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 SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

In his December 21, 2010 decision in these consolidated cases, Administrative Law Judge Geoffrey Carter concluded that Respondents Comau, Inc. ("Comau") and Comau Employees Association ("CEA") had committed unfair labor practices in connection with Comau's withdrawal of recognition from Charging Party Automated Systems Workers Local 1123 ("ASW"), Comau's recognition of the CEA immediately thereafter, and the collecting of CEA dues payments after a collective bargaining agreement with the CEA had been reached. ALJ Carter ordered a broad remedy that included the re-establishment of the ASW as the representative of a bargaining unit of approximately 175 of Comau's skilled trades employees; the ouster of the CEA, the union endorsed by a decisive majority of the employees in December 2009; the voiding of the collective bargaining agreement Comau and the CEA had negotiated; and a directive that Comau bargain again with the ASW.

Comau strongly excepts to certain of the ALJ's recommended findings and conclusions underlying this outcome, as Comau did no more than honor its employees' Section 7 right of self-determination with respect to union membership. As explained in this Brief, the ALJ disregarded a wealth of evidence that the employees had resolved to rid themselves of the ASW because that union stood for broken promises and burdensome dues, as well as a failed experiment in affiliating with a large international union, and not because a new health care plan calling for employee contributions had taken effect on March 1, 2009.

To be sure, the Board decided in a prior case involving these parties (NLRB Case No. 7-CA-52106) that Section 8(a)(5) of the Act had been violated by the events of March 1, 2009, when Comau allowed its health care plan to go into effect on the date that had been announced in December 2008 as part of a lawful post-impasse implementation of a Last Best Offer. See *Comau, Inc.*, 356 NLRB No. 21 (November 5, 2010), adopting without comment the

findings and conclusions in the May 19, 2010 decision of ALJ Paul Bogas. Comau has petitioned for review of the Board's decision by the U.S. Court of Appeals for the District of Columbia Circuit, and the Board has cross-petitioned for enforcement of its order. Comau herein excepts once again to the Board's conclusion in that initial case, as it must because that was a necessary predicate for ALJ Carter's conclusions in this second case. But the Board's conclusion in the initial case represents only the first step in the ALJ's reasoning in this case. Here, the Board must examine an array of factual findings and legal conclusions about different and subsequent events including the interaction of Comau, its employees, the incumbent ASW, and the resurgent CEA, during the period from late 2008 through mid-2010.

The heart of ALJ Carter's decision is his application of the Board's *Master Slack* test for determining whether employee disaffection with a union should be disregarded on the ground that the disaffection was caused by a prior unremedied unfair labor practice. See *Master Slack Corporation*, 271 NLRB 78, 84 (1984). As discussed *infra*, ALJ Carter's analysis misconstrues the record and disregards the logical necessity that a cause must precede its effect. Neither ALJ Bogas nor the Board found in the initial case that any unlawful conduct occurred before March 1, 2009; indeed, all such alleged violations were dismissed for lack of merit. ALJ Carter did not find any pre-March 1, 2009 violations in the instant case either. Glossing over and downplaying the testimony of over a dozen employees that they were unhappy with the ASW during December 2008–February 2009 for entirely different reasons (and refusing to hear testimony from many others), ALJ Carter inverted the concept of causation and found that the widespread disaffection among employees before March 1, 2009 was really caused by a supposed unfair labor practice that had not yet occurred – something akin to giving retroactive effect to an anticipatory unfair labor practice (Decision pp. 19-22). There is no precedent or

logic supporting that approach. ALJ Carter also concluded that the employees' reaction to the March 1, 2009 health care change persisted and tainted the disaffection petition they presented to Comau ten months later on December 22, 2009. The evidentiary record does not support that analysis either.

The pertinent historical background for these cases is largely uncontested. In March 2007 the ASW, successor-by-name-change-only to the independent Progressive (or Pico) Employees Association ("PEA"), decided to affiliate with the Michigan Regional Council of Carpenters and Millwrights ("MRCC" or "Millwrights"), a division of the United Brotherhood of Carpenters and Joiners of America. While the Millwrights' dues would be exorbitant by comparison (up to $2,500 per year compared to a maximum of $240 per year before affiliation), the Millwrights promised these skilled trades bargaining unit members better jobs, training, opportunities, and general support, at a time of sharp decline in their industry. A majority of the unit members voted to affiliate with the understanding it could be a two-year experiment. But when none of these promised benefits had materialized by year-end 2008, the local ASW leadership, including David Baloga (the ASW's Recording Secretary who was the General Counsel's principal witness in the instant trial) and a dozen other local Executive Committee members, unanimously decided to seek the decertification of the Millwrights to return to the *status quo ante* equivalent of their former independent union – which they now named the Comau Employees Association ("CEA"). Significantly, this powerful commitment by the local leadership was forged months before the occurrence of the only unfair labor practice found by ALJ Bogas and the Board in the prior case — i.e., the previously announced Company-wide health care plan taking effect on March 1, 2009.

According to Mr. Baloga, who with others visited the NLRB's Detroit Regional Office to procure a decertification petition, the local leadership's unanimous resolution to seek decertification of the Millwrights occurred in December 2008. By February 2009, the local leadership had collected more than enough signatures for a decertification petition. A decisive majority of the unit ultimately signed it. As they signed the decertification petition, employees also signed a separate petition to be represented by the CEA.

In the meantime, the Millwrights, having learned what was happening, began to threaten the local leaders with lawsuits, loss of their Comau jobs, and blackballing if they participated in the decertification effort. The dozen or so Executive Committee members, who had been among the first to sign the petition, asked that their signatures be blacked out. Willie Rushing, a unit employee who held no office at the time, agreed that he would shepherd the petition, and he eventually filed it with the Detroit Regional Office on April 14, 2009. The petition had been ready for filing over a month earlier, but Mr. Rushing held off because of a last-minute promise by the Millwrights that new jobs would be provided to the members. This promise, like previous promises, did not materialize. After the decertification petition was filed (and docketed as NLRB Case No. 7-RD-3644), the CEA was treated as an Intervenor.

Since threats and promises had not worked, the Millwrights now pursued another strategy to stop the decertification effort: Filing unfair labor practice charges in the hope that this would block the petition and prevent an election. This strategy succeeded. After initially scheduling a vote on the petition (in which the ASW-Millwrights and the CEA would both appear on the ballot), the NLRB Regional Office decided to hold the decertification case in abeyance pending the outcome of the unfair labor practice case. The unfair labor practice case (NLRB Case No. 7-CA-52106) was heard by ALJ Bogas on November 17-19, 2009. At the conclusion of the

ULP trial, a further record was developed for the decertification case to determine the *Master Slack* "causal connection" issue, pursuant to *Saint Gobain Abrasives*, 342 NLRB 434 (2004). All witnesses testified in that regard that the March 1, 2009 commencement of the new health care plan did not have anything to do with their desire to decertify the ASW-Millwrights.

Nevertheless, it became clear soon after this hearing that the decertification effort would continue to be blocked by the Regional Office pending a final decision in the unfair labor case. Obviously frustrated with the NLRB's delay, the employees then sought self-help by signing and presenting a disaffection petition to Comau. Negating the ASW-Millwrights' charges, the signers explicitly affirmed in their petition that the March 1, 2009 health care change had nothing to do with their desire to be rid of the ASW-Millwrights, and had everything to do with the ASW-Millwrights' broken promises and exorbitant dues (employees continued to pay those dues while the decertification petition was held in abeyance). The employees also explicitly reaffirmed in their petition their previously expressed desire to be represented by the CEA. On December 22, 2009, after validating signatures and calculating a clear majority, Comau recognized the CEA as the unit employees' collective bargaining representative. Comau and the CEA went on to negotiate a collective bargaining agreement, which has effective dates of December 22, 2009 to April 7, 2013. (Joint Exhibit 1.)

Unlike most cases involving the withdrawal of recognition of a union, this case does not involve an employer's desire or quest to be union-free. There is no hint of anti-union animus on the part of Comau, which for decades has dealt with three unions representing different segments of its manufacturing workforce. When Comau was presented with the disaffection petition on December 22, 2009, it was certainly permitted to withdraw recognition from the ASW-Millwrights, given the clear demonstration that that union did not enjoy majority support

of the employees. See *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 724 (2001). At the same time, Comau was also permitted to recognize the CEA in accordance with the employees' unambiguously expressed wishes. See *Dana Corp.*, 351 NLRB 434 (2007). If the withdrawal of recognition was lawful, the subsequent recognition of the CEA was also lawful.

ALJ Carter found instead that the withdrawal of recognition was unlawful because employee dissatisfaction with the ASW-Millwrights — even in December 2009 — was "caused" by the March 1, 2009 commencement of the new Company-wide health care plan, to which he attributed overriding importance while giving only passing mention to other critical sources of discontent such as broken promises and crushing dues (Decision, pp. 19-22). The Board should not defer to this skewed, and seemingly blinded, assessment of the record evidence.

The Detroit Regional Director sought interim injunctive relief under Section 10(j) of the Act in the U.S. District Court for the Eastern District of Michigan. *Glasser v. Comau, Inc. and Comau Employees Association*, Civil Action No. 10-13683. On February 10, 2011, U.S. District Judge Patrick J. Duggan issued an Opinion and Order denying Section 10(j) injunctive relief. The Court concluded that a temporary injunction was not warranted and dismissed the petition. (See Exhibit A hereto, Opinion and Order, and Judgment.) In particular, the Court rejected the *Master Slack* analysis advanced by the Regional Director as backward, for the identical reasons that Comau argues here in connection with ALJ Carter's decision, and believed that the goals of the Act were frustrated, not furthered, by disregarding the testimony of individual unit members about their reasons for signing the petition. (Exhibit A, pp. 21-28.) While the Court's findings and conclusions are not binding on the Board, the Court's assessment of the record evidence is entitled to respectful consideration.

After all, ALJ Carter's conclusion is fundamentally illogical. In the December 2008-February 2009 timeframe, Comau engaged in no unlawful conduct, so no unfair labor practice could have served as a cause of the employees' already mounting disaffection. After post-impasse implementation of Comau's Last Best Offer was announced in December 2008, some unit employees may very well have been unhappy that they would be sharing the cost of their health care beginning March 1, 2009 (following a two-month education, enrollment, and administrative transition period). The record demonstrates, however, that unit employees were evenly split between preferring the Company-wide health care plan or the ASW-Millwrights' alternative proposal, since the cost and benefit to individual employees depended on family size, the services they deemed important, and many other considerations. Beyond that, the mindset of those who were unhappy about making premium contributions was formed well before March 1, 2009 — i.e., it was formed shortly after Comau's lawful December 2008 announcement of its implementation of its Last Best Offer. Finally, if the unit members were motivated by Comau implementing the new health care plan (which already applied to all of the Company's other employees), why would they blame the ASW-Millwrights and prefer the CEA? The ASW-Millwrights had been advocating for their own no-cost health insurance alternative, and they sought to undo Comau's implemented plan by filing NLRB charges. The CEA, on the other hand, was silent on this issue. It defies common sense to conclude that implementing a health care plan the ASW-Millwrights had steadfastly opposed caused widespread disaffection with the ASW-Millwrights and simultaneous affection for the CEA.

During the trial before ALJ Carter, the General Counsel presented a fallback theory for why the disaffection petition should be deemed tainted: That "agents" of Comau — specifically, three hourly bargaining unit employees designated as "Leaders" — allegedly coerced employees

into signing the disaffection petition. The General Counsel conceded nevertheless that these three Leaders (and the 30 other Leaders among the 175 employees in the bargaining unit) are not statutory supervisors. ALJ Carter found it unnecessary to decide this "coercion by agents" theory, though he received a great deal of evidence on the subject and he made some factual findings that were pertinent to it. Comau has excepted to several of these factual findings and to the ALJ's failure to reject this theory outright, because it is patently unsupported by either the evidentiary record or the Board's precedents.

In sum, a number of insurmountable logical obstacles — e.g., a backwards cause-and-effect timeline, common-sense motivation factors, overwhelming witness testimony, and Board precedents – are arrayed against ALJ Carter's conclusion that the deep-seated and longstanding disaffection with the ASW-Millwrights expressed by Comau's employees in December 2009 was caused by the new health care plan taking effect on March 1, 2009. This is not a garden-variety case involving an employer's anti-union animus or bad-faith bargaining with a union in an effort to get rid of it. Rather, it is an extreme case in which abundant evidence shows that the members of the bargaining unit preferred one union (representing a return to their long-time independent status) over continuing an experimental affiliation with another union, for reasons totally unrelated to a single, discrete, one-time alleged unfair labor practice. Yet, the ALJ's analysis of the evidence and his conclusions, including an order re-installing a union the employees detest, shows no sensitivity whatever to the members' Section 7 rights. The Board has understandably refrained in prior decisions from forcing the imposition of an unwanted bargaining representative on an unwilling majority, and it should do likewise here – as U.S. District Judge Duggan did in the Section 10(j) proceeding.

II. STATEMENT OF THE CASE

A. The CEA And Its Independent Union Predecessors — PEA And ASW — And The ASW's 2007 Affiliation With The Millwrights.

For many years Comau has recognized and bargained with three independent labor organizations representing segments of its manufacturing workforce. The skilled trades employees involved in this case were represented by the Progressive (or Pico) Employees Association ("PEA") for decades. That bargaining unit includes highly skilled classifications such as toolmakers, machine builders, pipefitters, and electricians. (TR 578, 588.) In 2004, the unit employees voted to change the name of their independent union from the PEA to the Automated Systems Workers ("ASW") to broaden its appeal. The dues for PEA or ASW membership never exceeded $20 per month, i.e., $240 per year. (TR 336, 920.)

In early 2007, at a time when the industry was in decline, the ASW's leadership first approached the UAW, and then the Millwrights, about possible affiliation with a much larger "international" union. They hoped to obtain additional employment opportunities (Comau was reducing its workforce), advanced training, and general leverage from a larger labor organization. (TR 186, 864-865, 974, 1110, 1153.) The membership, relying on promises to that effect, voted for affiliation with the Millwrights despite the very significant increase in dues it entailed. The Millwrights' dues could amount to as much as $2,500 a year, depending on the overtime worked and resulting gross income. (TR 920.) The employees were told that they could try affiliation for a couple of years, and that, if they were dissatisfied, they could then vote the Millwrights out the same way they were voted in. The Millwrights would simply "ride off in the sunset." (TR 867.)

By late 2008 and early 2009, the membership had had enough of the ASW-Millwrights affiliation. A substantial contingent of employees, including the entire local union leadership, set to work to return to the independent union status that had preceded their ill-advised affiliation.

B. Employees Become Intensely Dissatisfied With The ASW-Millwrights' Representation — Before, And Not Because Of, The March 1, 2009 Health Care Change.

Darryl Robertson, a former Comau employee and President of the ASW-Millwrights local, first noticed that decertification activity was occurring shortly after Comau lawfully announced on December 3, 2008 that it was implementing its Last Best Offer following an impasse in bargaining. See generally, *Comau, Inc.*, 356 NLRB No. 21 (November 5, 2010). Mr. Robertson estimated that he learned of this activity around December 13 or 14, 2008. (TR 117-118.)[1]

David Baloga, Recording Secretary of the ASW-Millwrights local, testified that, following discussions among employees that started in December 2008, Fred Lutz and another employee asked the local Executive Committee to move forward with decertification of the ASW-Millwrights. (TR 374-376, 779-780.) As a result, the local Executive Committee (meeting without its members who were full-time Millwrights' employees, Pete Reuter and Darryl Robertson) unanimously resolved to determine "how to go about decertifying the ASW." (TR 376.) Mr. Baloga, the primary witness for the General Counsel during the trial before ALJ Carter, reluctantly admitted that he had personally downloaded a copy of a decertification petition form from the NLRB website. (TR 377.) This was then distributed to bargaining unit members in a notebook so the members could sign it. (TR 377-378.)

[1] While the transcript shows that Mr. Robertson said December 2009, the context makes clear that he meant 2008, because he placed this knowledge shortly after the December 2008 announcement of the LBO implementation. (TR 117-118.)

At the same time they signed the decertification petition, members also signed a form requesting that the CEA represent them. Even Mr. Baloga, the ASW's Recording Secretary, signed that form. (TR 380.)

ALJ Carter heard extensive testimony concerning the ASW-Millwrights' many failings that sparked widespread discontent. This testimony harmonized with and reinforced that given during the November 19, 2009 *Saint Gobain* hearing summarized *infra* (the transcript of that portion of the hearing before ALJ Bogas was admitted by ALJ Carter as Comau Exhibit 13). For example, Dan Molloy testified that he lost all confidence, and became outraged, when members were informed in about December 2008 that the ASW-Millwrights would not do anything about the "yellow line" — a jurisdictional issue affecting members' jobs at Comau's Novi facility. This devastated the membership (TR 777):

> We talked about it, we discussed it and we said, you know, what should we do? So we – we had a vote, we decided – we said, okay, how – you know, what do we want to do about this? It's like, so we – after discussing the – and Union isn't doing anything for us, nobody's helping us, we're stuck here, so let's have – let's – I want to have a vote, all in favor of going to the NLRB to try to set up a petition to decertify and have the NLRB hold an election for us raise your hand? (TR 780.)

The show of hands was unanimous.

A series of witnesses called by the CEA during the trial before ALJ Carter explained additional reasons why they wanted to oust the ASW-Millwrights. Fred Lutz testified that he was angry that Pete Reuter and Darryl Robertson, former Comau coworkers but now paid full-time Millwrights employees, had made off with the ASW's treasury of about $250,000, and that he was required to pay what he felt were exorbitant dues to the Millwrights (the rate was $20 per month plus 2% of gross income). (TR 740-741.) Willie Rushing described the broken promises — from journeyman certification to training — as well as his concern over the extremely high

dues. (TR 916-920.) James Kayko had seen no benefit from the affiliation to account for the high dues he was paying. (TR 973.) For Claude Fraudette, it was the failure to provide job security, the loss of the $250,000 treasury, and the high dues structure, that drove him toward decertification. (TR 1109-1110.) Cecil Brewington was disaffected because his effort to obtain training was thwarted by the Millwrights. (TR 1193-1197.) Robert Fox signed "because the ASW did absolutely nothing for me, and they took an exorbitant amount of union dues for nothing." (TR 1203.) When Mr. Fox was laid off, he called Mr. Robertson, only to be told that the Millwrights could do nothing for him. (TR 1203-1204.) Andrew Katsiyiannis testified:

> . . . [N]one of the promises that were ever made came through. Didn't matter what it was, with training or anything else. Even the lawyer was supposed to be free, and when I inquired about the lawyer, it wasn't free, now it's discounted. And I'm like, well, okay, you know, that doesn't surprise me because nothing else has been true. (TR 1153.)

Counsel for the CEA presented the testimony of over a dozen witnesses on this subject, including several former ASW-Millwrights officers. Each witness described plainly, emphatically, and often emotionally, how his or her disaffection resulted directly from the broken promises and exorbitant dues of the Millwrights – not from the March 1, 2009 health care plan change or from any encouragement by the Company. (TR 780, 796, 813, 835, 838, 1052.) Counsel for the CEA stated that she intended to, and would, call over 90 bargaining unit witnesses to testify to the same effect, but ALJ Carter ruled (and counsel for the General Counsel agreed) that such evidence would be "cumulative." (TR 1205-1206.) These witnesses — constituting a majority of the 175-employee bargaining unit — presumably would all have further validated the reasons for signing the disaffection petition given by those who testified.

Even Richard Mroz, the only person signing the disaffection petition who was called by the General Counsel, testified that he was dissatisfied with the ASW-Millwrights. (TR 158-159,

186.) He also testified that he believed being with the CEA had helped him more than being with the Millwrights had (TR 163), and that he felt that, when they had had "a smaller union," things worked a lot better (TR 161).

The trial testimony from these witnesses regarding the disaffection petition echoed that given at the *Saint Gobain* hearing almost a year earlier regarding employees' motivation for signing the decertification petition. The initial witnesses in that hearing before ALJ Bogas were called by the ASW-Millwrights, which was contesting the voluntariness and validity of the decertification petition. But even the ASW-Millwrights' own witnesses confirmed that the fact that the new Company-wide health care plan had gone into effect on March 1, 2009 (after the lawful December 2008 announcement of the Last Best Offer and a period for rollout and administrative preparation in January-February 2009) did not cause the decertification effort.

The decertification effort had begun for other reasons in December 2008 and had largely been completed before March 1, 2009. All witnesses at the *Saint Gobain* hearing testified that their dissatisfaction with, and desire to decertify, the ASW-Millwrights was fully formed prior to March 1, 2009. For instance, Phillip Scavone testified that he signed the decertification petition in February 2009 because he was unhappy that the ASW-Millwrights had not objected to the use of an outside contractor to do certain repairs in the shop. (Comau Exhibit 13, pp. 529-531.) He confirmed that the health care issue had nothing whatsoever to do with his signing of the decertification petition. (*Id.*, p. 531.) Another witness called by the ASW-Millwrights, Thomas Kalenick, testified that while he did not like having $90 a month for health care withheld from his paycheck after March 1, 2009, he would have signed the decertification petition even apart from that. (*Id.*, p. 557.)

The vast majority of the 116 employees who signed the decertification petition signed before March 1, 2009. As the decertification petition shows (CEA Exhibit 3), all but six had signed before Friday, March 6, 2009, when premium co-pays would have first been deducted from employees' pay checks. (See GC Exhibit 55, paystubs establishing the workweek as Monday through Sunday, with the following Friday as payday for that week.) Seven of the nine signatories to the decertification petition who testified during the *Saint Gobain* hearing said that the ASW-Millwrights' broken promises and exorbitant dues were the cause of their dissatisfaction and desire to get rid of that union. (Comau Exhibit 13, pp. 548, 554-555, 565, 571, 578, 592-596, 609-612, 615.) Those witnesses who said that the health care issue played any role at all in their decision said at the same time that their mindset was established by January 2009, shortly after the admittedly lawfully announced LBO implementation that included the Company-wide health care plan.[2] (*Id.*, pp. 546-547, 554, 563-564, 570-571, 578-579.) Every witness at the *Saint Gobain* hearing thus testified that his mindset to oppose the ASW-Millwrights was formed as a result of lawful developments occurring prior to March 1, 2009, thus leaving the General Counsel's "causation" theory – which ALJ Carter would adopt – incontrovertibly backwards.[3]

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[2] While Dan Molloy testified before ALJ Carter that, after monies for health care co-pays were taken out of the members' paychecks (beginning at the earliest on March 6, 2009), the members wanted to "fry the Committee," Mr. Molloy acknowledged that the members had already been "very upset" as a result of the December 2008 announcement of what was coming after March 1, 2009. (TR 833.) Mr. Molloy and other witnesses also testified that opinion among the membership was split 50-50 on which health care plan was better. (TR 835, 838, 1048, 1052.)

[3] U.S. District Judge Duggan agreed: "The Board's theory, which puts the cause after the effect, therefore is backwards." (Exhibit A, p. 23, n. 9.) The Court further noted: "The Board already has found that the announcement of the new health care plan in December 2008 did not constitute an unfair labor practice and nothing Comau did prior to March 1, 2009 (such as preparing for and informing the employees of the change), has been suggested to have constituted an unfair labor practice." (*Id.*, p. 23.)

The Millwrights' leadership did, after the fact, recognize that broken promises – the very promises that supposedly justified the high dues – were the essential problem. Doug Buckler, the Millwrights' President, asked to meet with Willie Rushing after he had filed the decertification petition. Mr. Buckler admitted to Mr. Rushing that "Pete Reuter is a liar," describing him as "no more than a used car salesman." (TR 912.) Mr. Buckler then assumed responsibility for what he said was justifiable discontent because he had failed to properly train Mr. Reuter, their former coworker who was now a full-time Millwrights employee. (TR 914.)

When the local Executive Committee members obtained signatures on the decertification petition in early 2009, a notebook containing the petition was made available and simply passed from hand to hand, in the same manner in which the disaffection petition was later passed in December 2009. (TR 787, 880-881.) The decertification petition was eventually handed by Dan Molloy and Dave Baloga to Willie Rushing for filing with the NLRB Regional Office. (TR 879-880.) Mr. Baloga confirmed to Mr. Rushing that the entire local Executive Committee, without Pete Reuter in attendance, had voted unanimously. Mr. Baloga boasted, "it's time to decertify the ASW." Mr. Baloga declared that "we don't work for Pete Reuter, we work for the men," and that "[i]f this is what the men want, then this is what we'll do." (TR 879-880.) But shortly thereafter, Mr. Baloga asked Mr. Rushing to black out the names of the Executive Committee members who had signed the petition. (TR 886-887, 1048.) According to Mr. Molloy, once Mr. Reuter found out about the decertification effort, he called Mr. Molloy and told him that, if anyone on the local Executive Committee had participated, they would be drummed out of the union and lose their jobs at Comau. (TR 788.) This "scared the crap out of everybody on the Committee and after that everybody went underground." (TR 788, 879-880, 1031, 1173.)

After the local Executive Committee members' names had been blacked out, Mr. Rushing did not file the decertification petition immediately. Instead, he waited for several weeks to see whether a last-minute promise by the Millwrights of new work for the members would materialize. As in the past, it did not, and Mr. Rushing filed the petition on April 14, 2009. (TR 888, 1025.)

C. No Decline In Attendance At ASW-Millwrights Meetings Could Be Attributed To The March 1, 2009 Health Care Plan Change.

The General Counsel attempted at the trial before ALJ Carter to show through the testimony of Mr. Baloga and attendance sheets at monthly meetings that a loss of support for the ASW-Millwrights had been reflected in a decline in attendance at regular union meetings following March 1, 2009. (TR 329, GC Ex. 9-13, 15-21.) Other proffered attendance sheets were rejected because of concerns about their reliability. (TR 332, 484.) ALJ Carter correctly found the record evidence insufficient to conclude whether the varying attendance figures resulted from routine seasonal fluctuations, the March 1, 2009 health care change, or some other cause. (Decision, pp. 2-3, n.3; p. 9, n. 16) ALJ Carter denied Comau's post-trial motion to supplement the record with additional attendance sheets to demonstrate that the pattern suggested by counsel for the General Counsel was absolutely untrue, and that complete attendance figures actually demonstrated the opposite. Comau has conditionally excepted to this ruling should the General Counsel seek to revive this false contention. (Exception No. 43.) In the related Section 10(j) injunction proceedings, U.S. District Judge Duggan held that Mr. Baloga's "assertion in his affidavit, notably prepared by Petitioner's counsel [Darlene Haas Awada], that membership at ASW/MRCC meetings began to drop after March 1 is contrary to the meeting records and appears intentionally misleading. . . . In fact, attendance at ASW/MRCC meetings after March 1, 2009 was frequently higher than at the same time the previous year." (Exhibit A, p. 25.) The

Court "flatly reject[ed]" the attempt to demonstrate a causal connection between the new health care plan and disaffection based on meeting attendance. *Id.*

D. Employee Frustration Leads To The December 2009 Disaffection Petition.

The bargaining unit employees, a decisive majority of whom wished to substitute the CEA for the ASW-Millwrights through the NLRB decertification election process, understandably became more and more frustrated when no NLRB election was scheduled even after the November 19, 2009 *Saint Gobain* hearing. (TR 894-895.)[4] Eight months had gone by since the decertification petition had been filed, and the employees were still paying exorbitant dues. In December 2009, they decided to wait no longer. After a few employees educated themselves about a legally recognized alternative, a substantial majority of the unit employees signed a "disaffection petition" and presented it to Comau's management on December 22, 2009. (TR 1040.) The disaffection petition, signed by 103 of 178 bargaining unit employees (57.9%), stated in boldface type:

> We, employees of Comau Inc. in the bargaining unit of the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters [and Millwrights]), declare by our signatures below that we no longer want to be represented by that Union, and we request that Comau Inc. immediately stop recognizing that Union as our collective bargaining representative.
>
> We no longer want to be represented by the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters [and Millwrights]) <u>because of the excessive dues that Union charges us each month and because it has not come through</u>

[4] The wait for action on the decertification petition continued until December 14, 2010, about 20 months after it was filed. On that date, the Detroit Regional Director dismissed the decertification petition, finding that the employees' desire and action to rid themselves of the ASW-Millwrights was tainted by the March 1, 2009 health care change. The Regional Director's dismissal, which utilized a time-backwards rationale similar to ALJ Carter's, is presently pending review by the Board at the request of the CEA and Comau.

> on its promises to increase job opportunities for us — and not because Comau Inc. in the last year or so unilaterally implemented new terms of employment for us including the Company health care plan.
>
> We also declare by our signatures below that we want to be represented by the Comau Employees' Association, and we request that Comau Inc. immediately begin recognizing the Comau Employees' Association as our collective bargaining representative. (Comau Exhibit 1; emphasis added.)

Thus, the employees explicitly attested that the health care plan change effective March 1, 2009 had nothing to do with their desire to be rid of the ASW-Millwrights – an obvious attempt to negate the ASW-Millwrights' contention that had just been litigated in the *Saint Gobain* hearing. (*Id.*; CEA Exhibit 8.)

After confirming through comparisons with signature exemplars that a solid majority had unequivocally expressed their desire not to be represented by the ASW-Millwrights, and having no reason to doubt that this was the true state of affairs (TR 1078-1080), Comau's legal duty under the Act was to withdraw recognition from the ASW-Millwrights. See *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 724 (2001) ("[A]n employer violates Section 8(a)(2) . . . by continuing to recognize a union that it knows has actually lost majority support . . ."). Because the disaffection petition not only demanded that Comau withdraw recognition from the ASW-Millwrights, but also asked that Comau recognize the CEA in its place (see the final paragraph of the above-quoted language), Comau then recognized the CEA, as it was legally permitted and required to do. (Joint Exhibits 4 and 5.) See *Dana Corp.*, 351 NLRB 434 (2007).

This development created yet another opportunity to determine, through an NLRB-supervised election, whether the unit employees in fact preferred the CEA or the ASW-Millwrights. The NLRB's rules required Comau to inform the Regional Office of the fact that it had recognized the CEA, and it did so. See *Dana Corp.*, *supra,* 351 NLRB at 443-444.

But the Regional Director did not schedule an election or even send out the prescribed "*Dana* notice" so Comau could post it.

After Comau recognized the CEA on December 22, 2009, Comau and the CEA bargained and agreed on a new collective bargaining agreement for a term running through April 7, 2013. Following ratification, the agreement was signed in May 2010 (TR 217; Joint Exhibit 3). That agreement contains the Company-wide health care plan that had taken effect for this bargaining unit on March 1, 2009. It also contains an hourly rate increase for the unit employees. And it contains a $20 per month ($240 per year) dues requirement for unit employees — which the ALJ's decision would void and replace with the exorbitant ASW-Millwrights' dues structure of $20 per month plus 2% of gross pay (Joint Exhibit 3, Section 3.02).

E. Alleged Management "Agents" — i.e., Leaders — Did Not Coerce Employees Into Signing The Disaffection Petition.

The General Counsel's fallback theory at the trial before ALJ Carter was that the disaffection petition was "circulated" with the unlawful and coercive assistance of management "agents" – three Leaders named Harry Yale, Nelson Burbo, and James Reno. The General Counsel contended these individuals were "agents" of Comau (TR 84), but also stipulated that they are not statutory "supervisors." (TR 200.) It is likewise undisputed that these individuals were acting on behalf of the CEA, an acknowledged labor organization, at the time in question. Although ALJ Carter declined to draw a legal conclusion regarding this theory, it fails resoundingly as a matter of fact, as even the ALJ's own incomplete findings on the subject suggest.[5]

[5] If there were any truth to this theory, then presumably the decertification petition was also "coerced" by management "agents" (though no one asserted that), and the leadership of the PEA and ASW has been riddled with management "agents" for decades.

The record contains not one scintilla of evidence that Comau had anything to do with the creation or promotion of the December 2009 disaffection petition (just as it had no role regarding the decertification petition). Certainly ALJ Carter identified none, and he should have made an explicit finding to that effect rather than remaining silent. Nor is there any record evidence that management knew when, where, or by whom the disaffection petition was being circulated and signed, let alone that management approved of any such activity during working hours (though historically the PEA and the ASW had collected dues authorizations, as well as conducted union meetings, during working hours).[6] (TR 355, 910-911.) Nor was any evidence introduced that even one of the 103 employees who signed the disaffection petition was pressured into doing so. By all accounts, including the testimony of the dozen witnesses called by the CEA, the unit employees signed the petition of their own volition without any urging — let alone coercion by management or its agents.

Taking all of ALJ Carter's findings on this subject together, it is apparent there is no basis to conclude that Comau gave Leaders Yale, Burbo, and Reno actual or apparent authority to solicit signatures or otherwise promote the effort to change union representation from the ASW-Millwrights to the CEA. It is surely irrelevant, as ALJ Carter found (Decision, p. 11), that Mr. Yale passingly mentioned to Labor Relations Director Fred Begle that he could expect a petition a few days before he presented it. Mr. Yale's limited "circulating" activity — the petitions were left on a table in a notebook for employees to sign if they wished, then handed on from employee to employee, as was done for the earlier decertification petition (TR 1029-1030, 1066) — was entirely on Mr. Yale's own initiative. (TR 1026-1027.) As for Mr. Yale's

[6] The ALJ did not accept the General Counsel's contention that, at one point, the binder containing the petition was on a work table where it must have been observed by management (Decision, pp. 10-11 and n. 21).

bringing a petition from one site to another, Comau employees move between work sites as part of their jobs, and Mr. Yale testified that he took care not to make these trips on working time. (TR 1030.) Messrs. Yale, Burbo, and Reno spoke neutrally about the disaffection petition to Richard Mroz — the only witness called by the General Counsel to describe such communications. Mr. Burbo even agreed with Mr. Mroz that it might not be the best time to get rid of the ASW-Millwrights. (TR 158-159.) Mr. Reno merely introduced Mr. Mroz to Mr. Yale (whom Mr. Mroz did not even know to be a Leader) after Mr. Mroz indicated he wanted to talk with him. (TR 159.) ALJ Carter implicitly recognized that no other evidence was introduced of interaction between these three Leaders and their coworkers about whether to sign the disaffection petition (Decision, pp. 10-11).

Mr. Mroz, the single witness (out of 103 signers) called by the General Counsel to explain why he had signed the disaffection petition, testified that he was impressed with the fact that some of the Leaders supported the petition, but also said that what actually convinced him to sign was that his coworker-brother supported it (and had signed it immediately above where Mr. Mroz placed his signature). (TR 162-163, 192.) Nothing even remotely coercive occurred between Mr. Mroz and these Leaders. After an especially suggestive question by counsel for the General Counsel whether he was "afraid [he] would lose [his] job if [he] did not sign the petition," Mr. Mroz answered "[t]hat did cross my mind." (TR 1-64165.) But he did not elaborate why this crossed his mind subjectively, and did not provide any factual basis for concluding it was because of the Leaders' support, let alone anything management had said or done. His answer thus did not support the General Counsel's coercion theory. The General Counsel presented absolutely no evidence — not even one witness — suggesting that any of the

signatures on the disaffection petition were anything other than freely given, or that any improper actions by Messrs. Yale, Burbo, or Reno (or anyone else) caused someone to sign.

Based on the approach taken at trial, the General Counsel's apparent intent was to prove that Comau's Leaders — evidently all 30 of them in a unit of 175 — are general agents of the Company for all purposes, including deciding who the unit employees' collective bargaining representative should be. That approach completely failed from an evidentiary standpoint and a legal one as well. The Leader classification has for years been defined in Comau's collective bargaining agreements as an hourly union-represented position. Leaders have always been members of the union and have frequently served as union officers (presumably because of their leadership abilities). When ASW President Darryl Robertson was a Leader, he served as Treasurer of the PEA and then the ASW, until he became a full-time Millwrights employee. (TR 122, 1010, 1043.) Harry Yale was a member of the ASW Executive Committee while a Leader, first serving as Secretary and then as Treasurer, until July 2009. (TR 1045.) Mr. Yale was also on the ASW's bargaining committee during negotiations in 2008. (TR 121.) Steve Wizinsky, Greg Sobeck, Bob Wisnewski, and Willie Rushing all served as PEA and/or ASW officials while employed as Leaders. (TR 124-126, 161, 383-385, 861-862.) Because of this history, it is well known to employees that Leaders are not members of management, but instead act on behalf of their union in connection with the types of labor relations activities at issue here.

Leaders comprise 15-20% of the roughly 175 members of the bargaining unit. (TR 592.) They are designated as Leaders because they have enhanced technical knowledge and skills as well as the ability and desire to "lead" other skilled workers in the manufacturing process (TR 592-594.) For this extra contribution, they receive on average $1.00 per hour more. (TR 594.)

Tom Kelly, the General Manager of Comau's Novi complex (where Mr. Mroz worked), described the role Leaders play in Comau's highly sophisticated automated assembly line manufacturing processes. (TR 587-606.) As machine tools are built, they are divided into projects, some costing millions of dollars and lasting for months. A project starts with a design and a bill of material, which is forwarded to production management, where it is determined which parts should be bought and which manufactured. The bill of material is next routed into a work center, first through a supervisor, and then to the Leaders and the other hourly employees. At this point, an automated system with established schedules takes over. The machine tools are constructed based on computer-generated documentation that is provided to supervisors, who distribute orders to the different work centers, which include the Leaders and other hourly employees. (TR 591-592.)

Management will initially identify the Leader for assignment to a given portion of the project. While the Leader may suggest other hourly employees to work on the project with him, it is management that decides which employees are to work with the Leader as members of his team. (TR 600-601.) Leaders are chosen by management based on their leadership interests, technical skills, and other characteristics, after an opening in the Leader classification is posted. (TR 594, 645.) While there is no doubt that Leaders undertake some internal-to-the-project scheduling, there is no evidence that this is anything more than what is routinely called for by manufacturing developments, i.e., the Leader does not exercise discretion of a quality that would ordinarily be associated with a supervisory or managerial function.

Much energy was spent during the trial before ALJ Carter on the Leaders' role in supposedly "approving" requests by employees to take time off. Mr. Kelly testified that, if an employee wishes to take a personal day (or vacation time), he must first let the Leader know and

present a form; the Leader then initials or signs the form to reflect his knowledge of the time-off request. (TR 618-620.) It is then the employee's responsibility to obtain a supervisor's or manager's approval and signature (TR 692). Nonetheless, it sometimes happens that administrative personnel (to whom the form is routed) will call to inquire because a signature is missing. (TR 621.) Thus, while Mr. Kelly acknowledged the existence of absentee slips that do not contain a supervisor's authorizing signature — some are missing the Leader's acknowledgement as well (see CGC Exhibits 40-43 and Comau Exhibits 14 and 17) — this would be in violation of the established administrative process (TR 615-620). But in all instances, management would have authorized the time off. (TR 621.)[7]

Mr. Baloga assumed correctly that Leaders get approval from someone else, higher up in the structure, authorizing an employee to be off work (TR 350). He also admitted that it "could happen" that a Leader like Mr. Yale might be getting a supervisor's approval after Mr. Baloga informed him that he wished to take time off. (TR 352.) Most telling was Mr. Baloga's testimony about obtaining required permission to circulate something in the plant (e.g., a birthday card or political information): He did not ask a Leader like Mr. Yale for permission because that involved "a matter for management" and he "wouldn't think Mr. Yale had that authority, but the manager did," so he would ask him instead. (TR 360.)

Similarly, Leaders are not decision-makers with respect to when overtime is required and who will work the overtime. Mr. Kelly testified "It's the management's decision on how many and how long people will work." (TR 611.) The decision on whether the entire team on a project will work overtime (or only a few individuals) is also up to management. Leaders

[7] Employees do not need formal authorization to leave the facility and can take time off if they have worked their contractual maximum hours. (TR 627-628.) No factual distinction was drawn by witnesses between such an occurrence, or when supervisory permission is required to do so.

sometimes have input as to which employees have the skills needed to accomplish the tasks immediately at hand. (TR 689-691.) Sometimes Leaders survey their teams to see which employees are interested in working overtime, and it was usually Leaders who notified individual employees that they would be needed – but it was higher management that authorized the overtime. (TR 275-277, 443, 690.)

The General Counsel sought to show that Mr. Reno participated in the hiring process, supposedly making him a general agent, merely because he reviewed and commented on an applicant's resume. This involved no more than Mr. Reno's educating decision-making management on an applicant's claimed technical experience on complex boring mills — machines which are unique to Comau and which only Mr. Reno would have the background to recognize. (TR 669.) Hourly non-agents provide such technical input all the time without being transformed into general agents of management. In the same vein, Mr. Burbo's isolated interaction with a supplier merely shows that a technically knowledgeable employee was involved in the machine upgrading process. (TR 695.) No evidence suggested that Mr. Reno effectively hired, or that Mr. Burbo purchased goods or services, let alone became general agents of Comau for all purposes including labor relations.

F. The Dues Checkoff Authorization Issue.

Like the ASW agreement that preceded it, the collective bargaining agreement between Comau and the CEA, which became effective in May 2010, contained the customary "union security" requirement that, as a condition of employment, bargaining unit members must pay union dues. (Joint Exhibit 3, Section 3.02.) Three bargaining unit employees (Gasper Calandrino, Nizar Akkari, and Jeffrey T. Brown) testified that they were told by Comau management and supervisors that their union dues must be paid through payroll withholding or their employment could be jeopardized. (Decision, pp. 12, 14.) All spoke with Comau's

then-Labor Relations Director, Fred Begle, in person or by phone. Mr. Begle testified that, after the CEA contract was ratified in May 2010, he wanted to ensure that employees were not faced with a CEA demand that employees be terminated for delinquency, because he recalled a past incident where a valuable employee had lost his job for not paying dues to the ASW. (TR 876-877.) At this point, Mr. Begle had not focused on the fact that employees could pay their dues directly to the union as an alternative to payroll deduction.

Soon after these conversations with the three employees, on June 9, 2010, Comau posted a notice signed by Mr. Begle (Comau Exhibit 9(b)) which made absolutely clear that employees were not required to pay dues through a payroll deduction, and that any employee who had signed a payroll authorization without understanding that he had the option of making direct payment to the CEA could reverse course. Mr. Begle's notice read in relevant part:

> While the contract contains a requirement that employees become dues paying members, the contract does not require the dues be paid through a payroll deduction authorization, with dues to be withheld by the Company from your paycheck. It is up to you whether you wish to authorize payment of your dues in this manner.
>
> In the event anyone signed a dues deduction authorization form under the mistaken assumption that the Company required this, you should feel free to rescind the authorization and deal with the CEA directly. In that event, please so indicate to me in writing.

Two bargaining unit employees did opt to make direct dues payments to the CEA, and the issue came to an end. (TR 1082-1083). Notwithstanding that prompt clarification, and the lack of any evidence that any employee misunderstood or was confused, ALJ Carter erroneously found that Comau's notice did not remedy any technical violation because it did not "unequivocally repudiate the prior communications." (Decision, pp. 25-26.)

There was also testimony regarding the CEA's posting a "letter of understanding" on the shop floor to advise employees that only certified checks for union dues would be accepted in lieu of payroll deduction. (GC Exhibit 2.) It is undisputed that this was not enforced. (TR 1059-1060.) The ALJ also, erroneously, attributed to Comau knowledge of and responsibility for the CEA's posting of this letter without support for such a finding in the record (Decision, p. 26, n. 44).

III. STATEMENT OF QUESTIONS INVOLVED

Question One: Did the ALJ err in concluding (because the Board so found in *Comau, Inc.*, 356 NLRB No. 21) that Comau committed an unfair labor practice on March 1, 2009 by allowing the Company-wide health care plan contained in its lawfully implemented December 2008 Last Best Offer to go into effect?

Related Exceptions: 3, 5, 10, 12

Question Two: Did the ALJ err in concluding that Comau unlawfully withdrew recognition from the ASW-Millwrights based on the December 2009 disaffection petition (and at the same time extended recognition to the CEA) because the loss of support reflected in the petition was tainted by Comau's giving effect to a new health care plan on March 1, 2009, notwithstanding extensive evidence of many other and independent sources of disaffection with the ASW-Millwrights?

Related Exceptions: 11, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34, 38, 43

Question Three: Did the ALJ err when, in evaluating whether a causal connection existed between the March 1, 2009 alleged unfair labor practice and the December 2009 employee disaffection, he refused to weigh the testimony of individual employees about their motivations for signing the disaffection petition and refused to allow the CEA to call additional witnesses to provide such testimony?

Related Exceptions: 11, 13, 14, 15, 16, 18, 19, 20, 21, 28, 29, 30, 32, 33, 34, 38

Question Four: Did the ALJ err in reasoning that the loss of support expressed in the decertification petition and later in the disaffection petition could be tainted by an unfair labor practice, even though the dissatisfaction with the union resulted from events that preceded rather than followed the occurrence of any unfair labor practice?

Related Exceptions: 25, 26, 38

Question Five: Did the ALJ's treatment of pre-March 1, 2009 events as unlawful violate the *Jefferson Chemical* doctrine and the six-month statute of limitations in Section 10(b)?

Related Exceptions: 27, 38

Question Six: Did the ALJ err in failing to find that the evidentiary record showed no evidence of any employee being coerced to sign the disaffection petition?

Related Exceptions: 4, 6, 8, 38

Question Seven: Did the ALJ err in failing to find that Leaders Harry Yale, James Reno, and Nelson Burbo were not "agents" of Comau for general purposes and certainly not for the purpose of obtaining signatures on the disaffection petition?

Related Exceptions: 1, 2, 6, 7, 9, 38

Question Eight: Did the ALJ err in concluding that Comau had unlawfully coerced employees to sign authorizations for payroll withholding of CEA dues and had not sufficiently clarified the point through its posting?

Related Exceptions: 33, 34, 35, 36, 37, 38

Question Nine: Did the ALJ err in recommending a remedy that requires Comau to re-recognize the ASW-Millwrights as the employees' bargaining representative, cease recognizing the CEA, resume bargaining with the ASW-Millwrights, and further prohibiting Comau from recognizing the CEA until it is actually certified by the NLRB as the employees' bargaining representative?

Related Exceptions: 39, 40, 41, 42

IV. LEGAL ARGUMENT

A. The ALJ Erred In Finding A "Causal Connection" Between The March 1, 2009 Effective Date Of The New Health Care Plan And The Loss Of Support For The ASW-Millwrights.

Whether the actual commencement of the new Company-wide health care plan on March 1, 2009 caused disaffection with the ASW-Millwrights that persisted and was then reflected in the December 2009 disaffection petition is, of course, a factual inquiry. In *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Board emphasized that employees seeking to oust an

incumbent union are entitled to a full hearing on whether their dissatisfaction is caused by, or by factors independent of, an unremedied unfair labor practice. This inquiry is necessary to properly respect the petitioning employees' Section 7 rights on the question of union representation. *Id.* at 434. The Board further explained:

> Here . . . the alleged unfair labor practice is a single unilateral change on a single subject [health care benefits] and . . . there are significant factual issues as to the impact of that change. In such circumstances, it is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. *Id.*

The Board has since reaffirmed that the General Counsel bears the burden of establishing through specific proof that employee disaffection is, in fact, attributable to unfair labor practices before an expression of disaffection can be rejected as tainted. *Champion Home Builders Co.*, 350 NLRB 788, 791 (2007), citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), *enforced in part and remanded in part*, 117 F.3d 1454 (D.C. Cir. 1997). Substantial evidence establishing the causal connection is required to meet this burden. *BPH & Company, Inc. v. NLRB*, 333 F.3d 213, 220 (D.C. Cir. 2003), citing *Quazite v. NLRB*, 87 F.3d 493, 496 (D.C. Cir. 1996), and *Avecor Inc. v. NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991).

The largely undisputed evidence presented during the trial before ALJ Carter, which included the record of the *Saint Gobain* hearing conducted on November 19, 2009, did not begin to approach this "specific proof" standard. Instead, ALJ Carter based the "causal connection" necessary to defeat the employees' Section 7 rights on mere speculation compounded by obvious illogic. Despite the parade of witnesses who testified that the employees' longstanding and deep-seated antipathy for the ASW-Millwrights had little or nothing to do with the March 1, 2009 change in the health care plan, ALJ Carter relegated their testimony to footnotes and clairvoyantly announced (without record support) that the membership would have been

willing to go on tolerating the ASW-Millwrights' broken promises and back-breaking dues until the health care change became the real tipping point. (Decision, pp. 19-21 and n. 37.)[8] Of course, the ALJ found this "causal connection" through the remarkable determination that the "effect" (disaffection in December 2008–February 2009) had preceded the "cause" (the March 1, 2009 health care change).

1. The ALJ Improperly Disregarded Or Minimized Other Independent Sources Of Disaffection With The ASW-Millwrights.

ALJ Carter acknowledged that by February 2009, when the decertification petition began to circulate in earnest, "employees had a variety of reasons to be unhappy with the ASW-MRCC and therefore sign the petition." (Decision, p. 19.) He also recognized that those reasons included

> employee impressions that the ASW/MRCC: was not effective in attempting to negotiate a new contract; charged unduly high dues that came with little or no resulting benefit to the bargaining unit; failed to deliver on its promises to provide bargaining unit members with training and job placements; did not protect bargaining unit members from losing job openings at Comau to contractors or members of other unions; and improperly claimed the entire balance of the ASW dues account (approximately $250,000) at the time of the March 2007 merger. *Id.*, n. 36.

That is a weighty set of reasons for discontent the employees had accumulated, in less than two years, against a union that they had affiliated with experimentally after being told they could disaffiliate if they felt it did not provide them with greater benefits to justify a ten-fold dues increase. ALJ Carter shrugged off the significance of these many other issues, remarking: "Several of those sources of discontent . . . had been present since the ASW/MRCC merger in March 2007, but were tolerated to some degree with the hope that in the end, the merger would

[8] Unlike a determination of which witness has more credibly testified concerning a particular event, this is not the type of factual ALJ determination to which the Board gives deference. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd,* 188 F.3d 362 (3d Cir. 1951).

be beneficial." (Decision, p. 20, n. 37; emphasis added.) Notably, the ALJ gave no citation to the record – because there was no testimonial or other support for this untrue statement. He also refused to credit language on the disaffection petition that declared that employees were disaffected "because of the excessive dues [the ASW-Millwrights] charges us each month and because it has not come through on its promises to increase job opportunities for us – and not because Comau Inc. in the last year or so unilaterally implemented new terms of employment for us including the Company health care plan." (Comau Exhibit 1.)

Those other "sources of discontent" cannot be so easily ignored, and it was wrong for ALJ Carter to do so.[9] As Comau has summarized above, the ASW-Millwrights had already lost substantial support well before March 1, 2009. The employees had affiliated with the Millwrights in March 2007 — for a two-year experiment — because they had hoped and expected to receive jobs, training, opportunities, and other benefits from the large international union in return for the high dues the Millwrights charged. None of that happened. The experiment had failed. The employees, including the entire leadership of the local union, were ready to face that fact, cut their losses, and revert to the pre-affiliation arrangement. Because the Millwrights had not fulfilled their promises — and there is no evidence whatsoever that they did

[9] As U.S. District Judge Duggan observed: "[T]he evidence indicates the erosion of support for the ASW/MRCC reached a level sufficient to require an election before the unlawful labor practice occurred. With the exception of Reuter and Robertson (who no longer worked at Comau's facilities) the members of the ASW/MRCC's executive committee unanimously voted to decertify their union in late December 2008 or early January 2009. Moreover, a significant amount of time passed between December 22, 2008 — when employees first became aware of the impending health care plan change — and December 22, 2009 — when they signed the disaffection petition.

"No member of the bargaining unit testified during the administrative proceedings that he signed the disaffection petition in December 2009 because of the implementation of the health care plan ten months earlier. In comparison, thirteen witnesses testified that Comau's action on March 1, 2009, was *not* the cause of their decision to sign the disaffection petition [and the CEA was prevented from presenting additional witnesses who would have testified to the same effect]." Exhibit A, pp. 26-27.

(recall Millwrights' President Buckler's admission that Mr. Reuter had "lied" to the members, TR 913) — the employees wished to return to the *status quo ante* of their independent self-governed union (now called the CEA).

ALJ Carter also disregarded other important facts showing the insignificance of the March 1, 2009 health care plan change in generating disaffection. It is undisputed in the record that employee opinion on the new health care plan was far from unanimous. In fact, the employees as a whole were evenly divided about which of the two health care plans discussed in the 2008 negotiations they preferred, the Company-wide plan or the Millwrights' proposed alternative. (TR 835, 838, 1048, 1052.) The ALJ ignored this. Furthermore, the employees who preferred the Millwrights' proposed alternative presumptively would not be unhappy with the Millwrights for persisting. They may have thought the Millwrights union was an ineffectual bargainer, but, if so, that mindset would have been formed by December 2008, when the lawful implementation of Comau's Last Best Offer, including the health care change that would take effect March 1, 2009 was lawfully announced.

And during the nine months between March 1, 2009 and the December 22, 2009 disaffection petition, the employees' sense of frustration with the ASW-Millwrights intensified, not because they were continually reminded that they were sharing the cost of their health care, but because the union had strategically chosen to litigate at the NLRB over the health care issue rather than request further bargaining with Comau. This action by the ASW-Millwrights continued to block the employees' much-desired vote on whether to continue the affiliation, and at the same time kept the employees paying exorbitant dues.[10]

[10] In denying Section 10(j) injunctive relief, U.S. District Judge Duggan observed: "There is no evidence suggesting that the March 1, 2009 implementation of the new health care plan led to lingering resentment toward the ASW/MRCC causing bargaining unit members to sign the

Moreover, Comau's alleged Section 8(a)(5) violation (of allowing its earlier-announced health care plan to take effect on March 1, 2009) was a single discrete event of a very technical nature that occurred in a context free of any other alleged unfair labor practices and without any evidence that it was intended to undermine the ASW-Millwrights. ALJ Bogas found no anti-union animus at all in connection with Comau's bargaining posture in that timeframe, and noted that Comau had actually urged the ASW-Millwrights' bargainers to reach an agreement soon to defeat the decertification effort that was rumored at the time. *Comau, Inc.*, 356 NLRB No. 21, pp. 11-12. If anything, at that critical time before it knew the extent of its employees' discontent, Comau was supportive of the ASW-Millwrights. *Id.* p. 18.

2. The ALJ Illogically Found That Employee Disaffection Had Resulted From An Unfair Labor Practice That Had Not Yet Occurred.

Both *Saint Gobain* and *Master Slack*, discussed *infra*, require that the unlawful conduct precede the disaffection that leads to the ensuing decertification effort and that there be "temporal proximity." [11] ALJ Carter recognized that "there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." (Decision, p. 18.) Yet his finding of a causal relationship in this case violates this basic principle and common sense as well.

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disaffection petition and [CEA] Authorization for Representation forms in December 2009. The evidence, to the contrary, indicates that the decision to pursue the disaffection petition was born out of the NLRB's failure to act on the decertification petition filed on April 14, 2009, and the reminder as the administrative proceedings ensued that the petition was being delayed by the unfair labor charges against Comau. The Court finds no evidence that any employee discontent arising from the implementation of the new health care plan was carried forward by the administrative hearings [in November 2009]. Significantly, the CBA that Comau and the CEA subsequently negotiated and the bargaining unit ratified included the very same health insurance plan that Comau unilaterally implemented on March 1, 2009." Exhibit A, p. 24.

[11] See *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004); *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

ALJ Carter found that most of the employee signatures (69 of 103) were placed on the decertification petition before March 1, 2009 — the only date on which the Board determined that an unfair labor practice had been committed. Most of the remaining signatures were affixed within a few days after March 1. (Decision, p. 19.) Yet the ALJ concluded that all of the signatures, and the decertification petition itself, were tainted because "the new health insurance plan . . . was on the minds of employees at least by January 2009." (Decision, pp. 20-21, n. 38.) This is a novel approach to causation, as it reverses the universal cause-and-effect sequence.

ALJ Carter ignored the testimony of Mr. Rushing that the sole reason he did not file the decertification petition in early March, well before its April 14, 2009 docketing date, was that the ASW-Millwrights had made more promises of outside work for laid off unit members, apparently to buy time to file blocking charges and forestall an election. (TR 888.) ALJ Carter also ignored the testimony during the *Saint Gobain* hearing held on November 19, 2009, where every witness testified that his dissatisfaction with the ASW-Millwrights had no connection with the March 1, 2009 health care changes and/or had been formed before March 1, 2009; in fact, almost all of the witnesses had signed in February 2009.

ALJ Carter's assigning the dissatisfaction of the pre-March 1 signers to the March 1 health care change by hypothesizing that it was already "on their minds" — even though no unfair labor practice had occurred — inverts the cause-and-effect sequence utilized in physics, logic, and law. This is an unprecedented theory based on an anticipated unfair labor practice that had undisputedly not happened (and that might never have happened) when the employees signed the decertification petition in February 2009. ALJ Carter cited no case law support, and his approach is strikingly incongruous given his refusal to consider the unit employees' own

testimony about the many other sources of disaffection that were "on their minds" throughout 2009.[12]

3. The ALJ Improperly Applied The *Master Slack* Test For Determining Cause And Effect.

In *Master Slack Corporation*, 271 NLRB 78 (1984), the seminal decision in this area for over 25 years, the Board identified four factors to be weighed in determining whether the General Counsel has established the requisite causal connection between an unfair labor practice and employee disaffection: (1) the length of time between the unfair labor practices and the filing of the petition; (2) the nature of the alleged acts; (3) any possible tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. Master Slack had committed several serious unfair labor practices eight or nine years before it was presented with a disaffection petition, and the General Counsel contended that the company could not lawfully withdraw recognition because the prior unfair labor practices had not been fully remedied (backpay was still in dispute).

ALJ Richard Linton disagreed. He observed initially that the period of time since the bulk of the illegal acts genuinely mattered. While the backpay litigation may still have been on the minds of the Master Slack employees signing the disaffection petition, ALJ Linton credited the uniform testimony given by 20 petition signers during the hearing that the backpay litigation did not motivate them:

> No signer of the petition testified that any of the past or pending litigation had anything to do with his or her signing the petition.

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[12] U.S. District Judge Duggan rejected this inverted logic out of hand: "The problem in this case, however, is that employee discontent with the ASW/MRCC <u>preceded</u> the alleged unfair labor practice." Exhibit A, p. 22. "The Board's theory, which puts the cause <u>after</u> the effect, therefore is backwards." *Id.*, p. 23, n. 9.

> It surely must be concluded that there is no direct evidence of a causal relationship between Respondent's unlawful conduct of 1973-1974 and the 1982 petition. Moreover, I further conclude that the indirect factors are insufficient here to operate as a matter of law to preclude respondent from withdrawing recognition. *Id.* at 84.

ALJ Linton had declined to hear testimony from 65 of the 85 signers, but inferred that they would have testified as the 20 testifying signers had. *Id.* at 79. The Board adopted ALJ Linton's recommended findings and conclusions, and specifically noted that it saw "no basis to disturb the Judge's reliance on the unambiguous testimony of the petition's signers that the matters raised in the prior and pending Board litigation had no impact whatsoever on their signing of the petition." *Id.* at 78 (emphasis added). The Board has not disavowed this consideration of testimony of individual signers regarding their personal motivation, even though the *Master Slack* test is sometimes described as an "objective" standard. Rendering causation decisions in a vacuum, with no regard for the testimony of individual employees who can connect signers' mindsets with objective events, is thus contrary to Board precedent. But that is what ALJ Carter did here. He not only refused to hear testimony from scores of signers who appeared at the hearing (TR 1205-1209), but he rejected the motivational explanations of those who did testify – in favor of his own speculative and clairvoyant sense of what he believed had really motivated them (Decision, pp. 19-20). That was wrong.

An abundance of evidence in this case sets out the many objective reasons for employees to have been understandably dissatisfied with the ASW-Millwrights. The testimony of the signers who were allowed to testify was illuminating in complementing this objective evidence to explain why the petition garnered so many signatures, and so quickly. As outlined above, ALJ Carter noted the litany of objective reasons, but blithely passed them off.

The Board's most prominent recent decision applying the *Master Slack* standard is *Champion Home Builders Co.*, 350 NLRB 788, 791-792 (2007), which reversed the ALJ's conclusion that a withdrawal of recognition was unlawful. The Board concluded that the employer's confiscation of union materials, one-day layoffs of all employees, threats to close the business in retaliation for picketing (all of which occurred at least six months before the withdrawal), and one refused request for information (two months before the withdrawal), were too remote in time and too attenuated to have caused the employees' disaffection. The unfair labor practices in *Champion* involved an array of discrete and isolated events, months earlier, and thereafter that employer — like Comau here during the period following March 1, 2009 — had continued to recognize and deal with the union. The Board found that the unlawful conduct could not have affected employee morale, organizational activity, or membership in the union to a degree that would have tainted the employees' expressed desire.

In *Garden Ridge Management, Inc.*, 347 NLRB 131 (2006), the employer's withdrawal of recognition was held not to be a violation because its most recent unlawful conduct – the refusal to schedule additional bargaining sessions (i.e., a basic Section 8(a)(5) violation) – had ended five months before the petition was presented.

In the instant case, the only alleged violation was a single event that occurred on March 1, 2009, after most of the signatures were affixed to the decertification petition and nine months before the disaffection petition was signed and presented in December 2009. There was no unfair labor practice before March 1, and there was no unfair labor practice in the nine months after March 1. While no bargaining occurred after March 1, 2009, this was the result of the ASW-Millwrights' strategic choice not to request bargaining and to rely instead on NLRB litigation.

The Sixth Circuit's decision in *Pleasantview Nursing Home, Inc., v. NLRB*, 351 F.3d 747 (6th Cir. 2003), is instructive. In *Pleasantview*, the employer had a mature bargaining relationship with a union, and the parties were negotiating toward a renewal contract during a time when the employer was experiencing a labor shortage and economic problems. After many bargaining sessions, the employer declared an impasse and implemented its Last Best Offer. When the union called a strike, a substantial majority of the unit employees immediately abandoned it and over 75% of the employees withdrew from the union. The employer then withdrew recognition. The ALJ and the Board found that the disaffection (and hence the withdrawal of recognition) was "tainted" under the *Master Slack* test by five unfair labor practices the Board held the employer had committed in connection with the negotiations and post-impasse LBO implementation. The Board ordered the employer to re-recognize the union.

The Sixth Circuit found, with regard to the disaffection issue, that none of the violations were substantial enough to the union, or detrimental enough to the employees, to produce employee dissatisfaction with the union, disrupt morale, or discourage or deter union membership or activities. *Id.* at 763-765. The same can be said of the single March 1, 2009 unfair labor practice involved in this case, especially in light of the other fundamental reasons that testifying signers gave for wanting to be rid of the ASW-Millwrights after the two-year affiliation experiment had failed.

ALJ Carter discounted the foregoing Board and court precedents as "fact-driven decisions that bear little similarity to this case." (Decision, p. 22, n. 41.) That misses the point and illustrates the ALJ's error. All decisions utilizing the *Master Slack* test are, by their very nature, fact-driven. What these cases show is that a five or six month time gap can be long enough to dispel a causal connection, and that the quantum of evidence detailing adverse effects

on employee morale and union membership is important. Here, there was no evidence that membership in the ASW-Millwrights was adversely affected after March 1, 2009 because of the health care change occurring that day, and there was little to no evidence of a lingering adverse effect on employee morale due to that one-time health care change. In contrast, there was abundant evidence that the employees continued to resent the Millwrights' high dues and broken promises in December 2009, as they had in December 2008-February 2009. Yet ALJ Carter flatly refused to acknowledge the significance of this evidence.[13]

B. The ALJ's Finding That The December 2009 Disaffection Petition Was Tainted Is Wrongly Based On A Treatment Of Pre-March 1, 2009 Events That Violates The *Jefferson Chemical* Doctrine And Section 10(b).

The first step in ALJ Carter's line of reasoning was the Board's decision in *Comau, Inc.*, 356 NLRB No. 21 (November 5, 2010), which found a single discrete Section 8(a)(5) violation on March 1, 2009. ALJ Bogas had rejected allegations challenging Comau's bargaining conduct during January and February 2009 (involving asserted failure to cloak company representatives with bargaining authority) and the General Counsel did not file exceptions to those findings. Nor has the General Counsel ever claimed that any unfair labor practice occurred in December 2008 when Comau declared a bargaining impasse with the ASW-Millwrights and announced the unilateral implementation of its complete LBO, including, as the main item, the Company-wide health care plan effective March 1, 2009 (following a necessary education, enrollment, and administrative transition period in January-February 2009). All of those actions by Comau over those three months were indisputably lawful and must be recognized as lawful today.

[13] U.S. District Judge Duggan did recognize the significance of this evidence. Exhibit A, pp. 26-27.

Similarly, the Complaint in the instant case says nothing about any unlawful conduct by Comau vis-à-vis the ASW-Millwrights other than the December 22, 2009 withdrawal of recognition (and then recognition of the CEA). On two prior occasions, the Detroit Regional Office and the Board's General Counsel had the opportunity to challenge the lawfulness of the December 2008 LBO implementation but determined not to do so because no unfair labor practice had occurred. In Case No. 7-CA-51886 the ASW-Millwrights had alleged a Section 8(a)(5) violation resulting from the implementation of the complete LBO. The charge was dismissed by the Regional Director, and the dismissal was upheld on appeal by the General Counsel. See *Comau, Inc.*, 356 NLRB No. 21, p. 8. Before ALJ Bogas, the General Counsel merely argued that "implementation" of the health care plan portion of the LBO occurred on March 1, 2009 (equating "implementation" with "effective date"), and did not assert that any aspect of the December 2008 announced LBO implementation was unlawful. *Id.*, p. 11. ALJ Bogas found that allowing the health care plan to "become effective" on March 1, 2009 constituted the only violation. *Id.*, p. 12.

The Regional Director and General Counsel thus had two earlier opportunities — not to mention the Complaint and trial in the instant case before ALJ Carter — to assert that the December 2008 post-impasse LBO implementation announcement that included the health care plan's implementation, and events that occurred between then and March 1, 2009, were unlawful. They did not do so. It violated due process for the ALJ to accept the General Counsel's revisionist theory, which retroactively attributes an unlawful character to a perfectly legitimate course of events, simply because an inchoate unfair labor practice may arguably have been "on the minds" of unit employees. That is not only a startlingly illogical theory, barren of support in the record, but one that has never been urged before in cases of this character.

The Board has long disapproved of such "move the goalposts" tactics. In *Jefferson Chemical Company, Inc.*, 200 NLRB 992, 994-995 (1972), the Board adopted the order of ALJ Benjamin Blackburn dismissing a second complaint against the employer. The allegations in the complaint could have been raised in a prior case that had just been tried before ALJ Blackburn, but at the earlier trial the General Counsel had disavowed any intention to raise those allegations.

The chronology in this case is similar. In the initial trial, ALJ Bogas asked counsel for the General Counsel whether her case would require him to address whether the parties were lawfully at impasse in December 2008 or whether the announced LBO implementation had been improper. She said that would not be necessary, and her proofs before ALJ Bogas focused on March 1, 2009 as the decisive date. The only unfair labor practice alleged between December 2008 and March 1, 2009 was Comau's asserted failure to grant authority to its bargaining representatives. As to those, ALJ Bogas found there had been no violation, and the General Counsel did not file exceptions. It was improper under *Jefferson Chemical* for ALJ Carter to then entertain, let alone adopt, the General Counsel's belated characterization of events from that period as having some inchoate or retroactive unlawfulness. He used this as a device to minimize the significance of all of the unquestionably lawful reasons for employee disaffection that persisted throughout 2009.

What occurred in this case is also tantamount to the General Counsel surreptitiously adding a time-barred allegation. The initial charge in the instant case was filed on December 29, 2009. Thus, events pre-dating June 29, 2009, and not previously raised in the case before ALJ Bogas, were barred by the six-month statute of limitations. See 29 U.S.C. §160(b). ALJ Carter's addressing of events occurring during the December 2008-February 2009 time period, and his

treating those events as unfair labor practices causing disaffection for the ASW-Millwrights, was also erroneous for this independent reason.

C. No Employee Was "Coerced" By Management "Agents" Into Signing The Disaffection Petition, And The ALJ Should Have So Found.

ALJ Carter declined to go beyond making a few factual findings to decide the merits of the General Counsel's fallback theory. This would have entailed addressing: (1) the alleged status as "agents" of three Comau Leaders — James Reno, Nelson Burbo III, and Harry Yale — who, like all of Comau's approximately 30 Leaders, are stipulated non-supervisory members of the bargaining unit; and (2) whether these Leaders unlawfully coerced employees to sign the disaffection petition. These three individuals were singled out because each of them had some passing contact with Richard Mroz, the only witness called by the General Counsel who arguably testified that he was influenced to any degree by knowing that Leaders supported the disaffection petition. Although Mr. Yale played a key role in making the disaffection petition available for employees to sign, Mr. Mroz knew Mr. Yale only as a "regular worker." (TR 160.) Mr. Burbo and Mr. Reno are Leaders with whom Mr. Mroz works at Comau's Novi facility. (TR 157.)

There are three reasons why no unlawful influence could have occurred: (1) the Leaders in question (especially Mr. Yale) were acting as agents of the CEA in connection with the disaffection petition and it was a statutory impossibility for them to be simultaneously acting as agents of Comau regarding the same subject; (2) Comau's Leaders do not possess actual or apparent authority with regard to the subject of union recognition or representation; and (3) in any event, there was no testimony that Mr. Mroz's or any other employee's signature was not freely given, i.e., was coerced.

The General Counsel alleged and acknowledged that Comau is an "employer" as defined by the Act, and that the CEA is a labor organization. The definition of "employer" in Section 2(2), 29 U.S.C. § 152(2), makes clear that officers and agents of a labor organization cannot simultaneously, and for the same purpose, be agents of an employer:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (Emphasis added.)

Mr. Yale is the only person whose role in preparing the disaffection petition and making it available for employees to sign was the subject of any testimony during the trial before ALJ Carter. (TR 1066.) It was also Mr. Yale who eventually presented the disaffection petition to Comau's management on December 22, 2009 as an agent of the CEA. Under Section 2(2), Mr. Yale could not also be Comau's agent with respect to actions he took to further the objectives of the CEA.[14] To the extent Messrs. Reno and Burbo encouraged Mr. Mroz to speak with Mr. Yale in the hope that he would sign the petition (a hope they did not voice), they too were acting as agents of the CEA. ALJ Carter did not address or even identify this threshold obstacle to the General Counsel's secondary theory.

For decades many Comau employees in Leader positions have simultaneously been officers of the union. Members know this. Mr. Yale was even a member of the ASW-Millwrights bargaining committee in 2008-2009 (TR 121). If employees regarded the Leaders as anyone's agent, it would be on behalf of the union, not Comau.

Furthermore, the General Counsel's fallback theory rested on the false premise that Comau had endowed these Leaders with "apparent authority" (albeit unspecified) that enabled

[14] U.S. District Judge Duggan agreed, holding that, "[b]y definition, [these Leaders] could not be agents of the employer." Exhibit A, p. 20.

them to coerce their fellow employees into signing the disaffection petition. The General Counsel claimed that, because Mr. Yale and the 30 other Leaders have limited input into selecting members of their teams, advise their teams about which projects or tasks are to be performed, give them a timeline and discuss production issues as they arise, and sign leave request slips (which then go to management for approval), other hourly employees would see them as Comau's "agents" for the wholly different and unrelated purpose of seeking signatures on a disaffection petition.

While Leaders may act as management's conduit in notifying employees of various decisions made by supervisors or managers above them in the hierarchy, the evidentiary record established that Leaders have no authority to hire, discipline, assign employees to projects or overtime, or excuse them from work. (Decision, pp. 4-5.) They are classic non-supervisory Leaders of the type frequently found in manufacturing settings.

The Board's precedents dealing with the concept of "apparent authority" make clear that the authority of the alleged agent must encompass the specific acts at issue, and that such authority cannot be established by a general showing that the person has responsible job duties. As explained in *Pan-Oston Co.*, 336 NLRB 305, 305-306 (2001), the Board

> applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994) (and cases cited therein). (Emphasis added.)

And, of course, the "burden of proving an agency relationship is on the party asserting its existence." *Millard Processing* Services, 304 NLRB 770, 771 (1991), *enf'd,* 2 F.3d 258 (8th Cir.

1993). Under the Board's test, an hourly non-supervisory employee who acts as management's point of contact for coordinating manufacturing work on the plant floor, without ultimate responsibility for assigning employees to projects and controlling their schedules, does not for that reason become the employer's "agent" when he acts to obtain signatures on behalf of a union or expresses his personal views on union representation.

The Board's requirement of showing apparent authority with respect to particular actions is illustrated in *Dorothy Land d/b/a Abbey Island Park Manor*, 267 NLRB 163 (1983). There an administrative assistant to the owner was alleged to have acted as management's agent in telling an employee seeking re-hire that she would not be considered because she had been identified as a union instigator. The Board found that she was not an agent "as to the hiring process," even though she might have been an agent for other purposes.

Similarly, in *Waterbed World*, 286 NLRB 425 (1987), it was charged that Mr. Torres, an employee who had allegedly made unlawful threatening statements to other employees, did so as an agent of the employer. The Board disagreed, finding no evidence

> . . . that at the time of the alleged unlawful statements (an interrogation and a threat of discharge) . . . Respondent had held Torres out as being privy to management decisions or as speaking with management's voice about these alleged unlawful matters or that employees perceived him as having such a role. *Id.* at 427 (emphasis added).

Even more pointedly, the Board declared in *Montgomery Ward & Co.*, 115 NLRB 645 (1956), that an acknowledged supervisor who had somehow voted in an election resulting in the union's certification could not have been an agent of the employer in this context because the employees could not have perceived him to be acting on behalf of the employer on the subject of the vote:

> The Board has generally refused to hold an employer responsible for the antiunion conduct of a supervisor [allowed to vote as if] included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management. *Id.* at 647.

This is the rule because, the Board explained:

> . . . the employees obviously regard him as one of themselves. Statements made by such a supervisor are not considered by employees to be the representatives of management, but of a fellow employee. Thus they do not tend to intimidate employees. *Id.* at 647.

The same is true here. Comau's hourly employees see Leaders such as Mr. Yale (and Messrs. Reno and Burbo) as co-workers who have specific and limited authority that extends only to the technical manufacturing processes they lead, but no authority whatsoever on behalf of management with respect to matters involving labor relations or union representation.

Finally, no coercion or improper influence was shown during the trial. Only Mr. Mroz suggested (and in only the slightest way) that he was influenced by hearing that the Leaders supported the disaffection petition. (TR 163.) Mr. Mroz recounted brief conversations with Leaders Reno, Burbo, and Yale that were absolutely neutral and non-coercive. Mr. Mroz asked questions and they answered them. They did not attempt to persuade him to support the petition — his brother had done that. (TR 165, 183, 185, 193.)[15]

[15] These isolated conversations between the Leaders and a single employee, even if they had involved a true member of Comau management (and they did not), would not have been coercive and would have been perfectly lawful expressions of the speakers' opinions. Section 8(c) of the Act, 29 U.S.C. §158(c), protects the rights of everyone (even supervisors and managers) to express their "views, argument, or opinion" so long as what is said contains "no threat of reprisal or force or promise of benefit." There was no evidence that any Comau Leader or CEA representative engaged in threats, coercion, intimidation, or promises. Even where low-level statutory supervisors have discussions with employees and express negative views about the

D. Comau Did Not Coerce Employees To Sign Dues Authorizations, And Its Clarification To Employees Was Fully Adequate.

The record does not establish that employees were threatened with loss of their jobs if they did not authorize withholding of CEA dues from their paychecks. This allegation is much exaggerated, and ALJ Carter erred in finding a violation. Mr. Begle testified that it was simply his intention to help employees avoid the difficult situation of having the CEA request their termination if they fell behind in their dues, as had happened for a valued employee under the ASW regime. (TR 876-877, 1084.)

Perhaps more importantly, ALJ Carter erred in concluding that the notice posted by Comau did not meet the legal standard for clarifying any misunderstanding on this subject. The notice was posted timely, was unambiguous, specifically addressed the conduct involved, and assured employees there would be no interference with their right to choose to pay dues directly rather than through payroll authorization. What was missing? It was fully sufficient to cure any prior misinformation.

E. Even If Comau Had Withdrawn Recognition On The Basis Of A Tainted Disaffection Petition, The ALJ Has Fashioned An Inappropriate And Unwarranted Remedy.

The remedy recommended by ALJ Carter effects not only the dis-establishment of a majority-supported incumbent union (the CEA), but the forced re-establishment of the non-majority predecessor union that the employees twice declared their desire to be rid of (the ASW-Millwrights). This case therefore presents Section 7 considerations well beyond those raised in the typical *Gissel* bargaining order case that involves a single union and an anti-union employer. The Board must be, as ALJ Carter was not, especially sensitive to the employees' Section 7 interests, rather than reflexively imposing a *status quo ante* order that restores the ASW-

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union, there is no "coercion" in the absence of evidence they are pressuring or intimidating employees. See, e.g., *NLRB v. Family Fare, Inc.*, 205 Fed. Apx. 403, 411 (6th Cir. 2006).

Millwrights, an obviously unwanted union, and abolishes the CEA, the independent self-governed union that represents the true *status quo ante*.[16]

In *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000), the employer had committed a number of egregious unremedied unfair labor practices, including making several unilateral changes, discriminatorily discharging two employees, and disciplining a third employee. The D.C. Circuit affirmed the Board's conclusion that the unremedied unfair labor practices had tainted the petition that led to the employer's withdrawal of recognition. But the court refused to enforce the Board's order to re-establish the union. The court held that this "extreme remedy" could only be "justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether the other purposes of the Act overrode the rights of employees to choose their bargaining representative; and (3) whether alternative remedies would be adequate to remedy the violations of the Act." *Id.* at 739. See also *Avecor, Incorporated v. NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991); *St. Francis Fed'n. of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 854-855 (D.C. Cir. 1984).

In *Matthews Ready Mix Inc. v. NLRB*, 165 F.3d 74 (D.C. Cir. 1999), the court refused to enforce a bargaining order entered after the employer withdrew recognition from a union based on a disaffection petition. While the employer concededly had engaged in coercive interrogations of employees, the court reasoned that the circumstances established a separate and legitimate reason for the disaffection of the petition's signers: They were strike replacements who were concerned they would lose their jobs if the union continued to be recognized.

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[16] Although still connected to the United Brotherhood of Carpenters and Joiners of America, in March 2010 the ASW ended its affiliation with the Millwrights (or MRCC) and became affiliated with the "Carpenters Industrial Council." So it is not the same union today (Decision, pp. 3-4, n. 4). The unit employees never voted to affiliate with the CIC. The ALJ's recommended order would thus force an entirely new entity on a group of employees who know nothing about it.

Given the paucity of "specific proof" of causal connection between any alleged unfair labor practice and the employees' deep-seated and longstanding disaffection for the ASW-Millwrights, the "extreme remedy" of restoring that union to its prior representative status (which means effectively destroying the now majority-supported CEA) is unjustified and improper. This is not a case where the employer set out to undermine a union or encouraged employee efforts to oust it. An affirmative bargaining order does not further the purposes of the Act. In fact, in these circumstances, the ALJ's recommended order defeats Section 7 rights. If any doubt remains about which union enjoys majority support, that doubt should be resolved by the traditional NLRB remedy of an election to ascertain the employees' wishes.[17]

Finally, the depth of ALJ Carter's error is seen in a minor, though striking, detail in his recommended Order and Notice: That Comau not only be ordered to withdraw recognition from the CEA, but that Comau not be permitted to recognize the CEA "unless and until that labor organization has been certified by the Board" (Decision, p. 31; Recommended Notice, p. 2). There is no precedent or warrant for that. As the Board has often stated, certification is but one of two permissible routes to lawful recognition of a union. See *Dana Corp.*, 351 NLRB 434 (2007).

V. CONCLUSION

The ALJ erroneously determined that the December 2009 disaffection petition did not represent the sentiment of an uncoerced majority of unit employees. The record does not contain "specific proof" (indeed, any proof) that unlawful conduct by Comau caused the discontent with the ASW-Millwrights that was expressed initially in the decertification petition and later in the

[17] As U.S. District Judge Duggan observed: "[E]njoining the representation of members by their chosen union, requiring them to be represented by a union they rejected, and blocking the enforcement of a CBA negotiated by the union chosen by the membership and ratified by the members is contrary to the NLRA's goals." Exhibit A, p. 27.

disaffection petition. The ALJ found a causal connection only by inverting cause-and-effect logic and either completely ignoring or facilely minimizing a wealth of evidence of other independent reasons for the employees' disaffection.

The ALJ's recommended order exceeds any reasonable assessment of what the circumstances warrant and barely gives lip service to the employees' Section 7 rights. It would re-impose an unwanted union on the unit employees, years after they began a determined effort to end their experimental affiliation with that union. And it would effectively destroy the CEA, the now majority-supported union. At most, an election should be conducted, something that should have happened two years ago.

Respectfully submitted,

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Dated: February 15, 2011

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEPHEN M. GLASSER, Regional Director of the Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

Case No. 10-13683
Honorable Patrick J. Duggan

COMAU, INC. and COMAU EMPLOYEES ASSOCIATION,

Respondents.
_____/

OPINION AND ORDER

On September 15, 2010, Stephen M. Glasser, as Regional Director of the Seventh Region of the National Labor Relations Board (the "NLRB" or "Board"), filed a petition on behalf of the Board, seeking interim injunctive relief pursuant to § 10(j) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j). The petition for injunction follows charges of unfair labor practices allegedly committed by Comau, Inc. ("Comau") and Comau Employees Association ("CEA"), a labor union. Petitioner (hereinafter also referred to as the "NLRB" or "Board") filed an amended petition on October 4, 2010. CEA filed an answer to the petition. Comau filed an answer to the petition and a motion to dismiss. This Court held a hearing with respect to the petition and Comau's motion to dismiss on January 13, 2011. For the reasons that follow, the Court denies the Board's request for an injunction pursuant to § 10(j) and Comau's motion to dismiss.

I. Factual and Procedural Background

Comau designs, builds, sells, and installs automated industrial systems, including automated assembly lines. Its headquarters are in Southfield, Michigan, and additional facilities are located in the Metropolitan Detroit area. Comau has recognized, and been dealing with, three independent labor organizations for many years. The members of the bargaining unit at issue here were represented by the Progressive Employees Association ("PEA") from the mid-1970s forward. This unit includes highly skilled trades classifications, such as toolmakers, machine builders, pipefitters, and electricians.[1] In 2004, the employees voted to change the name of their union from PEA to Automated Systems Workers "(ASW").

In 2007, the ASW's leadership began considering the possibility of affiliating with a larger union and eventually decided upon the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America ("MRCC"). Proponents of the ASW/MRCC merger hoped that it would, among other things, improve the ASW's

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[1]Specifically, the bargaining unit at issue is defined as:

> All full-time and regular part-time production and maintenance employees, inspectors and field service employees, employed by [Comau] at and out of its facilities located at 20950, 21000, and 21175 Telegraph Road, Southfield, Michigan; and 42850 West Ten Mile Road, Novi, Michigan; and machinists currently working at its 44000 Grand River, Novi, Michigan facility who formerly worked at its facility located at 21175 Telegraph Road, Southfield, Michigan, but excluding all office clerical employees, and guards and supervisors as defined in the [NLRA]."

(Doc. 1 Ex. 1 at 2 n.2.)

bargaining strength, offer more opportunities for training, and increase job opportunities for members of the bargaining unit. The merger, however, resulted in much higher union dues for members– up to $2,500 per year compared to $240 per year. The ASW bargaining unit voted to approve the merger with the MRCC effective March 31, 2007.

At the time of the ASW/MRCC merger, a collective bargaining agreement ("CBA") was in effect and due to expire in March 2008. Therefore, in 2008, Comau and the ASW/MRCC began negotiations for a new CBA. The parties eventually agreed to extend the existing CBA through December 21, 2008, while negotiations proceeded. The issue of health insurance coverage was an area of contention between the parties.

Under the existing CBA, unit employees were not required to pay any premiums for the company-provided Blue Cross Blue Shield coverage. During the 2008 negotiations, Comau offered to continue the same self-insured plan, but indicated that unit employees would be required to pay health insurance premiums for their coverage. The premiums under Comau's proposal ranged from $57.28 to $453.05 per month, depending on the level of benefits chosen and the type of coverage (i.e. individual, two-person, or family).

At a December 3, 2008 bargaining session, Comau declared that the parties were at impasse, gave 14 days notice that it was canceling the contract extension, and stated that it would impose its Last Best Offer on December 22 when the prior CBA expired. At the same time, Comau sent letters to bargaining unit employees describing the key changes to their insurance coverage, as well as some other rule changes, that would be imposed on

December 22. Due to the steps needed to implement the new insurance plan, Comau also informed bargaining unit employees that the new health insurance plan would not go into effect until March 1, 2009.

While Comau declared a bargaining impasse in December 2008, it continued to negotiate with ASW/MRCC representatives from December 8, 2008 through March 20, 2009. On approximately ten occasions during this time frame, the parties, through healthcare insurance subcommittees, met for negotiations regarding health insurance. One of the proposals discussed in these negotiations was the ASW/MRCC's suggestion that Comau stop paying to finance its own self-insured health insurance plan and instead make contributions to help cover the cost of insuring unit employees under an MRCC health insurance plan. Negotiations during this time period focused on the amount Comau would contribute towards its employees' coverage under the MRCC plan.

In the meantime, by late 2008, members of the bargaining unit had begun to voice their unhappiness with the ASW/MRCC. In addition to their concern that they would have to pay significant health insurance premiums, employees believed the union charged unduly high dues, was not effective in negotiating a new contract with Comau, and had failed during its brief representation to deliver promises of additional jobs and training for employees. In December 2008, all but two ASW/MRCC executive committee members met to discuss decertification of the union. The two members who did not participate in the decertification discussions were Pete Reuter and Darrell Robertson, former Comau employees who left their employment to become full-time MRCC officials following the

ASW/MRCC affiliation.

Sometime in December 2008, ASW/MRCC executive committee member Dave Baloga went to the Detroit NLRB office to find out how to accomplish decertification. In early 2009, all of the members of the executive committee, except Reuter and Robertson, voted to decertify the ASW/MRCC– their own union. Based on what Baloga learned at the NLRB, the executive committee prepared a decertification petition sometime in January 2009 to accomplish this goal.

On February 18, 2009, employee Frederick Lutz signed a written request that the ASW executive committee initiate decertification proceedings. The executive committee thereafter began gathering employee signatures (including their own) on the decertification petition, and also on individual Authorization for Representation forms authorizing the CEA to serve as the bargaining unit's collective bargaining representative. Executive committee members subsequently were warned that any member who circulated the petition could be disciplined or sued by the ASW/MRCC. Executive committee members thereafter redacted their names and signatures from the petition and turned over the responsibility for circulating the petition to employee Willie Rush. In mid-February 2009, Rush turned the decertification materials over to unit employees to pass around Comau's facilities for additional signatures.

Before March 1, 2009, eighty-four bargaining unit members (including the thirteen executive board members whose names and signatures were subsequently redacted) had

signed the petition, representing 47% of the bargaining unit.[2] (Doc. 31 Ex. AA.) Seventy-six employees had signed Authorization for Representation forms by that date, representing 42% of the membership. (*Id.* Ex. BB.) In the meantime, Comau had continued to prepare for the new health care plan announced in December 22, 2008. This included holding meetings for employees in January 2009 regarding the new plan and disbursing and collecting enrollment forms.

On March 1, 2009, a Sunday, Comau put the new health care plan into effect as planned. The first premiums for coverage were deducted from employee paychecks on March 6, 2009. In the nine days following the implementation of the new health insurance plan, thirty-four additional bargaining unit members signed the decertification petition and Authorization for Representation forms. (*Id.* Exs. AA, BB.)

Rushing thereafter returned the decertification petition and Authorization for Representation forms to Dan Malloy, an executive committee member. The executive committee at that point decided to delay filing the petition with the NLRB, as the ASW/MRCC had made some new promises regarding job opportunities for laid off workers that the committee hoped would materialize. When the jobs did not materialize,

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[2]According to ALJ Carter's decision, the parties stipulated that there were 178 employees in the bargaining unit on December 22, 2009. (Doc. 58 Ex. A at 9 n. 17.) The ALJ found evidence in the record indicating that there were 234-237 employees in the unit as of April 14, 2009. (*Id.*) Comau's and the CEA's pleadings suggest to the Court that the bargaining unit in March 2009 consisted of closer to 178 members. (*See, e.g.*, Doc. 31 at 9 (providing that 118 signatures constituted 66.2% of the membership and that 105 signatures constituted 58.9% of the membership).)

Rushing retrieved the petition from Malloy and filed it with the NLRB on or about April 14, 2009. In late April or early May 2009, Rushing met with MRCC director Doug Buckler and explained the rationale for the decertification petition: MRCC's failure to provide promised training; that the ASW's affiliation with the MRCC had not opened up members' eligibility for more jobs; the high cost of MRCC union dues; and the quality of the MRCC health insurance that the ASW/MRCC proposed belatedly in negotiations as an alternative to Comau's plan.

Meanwhile, on March 5, 2009, the ASW/MRCC (hereafter also referred to as the "Charging Union") filed charges against Comau alleging unfair labor practices based on the company's December 22, 2008 implementation of its Last Best Offer (or "LBO"), including the announcement of Comau's proposed health insurance plan. (Doc. 34 Ex. E Tabs E, F.) These charges were docketed as NLRB Case Numbers 7-CA-51886 and 7-CA-51906. On May 29, 2009, after an investigation, the Regional Director dismissed those charges. (*Id.* Tab G.) The charging union appealed that dismissal and, on August 31, 2009, the General Counsel's office denied the appeal finding that the parties were at a lawful impasse when the implementation occurred and thus Comau's implementation of its Last Best Offer did not constitute an unlawful labor practice. (*Id.* Tab H.)

Before the General Counsel's August 31 ruling, on May 19, 2009, the ASW/MRCC filed new charges alleging unfair labor practices by Comau in violation of Sections 8(a)(5) and (1) of the NLRA. These charges, docketed as NLRB Case No. 7-

CA-52106, complained of various acts of alleged "bad faith bargaining."[3] The initial complaint was silent with respect to Comau's March 1, 2009 unilateral implementation of the new health care plan. (Doc. 34 Ex. E. ¶ 21.) On July 28, 2009, however, on the advice of NLRB agent Linda Hammell, the ASW/MRCC amended the charge to also allege that Comau's March 1, 2009 action constituted an unfair labor practice.[4] (*Id.* Ex. E Tabs I, J.) The Regional Director issued the Complaint ("Complaint I") based on the charges on August 28, 2009. (*Id.* Tab K.)

The Regional Director also determined that substantial and material issues of fact existed as to whether the alleged unfair labor practices bore a causal relationship to the employee disaffection reflected in the decertification petition filed on April 14, 2009, which had been assigned Case No. 7-RD-3644. (*Id.*) The Regional Director therefore ordered the two cases heard together before an administrative law judge. (*Id.*)

Administrative proceedings were conducted before Administrative Law Judge Paul Bogas in November 2009. In the meantime, members of the bargaining unit became frustrated by the fact that the decertification petition had not resulted in an election and

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[3]The union charged that Comau failed to bargain in good faith by: failing to cloak its representatives with the authority to make proposals or enter into binding agreements; submitting written proposals to the Union without attempting to gain authority to do so; and introducing a new demand that the Union absorb Comau's liability for previously accrued health insurance "trailing costs."

[4]Comau contends that Hammell's role in the amended complaint was inappropriate. The Court finds it unnecessary to address this assertion at this time.

was being held in abeyance by the Board. In December 2009, bargaining unit members researched the NLRB rules and hired a consultant. As a result, the employees prepared and circulated a "disaffection petition" on which they collected the signatures of 103 of the 178 members of the bargaining unit. (Doc. 34 Ex. H.)

In addition to stating that those signing the petition no longer wanted to be represented by the ASW/MRCC and wanted to be represented immediately by the CEA, the disaffection petition states:

> We no longer want to be represented by the Automated System Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters) because of the excessive dues that the Union charges us each month and because it has not come through on its promises to increase job opportunities for us – and not because Comau Inc. in the last year or so unilaterally implemented new terms of employment for us including the Company health care plan.

(*Id.*) The disaffection petition was submitted directly to Comau on December 22, 2009 (not to be confused with December 22, 2008, the date Comau imposed its Last Best Offer).

When the disaffection petition was circulated, bargaining unit members also were asked if they would be willing to sign declarations stating that they signed the disaffection petition voluntarily, of their own free will, were not coerced or forced to sign by anyone from Comau or CEA, and that they "do not want the ASW, the Carpenters Industrial Council (CIC) or the MRCC to represent [them] in collective bargaining." (Doc. 34 Ex. DD.) 90 members of the bargaining unit signed such declarations. Members who signed the declarations were presented with two versions and, if they were willing to sign, were

asked to sign the one which best reflected their opinions. 83 of the 90 members who signed the declarations chose the version that include the above language, in addition to the phrase: "I am fearful that I may be retaliated against by the leadership of the ASW 1123 or someone from the CIC for exercising my rights under the law." (*Id.*)

When a disaffection petition is presented to an employer, the employer generally, after validating the signatures, must, according to NLRB rules and precedents, withdraw recognition from the union then representing the bargaining unit and is permitted to recognize the union that the majority designates as their bargaining representative. Comau did just that on December 22, 2009, withdrawing recognition of the ASW/MRCC and recognizing the CEA as the bargaining unit's designated bargaining representative.

Comau and the CEA thereafter engaged in negotiations for a new CBA. On May 14, 2010, they executed a CBA, which had been ratified by the CEA membership in April 2010. This new CBA includes the same health insurance plan implemented by Comau on March 1, 2009. The CBA also includes a union security provision which requires bargaining unit members to pay union dues to the CEA.

On December 29, 2009, the ASW/MRCC filed new charges alleging that Comau violated Sections 8(a)(1), (2), and (5) of the NLRA by withdrawing recognition of the union and giving unlawful assistance to and recognizing the CEA as the collective bargaining representative of its employees. This charge was assigned Case No. 7-CA-52614. The Charging Union filed additional charges against Comau and the CEA, on May 20, 2010, which were assigned Case Nos. 7-CA-52939 and 7-CB-16912. On July

30, 2010, a consolidated amended complaint ("Complaint II") was issued with respect to these charges.

Complaint II alleges that Comau violated Sections 8(a)(1), (2), (3), and (5) of the NLRA by: failing and refusing to bargain collectively and in good faith with the Charging Union; dominating and interfering with the administration of, and rendering unlawful assistance to, a labor organization; discriminating against employees and thus encouraging membership in a labor organization; and interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act. As to the CEA, Complaint II alleges that the CEA violated Sections 8(b)(1)(A) and (b)(2) of the Act by: restraining and coercing employees in the exercise of rights guaranteed in Section 7 and attempting to cause Comau to discriminate against its employees such that Comau would violate Section 8(a)(3) of the Act. The alleged violations were based on two theories: (1) that the December 2009 disaffection petition that Comau used to conclude that the ASW/MRCC did not represent a majority of employees in the unit was tainted by Comau's March 1, 2009 unilateral implementation of its new health care plan, which was alleged to constitute an unfair labor practice; and (2) that the disaffection petition was tainted because certain individuals who circulated it– specifically, Harry Yale, James Reno, and Nelson Burbo– did so with the apparent authority of Comau.

On May 20, 2010, ALJ Bogas issued his decision with respect to Complaint I, concluding that Comau engaged in an unlawful labor practice and therefore violated the NLRA when it implemented its new health care plan on March 1, 2009. (Doc. 1 Ex. 2.)

ALJ Bogas found that while Comau and the ASW/MRCC were at impasse on December 22, 2008 when Comau implemented its Last Best Offer, the impasse had passed in January 2009 when the parties continued to engage in negotiations regarding the health insurance issue. The ALJ rejected the other violations alleged in the complaint and declined to make a determination with respect to the decertification petition. Comau appealed ALJ Bogas' decision. The Board affirmed on November 5, 2010. (Doc. 49 Ex. 2.) In the interim, ALJ Geoffrey Carter conducted hearings with respect to Complaint II in August and September 2010.

On September 15, 2010, the Board filed the instant petition in this Court against Comau and the CEA pursuant to § 10(j) of the NLRA, 29 U.S.C. § 160(j). The Board filed an amended petition on October 4, 2010. In the petition, the Board alleges that Comau violated Sections 8(a)(1), (2), (3) and (5) of the NLRA when it withdrew recognition from the ASW/MRCC, recognized the CEA, and negotiated and entered into a CBA with the CEA following disaffection caused by an unremedied unfair labor practice– that being the unilateral implementation of the new healthcare plan on March 1, 2009. The Board also alleges that Comau violated the NLRA when *its* "agents," Harry Yale, Nelson Burbo III, and James Reno, circulated the disaffection petition. The Board asks the Court to enter an injunction requiring Comau to cease and desist from recognizing the CEA as the collective bargaining representative of the bargaining unit, from giving effect to the CBA between Comau and the CEA, from unilaterally changing employees' terms and conditions of employment, and from deducting dues from

employees' wages and remitting them to the CEA.[5] The Board also seeks to compel Comau to recognize and bargain with the ASW, which had since become affiliated with the Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America.

With respect to the CEA, the Board alleges that the CEA violated Sections 8(b)(1)(A) and (2) of the NLRA by accepting Comau's recognition as the bargaining representative of the unit and negotiating and entering into a CBA with Comau that requires the payment of union dues to the CEA, even though the CEA does not represent an uncoerced majority of the bargaining unit. The Board seeks to enjoin the CEA from acting as the bargaining representative of the unit and from maintaining a CBA with Comau.

Comau and the CEA filed answers to the petition on October 11, 2010. On the same date, Comau also filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). As part of its motion, Comau also seeks sanctions against Petitioner pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. §§ 1927 and 2412. Comau argues that there is no legal or factual basis for the injunction Petitioner seeks and that

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[5]As discussed *infra*, after the amended petition was filed, the NLRB issued a decision with respect to Complaint I. A district court's § 10(j) injunction expires upon the issuance of a Board decision. Therefore, Petitioner moved and was granted permission on November 18, 2010 to modify the injunctive relief it seeks in this case in light of the Board's decision. The relief set forth above reflects Petitioner's modified request. (*See* Doc. 49.)

Petitioner has wrongfully aided the ASW/MRCC in pursuing charges against Comau.[6] The petition and motion to dismiss have been fully briefed and the parties have submitted volumes of exhibits in support of their respective positions regarding the requested injunction. The Court held a motion hearing with respect to the pending pleadings on January 13, 2011.

Prior to the hearing, on December 14, 2010, the Regional Director issued a decision and order with respect to Case 7-RD-3644– addressing the April 14, 2009 decertification petition. (Doc. 54 Ex. A.) Finding a causal relationship between Comau's implementation of the new health care plan on March 1, 2009, which the Board previously held constituted an unfair labor practice ("ULP"), and the decertification petition, the Regional Director concluded that the petition should be dismissed. (*Id.*)

Also prior to the hearing in this case, on December 21, 2010, ALJ Carter issued his decision with respect to Complaint II. In his decision, ALJ Carter concludes that there is a causal relationship between the loss of majority support for the ASW/MRCC evidenced in the decertification and disaffection petitions and Comau's ULP found by ALJ Bogas and the Board– that being, Comau's implementation of the new health care plan on March

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[6]In its reply brief in support of its request for sanctions, Comau indicates that "[i]t is premature to argue about sanctions" and that it only intended to provide "fair warning" to Petitioner until the underlying issues are resolved that it may be seeking sanctions. (Doc. 46 at 1.) The Court therefore will not rule on Comau's motion for sanctions, will deny the motion without prejudice, and will allow Comau to re-file its request for sanctions if it chooses to do so once the petition for injunction is resolved. At that time, Comau can argue why, based on the resolution of the underlying issues, sanctions are appropriate.

1, 2009.[7] Finding that Comau engaged in unfair labor practices likely to diminish ASW/MRCC's status, ALJ Carter concludes that Comau could not lawfully withdraw recognition from the union and recognize the CEA as the bargaining representative of the unit. ALJ Carter, however, found no evidence that Comau, through its agents, facilitated or participated in the disaffection petition. Based on his rulings, ALJ Carter recommends that the Board enter an injunction similar, in part, to that sought in the present petition.

Comau and the CEA are filing exceptions to ALJ Carter's decision, which are due to be filed on February 15, 2011. (*See* Doc. 63 at 8.)

II. Comau's Motion to Dismiss

As indicated previously, in addition to filing an answer to the petition, Comau has filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). A rule 12(b)(6) motion tests whether a legally sufficient claim has been pleaded in the complaint, and provides for dismissal when a plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, – U.S. – , 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 555, 570, 127 S. Ct. 1955, 1974

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[7]Complaint II also alleged that Comau and the CEA violated the NLRA by conduct that reasonably could coerce employees to sign dues-checkoff authorization forms. ALJ Carter found that the CEA engaged in this misconduct, but found no evidence that Comau did so. These findings, however, are not relevant to the injunction sought in this Court as there is no claim that this misconduct caused the employees' disaffection with the ASW/MRCC.

(2007)). A claim is facially plausible when a plaintiff pleads factual content that permits a court to reasonably infer that the defendant is liable for the alleged misconduct. *Id.* (citing *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965). This plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965.

When assessing whether a plaintiff has set forth a "plausible" claim, the district court must accept all of the complaint's factual allegations as true. *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 512 (6th Cir. 2001). Even so, "the pleading must contain more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555, 570, 127 S. Ct. at 1965. A plaintiff has the duty to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . .." *Id.* Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, – U.S. – , 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965).

As an initial matter, to accept the arguments in Comau's motion to dismiss, the Court would be required to consider matters outside the Board's petition. For this reason alone, the Court is persuaded to deny the motion to dismiss. *See Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) ("Matters outside of the pleadings are not to be considered by a court in ruling on a 12(b)(6) motion to dismiss.") In addition, however, the Board has adequately alleged facts in its petition, when presumed true, to render its

theories "facially plausible." The Court therefore is denying Comau's motion to dismiss.

In actuality, Comau's motion is an answer to the petition which asks the Court to consider evidence submitted by Comau– and not set forth in the Board's petition– to find that there is no causal relationship between the March 1, 2009 implementation of the new health care plan and employee disaffection *and/or* that granting the requested preliminary injunction would not be just and proper. The Court therefore will consider Comau's motion for that purpose.

III. Applicable Law as to Section 10(j) Injunctive Relief

Section 10(j) of the NLRA authorizes district courts to grant preliminary injunctions pending the Board's adjudication of unfair labor practice cases:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 106(j). The Sixth Circuit Court of Appeals has set forth two findings that a district court must make before granting a § 10(j) injunction. First, the court must find "reasonable cause" to believe that the alleged unfair labor practice occurred. *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 234 (6th Cir. 2003) (citing *Schaub v. West Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001)). Second, the court must determine whether injunctive relief would be "just and proper." *Id.*

In *Ahearn*, the appellate court summarized the "reasonable cause" analysis as follows:

> Petitioner's burden of showing "reasonable cause" is "relatively insubstantial," inasmuch as the proof requires only that the Board's legal theory underlying the allegations of unfair labor practices be "substantial and not frivolous" and that the facts of the case be consistent with the Board's legal theory. *Schaub*, 250 F.3d at 969 . . . In reviewing the supporting facts, a district court "need not resolve conflicting evidence between the parties" or make credibility determinations." *Id.* . . . "Rather, so long as facts exist which could support the Board's theory of liability, the district court's findings cannot be clearly erroneous." *Id.* (citations omitted). Indeed, fact-finding is inappropriate in the context of a district court's consideration of a 10(j) petition.

351 F.3d at 237 (additional citations omitted). Further, to conclude that the facts support the Board's legal theory, the Court need only find "some evidence in support of the petition." *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987) (citing *Levine v. C & W Mining, Inc.*, 610 F.2d 432, 435 (6th Cir. 1979)).

"The 'just and proper' inquiry . . . turns primarily on whether a temporary injunction is necessary 'to protect the Board's remedial powers under the NLRA.'" *Schaub*, 154 F.3d at 279 (quoting *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208, 214 (6th Cir. 1995)). When making this determination, "'[c]ourts must be mindful that the relief to be granted is only that reasonably necessary to preserve the ultimate remedial power of the Board and is not to be a substitute for the exercise of that power.'" *Ahearn*, 351 F.3d at 239 (quoting *Schaub*, 154 F.3d at 279) (internal quotation marks and citations omitted)). "Where the Board's remedial powers would be ineffective without a court order temporarily returning the protagonists to the positions they occupied before

occurrence of the alleged unfair labor practice, the district court normally has discretion to issue such an order." *Schaub*, 154 F.3d at 279.

A district court does not review an ALJ's decision on the merits of an unfair labor charge, nor does it sit in review of the final decision of the Board. Review of the Board's determination of an unfair labor practice charge is reserved to the Courts of Appeals. *See* 29 U.S.C. § 160(f). Both decisions, however, are relevant to a district court's assessment of the propriety of § 10(j) relief. "The ALJ is the Board's first-level decisionmaker. Having presided over the merits hearing, the ALJ's factual and legal determinations supply a useful benchmark against which the Director's prospects of success may be weighed." *Bloedern v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001).

IV. Analysis

As indicated earlier, the Board presents two legal theories in support of its § 10(j) petition. First the Board asserts that Comau's unfair labor practice of March 1, 2009– that being, the unilateral implementation of the new health insurance plan– caused the employee's disaffection with the ASW/MRCC and therefore Comau could not lawfully withdraw recognition of the ASW/MRCC and recognize the CEA as the unit's bargaining representative. The Board also asserts that Comau's agents provided unlawful assistance and encouragement related to the circulation of the disaffection petition.

This Court can quickly dispose of the Board's second theory. As ALJ Carter, in this Court's view, correctly found, there is no evidence that Yale, Burbo, or Reno were acting as agents of Comau when they circulated the disaffection petition or that any agent

of Comau facilitated or participated in the circulation of that petition or the earlier decertification petition. Yale, Burbo, and Reno were members of the bargaining unit and the union's executive committee. By definition, they could not be agents of the employer. *See* 29 U.S.C. § 152(2) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any labor organization (other than when acting as an employer, or anyone acting in the capacity of officer or agent of such labor organization.")

As to the Board's first theory, Comau and the CEA spend little time arguing whether Comau's March 1, 2009 implementation of the new health care plan constituted an unfair labor practice. Instead, they focus on the Board's claim of a nexus between that alleged ULP and employee disaffection and contend that the asserted nexus is not substantial and is frivolous.[8]

"The Board has long held that an employer may not withdraw recognition [of a union] based on employee disaffection *if* there is a causal nexus between the disaffection and unremedied unfair labor practices." *NLRB v. AT Sys. West, Inc.*, 341 NLRB 57, 59 (2004) (emphasis added) (citing *Olson Bodies, Inc.*, 206 NLRB 779, 780 (1973)).

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[8]Comau argued before ALJ Bogas and mentions in its brief that charges relating to the March 1, 2009 implementation of the new health care plan are precluded by the finding that its December 22, 2008 announcement of the plan did not constitute an unfair labor practice. ALJ Bogas addressed this argument in his decision, finding that the charge is not precluded. (*See* Doc.1 Ex. 2 at 16.) ALJ Bogas further found that because any impasse existing on December 22, 2008, had been eliminated as of January 7, 2009, Comau engaged in an unfair labor practice when it went ahead and implemented the new health care plan on March 1, 2009.

However, "[n]ot every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the *ensuing* events indicating a loss of support." *NLRB v. Lee Lumber and Bldg. Material Corp.*, 322 NLRB 175, 177 (1996) (citing *Williams Entm't*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995)). "The unremedied unfair labor practices must be of a character as to either affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *AT Sys. West*, 341 NLRB at 59-60.

The Board has established several factors relevant in determining whether there is a causal relationship between an unfair labor practice and employee disaffection. Those factors include:

> (1) the length of time between the unfair practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility for a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union.

East Bay Automotive Council v. NLRB, 483 F.2d 628, 634 (6th Cir. 2007) (citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984)). In assessing the tendency of an unlawful labor practice to cause employee disaffection, the Board applies an objective, rather than a subjective test. *AT Systems West*, 341 NLRB at 60 (citations omitted). "[I]t is the objective evidence of the commission of unfair labor practices that has the tendency to

undermine the Union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard." *Id.*

As ALJ Carter found in his decision, the Board has held that an employer's unilateral imposition of a new health care plan– particularly one requiring significant employee-paid premiums not previously imposed– has the possibility of a detrimental and lasting effect on employees, as well as a tendency to cause disaffection. (Doc. 58 Ex. A at 20 (citing *Priority One Servs*, 331 NLRB 1527 (2000) (collecting cases).) The problem in this case, however, is that employee discontent with the ASW/MRCC *preceded* the alleged unfair labor practice. In fact, the decertification petition was signed by a sufficient number of bargaining unit members (71) before March 1, 2009– when Comau unilaterally implemented the new health care plan– to require the Board to take a vote to certify the results. *See* 29 U.S.C. § 159(e)(1) ("Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.") As ALJ Carter found, the disaffection petition in December 2009 simply "was essentially an effort to renew the Spring 2009 decertification movement . . ." (Doc. 58 Ex. A at 19.)

ALJ Carter found a causal connection between the employees pre-ULP signing of the decertification and the ULP because the employees were aware of the new health care

plan and its upcoming implementation. This Court finds several problems with this analysis. First, the NLRB's decisions reflect that "there must be specific proof of a causal relationship between the unfair labor practice and the *ensuing* events indicating a loss of support." *Lee Lumbar and Bldg. Material Corp.*, 322 NLRB at 177 (emphasis added).[9] The evidence shows that in the present case, before the unfair labor practice, a percentage of the bargaining unit's members sufficient to require an election had signed a decertification petition indicating a loss of their support in the ASW/MRCC. The evidence further shows that the loss of support for the union expanded much further than the health care issue. Executive committee members began to research how to accomplish decertification as early as December 2008. The Board already has found that the announcement of the new health care plan in December 2008 did not constitute an unfair labor practice and nothing Comau did prior to March 1, 2009 (such as preparing for and informing the employees of the change), has been suggested to have constituted an unfair labor practice.

The Court also notes that up to and following March 1, 2009, Comau still was engaged in negotiations with ASW/MRCC representatives to reach an agreement with respect to an alternative health care plan. In fact on February 20, 2009, members of the ASW/MRCC bargaining committee presented a healthcare proposal that met the amount Comau offered to contribute toward an ASW/MRCC plan and, at the end of the meeting,

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[9]The Board's theory, which puts the cause *after* the effect, therefore is backwards.

Comau's negotiators indicated that they would review the union's proposal and respond by March 20, 2009. Thus a day after most employees signed the decertification petition, Comau and the ASW/MRCC were close to resolving the health care issue and there was reason to believe that the health care plan in fact would not be implemented. These facts suggest that the health care issue was not the driving force behind the bargaining unit members' disaffection.

There is no evidence suggesting that the March 1, 2009 implementation of the new health care plan led to lingering resentment toward the ASW/MRCC causing bargaining unit members to sign the disaffection petition and Authorization for Representation forms in December 2009. The evidence, to the contrary, indicates that the decision to pursue the disaffection petition was born out of the NLRB's failure to act on the decertification petition filed on April 14, 2009, and the reminder as the administrative proceedings ensued that the petition was being delayed by the unfair labor charges against Comau. The Court finds no evidence that any employee discontent arising from the implementation of the new health care plan was carried forward by the administrative hearings. Significantly, the CBA that Comau and the CEA subsequently negotiated and the bargaining unit ratified included the very same health insurance plan that Comau unilaterally implemented on March 1, 2009.

The Court acknowledges that there is a scintilla of evidence suggesting a causal relationship between the alleged ULP and the disaffection of at least some members of the bargaining unit, although the Court questions whether it is sufficient to even satisfy

the Board's slight burden to demonstrate reasonable cause.[10] The Court flatly rejects, however, the Board's evidence of a change in ASW/MRCC meeting attendance after March 1, 2009, to demonstrate a causal connection between Comau's implementation of the new health care plan and disaffection. (*See* Doc. 1 Ex. 18.) David Baloga's assertion in his affidavit, notably prepared by Petitioner's counsel, that membership at ASW/MRCC meetings began to drop after March 1 is contrary to the meeting records and appears intentionally misleading. (Doc. 34 Ex. D Tabs 1, 3.) In fact, attendance at ASW/MRCC meetings after March 1, 2009 was frequently higher than at the same time the previous year. For example, 46 and 22 members attended meetings in April and May 2008, respectively. In comparison, in April and May 2009, attendance was 48 and 26 members.[11] (*Id.*) There were 26 members present at a meeting in July 2008, compared to 32 members in July 2009. (*Id.*) Only starting in August 2009 did the number of attendees decline compared to the same month the year before, yet attendance until November 2009 remained above 25 members.[12] (*Id.*) Because this decrease occurred at least five months after Comau's implementation of the new health care plan, the Court does not find it

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[10]For example, thirty four additional employees signed the decertification petition on or after March 1, 2009, and there was testimony that the new health care plan and the premiums employees would be required to pay under the plan caused, at least in part, some employees to sign the decertification petition.

[11]The fact that more members attended ASW/MRCC meetings *after* March 1, 2009 further supports a finding of no causation.

[12]Notably, attendance fell below or hovered around 25 members at certain meetings in 2008 as well, such as the meetings on May 15, 2008 (22 attendees), July 1, 2008 (26 attendees), and November 5, 2008 (25 attendees). (Doc. 34 Ex. D Tabs 1, 3.)

demonstrative of a causal relationship. However, even if the Court concluded that the Board satisfied its burden of demonstrating reasonable cause, the Court also concludes that injunctive relief is not just and proper.

The Board contends that a preliminary injunction is necessary to prevent the further "irreparable erosion" of member support for the ASW/MRCC. (Doc. 28 at 34.) The Board also argues that "without some form of immediate interim relief, employees will be unjustly deprived of the fruits of collective bargaining, . . . and industrial peace will be destabilized." (*Id.* at 36.)

As discussed above, however, the evidence indicates that erosion of support for the ASW/MRCC reached a level sufficient to require an election before the unlawful labor practice occurred. With the exception of Reuter and Robertson (who no longer worked at Comau's facilities) the members of the ASW/MRCC's executive committee unanimously voted to decertify their union in late December 2008 or early January 2009. Moreover, a significant amount of time passed between December 22, 2008– when employees first became aware of the impending health care plan change– and December 22, 2009– when they signed the disaffection petition.

No member of the bargaining unit testified during the administrative proceedings that he signed the disaffection petition in December 2009 because of the implementation of the health care plan ten months earlier. In comparison, thirteen witnesses testified that Comau's action on March 1, 2009, was *not* the cause of their decision to sign the disaffection petition. CEA sought to present ninety additional witnesses who would

testify similarly, but ALJ Carter ruled that the evidence would be cumulative. The disaffection petition also states that Comau's implementation of the new health care plan did not influence members to sign the petition; but instead, that those signing the petition were influenced by the ASW/MRCC's broken promises regarding increased job opportunities and high union dues.

Even if the employees' subjective reasons for signing the disaffection petition are not relevant in the Court's "reasonable cause" analysis, those reasons are influential in the Court's analysis of whether a preliminary injunction would be just and proper. This evidence suggests that bargaining unit members did not reject the ASW/MRCC and seek representation by CEA *because of* Comau's March 1, 2009 unfair labor practice. In this Court's view, enjoining the representation of members by their chosen union, requiring them to be represented by a union they rejected without coercion, and blocking the enforcement of a CBA negotiated by the union chosen by the membership and ratified by the members is contrary to the NLRA's goals.

There are additional factors supporting the Court's conclusion that preliminary injunctive relief would not be just and proper in this case. First, the Board was aware of the membership's discontent in early March 2009, and their signatures on the disaffection petition and Authorization for Representation forms in December 2009, asking Comau to withdraw recognition of the ASW/MRCC as their representative and to recognize the CEA instead. Yet the Board did not seek § 10(j) injunctive relief until September 15, 2010. During the Board's delay, the members proceeded with their new union and

entered into a CBA with that union as their representative.

Second, the Court finds it unlikely that membership support for the ASW/MRCC will erode any further in the time it should take the Board to review and decide whether to affirm ALJ Carter's decision. Further, there is nothing suggesting that, when the Board reaches its decision, it will be less likely to provide remedial relief if this Court does not now enter preliminary injunctive relief.

Third, the CEA points out that returning to the status quo as it existed before March 1, 2009, is no longer possible. According to the CEA, on March 1, 2010, the ASW disaffiliated from the MRCC and became an affiliate of the Carpenters Industrial Council (CIC). In March 2007, members of the bargaining unit voted to merge the ASW with the MRCC; they have not voted to accept the CIC as their bargaining representative. Finally, Comau's and the CEA's exceptions to ALJ Carter's decision are due to be filed with the Board on or before February 15, 2011. An answer to those exceptions and any cross-exceptions must be filed within 14 days of that date and the Board's policy is to issue expedited decisions in cases where § 10(j) proceedings are pending. *See* 29 C.F.R. § 102.94. Thus any preliminary injunction entered by this Court is expected to be short-lived. Considering the time that already has passed since the unlawful labor practice, it is unlikely that any harm that has ensued as a result of the unfair labor practices will become greater without such a temporary and brief injunction.

V. Conclusion

For the reasons set forth above, the Court concludes that a temporary injunction

pursuant to § 10(j) is not supported by reasonable cause and/or would not be just and proper.

Accordingly,

IT IS ORDERED, that the petition for injunction under Section 19(j) of the National Labor Relations Act filed by Petitioner Stephen M. Glasser, Regional Director of the Seventh Region of the National Labor Relations Board, on behalf of the National Labor Relations Board is **DENIED**;

IS IT FURTHER ORDERED, that Comau, Inc.'s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED**.

DATE: February 10, 2011

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record