

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

COMAU, INC.

Respondent Employer

and

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

COMAU EMPLOYEES ASSOCIATION (CEA)

Party in Interest/Respondent Union

and

Case 7-CB-16912

**AUTOMATED SYSTEMS WORKERS LOCAL 1123,
affiliated with**

**CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA**

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF CROSS-EXCEPTIONS**

Counsel for the Acting General Counsel, pursuant to Section 102.46(e) of the Board's Rules and Regulations, respectfully submits the following Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge.¹

- I. Because leaders who circulated the disaffection petition had apparent authority to do so, Respondent Comau could not lawfully rely upon it to withdraw recognition from the Charging Party and to recognize Respondent CEA**

The ALJ erred by finding it unnecessary to rule on Counsel for the Acting

¹ Throughout this brief the following references will be used: "ALJ": A Administrative Law Judge Geoffrey Carter. "ALJD": ALJ's decision. Transcript: Tr. (followed by page number); Joint Exhibit: J Ex. General Counsel Exhibit: GC Ex. Respondent Comau Exhibit: R. Comau Ex. Respondent CEA Exhibit: R. CEA Ex.

General Counsel's alternate theory that Respondent Comau violated Section 8(a)(5) and (2) of the Act by withdrawing recognition from the Charging Party and recognizing Respondent CEA based on a petition circulated by agents of Respondent Comau.² The ALJ made ample factual determinations to support a finding and legal conclusion that Harry Yale, James Reno, and Nelson Burbo III were agents of Respondent Comau within the meaning of Section 2(13) of the Act, and erred by failing to do so. In addition, the ALJ erred by failing to find that, by virtue of Yale, Reno, and Burbo's agency status and the manner in which the petition was circulated, the disaffection petition was tainted and Respondent Comau's reliance upon it to withdraw recognition from the Charging Party and recognize Respondent CEA violated Section 8(a)(5) and (2) of the Act.

A. Applicable Law

The Board has found a petition circulator's conduct to be attributable to the employer where he was acting as an agent of the employer, thereby tainting the petition. See, e.g., *SKC Electric, Inc.*, 350 NLRB 857 (2007). In determining whether an individual is an agent of the employer, the Board applies the common law principles of agency as set forth in the Restatement 2d of Agency. *Id.*; *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988). Agency status may be established under the doctrine of apparent

² The ALJ found it unnecessary to rule on Counsel for the Acting General Counsel's alternate theory because he found merit to the Acting GC's primary theory that the disaffection petition was tainted by Respondent Comau's unlawful implementation of health insurance found in *Comau, Inc.*, 356 NLRB No. 21 (2010), and Respondent Comau violated Section 8(a)(5) and (2) of the Act by relying upon it to withdraw recognition from the Charging Party and to recognize Respondent CEA.

authority, when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question. *Id.* at 82-83. "[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct [the manifestation] is likely to create such a belief." *Id.*; *Allegany Aggregates, Inc.*, 311 NLRB 1165 (1993). See also *SKC Electric*, *supra*.

When an employer places a rank-and-file employee in a position where employees could reasonably believe that the employee spoke on behalf of management, the employer has vested the employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer. *Corrugated Partitions West*, 275 LRB 894, 900 (1985). As such, apparent authority can still be found even if the employer gave no specific instructions to the agent. *Facchina Construction Co.*, 343 NLRB 886, 887 (2004); see also *Hausner Hard-Chrome of Ky., Inc.*, 326 NLRB 426, 428 (1998).

Under the circumstances present here, the record establishes that a reasonable employee would believe that the disaffection petition circulated by Yale, Reno, and Burbo was supported by Respondent Comau, and reliance on the petition in withdrawing recognition from the Charging Party and recognizing Respondent CEA was thus unlawful.

B. The ALJ's factual findings

The ALJ's factual determinations and the record as a whole support a finding and conclusion of law that Yale, Reno, and Burbo are agents of Respondent Comau, and that an employee would reasonably believe that the disaffection petition they circulated was supported by Respondent Comau.

Agency Indicia

The ALJ correctly found that leaders, including Yale, Reno, and Burbo, perform a variety of functions in connection with their role as intermediaries between management and employees in their work centers. The ALJ specifically found, and the record overwhelmingly establishes, that leaders may request specific employees to be assigned to their teams (ALJD p. 4, lines 31-32; Tr. 601, 604, 1005), leaders attend project kickoff meetings with management (ALJD p. 4, lines 32-33; Tr. 609, 873, 1005), and leaders assign specific tasks to individual employees (ALJD p. 4, lines 33-34; Tr. 266-267, 606, 682, 874, 1140-1141). The record also supports the ALJ's findings that leaders provide instructions to team members about new assignments, work revisions and corrections, and about how specific tasks should be performed. (ALJD p. 4, lines 35-38; Tr. 165, 189, 216-217, 270-272, 340-341, 437-438, 445-446, 606, 1008).

The ALJ's findings that leaders serve as the voice of management to employees as they are "the beginning and end points for communication between employees on the shop floor and management" is well-supported by the record as a whole (ALJD p. 5, lines 3-5). In that regard, leaders initiate nonconformance reports to advise

management about problems or defects in work product that require additional time or money to repair (ALJD p. 5, lines 4-6). Leaders recommend employees to perform overtime work, and leaders notify the individual employees who have been selected to work the overtime hours (ALJD p. 5, lines 6-9; Tr. 167, 275-277, 443, 612-613, 689-690, GC Ex. 5). Similarly, employees must receive their leader's approval and signature on an absentee report before their absence request is forwarded to a supervisor for final approval (ALJD p. 5, lines 9-12; Tr. 272-273, 615, 618-619). The record shows that sometimes the leader is the only individual to approve an employee's absence request (ALJD p. 5, lines 13-15; Tr. 620-621; GC Ex. 40-42).

The record evidence also supports the ALJ's finding that Respondent Comau supplies leaders with equipment that is generally not provided to other bargaining unit employees. Specifically, leaders have desks on the shop floor, telephones, and computers with password access requirements (ALJD p. 5, n.7, lines 32-35; Tr. 264, 647-648, 653, 701, 995, 999-1000, 1006, 1008-1010).

The ALJ also found, and unrebutted record evidence supports, that Reno reviewed résumés at Respondent Comau's request and made recommendations in connection with its hiring decisions (ALJD p. 5, n.8, lines 36-39; Tr. 658-659, 669, GC Ex. 46-48). On at least one occasion, Burbo communicated with an outside vendor on Respondent Comau's behalf to arrange a meeting about options for upgrading Respondent Comau's equipment (ALJD p. 5, n.8, lines 39-41; Tr. 695; GC Ex. 50)

Under these circumstances, where Respondent Comau has vested Yale, Reno, and Burbo with apparent authority to communicate on its behalf to employees, an employee would reasonably believe that the disaffection petition circulated by Yale, Burbo, and Reno was supported by Respondent Comau. See *SKC Electric, supra*.

Circulation of the Disaffection Petition

The ALJ found, based on employee Richard Mroz's unrebutted testimony, that one of his leaders, Burbo, initially approached him and advised him that the disaffection petition was circulating. Burbo then asked him if he was happy with the Charging Party, to which Mroz responded that although he was not happy with the Union, he thought it might be a bad time to get out of the Union in light of the litigation regarding health insurance. (ALJD p. 11, lines 10-15; Tr. 158-159) On another day, Mroz's other leader, Reno, approached him during working time and asked him if he wanted to speak to Harry Yale about the petition. (ALJD p. 11, lines 16-17; Tr. 159-160). Yale worked at a different facility than Mroz. (Tr. 155, 263) When Mroz and Yale met, Mroz asked Yale whether his leaders had signed the petition before signing it himself, and testified that the fact that his leaders signed it affected his decision because of the influence they had over his working conditions (ALJD p. 11, lines 21-25, Tr. 163). As the ALJ found, Mroz expressed concern about going against the opinion of his leaders and thus running the risk of the leaders taking an adverse action against him if he did not sign the disaffection petition (ALJD p. 11, n.20, lines 34-36; Tr. 162-163, 165).

With regard to the general circumstances under which the petition was circulated, the ALJ found that the disaffection petition was kept on Yale's desk, and that Yale took the petition to other Comau facilities for employees to sign (ALJD p. 10, lines 40-43, p. 11, lines 1-2; Tr. 897-898, 1029-1030). The ALJ also found that the petition was occasionally circulated during working time. (ALJD p. 11, lines 2-4; Tr. 1065-1066, 1112, 1153-1154).

The ALJ noted that employee/Charging Party recording secretary David Baloga saw two employees on layoff present at Respondent Comau's facility approach the binder with the petition in it, and that, because they were on layoff, they needed to be granted access to the facility. (ALJD p. 11, n.21, lines 39-41; Tr. 286-288) Similarly, the ALJ noted that Baloga testified that Respondent Comau generally enforced rules for when materials could be circulated on the shop floor (ALJD p. 11, n.21, lines 43-47; Tr. 284-285, 353).³ While the ALJ determined that there was no evidence that Respondent Comau knew the laid off employees were in the plant, or that the petition was circulating during working time on the shop floor, this is not the relevant inquiry.⁴ Rather, the relevance of these circumstances is how they would be viewed by a reasonable employee. *SKC Electric*, 350 NLRB at 862. Under the circumstances present here, the employees had every reason to believe that the disaffection petition circulated by Yale, Reno, and Burbo was supported by Respondent Comau.

³ The most recent collective bargaining agreement and the imposed last best offer each contain shop rules prohibiting the circulation of petitions of any kind without permission, prohibiting unauthorized distribution of literature, and unauthorized solicitation. (Tr. 284-285; Jt. Ex. 1, 3)

⁴ However, the ALJ erroneously failed to consider Yale's testimony that he informed human resources manager Fred Begle within a couple of days of when he began circulating the petition that he was circulating it. (Tr. 255)

C. An employee would reasonably believe the disaffection petition was supported by Respondent Comau.

The Board held in similar circumstances that employees would reasonably believe that circulation of a disaffection petition was authorized by the employer and that circulators spoke and acted on behalf of the employer when they circulated the petition. In *SKC Electric*, 350 NLRB 857 (2007), a disaffection petition was circulated by a bargaining unit employee who oversaw the employer's projects at various locations, requiring him to drive a company truck from project to project. The Board found that because the employee circulated the petition during working time while he was overseeing employer projects, and drove the employer's truck to different employer locations to do so, employees would reasonably believe he did so with employer support.⁵ *Id.*

Likewise, here, as the ALJ found and the record establishes, the petition was circulated by leaders who oversaw employees' work, assigned work to them, corrected their work, recommended them for work and for overtime, approved their time off, had input in hiring decisions (in the case of Reno), and served as spokespersons for management to employees. The petition was at least occasionally circulated during working time, taken from location to location by Yale during employees' working time, and maintained on Yale's desk. Signatures were collected during working time despite Respondent Comau maintaining and enforcing a prohibition on circulating

⁵ Although the employer directed the petition circulator in *SKC Electric* to collect employee signatures on the disaffection petition, the employees were unaware of the employer's direction. In finding the petition tainted, the Board relied upon the fact that the employees would reasonably conclude the employer supported the petition based on the circulator's apparent authority.

petitions of any kind without permission. Laidoff employees came into the Respondent Comau's access-controlled facility and walked over to Yale's desk where the petition was maintained. Here, as in *SKC Electric*, employees had every reason to believe that the disaffection petition circulated by Yale, Reno, and Burbo was supported by Respondent Comau. Where the disaffection petition circulators were acting as apparent agents of Respondent Comau, Respondent Comau's reliance on the disaffection petition was unlawful. See, e.g., *SKC Electric*, 350 NLRB at 862.

Respondents' claim (Comau Brief in Support of Exceptions, p. 42; CEA Brief in Support of Exceptions, p. 35-36) that the leaders in question were acting as agents of the CEA in connection with the disaffection petition, and that it was a statutory impossibility for them to be simultaneously acting as agents of Comau and the CEA regarding the same subject is without factual or legal support. With regard to apparent agency, it is axiomatic that an individual may be an agent of an employer for one purpose and not another. See, e.g., *Cooper Hand Tools*, 328 NLRB 145, 146 (1999). The test is whether, under all the circumstances, employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-427 (1987), citing *Einhorn Enterprises*, 279 NLRB 576 (1986). Respondents offer no evidence, nor was any adduced at trial, to establish that employees would reasonably believe Yale, Reno, and Burbo were acting as agents of the CEA when circulating the disaffection petition. In addition, the Board has found individuals to be simultaneously

agents of both an employer and a labor organization.⁶ See, e.g., *Service Employees Intern. Union*, 322 NLRB 402 (1996).

In sum, the ALJ made ample factual determinations to support a finding and legal conclusion that Yale, Reno, and Burbo were agents of Respondent Comau within the meaning of Section 2(13) of the Act. In addition, by virtue of Yale, Reno, and Burbo's agency status and the manner in which the petition was circulated, the disaffection petition was tainted and Respondent Comau's reliance upon it in withdrawing recognition and recognizing Respondent CEA violated Section 8(a)(5) and (2) of the Act.

II. Conclusion

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

Respectfully submitted this 1st day of March, 2011.

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⁶ Indeed, the interpretation of Section 2(2) urged by Respondent Comau would permit employer supervisors and managers to serve as officers of labor organizations and stands afoul of the Act's long-standing prohibition against employer-dominated unions. See, e.g., *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261 (1938).

CERTIFICATE OF SERVICE

I certify that on the 1st day of March, 2011, I electronically served copies of Counsel for the Acting General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions on the following parties of record:

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