

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

KENNAMETAL, INC.,	)	
Respondent,	)	
	)	
and	)	
	)	Case No. 01-CA-046689
UNITED STEELWORKERS, LOCAL 5518,	)	
Affiliated with UNITED STEEL, PAPER, AND	)	
FORESTRY, RUBBER, MANUFACTURING,	)	
ENERGY, ALLIED INDUSTRIAL AND	)	
SERVICE WORKERS INTERNATIONAL	)	
UNION, AFL-CIO/CLC,	)	
Charging Party.	)	

**BRIEF IN SUPPORT OF CHARGING PARTY’S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION**

Now comes the Charging Party, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“USW”), and United Steelworkers, Local 5518 (“Local”) (the USW and Local will hereinafter collectively be referred to as “Union”), pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or the “Board”), and hereby respectfully submits this memorandum in support of its exceptions to the Decision of the Administrative Law Judge.

On November 1, 2, and 3, 2011, the above-captioned case was heard before Administrative Law Judge Paul Bogas in Greenfield, Massachusetts, to consider unfair labor practice allegations against the Respondent, Kennametal, Inc. (“Kennametal” or “Respondent”). The General Counsel and the Union presented evidence at trial to support the charges against Kennametal, including its violation of Section 8(a)(3) and (4), and derivatively section 8(a)(1), of

the National Labor Relations Act (“NLRA” or the “Act”) by laying off seven employees and eliminating the Local President’s position because employees assisted the Union and participated in Board processes. The Administrative Law Judge (“ALJ”) issued his Decision (“ALJD”) on February 16, 2012, dismissing the allegations that Respondent violated 8(a)(3) (4), (1) of the Act as discussed herein. The Union excepts to those portions of his decision.

## **II. STATEMENT OF RELEVANT FACTS**

The Union and Kennametal are parties to a collective bargaining agreement effective October 2, 2010, through October 2, 2015, under which the Union represents production and maintenance employees at the Respondent’s Lyndonville, Vermont, facility. In 2009, Rick Brighenti became the plant manager at Lyndonville, and Leon Garfield became the Local Union President. Around that time, the Respondent requested early negotiations with the Union in anticipation of the contract expiring, and both Brighenti and Garfield were present at the negotiation sessions for the Respondent and the Union respectively. The early negotiations ended abruptly without an agreement between the parties being reached, primarily due to Garfield and the Union’s outright rejection of Kennametal’s proposal.

In early February 2010, the Respondent implemented a corporate-wide initiative entitled the Management Based Safety Program (“MBS”). The Union objected and demanded to bargain over the implementation of MBS, but Respondent refused. On July 30, 2010, the Union filed an unfair labor practice (“ULP”) charge against Kennametal for its refusal to bargain over MBS in violation of Section 8(a)(5) and (1) of the Act.

In September 2010, Respondent and the Union held several negotiation sessions for the current collective bargaining agreement. During one of those meetings, the lead negotiator for Kennametal, John Jamison, sternly relayed a message to the Union from Kennametal’s Chief

Human Resources Officer that MBS was not an issue that the Union should take a stand on, stating that the Union only made up 1% of all of Kennametal. See Tr. at 93-94, 156-157, 194-196.

A hearing was held on February 8-10, 2011, relating to the 8(a)(5) charges that were filed by the Union regarding the implementation of MBS. During the course of the hearing, based on information revealed by Respondent, the General Counsel amended the Complaint to include Respondent's failure to bargain over the implementation of another corporate-wide program entitled Procedure for Corrective Actions for Safety Violations and Work Instructions for Corrective Actions ("Safety Discipline Procedures"). From that point on, the hearing was not just about MBS anymore but very much concerned this other large company-wide program that was being threatened by the position the Union was taking. As a result of the dispute about whether the Safety Discipline Procedures were in fact implemented previously at Lyndonville, the discipline history of safety violations became an essential matter in the hearing. In support of the Union's position, Garfield testified extensively, and his safety-record database, which compiled the historical treatment of safety violations, was admitted into evidence.

The hearing closed on Thursday February 10, 2011, and on the following Monday, February 14, 2011, Brighenti (Lyndonville's plant manager) sent an email to his boss, Keith Koski notifying him that there would be layoffs at the Lyndonville plant. Accordingly, on February 18, 2011, Respondent laid off seven employees. Also on that same day, Brighenti informed Koski that Garfield would be moved to the night shift due to the layoffs. Respondent then eliminated Garfield's daytime position on February 22, 2011.

### III. ARGUMENT

As stated more precisely in its Exceptions, filed this date, the Union takes exception to the ALJ's finding that the General Counsel failed to establish a prima facie case for the Respondent's violation of section 8(a)(3) and 8(a)(4) of the Act under the analysis established in *Wright Line*, 251 NLRB 1083 (1980). The NLRA prohibits an employer, by discrimination, to discourage membership in a labor organization, and prohibits employers from discriminating against employees for filing charges or giving testimony under the NLRA. The Board must find that the Respondent violated these provisions both in laying off employees and in eliminating the day-shift position of the Local Union President.

**A. The ALJ Erred in Failing to Find that the Respondent Violated Section 8(a)(3), (4) and (1) in Laying Off Employees in February 2011.**

Under the *Wright Line* analysis, the General Counsel has the burden to establish the following elements: (1) that the employee(s) engaged in protected concerted activity; (2) that the employer knew or had reason to know that the employee(s) engaged in protected activity; (3) that the employer took an adverse employment action against the employee(s); and (4) that there is a nexus between the protected activity and the adverse employment action. The Board has held that an "unlawful motivation may be established when, as here, an employer takes adverse action against a group of employees, regardless of their individual sentiments toward union representation, in order to punish the employees as a group to discourage union activity or in retaliation for the protected activity of some." *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 fn. 4 (1996) (internal quotations omitted). Additionally, in *Davis Supermarkets*, 306 NLRB 426 (1992), the Board stated that "the General Counsel was not required to show a correlation between each employee's union activity and his or her discharge. Instead, the General Counsel's burden was to establish that the mass discharge was ordered to discourage union activity or in

retaliation for the protected activity of some.” *Id.*, quoting *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985). This framework is not only applicable in union organizing campaigns, as is suggested by the ALJ, but also can be utilized in other contexts as well, such as in the context of contentious and divisive unfair labor practice proceedings. *See, e.g., Copper Craft Plumbing, Inc.*, 354 NLRB 958 (2009) (two-member Board) (holding that the employer laid off employees to discourage them after it learned that the Region was investigating a ULP charge). It is highly plausible – and, indeed, axiomatic – that an employer might retaliate against a very active and strong union by laying off employees in an attempt to weaken and discriminate against the union. This is precisely the action that Respondent took against the Union in this case.

The case law is clear that the General Counsel does not have to show that each of the affected employees engaged in union activity or that the employer knew that all the individuals were engaged in protected activity. As long as the General Counsel demonstrated that Kennametal’s primary motivation was to punish the employees as a group for the brazen actions of the Union — spearheaded by Garfield — or to discourage union activity, then the prima facie case has been established. The General Counsel met this burden during the hearing, as is evidenced through the record. The ALJ wrongly concluded that “the record is devoid of evidence that the Respondent used the tactic described by the General Counsel,” ALJD at 14 L 8-10; rather, the record evidence amply supports this conclusion.

First, the Union was heavily engaged in protected activity that was at odds with Respondent: there were difficult contract negotiations, multiple grievances filed, and ULP charges that included employee participation in Board proceedings challenging the Respondent and its corporate-wide programs. (See Tr. at 89 Garfield, “We had to file a lot of grievances, we ended up going to NLRB charges. As you know, February we came here for a hearing.

Arbitrations that we'd never done before – I'd never done in my history.”). The pinnacle of this tumultuous relationship was reached during the prior Board hearing in February 2011, during which the Respondent revealed that it was primarily concerned about the Safety Discipline Procedures and not MBS and during which the General Counsel successfully amended its Complaint to include the disciplinary procedures as part of the bargaining violation. Ultimately, it was the Safety Discipline Procedures that were largely undermined by the credible testimony of Garfield at that hearing. See Tr. at 309, 622-623. Because of this, Respondent took immediate action against the Union by laying off seven employees and moving Garfield to the night shift. This adverse employment action served the purposes of discouraging Union activity for employees as a whole at Lyndonville and of retaliating against Garfield for his specific involvement in the Board hearing. The nexus between the protected activity and the adverse action is therefore established through the timing of these events.

Moreover, the nexus is further established through the anti-union statements made by a key Kennametal official. The ALJ incorrectly determined that John Jamison's statement to the Union was not evidence of Kennametal's antiunion animus because, in the ALJ's opinion, Jamison did not “allude to any type of adverse consequences or state that continued resistance to MBS would bring the facility into disfavor with the Respondent.” ALJD at 16 L 27-28. This interpretation ignores the state of the law and the weight of the evidence presented at the hearing.

To begin with, the test to determine whether the Respondent's statement interfered with, restrained, or coerced employees, is an objective test that hinges on whether the statement may reasonably be said to tend to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959). At the hearing in this matter, Garfield, along with David Brousseau and Terry Pray, testified about Jamison's demeanor, the manner in

which he delivered the statement, and the statement itself – all of which add to the objectively threatening nature of the statement. See Tr. at 209-210. Indeed, on its own, the statement that “this is not an issue for the Union to take a stand on” naturally carries an implicit message that a continued stance in opposition to Respondent would yield negative results for the Union. If Respondent was not attempting to coerce the Union, there would have been no reason for the Chief of Human Resources to send this message to the Union at all.

Furthermore, the ALJ erroneously opined that Jamison’s statement was not a threat because Respondent would only continue to refuse to bargain over implementation of its programs as a result of the statement. Whatever the resulting actions taken by Respondent might be are irrelevant to the analysis of whether the statement was objectively threatening or coercive (as well as providing evidence of animus). In *American Freightways*, the Board stated that “[i]t is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed.” *Id.* at 147. Consequently, it is immaterial what the outcome of the threat would be in the future, and thus the ALJ’s explanation of why the statement was a futile threat is of no relevance to the determination of whether the statement objectively showed animus. Further, the standard does not consider what the Respondent intended when it conveyed those words but rather what might have reasonably been interpreted by the employees who heard them. These statements made on behalf of a high-ranking official at Kennametal thus clearly satisfy the objective standard of coercion and further demonstrate anti-union animus.

The ALJ also noted in his decision that Jamison was not a permanent official of Kennametal but rather a consultant. ALJD at 16 L 41-46. However, the ALJ ignored the fact that although Jamison was the one who verbally delivered the message, the words in fact came

from Kevin Walling, the Chief of Human Resources for Kennametal. Jamison made it clear at the outset that the stern message came from Walling and then proceeded to read the statement to the Union from a sheet of paper. The fact that this statement was reduced to writing so that it could be explicitly delivered to the Union demonstrates both its genesis as coming from Walling (and not from Jamison) and the importance that Walling placed on the statement. Therefore, the statement was clearly a threat and evidence of blatant animus against the Union.

The timing of the layoffs also established the unlawful discriminatory motive behind the Respondent's adverse action taken against the Union and the represented employees. However, the ALJ erroneously concluded that the timing of the MBS trial was not a significant moment in this case. In coming to this decision, the ALJ ignored all the evidence in the record that demonstrated otherwise. Most crucially, it was at the prior ULP trial in February 2011 that the Union's resistance to Respondent's enforcement of unfair policies erupted. In addition to the ongoing internal strife between Respondent and the Union, the Union was now causing bigger problems (in the eyes of the Company) because the Lyndonville plant, which only made up "1%" of Respondent's workforce, was now disturbing *two* major company policies that Kennametal officials wanted implemented across the board.

At the hearing, Garfield's safety-record database contradicted the Respondent's argument and the claims it was making to defend its policies. Ultimately, Garfield's diligent record keeping and his testimony thereon credibly refuted the Company's claims and placed its programs in jeopardy. The Company decided to implement layoffs only one week after this factual revelation. Based on this evidence, which the ALJ wholly ignored, Counsel for the General Counsel cannot be said to have selected a "self-serving date" to make her case that the layoffs were discriminatory, as suggested by the ALJ. ALJD at 17 L 27-31. Accurately stated,



the hearing alone marked the date when Respondent would have been extremely concerned with the fate of MBS *and* the Safety Discipline Procedures, and it was immediately after this date that the layoff was announced.

None of the other dates preceding the hearing are of such critical importance as the dates of the hearing itself. In this regard, the case at hand is critically different from *Newcor Bay City Division*, 351 NLRB 1034 (2007), in which the judge found that the timing of the issuance of the complaint and the adverse action alleged did not justify an inference of unlawful motivation. In *Newcor*, there was not a significant event that occurred when the complaint was issued to make that timeframe relevant to establish a prima facie case, rather than when the union filed the initial charge. In contrast, the hearing in question was a significant time in this case that establishes a nexus with the layoffs. The ALJ utterly neglected to consider the Safety Discipline Procedures that arose during the hearing as a factor in the nexus analysis. Therefore, the Board should find a violation of 8(a)(3), (4) and (1) relating to the layoff.

**B. The ALJ Erred in Failing to Find that the Respondent Violated Section 8(a)(3), (4) and (1) in Eliminating Garfield's Day-Shift Position.**

As discussed above, the timing of the layoffs and the statement made by Jamison are evidence of animus, and that animus also extends to establishing a prima facie case against the Respondent for eliminating Garfield's day-shift position. Respondent's claim that it eliminated the position in favor of more direct labor positions is wholly unpersuasive.

As noted above, the decision to eliminate the day-shift position came right on the heels of the prior ULP hearing, in which Garfield participated extensively and figured prominently in undermining the Respondent's defenses. Moreover, the General Counsel and the Union presented credible evidence in this matter that the Respondent continued to assign other employees to perform Garfield's inspection work during the day shift even after eliminating his

position. Respondent did not offer any evidence to support the claim that it eliminated Garfield's position to increase direct labor positions. On the other hand, the record supports the position that Respondent was motivated by the need to obstruct Garfield's strong involvement in the Union and/or to retaliate against him for his strong leadership and participation in the prior ULP process.

After eliminating Garfield's position, Respondent did not "select" him to do calibration work on the day shift as the ALJ suggested; rather, Garfield remained to finish calibrating some equipment only as long as was necessary. And as a result of the permanent elimination of his position, Garfield landed in the night-shift cutoff job that was previously held as a day-shift position by John Levesque. Being on the night shift made it not just inconvenient for Garfield to perform his job effectively, but extremely difficult to do so. Moreover, the Respondent could not explain why it needed to move the cutoff position to the night shift only after Levesque left that position even though Levesque had requested such a change many months earlier. Indeed, the evidence plainly demonstrates that the cutoff position was much less effective on the night shift due to the need to interact with other day-shift employees in engineering the machines. The ALJ even recognized that the posting of the cutoff job as a night shift position was "somewhat curious," but he wrongly and inexplicably concluded that Respondent would have made the same decision absent Garfield's Union activities. Respondent offered no evidence to support this conclusion by the ALJ. The Respondent knew that, based on seniority, Garfield was most likely to land in that job, and it purposefully orchestrated these events to obtain that result. Therefore, the ALJ wrongly determined that Respondent did not violate Section 8(a)(3), (4), and (1) in eliminating Garfield's day-shift position and ostensibly forcing him into this night-shift position.

**C. The General Counsel Having Met His Burden of Proving a Prima Facie Case, the Respondent Cannot Establish a Legitimate Business Justification for Its Discriminatory Actions.**

As the General Counsel plainly met his burden of proving a prima facie case of discrimination, the burden should have been placed on Respondent to prove that it would have laid off seven employees and eliminated Garfield's position in the absence of the contested activities of the Union. The Respondent did not satisfy this burden, and the Union strenuously excepts the ALJ's conclusion that "Respondent introduced sufficient evidence that the layoff was motivated by business conditions." ALJD 18 L 19-20.

Respondent alleged that the layoffs were motivated by a drastic decline in the number of incoming orders and Lyndonville's poor variance-to-plan performance in the months leading up to the February layoffs. However, the record evidence does not show a drastic decline in orders or a lack of work that could justify the layoff. Although there was some decline in orders starting in September 2010, the decline was not nearly as grave as Respondent made it out to be. And in fact, the incoming orders for the critical month of February were at the highest they had been since the initial drop in September. Moreover, the fact that Lyndonville was not meeting its planned variance was not an unusual occurrence that necessitated laying off seven employees. For the majority of the months from 2007 to 2011, Lyndonville did not regularly meet its planned variance. This was not something new or unexpected that was occurring; even Koski (the director of the division) admitted under oath that he was unsurprised that Lyndonville only met, or bettered, its planned variance eight out of fifty-one months since 2008. It is undoubtedly evidenced through the record that Respondent's stated reason for the layoffs was false, and as such, was pretext for the unlawful discrimination and retaliation carried out against the Union and its members, particularly Garfield.

The Union takes further exception to the ALJ's finding that the events that occurred surrounding the layoffs were consistent with those layoffs that occurred in the past. Specifically, the February layoff was not similar to the layoffs that occurred in 2009. Unlike the layoff in 2009, the employees did not witness the usual signs in 2011 that illustrated economic hardships in the plant. Employees were actively working significant amounts of overtime and double overtime, there were no work slow-downs, and no one was performing make-work on their shifts (such as sweeping the floors or cleaning machines). There was no lack of work; rather, every employee who testified stated that there was substantial work to be done on the floor and a reportedly high number of orders.

In addition, the Respondent's claim that the layoffs were for economic reasons is highly undermined by Respondent's actions. Following the layoffs, Respondent continued to pay unnecessary insurance payments to the laid-off workers – a careless economic action that one would not expect from a plant in financial straits. It strains credulity to find that the layoff was supported by economic reasons since the Respondent did not make sure that it was recouping all the purported \$5000 that it estimated to be saved by laying off the employees. When the sole reason for the layoffs was purportedly to save labor costs, such an “oversight” is untenable and incomprehensible. This blatant neglect proves that the purported reason for the layoffs that Respondent offered is nothing more than a pretext for its underlying act of discriminations.

#### IV. CONCLUSION

In light of the foregoing, the Board should reverse the findings of the ALJ that the General Counsel failed to establish a prima facie case under the *Wright Line* analysis. Respondent's actions of laying off seven employees and eliminating the Local Union President's position should be found to be unlawful and violative of section 8(a)(3), (4) and (1) of the Act. For these reasons, the Charging Party respectfully requests that the Board modify the decision of the ALJ and issue an appropriate order consistent with a finding of these violations as alleged by the General Counsel.

Respectfully submitted,

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