UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of KENNAMETAL, INC. and UNITED STEELWORKERS, LOCAL 5518, affiliated with UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC	CASE 01-CA-046689

COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to section 102.46 of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the Acting General Counsel respectfully files the following Exceptions to the Decision of Administrative Law Judge Paul Bogas, dated February 16, 2012. Counsel for the Acting General Counsel hereby excepts to the following:

1. The Judge erred as a matter of law in concluding that Counsel for the Acting General Counsel failed to establish protected activity or knowledge of same sufficient to meet the burden under *Wright Line*. (ALJD p. 13, lines 32-35).
2. The Judge misapplied Board precedent establishing that where an Employer's goal is to discourage and/or retaliate for protected activity, it is the layoff itself, and not the selection of individual employees that is the unlawful act, and under such circumstances, it is unnecessary to show union activity by laid-off employees as part of the prima facie case. (ALJD p. 14-15, lines 32-13).
3. The Judge erred in determining that in order to show that the February layoffs were used to camouflage Respondent's discriminatory intentions toward Union President Garfield, or to discourage employee support for the Union, Counsel for the Acting General Counsel needed to show direct evidence that Respondent made an effort to cause employees to blame the Union for the layoff. (ALJD p.14, lines 8-20).
4. The Judge erred in failing to find that each of the laid off employees were union members pursuant to a union security clause.

5. The Judge erred in failing to find that at the February 2011 ULP hearing held just before the layoffs, there was entered into evidence a database maintained by Union President Garfield memorializing disciplinary actions against Respondent's employees over 8 years. (ALJD p. 3, GC 21).

6. The Judge erred in failing to find that at the ULP hearing held just before the layoffs, Union President Garfield testified in contradiction to Plant Manager Brighenti, and contrary to Respondent's interests. (ALJD p. 3).

7. The Judge erred in failing to find that as a result of testimony at the February 2011 ULP hearing, the issues to be decided broadened to include whether Respondent had lawfully implemented certain safety discipline procedures. (ALJD p.3, lines 35-38).

8. The Judge erred in concluding that Counsel for the Acting General Counsel failed to meet its burden under *Wright Line* of showing animus. (ALJD p. 15, lines 49-51).

9. The Judge erred in determining that John Jamison's statement to the Union advising that Respondent's Senior Human Resource Director had said that MBS was not an issue for the Union to take a stand on, and that Lyndonville was only 1% of Kennametal was not evidence of animus toward the Union's protected activities. (ALJD p. 16, lines 18-38).

10. The Judge erred in failing to find that by advising the Union Grievance Committee that Respondent's Chief Human Resource Executive wanted them to know that MBS was not an issue to take a stand on, and that Lyndonville was only 1% of Kennametal, Respondent was making an unspecified threat of reprisal, in violation of Section 8(a)(1) and not a "threat of futility." (ALJD p. 16 lines 12-35).

11. The Judge erred in failing to find that Jamison, in admonishing the Union Negotiating Committee of Respondent's view that MBS was "not an issue to take a stand on," specifically relayed that this sentiment was coming directly from Respondent's Chief Human Resource Officer. (ALJD p. 4, lines 38-40).

12. The Judge erred in finding that the "gist" of the argument that Jamison was making to the Union was that since MBS was a corporate-wide initiative it was not something that the Lyndonville employees' bargaining representative could expect to stop. (ALJD p. 4-5, n.5).

13. The Judge erred in determining that Jamison's statements could be understood as a threat of futility, but not a threat of unspecified reprisals, and in finding that Jamison did not imply that Respondent planned to do anything other than continue to refuse to bargain over MBS. (ALJD p. 16, lines 25-30).

14. The Judge erred in failing to find that Fletcher had been advised by Brighenti that he was not to discuss the ULP with anyone but Brighenti and Koski. (Tr. 490-491).

15. The Judge erred in failing to find that Garfield's testimony that there were no indications of a lack of work was corroborated by witnesses Terry Pray and Dave Brousseau, and that it was only from management, as an explanation for the layoff, that Garfield heard about a work slowdown. (ALJD p. 7, line 32-34).

16. The Judge erred in finding that Respondent had established that there was any fall-off in orders at Respondent's facility in early 2011. (ALJD at p. 18, lines 20-24).

17. The Judge erred in finding that Respondent had increasingly unfavorable performance beginning in October 2010, and continuing through May of 2011. (ALJD at 6, lines 10-14).

18. The Judge erred in finding that Respondent had more advance warning about the alleged downturn in workload in 2011 than it had before prior layoffs. (ALJD p. 11, line 22-24).

19. The Judge improperly relied on the evidence regarding Respondent's operating plan, rather than the amount of available work for employees, in determining whether layoffs have been justified in the past. (ALJD p. 10-11, lines 32-7).

20. The Judge's failure to find that, although Brighenti testified that Respondent would save $5000 in labor costs per month for each employee laid off, such savings would not be realized if Respondent needed to use overtime to meet production goals, and could not be fully realized for at least three months following a layoff due to Respondent's contractual obligation to continue to pay its share of health benefits. (ALJD p. 6, lines 37-39).

21. The Judge's failure to find that Respondent's needless payment of health insurance premiums on behalf of the laid off employees belied a lack of concern that the layoff result in savings on labor costs. (ALJD p. 8-9).

22. The Judge's finding that the optimal level of overtime for the Lyndonville facility was between 8 and 15% of total hours. (ALJD p. 8, lines 5-6).

23. The Judger erred in indirectly crediting Brighenti's claim that 8-15% overtime levels were optimal for the facility. (ALJD p. 18, line 40-43).

24. The Judge erred in finding that Respondent reduced labor costs through the layoff at the same time as it reduced labor costs by cutting overtime. (ALJD p. 18, line 37-42).

25. The Judge erred in determining that Respondent could not have had a discriminatory motive for the layoff, because in communications with employees, it blamed the need for a layoff on declining orders and poor variance performance, and not on the Union. (ALJD p. 14, lines 10-14).

26. The Judge erred in determining that employees' apparent lack of concern about the implementation of MBS weighed against a determination that Counsel for the Acting General Counsel met its initial burden under *Wright*

Line of demonstrating Respondent did not have an unlawful motive in implementing the layoffs. (ALJD p. 14, lines 16-18).

27. The Judge erred in finding that Respondent's adherence to a contractual agreement to solicit volunteers for layoff when an involuntary layoff is planned, weighed against finding that Counsel for the Acting General Counsel had met its initial burden under *Wright Line*. (ALJD p. 14, lines 22-25).

28. The Judge's failure to find that Respondent's request to seek volunteers in lieu of involuntary layoffs was made pursuant to the parties' collective-bargaining agreement. (ALJD p. 7, lines 16-18).

29. The Judge erred in determining that the continued provision of health insurance was not evidence providing an inference of animus. (ALJD p. 14, n. 12.)

30. The Judge erred in finding that Respondent "selected" Union President Garfield for a temporary day shift assignment calibrating equipment. (ALJD p.3, lines 17-20; ALJD p. 15, line 41-43.)

31. The Judge erred in concluding that it was inconceivable that Respondent would allow Garfield to remain the on day shift for any period of time after eliminating his day shift position, if Respondent's action of eliminating his daytime inspector position had been unlawfully motivated. (ALJD p. 15, lines 42-47.).

32. The Judge erred in finding that because Fletcher's Section 8(a)(1) statements regarding the "dark cloud" over Lyndonville occurred after the layoffs occurred, and he was not part of the decision, his comments could not be evidence of animus with respect to the layoffs. (ALJD p. 17, lines 5-13.)

33. The Judge erred as a matter of law and fact in finding that the timing of the layoff decision does not suggest unlawful motive or otherwise establish animus, and the date of completion of the unfair labor practice hearing is insignificant and self-serving on the part of Counsel for the Acting General Counsel as a means of establishing a convenient date to show a connection to the layoff. (ALJD p. 17, lines 13-38).

34. The Judge erred in finding that that Respondent had a history of using employee layoffs under similar circumstances in the past. (ALJD p. 18, lines 5-7).

35. The Judge erred as a matter of fact and law in concluding that under *Wright Line,* Respondent had no burden to show that it would have made the same decision absent the union or protected activity, and that even if the Judge had concluded that a prima facie case had been met, that Respondent had introduced sufficient evidence that the layoff was motivated by business decisions to rebut the prima facie case. (ALJD p. 18, lines 15-20).

36. The Judge erred in relying on the evidence regarding "variance-to-plan" in determining whether Respondent had shown a lack of work to meet its burden under *Wright Line*. (ALJD p. 18, line 22-23).

37. The Judge erred in finding that Respondent reduced its labor costs through reduced overtime costs as a result of the layoff. (ALJD p. 18, lines 38-42).

38. The Judge erred in finding that the Acting General Counsel had not established a prima facie case that the elimination of Garfield's daytime inspector position as part of the layoff was discriminatorily motivated. (ALJD p. 19, lines 17-22).

39. The Judge erred in finding that Respondent would have eliminated Garfield's daytime position even in the absence of Garfield's protected activities. (ALJD p. 20, lines 20-24).

40. The Judge improperly concluded that the complaint allegation that Respondent unlawfully eliminated Garfield's daytime inspector position should be dismissed. (ALJD p. 20, lines 32-35).

41. The Judge improperly concluded that the complaint allegation that Respondent laid off employees on February 18, 2011 should be dismissed. (ALJD p.18-19, lines 50-8).

42. The Judge erred in his implicit credibility findings with respect to the testimony of Rick Brighenti.

43. The Judge erred as a matter of law and fact in failing to find that Respondent's post-hearing abandonment of all arguments related to the unsupported evidence contained in Respondent's Exhibit 1 amounted to a "shifting defense."

44. The Judge erred in finding that Respondent's actions were justified by a defense never advanced by Respondent.

Respectfully submitted this 6th day of April, 2012.

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