

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

KENNAMETAL, INC.,)	
)	
Respondent,)	
)	
And)	1-CA-46689
)	
)	
UNITED STEELWORKERS, LOCAL 5518,)	
Affiliated with UNITED STEELWORKERS)	
OF AMERICA, AFL-CIO, CLC)	
)	
Charging Party)	

RESPONDENT’S ANSWERING BRIEF

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NOW COMES Kennametal, Inc., Respondent herein, and files its answering brief as follows:

STATEMENT OF CASE

This case arises out of an unfair labor practice charge filed by United Steelworkers, Local 5518 (“Union”) on March 3, 2011, and amended on July 20, 2011.¹ On July 29, the General Counsel issued a complaint challenging decisions by Respondent to (1) on or about February 18, lay off seven employees and (2) on or about February 22, eliminate the daytime inspector position held by Union President Leon Garfield and subsequently fail to post vacant daytime positions for bid. The complaint (paragraph 9) alleges that these decisions by Respondent were made because (a) “Garfield and other employees formed, joined, or assisted the Union and engaged in concerted activities” and (b) “Garfield and other employees participated in Board processes, including filing unfair labor practice charges and giving testimony at an unfair labor proceeding in Cases 1-CA-46293, and 1-CA-46294,” and that they violated sections 8(a)(3), (4), and (1) of the Act. Respondent filed its answer on August 10, denying the material allegations of the complaint, and pleading affirmatively that the decisions challenged by the General Counsel were taken for lawful economic and business reasons. (GC Exh. 1). This matter was heard by the Honorable Paul Bogas, Administrative Law Judge, in Greenfield, Massachusetts on November 1, 2, and 3.

On February 16, 2012, Judge Bogas issued his Decision, finding a single violation of § 8(a)(1). Judge Bogas dismissed the §§ 8(a)(3) and (4) allegations. In material part, Judge Bogas found that the General Counsel failed to establish a prima facie case of a violation and that even

¹ All dates are 2011 unless otherwise indicated.

assuming the existence of a prima facie case, Respondent had established that it would have taken the same actions for independent, lawful reasons.

STATEMENT OF FACTS ²

A. Respondent's Business

Kennametal is a multi-national corporation headquartered in Latrobe, Pennsylvania. It has a number of operating divisions and employs approximately 13,000 employees worldwide. (Tr. 19). One of its operating divisions is the Round Tools division. From April 2010 through October 2011, Keith Koski was the Director of the Round Tools division. (Tr. 380). Koski reported to Tommy Green, who was the Vice President of Manufacturing Americas, which encompassed all of Kennametal's manufacturing facilities located in North America and Brazil. (Tr. 381). During the relevant time period, the Round Tools division consisted of facilities located in Lyndonville, Vermont; Greenfield, Massachusetts; Rockford, Illinois; Huntley, Illinois; Victoria, British Columbia, Canada; Traverse City, Michigan; Irwin, Pennsylvania; and Asheboro, North Carolina. The employees at the Victoria, Lyndonville, and Irwin facilities are represented by the Steelworkers Union, and the employees at the Greenfield facility are represented by the United Electrical, Radio & Machine Workers of America (UE). The other facilities are non-union. (Tr. 382). As the name suggests, the facilities within the Round Tools division manufacture metal cutting tools that are round in shape, essentially "anything that makes, shapes or defines a hole pattern in a complex geometry." (Tr. 383).

² These facts are consistent with Judge Bogas' findings and credibility resolutions.

The Greenfield and Lyndonville facilities are sister plants. Both manufacture high speed steel taps,³ but the Greenfield facility is specifically designed to handle high volume “standards,” while the Lyndonville facility is designed to handle specialty or custom taps. The Lyndonville facility also handles low volume standards. (Tr. 20, 225-227; Resp. Exh. 14). The taps produced at the Lyndonville and Greenfield facilities are used for internal thread manufacturing. (Tr. 383).

At all relevant times, Rick Brighenti was the plant manager at the Greenfield facility. In September 2008, Brighenti acquired oversight responsibility for the Lyndonville facility, although the plant manager was Ishmael Sparkman. In April 2009, Sparkman was terminated for performance reasons, and Brighenti became the plant manager. Thereafter, he had dual responsibility for both facilities until April 2011, when Tom Fletcher became the plant manager at Lyndonville. (Tr. 17-19, 254-255). In his capacity as plant manager of both facilities, Brighenti reported directly to Koski. (GC Exh. 2).

B. Plant Performance Metrics

Kennametal operates on a fiscal year that runs from July 1 to June 30. As one would expect, the Company prepares an overall financial plan for each fiscal year. Each of the Company’s facilities has its own plan (approved by corporate), which is rolled up into the overall corporate plan. The annual planning process typically begins in the March-April time frame. As part of the planning process, Respondent examines what is happening in the general economy (anticipated growth rates for GDP or GNP) and the growth rate factors for the industries that the Company supports (e.g., automotive, aerospace) in order to develop a sales forecast. This information is then converted into a demand plan, which is converted into a production plan, which is converted into a piece plan, which is used to establish each plant’s plan. The plant’s

³ A tap is a cutting tool used to make internal threads on other products that Kennametal has manufactured. (Tr. 225).

plan must also meet the corporation's expectations for the type of growth that is desired in order to generate the desired shareholder return, as well as the desired capital to invest back into the company. If the first plan prepared by the plant does not meet the minimum corporate requirements, it is sent back down to the respective operating divisions, and the operating divisions are responsible for figuring out what they need to do to meet the minimum operating requirements. Koski testified that in his experience, the initial plan is always pushed back to the plants with the demand that better results be achieved. (Tr. 384-386).

Because the individual facilities are cost centers, rather than profit centers, performance is not measured in terms of sales or "profits." Rather, performance is based on how the facility performs in comparison to the fiscal year plan on shipments and the total manufacturing costs of those shipments. The key metric is referred to as the "variance." (Tr. 232-234). The Lyndonville fiscal year plans for 2008, 2009, 2010, and 2011 were introduced as Respondent's Exhibit 17, and were explained in detail by Martial Major, the Lyndonville Controller. (Tr. 422-482). These plans set out both "shipments at standard" and "shipments at actual." Both of these figures are projections based on the volume and types of taps that the Company anticipates or plans on shipping in each month of the fiscal year. The "shipments at standard" figure reflects these planned shipments at the assigned standard cost. [The Company assigns a standard manufacturing cost for each tap.] The "shipments at actual" figure reflects the Company's plan or expectations as to what the actual manufacturing costs for the projected shipments will be. The plan variance is calculated by subtracting the projected shipments at actual cost from the projected shipments at standard cost. (Tr. 425).

For example, the Fiscal Year 2011 Plan (Resp. Exh. 17(g)), which covers the period from July 2010 through June 2011, projected that the Lyndonville shipments at standard cost for July

(2010) would be \$945,000 and that the Lyndonville shipments at actual cost would be \$1,159,000. Thus, the plan allowed for actual costs to exceed standard costs in this month by \$214,000, which is an “unfavorable” plan variance of (\$214,000). Respondent also introduced into the record the actual operating results for fiscal years 2008, 2009, 2010, and 2011. (Resp. Exh. 17). The actual operating results reflect the same categories as the plan documents, but the figures are actual results, not projected results. Using the same month as above (July 2010), the actual shipments at standard cost were \$964,000, and the actual shipments at actual cost were \$1,048,000. This yielded an unfavorable actual variance of (\$84,000). However, the Company then compares the actual variance to the plan variance to see how the plant performed compared to plan. In this month, the actual unfavorable variance of (\$84,000) was less than the plan unfavorable variance at actual cost of (\$214,000). Thus, the Lyndonville facility had a favorable “variance to plan” of \$130,000. In essence, the facility performed better in July 2010 than called for by the plan. This, of course, is the type of result that Respondent desires.

Variance to plan is a very important operational metric to the Company, and the managers are held accountable for the individual plant performance on variance. (Tr. 233-234, 253-254). These metrics are reviewed at least weekly in metric calls with Tommy Green that last approximately 90 minutes. During these calls, the plants are required to project their month-end variance, and if it is projected to be unfavorable, to take corrective action. (Tr. 388-90). Corrective action involves taking appropriate steps “to drive productivity improvements as well as cost reduction initiatives as necessary to achieve [the Company’s] variance goals.” (Tr. 238). One of the key ways in which to take costs out of the facility is to reduce the head count. (Tr. 238). Brighenti testified that the fully loaded cost to the facility for each hourly employee is approximately \$5,000 per month. (Tr. 282).

It is clear from the record that the headcount at Lyndonville steadily declined during 2008, 2009, 2010, and 2011, and that Respondent was reducing its employee costs each year. General Counsel's Exhibit 4 reflects all of the layoffs that have occurred since March 2008, and Union President Garfield testified that whereas the hourly headcount had been in excess of 150, there were only 73 unit employees at the time of the hearing. (Tr. 143). Supervisor Jewell testified that at one time there had been between 200 and 240 employees (including salaried) at the Lyndonville facility. (Tr. 551).

C. 2008 – 2009

In general, the Lyndonville facility performed poorly during calendar years 2008 and 2009, as reflected in the summary chart below, and a number of layoffs were effectuated:

Summary Chart

<u>Month/Year</u>	<u>Factory Orders Created</u>	<u>Variance to Plan</u>	<u>Layoffs</u>
March 2008	118,278	(\$165,000)	7
April 2008	90,253	(\$188,000)	0
May 2008	108,373	(\$265,000)	1
June 2008	117,340	(\$312,000)	7
July 2008	115,018	\$15,000	0
August 2008	138,481	\$22,000	0
September 2008	137,169	(\$147,000)	0
October 2008	141,373	(\$112,000)	2
November 2008	86,034	(\$202,000)	11
December 2008	88,626	(\$88,000)	0
January 2009	82,992	(\$224,000)	5
February 2009	63,691	(\$198,000)	11
March 2009	67,501	(\$350,000)	2
April 2009	67,055	(\$181,000)	12
May 2009	65,896	(\$71,000)	2
June 2009	80,302	(\$164,000)	0
July 2009	55,115	(\$163,000)	0
August 2009	90,893	(\$137,000)	0
September 2009	85,110	(\$29,000)	0
October 2009	92,410	(\$137,000)	0
November 2009	71,487	(\$74,000)	0
December 2009	65,453	\$2,000	0

(Resp. Exhs. 17, 18).

Although factory orders created⁴ were strong in the early part of 2008, averaging 108,561 pieces per month between March and June 2008, the plant's variance to plan was trending increasingly unfavorable from (\$165,000) in March to (\$312,000) in June. In an effort to correct this negative trend, Respondent laid off 7 employees in March, 1 employee in May, and 7 employees in June. These layoffs had a positive effect as the variance to plan turned to a favorable \$15,000 in July 2008 and a favorable \$22,000 in August 2008. This effect, however, was short lived, as variance to plan went unfavorable in September 2008 (\$147,000) and October 2008 (\$112,000). In October 2008, Respondent laid off 2 employees. The situation grew worse in November 2008 as factory orders created fell from 141,373 pieces in October to 86,034 pieces in November 2008. As factory orders created decreased steadily over the following months, the plant's variance to plan grew increasingly negative. As a result, further layoffs were effectuated: 11 in November 2008, 5 in January 2009, 11 in February 2009, 2 in March 2009, 12 in April 2009, and 2 in May 2009. (GC Exh. 4).

In 2009, Brighenti instituted a number of initiatives aimed at improving plant performance. These included equipment combinations, increasing the machine-to-man ratio at the facility, eliminating as many hand operations and operations where an employee has only one or two machines as possible, and leveling out the shifts so that the Company could take

⁴ Factory orders created come in through Respondent's customer service department in Fort Mill, South Carolina. Each plant has a specific order base assigned to it based on the product that the facility manufactures. Fort Mill enters the order, and the plant to which that order is assigned converts the order over into a factory order. Unless the order is a quick delivery order, the typical lead time before shipment is 4 to 8 weeks. (Tr. 245-250). Thus, the actual impact of declining factory orders may not be felt for a month or two.

advantage of its more productive equipment across three shifts.⁵ At the time, a large majority of employees worked on the first shift. Brighenti viewed the ratio of employees between shifts to be undesirable because it left more efficient equipment sitting idle on off-shifts while some operators were running less efficient equipment on first shift, and it hindered the ability to move product through the plant quickly to satisfy delivery schedules. (Tr. 240-243). At Brighenti's direction, Supervisor Sean Jewell and the other supervisors began working on a realignment of the work force to improve efficiencies. Jewell developed a Fiscal Year 2010 Manning Spreadsheet. (Resp. Exh. 4).⁶ This realignment, which was effectuated in July 2009, resulted in the elimination of a number of positions, the consolidation of various jobs, and the rebalancing of the shifts to allow for more efficient utilization of equipment. Jewell explained that because layoffs are effectuated by seniority (except for volunteers), and many of the junior employees are on the third shift, it creates holes in different departments. In order to cover machines, it is necessary to move employees from different areas to fill those holes in order to produce the product in an effective and timely manner. (Tr. 515-516).

⁵ Needless to say, these initiatives did not endear Brighenti to the Union leaders, who viewed him as less accommodating than the prior plant manager. (Tr. 76-79, 89).

⁶ Metadata indicates that this document was created on April 3, 2009 and last printed on July 6, 2009. (Resp. Exh. 22).

The FY 2010 Manning Spreadsheet reflects that prior to the realignment there were 70 employees assigned to the first shift, 27 to the second shift, and 10 to the third shift. After the realignment, it was anticipated that there would be 46 on the first shift, 32 on the second shift, and 23 on the third shift.⁷ One of the positions affected by this realignment was Union President Garfield's first shift inspection position. Prior to the realignment, there were 3 first shift inspectors and 1 second shift inspector. As part of the realignment, Respondent eliminated PD inspection, combined Final and Heat Treat inspection, and eliminated one position. The three remaining positions were assigned to the three shifts, one per shift. Garfield, who was the junior employee in the department, ended up taking the open third shift inspection position. Garfield subsequently filed an unfair labor practice charge alleging that this action was in retaliation for grievances filed and an unsuccessful early negotiation. Garfield withdrew this charge on October 29, 2009, even though he did not return to the first shift until approximately a year later. (Tr. 128-129).⁸

In June 2009, factory orders created began to increase. Although the orders fluctuated up and down from month to month, the trend was positive. Whereas the Lyndonville facility averaged 69,427 pieces created per month from January through May 2009, the facility averaged 77,253 pieces created per month over the last seven months of the year. Correspondingly, the

⁷ The summary numbers on Respondent's Exhibit 4, p. d do not match up precisely with the individual department sheets. The record does not explain these variances, but it appears that the process was in a constant state of flux, and that the numbers were changing as the process developed. In any event, it is clear that there was a substantial rebalancing that resulted in many employees changing shifts.

⁸ Although Garfield changed his testimony on rebuttal to say that he returned to the first shift before withdrawing the charge, this was a clear fabrication. (Tr. 633-635). On cross-examination, when Respondent's counsel suggested that he returned to the first shift in March 2010, Garfield responded, "Yeah, I would say that's -- I mean not knowing off the top of my head, but yeah, it was about a year, roughly a year." (Tr. 128). Thus, it was Garfield who suggested that he stayed on the third shift approximately one year. While some discrepancy might be understandable, it is impossible to reconcile "roughly a year" with less than 4 months.

variance to plan, although still unfavorable, slowly improved. The quarterly average variance to plan (per month) was (\$256,000) in the first quarter, (\$139,000) in the second quarter, (\$110,000) in the third quarter, and (\$70,000) in the fourth quarter.

D. 2009 Contract Negotiations

The predecessor to the most recent collective bargaining agreement had an expiration date of October 2, 2009. In the spring of 2009, Respondent sought to reopen the agreement early. Discussions occurred between the parties, but were ultimately unsuccessful as the parties were far apart. When the Respondent then sought to begin regular negotiations for a new collective bargaining agreement in or around September 2009, the Union took the position that the agreement had rolled over for another year because neither party had given the contractually required 60-days written notice. Respondent disputed the Union’s position, and the matter proceeded to arbitration. An arbitrator subsequently ruled in the Union’s favor that the agreement had rolled over for one year. (Tr. 90-91, 174-175).

E. 2010 Performance

In the first nine months of calendar year 2010, the Lyndonville facility continued the trend that had started in late 2009 of gradually improving its variance to plan. Except for a single layoff of one employee in January 2010, there were no layoffs during the year. The following summary chart reflects this generally improving performance:

Summary Chart

<u>Month/Year</u>	<u>Factory Orders</u>	<u>Variance to Plan</u>	<u>Layoffs</u>
January 2010	93,807	(\$20,000)	1
February 2010	103,583	(\$28,000)	0
March 2010	161,816	(\$120,000)	0
April 2010	95,965	\$1,000	0
May 2010	126,555	(\$37,000)	0
June 2010	126,368	\$180,000	0

July 2010	101,323	\$130,000	0
August 2010	116,161	\$114,000	0
September 2010	72,443	\$61,000	0
October 2010	86,434	(\$12,000)	0
November 2010	80,621	(\$44,000)	0
December 2010	78,995	(\$64,000)	0

(Resp. Exhs. 17, 18).

Thus, the average monthly variance to plan was (\$56,000) in the first quarter of 2010, \$48,000 in the second quarter of 2010 and \$101,000 in the third quarter of 2010. Beginning in September 2010, however, factory orders created began declining. Whereas the factory orders created had averaged 115,697 pieces per month during the first eight months of the year, they averaged only 79,623 pieces per month during the last four months of the year, a decline of 31%. As orders declined, the variance to plan began to backslide from (\$12,000) in October to (\$44,000) in November to (\$64,000) in December. Thus, the average monthly variance to plan in the fourth quarter of 2010 was an unfavorable (\$40,000).

F. Other Issues In 2010

On February 2, 2010, the Lyndonville plant rolled out a Management Based Safety Program known as MBS. The joint safety committee, as well as all employees, was briefed on the program. The Union immediately grieved the program, taking the position that it was required to be bargained. (Tr. 177-183, 214). Respondent “discussed” the program with the Union on multiple occasions, but took the position that there was no obligation to “bargain” the program. The Union filed unfair labor practice charges on July 30, 2010, alleging an unlawful refusal to bargain over MBS and the failure to furnish certain information. (Tr. 178-179). At the same time, the Union representing the Greenfield employees had filed a series of unfair labor practice charges revolving around difficult, ongoing negotiations for a new collective bargaining

agreement covering that facility. The General Counsel ultimately issued complaints in both cases and consolidated them for hearing on February 8, 2011. (Tr. 42).

As noted above, Respondent and the Union had engaged in unsuccessful early negotiations in 2009 and the Union had prevailed in an arbitration on its position that the prior agreement had rolled over for another year. In 2010, Respondent gave timely written notice to reopen the contract, and the parties engaged in negotiations in September 2010. During these negotiations, Respondent's Chief Negotiator was John Jamison, an outside consultant. Although not alleged as a violation of § 8(a)(1), the General Counsel offered testimony concerning certain statements made by Jamison during these negotiations. This testimony was offered ostensibly to show animus.

The General Counsel offered the testimony and notes of Union President Garfield, Union Vice President Terry Pray, and Union Treasurer Dave Brousseau. Respondent offered the testimony of Rick Brighenti and the testimony and notes of Eric Huttenlocher. All witnesses agree that on September 16, 2010—the third day of contract negotiations—the subject of the pending grievances, arbitrations, and unfair labor practices came up. Huttenlocher's notes (which are the most detailed) reflect that bargaining started at 8:05 a.m., and that the parties spent approximately 50 minutes discussing various contract proposals and counterproposals by the parties. At approximately 8:55 a.m., Jamison sought to discuss the outstanding grievances, arbitrations, and unfair labor practice charges. He started with charge number 1-CA-46294 and read language from Articles 16.01 and 16.05 of the contract. The Union's Chief Negotiator, Carl Turner, interrupted Jamison, stating that the Union had no interest in listening to it and that the Board could decide the issue. Jamison asked if the Union was leaving. Turner replied that they were if that was all the Company had. Jamison then read a statement by Kevin Walling,

Respondent's Chief Human Resources Officer, which stated that the Company would not waiver on this issue and that this is not the issue to take a stand on. Turner then replied, "Unless the law says you have to bargain." At that point, Jamison moved to charge number 1-CA-46292, which dealt with past practice issues. After Jamison cited certain contractual language, Turner replied that he should save it for the labor board. Jamison then brought up charge number 1-CA-46293 regarding safety shoes and certain Union information requests. After some discussion, Turner stated that he was done talking about any unfair labor practices. Jamison then went through each outstanding grievance and arbitration one by one. Resolution was achieved on a safety glasses arbitration, but the other grievances and arbitrations remained unresolved. At 9:10 a.m., the parties broke into their separate caucuses. The parties did not resume until 2:05 p.m., at which time they spent approximately 13 minutes discussing a grievance involving discipline given to Doug Noyes for not wearing safety gloves. The issue remained unresolved, and the parties discussed that Huttenlocher would send Turner an email confirming the arbitration. Thereafter, at 2:23 p.m., the parties resumed discussing various contract proposals. The meeting adjourned at 3:15 p.m. (Tr. 585-592; Resp. Exh. 20).

The testimony of the Union's witnesses is largely consistent with Huttenlocher's notes, with the only point of dispute being whether Jamison, while quoting the position of Kevin Walling, also inserted the statement that the Lyndonville facility represented only 1% of Kennametal. The Judge credited the testimony of the Union witnesses that this statement was in fact made, and Respondent accepts that credibility resolution. Interestingly, however, later that same day, Garfield penned a USW Local 5518 News bulletin in which he described the various contractual proposals being discussed. The only mention of the unfair labor practices and charges was the following:

We have also discussed arbitrations and NLRB charges. We are trying to get them worked out but looks like most of them will move forward as planned.

(Resp. Exh. 21). No mention was included of Jamison's statements.

There is no contention that Respondent brought these issues up again at any point in the negotiations or that Respondent conditioned agreement on resolution of the unfair labor practice charges. (Tr. 209). To the contrary, the negotiations continued thereafter, and the parties eventually reached a new agreement on October 1, 2010.

G. The 2010 CBA.

Respondent and the Union have been parties to a series of collective bargaining agreements, the most recent effective by its terms from October 2, 2010 to October 2, 2015. (GC Exh. 3). Article 5 of this agreement provides that "the right to layoff due to lack of work, and in general all other functions of management unless expressly limited by this Agreement are reserved to and are vested exclusively in the Employer." Article 7 contains a four-step grievance procedure culminating in final and binding arbitration. Article 8 (Seniority) provides, "In all cases of layoffs for lack of work or of recalls after layoffs hereafter occurring, length of continuous service shall be the determining factor provided the senior employee has the ability necessary to perform the required work in a reasonably satisfactory manner without special assistance or supervision and satisfactory to meet normal production requirements within three (3) weeks after taking over the job." Article 8 further requires that laid off employees be given three days advance notice. Employees are also permitted to volunteer for layoff.

Appendix C to the CBA limits the number of short weeks that Respondent may use to four in a six-month period, subject to the right to use "one additional two (2) short work week periods during the term of the contract." A short work week is contractually defined as meaning

that “the plant will operate less than forty (40), but no less than thirty-two (32) hours.” During the 2010 negotiations, Respondent sought to expand its right to use short weeks to eight within a six-month period. (Resp. Exh. 13). Respondent was “seeking more flexibility, to be able to manage the organization through shorter work weeks, without having to go through more aggressive steps.” (Tr. 594). The Union resisted this proposal, but ultimately agreed to “one additional two (2) short work week periods during the term of the contract.” (Tr. 594-595).

H. 2011 Events

The record does not reflect the number of factory orders created in January 2011. But the variance to plan continued to trend increasingly negative. Thus, the unfavorable variance to plan increased to (\$103,000) in January and to (\$197,000) in February. In the middle of January, Brighenti began considering the possibility of a layoff. Thereafter, he and Koski began discussing the potential for a layoff. In addition to telephone discussions, there were a series of emails exchanged over the next few months. (Tr. 262, 391). On January 31, at 10:00 a.m., Brighenti sent Koski an email entitled “tap Plant Variance.” Brighenti indicated that the variance was “solid” at Greenfield and “we will be right on the number for January that we presented to Tommy [Green].” However, he indicated that Lyndonville was “not where it needed to be—the holes caused by the lack of CS [Custom Solutions] business—and the lack of visibility to it—has led to a \$59k miss from our previous projection (and the January number we presented to Tommy). We pulled in and received add’l standards from GSP—but the timing led to a Wip and semi drop. We will develop a plan to recover this within the quarter.” (Tr. 263-264, Resp. Exh. 6, p. a).

On February 8, 9, and 10, a hearing was held before ALJ Arthur Amchan regarding the prior unfair labor practice charges. During this hearing it became apparent to Respondent that the

Union's issue was not with the MBS program itself, but with a separate safety disciplinary policy that had been rolled out in 2009. The issue that arose at the hearing concerned the discipline of two employees (Doug Noyes and Ken Wilkins) pursuant to a new and more stringent safety disciplinary policy that Respondent believed had been adopted and properly posted in 2009. Respondent took the position that this policy was separate and distinct from MBS and barred by § 10(b) of the Act and that MBS had no disciplinary element to it. The Union, however, contended that the policy had never been posted. (Tr. 213-220, 306-310, 598-602).

In early to mid February, Supervisor Sean Jewell was instructed by Rick Brighenti that there was the potential for a layoff of up to 10 employees, and that Jewell needed to do what was necessary to operate the plant effectively. (Tr. 512). Thereafter Jewell and second shift supervisor Tim Morissette looked at the different departments and the employees in these departments to see how the employees could best be utilized. Using the same spreadsheet that had been developed in 2009, Jewell and Morissette developed a Fiscal Year 2011 Manning Plan. This plan was first submitted to Brighenti by email on February 17.⁹ A slightly revised plan (with ministerial changes only) was submitted on February 18. (Resp. Exh. 3). The first two pages of the final plan list the various departments at the facility. The third page identifies 5 employees (including Union President Garfield) who would likely be displaced by the moves being made, as well as 4 employees who were out on sickness/accident or long term disability.

⁹ At the request of the General Counsel, Respondent furnished metadata and emails related to this plan. By agreement of the parties, Respondent filed a motion to reopen the record to include these documents. Respondent's Exhibit 23 contains the February 17 and 18 emails from Jewell to Brighenti. Respondent's Exhibit 24 is the initial 2011 spreadsheet. The revised spreadsheet submitted to Brighenti on February 18, which is Respondent's Exhibit 3, contains only minor changes from Respondent's Exhibit 24. Respondent's Exhibit 3 is the final version and was last saved on February 18, 2011.

The third page also reflects the shift breakdown under the “current state” and under the “future state”:¹⁰

	1 st	2 nd	3 rd	Total
Current	45	28	21	94
Future	40	26	21	87

The following sheets of the document set out a current and future state with respect to each department. In Maintenance, two employees were retiring and one (Dave Jeannotte) was being laid off, thereby reducing the department from 13 to 10 employees. This reduced each shift by one employee and left 6 employees on first, 2 employees on second, and 2 on third. In Inspection, the decision was made to go to operator inspection on the first shift (as was being done on the second and third shifts) and to reduce the department from 4 to 3 employees, with 1 employee on each shift. As a result, Union President Garfield, the junior employee, would be unassigned. Jewell testified that prior to the proposed reduction in work force, the Company had been moving towards self-inspection within the Thread Department and had actively been running it on second and third shifts for a period of time. The Company was also looking for opportunities to move indirect employees into direct labor jobs. The “self inspection” was a buddy-checks system in which one employee would check another employee’s set up to ensure that the characteristics of the tool that they were making conformed to the standards of the shop. (Tr. 517-518).

In Coating, the size of the department remained at 4 employees, but a first shift employee (Mackay) was moved to third shift resulting in 2 employees on first and 2 employees on third. In Chamfer, the decision was made to combine two jobs and to lay off Roberta Borg, thus reducing

¹⁰ As with the 2010 spreadsheet, there is some inconsistency between these numbers and the individual department sheets, presumably due to the evolving nature of the process.

the department from 9 to 8 employees. In Thread, Keith Ward, who was out on military leave, was returning in February. As a result, the employee who had been filling the position (Delworth) was left unassigned. (Tr. 523-524). In Flute, no jobs were planned for reduction, but since Dennis Noyes was retiring on March 11, 2011, there was an anticipated vacancy that would be filled by an unassigned employee. (Tr. 524). In Centerless, there were 2 employees assigned to the department, but one employee had been out on disability for a long time and the department had been operating successfully with 1 employee. Thus, no changes were planned. (Tr. 525). In Outside Diameter, the two junior employees (Tanner and Fenoff) were laid off and their positions were left unfilled. However, a third shift position was opened up for an unassigned employee. Thus, the department was reduced from 4 to 3 employees. (Tr. 526). In Heat Treat, the Company initially planned to lay off the junior employee (McElroy) and move a second shift employee (Ruggles – who had been out for 6 months, but there was speculation he was coming back) to third shift. Ruggles, however, opted to retire, and McElroy retained his position. (Tr. 527-528). In Cut-Off, the junior employee was laid off, and the position was left unfilled. (Tr. 528). In Shipping, Surface Treat/Wash, and Milling no changes were planned.

On February 14, at 9:30 a.m., Brighenti sent Koski an email indicating that he was “in the process of finalizing the reduction in force” and that it appeared seven employees would be laid off effective February 21 and that short work weeks would be utilized throughout March. Brighenti advised, “As of this morning, we are showing only \$348k of MTO booked into March—this is at sales price and is approx. \$300k lower than what we would expect to see at this time.” (Resp. Exh., 6, pp. b, c). Koski replied five minutes later and inquired whether there was “anyway to do it sooner” and whether he could “go with this plan to Tommy to alert him of our actions due to the specials situation.” (Resp. Exh. 6, p. b). Fourteen minutes later, Brighenti

responded that he would be giving the three-day contractual notice the following day and that Koski “can go to Tommy—noting that I may tweak slightly.” (Tr. 277-280, Resp. Exh. 6, p. b). Later that day, Brighenti notified the Union officers of the planned reduction. Brighenti requested the Union’s consent to seek volunteers, and the Union agreed. (Tr. 280-281, GC Exh. 14).

On February 17, at 9:40 a.m., Brighenti sent Koski an email noting the contractual right to take four short work weeks every six months and that he would “review the total incoming again mid next week—but barring any significant changes, I plan to take the 4 days in March—March 4, 11, 14, and 21.” (Resp. Exh. 6, p. d). On February 18, at 11:25 a.m., Brighenti sent Koski an email advising that Union President Garfield would be advised the following Tuesday that he would be going back to the third shift as a result of the layoff. (GC Exh. 12). Brighenti sent this email because when Garfield had been moved to the third shift as a result of the 2009 layoff he had filed an unfair labor practice charge and had even placed a call to Brighenti’s boss at the time to discuss the matter. (Tr. 305).

On February 23, at 2:19 p.m., Brighenti sent Koski an email stating that he had “just announced the short work weeks” in Lyndonville and had contacted Christina Reitano (Kennametal Communications Officer) in case she received inquiries. At 3:06 p.m. that day, Koski sent Tommy Green an email forwarding Brighenti’s email and advising that this was “Phase II of the reduction plan at Lyndonville due to lower than forecasted load.” (Resp. Exh. 6, p. e). On March 1, at 11:03 a.m., Koski sent an email to Marcellos Campos and Chris Merlin regarding the high negative variances at both Lyndonville and Rockford. Koski inquired: “Is there any ‘quick’ opportunity to get specials business back into these plants? If not, what are your recommendations?” (Resp. Exh. 6, p. f). Campos and Merlin were product managers with

marketing responsibilities, and Koski was seeking their assistance in getting business into the plant. (TR. 395-396).

On March 10, at 4:04 p.m., Brighenti sent Koski an email noting that a minor reorganizing of the QA and Engineering departments had been completed. Brighenti then described the April workload for Lyndonville as follows:

Custom Solutions (including private label) due in April is \$425k at sales price - which correlates to \$340k at standard cost. Based on current order rates, we expect and [sic] additional \$95k of specials from blank and \$80k of quick delivery to be booked into April for a total of \$515k of custom solutions (at standard cost). Working with GSP, standards will be at \$350k at standard cost for April. We are driving the March orders and expect to be at no more than \$75k at month end. This gives a total of \$940k shipments at standard. Shipments plan for April is \$1.282M with 21 days. We propose taking 4 days off in April - the week of 4/18, which includes a Holiday. This would be a layoff of hourly personnel and would result in a variance savings of approximately \$75k versus working all 21 days and would allow us to meet the \$940k shipments at standard target needed. Additional, a salary furlough for that week would save an additional approximately \$20k - we are working with corporate HR to determine if this is feasible/allowable. These actions would be in lieu of further reducing hourly headcount (estimated at 15 to meet the demand) - and the associated bumping and loss of productivity associated with it - in anticipation of business levels returning in May due to the quoting and pricing activities that have been dealt with.

These actions would not totally mitigate variance - which would still be approximately \$100 off of plan. Incoming orders due in April will be monitored closely - with a final decision available NLT 4/1 with notice provided on 4/4, if the decision is to follow through with this plan. If business improves within that timeframe but not fully, we have the option via contractual terms to take two short work weeks in April instead of the 4 day layoff.

(Resp. Exh. 6, p. g).

On March 15, at 5:35 p.m., Brighenti sent Koski an email indicating that “we are starting to see an improvement on Specials from Blank and Quick Delivery—but the other CS groups are still low. Most of April is now booked—if the improvement trend continues for another week—

we may only need to take 2 days out of April, but that will be reviewed in detail at that time.”

(Resp. Exh. 6, p. i).

On March 29, at 11:13 a.m., Brighenti sent Koski the following email:

Following a detailed review of both the order base for April as well as the Reforecast (Q4), Tom and I feel the following is the recommended course of action for LYN:

Business has rebounded moderately for April. Existing CS orders (at standard cost) due through April are at \$650k, with an additional \$125k of QD expected for April. This, in addition to the \$325k standards load, will provide the \$1.1M needed to achieve the variance forecast of \$143k unfavorable for April. We have reduced headcount by an additional person, bringing the total to 10. No further days off are required for April, but if business drops off in May or June, we still have 2 short work weeks that can be contractually implemented if needed.

Please note, the variance forecast for May and June is \$100k tougher than the April number - Tom is working on action plans to drive to that number.

(Resp. Exh. 6, p. j).

On April 5, Tom Fletcher assumed the Plant Manager position in Lyndonville. Fletcher had previously been employed as Manufacturing Manager at a Kennametal facility in Roanoke Rapids, North Carolina. Fletcher actually moved to the Lyndonville facility on February 28, but was transitioning under Brighenti until April 5. (Tr. 483-484). The Complaint alleges that on various dates in late April and early May, Fletcher “impliedly threatened employees with unspecified reprisals due to the Union’s grievance and unfair labor practice charge filings.”

Dave Brousseau testified that at a meeting between Fletcher and the Union committee, Fletcher stated that he wanted to work with the Union and that Lyndonville had a big black cloud over it. (Tr. 161-164). Terry Pray testified that they had “a get to know each other” meeting at which they discussed all the issues that were going on in the shop. According to Pray, Fletcher “made it clear to us that right now there's a dark cloud over” Lyndonville that “used to always be

the Greenfield Plant.” Pray testified that Fletcher indicated “that this all stemmed from the NLRB and the arbitrations that were going on.” (Tr. 200-201).

Fletcher testified that he had numerous lead board meetings with employees in which he discussed the poor performance metrics at the Lyndonville facility. In the context of this discussion, Fletcher stated that there seemed to be a dark cloud over Lyndonville and “everyone needed to work as a team and stop all this in-fighting between management and the bargaining table.” Fletcher indicated that he was glad to be in Lyndonville, that everyone needed to forget the past, and that he looked at it as an opportunity to work with the employees to move the facility forward. Fletcher denied saying anything about unfair labor practices or the NLRB, as Brighenti had instructed him not to discuss these matters with employees. (Tr. 485-491).¹¹

As attrition occurred (retirements) during the spring and summer months, the laid off employees were gradually recalled. Two (Williams and Fenoff) returned on May 25. One (Jeannotte) returned August 3. Two (Tanner and Borg) returned on August 15. One (Hubbard) returned on August 16. (GC Exh. 4).

ARGUMENT

A. The ALJ Correctly Found That The General Counsel Failed To Establish A Prima Facie Case Under Sections 8(a)(3) and (4) Regarding the February Layoff.

The General Counsel and the Union take issue with the ALJ’s finding that no prima facie case was established under sections 8(a)(3) and (4) regarding the February layoff. The Judge’s findings and conclusions, however, are unassailable. Indeed, the entire theory advanced by the

¹¹ The ALJ credited the Union witnesses, and Respondent accepts that credibility resolution. For this reason, Respondent does not challenge the Judge’s finding of a single § 8(a)(1) violation based on Fletcher’s “dark cloud” statements. However, as discussed below, the Judge properly found that Fletcher’s statement had no connection to the prior layoff, which occurred before Fletcher even arrived in Lyndonville.

General Counsel was implausible and represented the General Counsel's improper attempt to substitute its misguided business judgment for that of Respondent.

1. The General Counsel And Union Waived Any Arguments Based On The Discrepancies Between Respondent's Exhibit 1 And Respondent's Exhibit 18.

Initially, it is necessary to address the contentions, particularly by the General Counsel, regarding discrepancies that came to light following the hearing between a summary document introduced by Respondent as Respondent's Exhibit 1 and the underlying business records, which were introduced as Respondent's Exhibit 18. The General Counsel argues at length in its brief that these discrepancies rendered Brighenti's testimony "false," supported an inference of animus, constituted shifting reasons for the layoff, and rendered Respondent's justification for the layoff pretextual. These arguments are largely based, not on the actual numbers reflected in Respondent's Exhibit 18, but on the fact that these numbers are different from those reflected in the summary document (Respondent's Exhibit 1), which was utilized during the direct examination of Brighenti. The General Counsel and the Union are certainly entitled to argue that the actual numbers do not support a finding that there was a decline in orders (even though they clearly do), but they explicitly waived any contention that the discrepancy itself was grounds for finding Respondent's Exhibit 1 to be an intentional fabrication or for drawing any type of adverse inference.

In their post-hearing briefs, the General Counsel and the Union first noted these discrepancies (which no one had noticed at the hearing). However, the General Counsel made no request that the Judge draw an adverse inference of any type or find animus or pretext based on the mere existence of discrepancies between the documents. The Union, while not requesting that any specific inferences be drawn, did contend that Respondent's Exhibit 1 was a deliberate fabrication. In response, on January 20, 2012, Respondent filed a motion with Judge Bogas

seeking leave to file either a reply brief or to reopen the record to address the discrepancies and the asserted fabrication. The Judge subsequently scheduled a telephone conference to discuss the motion and the discrepancies. During this conference call, the General Counsel and Union agreed that they would forego any claim in this proceeding that Respondent's Exhibit 1 was fabricated or that a negative or adverse inference should be drawn. On January 25, 2012, Judge Bogas issued an order recounting the conference call and the agreement of the parties. In material part, the Judge stated:

During the conference call, the General Counsel and the Charging Party stated that, for purposes of this case, they were not arguing either that the erroneous figures in Respondent's Exhibit 1 had been intentionally fabricated, or that a negative inference should be drawn from the presentation of those erroneous figures. I informed the parties that I would rely on the figures in Respondent's Exhibit 18, not those in the Respondent's Exhibit 1, and would draw no negative inference from the errors in Respondent's Exhibit 1. The Respondent indicated that, given the understandings discussed above, the reasons that motivated it to file the motion had been acceptably addressed.

At no time thereafter did either the General Counsel or the Union dispute Judge Bogas' recitation of the understanding of the parties or request that the Judge draw any type of negative inference or find pretext based on the discrepancies themselves. "It is well established that the failure to raise an issue in a timely fashion before the judge operates as a waiver of that argument." *Antioch Building Materials Co.*, 323 NLRB 73, 74 (1997). Thus, the pretext/shifting defenses/animus/adverse inference arguments advanced herein are highly improper, not properly before the Board, and should not be considered. The arguments of the General Counsel and the Union regarding what the actual numbers in Respondent's Exhibit 18 reflect are discussed below.

2. The Judge Applied The Proper Legal Standards.

The General Counsel and Union appear to argue that the judge failed to apply the proper legal standard or to appreciate the legal theory being advanced by the General Counsel. This assertion is without merit.

The allegations regarding the February layoff and the elimination of Union President Garfield's inspection position arise under sections 8(a)(3) and (4) of the Act. The legal framework is similar under both sections. *Newcor Bay City Division of Newcor, Inc.*, 351 NLRB 1034, n. 4 (2007). The General Counsel is required to establish "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," at which point, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd*, 662 F.2d 899 (1st Cir. 1981). Although sometimes stated in varying terms, the elements of the General Counsel's case include proof that (1) the employee(s) engaged in activity protected by the Act, (2) the respondent was aware of such activity, (3) the alleged discriminatee(s) suffered an adverse employment action, and (4) a nexus exists between the employee's protected activity and the adverse employment action. *Newcor Bay, supra*, 351 NLRB at 1036; *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Proof of animus toward the protected conduct is an essential element in establishing that the challenged action was unlawfully motivated. *Whirlpool Corp.*, 337 NLRB 726, 726 (2002). "In the typical § 8 (a)(3) case, the General Counsel must demonstrate that the employer was aware of the pro-union sentiments of individual employees." *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985); *accord, Reliable Disposal*, 348 NLRB No. 83 (2006).

The ALJ thus began his analysis with the typical prima facie case, (JD 13: 1-30), noting:

The General Counsel has failed to satisfy the first element of the prima facie case since the record does not show that a single one of the seven laid-off employees participated in any way in the prior unfair labor practice charge and hearing, or in any other union activity. The General Counsel has also failed to satisfy the second element of the prima facie showing since the record does not show that the Respondent knew, or believed, that any of the laid-off employees had engaged in such activities. The General Counsel's failure to meet either of the first two elements of the prima facie case is a serious blow to its effort to prove that the layoff was discriminatory.

(JD 13: 31-39).

Neither the General Counsel nor the Union seriously dispute these specific findings, although the General Counsel asserts that because of the contractual union security clause, all Lyndonville employees were union members. But that is true only in a "financial core" sense, *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and the General Counsel offered no evidence to establish that any of the seven laid off employees were actual "members" of the Union, much less that any of them were actively involved in the Union, engaged in any specific open and notorious union activity, or participated in the MBS unfair labor practice proceeding on which the General Counsel relies so heavily. Absent extraordinary circumstances, the elements of union activity and employer knowledge cannot be established merely by reference to a union security clause. *See Power Systems Analysis, Inc.*, 322 NLRB 511, 514 (1996) (employee "was terminated shortly after his role changed from mere union membership to active organizing"); *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1341 (1998) (employee's "membership in the Union was longstanding and we find that, insofar as his activity consisted of more than mere membership, it was too remote in time to be linked to the September 1984 layoff"); *Vernon Livestock Trucking Co.*, 172 NLRB 1805, 1813 (1968) (employee joined union pursuant to union security clause, but "was neither an active nor an articulate union adherent").

What the General Counsel and Union really contend is that the theory under which they were proceeding was different than the typical case. As the Board and courts have recognized, “an alternate theory” exists in which the General Counsel may “prevail by showing that the employer ordered general lay-offs for the purpose of discouraging union activity or in retaliation against its employees because of the union activities of some.” *Birch Run, supra*, 761 F.2d at 1180. The Judge, however, recognized that the General Counsel was attempting to proceed under this alternate theory, and he rejected the theory not because it was not a legally viable theory, but because the record utterly failed to support the theory:

If the allegation that the layoff was discriminatory has any life, it resides in the General Counsel’s argument that even though it could not show that the alleged discriminatees engaged in union activity or that the Respondent had reason to believe that they had, a prima facie is established by the evidence that the layoff was a tactic to blame the Union’s activities for the loss of work, and to camouflage the Respondent’s alleged discrimination against Garfield. [citations omitted]. The problem with this effort to side-step the first two elements of the prima facie case is that the record is devoid of evidence that the Respondent used the tactic described by the General Counsel. The record does not show that the Respondent made any effort to cause employees to blame the Union for the layoff. To the contrary, the evidence shows that Brighenti and Koski, in communications with both employees and management officials, stated that the layoff was necessitated by a decline in business and the facility’s deteriorating variance-to-plan performance. There was no evidence of communications in which the Respondent suggested to employees that the layoff was connected to the Union’s activities regarding MBS or any other labor-management issue. Indeed, the record does not establish that the dispute regarding MBS was something that employees in general were particularly concerned about. Given that the Respondent had, over the last few years, repeatedly resorted to layoffs at the Lyndonville facility, it is implausible that management would expect employees to simply assume that the February 2011 layoff was the result of the Union’s activities.

(JD 13: 46-51; 14: 1-20).

The Judge further noted that Respondent sought volunteers (with the Union’s consent) and recalled employees when vacancies occurred, which was “consistent with the view that the

Respondent was attempting to maintain what it considered an appropriately-sized workforce, not laying off people to cause an injury that employees would blame on the Union.” (JD 14: 22-30).

The Judge did not hold that the alternate mass layoff theory was limited to layoffs occurring during initial organizing drives. Rather, he merely noted that the cases relied upon by the General Counsel had arisen in highly charged organizing drives where “it is plausible that management would implement a layoff either in hopes that the display of economic power will chill employees from supporting a union, or in order to render certain employees ineligible to vote in an upcoming election.” (JD 14: 32-42). The Judge reasonably concluded that “[i]t is far less plausible that the Respondent would take such extreme action over the question of whether it had to bargain regarding a new safety program, and in a context where not a single one of the laid-off employees was a union partisan.” (JD 15: 9-12).¹²

It is perhaps conceivable that a mass layoff might be found to be discriminatorily motivated even though no union supporters/activists were directly affected, but such a case would clearly be the exception rather than the rule. Indeed, the General Counsel cites no such case, and Respondent is unaware of any such case. Rather, the reported cases in which this alternate theory has been successful have been (as far as Respondent is aware) confined to situations where the employer sacrificed some non-supporters to get at targeted supporters. *E.g.*, *Alpo Pet Foods, Inc. v. NLRB*, 126 F.3d 246, 255-256 (4th Cir. 1997) (and cases cited therein); *Birch Run, supra*; *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 450-451 (1996); *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 & n. 4 (1996).

¹² The Union’s citation to *Copper Craft Plumbing, Inc.*, 354 NLRB No. 108 (2009) is inapposite because this was a non-precedential two-member decision and because the facts in that case involved a complete closing to escape potential unfair labor practice liability.

The Judge also rejected the General Counsel's theory that the layoff was a tactic to move Garfield to the third shift where he would be less effective as Union president, again not because the theory was not a legitimate theory, but because it lacked any supporting evidence and was "rather farfetched."

The General Counsel would have one believe that the Respondent laid off seven individuals (all of whom were presumably still needed at the facility and none of whom had engaged in union activity), instituted shortened weeks for the remaining employees, and implemented a new staffing plan for the entire facility, all for the purpose of moving Garfield to the night shift. The record contains no meaningful evidence that the Respondent resorted to such a tactic, and absent such evidence I cannot simply assume that it did. There are no statements by managers or supervisors threatening retaliation against Garfield and certainly none showing intent to use a layoff to camouflage such retaliation. The General Counsel does not even explain why the Respondent would find such camouflage necessary. If the Respondent wanted to move Garfield to the night shift for unlawful purposes it could have "camouflaged" its action by citing its existing initiatives to rebalance shifts and eliminate indirect labor positions. Since even with the layoff it relies on those initiatives, the layoff would be somewhat superfluous as camouflage.

I also consider it implausible that the Respondent would believe it could garner so great an advantage by transferring Garfield to the night shift that it would be willing to engage in unnecessary layoffs, shortened weeks, and plant-wide staffing changes to accomplish the transfer. Although moving Garfield to the night shift would make it less convenient for Garfield to meet with day shift employees and address some union concerns, the evidence does not show that Garfield would be unable to continue engaging in those activities simply by remaining at the facility after the night shift ended and the day shift began. Moreover, while working on the nightshift, Garfield would be able to meet with night shift employees. Even at times when Garfield could not be present, there were other experienced employees on the Union committee – for example, Brousseau and Pray – who work on the day shift. Lastly, I note that after the Respondent implemented the layoff and eliminated Garfield's day-shift assignment, it selected Garfield to remain on the day shift for a period of some weeks in order to perform calibration work. If, as the General Counsel claims, the Respondent saw moving Garfield to the night shift as so pressing an objective that it was willing to lay off seven other employees and create a new staffing plan in order to accomplish the reassignment, it is inconceivable that the Respondent

would then select Garfield for even a temporary assignment on the day shift.

(JD 15: 14-47).

Clearly, the Judge did not disregard the General Counsel's alternate legal theory. He merely found the theory unsupported by any evidence and generally unbelievable. Although the General Counsel and the Union loudly proclaim that the evidence supports their theory, they point to nothing that would warrant overturning the Judge's thoughtful analysis and credibility determinations regarding the legitimate economic basis for the layoff.

3. The Judge Properly Found An Absence Of Probative Animus.

Contrary to the contentions of the General Counsel and the Union, the Judge properly found an absence of probative animus. First, regarding the remarks of John Jamison during the 2010 negotiations, the Judge concluded:

Jamison did not state, or imply, that the Respondent planned to do anything other than continue refusing to bargain over MBS. He 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. To the extent that what Jamison said can be understood as a threat, it is as a threat of futility – i.e., that MBS was a corporate-wide juggernaut and that a union representing a very small portion of the corporation's employees could not hope to stop it. Such a threat is consistent with the Respondent's subsequent refusal to bargain, but cannot reasonably be tied to the layoff. Moreover, the evidence does not show that the dispute regarding implementation of MBS was the result of animus rather than of a good faith disagreement about the necessity of bargaining over that change.

(JD 16: 24-35).

To be sure, Respondent believed that MBS was important and it wanted the Union to buy in, but there is nothing in Jamison's remarks that are threatening or portend retaliation.

Settlement of unfair labor practice charges is a permissive subject of bargaining, and when the Union shut the topic down for further discussion, Respondent acquiesced and moved on. Indeed,

within two weeks, the parties had reached agreement on a new collective bargaining agreement. Although the Union witnesses attempted at the hearing to portray Jamison's comments as a threat, Garfield was so unconcerned at the time that he blandly described the discussion in his newsletter penned later that day without even mentioning Jamison's statements or suggesting to the Union's members that a threat had been uttered: "We have also discussed arbitrations and NLRB charges. We are trying to get them worked out but looks like most of them will move forward as planned." (Resp. Exh. 21). Rather than suggesting animus towards the Union's protected conduct, Garfield's own words suggest that Respondent was simply making a good faith effort to resolve the charges and arbitrations. It is inconceivable that Garfield, an individual who clearly was not reticent in challenging management, would not have mentioned Jamison's remarks if he truly believed them to have been threatening.

Significantly, Jamison's remarks were made in the context of negotiations, and unlike statements made away from the bargaining table, statements made across the bargaining table enjoy some degree of privilege. "Although some statements by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining." *Logemann Brothers Co.*, 298 NLRB 1018, 1021 (1990). "To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties." *Allbritton Communications*, 271 NLRB 201, 206 (1984), *enfd.* 766 F.2d 812 (3d Cir. 1985).

Even if it could somehow be said that Jamison's remarks reflected animus, there is no nexus between this asserted animus and the subsequent layoff in mid-February. Jamison's remarks at the bargaining table were made a full five months before the layoff, and Jamison, as

an outside consultant, had no role in the layoff decisions. Further, because these remarks were made outside the 10(b) period, their only value is as background evidence. “While evidence, whether record or in the form of prior Board findings, concerning conduct which occurred prior to the statutory 6-month period may be utilized as background evidence to evaluate a Respondent's subsequent conduct, it is well established that Section 10 (b) of the Act precludes the Board from giving independent and controlling weight to such evidence.” *News Printing Co.*, 116 NLRB 210, 212 (1956). All of the critical events necessary to establish an unfair labor practice must occur within the 10(b) period. For example, in *Monongahela Power Co.*, 324 NLRB 214 (1997), the Board found that the General Counsel could use statements from outside the 10(b) period to shed light on events occurring within the 10(b) period. However, all of the elements of a section 8(a)(3) violation, including animus, existed within the 10(b) period:

Rather, the General Counsel's unfair labor practice allegations are properly confined to conduct occurring within 6 months of the filing of the charge. In addition, the judge found evidence of animus occurring within the 10(b) period based on statements made at the hearing by the Respondent's station manager that the Respondent has considered Cutlip and Prah to be “anti-company” because of their previous union and Board activity. Thus, all of the elements necessary to establish that their union activities were a motivating factor in the Respondent's conduct occurred within the 10(b) period. It is undisputed that the Respondent disciplined and reassigned Cutlip and Prah within that period. Furthermore, the statements made by the Respondent's representatives in 1991 and 1993 may shed light on the station manager's testimony and the Respondent's motivation for disciplining and reassigning Cutlip and Prah.

Id. at 214; *accord*, *Grimmway Farms*, 314 NLRB 73, 74 (1994).

In short, Jamison's remarks are patently insufficient to carry the General Counsel's burden. With respect to the “dark cloud” comments by Tom Fletcher, the Judge credited the General Counsel's evidence that the remarks were made and concluded that they constituted a violation of § 8(a)(1), but concluded that as Fletcher had no involvement in the layoff decision

and was not even hired until after the layoff occurred, his comments could not be connected to the layoff. (JD 17: 5-12). A single violation of the Act does not suffice to establish a prima facie case with respect to every employment action taken against a known union adherent, no matter how unconnected the violation is to the challenged action. *See Wild Oats Markets*, 339 NLRB 81, 88 n. 10 (2003); *Alexian Brothers Medical Center*, 307 NLRB 389, 399 (1992). Further, Fletcher's statements are far too vague to draw any meaningful inferences regarding the layoff. *See Neptco, Inc.*, 346 NLRB 18, 20 & n. 4 (2005) (statement that the employer was "cleaning house"); *Injected Rubber Products, Inc.*, 311 NLRB 66, 75 (1993) (statement upon observing employee wearing union button that "there'll be hell to pay").

Finally, as the Judge correctly held, the General Counsel's arguments regarding timing were wholly self serving:

According to the General Counsel, unlawful motive is also shown by the timing of the layoff, which was implemented about a week after the close of the unfair labor practices hearing at which MBS was an issue. The General Counsel hitches its case largely to what it characterizes as this "striking" timing. As the General Counsel states, it is possible to show unlawful motivation based on the timing of an adverse action. The problem with the General Counsel's argument is that the timing here is not at all "striking" and does not suggest unlawful motive. The dispute between the Respondent and the Union regarding MBS was not a new one at the time of the challenged layoff. Respondent implemented MBS in February 2010, a full year prior to the layoff, and the Union almost immediately disputed the Respondent's action by filing a grievance. The Union filed its unfair labor practice charge regarding MBS on July 30, 2010, the Region investigated that charge, the Region issued a complaint on December 28, 2010, and a hearing was held on February 8-10, 2011. The ALJ did not issue his decision at the close of the hearing, or prior to the implementation of the layoff. Rather the decision in favor of the Union issued on April 12, 2011 – well after the layoff was implemented. The General Counsel's focus on the date when the unfair labor practice hearing closed, rather than on any number of other dates during the lengthy course of the MBS dispute, is convenient for purposes of its effort to show a connection to the layoff, but that focus is not warranted by anything other than the General Counsel's convenience. The record does not show that in the course of the dispute regarding MBS, the

closing of the hearing stood out a moment when the Respondent would have been particularly troubled over the MBS issue, or as one when the Respondent would have seen a particular opportunity to influence the Union's or employees' actions. The Board has declined to draw an inference of discrimination when the General Counsel picks a self-serving date in an effort to show that the timing of an adverse action is suspicious, *Newcor Bay City Division*, 351NLRB 1034, 1039-1040 (2007), and I decline to draw such an inference under such circumstances here.

(JD 17: 14-38).

The General Counsel's effort to distinguish *Newcor* is unpersuasive. There, the General Counsel alleged that the employer violated section 8(a)(4) by subcontracting unit work in retaliation for the Union's filing of a prior unfair labor practice charge. In support of this allegation, the General Counsel argued that the announcement of the outsourcing decision in October came only a few weeks after the General Counsel issued a complaint on September 28 alleging that the employer had unlawfully implemented new terms of employment without reaching a good-faith impasse. In rejecting this contention, the judge opined:

Even assuming that Respondent made no earlier announcement, I am reluctant to infer unlawful motivation because this time period, selected by the General Counsel, is relatively short. The Union filed the initial charge in that case on June 16, 2004. If that date is used, then the interval becomes about three and one-half months. In the absence of some other persuasive evidence of unlawful motivation, I am reluctant to infer much from that long an elapsed time.

Arguably, Respondent might be more upset by the issuance of a complaint—resulting in an unfair labor practice hearing—than by filing of a charge. However, deciding which would bother an employer more entails a bit of conjecture. In any event, I do not believe drawing an inference from timing would be appropriate here and shall not do so.

Id. at 1039-40.

Finally, the whole timing issue is a bit like chasing after a greased pig. As is evident from this record, there was hardly any period of time in which the Union did not have some pending

grievance, charge, or issue with management. Under the General Counsel's theory of the case, a layoff at any point in time could be viewed as retaliatory for some type of protected activity by the Union. The contention that the actual hearing took on some higher status than all of the other prior events and activities is based on nothing more than that it serves the interests of the General Counsel and the Union. They do not cite to a specific piece of evidence to show that Respondent was upset by the hearing or the testimony offered by Garfield in that hearing. It is not sufficient to posit that Garfield's testimony was adverse to Respondent; there must be evidence of animus towards that testimony. No such evidence was offered, and the contention is mere surmise and speculation. "The Board may not raise suspicion to status of fact or base inferences upon mere speculation, ... and findings of the Board must rest on evidence, not on surmise or suspicion." *Baird-Ward Printing Co.*, 109 NLRB 546, 567 (1954).

4. Respondent Acted Within Its Entrepreneurial Discretion.

"The doctrine of entrepreneurial discretion holds that an employer may make significant changes in its operations 'so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the Act.'" *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 665 (6th Cir. 2005)(quoting *NLRB v. J.M. Lassing*, 284 F.2d 781, 783 (6th Cir. 1960)).

"Whether procedures other than a layoff might have been more or equally effective in remedying the Respondent's economic loss is not a matter the Board is empowered to decide. The Board's authority to evaluate the Respondent's business conduct extends only to the determination of whether the conduct is discriminatorily motivated or otherwise in violation of the Act." *Gem Urethane Corp.*, 284 NLRB 1349, 1350 (1987).

"Congress has left to management the decisions of whether a reduction in the number of employees is necessary." *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1265 (7th Cir.

1980). “The Board does not substitute its judgment for management but instead tries to determine, as accurately as possible, what considerations really motivated management to make a particular decision.” *Newcor Bay*, 351 NLRB at 1040. As the Fourth Circuit has stated:

Despite the special attention required when the economic justification for layoffs is apparent, however, the ALJ gave little weight to the business climate in which Goldtex was functioning. Instead, the ALJ concentrated on the timing of the layoffs after the November ULP hearings, finding that this timing was indicative of discriminatory motivation. The ALJ was certainly free to consider the timing of the layoffs as evidence of anti-union animus, . . . but such timing cannot be given conclusive effect. This is especially so because the Board's timing argument in this case is weakened by its failure to show that employees Reid, Wright, and Rutter were in any way involved in the November 1991 hearings. If layoffs such as these, which were conducted shortly after ULP hearings but were not shown to have any other connection to those hearings, were always prohibited, an employer would lose the ability to make decisions crucial to business operations whenever ULP hearings were held. The result would be some arbitrary time period after such hearings during which employers could not take any action capable of being construed as discouraging union activity, regardless of the employers' true motivation for that action.

Goldtex, Inc. v. NLRB, 14 F.3d 1008, 1013-14 (4th Cir. 1994).

Respondent had both a clear contractual right to lay off for economic reasons and an established historical practice of doing so. Indeed, Respondent’s actions in February 2011 were wholly consistent with what it did in 2008 and 2009 when it had far more extensive layoffs. As the variance to plan grew increasingly negative and factory orders created declined, Respondent took action, and this action invariably involved laying employees off. After all, if work is decreasing, it makes no sense at all to maintain the same number of employees doing less and less work.

The General Counsel offered nothing that would undermine the substantial documentary evidence offered by Respondent showing the economic basis of the layoff decision. The testimony of a few Union officers that they did not see a lack of work prior to the layoff hardly

constitutes probative evidence. Notably, in a November 2010 grievance response concerning non-bargaining unit employees performing bargaining unit work, Garfield acknowledged that work was declining:

The Union is not interested in a settlement that gives the company the right to keep doing Union Labor against the CBA. If in the future when business recovers if the situation arises the union would be willing to set [sic] down with the company. At this time there is plenty of people not getting overtime and that do not have work in their departments that can do the work.

(Resp. Exh. 10, pp. b-c).

Instead, the General Counsel sought to establish that Respondent could have eliminated or at least minimized the need for a layoff by reducing overtime to zero. Of course, it is not the province of the Board to second guess the Respondent's business justification. Moreover, not only would eliminating overtime not have eliminated the need for a layoff, but it would have been counterproductive. More importantly, despite numerous layoffs in the past, Respondent has never reduced overtime in such a drastic fashion.

Brighenti testified without rebuttal that the Lyndonville and Greenfield facilities functioned best when they operated between 8% and 15% overtime. He explained that these facilities have many long-term employees who have significant vacation benefits, and overtime allows the plant to cover these vacation days. (Tr. 374-375). Further, overtime did in fact decrease to just over 2% in the weeks following the layoff. (GC Exh. 8). Moreover, it is clear that Respondent was in fact seeking alternatives to a layoff by using short weeks. Unfortunately, the contract severely limited the number of short work weeks that could be worked. General Counsel also ignores the fact that the contract provides for daily overtime over 8 hours in a day and not just weekly overtime over 40 hours. (GC Exh. 3, p. 12). Thus, daily overtime was possible even if employees were only working four days a week. An employee who worked 9

hours per day during a short work week would have received 4 hours of overtime. Indeed, General Counsel's Exhibit 5 reflects that daily overtime is a regular occurrence.

Significantly, the Lyndonville facility has always continued to use overtime during periods of layoff. On March 3, 2008, Respondent laid off 7 employees, on May 12, 2008, it laid off 1 employee; on June 9, 2008, it laid off 7 more employees. Yet, during the months of March, April, May, and June of 2008, the average weekly overtime (per General Counsel's calculations) was 6.78%. On November 11 and 13, 2008, Respondent laid off 10 employees. Yet in the following six weeks, Respondent averaged 9.86% overtime per week. (GC Exh. 8). By way of comparison, during the six weeks immediately following the February 2011 layoff, the weekly average overtime was only 5.04 %. Even if one includes the 8 weeks thereafter (April and May), the average is only 7.86%. (GC Exh. 8).

Finally, Brighenti testified that the \$5,000 average monthly cost of an hourly employee was based on regular hours and did not include overtime. (Tr. 376). Thus, by taking out 7 employees, Respondent reduced its costs by approximately \$35,000 per month, *independent of overtime*. Unless overtime actually increases following a layoff (as compared to prior to the layoff), it cannot offset any of these savings. In fact, if, as here, the overtime goes down following the layoff, the cost savings are actually increased. Thus, General Counsel's efforts during cross examination of Brighenti to show that it cost more to use overtime than to lay off an employee had no valid mathematical basis.

The General Counsel's contentions regarding overtime can only be characterized as voodoo economics. Thus, the General Counsel asserts that if Respondent had not laid off employees, "it would have saved almost \$35,000 in labor costs over 5 months." (GC Brief at 24). It is not clear how the General Counsel arrived at this figure, but even if it were accurate, it

misses the obvious point that Respondent saved \$ 35,000 each month by laying off 7 employees (7 x \$5,000). Thus, over 5 months, the layoff achieved some \$175,000 in cost reductions, dwarfing the alleged savings by reducing overtime. The General Counsel's contention that "[i]t doesn't make sense to reduce straight time hours while continuing to maintain high overtime levels" and that this is akin to "closing a low interest line of credit so that you could open a high interest pay day loan" (GC Brief at 22 & n. 33) reflects a basic lack of business acumen. Laying off 7 employees eliminates 280 hours per week. At average contractual wage rates of roughly \$18 per hour (GC Exh. 3), the weekly cost savings on straight-time wages alone are \$5,040. Merely maintaining the same pre-layoff overtime levels does not diminish these savings at all. In fact, Respondent actually decreased overtime following the layoff. Thus, it saved even more costs.

As a practical matter, it would be impossible, and a very bad business decision, to wholly eliminate all overtime. The Judge credited Brighenti's testimony regarding the efficacy of a certain level of overtime. Further, the General Counsel erroneously assumes that any overtime being worked could magically be redistributed among the 7 laid off employees. But this of course depends on *where* and *when* the overtime is needed. The records reflect that a substantial percentage of overtime was worked on Saturdays. Under the contract, all work performed on Saturday is paid at time and one-half. Even if such work could in theory be assumed by laid off employees, there would be no cost savings to Respondent. Further, overtime is not evenly spread over all jobs, departments, and work days. Overtime may be necessary to satisfy a quick delivery order or to overcome a particular machine backlog. Overtime is a reality that cannot be dispensed with at whim. At bottom, the General Counsel's contentions are nothing more than unsupported propositions regarding the best way to operate a business.

The contention that overtime following the 2011 layoff was higher than during prior layoffs is non-probative. What is material, as the Judge recognized, is that Respondent did not increase overtime following the layoff and that it still was able to satisfy its orders with 7 fewer employees. The evidence offered by the General Counsel regarding overtime costs was properly rejected by the ALJ as inadequate to cast doubt on Respondent's motivation for the layoff:

The General Counsel argues that the Respondent's claim that the layoff was motivated by a desire to reduce labor costs should be rejected because the wage rate the Respondent had to pay employees to work overtime during the layoff was higher than the straight-time rate it could have paid the laid-off employees to do the same work. By reassigning employees in such a way as to eliminate the need for overtime, the General Counsel suggests, the Respondent could have retained laid off employees and instead met any need to cut labor costs by reducing overtime. This contention might be somewhat persuasive if the evidence showed that when the layoff was implemented the Respondent had to increase overtime in order to meet demand. Cf. *Stamping Specialty Co.*, 294 NLRB 703, 713 (1989) (layoff was not unlawful where, inter alia, the evidence did not show that reduced workforce prevented employer from satisfying orders). However, the evidence shows, to the contrary, that immediately after the Respondent implemented the February 2010 layoff, it also dramatically reduced the amount of overtime it was using at the facility. Thus the Respondent reduced labor costs through the layoff at the same time as it reduced labor costs by cutting overtime. At no point during the layoff does the record show that the Respondent's use of overtime exceeded the levels that were optimal for the facility. At any rate, the question for me is not whether the layoff was the most effective course of action to address business conditions, but whether the layoff was discriminatorily motivated. *Newcor Bay*, 351 NLRB at 1040; *Gem Urethane Corp.*, 284 NLRB 1349 (1987). The General Counsel's evidence regarding overtime does not show that the layoff was a bad business decision, and certainly not that it was so inexplicably bad a business decision as to justify a conclusion that something other than business concerns must have motivated it.

(JD 18: 27-49).

The contentions of the General Counsel and the Union that the record does not reflect a decline in orders ignores the undisputed documentary evidence. Respondent's Exhibit 18 reflects that whereas the factory orders created had averaged 115,760 pieces per month during the first

eight months of 2010, they averaged only 78,832 pieces per month during the last four months of the year, a decline of 31%. Thus, it is wholly inaccurate to say that Brighenti's testimony that orders declined was unsupported and incredible. While the raw numbers contained in the summary that he referenced in his testimony turned out to be inaccurate, the fact remains that there was a dramatic downturn in orders during the final 4 months of 2010. Indeed, the actual decline of 31% was more dramatic than the erroneous figures contained in Respondent's Exhibit 1, which reflected only a 23% decline from the first eight months to the last four months of 2010.¹³

It is true that the record does not show the actual data for January¹⁴, but the numbers for February (96,765) and March (82,571) reflect only a modest upturn in orders, still well below the numbers for the first eight months of 2010. Further, the real significance of the decline in orders is in the impact on the variance to plan. As orders decline, particularly over a sustained period, there is an inevitable negative impact on the variance to plan. And it is the variance to plan that drives the Respondent's actions (as evident from the emails). The record does reflect the variance to plan for January, which was unfavorable (\$103,000). This unfavorable trend continued in February (\$197,000) and March (\$235,000). Inasmuch as there is a lag time in

¹³ The erroneous figures in Respondent's Exhibit 1 reflected that factory orders created had averaged 87,584 pieces per month during the first eight months of the year and that they averaged only 67,053 pieces per month during the last four months of the year, a decline of 23%. Clearly, the errors in Respondent's Exhibit 1 were inadvertent, and do not undermine Brighenti's testimony or Respondent's basic evidence.

¹⁴ During the post-hearing conference call with Judge Bogas, Respondent offered to provide the actual orders number for January, but the General Counsel and the Union stated to the Judge that they preferred that the record not reflect the actual number. Thus, Brighenti's testimony that January orders remained depressed is unrebutted. In these circumstances, the General Counsel and the Union cannot speculate that there was some substantial increase in orders in January.

production of most orders, this declining variance further supports the finding that orders remained depressed in January.

Insofar as the General Counsel and the Union assert that the plan was much more demanding in 2010-2011 than in prior years, that is a matter that is not within the province of the Board. Respondent is entitled to determine for itself what variance levels must be achieved and to act in accordance with those determinations. There is no evidence in the record to suggest that Respondent made the plan more demanding in order to justify a layoff.

B. Assuming The Existence Of A Prima Facie Case, The ALJ Correctly Found That Respondent Carried Its Wright Line Burden.

Assuming, arguendo, that a prima facie case was established, it was an exceedingly weak prima facie case. “The weaker a prima facie case against an employer under the *Wright Line* test, the easier it is for the employer to meet its burden of proving that the same decision would have been made even if [there had been no protected activity.]” *GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351, 1357-58 (4th Cir. 1990). “The ultimate burden remains, however, with the General Counsel.” *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Thus, “a finding that the General Counsel has met the initial Wright Line burden by making a showing sufficient to support the inference that protected conduct was a motivating factor in [the employer’s decision] does not mean that the [decision] was in fact ‘unlawfully motivated.’” *Tom Rice Buick*, 334 NLRB 785, n. 7 (2001). Although the employer bears the burden of establishing its “affirmative defense” by a preponderance of the evidence, the evidence that will suffice to establish this defense is not unduly onerous. “Nothing in the Board’s Wright Line decision indicates that the employer’s burden cannot be met by using circumstantial, as opposed to direct, evidence,” *Centre Property Management v. NLRB*, 807 F.2d 1264, 1269 (5th Cir. 1987), and “[t]he Respondent’s defense does not fail simply because not all of the evidence supports it, or

even because some evidence tends to negate it.” *Merrillat Industries*, 307 NLRB 1301, 1303 (1992).

Even when the General Counsel succeeds in establishing union animus, the Board has not found a violation when the respondent establishes legitimate economic reasons for the layoff. For example, in *Stamping Specialty Co.*, 294 NLRB 703 (1989), shortly after employees voted to unionize, the employer (in September 1985) laid off six of the ten production and maintenance employees. The judge found that the employer had made prior unlawful threats and that the employees selected for layoff were union supporters. Thus, he concluded that the General Counsel had established a prima facie case that the layoff was unlawfully motivated. Nevertheless, the judge (with Board agreement) concluded that the employer had carried its burden of establishing that the layoff was in fact the result of a substantial decline in stampings orders. In particular, the employer established that the orders for stampings had declined from \$74,793 in January 1985 to \$28,006 in September. Further, whereas the stampings orders had averaged just over \$55,000 per month during the first 7 months of 1985, they averaged less than \$29,000 in August and September 1985. After noting the precipitous decline in stampings orders, the ALJ opined:

Significantly, the General Counsel offered no evidence that Respondent was unable to fill the orders it received during the months of September, October, or November 1985, with the individuals retained on and after 9 September. I am convinced, and find, that Respondent has shown the 9 September layoff was dictated by economic circumstances.

Id. at 713.

In *Roskin Brothers, Inc.*, 274 NLRB 413 (1985), the Board found that a layoff of nine of twenty warehouse staff shortly after employees signed union cards did not violate § 8(a)(3). Although the Board found that the employer discriminated in selecting the employees to be laid

off, it concluded that the layoff itself was economically motivated. The Board emphasized the financial information submitted by the employer:

The financial statement introduced into evidence shows that the Respondent in 1979 had gross sales of \$9,792,751 and showed a net profit of \$168,460. In 1980 the Respondent had gross sales of \$15,164,822 and, with the above-mentioned cuts in staffing, showed a net profit of \$19,114. We therefore find that the Respondent was justified under these circumstances in effectuating a lay-off of its warehouse staff and that such action was not a pretext to mask an unfair labor practice.

Id. at 414.

In *Sunbeam Plastics Corp.*, 144 NLRB 1010 (1963), despite finding that the employer committed significant violations of § 8(a)(1), the Board concluded that the employer thereafter lawfully laid off employees. The Board explained:

The Trial Examiner found that a layoff of 16 of Respondent's employees, occurring in January, late February, and again on March 9, 1962, was not, as alleged in the complaint, a violation of Section 8(a)(3) of the Act. We agree. He based his conclusion, as do we upon the finding that the layoffs followed, by only a brief period, the cancellation of orders by three of Respondent's largest accounts and the automation of a manually operated machine. Further, the layoffs were accomplished along strict seniority lines, leaving several known union adherents still employed. Finally, several of the laid-off employees were rehired when increased business warranted. Although the timing of the layoffs, following almost immediately upon the heels of the 8(a)(1) conduct described above, raises some suspicion, we find, that the General Counsel has not established by a preponderance of the evidence that union activity, rather than the economic reasons advanced by the Respondent, was the true cause of the layoffs.

Id. at 1011. *See also, United States Aviex Co.*, 279 NLRB 826, 834-836 (1986) (employer lawfully laid off employees following precipitous decline in sales and shortage in raw materials that precluded completion of outstanding orders).

Clearly, if a prima facie case was established, Respondent's evidence was sufficient to carry Respondent's *Wright Line* burden. The evidence falls far short of what would be necessary to invalidate an entrepreneurial decision of this nature.

C. The Judge Properly Dismissed The Allegations Regarding Leon Garfield.

The Judge's dismissal of the allegations regarding the elimination of Garfield's day shift position and his temporary move to the third shift is based in large part on his credibility resolutions:

I also do not find animus based on the fact that on February 18, 2011, Brighenti notified Koski that Garfield was being reassigned to the night shift. This communication does not mention or allude to any unlawful motive and I credit Brighenti's testimony that he alerted Koski to the reassignment because Garfield had filed a charge the last time he was reassigned. I also note that the suggestion that the Respondent was bent on interfering with Garfield's union activities by moving him to the night shift is contradicted by the fact that, after eliminating Garfield's day shift inspector position, the Respondent immediately selected Garfield to stay on the day shift for a period of time in a temporary assignment.

....

Regarding the related decision to eliminate Garfield's day shift position, Jewell testified that this was done as part of the Respondent's effort to improve performance by moving employees from indirect labor positions to direct labor positions. That explanation is facially credible and Jewell's testimony regarding it was not undermined during cross-examination or by other evidence. There is no dispute that the inspector position is "indirect" and that, because Garfield was the inspector with the least seniority, he was the one to be reassigned when an inspector position was eliminated. Moreover, it is not disputed that, even before the layoff, the Respondent was acting to reduce the need for inspectors by allowing employees to do self-inspections using a buddy system. In addition, based on Jewell's testimony and the record as a whole, I credit Jewell's statement that the reason he moved the day-shift position in the cut-off department to the night shift was to further management's plan to rebalance shifts. The transfer of the cut-off position from the day shift to the night shift was by no means a unique occurrence, but rather part of an ongoing effort to rebalance shifts in order to better exploit the facility's most productive equipment. The staffing plan that the Respondent put into effect in 2008 and 2009 – before the unfair labor

practice proceeding regarding MBS – reduced the number of employees on the day shift from 70 to 46 while increasing the number of employees on the night shift from 10 to 23. Then, at the time of the February 2011 layoff, the Respondent made further efforts to equalize staffing – moving positions in the coating and OD departments from the day shift to the night shift, and when a day shift position in the flute department became vacant, moving it to the night shift. As part of the 2011 staffing plan, five of the 45 positions on the day shift were eliminated, while the number of positions on the night shift remained constant at 21.

(JD 19: 21-29, 35-42; 20: 5-18).

In summary, there was no evidence of animus toward Garfield’s testimony at the February 2011 hearing, and the Judge credited the explanations offered by Respondent. There is no basis in this record for the Board to overturn the Judge’s findings and credibility resolutions.

CONCLUSION

Respondent requests that the Board adopt the judge’s decision as its own.

Respectfully submitted this 7th day of May 2012.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing ANSWERING BRIEF by electronic mail on the following parties:

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This the 7th day of May 2012.

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