

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

In the Matter of

KENNAMETAL, INC.

and

UNITED STEELWORKERS, LOCAL 5518, affiliated
with UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

CASE 01-CA-046689

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT
OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW
JUDGE**

Respectfully submitted, by

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I. INTRODUCTION

United Steelworkers of America, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC, (“the Union”) timely filed the charge and amended charge in this matter (GC 1; ALJD 1). Complaint issued against Kennametal Inc. (“Respondent” or “Company”), on July 29, 2011. (ALJD 1).

A hearing was held before Administrative Law Judge Paul Bogas on November 1-3, 2011, in Greenfield, Massachusetts. On February 15, 2012, Judge Bogas issued his decision (“ALJD”). Judge Bogas dismissed the complaint allegations that Respondent violated Sections 8(a)(3) and (4) of the Act by the announcement and layoff of seven employees on about February 18, 2011, and likewise dismissed the associated elimination of Union President Leon Garfield’s daytime Inspector position, by which Garfield was ultimately relegated to a position on the graveyard shift. Notably, Judge Bogas did find that Respondent violated Section 8(a)(1) of the Act by the new plant manager’s statements that there was a “dark cloud” over Lyndonville as a result of the union’s grievances and unfair labor practice charges. The following brief is offered in support of the Counsel for the Acting General Counsel’s Exceptions to the ALJD, simultaneously filed by separate document.

II. SUMMARY OF THE UNDISPUTED FACTS AND THEORY OF THE CASE¹

The Counsel for the Acting General Counsel’s theory of this case is that by announcing and implementing both a layoff and the associated elimination of a dayshift

¹ References to the Judge’s decision will be designated by “ALJD”, references to the transcript will be designated by “Tr.”. Where more than one witness testifies in a critical area, the witness will be identified. Counsel for the Acting General Counsel’s exhibits will be designated by “GC” followed by the exhibit number, and page number, where appropriate. Respondent’s exhibits will be designated by “RX” followed by the exhibit number, and page number, where appropriate. References to the April 12, 2011 ALJD in the February 2011 MBS hearing, *Kennametal Inc.*, 01-CA-046293 et al, JD-11-23, will be designated by “MBS ALJD”.

position for the Union President Leon Garfield on about February 15, 2011,² just days after Garfield had testified in an unfair labor practice hearing, and in circumstances where Respondent was unable to demonstrate a lack of work, Respondent violated Sections 8(a)(4) and (3) of the Act. Prior statements regarding the protected activities of the Grievance Committee, shortly after the charge was filed and attributed to one of the highest ranking executives in Respondent's global operation, together with post-layoff statements by the Plant Manager describing a "dark cloud" over Respondent's Lyndonville facility, as well as additional evidence from the record as a whole, provide animus linking the layoff and job elimination to a discriminatory motive.³ The record evidence, credited by Judge Bogas or *otherwise undisputed in the record*, readily establishes the following:

- (1) Throughout 2010, the Union's Grievance Committee and President Garfield tenaciously insisted that Respondent recognize the Union's role as bargaining representative by providing information and negotiating over a comprehensive, corporate sponsored safety initiative known as "Management Based Safety" (herein "MBS").
- (2) On July 30, 2010, the Union filed unfair labor practice charges over the failure to bargain or respond to information requests regarding the MBS program.
- (3) Six weeks later, during negotiations over a new collective-bargaining agreement and in the context of discussing the ULP charges, Respondent's lead negotiator advised the Grievance Committee that the Lyndonville plant was "1% of Kennametal" and that the Corporation's Chief Human Resource Officer himself was advising them that "MBS was not an issue that they should take a stand on."⁴

² All dates will be 2011 unless otherwise noted.

³ The Judge found these statements violate Section 8(a)(1) of the Act. Counsel for the Acting General Counsel excepts to the Judge's failure to find that these statements constitute animus against the protected activity of filing a charge.

⁴ ALJD at 4, lines 38-43. The ALJ gave a slightly different cant to the exchange, describing that Jamison made his statement "referencing a statement by the Chief's Human Resource Officer." In any event, the GC's witnesses were credited. Moreover, it was undisputed in the record that Garfield was so taken aback by the statement, that he advised the Grievance Committee to write it down, as he viewed it as a threat. (Tr. 94-95, Garfield; Tr. 156-157, Brousseau; Tr. 192-196, 209-210; GC 13, 16, 17; RX 20, p.3)

- (4) Complaint issued over Respondent's refusal to provide information or bargain over MBS, and during the February 8-10, 2011 hearing (herein, the "MBS hearing"), the allegations against Respondent expanded to include the allegation that Respondent had failed to bargain over a separate safety discipline policy, the implementation of which was a key component to Respondent's defense at the hearing.⁵
- (5) During the MBS hearing, Union President Garfield gave testimony adverse to Respondent's position, including by introduction of a comprehensive data base extensively chronicling Respondent's prior treatment of safety violations (GC 21; Tr. 628-630); and by testimony contradicting that of Plant Manager Brighenti. (Tr. 623-624).
- (6) The contract between the parties permits layoffs for "lack of work." (GC 3, Article 8). Respondent last implemented a number of layoffs between January and May of 2009. During every month of 2009, except November in 2009, monthly overtime rates never rose above 6.6%, and for many months were below 4%.⁶
- (7) In the months and weeks leading up to the MBS hearing, Respondent's Lyndonville facility had been operating at historically high rates of overtime, from 12-14%,⁷ and employees observed that there was an abundance of work on the floor, and announced to them via daily meetings.
- (8) In contrast, during prior layoffs, employees observed that work on the floor slowed, overtime dried up, and management would advise the Union in advance that a layoff was anticipated.
- (9) On the Monday following the MBS hearing, Brighenti advised his boss that he was laying off 7 employees, all of whom were bargaining-unit members covered by the contract. (GC 11).

⁵ MBS ALJD, p. 13, lines 44-39 ("The Complaint in this matter did not allege that Respondent violated Section 8(a)(5) by implementing new disciplinary policies for safety violations, until the filing of the post-hearing briefs. However, that Respondent was on notice that the disciplinary policies were at issue in this case is established by its motion to amend its Answer to include a Section 10(b) defense to any challenge to the Disciplinary Corrective Action Policy, Tr. 457, and the Acting General Counsel's motion for the Board to remedy the discipline and discharge of employees Noyes and Wilkins.)

⁶ November is deer hunting season in Vermont, typically resulting in a lot of vacation hours taken and a correspondingly high amount of overtime to cover for absent hunters. December also tends to have higher overtime due to holiday vacations, and regularly planned plant shutdowns.

⁷ Given the late revelation of inaccurate information contained in Respondent documents prepared in preparation for the hearing, Counsel for the Acting General Counsel eschews the use of these documents, urging instead reliance on earlier prepared documents. With this in mind, GC 5 is viewed as superior to GC 7 or 8, and figures respecting overtime are derived primarily from GC 5, a document received during the investigation, and not created in response to the Acting General Counsel's trial subpoena.

- (10) Garfield's daytime inspector position was eliminated in connection with the layoff, impacting his ability to carry out Union business. The shift supervisor conceded that there was no lack of work for daytime inspectors. (ALJD p. 9, lines 30-31; Tr. 561).
- (11) Although Supervisor Jewel's claimed explanation for eliminating Garfield's inspector position was an ongoing imperative to move first-shift positions to third shift (as part of "shift rebalancing"), in December 2010, Jewel had *denied* a request by first shift employee John Leveque to move his position to third shift.
- (12) Respondent also announced the implementation of four "short work weeks" for March 2011, which was not alleged to be discriminatorily motivated.
- (13) Respondent argued, and Plant Manager Brighenti testified, that the layoff had been justified by an ongoing drop in orders between October 2010 and January 2011, culminating in historically low incoming orders for the month of January 2011. (Tr. 13, 245, 257-260, *Respondent's Post-Hearing Brief*, p.11, 15-16).
- (14) Following the hearing, Respondent's Counsel admitted that the critical figures testified to by Brighenti to support his layoff decision, and appearing in Respondent's summary document RX 1 were wrong and unsupported by the underlying business records. No one other than Brighenti testified about the alleged decline in incoming orders. (ALJD p. 6, n.6).
- (15) Contrary to the testimony of Brighenti, the underlying business records reflect that the incoming orders for November 2010, December 2010, and February 2011 were higher than the year before for the same time period. The records of incoming orders for the critical month of January 2011 were missing completely.
- (16) Following the layoff, the plant continued to operate with relatively high rates of overtime, including almost 11% in February, and over 14% in April. Had Respondent retained the laid off employees and exercised its contractual right to transfer employees, it could have avoided about \$35,000 in overtime premiums while gaining over 300 additional straight time hours.
- (17) In late April and May 2011, the incoming Plant Manager, in discussions referencing the recent MBS trial and other labor relations issues, advised employees that there was a "dark cloud" over the Lyndonville plant.

III. SUMMARY OF ARGUMENT REGARDING THE ALJD.

Respecting the layoff, Judge Bogas concluded that Counsel for the Acting General Counsel had failed to show a prima facie case that the layoff was discriminatorily motivated, and/or that even if such a case had been established, that Respondent provided sufficient evidence to rebut Counsel for the Acting General Counsel's case. Having dismissed the allegation of discriminatory layoff, the Judge separately analyzed the job elimination for President Garfield, and determined that the Employer had established that it would have eliminated the position even in the absence of Garfield's protected activity.

In support of the numerous exceptions filed, Counsel for the Acting General Counsel respectfully submits that the Administrative Law Judge erred with respect to the above referenced conclusions. More specifically, and as argued more fully herein, Judge Bogas erred in determining that the protected activities of the Grievance Committee and the President are insufficient to constitute protected activities on behalf of the bargaining-unit members; erred in failing to find that the laid off employees were all Union members, unit members, and covered by the contract; erred in failing to find that giving testimony under the Act is distinguishable from other activities engaged in by Garfield for purposes of applying Section 8(a)(4), and for purposes of analyzing whether the timing of the layoffs provided for an inference of animus against such protected activity; erred in failing to find that Garfield's testimony, introduction of important documents, or the expansion of issues in controversy raised by the February 2011 hearings would have also been a basis to find timing based animus; erred in failing to consider numerous aspects of the record as a whole for purposes of finding an

inference of animus, and erred in concluding that the pre and post layoff statements made were not evidence of animus towards protected activities.

Regarding the extent to which the record as a whole supports a finding of animus, more specifically, and as argued more fully herein, the Judge erred in: 1) failing to find that that Respondent deviated from past practice respecting prior layoffs, e.g., that prior layoffs were implemented where there was a lack of work, and were accompanied by sustained drops in overtime, and erred in failing to credit the undisputed testimony of three witnesses on this point; 2) failing to find that the evidence that Respondent could have avoided overtime premiums – thereby achieving more favorable plan results, had it not laid off employees, supported a finding of animus; 3) failing to find Respondent’s unnecessary payment of insurance premiums on behalf of the laid off employees as contributing to an inference of animus; 4) failing to find that the false incoming levels testified to by Brighenti supported an inference of animus; 5) failing to finding that Jamison’s statements in reference to the MBS unfair labor practice charges did not constitute animus towards the protected activity of filing a charge; and 6) erred in finding that the post layoff 8(a)(1) comments regarding the “dark cloud over Lyndonville,” found to be a threat of unspecified reprisal, did not constitute animus toward the protected activity of filing charges and giving testimony in Board proceedings, and other union and protected activities. Judge Bogas also erred in failing to find that the treatment of John Leveque’s request to move to third shift, and the subsequent failure to post 1st shift vacancies contributed to a finding of animus.

In light of the above failings, Counsel for the Acting General Counsel amply shifted the burden to Respondent to demonstrate that it would have implemented both

the layoff and the associated elimination of Garfield's daytime inspector position in the absence the protected activities of Garfield and the Grievance Committee on behalf of unit employees/members. Judge Bogas erred in finding that Respondent had met such burden. In particular, the Judge erred in finding that Respondent had demonstrated that the layoff was implemented under circumstances similar to prior layoffs, erred in finding that Respondent had shown that there was a slump in incoming orders for early 2011, and erred in finding a *Wright Line* defense based on numbers contained in RX 18, since Respondent never advanced that theory itself. Moreover, given that Respondent has admitted that the numbers offered to explain the layoff were false, and therefore *not* in fact relied on, the rationale advanced is, by definition, pretext, and Respondent cannot satisfy its burden.

IV. STATEMENT OF FACTS

A. Background Facts--Respondent's Operations

Counsel for the Acting General Counsel agrees with the Judge's statement of Background facts, except to note the following: The record establishes that during the period material to these proceedings, until about November 2010, the highest ranking Human Resource position was filled by Kevin Walling, as Respondent's Chief Human Resource Officer, responsible for overseeing all of Respondents human resources *worldwide*. (Tr. 38; GC 2, p.4).

Additionally, the record does not support the Judge's finding that Respondent "selected" Garfield for a temporary day-shift assignment calibrating equipment. (ALJD 15, line 42). Rather, the calibration work was work Garfield performed as an inspector. Particularly, since his job elimination rendered him "unassigned," Respondent was free

to assign this work to him. Nowhere is there any claim or argument in the record that his retention for this purpose involved a selection process. Rather, the record evidence that Garfield was retained by Respondent to perform that work is merely further evidence that his job was eliminated despite there being sufficient daytime inspector work to be performed. (Tr. 122, 135).

B. Recent History of Labor Relations

Counsel for the Acting General Counsel agrees with Judge Bogas' findings in Section II.B of the ALJD, except that certain facts, all undisputed in the record, bear greater consideration as part of the record as a whole. In February 2010, Respondent announced the initial implementation of a comprehensive new MBS safety program. As new components of the program rolled out over the course of months, the Union determined that the program would have a significant impact on existing terms and conditions of employment, including the possibility of new levels of discipline for safety violations. On July 30, 2010, Union President Leon Garfield filed unfair labor charges 01-CA-046293 and 01-CA-046294 on behalf of Local 5518, alleging that the Employer violated Section 8(a)(5) by its unilateral implementation of MBS, and by failing to provide information, including information relevant to MBS. (Tr. 177).

Over the course of several weeks in September 2010, the parties met for contract negotiations, resulting in the collective-bargaining agreement currently in place between the parties. (Tr. 41; GC 3). The Judge's decision credits Counsel for the Acting General Counsel's witnesses regarding statements made by Respondent's lead negotiator, John Jamison, during those negotiations. However, some facets were glossed over, and warrant greater review.

The evidence readily establishes that during those negotiations, Respondent's lead negotiator Jamison broached the issue of the Union's ULP charges over MBS with the members of the Union's Grievance Committee.⁸ In articulating Respondent's view of those charges, Jamison menacingly advised the Union's bargaining committee that Respondent's *highest ranking* human resource executive, the Chief Human Resource Officer (GC 2, p.4), had said that "[MBS was] not an issue [for the union] to take a stand on." In making this point, Jamison emphasized Lyndonville's relative insignificance to Respondent's operations by pointing to the fact that Lyndonville was "1% of Kennametal." Importantly, Garfield, as Union President, was so taken aback by the threatening tone of Jamison's statements, that he asked Jamison to repeat them, and directed his bargaining-committee members to be sure to make note of the comments, which he described at the time as a threat. (Tr. 94-95, Garfield; Tr. 156-157, Brousseau; Tr. 192-196, 209-210; GC 13, 16, 17; RX 20, p. 3). Jamison obliged by re-reading the statement from the Chief Human Resource Officer. (Tr. 610, Huttenlocher). Indeed, Pray recalls that the second time Jamison read the statement, he added "seriously" to his warning. (Tr. Pray, 196, 209-210).

Respondent witnesses Eric Huttenlocher and Rick Brighenti both testified about the statements made by Jamison regarding the MBS charges. Tellingly, Rick Brighenti, who was present throughout the proceeding, is the **only witness** who did not acknowledge that Jamison had invoked the authority of the Chief Human Resource Officer in conveying the admonition, claiming instead that Jamison had told the Union that **he** (Jamison) felt it was not something to take a stand on. (Tr. 314).

⁸ The Grievance Committee is also the negotiating committee.

Judge Bogas implicitly discredited Brighenti's account of this statement, and explicitly discredited Huttenlocher and Brighenti's testimony that Jamison did not make the 1% statement at all.

C. The MBS ULP Hearing

While the ALJD accurately recounts the relevant dates with respect to the filing of the MBS charges and the hearing, Judge Bogas failed to acknowledge several critical and undisputed facts which are pertinent to his findings regarding activity protected by Section 8(a)(4), timing and a consideration of the record as a whole. Undisputed is that at the start of the MBS hearing, Counsel for the Acting General Counsel moved to amend the complaint to seek a remedy providing for reinstatement and backpay for two employees who had been disciplined for safety violations. (Tr. 621-623, Brighenti).⁹ Throughout the MBS hearing, Respondent contended that these disciplinary actions were unrelated to MBS, and instead, were based on Respondent's prior implementation of its Procedure for Corrective Actions for Safety Violations and Work Instructions for Corrective Actions (herein "Safety Discipline Procedures") which had allegedly been implemented in September 2009. As such, the lawfulness of the implementation of the Safety Discipline Procedures became a primary issue, including the question of whether the issue was barred by Section 10(b) of the Act. Brighenti admitted in testimony that he understood *at the time of the MBS hearing*, that the Safety Discipline Procedures had become an issue. (Tr. 309, 621-625 Brighenti).

At the MBS hearing, Leon Garfield testified that the first time anyone from the Union had seen a copy of these Safety Discipline Procedures was two weeks before the

⁹ See also n.4, *supra*.

MBS hearing began, at a grievance meeting with Brighenti, and that Brighenti had admitted in that meeting that the policy had not actually been implemented at Lyndonville. Brighenti disputed Garfield's testimony on this point at the MBS hearing, and *continued to contradict it during the hearing for this proceeding.* (Tr. 622-623; GC 20). Additionally, due to the change represented by the Safety Discipline Procedures, the past practice with respect to discipline over safety violations was a critical aspect of the MBS case. (Tr. 628-629; GC 21). At the MBS hearing, Garfield's extensive database documenting the historical treatment of safety violations was admitted into the record as proof of that past practice. (GC 21).

Additionally, the Judge failed to find that all of the laid off employees were members of the Union pursuant to a union security clause, or to acknowledge the significance of the role of Garfield and the Grievance Committee as their representative.

D. The Announcement of the Layoff Decision Immediately After the MBS Hearing

At 9:30 a.m. on the Monday following the MBS hearing, Rick Brighenti sent an email to his boss, Keith Koski, advising of his intention to implement a layoff of 7 people, effective one week hence. Importantly, this email was the *first* document of any kind by or between Respondent's managers or supervisors that references any need or consideration of a layoff.¹⁰ Brighenti admitted that he did not "finalize" his decision to layoff until that date.

Supervisor Sean Jewel testified that in "mid February," Brighenti directed that he draft a scheduling plan to operate the facility with up to ten fewer people. (Tr. 512). He worked on the document for "several days." The completed version, consistent with

Brighenti's email to Koski, sets out the elimination of seven employees, and specifically includes information showing that Garfield's position would be eliminated. (Tr. 534, 578-579, Jewel). Respondent's late-provided "metadata" shows the final version of the schedule was saved and printed on February 18. Since the schedule took several days to complete, and he was directed to do it in "mid February," Jewel has essentially admitted, while trying very hard not to, that the layoff was directed immediately following the MBS hearing.

Brighenti was working out of Respondent's Greenfield, MA plant on the day the Grievance Committee was advised of the layoff via conference call. In that call, Garfield and Pray "heard" for the first time Brighenti's claim that there had been a drop in orders, information that was met with disbelief.¹¹ Respondent asked Garfield for permission to post a notice soliciting volunteers for the layoff, in lieu of involuntary layoffs.¹² The Union agreed.

E. Brighenti's Claimed Explanation for the Layoff

The Judge found that Respondent introduced sufficient evidence that the layoff was motivated by business conditions to rebut any prima facie case.

Rick Brighenti was the Plant Manager responsible for the layoff decision. He identified Respondent's Exhibit 1. (Tr. 245).¹³ He repeatedly referred to RX 1 and the

¹⁰ Counsel for the Acting General Counsel's complaint did not allege that the 32-hour work weeks were unlawfully motivated, as they were viewed to be a reasonable response to a mild fluctuation in orders.

¹¹ See GC 15; Tr. 114, 155 (Garfield); Tr. 198 (Pray).

¹² This is permitted under Article 8.02 and 8.022 of the contract. (See GC 3, p.7-8). Moreover, Brighenti testified that he did it because he didn't want to retain people who weren't interested in being there. (Tr. 281). Thus, there is no basis for the Judge's determination that Respondent's adherence to this provision detracts from the evidence of discriminatory motive.

¹³ Q I'm going to show you what I've marked for identification as Respondent's Exhibit One
You made reference to incoming orders, well first of all, can you tell us what this document is, Respondent's Exhibit One? (Respondent Exhibit One identified)

figures contained therein during his testimony (Tr. 245, 248-260). At one point, he specifically relied on the inaccurate data in RX 1 to dispute the testimony of Counsel for the Acting General Counsel's witness.¹⁴ He was asked specifically how he reacted to the (alleged) incoming order levels for the time period from September 2010 through February 2011, as reflected in RX 1, as he was learning about it. (Tr. 257-258).¹⁵ He

A The second page is graphical representation of some of the data that occurred on the first page. And it's essentially a month by month summary from January '08 to September '11, of the factor orders creating the orders to the facility.

14 Q Okay. There's been some testimony in about 2011 that references were made to 10 thousand pieces coming in per day, are you aware of any time period in which, in the, in, that you've been there in which the company ever even closely approached 10 thousand pieces a day?

A No, I'm not, and I'm looking at the actual data in front of me right now and there was no time period that, most, most of them were very significantly less than that. No, no one hit that number. (Tr. 251).

15 Q Also, looking and comparing Respondent's Exhibit One, looking at calendar year 2010, what begin happening to the incoming orders starting in say September of 2010?

A They started dropping off from where they had been. There had been a slight increase in business beginning in December of '09 that carried through, through August of 2010, and then we started to see a aggregation in that, the next couple of months.

Q Was there a time period when this, well, when that drop off first began to happen what if anything did you do from a management standpoint to monitor the situation?

A Well, we kept, I kept a close eye on it. And I took a look at, at the day the, in November and December time frame when a good chunk of those orders are going to be due. November's has several holidays in it, as well as in Lyndonville a significant, a lot of vacation and calling time being with the rifle/deer season up there. There's a lot of people do it. So, that was already a significant time by the month of November.

In the month of December, in that particular year, also December tends to be a higher vacation time period. There's a holiday, at least one in the month, as well as that particular year we had a shutdown for the period between Christmas and New Year's. So, there was some essential time out of the, out of those particular months.

Q What if anything looking at these two charts, Respondent's Exhibit Nine and Respondent's Exhibit One, what if anything began happening in January, would anything begin happening in January that caused concern?

A Yeah, the business, the business incoming orders significantly dropped for January.

Q And if we look at the Respondent's Exhibit One, and if you look at the actual data sheet as opposed to the graph, it indicates how many pieces came in, in January of 2011?

A It's 51,149.

Q And do you ever recall it being that low previously while you were there?

A No, that was one of the, that was a very, that was the lowest number in the time period that I was with the facility. (Tr. 248-249).

was also asked to describe how the January 2011 incoming levels compared to other years.(Tr. 258-259).¹⁶

Brighenti was intimately familiar with the business records reflecting the *actual* incoming orders levels that evolve on a daily basis, and closely monitors them through receipt and review of daily copies of the “Daily Numbers Reports.” (Tr. 444).

F. Respondent’s Subsequent Disavowal of the Documentary Evidence Offered to Support its Defense.

Following the close of the hearing, Counsels for the Acting General Counsel and the Charging Party pointed out in their Post-Hearing Briefs that the information contained in RX 1, the summary exhibit prepared for the hearing, and referred to repeatedly by Brighenti in his testimony was inconsistent with the source documents (RX 18) and not accurate. Most importantly, the *critical claims* that a significant decline in incoming orders extended from September 2010 through February 2011 is contradicted by the month’s–end Daily Numbers Reports contained in RX 18, and the incoming information for January 2011, the month of the “historic low” is absent. Importantly, unlike RX 1, which is not a business record, and not used in the ordinary course of business, the Daily Numbers Reports *are* routinely distributed and relied on by Brighenti (Tr. 444).¹⁷

In response to this explosive post-hearing revelation, through a conference call with the parties, Counsel for Respondent admitted that the figures reflected in RX 1 were wrong. (ALJD p. 6, n. 6). These discrepancies render Respondent’s primary

¹⁶ *Id.*

¹⁷ It is also noteworthy that Brighenti was the *only* witness to testify about the decline in orders on a first-hand basis. Neither Sean Jewel nor Martial Major made any claim that they were aware of the decline. Jewel made no assertions corroborating that he had observed the decline. Nor did Jewel even deny that he had been asked in a lead board meeting about the decline.

claim, that there was a drop in orders for January 2011, highly suspect, as well as unsupported.¹⁸ They are also a devastating blow to Brighenti's credibility.

G. The Record Evidence Shows There was No Ongoing Decline in Orders Before the Layoff

Judge Bogas made several findings regarding Respondent's business at the facility that are unsupported by the record. These include that Respondent had established that there was a falloff in orders at Respondent's facility in early 2011. (ALJD at p. 6, lines 15-22, p. 18, lines 20-24). The Judge further found that "[a]fter posting favorable monthly variance-to-plan figures from June to September 2010, Lyndonville began to have unfavorable performance, beginning in October 2010 and continuing through May 2011." (ALJD at 6, lines 10-14).

The measure of available work is gauged through the number of "incoming orders" – which are the requests for product to be manufactured. (Tr. 469). As noted, Brighenti and all supervisors track these numbers daily and month-to-date, by use of a "Daily Numbers Report."¹⁹ A final "month-end report" is reported for the final day of each month, and maintained as a business record. (Tr. 457; RX 18).

The chart below presents the relevant information **drawn from the underlying source documents** regarding the flow of orders in a form that is useful for purposes of the questions presented.²⁰ (Months in which layoffs occurred are in **bold**):

¹⁸ RX 1, is purported to summarize reports of Respondent's "Daily Numbers Report," which is Respondent's RX 18. Mr. Major described, at Tr. 457-459, how the figures on RX 1 correlated to RX 18. However, a comparison of the numbers reveals that beginning with January 2010, through February 2011, the numbers contained in RX 18 ARE NOT THE SAME as the numbers in the summary document that is RX 1. Particularly troubling is THAT THERE ARE NO FINAL FIGURES AT ALL for the month of January 2011, the critical month at issue for purposes of Respondent's defense.

¹⁹Tr. 444, Martial. Much of this information is then passed on to employees at the daily "lead board" meetings between supervisors and hourly staff (Tr. 28-29, Brighenti; Tr. 158-159, Brousseau.; T. 114, Garfield.).

²⁰ This reflects the number of incoming orders, rounded to the nearest thousand, as reflected in RX 18. The numbers in bold reflect months in which layoffs occurred.

	JAN	FEB	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPT	OCT	NOV	DEC
2008	109	111	118	90	108	117	115	138	137	141	86	89
2009	83	64	68	68	66	80	55	91	85	92	71	65
2010	94	104	162	96	127	127	101	116	72	86	81	79
2011	???	97	83	75	64	196	70	66				

Viewed in this format, it is easy to discern that although there was a decline in orders in September 2010, by November 2010 the decline had reversed itself, such that in both November and December 2010, incoming orders were actually **higher** than the prior year.²¹ A rise in orders in November and December is particularly meaningful, given Brighenti's testimony that the lead time between an order being received, and actually put to the floor for creation is often 8 weeks. (Tr. 250). Additionally, November is prime vacation month due to hunting season, and December 2010 had both vacations/holidays, and a mandatory one week shutdown, so strong orders in November and December 2010 will translate into work to be done in January and February 2011. Nor does the record support that there was a significant decline in orders during January or February. There are no underlying documents for the critical month of January 2011. The incoming orders for February 2011 were 97,000 – significantly higher than in November and December 2010; higher by 30,000 orders compared to the last month that layoffs were implemented (May 2009, with 66,000 orders), and only 7,000 fewer than February 2010.²² Moreover, the incoming orders for

²¹ Between November 2008 and May 2009, a major realignment took place, during which over 40 employees were laid off. Between May of 2009 and December 2010, there were several months where orders were lower than the final months of 2010, yet no reduction in force was taken during that time.

²² And also 40,000 higher than the number attested to by RX 1.

any month beyond February 2011 are *irrelevant* to explain the timing of Respondent's decision in February.²³

Moreover, the undisputed testimony of employee witnesses Garfield, Brousseau, and Pray was that in the weeks leading up to the February layoff the level of work was high. At the daily lead board meetings, the amount of daily incoming pieces of work announced by the shift supervisor had been high, the amount of work waiting "next to the machines" was substantial, and the level of overtime had been consistently high for some time. (Tr. 113-115, Garfield; Tr. 160-161, Brousseau; Tr. 197-198, Pray; GC 5). Brousseau testified that there was so much work that the question of recalling laid off employees was raised at one of the lead board meetings, and that Sean Jewel had indicated that he and the other supervisors had been asking Rick Brighenti the same question. (Tr. 161). Pray's testimony corroborates this. (Tr. 198). Employee witnesses recalled that in the same week that the layoff was announced, they were asked to work on the President's Day Holiday, which is paid at two and a half times the normal rate of pay.²⁴

Further still, no witnesses corroborate Brighenti's testimony about the decline in orders. Despite Jewel being called to the stand, he did not corroborate any knowledge or observation of a drop in orders.²⁵ Similarly, he was never asked, nor did he ever dispute the observations from employees about his statements in the lead board meetings, or the amount of work available. (Tr. 511-573). Their testimony is therefore

²³ The ALJ found that "during the first half of 2011, the orders dropped again." However, since the layoff occurred by February, any records reflecting orders that were made *after* February are irrelevant for purposes of determining a *decision made in February*.

²⁴ See GC 3, p. 13, (Article. 12.03).

²⁵ The only exception to this is his report that when Brighenti told him of the layoff, Brighenti told him it was due to "low incoming".

undisputed in the record on these critical points, and the Judge erred in failing to credit it.

Perhaps more importantly, the numbers in the chart above were **not** the numbers that Respondent relied on at hearing to justify the layoff. Rather, the numbers that were offered to support the layoff decision – and specifically testified to as accurate by Brighenti - are reflected in the chart below.²⁶

	JAN	FEB	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPT	OCT	NOV	DEC
2008	109	111	118	90	108	117	115	138	137	141	86	89
2009	83	64	68	68	66	80	55	91	85	92	71	65
2010	<i>84</i>	<i>85</i>	<i>94</i>	<i>74</i>	<i>97</i>	<i>106</i>	<i>71</i>	<i>90</i>	<i>65</i>	<i>67</i>	<i>74</i>	<i>62</i>
2011	<i>51</i>	57	83	75	64	196	70	66				

The disparity between the two sets of numbers is striking, particular as it relates to key elements of Respondent’s defense – an ongoing drop in orders beginning in September 2010, historically low incoming orders in January 2011, and the absence of any turnaround by the time of the layoffs. The significance on the credibility of Respondent’s asserted defense of these discrepancies was not even considered by the Judge.²⁷ It should have been.

H. Brighenti’s Layoff Determination was Unaccompanied by any Careful Consideration or Explanation of How it Would or Did Improve Plan Performance

Koski explained that when a Plant is projected to miss its variance targets, his expectation is that the Plant Manager will make a decision that is “well thought out, [and] well planned to meet our variance numbers.” (Tr. 382, Koski; Tr. 369, Brighenti). In short, the best approach will require careful consideration of all factors at play.

²⁶ The numbers that are different are italicized, and shown in a larger font. **Bold** continues to represent layoff months.

²⁷ The only reference made to it is at p.6, n.6.

Several of Brighenti's emails regarding the plant's financial status reflect his ability to plan towards the variance numbers. (RX 6). Brighenti acknowledged that layoffs are only one way to take costs out of the facility, and that reducing overtime is another option. (Tr. 344, 351). The high level of flexibility offered by the collective-bargaining agreement allows the Employer to move employees as needed at the facility.²⁸

Employees are assigned to "departments," not individual machines, and are expected to operate any of the machines in their department. (GC 4, Appendix B, p. 29). A number of employees have long tenure with Respondent, and the record reflects that a number of employees are trained to work in a number of departments.²⁹ All of these facts combine to allow Respondent the flexibility to quickly reduce overtime as a means in turn of quickly lowering costs and improving "plan to variance" performance.

Despite these realities, Brighenti admitted that in arriving at the layoff decision, he considered the level of incoming orders as reflected in RX 1, but never considered overtime costs, or the possibility of their reduction as part of his decision making process. (Tr. 275-278, 324). These facts are undisputed in the record, and should have been considered by Judge Bogas to further support an inference of animus.

I. The Past Practice was That Layoffs Occurred In Conjunction with Sustained Drops in Orders, and a Corresponding Reduction in Overtime.

Judge Bogas properly found, at its heart, improving plan performance requires that product be manufactured more cheaply. (ALJD at p.6, lines 6-9). Where there remain available product orders to maintain employment levels, an immediate reduction

²⁸ Article 22 of the contract permits Respondent to temporarily transfer an employee to any department where he or she is needed on a short-term basis. (GC 4, p. 23).

²⁹ The record includes several references to Respondent's use of this practice. (Tr. 204, Pray)(shipping transfers), (Tr. 118, Garfield) (inspection transfers).

in labor costs will be achieved through a reduction in overtime. This is particularly true given that Respondent is contractually required to continue paying health benefits for three months following a layoff.

Indeed, the evidence regarding past layoff practice is consistent with both the contract language – under which layoffs are only to occur for *lack of work*, and with common sense.³⁰ Thus, both logic and practicality compelled that the first step in responding to either a drop in orders or poor variance performance was to bring about a planned reduction in unnecessary and expensive overtime, which does not implicate any contractual obligations, before reducing the straight time, which does. The undisputed record testimony establishes that this was the past practice. Witnesses Garfield, Brousseau, and Pray, all described that in prior layoffs, there was very little work on the floor, and overtime was way down. Brousseau, Pray, and Garfield had worked through prior layoffs, and in those cases there had been indicators on the floor that the work was declining, and that a layoff was in store. Dave Brousseau's undisputed testimony was as follows: "usually before layoffs people are not working any overtime and, you know, people don't have the work beside their machines, and work is slow and the main bodies usually can tell about a week or two before that there's going to be a layoff because there's not that much work on the floor." (Tr. 160). Pray explained, "In the past, you know, the layoffs, you know there's going to be a layoff coming because the work slows down, the overtime shuts off and you just know it's just a matter of time before it's going to happen." (Tr. 197). Garfield explained that in prior layoffs, people "were running out of work on the floor" and that people would be

cleaning for hours at a time, instead of the normal 10-15 minutes at the end of the day. Additionally, during prior layoffs, employees and the Union were notified in advance that a layoff was being planned. (Tr. 98-100).

Respondent's overtime records corroborate the employees' testimony concerning overtime levels at times of layoffs prior to February 2011.³¹ The chart below summarizes the rates of overtime from late 2008 through April 2011:

	JAN	FEB	MARCH	APRIL	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
2008										3.70	11.10	10.00
2009	2.76	3.82	4.63	3.10	6.58	5.24	5.36	5.77	5.22	6.44	12.52	6.09
2010	5.29	9.58	10.67	10.88	11.27	12.52	13.01	13.48	12.59	12.75	14.64	14.15
2011	13.41	10.88	6.27	14.06								

These records also demonstrate that, contrary to Judge Bogas' finding, the February 2011 layoffs did not occur in circumstances similar to the prior layoffs.³² The overtime levels for November and December 2010 do not detract from this, given Brighenti's testimony about the high amount of vacations during that time period, as well as the planned shutdown of the facility in December. Accordingly, given both the testimonial and documentary evidence, the Judge's finding that the circumstances of the 2011 layoffs were similar to those in which Respondent had previously implemented layoffs is clearly contrary to all the relevant evidence.

³⁰ Under Article Five (Management's Rights) and Article 8 (Seniority) of the collective-bargaining agreement between the parties, Respondent is permitted to layoff "due to lack of work." The determining factor in selection for layoff is the length of continuing service. (GC 3, p.5, 7).

³¹ These monthly overtime rates are taken from GC 5, by looking at the "Total Mtd%" for the last day of each month in GC 5. (See also Tr. 48). Brighenti explained that November and December are months with significant productive time lost due to holidays, hunting season, and a December shut down between Christmas and New Year's. (Tr. 258). November 2008 also reflects higher overtime rates, and there is no reason to believe it is not for the same reason.

³² The Union did not list a unilateral change theory of a violation in its initial charge, and it was not investigated. Moreover, RX 18 was not provided as part of the investigation of the charge.

At Lyndonville, the period from June 2010 through April 2011, represents ten months of consistently high overtime rates, with only a slight exception in March of 2011. The contract allows Respondent to utilize “short work weeks,” and Brighenti did so for four weeks in March. Accordingly, a reduction of overtime in March is to be expected, given that Respondent also reduced straight time hours across the board. It doesn’t make sense to reduce straight time hours while continuing to maintain high overtime levels.³³

The overtime data also contradicts Brighenti’s contention that it is Respondent’s practice to maintain overtime levels “between 8 and 15%.” Judge Bogas improperly credited this assertion, since all of the relevant evidence points otherwise. If Brighenti’s contention were true, why did he not adhere to it for the majority of months between October 2008 and January 2010? Absent substantial corroboration, and given the extent to which other key testimony offered by Brighenti is flatly contradicted by record evidence, it is a claim that should not be credited. Rather, the more likely explanation is that it was an ad-hoc explanation designed to attempt to explain his continued expensive use of overtime in circumstances where such use would seem unwarranted.³⁴

J. The Judge’s Finding of a Causal Link Between “Unfavorable Plan Performance” and “Layoffs is Misleading”

Judge Bogas found that, “since early 2008, Respondent has repeatedly resorted to layoffs at times when the Lyndonville facility’s variance-to-plan performance became

³³ That would be like closing a low interest line of credit so that you could open a high interest pay day loan. Moreover, if Respondent had continued with high levels of overtime, that would have cast doubt on the use of the short work weeks. As noted, Counsel for the Acting General Counsel did not allege that the use of short work weeks violated 8(a)(3) or (4) in the complaint.

³⁴ In this regard, it would be consistent with his testimony that it was Jamison who felt that the Union should not take a stand on MBS, and his testimony regarding the incoming order levels at the end of 2010.

unfavorable and/or when orders were low.” (ALJD p. 10). The Judge’s finding regarding prior layoffs improperly suggests a causal relationship between poor plan performance and layoffs when no such link exists. Judge Bogas creates this artificial link by noting that layoffs occurred during “unfavorable” plan months, and that Respondent “reacted” by laying off. Given that Respondent had unfavorable plan months in 43 out of 51 months, creating a correlation between unfavorable plan months is like finding that layoffs happen when the sun is out. The Judge could just as easily have created a correlation between plan performance and *recall* of employees, since there were recalls from layoffs during unfavorable plan months of March, April, May, June, July, and August of 2008. He might also have found the opposite, that Respondent doesn’t lay off during unfavorable months, since there were nine months between June of 2009 and March 2010 when the facility had unfavorable variances and *no layoffs*.

The Judge’s findings regarding “plan performance” are misleading in other respects. First, Judge Bogas fails to acknowledge that irrespective of the amount of incoming orders to the facility, the increasingly unfavorable plan variances were also tied to the fact that from January through June 2011, the plant’s performance expectations – as reflected in “the plan” were higher than *any other time for which records were provided*.³⁵ Second, the Judge’s superficial correlation of layoffs to plan performances, without more, suggests that Respondent’s only meaningful option for improving the variance-to-plan figures is through layoffs, or that layoffs will always decrease the cost of manufacturing the product. Clearly, the more nuanced

³⁵ See RX 9, “variance per plan” figures. No meaningful explanation was ever given for this sharp rise in expectation, as reflected by the plan documents. See also Tr. 473, explaining that “an unfavorable variance” is when you have a month that is worse than plan, and a favorable variance is when you have a month that is better than plan. The plant may have produced three times what it did the month before, and increased its profitability in doing so, but if “plan” had expected you to produce four times, it is still an “unfavorable variance.”

appreciation of Respondent's past practice regarding lay offs, set forth above, is called for.

K. There is No Record Evidence That Supports the Judge's Finding that Respondent Had More Advance Warning about a Downturn in Incoming Orders

As noted, after the Hearing, Respondent's Counsel admitted that the incoming levels that Brighenti testified to were false. As discussed above, there was no significant drop in incoming levels between November 2010 and February 2011. Accordingly, it is axiomatic that Respondent could not have had "advance warning" of such alleged downturn. Moreover, nowhere in the record is any such claim made, or even advanced by Respondent on brief. It is unsupported by all of the relevant evidence.

L. The Impact of the Layoff on Labor Costs. Respondent Spent More on Wages Than it Would Have Had the Laid-Off Employees Been Retained.

Under Article 11.04 of the collective-bargaining agreement, hours worked past eight in a day are paid at time and a half, as is Saturday work; Sunday work is double time. Under Article 12.03, work on a holiday is time and a half, in addition to holiday pay, if worked. (Tr. 351; GC 3, p. 11-13). Brighenti claimed that if he had not done the layoff, it would have caused the variance to be \$50,000 to \$75,000 worse than it was. (Tr. 303-304). He offered no explanation as to how he arrived at these figures. As with many of his critical assertions, an analysis of the record evidence contradicts his claim entirely, and demonstrates instead, that if Respondent had not laid off, it would have saved almost \$35,000 in labor costs over 5 months, and gained over 350 hours of

productive labor, at no extra cost. In short, by laying off, Respondent worsened its unfavorable variance-to-plan measures.

Judge Bogas acknowledged that calculations offered by Counsel for the Acting General Counsel support this claim, but counters, “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 is discriminatorily motivated.” (ALJD p. 18, lines 42-43). This contention misses the point. Judge Bogas should have recognized that this evidence supports an inference of animus, because Respondent’s claim is that the layoffs were implemented as a means of improving the facility’s “variance to plan” performance – *which the layoffs did not do*. In this regard, it matters not that overtime rates decreased following the layoff. What matters is that if Brighenti had not laid off, *the rates – and therefore labor costs --would have decreased even more*. Moreover, as described above, Brighenti undertook no careful analysis of this before implementing his plan. Thus, Respondent’s course of action was inconsistent with its stated goal. This is circumstantial evidence of pretext, and should have been recognized as such.

Judge Bogas also cites the decrease in overtime following the layoff, in March, to counter the inference compelled above. However, as explained, given the short work weeks in March, it stands to reason that overtime would be reduced for that month, and the complaint did not alleged that the use of short work weeks in March was discriminatory. Indeed, had Respondent not laid off, March overtime would have been less. By April, the overtime rate for the month was back to 14%. Therefore, proper consideration of the record as a whole does not support the Judge’s misleading finding.

M. Respondent Needlessly Continued to Pay for Insurance Premiums for the Laid-Off Employees

Judge Bogas properly found that Respondent unnecessarily continued to pay insurance premiums for the laid off employees, but determined that because he found it to be an administrative oversight, it could not be evidence that the layoffs were not intended to reduce labor costs. This conclusion is in error. Even if it was administrative oversight, such carelessness regarding costs still supports an inference of animus, as it suggests that the stated imperative, that of driving down operational costs to improve “variance” performances, was not as important as claimed. If it were, someone would have followed up.

N. The Elimination of Garfield’s Daytime Inspection Position, Garfield’s Move to Third Shift, and The Absence of Subsequent First Shift Postings

The Judge erred in failing to acknowledge Brighenti’s prophetic explanation for the elimination of Garfield’s first shift inspector position. Brighenti was asked directly how it was that the layoff compelled the elimination of Garfield’s first-shift inspector position. His answer was “there was only going to be a need for three inspectors.” (Tr. 63). This answer is in conflict with Jewel’s, who explained that there had been no lack of inspection work on first shift.

The Judge credited that in December 2010, first shift employee John Leveque asked Sean Jewel if his duties could be transferred to third shift, and Jewel told him “no.” Following the layoff, when Leveque bid out of his position, leaving it empty, his position was posted for third shift. It is undisputed that no first shift positions were posted again until August 2011. This undisputed evidence, credited by the Judge, also contributes to the overall record evidence supporting an inference of animus.

V. SUMMARY OF ISSUES

1. Did the Judge err, as a matter of law and fact, in finding that Counsel for the Acting General Counsel failed to meet his initial burden to establish that the layoff and job elimination of mid-February 2011 were unlawfully motivated, in violation of Section 8(a)(4) and (3) of the Act?

2. Did the Judge err in finding that even if Counsel for the Acting General Counsel had met his burden, Respondent established by a preponderance of the evidence that the layoff would have been implemented even in the absence of the protected activities of Garfield and the Union?

VI. ARGUMENT

A. **The Judge's finding that Counsel for the Acting General Counsel failed in its Prima Facie Case that the Layoff and Associated Transfer Violated 8(a)(4) and 8(a)(3), Misapplies Board Law, and Misinterprets the Facts of this Case.**

1. General Principles

Section 8(a)(4) of the Act makes it an unfair labor practice for an Employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The Supreme Court has held that because Section 8(a)(4) was designed to provide and protect employee access to Board processes, it is to be given a broad interpretation, despite its narrow language. In the Court's view, the presence of the words "to discharge *or otherwise discriminate*" reflect that this was Congress' intent in enacting this section. *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972). Notably, in *Metro Networks*, 336 NLRB 63, 66 (2001), the Board, in reference to Section 8(a)(4), stated:

The Board's approach to this provision "has been a liberal one in order to fully effectuate the section's remedial purpose." *General Services*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scivener*, 405 U.S. 117, 124 (1972). Such an approach is consistent with the Court's acknowledgement that the initiation of a Board proceeding effectuates public policy and, therefore, through Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).

Applying these principles, the Board and the Courts have read 8(a)(4) expansively. See, e.g., *NLRB v. Scrivener*, 405 U.S. 117 (1972) (extending protection of 8(a)(4) to those who provide affidavit); *General Services*, 229 NLRB 940 (1977) (finding violation under 8(a)(4) when Employer refused to hire former supervisor who had previously filed ULP charges). The Board has extended these protections so as to protect not only those employees who file charges or give testimony to the Board, but also those who are closely connected to employees who take such actions. *Stationary Engineers*, 346 NLRB 336 (2006) (adopting ALJ's determination that Employer's termination of an employee "allied" with another employee who filed charges violated 8(a)(4)); *Norris Concrete Materials*, 282 NLRB 289 (1986) (violation of 8(a)(4) where employer terminated father in retaliation for actions of formerly employed son in filing charges with the Board); *Yukon Mfg. Co.*, 310 NLRB 324 (1993) (violation of 8(a)(4) where employer laid off all employees who worked on the same line as that employee's fiancé.)

Judge Bogas properly found that the test of *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is applicable to 8(a)(4) discrimination. Under this framework, the Acting General Counsel must establish that anti-union animus is a motivating factor in the decision, and then the burden shifts to Respondent to establish

it would have made the same decision in the absence of Union activity. To do so, the Acting General Counsel must establish: (1) the alleged discriminatee engaged in protected concerted activities; (2) Respondent knew about such activities; (3) Respondent took an adverse action against the employees; and (4) animus against such activity by the Employer. While this is last element is often characterized as a “nexus” or motivational link between the particular protected activity and the adverse employment action taken, such showing is not required as part of the prima facie case. *TM Group and Kimberly Grover*, 357 No. 98, slip op. at n. 2 (September 30, 2011). If Counsel for the Acting General Counsel meets his burden, then the burden shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the same action, or made the same decision, even in the absence of protected activity.

2. **The Judge Erred in Finding that Counsel for the Acting General Counsel Had not Established the Protected Activity or the Employer’s Knowledge of Protected Activity with Respect to the Layoffs.**

The protected activities and the Employer’s knowledge of such activities by President Garfield and other members of the Union’s Grievance committee are well established in the record.³⁶ The Judge recognized Counsel for the Acting General Counsel’s argument that Respondent’s layoff actions were implemented to discriminate against Garfield and the Grievance Committee because they had filed charges and given testimony under this Act. Counsel for the Acting General Counsel’s theory of the violation was that the layoffs were implemented for two reasons: to give an air of

³⁶ In addition to President Garfield, former Grievance Committee Chair John Eastman testified at the MBS Hearing. (MBS ALJD at p. 4). The statements regarding the MBS charges and MBS “not being an issue to take a stand on” were made in mid-September by John Jamison to the entire Grievance Committee, and the Section 8(a)(1) statements found by the ALJ were also made to Grievance Committee members.

legitimacy to the removal of Garfield from the first shift, a move intended to cripple his effectiveness as Union President; and to discourage unit members from supporting the efforts of Garfield and the Grievance Committee, further undermining the Union's status and ability to effectively represent the unit. An important fact overlooked by the Judge is that the laid-off unit employees were all union members, the contract contained a union security clause requiring such membership, and the MBS charge filed by the Union was part of an effort to protect employees, including those laid off, from arbitrary unilateral actions by the Employer.

The Board has long recognized that where an Employer's actions in laying off, terminating, or demoting an employee or employees are undertaken to give an air of legitimacy to actions against the true target of an Employer's unlawful motivation, the Board does not require a showing that the collaterally affected employee engaged in union or protected activities. *Pillsbury Chemical Co.*, 317 NLRB 261 (1995) (layoff of one employee as part of a scheme to mask the Employer's retaliation against another employee for providing a Board affidavit violated 8(a)(4)); *Tasty Baking Company*, 330 NLRB 560 (2000) (employer's demotion and transfer of wife of union adherent to the night shift unlawful). Additionally, the Board has found protected activity by union agents will suffice for purposes of the prima facie Section 8(a)(4) case, even where the adverse action does not involve the Union agents.³⁷ Additionally, and as argued to in the Post-Hearing Brief to the ALJ, the Board has repeatedly acknowledged that in situations where the Respondent's goal is to discourage protected activity, it is not

³⁷ See, e.g., *Newcor Bay City Division*, 351 NLRB 1034 (2007) (affirming ALJ's conclusion that actions of union representatives in filing charges and testifying satisfy protected activity element, where none of unit employees impacted by subcontracting involved in such protected activity).

necessary to demonstrate the pro-union sentiments of each affected employee. As the Board articulated in *Electro-Voice*, 320 NLRB 1094 (1996):

The General Counsel need not establish that the Respondent had knowledge of each discriminatee's particular union activity. It is well settled that unlawful motivation may be established when, as here, an employer takes adverse action against a group of employees, regardless of their individual sentiments toward union representation, in order to punish the employees as a group "to discourage union activity or in retaliation for the protected activity of some." *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985); *Davis Supermarkets*, 306 NLRB 426 (1992), *enfd.* 2 F 3d 1162 (D.C. Cir. 1993); *Rainbow News 12*, 316 NLRB 52, 67 (1995).

The Judge contends that the precedent cited above was inapplicable to the case at hand, because in those cases, the layoffs at issue occurred in the context of an organizing campaign. The Judge opines that:

[A]n organizing campaign is a highly charged circumstance, and one that an employer might expect to see as engaging the workforce as a whole, regardless of a particular employee's position regarding representation. All employees might soon have the opportunity to sign an authorization card or to vote in a representation election. (ALJD at p. 14)

He views it as "far less plausible" that an employer would implement a discriminatory layoff in the absence of such a campaign, and determines that on that basis, the above precedent doesn't apply. His opinion ignores the fact that elections are also held to eliminate a union security provision (which is included in the Union's contract), or to decertify a union as the bargaining representative, and that the Board routinely is confronted by allegations that an employer has improperly withdrawn recognition based on the belief that the Union has lost the majority support of the unit. Each of these circumstances will "engage the workforce as a whole," and the Board recognizes as plausible that unfair labor practices by an employer can, and do contribute to the loss of majority support amongst employees. See, e.g., *Master Slack*, 278 NLRB 78 (1984)

(considering whether the employer's unlawful discharge of employees 10 years before a withdrawal of recognition affected employees rejection of the union). The Board also routinely confronts employers who engage in such unlawful practices in order to undermine union support, the lack of which the employer will then rely on to free itself from an unwanted bargaining obligation. Such unilateral changes typically often include the elimination of benefits and protections previously enjoyed by the bargaining unit. *Mesker Door*, 357 NLRB No. 59 slip op. (August 4, 2011). In light of such realities, the Judge's opinions are insufficient as a basis for determining that protected actions by Union leadership, on behalf of the unit, will not suffice to meet the requirement of demonstrating protected activity and employer knowledge of same, where the actions were taken to discourage the protected activity taken, and a bargaining relationship is established between the parties. The Judge cites no authority in support of his position, and the numerous cases cited above demonstrate otherwise.

The Judge cites two additional cases as support for this determination. However, each of these are inapposite, as neither involve layoffs that were alleged to have been implemented either to mask a primary target, or as a means of undermining the status of the union as bargaining representative. *Reliable Disposal, Inc.*, 348 NLRB 1205, 1206 (2006), involved an alleged discriminatee who was terminated within days of the termination of a known union adherent, and for whom there was no direct or circumstantial evidence of knowledge of union support. *Geo V. Hamilton*, 289 NLRB 1335, 1341 (1988), involved the layoff of an employee whose only protected activity was participation in protracted negotiations eleven months prior. Thus, neither of these

cases dealt with an attempt by the employer to weaken the union by undermining its effectiveness, or to mask an alternate goal of rendering impotent the union leadership.

Finally, where employees have enjoyed an established past practice, the Board has found the employer's unilateral elimination of such a benefit to be inherently destructive of employees' Section 7 rights, even absent evidence of union animus. *Covanta Energy Corporation*, 356 NLRB No. 98, Slip. Op. (2011) (employer's elimination of corporate bonus and annual wage increase for unit members violated 8(a)(3)); *Arc Bridges Inc.*, 355 NLRB No. 199, slip op. (2010) (unilateral elimination of inherently destructive of employee rights) (employer's decision to withhold established wage increase violates 8(a)(3)). Here, the employees have enjoyed the established past practice wherein layoffs are implemented only when there is a lack of work, and Respondent's elimination of this practice is destructive of their Section 7 rights.

Accordingly, Counsel for the Acting General Counsel has clearly met the first two prongs of the *Wright Line* test, and the Judge's finding to the contrary should be reversed.

3. **The Judge Erred in Finding that Counsel for the Acting General Counsel had Failed to Show Animus or Some other Motivational Link Between the Layoff and Interrelated Job Elimination and the Protected Activities at Issue.**

Judge Bogas was in error when he determined that Counsel for the Acting General Counsel could not meet the initial showing of unlawful motivation based on an absence of direct evidence that Respondent sought to blame the Union for the layoffs. (ALJD p. 14, 11-12). The Board has long recognized that direct evidence of unlawful motivation is rarely available, and that discriminatory motive may be demonstrated by

circumstantial evidence based on the record as a whole.³⁸ To support an inference of unlawful motivation, the Board looks to such factors as timing, disparate treatment, shifting and pretextual reasons for the actions taken,³⁹ deviations from past practice, and evidence that the stated reasons for an action are determined to be pretext, or false.⁴⁰ Additionally, the Board will routinely find animus where an employer/respondent has made Section 8(a)(1) statements reflecting animus toward the protected activities at issue.

As described more fully below, the totality of the circumstances in this case, including the timing of Respondent's actions, evidence that that the stated reasons for the layoff were false or otherwise pretextual, the shifting nature of Respondent's reasons for the layoff and job elimination, and evidence of a deviation in past practice concerning layoff, readily show that Counsel for the Acting General Counsel met his initial burden. Therefore, the burden shifted to Respondent to show that it would have implemented the layoff, and eliminated Garfield's job in the absence of protected activities. Moreover, animus is found in the coercive statements made before and after the layoffs, as they reflect animus towards the protected activities of the Grievance Committee.

³⁸ *Flour Daniel*, 304 NLRB 970, 970 (1991), enfd. 976 F. 2d 744 (11th Cir. 1992); see also *Real Foods Co.*, 350 NLRB 309, 316 (2007) (unlawful motive demonstrated not only by direct, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action).

³⁹ *Shattuck Denn Mining Corp. (Iron King Branch)*, 151 NLRB 1328 (1965), enfd. 362 F.2d 466 (9th Cir. 1966). The court reasoned that a finding of pretext allows an inference that another motive prompted the adverse employment action - a motive the employer wished to conceal, i.e., an unlawful motive. 362 F. 2d at 470.

⁴⁰ *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Tubular Corp. of America*, 337 NLRB 99, 99 (2001); *Techno Construction*, 333 NLRB 75 (2001); *Case Farms of North Carolina*, 353 NLRB 257, 260 (2008).

a) The Judge Erred in Finding the Timing of Respondent's Actions Insufficient to Show Animus Between the Negative Employment Actions and Garfield's Protected Activities.

Judge Bogas found the timing of Respondent's actions was insignificant. He determined instead, that Counsel's selection of that date was "self-serving" and was chosen merely for its convenience in linking the Employer's actions to the Union's protected activities. This is an astonishing conclusion, unsupported by the statute or Board and Court rulings.

To begin, the Judge's conclusion fails to consider long-standing Board precedent recognizing the elevated significance of an employee giving testimony that contradicts testimony of his or her supervisor, or is adverse to the employer's interest, thereby creating risk to the employee's own interests.⁴¹ The undisputed record evidence shows Garfield's significant contributions adverse to Brighenti's interests at the MBS hearing. These included the admission of Garfield's data base covering eight years of disciplinary records,⁴² and his testimony disputing that of Respondent's that the Union was given proper notice of the Safety Discipline Policy. Importantly, Brighenti twice contradicted Garfield's testimony regarding the Safety Discipline Policy – first in the MBS hearing, and a second time, at the hearing in this case when he was asked if he recalled Garfield's testimony. (Tr. 623). That Brighenti continued to contradict Garfield's version of events revealed the powerful resentment that Garfield's testimony evoked. Moreover, Judge Bogas erred in failing to find that the MBS hearing expanded the issues in controversy, or that such expansion would indeed have been "troubling" to

⁴¹ See, e.g., *Flexsteel Industries*, 316 NLRB 745 (1995), affirming the long recognized view that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests."

⁴² (GC 21, GC 39 in the MBS hearing)

Brighenti. Brighenti acknowledged that at the time of the MBS hearing, he was aware of the expansion of issues. (Tr. 621-624)

Moreover, the Judge's determination is striking in its disregard for the explicit protections of Section 8(a)(4). Section 8(a)(4) specifically lists "giving testimony under this Act" as protected activity. The Judge's conclusion that giving testimony is indistinguishable from the range of protected activities engaged in by Garfield over the course of the MBS dispute, utterly fails to honor the language of the statute, or the directive from the Supreme Court that the section be given broad interpretation. This was a significant error in the application of Section 8(a)(4) law, and his determination on this issue should be reversed.

Judge Bogas cites *Newcor Bay*, 351 NLRB 1034 (2007), as authority for his determination. However, *Newcor Bay* is clearly distinguishable. In that case, the ALJ determined that the General Counsel had failed to establish a motivational link between the employer's announcement that it would subcontract certain unit work and the Union's protected activity of filing an unfair labor practice charge.⁴³ In that case, the General Counsel sought primarily to rely on direct evidence – statements allegedly made by the General Manager indicating that the subcontracting decision had been in response to the charges being filed, and secondarily on timing. The ALJ in that case specifically discredited the General Counsel's witnesses on the critical direct evidence.

Moreover, the timing argument in *Newcor* was much more convoluted than the argument in this case. It was based on the proximity of the employer's subcontracting announcement to the issuance of General Counsel's complaint. However, there, the

temporal proximity had been four weeks, a much longer period than in the instant case. Further, a timing argument based on date of issuance of the complaint is much weaker; the issuance of the complaint was not an act performed by any Union agent, nor is it an act explicitly mentioned in Section 8(a)(4). Further still, the ALJ in *Newcor* observed that if the timing of the subcontracting decision was viewed with respect to the Union's action of filing the charge, the temporal link was more than three months. Under such circumstances, the Judge determined that deciding whether the issuance of the complaint or the filing of the charge would bother the Employer more, involved conjecture, and the Judge declined to draw an inference from the timing. Most importantly, the Board's affirmance of the ALJD was based specifically on the Judge's credibility findings, *not the timing determination*. *Newcor Bay*, 351 NLRB 1034, n.4 (2007). Accordingly, *Newcor* simply does not stand as precedent for the Judge Bogas' timing determination in this case.

Additionally, the Judge erred in failing to conclude that the timing of the layoff decision post dated the hearing. Brighenti *admitted* that he did not "finalize" his decision until after the hearing. (Tr. 55). Jewel's testimony establishes that he worked on the manning plan over several days (Tr. 534), completing the first draft on February 17, which is corroborated by RX 23.⁴⁴ While "several" days does not establish a fixed number, it is clearly understood to mean less than seven, and all the relevant evidence establishes that it was less than seven. (Tr. 534). On these facts, a finding should be made that the final decision to layoff was not made until after the hearing. Such a

⁴³ As discussed below, the subcontracting at issue in that case affected unit employees, *not* the Union leadership that had been involved in the ULP charges or hearing, and the Judge readily acknowledged that the protected activity element of the General Counsel's case had been met, with Board approval.

⁴⁴ This is the metadata admitted into the record via post-hearing motion.

finding provides further support to the overall record evidence supporting an inference of animus.

For all of these reasons, Judge Bogas' determination that the timing of the issue was mere convenience, and insufficient as a basis to establish animus for the prima facie case, should be reversed.

b) The Judge Erred in Failing to Consider the Totality of the Circumstances, Including the Evidence that Respondent Deviated from Past Practice in the Layoffs.

Given the timing of the protected activity and other established issues, it was incumbent on Judge Bogas to give proper consideration to the record as a whole, including factors typically viewed by the Board in assessing whether an inference of unlawful motivation can be drawn. The Board has found that a deviation from past practice in implementing an adverse action supports an inference of unlawful motivation. *Embassy Vacations Resort*, 340 NLRB 846, 848 (2003).

Here, the undisputed testimonial and record evidence regarding the amount of available work and overtime levels establishes the change from past practice respecting layoffs.⁴⁵ Respondent's layoff decision in February 2011 deviated from this practice. The undisputed evidence of this deviation should have been considered in further support of the inference of unlawful motivation.

Importantly, Respondent relied on the figures in RX 1 to explain the layoff decision, not only in its Opening Statement, and through Brighenti's testimony, but also in the Post-Hearing Brief.⁴⁶ Inexplicably, Judge Bogas did not discuss at all Brighenti's reliance on the "incoming" levels reflected in RX 1, or his claims respecting the figures

⁴⁵ See Sections IV (G) and IV (I).

⁴⁶ See *Respondent's Post-Hearing Brief*, at p.11, 15-16).

contained in the documents. Instead, Judge Bogas determined that there had been a drop in incoming levels based on the figures in RX 18, an argument that was never advanced by Respondent.⁴⁷

c) The Judge Erred in Failing to Consider that the Employer's Stated Defense Was False, and Therefore Pretext, to Find an Inference of Unlawful Motivation as Part of Counsel for the Acting General Counsel's Prima Facie Showing.

In addition to timing and a deviation from past practice, the record offers still more basis to infer that Respondent's actions were unlawfully motivated – the lack of truthfulness in Brighenti advancing the figures in RX 1, as well as the shifting nature of Respondent's defenses. It was an explosive post-hearing revelation that the underlying business records demonstrated strikingly different incoming order figures than those testified to by Brighenti as the basis for the layoff decision. Subsequent to this revelation, Respondent acknowledged that the figures relied on and testified to, were false. In addition to completely undermining Brighenti's credibility as a witness, this admission amounts to a shifting defense, an acknowledgement that the initial asserted basis was not relied on. Based on applicable precedent cited above, it was error for the Judge not to consider this evidence, as it lends substantial support to the strength of the Acting General Counsel's prima facie case.

d) The Judge Erred in Concluding that Jamison's Statements During September Negotiations Did Not Provide an Inference of Unlawful Motivation.

The Board will also find animus based on statements made in violation of Section 8(a)(1), particularly where the statements evidence animus toward the protected activity

⁴⁷ ALJD p. 6, n. 6

that is viewed as prompting the retaliatory actions. *TM Group and Kimberly Grover*, supra.

The Judge concluded that the “gist” of Jamison’s argument in advising the Grievance Committee that Lyndonville was 1% of Kennametal, and that, according to the Chief Human Resource Officer, “MBS was not an issue to take a stand on,” was that since MBS was a corporate-wide initiative, it was not something that the Lyndonville employees’ bargaining representative could expect to stop. Therefore, at most it was a “threat of futility.” (ALJD p. 16).⁴⁸

Judge Bogas’ spin on these statements discounts the full import of the Union’s charges – which was to insist that Respondent properly respect the Union as the certified bargaining representative. By such Union actions, Respondent faced the possibility of being required to *rescind* this important policy at Lyndonville, a fact that was surely not lost on Respondent. By referencing the “top” HR officer in a global corporation, while simultaneously pointing out that Lyndonville was 1% of Kennametal, Jamison was clearly reminding them who had the power in the situation, and that the Union’s pursuit of this was at their peril against such a formidable force. Moreover, contrary to the Judge’s contention, an employer does not have to specifically “allude to any type of adverse consequence” (ALJD p. 16, line 27) to be an unlawful threat – the Board has long recognized that an implicit threat of unspecified reprisal violates Section 8(a)(1).⁴⁹

⁴⁸ The Judge does not indicate whether by this he meant a finding that such a statement would have been a statement of futility in violation of Section 8(a)(1) had it been pled as within 10(b).

⁴⁹ See, e.g., *Ardsley Bus Corporation*, 357 No. 85 slip op. at 3 (August 31, 2011) (reversing ALJ to find 8(a)(1) statement of futility and threat of unspecified reprisal, where in Response to the Union’s grievance, Employer said “You are a union person....Now, you learn ... that I have the power here. I am your boss. I [have] the right to pay you your salary. Now, I do whatever I wantI have the power here”.

Additionally, the Judge's interpretation is improperly dismissive of the importance of the Section 7 right at issue. The reason the Board finds statements that bargaining will be futile violate Section 8(a)(1), is because such statements undermine the role of the bargaining representative. The Union's charge was a means for insisting that Respondent cease such undermining conduct, and Jamison's comments carried with them the implicit threat of reprisal unless the Union "backed off." Clearly, Garfield's conduct at the hearing in February did not heed this implicit threat. The fact that Jamison had no involvement in the decision to layoff, relied on by the Judge, is immaterial, since *Brighenti* was privy to them. Jamison's comments merely convey that Brighenti's actions were sanctioned by the highest level of Respondent's operations.⁵⁰ Therefore, Jamison's statements provide the strongest nexus possible between the layoff/job elimination and the protected activities of filing a charge and giving testimony – it utterly explains them. Therefore, Judge Bogas' finding to the contrary was error, and should be reversed.

e) The Judge Erred in Failing to Find that Fletcher's Statements That There was a "Dark Cloud" Over Lyndonville Established Animus.

Similarly, the Judge improperly found no animus in Fletcher's post layoff statements that there was a "dark cloud" over Lyndonville. This is a perplexing finding, given that he found the comments violate Section 8(a)(1), as they were made in direct reference to the protected activities of the Grievance Committee. Judge Bogas bases his conclusion on the fact that Fletcher had not yet started at the facility when the layoff

⁵⁰ Perhaps this explains the erroneous figures in RX 1, or why the "plan" calls for curiously greater performance from January to June 2011. As noted, the unfavorable variance levels in early 2011 have more to do with enhanced expectation than worsened productivity levels. Compare RX 17 with the chart reflecting incoming orders summarized in Section IV (G), above. 94,000 orders in January 2010 gets a fairly strong variance performance, yet 97,000 orders in February 2011 is highly unfavorable. The difference is the plan.

decision was implemented. However, the Judge failed to take into account that it was Brighenti who had directly schooled Fletcher in the recent history of labor relations problems. (Tr. 491, 494-495). Thus, it was not a situation where a front line supervisor completely unconnected to the decision making process was speculating without any basis in fact. Rather, he learned of the existence of the “dark cloud” that he spoke of directly from the decision maker. Given this explicit link, *Wild Oates Markets*, 339 NLRB 81, 88 fn. 10 (2003), relied on by the Judge, is distinguishable.

f) The Judge Erred in Concluding that Respondent Had Met its Burden in Establishing that the Layoff was Motivated by Business Conditions to Rebut the Prima Facie Case.

The Board distinguishes between “pretextual” and “dual motive” cases under *Wright Line*. If the Respondent’s evidence shows, and the trier of fact concludes that the proffered legitimate reason for the adverse action did not exist, or was not in fact relied upon, then the Respondent’s reason is pretextual. If there is no legitimate business justification for the adverse action, there is no dual motive, only pretext. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). Under such circumstances, the respondent-employer fails by definition to show that it would have taken the same actions for those reasons, absent the protected conduct. Accordingly, there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). See also *Bliss Clearing Niagara, Inc.*, 344 NLRB 296 (2004) (affirming finding of Section 8(a)(4) based on close temporal proximity of removal of assignment to employee testifying in ULP hearing, and discrediting rationale advanced by employer for action); *Verizon*, 350 NLRB 542 (2007) (finding Section 8(a)(4) violation based on timing and discredited claim of lack of work); *Mays Electric Co.*, 343 NLRB 121

(2004) (affirming ALJ's finding of Section 8(a)(4) based on timing and discredited claim of lack of work).

Judge Bogas concluded that the evidence failed to establish a prima facie case that the layoff was discriminatorily motivated, and that the burden did not shift to Respondent to show that it would have made the same decision absent Union (or Section 8(a)(4) protected) activity. He added, "even if I had concluded that the Acting General Counsel succeeded in making a very weak prima facie case, I would find that Respondent introduced sufficient evidence that the layoff was motivated by business conditions to rebut the prima facie case." As evidence of this rebuttal, Judge Bogas points to the purported showing regarding the poor "variance to plan" performance, and the alleged evidence that, "during the first months of 2011, there was a slump in orders for the facility."

As has been demonstrated, Counsel for the Acting General Counsel has established the prima facie case, and the burden shifts solidly to Respondent to demonstrate that it would have made the decision to layoff and eliminate Garfield's position on about February 14, 2012.

The Judge erred in finding that Respondent had met this burden. As explained above, the poor variance to plan performance is insufficient to show that Respondent would have laid off in the absence of protected activity, because there had been poor variance to plan performance for many months that did not result in layoffs, and in the past, layoffs have occurred in conjunction with a sustained reduction in overtime costs, and in circumstances where the work on the floor had "dried up."

In contrast, there were high overtime levels both pre- and post-2011 layoff, and undisputed testimonial evidence establishes that there remained significant amounts of work on the floor to be performed. While the overtime figures for March were somewhat reduced, this is attributable to the implementation of “short work weeks,” and such short work weeks were not alleged to violate Section 8(a)(4) or (3). Moreover, overtime promptly rebounded in April.

Additionally, following observations made in the Briefs of both Counsel for the Acting General Counsel and the Charging Party, Respondent acknowledged that the level of incoming orders for 2010 and 2011 advanced by its opening statement, testimony, summary exhibit, and post-hearing brief were *false*.⁵¹ Given the pivotal nature of the claim of a drop in orders to Respondent’s defense, it is impossible on this record to conclude that Respondent met its burden of showing that it would have implemented the layoff, or the associated job elimination. Accordingly, Judge Bogas’ finding that Respondent has demonstrated a “slump in orders” based on RX 18⁵² was a finding based on assertions not made by Respondent. Moreover, in relying on the figures in RX 18, rather than those advanced by Respondent at hearing, the Judge has created an argument on Respondent’s behalf. This is improper. See *Inland Steel Co*, 257 NLRB 65, 68 (1981) (“The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.”)

Lacking such documents, there is nothing left of Respondent’s defense except the email of January 31, wherein Brighenti speaks of a “\$59 K miss” and developing “a

⁵¹ Due consideration should also be given to the fact that Brighenti was the *only* witness to claim any decline in incoming orders. Jewel did not corroborate these assertions, other than to say that “I was given instruction by Rick Brighenti that we were going to potentially have a layoff due to low incoming and we needed the plant to operate the plant effectively and productively.” Tr. 512-513.

plan to cover within the quarter.” There is no urgency to this email, no mention of bloated labor costs, no mention of fear of an ongoing drop in orders, no calculations, nothing that meaningfully suggests that Brighenti viewed the situation as of January 31, 2011 called for a layoff.

The charge was filed on March 3, 2011. Brighenti advanced false testimony on the seminal aspect of Respondent’s defense, a drop in incoming orders. His testimony on all other points is utterly unreliable. Any evidence offered by, or through, Brighenti that postdates the filing of the charge should be given very little weight. Against the strength of Counsel for the Acting General Counsel’s case, this is not nearly enough to establish that Respondent would have laid off, or eliminated Garfield’s position, in the absence of the significant protected activity at issue.

Given that Counsel for the Acting General Counsel has met its prima facie showing under *Wright Line*, and for all of the reasons advance herein, it is urged that the Board find that Responded violated Sections 8(a)(1), (3) and (4) as alleged in the complaint.

VII. CONCLUSION and REMEDY

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests the Board find that Respondent violated Sections 8(a)(3), (4) and (1) of the Act in the manner described in the Complaint.

In remedy of these violations of the Act, Respondent should be ordered, among other things, to cease and desist from engaging in any like or related conduct which interferes with, restrains or coerces employees in their Section 7 rights. Respondent should further be ordered to make whole employees Roberta Borg, Steve Tanner, Harry

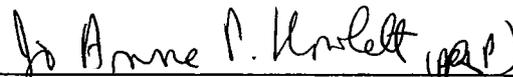
⁵² ALJD at 6, n.6.

Williams, Gerald Fenoff, Robert Hubbard, John Heywood, and Dennis Noyes with interest, compounded on a daily basis, for any losses they sustained because of Respondent's unlawful conduct.

Finally, Respondent should be ordered to post an appropriate Notice to Employees.⁵³

Dated this 6th day of April, 2012.

Respectfully submitted,



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⁵³ The Notice language should conform to the general principals set forth by the Board in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001); that is, to the extent possible, the Notice language should be comprehensible to the average employee.

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CERTIFICATE OF SERVICE

I, Mary H. Harrington, do certify that I have this day served by electronic and/or regular mail copies of COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE and COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE to the parties listed below:

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