

Kennametal, Inc. and United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC. Case 01-CA-046689

August 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On February 16, 2012, Administrative Law Judge Paul Bogas issued the attached decision. The Acting General Counsel and the Union filed exceptions and supporting briefs. The Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order.⁴

ORDER

THE NATIONAL LABOR RELATIONS BOARD
ADOPTS THE RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE AND ORDERS
THAT THE RESPONDENT, KENNAMETAL, INC.,
LYNDONVILLE, VERMONT, ITS OFFICERS,
AGENTS, SUCCESSORS, AND ASSIGNS, SHALL
TAKE THE ACTION SET FORTH IN THE ORDER.

¹ Member Hayes is recused and did not participate in the consideration of this matter.

² No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by threatening employees with reprisals because of the Union's grievance and unfair labor practice charge filings.

³ The Acting General Counsel and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's findings, we do not adopt his characterization of negotiator John Jamison's September 16 statement as a "threat of futility." Additionally, although we agree with the judge that Plant Manager Thomas Fletcher's "dark cloud" statement is not, in these specific circumstances, evidence of animus, we do not rely on *Wild Oats Markets*, 339 NLRB 81 (2003), in affirming that finding.

⁴ We shall substitute a new notice to include the correct name of the Respondent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals because either you or the United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC, engage in protected union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

KENNAMETAL, INC.

JoAnne P. Howlett, Esq., for the Acting General Counsel.
Charles P. Roberts III, Esq. (Constangy, Brooks & Smith, LLP), of Winston-Salem, North Carolina, for the Respondent.

Alfred Gordon, Esq. (Pyle Rome Ehrenberg, PC), of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Greenfield, Massachusetts, on November 1, 2, and 3, 2011. The United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC (the Union) filed the charge on March 3, 2011, and the amended charge on July 13, 2011. The Regional Director for Region 1 of the National Labor Relations Board (the Board) issued the complaint on July 29, 2011. The complaint alleges, inter alia, that Kennametal, Inc. (the Respondent), at its Lyndonville, Vermont facility, violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees with reprisals because of

the Union's grievance and unfair labor practice charge filings, and violated Section 8(a)(3) and (4) by laying off seven employees in February 2011, and eliminating the day-shift position of another because employees assisted the Union, engaged in concerted activities, and participated in the Board's processes. The Respondent filed a timely answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Union, and the Respondent, I make the following findings of fact and conclusions of law.¹

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures metal works, component parts, and tools at its facility located in Lyndonville, Vermont, where it annually derives gross revenues in excess of \$500,000 and sells and ships from its Vermont facility goods valued in excess of \$50,000 directly to points located outside the State of Vermont. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent is a multinational corporation that employs approximately 13,000 individuals worldwide and has a facility in Lyndonville, Vermont. Immediately prior to the February 2011 layoff at issue in this litigation, the Respondent employed 94 individuals at the Lyndonville facility. The Lyndonville facility operates on three shifts. The day shift (or first shift) is from 7 a.m. to 3 p.m.; the evening shift (or second shift) is from 3 to 11 p.m.; and the night shift (or third shift), is from 11 p.m. to 7 a.m. The Respondent manufactures steel taps—a category of tools used to cut internal threads into other products—at the Lyndonville facility.

Production and maintenance employees at the Lyndonville facility are represented by the Union, which, according to the most recent collective-bargaining agreement, was certified as the employees' bargaining representative in 1957. Leon Garfield, a Lyndonville employee, has been the president of the local union since May 2009 and was chairman of the union committee for approximately 7 years prior to that. From April 6, 2009, until April 5, 2011, Richard Brighenti was plant manager for both the Lyndonville facility and the Respondent's facility in Greenfield, Massachusetts. After that period, Brighenti continued as plant manager only for the Greenfield

location. During the relevant time period, Keith Koski, who works at the Respondent's corporate headquarters in Latrobe Pennsylvania, was the division director to whom Brighenti reported. In his capacity as division director, Koski had authority over eight of the Respondent's facilities, including the Lyndonville and Greenfield locations. Employees are represented by unions at four of the eight facilities in the division overseen by Koski.²

On February 18, 2011, the Respondent laid off 7 employees in the Lyndonville bargaining unit, reducing the total number of employees there to 87. As required by the collective-bargaining agreement, employees were selected for the layoff based on seniority and given 3 days' notice. Garfield, president of the local union, was not among those laid off. However, as part of the plan for operating the facility during the layoff, the Respondent eliminated Garfield's day-shift inspector position. As a result, Garfield was one of between three and five individuals who became "unassigned," meaning that they did not have permanent assignments. The Respondent's practice with respect to unassigned employees is to move those employees to other openings within the employees' departments (even if on another shift) or, if no such openings exist, permit them to bid to fill vacancies resulting from the layoff and the staffing plan. If unassigned employees do not bid on jobs, or are not selected for any jobs they bid on, the Respondent assigns them to jobs. After Garfield's inspector position was eliminated, the Respondent informed him that he would be reassigned to the night shift. Nevertheless, the Respondent chose Garfield for a temporary day-shift assignment calibrating equipment. Garfield continued in that day-shift assignment for some weeks, and in early March 2011 he bid on a night-shift position in the cut-off department. He was selected for that position based on seniority. As a result of the transfer to the night shift, Garfield could not meet with employees on the day shift, or attend day-shift meeting with management regarding union business, unless he remained at the facility after the end of his own shift. For a period of over 5 months following implementation of the 2011 layoff, the Respondent did not post any day-shift positions. Garfield returned to the day shift in August 2011.

B. Recent History of Labor Relations

Since 2009, a variety of issues have arisen between the Union and the Respondent. These include: a dispute in 2009 about whether the Respondent made a timely request to reopen the expiring contract; an unfair labor practices charge over the July 2009 elimination of Garfield's day-shift position;³ a 2009 un-

¹ On December 22, 2011, after the hearing in this matter had closed, the Respondent filed a motion to submit three additional exhibits. In its motion, the Respondent stated, *inter alia*, that the other parties agreed the exhibits should be received and consented to their receipt. None of the other parties have contradicted the Respondent's representations. I grant the unopposed motion and receive R. Exhs. 22, 23, and 24, into evidence.

² Besides the Lyndonville and Greenfield facilities, Koski oversaw the Respondent's operations in: Asheboro, North Carolina; Huntley, Illinois; Irwin, Pennsylvania; Rockford, Illinois; Traverse City, Michigan; and Victoria, British Columbia, Canada. The Steelworkers union represents employees at the locations in Lyndonville, Irwin, and Victoria. An electrical workers union represents employees at the Respondent's Greenfield facility.

³ This is a separate charge, involving a different transfer than the one at issue in the instant case. Garfield was previously transferred to the night shift when the Respondent laid off employees in 2009, but he returned to a day-shift position in March 2010. The charge regarding Garfield's 2009 transfer was withdrawn before the Region reached a

fair labor practices charge regarding the Company's response to information requests; and a grievance and unfair labor practices proceeding over the Respondent's February 2010 implementation of its "Management Based Safety Program" (MBS). MBS is a safety training program. The parties dispute whether MBS is connected to a policy regarding discipline for safety violations.

The Acting General Counsel contends that it was the prior ULP hearing regarding the Respondent's implementation of MBS that motivated the Respondent, on February 18, 2011, to announce the layoff seven employees and the elimination of Garfield's day-shift position. The record shows that the Respondent implemented MBS without bargaining in February 2010—a year before the layoff. The Union attempted to bargain over this implementation, but the Respondent maintained that it was not required to bargain and it refused to do so. Soon after implementation of MBS, the Union filed a grievance challenging the Respondent's action. Then, on July 30, 2010, the Union filed an unfair labor practices charge with the Board regarding the MBS issue. The Regional Office investigated the charge and, on December 28, 2010, issued a complaint regarding the unilateral implementation of MBS. A hearing was held before an administrative law judge (ALJ) on February 8 to 10, 2011. Of the eight employees who the Acting General Counsel alleges were discriminated against because of the hearing, only Garfield was shown to have testified or participated in that unfair labor practice proceeding in any way. Indeed, none of the other seven employees were shown to have engaged in any union activity at all. During the prior hearing, the complaint was amended to seek relief on behalf of two unit employees who had been disciplined for safety violations. The ALJ issued his decision on April 12, 2011, finding, *inter alia*, that the Respondent had violated its duty to bargain with respect to both the MBS program and a disciplinary policy regarding safety violations, had unlawfully disciplined two employees pursuant to that disciplinary policy, and had also failed to respond appropriately to union information requests. As of February 1, 2012, the case was pending before the Board.

During 2010 negotiations for a successor to the expiring collective-bargaining agreement, the Respondent's lead negotiator was John Jamison—an outside consultant who was not a management official or employee of the Company. The Respondent's bargaining committee also included Eric Huttenlocher (a human resources manager who provided "support" at the Lyndonville facility), and Brighenti. The Union's bargaining committee was led by Carl Turner, a representative from the International union, and also included four Lyndonville employees—Garfield, Dave Brousseau (treasurer of the local union), John Eastman, and Terry Pray (vice president of the local union). Regular bargaining commenced in September 2010,⁴ and during a session on September 16, the Respondent asked to discuss the possible resolution of a number of outstanding

determination regarding its merits. Garfield's day-shift position was eliminated again at the time of the February 2011 layoffs, and the complaint in this case concerns only that occurrence.

⁴ The parties had also engaged in unsuccessful early negotiations in 2009.

charges and grievances. The parties were able to dispose of one or more of these matters; however, they made no progress towards resolving the unfair labor practices charge regarding MBS. Jamison, referencing a statement by the Respondent's chief human resources officer, stated that MBS was "a corporate top down initiative that's being spread across all of Kennametal both North American and our overseas locations," and which the Respondent would not waver on. He also stated that Lyndonville was only 1 percent of the Respondent's operation, and that MBS was "not an issue [for the Union] to take a stand on." Turner responded that this was true "unless the law says you have to bargain." He took the position that the Union would wait for the MBS issue to be resolved through the NLRB process.⁵ After this, the parties did not discuss MBS further during the 2010 negotiations and soon reached agreement on a collective-bargaining agreement that was ratified on October 1, 2010.

Approximately 7 weeks after the February 18 layoff, Thomas Fletcher took over for Brighenti as Lyndonville's plant manager. Fletcher arrived at the Lyndonville on February 28 to begin training with Brighenti. He assumed the position of plant manager on April 4, 2011. Fletcher was not involved with the Lyndonville facility prior to February 28 and did not participate in the decision to lay off employees or eliminate the day-shift inspector position that Garfield occupied. In April and early May, Fletcher held multiple "get-to-know-you" meetings with employees. During these meetings he stated that it was important to end the "infighting between management and the Union" and begin working "as a team," and that there was a "dark cloud" over Lyndonville. Fletcher admitted that he made these remarks, but claimed that the "dark cloud" comment referred not to the union activity, but to the facility's poor performance. However, Pray who attended one of the meetings at which Fletcher referenced the "dark cloud," credibly testified that Fletcher made no reference to production numbers or service levels or "anything like that," but did talk "about the NLRB and stuff." Brousseau, who attended the same meeting as Pray, credibly testified that Fletcher did not state that the cloud over Lyndonville had to do with poor service levels, but did discuss "grievances, labor board charges and arbitration cases." Fletcher claimed that he discussed Lyndonville's per-

⁵ This account is based on the largely consistent accounts of witnesses for both the Acting General Counsel and the Respondent. The most significant difference in the accounts is that the Acting General Counsel's witnesses testified that Jamison said the Lyndonville facility was only 1 percent of Kennametal, whereas the Respondent's witnesses deny that any reference to "one percent" was made. I credit the Union's witnesses on this point. I base this credibility determination largely on the contemporaneous notes taken at the bargaining session by Garfield and Pray. Both of these sets of notes report the "one percent" remark. Moreover, Jamison's reference to the 1-percent figure is consistent with the gist of the argument he was making, which I understand to be that since MBS was a corporatwide initiative it was not something that the Lyndonville employees' bargaining representative could expect to stop. In addition, the evidence showed that the Lyndonville work force was about 1 percent of the Respondent's total work force, lending plausibility to the claim that Jamison pointed that out.

formance, but I found his testimony less credible than that of Pray and Brousseau, at least with respect to the meeting they attended. Pray and Brousseau testified in a clear and certain matter regarding this issue. On the other hand, when pressed, Fletcher conceded that he did not actually remember with any specificity what he said during that meeting. (Tr. 493.)

C. The February 2011 Layoff

1. State of business prior to layoff

According to the Respondent, it implemented the February 2011 layoff in an effort to improve the Lyndonville facility's performance during a period of reduced business. Brighenti and Koski both denied that the Union's challenge to MBS played any part in the layoff decision.

The Respondent evaluates the performance of the Lyndonville facility largely based on the extent to which the facility's monthly cost for manufacturing the product it sells is lower or higher than the cost the Respondent has set for that month in its annual plan. If the cost is higher than what the Respondent's plan calls for it is referred to as an "unfavorable [or negative] variance to plan." If the cost is lower than what the Respondent's plan calls for it is referred to as a "favorable [or positive] variance to plan." Unfavorable variance performance generally results when the facility does not have enough shipments to absorb the costs of manufacture to the extent contemplated by the plan. The fact that a facility posts unfavorable variance to plan results does not mean that the facility is not generating a profit for the Respondent, but rather that the facility is not manufacturing the product as cheaply as the Respondent had planned.

After posting favorable monthly variance to plan figures from June to September 2010, the Lyndonville facility began to have unfavorable variance performance, and for the most part increasingly unfavorable performance, beginning in October 2010 and continuing through May 2011. After May, the variance to plan figures remained unfavorable but less dramatically so.

The flow of orders received for the Lyndonville facility since 2008 has been uneven. In 2008, the number of pieces that were ordered from Lyndonville on a monthly basis ranged from 88,626 to 141,373. In 2009, orders dropped sharply, ranging only from 55,115 pieces to 92,410 pieces. Orders rebounded somewhat in 2010 when the monthly range was from 72,443 to 161,816 pieces. During the first half of 2011, the orders dropped again, ranging from 63,987 to 96,765, before rebounding in June 2011.⁶

⁶ I take these figures from R. Exh. 18, which consists of records kept by the Respondent in the ordinary course of business. Somewhat different figures appear for some months in R. Exh. 1, a summary document prepared by the Respondent for this litigation. During a posthearing telephone conference with all parties, the Respondent conceded that the figures in the summary exhibit were erroneous to the extent that they were inconsistent with the information in R. Exh. 18. I note also that while the summary exhibit contains figures for January 2011 orders—a key time for evaluating the workload at the time of the February 2011 layoff—I do not credit those January figures because the

The Respondent has reduced the size of the Lyndonville work force in recent years. In 2008, the Lyndonville facility had about 150 employees. However, even before the February 2011 layoff that number had shrunken to 94. By the time of the hearing in the instant case, there were only 73 employees at the Lyndonville facility.

Officials of the Respondent expressed concern about business and performance at the Lyndonville facility in email communications leading up to the February 2011 layoff. In an email sent on January 31, 2011, Brighenti informed Koski that the Lyndonville facility was "not where it needed to be" and that it was going to miss the projections made to Tommy Green—the management official in charge of the Respondent's North and South American manufacturing. Brighenti told Koski that this was "caused by the lack of C[ustom] S[olution] business." Brighenti ended the email by stating, "We will develop a plan to recover this within the quarter." In early February, Brighenti informed Huttenlocher that a layoff was going to be necessary if incoming orders were as low as they appeared to be. Ultimately, Brighenti settled on a plan to reduce the Lyndonville work force by about nine employees. He testified that, as a rule of thumb, for each Lyndonville employee he laid off the Company would save \$5000 per month in labor costs. On February 14, Brighenti sent an email to Koski stating that he was in the process of finalizing a plan that included the layoff of seven employees effective February 21 and the reduction of the remaining employees' schedules to 32 hours per week for the month of March. In the email, Brighenti wrote that the value of custom solution orders for the Lyndonville facility "booked into March" was \$348,000, which was approximately \$300,000 "lower than what we would expect to see at this time." Koski responded to Brighenti within minutes, asking whether the layoff could be implemented sooner. Brighenti told Koski that on February 15 he would give the employees selected for layoff the contractually required 3-day notice. On February 23, Koski notified Green that "due to lower than forecasted load" a "reduction plan" had been implemented for the Lyndonville workforce.

Some time after February 10 and prior to February 15, Brighenti had a phone conference with Garfield and Pray during which he informed them that, due to the downturn in orders for the Lyndonville facility, he was planning a layoff of between 5 and 10 employees. Brighenti asked for their permission to post a notice seeking volunteers for the layoff in order to reduce the number of persons who would have to be laid off involuntarily. The union officials agreed to that, and apparently two employees volunteered for either layoff or retirement.

In addition to trying to address the situation at Lyndonville through layoffs, Koski made efforts to improve matters by bringing more work to the facility. In a March 1, 2011 email, Koski asked the product manager for the product lines manufactured in the Lyndonville facility whether there was any "quick" opportunity to get [custom solution] business back into" the Lyndonville facility. Koski explained that Lyndonville was experiencing an "extremely low specials load," result-

underlying business records contain no order figures at all for January 2011.

ing in high unfavorable cost variance performance and reductions. On February 23, the Respondent announced that in order to save additional labor costs the employees would have 4 unpaid days off in March. Throughout March, Brighenti and Koski communicated with each other about business conditions at the Lyndonville facility and efforts to improve variance performance there.

Contrary to the evidence that business was poor, Garfield testified that he had seen no indications that workload was down during the lead-up to the February 2011 layoff. He conceded that he had been hearing about a “work slowdown” (Tr. 113–114), but stated that employees were busy and working significant amounts of overtime. According to Garfield, before Brighenti became plant manager there had been layoffs, but the prior plant manager had always put off taking such steps until employees began running out of work. The documentary evidence buttresses Garfield’s testimony to some extent because it shows that employees were working significant amounts of overtime during the period leading up to the February 2011 layoff.⁷ For every week but one from October 2010 through the first week of February 2011, over 10 percent of the total hours employees worked were overtime hours. Such overtime levels had been reached intermittently during the prior 3 years, but the percentage of total hours that were overtime each week was usually below 10 percent and not infrequently below 5 percent. The evidence shows that when the Respondent implemented the layoff, it also reduced the amount of overtime that the remaining employees were working. In March 2011, shortly after the layoff, the weekly percentage of hours that were overtime fell to between 2.1 and 3.7 percent. In April 2011, the overtime levels increased to approximately the same levels that were seen leading up to the layoff, but in May and the first part of June 2011 the overtime levels fell to under 10 percent again. Brighenti testified that the optimal overtime level for the Lyndonville facility is between 8 and 15 percent of total hours. This allows, he explained, for the Respondent to cover for contingencies such as vacations.

2. The February 2011 layoff and staffing plan

In mid-February 2011, Brighenti told Sean Jewell, the day-shift supervisor at the Lyndonville facility, that the facility had “low incoming” orders. He directed Jewell to prepare a plan to lay off up to 10 employees, and staff the facility with the remaining employees.⁸ Brighenti testified that the size of the layoff was based on the need to adjust the size of the staff to the reduced workload while minimizing retraining and the loss of core competencies. Jewell, with the assistance of Tim Morissette, the evening-shift supervisor, developed a plan to lay off seven individuals, and delivered that plan to Brighenti on February 17, 2011. Then next day, Jewell followed up with a slightly revised version of the plan. Prior to the layoff there

had been 45 employees on the day shift, 28 on the evening shift, and 21 on the night shift. Under the new staffing plan, the number of employees on the day and evening shifts were reduced to 40 and 26 respectively, but the number of employees on the night shift remained at 21. Brighenti testified that the reason positions were eliminated on the day and evening shifts, but not the night shift, was that the Respondent was “rebalancing” the shifts. This was also the reason given to employees at the time of these changes. As part of the staffing changes adopted around the time of the layoff, the Respondent ended up increasing the number of employees on the night shift in at least three departments—cut-off, coating, and OD—even while it was reducing the overall numbers of employees. Brighenti explained that rebalancing the staff more evenly across the three shifts was advantageous to the Respondent because the facility historically had a disproportionate number of employees on the day shift, which meant that some of the day-shift employees would have to use less productive equipment while the better equipment was used by others on the shift. At the same time, the better equipment would sit idle for stretches during the thinly staffed night shift. Rebalancing the shifts meant that the Respondent’s employees could do more of their work using the more productive equipment. The natural consequence of this rebalancing was that some employees who had previously worked on the day or evening shifts were likely to be moved to the night shift. This effect was magnified during the layoff since night-shift employees tended to have less seniority and were therefore more likely to be laid off, leaving a disproportionate number of vacancies on the night shift.

The record shows that in addition to laying off employees, the Respondent saved labor costs by instituting four “short weeks” in March 2011. During those weeks the employees who were not affected by the layoff worked 4 days rather than 5 days. Brighenti notified the Union about this action at the same time that it gave notice of the layoff.

The evidence shows that during the 6-month period of the 2011 layoff, the Respondent maintained the health insurance of laid-off employees, and did not require those employees to pay premiums. Under the collective-bargaining agreement, the Respondent was not required to do this. The agreement provides that the Respondent would continue to pay the employer’s share of the health insurance premium during the first 3 months of the layoff, but that the laid-off employee would pay his or her share of the premium. After 3 months, the laid-off employee could choose to either pay the full premium amount, or terminate the health insurance coverage entirely. An employee’s monthly share of the health insurance premium ranges from approximately \$100 to \$230, and the Respondent’s share ranges from about \$1300 to \$1400. Brighenti testified that unless the Respondent required laid-off employees to pay for their health insurance as described in the collective-bargaining agreement, the full \$5000 per employee/per month savings that the Respondent hoped to achieve by laying off employees would not be realized. Based on the credible testimony of Brighenti and Huttenlocher, I find that the Respondent’s provision of insurance benefits that exceeded those required by contract was the result of an administrative oversight, not any in-

⁷ The Respondent generally pays employees one and half times their regular hourly wage rate for overtime hours, but in some circumstances the overtime rate is twice the hourly rate.

⁸ The record shows that this conversation took place around the time of the unfair labor practices hearing that was held regarding MBS on February 8, 9, and 10, but does not show whether the conversation occurred before or during or after that hearing.

tentional decision to cushion the blow to laid-off employees, or forgo potential labor cost savings.

The layoff plan also called for the elimination of Garfield's day-shift assignment. Prior to the layoff there were four employees working in the inspection department. Garfield and one other inspector were assigned to the day shift and one inspector was assigned to each of the other two shifts. The plan prepared by Jewell eliminated one of the day-shift inspector positions. Because he was the inspector with the least seniority, Garfield was the inspector who became unassigned. According to Jewell, the inspection position was chosen for elimination as part of the facility's effort to move employees from "indirect labor" positions to "direct labor" positions in which they fabricated product. Moreover, Jewell testified, the Respondent had been increasing its reliance on "self-inspection"—a practice under which machine operators inspect one another's work, rather than relying on dedicated inspectors do this. Even prior to the layoff, the Respondent had started allowing employees on the evening and night shifts to self-inspect the first piece in production runs.⁹ Thus, Jewell said, he saw an opportunity to move an employee from an indirect labor position to a direct labor position by reducing the number of inspectors on the first shift, and using the former inspector to perform production work. Jewell conceded that before he took this action there was not a shortage of work for inspectors.

On February 21, 2011, Brighenti implemented the layoff/staffing plan essentially as presented by Jewell. The employees laid off were Roberta Borg, Gerald Fenoff, John Heywood, Robert Hubbard, David Jeannotte, Steven Tanner, and Harry Williams. In a February 18 email, Brighenti informed Koski about Garfield's transfer to the evening shift. The email stated: "Garfield will be informed on Tuesday that he will be going back to [night] shift as a result of the L[ymdonville] layoff." Garfield was the only employee about whose shift transfer Brighenti notified Koski, even though Garfield was not the only employee who was being transferred between shifts. Brighenti testified, credibly in my view, that he felt it was necessary to warn Koski about the Garfield's transfer, but not about that of other employees, because Garfield had, in 2009, filed an unfair labor practice charge when he was transferred to the night shift during a prior layoff. See *supra* fn. 4.

Shortly, after the layoff was announced, John Levesque, an employee who had been assigned to a day-shift position in the cut-off department, successfully bid on an opening that the layoff created on the night shift.¹⁰ When Levesque left his day-shift job subsequent to the layoff, the Respondent moved the opening to the night shift. Jewell testified that this was done pursuant to the general effort to even out staffing over the three shifts. According to Jewell, Levesque's day-shift position was

not "rebalanced" to the night shift as part of the initial layoff/staffing plan because the Respondent did not want to dislocate employees to a greater extent than necessary. Jewell stated that when Levesque voluntarily left the day-shift position he created the opportunity to even out shifts by moving the cut-off position to the night shift without transferring the person holding that position to another shift. Jewell testified about one other instance when the same protocol was followed—i.e., an employee left a day-shift position in the flute department, and the vacancy was opened for bid as a night shift position. Jewell did not expect Garfield to bid on the night-shift cut-off position, but Garfield did and was selected based on his seniority. The Respondent pays employees a 5-percent wage premium for hours worked on the night shift.

After Garfield's inspector position was eliminated, the Respondent sometimes found it necessary to temporarily assign noninspectors to perform inspection work on the day shift. This would occur when the remaining full-time inspector on that shift was unavailable. The record does not show that the amount of time the noninspectors were used to perform inspection work was significant or hampered the noninspectors' ability to complete their regular assignments. After moving to the night-shift position in the cut-off department, Garfield remained on the night shift for 5-1/2 months. Then, the Respondent opened a day-shift position that Garfield applied for and obtained.

On May 25, the Respondent recalled two of the laid-off employees—Fenoff and Williams—in order to fill vacancies created when two other employees left the Company.

D. Prior Layoffs

At trial, evidence was introduced on the question of whether the February 2011 layoff was consistent with the Respondent's prior actions at the Lyndonville facility. The evidence shows that at least since early 2008, the Respondent has repeatedly resorted to layoffs at times when the Lyndonville facility's variance to plan performance became unfavorable and/or when orders were low. For example, from March to June 2008 the facility's variance to plan figures became increasingly unfavorable and the Respondent laid off 14 employees. There followed a short period of relatively favorable variance performance during which the Respondent did not carry out further layoffs. The facility's variance to plan performance became very unfavorable starting in September 2008 and continuing until about October 2009. The Respondent reacted by laying off 2 employees in October 2008, 11 employees in November 2008, 5 employees in January 2009, 11 employees in February, 2 employees in March, 12 employees in April, and 2 employees in May. Throughout much of 2010, the facility's variance to plan performance was either favorable, or only moderately unfavorable, and during that year the Respondent did not carry out any layoffs. Towards the end of 2010, the Lyndonville facility began having unfavorable variance to plan performance, and this trend worsened during the first months of 2011. In February 2011, the Respondent carried out the layoff of seven employees that is the subject of this litigation.

As with the February 2011 layoff/staffing plan, the plan that was prepared for the layoff in 2008/2009 was developed by

⁹ Garfield testified to his belief that the "self-inspection" system was failing to catch problems early and thus was leading the Respondent to produce larger amounts of defective product.

¹⁰ Levesque wanted to transfer from the day shift to the night shift for personal reasons and, in December 2010, had asked Jewell, the day-shift supervisor, if he could do so. Jewell denied the request, and Levesque did not renew that request until the time of the layoff.

Jewell and Morissette. The written plans have very similar formats. Both plans “rebalance” the three shifts, but the 2008/2009 plan did so much more dramatically than the 2011 plan. That plan decreased the number of employees on the day shift from 70 to 46, and increased the number of employees on the night shift from 10 to 23.

As discussed above, Garfield testified that during the days leading up to prior layoffs he had observed employees running out of work. He testified that during the days leading up to the February 2011 layoff, however, there had not been a lack of work. The overtime rate figures for periods leading up to prior layoffs provide some limited support for Garfield’s perception. The amount of overtime that employees were working was low in February and March 2008, and January, February, and March 2009—less than 5 percent of total hours—leading up to layoffs during those years. However, during the period preceding the layoff in February 2011, employees were working significant amounts of overtime—8.81 to 12.37 percent of total hours. At the same time, the evidence does not show that, during the periods leading up to the prior layoffs, the Respondent had the same degree of advance warning about the downturn in workload that it had in 2011.

E. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) in late April and early May 2011 when Fletcher threatened employees with unspecified reprisals for grievance and unfair labor practices charge filings. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act on about February 18, 2011, by laying off employees Roberta Borg, Gerald Fenoff, John Heywood, Robert Hubbard, David Jeannotte, Steven Tanner, and Harry Williams, and on about February 22, 2011, by eliminating the daytime inspector job held by Leon Garfield and subsequently failing to post any day-shift vacancies, because of employees’ union and concerted protected activities. The complaint alleges that the Respondent also violated Section 8(a)(4) and (1) of the Act by laying off those seven employees, and by eliminating Garfield’s daytime position and failing to post day-shift vacancies because employees participated in the filing of unfair labor practice charges and gave testimony in the unfair labor practice hearing held on February 8 to 10, 2011.

III. ANALYSIS AND DISCUSSION

A. Section 8(a)(1)

The Acting General Counsel alleges that Fletcher’s statement that there was a “dark cloud” over Lyndonville was a threat in violation of Section 8(a)(1). As discussed above, at meetings with employees in April and May 2011, Fletcher complained about the ULP charges and “infighting between management and the Union,” and warned employees that there was a “dark cloud” over the Lyndonville facility. The Respondent contends that Fletcher’s statements were not threats based on union activity because the statements were made during a discussion of the facility’s poor performance. However, the evidence showed that, at least during the meeting attended by Brousseau and Pray, Fletcher made the “dark cloud” comment in the con-

text of his complaints about the Union’s activity, not in the context of any discussion of the facility’s performance.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of” the rights to engage in protected union and concerted activity. In deciding whether an employer has made a threat in violation of this prohibition, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or rely on the success or failure of such coercion. *Divi Carina Bay Resort*, 356 NLRB 316, 320 (2010), *enfd.* 2011 WL 5560288 (3d Cir. 2011); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), *affd.* in relevant part 111 F.3d 1284 (6th Cir. 1997). When applying this standard, the Board considers the totality of the relevant circumstances. *Medplex of Danbury*, 314 NLRB 470, 471 (1994).

I conclude that Fletcher’s remarks during the meeting attended by Brousseau and Pray constituted a threat of unspecified reprisals in violation of Section 8(a)(1). Under all the circumstances here, I find that employees would reasonably understand Fletcher’s comment to be a warning that the Union’s charge and grievance activity was creating a “dark cloud” of employer disfavor under which employees would work until such activities were curtailed. *Vic Koenig Chevrolet, Inc.*, 321 NLRB 1255, 1277 (1996) (violation of Sec. 8(a)(1) based on employer’s statement that union activity meant it “had to worry about this ‘black cloud’ instead of thinking about ‘our future,’” and asked employees to end the union activity “so that we can both make more money”); *Ray-Loc*, 265 NLRB 1663, 1665 (1982) (unlawful threat where employer said it would not be ordering necessary parts until the union talk was settled and “this dark cloud over us was gone”); *Cf. Rogers Electric, Inc.*, 346 NLRB 508, 520 (2006) (manager statements that employee was a “chronic complainer” who had a “black cloud around him” is a “veiled reference” to protected activity). The Respondent’s claim that Fletcher was warning employees about the need to improve performance metrics is unpersuasive for the simple fact that during the meeting Fletcher did not discuss performance, but rather complained about recent actions by the Union.

For the reasons discussed above, I find that the Respondent, by Fletcher, threatened employees with unspecified reprisals for engaging in union activities, and therefore violated Section 8(a)(1) of the Act.¹¹

¹¹ The complaint does not allege a violation of Sec. 8(a)(1) based on Jamison’s September 16, 2010 statement to the union bargaining committee that MBS was “not an issue [for the Union] to take a stand on.” At trial, the Acting General Counsel argued that this statement was evidence of animus, but stated that it was not alleged as a violation because it occurred outside the charge filing period under Sec. 10(b) of the Act. Tr. 217. The Board has held that statements made outside the 10(b) charge-filing period may nevertheless be used to establish animus. See *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003); *Wilmington Fabricators, Inc.*, 332 NLRB 57, 58 fn. 6 (2000); and *Kaunagraph Corp.*, 316 NLRB 793, 794 (1995).

B. Section 8(a)(3), (4), and (1)

1. February 2011 layoff

The Acting General Counsel argues that the February 2011 layoff of seven employees violated Section 8(a)(3) because the Respondent was motivated by employees' union and concerted activities and also violated Section 8(a)(4) because the Respondent was motivated, in particular, by employees' participation in the prior unfair labor practice charge and hearing. Under the Board's *Wright Line* decision, in cases alleging violations of Section 8(a)(3) and/or (4), the Acting General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); see also *Verizon*, 350 NLRB 542, 546–547 (2007) (applying *Wright Line* analysis to allegations of discrimination in violation of Sec. 8(a)(4) as well as Sec. 8(a)(3)). The Acting General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or union activity. *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011). If the Acting General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

The Acting General Counsel has failed to satisfy the first element of the prima facie case since the record does not show that a single one of the seven laid-off employees participated in any way in the prior unfair labor practice charge and hearing, or in any other union activity. The Acting General Counsel has also failed to satisfy the second element of the prima facie showing since the record does not show that the Respondent knew, or believed, that any of the laid-off employees had engaged in such activities. The Acting General Counsel's failure to meet either of the first two elements of the prima facie case is a serious blow to its effort to prove that the layoff was discriminatory. See, e.g., *Reliable Disposal, Inc.*, 348 NLRB 1205, 1206 (2006) (prima facie case not established with respect to laid-off employees where the employer was not shown to have knowledge of their union activities, even though it did have general knowledge of union activities, and of the specific union activities of other employees); *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1341 (1988) (no prima facie case that layoff was discriminatory where the alleged discriminatee was a union member who had engaged in union activity, but was not shown to have engaged in union activity close in time to his discharge).

If the allegation that the layoff was discriminatory has any life, it resides in the Acting General Counsel's argument that even though it could not show that the alleged discriminatees engaged in union activity or that the Respondent had reason to believe that they had, a prima facie is established by the evidence that the layoff was a tactic to blame the Union's activities for the loss of work, and to camouflage the Respondent's alleged discrimination against Garfield. See brief of Acting General Counsel at page 34, citing *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 451 (1966), enf. 135 F.3d 1 (1st Cir. 1997); *Weldun International*, 321 NLRB 733, 734, and 748 (1996), enf. mem. in relevant part 165 F.3d 28 (6th Cir. 1998) (Table), and *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 fn. 4 (1996). The problem with this effort to side-step the first two elements of the prima facie case is that the record is devoid of evidence that the Respondent used the tactic described by the Acting General Counsel. The record does not show that the Respondent made any effort to cause employees to blame the Union for the layoff. To the contrary, the evidence shows that Brighenti and Koski, in communications with both employees and management officials, stated that the layoff was necessitated by a decline in business and the facility's deteriorating variance-to-plan performance. There was no evidence of communications in which the Respondent suggested to employees that the layoff was connected to the Union's activities regarding MBS or any other labor-management issue. Indeed, the record does not establish that the dispute regarding MBS was something that employees in general were particularly concerned about. Given that the Respondent had, over the last few years, repeatedly resorted to layoffs at the Lyndonville facility, it is implausible that management would expect employees to simply assume that the February 2011 layoff was the result of the Union's activities.

In addition, much about the way the Respondent conducted the layoff is inconsistent with the Acting General Counsel's contention that the action was designed to harm employees. For example, the Respondent began the layoff by requesting volunteers, an apparent effort to reduce the pain that the layoff would cause employees. Cf. *Twistex, Inc.*, 283 NLRB 660 (1987) (prima facie case supported, inter alia, by evidence that employer did not seek volunteers for the layoff). In addition, when two employees left the Respondent's work force several months after the layoff began, the Respondent recalled two of the laid-off individuals. This is consistent with the view that the Respondent was attempting to maintain what it considered an appropriately-sized work force, not laying off people to cause an injury that employees would blame on the Union.¹²

¹² I also considered whether a lack of animus was evidenced by the fact that the Respondent provided the laid-off employees with certain health insurance benefits even though it was not required to do so under the collective-bargaining agreement. However, the testimony of Brighenti and Huttenlocher lead me to conclude that this was not done intentionally, but rather resulted from an oversight. Therefore, I do not consider the provision of those benefits to be evidence weighing against a finding of animus. Because the record indicates that the continued provision of health insurance was an oversight, I also do not view those benefits as evidence that the layoff was not motivated by a desire to save labor costs.

Lastly, I note that in the three cases the Acting General Counsel relies on for the proposition that a showing of union activity by laid-off employees is not necessary to show a prima facie case, the layoffs all took place in the context of a union organizing campaign. See *McGaw*, supra; *Weldun International*, supra; *Electro-Voice, Inc.*, supra. An organizing campaign is a highly charged circumstance and one that an employer might be expected to see as engaging the work force as a whole, regardless of a particular employee's position regarding representation. All employees in the unit might soon have the opportunity to sign a union authorization card or vote in a representation election. Under such circumstances, it is plausible that management would implement a layoff either in hopes that the display of economic power will chill employees from supporting a union, or in order to render certain employees ineligible to vote in an upcoming election. See, e.g., *Hovey Electric*, 302 NLRB 482, 488 (1991). That is especially true where, as in *McGaw* and *Electro-Voice*, many of the employees included in the layoff are union supporters. *McGaw*, 322 NLRB at 451 (employer "had knowledge that at least three" of the nine laid off employees "were leaders in the [u]nion's drive to organize its employees, and suspected that a fourth . . . may also have been involved"); *Electro-Voice*, 320 NLRB at 1110 ("All the discharged employees were union partisans"). It is far less plausible that the Respondent would take such extreme action over the question of whether it had to bargain regarding a new safety program, and in a context where not a single one of the laid-off employees was a union partisan.

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

I also consider it implausible that the Respondent would believe it could garner so great an advantage by transferring Garfield to the night shift that it would be willing to engage in unnecessary layoffs, shortened weeks, and plantwide staffing changes to accomplish the transfer. Although moving Garfield to the night shift would make it less convenient for Garfield to meet with day-shift employees and address some union con-

cerns, the evidence does not show that Garfield would be unable to continue engaging in those activities simply by remaining at the facility after the night shift ended and the day shift began. Moreover, while working on the night shift, Garfield would be able to meet with night-shift employees. Even at times when Garfield could not be present, there were other experienced employees on the union committee—for example, Brousseau and Pray—who work on the day shift.

Lastly, I note that after the Respondent implemented the layoff and eliminated Garfield's day-shift assignment, it selected Garfield to remain on the day shift for a period of some weeks in order to perform calibration work. If, as the Acting General Counsel claims, the Respondent saw moving Garfield to the night shift as so pressing an objective that it was willing to lay off seven other employees and create a new staffing plan in order to accomplish the reassignment, it is inconceivable that the Respondent would then select Garfield for even a temporary assignment on the day shift.

Assuming that the Acting General Counsel had succeeded in side-stepping the first two elements of the prima facie case, it would still fail to meet the third element—i.e., showing that the Respondent harbored animus towards the Union or union activity. The attempt to show animus is made against the background of a longstanding bargaining relationship at the Lyndonville facility. The Union was certified as the representative of employees at the facility over 50 years ago in 1957. Regular negotiations for the most collective-bargaining agreement began in September 2010, and the Union and the Respondent worked together well enough to ratify an agreement only a month or so later on October 1, 2010. Of the eight facilities in the same corporate division as the Lyndonville facility, half are unionized.

The Acting General Counsel attempts to establish antiunion motivation based on statements by Jamison and Fletcher, and the timing of the layoff. The earlier of the two statements was made by Jamison during the September negotiations that resulted in the ratified agreement. During the third day of negotiations, the parties discussed the possibility of resolving a number of outstanding grievances and charges, including the charge that the Union filed approximately 6 months earlier regarding the Respondent's unilateral implementation of MBS. On the subject of MBS, Jamison (the Respondent's lead negotiator) stated that: MBS was something that the Respondent was implementing globally and corporatwide; Lyndonville was only 1 percent of the Company; the Company would not change its position regarding MBS; and MBS was "not an issue [for the Union] to take a stand on." The Acting General Counsel contends that Jamison's statements are evidence of animus because they constitute a threat the Respondent would retaliate if the Union refused to back down regarding MBS. After considering Jamison's statements and the surrounding circumstances, I conclude that they are not evidence of animus or a willingness to retaliate against the Union for continuing to seek bargaining over MBS. Jamison did not state, or imply, that the Respondent planned to do anything other than continue refusing to bargain over MBS. He did not allude to any type of adverse consequences or state that continued resistance to MBS would bring the facility into disfavor with the Respondent. To the

extent that what Jamison said can be understood as a threat, it is as a threat of futility—i.e., that MBS was a corporatwide juggernaut and that a union representing a very small portion of the corporation’s employees could not hope to stop it. Such a threat is consistent with the Respondent’s subsequent refusal to bargain, but cannot reasonably be tied to the layoff. Moreover, the evidence does not show that the dispute regarding implementation of MBS was the result of animus rather than of a good faith disagreement about the necessity of bargaining over that change. Thus the Respondent’s refusal to bargain, even if unlawful, is not evidence of antiunion animus. See *Denver Post Corp.*, 328 NLRB 118 fn. 2 (1999) (unilateral change is violation of Sec. 8(a)(5), but not evidence of antiunion animus); *Haynes-Trane Service Agency*, 259 NLRB 83, 87–88 (1981) (employer’s unlawful unilateral change is not evidence of animus where animus was not part of the showing regarding the unlawful change).

In addition, I note that Jamison was not a permanent official of the Respondent, but rather a consultant retained to serve as the Company’s lead negotiator during bargaining for a new contract. There is no evidence that Jamison had any input at all into the February 2011 layoff, or even that he was still working for the Respondent at the time of that layoff. Thus, whatever I make of Jamison’s statements, I would be hard-pressed to see them as connected to the February 2011 layoff.

The second statement that the Acting General Counsel relies on as evidence of animus, is Fletcher’s April/May 2011 remarks about “infighting between management and the Union” and the resulting “dark cloud” over the Lyndonville facility. As is discussed above, I find that this statement did constitute a threat of unspecified reprisals in violation of Section 8(a)(1). If such a statement had been made before the layoff decision, by someone who had a hand in that decision, it would likely be strong evidence that antiunion animus was connected to the layoff. However, in this case it is undisputed that Fletcher had not even started at the Lyndonville facility when the layoff was implemented and had no part in the layoff decision or the creation of the layoff staffing plan. Under these circumstances, Fletcher’s threat is not connected to the layoff and does not show antiunion animus relative to that action. *Wild Oats Markets*, 339 NLRB 81, 88 fn. 10 (2003) (statements by supervisor do not show animus where supervisor had no part in the challenged decision).

According to the Acting General Counsel, unlawful motive is also shown by the timing of the layoff, which was implemented about a week after the close of the unfair labor practices hearing at which MBS was an issue. The Acting General Counsel hitches its case largely to what it characterizes as this “striking” timing. As the Acting General Counsel states, it is possible to show unlawful motivation based on the timing of an adverse action.¹³ The problem with the Acting General Coun-

sel’s argument is that the timing here is not at all “striking” and does not suggest unlawful motive. The dispute between the Respondent and the Union regarding MBS was not a new one at the time of the challenged layoff. Respondent implemented MBS in February 2010, a full year prior to the layoff, and the Union almost immediately disputed the Respondent’s action by filing a grievance. The Union filed its unfair labor practice charge regarding MBS on July 30, 2010, the Region investigated that charge, the Region issued a complaint on December 28, 2010, and a hearing was held on February 8–10, 2011. The ALJ did not issue his decision at the close of the hearing, or prior to the implementation of the layoff. Rather the decision in favor of the Union issued on April 12, 2011—well after the layoff was implemented. The Acting General Counsel’s focus on the date when the unfair labor practice hearing closed, rather than on any number of other dates during the lengthy course of the MBS dispute, is convenient for purposes of its effort to show a connection to the layoff, but that focus is not warranted by anything other than the Acting General Counsel’s convenience. The record does not show that in the course of the dispute regarding MBS, the closing of the hearing stood out as a moment when the Respondent would have been particularly troubled over the MBS issue, or as one when the Respondent would have seen a particular opportunity to influence the Union’s or employees’ actions. The Board has declined to draw an inference of discrimination when the Acting General Counsel picks a self-serving date in an effort to show that the timing of an adverse action is suspicious, *Newcor Bay City Division*, 351 NLRB 1034, 1039–1040 (2007), and I decline to draw such an inference under such circumstances here.

The Acting General Counsel contends that, because the evidence does not show that Brighenti was planning the layoff prior to when the hearing closed on February 10, the timing is suspicious. I do not find this contention persuasive for a number of reasons. First, documentary evidence shows that by January 31—prior to the February 2010 hearing—Brighenti had already told his supervisor that he was going to develop a plan to address declining business and poor variance performance at the Lyndonville facility. The record shows that employee layoffs were one of the plans that the Respondent had a history of using under similar circumstances in the past. Moreover, although there is no documentation showing that, prior to February 10, Brighenti had settled on the layoff plan, there is also no documentary evidence showing that he had not. The testimony on that point was vague and, in my view, does not establish that the decision was made after February 10. Finally, even assuming the Acting General Counsel had established that the layoff decision was not made or contemplated until after February 10, that would not show unlawful motive because, for the reasons discussed above, February 10 is not a particularly meaningful date.

For the reasons discussed above, I conclude that the evidence fails to establish a prima facie case that the layoff was unlawfully motivated. Thus under *Wright Line*, the burden does not

¹³ The Board has made clear that timing is an important factor in assessing motivation in cases alleging discrimination based on union or protected activity. See, e.g., *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed.

Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

shift to the Respondent to show that it would have made the same decision absent the union activity. Even if I had concluded that the Acting General Counsel succeeded in making a very weak prima facie case, I would find that the Respondent introduced sufficient evidence that the layoff was motivated by business conditions to rebut that prima facie case. As is discussed in greater detail above, the record shows that beginning in October 2010 and continuing through May 2011 the Lyndonville facility's variance-to-plan performance became increasingly poor, and that during the first months of 2011, there was a slump in orders for the facility. Management officials discussed their concern over the State of the Lyndonville facility's business, and the need to address those concerns, in written communications sent in January, February, and March 2011.

The Acting General Counsel argues that the Respondent's claim that the layoff was motivated by a desire to reduce labor costs should be rejected because the wage rate the Respondent had to pay employees to work overtime during the layoff was higher than the straight-time rate it could have paid the laid-off employees to do the same work. By reassigning employees in such a way as to eliminate the need for overtime, the Acting General Counsel suggests, the Respondent could have retained laid-off employees and instead met any need to cut labor costs by reducing overtime. This contention might be somewhat persuasive if the evidence showed that when the layoff was implemented the Respondent had to increase overtime in order to meet demand. Cf. *Stamping Specialty Co.*, 294 NLRB 703, 713 (1989) (layoff was not unlawful where, inter alia, the evidence did not show that reduced workforce prevented employer from satisfying orders). However, the evidence shows, to the contrary, that immediately after the Respondent implemented the February 2010 layoff, it also dramatically reduced the amount of overtime it was using at the facility. Thus, the Respondent reduced labor costs through the layoff at the same time as it reduced labor costs by cutting overtime. At no point during the layoff does the record show that the Respondent's use of overtime exceeded the levels that were optimal for the facility.

At any rate, the question for me is not whether the layoff was the most effective course of action to address business conditions, but whether the layoff was discriminatorily motivated. *Newcor Bay*, 351 NLRB at 1040; *Gem Urethane Corp.*, 284 NLRB 1349 (1987). The Acting General Counsel's evidence regarding overtime does not show that the layoff was a bad business decision, and certainly not that it was so inexplicably bad a business decision as to justify a conclusion that something other than business concerns must have motivated it.

For the reasons discussed above, the allegations that the Respondent violated Section 8(a)(3), (4), and (1) by discriminatorily instituting a layoff because of employee's union and protected concerted activities and/or because of employees' participation in the unfair labor practices process are without merit. The complaint allegations relating to the layoff should be dismissed.

2. Elimination of Garfield's day-shift position

The complaint also alleges that the Respondent discriminated in violation of Section 8(a)(3) and (4) by eliminating Garfield's

day-shift position on about February 22 and subsequently failing to post any day-shift vacancies. The evidence presented satisfies the first two elements of the *Wright Line* prima facie case with respect to this allegation. Garfield has been active in the Lyndonville facility's union for many years and became the president of the local union in May 2009. There is no doubt that the Respondent was aware that Garfield participated in a range of union activities and testified at the February 2011 unfair labor practices hearing regarding MBS. However, the Respondent has failed to establish animus connected to the decision to eliminate Garfield's day-shift position and therefore has not established a prima facie case. For the reasons discussed above, neither the statements of Jamison and Fletcher,¹⁴ nor the timing of the reassignment show such animus. I also do not find animus based on the fact that on February 18, 2011, Brighenti notified Koski that Garfield was being reassigned to the night shift. This communication does not mention or allude to any unlawful motive and I credit Brighenti's testimony that he alerted Koski to the reassignment because Garfield had filed a charge the last time he was reassigned. I also note that the suggestion that the Respondent was bent on interfering with Garfield's union activities by moving him to the night shift is contradicted by the fact that, after eliminating Garfield's day-shift inspector position, the Respondent immediately selected Garfield to stay on the day shift for a period of time in a temporary assignment.

Even assuming that the Acting General Counsel had succeeded in establishing a prima facie case, there would be no violation since the Respondent has met its responsive burden under *Wright Line* by showing that it would have taken the same actions with respect to Garfield even absent any antiunion animus. For the reasons discussed above, I conclude that the layoff itself was motivated by lawful business reasons. Regarding the related decision to eliminate Garfield's day-shift position, Jewell testified that this was done as part of the Respondent's effort to improve performance by moving employees from indirect labor positions to direct labor positions. That explanation is facially credible and Jewell's testimony regarding it was not undermined during cross-examination or by other evidence. There is no dispute that the inspector position is "indirect" and that, because Garfield was the inspector with the least seniority, he was the one to be reassigned when an inspector position was eliminated. Moreover, it is not disputed that, even before the layoff, the Respondent was acting to reduce the need for inspectors by allowing employees to do self-inspections using a buddy system. In addition, based on Jewell's testimony and the record as a whole, I credit Jewell's statement that the reason he

¹⁴ I considered whether animus is shown by Fletcher's April/May 2011 threat in light of the fact that the complaint allegation concerning Garfield references not only the elimination of his position, but also a subsequent failure "to post any vacated daytime positions for bid." However, the record does not show that during the period after Fletcher became plant manager and before Garfield returned to the day shift in August 2011, any daytime positions were vacated and not posted as day-shift vacancies. Assuming the failure to post daytime positions is itself alleged to be a violation, there is no evidence that Fletcher had a part in any such decisions, and therefore, his animus has not been shown to be relevant to such an allegation.

moved the day-shift position in the cut-off department to the night shift was to further management's plan to rebalance shifts. The transfer of the cut-off position from the day shift to the night shift was by no means a unique occurrence, but rather part of an ongoing effort to rebalance shifts in order to better exploit the facility's most productive equipment. The staffing plan that the Respondent put into effect in 2008 and 2009—before the unfair labor practice proceeding regarding MBS—reduced the number of employees on the day shift from 70 to 46 while increasing the number of employees on the night shift from 10 to 23. Then, at the time of the February 2011 layoff, the Respondent made further efforts to equalize staffing—moving positions in the coating and OD departments from the day shift to the night shift, and when a day-shift position in the flute department became vacant, moving it to the night shift. As part of the 2011 staffing plan, 5 of the 45 positions on the day shift were eliminated, while the number of positions on the night shift remained constant at 21.

The Acting General Counsel points out that the 2010 layoff staffing plan called for Levesque to continue on the day shift in the cut-off department, but when he voluntarily left that position, the vacancy was posted on the night shift. I agree that this is somewhat curious, but not so curious as to outweigh the strong evidence indicating that the Respondent would have made the same decision even absent Garfield's activities on behalf of the Union. See *Merrilat Industries*, 307 NLRB 1301, 1303 (1992) (The Respondent need only establish its *Wright Line* defense by a preponderance of the evidence, and therefore that defense “does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it.”). Moving the opening to the night shift was consistent with the Respondent's ongoing efforts to rebalance the shifts. In addition, Jewell credibly testified that when the cut-off vacancy was posted he had not even expected Garfield to bid on the position.

For the reasons discussed above, the evidence does not show that the Respondent violated Section 8(a)(3), (4), and (1) by discriminatorily eliminating Garfield's day-shift inspector position and subsequently failing to post any day-shift positions for bid. The complaint allegations relating to the elimination of Garfield's position and the failure to post day-shift positions should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5).
3. The Respondent violated Section 8(a)(1) in April or May 2011 by threatening employees with unspecified reprisals because of the Union's activities.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Kennametal, Inc., Lyndonville, Vermont, shall

1. Cease and desist from

(a) Threatening employees at the Lyndonville, Vermont facility with unspecified reprisals because of the protected union activities of employees and/or of the United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL-CIO, CLC.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Lyndonville, Vermont, copies of the attached notice marked “Appendix.”¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 4, 2011.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.