K-Mart Corporation, Debtor-In-Possession *and* Kevin Barthold *and* Ricky D. Brock *and* Local 157, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO and its successor Local 174 *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–42873(1)(2), 7–CA–43820(1), 7–CA–43820(2)(3), 7–CA–44449(2), 7–CA–44570, 7–CA–44653, and 7–CA–44746(2)

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 8, 2002, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

For the reasons below, we agree with the judge's dismissal of the allegation that the discharge of Christopher Munsie violated Section 8(a)(1), and find merit in the Respondent's exceptions to the judge's finding that the discharge of Ricky Brock violated Section 8(a)(3) and (1). Accordingly, we dismiss the complaint.

[1] The Respondent has 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The parties reached a non-Board resolution regarding Cases 7–CA–43820(3), 7–CA–44449(2), 7–CA–44653, 7–CA–44746(2), and 7–CA–42873(1)(2). By order dated July 14, 2003, the Board granted a joint motion by the Charging Parties and the Respondent to sever those cases from these proceedings, approve the Charging Parties' request to withdraw those cases, and dismiss the corresponding complaint allegations.

In the absence of exceptions, the Board also adopted the judge's recommendation to dismiss the allegation that the discharge of Kevin Barthold in Case 7–CA–43820(1) violated Sec. 8(a)(3) and severed that case from the remaining cases in this matter. Accordingly, Case 7–CA–44570 concerning the discharge of Ricky Brock and Case 7–CA–43820(2) concerning the discharge of Chris Munsie are the only cases remaining before the Board for decision.

Background

The Respondent operates a distribution center in Clinton, Michigan, with approximately 600 office, maintenance and general warehouse employees (associates) who work on three shifts. The Union began its organizing campaign in December 1998. In an election held on December 21, 2000, the employees voted for union representation and the Union was certified on January 2, 2001. Alleged discriminatees Munsie and Brock were active union supporters, and Brock was appointed to the Union's bargaining committee.

1. Discharge of Christopher Munsie

On February 13, 2001, Christopher Munsie returned to work at the Distribution Center after a month-long medical leave of absence. That same day, Supervisor Gerald Scott asked Muncie if he had received a copy of the Respondent's rules, which had been distributed several weeks earlier. After Munsie confirmed that he had received the rules (including that breaks had to be taken in designated break areas), Scott reminded Munsie that he could not take his breaks in the lobby, as had been his practice. Munsie proceeded to raise his voice, and curse at Scott arguing the rules "don't mean shit" in light of the Union's recent victory. Munsie admitted that he was the first to raise his voice, that only he used profanity, and that he refused to permit Scott to discuss the remainder of the memorandum with him. Later that day, Munsie was placed on administrative leave. On February 26, the Respondent sent Munsie a letter terminating him for insubordination and creating a hostile work environment, relying on a rule in its associates handbook.[3]

The judge dismissed the allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Munsie for complaining to Respondent on behalf of himself and other employees regarding the promulgation of work rules limiting the locations where employees could take their breaks. The judge also found no evidence that Munsie was acting on behalf of other employees in his protest. Instead, the judge found that Munsie was protesting and rejecting his supervisor's authority to remind and direct him to the Respondent's established rules, which had been implemented prior to the Union's certification. Thus, the judge found that the Respondent had recently circulated a memorandum to the employees reminding them of the rules, but had not implemented new

[3] The rule relied on by the Respondent stated in relevant part that:

> There are occasions when an associate's conduct is so detrimental to other associates and/or the Company that it warrants termination on the first occurrence. Examples include, but are not limited to, offenses such as: . . . Assaulting, fighting, threatening, horseplay, hostile conduct, or any other act which could affect the well being of any associate.

rules governing the break area. Accordingly, the judge found that both the object of Munsie's protest and his conduct took his activity outside the protection of the Act.

In exceptions, the General Counsel contends that Munsie's conduct was concerted, as an expression both of the concerns of Distribution Center employees and of Munsie's support for the Union's position that promulgation of the rules without negotiation was unlawful.

We agree with the judge that Munsie's conduct was unprotected, but do so solely because Munsie's conduct was not concerted in nature.[4] Thus we find no merit in the General Counsel's exceptions described above.

Section 7 gives employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. In *Meyers Industries*, the Board distinguished between an employee's activities engaged in with or on the authority of other employees (concerted) and activities engaged in solely by and on behalf of the employee himself (not concerted).[5] There, the Board overruled *Alleluia Cushion Co*., 221 NLRB 999 (1975), and its progeny, which held a broader view of concerted conduct as including individual activity on certain matters of possible group concern even in the absence of explicit authorization of the individual's action by other employees.[6] To the extent that the General Counsel is arguing that Munsie's protest, even if not authorized by other employees, would be protected as an expression of the unit employees' common concerns, we find it contrary to controlling Board precedent. *Meyers I & II*, supra. Because we agree with the judge that there is no evidence in the record that Munsie was acting either on the authority of, or with, other employees in protesting the break rules—or that he was "seek[ing] to initiate or to induce or to prepare for group action[7]—we find that his conduct was not concerted, and therefore not protected.

We also reject the General Counsel's alternative theory that Munsie's protest was concerted because he was taking a position consistent with that of the Union. See, e.g., *Tradesmen International, Inc.*, 332 NLRB 1158, 1159 (2000), enf. denied on other grounds 275 F.3d 1137, 1142 (D.C. Cir. 2002) (Court assumes conduct to be concerted, but finds it to be unprotected). Here, there is no record evidence that the Union had taken a position regarding the Respondent's breakroom rules prior to February 13.

In sum, because the General Counsel has not shown that Munsie was engaged in concerted activity, we dismiss the allegation.

2. Discharge of Ricky Brock

Ricky Brock actively supported the Union in its organizing campaign at the Distribution Center. After its certification, the Union selected him to be a member of its bargaining committee. On a number of occasions, the Union had requested that Brock be given time off to participate in meetings held to prepare for bargaining with the Respondent. The Respondent's human resources manager Kenneth Kolb disputed the necessity of Brock taking time off from his night-shift duty for daytime meetings.

On May 17, 2001, Brock and a fellow employee Stuart Spencer argued over how Spencer was performing his work. In the course of the incident, Spencer used his forklift to block Brock's path and taunted Brock about his recent divorce. Brock told Spencer not to discuss his personal life at work and grabbed Spencer's collar. Brock reported the incident to management, which spoke with both employees and had them provide written statements. Both continued working at their regular shifts. Although Brock initially denied touching Spencer, on May 17 he admitted doing so.[8] On May 25, Kolb summoned Brock to his office and handed him a letter terminating him for grabbing Spencer's collar and threatening him.

The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging Ricky Brock because he assisted the Union in its election campaigns and to discourage other employees from engaging in such activity. She found antiunion motivation for Brock's discharge was established largely on the timing of his termination that occurred during the same time period as his dispute with Kolb over taking time off to prepare for negotiations. The judge rejected the Respondent's rebuttal argument that Brock would have been terminated for his conduct, even in the absence of his union or protected

[4] Accordingly, we find it unnecessary to determine whether the judge correctly found that Munsie's protest, even if concerted, would have lost its protection because of the manner of his conduct.

[5] 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[6] Moreover, we disagree with the General Counsel's contention that the *Interboro* doctrine applies. An individual employee activity is concerted if the employee seeks to enforce provisions of a collective-bargaining agreement. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors, Inc*., 157 NLRB 1295 (1966), enfd. 338 F.2d 495 (2d Cir. 1967). In the absence, as here, of a collective-bargaining agreement, the *Interboro* doctrine is inapplicable.

[7] *Meyers II*, supra, 281 NLRB at 887.

[8] Brock testified that he only touched Spencer's collar, while Spencer testified that Brock grabbed his collar and threatened to beat him. The judge did not make an explicit finding as to what actually happened, but "assumed" that Brock had admitted to grabbing Spencer's collar.

activity, under its rule authorizing termination for violent or threatening behavior.[9] In doing so, the judge relied on the Respondent's failure to fire employee Jason Shudell for pushing another employee's head towards a wall and threatening to punch her as evidence that it has tolerated assaultive or hostile behavior between employees.

In exceptions, the Respondent contends that Brock would have been terminated for his threatening and assaultive behavior even in the absence of any protected activity. We find merit in this argument.

In her decision, the judge assumed that Brock had admitted to grabbing Spencer's collar (but did not make any finding regarding his use of threatening language). Spencer testified without contradiction that he told Respondent's officials that Brock grabbed Spencer's collar and threatened to beat him. And, even Brock admitted that he told the Respondent's officials that he touched Spencer's collar. In light of this, and the fact that the reported conduct was in the course of an altercation, the Respondent discharged Brock. That discharge was consistent with the handbook rule set forth above.

Unlike the judge, we do not find that the Respondent's failure to discharge Shudell establishes disparate treatment of Brock. As the Respondent points out, it chose not to fire Shudell because: one, he denied attacking the other employee and two, there were no witnesses to the alleged violence. Brock conceded, however, to have physically approached Spencer to the point of touching Spencer's collar.[10] This concession strongly corroborates Spencer's account of the incident. In these circumstances, we do not find that the Respondent's treatment of Shudell constitutes disparate treatment of Brock. Moreover, the record establishes Respondent's consistent enforcement of its detrimental conduct rules. It has terminated employees for hostile conduct toward fellow employees. For example, Respondent terminated employee Whitecraft for striking another employee under provocation similar to Spencer's taunting of Brock. Indeed, the Respondent has terminated several employees for hostile conduct less serious than Brock's conduct.

Accordingly, we find that the Respondent rebutted the General Counsel's case, and we dismiss the allegation.

ORDER

The complaint is dismissed.

John Ciaramitaro and *Ingred Kock, Esqs.*, for the General Counsel.

Daniel J. Bretz and *Paul W. Coughenour, Esqs.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH**,** Administrative Law Judge. This case was tried in Detroit, Michigan, from May 6–9, 2002. The original charge in Case 7–CA–42873(1) was filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union) on March 17, 2000, against K-Mart Corporation (Respondent). The original charge in Case 7–CA–42873(2) was filed by the Union on May 3, 2000. The amended charge in Case 7–CA–42873(1) was filed by the Union on July 18, 2000. Based on these charges, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on June 29, 2000. On August 15, 2000, the Board issued an order consolidating cases, amended consolidated complaint, and notice of hearing in Cases 7–CA–42873(1) and 7–CA–42873(2). The original charge in Case 7–CA–43820(1) was filed by Kevin Barthold, an individual (Barthold) on March 13, 2001. The original charge in Case 7–CA–43820(2) was filed by the Union on March 13, 2001. The original charge in Case 7–CA–43820(3) was filed by the Union on May 1, 2001. The amended charge in Case 7–CA–43820(3) was filed by the Union filed on June 28, 2001. On June 29, 2001, the Board issued an order setting aside settlement agreement and order consolidating complaints. In the order, the Regional Director for Region 7 set aside a prior settlement agreement in Cases 7–CA–42873(1) and 7–CA–42873(2) and pursuant to Section 102.33 of the Board's Rules and Regulations consolidated these cases with Cases 7–CA–43820(1) and 7–CA–43820(2)(3). On August 1, 2001, the Board issued an order consolidating cases, second consolidated amended complaint and notice of hearing for Cases 7–CA–43820(1), 7–CA–43820(2)(3), and 7–CA–42873(1)(2). On October 17, 2001, the Union filed the original charge in Case 7–CA–44449(2). On November 20, 2001, Ricky D. Brock, an individual (Brock) filed a charge in Case 7–CA–44570. On December 17, 2001, the Union filed a charge in Case 7–CA–44653. Based on the charges filed in Cases 7–CA–44570 and 7–CA–4449(2), the Board issued an order consolidating cases, consolidated complaint and notice of hearing. Based on the charges in Cases 7–CA–43820(2)(3), 7–CA–44449(2), 7–CA–42873(1)(2), and 7–CA–44570, the Board issued an order consolidating cases. The original charge in Case 7–CA–44746(2) was filed by the Union on January 18, 2002. The amended charge in Case 7–CA–44746(2) was filed by the Union on March 26, 2002. Based on the charges in Cases 7–CA–43820(1), 7–CA–44570, 7–CA–43820(2)(3), 7–CA–44449(2), 7–CA–44653, 7–CA–44746(2), and 7–CA–42873(1)(2), the Board issued an order setting aside settlement agreement, order consolidating cases and fourth consolidated amended complaint and notice on hearing on March 28, 2002.

The fourth consolidated amended complaint alleged that Respondent violated Section 8(a)(1) of the Act by: threatening employees with discharge for engaging in activities in support of the Union and with loss of opportunities for advancement if

[9] *Wright Line*, 251 NLRB 1083, 1089 (1980).

[10] We would come to the same conclusion even if the judge had relied upon Brock admitting to only touching—and not "grabbing"—Spencer's collar.'"

employees selected the Union as their bargaining representative, telling an employee that he was not allowed to talk with anyone on the receiving floor, telling an employee to keep his eyes open during Respondent's meetings with its employees and note the identity of employees who were outspoken in support of the Union, telling employees to identify employees who supported the Union and to find reasons that Respondent could terminate them, repeatedly and coercively interrogating its employees regarding their union sympathies, isolating an employee from other employees, telling employees that they could not talk about a union while they were working, while at the same time not prohibiting employees from talking about other nonwork subjects, and conducting an employee interview without benefit of representation. The fourth consolidated amended complaint alleged that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Dennis Theobald, Kevin Barthold, Christopher Munsie, and Ricky D. Brock. The complaint further alleged that Respondent violated Section 8(a)(3), (4), and (1) of the Act by issuing disciplinary actions to employee Arnold Gregory. The complaint further alleged that Respondent violated Section 8(a)(5) and (1) of the Act by: ceasing its practice of granting annual across-the-board wage increases for employees, requiring its maintenance employees to complete a form detailing their activities, dealing directly with its employees by soliciting volunteers for a 1-week layoff, laying off employees, and eliminating the afternoon and midnight shifts and consolidating all operations to the day shift.

During the course of the hearing, counsel for the General Counsel withdrew complaint paragraphs 12 (a), (b), and (c) as well as paragraphs 13 and 14. Counsel for the General Counsel also moved for the reinstatement of the settlement agreement in Case 7–CA–42873(1)(2) and Respondent joined in the stipulation. General Counsel's motion was granted. Thus, the allegations dealing with the discharge of Dennis Theobald, the isolation of Steve Illellum, and the threats attributed to Michael Tripp were withdrawn from the complaint.

Respondent filed answers to each of the complaints and to the fourth consolidated amended complaint denying the essential allegations, and asserting certain defenses.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, has been engaged as a general merchandise retailer at its facility in Canton, Michigan, where it annually derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 at its Michigan facility directly from points located outside the State of Michigan. 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.

[1] Respondent's unopposed motion to correct the transcript, dated June 26, 2002, is granted and received into evidence as R. Exh. 50.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a general merchandise retailer that owns and operates approximately 2000 retail stores. The Canton, Michigan distribution center, one of Respondent's 18 warehouses or "distribution centers" (DC's), receives, stores, and ships merchandise to approximately 130 stores in three States. The Canton DC employs approximately 600 office, maintenance, and general warehouse employees or "associates."[2] General warehouse associates are assigned to various departments including receiving, put-a-away, shipping, non-conveyable, and repack. Associates work three shifts: first (generally 7 a.m.–3 p.m.); second (generally 3–11 p.m.); and third (generally 11 p.m.–7 a.m.).

The warehouse, maintenance, and clerical workers at six of K-Mart's distribution centers are covered by collective-bargaining agreements. In May 1999, a union election was held at the Canton DC, which resulted in a vote of 367 against and 206 in favor of representation by the Union. On September 20–23, 1999, an unfair labor practice trial was held at Region 7 of the Board before Administrative Law Judge C. Richard Miserando regarding unfair labor practice charges and objections filed regarding the May 1999 election at the Canton DC. On December 21, 2000, a representation election was held pursuant to a stipulated agreement, which resulted in a vote of 260 in favor and 244 against the Union's representation. On January 2, 2001, the Union was certified as the exclusive collective-bargaining representative for all full-time and regular part-time computer operators, warehouse associates, plant clerical associates, office clerical associates, skilled maintenance associates, general maintenance associates, and general warehouse associates employed by Respondent at its Canton, Michigan warehouse facility. In or about October 2001, Local Union 174 became the successor to Local Union 157 and since then Local Union 174 has been designated by the International Union as its servicing agent.

B. The Discharge of Chris Munsie

General Counsel alleges that Respondent suspended and later terminated Chris Munsie for concertedly complaining to Respondent on behalf of himself and others the promulgation of certain work rules. Respondent asserts that Munsie was terminated on February 26, 2001, after a verbally abusive, profanity-laced confrontation with his immediate supervisor, Gerard Scott.

1. Evidence presented by General Counsel

Prior to his termination on February 26, 2001, Munsie had worked for Respondent since February 7, 1997. As an hourly general warehouse associate, Munsie drove a motorized forklift or "hi-lo" on the third shift in the nonconveyable department. Gerard Scott supervised Munsie at the time of his discharge. Employees on the third shift are allowed two breaks during

[2] Bargaining unit employees are generally referred to as employees throughout this decision. Respondent's witnesses and documentation refer to employees as associates.

their shift, one at 2 a.m. and a second at 5 a.m. While there are two breakrooms available to employees on their breaks, Munsie developed a habit of drinking coffee in the downstairs lobby area during his scheduled breaktime. Munsie asserted that he had taken his breaks in the lobby for as long as a year prior to his termination and no one had told him that he could not do so. While the lobby is open to the public during the regular workday, the lobby is closed to the public during the evening hours when Munsie worked. Munsie recalled that fellow employees, Randy Smith and George Camp, took their breaks there as well.

Munsie returned to work on February 13, 2001, after a medical leave of absence. At approximately 10:30 or 11:30 p.m., Scott, riding a bicycle, approached Munsie on his hi-lo. Scott asked Munsie if he had received a copy of the company rules that had been distributed a few weeks before. Munsie confirmed that he had. When Scott further reminded Munsie that he could not take his breaks in the lobby, Munsie asserted that there had been nothing in the rules about where employees could take their breaks. Scott added that this rule had also been posted on the company bulletin board. Munsie testified that he told Scott that the Union had said that Respondent could not enforce any new rules. Munsie admits that he was probably the first to raise his voice to Scott. Munsie also admitted that while Scott had not cursed him, he had cursed Scott. He also recalled that when he swore at Scott, Scott responded by sticking his finger in Munsie's face and saying, "K-Mart can do anything they want." Munsie recalled telling Scott that he didn't want to work for him and Scott responded that he could arrange that. Munsie contends that after they argued he told Scott that if he would move out of his way, he would go back to work. Scott answered that he was the boss and Munsie would do what he told him to do.

After Munsie returned to work, Scott and Supervisor Rich Markham came to Munsie and told him that he was to report to human resources. On the way to human resources, Munsie met Loss Prevention Supervisor Jerry Waislesky and asked him if he could have a witness. When Waislesky confirmed that he could, he paged employee John Williams using the company paging system. When Munsie went to the human resources office, he met with Markham, Waislesky, Scott, and employee Williams. Munsie recalled that he was told that he was being suspended and was given a statement form to complete, explaining his position on what had occurred. Munsie contends that while he had not completed the form immediately, he had done so the next day and submitted it as requested.

2. Evidence presented by Respondent

Munsie admitted that 2 weeks prior to February 13, 2001, he had received a memorandum entitled "Reminder as to Rules and Regulations," dated January 31, 2001. Page two of the memorandum contains the reminder that food, coffee, and other drinks are permitted only in designated break areas. A valid doctor's note must support any and all medical conditions requesting exceptions to this rule. Munsie also acknowledged that he had received a copy of the employee handbook that was distributed in August 2000. The handbook not only specifies that food, coffee, and soft drinks are permitted only in designated areas, but also that breaks are to be taken in designated areas.

Scott testified that he had approached Munsie on February 13 to bring him up to date on some of the things that had occurred during his leave of absence. Knowing that Munsie had been taking coffeebreaks in the front lobby, Scott wanted to inform Munsie that the January memorandum had restated the employee handbook provision as to where breaks could be taken. Scott testified that when he mentioned the reminder memorandum to Munsie, he immediately blew up, announcing that the rules "do not mean shit because of the union." When Scott told Munsie that the rules applied, Munsie demanded to see it in "black and white." Scott explained that he did not have a copy of the rules with him and Munsie responded, "You never have a copy of a motherf–king thing." When Scott tried to calm Munsie, Munsie replied "I am tired of your shit, I do not have to take this. I want out of your department. I do not want to work for you." Scott told Munsie that if he wanted out of his department it was not a problem. Scott told him that when openings came up, he could bid out of the department.

Respondent asserts that Munsie did not deny that he cursed Scott. Scott recalled that Munsie had called him a "motherf–ker" at least three times and had also said, "f–k you" to Scott. Respondent points out that while Munsie alleged that Scott had stuck his finger in his face, Munsie admitted that he was standing on his hi-lo and was at least a foot and a half above Scott, who was standing on the floor straddling his bicycle. Respondent presented Roger Lambert, a member of the bargaining unit to testify concerning his observation of the conversation between Munsie and Scott. Lambert recalled having heard Munsie talking in a loud voice and his having called Scott a "motherf–ker" at lest three times. Lambert also heard Munsie say to Scott, "I don't think so, mother f–ker. We'll see about that." Lambert heard Munsie tell Scott to "Get the f–k away" before he drove away on his hi-lo.

Order Filling Department Manager Richard Markham was the most senior management person on the third shift on February 13. During the shift, Scott came to him and reported that Munsie had cursed him on the floor. Markham went to Munsie and told him to report to the nonconveyable desk where they could talk. Markham recalled that upon coming to the desk Munsie paced back and forth with clenched hands and flushed face. Munsie began making pages on the telephone paging system, shouting with a loud voice. Although Markham instructed Munsie not to page on the PA system in such a loud manner, Munsie continued to do so. Markham told Munsie that if he continued to do so, Markham would have to call security and possibly the police to intervene. Markham recalled that Munsie responded, "Do what you have to do, pal." When Markham asked Munsie to fill out a statement as to what had occurred with Scott, Munsie responded, "I'm not filling shit out." Markham then placed Munsie on administrative leave and sent him home. As Munsie was leaving, he said, "this place is f–ked up. You guys are all alike."

Munsie's conduct was reviewed by Canton DC Human Resources Manager Ken Kolb, and by Regional Human Resources Director for Logistics Jack Barclay. The employee handbook identifies occasions when an associate's conduct is so detri-

mental to other associates and/or the Company that it warrants termination on the first occurrence. The handbook lists such conduct as "Assaulting, fighting, threatening, horseplay, hostile contact, or any other act which could affect the well being of any associate." In reviewing the occurrence involving Munsie and Scott, Barclay found seven comparable situations where employees were discharged for similar threatening, profane, or abusive conduct on the first occurrence. Respondent submitted the documentation showing the termination of employees Bozak and Smith for using "f–k" and "motherf–ker" to supervisors. Employee Gryzmala was terminated for using profanity and for threatening his manager. Employee Hester was terminated for one incident of directing profanity to another employee on the internal computer system. Employees' McGhee and Micheli were both terminated for a single incident when they used profanity and made threats against each other. Barclay testified that after review of the information concerning Munsie's conduct, and review of the comparables to ensure consistency and uniformity in the application of K-Mart's policies, he approved Munsie's discharge.

C. The Discharge of Ricky D. Brock

General Counsel alleges that Brock was discharged on or about May 25, 2001, because he joined or assisted the Union and to discourage employees from engaging in these and other concerted activities. Respondent alleges that Brock was terminated for assaultive behavior, specifically grabbing another employee's shirt collar and threatening the employee. In its discharge of Brock, Respondent relies on the same employee handbook section identifying conduct that warrants termination on the first occurrence.

1. Evidence presented by General Counsel

Brock began working for Respondent in February 1991. At the time of his discharge in May 2001, Brock worked as a third shift employee in the put-away department and was supervised by Dale Tritten. Prior to the May 1999 and December 2000 elections, he passed out union literature at the front gate and in the warehouse. During both campaigns in 1999 and 2000, he regularly wore union hats, buttons, and tee shirts. He also testified at the unfair labor practice trial in September 1999. After the December 2000 election, he was appointed as a member of the Union's bargaining committee. The initial notification of his appointment was given to Respondent by letter dated February 6, 2001. The Union later requested that Brock be excused from work for his entire shift for March 6, 7, 8, 9, 23, and 24 as well as May 30 and 31 for official union business. Brock recalled that he had a continuing dispute with Human Resources Manager Kolb about whether he could take off the midnight shift before or after the union meetings that occurred during day shift. The dispute was never resolved prior to his discharge.

At about 12:30 a.m. on May 17, Brock was working in the staging area transporting freight from receiving to the caseback department. Brock observed employee Steve Spencer sweeping the floor. Spencer's responsibility however, was to sort freight for Brock and other employees to pick up and transport to the various areas of the warehouse. When Brock saw Spencer, he asked why he was not sorting freight and complained that Brock and the other two pallet riders were riding around with nothing to do. Spencer told Brock that if he was not happy with his work, he could speak with Spencer's supervisor. Brock left Spencer and went into the cafeteria to look for Tritten. When Brock did not find Tritten in either the cafeteria or the shipping area, he walked back toward the receiving area. On his way, Spencer pulled his hi-lo between parked freight and positioned the hi-lo in front of Brock to block his path. Spencer leaned down from his hi-lo into Brock's face and asserted that Brock was just angry because his wife had taken all his money. Brock knew what Spencer meant by the remark as his divorce had been finalized the previous day. Brock responded that this was no place for his personal life and he walked through the freight to get to the main aisle and to call his supervisor. As he was speaking to Spencer, Brock raised his hand and grabbed the side of Spencer's hi-lo. While Brock initially testified that he did not touch or grab Spencer, he later admitted that he had touched Spencer's collar to "hold him back." When Brock got to the receiving office, he reported the incident to Receiving Supervisor Kurt Ahlighan before paging Tritten on the intercom. When he was able to speak with Tritten personally, he told him what Spencer had said. Tritten called a conference to speak with both Spencer and Brock. During the meeting, both Brock and Spencer gave their own account of what occurred and they were directed to prepare a written account of the incident. In his written statement, Brock asserted that Spencer had embellished his side of the story. Spencer had complained that Brock threatened him and grabbed his shirt collar. Brock continued to work all of his scheduled workdays after May 17 and until May 25. At the completion of his shift on May 25, Human Resources Director Kolb told Brock that he was terminated for violence in the work place.

Employee Amy Deroo described an incident in August 2001 that occurred between her and fellow employee Jason Shudell. As she was descending a flight of stairs at Respondent's facility, she stopped to talk with employee Larry Sokol, who was standing at a lower level of the stairs. While her attention was focused on Sokol, Shudell told her to "shut up" and forcefully pushed the left side of her head toward the wall, knocking her off balance. She was able to grab the wall and regain her balance. When she responsively swatted at Shudell, he drew his fists and asked her if she "wanted her ass kicked." Deroo backed away from him and asked if he liked his job because workplace violence was not tolerated. In a statement given to Respondent, Sokol verified that he had not seen Shudell strike Deroo, however he heard loud talking. He also heard Deroo questioning Shudell as to whether he wanted to lose his job.

After the incident, Deroo filed a written report and spoke with her immediate supervisor, Dale Tritten, as well as Human Resources Manager Tom Hunt, human resources specialist, Cheryl Greenhalge, and General Manager Duane Baker. Shudell was not terminated for the physical assault and threat to Deroo. Within a few weeks of the incident, Shudell was terminated for an unrelated reason. Although he was terminated for exceeding his allowed number of time off hours, he was reinstated after a peer review hearing. When Shudell returned to

the facility after a 6-weeks absence, Respondent assigned Deroo to work near Shudell. Although Deroo complained to Tritten and to Regional Human Resources Director Jack Barclay, Respondent has continued to assign Deroo and Shudell to the same shift and in the same department.

2. Evidence presented by Respondent

Supervisor Tritten testified that on May 17, Spencer came to him and reported that Brock had grabbed him by the collar and threatened to "beat his ass." Tritten further testified that when he spoke with Spencer and Brock, Brock admitted that he had grabbed Spencer's collar and made a verbal threat to him. Receiving Manager Ahlijian also testified that when he had spoken to Brock on the evening of May 17, Brock admitted that he had grabbed Spencer's collar during the argument. Asset Protection Supervisor Wasilewski recalled that when Brock met with Kolb and he on May 17, Brock was questioned as to whether he had put his hand on Spencer. Wasilewski recalled that while Brock did not admit that he grabbed Spencer's collar, he acknowledged that he "rearranged" Spencer's collar. Brock testified that while he had touched Spencer's shirt, he had not admitted to Tritten, Ahlighan, Greenhalge, or Wasilewski that he had touched Spencer's shirt. Brock asserted that if these individuals had testified that he had, they were conspiring against him.

Respondent asserts that Sokol's statement indicated that he did not see anything and did not hear anyone speak except Amy Deroo. Because there were no corroborating witnesses and because Shudell denied Deroo's accusations, he was not terminated. Respondent distinguishes this situation from that of Brock's termination because Shudell denied the accusation and Brock did not. Regional Human Resources Director for Logistics Barclay testified that he did not view Spencer's comments about Brock's wife as mitigating factors in Brock's conduct. Barclay provided an example of a situation in which Respondent terminated an employee for conduct similar to Brock. On August 29, 2001, Respondent terminated employee Ronald Whitecraft for striking fellow employee Terry Heller in the mouth with his elbow. Prior to Whitecraft's striking Heller, Heller had joked about Whitecraft's wife. Whitecraft admitted that he struck Heller and that the blow brought blood. Barclay recalled that Heller had received a notice of correction but had not been terminated.

D. The Discharge of Kevin Barthold

General Counsel asserts that Respondent terminated Barthold on January 31, 2001, because he joined or assisted the Union and to discourage employees from engaging in these activities and other concerted activities. Paragraph 12 of the complaint also alleges that on or about December 2000, Supervisor Donald Kullick told Barthold to keep his eyes open during Respondent's meetings with its employees and note the identity of employees who were outspoken in support of the Union. The complaint further alleges that Kullich told Barthold to identify employees who supported the Union and to find reasons Respondent could terminate them. Respondent denies the statements attributed to Kullich and asserts that Barthold was laid off as a result of a nationwide reduction and reorganization of the loss prevention staff throughout Respondent's distribution centers.

1. Undisputed facts

Barthold was hired at the Canton DC on October 6, 1997, as an hourly loss prevention associate (LPA), a position excluded from the bargaining unit. At the time of his layoff, Barthold worked on first shift in the loss prevention department. Don Kullich served as loss prevention manager and Tom Jasdrewski functioned as loss prevention supervisor on second shift. In addition to Barthold, there were four other hourly LPA's. While Ray Ferioli and James Wasko worked on the first shift with Barthold, James Honsinger and Jerry Wasilewski worked on second and third shifts, respectively.

In early December 2000, Barthold told Kullich that he had taken a second job at Ameritech Corporation requiring 40 hours each week. Prior to this time, Barthold's first shift schedule required that he work from 7 a.m. until 3:30 p.m. In order to accommodate Barthold's work schedule at Ameritech, Kullich agreed that beginning December 11, Barthold could work at K-Mart from 4 p.m. to 8 p.m. Monday through Friday and devote his day shift hours for his work at Ameritech. Kullich also agreed that Barthold could work at K-Mart on Saturdays or Sundays to insure 30 hours a week and the opportunity to retain his benefits and vacation days. Prior to Kullich's working out this arrangement with Barthold, all of the employees in the LP Department had shared the overtime work on Saturdays. In order for Barthold to get his requisite hours, Kullich gave him all of the Saturday overtime. Prior to the layoff on January 31, Kullich told Barthold that he had to make a decision and choose between K-Mart and Ameritech. Barthold agreed that he would do so. Barthold acknowledged that he submitted a request to take his entire 2 weeks of vacation beginning February 1, 2001, as soon as he became eligible for the vacation. He also admitted that he had "possibly" considered taking all 80 hours off and then resigning at that time. Barthold further confirmed that he "might have" told other employees that he would resign as soon as he obtained and used all 80 hours of vacation. On January 31, 2001, Kullich met individually with the employees in the LP department. When Kullich met with Barthold he told him that he was laid off and the entire LP department had been eliminated.

2. Evidence presented by General Counsel

Barthold testified even though the loss prevention employees were not eligible to vote in the 2000 election, they were included with other employees in Respondent's preelection employee meetings. Barthold testified that Kullich told him to "keep an eye on the people at the meetings" and "note down the people strongly for the Union" and report back to him. Kullich told Barthold that Respondent wanted to know who these people were because "they wanted to eliminate the people that were pro-union."

Barthold recalled that during Respondent's meetings with employees prior to the election, union issues and the election process were discussed and employees were allowed to ask questions. Barthold testified that during a meeting in December, he had raised a question about why 55 employees had not

received a $.50 wage increase after the first election in 1999. Corporate attorney Anthony Byergo, who was conducting the meeting, was not able to answer Barthold's question. He told Barthold that he would check into it.

Prior to his termination, Barthold worked in the annex warehouse, where the number of employees totaled approximately 35 to 100. Wearing tee shirts and buttons identified employees who supported the Union. Barthold spoke and worked with these employees every day. In December 2000, Kullich asked Barthold to meet with him in his office in the main building. Kullich asked him if he were a union supporter. Barthold testified that he told Kullich that while he sympathized with the supporters, he was not a union supporter because he could not vote in the election. He explained that he sympathized because of what had happened with a prior wage increase. Barthold testified that Kullich accused him of walking around the floor supporting the Union. Barthold assured Kullich that he had nothing to worry about, again asserting that he was not eligible to vote. Kullich stated that he would let management know that he had spoken with Barthold and would reassure management that Barthold did not support the Union.

Barthold testified that after his layoff, he went back to the facility more than once and spoke with Kullich more than once. When he spoke with Kullich, they discussed how his new job was going and what was happening in the warehouse. Barthold described Kullich as a good friend. He denied however, that he was ever offered employment in the warehouse.

3. Evidence presented by Respondent

In January 2001, Respondent began the nationwide elimination of the LPA position and reorganized the LP department structure throughout the 18 distribution centers. The proposal was to lay off all hourly LPA's and expand the supervisory function so that a supervisor would cover each DC shift in operation. Respondent's plan included the layoff of at least four to five hourly LPA's at each of the 18 distribution centers. In late January 2001, this departmental organization was implemented. Brian King, regional director for logistics, loss prevention/asset, made the decision as to which of the five LPA's would be laid off and who would be selected for the three supervisory positions at the Canton DC. King requested input from Kullich as to which LPA's to retain. Kullich did not recommend against retaining any LPA's. With respect to Barthold, Kullich advised that he "does a great job but he has accepted a job with Ameritech." King made the decision to retain Tom Jasdrewski as a supervisor. He selected Ray Ferioli and Jerry Wasilewski for the two remaining supervisory positions. Both individuals had more seniority than Barthold. Barthold also had less seniority than Jim Honsinger and Jim Wasko who were laid off with Barthold.

Barthold admitted that when Kullich met with him on January 31 to tell him of the layoff, he told Barthold that he would do what he could to get him rehired and back in the warehouse. Barthold went on to tell Kullich and Kolb that the layoff was "okay" as he had a job. He told them that he was "just worried about Jim Honsinger and Jim Wasko."

Kullich testified that the day following the layoff of the three LPA's, he found out that the Canton DC was hiring for warehouse jobs. He recalled that he went immediately to General Manager Greg Caccavale and asked if he could offer a job to the three hourly LPA's who had been laid off. When Caccavale authorized him to do so, he began trying to reach Honsinger, Wasko, and Barthold. He was able to contact Honsinger and Wasko who both accepted the positions in the warehouse. When he was not able to reach Barthold by telephone he assumed that he was "obviously working" for Ameritech. Later that same day however, Barthold drove into the K-Mart parking lot in an Ameritech van. Kullich testified that he told Barthold that he could bring him back to a warehouse job, although he could not guarantee the shift or job. Kullich testified that Barthold declined the offer but indicated that he was pleased that Kullich had been able to take care of Wasko and Honsinger.

James Wasko testified that he came back to talk with Kullich about a job in the warehouse the day after his layoff. As he and Honsinger were walking out from their meeting with Kullich, he saw Barthold drive into the parking lot in the Ameritech van. Wasko told Barthold that he was being recalled to a warehouse job and suggested that Barthold go in and speak with Kullich about getting recalled. Barthold told Wasko, "Well, I've already got a job. I don't want to come back." Ray Ferioli testified that on the day following his layoff he overheard Kullich offer Barthold a job in the warehouse. Ferioli recalled that Barthold replied, "No, I'm all set . . . I've got Ameritech."

E. Arnold Gregory's Discipline and Alleged Counseling not to Talk with Employees

The complaint alleges that on or about March 28, 2001, Arnold Gregory was denied the right to union representation during an interview. General Counsel further alleges that despite Gregory's request for representation, Respondent's representatives nevertheless conducted an interview and issued Gregory an informal written prediscipline coaching. Complaint paragraph 25 alleges that Respondent gave both the March 28 discipline, as well as an April 30 written prediscipline counseling, because Gregory gave testimony in a prior National Labor Relations Board hearing in 1999. At trial, General Counsel claimed that Respondent also disciplined Gregory because he participated in a peer review panel on April 25, 2001. The peer review panel is a process set up by Respondent where a panel of employees hear another employee's grievance and make a finding as to whether the employee was treated improperly under existing employee rules. Respondent opposed this claim, asserting that such allegation was not a part of the complaint. General Counsel argued that such evidence was presented as evidence of animus toward Gregory. Respondent asserts that Gregory was not disciplined but only received two mild "coachings" in March and April 2001 for failing to meet production standards.

Gregory worked in the receiving department on the second shift. From January to August 2001, Christopher Happner was Gregory's immediate supervisor on second shift. John Sugden became the receiving manager for second shift in March 2001. Sugden reported to Roger Hudson, receiving operations manager, who began his employment at the Canton DC in December 2000. Gregory was on the Union's organizing committee prior to the 2000 election and he became an alternate union

committeeman in March 2001. He testified at the unfair labor practice and objections hearing in Cases 7–CA–42082 and 7–RC–21537 in September 1999.

1. Evidence presented by Respondent

The Canton DC has a production standard that requires unloaders to unload an average of 210 cartons per hour. When Roger Hudson became the operations manager at the Canton DC in December 2000, the facility ranked last in unloading production among all of the DC's. Hudson and General Manager Greg Caccavale set the Canton standard at 210 cartons per hour based on previous standards, however below the average of other distribution centers. Hudson testified that by comparison, other DC's were averaging between 225 and 275 units per hour.

Unloading trailers is the primary job in the receiving department. Employees are usually assigned to a set of docks in teams of two or three and are rotated by teams and dock location on a weekly basis. Supervisors designate which truck pulls into a specific dock. Trailers are unloaded by priority and based on the need for the merchandise and the length of time the trailer has been at the DC. Employees who unload trailers complete a performance report or "Pro Rep" each day detailing the number of units or cartons unloaded from each trailer.

On February 19, 2001, Canton general manager, Greg Caccavale, issued a memorandum regarding discipline for lack of productivity in the receiving department. The memorandum stated that "Normally at least two coachings should precede any formal discipline." On March 27, 2001, Sugden received a production summary that showed that Arnold Gregory, Terry Lambert, and Alonzo Hills had failed to meet production standards over the previous 2 weeks, March 17 and 24. On receiving this information, Sugden prepared an "Associate SKU" for each of these employees.

"Associate SKU's" are documents that memorialize a verbal coaching or work floor discussion. These documents remain in the receiving department and are neither forwarded to the human resources department nor placed in the individual employee's personnel file. Hudson confirmed that the SKU's are kept in a binder in the manager's office. Hudson further testified that an SKU is not disciplinary in nature and could either document a positive or negative verbal discussion. Each of the "SKU's" given to Gregory, Hills, and Lambert informed the employees that if there was no improvement in their production, they would receive an "Associate Interview," which is a more formal documentation prior to formal discipline. Respondent's employee handbook specifies that a "Notice of Correction" is considered disciplinary action and such documentation is placed in the employee's file. The document remains in the employee's file for 12 months from the date of occurrence. Any employee receiving three notices of correction, regardless of reason, within a consecutive 12-month period will be terminated. The handbook contains no reference to "SKU's" or "Associate Interview's." The handbook states:

> Each associate is expected to achieve and maintain satisfactory standards of performance with respect to the quality and quantity of work produced. If an associate fails to meet these requirements, management will review deficient areas with the concerned associate and provide any indicated assistance in order to help the associate achieve the required standard. If the associate's performance remains unacceptable, additional corrective action may be taken leading up to and including termination of employment.

On March 28, 2001, Happner and Sugden met with Gregory to present him with the SKU. When Gregory requested a witness, Sugden denied the request. Sugden informed Gregory that his production was low and he read aloud the information that was contained in the SKU. Sugden and Hudson did not grant Gregory's request for a witness or representative because the meeting was not disciplinary and no investigation took place. The information on which the SKU was prepared had been the information provided by Gregory in his own self-reported production report.

On April 24, 2001, Sugden received the weekly production summary and again saw that Gregory's production for the prior week ending April 21 was below standard, averaging only 142 cartons per hour. Sugden prepared an associate interview form and dated it for Wednesday, April 25, the date when he planned to speak with Gregory about his production. Sugden testified that he predated the form because he had to submit it for review by human resources. The review took longer than he had expected and he was not able to give the form to Gregory until April 30. When Sugden met with Gregory on April 30, Gregory requested a union representative. Gregory was allowed to choose employee Tom Demmers as a representative to attend the meeting.

2. General Counsel's evidence on Gregory's discipline

When Gregory was called into Sugden's office on March 28, he saw that Chris Happner was also present. Seeing both Sugden and Happner, Gregory asked for a witness. When Sugden denied his request, Gregory stated that under "*Weingarten*" that if he felt that he was being disciplined for any reason, he could have a witness. Gregory questioned why his other team members Lambert and Javier were not present in the same meeting. Gregory also asserted that he felt that his team was getting "bad loads."

When Gregory was called into the office again on April 30, 2001, Hudson asked Gregory if he would like to be retrained. Initially Gregory refused. After some further discussion with Demers, Gregory came back and agreed to the retraining. Gregory voiced in the meeting that he felt that he was being harassed and he wanted to file harassment charges. Hudson told him that he didn't know anything about any harassment but explained that Gregory could file charges with human resources.

Gregory testified that the figures that he included in his daily production report were obtained from the checker. Gregory maintained that the checker did not maintain totals for each individual loader, but simply divided the total number of product unloaded by the number of unloaders. Gregory also explained that not all trucks are the same for unloading and that some kinds of merchandise took much longer to unload.

F. Happner's Admonition not to Talk About the Union

Gregory testified that he spoke with Supervisor Chris Happner about the Union on several occasions during the 2 months preceding the 2000 election. Gregory recalled that Happner had told him that he could not talk about the Union to the people with whom he worked. Gregory replied that he could talk about anything that he wanted as long as he was doing his job. Gregory testified that he had never been told about any rule prohibiting talking while working. Gregory has heard other employees talk about such nonwork related subjects as sports and their personal lives while they worked. Gregory testified that not only have supervisors including Happner, overheard such conversations, they have also participated as well. Employee Jason Washington testified that on one occasion he overheard Happner tell Gregory that he could not talk about the Union. At the time, Washington thought that Happner may have been joking, but he recalled that Gregory had become upset and responded that it was his right to talk.

Happner denied that he ever told Gregory that he could not talk about the Union to the people with whom he worked during working hours. Happner recalls that he counseled with Gregory about standing around and talking instead of working. Happner also recalled that "most" of the other associates had complained to him about having to work with Gregory because he spent more time talking than working.

G. Respondent's Failure to Grant an Across-the-Board Wage Increase

Complaint paragraphs 27 and 28 allege that Respondent failed and refused to bargain with the Union concerning its failure to grant an annual across-the-board wage increase for unit employees in 2001 and its failure to pay such increase. General Counsel and Respondent jointly stipulated that no across-the-board wage increase was given to the Canton DC employees in 200l. They further stipulated the following wage increases were granted in previous years to employees with 2 or more years of service as of the date of the increase: 50 cents in June 2000, 50 cents in June 1999, 35 cents in June 1998, 25 cents in June 1997, 35 cents in May 1995, 38 cents in May 1994, 25 cents in May 1993, and 30 cents in May 1992. While no wage increase was given in 1996, employees received a lump sum payment of $400.

Respondent acknowledges that there is an entry level wage progression that is applicable to new hires. At each DC, there is an entry wage rate, a 6-month wage rate, a 12-month wage rate, and a 24-month wage rate, with variances depending on the position held by the employee. Respondent concedes that the entry level wage progression is "automatic" and "standardized" for purposes of new hires. Respondent asserts that there is also a second type of wage increase, which is a discretionary wage increase granted to employees who have at least 2 years of service. Divisional counsel for labor relations, Anthony Byergo, testified that these wage increases are not automatic, standardized in the amount or timing, and are not announced in advance. Byergo testified that Respondent's employees are never informed that there will always be a raise every year.

Byergo testified that Respondent's practice with its unionized facilities has been not to grant a general wage increase following certification of a collective-bargaining representative. Respondent submitted a distribution center general warehouse wage history to show that annual wage increases were not granted to employees at its Manteno, Illinois facility in 1998 because Respondent was engaged in collective bargaining with the Teamsters. In 1999, employees at the Morrisville DC did not receive a general increase because Respondent and the UAW International were engaged in bargaining for an initial collective-bargaining agreement. Employees at the Warren, Ohio DC did not receive a wage increase in 1999 as Respondent and the UAW International were involved in bargaining for an initial collective-bargaining agreement.

H. Respondent's Layoff and Consolidation of Shifts

Complaint paragraph 29 alleges that about October 1 and December 18 and 27, 2001, January 7 and 24, 2002, Respondent, at its Canton distribution center, bypassed the Union and dealt directly with its employees in the unit by soliciting volunteers for a 1-week layoff. The complaint further alleges in paragraph 30 that about October 22, 2001, January 1 and February 2002, Respondent laid off employees in the unit at the Canton DC. Complaint paragraph 31 further alleges that about January 7, 2002, Respondent eliminated the afternoon and midnight shifts for unit employees at the Canton DC, consolidating all operations to the day shift. General Counsel alleges that these unilateral actions were violations of Section 8(a)(5) and (1) of the Act.

1. Evidence presented by General Counsel

International Representative Al Przydial testified that during the December 2001 bargaining session, Respondent's spokesman, Terry Lardakis, told the Union that Respondent needed to make changes in hours, shifts, and days of work because of the current state of the company. Lardakis told union representatives that Respondent wanted to have shift meetings with employees to discuss the need for flexibility in these kinds of changes. Przydial testified that he opposed such meetings. By letter dated December 13, 2001, Przydial reiterated its desire to negotiate enumerated terms and conditions of employment. The Union also stated that it did not agree to have the issue of changes in work hours or shifts discussed in the workplace with members. The Union went on to state that the membership has elected a barraging committee to represent them for these purposes and the Union was willing to discuss these issues at the bargaining table.

During the Union's Christmas holiday, Przydial called negotiating committeeman, Bob Sullivan. During the conversation, Przydial learned that Respondent was seeking 136 volunteers for a lay-off scheduled for January. Przydial contended that as of that date, no representative of Respondent had ever advised him that there was going to be a layoff in January 2002. Local President Bruno Duchaine also testified that he had never received any notice or opportunity to bargain about the layoff prior to its commencement.

2. Respondent's evidence

a. October layoff

The Canton DC associate handbook provides authority for management to permit some or all associates to leave early or not come in for a day or more when there is not enough work for all personnel. Respondent asserts that it has a historical practice of implementing "codes" or voluntary layoff's in January of each year. Director of Labor Relations Henry Bechard testified that voluntary layoffs normally take place at the end of the Christmas season or the end of December. There had been voluntary layoffs in January 1999 and in early 2000. Between October 22–26, 2001, 79 associates from nine different departments were approved for a voluntary layoff. Respondent contends that General Counsel presented no evidence as to whether there was prior notice to the Union or whether the parties collectively bargained concerning this layoff.

b. January layoff

After the October voluntary layoff, the volume of freight remained low. Around December 10, 2001, employees were issued a survey entitled "Lack of Work Time Off Request Canton K-Mart Distribution Center," which they were to return by December 13, 2001. Employees were informed that the purpose of the survey was to determine employees' interest in taking a voluntary layoff during the period between Wednesday, January 2, through Thursday, January 31, 2002. Although Respondent was seeking 146 employees for the voluntary time off, only 141 employees indicated an interest in doing so. All 141 employees signed an "Associate Interview Record" form on December 20, 2001, agreeing to a voluntary layoff to begin on January 2 and ending on January 31, 2002.

The Canton DC received a new volume forecast on December 19, 2001, necessitating the reduction of 100 additional employees. Based on the new forecasts, Respondent held meetings on December 27 with those employees who had not already volunteered for the January layoff. Employees were informed of the need for additional employees for the voluntary layoff and they were asked to return their voluntary time off forms by December 28 for a second layoff period beginning on January 7.

Respondent asserts that because of the significant reductions in staff and workload, the normal three-shift operation had to be temporarily condensed into one shift. With the reduction of 248 employees, the entire distribution center had only approximately 238 employees remaining. When the voluntary time off was extended in February 2002, Respondent used the same process that was used to implement the January VTO's. By mid-February, all of the employees had returned to work from the voluntary layoff and the Canton DC returned to its former three-shift operation.

Respondent asserts that no employees were laid off involuntarily. Bargaining unit employees David Andrews, John Williams, and Katherine Javor confirmed that Respondent had previously utilized voluntary layoffs during January in previous years. Administrative Operations Manager Mark Harrison, testified that he had spoken with John Stout, a member of the union bargaining committee, on December 27 concerning the anticipated layoff. Assistant General Manager David Mucciarone testified that on December 27, he met with union bargaining committee member Bob Sullivan to discuss the voluntary layoff process. Respondent asserts that neither Sullivan nor Williams opposed the layoff and expressed an understanding for the need for the layoff.

Mucciarone testified that as of November 27, the forecasts for weighted carton volume for the Canton DC was 3.8 million, a reduction of almost a million from the January 2001 volume. On December 19, the January forecast for weighted volume had dropped to 2,126,509. Merchandise was not coming into the Canton DC because of Respondent's ever-increasing cash flow problems throughout Respondent's corporate structure in late 2001 and early 2002. Respondent's Newnan, Georgia DC, also utilized voluntary layoff's during this same period and Respondent's Sparks, Nevada DC, had a shift consolidation.

Director of Labor Relations Henry Bechard testified that the union's bargaining committee was advised in November 2001 that layoffs would be necessary because of the reduction in work. Bechard also testified that union committee members John Williams, John Stout, Bob Sullivan, Ed Wolverton, Dan Wince, and Tom Demmers were told prior to the December 12, 2001 bargaining session that layoffs would occur. Union bargaining committee member, John Williams, confirmed that Respondent's chief negotiator and the DC general manager, Duane Baker, mentioned the survey during negotiations. Williams testified that while a layoff was implied, Respondent had "already mentioned that there was going to be a reduction" because of the workload. Williams recalled that during the December 12 bargaining session, union committee member Wince asked about how the voluntary layoffs would affect insurance and benefits.

Bechard testified that the Respondent was never told during the December 12 bargaining session that Respondent was only to talk with Union Representatives Przydial and Duchaine about the issue of layoff. By letter dated December 12, 2001, International Representative Przydial informed Respondent that the Union wished to negotiate wages, hours, benefits, and all terms and conditions of employment. The letter contained a listing of the various conditions of employment that would fall into this request. Layoffs were included in the listing. The letter also contained the following language:

> As a reminder, the Union does not agree to have the issue of changes in work hours or shifts being discussed in the workplace with our members. The membership has elected a bargaining committee to represent them for these purposes. We are willing to discuss these issues at the bargaining table. If the Company chooses to ignore our request, we will pursue this issue through another forum.

Union Representative Przydial acknowledged that the Union canceled the bargaining sessions that were set for December 13, 19, and 20. Przydial recalled that between Christmas and New Year's, he called bargaining committee member, Sullivan. Sullivan told him that a layoff was scheduled to begin in January and would last for approximately 30 days. When Przydial returned to work after the Christmas vacation and around Janu-

ary 3 or 4, he contacted Respondent's chief negotiator, Terry Lardakis, to inquire about the specifics of the layoff.

I. Respondent's Implementation of a New Maintenance Form

Complaint paragraph 28 alleges that on or about November 2001, Respondent began requiring its maintenance employees at the Canton DC to complete a form detailing their activities, including breaks and lunch, from the start to the end of their shift. The form, which was introduced as General Counsel Exhibit 32, is a sheet containing the employee's name, a space for a date, and 19 blank lines. General Counsel alleges that Respondent instituted this form without notice to or bargaining with the Union.

It has been the practice of maintenance employees to use equipment work orders to identify the quantity, part number, number of hours worked, and name of the mechanic for those equipment parts that required replacement or repair. At the end of November 2001, maintenance employee, Stephen Lenart, was informed that he and other maintenance employees were required to complete the form that was identified as General Counsel Exhibit 32. The forms were put in a folder for each employee and employees were to fill them out by the end of the day.

First Shift Maintenance Supervisor Patrick Ertman testified that the new form was given to employees to write down any problems with repairs and to record what the employee had done for the day. He testified that "basically the same" form had been used in the past to record any problems that occurred on jobs. For a time, the department "did away" with the former form and the November form was a return to it. He estimated that there might have been a year or 2-year gap in the use of this form. Ertman also testified that the information collected on the form was no different than what employees provide verbally to their supervisor.

Lenart testified that while he was told to fill out this form every day, he was never told what to put on the form. Lenart submitted his form each day when he began his shift and he listed his duties as "Repair PMs." He estimated that it had taken him approximately 8 seconds to fill out the form in this same way each day. In April 2002, maintenance employees were told they no longer had to fill out the "new" forms.

III. ANALYSIS AND CONCLUSIONS

A. The Discharges of Brock, Munsie, and Barthold

General Counsel alleges that Respondent committed various violations of Section 8(a)(1), (3) of the Act through its actions toward Barthold, Munsie, and Brock. In order to prevail, General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity, which is protected by the Act, was a motivating factor in Respondent's action alleged to constitute discrimination in violation of the Act. Once General Counsel meets this burden, the burden then shifts to Respondent to demonstrate that the alleged discriminatory action would have taken place even in the absence of the protected activity. If Respondent is able to present such evidence, General Counsel is further required to rebut the employer's asserted defense by demonstrating that the alleged discrimination would not have taken placed in the absence of the employee's protected activities.[3]

A prima facie case is made out where the General Counsel establishes union or protected activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity.[4] Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. The Board may infer animus from all of the circumstances.[5]

1. Munsie's discharge

General Counsel asserts that Munsie was discharged because he was very active in the Union and because he asserted employee rights with respect to location of breaks. I do not find the evidence sufficient to establish a prima facie case that Respondent discriminatorily discharged Munsie.

On direct examination by counsel for the General Counsel, Munsie admitted that he played no role in the union organizing activities. He wore a union button daily prior to the 2000 election as well as wearing a union hat "off and on." He remembered only once when a supervisor said anything to him about the union button. He recalled that supervisor, Dennis Rons, made the comment that "those were not nice buttons." He did not identify when the statement was made or the circumstances of Rons having made the statement. Rons was not alleged to be a supervisor and there was no proof presented as to his supervisory status. Munsie acknowledged that he was one of more than 200 other employees who wore union buttons and hats during this same time period. He admitted that he was not unusually unique in wearing these items of support.

Munsie testified that when Scott asked him about having seen the rules, he asserted that the Union had told employees that Respondent could not enforce new rules. Scott recalled that Munsie had argued, "Those rules and regulations do not mean shit because of the Union." Admittedly, Munsie then proceeded to raise his voice and curse Scott. Despite Munsie's testimony that he was arguing that Respondent could not enforce any new rules, the evidence reflects that the memorandum issued on January 31, 2001, was simply a reminder of rules implemented prior to the Union's certification and contained in the employee handbook. While General Counsel argues that Munsie's protestation was on behalf of other employees, there is insufficient evidence to support this argument. By Munsie's own testimony, he rejected Scott's attempt to discuss the reminder memorandum with him. There is no evidence that Munsie was acting on behalf of other employees to protest implementation of new rules concerning break areas. The evidence demonstrates that rather than protesting the specific rules, he was protesting and rejecting his supervisor's authority to remind him and direct him to the rules that had been posted and distributed. Thus, the object of his protestation and his

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[4] *Farmer Bros. Co*., 303 NLRB 638, 649 (1991), enfd. 988 F.2d 120 (9th Cir. 1993).

[5] *Electronic Data Corp*., 305 NLRB 219 (1991).

conduct in doing so takes such conduct outside any protected status.

Accordingly, I do not find that General Counsel has met its burden of establishing a prima facie showing that Munsie was terminated because of his union or protected activity. His union activity was minimal and of the same nature as more than 200 other employees. His behavior toward his supervisor was unprotected and his discharge was consistent with Respondent's treatment of other employees engaging in the same or similar conduct. Thus, even if General Counsel had established a prima facie showing of discrimination, Respondent has demonstrated that it would have terminated Munsie even in the absence of any union or protected activity. Based on the above, I recommend dismissal of the complaint allegations concerning Munsie.

2. Brock's discharge

Respondent asserts that while Brock initially denied that he touched Spencer, he later admitted in testimony that he touched Spencer's collar. Respondent contends that given Brock's lack of credibility in initially denying assaultive behavior, his denial of making a threat should also be rejected. Respondent further asserts that Brock's termination was for legitimate business reasons, was consistent with the manner in which K-Mart treated similar instances of threatening and assaultive behavior, and was unrelated to any alleged union activity on his part. For the reasons set forth below, I do not accept Respondent's premise and find that the evidence supports that Brock was terminated for his union activity.

It is undisputed that Brock actively supported union representation at the Canton DC, as demonstrated by his campaign activities in 1998, 1999, and 2000. Obviously in recognition of his strong support, Brock was selected as one of five employees for the Union's bargaining committee. Respondent asserts in its brief that his membership on the committee should be given little import as no actual bargaining sessions had occurred prior to the altercation with Spencer. Despite the fact that no sessions had occurred, the Union had requested time off for Brock to attend union planning meetings for eight separate shifts. Brock testified without contradiction that there was conflict with Human Resources Manager Kolb about when he would be allowed to take this time off. Respondent contends that there was no suspicious timing involved in the termination as Brock's organizing activities occurred prior to the December 2000 election and his termination was not until May 2001. His time off for the union planning sessions, however, occurred in March and May 2001. The most recent request from the Union was made on May 23, requesting Brock's time off for May 30 and 31.

Respondent asserts that even if General Counsel had established a prima facie case, it has demonstrated that Brock would have been terminated regardless of any alleged protected activity. Respondent argues that Shudell was not terminated for the altercation with Deroo because Respondent lacked solid evidence of an assault. Respondent further argues that it has demonstrated that it has taken the same action against other employees even in the absence of any alleged union activity or conduct. Based on the overall evidence, I do not find Respondent's argument persuasive.

Respondent asserts that both Munsie's and Brock's terminations were pursuant to the K-Mart associate handbook that authorizes termination for a first occurrence for "Assaulting, fighting, threatening, horseplay, hostile contact or any other act which would affect the well being of any associate." Respondent provided examples of three employees who were terminated for profanity and/or threats to supervisors. Two employees who used profanity and made threats toward each other were terminated and an employee who used profanity toward another employee on the internal computer system was terminated. Human Resources Director Barclay testified that Respondent terminated employee Jay Wendell for threatening to "beat the shit" out of another employee and he found this comparable to Respondent's discharge of Brock. Barclay gave no additional information however, as to the circumstances in which Wendell's threat was made or whether there was any evidence of provocation by the other employee. Respondent asserts that its discharge of Whitecraft 3 months after Brock's discharge was comparable because Whitecraft struck another employee who made a comment about Whitecraft's wife. Whitecraft's conduct was distinguishable however, as he admittedly struck the other employee in the mouth with his elbow and Respondent had an eyewitness who witnessed the assault and overheard Whitecraft's profanity toward the employee. Such circumstances come far closer to the circumstances described in the handbook than those involving Brock. Assuming Brock admitted that he grabbed Spencer's collar, there was no eyewitness and Brock denied having made any threat to Spencer.

Respondent maintains that it consistently terminates those employees who engage in assault or hostile contact or "any other act that would affect the well being of any associate" as specified in the handbook. The circumstances involving Amy Deroo belie this assertion. Respondent submits that it did not terminate Shudell because there was no solid evidence of the assault. Deroo however, appeared to do everything that she could to bring this matter to the attention of management and to prevent any possible reoccurrence. Despite the fact that Deroo obviously felt threatened by Shudell, Respondent not only failed to terminate him, but has also continued to assign Deroo and Shudell to the same shift and the same department. Such actions are patently contradictory to a professed intolerance of assaultive, hostile or other behavior that would affect the well being of employees.

Respondent argues that because Brock did not initially admit that he touched Spencer's collar, his testimony is not to be credited. Assuming that Brock grabbed Spencer's collar and admitted to Respondent on May 17 that he had done so, the evidence supports that his discharge was discriminatorily motivated. Inferences of animus and discriminatory motivation may be warranted under all circumstances of a case, even without direct evidence. Evidence of suspicious timing and false reasons given in defense support such inferences.[6] The overall evidence does not support that Respondent would have termi-

[6] *KOFY TV-20*, 332 NLRB 771 (2000).

nated Brock in the absence of his past union activity and his most recent participation on the Union's negotiating committee. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) by discharging Ricky D. Brock.

3. The 8(a)(1) allegations attributed to Kullich

Kullich testified that employees openly showed their support for the Union prior to the election by handing out literature and wearing union shirts, hats, and buttons. He denied that he was ever asked to conduct surveillance of union supporters or told to find reasons to discharge union supporters. He further denied that he was ever instructed to interrogate employees. He specifically denied that he ever told Barthold to identify employees who supported the Union or to find reasons to terminate them. He denied that he ever told Barthold to interrogate employees about their union support.

Based on the overall evidence, I find Kullich to be a more credible witness than Barthold. I base this on several factors. For one thing, Barthold's testimony is simply less than plausible. He alleges that Kullich wanted him to attend Respondent's meetings with employees and identify those employees who actively supported the Union. These were Respondent meetings that were presumably attended by Respondent's supervisors and managers. It is difficult to imagine how Barthold, as an ineligible voter, could determine employees' union support any more than Respondent's representatives at these same meetings. It is also perplexing that Respondent would presumably rely on Barthold who had no supervisory authority or discretion to find reasons to terminate other employees. Barthold gives no basis for why Respondent would have entrusted him with such a discretionary management function. Finally, Barthold's own testimony undercuts his allegations of Kullich's 8(a)(1) conduct. On cross-examination, Barthold testified that Kullich had told him more than once that he wanted to eliminate people who supported the Union. When Barthold could not provide any dates for these statements, he added that he was sure that Kullich had said this during his meeting with him in his office where Kullich had accused Barthold of talking about the Union on the floor. Barthold admitted however that during General Counsel's direct examination, he failed to mention this additional comment in his testimony about the individual meeting. He also admitted that while he had described the meeting with Kullich in his affidavit given to the Board, he had not mentioned Kullich's telling him to find reasons to get rid of union supporters. Pressed further on cross-examination, Barthold then added that other loss prevention employees had told him that they too had been instructed to keep an eye on the strong union supporters in the warehouse and report this back to management. For the above-described reasons, I find Barthold's testimony to be self-serving and it appears to be offered to bolster his allegation of unlawful discharge. Accordingly, I do not find that the evidence supports that Kullich engaged in violations of Section 8(a)(1) as alleged in company paragraphs 12 (d) (1), (2), and (3).

4. Barthold's termination

General Counsel asserts that after the elimination of the loss prevention department, Barthold was never offered a job in the warehouse. General Counsel further asserts that despite his job at Ameritech, Barthold was available to work full-time on the afternoon or midnight shift after January 31, 2001. In its brief, the government argues that although employees Wasco and Honsinger were originally hired into the warehouse after their layoff, they eventually worked their way back into jobs performing similar duties to their prior positions in the loss prevention department. General Counsel asserts that Respondent never satisfactorily explained why the loss prevention department restructuring was necessary, when in the end, the only change to emerge from the restructuring was Barthold's absence from Respondent's facility.

The evidence demonstrates that on or about January 31, Respondent promoted two senior loss prevention employees to supervisor. The remaining three employees, including Barthold, were terminated. While Barthold testified that he was never offered a position to come back as a warehouse employee, employee Honsinger testified without contradiction that Barthold said that he didn't want to come back and declined to follow-up on the possible opening in the warehouse department. Ray Ferioli testified without contradiction, that he overheard Kullich offer Barthold a position to come back and work in the warehouse. Barthold declined, stating that he was all set with his job at Ameritech. Neither Ferioli's nor Honsinger's testimony was rebutted by Barthold. I note that at the time of Ferioli's testimony, he no longer worked for Respondent. I find this testimony far more persuasive as he apparently had no personal interest in the outcome of this matter. With respect to the offer of reinstatement, I find Kullich, Ferioli and Honsinger more credible witnesses than Kullich. The evidence supports that regardless of why Respondent restructured the loss prevention department, Respondent treated Barthold no differently than the two other similarly situated employees. General Counsel asserts that even with Barthold's full-time job at Ameritech, he could have worked a full-time shift afternoon or evening shift at Respondent's Canton DC. Inasmuch as Barthold was only working 4 hours a day at K-Mart prior to January 31, it is not feasible that he would have been able to work full-time for both employers after January 31, 2001. While he did not mention it on direct examination, Barthold testified on cross-examination that after his layoff, he had asked Kullich for a job in the warehouse. Barthold also admitted that there was nothing in his sworn affidavit given to the Board about his having asked Kullich for a job in the warehouse. Finding Barthold's testimony to be contradictory and inconsistent, the record supports that Barthold was offered employment in the warehouse, but chose to decline. I further find the total record does not support a prima facie showing of Barthold's unlawful discharge. I find no evidence of animus and there is no showing that Barthold was denied a position in the warehouse. Thus, with the absence of animus and adverse action, there is insufficient evidence that Barthold's union or protected activity was a substantial or motivating factor in his discharge.[7] Accordingly,

[7] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 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). *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

I shall recommend the dismissal of those complaint paragraphs relating to the discharge of Barthold.

B. Allegations Relating to Arnold Gregory

There are several issues involving Arnold Gregory. The issues that are raised in the pleadings and at trial are:

1. Whether prior to the December 2000 election, Happner told Gregory that he could not talk with other employees about the Union while he was working.

2. Whether Respondent unlawfully denied Union representation to Gregory on March 28 and conducted the meeting without benefit of representation.

3. Whether Respondent issued a March 28 Associate SKU and an April 30 Associate Interview to Gregory because he gave testimony in Board proceedings and to discourage employees from engaging in these and other protected activities.

4. Whether Respondent issued the April 30 Associate Interview because he participated in a peer review panel on April 25, 2001.

1. Happner's restriction on talking about the Union

Happner not only denied making the alleged statement to Gregory about the Union, but he denied that he had ever heard Gregory talking about the Union on work time. He acknowledged however, that he had counseled Gregory about standing around and talking instead of working. Happner described Gregory as an employee who generated complaints from other employees because he spent more time talking than working. Happner also admitted that Gregory was very vocal about the Union during daily start-up meetings and raising questions about various matters. I find Happner to be a credible witness. Based on the overall evidence, and considering the demeanor of both Gregory and Happner, it is likely that Gregory was in fact, an employee who enjoyed talking more than working. I credit Happner's testimony that he received complaints from other employees who did not want to work with Gregory because of his proclivity for talking. Taking this analysis one step further, it is also very likely that at that particular point in time, Gregory was devoting a good deal of his "talking time" to discussions of the Union. Whether Happner actually told Gregory not to talk about the Union or whether Gregory and Washington simply understood his comment to refer to their Union talk, the effect was the same. While Happner may have simply been trying to get Gregory to actually work instead of talking, his comments to Gregory resulted in a restriction of his talking about the Union. Because Gregory was very likely talking about the Union, the prohibition applied only to the Union. Thus, Happner's prohibition was violative of Section 8(a)(1) of the Act. *Energy One Inc*., 306 NLRB 800, 806 (1992); *Earthgrains Co*., 336 NLRB 1119 (2001).

2. The denial of union representation

Under the Court's ruling in *NLRB v. Weingarten*, 420 U.S. 251 (1975), an employee has a Section 7 right to union representation in situations in which the employee reasonably believes will result in discipline and the employee requests representation. Despite Gregory's assertion on March 28, this right does not apply to interviews held to simply inform the employee of disciplinary action already decided on.[8] In this case, Respondent had already determined that Gregory had not met the production standard for the 2-week period in question. The documentation had been prepared and the interview was simply the means of informing Gregory of his production deficiency. Accordingly, Respondent did not violate Section 8(a)(1) of the Act by denying his request for a union representative.

3. The March 28 SKU and April 30 associate interview

On the basis of the following, I do not find the evidence demonstrates that Respondent issued the March 28 SKU and the April 30 associate interview to Gregory because he gave testimony in the September 1999 unfair labor practice hearing. There is no evidence that any of Gregory's supervisors in March and April 2001 ever said anything to him about his having given prior testimony. Gregory admitted that Sugden, Happner, and Hudson were not his supervisors at the time of his testimony. Sugden and Hudson were not even employed at the Canton DC in September 1999.

Respondent asserts that while neither the SKU nor the associate interview is considered discipline, Gregory had actually received a notice of correction for his conduct and attitude in September 2000. Respondent submits that there is no proof that Gregory claimed that this discipline was in retaliation for his testimony, even though it occurred closer in time to his 1999 testimony.

Gregory asserts that his low production was affected by the kinds of loads that he received and also that his production report was based on the numbers given to him by the checker. There is no dispute however, that other employees also received SKU's and associate interviews because of their low production. General Counsel relies on Happner's statement to Gregory prior to December 2000 as evidence of animus. There was no evidence of any other employee who failed to meet production standards that was not coached or counseled. In *UBX International Inc.*, 321 NLRB 446 (1996), the Board took notice of an employee's minimal amount of protected activity, the lack of animus against the protected activity and the timing of these events to find that General Counsel had failed to establish a prima facie case. In the instant case, Gregory's protected activity occurred 18 months prior to these coachings and there is no evidence of animus related to his having given testimony. Even if I found the evidence sufficient to establish a prima facie case, Respondent has met its burden of showing that it would have issued the SKU and Associate Interview in the absence of his protected activity in 1999. The Board has previously noted that even where animus can be shown and there is actually reason for suspicion, an unlawful motive cannot be shown when there is an absence of disparity.[9]

4. Gregory's participation on the peer review panel

Firstly, I note that the complaint was never amended to include Gregory's participation on the peer review panel as a basis for his receiving the SKU and associate interview. Thus,

[8] *Baton Rouge Water Works Co*., 246 NLRB 995 (1979).

[9] *Industrial Construction Services*, 323 NLRB 1037 (1997); *Part Depot, Inc*., 332 NLRB 733 (2000).

no finding is made as to whether this activity is protected activity. While General Counsel argues that it should be considered as animus, I find no basis for doing so. Gregory's claim of retaliation for his participation on the peer review panel is without substance based on the undisputed timing of the associate interview. Sugden testified, without contradiction, that he prepared the associate interview on Tuesday, April 24, 2001, when he received the production summary. Gregory did not sit on the peer review panel until the next, day, Wednesday, April 25, 2001. I accept Respondent's argument that there can be no causal connection for retaliation where the associate interview was prepared before the alleged protected activity.

C. Respondent's Failure to Grant a 2001 Wage Increase

Respondent relies on the Supreme Court's ruling in *NLRB v. Katz*, 369 U.S. 736 (1992), where it held that an employer violates the Act by granting a unilateral wage increase during the course of negotiations. In *Oneita Knitting Mills*, 205 NLRB 500 (1973), the Board found that an employer violated the Act when it granted an increase without prior bargaining with the union pursuant to its policy of giving increases at a set time each year. The employer asserted that it had given this raise pursuant to its fixed policy to grant increases annually at approximately the same date each year. The Board found no merit in the employer's argument and found that the employer retained an element of discretion as to the amount and manner of distribution. Respondent argues that under *Katz* and *Oneita,* it would have risked committing an unfair labor practice had it granted an increase to the Canton DC employees while engaged, at the same time, with the UAW in the course of negotiations for a first time collective-bargaining agreement.

While an employer is prohibited from changing the wages, hours, terms, and conditions of employment without giving the union notice and an opportunity to bargain, the Board has also held that an employer is obligated to maintain the status quo, as it existed before the union achieved representational status during its initial bargaining with a newly certified union. *General Motors Acceptance Corp.,* 196 NLRB 137 (1972), enfd. 476 F.2d 850 (1st Cir. 1973). In a 1994 case, the Board specifically considered the earlier decision in *Oneita Knitting Mills*, as it dealt with a case where the employer discontinued a wage increase program. The Board noted that while *Oneita* involved a situation in which the employer granted a wage increase, a bargaining obligation arose in both cases because a change in employment conditions was effectuated.[10]

Respondent further relies on dicta in *Katz* that recognizes that a wage increase could be granted without bargaining only if the increase was "simply automatic" and a mere continuation of the "status quo." Respondent asserts that there was no pattern or consistent history as to general wage increases followed by K-Mart. Respondent asserts that the amounts and date of these increases have changed and in certain years increases were not given at all.

General Counsel argues that it has been the practice at the Canton DC to grant annual wage increases since at least 1992 with only one exception in 1996 when there was a $400 lump sum payment. During the trial, General Counsel offered excerpts from the testimony of Respondent's human resources director, William Gilooly, and director of logistics, David Lanni, from the 1999 unfair labor practice trial. Both testified that June has been the established date for granting wage increases. Respondent objected to the introduction of this testimony on the basis that it was hearsay. Counsel argued that neither Gilooly nor Lanni were present at the trial and the submission of their prior testimony was an attempt to impeach them with a prior statement or prior sworn statement, thus, constituting hearsay. Respondent argues that under Federal Rule of Evidence 801(d)(1), prior statements by a witness are only admissible where (1) the declarant testifies at trial; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is inconsistent with his present testimony; and (4) the statement was given under oath. While Respondent correctly argues that the prior statement is not admissible under Federal Rule of Evidence 801(d)(1), Respondent does not address the admissibility under 801(d)(2). A statement is not hearsay under 801(d)(2) where the statement is an admission by a party or party representative concerning a matter within the scope of their agency or employment and made during the existence of the relationship. It is obviously on this portion of the Federal Rules of Evidence upon which General Counsel relies in offering this prior testimony. While the prior testimony is arguably admissible, I do not find it sufficiently relevant for reliance.

Respondent also argues that Gilooly's and Lanni's testimony is not relevant as the 1999 trial did not deal with whether Respondent was required to issue a wage increase while bargaining over wages, hours, and conditions of employment. The Board affirmed Administrative Law Judge Richard Miserendino's decision that Respondent's 1999 grant of a wage increase and the timing of the postelection formal presentations at the Canton facility were conducted in the normal course of business without any motive of inducing the employees to vote against the Union. The judge however, went on to find that Respondent acted unlawfully when it included reference to the wage increase in its 25th hour meeting with employees prior to the election. By its actions, Respondent was found to have used the wage increase to discourage support for the Union. Respondent's argument that these individuals were not examined relative to the issues of this case has merit. As the issues were not the same in these two cases, there is no way to determine that the record was fully developed with these witnesses on the issue herein. In contrast however, Director of Labor Relations Henry Bechard testified in the current hearing concerning the relevant issue. Bechard testified that it has been a common practice for Respondent to grant a wage increase in June.

Respondent would assert that discretion in past wage increases prevents the practice from falling into the "simply automatic" pay increases recognized and sanctioned by *Katz*. In a recent case, the Board determined that the amount of discretion exercised by the employer did not defeat the employees'

[10] *Daily News of Los Angeles*, 315 NLRB 1236, 1239 (1994), enfd. 73 F.3d 406, (D.C. Cir. 1996), cert. denied *Daily News of Los Angeles v. NLRB*, 519 U.S. 1090 (1997).

expectation that they would receive a raise on a particular, regularly occurring date.[11] The Board held that a merit wage program would be found to be a term and condition of employment when it was an established practice regularly expected by the employees. The criteria set out for this determination was:

> 1. The number of years the program had been in place;
> 2. The regularity with which raises are granted;
> 3. Whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.

In the present case, the evidence demonstrates that Respondent has had a practice of granting across-the-board wage increases since 1992, with the exception of 1 year when employees received a lump sum amount rather than an hourly wage increase. The wage increases have routinely been granted in either May or June of each year. Unlike the raises in *Rural/Metro Medical Services*, Respondent's wage increases were not based on an assessment of any individual employee's performance. The wage increases appear to have been the same amount for all employees, without regard to individual merit assessment. The amount of hourly increase has varied no more than $0.25 during this 8-year period. Respondent has clearly retained discretion as to the amount of the increase. Based on the overall evidence however, it is apparent that employees retained the expectation that they would receive a wage increase in or about June 2001. *Burrows Paper Corp.*, 332 NLRB 82 (2000); *Kurrdziel Iron of Wauseon*, 327 NLRB 155 (1998).

Respondent presented evidence to show that its failure to grant a wage increase during the pendency of initial contract negations was consistent with what it has done in its other newly unionized facility. While this may be a practice that Respondent has initiated to avoid becoming the target of unfair labor practices, such practice does not negate the expectations of the bargaining unit employees in the Canton DC. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) by failing to bargain to agreement or impasse with the Union before discontinuing its practice of granting a June wage increase to bargaining unit employees.

D. Respondent's Layoff and Consolidation of Shifts

The law is clear that when a collective-bargaining agent represents employees, the employer may no longer make unilateral changes in wages, hours, and terms and conditions of employment as it could freely do before its employees were represented. *NLRB v. Katz*, 369 U.S. 736 (1962). Thus, if an employer anticipates any such changes affecting its employees, it has a duty to notify the bargaining representative of the proposed changes, afford that representative an opportunity to bargain over the proposal, and if bargaining is requested, meet with the representative and bargain collectively in good faith concerning the proposal before putting them into effect. *Farina Corp.*, 310 NLRB 318 (1993). Even where an employer has a past practice of instituting economic layoffs due to lack of work, it has an obligation to bargain with its employees' bargaining representative over such layoffs. The employer can no longer unilaterally exercise its discretion with respect to such layoffs. *Adair Standish Corp.*, 292 NLRB 890 (1989).

Respondent argues that it had no duty to bargain regarding the voluntary layoffs, as they were consistent with past practice. Citing *Advertisers Mfg. Co.*, 280 NLRB 1185 (1986), Respondent asserts that it is only changes or deviations from the status quo that are prohibited; action that are a "mere continuation of the status quo" are not unlawful. Respondent points out in its brief that both management and employee witnesses confirmed that there had been layoff's in past years when the business slowed in January and after the holiday season. Respondent argues that the procedure for layoff was consistent with that used in prior layoffs. Despite the fact that the layoffs in issue may have been consistent with those utilized in the past, I am not persuaded that such consistency releases Respondent from its bargaining obligation. I note that in *Advertisers Mfg. Co.*, the Board affirmed the judge's finding that the employer was obligated to notify and bargain with the union concerning layoffs, even though the employer argued that such actions were "consistent with on-going policies and procedures" and were caused by "the poor business conditions confronting the Company at that time." It is to be expected that an employer's actions concerning wages, hours, and other conditions of employment may be consistent with actions preceding a union's representational status. The mere fact that an employer has similarly laid off employees in the past does not preclude its notice and bargaining obligation once its employees are represented. Clearly under Board law, an employer's past practices prior to union certification as the exclusive bargaining representative do not relieve the employer of the obligation to bargain with the certified union about subsequent changes to wages, hours, and other terms and conditions of employment. *Porta-King Building Systems*, 310 NLRB 539, 543 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994).

Respondent also argues that while layoffs and shift schedules are generally subject to bargaining, that general rule does not apply where "compelling economic considerations" have motivated the layoff. Respondent points out that it experienced a rapid downward spiral in its business fortunes in December 2001 and January 2002. In a span of a few weeks, the Canton DC's anticipated work volume for January 2002 dropped from 5,360,000 gross cartons to 2,123,000 gross cartons, a decline of over 60 percent. Anthony Byergo, divisional legal counsel, testified that at the very same time, Respondent experienced a number of cashflow issues which resulted in nonpayment to its vendors and prevented merchandise from reaching the Canton DC. Eventually, this downward spiral forced Respondent to seek protection under chapter 11 of the U.S. Bankruptcy Code on January 22, 2002.

As the Board noted in *Hankins Lumber Co.*, 316 NLRB 837 (1995), most layoffs are taken as a result of economic considerations. The Board noted that business necessity is not the equivalent of compelling economic considerations that excuses bargaining. "Were that the case, a respondent faced with a gloomy outlook could take any unilateral action it wished or violated any of the terms of a contract which it had signed sim-

[11] *Rural/Metro Medical Services*, 327 NLRB 49 (1998).

ply because it was being squeezed financially." In *Angelica Healthcare Services*, 284 NLRB 844, 853 (1987), the judge defined "compelling economic considerations" as an unforeseen occurrence, having a major effect, is about to take place that requires the employer to take immediate action." In *Bottom Line Enterprises*, 302 NLRB 373 (1991), the Board held that where parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. The Board recognized that the employer must also refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board however, also noted two limited exceptions to this general rule: when a union engages in tactics designed to delay bargaining and "when economic exigencies compel prompt action."

In *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979), the Board enumerated some circumstances that would justify or excuse an employer's taking action while bargaining is ongoing. These circumstances were described as involving "extenuating circumstances" and a "compelling business justification." The Board has continued to view "compelling economic considerations" as extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action.[12] In *Hankins Lumber Co*., 316 NLRB 837, 838 (1995), the Board confirmed that only such extraordinary events would excuse the bargaining obligation. In a later case that same year, the Board further explained its position and reiterated that absent a dire financial emergency, economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral change.[13]

In its decision in *RBE Electronics*, the Board also identified other economic exigencies that although not sufficiently compelling to excuse bargaining altogether, should nonetheless fall within the *Bottom Line* exception. Where an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, it will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. These exigencies are only when time is of the essence and which demand prompt action, and the employer would need to show a need that the particular proposed action be implemented promptly. The employer must also demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. If the employer has demonstrated that a situation meets these requirements, it would satisfy its statutory obligations by providing adequate notice and an opportunity to bargain over the changes that it proposes to respond to the exigency.

Respondent argues that even if the decision for the voluntary layoff and temporary shift consolation was subject to the duty to bargain, no violations exists as Respondent and the Union discussed and negotiated the layoffs at the bargaining table. Director of Labor Relations Bechard testified concerning the bargaining sessions in late November and on December 12, 2001. Bechard testified that not only had Respondent discussed the necessity for layoffs but also the issuance of the surveys to determine what employees wanted a voluntary layoff. Union bargaining committee member, John Williams, corroborated the December 12 discussion concerning the plans to issue the survey. Williams acknowledged that the Respondent talked with the Union about their forecasts having fallen far short of what was expected and that these were tough economic issues facing Respondent. Williams recalled that fellow committee person Wince asked about how the voluntary layoffs would affect insurance and benefits. Wince also asked how unemployment benefits would apply for those employees who took a voluntary layoff.

International Representative Alan Przydial testified that while he was present at the bargaining sessions on November 28, 29, and December 12, he could not recall if there was discussion about the surveys for the proposed layoff. When asked about whether he recalled these discussions he replied:

> Not only do I not remember. Please understand that there are times that I leave the room to return phone calls and so forth. So something could have been said while I was out of the room.

Przydial confirmed that the Union canceled the next three bargaining sessions that had been set for December 13, 19, and 20. He also confirmed that when he had spoken with union bargaining committee member, Sullivan after December 12, Sullivan told him that he had been involved in some discussions with Respondent about the layoff. Przydial's office was closed 9 to 10 days prior to the scheduled layoff. On Przydial's return to the office and on January 3 or 4, he contacted Respondent to inquire about the layoffs that had been scheduled to begin on January 2.

Local President Bruno Duchaine testified that he did not specifically recall whether he had received any notice of the layoff before the first of the year. He acknowledged that it is possible that a company representative had advised him of the proposed layoff prior to its implementation but he could not recall. Duchaine also confirmed that there were times that he left the room during bargaining, although normally Przydial and he did not leave at the same time. Duchaine's office was closed for only 1 week between Christmas Eve and New Year's. He could not give the specific dates but recalled talking with Przydial and Sullivan about the layoff. He acknowledged however, that he never attempted to talk with anyone from the company about the layoff until the next scheduled bargaining session in February 2002.

Hartman Luggage Co., 173 NLRB 1254 (1968), dealt with a similar situation in which there was an issue of whether the employer had given the union adequate notice of a layoff and an opportunity to discuss and/or object to the layoff. Although there was no direct communication to a union official, the employer advised the employee-members of the Union's bargaining committee 4-1/2 days prior to the layoff. The Board affirmed the judge in finding that the employer's failure to give formal notification directly to the Union under these circumstances does not render ineffectual or inoperative the notice

[12] *Maple Grove Health Care Center*, 330 NLRB 775, 779 (2000).
[13] *RBE Electronics of S.D., Inc*., 320 NLRB 80, 81 (1995).

actually received by it. In the *Hartman* case, the Board not only found that the union had received adequate notice, but also that the union had failed to act diligently in its right to demand discussion or bargaining.

In the instant matter, the Union relies on its letter of December 13 as a blanket request to bargain about all terms and conditions of employment. While the language of the letter includes this all-encompassing request to bargain on numerous subjects, it also states that the bargaining committee is the representative of Respondent's employees. Williams recalls that not only was the layoff survey discussed, but also some of the actual effects and procedures of the layoff discussed during the December 12 meeting. Duchaine does not deny that he was given advance notice of the layoff; he simply can't recall. Przydial admitted that he was sometimes out of the room during negotiations and there were subjects discussed in his absence. Based on the above, I find that the evidence supports that the Union was given notice of the changing economic situation and the need for a drastic reduction in staff through a January layoff. Having this notice Pryzdial did not request specific bargaining or even attempt to contact the employer until after the layoff went into effect. Duchaine made no attempt to discuss the matter with the employer until the next bargaining session a month later.

The Board has been very reluctant to find circumstances in which the employer was totally relieved of its duty to bargain with a union about changes in terms and conditions of employment. As discussed above, there are cases where the Board has found the employer's economic crisis insufficient to waive the duty to bargain, but few where the Board specifically identifies what is sufficient to totally release the employer from its bargaining duty. In the instant case, this employer certainly comes as close as any in meeting these criteria. I take judicial notice of the fact that the December 2001 holiday season came only 3 months after the terrorist's attack of September 11, 2001. It is undisputed that the overall economy was feeling the negative effects of this horrific incident. Over the course of a few weeks, the anticipated business volume for the Canton DC facility dropped by 60 percent from that initially forecast. Respondent experienced such marked losses that it filed for Bankruptcy by the third week of January 2002. Overall, it appears that the circumstances facing Respondent in December 2001 were extraordinary unforeseen events having a major economic effect that required the employer to take immediate action as contemplated by the Board's decision in *Bottom Line*. Even if the Respondent was not entirely relieved of its bargaining obligation, it satisfied its statutory obligation by providing the Union with adequate notice and an opportunity to bargain.[14]

Based on the above, I find the evidence insufficient to establish that Respondent laid off employees in October 2001,[15] January 2002, or February 2002 in violation of Section 8(a)(5) and (1) of the Act. Because the reduction in force necessitated the consolidation of shifts, I find the consolidation a natural result of the layoff and likewise within the realm of lawful conduct. General Counsel asserts that Respondent engaged in direct dealing with employees by soliciting employees for the layoff. Because I find that the Respondent met its duty with respect to bargaining about the proposed layoff, I also find that its implementation by a voluntary layoff was not unlawful. Accordingly, I recommend dismissal of the complaint allegations relating the layoff, shift consolidation, and direct dealing concerning the layoff.

E. Implementation of the New Maintenance Form

As evidenced by the testimony of maintenance employee Lenart, the employee was free to complete the form with as much brevity as he desired. The evidence did not demonstrate that employees were required to record their lunches and break times on the form; the form does not seek this information and no supervisor required this kind of information. The form allowed the employee to chose the type of information he wanted to record. Lenart chose to provide virtually none and there was no evidence that he was disciplined for choosing to do so. As Respondent points out in its brief, there is no evidence that any new standards were established, no new penalties were imposed for low productivity or improperly filling out the form, and no discipline was threatened for doing so.

In *Goren Printing*, 280 NLRB 1120 (1986), the employer changed the method by which employees were required to inform management that they were leaving work early (from oral communication to a written note). The Board found that there was no change in the underlying existing condition of employment requiring employees to notify management of their early departure. As a result the Board said:

> The note requirement is merely a more dependable method of enforcing Respondent's rule that its employees must give notice if they leave work early. The rule itself remains intact and the procedural change has an inconsequential impact on those employees who complied with the earlier notice requirement.

Respondent argues that the form was nothing more than a continuation of a form that had fallen into disuse a year or 2 before. Respondent further argues that the form required no more detail than what a supervisor might require in any verbal communication with an employee in the maintenance department. Only changes which constitute a "material, substantial, and significant" change triggers a duty to bargain under the Act. *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991). In the instant case, there is no evidence of a material change. Any change related to the form was so slight and minimal that employees were barely inconvenienced or affected by it. Certainly, Lenart found it of such little consequence that he made no meaningful attempt to complete the form, simply filling in the same words each day. Accordingly, inasmuch as the form represented no material, substantial, or significant change, Respondent had no duty to bargain about the use of this form for the 5-month period, prior to its discontinuance. I recommend the dismissal of complaint paragraph 28.

[14] *RBE Electronics*, supra.

[15] While the October layoff was included in par. 30 of the complaint, there was no evidence that the Union opposed this layoff or even addressed it during the bargaining sessions in November and December 2001.

CONCLUSIONS OF LAW

1. Respondent, K-Mart Corporation, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 157, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO and its successor Local 174 and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. By telling employees that they could not talk about a union while they were working while at the same time not prohibiting employees from talking about other nonwork subjects, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

4. By terminating Ricky Brock on or abut May 25, 2001, because of his protected and union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

5. By unilaterally ceasing its established practice of granting an annual across-the-board wage increase for bargaining unit employees on or about June 1, 2001, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

6. Respondent did not violate the Act in the other ways alleged in the complaint.

REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Specifically, I shall recommend that Respondent be ordered to offer reinstatement to Ricky D. Brock and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

With respect to Respondent's failure to grant employees the June wage increase which it had given regularly on or about that time in previous years, Respondent must grant such increase to the full extent that it would have increased wages in the absence of the Union. If necessary, the determination of the amount of such increase may be resolved at the compliance stage.

[Recommended Order omitted from publication.]