

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KINGSPAN INSULATED PANELS, D/B/A
KINGSPAN BENCHMARK

and

Cases 9-CA-072906
9-RC-069754

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 24

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS

I. INTRODUCTION:

On June 8, 2012, Administrative Law Judge Arthur J. Amchan issued a Decision and Recommended Order finding that Respondent violated Section 8(a)(1) of the National Labor Relations Act, herein called the Act, by: (1) unlawfully interrogating employees on two occasions; (2) increasing the wage rates of one employee in part to discourage union support; and (3) announcing and implementing a shift differential for second shift employees to discourage union support. (ALJD p. 10, ll. 23-37) ^{1/} On the same date, pursuant to Section 102.45 of the Board's Rules and Regulations, this case was transferred to and continued before the Board. On July 6, 2012, Respondent filed timely exceptions to the Judge's Decision together with a Brief in Support of Exceptions (Respondent's Brief) challenging almost all of the Judge's findings of fact and conclusions of law.

^{1/} References to the official transcript will be designated as (Tr. ____); references to Acting General Counsel's Exhibits will be designated as (G.C. Ex. ____); references to Respondent's Exhibits will be designated as (Resp. Ex. ____); references to the Administrative Law Judge's Decision will be designated as (ALJD p. ____, ll. ____); and references to Respondent's Brief in Support of its Exceptions will be designated as (Resp. Brief p. ____)

Counsel for the Acting General Counsel respectfully submits its answering brief to Respondent's 79 exceptions and asserts that the exceptions have no basis in fact, are unsupported by Board law or policy and should be rejected. Respondent's Brief, including its Introduction and Statement of Facts, is replete with assertions that are immaterial to the violations alleged. Contrary to Respondent's assertions, the Administrative Law Judge's findings that Respondent violated the Act are overwhelmingly supported by both the record evidence and Board law. In this brief, Counsel for the Acting General Counsel will not address each numbered exception individually, but rather will address credibility concerns and the central issues raised by Respondent's exceptions.

II. ANSWER TO RESPONDENT'S EXCEPTIONS:

- 1. The Administrative Law Judge's credibility determinations are firmly grounded in the record evidence and should be adopted by the Board. Exceptions 6 -7, 10-12, 14, 16-18, 20, 22-26, 33-34, 41, 45, 48, 51, 55, 59, & 62**

Respondent's Exceptions are fact-based and a matter of a credibility determination. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless a clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Judge Amchan resolved all factual disputes correctly in this case and Respondent did not meet the *Standard Drywall* standard to lead the Board to overrule these findings. Although this standard should apply to all of Respondent's credibility exceptions, below Counsel for the General Counsel will respond to some specific credibility exceptions.

First, Respondent would like the Board to believe that Maintenance Mechanic Roger Wood's testimony should be wholly discredited because he became confused about the date of a particular lunch with Harris, of which they had shared many in the past, and that this

confusion amounts to Wood “recounting” [sic] his Board Affidavit.^{2/} (Tr. 73, 273-274, 280) This position is misleading. In his Decision, the Administrative Law Judge acknowledges Wood’s confusion (ALJD p. 3, ll. 21-22) but finds it is of little consequence because, as Judge Amchan points out, “the record indicates that Wood was discussing the Union with other of Respondent’s agents” prior to the date of the lunch in question. (ALJD p. 7, ll. 29-30) In fact, Respondent’s witness Harris was also not clear on the date this lunch occurred. (Tr. 274) Ultimately, the Administrative Law Judge declined to find this conversation unlawful and Counsel for the Acting General Counsel does not take exception to the Administrative Law Judge’s finding here. (ALJD p. 7 ll. 28-31) Therefore, Wood’s confusion about a single date, concerning only an issue no longer in dispute, does not translate into a recanting of his affidavit and has no bearing on the credibility of Wood’s testimony of other events.

Secondly, Respondent, in its Brief, claims Union Representative Scott Hammond’s testimony is inconsistent with his Board affidavit as to when he gave employees union apparel and he should therefore be discredited. (Resp. Brief at 6) Although the Administrative Law Judge did rely on Hammond’s testimony as to when he delivered the Union’s letter demanding recognition- which was corroborated with other documentary evidence and undisputed by Respondent- there is no indication that Judge Amchan relied on Hammond’s testimony as to when he distributed Union apparel to senior maintenance technician Terry Whitehall. (ALJD p. 8, ll. 21-25; Tr. 139; G.C. Exs. 8, 18) Respondent claims that the Administrative Law Judge relied on Hammond’s testimony to establish that Whitehall was a known union supporter. (Resp. Brief at 33) However, Judge Amchan found “Whitehall wore union paraphernalia and may have done so prior to his discussions with Irwin,” which does not conflict with either Hammond’s Board affidavit or Hammond’s testimony at trial. (ALJD p. 7, fn 11) The fact is, it is immaterial

^{2/} No Board Affidavits were offered into evidence at this proceeding.

whether Whitehall was a known union supporter when Irwin questioned him, since Irwin's questions were not about Whitehall's union activities but those of other employees, and therefore cannot be justified under *Rossmore House*, 269 NLRB 1176 (1984). In any event, Respondent's exception to Hammond's credibility does not meet the clear preponderance standard as set forth above in *Standard Drywall Product*.

Finally, Respondent misstates Judge Amchan's finding in its Exception 10. The Administrative Law Judge discredited Irwin's, and not Harris's, testimony that he (Irwin) first became aware of renewed organizing activity in November, 2011. ^{3/} (ALJD p. 3, ll. 1-4; Tr. 336) The exception is nonsensical as Harris testified that he sent an email on October 8 titled "Union meetings" and thus Harris knew about union activity at that time. (ALJD p. 2, l. 47- p. 3, ll. 1-4; Tr. 284; G.C. Ex. 11) Irwin, on the other hand, was discredited by the Administrative Law Judge, in part because he was unable to deny conversations he had with Whitehall, and because Irwin's testimony conflicted with Wood's and Whitehall's credible testimony. (ALJD p. 3, ll. 12-14; Tr. 336)

2. The Administrative Law Judge correctly found Respondent interrogated employees Wood and Whitehall in violation of 8(a)(1) of the Act; Exceptions 6-13, 41, 43-47, 64, 74 & 75

The Administrative Law Judge properly found that Respondent interrogated employees Wood and Whitehall through Chief Executive Officer Jeff Irwin on or about November 1 and on or about December 5 respectively. (ALJD p. 10, ll. 23-27; Tr. 16-17, 85-86) Beyond the credibility exceptions already discussed, Respondent takes exception to a number of the Administrative Law Judges' findings and inferences relating to its unlawful interrogations. In essence, Respondent argues that Judge Amchan wrongly inferred that Irwin knew about renewed

^{3/} All dates herein occurred in 2011, unless otherwise noted.

union activity and claims that Irwin was not interested in employees' union activities because he was no longer their direct manager. (Resp. Brief at 31-33) ^{4/}

The Administrative Law Judge properly found that Respondent became aware of employees' renewed union activity on at least October 8, when the acting production manager Patrick Harris sent an email to Respondent's Human Resource Manager Andrea Lackemacher and Operations Manager Gabor Tovari-Nagy. (ALJD p. 2, l. 24 p. 3, l. 6; G.C. 11) Here, the Administrative Law Judge draws a logical inference that "this information was shared with all the top managers, including Irwin." (ALJD p. 3, ll. 1-2) In the response to Harris's email, Lackemacher asked Harris to "keep her informed." (ALJD p. 2, ll. 37-43; G.C. Ex. 11) Harris then testified that he indeed kept Lackemacher and his new supervisor Tovari-Nagy informed. (Tr. 285) Tovari-Nagy had only been working at the Columbus plant since the summer of 2011 and reported to Chief Executive Officer Jeff Irwin. (ALJD pg. 4, ll. 7-10; Tr. 171, 278) Judge Amchan did not make a far leap to infer the corporate office and a new manager would keep the CEO informed of happenings at his plant. Even in the unlikely event that Irwin's subordinates and corporate office neglected to inform him of employees renewed union activity, Irwin testified that he was aware that the one-year time bar for a new election lifted in October and could have expected such activity to reignite. (Tr. 335, 337)

Although Respondent would like the Board to believe that Irwin had left the day-to-day operations of the plant to Tovari-Nagy and therefore Irwin was uninterested in employees' union activity, the documentary evidence is to the contrary. (Resp. Brief at 21) In an email to Tovari-Nagy on November 19, Irwin expressed his opinion that the employees' organizing drive was "exactly what we do not need." (G.C. Ex. 16) Then, Irwin hired Labor Consultant

^{4/} Respondent also excepts to the Administrative Law Judge's analysis and conclusion that the place (Irwin's vehicle) of the November 1 interrogation of Wood tends to make the inquiry more coercive, but offers no explanation or case law in support of this contention in its Brief. (Resp. Exception 47)

Frank Ashcraft on November 21. (G.C. Ex. 24; Tr. 338-339) The Administrative Law Judge properly concluded that Respondent's managers, including Irwin, were "obviously very interested in whether or not there would be another organizing drive." (ALJD p. 2, l. 47, p. 3, l. 2) Irwin took action to not only speak with other managers and a labor consultant, but also employees who he knew had been union supporters in the past. Irwin sought information from Whitehall and Wood relating to the identity of other union supporters in violation of 8(a)(1) of the Act. (ALJD p. 2, ll. 24-31, p. 3, ll. 8-15, p. 7, ll. 5-27)

3. The Administrative Law Judge properly found that Respondent raised the wages of Roger Wood and announced and implemented a shift differential for second shift employees in violation of 8(a)(1) of the Act. Exceptions 56, 61, & 64

As the Administrative Law Judge stated in his Decision, an employer violates Section 8(a)(1) of the Act if it grants benefits to employees for the purpose of influencing them not to support the union.^{5/} (ALJD p. 8, ll. 1-9) To find pre-election activity unlawful, the Board may draw an inference of interference with employee free choice from all the evidence presented and the Respondent's failure to establish a legitimate reason for the timing of the announcement of a benefit. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993); *Speco Corp.*, 298 NLRB 439 fn. 2 (1990).

As the Judge found, Respondent failed to show that Wood's wage increase and the implementation of the shift differential "was not in large part motivated by a desire to discourage union support." (ALJD p. 9, ll. 1-4) The single best piece of evidence demonstrating Respondent's unlawful motivation lies in President Joseph Brash's email from November 19. (G.C. Ex. 17) In that email, Brash directs Operations Manager Tovari-Nagy to use a "charm offensive" on employees in response to news that "the majority of the guys want union

^{5/} The *unlawful* nature of Respondent's activities is not contingent upon it occurring during the "critical period". (ALJD p. 8, ll. 4-6) Although the Judge also found that Wood's raise and the implementation of the second shift differential constitutes objectionable conduct because it occurred during the critical period, the objectionable nature of Respondent's activities is not part of the Complaint. (ALJD p. 8, ll. 13-15; ALJD ll. 9-10; G.C. Ex. 1(c))

representation.” (G.C. Ex. 17) Respondent announced the granting of the shift differential only three days later, on November 22 and gave Wood, a then-known union leader, a substantial raise on November 29. (ALJD p. 3-5) Just as Judge Amchan arrived in his Decision, the announcement and implementation of the second shift differential and the wage increase for Wood were motivated by an unlawful desire to discourage union support. (ALJD p. 10, ll. 30-37)

Respondent argues in its Brief that the Administrative Law Judge improperly relied on *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002). (Resp. Brief at 23) However, the Administrative Law Judge cites *Mercy Hospital* for the proposition that if Respondent had provided sufficient evidence that the benefits were bestowed pursuant to an established company policy the action may have been lawful. (ALJD p. 8, ll. 4-9) Respondent did not provide any such evidence. In fact, as Judge Amchan found, Respondent produced no documentation to rebut that Respondent’s motivation in granting these benefits were, at least in part, the employees’ organizing efforts. (ALJD p. 9, ll. 1-5) Therefore, the Judge correctly found that Respondent failed to establish a legitimate reason for the timing of the increase to Wood and the implementation of the second shift differential.

**4. The evidence establishes that Wood’s raise was unlawfully motivated. ^{6/}
Exceptions 17-19, 28-34, 38-40, 51-54, 57-59, 62, & 76**

Respondent would have the Board overrule the Judge’s finding that Wood’s raise was unlawfully motivated and instead consider Wood’s pay increase as similar to raises given to four other employees from July to September. (Resp. Brief at 29) The evidence fails to support this claim. Wood’s “appraisal” on November 29 was out of step in both time and type with how Respondent administered other employees’ appraisals in January and February 2012. The

^{6/} In its exception 52, Respondent contends the Administrative Law Judge applied *Exchange Parts*, 375 US 405 (1964) incorrectly as to the increase that was provided to Wood, but presents no argument in its Brief on that point.

November 29 appraisal was only oral, administered by Tovari-Nagy and accompanied by notice of a substantial raise. (Tr. 22-24) Employees Whitehall, Groce and Adair testified that they too received appraisals, but those appraisals occurred in 2012 after they had already received their January company-wide raises, were in writing, and were administered by their direct supervisors. (Tr. 99-100, 119, 132) Oddly, Wood received another appraisal consistent with other employees' appraisals in February 2012 and, unlike Mitchell, Stewart, Edington and Benghalem, who had received raises in 2011 and were therefore ineligible for the January 2012 company-wide raises, Wood received this January 2012 raise in addition to his November 29 raise. (Tr. 295, G.C. Ex. 25, Resp. Ex. 6) Thus, the evidence supports a finding that Tovari-Nagy would not have given Wood an oral appraisal and \$1.41 raise on November 29 absent Wood's union activity and the Union's demand for recognition.

Despite Respondent's Exception 58, the Administrative Law Judge was correct when characterizing Wood's raise as *ad hoc*. (ALJD p. 9, ll. 5-7) As Wood's credited testimony shows, Tovari-Nagy did not even tell Wood the amount of his raise and Respondent did not present Simons to rebut Wood's testimony that he was outright refused a raise in October. (ALJD p. 4, ll.16-31) As the Administrative Law Judge found, Respondent's explanation for the amount and timing of Wood's raise is not credible and where the explanation proffered by the employer is either false or pretextual, an inference of an anti-union motive is raised. (ALJD p. 8, l. 21 p. 9, l. 7) ^{7/} The Board has long held that wage increases during an organizing campaign, given on an *ad hoc* basis rather than on the basis of a predetermined schedule, tends to show an

^{7/} See, e.g., *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 (D.C. Cir. 1995); *Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 490-491 (7th Cir. 1993); *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2d Cir. 1992) (panel rehearing); *Precision Industries, Inc.*, 320 NLRB 661, 662 n.7 (1996), *enfd. sub nom. Pace Industries, Inc. v. NLRB*, 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12 ("The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case.").

employer's motivation is to discourage employees' union activity. *Huck Store Fixtures Co.*, 334 NLRB 119, 123 (2001); *Scott Glass*, 261 NLRB 906 (1982). (ALJD p. 9, ll. 5-7)

Wood's appraisal and raise came unannounced. Wood is a hard-working employee who had repeatedly requested compensation for his efforts. Respondent knew that Wood had changed his mind about his support of the Union after the election in 2010 and attempted to persuade or "charm" him to change it once again by showing him it was willing to deal directly with him and meet his demands. Therefore, Respondent's attempt to offer Wood's raise as compensation for his performance is merely a pretext for its true motivation discouraging Wood's union activity.

Wood's requests for a raise in both March and October were rejected: the former because Harris said the company did not have the money; the later because Tovari-Nagy had "no intention of giving him a raise." (Tr. 12-14, 55) Wood's increase is not an extension of the raises given to Mitchell, Stewart, Edington, and Benghalem because at the time these men received raises, Wood's request had been repeatedly rejected. Finally, as Judge Amchan found, there is no documentation of any consideration of a wage increase prior to November 29. The Judge's finding should be adopted in full as to the unlawful nature of Wood's wage increase.

5. The evidence establishes that the granting of the second shift differential was unlawfully motivated. Exceptions 20-27, 30, 31, 35-40, 73, & 77

Although Respondent would like the testimony of Tovari-Nagy and a single email from Harris in August to be sufficient evidence that the second shift differential was not motivated by the employees organizing efforts, it simply is not. (Resp. Brief at 24-29) The facts show that although Harris may have inquired about the possibility of a shift differential in August, Respondent did not put a shift differential into place until a directive was issued by Brash to "do some charm offensive with employees" (ALJD p. 6, ll. 22-25, 30-33; G.C. Ex. 17) Respondent offered no documentary evidence or credible testimony that there were any concrete plans to

implement the shift differential before November 22. According to Tovari-Nagy, authorization for the shift differential was conveniently offered in person by Brash at a meeting on November 17. However, Respondent neither produced notes from that meeting or offered the testimony of Brash to corroborate Tovari-Nagy. (ALJD p. 5)

Respondent excepts to some inferences made by the Administrative Law Judge relating to the shift differential because Respondent did not produce sufficient evidence. Tovari-Nagy testified he created a list of “Action Items” Respondent’s Columbus facility needed to accomplish soon after his arrival to the Columbus facility. (Tr. 166-168) Tovari-Nagy testified that “it was immediately brought to my attention...and I realized that there’s no shift premium here.” (Tr. 166-168) The Administrative Law Judge astutely points out, the second shift differential did not make the Action Items list. (ALJD p. 5, ll. 18-21; Tr. 181, Resp. Ex. 3) Note also that other very specific requests, such as “hire full time person for quality assurance” appear on the list, yet the second shift did not appear. (Resp. Ex. 3)

6. Board Appointments

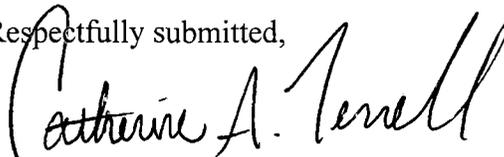
Finally, Respondent Exception 79 questions the legitimacy of the recess appointment of certain current Board members as a defense to the Board’s authority to decide the present case. However, the Board has already rejected this argument and it warrants no further consideration. See, *Center for Social Change*, 358 NLRB No. 24 (2012).

III. CONCLUSION:

For all the foregoing reasons, Counsel for the Acting General Counsel requests that the Board affirm the Decision of the Administrative Law Judge and adopt the remedy recommended in his Decision.

Dated at Cincinnati, Ohio this 19th day of July 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "Catherine A. Terrell". The signature is written in a cursive style with a large initial "C".

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