

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

In the matter of:)		
)		
Kingspan Insulated Panels, Inc. d/b/a Kingspan Benchmark)	NLRB Case Nos.	9-CA-072906 & 9-RC-069754
)		
Respondent,)		
)		
and)		
)		
Sheet Metal Workers International Association, Local Union No. 24,)		
)		
Charging Party.)		

**RESPONDENT KINGSPAN INSULATED PANELS, INC. D/B/A KINGSPAN
BENCHMARK'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION**

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I. INTRODUCTION

There are three distinct issues involved in this proceeding. The core issue involves an employer's right to conduct its business operations during the pendency of union organizing activity. Here, the administrative law judge (ALJ) concluded that Kingspan Insulated Panels, Inc. d/b/a Kingspan Benchmark's (Kingspan's) announced implementation of a second shift premium or differential prior to the Sheet Metal Worker's, Local 24 (Union's) petition violated Section 8(a)(1) of the National Labor Relations Act, 29 USC § 158(a)(1) (Act) and constituted objectionable conduct. In addition to announcing the implementation of the premium before the petition, and the shift premium actually becoming effective before the petition, the substantial record evidence shows that the second shift premium had been under consideration prior any union activity, and was delayed while waiting for corporate approval. Thus, the shift premium had nothing to do with any union activity.

Notwithstanding the record evidence, the ALJ damned Kingspan's actions. It does not require leaps of logic to conclude that had Kingspan withdrawn its announced shift premium upon receiving the Union's petition, its conduct would likewise have been damned. Thus, Kingspan's decision-making ability as an employer is severely compromised: it is damned for proceeding forward with a planned business change, and it certainly would be damned had it not proceeded forward with a previously announced change. The evidence clearly demonstrates that the charge allegation should have been dismissed,¹ and that the conduct at issue cannot be objectionable.

Next, the ALJ concluded that Kingspan violated Section 8(a)(1) of the Act and engaged in objectionable conduct when it provided a pay raise to employee Roger Wood on the day the

¹ The Complaint also alleged a violation of Section 8(a)(3) of the Act. The ALJ, however, deemed it not necessary to decide that issue. (Dec. 10 n. 15).

Union filed its petition.² In reaching his conclusion, the ALJ again ignored record evidence regarding the approval process and the sequence of events that shows that the wage increase had nothing to do with any union activity. Accordingly, the wage increase was neither violative nor objectionable.

Finally, the ALJ concluded that two instances of interrogation occurred in violation of Section 8(a)(1) of the Act. One of the alleged instances of interrogation occurred a month before the petition. While the ALJ does not address the objection relating to this alleged conversation, presumably he dismissed it. (Dec. 2-3, 9-10).³ As for the other alleged interrogation, the ALJ ignores not only Kingspan's representative's denial, but the total lack of dissemination of the alleged conversation. Thus, even if true, these alleged interrogations cannot form the basis for a re-run election as ordered by the ALJ.

The quality of the ALJ's decision is reflective of the haste in which it was rendered. A scant three days after the close of the briefing, the ALJ issued his decision. In addition to a multitude of ministerial errors, the ALJ appears to have attempted to back into a conclusion by selectively considering and applying the record evidence and wholesale ignoring record evidence where it does not support his desired outcome.

Kingspan submits that it is the National Labor Relations Board's (Board's) responsibility to rectify the ALJ's decision. Based upon all of the circumstances, the re-run election ordered in this matter is wholly inappropriate. The ALJ's decision should be overruled on all counts.

² Again, the ALJ did not decide the Section 8(a)(3) allegation as it relates to Wood's wage increase. (Dec. 10 n. 15).

³ References to the record are as follows: ALJ's Decision (Dec. ____); Transcript (Tr. ____); Acting General Counsel's Exhibits (GC Ex. ____); and Respondent's Exhibits (R. Ex. ____).

II. PROCEDURAL BACKGROUND

On November 29, 2011, between 8:30 and 9:00 a.m., the Union hand-delivered a letter to Kingspan demanding recognition. (Dec. 4, 8; Tr. 139; GC Ex. 7). Kingspan responded that evening by rejecting the Union's demand. (Tr. 140-41; GC Ex. 8). The Union filed its petition for an election sometime the same day. (Dec. 1; GC Ex. 1e).

On December 13, 2011, the Regional Director approved the parties' stipulated election agreement. (GC Ex. 1e; R. Exs. 1a & 18). The voting unit in the stipulated election agreement consisted of:

All full-time and regular part-time production and maintenance employees employed by the Employer at its Columbus, Ohio facility located at 720 Marion Road, including fabricators, glue coater operators, floaters, FIP line operators, FIP helpers, maintenance employees, janitors, CTL operators, foam router operators, foam line operators, packagers, laminators, packaging operators, draftsmen, material movers, sample technicians, shipping & receiving clerks, and quality control technicians, but excluding, office clerical employees, temporary agencies, managers, directors, schedulers, estimators, quality assurance specialists, engineers, buyers, customer service assistants, customer service coordinators, team leaders, professional employees, guards, and supervisors as defined by the Act.

(Dec. 1 n. 1; GC Ex. 1e; R. Exs. 1a & 18; Exception 4).

On January 13, 2012, the Board conducted the election at Kingspan's Columbus, Ohio facility.⁴ (Dec. 1; GC Ex. 1e; R. Ex 1a). Of the 44 eligible voters, 42 ballots were cast – 20 for the Union; 19 against the Union; and 3 dispositive ballots challenged by the Union. (Dec. 1; GC Ex. 1e).

⁴ Although initially properly identifying the election date as January 13, 2012, the ALJ then improperly refers to the election date as being January 20, 2012. (Dec. 1; Exception 2).

On January 20, 2012, the Union timely filed objections and also filed the above-captioned unfair labor practice charge alleging certain misconduct by Kingspan.⁵ (Dec. 1; GC Ex. 1a & 1e). On February 29, 2012, the Region issued the Complaint on certain allegations contained in the charge; other allegations were withdrawn. (Dec. 1; GC Ex. 1a, 1c & 1e). On March 8, 2012, the Regional Director issued his Report on Challenged Ballots and Objections to the Election. (Dec. 1; GC Ex. 1e). The Report ordered a hearing on the remaining objections and the challenged ballots, and consolidated the same with their remaining corresponding Complaint allegations. (Id.; Id.)

On April 30 and May 1, 2012, the ALJ conducted a hearing in Columbus, Ohio among the parties regarding the challenged ballots, the objections and the Complaint. (Dec. 1). Following the hearing, the Union withdrew its challenges to the three dispositive ballots, and the ALJ entered an order approving the withdrawal on the same day. (Dec. 1). The resulting revised tally of ballots is: 20 votes for the Union and 22 votes against the Union.⁶ Accordingly, Kingspan's employees rejected representation by the Union. (Dec. 1).

On June 8, 2011, three days after the close of briefing, the ALJ issued his decision. The case was transferred to the Board on the same day. (Exception 79). On July 6, 2012, Respondent Kingspan timely filed exceptions to the ALJ's decision and its supporting brief.

⁵ The ALJ improperly cites the filing date of the unfair labor practice charge as January 30, 2012. (Dec. 1; GC Ex. 1a; Exception 1).

⁶ The ALJ inexplicably fails to cite the revised tally of ballots.

III. STATEMENT OF RELEVANT FACTS

A. The ALJ's Credibility Determinations (Exceptions 6-7, 10-12, 14-16, 23, 41, 54, 59)

The ALJ's credibility determinations are without substance or merit, and are completely illogical. Indeed, the determinations are difficult to follow because the ALJ simply credits testimony that supports the decision he wishes to reach, and discredits or completely ignores testimony and evidence contrary to his desired result. In several instances, the ALJ's decision is internally inconsistent.

Although typically the Board's policy is not to overrule an ALJ's credibility resolutions, this case is the exception. Standard Dry Wall Prods., 91 NLRB 544, enf'd, 188 F.2d 362 (3rd Cir. 1951). The ALJ does not provide bases for his credibility resolutions in most instances. The resolutions are against the weight of the evidence, and are little more than a self-serving effort to develop facts to support a conclusion of objectionable and unlawful conduct. Betances Health Unit, 283 NLRB 369, 369-70 (1987); Kelco Roofing, 268 NLRB 456, 456 (1983).

The most glaring example of the ALJ's selective credibility resolution is that relating to Kingspan's Day Shift Supervisor, Patrick Harris. Without any commentary on his demeanor or any purported inconsistencies in his testimony, the ALJ simply takes Harris' testimony and credits it where he finds it beneficial to reaching his conclusion (Dec. 2-3, 5-6, 9), and discredits it where it is not so helpful in reaching his desired result (Dec. 2-3). There is no discernible rhyme or reason for the ALJ's treatment of Harris' testimony other than the ends justifying the means.

Similarly, the ALJ's discrediting of Gabor Tovari-Nagy, Kingspan's Operations Manger, and Jeff Irwin, Kingspan's CEO, appears to be done solely to ensure that he can reach his desired outcome – namely a re-run of the election. The ALJ sheds no insight about Tovari-Nagy's and

Irwin's testimony that he found incredible (Dec. 2-3, 5-8). Betances Health Unit, 283 NLRB at 369-70; Kelco Roofing, 268 NLRB at 456.

The ALJ's blind crediting of employee Roger Wood (Dec. 2-3), just because he is a current employee, is undercut by Wood's recanting of his Board affidavit testimony. Wood initially testified that a lunch involving an alleged interrogation (which the ALJ concluded was not violative or objectionable) occurred on November 18, 2011. (Tr. 18). Wood then testified that the lunch occurred on December 8, 2011. (Tr. 79-80). Upon being shown his Board affidavit, which cited the November 18 date, Wood refused to acknowledge that the November 18 date was the accurate date. He only stated that he could not remember. (Tr.72-73, 79-80).

In addition, at the same alleged lunch (Dec. 3), Wood testified that Harris told him that if the Union was voted in, Kingspan would provide the employees a \$1.00/hour across-the-board pay increase. Thus, according to Wood, he was told before the Union filed its petition that if the Union was voted in, through the course of bargaining, Kingspan would provide the employees a pre-determined additional \$1.00/hour. The timing and content of such a statement is nonsensical, reinforces the self-serving nature of his testimony and further undermines Wood's credibility. (Tr. 19-20).

Likewise, Scott Hammond, the Union's Business Manager, recanted his Board affidavit. Hammond testified on cross, and his Board affidavit stated, that he distributed Union t-shirts and hats to Wood and maintenance employee, Terry Whitehall, on November 20, 2011. (Tr. 144, 150-153). Yet, on direct examination, Hammond went to some lengths to convince the tribunal that the t-shirt and hat distribution occurred in December 2011. (Tr. 95-96, 150-53). Again, a credited witness is clearly attempting to manipulate testimony to reach a desired outcome.

Accordingly, the ALJ's treatment of the testimony and his credibility determinations are without support in the record.

B. Common Background Facts (Exception 40)

Kingspan is an international company with its headquarters in Ireland and operations in several different countries. (Dec. 2; Tr. 161). Kingspan operates several different product lines. (Tr. 161). One of its product lines is insulated panels used in the construction of commercial buildings. (Dec. 2; Tr. 164, 175-76). In 2008, Kingspan purchased five insulated panel facilities in North America from Metecno: Columbus, Ohio; Deland, Florida; Modesto, California; Langley, British Columbia; and, Caledon, Ontario. (Dec. 2; Tr. 52, 56-57, 89-90, 162-63). These five facilities comprise Kingspan's North American insulated panel division. (Dec. 2; Tr. 162-63). The North American headquarters is located in Deland. (Dec. 2; Tr. 165). The Columbus facility at 720 Marion Road is known separately as Kingspan Benchmark. (Dec. 2; Tr. 52, 89-90, 160, 163, 169).

Following Kingspan's 2008 acquisition of Metecno, Kingspan struggled to integrate its five North American facilities. (Tr. 161-62). Columbus, in particular, lacked a cohesive fit with the other Kingspan operations due, in part, to its manual operation method (versus the continuous production lines at the other facilities) and the different customer base it serves (public sector vis-à-vis the other facilities (private sector)). (Tr. 162-64, 313-15).

In June 2011, Steve Gross, the prior Columbus Operations Manager separated from Kingspan. (Dec. 4; Tr. 53, 74, 161, 277-78). Kingspan (International) tagged Gabor Tovari-Nagy, Operations Director responsible for Kingspan's plant in Hungary, to go to Columbus to evaluate the operations and make recommendations. (Dec. 4; Tr. 161, 225-26). Tovari-Nagy arrived in the U.S. in late June in a consulting capacity. (Dec. 4; 160-61, 278, 298-99).

According to Tovari-Nagy, the Columbus plant was not in good shape: profits were down; the quality of the product was down; customer complaints were up; there was inaccuracy in materials and inventory; warranty work was up; attrition and absenteeism were high; and the production process was inefficient. (Tr. 161-62, 166-67, 189-92). Early in his consulting role, Tovari-Nagy developed a comprehensive list of action items that needed to be addressed in Columbus. (Dec. 5; Tr. 166-67; 189-92, 225-26; R. Ex. 3). The list covered multiple issues including production, scheduling, human resources, restructuring/reorganizing management, leadership initiatives and overall improvement of the organization. (Dec. 5; R. Ex. 3). Tovari-Nagy provided the action items to the then-General Manager of Operations for North America, Ralph Mannion, as well as to Andrea Lackemacher, Director of Human Resources for Kingspan Insulated Panels in North America. (Tr. 167-68). Tovari-Nagy subsequently provided the action items to Joe Brash when he assumed responsibilities of President of Kingspan's North American operations. (Tr. 168-69).

The Chief Executive Officer at Kingspan Benchmark, Jeff Irwin, is responsible for the profit and loss in Columbus, as well as sales and business development. (Tr. 171, 334; R. Ex. 2). On October 10, 2011, Kingspan assigned Tovari-Nagy full-time as the Operations Manager for Columbus. (Dec. 4; Tr. 162). Tovari-Nagy is responsible for all aspects of production in Columbus. (Tr. 160-61). With Tovari-Nagy assuming production responsibilities, Irwin's focus shifted from operations to business development. (Tr. 161, 171, 278, 298-99, 334). Tovari-Nagy directly reports to Andrew Hamer, Vice-President of Operations for North America, and indirectly reports to Irwin. (Dec. 4 n. 5; Tr. 165, 211; R. Ex. 4).

During that same time frame, Mannion transitioned to another division of Kingspan in Europe. (Dec. 5; Tr. 182-83, 211). On November 1, 2011, Brash began taking over

responsibilities as President of Kingspan's North American insulated panels operations. (Dec. 5; Tr. 182-83). Brash, Hamer and Lackemacher operate out of Deland. (Dec. 5; Tr. 167-68).

C. Origins of the Union's 2011 Campaign (Exceptions 7-10, 14, 37, 39-40, 48, 55, 60, 71)

The Union first attempted to organize workers at Kingspan in the Fall 2010 and lost.⁷ (Dec. 2; Harris Tr. 249). In October 2011, both Harris and Irwin testified that they were aware that the one-year bar on another election would be expiring. (Dec. 2-3; Harris Tr. 283-84; Irwin Tr. 337). The ALJ takes this statement of obvious fact and runs wild with it – the testimony morphs from “aware” to “very interested” (Dec. 2-3), to “very concerned” (Dec. 8), to wanting to “nip such a drive in the bud” (Dec. 6).⁸ Apparently, in the mind of the ALJ, employers should be oblivious to the obvious (presumably had Kingspan testified that they were unaware that the one-year bar expired, however, it would have been discredited).

On October 8, 2011, Harris heard from another supervisor that a couple of the employees were talking about a union.⁹ (Dec. 2; Tr. 285, 299-301, 307). Harris e-mailed Lackemacher and Tovari-Nagy advising them that, “I hear the guys have been meeting and discussing another union attempt and just wanted to keep you guys informed.” (Dec. 2; Tr. 285; GC Ex. 11). Lackemacher responded to Harris and Tovari-Nagy stating, “Thanks Patrick. Keep me

⁷ There is no bargaining unit at Kingspan's Columbus facility (Dec. 2; Exception 5). Accordingly, Roger Wood cannot be included in a bargaining unit.

⁸ The “nip in the bud” reference, presumably borrowed from GC Memo 10-07 (Sept. 30, 2010), is misplaced. There are no discharges, or even disciplines for that matter, of alleged union supporters.

⁹ It is unclear who the employees talking were. While the ALJ conveniently omits material evidence, the record demonstrates that no employee from the plant even spoke to the Union prior to October 28, 2011 (Tr. 17), and the Union did not meet with anyone from the plant until November 3, 2011 (Tr. 138-39). Thus, whatever was heard could not have been anything other than two employees discussing the Union. (Exception 40).

informed.” (Dec. 2; Tr. 285; GC Ex. 11). The ALJ conveniently omits that Tovari-Nagy, who at this point had been in and out of the country over the span of 3 months did not respond, and had no recollection of the e-mail. (Tr. 213-14, 241-42; GC Ex. 11). Further, there is no evidence that Irwin was included in any of the October communication.¹⁰ (GC Ex. 11).

The ALJ omits any discussion of the evidence regarding the Union’s organizing activities. Wood testified that he spoke to Hammond for the first time on October 28, 2011 regarding getting authorization cards signed at the plant. (Tr. 14, 138). According to Hammond, on November 3, 2011, he and Rob Durham, Union Business Representative, met with Wood, maintenance employee Terry Whitehall and Roger Justice, a then-Kingspan employee, for the first time about attempting to organize Kingspan Columbus again. (Tr. 83, 139).

According to Hammond, he held about ten organizational meetings with employees between November 3, 2011 and the election, January 13, 2012. (Tr. 138, 142, 144). Wood and Whitehall both testified that they were discreet in their organizing. As of mid-November, they were not doing any organizing at the plant. (Tr. 21, 83-84, 97-98). Indeed, Harris testified that he was not aware of authorization cards in the plant until November 19. (Tr. 286, 301-02).

Counsel for the Acting General Counsel put into the record the evidence of internal Kingspan discussions regarding union activity. Notwithstanding that the emails are consistently directed to select supervisory employees, the ALJ takes the leap and infers that by October all the management team at the plant knew. (Dec. 9; GC Exs. 11-18, 24).

Further, notwithstanding the complete lack of evidence of union activity, or of discussions amongst management about any alleged union activity between October 8, 2011 and

¹⁰ Notwithstanding the absence of any evidence that Irwin was included in this email exchange, the ALJ, out of whole cloth, concludes that the information was shared, not only with Irwin, but “will all the top managers.” (Dec. 3). This is part and parcel of the ALJ’s efforts throughout the decision to manufacture support for the conclusions reached. (Exceptions 9, 55, 60, 71).

November 19, 2011, the ALJ discredits Harris' testimony on this point, and concludes that other discussions occurred; nevermind that there is not any evidence upon which such an inference could be drawn. (Dec. 3). The ALJ then goes on to omit Kingspan's reaction to the information about union activity at the plant that it obtained on November 19, 2011; presumably because it reinforces that, in fact, there was no interim communication between October 8 and November 19, and Kingspan did not have knowledge of the Union's activity prior to November 19.

On November 19, 2011, Harris heard through supervisors that the Union had sent an e-mail to Brash or Russell Shiels, Brash's superior, demanding recognition.¹¹ (Tr. 213, 243, 300, 307-08; GC Exs. 12-14). Harris referred to that information as the "first big thing" about the Union, and informed Tovari-Nagy and Lackemacher. (Tr. 300-01; GC Exs. 12-14).

Upon receiving Harris' email, Lackemacher emailed Tovari-Nagy asking, "What is going on with this?" (Tr. 239-40; R. Ex. 8). Tovari-Nagy responded that, "I have no idea..." (Id.) Lackemacher then responded to Harris, copying Tovari-Nagy, stating that, "Gabor and I are not aware. What have you heard?" thereby reinforcing the lack of knowledge of any union activity (GC Ex. 14). Harris responded explaining that he doubted the veracity of the rumor he reported on earlier, but that workers were signing cards and bringing them to the maintenance shop, and the supervisors suspected that they had a majority of the workers signed up. (Tr. 215; GC Exs. 14-15). Lackemacher thanked Harris. (GC Ex. 14).

Tovari-Nagy then forwarded that e-mail to Irwin who responded that the Union's organizing efforts were just what they did not need at that time.¹² (Dec. 6; Tr. 215-16, 336-37,

¹¹ The ALJ puts Harris' knowledge on November 18 – contrary to every piece of evidence in the record, and contrary to his own conclusion that the "November 18" lunch occurred on November 21, 22, or 23. (Dec. 3; Exceptions 10, 14, 48).

¹² It is not until this juncture in the sequence of events that the ALJ picks up on the record evidence. (Dec. 6).

343-44, 347-48; GC Exs. 15-16). Tovari-Nagy then forwarded Harris' e-mail to Brash. (Tr. 216; GC Ex. 17). Brash responded that Tovari-Nagy needed to "charm" the employees, and encouraged Tovari-Nagy to have small group meetings with the employees over the next several weeks. (Dec. 6; Tr. 216; GC Ex. 17). On November 21, 2011, Irwin informed Hamer, Lackemacher and Tovari-Nagy that he had retained a labor consultant and legal counsel in response to the Union's organizing activity. (Dec. 6; Tr. 220; GC Ex. 24).

In what can only be described as dumbfounding, the ALJ takes Kingspan to task because the November 19 email exchanges about the Union activity did not also mention the shift differential or Wood's pay increase. (Dec. 6 n.10). Logic dictates that the absence of commentary about pay changes in conjunction with discussions about union activity is evidence that the two are unrelated. The ALJ appears to try to find that failing to mention pay increases in conjunction with discussions about Union activity is evidence the pay issues are in response to union activity. Again, the ALJ's decision is replete with illogical, contradictory inferences to reach a desired outcome.

On November 29, 2011, the Union made its demand for recognition on Kingspan. (Dec. 4, 8; Tr. 21-22, 84, 139-40; GC Ex. 7). Michelle Robinson, Office Manager, forwarded the demand to Tovari-Nagy, Lackemacher, Hamer and Irwin, at 9:16 a.m. (Tr. 22; Tr. 216-17; GC Ex. 18).

D. The Second Shift Differential (Complaint Paragraph 6(b) & Objection 2(b)) (Exceptions 20-28, 30-31, 35-40, 42, 65, 68-70, 72-73)

All pay increases and other pay adjustments must have corporate approval. (Dec. 6; Tr. 11, 55, 108, 115, 127, 166-67, 184-85, 188-89, 209-10, 222-23, 225-26, 229-31, 233-38, 264-65). Without discrediting or suggesting doubt as to this testimony, which was acknowledged by

virtually all witnesses including the Acting General Counsel's, the ALJ just ignores this crucial fact in his march to a decision. (Dec. 6).

Kingspan has not historically operated a second shift consistently, but reinstated it sometime in late July 2011. (Dec. 5; Tr. 287-88). The first shift typically operates from 6 a.m. to 3 p.m. (sometimes until 4 p.m.). (Dec. 5; Tr. 105-06, Tr. 169-70). The second shift generally operates from 3 p.m. to midnight, although it can vary as well. (Dec. 5; Tr. 106, 122, 169-70). During the relevant period, the second shift consisted of eleven individuals – five voting unit employees, one non-voting unit employee and five temporary employees (who are not Kingspan employees).¹³ (Dec. 5, 10; Tr. 70, 106, 123, 133-34, 169-70; R. Ex. 10).

Prior to November 28, 2011, the Columbus facility did not have a shift premium for its off shift.¹⁴ (Tr. 25, 181, 250-51). The ALJ finds that two employees, Chaz Vallette and William Groce, asked about a second shift differential “months” before Kingspan implemented it. (Dec. 5; Tr. 115-16, 128-29). Vallette asked about a shift differential when in September when he transferred to second shift, but was told that the local plant had no control over pay issues. (Dec. 5; Tr. 107-08, 115). The ALJ's reliance on Groce's testimony to support that he repeatedly asked his supervisors, Harris and James Latham,¹⁵ for a second shift premium is confounding in

¹³ As will be developed further, the ALJ goes to some length to expand the number of voting unit employees working on second shift. In doing so, he ignores not only the record evidence, but is internally inconsistent in his decision; further evidencing a desire to reach an outcome not supported by the record. (Dec. 5, 10; Exceptions 20-21, 72-73).

¹⁴ In his decision, the ALJ does not mention the effective date of the second shift premium, and focuses only on when shift premium appeared in the pay checks. (Dec. 5-6, 10; Exceptions 22, 40, 65, 67-70).

¹⁵ Notwithstanding the ALJ's identification of Latham as a supervisor here (Dec. 5), he later finds that there is no evidence that Latham was not in the voting unit. (Dec. 10; Exceptions 26, 72-73). Even Wood identified Latham as a supervisor. (Tr. 36).

that Groce contends he was “promised” the shift differential after he would have been receiving it. (Dec. 5; Tr. 128-29).

Upon Tovari-Nagy’s arrival in Columbus from Hungary, one of his observations was that even though the plant was operating a second shift, there was no shift premium. This was odd to Tovari-Nagy because in Hungary shift differentials are required by law, and the plant was having difficulty getting qualified workers to work second shift. (Dec. 5; Tr. 181, 250-51). Tovari-Nagy and Harris discussed adding a second shift premium, and Harris followed up with Lackemacher on August 1, 2011 in an e-mail explaining the need for a premium.¹⁶ (Dec. 5; Tr. 181, 250-51; R. Ex. 9). Harris did not receive any substantive response; relayed this to Tovari-Nagy; and purportedly did nothing more with respect obtaining the shift differential. (Dec. 5; Tr. 181, 252).

Tovari-Nagy then took the matter up with Mannion, but was unable to get a response. (Dec. 5; Tr. 181-82, 221-22, 252). In the interim, and wholly ignored by the ALJ, in order to effectively staff the second shift, Kingspan temporarily transferred its most experienced production worker (supervisor) Bryant Messer to second shift to train James Latham, the Afternoon Shift Production Manager. (Tr. 173, 187-88, 247). Rob Edington, another experienced production employee at the time, likewise agreed to move to second shift. (Tr. 188).

On November 1, Brash assumed Mannion’s role. (Dec. 5; Tr. 182-83, 211). Brash made his first visit to Columbus on November 17, 2011. (Dec. 5; Tr. 183-84). In what Tovari-Nagy

¹⁶ Notwithstanding the e-mail from Harris to Lackemacher, copying Tovari-Nagy, dated August 1, 2011, the ALJ states, “Tovari-Nagy testified that he began to work with Pat Harris on instituting a shift differential prior to November 1. There is no evidence documentary or otherwise that corroborates his testimony. I decline to credit it.” (Dec. 5). Beyond simply not being true (R. Ex. 9), this creates a burden on the employer that apparently every conversation or discussion must be reduced to writing in some fashion. The ALJ is imposing not only a burden that does not exist, but a next to impossible one (which, at least on this point, Kingspan actually met – R. Ex. 9). (Exception 24).

described as an “all day, effective meeting,” Tovari-Nagy reviewed in detail with Brash the multitude of issues in Columbus.¹⁷ (Tr.184-85). As a result of that meeting, Tovari-Nagy obtained approval to advance on a number of initiatives, including: remodeling of the break area into a canteen/meeting room; approval to proceed with a plan to reorganize the entire production layout of the plant (subject to board approval); and approval to reorganize the management structure at the plant and begin the hiring process for a plant production manager. (Tr. 225-26). Because all compensation issues require corporate approval, while Tovari-Nagy had Brash’s attention, he also obtained approval to implement a second shift premium, as well as a pay adjustment for Wood. (Dec. 6; Tr. 11, 55, 108, 115, 127, 166-67, 183-85, 188-89, 209-10, 222-23, 225-26, 229-31, 233-38, 252, 264-65).

On November 22, 2011, in a “state of the business” communications meeting with employees at the plant, Tovari-Nagy announced the shift premium would be effective December 1, 2011. (Dec. 5; Tr. 62-64, 185-87; R. Ex. 2). The \$1.00/hour shift premium, however, was in fact implemented November 28, 2011 because that was the beginning of the payroll period. (Tr. 108-09, 130-31, 180-81, 253-54, 261-62, 289-90; GC Exs. 3-4; R. Exs. 10-13). All individuals who work the second shift, receive the premium – regular full-time employees, supervision and temporary employees obtained through a staffing agency. (Dec. 5, 10; Tr. 230, 253-58; GC Exs. 3-4; R. Exs. 10-13). There were no discussions about any Union activity in connection with the decision to implement the shift premium. (Tr. 188, 262). Kingspan did not inform its employees that it was in the process of getting approval for a shift differential from corporate headquarters. (Dec. 5). Yet, it is not clear what benefit there would have been in announcing something not approved.

¹⁷ The ALJ omits the overall content of the meeting, and again chastises Kingspan for not reducing everything to writing. (Dec. 5-6; Exceptions 36, 40).

F. Wood's Pay Increase and Other Local Pay Adjustments (Complaint Paragraph 6(a) & Objection 2(a)) (Exceptions 17-19, 28-34, 38-40, 53-54, 57-59)

1. Wood's Pay Increase

Wood started working at the plant in May 2007 making \$11.00/hour. (Dec. 3; Tr. 11-12). Eighteen months later, his wage rate went to \$11.50/hour. (Dec. 3-4; Tr. 12). In January 2011, Wood's wage rate went to \$12.09/hour.¹⁸ (Dec. 4; Tr. 12).

Harris and Wood are friends. (Dec. 4; Tr. 67, 273). During the course of 2011, Wood spoke to Harris about making more money. (Dec. 4; Tr. 12-13). Harris testified at some length that he was never Wood's supervisor, and that Wood's never "asked" him about a wage increase. Indeed, Harris testified that Wood "mentioned" a wage increase in passing; along the lines of "I need more money." (Tr. 273, 279-80). Notwithstanding Harris' adamancy that he was not Wood's supervisor, and Wood's acknowledgment that Harris was never his supervisor (Tr. 54, 79), and that Harris did not consider Wood's mentioning of needing more money a request for a pay increase, the ALJ states that Wood asked Harris for a pay increase, and Harris told him that the then-Operations Manager, Steve Gross, said that Kingspan could not afford to give him a pay increase. (Dec. 4; Tr. 53-54, 79, 273, 279-80).

Between June 2011 and October 5, 2011, the maintenance department reported to Tovari-Nagy. (Dec. 4) In August/September 2011, Whitehall lobbied Tovari-Nagy for a pay increase on Wood's behalf. (Dec. 4 n. 4; Tr. 193). Tovari-Nagy responded that Whitehall was not Wood's supervisor, and that if Wood wanted to discuss a pay increase, Wood should see

¹⁸ The ALJ creates an impression that the January 2011 wage increase was for Wood only. (Dec. 4). This pay increase, however, was the product of a three to five percent general wage increase that all Kingspan North American employees received, across all five plants. (Tr. 12, 26-27, 55-56, 263-64; Exception 15).

Tovari-Nagy in person. (Dec. 4 n. 4; Tr. 193). Wood never approached Tovari-Nagy to request a pay raise.¹⁹ (Tr. 193).

On October 5, 2011, Kingspan hired a new Maintenance Supervisor, David Simons. (Dec. 4; Tr. 13, 44-45, 53, 101, 173-74). Within a week of Simons' arrival on October 5, 2011, Wood lobbied Simons for a pay increase. (Dec. 4; Tr. 13, 55). The ALJ found, based solely on Wood's testimony, that Simons went to Tovari-Nagy at that point (October) and asked about a pay increase for Wood, and that Tovari-Nagy told Simons, who told Wood, that Tovari-Nagy said that he had no intention of giving Wood a raise.²⁰ (Dec. 4; Tr. 13-14).

Notwithstanding Tovari-Nagy's purported denial of Wood's pay increase, Wood lobbied Simons at least two more times in the course of approximately a month (October). (Dec. 4 n. 4; Tr. 55). In early November, Simons approached Tovari-Nagy about an increase for Wood. (Dec. 4 n. 4; Tr. 14, 144, 230). Simons' position was that Wood was doing good work, had significantly improved attendance and had experience on unique equipment that would be very difficult to replace if Wood left. Thus, according to Simons, they needed a pay increase to ensure Wood did not leave. (Tr. 194). Tovari-Nagy reviewed the pay rates of Whitehall and Larry Strong, the other maintenance technicians. Tovari-Nagy concluded that given Wood's experience and skill set, his pay rate should be closer to Whitehall (a 17-year employee) than Strong, a newer employee. (Dec. 4 n. 4; Tr. 194-96).

While Brash was in Columbus on November 17, Tovari-Nagy obtained his approval for a pay adjustment. (Dec. 5; Tr. 192). On November 29, 2011, at approximately 10:00 a.m., Tovari-

¹⁹ The ALJ fails to mention this fact. (Exception 40).

²⁰ The ALJ's conclusory statement that Simon's alleged statement to Wood about Tovari-Nagy's alleged statement to Simons is not hearsay misses its mark. (Dec. 4 n. 4; Exception 42).

Nagy and Simons met with Wood and evaluated him, and advised him of his pay increase.²¹ (Dec. 4; Tr. 22, 26, 196-97; R. Ex. 5). Wood's pay increase, effective December 1, 2011, was \$1.41/hour taking him to \$13.50/hour. (Dec. 4; Tr. 23-24, 59, 196-97; R. Ex. 5).

Notwithstanding the existence of documentation the ALJ so desperately demands showing that Wood's wage increase went to \$13.50/hour on November 29, 2011 (R. Ex. 5), the ALJ ignores the documentary evidence and credits Wood's testimony that he was initially not told what his increase would be on November 29, and that Simons also identified the incorrect amount, \$1.50/hour, on November 30. (Dec. 4-5; Tr. 22-24).

Although obviously not acknowledged by the ALJ, at the time Tovari-Nagy met with Wood, he was not aware that the Union had presented a letter demanding recognition. (Tr. 197-98). Moreover, the ALJ's commentary that Irwin knew about the demand letter at the time of Wood's pay increase is completely irrelevant. (Dec. 8). Neither the Acting General Counsel, nor the Union alleges, nor is there any evidence, that Irwin was included in the decision regarding Wood's pay raise in any manner.

2. Pay Increases for Other Employees

In addition to Wood, during the course of 2011, the Columbus plant made several individual wage adjustments where the Company felt they were merited. (Dec. 6; Tr. 264). On July 5, 2011, voting unit employee Orlando Mitchell received a \$1.25/hour pay increase.²² (Dec. 6; Tr. 268-71, 298; GC Ex. 22; R. Ex. 14). On August 1, 2011, Calvin Stewart received a \$2.50/hour increase. (Dec. 6; Tr. 198-99, 207-10, 271-73, 297; GC Ex. 23; R. Ex. 15). On

²¹ The ALJ omits the evaluation associated with the pay increase – an evaluation that Wood described as “in-depth” and thus, not indicative of being a “hasty” decision by Kingspan. (Dec. 6; Tr. 76-77; Exception 40).

²² The ALJ omits the amounts of the pay increases for the other employees; presumably because it would otherwise undermine his characterization of Wood's pay increase as “substantial.” (Dec. 6; Exception 40).

September 12, 2011, Robert Edington, a packager at the time, received a \$1.50/hour increase. (Dec. 6; Tr. 267-68; GC Ex. 10). On September 26, 2011, Hicham Benghalem, a voting unit employee, received a \$1.50/hour increase. (Dec. 6; Tr. 266; GC Ex. 9).

Although the ALJ stated that there was no evidence of a procedure for obtaining these raises, that conclusion smacks of the selective incorporation of evidence throughout the ALJ's decision. Harris and Tovari-Nagy both described a process whereby Tovari-Nagy had to approve the wage increase, then it was sent to Lackemacher at corporate for approval. (Dec. 6; Tr. 184-85, 192, 198-99, 207-10; 233-34, 264-65, 267, 272, 281-82). While Harris stated that he that he did not know who, if anyone, Lackemacher consulted with for approval, that does not constitute "no evidence of procedure;" corporate approved, and then the local plant implemented, the wage increases. (Dec. 6; Tr. 264). Similarly, the ALJ's "finding" that there was no evidence of consideration of Wood's pay increase before November 29 (Dec. 6) is not informative. There is likewise no evidence of consideration of the other pay increases prior to their meeting with the employees. This is part and parcel of the ALJ creating inferences unsupported by the record.

G. The Alleged Interrogations (Complaint Paragraphs 5(a) & (b) & Objection 3) (Exceptions 6, 9, 11-13, 40-41, 43)

1. Irwin and Wood

On or about November 1, 2011, Irwin took Wood to a off-premises garage to perform some work. (Dec. 2; Tr. 15, 335). Irwin had done this a few times before. (Tr. 340-43). According to Wood, while they were driving, Irwin asked if Wood had heard anything about the Union and if Wood had spoken to anyone about the union. (Dec. 2; Tr. 16-17). For his part, Irwin recalled driving Wood to the garage, but denied making any such statements. (Dec. 2; Tr.

335, 337-38). There is no evidence that Wood relayed this alleged conversation to any other voting unit employees.²³

The ALJ credited Wood's testimony based on the following "evidence": (a) the 2010 organizing campaign; (b) Wood's status as a prominent union support and observer in 2010; (c) Kingspan's knowledge that the election bar would expire; (d) Harris' October 8 e-mail to Lackemacher and Tovari-Nagy; (e) that Harris would keep Lackemacher "informed;" (f) an inference that Irwin knew of the October 8 e-mail; (g) Wood's status as a current employee; and (h) the unlikelihood that Wood, who had twice tried to get the union in and twice failed, and who recounted his Board affidavit testimony, would "conjure up his story out of whole cloth." (Dec. 2-3; Tr. 18, 72-73, 79-80, 249, 285-84, 306-08, 337; GC Ex. 11). As discussed above, the ALJ's inferences are without record support.

2. Irwin and Whitehall

On or about December 5, 2011, Whitehall testified that he encountered Irwin near the breakroom in the plant, and Irwin asked him who was in charge of getting the Union in the plant. (Dec. 3; Tr. 84-86). Whitehall replied that there was no one lead in-plant organizer, but rather a committee of five to six employees. (Id.; Id.) For the same reasons as he credited Wood, the ALJ credited Whitehall. (Dec. 3). Further, the ALJ concluded that because Irwin did not recall the conversation, he did not categorically deny the conversation. (Dec. 3; Tr. 336). There is no evidence that Whitehall told any other employees about the conversation that allegedly took place with Irwin.²⁴

²³ The ALJ omits this fact. (Exception 40).

²⁴ The ALJ once again omits this fact. (Dec. 3; Exception 40).

IV. LAW AND ARGUMENT

A. Applicable Legal Standards Regarding the Pay Allegations

1. Objectionable Conduct Standard

The Union bears the burden of proving election objections by a “fair preponderance of the substantial credible evidence.” AAA Lapco, Inc., 197 NLRB 274, 280 (1972) (affirming ALJ’s holding that “[n]one of the Union’s objections has been established by a fair preponderance of the substantial credible evidence upon the records as a whole.”); Emerson Elec. Co., 177 NLRB 75, 100 (1969) (affirming ALJ’s holding that the union failed to support its election objections with a “fair preponderance of the substantial credible evidence.”); Clark Control Div. of A.O. Smith Corp., 166 NLRB 266, 270 (1967) (same).

In order to have its objections sustained, the Union must not only prove the existence of objectionable conduct, but must also demonstrate by a preponderance of credible evidence, that such objectionable conduct could have actually and materially affected the election’s results. NLRB v. Mattison Mach. Works, 365 U.S. 123, 124 (1961); Wireways, Inc., 309 NLRB 245, 245 (1992); Galloway Sch. Lines, 308 NLRB 33, 33 n.1 (1992); Clark Equip. Co., 278 NLRB 498, 505 (1986) (refusing to set aside election where the evidence fails to establish that the misconduct affected the election results), overruled in part on other grounds, Nickles Bakery of Ind., 296 NLRB 927 (1989); Viteck Elec., 268 NLRB 522, 536 (1984); NLRB v. Shrader’s, Inc., 928 F.2d 194, 196 (6th Cir. 1991); Beaird-Poulan Div. v. NLRB, 649 F.2d 589, 591 (8th Cir. 1981); Boston Insulated Wire & Cable Sys. v. NLRB, 703 F.2d 876, 880 (5th Cir. 1983). In short, unless the Union can meet its “heavy burden of showing adequate reasons for setting aside the [election] results,” its objections must be overruled. J. Ray McDermott & Co. v. NLRB, 571

F.2d 850, 855 (5th Cir. 1978). The ALJ very much appears to have placed the burden of proof on Kingspan as opposed to the Union.

In order for alleged conduct to be objectionable, it must occur during the critical period. The Ideal Elec. & Mfg. Co., 134 NLRB 1275, 1277 (1961). Here, the critical period is November 29, 2011 (date of the petition) through January 13, 2012 (date of the election). (GC Ex. 1e); West Texas Equipment Co., 142 NLRB 1358, 1360 (1963). The purpose of the critical period is to prevent consideration of “conduct too remote to have prevented the free choices guaranteed by Section 7.” Ideal Elec., 134 NLRB at 1277. It is the objecting party’s burden to show that the conduct occurred during the critical period. Accubuilt, Inc., 340 NLRB 1337, 1338 (2003); Gibraltar Steel Corp., 323 NLRB 601, 603 (1997).

The consideration of pre-petition conduct is very limited. Nat’l League of Prof’l Baseball Clubs, 330 NLRB 670, 676 (2000). Not surprisingly, the ALJ ventures outside of the critical period in order to support conclusion that a re-run is warranted. (Dec. 9). In the same breath of acknowledgement that he is going outside of the critical period for evidence in support of his conclusion that a re-run election should occur, he engages in gymnastics exercises to create an impression that events did not occur outside the critical period, namely the implementation of the second shift premium. (Dec. 9). The consideration of alleged conduct outside the critical period is completely unwarranted where, as here, there is not a single allegation of objectionable conduct occurring within 40 days prior to the election. (Exceptions 68-71). Thus, the alleged pre-petition conduct sheds no light on alleged post-petition conduct.

2. Analytical Framework for Section 8(a)(1) – Second Shift Premium and Wood’s Wage Increase²⁵

The conferral of benefits during an organizational campaign is not per se unlawful. Star, Inc., 337 NLRB 962, 962 (2000). Although generally allegations of violations of Section 8(a)(1) do not involve motive, the analysis regarding alleged promises of, or the alleged implementation of, benefits does in fact consider the employer’s motives. Network Dynamics Cabling, 351 NLRB 1423, 1424 (2007). When addressing the promise of benefits and/or the implementation of benefits, it is well-settled that while a petition for representation is pending, an employer is generally free to proceed as if the union were not present. McCormick Longmeadow Store Co., 158 NLRB 1237, 1242 (1966) (An employer’s legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union were not in the picture.”); Kauai Coconut Beach Resort, 317 NLRB 996, 997 (1995) (similar); Atlantic Forest Prods., 282 NLRB 855, 858 (1987). In other words, where an employer can show that it is not motivated by union activity in its decision to grant or withhold benefits, the employer’s actions are lawful. Star, Inc., 337 NLRB at 962; American Sunroof Corp., 248 NLRB 748, 748 (1980); McCormick Longmeadow, 158 NLRB at 1242. Again, the ALJ appears to impose the burden of proof entirely on Kingspan.

The ALJ’s reliance on Mercy Southwest Hosp., 338 NLRB 545 (2002) is misplaced. While the ALJ does his best to manufacture facts consistent with those in Mercy Southwest, there the employer announced implementation of a pay increase during the critical period (the announcement here was one week before the petition), and the employer offered no explanation

²⁵ Although the ALJ drops a gratuitous footnote (Dec. 8 n. 13; Exception 50) that Respondent’s discussion of anti-union animus is irrelevant the Complaint included alleged Section 8(a)(3) violations which would, of course, make such discussion by Respondent very germane.

at all for the time (unlike here, where there is substantiated evidence regarding how and why Kingspan implemented the second shift differential).

B. The Second Shift Premium Implemented by Kingspan was Not Objectionable or Unlawful (Exceptions 49, 55-57, 60, 63, 65-69, 71-73, 77, 78)

First, contrary to the ALJ's conclusion (Dec. 9), the initiation and the implementation of the second shift premium did not occur during the critical period. Ideal Elec., 134 NLRB at 1277. Kingspan initiated the process for the shift premium in August 2011; received approval on November 17, 2011, announced it to employees on November 22; and implemented it effective November 28. The Union filed its petition on November 29. The ALJ acknowledges this sequence of events (even if he wrongly states that there is no documentation in support thereof).

The ALJ's sole attempted claw back to the critical period is the fact that, as a result of the payroll period, employees first received the shift premium in their paychecks on December 9. (Dec. 5). Given that Kingspan had already announced the employees' receipt of the shift premium one week before implementation, and over two weeks before it appeared in their paychecks, the mere fact that it showed up in the paychecks during the critical period is not material, let alone dispositive. There is no basis, and the ALJ does not cite any authority as to how pre-petition conduct (announcing and implementing shift premiums) "sheds light" on post-petition conduct. Indeed, it is not entirely clear, other than the alleged December 5 interrogation, what post-petition conduct could be at issue. See Dresser Indus., 242 NLRB 74, 74 (1979).

Second, The ALJ's reliance on Wis-Pak Foods, 319 NLRB 933 n. 2 (1995), is inapposite. In Wis-Pak, the employer's change in its overtime policy was announced two days before the petition, and there was no evidence or prior consideration. While the ALJ would like to cram the facts of this case into Wis-Pak, it does not work.

Here, the process for implementation of a shift premium began well before any alleged Union activity occurred. Tovari-Nagy identified the need for a shift premium as early as July 2011 when he arrived as a consultant. (Dec. 5; Tr. 181). Harris sent an e-mail to Lackemacher on August 1, 2011 inquiring about implementing a shift premium. (Dec. 5; R. Ex. 9). Thereafter, Tovari-Nagy was unsuccessful in getting the attention of the outgoing President (General Manager) Mannion on the issue. (Dec. 5; Tr. 181-82, 221-22). Brash took over on November 1, 2011, and met with Tovari-Nagy on November 17, at which time he approved the shift premium. (Dec. 5; Tr. 183-85). Tovari-Nagy also testified that in his discussions with Brash about the shift premium, there was no mention of any union activity. (Tr. 188). See e.g., The Guard Publishing Co., 344 NLRB 1142, 1142 (2005) (finding wage increase violative where there was no evidence that the wages were decided upon prior to the employer's knowledge of union activity).

By Hammond's own admission, he did not start meeting with Kingspan employees until November 3, 2011. (Tr. 138, 142, 144). Moreover, both Wood and Whitehall testified that their organizing activities were designed to be undetected. (Tr. 21, 83-84, 97-98). Their efforts were discreet until November 19, 2011, when Harris alerted leadership that the Union may have sent an e-mail to Brash or Russell Shiels, Brash's superior, demanding recognition – two days after the Tovari-Nagy received permission to implement the shift premium. (Tr. 183-85, 252; GC Exs. 12-17).

Accordingly, at the time Kingspan received approval to implement the shift premium, it was unaware of the Union's organizing activity at the plant. Thus, the impetus for the second shift premium and the approval process all preceded the Union's activity at the plant and

therefore, contrary to the ALJ's conclusion (Dec. 5-6, 7-9) the decision could not have been motivated by any Union activity.

Third, the delay in the implementation of the second shift premium due to changes in corporate leadership is entirely consistent with the sequence of events. Compensation changes and adjustments require corporate approval. (Dec. 6; Tr. 11, 55, 108, 115, 127, 166-67, 184-85, 188-89, 209-10, 222-23, 225-26, 229-31, 233-38, 264-65). Without corporate approval, Tovari-Nagy had no authority to implement. (Tr. 188). Brash assumed North American responsibilities on November 1; met in Columbus with Tovari-Nagy on November 17; and the announcement was made November 22.

The ALJ's focus on Kingspan being aware that the election bar was expiring in October 2011, and Harris' email that he became aware of a couple of unidentified employees talking about the Union actually serves to reinforce that Kingspan's second shift premium had nothing to do with the Union. If Kingspan was truly aware of union activity at the plant in October 2011, then Kingspan would have had every incentive to implement the second shift premium at that time, if its motive was to deter organizing. But, it did not. Kingspan did not react; it waited until it went through its internal process and had approval for the differential. Only then did it announce and implement the second shift premium. The employees who testified substantiated that they were told repeatedly that the local management did not have control over pay issues. (Tr. 11, 55, 108, 127); see e.g., Monroe Mfg. Co., 162 NLRB 20, 29 (1966) (finding no violation of the Act where supervisors informed employee he was not the one who decided pay increases). Thus, the sequence of events overwhelmingly demonstrates that the second shift premium was not implemented in response to union activity.

Fourth, the ALJ completely ignores Kingspan's remedial efforts to effectively staff the second shift pending corporate approval of the premium. Because of the delay in getting approval of the shift premium, Tovari-Nagy and Harris moved the most experienced production employee they had, Bryant Messer, to second shift. Messer's job was, in essence, to "train the trainer" – Latham, who was the supervisor on second shift. Again, if Kingspan's motive was to squelch an organizing drive, it would have implemented the second shift premium earlier, and not shifted resources to adequately staff the second shift.

Fifth, even at the plant level, the implementation of the second shift premium precludes an inference anti-union motive in implementing the second shift premium. The shift premium applied to all employees working on the second shift in Columbus; full-time employees, hourly paid supervisors and even temporary employees – a total of 11 employees. (Dec. 5 n.7, 10; Tr. 253-58; GC Exs. 3-4; R. Exs. 10-13). Thus, non-voting unit employees received the shift premium than voting unit employees (6 to 5). And other than being even-handed, there was no incentive whatsoever to apply the second shift premium to the temporary employees who are not even Kingspan employees. Accordingly, the actual implementation of the shift premium precludes an inference of anti-union motive.

Recognizing this, the ALJ goes to great lengths to inflate the number of affected employees. Indeed, both the Complaint and the Counsel for the Acting General Counsel's opening statements identify five affected employees. (GC Ex 1a; Tr. 10). The ALJ inflates this number to eleven notwithstanding evidence identifying employees who are temporary and excluded, as well as supervisory staff. (Tr. 230, 253-58; R. Ex. 10). In fact, the ALJ claims that there is insufficient evidence that Latham is a supervisor (Dec. 10 n. 14), but in the text of his decision refers to Latham as a supervisor (Dec. 5). The ALJ's analysis is internally

irreconcilable. The allegations and the evidence show that five employees were affected by the shift differential.²⁶

Finally, the failure of Kingspan to proceed on its plans to implement a second shift premium would have violated the Act. Board law requires Kingspan to proceed with pay or benefit adjustments as if the Union were not present. Kauai Coconut Beach Resort, 317 NLRB at 997; Atlantic Forest, 282 NLRB at 858; McCormick Longmeadow, 158 NLRB at 1242 (“[I]f the employer’s course is altered by virtue of the Union’s presence, then the employer has violated the Act, and this is true whether he confers benefits because of the Union, or withholds them.”) Here, for Kingspan to have then changed course and not implemented the shift premium would have certainly resulted in Kingspan being subject to the same challenge albeit for failure to implement the second shift premium.

Again, the overwhelming evidence shows that Kingspan believed that it needed the shift premium to improve the quality of the production personnel on the second shift. Accordingly, Kingspan’s implementation of the second shift premium was neither unlawful, nor objectionable:

The Act does not require an employer pending an election to refrain from making economically motivated decisions involving business matters or any changes in working conditions necessary to the continual and orderly operations of its business, absent a promise of benefits conditioned upon rejection of the Union and/or any causal connection between such changes and the rights accorded to employees by the Act. Normal business decisions must continue to be made and frequently are necessary for the efficient operation of an enterprise, even though it occurs during an organizational campaign.

Walnut Creek Hosp., 208 NLRB 656, 663 (1974) (citations omitted).

²⁶ The record evidence shows that Latham and Edington were not eligible voters because they were supervisors and the two Holcombs were not eligible because they were temporary employees. (Tr. 70, 106, 122, 169-70, 230, 253-58; R. Exs. 10-13; Exception 73).

Accordingly, the objection regarding the second shift premium is without merit and should have been dismissed. Likewise, Kingspan clearly demonstrated that paragraph 6(b) of the Complaint allegations should be dismissed as being without merit Kingspan's implementation of the shift premium neither interfered with the election, nor violated employees' Section 7 rights.

C. Kingspan's Pay Increase to Roger Wood was Neither Objectionable nor Unlawful (Exceptions 49, 51-64, 67-72, 76-78)

Similarly, the ALJ's conclusion that Wood's November pay increase was unlawful and objectionable is without foundation. First, contrary to the ALJ's conjecture that Wood's increase was an isolated, targeted event (Dec. 8) that could have occurred when the others' did (between July and September), as discussed above, the timing of the pay increase is explained by the change in management and the need for corporate approval. During the course of 2011, Kingspan Columbus made several pay adjustments to employees: Orlando Mitchell, a CTL Operator, received a \$1.25/hour pay increase on July 5, 2011; Calvin Stewart, a Team Lead, received a \$2.50/hour increase on August 1, 2011; Rob Edington, a Packager at the time, received a \$1.50/hour pay increase on September 12, 2011; and Hicham Benghalem, another CTL Operator, received a \$1.50/hour increase on September 26, 2011. While the ALJ acknowledges the wage adjustments occurred, he conveniently omits the amounts which then allow him to call Wood's \$1.41/hour pay increase "substantial." The record evidence demonstrates that Wood's pay increase was well in line with the others given.

Everyone agrees, including Wood, that Harris was not his supervisor, but his friend. Thus, Wood's "request" to Harris that he should be paid more (to the extent it was a "request") was pointless. The ALJ identifies Tovari-Nagy as Wood's supervisor after Gross left and until Simons arrived (Dec. 4). Yet, Wood never asked Tovari-Nagy for a wage increase. Unlike the production workers who received pay increases at the recommendation of their direct supervisor,

maintenance did not have a direct supervisor until October. Once Simons initiated the request for the pay increase in November, it proceeded just like others.

Simons started October 5, 2011, and recommended a pay increase for Wood in early November. Tovari-Nagy had the attention of his new boss on November 17, and obtained approval at that time. As a result, there was no delay in Wood's increase after initiating the pay raise unlike the other similar employee pay adjustments: Stewart – 5 days; Edington – 11 days; and Benghalem – 11 days. With Wood, Tovari-Nagy already had corporate approval; the pay increase went into effect a couple of days later. Tovari-Nagy testified without refutation that he was not aware of the Union's demand letter at the time he met with Wood about the pay adjustment. (Tr.197-98). There is nothing in the record to suggest that Wood's pay adjustment was inconsistent with what Kingspan had done with other employees, and certainly nothing to support the allegation that the pay adjustment was "because of" the Union's activity.

Second, the "timing" of Wood's pay increase is further undermined by the ALJ's insistence on Kingspan's intent to undermine the Union beginning in October 2011. (Dec. 2-3). Wood asked Simons for a pay increase at least three times in the course of the month of October. (Dec. 4; Tr. 13, 55). If Kingspan knew of other activity then, and since it knew of Wood's status as a Union advocate (Dec. 2), it would have behooved Kingspan to promptly grant the increases upon Wood's request. That did not happen. Accordingly, the challenges to Kingspan's increase of Wood's pay as alleged in paragraph 6(a) of the Complaint and the Union's objection must be dismissed.

D. The Alleged Interrogations Did Not Violate the Act and Did Not Interfere with the Election (Exceptions 41, 43-47, 63-64, 67-68, 74-75, 78)

1. Applicable Legal Principles

“It is well-established that interrogation of employees is not per se illegal. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce, or interfere with employee rights.” Rossmore House, 269 NLRB 1176, 1177 (1984). Indeed, if the Act “deprived the employers of any right to ask non-coercive questions of their employees during a campaign, the Act would directly collide with the [First Amendment of the United States] Constitution.” Id.

In determining whether a violation has occurred, the Board examines all of the circumstances surrounding the alleged interrogation to determine if it reasonably tends to interfere, restrain, or coerce rights protected by the Act. Id. In evaluating such allegations, the Board looks at: (1) whether the employee tried to keep his position concerning unions hidden; (2) whether the employer has a history of hostility or discrimination against union supporters; (3) whether the nature of the questions asked was general or non-threatening; and (4) whether the relationship between the supervisor and the employee was friendly. Sunnyvale Med. Ctr., 277 NLRB 1217, 1218 (1985); Emery Worldwide, 309 NLRB at 186; Laidlaw Waste Sys., 305 NLRB 30, 32-33 (1991); Flex Prods., 280 NLRB 1117, 1117 (1986); Page Avjet, Inc., 278 NLRB 444, 449 (1986).

2. The Alleged Statements by Irwin Do Not Constitute Interrogation

Contrary to the ALJ’s conclusions, neither of the alleged conversations involving Irwin constitutes interrogation under the Act. First, Wood contends that on November 1 while he and Irwin were riding together in a vehicle, Irwin asked him if he’d heard anything about the union. As an initial matter, Irwin vehemently denied any such conversation. Irwin’s alleged question

makes little sense in that by that time he was removed from the day-to-day operations of the plant. And contrary to the ALJ's "observation," given Wood's waffling on his Board affidavit, his incredible testimony about getting a \$1.00/hour raise if the union was voted in, and that he has twice led organizing efforts that failed, it is not so unlikely that Wood would make something up "out of whole cloth."

Regardless, the record is devoid of any evidence that Wood told anyone, let alone another eligible voter, about the alleged conversation. Bon Appetit Mgr. Co., 334 NLRB 1042, 1044 (2001) (undisseminated threat isolated; no effect on election); Terry Mach. Co., 332 NLRB 855, 856 (2000) (refusing to overturn election where only 3 employees heard supervisor's unlawful threat); Bonanza Alum. Corp., 300 NLRB 584, 584 (1990) (holding that election should not be set aside where the employee to whom unlawful threats were made relayed the threats to only 6 eligible voters out of 120); Metz Metallurgical Corp., 270 NLRB 889, 889 (1984) (interrogation of one employee insufficient to overturn election where only one other employee (out of 136) knew of comment). Wood's failure to disseminate seems odd given Irwin's position and title.

Further, the timing of this alleged conversation undermines any alleged coercive effect. The alleged comment occurred 28 days before the petition. As a result, the alleged interrogation cannot be an objection because it falls well outside the critical period. Ideal Elec., 134 NLRB 1277. While the ALJ does not specifically say it cannot form the basis of an objection, he does not bring himself to dismiss it outright either (Dec. 7). Without a preponderance of evidence that the conversation even occurred, and with no evidence of any threatening or coercive nature was inferred, the alleged question in all events does not constitute interrogation under the Act. AAA Lapco., 197 NLRB at 280; Emerson Elec., 177 NLRB at 150; Clark Control, 166 NLRB at 270.

Second, Irwin allegedly asked Whitehall on December 5 by the employee break area who was in charge of getting the Union. While the ALJ pounced on Irwin's testimony that he did not recall the statement as something less than a denial (Dec. 3), the context leaves the statement questionable at best. This alleged conversation is made improbable by the fact that Kingspan knew at that point that the Union had filed the petition and who was behind the organizing drive. The ALJ attempts to defuse this argument by quoting Harris who stated "there had been a lot of new employees." (Dec. 7 n. 12). However, neither Wood nor Whitehall were new, and both were known union advocates. Again, the conversation makes little, if any, sense in its context. And the ALJ's conjecture flies in the face of the record.

Regardless, there is again absolutely no evidence that Whitehall told anyone else, including any eligible voters, about the conversation, or that Whitehall felt threatened or coerced as a result of the conversation. Bon Appetit, 334 NLRB at 1044; See Bonanza Alum., 300 NLRB at 584; Terry Mach. Co., 332 NLRB at 851; Metz Metallurgical, 270 NLRB at 889. Accordingly, without a preponderance of evidence that the conversation even occurred, and without any evidence of an adverse effect, no interrogation can be shown. Accordingly, the alleged conversation cannot be objectionable, and cannot form the basis of a re-run election.

Based on the foregoing, even accepting the ALJ's conclusion that Irwin made the statements attributed to him, they were isolated statements to two separate individuals that had no discernible effect on either person and were not disseminated at all. Accordingly, any alleged effect is de minimis. Grapetree Shores, Inc., 356 NLRB No. 60 (2010); Executive Mgt. Servs., Inc., 355 NLRB No. 33 (2010); Sea Breeze Health Ctr., 331 NLRB 1131, 1133 (2000). Based on the foregoing, the alleged violations of the Act, as well as the Union's objection, should be dismissed in their entirety.

V. CONCLUSION (Exceptions 63, 66-68, 71-73, 78)

Representation elections are not lightly set aside. Madison Sq. Garden Ct. LLC, 350 NLRB 117, 119 (2007). For all of the foregoing reasons, the ALJ's findings and conclusions, as excepted, should be overruled. First, there is no basis for finding the shift differential either objectionable or unlawful. The process and the timing amply show that Kingspan did not implement the shift premium in response to any union organizing activity. Second, the pay increase to Wood likewise does not support a finding of objectionable or unlawful conduct. The pay increase was consistent in both process and amount as what was provided to other employees who received such pay increases. Finally, the interrogations are neither objectionable nor unlawful. While Kingspan continues to deny that either constituted interrogation, it is immaterial. The alleged conversation with Wood is too remote to constitute objectionable conduct, and without evidence of dissemination, neither the Wood nor the Whitehall conversations can support objectionable conduct.

Accordingly, the ALJ's recommended order and re-run of the election should be overruled. The results of the election should stand pursuant to the revised tally of ballots. The ALJ's reliance on factors 3, 4, 5, 6, and 9 in Cedars-Sinai Med Ctr., 342 NLRB 596 (2004) is unsupported by the record. As demonstrated, the ALJ inflated the effect of any alleged misconduct on the voting unit by improperly including non-voting unit employees (factor 3). The proximity of the misconduct to the election is without support. (factor 4). The alleged December 5 interrogation is the last objectionable event, and it occurred over 40 days before the election. There is absolutely no evidence regarding the "persistence" of the alleged misconduct in the minds of the employees (factor 5) in part because there is likewise no evidence of dissemination (factor 6). And, but for the ALJ's tortured factual development, the alleged

misconduct cannot be attributed to Kingspan (factor 9). The only variable implicated here is the closeness of the election, 22-20 against the Union (3 vote margin), and that variable alone is driving the ALJ's decision. That alone, however, does not warrant a re-run of the election.

Respectfully submitted,



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July 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2012, an electronic PDF version of this Respondent Kingspan Insulated Panels, Inc. d/b/a Kingspan Benchmark's Post-Hearing Brief was filed using the Board's electronic filing system upon:

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