

Kingspan Insulated Panels, Inc., d/b/a Kingspan Benchmark and Sheet Metal Workers International Association, Local Union No. 24. Cases 09–CA–072906 and 09–RC–069754

November 8, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On June 8, 2012, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and supporting brief, and the Acting General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board decision adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kingspan Insulated Panels, Inc., d/b/a Kingspan Benchmark, Columbus, Ohio, its officers, agents, successors, and assigns shall take the actions set in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

¹ The Respondent excepts to the Board's consideration of this case, arguing that the recess appointments of Members Griffin and Block were not properly constituted and that the Board therefore lacks a quorum to act. For the reasons set forth in *Center for Social Change*, 358 NLRB 161 (2012), we reject this argument.

² 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.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Board affirms the judge's order setting aside the election based on the closeness of the election (the revised ballot tally shows 20 votes for and 22 votes against the Union) and the cumulative effects of the following postpetition conduct: (1) Roger Wood's wage increase, (2) the implementation of the shift differential, and (3) the interrogation of Terry Whitehall.

³ We shall substitute a new notice to conform to the Board's standard remedial language.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your support or activities on behalf of Sheet Metal Workers International Association, Local Union No. 24, or any other union, or about the union support and activities of other employees.

WE WILL NOT announce and/or implement improvements in your wages, hours, and working conditions in order to discourage you from selecting union representation.

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

KINGSPAN INSULATED PANELS, INC., D/B/A
KINGSPAN BENCHMARK

Catherine Terrell, Esq., for the General Counsel.

Todd Sarver, Esq. (Steptoe & Johnson), of Columbus, Ohio, for the Respondent.

Julie Ford, Esq. (Doll, Jansen, Ford & Rakay), of Dayton, Ohio, for the Petitioner/Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Columbus, Ohio, on April 30 and May 1, 2012. The Charging Party Union, Sheet Metal Workers International Association, Local Union No. 24, filed charge 09–CA–072906 on January 30, 2012. The General Counsel issued the complaint on February 29, 2012.

The Union also filed a representation petition with the Board on November 29, 2011. A representation election was conducted on January 13, 2012. Thus the "critical period" for purposes of the objections to the conduct of this election filed by the Union on January 20, 2012, runs from November 29, 2011, to January 13, 2012.

Several of the objections were later withdrawn by the Union. In the January 20 election, 20 bargaining unit employees voted in favor of the Petitioning Union; 19 voted against union representation and 3 ballots were challenged by the Union.¹ The Regional Director consolidated the challenges and the objections that had not been withdrawn with the unfair labor practice case for hearing. After the hearing in this matter, the Petitioner/Charging Party withdrew its challenges to the ballots of the three employees in question. When the three ballots were counted, the Union failed to obtain a majority of the votes cast.

On the entire record, 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

Respondent Kingspan is an international company with headquarters in Ireland and facilities in many different countries. In 2008, Kingspan purchased five factories in North America, including the Columbus, Ohio Benchmark facility at issue in this case. Kingspan's North American headquarters is located in Deland, Florida. At the Columbus facility, Respondent manufactures insulated panels used in the building trades. The Columbus Benchmark facility was operated by a company named Metecno from about 1997 to 2008, and by Lamit Industries prior to 1997.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Complaint Paragraphs 5(a) and (b)/Objection 3: Alleged Unlawful Interrogation

Complaint paragraph 5(a)(i): On about November 1, 2011, Roger Wood, a maintenance electrician and bargaining unit member, rode from Respondent's plant to an off-premises garage with Respondent's chief executive officer, Jeff Irwin. Wood testified that during the ride, Irwin asked him if he had heard anything about the Union and had Wood spoken to anybody about the Union. Wood responded that he had not heard anything (Tr. 16–17). Irwin testified that he drove Wood to the garage on the day in question, but denied that he had any discussion with Wood about the Union or union activity (Tr. 335).

I credit Wood and find that the conversation occurred as Wood testified. The Union had an organizing drive in 2010 which culminated in a representation election in October 2010, which the Union lost. Wood was a prominent union supporter and had been the Union's election observer in 2010. Respondent's management was well aware that under Section 9 of the Act, a representation election could not be conducted until a year had expired since the October 2010 election (Tr. 283). On October 8, 2011, Patrick Harris, the acting production manager at the Columbus facility, sent an email to Andrea Lacke-

macher, Respondent's human resources manager in Deland, Florida, and Gabor Tovari-Nagy, the operations manager at the Columbus plant. The subject of the email was "Union Meetings." Harris stated, "I hear the guys have been meeting and discussing another union attempt and just wanted to keep you guys informed" (GC Exh. 11). Lackemacher responded to Harris and Tovari-Nagy on October 10, "Thanks Patrick. Keep me informed."

Harris admitted that he did keep Lackemacher "informed." To the extent that Harris suggests that he had no further communication about the Union with Lackemacher or Tovari-Nagy until November, I discredit his testimony. Respondent was obviously very interested in whether or not there would be another organizing drive at least as early as October 8. I infer this information was shared with all the top managers, including Irwin. I thus discredit his testimony at transcript 336 that he first became aware of renewed union activity at the plant on November 18, 2011. Given his lack of credibility on this point and the unlikelihood that Wood would conjure up his story out of whole cloth, I credit Wood's testimony concerning Irwin's inquiry of November 1.²

Complaint paragraph 5(a)(ii): Terry Whitehall, Respondent's senior maintenance technician, testified that he encountered CEO Irwin somewhere near the plant breakroom on or about December 5, 2011. Whitehall testified that Irwin asked him who was in charge of getting the Union in. Whitehall replied that there was no one lead in-plant organizer, but rather a committee of about five or six employees (Tr. 85–86). Irwin testified that he did not *recall* any discussions with Whitehall about union activity or asking Whitehall who was in charge of getting the Union in (Tr. 336). I credit Whitehall not only for the same reasons that I credit Wood, but I also rely on the fact that Irwin did not categorically deny asking Whitehall this question.

Complaint paragraph 5(b): Roger Wood testified that on or about November 18, 2011, he went to lunch with Patrick Harris, Mike Holden, another manager, and Cory Dimmerling, a leadman. According to Wood, at lunch, Harris asked him, "[H]ow I thought the progress was going, and what might be involved at the Union" (Tr. 19). Wood testified that he replied that he was not sure, that "we haven't talked yet." Wood, later in his testimony, could not recall whether this conversation occurred in November or December, after the representation petition was filed (Tr. 79–80). Harris recalled the lunch in question as taking place prior to Thanksgiving on November 24. I credit Harris. This conversation would have made no sense after the Union gave the demand letter to Respondent on November 29. Harris testified that Wood brought up the subject of the Union and that he inquired as to the progress of the drive only afterwards (Tr. 274–275, 286).

No later than November 19, Harris knew that Wood was talking to Cory Dimmerling, an admitted agent of Respondent,

¹ The unit generally includes all full-time and regular part-time production and maintenance employees at Respondent's Columbus, Ohio facility.

² I also rely on the fact that Wood is a current employee of Respondent. As such his testimony is particularly reliable in that it is adverse to his pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Flexsteel Industries*, 316 NLRB 745 (1995).

about the renewed organizing drive (GC Exh. 14). The General Counsel has not alleged that Respondent, by Dimmerling, violated the Act in interrogating Wood. I therefore infer that Wood was talking to Dimmerling about the organizing drive voluntarily and at his own initiative. Thus, by the time of the November lunch, Wood had disclosed his support for the Union to Respondent.

Complaint Paragraph 6(a); Objection 2(a):
November 29, 2011 Pay Increase for Roger Wood

Roger Wood started working at the Benchmark facility for Metecno as a maintenance technician in May 2007 at a wage of \$11 per hour.³ Sometime in 2008, Kingspan purchased the plant, along with four other facilities in North America. Eighteen months after Wood was hired, his wage rate went up to \$11.50. In January 2011, Respondent raised Wood's wage rate to \$12.09 per hour. During 2011, Wood repeatedly asked Pat Harris, the production manager, who was also a personal friend, for another raise. Prior to June 2011, Harris reported to Wood that then Operations Manager Steve Gross told Harris that Respondent could not afford to give Wood another raise.

In June 2011, Respondent transferred Gabor Tovari-Nagy from a plant in Hungary to the Columbus facility. Although, he was technically a consultant, Tovari-Nagy acted as operations manager soon after his transfer. Tovari-Nagy was permanently assigned to Columbus as operations manager on October 10, 2011.

On October 5, 2011, Respondent hired David Simons as manufacturing engineer. The maintenance technicians have reported to Simons since he was hired. Between June and October 2011, the maintenance technicians reported directly to Tovari-Nagy.

Shortly after Simons was hired, Wood asked Simons to speak to Tovari-Nagy about getting Wood a raise. Simons told Wood that "[H]e spoke to Gabor, and the answer at the time was that he had no intention of giving me a raise" (Tr. 13–14).⁴

³ I also rely on the fact that Wood is a current employee of Respondent. As such his testimony is particularly reliable in that it is adverse to his pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Flexsteel Industries*, 316 NLRB 745 (1995).

⁴ Wood's testimony regarding this conversation with Simons is uncontradicted. I therefore credit it. Simons did not testify. Moreover, Tovari-Nagy testified that he told Terry Whitehall in August or September 2011 that Wood needed to come to him personally if he wanted a raise, Tr. 193. Tovari-Nagy also testified that Simons came to him later to tell him that Wood has asked Simons for a raise several times. Tovari-Nagy testified that this led him to consider the request and compare Wood's compensation with that of Whitehall and Larry Strong, another maintenance technician, Tr. 194–198. Tovari-Nagy did not specifically deny making the statements to Simons that Wood testified Simons relayed to him.

Respondent at p. 15 of its brief, fn. 7, incorrectly characterizes Wood's testimony regarding what Simons told him as hearsay. In its answer to the complaint, Respondent admitted that Simons and Tovari-Nagy are supervisors and agents within the meaning of the Act. Pursuant to Rule 801(d)(2) of the Fed.R.Evid. Wood's testimony as to what Simons said to him is not hearsay. Under Rule 805, Wood's testimony as to what Tovari-Nagy said to Simons is also not hearsay.

On November 29, 2011, the Union presented Respondent with a letter demanding recognition between 8:30 and 9 a.m. Michelle Robinson, the office manager at the Columbus facility, emailed the letter to Jeff Irwin, Gabor Tovari-Nagy, her boss, HR Director Lackemacher and Andrew Hamer, vice present for operations, at 9:16 a.m. (GC Exh. 18).⁵ Forty-five minutes to an hour later, Tovari-Nagy and Simons summoned Wood to a meeting and informed him that he was getting a wage increase. On November 29, neither Tovari-Nagy nor Simons told Wood the amount of the raise. The next day, November 30, Simons told Wood that his raise would be \$1.50 per hour. Effective December 1, 2011, Wood's wage rate went up by \$1.41 per hour. The fact that Respondent did not tell Wood the amount of the raise on November 29, and that Simons gave him an incorrect figure on November 30, is evidence that the decision to raise Wood's wage rate was made hurriedly and in response to the demand for recognition. I infer that this in fact was the case.

Complaint Paragraph 6(b)/Objection 2(b):
The Shift Differential

Since late July 2011, Respondent's employees have been working two shifts.⁶ Six to eight employees currently work on the second shift, which normally operates between 3 p.m. and midnight. However, both the starting and finishing time for this shift varies.⁷ At a meeting on November 22, 2011, Operations Manager Tovari-Nagy informed employees that effective December 1, 2011, Respondent would be paying second-shift employees \$1 per hour more as a "shift differential." An extra dollar per hour for second-shift employees first appeared in employees' paychecks on December 9, 2011. Prior to that time Respondent's employees had not been receiving any extra pay for working the second shift. For several months prior to November 22, second-shift employees had been inquiring of management about a shift differential (Tr. 106–109, 115; GC Exh. 2). Pat Harris, then Respondent's production manager, suggested paying a shift differential to Human Resources Manager Lackemacher on August 1, 2011, in an email on which Tovari-Nagy was copied (R. Exh. 9).

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. When Tovari-Nagy arrived in Columbus in June 2011, it was immediately brought to his attention that the plant did not have a second-shift premium (Tr. 181). In June he prepared an action list (R. Exh. 3), which does not mention implementing a shift differential or shift premium.

Pat Harris' testimony at transcript 252 indicates he did nothing about obtaining a shift differential after sending the August 1 email. Chaz Vallette's testimony at transcript 108, 115–116 also suggests Respondent did nothing towards implementing a shift differential until late November. He asked Harris about a

⁵ Tovari-Nagy reports directly to Hamer, who is located in Deland.

⁶ There had been a second shift prior to late July, but Respondent did not operate a second shift continuously until July 2011, R. Exh. 9.

⁷ However, 11 employees were apparently paid the shift differential on December 9, the first check in which it appeared, R. Exhs. 10 and 13.

shift differential at least twice in September. William Groce asked Harris and Second-Shift Supervisor James Latham about the shift differential repeatedly. They were never given any indication that Columbus management was in the process of getting approval for one from corporate headquarters.

Tovari-Nagy testified further that he received no response on this matter from Ralph Mannion, who was Respondent's president prior to November 1.⁸ Mannion was in the process of transferring to Ireland and on November 1, Joseph Brash, a transfer from Europe, succeeded Mannion as president. Tovari-Nagy testified that institution of the shift differential was approved by Brash at a meeting in Columbus on November 17, 2011. At this meeting, Tovari-Nagy testified Brash also approved the \$1.41-wage increase for Roger Wood.

Respondent's position appears to be that the implementation of the shift differential and the wage increase for Wood which were effective on December 1, have nothing to do with the union organizing drive. It suggests that it is mere coincidence that Wood received his increase the day that the Union gave its demand letter to Respondent. Tovari-Nagy testified that he does not have authority to raise employee's wages without approval from Respondent's North American headquarters in Deland.

I find to the contrary, that the timing of both Wood's December 1 increase and the implementation of the shift differential were hasty management decisions made in late November 2011 which were motivated by a desire to discourage employees from organizing. Respondent raised the wages of several employees in the summer/fall of 2010 and has demonstrated no credible explanation as to why the Wood's increase or implementation of the shift differential could not have been instituted in the same timeframe.⁹

Employee Orlando Mitchell received a wage increase on July 5, 2011; Calvin Stewart received one on August 1; Robert Edington also received a wage increase in this timeframe, as did Hicham Benghalen. There is no evidence as to the procedure followed in raising these employees' wages (see Tr. 233–234). In fact, Tovari-Nagy testified that he did not know what procedure was followed to raise these employees' wages. Harris testified that he filled out some forms, had Tovari-Nagy sign them and then sent the forms to Andrea Lackemacher (Tr. 265, 282). He did not know what happened to raise these employees' wages afterwards. There is no documentation of any consideration of a wage increase for Wood prior to November 29; R. Exh. 5 (Tr. 197), or a plan to institute a shift differential prior to November 22.

Furthermore, there is no evidence regarding Tovari-Nagy's November 17 meeting with Brash, other than Tovari-Nagy's testimony. On the other hand, it is clear that Respondent's

⁸ According to GC Exh. 5, Mannion's position was general manager, Kingspan Insulated Panels North America.

⁹ Respondent in its brief argues that discriminatory motive cannot be drawn from corporatewide pay initiatives. The violative conduct herein is not the result of any corporatewide initiative. Shift premiums apparently had been implemented at other Kingspan facilities prior to April 2011; Tr. 296, R. Exhs. 14 and 15. The plant specific shift premium initiative in this case is further evidence that its implementation was motivated by the organizing drive.

management was aware of the possibility of a renewed union drive in early October and knew that such a drive was almost certain on November 19. By the evening of November 21, it retained a labor consultant, Frank Ashcraft, to assist it in opposing the organizing drive (GC Exh. 24).

It is also clear that Respondent very much wanted to nip such a drive in the bud. As CEO Irwin noted, an organizing drive was "exactly what we do not need" (GC Exh. 16). I infer that the announcement of the shift differential and the December 1 raise for Wood were part of the "charm offensive" that Tovari-Nagy was advised to undertake by Brash on November 19, to thwart the organizing drive (GC Exh. 17).¹⁰

Analysis

Interrogations

The lead Board case regarding the legality of interrogations is *Rossmore House*, 269 NLRB 1176 (1984), aff'd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

Under Board law, it is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."

In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002).

Applying this test to the instant case, I find that the Respondent violated Section 8(a)(1) as alleged in complaint paragraphs 5(a)(i) and (ii) and that Irwin's inquiry to Terry Whitehall constitutes objectionable conduct since it occurred during the "critical period."

Jeff Irwin, the questioner in both instances, is a very high ranking official, the chief executive officer of Respondent. The nature of the information sought, particularly in seeking from Whitehall the identity of the in-house leaders of the organizing drive, is extremely coercive. Although Whitehall may already have openly demonstrated his support for the Union at the time Irwin questioned him, the inquiry is violative because Irwin was seeking the identity of other union supporters.¹¹ He obviously did not know who they were because otherwise he would not have asked Whitehall for this information.¹²

The place of the November 1 interrogation of Wood, Irwin's vehicle, would tend to make that inquiry more coercive. There

¹⁰ I note that the November 19 emails do not mention either the decision to implement a shift differential or a decision to raise Wood's wage rate substantially.

¹¹ Whitehall wore union paraphernalia and may have done so prior to his discussion with Irwin.

¹² Respondent at p. 42 asserts that by December 5 it knew who was behind the organizing drive. However, as Patrick Harris testified, while he assumed some of the union supporters were the same employees who had supported the Union in 2010, "it had changed. There had been a lot of new employees," Tr. 305.

is no evidence that Wood was openly supporting the renewed union drive as of November 1.

I decline to find that Respondent, through Pat Harris, violated the Act when questioning Wood on or about November 18. The record indicates that Wood was discussing the Union with other of Respondent's agents prior to that date. Moreover, it is unclear whether Harris or Wood raised the subject of the Union first.

Wood's Wage Increase and the Shift Differential

An allegation that an employer has violated Section 8(a)(1) by promising and/or implementing beneficial changes in employees' wages, hours, and/or working conditions in response to union organizational activity is analyzed under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). Unlike other alleged 8(a)(1) violations, this analysis is motive-based, *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007).

An employer which is aware of a union organizing drive violates Section 8(a)(1) in granting unit employees benefits unless it proves that it had a legitimate business reason for the timing and grant of the benefit, *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087–1090 (2004). Granting such a benefit violates Section 8(a)(1) regardless of whether or not it occurs within the critical period between the filing of the representation petition and the representation election. The granting of benefits during an organizing drive is not per se unlawful if the employer can show its actions were governed by factors other than the organizing campaign, such as a showing that the benefit was granted pursuant to an already established company policy, *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002).¹³

In the instant case, it is clear that Respondent was aware of the Union's 2011 organizing drive when it announced the shift differential on November 22, 2001, and when it raised Roger Wood's wage rate on November 29. Moreover, I find that Wood's wage increase constitutes objectionable conduct in that Respondent was aware that the Union filed its demand letter when it raised Wood's wages. As explained in a number of Board and court cases, such as *NLRB v. Exchange Parts Co.*, supra, the message implicit in such increases is that they constitute a reward for eschewing union representation whose continuation may depend on employees continuing to sacrifice their Section 7 rights ("a fist inside a velvet glove," in the words of Justice Harlan).

With regard to the timing of Wood's increase, the testimony of Scott Hammond, the Union's business agent, is uncontradicted that he delivered the Union's demand letter to Respondent between 8:45 and 9 a.m. on Tuesday, November 29, 2011.

¹³ Respondent's discussion of the absence of evidence of antiunion animus is irrelevant in the context of an alleged 8(a)(1) violation. Proof of animus is not an element of the General Counsel's prima facie case, *Post Tension of Nevada, Inc.*, 352 NLRB 1153, 1161 (2008). Moreover, actions which do not violate the law may be relied upon in establishing animus, *Gencorp*, 294 NLRB 717 fn. 1 (1989). Finally, there is plenty of evidence from which I infer antiunion animus including the timing of the wage increase for Wood, the timing of the implementation of the shift differential, and CEO Irwin's expressed opinion that unionization was "exactly what we don't need."

Respondent's office manager, Michelle Robinson, emailed the letter to Irwin, Tovari-Nagy, HR Director Lackemacher, and Vice President Hamer at 9:16 a.m. Roger Wood's testimony is uncontradicted that he was called into a meeting with Gabor, Tovari-Nagy, and David Simons between 10 and 10:30 a.m. the same day to be informed of an unspecified wage increase, which turned out to be \$1.41 per hour. Jeff Irwin, to whom the demand letter was directed, did not testify as to when he was first aware of the demand letter.

The burden of proof is on Respondent to establish that despite Hammond's testimony and Robinson's email, neither Irwin nor Tovari-Nagy was aware of the letter when Tovari-Nagy met with Wood 1 to 1-1/2 later. I find to the contrary and I discredit that testimony of Tovari-Nagy that he was unaware of the letter when he met with Wood. Respondent was very concerned about the organizing drive and I infer that all members of management became aware of the demand letter very soon after it was delivered and emailed to them.

Respondent has not met its burden of showing that either the wage increase for Wood or the implementation of the shift differential was not in large part motivated by a desire to discourage support for the Union. There is absolutely no documentation to show that the granting of these benefits and timing of these benefits was solely the result of a legitimate business decision unrelated to the organizing drive. Moreover, the ad hoc aspect of Wood's wage increase suggests antiunion motivation as well as the timing of the increase, *Huck Store Fixture Co.*, 334 NLRB 119, 123 (2001).

Finally, I conclude that Pat Harris' testimony at transcript 306–307 provides the most likely explanation for Wood's wage increase. Harris testified that Wood made it clear that he no longer supported the Union after the 2010 representation election. By November 2011, Harris was aware that Wood was supporting the Union anew. I infer that this was known by everybody in Respondent's management of the Columbus plant. Thus, I infer that Respondent hoped that by giving Wood a substantial pay increase it would wean him from his union support. Moreover, since Respondent knew that Wood had been a leader of the 2010 organizing campaign, I infer that it hoped and believed that if Wood stopped supporting the Union other employees would also do so.

Respondent Employer's Objectionable Conduct Warrants Setting Aside the Results of the January 13, 2012 Election

Given that the counting of the three challenged ballots results in a majority of employees voting against union representation, I conclude that Respondent's objectionable conduct warrants setting aside the January 13, 2012 election and remanding this case to the Regional Director to conduct a second election.

Usually, the Board considers only prepetition conduct in determining whether to set aside an election, *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). However, it may consider prepetition conduct where it adds meaning and dimension to related postpetition conduct, *Dresser Industries*, 242 NLRB 74 (1979). In the instant case, I conclude that the sudden wage increase to Roger Wood and the interrogation of Terry Whitehall were part of a continuing plan by Respondent to thwart unionization, which included the announcement of the shift

differential 7 days prior to the filing of the representation petition. Moreover, the implementation of the shift differential took place during the “critical period,” which is further reason to consider it in determining whether to set aside the results of the election, *Wis-Pak Foods*, 319 NLRB 933 fn. 2 (1995), enfd. 125 F.3d 518 (7th Cir. 1997). The shift differential only began to show up in employees’ paychecks after the start of the critical period. Finally, the violative conduct manifested itself each and every time a second-shift employee received a paycheck during the critical period. The weekly receipt of the shift differential served as a constant reminder to each employee that a benefit granted to discourage support for the Union could just as easily be withdrawn for the same reason.

It is well settled that conduct in violation of Section 8(a)(1) that occurs during the critical period prior to an election is “a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.” The Board will thus set aside an election unless the 8(a)(1) violation is so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results, e.g., *Iris U.S.A., Inc.*, 336 NLRB 1013 (2001). I conclude that the misconduct properly considered in the instant case was not so minimal to preclude an affect on the outcome of the election.

In determining whether to set aside election results the Board considers a number of factors, such as (1) the number of incidents of misconduct; (2) the severity of incidents and whether they were likely to cause fear among unit employees; (3) the number of employees in the unit subject to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree of persistence of the misconduct in the minds of unit employees; (6) the extent of dissemination of the misconduct; (7) the closeness of the vote; and (8) the degree to which the misconduct can be attributed to the party, *Cedar-Sinai Medical Center*, 342 NLRB 596, 597 (2004).

In the instant matter, factors 3, 4, 5, 6, 7, and 8 above weigh in favor of setting aside the election. The vote was close and the illegal benefits were announced either just before or at the start of the critical period. They were effectuated during the critical period. Respondent’s highest level of management was responsible for this conduct. A sufficient number of employees (up to 10 of the 44 employees eligible to vote, including Wood) were directly affected by the misconduct to tip the balance in the election and it is most likely that many unit members who did not work second shift became aware of the shift differential and the substantial raise for Wood prior to the election.¹⁴

CONCLUSIONS OF LAW

1. Respondent, Kingspan Insulated Panels, Inc., d/b/a Kingspan Benchmark, by CEO Jeff Irwin violated Section 8(a)(1) of the Act on or about November 1, 2011, by interrogating Roger Wood about employees’ union activities.

¹⁴ Of the 11 employees who received the shift differential according to R. Exh. 10, the credible evidence establishes that two of these employees were temporary employees who were not eligible to vote in the January 13, 2012 election. Respondent’s evidence is insufficient to prove that employees Edington, Latham, Chris Holcomb, and Eric Holcomb were ineligible to vote.

2. Respondent, by CEO Jeff Irwin, violated Section 8(a)(1) on or about December 5, 2011, by interrogating Terry Whitehall about employees’ union activities.

3. Respondent violated Section 8(a)(1) by increasing the wage rate of Roger Wood on November 29, 2011, in part to discourage employees from supporting Sheet Metal Workers International Association, Local Union 24.¹⁵

4. Respondent violated Section 8(a)(1) by announcing the implementation of a shift differential on November 22, 2011, and implementing this shift differential in early December 2011 in part to discourage employees from supporting Sheet Metal Workers International Association, Local Union 24.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, Kingspan Insulated Panels, Inc., d/b/a Kingspan Benchmark, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about his or her union support or union activities, or that of any other employee.

(b) Announcing and implementing improved working conditions or benefits in order to discourage employees from selecting union representation.

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

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

(a) Within 14 days after service by the Region, post at its Columbus, Ohio facility copies of the attached notice marked “Appendix.”¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as

¹⁵ The wage increase for Wood and implementation of the shift differential may also have violated Sec. 8(a)(3), *Clock Electric, Inc.*, 338 NLRB 806 (2003); *Koons Ford of Annapolis*, 282 NLRB 506, 525–528 fn. 2 (1986), but I find it unnecessary to make this determination.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and

former employees employed by the Respondent at any time since November 1, 2011.

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

IT IS FURTHER ORDERED that the Regional Director for Region 9 shall set aside the representation election conducted in Case 09-RC-069754 and that a new election be held at a date and time to be determined by the Regional Director.