UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

KUMHO TIRES,	)	
	)	
Respondent,	)	
	)	
and	)	**Case 10-CA-208255**
	)	**Case 10-CA-208414**
UNITED STEEL, PAPER & FORESTRY	)	
RUBBER, MANUFACTURING, ENERGY	)	
ALLIED INDUSTRIAL & SERVICE	)	
WORKERS INTERNAIONAL UNION	)	
AFL-CIO, CLC	)	
Petitioner.	)	
	)	
	)	
	)	

RESPONDENT'S POST-HEARING BRIEF

COMES NOW KUMHO TIRES[1] (hereinafter "Kumho", "Respondent", or "Company"), by and through the undersigned counsel, and files its post-hearing brief as follows:

I. STATEMENT OF THE CASE

On September 18, 2017, the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC (hereinafter "Union" or "Petitioner"), filed a petition to represent certain employees of Kumho located at 3051 Kumho Parkway in Macon, Georgia. Pursuant to a Stipulated Election Agreement, the parties held an election on October 12 and 13, 2017, and the outcome of the election was as follows:

Approximate number of eligible voters	315
Number of void ballots	0

[1] The correct name of the employer is Kumho Tire Georgia, Inc.

Number of ballots cast for the Petitioner	136
Number of votes cast against the Petitioner	164
Number of valid votes counted	300
Number of challenged ballots	4
Number of valid votes counted plus challenged ballots	304

On October 20, 2017, Petitioner filed objections and unfair labor practice charges in Cases 10-CA-208255 and 10-CA-208414. On July 31, 2018, the Regional Director issued a Consolidated Complaint and Notice of Hearing, which consolidated 10-RC-206308, 10-CA-208255, and 10-CA-208414, and set a hearing for December 3, 2018, to take place at the courthouse in Monticello, Georgia. Subsequently, the hearing was postponed and rescheduled for the week of March 18, 2019. On March 5, 2019, the General Counsel filed an Amended Complaint, which contains 48 paragraphs, many of which have several subparts, mainly alleging that Cliff Kleckley is a statutory supervisor and/or agent, and that Respondent's supervisors, agents, or representatives had engaged in unlawful labor practices by: (1) threatening employees with plant closures, job loss, or other unspecified reprisals; (2) soliciting grievances; (3) threatening employees with loss of benefits; or (4) engaging in acts of surveillance or interrogation. The hearing ultimately took place from March 18 to March 22, 2019. [2] Respondent hereby files its post-hearing brief.

II. STATEMENT OF FACTS

With the filing of the Union's Petition on September 18, 2017, to represent certain Kumho employees, the union campaign ensued. Kumho held training sessions to educate its supervisors on lawful ways to engage employees (Tr. Vol.5, p.511 13-21, p.521 at 25 to p.522 at 1-13) and

[2] At the conclusion of the General Counsel's case on March 20, 2019, the counsel for the General Counsel made a motion to withdraw paragraph 26 of the Amended Complaint and the motion was granted. (Tr. Vol.3, p.392 at 10-13).

held separate training for its employees to provide them with educational information to assist them in making an informed decision in the union election. (Tr. Vol.4, p.424 at 16-19). The educational sessions for Kumho's non-supervisory employees were conducted by the consultants from Road Warrior Productions. (Tr. Vol.4, p.435 at 24-25 to p.436 at 1-2). As professionals brought into educate employees, the consultants understood the limitation of communication with employees (i.e., they cannot threaten, interrogate, promise, or spy on employees) (Tr. Vol.4, p.424 at 12-15), which mirrors what supervisors had learned (Tr. Vol.4, p.449 at 2-6, p.462 at 14-16, p.465 at 3-13, p.492 at 18-24; Tr. Vol.5, p.518 at 22-25 to p.519 at 1-7).

The consultants held five separate training sessions for employees (U. Exh. 7)[3] and trained employees on their rights under the National Labor Relations Act, including but not limited to, the collective bargaining process, history of strikes, and work stoppages. (Tr. Vol.4, p.423 at 9-11, p.423 at 24-25 to p.424 at 1-11, p.425 at 3-7). For example, the consultants conducted a training session on collective bargaining and told employees about the collective bargaining process, what is involved, and the potential outcome of collective bargaining (i.e., "that things could stay the same, they could get better, [or] they could get worse"). (Tr. Vol.4, p.425 at 8-25 to p.427 at 1-16; E. Exhs. 7 - 9). To further illustrate the possible outcome of the collective bargaining process, the consultants shared Employer's Exhibit 10 with the employees, which demonstrates that employees in the Southeast who are represented by the United Steelworkers receive more through collective bargaining more often than not. (Tr. Vol.4, p.427 at 23-25 to p.428 at 1-9). Furthermore, the consultants explained that since the collective bargaining process is a give and take process, during

[3] The parties were represented by the counsel for the General Counsel, counsel for the Union, and the counsel for the Employer. Each representative entered exhibits. Exhibit offered by the counsel for the General Counsel are designated as "GC Exh."; the exhibits offered by the Union's Counsel are designated as "U. Exh."; and the exhibits offered by the Employer's Counsel are designated as "E. Exh."

a collective bargaining session, companies are going to make proposals that are in the best interest of the company, including economic proposals like wages. (Tr. Vol.4, p.428 at 10-18). To that end, the consultants showed employees that according to the Bureau of Labor Statistics' May 2016 report, which showed that the average rate for production workers in Macon-Bibb County was $11.35. This prompted quite a few employees to approach Bill Monroe with questions. (Tr. Vol.4, p.428 at 1-25 to p.429 at 1-17; E. Exh. 11).

The election was held on October 12 and 13, 2017, and Kumho employees voted against the Union by a margin of 164 to 136.

III. LEGAL ANALYSIS

A. LEGAL STANDARD TO BE APPLIED

The Board has long held that "the burden of proof on parties seeking to have a Board supervised election set aside is a heavy one," as such, "an objecting party must show by specific evidence not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice." Sonoma Health Care Center, 342 NLRB 933, 934-35 (2004). An objecting party cannot satisfy the burden by merely showing that an election "f[e]ll short of perfection." NLRB v. Duriron Co., 978 F.2d 254, 256 (6th Cir.1992). Furthermore, "this burden is not met by proof of misconduct, but rather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' free choice to such an extent that they materially affected the results of the election." Kux Mfg. Co. v. NLRB, 890 F.2d 804, 808 (6th Cir. 1989) (internal citations omitted).

The Supreme Court has made it clear that, during an election campaign, an employer is free to communicate to its employees any general views about unionism or any specific views about a particular union, so long as the communications do not contain a threat of reprisal, force,

or promise of benefit. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). A violation of the National Labor Relations Act ("NLRA") cannot be established by the mere fact that members of management spoke to employees about the Union, and employers have a right under the Act to communicate with employees by expressing opinions, facts, and experiences about unionization. Park N Fly, Inc., 349 NLRB 132 (2007). Finally, the Board has recognized that "the exercise of free speech in these campaigns should not be unduly restricted by narrow construction." Michael's Markets, 274 NLRB 826, 826 (1985).

Here, as evidenced during the hearing, the General Counsel and Union have failed to meet their heavy burden required to overthrow the results of the election. They have failed to prove any evidence of direct threats of plant closure or job loss, any evidence of supervisory authority for a non-supervisory employee (i.e., Cliff Kleckley), any threat of loss of benefits, any evidence of unlawful interrogation or soliciting grievances, nor any indication of surveillance. Instead, they have offered only vague and conclusory statements, which they allege carry the implied threat of various consequences, and the implicit promise of remedy. However, as demonstrated below, their evidence is insufficient to establish that any unlawful acts were committed by Kumho during the period surrounding and leading up the election. Moreover, even if any violations did occur, the General Counsel and Union have failed to show that such isolated events had any effect whatsoever on the election result. As such, and for the reasons described below, the General Counsel's Amended Complaint and the Union's Objections should be dismissed.

B. ANALYSIS

I. The General Counsel Cannot Establish that Cliff Kleckley is a Section 2(11) supervisor or a 2(13) agent of Kumho.

The Amended Complaint paragraph 4(e) alleges that Mr. Cliff Kleckley ("Kleckley"), a Safety Coordinator of Respondent, is a supervisor within the meaning of Section 2(11) and an

agent of the Company within the meaning of Section 2(13) of the Act, and as a result, the alleged statements and conduct by Kleckley in paragraph 36 of the Amended Complaint is imputed to Kumho. The party asserting the supervisory status has the burden to prove supervisory authority and must establish it by a preponderance of the evidence. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711 (2001). "Purely conclusory evidence does not satisfy that burden." Lynwood Manor, 350 NLRB 489, 490 (2007). Furthermore, where the record evidence is in conflict or otherwise inconclusive, supervisory status is not established. Phelps Community Medical Center, 295 NLRB 486, 490 (1989). "Lack of evidence is construed against the party asserting supervisory status." Veolia Transportation Serv., Inc., 363 NLRB No.188, at *7 (May 12, 2016) (internal citation omitted).

As mentioned in detail below, the General Counsel not only failed to establish the allegations in paragraphs 4(e) and 36, it cannot rebut Kleckley's own testimony and has not introduced any contradicting testimony that he is either a supervisor or an agent of the Company; instead, he is simply an employee who deserves protection under the NLRA. See St. Francis Medical Center-West, 323 NLRB 1046, 1047 (1997) (The Board should not construe the statutory language too broadly because the individual found to be a supervisor is denied the rights protected under the Act); See also, Hydro Conduit Corp., 254 NLRB 433, 437 (1981).

1. Cliff Kleckley Is Not a Section 2(11) Supervisor.

An employee's job duties, not the job title, determine supervisory status. Dole Fresh Vegetables, 339 NLRB 785 (2003). Under the Act, a supervisor is:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C.A. § 152 (emphasis added).

As evidenced during the hearing, Kleckley's job duties do not include the requisite §2(11) authority, as he does not hire, transfer, suspend, promote, terminate, assign, reward, discipline or direct employees nor make such recommendations.

Kleckley testified that he began working for Kumho in October of 2015 as a Safety Coordinator. (Tr. Vol.5, p.537 at 15-18). From September to October of 2017, the relevant time period in this case, Kleckley stated that he was not in charge of any department. (Tr. Vol.5, p.537 at 19-22) and no employees reported to him. (Tr. Vol.5 p.543 at 24-25 to p.544 at 1-2). Instead, he reported to an assistant manager, Olivia [*sic*] Holmes (Tr. Vol.5, p.539 at 23-24) and the Environment, Health and Safety (EHS) manager Carl [LNU]. (Tr. Vol. 5, p.539 at 17-21). As one of four Safety Coordinators (Tr. Vol. 5, p. 539 at 7-12), Kleckley was assigned to C shift. (Tr. Vol. 5, p. 539 at 13-14). Furthermore, Kleckley did not hire (Tr. Vol.5, p.537 at 25 – p.538 at 1), fire (Tr. Vol.5, p.538 at 2-3), transfer (Tr. Vol.5, p.537 at 4-5), discipline any employees[4] (Tr. Vol.5, p.538 at 6-7), assign any work to employees (Tr. Vol.5, p.538 at 8-9), or approve any employees' vacation days (Tr. Vol.5, p.538 at 10-11) or paid time off. (Tr. Vol.5, p. 538 12-13). Nor did he attend any supervisory meetings[5] (Tr. Vol. 5, p.538 at 14-15) or meetings with team leaders. (Tr. Vol.5, p.538 at 16-17). Kleckley's lack of supervisory authority remains the same to this day. (Tr. Vol.5, p.538 at 18-22).

[4] In fact, Kleckley cannot even send employees home when he observes them not wearing proper personal protective equipment. (Tr. Vol.5, p.545 at 7-10).

[5] Instead of attending meetings with supervisors and team leads, Kleckley attended meetings meant for employees at large during the union campaign. (Tr. Vol. 5, p.547 at 21-25 to p.548 at 1).

As a Safety Coordinator, Kleckley conducts walkthroughs in the plant to ensure that employees are wearing proper personal protective equipment (PPE), teaches first aid and CPR classes, and handles fire and alarm systems for the plant. (Tr. Vol.5, p.539 at 1-6). He also assists the EHS manager or the assistant manager in reviewing safety-related standard operating procedure. (Tr. Vol. 5 p.556 at 24-25 to p.557 at 1-9, p.568 at 9-20). During his walkthroughs, if he sees an employee violating a safety rule, he notifies the employee of the safety violation (Tr. Vol.1, p.50 at 12-18), and when he writes the employee a safety ticket as a result of the violation, he gives a copy of the ticket to the employee's team leader to inform him/her of the employee's safety violation. (Tr. Vol.1, p.31 at 14-25 to p.32 at 1-2; Tr. Vol.5, p.540 at 3-8 and 18-21). The ticket is titled "Safety Violation", and it identifies the type of safety rules the employee violated but does not denote any type of discipline given for the current or future safety violation. (GC Exh. 4). "Warnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisory authority. . . . The Board has found that putative supervisors do not possess disciplinary authority where counseling, warnings, or reports do not constitute an initial step in a progressive disciplinary system, and thus do not impact job status." Veolia, 363 NLRB No. 188, at 7 (quoting Children's Farm Home, 324 NLRB 61, 61 (1997).

At Kumho, the receipt of a Safety Violation ticket does not result in automatic discipline (Tr. Vol.5, p. 540 at 22-24) (emphasis added), and the ticket is not a disciplinary form. (Tr. Vol.1, p.101 at 1-2). Whether the employee receives discipline based on a Safety Violation ticket is solely up to the team leader, supervisor, and Human Resources (Tr. Vol.5, p.539 at 25 to p.541 at 1-6, p.554 at 22 to p.555 at 1-10), and Kleckley does not give any input on employee discipline or recommend any discipline based on the employee's receipt of a Safety Violation ticket. (Tr. Vol.5,

p.539 at 25 to p.541 at 1-2 and 7-13, p. 553 at 10-18). In fact, Kleckley testified that he "can write 1,000 tickets to the same employee that same day." (Tr. Vol. 5, p.553 at 14-19). "What happens after that, I have no input." Id. When an employee does not recommend discipline, supervisory authority is not demonstrated by a written report on employee conduct, even if accompanied by oral warning. See Vencor Hosp.-Los Angeles, 328 NLRB 1136, 1139 (1999) (finding that there was no supervisory authority from registered nurse team leaders who gave employees oral warnings and reduced the warning to a written report when the report lacked recommended disciplinary action and was sent to the director of nursing to be placed in the employee's file). Also, Kleckley is not told and does not know whether an employee receives discipline based on the Safety Violation ticket he issued (Tr. Vol.5, p. 541 at 11-16, p. 553 at 19-23), and he never accompanies a team leader to talk to the employee about safety practice. (Tr. Vol.5 p.555 at 11-13).

The Safety Coordinators' lack of authority to discipline is clearly demonstrated through incidents involving Kleckley and Susie Clyde. In December 2017, Patricia Moore burned her hand and arm in the performance of her duties. (Tr., Vol.5, p.561 at 23-25). Kleckley visited her and attempted to provide a first aid treatment. (Tr. Vol.5, p.562 at 1-3). However, Moore refused. (Tr. Vol. 5, p.562 at 4-6). Since Moore refused the treatment, Kleckley asked her to sign her refusal to receive first aid treatment. (Tr., Vol.5, p.562 at 4-19). In response, Moore stated, "she was not going to sign shit", and directed other profanities at Kleckley. (U. Exh. 6; Tr. Vol.5, p.563 at 3-5). Despite Moore's action in hurling profanity at Kleckley, Kleckley was not authorized to initiate discipline and was required to involve Moore's team leader to address her inappropriate behavior just like any other hourly employee would be required to do. (Tr. Vol.5, p.563 at 6-9, p. 567 at 15-25 to p.568 at 1-8). Similarly, Clyde issued Mario Smith a Safety Violation ticket when she

observed him using a cell phone on the floor. (Tr. Vol.1, p.99 at 15-20). Upon receipt, Smith yelled at Clyde and got into a dispute regarding the issuance of the ticket (Tr. Vol.1, p.101 at 3-4), and ultimately, Smith threw away the Safety Violation ticket. (Tr. Vol.1, p.64 at 5-8). Despite Smith's disrespectful behavior, Clyde did not and could not issue any discipline (Tr. Vol.1 p.100 at 20- 22, p.101 at 1-15); instead, Smith's supervisors pulled him aside, talked with him, and suspended him for his disrespectful behavior. (Tr. Vol.1, p.65 at 11-20, p.65 at 25 to p.66 at 1-25, p.67 at 3-8, p.100 at 20-22).

Based on the foregoing, it is clear that the General Counsel failed to satisfy his burden to prove that Cliff Kleckley is a statutory supervisor who has "the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer." Schuff Steel & Derek Dixon, 367 NLRB No. 76 (Jan. 25, 2019) (internal citation omitted). In fact, one of the General Counsel's witnesses voluntarily proclaimed that Kleckley is not a supervisor. (Tr. Vol.3, p.260 at 3-7) (emphasis added).

2. Cliff Kleckley Is Not An Agent of the Company.

To determine whether an employee is an agent of an employer as defined by Section 2(13) of the Act, the Board applies common-law agency principles and asks "whether under all the circumstances, the employee 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" Id. (quoting Waterbed World, 286 NLRB 425, 426-427 (1987) (internal citation omitted)). The General Counsel has the burden to establish an agency relationship and connect it with the alleged unlawful conduct or statement. In re Pan-Oston Co., 336 NLRB 305 (2001).

Here, the General Counsel has failed to introduce any evidence that Kleckley acted on behalf of Kumho as an agent. In fact, other than generally alleging that Kleckley is a section 2(13) agent in paragraph 4 of the Amended Complaint, the General Counsel has failed to introduce any evidence that Kleckley acted as an agent of the Respondent with regard to specific conduct alleged to be unlawful in paragraph 36. To the contrary, Kleckley testified that not only did he not ask Van McCook or Chase Register whether he could count on them for a "no" vote, no company representatives asked him to tell employees to not vote for the Union. (Tr. Vol.5, p.542 at 8-19). Similarly, Kleckley testified that no company representatives asked him to tell employees that they needed to consider whether they really wanted a union because Kumho could shut down. (Tr. Vol.5, p.543 at 11-23).

With the absence of any evidence introduced by the General Counsel to establish an agency relationship between Kleckley and Kumho, Kleckley is not a section 2(13) agent of the Company and no statements or conduct by Kleckley may be imputed to Respondent.

II. The General Counsel Cannot Establish that Kumho Engaged in Unlawful Interrogations as alleged in paragraphs 11, 12, 14, 15(a), 21(a), 22(a), 25(a), 28, 29, 32, 33, 36(a), 37, and 43.

The leading Board law on the legality of interrogation is Rossmore House, 269 NLRB 1176 (1984), and its principles as interpreted by the Board in Sunnyvale Medical Clinic, 277 NLRB 1217 (1985) are as follows:

> The specific purpose of the Board's decision in Rossmore House was to reject the *per se* approach to the interrogation of open and active union supporters about their union sympathies. Thus, the Board expressly overruled a particular line of cases "to the extent they [found] that an employer's questioning of open and active union supporters about their union sentiments, in the absence of threats or promises, necessarily [violates the Act]." However, an important additional purpose of the Board's decision in Rossmore House was to signal disapproval of a *per se* approach to allegedly unlawful interrogations in general, and to return to a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation and does not ignore the reality of the workplace.

Id. at 1218

Therefore, in determining the legality of interrogations, the Board applies a totality of the circumstances test to consider whether the interrogation "reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." Id. at 1217. Specifically, the Board considers multiple factors such as (1) the background (i.e., history of employer hostility and discrimination); (2) the nature of the information sought (i.e., did the interrogator appear to be seeking the information on which to base taking action against individual employees?); (3) the identity of the questioner (i.e., how high was he in the company hierarchy); (4) the place and method of interrogation (i.e., was employee called from work to the boss' office?); and (5) whether the employee being questioned is an open and active union supporter. Quicken Loans, Inc. v. Austin Laff., 367 NLRB No. 112 (Apr. 10, 2019); see also, In re Norton Healthcare, Inc., 338 NLRB 320, 320-321 (2002).

The General Counsel cannot show that under the totality of the circumstances, Kumho, through its alleged supervisors and/or agents, engaged in unlawful interrogation as alleged in the Amended Complaint.

1. Paragraph 11, 22(a), and 32 – Harry (Kip)[6] Smith

Paragraph 11: The General Counsel cannot establish that Harry Smith engaged in unlawful interrogation as alleged in paragraph 11. The General Counsel introduced Sterling Lewis who testified that when he and Smith were walking from one department to another, Smith asked him how he felt about the union. Lewis responded that he didn't feel either way, and they went on their separate ways. (Tr. Vol.3, p.320 at 11-25 to p.321 at 1-2). Smith denies such conversation ever happened and testified that Lewis would not have worked on Smith's shift unless Lewis was

[6] Harry Smith's nickname is Kip Smith. (Tr. Vol.4, p.447 at 14-15).

working overtime, and he testified that Lewis was out of work for a while. (Tr. Vol.3, p.320 at 24-25 to p.320 at 1-10; Vol.4, p.462 at 2-16).

Even if Lewis' testimony is true, in consideration of the totality of the circumstances, the General Counsel cannot establish that Smith engaged in unlawful interrogation for the following reasons: (1) there was no history of hostility; (2) Smith was not seeking any information on which to base taking action against Lewis;[7] (3) although Smith was a team leader, he was not Lewis' direct team leader; and (4) the inquiry was allegedly made when they were walking between departments (i.e., not Smith's office, and the inquiry was very brief, casual, and innocuous). Pursuant to Rossmore, not all interrogation is unlawful and the analysis must consider all circumstances surrounding an alleged interrogation and not ignore the reality of the workplace. Sunnyvale Medical Clinic, 277 NLRB 1217, 1218 (1985). This alleged interrogation, even if true, does not rise to the level of unlawfulness under the Rossmore totality of the evidence standard.

Paragraph 22(a): The General Counsel introduced the testimony of Van McCook and Marcus Horne to prove the allegation in paragraph 22(a). McCook testified that Smith asked him a question "something along the line" of how he feels about the union. (Tr. Vol.2, p. 235 at 24-25 to p.236 at 1-10). Horne testified that Smith asked him how he was going to vote. (Tr. Vol.3, p.384 at 2-3). Smith denies the allegation and testified that he never had a conversation with McCook or Horne where he asked them about their union feelings. In fact, Smith stated that Horne was not even on his shift, insinuating that they would not have cross paths to have such conversation. (Tr. Vol.4, p.455 at 23-25 to p.456 at 1-12).

First, none of the testimony matches the allegation in paragraph 22(a), which alleges that Smith asked employees "if they were going to vote no for the union." Therefore, since the General

[7] In fact, there was no promise of benefit or a threat of reprisal connected to the inquiry.

Counsel failed to provide sufficient factual proof for the allegation in paragraph 22(a), it should be dismissed. Moreover, even if Smith had made such inquiry to McCook and Horne, it does not constitute unlawful interrogation under the totality of the circumstances analysis because the General Counsel cannot show that there was any history of hostility or discrimination between Smith and McCook or Horne, nor that Smith was seeking any information to take any action against McCook or Horne.

Paragraph 32: Similarly, the General Counsel cannot establish that Smith engaged in unlawful interrogation by asking employees "what team they were on." In support of paragraph 32, the General Counsel introduced the testimony of Chase Register. In response to the General Counsel's question of whether Smith ever asked his opinion about the Union, Register testified "he asked me what team I was on." (Tr. Vol.1, p.29 at 7-9). Then, Register testified that he asked Smith what he was referring to and whether Smith was asking Register whether Register was pro-union or not. Register did not indicate whether Smith responded and it is unclear what, if anything, Smith meant by that remark. (Tr. Vol.1, p.29 at 10-13) (emphasis added). Register's testimony (i.e., I asked him what Smith was referring to and whether Smith meant I was pro-union or not) does not match the allegation in paragraph 32, which alleges that Smith asked Register whether he was pro-union or not. Accordingly, the General Counsel failed to provide sufficient factual proof for the allegation in paragraph 32.

Moreover, Smith vehemently denies that he asked Register what team he was on. If "team" actually meant union support, Smith knew what "team" Register was on so there was no need for such question, especially since Register already come forward and told Smith that he was afraid he was being perceived as the union ringleader. (Tr. Vol.4, p.459 at 3-16). Smith also knew that Register was pro-union due to his responses during classes that were provided to educate the

operators. (Tr. Vol.4, p.460 at 1-9). In fact, Register was very open and vocal about his pro-union position. (Tr. Vol.1, p.46 at 22-25 to p.47 at 1-3). Register told supervisors, managers, consultants, and other people that he was a supporter of the union. Id. Also, during the "captive meetings with the consultants," he was very vocal. (Tr. Vol.1, p.48 at 13-18). In fact, Register raised his hand at least two or three times during the captive audience meetings with the consultants and disputed the statements that were made during the meeting. (Tr. Vol.1, p.48 at 21-25 to p.49 at 1-7). Lastly, assuming *arguendo* that Smith asked Register what team he was on, such statement is not an unlawful interrogation as the question was a brief, casual, and innocuous, and unaccompanied by any promise of benefit or threat of reprisal.

2. Paragraph 12 – Mike Walker

The General Counsel provided Natasha Lee's testimony in support of the allegation in paragraph 12. While Lee could not remember the details of the conversation such as the date or time or content of the complete conversation, she testified that Mike Walker walked up to her and said, "you know I got to talk to you about the union." She also alleged that Walker referenced the Bible and said, "you don't want anybody talking to God for you." (Tr. Vol.2, p.168 at 9-25 to p.169 at 1-7). Walker denies having such conversation with Lee. (Tr. Vol.5, p. 520 at 11-15).

However, even if such conversation took place, the General Counsel cannot establish that it was an unlawful interrogation because the testimony does not match the allegation in paragraph 12. Paragraph 12 states that Walker asked Lee how she felt about the Union. There is simply no evidence on the record to support that allegation. In contrast, Lee testified that Walker did not ask her any questions, but simply said "you know I got to talk to you about the union" and referenced the Bible. (Tr. Vol.2 p.168 at 25 to p.169 at 1-7) (emphasis added). Furthermore, assuming *arguendo* that such conversation took place, the General Counsel cannot establish that it was an

unlawful interrogation because: (1) Walker is not in a position of authority with regard to Lee (Tr. Vol.2 p.167 at 8-11; Tr. Vol.5, p.519 at 11-17); (2) the alleged interrogation was not connected to any promise of benefit or threat of reprisal; and (3) Lee was an active open supporter of the union. In fact, she testified that she had already told Walker that she was voting "yes", and that the company knew she was voting "yes" because she said it from the beginning. (Tr. Vol.2, p.169 at 3-4). Furthermore, in response to Walker's ambiguous comment, she said, "I told him I was voting yes." (Tr. Vol.2 p.169 at 13-16). This shows that Lee was not intimidated or threatened. Therefore, if such conversation occurred, it was merely an innocent remark and not an unlawful interrogation.

3. Paragraphs 14 and 15(a) – Bill Monroe

Paragraph 14: The General Counsel cannot establish that Bill Monroe engaged in unlawful interrogation. The General Counsel introduced Michael Cannon in support of paragraph 14. Cannon testified that when he was at his work station, Monroe approached him and asked him why employees needed a union. (Tr. Vol.3, p.361 at 18-25 to p.362 at 1). Monroe categorically denies this allegation. (Tr. Vol.4, p.430 at 24-25 to p.431 at 1-4). During the campaign, Monroe was brought in to provide employees with educational information regarding their rights under the NLRA. He and another consultant trained employees on the collective bargaining process, history of strikes, and work stoppages. (Tr. Vol. 4, p.424 at 2-11). Furthermore, he was aware of his limitation in engaging employees (i.e., that he cannot threaten, interrogate, promise, or spy on employees). (Tr. Vol.4, p.424 at 12-15). Because of this awareness, Monroe knew not to ask Cannon any questions. (Tr. Vol.4 p.431 at 5-7). However, Monroe did answer many of Cannon's questions and/or respond to his opinions about the truth of the information provided during the training. (Tr. Vol.4, p.430 at 24-25 to p.431 at 1-4). Monroe's conversation with an employee in response to the employee's question unaccompanied by any threats, interrogation, or other

unlawful coercion is not prohibited under the NLRA. P.S. Elliott Servs., 300 NLRB 1161, 1162 (1990).

Paragraph 15(a): The General Counsel also cannot establish that Monroe engaged in unlawful interrogation as alleged in paragraph 15(a). Chase Register was an open supporter of union. (Tr. Vol.1, p.46 at 19-25, p.47 at 1-2, p.48 at 13 to p.49 at 1-11). In regard to paragraph 15(a), Register testified that he had a five to ten minute conversation with Monroe wherein Monroe allegedly talked about the union and asked Register how he felt about it. (Tr. Vol.1, p.23 at 22-25 to p.24 at 1-17). In response, Register told Monroe that "yes, we needed *[sic]* one" and that the company needed structure. (Tr. Vol.1, p.24 at 7-16). Even if such allegation is true, it is not enough to establish that Monroe engaged in unlawful interrogation based on a brief (5-10 minute) conversation with an open supporter of the union where no promise of benefit or a threat of reprisal was made. Sunnyvale Medical Clinic, 277 NLRB 1217, 1218 ("the specific purpose of the Board's decision in Rossmore was to reject the *per se* approach to the interrogation of open and active union supporters about their union sympathies").

4. Paragraph 28 – Lorenzo Brown

On behalf of the General Counsel, Landon Bradley testified in support of paragraph 28. Specifically, he stated that Lorenzo Brown asked him what he thought about Kumho staying a non-union facility. (Tr. Vol.2 p.178 at 5-7). In response, Bradley just walked off. (Tr. Vol.2, p.178 at 8-9). While Brown denies that such alleged interrogation occurred, even if he did, such interrogation is not unlawful because: (1) there was no connection between the interrogation and a promise of benefit or a threat of reprisal; (2) Brown was not attempting to seek information to base taking action against Bradley;[8] and (3) Brown was not Bradley's team lead. In fact, Brown is

[8] In fact, even after Bradley walked off following Brown's question, Brown did not take any further action. (Tr. Vol. 2, p.178 at 3-16).

in quality control (Tr. Vol.5, p.509 at 12-13), and Bradley is in the curing department (Tr. Vol.2, p.175 at 10-22).

5. Paragraphs 21(a) and 29 – Chris Butler

Paragraph 21(a): Marcus Horne testified in support of paragraph 21(a). Horne stated that Chris Butler asked him how he (Horne) was going to vote and that Butler told him to give the company time. (Tr. Vol.3, p.378 at 23-25 to p.379 at 1-5). Horne further testified that he did not tell anybody about this alleged conversation with Butler prior to the election. (Tr. Vol.3, p.390 at 12-15). The testimony is not supportive of the allegation in paragraph 21(a) which asserts that Butler asked Horne what he thought about the union. Therefore, the General Counsel failed to establish sufficient facts to prove the allegation in paragraph 21(a) and it should be dismissed.

Furthermore, even if the allegation in paragraph 21(a) is true, in light of Horne's testimony that he did not tell anybody about the alleged conversation prior to the election, Butler's alleged unlawful conduct could not have reasonably affected the results of the election. One of the factors the Board considers in determining whether a misconduct could have affected the results of the election is the extent of dissemination. It is the responsibility of the objecting party to establish that the dissemination of alleged statements "interfered with pre-election conditions; dissemination will not be presumed." In Re Lockheed Martin Skunk Works, 331 NLRB 852, 854 (2000) (internal citation omitted). The Board has found that "isolated instances of interrogations or threats, which were not disseminated to other unit employees, could not reasonably affect the results of the election." Werthan Packaging, Inc. & Rick Holt & PACE, AFL-CIO, 345 NLRB 343, 345 (2005). See Bon Appetit Management Co., 334 NLRB 1042, 1044 (2001) (even though the Board ruled that the employer's conduct was unlawful and an objectionable interrogation and threat, because

the conduct was isolated and was not disseminated, the Board concluded that it could not have affected the results of the election).

Paragraph 29: The General Counsel introduced Landon Bradley in support of paragraph 29. He testified that when he was in the curing break room by himself, Chris Butler asked him whether he liked hats and whether he wanted a hat. Bradley testified that he replied, "no." (Tr. Vol.2 p.180 at 10-24 to p.181 at 1-2; p.181 at 11-14). Bradley's testimony does not support the allegation in paragraph 29, and Bradley's credibility and reliability should be questioned. There are many stark differences between paragraph 29 and Bradley's testimony. For example, while paragraph 29 states that the interaction took place on the work floor, Bradley testified that it took place in the curing break room. Also, while paragraph 29 alleges that Butler asked employees if they wanted one of the "vote no" hats, Bradley testified that Butler only asked him whether he "liked hats" and whether he wanted a hat. There was no testimony that Butler was referring to the "vote no hats" during the alleged conversation. Since the General Counsel failed to provide sufficient facts to prove paragraph 29, it should be dismissed.

6. Paragraph 33 – Eric Banks

In support of paragraph 33, the General Counsel introduced Chauncey Pryor. Pryor testified that Eric Banks asked him how he felt about the union. Pryor testified that he responded that he did not really know anything about the union because he has never been a part of one. Then, Banks allegedly explained that when you are part of a union, you have to sign up to work overtime. (Tr. Vol.2, p.159, at 10-24). However, Banks' testimony directly negates Pryor's testimony. (Tr. Vol.5, p.573 at 2-4).

Assuming *arguendo* that Pryor's alleged version of the conversation took place, the General Counsel cannot establish that such conversation was an unlawful interrogation based on

Pryor's testimony because there is no testimony that Banks made any promise of benefit or threat of reprisal in connection with this alleged interrogation. Hotel Roanoke, 293 NLRB 182, 227 (1989) (there is no unlawful interrogation when there is no suggestion in the testimony that the interrogation was connected to a promise of benefit or a threat of reprisal).

7. Paragraph 36(a) – Cliff Kleckley

The General Counsel introduced the testimony of Van McCook and Chase Register in support of paragraph 36. McCook testified that he talked with "the safety guy" once where the topic of the union came up during the campaign. (Tr. Vol.2, p.242 at 17-23). McCook stated, "I really don't remember a whole lot of the conversation as far as the whole entire thing." (Tr. Vol.2, p.243 at 12-13). Nevertheless, he testified with particular clarity that Kleckley said, "Can I count on y'all, basically, not to vote for the union?" McCook said that Chase Register was there. (Tr. Vol.2, p.243 at 9-15). McCook testified that he responded, "I just kind of said, I'll talk to you later." "I mean, I honestly don't remember what I said word for word." (Tr. Vol.2, p.243 at 16-19). Additionally, Register testified that Kleckley allegedly walked up to him and asked if he could count on Register for a "no vote" and then later walked off. (Tr. Vol.1, p.32 at 3-24).

Kleckley denies asking McCook or Register whether he could count on them to not vote for the union. (Tr. Vol.5, p.542 at 11-16). However, even if Kleckley had asked McCook and Register, "Can I count on y'all to not vote for the union," such statement is not unlawful because: (1) Kleckley is an employee who is protected by the NLRA and has the freedom to express his sentiment regarding the union (see *supra* Section III(B)); and (2) the Board has held that such statement is not an unlawful interrogation. See Volt Tech. Corp., 176 NLRB 832, 835 (1969) (finding the statement "will you please do me one favor and vote no" non-coercive communication).

8. Paragraph 37 – Michael Geer

The General Counsel alleges that Michael Geer interrogated Andre Mormon by asking him what he thought about the union. (Amend. Compl. ¶37). In support, Mormon testified that at "the guard shack where you smoke," Geer asked him what he thought of the union and shared his experience with the Steelworkers. (Tr. Vol.2, p.196 at 16-18, p.196 at 23-15 to p.197 at 1-20). Geer denies that he asked Mormon or anybody else how they felt about the union. (Tr. Vol.4, p.469 at 21-23). In fact, Geer testified that to his knowledge, Mormon does not smoke, so he was never in the smoking area. (Tr. Vol.4, p.469 at 16-20).

Based on the foregoing, the General Counsel cannot establish that such conversation took place, and even if it had, it was lawful because: (1) Morman and Geer were outside in the smoking area and not in Geer's office; (2) there was no evidence of prior hostility from Geer to Morman nor any evidence that Geer was seeking information to take action against Morman; and (3) most importantly, the alleged interrogation was not tied to any promise of benefit or a threat of reprisal; instead, Geer allegedly shared his personal experience with the Steelworkers. (Tr. Vol.2, p.197 at 11-19). Not every act of interrogation by supervisor is unlawful. Rossmore, 269 NLRB 1176 (1984). Additionally, the General Counsel presented no evidence of dissemination. Bon Appetit Management Co., 334 NLRB 1042, 1044 (2001) (isolated interrogation could not have affected election if not disseminated).

9. Paragraph 43 – Sharon McCalla

The General Counsel alleges that Sharon McCalla interrogated employees by asking them for a favor and for their support in reference to union activities. (Amend. Compl. ¶43). In support, the General Counsel offered Randy Wilson, a production forklift driver at Kumho. (Tr. Vol.2, p.202 at 18-19). Wilson claimed that when he was working on the first floor, McCalla approached

him and said, "I need your support, I need 100 percent of your support." (Tr. Vol.2, p.207 at 10-19). In response, Wilson said, "if you are talking about what I think you are talking about, this conversation needs to end." McCalla allegedly responded, "well, okay, have a good day." Wilson allegedly said, "thank you, you have a good day." (Tr. Vol.2, p.207 at 20-23). That was the extent of Wilson's alleged conversation with McCalla and there was no mention of the union. McCalla affirmatively denied that she asked Wilson for a favor, or that she said she needed his support in reference to union activities. (Tr. Vol.5, p.577 at 4-7). But, she testified that she frequently asks employees to support production all the time. (Tr. Vol.5, p.577 at 16-17). Wilson could have easily mistaken McCalla's statement seeking support for production for seeking support against the union.

Assuming *arguendo* that Wilson's allegation is true, the alleged conversation is not an unlawful interrogation based on the following reasons: (1) there was no prior history of discrimination or hostility from McCalla to Wilson; (2) there was no evidence that McCalla was seeking information to take action against Wilson; (3) McCalla was not Wilson's team lead (Tr. Vol. 2, p. 203 at 3-4); (4) the conversation took place on the plant floor and not in McCalla's office; and (5) there was no mention of the union in McCalla's statement. Regardless, Wilson stopped the conversation from going further. Furthermore, asking an employee for a favor is not an unlawful interrogation. See Big Three Indus., Inc., 192 NLRB 370, 373 (1971) (holding that a supervisor's request to "do him a favor and vote against the Union" was not unlawful and was just a strong sales pitch using the supervisor's "good guy image" to be more effective).

10. Paragraph 25(a) – Freddy Holmes

The General Counsel introduced Jemel Webb's testimony in support of the allegations in paragraph 25(a). Webb testified he took a picture of a list that was on Holmes' desk which is

located in the same work space as Webb. (Tr. Vol.2, p. 214 at 12-25, p.218 at 18-23). He first saw the list laying right beside Holmes' leg after a shift meeting. (Tr. Vol. 2, p.215 at 15-20). The list contained names of individuals who were present at the meeting. (Tr. Vol.2, p.215 at 24-25). The list also included Webb's name and the words "yes" and "money" with two question marks. (Tr. Vol.2, p.219 2-4). When asked if Webb had any conversation with Homes about money, Webb testified, "I don't know what he meant by that." He further testified that about week or two before seeing the list, he and Holmes were discussing the union and Holmes asked Webb what could the union do for him. Then, Webb said that the better paying jobs in the area were all union-based facilities. (Tr. Vol.2, p.219 5-25 to p.220 1-7).

Holmes denied the allegation in paragraph 25(a). (Tr. Vol.4, p.485 at 22-25). However, he testified that he did talk to Webb about the union, but only after Webb and Lance Brantley asked Holmes what he thought about a union. (Tr. Vol.4, p.486 at 1-2). In response to their question, Holmes shared his experience with the Teamsters. (Tr. Vol.4, p.486 at 3-14). Furthermore, when asked about the list (GC Exh. No.9), Holmes testified that the document was kept in the Team Lead (TL) desk, specifically in the TL file cabinet, in the MCC room, and that no employees had authorization to access the desk. (Tr. Vol.4, p.488 at 13-25 to p.489 1-4; p.489 at 5-7 and 18-22).

Based on the foregoing testimony, the General Counsel failed to present sufficient evidence to prove the allegation in paragraph 25(a). Even if Holmes did ask Webb what employees thought they were going to benefit from the union, based on Board law, it is clear that question without the promise of benefit or unspecified reprisal is not an unlawful interrogation. Also, the fact that Webb was not afraid to voice his support for the union and answered truthfully in response to Holmes' alleged question shows that he was not intimidated. Furthermore, Holmes' response to Webb's question is not unlawful interrogation. See In re Hancock, 337 NLRB No. 183 (2002) (questions

that arise casually as part of an ordinary conversation and do not contain a threat of reprisal are not unlawful interrogation). Lastly, the list which is the foundation of Webb's testimony was unlawfully obtained from Holmes' desk and the General Counsel should not be allowed to use a unlawfully obtained document to prove the allegation in the Amended Complaint. Holmes testified that this list was kept in the Team Lead (TL) desk, specifically in TL file cabinet, in the MCC room and that no employees have authorization to access the desk. (Tr. Vol.4, p.488 at 13-25 to p.489 1-4, p.489 at 5-7 18-22).

III. The General Counsel Failed to Establish that Respondent Engaged in Unlawful Solicitation of Grievances as alleged in paragraph 15(b).

With respect to soliciting grievances and making promises, the Board has long held that the solicitation of grievances, standing alone, is insufficient to set aside an election, and that vague statements that do not promise anything in particular do not violate the Act. National Micronetics, Inc., 277 NLRB 993 (1985). Petitioner alleges that, at the end of September 2017, Bill Monroe solicited grievances and impliedly promised to remedy them by telling employees that he knew there were issues going around and that the consultants were there to try to fix them. (Amend. Compl. ¶ 15(b)). In support, Chase Register testified that Monroe "told us that he was there to fix the problems, help Kumho fix the problems." (Tr. Vol.1, p.24 at 20-23). Monroe vehemently denies this allegation and testified: "I never made that statement to Chase Register . . . or to anybody. I had no authority to fix problems. I had no capability to fix any problems." (Tr. Vol.4, p.431 at 21-25 to p.432 at 1-5). Also, Monroe is acutely aware that he cannot interrogate or promise benefits to employees in his engagement with them. (Tr. Vol.4, p.424 at 12-15).

Furthermore, assuming *arguendo* that the alleged statement was made by Monroe, it is not unlawful solicitation of a grievance because Monroe did not ask any question to Register seeking his grievances; instead, Register voluntarily disclosed he had problems with the pay and structure.

(Tr. Vol.1, p.24 at 23-25). Monroe's opinion regarding the purpose of his role is not an unlawful promise. Accordingly, paragraph 15(b) should be dismissed.

IV. Respondent Did Not Engage in Unlawful Surveillance as Alleged in Paragraphs 16, 38(a), 40(a), and 46(c).

In Frontier Telephone of Rochester, Inc., 344 NLRB 1270, 1276 (2005), the Board defined when an employer creates an impression that its employees' union activities are under surveillance:

> In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. Flexsteel Industries, 311 NLRB 257 (1993); Schrementi Bros., 179 NLRB 853 (1969). The essential focus has always been on the reasonableness of the employees' assumption that the employer was monitoring their union or protected [activities]. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the individual involved, to determine whether an employer's actions tend to restrain, coerce, or interfere with the Section 7 rights of employees. KSM Industries, 336 NLRB 133 (2001); Sunnyside Home Care Project, 308 NLRB 346 fn. 1 (1992); El Rancho Market, 235 NLRB 468, 471 (1978), enfd. mem. 603 F.2d 223 (9th Cir.1979).

Applying the law to the facts below, the General Counsel cannot establish that the Company created the impression of surveillance.

1. Paragraph 16 – Harry (Kip) Smith

The General Counsel alleges that Harry Smith created the impression of surveillance by telling Chase Register that he was the ringleader of the union. (Amend. Compl. ¶ 16). Register testified that Smith made fly-by comments three or four times that Kumho believed that Register was the ringleader. (Tr. Vol.1, p.28 at 6-19). Smith denies that he referred to Register as "the ringleader"; instead, Smith testified that Register approached him and proclaimed that everybody thought that he [Register] was the ringleader; Register then elaborated that if the union did not get voted in, he would be screwed. In response, Smith assured Register that his job was not in jeopardy,

regardless of his union statements. Specifically, Smith told him that Smith was his team leader and that as long as Register does his job, he will not be fired. (Tr. Vol.4, p.451 at 3-25 to p.452 at 1-6). In short, there was no surveillance by Smith; instead, Register voluntarily disclosed that he was worried that everybody thought he was the ringleader. Smith reassured him that his job was secured regardless of the result of the union election. In fact, Register is still employed at Kumho. (Tr. Vol.1, p.16 at 4-5).

2. Paragraphs 38(a) and 46(c) – Aaron Rutherford

Paragraph 38(a): The General Counsel introduced Mario Smith to prove paragraph 38(a), which states that Aaron Rutherford created the impression of surveillance by telling employees that he heard an employee was supportive of the union. Smith testified that upon receiving an article from another team leader (GC Exh. 6), he started conducting his own research and found other articles on the same topic. (Tr. Vol.1, p.70 at 17-25 to p.71 at 1-5 and 17-23, p.72 at 15-19). Then, he asked Rutherford about the source of the article. (Tr. Vol.1, p.72 at 24-25 to p.73 at 1-5). After discussing the content of the article, Rutherford allegedly told Smith that he never came to talk to Smith because he knew that Smith had his mind made up, and that Rutherford heard Smith was for the union. (Tr. Vol.1, p.73 at 12-15). Rutherford denies that he ever told Smith or anybody else that he was keeping an eye on them. (Tr. Vol.4, p.500 at 19-24).

In determining whether an employer has created the unlawful impression of surveillance, the Board must consider whether under all relevant circumstances, reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. Target Corp. & UFCW Local 1500, 359 NLRB 953, 964 (internal citation omitted). Based on the foregoing, it is unreasonable to allege that Rutherford unlawfully created the impression of surveillance by stating that "he heard [Smith] was supportive of the union." (Amend.

Compl. ¶38(a); Tr. Vol.1, p.73 at 12-15). Based on that comment alone, it is unreasonable to conclude that Rutherford learned this information from spying on Smith. The information could just easily come from another employee who is unsympathetic to the union. See In Re Skd. Jonesville Div. L.P., 340 NLRB 101, 107 (2003). Moreover, the conversation began because Smith approached Rutherford and asked him about the origin of the article that was handed out by the team leaders.

Paragraph 46(c): Similarly, the General Counsel cannot establish that Rutherford created the impression of surveillance as alleged in paragraph 46(c). Marcus Horne testified on behalf of the General Counsel and stated that after the election, in response to Horne's question about the circumstances surrounding Mario Smith's termination, Rutherford allegedly stated that "they know everything you post on that site (referring to the private Facebook website)." (Tr. Vol.3, p.385 at 24-25 to p.386 1-11). Rutherford strongly denies such a conversation occurred. He testified that he did not tell Horne why Smith was fired, nor threaten Horne that he was keeping an eye on him or what he posts on Facebook. (Tr. Vol.4, p.501 at 8-25). Rutherford further testified that Horne had performance problems prior to the union campaign which resulted in Rutherford having a hard conversation with him about making production mistakes, and ever since then, Horne gave Rutherford a lot of backlash. (Tr. Vol.4, p.502 at 1-9). Based on all relevant circumstances, it is unreasonable for Horne to believe that Rutherford was conducting surveillance of him. Moreover, it is more reasonable to think that Horne is falsely accusing Rutherford of engaging unlawful activity due to his personal animosity towards him. Finally, post-election misconduct, even if true, cannot be the basis for setting aside an election. Head Ski Co., 192 NLRB 217, 218 (1971).

3. Paragraph 40(a) – Michael Geer

The General Counsel alleges that Michael Geer created the impression of surveillance by telling Annie Scott that he knew she was pro-union. (Amend. Compl. ¶ 40(a)). Scott testified that Geer asked to talk to her outside. During the conversation with Geer, he allegedly said to Scott, "You are pro-union, right?" She allegedly responded, "Yes, I am. I am a union person." (Tr. Vol.3, p.282 at 16-20). Geer denies interrogating Scott. According to Geer, following an employee's complaint that she was tired of being harassed by Scott about the union – Scott refused to stop even when the employee told her to stop. Geer met with Scott to discuss the matter. The employee requested that Geer talked to Scott. (Tr. Vol.4, p.470 at 25 to p.471 at 1-16). Then, Geer told Scott that if she was doing something and somebody asked her to stop it, but she didn't, such activity could be construed as harassment. (Tr. Vol.4 p.471 at 16-21). Scott responded that she was going to vote for the union, and if they didn't make it in this time, she was not going to vote for them anymore. (Tr. Vol.4, p.471 at 22-25). Geer responded, "It doesn't matter." He told her what matters is knowing who she is voting for and making an informed decision. He also told her that if somebody asks her not to discuss a specific subject or conduct a specific activity, she needed to stop. (Tr. Vol.4, p.472 at 2-8).

Based on the foregoing, it is undisputed that Geer acquired Scott's pro-union position not through surveillance but from a complaint from an employee. Scott also volunteered that she was voting for the union. (Tr. Vol.3, p.307 at 3-5; Vol.4, p.471 at 22-23). Therefore, the General Counsel cannot establish that Geer created an impression of surveillance as alleged in paragraph 40(a).

V. Respondent Did Not Threaten Employees With Plant Closures, Job Losses, Or Any Other Unspecified Reprisals as alleged in Paragraphs 7, 8, 9, 19, 20, 21(b), 22(b), 24, 25(b)-(c), 27, 30, 31, 34, 35, 36(b), 39, 40 (d)-(g), 41, 42, 44, 45, and 46(a) and (b).

Pursuant to section 8(c) of the Act, employers have a right to:

> …propagandize against union organization, provided they do so without promise of benefit or threat. Just as a union may flaunt its successes, Gissel[9], and its progeny, do not, in absolute terms, preclude an employer from educating employees as to past failures of collective bargaining. Consistent therewith, references to strikes, loss of jobs and closures affecting unionized facilities do not give rise to a per se violation of Section 8(a)(1).

Farm Fresh, Inc., 326 NLRB 997, 1029 (1998) (internal citation omitted).

For example, in Manhattan Crowne Plaza Town Park Hotel, 341 NLRB 61 (2004), the Board held that an employer had engaged in permissible campaign communication when it provided an example of job loss regarding employees who were represented by the same union that sought to represent the employer's employees. The example was found lawful because it described what *could* happen at the employer and did not describe what *would* happen. Id.; See also, Novi American, Inc., 309 NLRB 544 (1992); Caradco Corp., 267 NLRB 1356 (1983).

Similarly, in Miller Industries Towing Equip., 342 NLRB 1074 (2004), the Board found the statements of a company's CEO to be permissible where, in an employee meeting on the day before the election, he described the company's economic condition, citing their history of declining sales figures and financial losses; pointed out that special efforts had been made to prevent lay-offs; and remarked upon unionized competitors who had gone bankrupt. Id. at 1075. The CEO also remarked that the company's current competitors were nonunion, and therefore, he believed that they might use the prospect of the company's unionization to gain a competitive advantage. Id. While the CEO noted that he was not predicting a strike, he still voiced concern

[9] NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

about the possibility that one would occur, and that an interruption in business could harm relationships with customers. Id. Finally, the CEO concluded that the union could not help, and could even hurt, the company's economic situation, and ended the speech by asking employees to work with management through the rough times. Id.

In finding that the CEO did not violate the Act by his comments, the Board reasoned that his statements "were based on demonstrable facts, including sales and earnings (loss) figures, and verifiable accounts of past events." Id. at 1076. To that end, the Board recognized:

> [The] declining market was a reality of the business downturn, about which employees were fully aware. The bankruptcy and relocation of former area unionized plants were also actual occurrences, not matters of opinion. So, too, was the fact that the Respondent had made a choice to keep its employees working by bringing into the plant work previously done by outside contractors.

Id. As such, the CEO's statements could not reasonably be viewed as threats. Id.

Turning to the portion of the CEO's speech that indicated his own views regarding the impact of the union, the Board again found that his statements "did not predict unavoidable consequences, but only offered his perspective that unionization could have some effect on the Respondent's business condition based on the conduct of its competitors." Id. Similarly, the reference to what might result in the event of a strike – the loss of customers – was, according to the Board, "merely an apt description of the likely effects of interrupted production." Id. As such, these statements were permissible, as well. Id.

In the instant case, the General Counsel alleges that Kumho supervisors or other members of management threatened employees with plant closures, job losses, or other unspecified reprisals. However, as described in detail below, no communications from members of management amounted to an unlawful threat.

1. Paragraphs 7, 8, and 9 - Brad Asbell, Eric Banks, and Chris Wilson

The General Counsel alleges that on or about September 18, 2017, Brad Asbell, Eric Banks, and Chris Wilson threatened plant closure or loss of benefits. (Amend. Compl. ¶¶ 7, 8, and 9). Anthony Arnold testified in support of all three allegations and his testimony seems unnatural and unlikely. For example, Arnold testified that he had three separate conversations with Asbell, Banks, and Wilson all in one day in one or two hour increments, and they all made the same threat to him without any provocation or conversation. He also testified that the first and the last thing out of their mouths were a threat of plant closure. Arnold's testimony is incredible and implausible.

First, Arnold testified that upon returning from a meeting about the union, Asbell walked back in the maintenance office in the APU section where Arnold and Mike Nelson were sitting. Arnold testified that Asbell put his head down and said that the plant is going to shut down if the union comes in. (Tr. Vol.1, p.127 at 24-25 to p.129 at 1). Arnold did not respond and nothing else happened. (Tr. Vol.1, p.129 at 2-5). Then, about an hour or two later, both Arnold and Nelson went to the semi production unit where Eric Banks was the "production supervisor."[10] Arnold testified that as soon as they arrived, Banks allegedly said: "If you guys got [*sic*] the union in, they're going to take this plant down. They are going to shut the plant down." Arnold allegedly responded, "I don't think you are supposed to say stuff like that . . .." Banks allegedly smiled and changed the subject. (Tr. Vol.1, p.129 at 6-24). Then, another hour or two later, Arnold and Nelson visited the maintenance office in the mixing area and saw Chris Wilson. Arnold testified that "without prompting," Wilson allegedly said: "If you get the union in, the plant is gone. It's going to shut down." Arnold allegedly didn't respond, and Wilson didn't either. Arnold left the office. (Tr. Vol.1, p.130 at 5-25 to p.131 at 1).

[10] Banks was actually a team lead and not supervisor. (Tr. Vol.1, p. 129 at 18-20).

Banks denies that he told Arnold that if the union got in, Kumho would shut down. (Tr. Vol.5, p.571 at 15-17). Asbell denies the same. (Tr. Vol.5, p.575 at 2-4). Wilson also denies that he told Arnold the plant would shut down if the union came in. (Tr. Vol.4, p.475 at 20-23). There was no threat of plant closure. Arnold's testimony is incredible and should be discounted. The fact that the General Counsel did not offer Mike Nelson, who allegedly had witnessed all three threats of plant closure along with Arnold, further undermines Arnold's credibility and the strength of the General Counsel's evidence.

2. Paragraph 19 - Mike Whiddon

The General Counsel introduced Christopher Daniely in support of paragraph 19. Daniely testified that Michael Whiddon made a comment that "if we was [*sic*] to get the union in, it's possible that we could go on strike, and we could lose our jobs." As soon as Daniely allegedly heard that statement, he claims he walked out of the meeting. (Tr. Vol.3, p.272 at 2-14; p.273 at 15-20). While Whiddon denies that he even engaged in any discussion with Daniely regarding unions, or that he mentioned a strike and its impact on the company, Daniely's testimony as alleged is not an unlawful threat of a job loss. (Tr. Vol.4, p.480 at 25 to p.481 at 5).

Whiddon's alleged statement was a protected 8(c) statement couched in an objective possibility (i.e., if there is a union, there is a possibility that employees can go on strike and a possibility that employees could lose their jobs). See Park N Fly, Inc., 349 NLRB No. 16 (2007) (holding that a violation of the Act cannot be established by the mere fact that members of management spoke to employees about the Union, and employers have a right under the National Labor Relations Act to communicate with employees by expressing opinions, facts, and experiences about unionization); See also, Novi American, Inc., 309 NLRB 544 (1992) (finding

statement that "I am not predicting a strike if the Union is voted in. I don't know what will happen and I hope a strike will never happen" not objectionable).

3. Paragraph 20 - Stevon Graham

The General Counsel introduced Christopher Harris and Annie Scott in support paragraph 20. Harris testified that in the beginning, Graham was in support of employees having a union. Graham even told Harris if he was not a team leader, he would be joining the union. (Tr. Vol.2, p.153 at 5-12). As a result, Harris was comfortable discussing the union with Graham. (Tr. Vol.2, p.153 at 15-20). Graham allegedly would come up and join Harris and his co-workers in conversation, which is when Harris asked Graham various questions regarding the union such as whether there was a risk of losing contracts with customers with union's presence. (Tr. Vol.2, p.153 at 20-25 to p.154 at 1-10). In response, Graham allegedly said, "If we got [*sic*] the union, we would be at risk of shutting down because we would lose two contracts." (Tr. Vol.2, p.146 at 17-24; p.153 at 3-4). Harris alleged that Graham said Kia and Hyundai would not want to work with Kumho because they think there would be a risk that Kumho could go on strike. (Tr. Vol.2, p.146 at 20-25 to p.147 at 1-4).

Scott testified that she was with Harris when Graham approached them and told them that they do not need to vote "yes" for the union. Scott also testified that Graham allegedly said "we can lose our job and . . . they can move their machines back to . . . any of their Korean facilities." (Tr. Vol.3, p.284 at 23-25 to p.285 at 1-7). Scott testified that Graham was merely discussing possibilities not probabilities. In fact, she made various statements in her affidavit to the Board documenting the employer's lawful communication: (1) "I do not recall the employer saying anything that would make me think the plant would close if the union were voted in, that the employees would lose their jobs" (Tr. Vol.3, p.310 at 11-17; (Affd. ¶ 43)); (2) "The employer

never said that it would not agree to the union's requests" (Tr. Vol.3, p.310 at 18-24; (Affd. ¶ 44)); (3) "During the meetings, I recall the employer saying that if we go on strike, we could be on strike for some weeks, and that if we were out for a week or more, it is possible that the employer could lose the contract" (Tr. Vol.3, p.311 at 7-15; (Affd. ¶ 46)); and (4) "I recall the employer saying something to the effect that if we cannot get the product out on time, then customers were going to find other vendors." (Tr. Vol.3, p.311 at 16-20).

Graham testified that he never threatened Harris or Scott that the plant would close if the union came in. (Tr. Vol.4, p.493 at 18-20; p.494 at 16-18). However, he did have conversations with them where the subject of the union came up wherein they asked him for his opinions about the union and where the company stood if the union were to come in. (Tr. Vol.4, p.493 at 24-25 to p.494 at 1-12). In response, Graham testified that he could not give them any information because he did not know. (Tr. Vol.4, p. 494 at 13-15). He denied ever telling employees that Kumho's customers did not want to work with unionized companies or that Kumho would lose contracts if the employees voted a union in. (Tr. Vol.4, p.494 at 16-24).

Graham did not threaten employees with job loss or plant closure as alleged in paragraph 20. Moreover, even if Graham had said the alleged statement, it was in response to the employees' questions and a statement of an honest, objective possibility. See Park N Fly, Inc., 349 NLRB No. 16 (2007) (holding that a violation of the Act cannot be established by the mere fact that members of management spoke to employees about the Union, and employers have a right under the National Labor Relations Act to communicate with employees by expressing opinions, facts, and experiences about unionization); see also, Michael's Markets, 274 NLRB 826, at *2 (1985) (holding that "[o]f course the employees are free to draw their own conclusions therefrom, but

employee conclusions are certainly not to be viewed as employer predictions. The exercise of free speech in these campaigns should not be unduly restricted by narrow construction").

4. Paragraph 21(b) - Chris Butler

Butler denies making any such statement as alleged in paragraph 21(b) of the Amended Complaint. (Tr. Vol.5, p.580 at 13-16). Moreover, even if true, Butler's alleged statement was lawful. Specifically, Butler is alleged to have said if the union comes in, Respondent *may* leave and go to South Korea. Butler was privileged to make comments regarding the potential impact unionization would have on Respondent's manufacturing in the United States. See Gravure Packaging, Inc., 321 NLRB 1296, 1299 (supervisor's suggestion that unionization might adversely affect the company are not unlawful) (citing Best Plumbing Supply, 310 NLRB 143, 148); see also, CPP Pinkerton, 309 NLRB 723, 724 (1992) (finding lawful statements relating what could possibly happen, rather than what would happen, with employees if the company unionized).

5. Paragraphs 22(b), 24, 31, and 41 - Harry (Kip) Smith

Paragraph 22(b): In support of paragraph 22(b), Marcus Horne testified that during a pre-shift meeting, Smith stated that: "If the union comes in, there is a chance we'd lose contracts with companies, like different companies like Fiat, Chrysler and Hyundai, and there's a chance that the company could fail and you know we could lose our jobs, and they can go back to South Korea." (Tr. Vol.3, p.382 at 16-23) (emphasis added). Assuming *arguendo* the alleged statement is true, an employer's description of what *could* happen without prediction of what *would* happen is lawful and within the range of permissible campaign conduct. See Manhattan Crowne Plaza Town, 341 NLRB at 619 (2004); see also, CPP Pinkerton, 309 NLRB 723, 724 (1992) (finding lawful statements relating what could possibly happen, rather than what would happen, with employees if the company unionized).

Paragraph 24: First, the General Counsel failed to establish that Harry Smith engaged in a threat of unspecified reprisals as alleged in paragraph 24(a). Marcus Horne testified that Smith told him that he needs to be careful how he votes *because* Kumho is a new company that is starting up, there is a chance that the company could fail if the union comes in. (Tr. Vol.3, p.384 at 6-10). The testimony shows that Smith shared objective possibility of what could happen to Kumho based on the fact that Kumho Tire Georgia was a new company. Id. In addition, paragraph 24(b) and (c) as alleged are not unlawful threats of plant closure. Marcus Horne and Brandon Lucas both testified that Harry Smith told employees that Respondent "could lose its contracts . . . ." Furthermore, both Marcus Horne (see *supra* Section III(B)(v)(5)(paragraph 22(b)) and Brandon Lucas testified that Smith's statement were couched as possibilities – not predictions. For example, Lucas testified that in a meeting, Smith told employees about "what *could* happen from the vote . . . certain things *could* happen - like, we *could* lose our contract with companies; the business *could* close . . . Both ways – he was telling us what *could* happen, the outcome either way." (Tr. Vol.3, p.264 at 10-21) (emphasis added). As mentioned above, discussing possible outcomes based on objective economic reasons and/or union's own track record is a permissible campaign communication.

Paragraph 31: Paragraph 31 of the Amended Complaint alleges that Harry Smith "threatened loss of work by telling employees that if they voted the Union in Respondent could take the molds out of curing and ship them back to Korea and would not ship the molds back to Respondent's facility." In support, Chase Register, Van McCook, and Michael Cannon testified. Register testified that in one of the shift meetings, Smith mentioned that if the union was voted in, they could ship the molds back to Korea. (Tr. Vol.1, p.22 at 2-10). McCook testified that Smith mentioned during a pre-shift meeting that if the union to be voted in at Kumho, the company could shut the place down and send the molds back to Korea. (Tr. Vol.1, p.239 at 20-25 to p.240 at 1-5,

19-21). Cannon testified that Smith said the "molds and curing could be shipped back to Korea." (Tr. Vol.3, p.358 at 4-7; 17-19; 24-25 to p.359 at 1-2). First, what is clearly missing from their testimony is any evidence that the employer "would not ship the molds back to Respondent's facility." Therefore, that allegation, which is a part of the paragraph 31, should be dismissed.

Second, Smith testified that he had only told employees that *if* the union were to come in and *if* the union were to strike, in order to meet customer demands, Kumho *could* possibly pull the molds out and ship them over to Korea to make the tires to satisfy the customers. In other words, "that if there were a labor dispute and customer demands needed to be met, then one option for the company was transferring the molds and making the product elsewhere." (Tr. Vol.4, p. 457 at 16-25 to p.458 at 1-23; p.461 at 6-17). In fact, Register understood from the meetings with the consultants that if the company and union were to not agree in collective bargaining, the union could call a strike. (Tr. Vol.1, p.51 at 7-25 to p.52 at 1-4). A discussion of what could happen in the event of labor dispute is lawful permissible communication. See Novi American, Inc., 309 NLRB 544, 544-545 (1992) (finding statement that "I am not predicting a strike if the Union is voted in. I don't know what will happen and I hope a strike will never happen" not objectionable).

Paragraph 41: Chase Register and Michael Cannon testified in support of paragraph 41. Register testified that Smith showed him a picture of a "help wanted ad" and said "if we vote this union in, we may all need to be looking for jobs." (Tr. Vol.1, p.33 at 2-18). Michael Cannon testified that although he does not remember who initiated the conversation, Smith showed him a picture of a help wanted sign and said "if the union's voted in, I found y'all another job." (Tr. Vol.3, p.356 at 11-25). Harry Smith testified that it was not until after the election that he showed them a picture of a help wanted sign. (Tr. Vol.4, p.460 at 10-25 to p.461 at 1-4). Aside from the fact that Smith did not threaten discharge but merely showed the picture as a joke, post-election

conduct is not a basis for objection to an election. In Head Ski Co., 192 NLRB 217, 218 (1971), the Board stated:

> It is axiomatic that the Board, in considering objections to an election, looks only to evidence of conduct which occurred between the time the petition is filed and the election is held. Accordingly, there is no basis here for considering evidence of alleged misconduct which occurred… after the election to determine whether the preelection atmosphere was fraught with fear and coercion. Those incidents could have no impact on the votes cast by the employees and cannot show an effect on the election atmosphere.

Thus, Smith's post-election conduct cannot be the basis for objection or setting aside the election.

6. Paragraph 25 (b) and (c) - Freddy Holmes

In support of paragraph 25(b), Jamel Webb testified that Holmes and Webb were talking about the union and Holmes said "if we get the union in, they're going to send the molds back to Korea." Webb testified that he understood Holmes' statement to mean that the plant would shut down because if the molds were gone, you cannot make any tires. (Tr. Vol.2, p.228 at 8-16). However, Holmes did not say that the plant would shut down if the molds were gone. (Tr. Vol.2, p.228 at 17-19). In support of paragraph 25(c), Jamel Webb testified that during another conversation with Holmes, Holmes stated that Hyundai and Kia would pull out if unionized because they do not buy from union-based facilities. (Tr. Vol.2, p.220 at 16-22). Holmes denies making such statement. In fact, he does not even know whether or not Hyundai or Kia works with unionized companies. (Tr. Vol.4, p.487 at 4-17).

Webb's testimony is not credible in light of the uncontradicted testimony that Kumho employees were told that the company would bargain in good faith, and that the success of Kumho's facilities did not depend on the presence or absence of a union, but rather economic conditions. Moreover, from meetings with the consultants, Webb knew that companies shut down because of business problems or other economic reasons and not because of unions. In fact, he

declared this under oath in his affidavit for the NLRB. (Tr. Vol.2, p.230 at 12-25 to p.231 at 1-12). Since the General Counsel did not establish sufficient facts to support the allegations in 25(b) and (c), they should be dismissed.

7. Paragraphs 27, 35, 40(d)-(g), and 45 - Michael Geer

Paragraph 27: The General Counsel introduced Jason Bailey in support of the allegation in paragraph 27. Bailey testified that during pre-shift meetings, Geer told employees that it is up to them to vote for the union, and that he could not make them do anything they did not want to do. (Tr. Vol.3, p.345 at 13-25 to p.346 at 1). Furthermore, Bailey testified that Geer allegedly said, "If the union comes in, we might lose some of our contracts, but [we] don't know." (Tr. Vol.3, p. 348 at 13-16). Bailey also testified that Geer told him if the union were voted in, Kumho could lose contracts because the Company did not have enough money from the banks. (Tr. Vol.3, p.348 at 10-25). It is uncontested that the bank took over Kumho about a week or two before the election, the same time frame as alleged in paragraph 27. (Tr. Vol.3, p.352 at 13-18). It is also uncontested that employees were informed regarding an article in The Korea Herald that stated:

> In the process of restructuring, all the concerned parties – creditors, workers at the tiremaker and subcontractors – badly need to 'share the burden deriving from the painful debt-rescheduling program.

(E. Exh. 7). Although Geer denies threatening employees, it is not unlawful for him to comment about the reality of Kumho's then-economic condition.

Geer testified that during a few pre-shift meetings, he received questions regarding a rumor that customers would pull their contracts if the union were to come in. Geer responded: "If we could not produce tires or deliver tires to our customers, if there was . . . interruption in production . . . or interruption to our delivery to our customers, then it [losing customer contracts] could happen; it could be feasible that . . . they might decide to go with other suppliers." (Tr. Vol.4, p.466

at 13-23). Furthermore, he testified that he informed employees if there was a strike and it interrupted enough of production, it would be possible that customers could pull their contracts. (Tr. Vol.4, p.466 at 24-25 to p.467 at 1-4). As discussed in Miller Industries Towing Equip., a reference to what might result in the event of a strike – the loss of customers is "merely an apt description of the likely effects of interrupted production" and is a permissible communication. 342 NLRB 1074, 1076. Thus, Geer's statements, even if made, were lawful.

Paragraph 35: The General Counsel alleged that Michael Geer threatened unspecified reprisals if employees engaged in activities on behalf of the union by telling employees that the union would hurt employees more than it would hurt Geer. (Amend. Compl. ¶ 35). In support of paragraph 35, Annie Scott testified that Geer told her that "you guys don't need to vote the union in, if you guys do, it will hurt the employees more than the employers." (Tr. Vol.3, p.280 at 22-25 to p.281 at 1-3). In her affidavit, she elaborated more on this point. In her affidavit, she stated that Geer said the employer mentioned that Kumho might lose its contracts and that employees' salary would be the subject of the negotiations. (Tr. Vol.3, p.304 at 10-25 to p.305 at 1-2). As set forth above, discussing the possible outcome of collective bargaining is not unlawful.

Geer testified that he had experience in working for a unionized facility. As a member of the management team in that unionized facility, the collective bargaining agreement did not affect his pay and benefits. Rather, it only affected the bargaining unit employees' pay and benefits. When asked by employees of the possible effects of unionization, he told employees that, as a member of the management team, his job description would not change, but it was possible that some of their responsibilities may. When Geer was talking to Scott about the impact of unionization that was the point he wanted to illustrate. (Tr. Vol.4, p.465 at 14-19; p.467 at 19-25 to p.469 at 1). Geer's statement was not a threat of unspecified reprisals; instead, it was a lawful

communication regarding the possible outcome of collective bargaining and the effect of the unionization based on facts and experience. See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal, force, or promise of benefit).

Paragraph 40(d) – (g): To support the allegations in paragraph 40(d) – (g), the General Counsel called Annie Scott. Scott testified that Geer approached her to talk to her outside. When they started talking, Geer allegedly said, "If you all vote the union in . . . . you could lose your contract." (Tr. Vol.3, p.281 at 17-25 to p.282 at 1-3). Then, Geer allegedly said, "Ms. Scott, you know it's harassment if you talk to anyone about the union." (Tr. Vol.3, p.282 at 20-25). Scott allegedly responded that she was aware of the rules against harassment, but she did not talk to anti-union people and that she only talked to pro-union people. Id. Geer allegedly asked her to do him a favor and not talk to anyone about the union. Id.

Scott's testimony cannot be further from the truth. Geer testified that shortly after one of pre-shift meetings, an employee approached him and told him that she was tired of hearing about the union from Scott and tired of Scott harassing her. The employee told Scott not to bother her anymore, but that Scott would just continue. The offended employee asked Geer if he would talk to Scott and he said he would. (Tr. Vol.4, p.470 at 21-25 to p.471 at 1-12). Later that day, Geer met Scott outside and told her that if she was doing something and somebody asked her to stop, but she continued, such activity could be construed as harassment. (Tr. Vol.4 p.471 at 16-21). Scott responded that she was going to vote for the union and if the union did not make it in this time, she was not going to vote for them anymore. She also talked to Geer about Cooper Tire. (Tr. Vol.4, p.471 at 22-25 to p.472 at 1). In short, instead of responding to Geer's advice regarding harassment,

Scott started discussing Cooper Tire and the potential outcome of the bargaining. Geer responded, "It doesn't matter," and what matters is all employees making an informed decision. He also said that Scott she needed to respect the wishes of other employees. (Tr. Vol.4, p.472 at 2-15).

The circumstances surrounding Geer's conversation with Scott regarding another employee's harassment complaint against Scott is comparable to the facts in Publix Super Markets Inc., 347 NLRB 1434 (2006). In Publix, an employee complained that union organizers had harassed him by speaking to him about the union on several occasions. Id. at 1437. In a meeting between the two employees, the supervisor read the rule regarding harassment and told the employee that this rule "applied to employees acting on behalf of the Union as well." Id. While the Administrative Law Judge held these statements violated the Act, the Board reversed, and held that because the statement was made in the face of a harassment complaint, the statement was not unlawful. Id. Therefore, allegations in paragraph 40(f) and (g) should be dismissed.

Moreover, in response to paragraph 40(e), Geer testified that Scott initiated the discussion about Cooper Tire and the potential outcomes of collective bargaining. Geer testified that he responded that he had no personal knowledge about Cooper Tire. (Tr. Vol.4, p.472 at 13-20). To the extent that there was a talk about losing contracts if the union came in, Scott knew from the meetings with the consultants that a loss of contracts was a possibility as a result of a strike. She testified under oath: "During the meetings, I recall the employer saying that if we go on strike, we could be on strike for some weeks, and that if we were out for a week or more, it if possible that the employer could lose the contract." She also recalls "the employer saying something to the effect that if we cannot get the product out on time, then customers were going to find other vendors." (Tr. Vol.3, p.310 at 18-25 to p.311 at 1-20). For the reasons set forth above, these

statements, even if made, were lawful. Therefore, the allegations in paragraphs 40(d) and (e) based on Scott's testimony cannot be substantiated.

Paragraph 45: Brandon Lucas testified in support of paragraph 45. He testified that after the votes were counted, around 11 p.m. in the smoking area, Lucas overheard Geer say to Craig (another supervisor) that since Kumho won, "we" have to find out the identities of the 136 people who voted in favor of the union and get rid of them. (Tr. Vol.3, p.260 at 16-25 to p.261 at 1-23). Geer denies making this statement. (Tr. 4, p.472 at 21-25 to p.473 at 1-3). Regardless, such post-election conduct cannot a basis for objection to an election. See Head Ski Co., 192 NLRB 217, 218 (1971).

8. Paragraphs 30 and 39 - Hyunho Kim

Paragraph 30: The General Counsel introduced Landon Bradley in support of paragraph 30. Paragraph 30 alleges that Hyunho Kim threatened that if the union came in, all of their jobs would be in jeopardy. Bradley testified that, through his interpreter, Hyunho Kim said, "All of our jobs were in jeopardy." (Tr. Vol.2, p.183 at 13-25 to p.184 at 1-5) (emphasis added). Kim denies threatening the jobs of the employees. (Tr. Vol.5, p.534 at 14-16). Instead, Kim testified that economic conditions impacting Kumho affected the futures of all Kumho employees. (Tr. Vol.5, p.536 at 6-12). Kim's testimony is actually supported by Bradley who testified that, through his interpreter, Hyunho Kim said all of our jobs (meaning everybody in the plant, including employees and Hyunho Kim) and not only their jobs (meaning employees' jobs only) were in jeopardy if the company continued to have economic losses. This shows that General Counsel failed to provide sufficient facts to prove the allegation asserted therein, and paragraph 30 should be dismissed.

Paragraph 39: The General Counsel introduced Mario Smith in support of paragraph 39. Smith testified, that through his interpreter, Hyunho Kim said he was worried about the future of

Kumho and that he thought the Company would survive if the union were to come in. Smith testified that Kim allegedly said: "The Company is going through a tough time right now with the creditors, and we need to show the creditors that we are strong. And by doing that, we should vote no for the union and that will show the creditors that we are strong and we are able to stand on our own." (Tr. Vol.1, p.75 at 11-25 to p.76 1-5).

Kim testified that although he told employees that the Company was not financially doing well, he did not tell Smith that Kumho would not be successful with a union, and to vote "no." (Tr. Vol.5, p.535 at 14-16). He also did not tell Smith or other employees to vote "no" for the survival of the company. (Tr. Vol.5, p.535 at 24-25 to p.536 at 1-5). In describing the financial status of the company, Kim told employees that since the plant was at the beginning stage, Kumho Tire Georgia was losing money. He also testified that he said if the losses continued, everyone could lose their jobs and everyone would have serious issues. (Tr. Vol.5, p.536 at 6-12). So, he told employees to "vote no and could you give us another chance." (Tr. Vol.5, p.535 at 21-23, p.536 at 2-5).

The Board has found that a CEO's communication in describing the company's economic condition is lawful communication. Miller Industries Towing Equip., 342 NLRB at 1074 (CEO engaged in permissible communication when he described the company's economic condition and concerns about potential impact of a unionization on the company). Moreover, asking employees to vote "no" is not an unlawful communication. See Big Three Indus., Inc., 192 NLRB 370, 373 (1971) (holding that a supervisor's request to "do him a favor and vote against the Union" was not unlawful and was just a strong sales pitch using the supervisor's "good guy image" to be more effective); Craft Elec. Co., 293 NLRB 1074, 1076 (1989) (asking a known union supporter to vote

no was not unlawful interrogation); and Volt Tech. Corp., 176 NLRB 832, 836 (1969) (finding the statement "will you please do me one favor and vote no" to be a non-coercive communication).

9. Paragraphs 34 and 42 - Mike Walker

Paragraph 34: Natasha Lee testified in support of paragraph 34. She testified that Mike Walker came in the break room and told her that if she voted "yes" for the union, it would affect her job, her family, and his family. (Tr. Vol.2, p.170 at 6-17). Walker denies having such conversation with Lee. (Tr. Vol.5, p.520 at 16-25). However, even if the alleged statement is true, such statement does not contain any threat of job loss or other reprisal. It is therefore lawful. In fact, statements related to employees' families have been upheld as lawful communication by the Board. See Hasbro Industries, 254 NLRB 587, 592 (1981), enf'd. in pertinent part, NLRB v. Hasbro Industries, 672 F.2d 978, 983 (1st Cir. 1982) (lawful communication in a letter to employees included an admonition "to discuss the real risks which you and your family may face if you make the wrong decision" and the statement that "if the Union is successful, the possibility that you and your family may be harmed if there are negotiations causes me great concern").

Paragraph 42: Randy Wilson testified that Mike Walker approached him and allegedly said, "We don't need a union," and "if you bring a union in, the union will shut the job down . . . you won't get your wages . . . let God take care of everything." (Tr. Vol.2, p.205 at 19-25 to p.206 at 1). In response, Wilson allegedly said he had to get back to work. (Tr. Vol.2, p.206 at 7-14). Walker denies the allegation. (Tr. Vol.5, p.521 at 1-18). Specifically, Walker testified that Wilson is on D shift and he is on A shift. Id. So, it is unlikely that Walker ever talked with Wilson. Moreover, he denies ever threatening that the Kumho Tire plant would shut down or threaten reduction in wages. Id. Walker was a credible witness and his version of events should be credited. The General

Counsel has also not introduced any evidence that the statement, if true, was disseminated or otherwise had an impact on the outcome of the election.

10. Paragraph 36(b) - Cliff Kleckley

In support of paragraph 36(b) of the Amended Complaint, the General Counsel introduced Van McCook. When asked if he remembed anybody saying anything about what could happen if union was brought in, McCook testified that he does not recall if anybody said anything about what could happen if the union was voted in. (Tr. Vol.2, p.243 at 22-24). Therefore, General Counsel failed to allege sufficient facts to prove paragraph 36(b), and it must be dismissed. Moreover, as discussed in Section III (B)(i), Cliff Kleckley is not a supervisor nor an agent; thus, his speech regarding unions is protected under Section 7. 29 U.S.C. § 152.

11. Paragraph 44 - Jerome Miller

At the hearing, the General Counsel introduced General Counsel Exhibit 7, a recording made by Sterling Lewis. The recording purports to portions of Jerome Miller's 25th hour speech. The Counsel for the General Counsel also introduced General Counsel Exhibit 8, which purports to be a transcript of the recording. The recording allegedly captures twelve minutes of Miller's speech and there was an additional seven minutes of indiscernible noise. (Tr. Vol.1, p.89 at 14-23; Tr. Vol.3, p.329 at 24-25 to p.330 1-4, p.330 at 9-21). First and foremost, Kumho renews its objection on the admission of General Counsel Exhibit 7 for its lack of completeness. (Tr. Vol.1, p.86 at 8-13). The partial recording, and the transcript thereof, is not a true and accurate representation of the entire 25th hour meeting. As such, it is devoid of context and should be excluded from evidence. In fact, the recording starts in mid-sentence (". . . those of you who had decided, I hope the information that I just rambled off will impact you.").

Second, the recording's incompleteness and unreliability is further evidenced by employees' testimony. Employees who were present at the 25th hour meeting and who testified to the content of Miller's speech all have different recollection of the length of the meeting and its content. This underscores that the recording is missing valuable context necessary to interpret the statements made therein. Mario Smith testified that the he attended the meeting in cafeteria day(s) before the election along with 60 to 100 other employees. (Tr. Vol.1, p.77 at 10-25). Smith was seated in the back towards the refrigerators and three other employees, including Sterling Lewis, were seated around him. (Tr. Vol.1, p.78 at 25 to p.79 at 1-13). The meeting started with President Kim reading a short paragraph in English. Then, a video was played for about two or three minutes and then another video from a congresswoman was played. Then, according to Smith, Miller spoke for almost ten minutes. (Tr. Vol.1, p. 79 at 19-25; p.80 at 17-25 to p.81 at 1-3). However, within that ten minute time frame, Miller allegedly played two additional videos: one from the mayor and one from a city councilman and resumed his speech after those videos were played (Tr. Vol.1, p.82 at 23-25 to p.83 at 1-18). This testimony alone shows that the recording is incomplete and unreliable. Furthermore, Smith admitted that the recording did not capture the entire meeting, and that Miller said something prior to the point when the recording started. (Tr. Vol.1, p.103 at 3-15).

Sterling Lewis who recorded the 25th hour meeting stated that the entire meeting may have lasted about 35 minutes to an hour, and he conceded that the recording did not capture the entire meeting. In fact, he conceded that it did not even capture the entirety of Jerome Miller's speech. (Tr. Vol. 3, p.335 at 5-8; p.336 at 22-25 to p.337 1-3; p.337 at 18-25 to p.338 at 1-12). Marcus Horne testified that in the 25th hour meeting, President Kim first spoke in English for about 5 to 10 minutes and, then, Miller spoke for about 30 minutes. (Tr. Vol.3, p.391 at 8-25). Lewis testified that Miller spoke for around five minutes or less before he started recording. Lewis testimony is

simply incredible. If Lewis' testimony is truthful, Lewis' recording of Miller's speech should be at least 25 minutes. However, the recording is only 12 minutes.

According to the Rule 106 of the Federal Rules of Evidence, "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." The Rule exists because it is "concerned with misleading impressions created by taking statements in documents or recordings out of context." 1 *Weinstein's Federal Evidence* § 106.02[1] (2d ed. 2013). Here, the General Counsel Exhibits 7 and 8 represent a partially recorded statement, and without the missing part of the recording, it is impossible for the Administrative Law Judge to determine the context of the speech and legality of the allegations in paragraph 44. Therefore, it should be excluded.

In addition, as to the allegations in paragraph 44(c) and (d), it is well-established that "bargaining from ground zero" or "bargaining from scratch" do not constitute a violation when the employer's communications make it clear that a reduction in wages or benefits will occur a result of the normal give and take of negotiations. Taylor- Dunn, Mfg. Co., 252 NLRB 799, 800 (1980) (citing TRW United Greenfield Division, 245 NLRB 1135 (1979)); See BP Amoco Chemical, 351 NLRB 614, 617-618 (2007) (statements regarding loss of existing benefits are evaluated in terms of whether they are reasonably construed as a result of union selection versus a "possible outcome of good-faith bargaining").

As demonstrated by Respondent's collective bargaining speech and slides, all statements related to the outcome of wages and benefits were made in relation to the collective bargaining process. It is uncontested, and the witnesses testified, that employees were told repeatedly that collective bargaining could produce wages that were more, less, or the same as then-wages of

Kumho employees. (E. Exh. 7-10). Thus, any communications were therefore lawful and the employees understood the concept of good faith collective bargaining. For example, Mario Smith testified that he attended meetings that were given by the consultants wherein consultant Smith explained that as a result of collective bargaining, the employees could wind up with more. (Tr. Vol.1, p.113 at 3-6; Tr. Vol.4, p.426 at 25 to p.427 at 1-9). She also discussed an article where General Motors had quit doing business with a vendor because the vendor went on strike to illustrate that a company could lose contracts because of a strike. (Tr. Vol.1, p.110 at 22-25 to p.111 at 1-12). Also, consultant Monroe testified that in the course of communicating to employees about the collective bargaining process, and he told employees that collective bargaining is a give and take process. Specifically, that, in collective bargaining, the company is going to make proposals they think are in the best interest of the company. (Tr. Vol.4, p.428 at 10-18).

12. Paragraph 46(a) and (b) - Aaron Rutherford

After the election, around October 18, 2017, Marcus Horne allegedly initiated the conversation with Aaron Rutherford. Horne allegedly asked Rutherford, "Why did Mario [Smith] get fired?" (Tr. Vol. 3, p.385 at 11-25 to p.386 at 1). Rutherford allegedly responded Smith was fired because Smith was posting things on Facebook. (Tr. Vol.3, p.386 at 2-11). Horne followed up by asking why other people posting on the site were not terminated. Rutherford allegedly said that they are going to take care of that too. (Tr. Vol.3, p.386 at 12-20). First, Horne's testimony does not match the allegation in paragraph 46(b). Second, Rutherford denies that he told Horne the reasons for Mario Smith's termination. Regardless, because the conduct occurred after the election, it is not grounds for objection. See Head Ski Co., 192 NLRB 217, 218 (1971).

VI. Respondent Did Not Threaten Employees With Loss of Benefits as Alleged in Paragraphs 10, 13, 17, 18, 23, 38(b), 40(b) and (c), and 44(d).

The weight of the case law is that, without an actual or implied threat that employees will lose benefits if they vote for union representation, or that union representation would be futile because the employer will not bargain in good faith with a union, an employer's description of the collective-bargaining process – including the reality that employees may end up with less as a result – does not violate the Act. Wild Oats Markets, Inc., 344 NLRB 717 (2005); see also, Noah's New York Bagels, Inc., 324 NLRB 266, 267 (1997); La-Z-Boy, 281 NLRB 338, 339 (1986) (finding that an employer's reference to a blank sheet of paper was not unlawful); Langdale Forest Products Co., 335 NLRB 602, 602 (2001) (finding that an employer's newsletter, noting that employees at its nonunion facilities received greater wage increases than employees at its union facility, did not violate Section 8(a)(1)).

In applying this rule, in Medieval Knights, LLC, 350 NLRB 194 (2007), the Board considered a program presented by a paid consultant in employer meetings held a week before the election. During the presentation, the consultants conducted a collective-bargaining exercise involving hypothetical parties. Id. at 195. In the course of the demonstration, the consultant stated that an employer did not have to agree on any specific proposals, that all negotiations were different, and that the bargaining process could take more than a year to complete. Id. The Board concluded that the bargaining scenario portrayed by the consulting group merely pointed out "the possible pitfalls for employees of the collective-bargaining process," and was therefore lawful. Id. at 195; See also, Standard Products Co., 281 NLRB 141, 163 (1986), enfd. in part, enf. denied in part on other grounds, 824 F.2d 291 (4th Cir. 1987) (finding no violation where the employer's plant manager told employees that, if the union won the election, he would "be sitting at the bargaining table and everything that is asked, I can say no, no, no." The Board held that the

manager's remarks did nothing more than portray the pitfalls for employees of the collective-bargaining process) (citing Coach & Equipment Sales Corp., 228 NLRB 440 (1977)).

1. Paragraph 10- Eric Banks

The General Counsel alleges that at the end of September 2017, Eric Banks threatened employees with the loss of benefits by telling employees that they have good benefits and if they brought the Union in, they would lose those benefits. (Amend. Compl. ¶ 10). In support, Anthony Arnold testified that he, Michael Nelson, and Eric Banks had a long conversation about benefits. (Tr. Vol.1, p.131 at 2-23). It probably started because either Arnold or Nelson brought it up. (Tr. Vol.1, p.132 at 5-8). Banks allegedly said that everything was on the table, including benefits. (Tr. Vol.1, p.131 at 2-23). While Banks admits that he talked to employees about how great the benefits are at Kumho and, in fact, that is the reason he came to Kumho, he denies ever telling Arnold that employees would lose benefits if the union comes in. (Tr. Vol.5, p.572 at 5-11). In fact, it was impossible to make that statement because Banks did not have any knowledge that employees would lose benefits if a union came in at Kumho. (Tr. Vol.5, p.572 at 1-4, 12-14).

2. Paragraphs 13, 17, 18, and 23 – Harry (Kip) Smith

Paragraphs 13, 17, and 23: The General Counsel alleges that Harry Smith threatened changed working conditions by stating that if the Union were voted in, he would no longer be able to help employees on the machines or with their work tasks. (Amend. Compl. ¶ 13, 17, 23). In support, Michael Cannon testified that Smith told him once that if the union was voted in, he could not help employees on the machine anymore. (Tr. Vol.3, p.360 at 1-4). Marcus Horne testified that when he asked Smith for help with the machines, Smith allegedly said that he would help now but if the union came in, he would not be able to come out and help the employees. (Tr. Vol.3, p.381 at 13-22). Van McCook testified that Smith allegedly commented that due to rules, if the union

came in, Smith could no longer help employees. (Tr. Vol. 2, p.241 at 15-22). Lastly, Chase Register testified that Smith told him that if employees voted the union in, Smith would no longer "be able to do my work for me." Register also testified that Smith allegedly said: "He wouldn't be able to operate my machine, he'd only be able to stand there and point his finger." (Tr. Vol. 1, p.25 at 15-25 to p.26 1-2).

Smith testified that he simply pointed out the possibilities of what might happen if the union were to come in. Smith stated that he understood collective bargaining and based on collective bargaining, he might not be able to help employees with their work depending on the agreement reached with the union. (Tr. Vol.4, p.452 at 7-25 to p.453 at 1-20, p.453 at 21-25 to p.454 at 1-18, p.456 at 13-25). Similar statements have been found lawful. In Norton Healthcare, Inc., No. 9-CA-44236, 2008 WL 5244874 (Dec. 12, 2008), there were several comments regarding helping nurses with patient care, including the statement that one nurse "might no longer be able to assist in patient care, depending on the outcome of bargaining." Since there was no threat and the statements related to a potential effect of a negotiated agreement, the court dismissed the allegations. Id. The same outcome should apply in this matter.

Paragraph 18: The General Counsel alleged that Smith threated the loss of benefits by telling employees that he would have to go "strictly by the book" and that he would wait to approve an employee's requested day off so that the employee would have time to think about whether he wanted a union. (Amend. Compl. ¶ 18). Van McCook testified that before the shift started, he asked for a day off and Smith allegedly said that McCook did not request a day off with enough advance notice. Smith allegedly mentioned that if there was a union, he would have to go by the rules. (Tr. Vol.2, p.238 at 20-25 to p.239 at 1-4; Tr. Vol.1, p. 27 at 12-23). Chase Register testified that he was with McCook when McCook made the request. Register also testified that Smith saw

Smith counting the days from the day of the request to the requested day off to determine whether McCook satisfied the advance notice policy. Register alleges that Smith said that if the union is voted in, "we are going to have to go strictly by the book." (Tr. Vol.1, p.27 at 12-21). At Kumho Tires, an employee is required to provide a 10-day advance notice to seek time off. (Tr. Vol.1, p.26 at 25 to p.27 at 1-6).

Smith testified that McCook approached him on a Monday to ask if he could have Friday off. Smith told him that he needed to make sure that nobody else was off because the company policy dictated that Smith could only let two employees off at a time because of a coverage concern. Smith then reiterated that if there was a union, he might not have the flexibility in granting time off. For example, there have been some circumstances where Smith tried to help the employee take a day off even when there were already two people off. Smith certainly did not tell McCook that he was going to withhold making a decision on his request to give McCook some time to think about his union decision. (Tr. Vol.4, p.455 at 20-22). After checking to make sure that there was no coverage issue, Smith told McCook that he could have Friday off on the day of his request or the next day. (Tr. Vol.4, p.455 at 3-19). Regardless of the truth of the allegation, statements that an employer would have to go strictly by the book and might be unable to favor employees have frequently been held to be lawful communications. See Trash Removers, Inc., 257 NLRB 945, 951 (1981) (no violation where employees were told that past favored treatment would have to stop under a union contract); see also, Beverly Enterprises, Inc., 322 NLRB 334, 344 (1996) (enforcement denied on different grounds) (statement that employer would have to go by the book and would not be able to treat employees individually anymore permissible).

3. Paragraph 38(b)- Aaron Rutherford

In paragraph 38(b), the General Counsel alleges that Aaron Rutherford threatened stricter rule enforcement by telling employees that team leads would not be able to look after employees, and that Respondent would have to go straight by the book if the Union were voted in. (Amend. Compl. ¶ 38(b)). In support, Mario Smith testified that during his conversation with Rutherford, Rutherford allegedly stated that if the union were to come in, the team leads would have to go strictly by the book. (Tr. Vol.1, p.73 at 18-21). Rutherford denies making these statements. (Tr. Vol.4, p.500 at 25 to p.501 at 1-2). However, as shown above, even if he did state something akin to the fact that Respondent would have to go strictly by the book, these statements are lawful communications. See Beverly Enterprises, Inc., 322 NLRB at 344 (1996) (statement that "if the Union comes in, [employer] would have to go by the book" was lawful).

4. Paragraph 40(b) and (c)- Michael Geer

The General Counsel alleges that on or about October 8, 2018, Geer told employees that salaries could be dropped to $11 per hour and they could lose their insurance. (Amend. Compl. ¶ 40(b) and (c)). In support, Annie Scott testified that during her conversation with Michael Geer, he said that if the union comes in, "they can lower your pay" and "you can lose your insurance." (Tr. Vol.3, p.281 at 17-25 to p.282 at 1-5). The testimony and the allegation on its face are lawful communication based on objective possible outcomes of collective bargaining. Washington Fruit & Produce Co., 343 NLRB 1215, 1271 (2004) ("The Board and the courts have said that Section 8(a)(1) and 8(c), when read together, leave an employer free to communicate with his employees so long as the communication does not contain a "threat of reprisal, or force, or a promise of benefit") (internal citation omitted). Furthermore, communication regarding average wage rate is lawful. See Standard-Coosa-Thatcher, Carpet Yarn Div., 257 NLRB 304, 318 (1981) (statement

regarding comparison of average wage rate at two facilities was protected speech under Section 8(c) of the Act).

5. Paragraph 44(d)- Jerome Miller

The Counsel for the General Counsel introduced the General Counsel Exhibits 7 and 8 to show that Jerome Miller threatened the loss of benefits by telling employees that everything was at risk in collective bargaining, and Respondent would not have to agree in collective bargaining to give employees what they were currently earning. (Amend. Compl. ¶ 44(d)). Notwithstanding the lack of completeness of the General Counsel Exhibits 7 and 8, Miller's description of the collective bargaining process is lawful. The alleged transcript of the 25th hour meeting indicates that Miller is purported to have said the following:

> As we prepare to wrap up, I'll tell you a very brief story. It's a confidential conversation I had with an employee. He said, you know what? I was part of the Union before and what I learned was, everything's at risk. And I said, what do you mean by that? He said, well, (indiscernible) bargaining process, and I'm all ears. I knew part of this. But he said, everything's at risk. He said, you know what? We get paid well in our (indiscernible). Very good. We overlook that sometimes.
>
> And I said, say more to me because I've been here a couple weeks. He said, well, you know, look at her insurance (indiscernible), and he said, you know, you all show this average rate here in the region, as he called it, meaning, like $11 and some cents. He said, when you go to collective bargaining, man, what I get now, it'll really now become what the average is, because you all won't have to give me what (indiscernible) earning.
>
> In other words, he said, that's too much risk for me to take (indiscernible), because the company seems to be committed, and our total package, like we use, which is pretty doggone good, as he said. And I agreed with him that that's one key point that all of you who are not aware of that, collective bargaining; we can start from scratch. So whatever you're getting paid now, hourly, could actually go to down. That's just they – that's the way it works.

pp. 5-6 of GC Exh. 8.

Miller was sharing an employee's experience about being in a union and facts about contract negotiations. Miller's statement is particularly lawful insofar as employees were

continually told that wages and benefits could increase in bargaining as well as decrease. The Company specifically showed examples where the Steelworkers actually achieved wage increases. This is permissible Section 8(c) communication. See Washington Fruit & Produce Co., 343 NLRB 1215, 1271 (2004) ("The Board and the courts have said that Section 8(a)(1) and 8(c), when read together, leave an employer free to communicate with his employees so long as the communication does not contain a "threat of reprisal, or force, or a promise of benefit") (internal citation omitted).

viii. Excelsior List

The only objection that is not co-extensive with the unfair labor charges is Union's objection regarding the *excelsior* list (Objection No. 13). During the hearing, USW Local 572 President Alex Perkins testified on behalf of the union and confirmed that the *excelsior* list was sent to the union on or about September 26, 2017. (Tr. Vol.4, p.405 at 13-24). He also testified that the union received a copy of the list the next day or so. (Tr. Vol.4, p.414 at 1-12). However, the union did not review the *excelsior* list until approximately October 5, 2017. (Tr. Vol.4, p.417 at 1-15). Perkins testified that the union did not review the *excelsior* list until around October 5, 2017 because the union was preoccupied with contacting people on its own list. The union had compiled its own list of Kumho employees from sign-in sheets from union meetings, union cards, and through other employees. The list included the names of employees, their addresses, and their phone numbers. (Tr. Vol.4, p.411 at 13-16, p.416 at 1-13). Perkins testified that the union's main focus was on maintaining its base, which was the people on its own list. As a result, the union focused its resources in first contacting those people on its own list. (Tr. Vol.4, p.414 at 13-25 to p.415 at 1-3; p.415 at 9-21). Only thereafter, did the union review the *excelsior* list to contact the employees with whom they had not talked with before. At that point, the union discovered that the list was inaccurate. (Tr. Vol.4, p.414 at 13-25 to p.415 at 1-3). When asked if union took any steps

to notify the Company of the mistakes in the *excelsior* list upon the discovery of the problem, Perkins testified that it did not. (Tr. Vol.4, p.417 at 16-20).

Based on above, Kumho asserts that the election result should not be overturned based on the incompleteness of the excelsior list because: (1) the *excelsior* list's shortcomings did not impede the union's ability to communicate with the eligible voters as it had its own list of employees to contact; (2) the union did not even review the list for a period of ten days following its receipt of the *excelsior* list; and (3) the union failed to notify anyone to remedy the incomplete *excelsior* list, which signals that the union really did not need the list, especially since its focus was on maintaining its base of employees on its own list. Therefore, the union was not prejudiced by the incomplete list. See Sprayking, Inc., 226 NLRB 1044 (1976) (the union's failure to seek the list earlier despite having knowledge that its receipt was overdue "indicates that it did not really need the list prior to the time it actually received the list" and therefore, was not prejudiced by the delay).

IV. CONCLUSION

The allegations set forth in the consolidated Amended Complaint are factually and legally unsupported, and the General Counsel cannot meet the heavy burden to establish that unfair labor practices occurred and that had negatively affected the election result. Thus, Respondent requests that the consolidated Amended Complaint and Objections be dismissed in its entirety and allow the election result to stand.

** SIGNATURES FOLLOW NEXT PAGE **

Respectfully submitting, this 26th day of April, 2019.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

KUMHO TIRES,	)	
	)	
Respondent,	)	
	)	
and	)	**Case 10-CA-208255**
	)	**Case 10-CA-208414**
	)	
UNITED STEEL, PAPER & FORESTRY	)	
RUBBER, MANUFACTURING, ENERGY	)	
ALLIED INDUSTRIAL & SERVICE	)	
WORKERS INTERNAIONAL UNION	)	
AFL-CIO, CLC	)	
Petitioner.	)	
	)	
	)	
	)	

This is to certify that I have electronically filed the above **RESPONDENT'S POST-HEARING BRIEF** with the National Labor Relations Board's e-filing service. I have also emailed a copy to the parties listed below:

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Dated this 26th day of April, 2019.

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