

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

<b>KUMHO TIRES,</b>	)	
	)	
<b>Respondent/Employer</b>	)	
	)	
<b>and</b>	)	<b>Case 10-CA-208255</b>
	)	<b>Case 10-CA-208414</b>
<b>UNITED STEEL, PAPER &amp; FORESTRY</b>	)	<b>Case 10-RC-206308</b>
<b>RUBBER, MANUFACTURING, ENERGY</b>	)	
<b>ALLIED INDUSTRIAL &amp; SERVICE</b>	)	
<b>WORKERS INTERNATIONAL UNION</b>	)	
<b>AFL-CIO, CLC</b>	)	
<b>Charging Party/Petitioner</b>	)	
	)	
	)	
	)	

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**RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS**

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COMES NOW KUMHO TIRES (hereinafter “Kumho”, “Respondent”, or “Company”), by and through the undersigned counsel, and files this Brief in Support of Exceptions 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,” “Charging Party,” or “Petitioner”), filed a petition to represent certain employees of Kumho located at 3051 Kumho Parkway in Macon, Georgia. The Board held an election on October 12 and 13, 2017, and the results of the election were as follows:

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

On October 20, 2017, Petitioner filed Objections in Case 10-RC-206308. Petitioner also filed unfair labor practice charges in Cases 10-CA-208255 and 10-CA-208414 on October 19, 2017 and October 23, 2017, respectively. On July 31, 2018, the Regional Director issued a Consolidated Complaint and Notice of Hearing, which consolidated the cases, and set a hearing on the alleged unfair labor practices and objections. On March 5, 2019, the General Counsel filed an Amended Complaint (“Amended Complaint”). A hearing was held from March 18 to March 22, 2019 before Administrative Law Judge Arthur J. Amchan.<sup>1</sup>

On May 14, 2019, the Administrative Law Judge (hereinafter “ALJ”) issued a Decision on the alleged unfair labor practices and the election objections. The ALJ found multiple unfair labor

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<sup>1</sup> Citation to exhibits offered by the General Counsel are designated with the abbreviation “GCX-”, exhibits offered by the Union/Charging Party/Petitioner with “UX-”, and exhibits offered by the Respondent/Employer with “EX-.” Citations to the hearing transcript are designated with the abbreviation T.\_\_\_\_ followed by the page or pages where the authority may be found.

practices<sup>2</sup> and that certain objections had merit and warranted a new election and remedial order. Respondent has filed Exceptions to the ALJ Decision.

## **II. SPECIFICATION OF QUESTIONS INVOLVED AND TO BE ARGUED**

A. Whether the ALJ demonstrated bias prejudicial to the Respondent/Employer in his credibility determinations warranting that the Board not adopt his Decision and Order. **[Exceptions 3, 15, 17-20, 22-25, and 63-66].**

B. Whether the ALJ's recommendation of a new election under the current Rules and Regulations for Representation is supported by the evidence of record and/or erroneous as a matter of law. **[Exceptions 59-60, 62, and 63-66].**

C. Whether the ALJ's findings of violations of Sections 8(a)(1) of the Act based on statements by Respondent's officials Kim and Miller that were alleged by the General Counsel as threats of reprisal are supported by evidence of record and law. **[Exceptions 1, 2, 4, 5, 27-37, 61, and 63-66].**

D. Whether the ALJ's findings of violations of Sections 8(a)(1) of the Act based on statements by Respondent's supervisors and others that were alleged by the General Counsel as threats of plant shut down and/or job loss reprisal are supported by evidence of record and law. **[Exceptions 11, 12, 16, 38-46, 51-52, 57, and 63-66].**

E. Whether the ALJ's findings of violations of Sections 8(a)(1) of the Act based on statements by Respondent's supervisors and others that were alleged by the General Counsel as unlawful interrogations are supported by evidence of record and law. **[Exceptions 6, 7, 8, 9, 10, 13, 21, 47, 48, 49, 50, 55, and 63-66].**

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<sup>2</sup> As discussed in Exception No.14 of the accompanying Exceptions list, the ALJ incorrectly found that Respondent held a meeting within 24 hours of the start of balloting. However, the ALJ did not conclude that the allegation constituted unfair labor practice.

F. Whether the ALJ's findings of violations of Sections 8(a)(1) of the Act based on statements by Respondent's supervisors that were alleged by the General Counsel as various forms of interference with employees' Section 7 rights are supported by evidence of record and law. **[Exceptions 11, 12, 14, 26, 51-54, 56-58 and 63-66].**

### **III. ARGUMENT**

#### **A. The ALJ Demonstrated Bias Prejudicial to Respondent That Requires a New Hearing on All Issues – Exceptions 3, 15, 17-20, 22-25, and 63-66.**

With no sound basis stated, the ALJ, on nearly all credibility determinations, found that witnesses for the General Counsel were credible witnesses because they were employees, and that the Respondent's witnesses were not credible for no stated reason or because they did not "sufficiently" address the employee testimony. The bias in favor of the General Counsel's employee witnesses tainted essentially all the fact finding of the ALJ. Therefore, a new hearing before another ALJ should be ordered. Examples of bias are vivid in the record.

For example, first, the ALJ states that he will treat certain employee witnesses' testimony as "uncontradicted and therefore credible" simply because the ALJ feels that the testimony was not "sufficiently" addressed by Respondent's witnesses. (JD 2:FN2). This shows the ALJ's bias prejudicial to Respondent. The ALJ, by his own admission in Footnote 2, wholly ignored and failed to consider other factors regarding credibility, such as other established or admitted facts, inherent probabilities and reasonable inferences that can be drawn from the record as a whole. *Compare* ALJ Decision Footnote 2 *with* ALJ Decision at 13, lines 33-36.

Second, the ALJ demonstrates his bias prejudicial to Respondent in stating, with no supporting evidence of record or reasonable basis in fact, that: "[T]he testimony of current employees which contradicts statements of their supervisors **is likely to be particularly reliable**

**because these witness are testifying adversely to their pecuniary interests.”** (Emphasis added). (JD 13:39-41). Here, there is no evidence of record that any of the employees’ testimony is adverse to his or her own pecuniary interests. To the contrary, the record evidence demonstrates that employee witnesses believed that their testimony and support for the Union were in their pecuniary and other interests, as it will help the Union which they support get them better “wages, hours and other terms and conditions of employment.” (See Tr. pp.24:9-16; 219:5-11; 220:1-7). Thus, the ALJ adopted an unsupported, unreasonable, and prejudicial inference for determining credibility that the employee testimony was “particularly reliable.” Employees’ testimony in support of General Counsel and Union allegations is not any more reliable than any other person’s testimony. All witness testimony, “out of the blocks,” deserves equal credit until proof of reliability or unreliability is established on the record. To do otherwise, is clear preconceived bias prejudicial to Respondent and reversible error.

Third, the ALJ goes on to find that he finds it “extremely unlikely” that 18 employee witnesses, including 11 current employees, “fabricated” their testimony. (JD 14:9-11). However, the ALJ failed to offer any reasonable basis in making credibility determination and accordingly erred in his fact finding role. Most egregiously, a witness need not be “fabricating” to not be reliable or credible. A witness can simply have bad recall, have memory lapses, have testimony shaped by legal handlers in case preparation, have physical or mental impairment, or have vocabulary or perspective different than what was said by another person. All these factors are critical to witness credibility and none involve “fabrication.”

There are only few witnesses who can recall an exact quote and quote it exactly. Yet, here, the ALJ chooses to credit employee witnesses’ testimony of what was allegedly said to them word by word without a reasoned explanation and/or basis for his findings despite controverting

testimony from Respondent witnesses. This was not an objective fact-finding by a neutral ALJ. This is reversible error.

Finally, the ALJ declines to credit Respondent's witnesses who specifically denied the alleged conducts they are accused of simply because they denied it categorically and efficiently with a straight-forward denial, as if there is some hard-fast rule that requires a witness to explain "how" or "why" something asserted by a General Counsel's witness is not true when it is simply not true. (JD 14:3-7). Each witness whose testimony the ALJ ignored in this fashion expressly and specifically denied the allegation written in the Amended Complaint and/or as alleged by an opposing witness years after the oral statement was allegedly made. The ALJ cannot, without any reasonable explanation for the finding, simply discredit a witness's denial as not "sufficiently" detailed enough. However, that is what the ALJ, by his own admission, did here. The lack of even-handed treatment of witnesses of the parties is obvious and shows bias of the ALJ prejudicial to the Respondent.

**B. The ALJ's Decision Regarding the Voter List Objection Warrants a New Hearing – Exceptions 59-60, 62, and 63-66.**

The voter list Objection (Objection No. 13) was analyzed wholly under the rule of the Excelsior case. See Excelsior Underwear, Inc., 156 NLRB 1236 (1966). Excelsior has been replaced by new Board Rules and Regulations for Representation Cases that purport to impose additional, largely new "voter list" requirements. The new Rules and Regulations require not just employee names and home addresses (required under the Excelsior rule), but additionally compel the employer to provide both the Union and the Board with employees' personal information of email addresses, home telephone numbers, and mobile phone numbers.

The ALJ found that the voter list which Respondent provided to the Petitioner was “completely inaccurate.” (JD 20:2-29). This finding is erroneous. The ALJ failed to provide any explanation of how he came to that conclusion when the evidence failed to show that the list was completely inaccurate. Indeed, the ALJ conceded that only some of the telephone numbers were incorrect. (JD 14:18-19). It is thus undisputed that employee names were correct and that some phone numbers were correct. The only finding of fact the ALJ could make with respect to the accuracy of the list was that all or virtually all of the addresses were incorrect. Conversely, that means that an unspecified number of the home addresses were correct, and that the list thus was not “completely incorrect” even by the ALJ’s own findings of fact.

The ALJ concluded that since Respondent allegedly provided a “completely inaccurate” voter list and it failed to offer any explanation for the inaccurate voter list, the inaccuracy was “deliberate” and that fact alone could be the basis for overturning the results of the first election. (JD 20:24-26; 21:11-12). However, the ALJ’s conclusion is wrong since the basis for the conclusion (i.e., Respondent’s voter list was “completely inaccurate”) is not supported by the record evidence as discussed above.

Further, the Union had access to many if not most of the employees’ home addresses and phone contact information. The Union did not review the voter list until approximately October 5, 2017. (Tr. p.417:1-15). The Union compiled its own list of Kumho employees from sign-in sheets from union meetings, union cards, and through other employees. That list included the names of employees, home addresses, and phone numbers. (Tr. pp.411:13-16, 416:1-13). At some point, the Union reviewed the voter list to contact the employees with whom they had not spoken. At that point, the Union discovered that the voter list had some but not all inaccurate information. (Tr.

pp.414:13-25 to 415:1-3). The Union took no measures to notify the Company of any inaccuracies in the voter list upon the discovery of the problem. (Tr. p.417:16-20).

Based on above, Kumho asserts that the election result should not be overturned based on the incompleteness of the voter list because: (1) the 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 10 days following its receipt of the voter list; and (3) the Union failed to notify anyone to remedy the inaccuracies in the voter list, which signals that the Union really did not need the list. Therefore, the Union was not prejudiced by the incomplete list. See *Spraying, 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). Here, the ALJ's failure to consider and evaluate any prejudice to the Union of the inaccuracies in the list and treatment of the list as "completely inaccurate" and automatically warranting a new election is error.

Moreover, the ALJ's finding with respect to the voter list objection wholly ignored aspects of the Rules and Regulations that, **as applied here**, are invalid and violate the National Labor Relations Act, the Administrative Procedures Act ("APA"), and/or the U.S. Constitution. To the extent that the Rules and Regulations are invalid, the ALJ should not require compliance with them, including the voter list requirements that exceed those of Excelsior. Here, the Rules and Regulations, as applied here, are invalid for the following reasons:

1. The current voter list requirement of the Rules and Regulations, as applied here, denied employees a realistic opportunity "to hear" free speech from third party labor organizations, speech that is protected by the Act and the U.S. Constitution, thus also violating the APA. The

Rules and Regulations, by having such short time periods and requiring only a petitioning or intervening union to get the list, deprive employees of a realistic opportunity “to hear” the message of speech from all sources, including other third parties such as other labor organizations which, with more notice and time from petition to hearing, could choose to intervene. The current voter requirement, as applied here with the shortened Board process, violates the employees’ right “to hear” from such sources.

2. The current voter list requirement of the Rule and Regulations, as applied here, is invalid and violates the Act, the APA, and the U.S. Constitution, because it eliminated a time period of reasonable length to permit any realistic possibility of intervention and competition in the election by any would-be intervening labor organization, with the intervening labor organization also having the voter list to compete for votes in the election.

3. The current voter list requirement of the Rules and Regulations, as applied here, violates the Act, the APA, and the U.S. Constitution because it interferes with employees’ ability to exercise their Section 7 rights under the Act freely in that they force the Employer, **as a conduit for the employees**, to provide the employees’ confidential personal information to Petitioner and the federal government (namely, the NLRB) without the consent of the employees – employees who might wish to keep their information confidential and private and/or refrain from some or all Section 7 activity, including “hearing” any, some, or all communication from any and/or all people and entities, including the federal government and petitioning labor organizations. This violates the employees Section 7 right “**to refrain**” any protected concerted activity in violation of the Act. Moreover, employees have no reasonable opportunity to protect their personal information from disclosure that they have not authorized to the federal government and/or any third parties and thus

their right to privacy under the U.S. Constitution is unreasonably violated by the voter list requirement of the Rules and Regulations as applied here.

4. The current voter list requirement of the Rules and Regulations, as applied here, violates the Act and the U.S. Constitution due process protections because it deprives employees of the right to vote for or against union representation while knowing the complete and exact grouping of the voting unit. Under the new Rules and Regulations, employees do not know exactly who will be eligible to vote for establishing a majority in a bargaining unit to be certified under the Act. By establishing a procedure that requires a voting list of a group of names and information that is not exact, fixed and complete, and permits voting in an election based on such a list before the “descriptive scope” of the voting and bargaining unit are conclusively determined and final, the requirement impermissibly deprives or interferes with the ability of employees to vote meaningfully in this case.<sup>3</sup>

**C. The Exceptions to the Findings Regarding the Statements of Hyunho Kim and Jerome Miller’s Speech Have Merit – Exceptions 1, 2, 4, 5, 27-37, 61, and 63-66.**

The ALJ found that certain statements by President Hyunho Kim and Jerome Miller were threats violating Section 8(a)(1) of the Act. The ALJ findings are erroneous. As explained more fully below, none of the statements can reasonably be construed as threats.

Besides the ALJ’s prejudicial bias which tainted all findings in the ALJ’s Decision, the source of many of the errors that the ALJ makes is largely unreasonable assumptions as to the meaning and insertion of words by the ALJ that were not used by the witnesses or by Messrs. Kim and Miller. Furthermore, the ALJ took the overwhelming majority of the statements out of their

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<sup>3</sup> An analogy would be that a U.S. Presidential election would be conducted with a regulation saying that we will decide whether a certain state is in or not in the election after the election occurs. Such a regulation, as that here, is unreasonable and unacceptable because the voters reasonably could change their vote based on what states are in and what states are not in. Respondent contends that a voter is entitled to know before the vote.

context and unreasonably treated them as stand-alone phrases, not as parts of a larger communication<sup>4</sup> that was made. Instead, they were lawful statements of opinion as to what was possible if factors beyond the control of Respondent came into play or lawful statements of law in the context of collective bargaining.

Here, most of the statements alleged as threats were not threats at all, and none were threats of economic reprisal to be taken solely of Respondent's own volition; instead, they were, unambiguously, statements of the Respondent's reasonable belief of possible economic consequences that were outside the control of Respondent. With respect to other statements, they were simply accurate statements of law in the context of collective bargaining and not threats at all. However, the ALJ was prejudicially intent on finding a threat in each the statements alleged to be unlawful.

In reaching his findings, the ALJ wholly ignored the critical language of the U.S. Supreme Court's Gissel decision that the ALJ himself quoted. The critical distinction which Gissel makes clear is that **only threats of economic reprisal for unionization taken solely on Respondent's own volition are unlawful**, and Respondent could freely speak of the possible economic consequences of actions that "would, could, or might" be caused by events set into motion by third parties such as corporate creditors. See NLRB v. Gissel Packing Co., 395 U.S. at 619; Miller Industries Towing Equipment, Inc., 342 NLRB 1074, 1076 (concluding that employer statement

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<sup>4</sup> For all of the ALJ's findings in regards to Jerome Miller's speech, Respondent renews its objections to the ALJ's admission General Counsel's exhibits 7 and 8 - a partial recording of Jerome Miller's speech and its transcript. 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.

of “apt description of the likely effects of interrupted production” is lawful); Action Mining, Inc., 318 NLRB 652, 656-57 (1995) (concluding that employer’s statement of negative economic conditions facing employer and possibility of losing customers because of their concern that the company could face a strike is lawful because there is no suggestion of company taking retaliatory action solely of own initiative); see also, General Elec. Co. v. NLRB, 117 F. 3d 627, 632-33 (D.C. Cir. 1997) (holding that employer predictions about the effect of unionization on job security based on objective facts about economic consequences beyond its control are lawful).

Therefore, an employer’s explanation and/or discussion of possible economic consequences to employees of events set in motion by third parties is lawful. Here, from the inception of the campaign, the Company was very forthcoming about its financial condition. President Hyunho Kim testified that he told employees that the Company was not financially doing well. (Tr. p.535:14-16). In describing the financial status of the company, Kim told employees that since the plant was at the beginning stage, Kumho was losing money. He also testified that he said if the losses continued, everyone, including himself, could lose their jobs and “we can be in serious issue.” (Tr. p.536:6-17). Employees were also informed and aware of Kumho’s financial status that could have affected the future of the plant from an outside source. It is undisputed that the bank took over Kumho about a week or two before the election. (Tr. p.352:13-18). The Company’s financial condition was widely publicized by The Korea Herald article that was published on September 27, 2017, in the middle of the election. (Tr. P.426:10-15). The excerpt from The Korea Herald article which was shared with employees during a collective bargaining education class 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.” (EXs. 7 and 8).

Against the backdrop of the Company's poor financial condition, many of the statements that the ALJ found to be unlawful are precisely the type of lawful communications to voters of what might be the consequences of the labor situation. However, the ALJ ignored the fact that Respondent was permitted to accurately state law, even if the law may not be pleasing to the ALJ's prejudicial, subjective views. None of the statements could reasonably be interpreted as threatening any sort of reprisal of the Respondents own volition. Thus, under Gissel and current Board progeny correctly applying the law of that decision, the ALJ's findings should be set aside. The Company addresses the ALJ's findings in the order addressed by the ALJ below.

**1. Kim's conversation with Landon Bradley – Exceptions 1, 2, 5, and 27.**

The ALJ found that the following statement violated the Section 8(a)(1): "The statement by Hyunho Kim to Landon Bradley that if the plant were unionized, employees' jobs were in jeopardy."

There is no evidence that Kim made such a statement. What Kim did indicate was that all company jobs, including his, were at risk if creditors evaluating the deteriorating financial condition of the Company chose to pressure the Company into closing because the creditors took unionization as a negative sign. There was no statement by Kim to Bradley that is reasonably susceptible to an interpretation of a threat of reprisal by the Company against employees for voting in the union. None! The statement Kim made about possible economic consequences driven by third parties such as the creditors are permitted by Gissel. See NLRB v. Gissel Packing Co., 395 U.S. at 619; General Elec. Co. v. NLRB, 117 F. 3d 627 at 632-33; Miller Industries Towing Equipment, Inc., 342 NLRB at 1076.

**2. Kim’s Conversation with Mario Smith – Exceptions 5 and 28.**

As noted in Exceptions 23, the ALJ found that the following statement violated the Section 8(a)(1): “The statement by Hyunho Kim to Mario Smith that the plant would not survive if employees chose to be represented by the Union.”

The ALJ plucked the statement he cites out of a longer conversation that shows that the statement is lawful under Gissel. Mario Smith testified that Kim said he was worried about the future of Kumho and that he thought the Company would not survive if the union were to come in. Smith added that Kim 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. pp.75:11-25 to 76:1-5). Kim testified that he told employees that the Company was not financially doing well. (Tr. pp.535:14-16; 536:6-17). This communication was lawful. Nowhere in the conversation is any statement that could be reasonably be interpreted as a threat of reprisal taken by the Company of its own volition against the employees for voting for the Union. The entire backdrop to the conversation was the financial condition of the Company, the pressure from creditors on the Company, and the need to demonstrate positive economic factors to the creditors.

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 1074.

**3. Miller’s statement that, “Five percent of productivity can just quickly go away and be captured by someone else.” – Exceptions 4 and 29.**

The ALJ found that this statement was a threat violating Section 8(a)(1). (JD 15:25). This statement cannot reasonably be interpreted as a threat of economic reprisal to be taken solely of Respondent’s own volition. Instead, when interpreted in its context within the portion of the speech

in evidence, it is reasonably interpreted only as a lawful statement of the Respondent's reasonable belief of possible economic consequences outside the control of Respondent. For example, any reasonable fact finder would find a part of Miller's statement in this section to be lawful in the context of the background information discussed in Section C(7) below. However, the ALJ cherry picked the statement without any consideration of the background context and incorrectly found a part of Miller' statement discussed herein as violative of the Act. This is a clear error.

**4. Miller's statement that, "We cannot just have this place shut down because we did not decide to get together and work together." – Exceptions 4 and 30.**

The ALJ found that this statement was a threat violating Section 8(a)(1). This statement cannot reasonably be interpreted as a threat of economic reprisal to be taken solely of Respondent's own volition. Instead, when interpreted in its context within the portion of the speech in evidence, it is reasonably interpreted only as a lawful statement of the Respondent's reasonable belief of possible economic consequences outside the control of Respondent.

**5. Miller's statement that, "I have to sit across the table, not because I really want to, but the NLRB's laws and regulations requires that . . . ."– Exceptions 4 and 31.**

The ALJ found the above mentioned statement showed an indication of lack of intent to bargain in good faith threat violating Section 8(a)(1). The ALJ is simply wrong and makes inappropriate inferences. This is a lawful statement accurately explaining the law under the NLRA.

**6. Miller's statement that, "We all could be adversely impacted if the business closes down or if the tires are shipped or there's a disruption in the production and you sit idly by . . . ." – Exceptions 4 and 32.**

The ALJ found that the above statement was a threat in violation of Section 8(a)(1). This statement cannot reasonably be interpreted as a threat of economic reprisal to be taken solely of

Respondent's own volition. Instead, when interpreted in its context within the portion of the speech in evidence, it is reasonably interpreted only as a lawful statement of the Respondent's reasonable belief of possible economic consequences outside the control of Respondent.

**7. Miller's statement that, "If they strike, you can see the molds and tires being produced somewhere else. It's that five percent, and that's why we have to put a number around it. It can be produced somewhere else." – Exceptions 4 and 33.**

The ALJ found that this statement was a threat violating Section 8(a)(1). This statement cannot reasonably be interpreted as a threat of economic reprisal to be taken solely of Respondent's own volition. Instead, when interpreted in its context within the portion of the speech in evidence, it is reasonably interpreted only as a lawful statement of the Respondent's reasonable belief of possible economic consequences outside the control of Respondent. See Miller Industries Towing Equipment, Inc., 342 NLRB at 1076; Action Mining, Inc., 318 NLRB 652, 656-57 (1995).

**8. Miller's statement that, "It's only taken me a couple of weeks to determine that bad things could happen, that worse things could happen." – Exceptions 4 and 34.**

The ALJ found that this statement was a threat violating Section 8(a)(1). (JD 15:37-38). This statement cannot reasonably be interpreted as a threat of economic reprisal to be taken solely of Respondent's own volition. Instead, when interpreted in its context within the portion of the speech in evidence, it is reasonably interpreted only as a lawful statement of the Respondent's reasonable belief of possible economic consequences outside the control of Respondent.

**9. Jerome Miller's statement that, "And we'll all be looking at tires being shipped somewhere else. So I'm telling you now, okay?" – Exceptions 4 and 35.**

The ALJ found that this statement was a threat violating Section 8(a)(1). (JD 15:39). This statement cannot reasonably be interpreted as a threat of economic reprisal to be taken solely of

Respondent's own volition. Instead, when interpreted in its context within the portion of the speech in evidence, it is reasonably interpreted only as a lawful statement of the Respondent's reasonable belief of possible economic consequences outside the control of Respondent.

**10. Miller's statement that, "But he said, everything's at risk. He said, you know what? We I [sic] get paid well in our currently. Very good. We overlook that sometimes." – Exceptions 4 and 36.**

The ALJ found that this statement was a threat violating Section 8(a)(1). (JD 15:40-41). This statement cannot reasonably be interpreted as a threat of economic reprisal to be taken solely of Respondent's own volition. Instead, when interpreted in its context within the portion of the speech in evidence, it is reasonably interpreted only as a lawful statement of the Respondent's reasonable belief of possible economic consequences outside the control of Respondent and a lawful statement of the reality of collective bargaining under the NLRA. This is permissible Section 8(c) communication. See Washington Fruit & Produce Co., 343 NLRB 1215, 1271 (2004).

**11. Jerome Miller's statement that, "Collective bargaining; we can start from scratch." – Exceptions 4 and 37.**

The ALJ found that this statement was a threat violating Section 8(a)(1). (JD 16:2-8). This is a lawful statement of law under the NLRA. The statement is materially different from the statements that the ALJ cited for the proposition that the statement is unlawful. The unlawful statements cited by the ALJ and in the decision he cites all are to the effect that bargaining "will start from scratch" and that implies reprisal for unionization. Here, futility of bargaining and/or loss was not stated or implied. Miller did not say "we will" beginning bargaining from scratch." He said "we can." His statement is a true and lawful to educate employees on the reality of the law of negotiation under the NLRA.

Furthermore, 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. (EX- 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. pp.113:3-6; 426:25-427:1-9). 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. pp.110:22-25 to 111:1-12). 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. p.428:10-18).

**D. The Exceptions Regarding Other Alleged Threats of Plant Shutdown or Loss of Employment Have Merit. – Exceptions 11, 12, 16, 38-46, 51-52, 57, and 63-66.**

The ALJ, consistent with his expressed bias in favor of the General Counsel's employee witnesses and against Respondent's witnesses, took multiple supervisors' statements and/or conversations out of context and used unreasonable interpretations to find the statements to be threats. But none were statements threatening reprisal for voting for the union or unionization.

**1. Harry<sup>5</sup> “Kip” Smith’s alleged comments that in the event of a strike there would be a possibility of molds sent to Korea – Exception 38.**

The ALJ concluded that Smith’s comments at a pre-shift meeting about the possibility of a strike followed by the possibility that tire molds would be sent back to Korea was an unlawful prediction or threat of plant shut down or loss of employment. (JD 16:13-14). The ALJ’s conclusion is wrong. As summarized below, the comments were lawful comments about the “possible” economic consequences of actions taken by others in response to a possible strike, not a prediction or threat of reprisal solely in the Respondent’s control for voting for a union or unionization.

Marcus Horne testified that during the 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. p.382:16-23) (Emphasis added). Smith told employees that *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. p.384:6-10). 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.* Marcus Horne and Brandon Lucas both testified that Smith told employees that Respondent “could lose its contracts . . . .” They both testified that Smith’s statements 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

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<sup>5</sup> Hereinafter “Kip Smith.”

– he was telling us what *could* happen, the outcome either way.” (Tr. p.264:10-21) (Emphasis added).

Smith testified that he 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. He made clear “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. pp. 457:16-25 to 458:1-23; 461:6-17).

An employer’s description of economic consequences that *could* happen driven by third parties is not a prediction at all, much less a threat of reprisal taken solely by the respondent due to employees voting for a union. Without prediction of what *would* happen, statements of possible economic consequences driven by third party actions (such as customers cutting contracts for production), direct or indirect, are 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). 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).

**2. Michael Geer’s alleged comment that unionization would result in Respondent losing contracts – Exception 39.**

The ALJ concluded that Geer’s comment that unionization would result in Respondent losing contracts was an unlawful prediction or threat of plant shut down or loss of employment.

(JD 16:16-17). The ALJ's conclusion is wrong. As summarized below, the comments Geer *actually* made were lawful comments about the "possible" economic consequences of actions taken by others, not a threat of reprisal solely in the Respondent's control for voting for a union or unionization. (Emphasis added).

Jason Bailey testified that Geer allegedly said, "If the union comes in, we might lose some of our contracts, but [we] don't know." (Tr. p.348:13-16). 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. p.348:10-25).

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. p.466:13-23). 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. pp.466:24-25 to 467:1-4). 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 were lawful.

Lastly, employees were informed and aware of Kumho's financial status that could have affected the future of the plant. It is undisputed that the bank took over Kumho about a week or two before the election, the same time frame as alleged in paragraph 27. (Tr. p.352:13-18). It is also undisputed that the Company's financial condition was widely publicized by The Korea

Herald article that was published on September 27, 2017, in the middle of the election. (Tr. p.426:10-15) (EXs. 7 and 8).

**3. Kip Smith's alleged statements made in conjunction with showing of pictures of carnival workers to the effect that he had found employees another job -- Exception 40.**

The ALJ concluded that Kip Smith's statements made in conjunction with showing of pictures of carnival workers to the effect that he had found employees another job were unlawful predictions or threat of plant shut down or loss of employment. (JD 16:19-20). In footnote 25, the ALJ states that he finds Smith's statement to be a statement linking unionization to plant closure. Again, the ALJ's conclusion is wrong. As summarized below, the comments Smith actually made were lawful comments about the "possible" economic consequences of actions taken by others, not a threat of reprisal solely in the Respondent's control for voting for a union or unionization.

First, the ALJ's bias against Respondent's witness is evident in the ALJ's misquotation of Smith's statement to employees. The ALJ found that Smith's showing of employees a photo of a "help wanted" sign related to taking down the rides occurred **before the union election** because although the General Counsel's witnesses (Chase Register and Michael Cannon) did not testify that this conduct occurred before the election, and Smith actually testified that it occurred after the election, ALJ concluded that Smith's behavior must have occurred before the election because "there would be no reason for Smith to talk about 'if disaster struck,' after the balloting." (JD 8:45-9:1). However, that is not what Smith testified to without contradiction. Smith stated that "I said . . . 'if disaster would've struck and the plant would've closed, I found everybody a job,'" clearly using a past tense. (Tr. pp.460:25 - 461:1).

Second, all employees, including those Smith spoke to, were informed that the Company was doing all it could do to prevent plant closure (actually company closure) and that it was

creditors and customers who might take action in response to unionization, not the Company. There was not threat of reprisal by the Company but instead communication of possible economic consequences driven by actions of third parties. Informing employees there might be job loss as a result of the third party actions in response to unionization is lawful. In a context where the Company was in financially precarious position and had been placed into receivership by a bank creditor, and where these employees knew their jobs were at risk from published press reports, the comments by Smith were lawful.

**4. Brad Asbell, Chris Wilson, and Eric Banks’ alleged statements predicting plant shutdown and/or loss of benefits – Exception 41.**

The ALJ concluded that statements made by Asbell, Wilson, and Banks were unlawful predictions or threats of plant shutdown or loss of employment and statements of Banks were threats of loss of benefits. (JD 16:22-23). Again, the ALJ’s conclusion is wrong. As summarized below, the statements made were lawful comments about the “possible” economic consequences of actions taken by others and not predictions or threats of reprisal solely in the Respondent’s control for voting for a union or unionization.

The General Counsel alleged 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 was a threat of plant closure. Arnold’s testimony is simply 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. pp.127:24-25 to 129:1). Arnold did not respond and nothing else happened. (Tr. p.129:2-5). Then, about an hour or two later, both Arnold and Nelson went to the semi production unit where Eric Banks was the “production supervisor.”<sup>6</sup> 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. p.129:6-24). 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. pp.130:5-25 to 131:1).

Banks denies that he told Arnold that if the union got in, Kumho would shut down. (Tr. p.571:15-17). Asbell denies the same. (Tr. p.575:2-4). Wilson also denies that he told Arnold the plant would shut down if the union came in. (Tr. p.475:20-23). 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<sup>7</sup>.

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<sup>6</sup> Banks was actually a team lead and not supervisor. (Tr. p.129:18-20).

<sup>7</sup> And again, the ALJ crediting one General Counsel witness over three Respondent’s witnesses and ignoring General Counsel’s failure to call Nelson shows the ALJ’s bias.

The ALJ found that a former employee Anthony Arnold correctly testified that Banks told him that if the Union won, employees would lose all their benefits, specifically, health insurance. (JD 10:3-4). Accordingly, the ALJ found that Banks' statement of loss of benefits was an unlawful threat. (JD 16:22-23). However, 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 denied ever telling Arnold or any other employees that they would lose benefits if the union comes in. (Tr. p.572:1-14). Banks telling employees that everything is on the table is a legal statement about the realities of collective bargaining. Not a threat or prediction of loss of benefits<sup>8</sup>.

**5. Freddie Holmes' alleged comment to Jemel Webb that Respondent would lose contracts with Kia and Hyundai because those companies do not do business with unionized suppliers—Exception 42.**

The ALJ concluded that Freddie Holmes' comment to Jemel Webb that Respondent would lose contracts with Kia and Hyundai because those companies do not do business with unionized suppliers was an unlawful prediction or threat of plant shut down or loss of employment. (JD 16:25-26). The ALJ's conclusion is wrong based on the record evidence. Instead, Holmes' comment was a lawful comment about the "possible" economic consequences of actions taken by others, not a threat of reprisal solely in the Respondent's control for voting for a union or unionization.

Jemel Webb testified that Holmes stated that Hyundai and Kia would pull out if unionized because they do not buy from union-based facilities. (Tr. p.220:16-22). Holmes denied making such statement. In fact, Holmes did not even know whether or not Hyundai or Kia works with unionized companies. (Tr. p.487:4-17). However, Webb knew that Hyundai and Kia would not

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<sup>8</sup> The ALJ crediting Arnold, again, demonstrates the ALJ's bias against Respondent's witnesses. See Footnote 7.

pull out simply because they do not buy from unionized facilities. 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. Webb was informed that companies shut down because of business problems or other economic reasons and not because of unions. (Tr. pp.230:12-25 to 231:1-12).

Moreover, even if Holmes had made the statement, it is a lawful statement of opinion of possible economic consequences of unionization taken by other third parties, not a prediction or threat of reprisal by the Company for the employees' choice. See NLRB v. Gissel Packing Co., 395 U.S. at 619. Certainly, it is obvious that Holmes could not speak for Kia or Hyundai with respect to purchasing decisions.

**6. Stevon Graham's alleged comments to Annie Scott and Christopher Harris that Respondent would lose contracts with Kia and Hyundai because those companies do not do business with unionized suppliers—Exception 43.**

The ALJ concluded that Stevon Graham's comments to Annie Scott and Christopher Harris that Respondent would lose contracts with Kia and Hyundai because those companies do not do business with unionized suppliers was an unlawful prediction or threat of plant shut down or loss of employment. (JD 16:27-28). The ALJ's conclusion is wrong. As summarized below, the comments, were denied by Graham, but even if made, were lawful comments about the "possible" economic consequences of actions taken by others, not a threat of reprisal solely in the Respondent's control for voting for a union or unionization.

Harris testified that he asked Graham various questions regarding the union such as whether there was a risk of losing contracts with customers with union's presence. (Tr. pp.153:20-25 to 154:1-10). 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. pp.146:17-24; 153:3-4). 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. pp.146:20-25 to 147:1-4).

Scott testified that she was with Harris when Graham approached them and Graham allegedly said “we can lose our job and . . . they can move their machines back to . . . any of their Korean facilities.” (Tr. pp.284:23-25 to 285:1-7). 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. p.310:11-17; (Affd. ¶43)); (2) “The employer never said that it would not agree to the Union’s requests” (Tr. p.310:18-24; (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. p.311:7-15; (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. p.311:16-20).

Graham testified that he never threatened Harris or Scott that the plant would close if the union came in. (Tr. pp.493:18-20; 494:16-18). 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. pp.493:24-25 to 494:1-12). In response, Graham testified that he could not give them any information because he did not know. (Tr. p.494:13-15). 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. p.494:16-24).

Even if Graham had made the alleged statement, and statement were in response to the employees' questions and a statement of an honest, objective possibility of economic consequences caused by actions of third parties, not actions of reprisal by the Company. See NLRB v. Gissel Packing Co., 395 U.S. at 619; see also Park N Fly, Inc., 349 NLRB No. 16 (2007) (finding 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); 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").

**7. Michael Walker's alleged comment to Randy Wilson that unionization would result in plant shutdown —Exception 44.**

The ALJ concluded that Michael Walker's comment to Randy Wilson that unionization would result in plant shutdown was an unlawful prediction or threat of plant shut down or loss of employment. (JD 16:31-32). The ALJ's conclusion is wrong. There is no credible evidence that the comment was made. Moreover, as summarized below, the comment was a lawful statement about the "possible" economic consequences of actions taken by others, not a threat of reprisal solely in the Respondent's control for voting for a union or unionization. As previously mentioned, all employees, including Wilson, were notified of the Company's financial status and the

consequences of third party's (i.e., banks and creditors) action through company education meetings. (See infra. Section III.C).

Wilson testified that 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. pp.205:19-25 to 206:1). In response, Wilson allegedly said he had to get back to work. (Tr. p.206:7-14). Walker denies the allegation. (Tr. p.521:1-18). 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.

**8. Chris Butler's alleged statements to Marcus Horne to the effect that if the Union comes in, Respondent may leave and go to South Korea – Exception 45.**

The ALJ concluded that Chris Butler's statements to Marcus Horne to the effect that if the Union comes in, Respondent may leave and go to South Korea were an unlawful prediction or threat of plant shut down or loss of employment. (JD 16:34). The ALJ's conclusion is wrong. As summarized below, the statements were not made and even if made, they were lawful comments about the "possible" economic consequences of actions taken by others, not predictions or threats of reprisal solely in the Respondent's control for voting for a union or unionization.

First, Butler denies making any such statements. (Tr. p.580:13-16). Second, even if the statements were made, Butler's alleged statements were lawful. Butler was privileged to make comments regarding the potential impact unionization might have on Respondent's manufacturing in the United States as a result of third party actions. See NLRB v. Gissel Packing Co., 395 U.S. at 619; Gravure Packaging, Inc., 321 NLRB 1296, 1299.

**9. Alleged statement by Michael Whiddon at pre-shift meeting to the effect that if we get the Union in, it's possible that we could go on strike, and we could lose our jobs – Exception 46.**

The ALJ concluded that a statement by Michael Whiddon at pre-shift meeting, to the effect that if we get the union in, it's possible that we could go on strike, and we could lose our jobs was an unlawful prediction or threat of plant shut down or loss of employment. The ALJ's conclusion is wrong. As summarized below, the statement was not made, and even if the statement had been made, it would have been a lawful statement about the "possible" economic consequences of actions taken by others, not a prediction or threat of reprisal solely in the Respondent's control for voting for a union or unionization.

Christopher 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." (Tr. pp.272:2-14; 273:15-20). 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. (Tr. pp.480:25 to 481:5).

Even if the statement had been made, is not an unlawful prediction or threat of a job loss. 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 as a result of actions by third parties). See Park N Fly, Inc., 349 NLRB No. 16 (2007); See also, Novi American, Inc., 309 NLRB 544 (1992) The alleged statement about possible strike consequences caused by possible actions taken by third parties in response to a strike is not a prediction or threat of reprisal by Respondent at all. See Miller Industries Towing Equipment, Inc., 342 NLRB at 1076; Action Mining, Inc., 318 NLRB at 656-57.

**E. The Exceptions Regarding Findings of Unlawful Interrogations Have Merit. – Exceptions 6, 7, 8, 9, 10, 13, 21, 47, 48, 49, 50, 55, and 63-66.**

The leading Board law on the legality of interrogation is Rossmore House, 269 NLRB 1176 (1984), enfd, 760 F. 2d 1006 (9th Cir. 1985), 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 ALJ erred in finding that Respondent, through its alleged supervisors and/or agents, engaged in unlawful interrogation as alleged in the Amended Complaint. As with each of the ALJ’s

other findings, each of these findings is tainted by the ALJ's bias in making credibility determinations<sup>9</sup>.

**1. Alleged interrogation by William Monroe of Michael Cannon – Exceptions 47 and 50.**

The ALJ incorrectly found that the alleged interrogation by William Monroe of Michael Cannon violated Section 8(a)(1) of the Act. (JD 17:41). The General Counsel did not credibly establish that Monroe engaged in unlawful interrogation of Cannon. Cannon testified that when he was at his work station, Monroe approached him and asked him why employees needed a union. (Tr. pp.361:18-25 to 362:1). Monroe categorically denies this allegation. (Tr. pp.430:24-25 to 431:1-4). Instead, Monroe testified that he answered many of Cannon's questions and/or respond to his opinions about the truth of the information provided during the training. (Tr. pp.430:24-25 to 431:1-4). 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. p.424:2-11). Furthermore, he was aware of his limitation in engaging employees (i.e., that he cannot threaten, interrogate, promise, or spy on employees). (Tr. p.424:12-15). Because of this awareness, Monroe knew not to ask Cannon any questions. (Tr. p.431:5-7). 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). Based on totality of circumstances, Monroe's testimony should have been credited instead of Cannon's testimony.

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<sup>9</sup> The ALJ found that the "Respondent violated Section 8(a)(1) in each and every interrogation alleged in the [Amended] Complaint." However, the Amended Complaint includes paragraph 26 which lists allegations against Craig Perryman which was dismissed by the General Counsel at the closing of their evidence. Thus, the ALJ's finding shows clear error and his bias towards Respondent.

**2. Alleged Interrogation<sup>10</sup> by William Monroe of Chase Register– Exceptions 7, 8, 47, and 50.**

The ALJ incorrectly found that an alleged interrogation by Monroe of Chase Register violated Section 8(a)(1) of the Act. (JD 17:42). The General Counsel did not establish that Monroe engaged in unlawful interrogation of Register. Register was an open supporter of the Union. (Tr. pp.46:19-25, 47:1-2, 48:13 to 49:1-11). 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. pp.23:22-25 to 24:1-17). In response, Register told Monroe that “yes, we needed [*sic*] one” and that the company needed structure. (Tr. p.24:7-16). 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”).

**3. Alleged Interrogation by Kip Smith of Sterling Lewis– Exceptions 47 and 50.**

The ALJ found that the alleged interrogation by Kip Smith of Sterling Lewis violated Section 8(a)(1) of the Act. (JD 17:43). This was error. The General Counsel did not credibly establish that Smith engaged in unlawful interrogation of Lewis. Lewis 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. pp.320:11-25 to 321:1-2). Smith denies such conversation ever happened and testified that Lewis

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<sup>10</sup> Although the ALJ incorrectly found that Monroe engaged in unlawful interrogation of Chase Register, the ALJ did not find that Monroe engaged in unlawful solicitation of grievances as alleged in paragraph 15(b) of the Amended Complaint nor discusses the allegation at all in the Decision. This evidence another example of the ALJ’s bias against Respondent in finding any and all allegation against the Respondent without any reasonable basis.

would not have worked on Smith's shift unless Lewis was working overtime, and he testified that Lewis was out of work for a while. (Tr. pp.320:24-25 to 320:1-10; 462:2-16).

Even if Lewis' testimony were true, Smith should be credited 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;<sup>11</sup> (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.

**4. Alleged Interrogation by Kip Smith of Van McCook and Marcus Horne—  
Exceptions 10, 13, 47, and 50.**

The ALJ incorrectly found that the alleged interrogation by Kip Smith of Van McCook violated Section 8(a)(1) of the Act. (JD 17:44-45). Van McCook and Marcus Horne testified in support of the allegation in paragraph 22(a) of the Amended Complaint. McCook testified that Smith asked him a question "something along the line" of how he feels about the union. (Tr. pp.235:24-25 to 236:1-10). Horne testified that Smith asked him how he was going to vote. (Tr. p.384:2-3). Smith denied 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

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<sup>11</sup> In fact, there was no promise of benefit or a threat of reprisal connected to the inquiry.

even on his shift, indicating that they would not have crossed paths to have such conversation. (Tr. pp.455:23-25 to 456:1-12).

Respondent notes that 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 Counsel failed to provide sufficient factual proof for the allegation in paragraph 22(a), it should have been 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 did not show that there was any history of hostility or discrimination between Smith and McCook or Horne, or that Smith was seeking any information to take any action against McCook or Horne.

**5. Alleged interrogation by Michael Geer of Andre Morman– Exceptions 47 and 50.**

The ALJ incorrectly found that the alleged interrogation by Michael Geer of Andre Morman violated Section 8(a)(1) of the Act. (JD 17:46). The General Counsel alleged that Michael Geer interrogated Andre Morman by asking him what he thought about the union. (Amend. Compl. ¶37). In support, Morman 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. pp.196:16-18, 23-15 to 197:1-20). Geer denies that he asked Morman or anybody else how they felt about the Union. (Tr. p.469:21-23). In fact, Geer testified that to his knowledge, Morman does not smoke, so he was never in the smoking area. (Tr. p.469:16-20). Geer should be credited.

Based on the foregoing, the General Counsel did not credibly establish that such conversation took place, and even if it had, it was lawful because Geer’s denial should be credited and: (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. p.197:11-19). 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).

**6. Alleged interrogation by Eric Banks of Chauncey Pryor and others—  
Exceptions 47 and 50.**

The ALJ incorrectly found that the alleged interrogation by Eric Banks of Chauncey Pryor violated Section 8(a)(1) of the Act. (JD 17:47). 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. p.159:10-24). However, Banks' testimony directly contradicts Pryor's testimony. (Tr. p.573:2-4). Banks's denial of the alleged interrogation should be credited.

Furthermore, assuming *arguendo* that Pryor's alleged version of the conversation took place, the General Counsel did not 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. Alleged Interrogation by Freddy Holmes of Jemel Webb– Exceptions 47 and 50.**

The ALJ found that the alleged interrogation by Freddy Holmes of Jemel Webb violated Section 8(a)(1) of the Act. (JD 17:48). This was error. Webb testified that Holmes asked Webb what the Union could do for him. Then, Webb said that the better paying jobs in the area were all union-based facilities. (Tr. pp.219:5-25 to 220:1-7). Holmes denied the allegation in paragraph 25(a). (Tr. p.485:22-25). 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. p.486:1-2). In response to their question, Holmes shared his experience with the Teamsters. (Tr. p.486:3-14).

Based on the foregoing testimony, the General Counsel failed to present sufficient credible evidence to prove the allegation in paragraph 25(a). Holmes denial should be credited. Webb admitted pecuniary interest in the outcome of the union election and he should not be credited. (Tr. pp.219:2-25 to 220:1-10). 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 threat of 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. 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).

**8. Alleged interrogation by Stevon Graham of Landon Bradley– Exceptions 47 and 50.**

The ALJ found that the alleged interrogation by Stevon Graham of Landon Bradley violated Section 8(a)(1) of the Act. (JD 18:1). This again demonstrates ALJ’s bias against Respondent’s witnesses. There is no allegation in the Amended Complaint that states or even suggests an unlawful interrogation by Graham of Bradley. During the hearing, Bradley testified that Stevon approached him and allegedly said, “I haven’t talked to you about it but what do you think about the whole situation, what are you planning to do? And he never said it, he just kind of alluded to it, and I just said, well, I’m not really sure what I’m going to do. And he said, oh, okay, well, I’m sure you’ll make the right decision. And that was the end of that conversation.” (Tr. pp.181:18-25 to 182:1-12). Paragraph 20 of the Amended Complaint, which the ALJ cited, has no allegation related to the above conversation, and there is no other allegation that involves Stevon Graham in the Amended Complaint. The ALJ’s finding of a violation of the Act based on the disputed conduct of Graham which was not even alleged in the Amended Complaint is erroneous.

**9. Alleged interrogation by Lorenzo Brown of Landon Bradley– Exceptions 47 and 50.**

The ALJ incorrectly found that the alleged interrogation by Lorenzo Brown of Landon Bradley violated Section 8(a)(1) of the Act. (JD 18:2). Bradley asserted that Lorenzo Brown asked him what he thought about Kumho staying a non-union facility. (Tr. p.178:5-7). In response, Bradley just walked off. (Tr. p.178:8-9). Brown denies that such alleged interrogation occurred and that denial should be credited. (Tr. p.510:3-15).

Even if the interchange had occurred, the single question is not unlawful because: (1) there was no connection between the alleged 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; and (3) Brown was not Bradley's team lead. In fact, Brown is in quality control (Tr. p.509:12-13), and Bradley is in the curing department (Tr. p.175:10-22).

**10. Alleged interrogation by Cliff Kleckley of Chase Register and Van McCook—  
Exceptions 21, 47, 50, and 55.**

The ALJ incorrectly found that Cliff Kleckley is Section 2(13) agent of the Company and therefore, the alleged interrogation by Kleckley of Chase Register and Van McCook violated Section 8(a)(1) of the Act. The bases for the ALJ's findings are as follows: (1) Kleckley issues safety violations that may result in discipline, which is completely contradictory of the record evidence; (2) when Kleckley tells employees to utilize safety equipment, they do so; (3) Kleckley testified voluntarily at the hearing for Respondent without a subpoena; and (4) Kleckley allegedly asked employees "can I count on you?" (JD 13:2-9).

None of the ALJ's reasoning establishes an agency relationship between Kleckley and Kumho, which is required to establish Section 2(13) agency relationship. 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)).

The General Counsel failed to satisfy its burden to prove that Kleckley is an agent of the Company based on the record evidence. 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. (Emphasis added). 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. p.542:8-19). 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. p.543:11-23).

With the absence of any evidence introduced by the General Counsel to establish an agency relationship between Kleckley and Kumho, it is erroneous for the ALJ to find that Kleckley was Section 2(13) agent of the Company. Accordingly, no statements or conduct by Kleckley may be imputed to Respondent as well. Moreover, the ALJ’s finding that Kleckley is Section 2(13) agent of the Company is especially controversial considering that the ALJ did not find sufficient facts to establish that Kleckley was Section 2(11) supervisor of the Company.

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; 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).

**11. Alleged interrogation by Chris Butler of Marcus Horne - Exceptions 47 and 50.**

The ALJ found that the alleged interrogation by Chris Butler of Marcus Horne violated Section 8(a)(1) of the Act. (JD 18:4). This was error. Marcus Horne testified in support of paragraph 21(a) of the Amended Complaint. 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. pp.378:23-25 to 379:1-5). Horne further testified that he did not tell anybody about this alleged conversation with Butler prior to the election. (Tr. p.390:12-15). 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) of the Amended Complaint and it should have been dismissed.

**12. Alleged interrogation by Chris Butler of Landon Bradley involving the “Vote No” hat – Exception 2 47 and 50.**

The ALJ incorrectly found that the alleged interrogation by Chris Butler of Landon Bradley about whether Bradley wanted a “Vote No” hat violated Section 8(a)(1) of the Act. (JD 18:5).

The General Counsel introduced testimony of Landon Bradley in an attempt to support paragraph 29 of the Amended Complaint. Bradley 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. pp.180:10-24 to 181:1-2; 181:11-14). 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 of the Amended Complaint alleges that the interaction took place on the work floor, Bradley testified that it took place in the curing break room. Also, while paragraph 29 alleged 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, that allegation should have been dismissed.

**13. Alleged interrogation by Kip Smith of Chase Register Alleged in Paragraph 32 – Exceptions 10, 47, and 50.**

In the ALJ's Decision, he found that Respondent violated Section 8(a)(1) of the Act in each and every interrogation alleged in the complaint. (JD 17:9-10). Thereafter, the ALJ lists specific findings on alleged interrogations, but does not include the allegation of paragraph 32 of the Amended Complaint regarding an allegation of interrogation by Kip Smith of Chase Register. Regardless, any ALJ finding of a violation of the Act with respect to the allegation of paragraph 32 is erroneous for the reasons set forth below.

The General Counsel alleged Smith engaged in unlawful interrogation by asking employees "what team they were on." (Amend. Compl. ¶32). In support, the General Counsel introduced the testimony of Chase Register, wherein he testified that "[Smith] asked me what team I was on." (Tr. p.29:7-9). 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. p.29:10-13) (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 (i.e., Smith asked employees what team they were on and told them that he was asking if they were pro- or anti-Union). Accordingly, the General Counsel failed to provide sufficient factual proof for the allegation in paragraph 32 of the Amended Complaint.

Moreover, Smith vehemently denies that he asked Register what team he was on, and Smith should be credited over Register. If "team" actually meant union support, as the General Counsel suggested, Smith knew Register was a supporter of the Union so there was no need for Smith to ask Register what team he was on. Register previously had come forward and told Smith that he

was afraid he was being perceived as the Union ringleader. (Tr. p.459:3-16). Smith also knew that Register was pro-Union due to his responses during classes that were provided to educate the operators. (Tr. p.460:1-9). In fact, Register was very open and vocal about his pro-Union position. (Tr. pp.46:22-25 to 47:1-3). 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. p.48:13-18). 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. pp.48:21-25 to 49:1-7).

Assuming *arguendo* that Smith had 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. Thus, the ALJ’s apparent finding at page 17 lines 9 and 10 that the interrogation violated the Act is error.

**F. The Exceptions to Findings of Other Alleged Interference Have Merit – Exceptions 11, 12, 14, 26, 51-54, 56-58 and 63-66.**

**1. Kip Smith allegedly telling employees that he would not be able to assist them in their work – Exceptions 11, 12, and 51.**

The ALJ found that Kip Smith threatened changed working conditions and violated Section 8(a)(1) of the Act 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. (JD 18:7-16). The ALJ’s finding and conclusion again are a product of his bias in favor of the General Counsel’s “employee witnesses” in his credibility determinations and are erroneous.

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. p.360:1-4). 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. p.381:13-22). Van McCook testified that Smith allegedly commented that due to rules, if the Union came in, Smith could no longer help employees. (Tr. p.241:15-22). 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. pp.25:15-25 to 26:1-2).

Smith denied their assertions and should be credited. He credibly 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. pp.452:7-25 to 453:1-20; 453:21-25 to 454:1-18, 456:13-25). 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.

**2. Kip Smith allegedly telling Van McCook that if employees selected the union he not be able to give McCook a day off without 10 days’ notice – Exception 52.**

The ALJ found that Kip Smith threatened changed working conditions and violated Section 8(a)(1) of the Act by telling Van McCook that if employees selected the union he would not be able to give McCook a day off without 10 days’ notice. (JD 18:7-9; 18-21). The ALJ’s finding and

conclusion again are a product of his bias in favor of the General Counsel's "employee witnesses" in his credibility determinations and are erroneous.

The Company generally requires an employee to provide a 10-day advance notice to seek time off. (Tr. pp.26:25 to 27:1-6). Van McCook testified that before the shift started one day, 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. pp.238:20-25 to 239:1-4; p.27:12-23). 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. p.27:12-21).

In contrast to the employee witnesses, Smith credibly 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. (Tr. p.455:3-19). 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. p.455:20-22). 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. p.455:3-19).

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. Michael Geer allegedly telling Annie Scott not to harass other employees when the employees asked not to be harassed – Exception 53.**

The ALJ found that Michael Geer violated Section 8(a)(1) of the Act by telling employee Annie Scott not to talk to other employees about the Union. (JD 18:23-33). The ALJ’s finding and conclusion is not supported by the evidence, was a product of his bias in favor of the General Counsel’s “employee witnesses” in his credibility determinations, and is erroneous.

Scott testified that Geer approached her to talk to her outside. Geer allegedly said, “Ms. Scott, you know it’s harassment if you talk to anyone about the union.” (Tr. p.282:20-25). 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 is not credible but was credited by the ALJ without any specification of any valid reasons. That testimony was countered by credible testimony of Geer. 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 indicated that she had 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. pp.470:21-25 to 471:1-12). 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. p.471:16-21). (Emphasis added). His statement was true and lawful. He made no direction to stop and he made no threat of discipline.

According to Geer, 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. pp.471:22-25 to 471:1). In short, instead of responding to Geer's advice regarding harassment, Scott started discussing Cooper Tire and the potential outcome of the Cooper Tire bargaining. Geer responded, "It doesn't matter," and what matters is all employees making an informed decision. He reminded Scott that she needed to respect the wishes of other employees. (Tr. p.472:2-15).

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. Similarly, the allegation involving Geer and Scott should have been dismissed.

**4. Aaron Rutherford allegedly creating an impression of surveillance – Exception 54.**

The ALJ found that Aaron Rutherford violated Section 8(a)(1) of the Act by creating the impression that the Company was engaged in surveillance of employees' union activities. (JD

18:35-42 to 19:1-3). The ALJ, as the sole basis for the finding, stated that “ Rutherford’s statement to Marcus Horne that Respondent is watching who posted on a pro-union website, at least created the impression that the company would [sic] placing employees’ union activities under surveillance ...” (JD 18:41-19:1-3). There was no such statement in any record evidence. Thus, the ALJ’s finding and conclusion is not supported by the evidence<sup>12</sup>. Moreover, the finding and conclusion were a product of the ALJ’s bias in favor of the General Counsel’s “employee witnesses” in his credibility determinations, and are erroneous.

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 evidence of record, the ALJ erred in finding a violation of the Act based on the alleged impression of surveillance. Based on all relevant circumstances, it is

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<sup>12</sup> Marcus Horne testified 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 that you post on that site (referring to the private Facebook website).” (Tr. pp.385:24-25 to 386:1-11). Rutherford denied 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. p.501:8-25). 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. p.502:1-9).

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.

Lastly, even if Horne's testimony were credible, which it is not, the statement that Horne claims was made does not indicate in any way that the Company was watching a pro-union website for its source of knowledge about employee activities. Employees could have been the source, if any, for Company's knowledge. Employees are allowed to watch such websites and tell their employers of their own free choice.

**5. Michael Geer's alleged post-election suggestion that Respondent would get rid of some or all employees who voted for union representation – Exceptions 56 and 58.**

The ALJ found that Michael Geer violated Section 8(a)(1) of the Act by making the post-election suggestion that Respondent would get rid of some or all employees who voted for union representation. (JD 19:14-23). The ALJ's finding and conclusion was a product of his bias in favor of the General Counsel's "employee witnesses" in his credibility determinations and is erroneous.

Brandon Lucas 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. pp.260:16-25 to 261:1-23). Geer denies making this statement. (Tr. pp.472:21-25 to 473:1-3). The ALJ says he credits Lucas over Geer without any stated or reasonable basis, apparently because he credits current employees over supervisors simply because of impermissible and unreasonable bias. See ALJ Dec. p. 13, lines 39 to 41. Respondent contends that Geer's denial is more credible. Regardless, post-election conduct cannot a basis for objection to an election. See Head Ski Co., 192 NLRB 217, 218 (1971).

**6. Aaron Rutherford allegedly telling Mario Smith that Respondent would “go by the book” if the employees selected the Union and that employees who posted on the pro-union website would suffer retaliation as well – Exception 57.**

The ALJ found that Aaron Rutherford violated the Act by telling Mario Smith that Respondent would “go by the book” if the employees selected the Union and that employees who posted on the pro-union website would suffer retaliation as well. (JD 19:25-33). The ALJ’s finding and conclusion was a product of his bias in favor of the General Counsel’s “employee witnesses” in his credibility determinations and is erroneous.

Mario Smith testified that during a 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. p.73:18-21). Rutherford denied making these statements. (Tr. pp.500:25 to 501:1-2). 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). Moreover, there is no evidence that Rutherford told Mario Smith<sup>13</sup> that employees who posted on the pro-union website would suffer retaliation as well, contrary to the ALJ’s finding that there was.

**IV. CONCLUSION**

For the reasons set forth herein and in the accompanying Exceptions, the Respondent requests that the ALJ’s Decision and remedial order not be adopted as the Board’s Decision and Order and that the Amended Complaint and the Representation Case be dismissed. Respondent

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<sup>13</sup> There was an allegation that Marcus Horne had such conversation with Aaron Rutherford. This is allegation is addressed in Section F.4.

further requests that the representation election result not be set aside, contrary to the recommendation of the ALJ.

Respectfully submitting, this 25th day of June, 2019.

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

<b>KUMHO TIRES,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>and</b>	)	<b>Case 10-CA-208255</b>
	)	<b>Case 10-CA-208414</b>
	)	<b>Case 10-RC-206308</b>
<b>UNITED STEEL, PAPER &amp; FORESTRY</b>	)	
<b>RUBBER, MANUFACTURING, ENERGY</b>	)	
<b>ALLIED INDUSTRIAL &amp; SERVICE</b>	)	
<b>WORKERS INTERNAIONAL UNION</b>	)	
<b>AFL-CIO, CLC</b>	)	
<b>Petitioner.</b>	)	
	)	
	)	
	)	

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This is to certify that I have electronically filed the above **Respondent’s Brief in Support of Exceptions** 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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