

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**SHAMROCK FOODS COMPANY**

**and**

**Cases 28-CA-167910  
28-CA-169970**

**BAKERY, CONFECTIONERY, TOBACCO  
WORKERS' AND GRAIN MILLERS  
INTERNATIONAL UNION, LOCAL  
UNION NO. 232, AFL-CIO-CLC**

**COUNSEL FOR THE GENERAL COUNSEL'S  
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS**

Counsel for the General Counsel (CGC) opposes the Motion to Dismiss Complaint Allegations (the Motion) filed by Shamrock Foods Company (Respondent) on May 20, 2016. The Motion seeks dismissal of Paragraphs 5(a)(1) and (2) of the Consolidated Complaint, which allege that Respondent unlawfully interrogated employees and created the impression that their union activity was under surveillance by distributing orange "We are Shamrock" shirts on about August 16, 2015. Respondent argues that these allegations are precluded by the collateral estoppel doctrine and are time-barred.

Respondent argues that these allegations are estopped because they are no different from than allegations that were litigated in a hearing before Administrative Law Judge Keltner W. Locke (ALJ Locke) in Cases 28-CA-161831, 28-CA-162851, and 28-CA-165951 on March 15, 2016, through March 22, 2016. Respondent characterizes the inclusion of new allegations related to interrogation and creating the impression of surveillance through the distribution of "We are Shamrock" shirts in the instant Consolidated Complaint as an attempt by the General Counsel to re-litigate the same issue already litigated before ALJ Locke.

However, the instant allegations are different from the allegations already litigated before ALJ Locke. The allegations of the Consolidated Complaint in the matter before ALJ Locke related to Respondent's mass distribution of orange "We are Shamrock" shirts throughout its warehouse in July 2015 and statements made by Floor Captain David Cruz about the shirts on a date in or around early August 2015. In contrast, the allegations of the Consolidated Complaint in the instant matter relate to an incident in which Loading Dock Supervisor Leland Scott individually presented employee John Tolliver, an alleged discriminatee in the instant matter, with an orange "We are Shamrock" shirt several weeks to a month after the initial mass distribution of the shirts. This incident is alleged to have independently violated the Act.

The fact that Respondent's conduct in both the prior and instant matters involved the distribution of orange "We are Shamrock" shirts does not change the fact that the conduct raised by the instant allegations amounts to separate, independent unfair labor practices. Just as a supervisor may unlawfully interrogate an employee by directly inquiring about the employee's union sympathies on a certain date, the same supervisor may again unlawfully interrogate that same employee or other employees by asking the same question on a different date. This situation is no different. Respondent does not dispute that no evidence concerning the incident involving Scott and Tolliver on about August 16, 2015, was adduced during the hearing before ALJ Locke, and it could not make such a claim, as that matter simply has not yet been litigated.

Respondent argues that the fact that CGC's subpoena seeks documents similar to documents sought in the litigation of the prior matter before ALJ Locke illustrates that CGC is attempting to re-litigate the matter already litigated before ALJ Locke. This is a blatant *non*

*sequitur*. As explained above, the allegations of the Consolidated Complaint in the prior matter and those of the Consolidated Complaint in the instant matter relate to separate incidents, and the allegations raised in the instant matter have not yet been litigated. CGC has sought similar documents in the subpoenas in both matters because, although the allegations in both matters refer to separate incidents, both incidents relate to distribution of orange “We are Shamrock” shirts, and it is anticipated that Respondent will raise similar defenses with respect to the allegations in both matters. That is, it is anticipated that Respondent will argue that its distribution of the shirts was merely part of a safety program it implemented outside the Section 10(b) period, and that it was not aimed at forcing employees to publicly disclose their Union sympathies. The fact that Respondent may raise similar defenses simply does not in turn mean that the allegations in the instant matter have already been litigated.

To the extent Respondent is arguing that the allegations in the instant matter should already have been litigated through consolidation with the prior matter, the Regional Director has properly exercised prosecutorial discretion to litigate the allegation related to the one-on-one incident involving Scott and Tolliver together with the other allegations related to the discipline of Tolliver in a later, separate proceeding. Although Respondent might prefer for CGC to defer litigation of all charges against it until all allegations can be litigated together in one hearing, the Regional Director has made a reasoned judgment that the matters involving Respondent, all of which have arisen during the course of an organizing campaign, some of which involve discharges during an organizing campaign, and some of which the Board has found to warrant authorization of the filing of petitions seeking Section 10(j) injunctive relief, should be litigated without delay, as investigations of charges are completed. Consolidating new allegations into pending complaints each time a new allegation against Respondent is

found to have merit would create a risk of undue delay of an urgent matter and could undermine a petition for Section 10(j) injunctive relief.

Respondent argues that the CGC's position that litigating allegations against it in separate hearing would cause undue delay is undermined by the fact that the allegations at issue in the instant matter were included in a Consolidated Complaint that issued one week before the hearing before ALJ Locke in the prior matter concluded.<sup>1</sup> However, the hearing before ALJ Locke, which commenced on March 17, 2016, and, essentially concluded on March 22, 2016, three days before the original Complaint in this matter was issued, in addition to involving allegations related to the distribution of orange "We are Shamrock" shirts, involved allegations of a discharge and the removal of two employees from light duty, resulting in a loss of work, all during an organizing campaign. The Board has determined that the allegations in the prior matter warrant the filing of a petition for Section 10(j) injunctive relief. An attempt to consolidate the matters raised by the Complaint in the instant matter with the issues already litigated before ALJ Locke would most certainly have resulted in a delay in the litigation and disposition of the matter before ALJ Locke, thus posing a risk of remedial failure in a priority matter. Moreover, "[e]ven where the General Counsel fails to consolidate cases that the Board believes should have been consolidated, the Board will not dismiss the complaint in the absence of a showing of prejudice to the respondent." *U-Haul of Nevada, Inc.*, 345 NLRB 1301, 1302 (2005), *enfd.* 490 F.3d 957 (D.C. Cir. 2007). Here, Respondent has not made any showing of prejudice. In sum, CGC should not be precluded from litigating the allegation concerning Scott's separate, independent unlawful conduct toward Tolliver.

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<sup>1</sup> The original complaint in this matter issued on March 30, 2016. The majority of the prior hearing closed on March 22, 2016.

Respondent's additional argument that these allegations are time-barred is also without merit. Respondent argues that these allegations do not relate back to the original filing date of the charge because the charge "alleged only that [Tolliver] was unlawfully disciplined." However, the referenced charge actually alleges that Respondent engaged in unfair labor practices within the meaning of both Section 8(a)(1) and (3) of the Act, and it not only alleges that Tolliver was disciplined, but, also, alleges, broadly, that he was "harassed." Again, the allegations that Scott created the impression of surveillance and engaged in unlawful interrogation relate to conduct by Scott that was directed specifically at Tolliver. Thus, the allegations are clearly encompassed by the original charge, which was filed well within the Section 10(b) period.

Based on the forgoing, CGC respectfully requests that the Motion be denied in its entirety.

Dated at Phoenix, Arizona this day of 23<sup>rd</sup> day of May 2016.

*/s/ Sara S. Demirok*

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Sara S. Demirok  
Counsel for the General Counsel  
National Labor Relations Board, Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Phone: (602) 640-2123  
Fax: (602) 640-2178  
E-mail: [Sara.Demirok@nlrb.gov](mailto:Sara.Demirok@nlrb.gov)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT ALLEGATIONS in Shamrock Foods Company, Cases 28-CA-167910 and 28-CA-169970, was served by E-Gov, and E-Filing, E-Mail, or Regular U.S. Mail on this 23<sup>rd</sup> day of May 2016, on the following:

### Via E-Gov & E-Filing:

Honorable Gerald M. Etchingham  
Associate Chief Administrative Law Judge  
NLRB – Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

### Via E-Mail:

Todd A. Dawson, Attorney at Law  
Baker & Hostetler, LLP  
1050 Connecticut Avenue NW, Suite 1100  
Washington, DC 20036  
[tdawson@bakerlaw.com](mailto:tdawson@bakerlaw.com)

Nancy Inesta, Attorney at Law  
Baker & Hostetler, LLP  
1050 Connecticut Avenue NW, Suite 1100  
Washington, DC 20036  
[ninesta@bakerlaw.com](mailto:ninesta@bakerlaw.com)

Jay Krupin, Attorney at Law  
Baker & Hostetler, LLP  
1050 Connecticut Avenue NW, Suite 1100  
Washington, DC 20036  
[jkrupin@bakerlaw.com](mailto:jkrupin@bakerlaw.com)

David A. Rosenfeld, Attorney at Law  
Weinberg, Roger, & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501  
[drosenfeld@unioncounsel.net](mailto:drosenfeld@unioncounsel.net)

*/s/ Dawn M. Moore*

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Dawn M. Moore  
Acting Secretary to the Regional Attorney  
National Labor Relations Board  
Region 28 - Las Vegas Resident Office  
Foley Federal Building  
300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, Nevada 89101  
Telephone: (702) 388-6417  
Facsimile: (702) 388-6248  
E-Mail: [Dawn.Moore@nlrb.gov](mailto:Dawn.Moore@nlrb.gov)