

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

SHAMROCK FOODS COMPANY

and

Case 28-CA-161831

ANDRES CONTRERAS, an Individual

and

**Cases 28-CA-162851
28-CA-165951**

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

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

This case involves actions of Respondent Shamrock Foods Company (Respondent) aimed at systematically identifying supporters of Charging Party Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC (the Union) and eliminating them from the workplace.

Embroided in a contentious Union organizing campaign, in July 2015,¹ Respondent bootstrapped onto an action taken by a faction of its anti-Union employees to display their opposition to the Union's organizing campaign—their wearing orange shirts to send the message, “Don't bother me,”—in order to force all of its employees to make a highly visible choice to display, or not to display, opposition to the Union. After a contingent of more than 15 to 20 of Respondent's anti-Union employees began wearing orange shirts to repel Union supporters and show their solidarity in opposing the Union, Respondent distributed high-visibility orange shirts prominently featuring the statement of loyalty, “We are Shamrock,” to all employees in its warehouse.

Objectively, given this sequence of events, employees would understand the orange “We are Shamrock” shirts to be intended to give employees a means to signify opposition to the Union. By putting its employees in a position in which they had to choose whether or not to wear the shirts on the work floor, Respondent effectively interrogated them about their Union sentiments and created the impression that their Union activities were under surveillance. Further, Respondent's giving the “We are Shamrock” shirts to its employees was an unprecedented action, and, unlike other high-visibility shirts Respondent provided to employees, the “We are Shamrock” shirts were not given to employees as part of their annual uniform

¹ All dates are in 2015, unless otherwise noted.

orders. In that sense, giving the shirts to employees also amounted to a grant of benefits to discourage Union support.

After taking this action to force its employees to make an observable choice about whether to display opposition to the Union, in October, Respondent targeted two particularly vulnerable Union supporters, Marvin Woods (Woods) and Benny Saenz (Saenz), for elimination from the workplace. At the time, Respondent had recently faced the possibility of the issuance of a remedial bargaining order based on a finding that a majority of its employees at one point supported the Union but that its unfair labor practices rendered the chances of fair election slight. Woods and Saenz were part of a renewed push for employees to sign Union authorization cards around that time. Although Respondent had allowed Woods and Saenz to remain on modified duty for 14 months and 7 months, respectively, prior to their participation in the push for Union authorization cards, in October, in the wake of that push, Respondent abruptly put an end to its largesse, removing both employees from modified duty, and, thus, removing them from the workplace. Although Respondent contends that this action was consistent with its long-standing policy limiting modified duty assignments to no more than 90 days, Respondent had never enforced this 90-day limitation until it used it to oust Woods and Saenz. Several months later, Respondent took further action against Saenz, telling him that he was no longer guaranteed a return to his former position and informing him, essentially, of the phasing out of his medical insurance over time.

Respondent's unlawful actions are undermining its employees' right to freely choose a union to negotiate with Respondent on their behalf. These actions must not go unaddressed. Counsel for the General Counsel (CGC) respectfully requests that the National Labor Relations Board (the Board) grant the General Counsel's exceptions, find that Respondent's distribution of

the “We are Shamrock” shirts and its removal of Saenz and Woods from modified duty were unlawful, and order all remedies necessary to protect the rights of Respondent’s employees under the National Labor Relations Act (the Act).

II. STATEMENT OF THE CASE

On January 29, 2016, the Regional Director for Region 28 issued an Order Consolidating Complaint, Consolidated Complaint and Notice of Hearing (the Complaint) in this matter, which was subsequently amended in certain respects at hearing. (JD 2:19-31)² Administrative Law Judge Keltner W. Locke (ALJ Locke) conducted a hearing concerning the allegations of the Complaint in Phoenix, Arizona, on March 15 through 18 and 21 through 22, 2016, and by videoconference on April 27, 2016. (JD 2:33-34). On May 13, 2016, CGC and Respondent’s Counsel made oral arguments on the record to ALJ Locke by telephone conference. (JD 2:34-35) On June 10, 2016, ALJ Locke issued a decision recommending dismissal of the Complaint. (JD 35:22) In exceptions filed concurrently with this brief, CGC has excepted to certain portions of ALJ Locke’s decision pursuant to Section 102.46 of the Rules and Regulations of the Board.

III. QUESTIONS INVOLVED AND ISSUES TO BE ARGUED

- A. Did ALJ Locke err in failing to take administrative notice of the decision of Administrative Law Judge Wedekind (ALJ Wedekind) in *Shamrock Foods Co.*, JD(SF)-05-16 (Feb. 11, 2016)? (Exceptions 35, 57, addressed in Section V.A below)
- B. Did ALJ Locke err in failing to find that Respondent’s distribution of high-visibility orange “We are Shamrock” shirts amounted to interrogation, creation of the impression of surveillance, and a grant of benefits to discourage employees from supporting the Union? (Exceptions 1 through 45 and 79 through 83, addressed in Section V.B below)

² As used in this brief, “JD” refers to ALJ Locke’s decision, *Shamrock Foods Co.*, JD-49-16 (Jun. 10, 2016); “Tr.” to the transcript of the hearing before ALJ Locke; “GC” to General Counsel Exhibits; “R” to Respondent’s Exhibits; and “Exc.” to the General Counsel’s Exceptions.

- C. Did ALJ Locke err in failing to find that Respondent changed the manner in which it enforced its modified duty program, removed Woods and Saenz from modified duty, and take further action against Saenz because Woods and Saenz supported the Union? (Exceptions 46 through 83, addressed in Section V.C below)
- D. Did ALJ Locke err in failing to order that Respondent publicly read the Notice to Employees to its employees? (Exception 84, addressed in Section V.D below)
- E. Did ALJ Locke err in failing to order that Respondent compensate Woods and Saenz by making them whole, including through payment for search-for-work and work-related expenses, regardless of whether these amounts exceed interim earnings? (Exception 85, addressed in Section V.E below)

IV. STATEMENT OF THE FACTS

A. Background

Respondent is engaged in the wholesale distribution of food products. (JD 3:10-11)

Respondent has six distribution centers in five states, including its distribution center in Phoenix, Arizona, which is its largest distribution center. (Tr. 51) The conduct at issue in this matter took place at Respondent's Phoenix warehouse.

Respondent's employees at its Phoenix warehouse report to Captains, who report to Warehouse Supervisors, who report to Warehouse Managers, who report to Warehouse Operations Manager Ivan Vaivao (Vaivao), who, in turn, reports to Operations Manager, Tim O'Meara.³ (Tr. 47) Respondent also has a human resources department with offices in the same building as the Phoenix warehouse. (Tr. 52-53, 480) Human Resources Business Partner Daniel

³ The General Counsel is not excepting to ALJ Locke's finding that CGC did not meet the burden of establishing that Respondent's Captains are supervisors within the meaning of Section 2(11) of the Act, even though, in CGC's view, the record amply establishes their supervisory status. (Tr. 64-69, 87, 112-114, 148-149, 221-223, 291-295, 300-318, 330-334, 350-351, 653-658, 938-941, 975-982) The General Counsel is not excepting to that finding in view of the ALJ's decision to credit Captain David Cruz's denial of testimony of employee witnesses concerning conduct by Cruz that is relevant to this case despite Cruz's stunning and incredible claims of lack of recall in response to CGC's questioning (JD 6:19-21, 12:15-15:2, 18:26-19:34; Tr. 317-322), and also in view of the Board's policy against overruling administrative law judges' credibility resolutions unless the clear preponderance of evidence convinces it that those resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

Santamaria (Santamria) and Human Resources Manager Heather Vines-Bright (Vines-Bright) belong to the human resources department. Respondent also has a worker's compensation department, in which Jamie Keith (Keith) worked as Respondent's Workmen's Compensation Claims Manager and reported to Safety Director Branch Muller (Muller) during times relevant to this matter. (Tr. 203-204, 465-466, 468, 497, 729)

B. Employees' Organizing Efforts and Respondent's Attempts to Quash Them

Long before the organizing campaign during which the conduct at issue in this case occurred, in 1998, warehouse employees and drivers at Respondent's Phoenix warehouse launched a campaign seeking representation by International Brotherhood of Teamsters, Local No. 104 General Teamsters (excluding Mailers), State of Arizona, affiliated with International Brotherhood of Teamsters, AFL-CIO. In response to that campaign, Respondent illegally interrogated employees, asked employees to report their coworkers' union activities, spied on employees' union activities, and suspended and discharged an active union supporter. *Shamrock Foods Co.*, 337 NLRB 915 (2002), *enfd.* 346 F.3d 1130 (D.C. Cir. 2003).

Sixteen years later, in December 2014, Respondent's employees again summoned the courage to initiate a campaign to seek union representation, this time by the Union. (Tr. 573) Employee Steve Phipps approached employee Saenz early in the campaign, and, by January, the two had formed an organizing committee. (Tr. 573) During these nascent stages of the organizing campaign, several employees, including employee Woods, who signed in March, signed Union authorization cards. (Tr. 503)

On February 11, 2016, based on evidenced at a hearing held over 7 days between September 8 and 16, concerning the allegations of a complaint issued on July 21 and amended on August 13, ALJ Wedekind issued a decision finding that, between January and June, Respondent

engaged in a barrage of unfair labor practices, including interrogating employees, threatening employees, promising and granting benefits to employees, telling employees to report union activities, informing employees that support for the Union was futile, engaging in surveillance, creating the impression of surveillance, confiscating Union flyers, disciplining one employee because of his Union support, and discharging another employee for his Union support.

Shamrock Foods Co., JD(SF)-05-16. Many of ALJ Wedekind's findings were based on actual recordings of Respondent's unlawful conduct. *Id.* at 3-4, 6, 8-10, 13, 27, 38-39, 41. The conduct that was the subject of ALJ Wedekind's decision also led to the issuance of a Section 10(j) injunction by the United States District Court for the District of Arizona (Humetewa, J.) on February 1, 2016. *Overstreet v. Shamrock Foods Co.*, CV-15-01785-PHX-DJH (Feb. 1, 2016). ALJ Locke denied CGC's motion for him to take administrative notice of ALJ Wedekind's decision, and he also sustained Respondent's objection to the General Counsel's attempt to elicit testimony about Respondent's underlying unlawful conduct in the case before ALJ Wedekind for the purpose of establishing that Respondent harbored hostility toward its employees' organizing campaign. (JD 24:9-42; Tr. 192-195)

Around the time when ALJ Wedekind conducted the hearing in September, Saenz openly discussed the hearing and the Union with employees in the warehouse. (Tr. 574, 576-578) On September 16, pursuant to a request by CGC, ALJ Wedekind held the record of the hearing before him open indefinitely pending investigation of a new charge filed by the Union, seeking a remedial bargaining order under *NLRB v. Gissel Packing Corp.*, 395 U.S. 575 (1969), which would require an investigation of whether the Union, at some point, reached majority status.⁴ *Shamrock Foods Co.*, JD(SF)-05-16 at 2 n. 2. Around that same time, Phipps approached Saenz and told him that he needed to press to get more Union authorization cards signed. (Tr. 578)

⁴ The charge was later withdrawn. *Shamrock Foods Co.*, JD(SF)-05-16 at 2 n. 2.

Saenz did so, soliciting employees to sign cards, distributing flyers, and talking to other employees about the Union. (Tr. 578-581; GC 27) Saenz also talked to Captain Art Manning and Warehouse Supervisor Leland Scott (Scott), an admitted supervisor, openly about the Union. (Tr. 581-582) Around the time Saenz was pressing for more employees to sign cards, Woods also attended a Union meeting where he was encouraged to try to get employees to join the organizing campaign and then started passing out Union flyers and soliciting employees to sign Union authorization cards. (Tr. 504-507; GC 8, 9) In fact, Vaivao admitted to seeing some of the same flyers Woods distributed. (Tr. 98-99, 504-507; GC 8, 9) Woods also re-signed a Union authorization card himself in October. (Tr. 503-508) Vaivao freely admitted that he knows which employees are involved in its employees' organizing campaign, even offering, "And it's out now. It's public knowledge now." (Tr. 72)

It is against this backdrop that the conduct at issue in this case occurred.

C. Respondent's Distribution of High-Visibility Orange "We Are Shamrock" Shirts

In late April and early May 2015, a group of anti-Union employees began wearing orange shirts at Respondent's Phoenix warehouse. (Tr. 89, 276-277) One of those employees, Leonardo Baeza (Baeza), testified that, initially, only about 15 to 20 anti-Union employees wore the shirts. (Tr. 277) However, Baeza explained that, after that, "it just kept growing," and that "a lot" of employees started wearing orange shirts. (Tr. 277) Baeza unequivocally testified that the anti-Union employees wore the shirts to signify opposition to the Union. (Tr. 276-277) He gave the following testimony when asked why he wore an orange shirt:

Me personally, I do have my reason for it. But there was a group of us that felt this way. And it was -- honestly, to be all honest, it was to create awareness that -- I mean because we had guys coming to us constantly about this union stuff.

[...]

And it was just the way of us to be like hey, we already made our decision. Stop the union stuff with us at least.

(Tr. 277) When asked to clarify, to the extent his earlier testimony was unclear on this point, Baeza explained that the employees wore the shirts to stop “pro-union” employees from coming up to them about the Union. (Tr. 276-277)

Warehouse Supervisor Scott admitted that he understood the orange shirts to signify that the employees wearing them were not interested in discussing the Union. (JD 8:12-9:19) Specifically, Scott testified, “My understanding was that they were wearing the shirts not to be harassed. To be left alone. You know, ‘I don’t want to be questioned, or asked, or given anything.’ You know, ‘I just want to work and go home.’” (Tr. 8:20-9:2) He later elaborated, “All I know is that they just wanted to say hey, I’m here to work and I don’t want to be bothered.” (JD 9:11-12)

ALJ Locke, essentially drawing an adverse inference against the General Counsel, found that the testimony of employee Woods contradicted CGC’s assertion that employees understood that wearing orange shirts signified unwillingness to talk about the Union. (JD 8:12-14, 8 n. 5) ALJ Locke reasoned that Woods certainly would have been aware of such a common understanding among employees, and it would have been in his interest to give testimony supporting that such a common understanding existed due to the claim about his being removed from modified duty because of his Union support. (JD 8:12-14, 8 n. 5) However, in this part of his decision, ALJ Locke glosses over the fact that Woods was just returning from being out of work for two weeks due to a surgery at the time when he was presented with one of the orange “We are Shamrock” shirts, and, prior to his surgery, he had been on modified duty since his injury on March 8. (JD 16:35-17:4, 6 n. 9; Tr. 528-529)

In mid-July, immediately following Respondent's anti-Union employees' collective use of orange shirts to ward off Union supporters, Respondent visually endorsed their message by distributing high-visibility orange DriFit (nylon) shirts with the message "We are Shamrock" printed in large black lettering across the back. (Tr. 968; GC 6, 19, 20) Warehouse Supervisor Scott and Warehouse Manager Jeff Vanderwalker distributed the shirts, with Scott distributing shirts from the loading dock, his office, and a conference room next to his office, and with Vanderwalker distributing shirts from his office. (Tr. 132-133, 370) The shirts were readily discernible from other high-visibility shirts worn by employees, so that employees wearing the shirts could easily be identified by supervisors. (Tr. 124, 444)

Although Warehouse Operations Manager Vaivao testified that Respondent distributed the "We are Shamrock" shirts to commemorate a successful season, Respondent had only recently distributed black commemorative "Shamrock Pride" shirts and hats at a barbeque on June 4 to commemorate the season, which ends in early May, on Mother's Day. (JD 5:28-29; Tr. 969-970; 1006-1007; R 45d) There is no evidence that Respondent ever distributed two different commemorative shirts to employees in rapid succession as it claims to have done here, and many commemorative shirts distributed to employees in the past seem to have been intended to commemorate anniversaries and holidays. (R 45) Many of the commemorative shirts distributed in the past also incorporated the color green, perhaps because it calls to mind Respondent's name and logo, Shamrock. (R 45) One commemorative shirt even had an image of a leprechaun on it, and another used a seemingly Celtic-style font. (R 45d) Other commemorative shirts had patriotic (red, white, and blue) or militaristic (camouflage) color schemes. (R 45d, 45e) The only orange shirt Respondent distributed in the past was a shirt for its security team, and was

apparently made in the color orange to differentiate the security team, make it identifiable, and signal the wearers' authority as security team members. (Tr. 1008; R 45e)

Further, although Vaivao testified that Respondent distributed the orange "We are Shamrock" shirts in furtherance of its newly-implemented high-visibility safety program, that program was implemented in 2014, and other apparel distributed in furtherance of that program, unlike the orange "We are Shamrock" shirts, had to be ordered through Respondent's annual uniform allowance. (Tr. 93-96, 425-426, 1002-1005; R 1, 44) Further, high-visibility apparel made available through the uniform allowance in the past was not orange but green: employees were permitted to order green high-visibility short- and long-sleeve shirts and green high-visibility hooded sweatshirts. (Tr. 366-367, 1004-1005) Respondent also provided employees who worked in the freezer with bibs and jackets to use while working there. (Tr. 1003-1005)

Vaivao also claimed that Respondent only selected the orange color of the "We are Shamrock" shirts because orange was the only color its vendor available in Dri-Fit material. (JD: 10:36-11:6; Tr. 969) Although ALJ Locke found that Vaivao's testimony on this point was confusing and was capable of some different interpretation, Vaivao testified, in response to a question about why Respondent chose orange:

We wanted, the reason why was [Operations Manager Jerry [Kropman] wanted a comfortable shirt and our vendor didn't have the DriFit in the other colors so that's the reason why we got the DriFit. The reason why it was orange is because we wanted a shirt for what it was intended for. Right? There's a date line, there's a time line that we wanted the shirts for. That was teh quickest that we could get those shirts in that DriFit material.

(JD: 10:36-11:6; Tr. 969) Vaivao later testified:

We had the orange shirts that we passed out, but, you know, the ones we passed out was, hey, to endorse our safety or HiVis. That was the – that was – that was the reason for that. The reason for the orange is because, hey, it was available in [DriFit]. So that way they don't have to wear a shirt and a vest over it. It's a just to wear a shirt and that's it.

(Tr. 1008) Vaivao clearly claimed that Respondent chose orange shirts, despite its favoring the color green for commemorative shirts and high-visibility shirts made available through its uniform allowance in the past, because the vendor only had DriFit shirts available in orange.

(Tr. 969, 1008) Documentary evidence plainly contradicts Vaivao's claim. Email correspondence between Respondent and its vendor clearly demonstrates that both the color orange, and the color traditionally favored by Respondent, green, were available. (GC 19 p. 1) Although ALJ Locke states that the email correspondence falls short of showing that both the orange and green shirts were DriFit, it is clear from the outset of the email exchange that the entire exchange related to an order for "Class 2 Hi-Vis Moisture Wicking Shirt." (GC 19 p. 3)

In addition to sending the message that Respondent was endorsing its anti-Union employees' message, Respondent's distribution of the shirts was a benefit to employees. The shirts, unlike high-visibility shirts distributed in the past, were not counted as part of employees' uniform allowance. (Tr. 95-96, 280-281, 1003-1005) Further, as Warehouse Operations Manager Vaivao explained, as DriFit shirts, the orange "We are Shamrock" shirts were more desirable than cotton shirts because of the high physical demand of Respondent's employees' work. (Tr. 968-969). In addition, wearing the shirts would allow employees to avoid having to wear safety vests, which affected their mobility and had to be donned and doffed at the start and at the start and end of the workday and before and after breaks. (Tr. 124-125, 611, 633)

D. Respondent's Changed Enforcement of Its Modified Duty Program and Removal of Woods and Saenz

On October 20 and 22, following the participation of Woods and Saenz in a push to solicit more Union authorization cards during a time when an investigation of the Union's

majority status for the purpose of determining the appropriateness of a remedial bargaining order was underway, Respondent removed Woods and Saenz from modified duty, thus removing them from the workplace. (Tr. 518-520, 592-594)

Woods and Saenz had both been employed by Respondent for a significant amount of time, Woods since 2013 and Saenz since 2010. (Tr. 500; 565) They also both sustained work-related injuries long before their removal from modified duty. Woods injured his ankle on March 8, and Saenz injured his knee on August 20, 2014. (Tr. 528, 570, 582, 604-606, 633-635, 640-641; GC 25) Woods and Saenz were both offered modified duty assignment after their injuries. Woods was assigned to perform various tasks, including data entry, filing, making boxes, helping in inventory, cutting paper, and working as a back-up Captain. (Tr. 500-501, 514) Saenz was also assigned to perform various tasks, including folding boxes, catching weights, closing out routes, organizing paperwork in the transportation department, and watching cranes. (Tr. 570, 572) Saenz and Woods also both sustained additional injuries after their initial placement on light duty. Woods underwent surgery on July 10 and was away from work for two weeks after that. (JD 16 n. 9; Tr. 510-511) Further, after being released to work full duty by his doctor, Woods returned to full duty on October 12, and, the same day, reinjured his ankle, requiring a return to modified duty. (Tr. 516-518) Saenz reinjured his knee while working modified duty on July 30 and October 20. (Tr. 583-588) On October 20 and 22, respectively, both Woods and Saenz were told that they were being removed from modified duty and should no longer come to work because they had exceeded the 90-day period during which they were permitted to remain on modified duty. (Tr. 518-520, 592-594)

Although Respondent contends that these employees' removal from modified duty was consistent with its policy limiting modified duty to 90 days, Respondent did not enforce that

policy until it used it to remove Woods and Saenz from the workplace in the wake of their push for Union authorization cards. Woods and Saenz had been permitted to remain on modified duty for far longer than 90 days—Woods for 7 months and Saenz for 14 months—, and, before the September push for more Union authorization cards, Respondent permitted Saenz to remain on modified duty despite a re-injury on July 30. (Tr. 516-520, 528, 570, 572, 582, 592-594, 604-606, 633-635, 640-641; GC 25) Further, another employee, Phillip Kiss (Kiss), was permitted to remain on modified duty for 10 months, from March 16, 2014, to January 15. (GC 36 p. 5) Respondent did not present evidence that, before its removal of Woods and Saenz from modified duty it had ever removed any other employee from modified duty for exceeding 90 days in that status.

Respondent also attempts to insulate the decision to remove Woods and Saenz from modified duty from its knowledge of, and animus toward, its employees' organizing campaign, by characterizing Workmen's Compensation Claims Manager Keith as the sole decision-maker and asserting that she lacked knowledge of the campaign. However, in its Answer to the Complaint, Respondent denied that Keith was a supervisor within the meaning of Section 2(11) of the Act, which, presumably, would indicate that she did not have the authority to remove an employee from a modified duty assignment. (GC 1(n)) Further, Respondent's modified duty policy itself suggests that a person in the position of Workmen's Compensation Claims Manager would need to consult with others in assessing whether employees will be permitted to remain on modified duty for more than 90 days. Specifically, the policy states:

Should additional modified duty be recommended by a treating physician, a decision on whether to continue to offer such an accommodation will be made after consideration of Shamrock's business needs, the projected, continued duration of the medical restrictions, the overall performance of the individual (e.g., attendance, quality of work, productivity, etc.), the potential impact on the

department, and other related issues. Any extension beyond the ninety (90) day period must be approved by Human Resources.

(JD 21:29-36; GC 15b) While some of these factors could be considered in isolation by reviewing a medical file, many, such as business needs, overall performance, attendance, quality of work, productivity, and potential impact on the department, could not.

Although ALJ Locke, in what he characterized as a credibility resolution, found that Keith was the person who decided to remove Woods and Saenz from modified duty, there is undisputed evidence that others were involved in the decision, and there are also significant contradictions in the testimony of those involved.

First, although, Keith testified that she “had to make the executive decision” concerning employees’ continuance of modified duty assignments and claimed that she did not take business needs into account in making her decision, at other times, when asked about the involvement of the human resources department in the decision-making process, Keith characterized the process as “collaborative” and stated, “I would ask them if, you know, what the business needs are because I wasn’t aware, you know. And that’s where they would make the decision.” (Tr. 736-738, 763-768, 753) She further stated that, when employees reached 90 days of modified duty, she would call the human resources department to see if they had anything to add. (Tr. 745) Keith also specifically testified that any extension of modified duty would need to be approved by the employee’s manager. (Tr. 745)

Correspondence dated October 22 and 30 supports Keith’s acknowledgement (or, at least, her acknowledgement at some points in her testimony) that others were involved in the deciding to remove Saenz and Woods from modified duty. In an Outlook meeting invitation for a meeting on October 21 to Human Resources Manager Vines-Bright, Keith, Human Resources Business Partner Santamaria, Warehouse Manager Vanderwalker, Branch Safety Supervisor Melanie

Grassie, and someone named Todd Lundmark, Vines-Bright stated, “Jeff, We would like to discuss our action plan with removing Marvin Woods and Saenz off of modified duty.” (GC 33) Further, in an email dated October 30, Keith states, “I discussed this case with Karen and the HR staff and *we* have decided to stop accommodating modified duties because [Saenz] has exhausted the allotted modified duty days.” (GC 34) Although Respondent’s current supervisors Vines-Bright and Santamaria claimed that Keith had already made the decision to remove Saenz and Woods from modified duty by the time of the October 21 meeting about the subject, Keith stated that she made her decision after the meeting, and Vanderwalker testified that he believed a recommendation about whether to take Woods and Saenz off modified duty was made at the meeting. (Tr. 178, 236, 482, 750-751) Keith also stated, in response to a question about whether she talked to Vines-Bright about removing Woods and Saenz before the meeting, “Yeah. We talked on the phone and through email a lot.” (Tr. 752) She later explained:

I can’t say we ever really discussed about removing them. I would say that we’re nearing a 90-day. We’ll have to reevaluate the situation and look at the medical or I’ll look at the medical and they’ll have, you know, I’d like their insight if they have anything to add. But, typically, they, you know, that’s where we were at.

(Tr. 752)

There are also additional inconsistencies between Human Resources Business Representative Santamaria’s attempt to emphasize Keith’s control over administration of the modified duty program and Keith’s attempt to distance herself from it. Santamaria testified that in December, Keith gave a PowerPoint presentation concerning the modified duty program to Respondent’s supervisors. (Tr. 239; GC 16) In contrast, Keith denied giving the presentation at all, claiming that she merely showed Santamaria and other supervisors an acknowledgement of modified duty form. (Tr. 739) Keith, in fact, denied ever seeing the PowerPoint presentation Santamaria said she gave. (Tr. 740; GC 16) Keith also claimed that others, including

representatives of Respondent’s insurance company Travelers and supervisors from Respondent’s human resources department were involved in tracking modified duty, but, then, later, claimed not to know who tracked modified duty. (Tr. 730, 741-743)

In addition, there is also an inconsistency between Keith’s claim to have adhered to Respondent’s modified duty policy, which required consideration of business needs, overall performance, attendance, quality of work, productivity, and potential impact on the department, and her claim to have made her decision based solely on medical information as well as her claim not to recall speaking to any supervisors about business needs like the availability of work. (JD 21:29-36; Tr. 766-767, 774-775, 851; GC 15b)

Finally, although ALJ Locke found that, as a former supervisor, Keith had little interest in the outcome of the proceeding, Keith had to be subpoenaed by CGC, who believed Keith was avoiding service of her subpoena; Keith was in communication with Respondent’s Counsel both before and after the service of her subpoena; and Respondent reported that Keith was very upset about the manner in which her subpoena was served. (JD 22:8-9; Tr. 266-269, 459-463) These events call into question ALJ Locke’s assumption that, as a former supervisor, Keith was, in any sense, a neutral witness.

V. ARGUMENT

A. ALJ Locke Erred in Failing to Take Administrative Notice of ALJ Wedekind’s Decision Finding That Respondent Recently Engaged in Numerous Egregious Unfair Labor Practices (Exceptions 35 and 57)

1. Legal Standard

Under Federal Rule of Evidence 201(c)(2), “[a] court shall take judicial notice if requested by a party and supplied with the necessary information.” Fed.R.Evid. 201(c)(2). Courts “may take notice of proceedings in other courts, . . . , if those proceedings have a direct relation

to the matters at issue.” *U.S. v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 973 (E.D. Cal. 2004) (citing *U.S. ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)). Moreover, “it is a well-settled principle that the decision of another court or agency, including the decision of an administrative law judge, is a proper subject of judicial notice.” *Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996).

“[T]he Board is not required to blind itself to past infractions as is a judge or jury in determining the guilt or innocence of a criminal defendant.” *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 680 (5th Cir. 1980), enforcing as modified 245 NLRB 198 (1979) (relying on employer’s history of misconduct in finding violations of Section 8(a)(1) and (3)). While an administrative law judge’s decision that is pending before the Board on exceptions is not binding authority, an administrative law judge may nevertheless rely on factual findings made by another administrative law judge in a prior case even if the case is still pending before the Board on exceptions. *See Detroit Newspapers Agency*, 326 NLRB 782 n. 3 (1998) (noting that an administrative law judge had relied on an earlier decision by another administrative law judge that was pending before the Board to find that a strike was an unfair labor practice strike, and that the Board had since affirmed original administrative law judge’s decision), enf. denied on other grounds 216 F.3d 109 (D.C Cir. 2000). The Board has held that an administrative law judge may rely on the factual findings made by another administrative law judge in a prior case, even though the prior case is still pending before the Board. *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394-395 (1998); *Southern Maryland Hospital*, 293 NLRB 1209, 1209 n. 1 (1989). The Board has particularly found it appropriate to consider prior pending cases in deciding a later related matter, especially where the allegations in the later case are

substantially similar to the violations found in the prior case. *Grand Rapids Press of Booth Newspapers*, 327 NLRB at 394-395 (citing *Opelika Welding*, 305 NLRB 561, 566 (1991)).

Furthermore, an administrative law judge presiding over a hearing may rely on prior cases involving the same respondent to find animus and as proof of retaliation against employees who were prominent union supporters. *Success Village Apartments, Inc.*, 348 NLRB 579, 579 n. 4 (2006) (affirming an administrative law judge's reliance on prior case's recitation of substantial background evidence); *see also Planned Building Services, Inc.*, 347 NLRB 670, 670 n. 2 (2006) (finding appropriate administrative law judge's reliance on prior cases involving the same respondent in finding animus), overruled on other grounds *Pressroom Cleaners*, 361 NLRB No. 57 (Sept. 30, 2014).

2. Analysis

ALJ Locke erred in failing to take judicial notice of ALJ Wedekind's decision. Contrary to the assertions made in his decision, as explained above, he was authorized to take judicial notice of the decision. Further, notice of ALJ Wedekind's decision is essential to an understanding of the background of the conduct at issue in this case and the extreme hostility that Respondent harbored toward its employees' organizing campaign.

Respondent's history of unfair labor practices and its hostility toward the organizing campaign are directly relevant to the issues of whether Respondent's interrogation of employees by means of the "We are Shamrock" shirts was coercive and also to the issue of whether it harbored the kind of animus toward its employees' organizing activities that would establish an unlawful motivation for its actions against Woods and Saenz. Thus, the failure to consider ALJ Wedekind's decision is highly prejudicial to the outcome of this case. This is evidenced in ALJ Locke's assessment of the factor of whether Respondent had a history of hostility to unions or

discrimination against union supporters in analyzing whether the distribution of the orange “We are Shamrock” shirts was coercive. After declining to take judicial notice of ALJ Wedekind’s decision, ALJ Locke found that the Board’s finding in *Shamrock Foods Co.*, 337 NLRB 915, that Respondent engaged in unfair labor practices in 1998, had “limited weight.” (JD 16:10-16)

It is also evidenced in ALJ Locke’s analysis of whether Respondent harbored animus toward its employees’ organizing activities in assessing whether Respondent’s removal of Woods and Saenz from modified duty was unlawful. ALJ Locke, declining to take notice of ALJ Wedekind’s decision, found that CGC failed to establish the existence of animus and relied on that finding in dismissing the allegations concerning Respondent’s actions against Woods and Saenz. (JD 24:15-41, 25:13-14 29:14-18, 34:13-16, 34:33-34) In fact, ALJ Locke found, rather outrageously, “Additionally, if the fire of animus found in a past case continued to burden, there would be at least a flicker of it in the present record. However, in the record before me, I find no manifestation of animus, not even a cinder too spent and cold to ignite discrimination.” (JD 24:30-32) This finding is rather because the unfair labor practices found by ALJ Wedekind in the prior case continued through June, immediately before the unfair labor practices involved in this case began, with the unlawful discharge of discriminatee Thomas Wallace occurring in May. *Shamrock Foods Co.*, JD(SF)-05-16. It is also outrageous given the sheer number and egregiousness of the unfair labor practices found by ALJ Wedekind—a house on fire would not crumble to cold and spent cinders so quickly. The prejudice caused by ALJ Locke’s refusal to take judicial notice of ALJ Wedekind’s decision is compounded by the fact that he precluded CGC from presenting evidence concerning Respondent’s history of unfair labor practices and its hostility toward the Union organizing campaign at the hearing in this matter.

Although ALJ Locke found that taking notice of ALJ Wedekind’s findings before the Board has ruled on exceptions to his decision “would be both premature and presumptuous,” there is no question that many of ALJ Wedekind’s findings will be adopted by the Board as they are based on actual recordings of Respondent’s unlawful conduct. *Id.* at 3-4, 6, 8-10, 13, 27, 38-39, 41. Further, it is anticipated that, by the time the Board considers the instant exceptions, the Board will have considered Respondent’s exceptions to ALJ Wedekind’s decision and upheld that decision, such that judicial notice would, unquestionably, be appropriate. See *Grand Rapids Press of Booth Newspapers*, 327 NLRB at 394-395; *Southern Maryland Hospital*, 293 NLRB at 1209 n. 1.

CGC therefore respectfully requests that the Board overrule ALJ Locke’s decision to decline to take judicial notice of ALJ Wedekind’s decision and give ALJ Wedekind’s decision appropriate weight in analyzing the unfair labor practices at issue in this case.

B. ALJ Locke Erred in Failing to Find That Respondent’s Distribution of High-Visibility Orange “We Are Shamrock” Shirts Was Unlawful (Exceptions 1 through 45 and 79 through 83)

1. Respondent’s Distribution of the “We are Shamrock” Shirts Amounted to Interrogation (Exceptions 2 through 38, 40 through 43, 45, and 79 through 83)

a. Legal Standard

Employers may not create situations in which employees are forced to disclose their union sentiments. *Lott’s Electric Co.*, 293 NLRB 297, 303-304 (1989), *enfd. mem.* 891 F.2d 281 (3rd Cir. 1989). Thus, employers may not distribute campaign paraphernalia in a manner that pressures employees to make an observable choice demonstrating their support for or rejection of the union. *A. O. Smith Automotive Products Co.*, 315 NLRB 994, 994 (1994). “[A] central statutory vice in an employer’s soliciting of employees to wear a procompany campaign emblem

is that, like more direct forms of union-related “interrogation,” it puts pressure on employees openly to declare that which they have a right to withhold from their employer (and from their fellow employees)—their feelings about union representation.” *Howarth & Co.*, 304 NLRB 805, 815 (1991).

“Traditionally, the Board looks to the “totality of the circumstances” in determining whether a supervisor’s questions to an employee about his protected activity were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984), *aff’d. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors, including the background of the parties’ relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply, which are to be considered in determining whether an alleged interrogation was coercive. These factors are sometimes called the “*Bourne* factors,” so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

b. Analysis

The evidence strongly establishes that, objectively, employees would have understood Respondent’s distribution of orange “We are Shamrock” shirts in July to be intended to give them a means of identifying themselves as employees who opposed the Union and did not want Union supporters to bother them. The orange “We are Shamrock” shirts were distributed immediately after a large contingent of Respondent’s employees independently began wearing orange shirts to send that message, and their distribution deviated from Respondent’s past practice in many respects. Although Respondent occasionally distributed commemorative shirts, these shirts were distributed very soon after Respondent had already distributed other commemorative shirts, purportedly to commemorate the same event, a good season ending in

early May. Although Respondent made high-visibility shirts available to employees previously, the high-visibility apparel was green, not orange, and it was provided through employees' annual uniform allowance. The timing of the distribution of the orange "We are Shamrock" shirts in relation to the anti-Union employees' collectively wearing orange shirts to repel Union supporters, together with the deviation it represented from Respondent's normal practice, would objectively and reasonably send employees the message that the shirts were intended to be an endorsement of Respondent's anti-Union employees' message.

ALJ Locke seizes on the fact that employee Woods did not testify that he knew of a widespread belief among employees in the warehouse that the orange "We are Shamrock" shirts were for anti-Union employees in finding that employees would not reasonably understand the distribution of the shirts to force them to make an observable choice about whether to oppose the Union. ALJ Locke essentially draws an adverse inference against the General Counsel, reasoning that Woods would have known of such a widely held belief and was predisposed to testify favorably for the General Counsel because of the allegation related to his removal from light duty. (JD 8 n.9) However, ALJ Locke failed to consider the fact that Woods had been out for surgery during the time when the shirts were distributed and that he was on modified duty before that. Further, by finding that the shirts would not reasonably be understood to be an invitation to display anti-Union sentiment based on the lack of testimony of the subjective understanding of Woods and other employees, ALJ Locke applies a subjective standard rather than an objective one. Although CGC could have called a parade of employees to testify about their subjective understanding of the shirts, the objective circumstances are what matter, and those objective circumstances, as explained above, would reasonably lead employees to believe that the shirts were intended to further Respondent's anti-Union employees' message. Similarly,

even if the plan to purchase DriFit shirts for employees was set into motion as part of a commemorative shirt or high-visibility apparel program before Respondent's anti-Union employees' orange shirt campaign reached its peak, Respondent's subjective intention in initially deciding to purchase DriFit shirts is not relevant, and, in any event, the color orange was not selected and the shirts were not distributed until after the orange anti-Union shirt campaign was well underway.

Although ALJ Locke concluded that, based on an application of the *Bourne* factors, even if the distribution of shirts did amount to questioning of employees about their union sentiments, that questioning was not coercive, that conclusion is unfounded. (JD 17:28-29) Respondent's history of numerous and egregious unfair labor practices on its own would certainly render an act aimed at forcing employees to publicly identify themselves as supporters or opponents of the Union coercive. Further, although the only supervisors specifically identified as distributing the shirts were Warehouse Supervisor Scott and Warehouse Manager Vanderwalker, employees had to make a choice about whether to wear the shirts, and support their anti-Union message on the work floor, for all, including Respondent's highest-level supervisors, to see. Thus the second, third, and fourth *Bourne* factors (nature of the information sought, identity of the questioner, and place and method of interrogation) all weigh in favor of a finding that Respondent's action was coercive. The final factor, truthfulness of the reply, as ALJ Locke acknowledges, does not weigh one way or another, as the record does not establish whether any employee engaged in "prevarication by attire" (*i.e.*, wearing an orange "We are Shamrock" shirt although he or she supported the Union. (JD 17:20-26)

In sum, Respondent's distribution of the shirts amounted to a coercive interrogation. Accordingly, CGC respectfully requests that the Board grant the General Counsel's objections to the ALJ's findings and conclusions to the contrary.

2. Respondent's Distribution of the "We are Shamrock" Shirts Created the Impression of Surveillance (Exceptions 2 through 33, 35, 39 through 45, and 79 through 83)

a. Legal Standard

An employer creates an unlawful impression of surveillance if its employees "would reasonably assume from the statement in question that their union activities had been placed under surveillance." *Heartshare Human Services of N.Y.*, 339 NLRB 842, 844 (2003). "The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaign without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Indus.*, 311 NLRB 257, 257 (1993) (quotations omitted).

Just as an employer may not create the impression that employees' union activities are under surveillance, it may not actually engage in surveillance. *Id.* at 257; *see also NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978). Although employers may observe "employees conducting their activities openly on or near company premises," *Roadway Package Sys., Inc.*, 302 NLRB 961, 961 (1991), observation of employees becomes unlawful surveillance when it is conducted in such a conspicuous manner that it interferes with employees' protected activities. *See Alle-Kiski Med. Ctr.*, 339 NLRB 361, 364-65 (2003); *Basic Metal & Salvage Co., Inc.*, 322 NLRB 462, 464 (1996); *Carry Companies. of Illinois*, 311 NLRB 1058 (1993), *enfd. in*

relevant part 30 F.3d 922, 934 (7th Cir. 1994); *Impact Industries*, 285 NLRB 5, 24 (1987); *Lundy Packing Co.*, 223 NLRB 139, 147 (1976).

b. Analysis

In addition to amounting to a coercive interrogation, Respondent's distribution of the orange "We are Shamrock" shirts created the impression that employees' Union activities were under surveillance. After the distribution of the shirts, Union supporters who did not wear orange shirts on the work floor stood in sharp relief against employees who wore the shirts supporting Respondent's anti-Union employees' message. By putting employees in a position where they knew they could be observed, by anyone and everyone, including Respondent's highest-level supervisors, on the work floor making a choice as to wear the shirts, Respondent created the impression that its employees' union activities—*i.e.*, their choice as to whether to wear the anti-Union shirts—under surveillance. CGC therefore respectfully requests that the Board grant the General Counsel's exceptions to the portions of ALJ Locke's decision finding that the distribution of the shirts did not create the impression of surveillance of employees' union activities.

3. Respondent's Distribution of the "We are Shamrock" Was a Grant of Benefits (Exceptions 1 through 8, 45, 79)

a. Legal Standard

An employer violates Section 8(a)(1) by promising or granting benefits to employees in order to influence their union activities or vote. *General Electric Co. v. NLRB*, 117 F.3d 627, 636-37 (D.C. Cir. 1997). *See also Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944) ("[t]he action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination"). In *Medo Photo Supply Corp.*, the Court said, "The action of employees with respect to the choice of their

bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.” Although in that case there was already a designated bargaining agent and the offer of “favors” was in response to a suggestion of the employees that they would leave the union if favors were bestowed, the principles which dictated the result there are fully applicable here. The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

“As a general rule, an employer’s legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene.” *Perdue Farms, Inc., Cookin' Good Division v. NLRB*, 144 F.3d 830, 836 (D.C. Cir. 1998) (quoting *United Airlines Services Corp.*, 290 NLRB 954, 954 (1988)). If the employer's action is prompted by the union’s presence, it violates the Act. *Pedro’s Inc. v. NLRB*, 652 F.2d 1005, 1008 n.8 (D.C. Cir. 1981). On the other hand, if the action occurs “in the normal course of the business of an employer, without any motive of inducing employees to vote against the union,” it is lawful. *Id.* at 1008. “Both the decision to confer benefits and the timing of the announcement of such benefits are subject to ‘in the normal course of business’ analysis.” *Perdue Farms*, 144 F.3d at 836.

When an employer increases benefits during a union campaign, the Board initially must determine whether the employer made the changes outside of the normal course of business, in an attempt to influence employee votes. If the employer lacks an established practice of granting the types of improvements at issue, its deviation from the *status quo* creates an inference that such well-timed and unanticipated generosity in the midst of a union campaign is intended to

influence employee attitudes towards union representation. *Exchange Parts*, 375 U.S. 405, 409 (1964); *General Electric*, 117 F.3d at 636-37. *See also St. Francis Federation of Nurses and Health Professionals v. NLRB*, 729 F.2d 844, 851 (D.C. Cir. 1984) (distinguishing between a “change in policy” and a “benefit ‘customarily granted to employees’ ”).

As courts have recognized, however, a grant of even minimal benefits as an election is approaching in an effort to discourage union support can be unlawful. *See, e.g., Exchange Parts*, 375 U.S. at 406-08 (birthday holiday, more favorable system for holiday overtime, and more favorable vacation schedule); *General Electric*, 117 F.3d at 636-37 (distribution of free desk clocks).

b. Analysis

Respondent’s distribution of the orange DriFit shirts, which were provided at no cost and were not counted against employees’ uniform allowances, bestowed a benefit on Respondent’s employees. In addition to being provided at no cost, the shirts were made of a material that Respondent believed would be more comfortable for its employees to wear, given their physically demanding jobs. Further, although ALJ Locke found that the distribution of the shirts was not a deviation from Respondent’s past practice, the evidence establishes that it was. (JD 6:5-6) Although Respondent had distributed commemorative shirts in the past, the circumstances indicate that the distribution of the orange “We are Shamrock” shirts was not part of this practice, as it immediately followed the distribution of different commemorative shirts at a commemorative barbeque on June 4. Further, unlike other high-visibility shirts that Respondent had distributed to its employees in the past, the orange “We are Shamrock” shirts were not counted against employees’ uniform allowances. Thus, the distribution of the shirts amounted to a grant of benefits and, as such, presumptively was intended to influence its

employees Union sentiments. Given the coercive effect of the distribution of the shirts, Respondent cannot overcome this presumption. CGC therefore respectfully requests that the Board grant CGC's exceptions to the portions of ALJ Locke's decision finding that the distribution of the shirts did not amount to an unlawful grant of benefits.

C. ALJ Locke Erred in Failing to Find that Respondent Changed the Manner in Which It Enforced Its Modified Duty Program and Took Action against Woods and Saenz Because Woods and Saenz Supported the Union (Exceptions 46 through 83)

1. The Board's *Wright Line* Framework Must Be Applied in Analyzing the Employer's Changed Enforcement of Its Modified Duty Program and Its Actions against Woods and Saenz

Based on an analysis of the Board's decisions, in order to establish unlawful discrimination under Sections 8(a)(1) and (3) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).⁵

⁵ The *Wright Line* standard upheld in *Transportation Mgt.* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the context of the Act, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

It is well established that knowledge of union activities can be inferred based on circumstantial evidence, including: (1) general knowledge of union activities, (2) animus, (3) timing, (4) disparate treatment, and (5) simultaneous action against more than one discriminatee.⁶ See, *Regional Home Care, Inc.*, 329 NLRB 85 (1999); *Matthews Industries*, 312 NLRB 75, 76-77 & n. 9 (1993); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Abbey's Transportation Services, Inc.*, 284 NLRB 698 (1987).

Further, evidence that may establish a discriminatory motive – *i.e.*, that the employer's hostility to protected activity “contributed to” its decision to take adverse action against the employee – includes:

- (1) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card));
- (2) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, *passim* (2000), *enfd. mem.* 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or
- (3) evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014); *ManorCare Health Services – Easton*, 356 NLRB 202, 204 (2010), *enfd.* 661 F.3d 1139 (2011); *Greco & Haines, Inc.*, 306 NLRB at 634; *Wright Line*, 251

⁶ With respect to simultaneous action against more than one discriminatee, see *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992) (inference of knowledge was warranted in view of various factors, including “the abrupt termination of the leading union instigator and another union supporter who had both received raises in the previous week”); (inference of knowledge was warranted in view of various factors, including “the fact that [the two discriminatees] were discharged simultaneously and at a time shortly after they, as the prime movers of the organizing effort, had made substantial progress in card signing and in generating attendance at a union organizational meeting”).

NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-57 (1994), *enfd. sub nom. NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Mgt.*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

2. Respondent Removed Woods and Saenz from Modified Duty and Took Other Actions against Saenz Because Woods and Saenz Supported the Union (Exceptions 35, 46, 48, and 51 through 83)

The evidence strongly establishes that Woods and Saenz engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. Both Woods and Saenz supported Respondent's employees' organizing campaign from the outset, and, shortly before their removal from modified duty, both participated in a push to collect more Union authorization cards during a time when a remedial bargaining order was under consideration. In fact, during that timeframe, Saenz spoke directly to Warehouse Supervisor Scott about the Union. Further, Warehouse Operations Manager Vaivao admitted that he knew which employees were involved in the Union's organizing campaign. Respondent's knowledge of the Union activities of Woods and Saenz is also established by circumstantial evidence, including: Respondent's general knowledge of Union activities; Respondent's demonstrated animus toward

such activities; the timing of Respondent's actions against Woods and Saenz in relation to their recent participation in the push for more signed Union authorization; Respondent's disparate treatment of Woods and Saenz in relation to treatment of employee Kiss and in relation to its treatment of them during the period before their push for more signatures; and Respondent's nearly-simultaneous action against Woods and Saenz. Although Respondent claims that Workmen's Compensation Claims Manager Keith was the sole decision-maker with respect to its actions against Woods and Saenz, that claim is belied by Respondent's denial of her supervisory status, which necessarily would indicate that she could not make such a decision, and, further, it is belied by the substantial record evidence establishing that others, including Warehouse Manager Vanderwalker and other supervisors from Respondent's human resources department were involved in making the decision.

The evidence also strongly establishes that Respondent's hostility toward its employees' organizing efforts contributed to its decision to remove Saenz and Woods. First, the timing of Respondent's action, very soon after Woods and Saenz were involved in a push for additional signatures on Union authorization cards, which could have resulted in the issuance of a remedial bargaining order against Respondent, is indicative of unlawful motivation. Second, Respondent's numerous, egregious unfair labor practices in the recent past support a finding of unlawful motivation. Finally, the evidence showing that Respondent's asserted reasons for its actions against Woods and Saenz were pretextual establishes unlawful motivation. In particular, Respondent's disparate treatment of Woods and Saenz as compared to Kiss, who was also on modified duty for far longer than 90 days, evidences pretext. Further, Respondent's disparate treatment of Woods and Saenz themselves as compared to its treatment of them before their push for more signatures evidences pretext. Although both Woods and Saenz had been on modified

duty for more than 90 days and had suffered re-injuries before the push, their conditions only led to their removal from light duty after the push. Respondent's shifting and inconsistent evidence concerning how the decision to remove Woods and Saenz from modified duty was made, including the inconsistencies between supervisors' testimony and internally within Workmen's Compensation Claims Manager Keith's testimony concerning who was involved in the decision and inconsistencies between supervisors' testimony and documentary evidence on this point, is another indicator of pretext. In addition, Workmen's Compensation Claims Manager Keith's intermittent admissions or claims not to have considered factors other than the discriminatees' medical conditions, although Respondent's modified duty policy squarely requires consideration of other factors, together with her claim not to recall speaking with anyone about Respondent's business needs in making her decision, amount to the kind of failure to investigate that is indicative of pretext. Respondent's defense for its actions against Woods and Saenz is completely undermined by the evidence that the reasons for this action were pretextual, such that Respondent cannot meet its burden of establishing that it would have taken the same action even in the absence of the discriminatees' protected activities. Since Respondent's later actions against Saenz, including its notification to him that it would no longer hold his position for him and its notification to him essentially that it would phase out his medical insurance over time, stemmed from its earlier termination of his modified duty assignment.

In sum, Respondent's removal of Woods and Saenz from modified duty was unlawful. CGC therefore respectfully requests that the Board grant the General Counsel's exceptions to the portions of ALJ Locke's decision to the contrary.

3. Respondent Changed Its Enforcement of Its Modified Duty Program Because Woods and Saenz Supported the Union (Exceptions 47 through 50, 52 through 62, 64 through 76, and 79 through 83)

ALJ Locke dismissed the allegation that Respondent changed its enforcement of its modified duty policy because Woods and Saenz supported to the Union solely based on a finding that the allegation was duplicative of the allegations about Respondent's actions against Saenz and Woods. (JD 20:15-32) However, ALJ Locke cites no case in support of the proposition that dismissal of complaint allegations is appropriate if the allegations refer to the same conduct. Moreover, the allegation concerning the change in the enforcement of the modified duty program is not duplicative of other allegations. Although the General Counsel is alleging that Respondent removed Saenz and Woods from modified duty, the General Counsel is also alleging that Respondent began enforcing a previously unenforced 90-day limitation on modified duty assignments in order to target Woods and Saenz, the only two employees who were in the vulnerable position of having been on modified duty assignment for more than 90 days, and both employees who had participated in a recent push to collect more signed Union authorization cards. CGC therefore respectfully requests that the Board grant the General Counsel's exceptions to the portion of ALJ Locke's decision dismissing the allegation that Respondent unlawfully changed its enforcement of its modified duty policy.

D. ALJ Locke Erred in Failing to Order That Respondent Publicly Read the Notice to Employees to Its Employees (Exception 84)

The Board has found that, when a respondent has a history of committing unfair labor practices, additional remedies, such as the reading of a notice to employees, is necessary to dissipate, as much as possible, the lingering effects of the respondent's unfair labor practices on employees' Section 7 rights. *United States Service Industries, Inc.*, 319 NLRB 231, 232 (1995);

Three Sisters Sportswear Co., 312 NLRB 853 (1993), review denied, enfd. 55 F.3d 684 (D.C. Cir. 1995). Here, from the moment it learned of its employees' organizing campaign, Respondent has relentlessly assaulted its employees' rights under the Act. It has engaged in numerous egregious unfair labor practices. *Shamrock Foods Co.*, JD(SF)-05-16. Despite the filing of a charge, the issuance of a complaint, and the institution of a hearing before an administrative law judge and Section 10(j) proceedings before a federal district court, Respondent has persisted in its unfair labor practices. Employees must be left with little faith in the government's ability to protect their rights. In this context, like the unfair labor practices that were the subject of the hearing before ALJ Wedekind, Respondent's unfair labor practices demand an order that Respondent publicly read to its employees the Board's notice to employees, in order to impress upon them that Respondent's unlawful actions have had consequences and that their rights will be protected.

E. ALJ Locke Erred in Failing to order That Respondent Compensate Woods and Saenz by Making Them Whole, Including through Payment for Search-for-Work and Work-Related Expenses, Regardless of Whether These Amounts Exceed Interim Earnings (Exception 85)

As specifically requested in the Complaint, in addition to being entitled to all traditional remedies for Respondent's actions against them, Woods and Saenz are entitled to be made whole for search-for-work and work-related expenses they may incur in if they are able to search for or obtain substantially equivalent employment to replace their modified duty assignments, regardless of whether these amounts exceed any interim earnings. Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498

(1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment⁷; the cost of tools or uniforms required by an interim employer⁸; room and board when seeking employment and/or working away from home⁹; contractually required union dues and/or initiation fees, if not previously required while working for respondent¹⁰; and/or the cost of moving if required to assume interim employment.¹¹

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also N. Slope Mech.*, 86 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to

⁷ *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

⁸ *Cibao Meat Products*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

⁹ *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

¹⁰ *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

¹¹ *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

seek interim work,¹² but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the “primary focus clearly must be on making employees whole.” *Jackson Hosp. Corp.*, 356 NLRB 6, 8 (2010). This means the remedy should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners*, 361 NLRB No. 57 (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

¹² *Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) (“To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.”).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, “the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . . .” *Don Chavas, LLC*, 361 NLRB No. 10 at slip op. at 3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.¹³ These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.*, 356 NLRB at 6 (interest is to be compounded daily in backpay cases).

VI. CONCLUSION

The evidence establishes that Respondent used orange “We are Shamrock” to identify supporters and opponents of the Union in a highly visible manner and then acted to remove two particularly vulnerable Union supporters from the work place. The Board must act to stem the injury these unremedied actions are inflicting on employees’ rights under the Act. CGC therefore respectfully requests that the Board order all remedies necessary to counter Respondent’s unlawful actions, including a cease and desist order, a requirement that Respondent offer Woods and Saenz modified duty assignments and compensate them for all financial losses caused by its actions against them, and post and publicly read a notice reassuring its employees of their rights.

¹³ Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerboxer Plastic Co., Inc.*, 104 NLRB 514, 516 at n.2 (1953).

Dated at Phoenix, Arizona, this 22nd day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Exceptions to the Administrative Law Judge's Decision in Cases 28-CA-161831, 28-CA-162851, and 28-CA-165951 was served by E-Filing, U.S. Mail, and E-mail on this 22nd day of July, 2016, on the following:

Via E-Filing:

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