

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

SHAMROCK FOODS COMPANY

And

ANDRES CONTRERAS, an Individual

and

THE BAKERY, CONFECTIONERY,
TOBACCO WORKERS' AND GRAIN
MILLERS INTERNATIONAL UNION, AFL-
CIO/CLC

Case Nos. 28-CA-161831
28-CA-162851
28-CA-165951

RESPONDENT SHAMROCK FOODS COMPANY'S
ANSWERING BRIEF TO GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Counsel for the General Counsel's¹ exceptions all revolve around its complaint that Administrative General Counsel Law Judge Keltner W. Locke (the "ALJ") was unwilling to overlook the holes in the General Counsel's evidence. For example, in regard to its various claims that Shamrock unlawfully provided its employees with t-shirts to comply with its requirement of high-visibility apparel, the General Counsel essentially maintains that the ALJ should have readily accepted its assertions concerning employee sentiments and witness credibility without analysis or consideration. Regarding General Counsel's allegation that Shamrock applied its modified duty policy precisely as it was written to two alleged discriminatees, the GC insists that the ALJ erred in finding that the decision maker credibly testified that she applied the policy based on legitimate business considerations without knowledge of any protected conduct by the alleged discriminatees.

In truth, contrary to General Counsel's arguments, the ALJ's recommended decision reflects careful and thorough analysis of the relevant evidence and an appropriate unwillingness to presume unlawful motivation and/or conduct simply on the basis that they were alleged. His recommended decision should be adopted in its entirety,² and the General Counsel's allegations should be dismissed.

¹ Counsel for the General Counsel will be referred to herein as "General Counsel" or the "GC." Respondent Shamrock Foods Company will be referred to as "Shamrock." The ALJ's recommended decision will be cited as the "ALJD."

² Shamrock is filing concurrently herewith two cross-exceptions to the ALJ's decision that need only be addressed in the event that the GC's exceptions are not rejected in their entirety.

II. LAW AND ARGUMENT

A. The ALJ Correctly Limited His Consideration Of Events From A Prior Case That Remains Pending Before The Board.

1. The ALJ Properly Exercised His Discretion In Declining To Take Judicial Notice Of A Prior ALJ Decision.

General Counsel complains that the ALJ should have taken “judicial notice” of a decision³ in a prior case involving Shamrock issued by Administrative Law Judge Jeffrey D. Wedekind. According to the General Counsel, the ALJ should have used Judge Wedekind’s decision to find animus in this case. The ALJ, however, properly exercised his discretion in declining to accept this argument.

The Board refuses to treat ALJ opinions as binding authority. *See* ALJ Bench Book § 13-300 (*citing St. Vincent Medical Ctr.*, 338 NLRB 888 (2003)). Accordingly, while an ALJ *may* accept another ALJ’s findings, he is not required to do so. (*Id.*) The ALJ Bench Book, in fact, urges caution in determining whether to accept the findings of a prior judge. “[I]f the Board reverses the earlier judge’s findings on review, the judge’s findings in the second case may likewise be vulnerable to reversal.” *See* ALJ Bench Book § 13-300.

The Board has further observed that an ALJ should *not* adopt the findings of a prior judge where those findings involve credibility determinations. *See* ALJ Bench Book § 13-300 (*citing Electrical Workers (Nixdorf Computers Corp.)*, 252 NLRB 539 (1980); *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 972 (6th Cir. 2003)). It is “generally inappropriate for an [ALJ] to rely on credibility findings made in another case.” *Electrical Workers*, 252 NLRB at 539, fn.1.

The General Counsel’s argument fails in light of these principles. First and foremost, Judge Wedekind’s opinion is not binding authority. His decision is entitled to no greater dignity than any

³ It is at least questionable whether a request for judicial notice was the appropriate vehicle for the GC to raise this issue. Judge Wedekind’s decision is a publicly available document. The GC has offered no explanation as to why “judicial notice” of this decision is necessary, or how such notice would be different from simply citing the case.

other administrative law judge decision that the Board has not yet adopted.⁴ The ALJ therefore was under no obligation to adopt Judge Wedekind's findings in the blind, wholesale fashion that the General Counsel urges. Rather, he had full discretion to decide what weight to accord to that opinion.

Second, the ALJ's decision reflects a reasoned and thoughtful exercise of his discretion in declining to adopt Judge Wedekind's findings. The ALJ did, in fact, compare the evidence in the present matter against the issues litigated before Judge Wedekind. He concluded that, even if Judge Wedekind's findings were correct, there was no basis to hold that Shamrock engaged in a continuing course of conduct in this case:

[I]f the fire of animus found in a past case continued to burn, 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.

(ALJD p. 24:30-33). While the General Counsel dismisses this finding as "outrageous," it offers no factual basis for its assertion.

The ALJ further recognized that, while styled as a request for "judicial notice," the General Counsel essentially was seeking application of collateral estoppel. In this regard, the ALJ explained that General Counsel was not simply asking for judicial notice of independently verifiable *facts*. Rather, the General Counsel was asking him to adopt Judge Wedekind's *findings*. (ALJD p. 24:34-39). As the ALJ correctly noted, those findings were based, in part, on credibility resolutions. In fact, given the extent to which Judge Wedekind's decision (including his finding of animus) was based on his credibility findings, the ALJ arguably would have erred if he had chosen to adopt it.

The cases cited by General Counsel do not support a contrary conclusion. First, none of the cited cases supports the proposition that an ALJ is *required* to take judicial notice of prior ALJ

⁴ It is important to note that all interested parties (the Charging Party Union, General Counsel and Shamrock) have filed exceptions to Judge Wedekind's opinion, which remain pending. While the GC claims that Board adoption of Judge Wedekind's decision is an absolute certainty, this observation constitutes nothing more than speculation.

opinions. Nor do any of the cases hold that an ALJ is bound to accept the credibility findings of a prior ALJ.

Second, the General Counsel's cited cases are readily distinguishable. For example, in *Planned Building Services*, 347 NLRB 670 (2006), the ALJ relied on a prior ALJ decision that had already been affirmed by the Board. *Id.* at 684-85. Accordingly, there was no possibility that the Board might reverse the prior findings. In contrast, as noted above, all parties have filed exceptions to Judge Wedekind's decision, which remain pending before the Board.

Success Village Apartments, 348 NLRB 579 (2006), is equally inapposite. The ALJ in *Success Village Apartments* relied on a prior ALJ decision involving the same employer in which there was evidence of a corporate memorandum outlining a plan to target and discharge pro-union activists. The allegations in the second case related to the methodical discharge of union supporters pursuant to the plan set forth in the memorandum from the first proceeding. Thus, the second case shared a *specific* factual nexus with the matters litigated in the first case.

There is no such nexus in this matter. In essence, General Counsel is relying entirely on the fact that some of the violations alleged in the earlier case before Judge Wedekind also required a showing of union animus. *Success Village Apartments*, however, did not simply involve similar allegations or a common assertion of general union animus. Rather, the employer in that case was alleged to have developed a specific, unlawful plan to discharge union supporters, and that same plan was the basis of the alleged violations in both proceedings. There is no such allegation here, and *Success Village Apartments* is accordingly irrelevant.

2. **The ALJ Did Not Preclude General Counsel From Introducing Evidence From The Prior Case To Show Animus.**

The General Counsel additionally complains that the ALJ barred it from introducing evidence from the prior case in an attempt to show animus. There are at least two critical flaws in this argument. First, the General Counsel asked the ALJ to accept the *entire* administrative record

from the prior case before Judge Wedekind. As the Bench Book states, parties “cannot ‘incorporate by reference’ portions of other records, even those of Board cases involving the same parties.” See ALJ Bench Book § 13-500 (citing *Beverly Health & Rehabilitation Servs.*, 335 NLRB 635, 639, fn.26 (2001)).

In *Beverly Health*, the parties agreed (with the ALJ’s permission) to incorporate the record from two prior, related cases. 335 NLRB at 639, fn.26. The stated reason for this agreement was to “limit the size of the record and avoid extensive duplication.” *Id.* The Board, however, chastised the parties for agreeing to such wholesale incorporation:

[W]e strongly discourage the practice of verbally incorporating entire sections of previous trial records into the record en masse as an alternative to introducing the particular excerpts or exhibits on which a party intends to rely. The undifferentiated incorporation, in whole or in part, of a separate trial record tends to make it more difficult for the Board and a reviewing court to identify the specific evidence on which the judge’s findings were based. Incorporation of the record of another case which is still pending before the Board may also create complications in jurisdiction between the Board and reviewing courts of appeals. Moreover, requiring the Board to review portions of the records of previous cases (which may be located at different sites) puts an additional burden on the Board’s resources and can cause significant delay in the processing of cases. For all of these reasons, the Board expects the parties in each case to introduce all nontestimonial evidence on which they rely in the form of individual exhibits.

Id. (emphasis added); see also *NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962) (affirming NLRB decision based on Board’s explicit disavowal of ALJ’s reliance on record from prior proceeding). The ALJ therefore was correct in declining the General Counsel’s request to incorporate the entire record.

Second, General Counsel’s argument is based entirely on a mischaracterization. The General Counsel claims that the ALJ “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.” (G.C. Br. at 6). The only portion of the record that the General Counsel cites to support this assertion is an exchange where it sought to question a witness generally about union education meetings that Shamrock conducted in early 2015. (Tr. 192-95).

A review of the transcript reveals that this questioning had little to do with animus. The cited portion of the record consists of the following exchange:

Q. (By Counsel for the GC) So [Shamrock conducted] educational meetings for employees regarding the union organizing campaign?

A. (By the witness) Educational meetings regarding unions.

Q. Regarding unions?

A. Yes.

Q. And you attended several of those meetings, correct?

A. I attended a few of them, yes.

Q. And there were meetings in February and March, correct?

A. I don't recall when the meetings were.

Q. Do you remember how many meetings were held to educate employees about the union?

A. No.

Q. Do you remember how -- the span of time that these meetings would held [*sic*]?

A. No.

(Tr. 191-92). At this point, Shamrock's counsel objected on grounds that the February and March meetings were too remote in time to establish animus in regard to the 8(a)(3) claims in the current matter (which were alleged to have occurred at the end of October). (*Id.*).

While the General Counsel initially made a passing reference to animus in responding to the objection, it went on to argue that the questioning was intended to establish Shamrock's *knowledge of the Union campaign*.

(By Counsel for the GC) So the line of questioning really started when he was unable to remember anything. So I think as this is the -- cross-examination, and pinpointing certain points in time is probative as to whether or not he knew at certain points in time when the union activity was occurring. So the extent to which he knew about the union campaign is certainly at issue in this case. And these questions go directly to probing what his memory is on that issue.

(Tr. 194). The General Counsel's reliance on this exchange to demonstrate that it was precluded from producing evidence of animus is therefore misplaced. General Counsel furthermore made no other attempt to demonstrate animus during the hearing.

Thus, in truth, General Counsel was not *precluded* from offering evidence of animus. Instead, the General Counsel *chose* not to present such evidence based on its assumption that the ALJ would permit undifferentiated incorporation of the administrative record from the case tried before Judge Wedekind. That assumption proved incorrect, as the ALJ declined the General Counsel's request. Moreover, the ALJ's denial of this request was not only permissible; it was mandated by Board precedent. The General Counsel's exceptions therefore are meritless, and the ALJ's decision should be adopted.

B. The ALJ Correctly Rejected General Counsel's Various Theories Concerning The Orange "We Are Shamrock" T-Shirts.

General Counsel asserted a series of claims—all of which the ALJ rejected—based on Shamrock's distribution in July 2015 of high visibility, "Dri-Fit"⁵ orange t-shirts with the words "We Are Shamrock" printed on them. (See G.C. Ex. 1(l) at ¶ 5; G.C. Ex. 6(a)-(b)). Shamrock distributed the t-shirts to celebrate the end of one of the most successful seasons in the Company's history, and to promote the Company's new policy requiring warehouse employees to wear high-visibility apparel (the "hi-vis policy"). (Tr. 95, 969).

As the ALJ recognized, it is undisputed that the t-shirts made no mention of the Union campaign, and there is no credible evidence that any supervisor mentioned the Union campaign as

⁵ "Dri-Fit" is a nylon material made to wick perspiration away from a person's body. (See Tr. 968).

the t-shirts were distributed. (ALJD p. 6:18-23). Nonetheless, General Counsel claims that distribution of the t-shirts was tantamount to interrogation and surveillance because a small group of employees wore orange t-shirts several months earlier to indicate that they did not want Union supporters to solicit them. (ALJD p. 6:25-30). The General Counsel further claims that the t-shirts constituted an unlawful benefit designed to turn employees against the Union. For the reasons explained below, the ALJ correctly recommended dismissal of all three claims.

1. General Counsel's Exceptions Concerning The "We Are Shamrock" T-Shirts Incorporate Multiple Misstatements Of Fact.

Before addressing General Counsel's claims concerning the t-shirts, it must be noted that the General Counsel's arguments incorporate multiple misstatements, mischaracterizations and omissions. For example, General Counsel asserts that supervisors "readily discern[ed]" the "We Are Shamrock" t-shirts from other high-visibility shirts being worn in the warehouse. The General Counsel cites first-level supervisor Leland Scott's testimony in support of this point. (G.C. Br. 9; Tr. 124). But, the General Counsel omits Scott's testimony that he did not check or even recognize whether employees were wearing the "We Are Shamrock" shirts as opposed to other high-visibility apparel. (Tr. 123).

General Counsel's citation to Melanie Petrola's testimony on this point is equally problematic. (G.C. Br. 9). While the General Counsel cites Petrola's testimony for the notion that supervisors identified the employees who wore the "We Are Shamrock" t-shirts, Petrola was not alleged to be a supervisor. But, even more alarming is the fact that the cited portion of Petrola's testimony (Tr. 444) has nothing to do with the "We Are Shamrock" t-shirts. Rather, Petrola was describing high-visibility t-shirts that some employees purchased on their own.

Perhaps the most concerning of the General Counsel's misstatements is its insistence that Shamrock's high-visibility policy was implemented at the Phoenix warehouse in 2014. (G.C. Br. 10). While the policy was drafted in 2014, there is no dispute that the policy was not implemented in

Phoenix until January 2015. (Tr. 426). In fact, Marvin Woods (a purported discriminatee and the General Counsel's own witness) corroborated this fact. (Tr. 508). He testified that the employees received safety vests (which were provided shortly after implementation of the hi-vis policy) in February 2015. (*Id.*).

General Counsel similarly ignores the testimony of its own witnesses in claiming that the "We Are Shamrock" t-shirts were distributed "immediately" after the group of employees began wearing orange shirts to demonstrate their opposition to the Union. (G.C. Br. 21). There is no dispute that the orange "We Are Shamrock" t-shirts were distributed in mid-July 2015. (G.C. Br. 9). There is similarly no dispute that the Company held a barbeque for employees more than a month earlier, on June 4, 2015. (*Id.*). Leo Baeza—again, General Counsel's own witness—testified that, by the time of the barbeque, most employees had *stopped* wearing the orange shirts to demonstrate opposition to the Union. (Tr. 278).

General Counsel also mischaracterizes the ALJ's remark that Marvin Woods' testimony does not support a finding that employees widely viewed orange t-shirts as an indication of Union opposition. (G.C. Br. 22). According to the General Counsel, the ALJ "glossed over" the fact that the "We Are Shamrock" t-shirts were distributed during the two weeks that Woods was off work for surgery,⁶ and that Woods therefore would not have knowledge concerning employees' perception of the shirts. (G.C. Br. 8, 22). But, the ALJ's observation had nothing to do with the "We Are Shamrock" t-shirts. Rather, the ALJ was referring to the employees' general level of awareness concerning those individuals who had previously worn orange t-shirts as a concerted expression of opposition to the Union. (ALJD p. 8, n.5). There is no dispute that Woods was working in the

⁶ The GC's complaint that this observation constitutes an "adverse inference" is meritless. The ALJ made the statement in a footnote of his opinion, simply as an example of General Counsel's failure to establish any widespread belief among employees that orange shirts were a statement of opposition the Union. (ALJD p. 8, n.5).

warehouse on modified duty at that time. (G.C. Br. 8). The ALJ's observation therefore was entirely correct.

While General Counsel's claims suffer from multiple legal flaws (discussed below), its factual mischaracterizations and inaccurate portrayal of witness testimony further confirm that its arguments lack merit. As a result, the ALJ's recommended decision should be adopted, and the General Counsel's t-shirt allegations should be dismissed in their entirety.

2. **General Counsel's Interrogation Claim Fails Because Employees Would Not Regard The T-Shirts As An Expression Of Their Support Or Opposition To The Union.**

Aside from General Counsel's misstatements of fact, its arguments are legally unsupportable. The General Counsel's interrogation claim, for example, fails on multiple grounds. Allegations of unlawful interrogation must be viewed in the context of normal workplace communication:

In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover . . . [i]f section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution.

Rossmore House, 269 NLRB 1176, 1177 (1984).

Determining whether a particular action amounts to coercive interrogation must be based on a totality of the circumstances. *Rossmore House*, 269 NLRB at 1178. This determination requires consideration of factors including: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Id.* at 1178 n.20; *see also Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

Applying the *Rossmore* factors to distribution of the “We Are Shamrock” t-shirts confirms that the ALJ’s recommendation of dismissal was correct. First, a reasonable employee would not view her decision whether to accept an orange t-shirt as disclosing her sentiments concerning the Union. As the ALJ recognized, the linchpin of General Counsel’s interrogation argument is the notion that employees would immediately associate the orange “We Are Shamrock” t-shirts with Union opposition. (ALJD p. 6:21-23). The General Counsel, however, offered no evidence to support this proposition.

Instead, the General Counsel submitted testimony that, more than a month before the “We Are Shamrock” t-shirts were distributed, an unnamed group of employees had worn orange t-shirts to communicate to their coworkers that they did not wish to be approached concerning the Union. The General Counsel offered no evidence as to the distribution of these employees across the various shifts and operations. Nor did the General Counsel submit evidence concerning the areas in which these employees worked or how dispersed they were throughout Shamrock’s one million-square foot warehouse. The General Counsel had ample opportunity to do so, as it called five (5) Shamrock employees as witnesses (Leo Baeza, Melanie Petrola, Kevin Owens, Benny Saenz and Marvin Woods).

Rather than requiring it to call a “parade of employees” (G.C. Br. 22),⁷ General Counsel suggests that the ALJ simply should have inferred (i) that knowledge of the prior orange t-shirts was widespread among employees, (ii) that, based on such knowledge, the employees would overwhelmingly associate the orange “We Are Shamrock” t-shirts with opposition to the Union, and (iii) that employees would assume that Shamrock was aware of this sentiment. The General Counsel

⁷ General Counsel claims in its brief that it “could have called a parade of employees to testify about their subjective understanding of the shirts.” (G.C. Br. 22). The fact that it called five employees and still failed to establish that employees viewed the “We Are Shamrock” t-shirts as an expression of Union opposition strongly suggests that this claim is nothing more than unsupported rhetoric.

complains that, in refusing to draw such inferences, the ALJ applied a “subjective standard.” (ALJD p. 9:37-39; G.C. Br. 22). This assertion is wrong.

There is nothing intrinsic to an orange t-shirt that would cause a reasonable person to view it as an expression of opposition to unionization.⁸ The ALJ was simply canvassing the record to determine if there was any evidence to rebut this objective conclusion. (ALJD p. 6:18-23; p. 8 n.6). In finding none, he noted that the “We Are Shamrock” t-shirts contained no reference to the Union campaign, that no Shamrock official mentioned the Union in distributing the t-shirts, that no evidence suggested that all employees who wore orange t-shirts were opposed to the Union, and that Shamrock had a history of providing free t-shirts to its employees. (ALJD pp. 5:28-6:41).

Thus, the ALJ *did* apply an objective standard (*i.e.*, that an orange t-shirt is not an objective expression of union opposition), but considered whether any unique factors would require modification of this standard based on the facts of this case. His determination that no such factors exist was made after a thorough examination of the record. Thus, Shamrock’s distribution of the “We Are Shamrock” t-shirts did not elicit information concerning employees’ Union sentiments (or any other topic, for that matter), and the General Counsel’s interrogation claim must fail.

While unnecessary to the analysis, the “identity of the questioner” and “place and method” factors also preclude a finding of coercive interrogation. For example, Marvin Woods testified that first-level supervisor Leland Scott provided him with a “We Are Shamrock” t-shirt after he returned from a two-week medical leave. (Tr. 510). Under the *Rossmore* factors, situations involving low-level supervisors are typically deemed to be non-coercive. *See, e.g., Toma Metals, Inc.* 342 NLRB 787, 789 (2004); *Hancock*, 337 NLRB 1223, 1224-25 (2002).

⁸ As the ALJ aptly recognized, “because the lettering on the ‘We Are Shamrock’ shirts said nothing about the Union, it cannot simply be assumed that employees would associate these shirts with the union organizing campaign.” (ALJD p. 9:37-39).

Moreover, Woods testified that Scott simply handed the t-shirt to him, and did not claim that Scott asked whether he wished to receive the shirt. General Counsel witness Leo Baeza similarly testified that the t-shirts were distributed in the same manner as high visibility safety vests that were provided to employees earlier in the year. (Tr. 275). In addition to confirming that the t-shirts were intended to further Shamrock's hi-vis policy (which began with distribution of the safety vests), these facts further confirm that employees would not have felt pressured to reveal their Union sentiments as the shirts were distributed.

3. **General Counsel's Implied Surveillance Claim Fails Based On Its Inability To Establish That Employees Would Associate The "We Are Shamrock" T-Shirts With The Union Campaign.**

General Counsel's inability to demonstrate that employees associated the orange t-shirts with the Union campaign is similarly fatal to its implied surveillance claim. Implied surveillance allegations are analyzed under a "reasonable employee" standard, *i.e.*, whether a reasonable employee would assume from the employer's actions that his or her union activities were under surveillance. *Schrementi Bros. Inc.*, 179 NLRB 853 (1969). Accordingly, like the General Counsel's interrogation claim, its implied surveillance allegation requires some basis upon which to conclude that a reasonable employee would associate the orange "We Are Shamrock" t-shirts with opposition to the Union.

As explained in the preceding section, there is no support for such a conclusion. The t-shirts contained no reference to the Union campaign, and there is no suggestion that any Shamrock official mentioned the Union in distributing the t-shirts. (ALJD p. 6:18-23). Nor is there any basis to find that a reasonable employee would view an orange t-shirt as an expression of support for the Company or opposition to the Union. (*Id.*). To the contrary, in light of the undisputed testimony that the "We Are Shamrock" t-shirts were distributed in the same manner as the safety vests (Tr.

275), a reasonable employee would view the t-shirts precisely as they were intended—as a safety measure consistent with Shamrock’s hi-vis policy.

4. **General Counsel’s Actual Surveillance Claim Fails Based On Its Inability To Establish That Shamrock Regarded The Orange Shirts As An Expression Of Union Opposition.**

General Counsel also claims that Shamrock conducted actual surveillance of its employees by providing the orange “We Are Shamrock” t-shirts. Warehouse Manager Ivan Vaivao testified without contradiction, however, that the Company viewed the “We Are Shamrock” t-shirts as an apparel option available to employees to comply with the hi-vis policy, not as an expression of Company support. (Tr. 972). Indeed, Vaivao testified—again without contradiction—that he was not even aware that employees were wearing orange shirts to express opposition to the Union at the time the “We Are Shamrock” t-shirts were ordered. (Tr. 91).

The General Counsel furthermore failed to offer any evidence that Shamrock tracked or even identified employees who wore the t-shirts. Supervisor Leland Scott testified to the contrary, *i.e.*, that he paid no attention to whether employees were wearing the “We Are Shamrock” t-shirts as opposed to other high visibility apparel. (Tr. 122, 124). Vaivao testified consistently with Scott on this point, and further noted that employees of a third-party company that Shamrock uses to unload inbound trucks wear orange, high-visibility t-shirts as well. (Tr. 91-92).

General Counsel purports to rely on the testimony of Scott to prove that Shamrock was aware of employees who were wearing orange t-shirts to express opposition to the Union. According to the General Counsel, Scott “admitted that he understood the orange shirts to signify that the employees wearing them were not interested in discussing the Union.” (G.C. Br. 8). Notably, the General Counsel quotes Scott’s testimony as described in the ALJ’s opinion rather than the transcript. (*Id.*).

The reason for this unusual citation becomes clear upon examination of Scott's actual testimony.⁹ Scott testified that he understood the employees in this group were wearing the t-shirts to communicate the fact that they did not wish to be engaged by *either* side regarding the Union campaign:

Q. (By Counsel for the GC) They were wearing the shirts to show that they did not support the Union, right?

A. (By Scott) 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."

Q. Harassed by Union's organizers, right?

A. By anybody. You know, they're -- they just want to do their job and go home. That's it.

Q. Well, there was a lot of talk about harassment in the warehouse, but that was in terms of employees getting approach [sic] to sign union cards, right?

A. I don't know specifically. All I know is that they just wanted to say hey, I'm here to work and I don't want to be bothered. So whether that was by either side, I don't know.

Q. But those employees didn't support the Union, right?

A. Again, I don't ask anybody. I don't know.

Thus, General Counsel's reference to Scott's testimony is yet another mischaracterization of evidence. Moreover, because the General Counsel identifies no other evidence to support its contention of actual surveillance, its surveillance claim must fail.

Aside from the above considerations, General Counsel's claim of actual surveillance would transform the distribution of campaign t-shirts into a *per se* violation of the Act. In short, the General Counsel claims that the shirts constituted a surveillance tactic because they would allow the

⁹ Shamrock respectfully submits that the ALJ erred in concluding that Scott was aware of the fact that the employees who previously wore orange t-shirts were opposed to the Union. As quoted above, Scott testified that he was *not* aware of this fact, and no evidence to the contrary was introduced.

Company to identify employees who opposed the Union. The same would be true in any campaign, however, particularly in regard to shirts that explicitly reference a petitioning labor organization. Yet, the Board has not adopted such an inflexible approach. *Cf. R.L. White Co., Inc.*, 262 N.L.R.B. 575, 576 (N.L.R.B. 1982). The General Counsel's surveillance claim therefore should be dismissed, consistent with the ALJ's recommended decision.

5. **General Counsel's "Unlawful Benefit" Argument Is Contrary To Board Precedent And Ignores Undisputed Facts.**

General Counsel also argues that the ALJ should have found that the "We Are Shamrock" t-shirts were an unlawful benefit designed to persuade employees to oppose the Union. This assertion is contrary to the Board's well-established recognition that distribution of t-shirts does not rise to the level of an unlawful benefit:

A party to an election often gives away T-shirts as part of its campaign propaganda in an attempt to generate open support among the employees for the party. As such, the distribution of T-shirts is no different than the distribution of buttons, stickers, or other items bearing a message or insignia. A T-shirt has no intrinsic value sufficient to necessitate our treating it differently than other types of campaign propaganda, which we do not find objectionable or coercive. Accordingly, we hereby dismiss this allegation of the complaint.

R.L. White Co., Inc., 262 N.L.R.B. 575, 576 (N.L.R.B. 1982).

The General Counsel's unlawful benefit theory furthermore fails based on Shamrock's undisputed history of providing free t-shirts to employees. "An employer's legal duty in deciding whether to grant a benefit during [union organizing] is to act as it would have if the union were not present." *Desert Aggregates*, 340 N.L.R.B. 289, 290 (2003); *see also American Sunroof Corp.*, 248 N.L.R.B. 748, 748 (1980). This showing is satisfied by evidence that the employer has acted in accordance with its past practice. *E.g., The Rich Plan of Western Reserve*, 271 N.L.R.B. 1010 (1985) (employer did not violate 8(a)(1) by allowing employees to leave work approximately two hours early with pay on Good Friday where granting of such time off was consistent with employer's past practice);

Maremont Corp., 294 NLRB 11 (1989) (no 8(a)(1) violation where employer shortened overtime to permit employees to attend county fair, in light of employer's practice of accommodating employee desires to leave work early to attend community events).

Here, the General Counsel claims that Shamrock violated Section 8(a)(1) by distributing the "We Are Shamrock" t-shirts to employees without charging them or deducting the cost from the employees' respective uniform allowances. But, the ALJ credited the testimony of Shamrock Warehouse Manager Ivan Vaivao that the Company frequently provides t-shirts to its employees free of charge, separate from uniform orders. (Tr. 971, 1008). In fact, Vaivao identified 20 different t-shirts that Shamrock has given to employees just in the past few years. (Tr. 971; R. Ex. 45(a)-(e)). Notably, two of these t-shirts included the "We Are Shamrock" slogan. (Tr. 971-72; R. Ex. 45(a), (d)).

General Counsel does not dispute that Vaivao's testimony is fatal to its unlawful benefit claim. Instead, the General Counsel challenges—though somewhat tacitly—the ALJ's finding that Vaivao was a credible witness. In this regard, General Counsel paints Vaivao as testifying that Shamrock purchased orange t-shirts because no other high visibility colors were available. General Counsel then points to an email from a vendor that mentions green t-shirts as evidence that Vaivao was untruthful.

But, the ALJ considered this very argument, and rejected the General Counsel's characterization of Vaivao's testimony. (ALJD pp. 10:9-11:30). Instead, the ALJ understood Vaivao's testimony to be that the vendor did not have Dri-Fit t-shirts available in colors other than orange. (*Id.*). The vendor email upon which General Counsel relies does not suggest otherwise. (ALJD p. 11:30). Accordingly, General Counsel cannot satisfy its considerable burden to establish a

basis for disturbing the ALJ's determination concerning Vaivao's credibility. Its unlawful benefit claim should be dismissed.¹⁰

C. The ALJ Correctly Rejected General Counsel's Assertion That Additional Modified Duty Was Not Provided to Saenz and Woods Due To Their Alleged Protected Activity.

As outlined below, the ALJ correctly held that Shamrock did not violate the Act by deciding, in late 2015, that Benny Saenz ("Saenz") and Marvin Woods ("Woods") were no longer good candidates for Shamrock's Modified Duty Program and therefore would not be offered additional light duty work at that time. As a preliminary matter, the ALJ's decision on this issue was based largely on his credibility determinations, which cannot be overruled unless a clear preponderance of the evidence establishes that the determination was not correct. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). General Counsel has not made, and cannot make, such a showing in this case. Moreover, the evidence supports that the decisions regarding Woods and Saenz were made by Shamrock's Workers' Compensation Claims Manager Jamie Keith ("Keith") based on legitimate non-discriminatory business reasons (i.e., her assessment of Woods' and Saenz' medical situations and review of their workers' compensation files). The evidence also supports that Keith, the decision maker, had no knowledge of any protected activity by Woods or Saenz. Finally, Keith's decisions were consistent with Shamrock's stated Modified Duty Program, the program's goals and how the program has been administered. The General Counsel did not present evidence of disparate treatment.

¹⁰ General Counsel also appears to insinuate that the "We Are Shamrock" t-shirts were an unlawful benefit because employees were permitted to wear them in lieu of safety vests to comply with the hi-vis policy. (G.C. Br. 11). But, Shamrock permitted employees to wear shirts rather than vests from the time the hi-vis policy was implemented. (Tr. 428-29).

1. **General Counsel Cannot Establish by A Preponderance of the Evidence that the ALJ's Credibility Determinations Were Incorrect**

In his decision, the ALJ repeatedly credited Keith's testimony, calling her a "reliable witness" and noting that "based on [his] observations as [Keith] testified" the ALJ "conclude[d] that Keith was forthright." [ALJD p. 22:5-20; 22:40]. In addition to her demeanor, in crediting Keith's testimony, the ALJ correctly acknowledged that Keith no longer worked for Shamrock and therefore had little interest in the outcome of the proceeding. (ALJD p. 22:10-15). On the other hand, the ALJ discredited the testimony of General Counsel's witness Saenz. The ALJ expressed "concern" over Saenz' "pattern" of "at first denying," then changing his testimony or making admissions "when pressed" or after being shown documents that "forced him to admit" that his original answer was not true. [ALJD p. 28:5-29:10]. The ALJ's decision also noted several other instances where Saenz' testimony was not clear, incorrect, or suggested a contradiction. (ALJD p. 25:30-40, p. 26, fn. 12, p. 27:25-28:5).

Based on his credibility assessments, the ALJ made critical findings that prevent the General Counsel from meeting its burden under *Wright Line* to support that Woods or Saenz were removed from the modified duty program due to their purported protected activity. Specifically, the ALJ found that (1) Keith was the sole decision maker in removing Saenz and Woods from the light duty program, (2) in making the decision Keith focused on Saenz and Woods medical records and determined that they were not "a good fit" for the modified duty program because "medically, they were not getting better," and (3) Keith did not know about Woods' or Saenz' alleged union activities. (ALJD p. 24:5-10, 27:1-5, 29:10-15). Based on the foregoing, the ALJ determined that the General Counsel did not establish "employer knowledge" under *Wright Line*. [Decision, p. 29:10-15].

It is well established that the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and it is the ALJ and not the Board that has had the advantage of observing the witnesses while they testified. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). It is

therefore the Board's policy to attach great weight to an ALJ's credibility findings, which will be upheld, along with his findings of fact based thereon, unless the General Counsel has shown, by a clear preponderance of all the relevant evidence, that the ALJ's resolution was incorrect. *Id.* The General Counsel has not, and cannot, made that showing.

2. **The ALJ Correctly Determined that Shamrock Did Not Have Knowledge of Woods' or Saenz' Alleged Protected Activity**

While the ALJ's credibility determinations are sufficient to refute the General Counsel's modified duty claims, the General Counsel failed to present evidence to support that Shamrock had knowledge of Woods' or Saenz protected activity. Keith credibly testified that she not aware of union activity by Saenz or Woods and that she never had any conversation with *anyone* at Shamrock about Saenz or Woods engaging in any union activity. (Tr. 796). Rather, Keith was familiar with Saenz and Woods through their workers' compensation files, and only met Saenz on one occasion. (Tr. 738). Further, Keith (who had only worked for Shamrock since late April 2015) worked at Shamrock's corporate headquarters, not at the warehouse where Woods, Saenz and the other managers worked. (Tr. 729, 787). Moreover, the ALJ correctly rejected General Counsel's attempt to establish knowledge by relying on a vague statement by Warehouse Manager Ivan Vaivao that he received reports from associates about union organizers. As noted by the ALJ, Vaivao's statement did not confirm whether Saenz nor Woods were the subject of any such report or whether he believed them to be union organizers. (ALJD p. 23:1-24:10). As such, the General Counsel failed to show knowledge of Saenz or Woods protected conduct. (ALJD p. 24, 29).

3. **The ALJ Correctly Determined that Keith Was the Decision Maker**

The ALJ correctly determined that Keith was the decision maker and that General Counsel failed to meet its burden of proving that Shamrock had knowledge of Woods' or Saenz' protected activity. First, Keith credibly testified that she made the "executive decision" regarding Woods' and Saenz' modified duty. (Tr. 751). The General Counsel's attempt to refute that Keith made the

decision, by pointing to an October 2015 meeting between Keith and several managers (Jeff Vadawalker, Melanie Petrola, Daniel Santamaria and Heather Vines-Bright), is without merit. Rather, the testimony (as follows) of the witnesses who attended the October meeting supports that Keith was the decision maker:

- Vandawalker testified that he was not part of the decision, rather he was told by Keith that Woods and Saenz were being taken off light duty (Tr. 187, 201);
- Santamaria testified that he had never reviewed Woods and Saenz workers' compensation files and was not involved in the decision, rather he was informed because he was to call and inform Woods about being taken off the program (Tr. 230, 258);
- Petrola testified that she played no role in modified duty other than being informed when someone is on it and that she was told about the program at the meeting and about people who were largely outside of the program's margins (Tr. 421, 422);
- Vines-Bright testified that the extent of her involvement was being informed when a person is on modified duty and that Keith contacted her and informed her that Woods and Saenz were well over the allotted 90 days, and they needed to take them off modified duty (TR. 469:10-18).

Further, Keith testified that she did not get recommendations regarding what to do with Woods and Saenz at the October meeting. (Tr. 750). Rather, she met with the group to keep them informed, in the loop and on the same page. (Tr. 753, 761). Further, because this group did not review either Saenz or Woods medical reports, and only received copies of their restrictions, they would not have been able to determine if it was appropriate to extend the modified duty assignment because such a decision is based, in large part, on medical reports that detail the employees' improvement. (Tr. 754, 764, 765, 768, 779).

4. The General Counsel Failed To Establish Disparate Treatment

While the foregoing is enough to defeat General Counsel's modified duty claims, the claims also fail because General Counsel did not, and cannot show, that the modified duty program was applied disparately to Saenz or Woods.

Shamrock's modified duty program was designed to provide associates with a limited-term assignment that would accommodate them while they are temporarily unable to perform the essential functions of their regular duties. (G.C. Exh. 15(a)). While the modified duty program "typically" did not exceed 90 days, where additional modified duty was recommended by a physician, Shamrock would decide whether to continue to offer the accommodation. (G.C. Exh. 15(b)). Keith explained that the duration of modified duty was determined by the associate's medical progress, i.e., whether they were moving forward in their recovery, and Keith could extend the time depending on the situation. (Tr. 735, 738, 750-51, 774-75).

As acknowledged by Saenz and Woods, the modified duty program was not meant to provide a permanent modified duty position. (Tr. 538-539, 600). Further, it was rare for associates to exceed the 90 days. Keith testified that in 95% of the situations, associates would "not even hit 90 days." (Tr. 787). Consistent with this, Santamaria testified that associates use modified duty, but it's for a "a very short time." [Tr. 17-23]. Saenz and Woods were the first associates he had ever heard of surpassing the 90 days. [DS Tr. 245:3-4]

Although it was not the norm, the evidence showed that like Woods and Saenz, some associates were approved to surpass the typical 90 days of modified duty.¹¹ For example, if an employee was still progressing, or close to achieving maximum medical improvement, or had an

¹¹ Shamrock provided Woods approximately 6 months of light-duty assignments and Saenz approximately 8 months of light-duty assignments. (Tr. 529, 602).

intervening surgery that required additional recovery time, the modified duty assignment could be extended. (Tr. 750-751). Alternatively, associates who were not progressing, or going backwards in their recovery despite being on modified duty, were no longer “a good fit” for the program. (Tr. 750-751, 765, 769, 782). Again, the program was designed to provide a smooth transition to full duty, not to aggravate the injury or stall the recovery. (Tr. 783).

The evidence supports that Keith’s decision to remove Saenz and Woods from the modified duty program was consistent with the foregoing legitimate considerations. Mr. Saenz was removed from light duty in October 2015 because his recovery was stagnant and only after he reinjured himself performing his sedentary light duty assignment (he fell off the chair he was provided to sit on while doing his light-duty work). (Tr. 586, 592). Woods was removed from his light duty assignment because he went backwards in his recovery, to sedentary work, after being released to return to work without restrictions and almost immediately reinjuring himself. (Tr. 516). As of the hearing in this case, both Saenz and Woods had not been released to return to work. (Tr. 523).

Notably, the evidence supports that Woods and Saenz were not the only Shamrock associates removed from the modified duty program. Heather Vines-Bright knew of several associates, and was able to specifically identify some who had been removed. (Tr. 494-495). Finally, General Counsel’s attempt to show disparate treatment by alleging that a prior Shamrock associate (Phillip Kiss) had been provided more than 90 days of modified duty, without providing any evidence as to Mr. Kiss’ circumstances, must fail. General Counsel presented no evidence regarding whether or why Kiss’ modified duty was allegedly extended.

D. The General Counsel's Proposed Relief Is Not Appropriate.

1. No Relief Is Appropriate In This Matter Because Shamrock Did Not Violate The Act.

For the reasons explained above, the ALJ correctly held that Shamrock did not violate the Act as alleged in General Counsel's Complaint or in any other manner. Accordingly, no relief is appropriate in this matter.

2. General Counsel's Request For Reading Of A Notice Is Improper.

Section 10(c) of the Act directs the Board, if it concludes that a party before it engaged in an unfair labor practice, to order the offending party "to cease and desist from such unfair labor practice, and to take such affirmative action ... as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). This authority is remedial. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941); *see also Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes."). "The measure of the Board's remedial power cannot depend solely on the length or frequency of the Employer's conduct: the crucial factor is the effect of that conduct on the employees." *Teamsters Local 115 v. NLRB (Haddon House)*, 640 F.2d 392, 399 (D.C. Cir. 1981).

The requirement that a management official read the Board's notice of rights to employees does not effectuate the Act's policies in this case. There is an element of humiliation in requiring that a company official personally and publically read such notice. *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 304 (2nd Cir. 1067). The Fifth Circuit denied such relief as "unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966).

In this case, the General Counsel seeks extraordinary relief in the form of requiring Shamrock to read a notice to employees. This *ad hominem* attack does not serve the Act's remedial purpose. As discussed above, the ALJ correctly rejected each of the General Counsel's alleged

violations. Even aside from the failure of the General Counsel's claims, its allegations amount to nothing more sinister than distribution of t-shirts and enforcement of a Company policy as written. Accordingly, even if the General Counsel's allegations had merit (which they do not), reading of a notice would be improper.

3. **The Board Should Not Award Search-For-Work Expenses In This Case.**

Finally, General Counsel claims—contrary to existing Board law—that Saenz and Woods should be awarded search-for-work expenses. As General Counsel admits, Board law does not permit search-for-work expenses to be reimbursed separately as damages. Rather, such expenses are considered only as deductions from interim employment earnings, thereby reducing an employer's mitigation setoff. *See e.g., D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007); *Cibao Meat Prods.*, 348 NLRB 47, 50 (2006). General Counsel has petitioned the Board on multiple occasions to depart from this well-established rule, and has been unsuccessful. *E.g., Casworth Enterprises, Inc.*, 362 NLRB No. 131, slip op. at 2 n. 2 (2015); *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (2015); *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 4 n. 5 (2015).

Despite these repeated failures, General Counsel again offers the same arguments in this case. First, the General Counsel claims that reimbursement of search-for-work expenses is required in light of the remedial nature of the Act. But, the Act has had a remedial purpose from its inception, and search-for-work expenses have not been considered necessary to promote this objective. Thus, in essence, General Counsel's argument amounts to a blanket assertion that its reasoning should be deemed superior to more than 60 years of precedent from countless Board members. Decades of case law should not be disregarded so lightly.

In fact, the impetus for awarding search-for-work expenses has become even *less* compelling over time. As ALJ Locke recognized in a prior decision, the advent of the Internet and

other technological resources has allowed employment candidates to conduct job searches without investment of extraordinary expenses:

In a past age, a search for work might indeed have resulted in an expense for gasoline or, earlier, hay for the horse. However, the telephone and Internet make it possible to conduct a job search at no extra expense. Indeed, to a significant extent the Internet has transformed the process of looking and applying for a job. This technology has become many individuals' regular way of finding work, and the Board only requires a discriminatee to seek employment using his regular method.

Int'l Bhd of Teamsters, Local 71, 2014 NLRB LEXIS 738 at *84-85 (Sept. 26, 2014) (ALJ opinion).

Thus, while employees may choose to invest additional expenses in a job search, there is no basis for charging those expenses to the employer.

Second, General Counsel claims that treating search-for-work expenses as a deduction from interim earnings precludes discriminatees from being made whole. But, there is no evidence or suggestion that Woods or Saenz incurred *any* search-for-work expenses at all in this case. In fact, neither individual was separated from Shamrock. To the contrary, they were simply unable to perform their regular duties.

General Counsel may insist that such evidence can be submitted during the compliance phase. However, in light of the General Counsel's request that the Board disregard *decades* of well-established precedent, it is incumbent upon General Counsel to make at least some preliminary showing that this is an appropriate case in which to consider such a departure from the law. It has failed to do so.

Even aside from the lack of evidence, an award of search-for-work expenses would be inherently speculative and incapable of reliable proof. The General Counsel offers no suggestion, for example, as to how a discriminatee might allocate the appropriate portion of an Internet or telephone data charge to his/her job search, or how a respondent might verify that receipts produced by a discriminatee reflect expenses actually incurred while searching for work. While

these difficulties may exist even under the present state of the law, they are at least ameliorated by the fact that such expenses are a setoff from interim earnings. General Counsel's position would disrupt this balance.

Third, General Counsel analogizes to EEOC and DOL rules and regulations to support its claim that search-for-work expenses should be separately reimbursable. The NLRA, however, is not comparable to Title VII or other employment discrimination statutes. Those statutes authorize the recovery of compensatory and even punitive damages. The NLRA, on the other hand, only permits an award of back pay to the extent necessary to compensate a discriminatee for his/her lost wages.

The fact that General Counsel questions the effectiveness of this remedy is irrelevant. A departure from this well-established framework requires Congressional action. General Counsel's exception regarding search-for-work expenses therefore should be rejected.

III. CONCLUSION

For the reasons explained above, General Counsel's cross exceptions to the ALJ's recommended decision should be rejected, and the relevant allegations should be dismissed.

Respectfully submitted,

BAKER HOSTETLER LLP



Todd A. Dawson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of August, 2016, a true copy of the foregoing was filed electronically with the Executive Secretary. Copies were also sent by electronic mail to:

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A handwritten signature in black ink, appearing to read 'D. Rosenfeld', written over a horizontal line.

One of the Attorneys for
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