

**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 REPLY TO RESPONDENT'S
ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,

Sara S. Demirok
Néstor Miguel Zárate Mancilla
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Phone: (602) 416-4761
(602) 416-4771
Fax: (602) 640-2178
E-mail: sara.demirok@nlrb.gov
nestor.zarate-mancilla@nlrb.gov

I. Introduction

The Answering Brief to the General Counsel's Exceptions to the Decision of the Administrative Law Judge filed by Respondent Shamrock Foods Company (Respondent) is strained and suffers from many of the same deficiencies as the Administrative Law Judge's Decision, JD (SF)-49-16 (Jun. 10, 2016). While Respondent contends that Administrative Law Judge Locke (ALJ Locke) provided a thoughtful and careful analysis of the relevant evidence, Respondent, in turn, emphasizes only partial portions of the record and omits crucial excerpts from examinations. In doing so, Respondent attempts to paint a picture in which gaping holes prohibit the most otherwise reasonable conclusions. However, record evidence and proper legal analysis demand reversal of the findings and conclusions to which the General Counsel has excepted.

II. The Board Should Adopt the General Counsel's Exceptions

A. ALJ Lock 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, 57)

The Board should reverse ALJ Locke's decision to decline to take judicial notice of the decision of Administrative Law Judge Jeffrey D. Wedekind (ALJ Wedekind) in *Shamrock Foods Co.*, JD(SF)-05-16 (Feb. 11, 2016), and the factual findings therein. In defending ALJ Locke's refusal to consider the significant and egregious conduct at issue in the prior case, Respondent parrots ALJ Locke's impossibly forced finding that there was no nexus between that conduct and the conduct at issue in these cases. (R Br. 4).¹ This argument however, is completely unsupported by the record. Where the one case leaves off in June 2015, the other

¹ Respondent's Answering Brief to General Counsel's Exceptions to the Decision of the Administrative Law Judge (August 19, 2016) will be cited to herein as "R. Br.," whereas the General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision (July 22, 2016) will be cited to as "GC Br."

resumes in July. Where the prior case centers on Respondent's conduct squelching a budding union campaign, this one centers on Respondent's continued attempts to target supporters of Charging Party Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC (the Union) during *the same campaign*, before its employees organizing efforts were able to recover from Respondent's devastating first series of blows. This nexus is self-evident, and, moreover, was clearly articulated to ALJ Locke. (Tr. 89, 276-277 (timing of Respondent's distribution of the "We are Shamrock" shirts); 504-505; 573-576 (Counsel for the General Counsel (CGC) arguing that administrative notice is necessary for, among other reasons, connecting the conduct involving the discriminatee in the prior case with the Union activity being targeted by Respondent in the current case); see also GC Br. 5-8).

The impact of ALJ Locke's refusal to take notice of Respondent's prior conduct before ALJ Wedekind is amplified by ALJ Locke's decision to preclude examination regarding Respondent's history of unfair labor practices and its overall response to the campaign. Respondent contends that this is "entirely a mischaracterization." (R. Br. 5-7). However, Respondent's contention is nothing more than the pot calling the kettle black by clinging to only one of three attempts made by CGC to argue before ALJ Locke that questioning on matters at issue in the prior case be allowed. The record is clear that CGC argued to elicit testimony on Respondent's prior conduct for the purposes of: (1) establishing knowledge of the union campaign, (2) establishing animus, and (3) appropriately probing the witness's evasive testimony during an examination under FRE 611(c). (Tr. 188-195). Notwithstanding the fact that the examination should have been allowed on all three grounds, ALJ Locke erroneously sustained Respondent's objection to preclude it. This error is particularly prejudicial to CGC considering ALJ Locke's failure to take notice of ALJ Wedekind's factual findings.

By declining to take notice of Respondent's recent history of serious and pervasive unfair labor practices and refusing to allow CGC to establish elicited testimony about that history on the record, ALJ Locke chose to don blinders before reading the facts, resulting, most significantly, in an impossibly forced finding that Respondent, historically an egregious wrongdoer, did not harbor animus toward its employees' organizing efforts. Accordingly, CGC respectfully requests that the Board reverse these errors and reweigh all evidence including Respondent's recent history of unfair labor practices in the balance.

B. ALJ Locke Erred in Failing to Find That Respondent's Distribution of the High-Visibility Orange "We Are Shamrock" Shirts Was Unlawful (Exceptions 1-45, 79-83)

Although Respondent devoted much effort in its attempt to poke holes in the facts CGC relied upon in excepting to ALJ Locke's finding that Respondent's distribution of the high-visibility "We Are Shamrock" shirts was lawful, Respondent, by not refuting it, conceded one of the most important facts overlooked by the ALJ: that about a month prior, Respondent had already distributed other commemorative shirts to employees, purportedly to commemorate the same event, a good season ending in early May. (Tr. 969-970; 1006-1007). This fact, when considering the objective standard routinely applied by the Board, tends to show that employees on the receiving end of both shirts would reasonably believe that the separate distributions of completely different shirts carried independent significance. The first, a black shirt with a shamrock emblazoned on it, would reasonably be construed as commemorating a good season because it was distributed at a company barbecue that was commemorating the same thing. Regarding the second though, the high visibility "We Are Shamrock" shirts, those would not likely be construed by employees as signifying the very same thing that had been celebrated with such fanfare over a month prior. Rather, when considered in the context of the already large

faction of anti-union employees who wore the same orange color to express their distaste for the Union and its organizers, employees would reasonably believe that Respondent was merely spreading the anti-union sentiments through its “We Are Shamrock” shirts as far as it could throughout the warehouse – so long as employees were willing to don the shirts themselves.

Respondent also contends, erroneously, that ALJ Locke actually applied an objective standard when considering the allegations related to the lawfulness of Respondent’s “We Are Shamrock” shirt distribution. (R. Br. 12). In doing so, Respondent continues to criticize, just as ALJ Locke did, the lack of testimony evidence from employees revealing what they subjectively understood as the true meaning behind either orange shirt worn in the warehouse. (R. Br. 9, 11-14). However, the subjective impressions of employees (or even Respondent for that matter²) do not bear on whether violations occurred. (GC Br. 22-23).

In directly countering CGC’s exceptions related to the allegations that Respondent’s distribution of the “We Are Shamrock” shirts constituted an unlawful interrogation and created the impression that employees’ union activity was under surveillance, Respondent relies almost entirely on the fact that employees would not associate the shirts with anti-union sentiment. (R. Br. 9, 11-14). However, as discussed above, this baseline finding is mistaken. For this reason alone, Respondent’s shepherding of ALJ’s Locke’s findings are equally misguided.

Regarding the interrogation allegation, Respondent also argues that two of the factors considered by the Board in assessing whether questioning about protected activities is coercive, as articulated in *Rossmore House*, 269 NLRB 1176 (1984), aff’d. sub nom. *HERE Local 11 v.*

² Respondent tries to claim that none of its supervisors knew why the large faction of anti-union supporters wore their own orange shirts. In doing so, Respondent ignores the obvious truth within Supervisor Leland Scott’s testimony – one of the only findings that ALJ Locke actually got right in his decision. (ALJD at 8:14-15). Although Scott attempted to deny that he knew why those shirts were being worn, he let slip that he knew they were wearing the shirts “not to be harassed. . . to be left alone.” (Tr. 117:17-22). Of course he was referring to harassment from union supporters, consistent with employee Baeza’s testimony that he and others wore the shirts to keep coworkers who supported the union and were “coming to [them] constantly” away. (Tr. 277).

NLRB, 760 F.2d 1006 (9th Cir. 1985), and *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), specifically, the “identity of the questioner” and “place and method” factors, weigh against finding a violation. Although Respondent conducted a mass distribution of orange “We are Shamrock” shirts, in making its argument, Respondent only addresses the manner in which one employee, Marvin Woods (Woods), was provided with a shirt and wholly fails to address CGC’s argument and discussion of these factors. (R. Br. 12-13). As explained more fully in CGC’s Brief in Support of Exceptions, an analysis of these factors must take into consideration the fact that, once Respondent distributed the shirts, all supervisors, including those at the highest levels, would see whether employees chose to wear the shirts. (GC Br. 23). Accordingly, Respondent missed the mark, and the Board should find that it unlawfully interrogated employees by distributing the “We Are Shamrock” shirts.

Respondent similarly misses the mark on the allegation that it unlawfully granted benefits to employees by providing the DriFit “We Are Shamrock” shirts. Respondent points to the fact that employees were given commemorative shirts in the past, but fails to address CGC’s points that the shirts at issue were unlike its past commemorative shirts, that Respondent had recently provided actual commemorative shirts, and that the DriFit shirts were designed to be worn at work to comply with its HiVis Policy.³ The only other HiVis compliant shirts were available through Respondent’s annual uniform allowance program, but employees had to essentially pay for those. All of these factors show that Respondent deviated from its past practice in providing the “We Are Shamrock” shirts at issue and accordingly the Board should find that Respondent granted an unlawful benefit to employees to discourage union activity.

³ Respondent also addresses the CGC’s discussion of Vaivao’s testimony about why Respondent chose to order the color orange for these shirts. In doing so, Respondent wrongly asserts that ALJ Locke attached meaning to Vaivao’s testimony. (R. Br. 17) (claiming that ALJ Locke “understood Vaivao’s testimony to be that the vendor did not have Dri-Fit t-shirts available in colors other than orange”). However, ALJ Locke could not conclude what Vaivao actually meant in his testimony, but settled with concluding what Vaivao did not mean. ALJD 10-11.

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 46-83)

Respondent insists that reversal of ALJ Locke's failure to find that Respondent unlawfully removed employees Woods and Benny Saenz (Saenz) from its modified duty program requires disrupting his credibility resolution related to the purported decision maker, Jamie Keith (Keith). (R. Br. 18). However, although documentary and testimonial evidence cast undeniable doubt as to the veracity of Keith's claim that she was the sole decision maker, the Board need not second guess ALJ Locke's credibility finding to overturn his conclusions. Keith testified throughout the hearing that in making the decision to remove Woods and Saenz from modified duty, she took a "collaborative approach." In that vein, she spoke and met with several different human resource managers and other supervisors who work at the warehouse before Woods and Saenz were notified about their removal. (Tr. 736-738, 763-769, 753). Even if Keith did not have direct knowledge of Woods' and Saenz' Union activities, the Board should find that the knowledge of the various supervisors working at its warehouse should be imputed to Respondent, including Keith, and, that, even if Keith herself did not have direct knowledge of Woods' and Saenz' Union activities, Respondent is accountable under a "cat's paw" theory, since others with knowledge of those activities were enmeshed in the decision-making process. See *Jeff MacTaggart Masonry, LLC*, 363 NLRB No. 149, slip op. at 1 n.3 (discussing the "cat's paw" theory of liability described in *Staub v. Proctor*, 562 U.S. 411 (2011), where one supervisor, motivated by discriminatory animus, influences and causes an adverse action).

In arguing that the evidence does not establish that it did not have knowledge of the Union activities of Saenz and Woods, Respondent only refutes that Warehouse Manager Ivan Vaivao's statement that he knew who the organizers were and that it was "public knowledge" is

sufficient to establish Respondent's knowledge. (R. Br. 20). Even if the Board agrees and finds Vaivao's admission insufficient on its own, the record provides strong circumstantial evidence of Respondent's knowledge. This evidence, specifically outlined in the General Counsel's Brief in Support of Exceptions, went unaddressed by Respondent. (See GC Br. 30-31 (discussing timing, comparative treatment, and simultaneous adverse actions)). Accordingly, the Board should find that Respondent knew of Woods' and Saenz' Union activities and consider that knowledge in analyzing the lawfulness of Respondent's actions against them.

Just as ALJ Locke failed to address any of CGC's pretext arguments when he failed to find that Respondent harbored animus under the *Wright Line* framework, Respondent failed to address several of CGC's arguments on this very point. Such factors include: the inexplicable timing of Respondent's actions against Saenz and Woods, Respondent's failure to consider all factors required under its modified duty program before taking action against the discriminatees, and the shifting evidence concerning Respondent's decision. These circumstances indicate that Respondent harbored animus towards the employees' recently increased Union activities in the warehouse, which was the motivating factor in deciding to remove them from the program altogether. (See GC Br. 11-16, 29-32).

Respondent failed to substantively address other factors that also lead to the same conclusion. Respondent's supervisors clearly testified inconsistently with regards to when the decision was made to remove Woods and Saenz from the modified duty program and the extent of Keith's role in administering and monitoring the modified duty program. (See GC Br. 14-15 (providing detailed transcripts citations and pointing out inconsistencies in Respondent's supervisors' testimony on this issue)). Respondent argues that their testimony was consistent, but only by pointing out that they all denied having made the decision themselves and shirking

the ultimate responsibility on Keith. (R. Br. 21). However, this explanation does not substantively counter the overwhelmingly inconsistent testimony on when the decision made and who was responsible for changing, administering, and monitoring the modified duty program, an inconsistency which itself amounts to another indicator of pretext.

Additionally, Respondent argues that CGC failed to establish disparate treatment in the workplace as a way of bolstering ALJ Locke's failure to find animus. (R. Br. 22). In doing so, Respondent points to testimony indicating that Respondent may have removed employees from modified duty who work at an entirely different facility, who may not be subject to the same modified duty program, and who were not engaged in the Union organizational drive at Respondent's warehouse. (R. Br. 23 (citing Tr. 494-495)). In fact, the testimony cited by Respondent shows that a high-level, long-term manager working in human resources, Heather Vines-Bright (Vines-Bright), could only give one example of an employee who was removed from modified duty prior to Respondent deciding to remove Saenz and Woods. And, this employee works in Respondent's dairy division, which is a wholly separate operation located elsewhere. (Tr. 494-495). Respondent fails to cite to the continued transcript which actually supports a finding that Respondent changed the manner in which it enforced its modified duty policy as alleged. In fact, Vines-Bright disclosed that her only other example, employee Christopher Martinez, who actually works at the warehouse, was removed from modified duty after Woods and Saenz were removed. (Tr. 495-496). This shows that not only did Respondent unlawfully remove Woods and Saenz from the program, but it made an overall change in the manner it began enforcing the program, as alleged in paragraph 6(a) of the Consolidated Complaint, as amended at the hearing. For, rather than allow its employees to work well over 90 days on the program as it had in the past, Respondent (beginning with two lead organizers), used

the program to thin out its workforce. In sum, Respondent's counter-comparator evidence does nothing more than bolster the CGC's position.

Respondent goes further by trying to argue that CGC did not show disparate treatment by pointing out that circumstances surrounding employee Phillip Kiss' removal went unlitigated. (R. Br. 23). However, CGC attempted to examine each of Respondent's supervisors on the circumstances of Kiss' removal. Without fail, no one could recall anything about it, nor were subpoenaed documents provided. (Tr. 101, 179-180, 182-183, 496-497, 791-792, 914-916). However, Respondent admitted, early on, but not during the administrative hearing, the relevant comparative facts in its position statement which was received into evidence. According to Respondent, Kiss worked on modified duty from March 16, 2014, to January 15, 2015. He stopped working on modified duty only after he "was released by his treating physician to return to his regular position" in the warehouse. (GC Ex. 36 at 4). Thus, Kiss was allowed modified duty for well over 90 days and was never removed from the program by Respondent as Woods and Saenz were.

For the forgoing reasons, including the fact that ALJ Locke incorrectly failed to take notice of ALJ Wedekind's decision and factual findings, CGC respectfully requests that ALJ Locke's findings that CGC failed to establish animus or knowledge, be reversed. Accordingly, the Board should find that Respondent changed the manner in which it enforced its modified duty program and took action against Woods and Saenz because they supported the Union.

D. ALJ Locke Erred in Failing to Order CGC’s Requested Relief, Including That Respondent Publicly Read the Notice to Employees to its Employees and Award Search-For-Work Expenses (Exceptions 84-85)

First, Respondent argues that a public notice reading is inappropriate, characterizing it as “humiliating” and an “*ad hominem* attack.” (R. Br. 24). Respondent claims that even if merit were found to the allegations, a public notice reading is improper because the Board’s authority is strictly remedial. *Id.* However, in some cases, special remedies and actions are required to effectuate or preserve the Board’s remedial power. The Board has recognized that special remedies are often required in order to “enable employees to exercise their Section 7 rights free of coercion.” *Evenflow Transportation, Inc.*, 361 NLRB No. 160, slip op. at 1 (2014) (internal quotations omitted) (quoting *Carey Salt Co.*, 360 NLRB No. 38, slip op. at 2 (2014)). In particular, the Board finds that public notice readings are necessary to effectuate the policies of the Act when the respondent’s unlawful conduct is “sufficiently serious and widespread” that employees need reassurance that their rights “will be respected in the future.” *Evenflow Transportation, Inc.*, 361 NLRB slip op. at 1 (citing *Whitesell Corp.*, 357 NLRB 1119, 1123-24 (2011)). In some such circumstances, a notice reading “is warranted in order to dissipate as much as possible any lingering effects of the Respondent’s unfair labor practices.” *Evenflow Transportation, Inc.*, 361 NLRB slip op. at 1 (quoting *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), *enfd. mem.* 273 Fed. Appx. 32 (2d Cir. 2008)). Here, Respondent’s conduct should be viewed in the context of its recent assault on employees’ free choice, documented in detail in ALJ Wedekind’s decision, which left its employees’ willingness to engage in protected activities and their faith in the Board’s ability to protect their rights under the Act deeply vulnerable to further injury. Respondent’s continued assault requires that employees be reassured of their rights and that Respondent face the consequences of its actions.

In addition to not recommending a public notice reading, ALJ Locke failed to award search-for-work expenses because he did not find merit to the allegations. However, because the Board should find otherwise, that Saenz and Woods were discriminatorily removed from Respondent's modified duty program, which caused them to lose work, the Board should also find that they are entitled to search-for-work expenses. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 8 (Aug. 24, 2016).

III. Conclusion

For the reasons explained above and throughout CGC's Brief in Support of Exceptions, ALJ Locke's findings and conclusions should be reversed and the Board should order the appropriate remedies to effectively counter-balance Respondent's unlawful conduct in combatting employee free choice.

Dated at Phoenix, Arizona, this 2nd day of September 2016.

Respectfully submitted,

/s/ Sara S. Demirok
Sara S. Demirok
Néstor Miguel Zárate Mancilla
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Phone: (602) 416-4761
(602) 416-4771
Fax: (602) 640-2178
E-mail: sara.demirok@nlrb.gov
nestor.zarate-mancilla@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S REPLY TO RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in SHAMROCK FOODS COMPANY, Cases 28-CA-161831, 28-CA-162851, and 28-CA-165951 was served by E-Filing, and E-mail on this 2nd day of September 2016, on the following:

Via E-Filing:

The Honorable Gary Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Via U.S. Mail:

Shamrock Foods Company
3900 E. Camelback Rd. Suite 300
Phoenix, AZ 85018

Bakery, Confectionery, Tobacco Workers'
and Grain Millers International Union, Local
Union No. 232, AFL-CIO-CLC
3117 North 16th Street, Suite 220
Phoenix, AZ 85016-7679

Via Email:

Nancy Inesta, Attorney at Law
Baker & Hostetler LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025
Email: ninesta@bakerlaw.com

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

Todd A. Dawson, Attorney at Law
Baker & Hostetler LLP
3200 PNC Center
1900 East 9th Street
Cleveland, Ohio 44114-3482
Email: tdawson@bakerlaw.com

David A. Rosenfeld, Attorney at Law
Weinberg Roger and Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
Email: drosenfeld@unioncounsel.net

Mr. Andres Contreras
6441 West McDowell Road, Apt. #1014
Phoenix, AZ 85035
Email: dezcontreras22@hotmail.com

/s/ Sara S. Demirok

Sara S. Demirok
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Phone: (602) 416-4761
(602) 416-4771
Fax: (602) 640-2178
E-mail: sara.demirok@nlrb.gov
nestor.zarate-mancilla@nlrb.gov