

**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 ANSWERING BRIEF
TO RESPONDENT'S CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,

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I. INTRODUCTION

Counsel for the General Counsel (General Counsel) files this Answering Brief in response to the Cross-Exceptions to the Administrative Law Judge's Decision, JD (SF)-49-16 (Jun. 10, 2016), filed by Respondent Shamrock Foods Company (Respondent). In its cross-exceptions, Respondent excepts to the finding by Administrative Law Judge Keltner W. Locke (the ALJ) that its supervisor and agent Leland Scott (Scott) knew that a group of employees collectively wore orange shirts to work to signal opposition to Charging Party Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC (the Union), and to the ALJ's failure to find that alleged discriminatees Benny Saenz (Saenz) and Marvin Woods (Woods) would have been removed from modified duty even in the absence of their protected activities. Neither of these cross-exceptions has merit.

II. THE ALJ'S FACTUAL FINDING THAT RESPONDENT'S SUPERVISOR AND AGENT LELAND SCOTT KNEW EMPLOYEES WORE ORANGE SHIRTS TO SIGNAL OPPOSITION TO THE UNION IS SUPPORTED BY THE FACTS AND THE LAW

Respondent's cross-exception to the ALJ's finding that Scott knew employees wore orange shirts to signal opposition to the Union is essentially an exception to a credibility finding. Respondent is correct that Scott admitted knowing that a group of loaders started wearing non-reflective orange shirts at some point in time, and that, when repeatedly pressed, Scott only went so far as to admit, "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,'" and, later, "All I know is that they just wanted to say hey, I'm here to work and I don't want to be bothered." (Tr. 116-118) Respondent is also correct that Scott denied that he knew that employees wore the shirts to signal opposition to the

Union, or to say they did not want to be “bothered,” “harassed,” “questioned,” “asked,” or “given anything” about the Union. (Tr. 117-118) However, Respondent fails to acknowledge that the ALJ’s finding that this denial was not credible and that Scott, in fact, knew the shirts were intended to signal opposition to the Union, despite his denial, is strongly supported by the facts.

Scott’s claims of lack of recall and lack of knowledge are stunningly implausible. When asked when he noticed a group of loaders wearing non-reflective orange shirts, Scott claimed he did not recall. (Tr. 116) When asked whether the employees started wearing the orange shirts before or after a barbeque held to celebrate the end of a successful season, Scott again claimed not to recall, concluding, smugly, “You know, it was an orange shirt, so that was it.” (Tr. 116) When asked if he talked to prominent anti-Union employee Leo Baeza about the shirts, Scott again said he did not recall. (Tr. 117) When he asked if he talked to any of the employees who wore the orange shirts about the shirts, he evaded by trying to change the subject to different shirts, responding, “I talked to employees about wearing HiVis shirts. That’s what I talked to employees about.” (Tr. 117) However, because Scott admitted knowing that the employees wore the shirts to signal that they did not want to be “bothered,” “harassed,” “questioned,” “asked,” or “given anything,” he must have talked to employees about the shirts. (Tr. 117-118)

Further, Scott’s claim not to know that employees were wearing the shirts to signal opposition to the Union, even though he admitted knowing that they were wearing the shirts because they did not want to be “bothered,” “harassed,” “questioned,” “asked,” or “given anything,” is completely implausible. The shirts were worn in the charged environment of a contentious Union organizing campaign, during which Respondent itself characterized solicitation in support of the Union as “bugging,” “heckling,” “insulting,” “coercive,” and “bullying” behavior in communications to its employees. *Shamrock Foods Company*, JD(SF)–

05–16 at 10, 25-27 (Feb. 11, 2016). The ALJ’s decision to discredit Scott’s claim not to know that employee concerns about being “bothered,” “harassed,” “questioned,” “asked,” or “given anything” related to the Union organizing campaign, in this context, is, thus, strongly supported.

It is well-established that the Board will not overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Here, the clear preponderance of all the relevant evidence supports the ALJ’s finding that Scott knew that a group of employees collectively wore orange shirts to work to signal opposition to the Union.

III. A FINDING THAT RESPONDENT WOULD HAVE REMOVED ALLEGED DISCRIMINATEES BENNY SAENZ AND MARVIN WOODS FROM MODIFIED DUTY EVEN IN THE ABSENCE OF THEIR UNION SUPPORT WOULD NOT BE SUPPORTED BY THE FACTS OR THE LAW

Respondent’s cross-exception to the ALJ’s failure to find that alleged discriminatees Saenz and Woods would have been removed from modified duty even in the absence of their Union support is also without merit. As explained more fully in the General Counsel’s Brief in Support of Exceptions to the Administrative Law Judge’s decision, Respondent failed to meet its burden of establishing that it would have removed Saenz and Woods from modified duty, even in the absence of their protected activities, as the evidence established that the reasons given for this action were pretextual. See General Counsel’s Brief in Support of Exceptions, pgs. 11-16, 31-32.

IV. CONCLUSION

Based upon the foregoing, the General Counsel respectfully submits that the ALJ correctly found that Respondent's supervisor and agent Scott knew that a group of anti-Union employees collectively wore non-reflective orange shirts to signal opposition to the Union and further submits that a finding that Respondent would have removed alleged discriminatees Saenz and Woods from modified duty even in the absence of their Union support is not supported by the facts or the law. Accordingly, the General Counsel respectfully urges the Board to reject Respondent's Cross-Exceptions.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-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, U.S. Mail, and E-mail on this 2nd day of September 2016, on the following:

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