

**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,

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I. Introduction

Respondent's Answering Brief to the General Counsel's Exceptions to the Decision of the Administrative Law Judge filed 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 portions of the record and omits crucial excerpts from examination. 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 Sustain the General Counsel's Exceptions

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, 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 resumes in July. Where the prior case centers on Respondent's conduct squelching a budding union

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 will be cited to as "GC Br."

campaign, this one centers on Respondent's continued attempts to target employees during *the same campaign*, before its employees' organizing efforts were able to recover from its 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 (administrative notice necessary for, among other reasons, connecting Respondent's conduct toward the discriminatee in the prior case with its targeting of employees' protected activities in the current case); see also GC Br. 5-8).

The impact of ALJ Locke's refusal to take notice of Respondent's prior unlawful conduct 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, in making this argument, Respondent clings 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, although Counsel for the General Counsel (CGC) sought to elicit testimony concerning Respondent's prior unlawful conduct explicitly 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.

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 with 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)

In attempting to poke holes in the facts upon which CGC relied in arguing that Respondent's distribution of high-visibility "We Are Shamrock" shirts was unlawful, 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 barbeque commemorating the same thing. The second, a high visibility orange "We Are Shamrock" shirt, would not have been seen 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's distribution of the shirts was an endorsement of this anti-union display. 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, a *post hoc* recitation of the subjective impressions of employees, as opposed to the objective question of what employees would reasonably believe or understand under the circumstances, do not bear on whether a violation occurred. (GC Br. 22-23).

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. 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. However, 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 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.² 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.

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, 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

² 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.

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.

Moreover, 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. With respect to Respondent’s shifting claims, although Respondent’s supervisors clearly testified inconsistently about when the decision was made and the extent of Keith’s involvement (GC Br. 14-15), Respondent argues that their testimony was consistent, but only by pointing out that they all

denied having made the decision themselves and shirked 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, an inconsistency which itself amounts to an indicator of pretext.

Additionally, Respondent argues that CGC failed to establish disparate treatment as a way of bolstering ALJ Locke's failure to find animus. (R. Br. 22). In making this argument, Respondent relies on the testimony of a high-level, long-term manager in human resources, Heather Vines-Bright (Vines-Bright), who could only give one example of an employee who was removed from modified duty before Saenz and Woods, and that employee was an employee in Respondent's dairy division, a wholly separate operation at a different location. (Tr. 494-495). The only employee at Respondent's warehouse other than Saenz and Woods whom Vines-Bright could recall being removed from modified duty, employee Christopher Martinez, was removed from modified duty only 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.

Respondent further argues that the evidence CGC presented concerning employee Phillip Kiss (Kiss) being permitted to remain on modified duty for an extended time does not establish disparate treatment. (R. Br. 23). However, despite Respondent's supervisors' implausible claims not to recall anything about Kiss's long-term modified duty assignment and Respondent's failure to produce any documents about the same, Respondent admitted in a position statement

submitted during the course of the investigation that Kiss was assigned modified duty from March 16, 2014, to January 15, 2015, and only stopped working modified duty after he “was released by his treating physician to return to his regular position” in the warehouse. (Tr. 101, 179-180, 182-183, 496-497, 791-792, 914-916; GC Ex. 36 at 4). Thus, Kiss was allowed to remain on modified duty for well over 90 days, while Woods and Saenz were abruptly removed.

For the forgoing reasons, CGC respectfully requests that the Board 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, the Board has recognized that public notice readings are necessary to effectuate the policies of the Act when a 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’ rights, 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 of the Board's ability to protect them.

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 evidence establishes that Saenz and Woods were discriminatorily removed from modified duty, causing 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 in the General Counsel'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.

Dated at Phoenix, Arizona, this 6th day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Reply to Respondent's Answering Brief to the 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 6th day of September, 2016, on the following:

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