

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

SHAMROCK FOODS COMPANY

and

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

Case Nos. 28-CA-177035
28-CA-178621
28-CA-181714
28-CA-182541

**RESPONDENT SHAMROCK FOODS COMPANY'S
REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

July 19, 2017

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I. INTRODUCTION

General Counsel's¹ answering brief to Shamrock's exceptions in this matter presumes that the GC needs only to make an assertion to prove its truth. As explained in part² below, the GC repeatedly insists that the ALJ properly misconstrued and/or ignored relevant evidence, largely on the basis that such evidence would undermine the GC's theory of the case. Such reasoning cannot withstand scrutiny. General Counsel's attempted defense of the ALJ's recommended decision therefore must fail, and its Complaint should be dismissed in its entirety.

II. LAW AND ARGUMENT

A. The 2015 Holiday Banquet Raffle Was Not An Unlawful Benefit.

1. The ALJ Erred In Rejecting Shamrock's Reasonable Belief That The Union Campaign Was In Abeyance By The Time Of The 2015 Banquet.

General Counsel urges the Board to ignore the fact that only 7 employees were engaged in Union activity at the time of the 2015 banquet, rhetorically asking how many employees should be required to "put targets on their backs." [G.C. Br. 5]. The GC's sarcasm misses the point.

According to General Counsel, an employer should be prohibited from providing benefits so long as a single employee continues to promote unionization. Yet, an employer who prevails in an election may lawfully provide benefits after the objections period closes, regardless of whether the union continues to enjoy employee support. *See, e.g., Shop-Rite Development Co., Inc.*, 215 NLRB 777, 778 (1974). General Counsel has failed to articulate any rational basis for a different outcome in cases where a *prolonged* union campaign never achieves sufficient support even to file a petition.

Moreover, the NLRA's prohibitions against employer surveillance and interrogation would preclude an employer in these circumstances from reliably gauging whether organizing activity is ongoing. The GC's position therefore would lead to the anomalous result that a union campaign may act as a longer term impediment to improvements in employment terms where the union fails

¹ Administrative Law Judge Eleanor Laws will be referred to herein as the "ALJ." General Counsel will be referred to as the "GC," and its Answering Brief will be cited as "G.C. Br." The Bakery, Confectionery, Tobacco Workers and Grain Millers Union, AFL-CIO/CLC will be referred to as the "Union" or the "Charging Party." Respondent Shamrock Foods Company will be referred to as "Shamrock."

² Because space constraints preclude a comprehensive examination of the flaws in each of the GC's arguments, this brief will be limited to a discussion of only the most serious failings. The fact that a particular argument is not addressed herein should not be viewed as a concession of its merit.

to file for an election. This result is inconsistent with employees' Section 7 right to refrain from union organizing, and improperly interferes with an employer's right to manage its business.

2. **The ALJ Erred In Ignoring The Disparity In Attendees And The Undisputed Consistencies With Other Events.**

General Counsel similarly fails in its attempt to defend the ALJ's finding that employees would have viewed the 2015 banquet as an attempt to influence their sentiments regarding the Union. The warehouse employees that the Union sought to organize comprised a small minority of the individuals who attended the banquet, outnumbered by other attendees by more than 2 to 1. [Tr. 461:20-22 (Phipps); R. Ex. 13]. The GC glosses over this disparity by focusing only on the fact that the 2015 banquet was twice the size of prior events. [G.C. Ans. Br. 9]. The GC then declares that attendees from outside the warehouse—the large majority of those who were present—should simply be ignored. According to the GC, the purportedly “coercive message” was conveyed by “the eligibility to win [the grand prize], rather than the random outcome of the raffle.” [*Id.*].

This assertion is unfounded. In *Fresh Organics, Inc.*, 350 NLRB 309 (2007), the Board rejected the GC's claim that the employer coerced employees by unlawfully offering a new longevity award during a union campaign. The Board based its holding in part on the fact that only two of the 28 employees working at the site received an immediate benefit, while the others needed to accrue additional years of seniority to be eligible. *Id.* at 311.

The 2015 banquet presents an even more compelling case for dismissal. Here, only one of the 769 eligible employees received the grand prize. The ratio in *Fresh Organics* (2 out of 28) was much more favorable, and those employees who did not immediately receive an award would have been eligible once they accumulated sufficient seniority. Moreover, unlike *Fresh Organics*, there is no evidence concerning the identity of the individual who won the grand prize or whether he/she worked in the warehouse unit that the Union sought to organize.³ In truth, the 2:1 disparity in attendees resulted in a significantly greater likelihood that the grand prize would **not** be awarded to a

³ Curiously, General Counsel argues that the ALJ's opinion is not silent regarding the prize winner because the ALJ observed that the grand prize “was a single award granted to a single employee.” [G.C. Ans. Br. 9]. This argument misses the point. While the portion of the opinion quoted by the GC mentions that the grand prize was awarded to an “employee,” the ALJ did not find that it was awarded to a **warehouse** employee.

warehouse employee. The GC is therefore unable to satisfy its burden of proof.⁴

General Counsel similarly insists that the Board should ignore the various aspects in which the 2015 banquet was indisputably consistent with prior events, and should consider only the matters that the GC claims were a departure from Shamrock's past practice. [G.C. Br. 9-10]. This argument fails on two grounds. First, as explained more fully below, the only matter alleged in the Complaint as an unlawful departure from Shamrock's past practice was the prize raffle. Although she erred in doing so (discussed *infra*), the ALJ looked far beyond this allegation in finding a violation. The GC offers no explanation for its apparent position that matters outside the Complaint are relevant only to the extent that General Counsel believes they support its theory of the case.

Second, regarding other events, General Counsel still has failed to offer any basis to assume that year-end banquets are so unique in character that they would be viewed by reasonable employees in isolation from Shamrock's history of other employee appreciation events. The legalistic view of relevance that the ALJ and General Counsel espouse in regard to past practice therefore is unjustified. Through the eyes of a reasonable employee, this question would instead be viewed through the more general lens of whether the 2015 banquet was out of character for Shamrock. The various aspects in which the 2015 banquet was indistinguishable from prior events would have strongly suggested to a reasonable employee that the banquet was simply another in a long line of employee appreciation celebrations that Shamrock sponsors.

Perhaps the most notable of these matters⁵ was Shamrock's presentation of \$1,000 associate-of-the-year awards at the 2015 banquet, in addition to \$500 awards presented to runners-up. [R. Ex. 11(b), 11(f)]. General Counsel asserts that the ALJ's refusal (without explanation) to consider these awards was proper because a reasonable employee would not "equate a \$1,000 award that was not

⁴ General Counsel also challenges Shamrock's statement that the ALJ concentrated exclusively on the grand prize (*i.e.*, the travel voucher) in finding a violation, and argues that she considered other factors such as the location of the banquet, *etc.* [G.C. Ans. Br. 8-9]. The GC has apparently misunderstood Shamrock's argument. Although the Complaint alleged that the entire raffle and all of the prizes presented at the 2015 banquet were unlawful (see Compl. ¶ 5(a)), the only *prize* addressed in the ALJ's finding of a violation was the grand prize travel voucher.

⁵ These undisputed consistencies also include the timing of the event, the content of the program (which made no reference of any kind to the Union), and the similarity in raffle prizes.

randomly granted . . . with a \$5,000 travel voucher granted to someone holding the golden ticket.” [G.C. Br. 10]. The GC’s failure to justify this assertion reflects its lack of merit.

In essence, the GC claims that a warehouse employee who was one of 769 individuals⁶ with an equal, *random* chance to win a raffle prize would have felt coerced in his/her Union sentiments, while simultaneously admitting that a warehouse employee who was *purposely* selected or passed over for an associate-of-the-year award would not. This argument is even more attenuated given the fact that warehouse employees comprised less than a third of the 769 employees in the raffle pool. In contrast, the associate-of-the-year awards associated with the various warehouse functions had significant smaller eligibility pools comprised entirely of warehouse employees. Yet, the GC continues to maintain that employees would have been coerced by the value of the grand prize, despite tacitly acknowledging that the associate-of-the-year awards were not coercive. This paradox is fatal to the GC’s position. *Cf. Fresh Organics, Inc., supra.*

The GC’s argument against consideration of the associate-of-the-year awards is flawed on a more general level as well. General Counsel claims that a \$5,000 voucher limited to use for travel is coercive based upon its value, while a \$1,000 cash award is not. The logic of this position is not self-evident, and neither the ALJ nor General Counsel have attempted to support it. Thus, contrary to the GC’s arguments, the ALJ’s refusal to consider this evidence was improper.

The ALJ committed a similar error in finding that Shamrock violated Section 8(a)(1) by paying employees for their attendance at the 2015 banquet. While not disputing that employees were routinely paid to attend other employee appreciation events,⁷ General Counsel again focuses myopically on prior year-end banquets. [G.C. Br. 12]. To support its limited focus, the GC declares without explanation that “reasonable employees would likely draw a distinction between unrelated events and how Respondent had specifically treated them with regard to holiday events in the past.” [*Id.*]. As explained above, this narrow, hypertechnical view of relevance is incompatible with the

⁶ See R. Ex. 13.

⁷ In fact, General Counsel would discredit its own witness if it did so. Lead Union organizer Steve Phipps admitted that Shamrock has provided employees with four (4) hours’ pay to watch the Super Bowl and “a lot of things like that.” [Tr. 455:17-24].

reasonable employee standard. The GC's failure to explain its assertion therefore is unsurprising.

The ALJ's failure to address Warehouse Manager Ivan Vaivao's testimony concerning this issue is equally improper. Vaivao explained that Shamrock paid warehouse employees for their time because it was already required under U.S. Department of Transportation rules to pay its transportation employees. [*Id.* 554:5-10]. Although not disputing the substance of this testimony or the fact that the ALJ ignored it, General Counsel argues that it should be disregarded because Vaivao also testified that warehouse employees were granted pay to attend the 2015 banquet to be consistent with prior events. [G.C. Br. 12-13]. The GC's argument would require acceptance of the simplistic notion that employer decisions must be based on one and only one motive. This view of employer decision-making is inconsistent with reality and should be rejected.⁸

3. The ALJ Erred In Finding That Planning For The 2015 Banquet Did Not Commence Until After The Onset Of Union Activity.

For the reasons explained in Shamrock's exceptions brief, the ALJ furthermore erred in her consideration of Shamrock's financial accruals for the 2015 year-end banquet. In its response, General Counsel attempts to cast the ALJ's findings on this issue as a credibility determination concerning Shamrock witness Tom Petrola, entitled to deference under *Standard Drywall Products*, 91 NLRB 544 (1950). But, "to the extent that [an ALJ's] credibility findings are based upon factors other than demeanor . . . the Board itself may proceed with an independent evaluation." *Starcraft Aero., Inc.*, 346 N.L.R.B. 1228, 1231 (2006). Here, the ALJ discredited Petrola based on an unsupported and unsupportable reading of Shamrock's financial data. Her determination therefore should be reviewed *de novo*, and overturned for the reasons explained in Shamrock's exceptions brief.⁹ *Starcraft, supra*.

⁸ General Counsel also opines—again without support—that "the more likely reason Respondent paid warehouse employees was a last minute attempt to ensure the largest audience for its elaborate event." [G.C. Br. 13]. But, the GC provided no evidence that this decision was communicated to employees prior to the banquet or that it had any impact on attendance. As the GC acknowledges, the email concerning this issue is dated three days *after* the 2015 event. [*Id.*; *see also* G.C. Ex. 7]. Moreover, the context of the email strongly suggests that this decision was approved after the banquet because the amount left over in the budget for the 2015 event was sufficient to cover the cost. Thus, General Counsel's claim that pay was provided to insure a larger audience is simply another example of the GC's view that it needs only to make an assertion to prove its truth.

⁹ The ALJ's generic reference to witness demeanor in a footnote [ALJD 11 n.18] does not alter this conclusion, as she did not cite anything specific in regard to Petrola. *See, e.g., Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011) ("Although the judge generally referenced demeanor, he did not specifically refer to Garcia's demeanor or that of any other witness.")

General Counsel’s argument furthermore overlooks the most critical portion of Petrola’s testimony. Petrola testified that the budget for the 2015 banquet was established prior to the beginning of Shamrock’s fiscal year in October 2014, and that the final cost of the banquet was below what was budgeted. [Tr. 628:10-629:5]. In fact, the December 22 email from Petrola—General Counsel’s own evidence—stated that the amount remaining in the event budget would cover the cost of paying warehouse employees for their attendance. [G.C. Ex. 7]. The GC’s position is meritless.

4. The ALJ Improperly Considered Matters Not Alleged As Violations.

While refusing to consider other events and awards not alleged as violations, the ALJ went far beyond the Complaint allegations in finding that the raffle and pay for attending the 2015 year-end event were unlawful. General Counsel seeks to defend this error by claiming that the ALJ was required to consider the “totality of the circumstances” in regard to the violations alleged in the Complaint. [G.C. Br. 15-16]. Although the GC cites to *Fresh Organics, Inc.*, 350 NLRB 309 (2007), and *Camvac Int’l, Inc.*, 288 NLRB 816 (1988), neither case supports its argument.

In *Fresh Organics, Inc.*, *supra*, the GC claimed that the employer unlawfully granted a longevity award during a union campaign. The Board rejected this claim based in part on the fact that only two employees received an immediate benefit. *Id.* at 311. In *Camvac Int’l*, *supra*, the ALJ found that the employer’s announcement of five new benefits was unlawful based on the proximity in time to the union’s bargaining demand, the number of favorable changes announced simultaneously, the fact that the announcements were made in individual conferences with employees, and the employer’s contemporaneous distribution of antiunion literature. *Id.* at 850-51. Although the Board agreed with the ALJ’s findings in regard to 4 of the 5 benefits, it explicitly disavowed the ALJ’s remark that the context of the announcement was “unusual.” *Id.* at 818 n.7. Neither of these decisions provides the GC or an ALJ with unbounded license to rely upon matters not alleged as violations simply by purporting to conduct a “totality of the circumstances” analysis.

Instead, both decisions recognize that a contextual factor must bear a close and direct relation to the allegedly unlawful benefit(s) to be relevant. The individual meetings with employees

in *Camvac*, for example, were held solely to announce the unlawful benefits. *Id.* at 851. In this case, Shamrock has hosted a year-end banquet at the same time each year, confirming that the 2015 banquet was not held simply to award the grand prize. In *Camvac*, the employer furthermore distributed antiunion literature in connection with the individual meetings. *Id.* at 850. Here, there was no mention of the Union or its campaign during the 2015 banquet. In *Fresh Organics*, the Board considered the small number of employees who received an award. In this case, as explained above, General Counsel itself has insisted that the number (and identity) of employees who received prizes is irrelevant. General Counsel's reliance on *Camvac* and *Fresh Organics* therefore is misplaced, and its argument must fail.

Furthermore, where the GC relies upon matters not alleged as violations under a "totality of the circumstances" analysis, the GC should be required to demonstrate that such matters are closely connected to its claim to protect respondents from ambush. In this case, for example, the GC acknowledges that the location of the 2015 banquet was not alleged as a violation. Yet, the GC insists that this fact still is relevant as part of the "totality of the circumstances." [G.C. Br. 16-17]. In the context of this case, the decision on where to hold the banquet can only be relevant if it was made after Shamrock had knowledge of the Union's campaign. General Counsel therefore should bear the burden to prove this fact. Its failure to do so should result in rejection of the ALJ's decision.

5. The ALJ's Adverse Inference In Regard To The Decision To Hold The 2015 Banquet Offsite Was Improper.

One of the ALJ's most critical errors was her imposition of an adverse inference because Vaivao was not asked about the timing of the decision to hold the 2015 banquet offsite. [ALJD 11 n.19]. While not disputing that an inference limited to this issue would be improper, General Counsel attempts to defend the ALJ's error by recharacterizing her decision. According to the GC, the ALJ intended for her adverse inference to extend to the timing of both the decision to hold the 2015 event offsite, and the decision to include a raffle in the proceedings.

This proposed reading of the ALJ's decision is incorrect. The ALJ held as follows:

Vaivao, who was involved in the decision about where to hold the banquet, was not asked about the timing. The General Counsel has asked for an adverse inference I find such an inference is warranted, and conclude that Vaivao would have testified that the decision was made after [Shamrock] became aware that employees had contacted the Union.

[ALJD 11 n.19]. There is no mention of the timing of the decision to hold a raffle or any matter other than the timing of the decision to host the banquet offsite. Moreover, while General Counsel attempts to manufacture a dispute over whether prior banquets included prize raffles, the ALJ held that Shamrock's year-end banquets have included such raffles "[f]or at least the past couple of years."¹⁰ [ALJD 5:10-12]. Accordingly, there would have been no reason for the ALJ to consider, much less grant, an adverse inference concerning the timing of the decision to hold a raffle. The GC's *post hoc* attempt to legitimize the ALJ's error therefore is unsupported.¹¹

6. The ALJ Erred In Granting An Adverse Inference In Regard To Kent McClelland's Potential Testimony.

Finally, the ALJ erroneously found (through an adverse inference) that CEO Kent McClelland would have testified that Shamrock provided "enhanced prizes" and pay to attend the 2015 banquet to discourage support for the Union. As explained in Shamrock's exceptions, this inference was improper because General Counsel failed to demonstrate that McClelland possessed relevant knowledge concerning these issues or that his absence prevented submission of evidence regarding a material matter. The GC does not dispute that an adverse inference cannot be granted in the absence of these elements, and does not attempt to distinguish the case law upon which Shamrock has relied.

Instead, the GC attempts to show that the adverse inference concerning McClelland's testimony was appropriate simply by declaring it to be so. For example, Vice President of Operations Mark Engdahl testified unequivocally at trial that he was "charged with approving all expenditures for the warehouse employee events" [Tr. 51:19-21], and testified by affidavit that Mr.

¹⁰ According to General Counsel, GC witness Tom Richardson testified that the 2007 and 2008 banquets did not include raffles. [G.C. Br. 18]. A review of Richardson's testimony, however, demonstrates that he equivocated over this issue due to the passage of time. [Tr. 279:18-280:12].

¹¹ Moreover, for the reasons explained in the preceding section, General Counsel should at least bear the burden to prove that the decision to hold the 2015 banquet offsite was made after Shamrock was aware of Union activity.

McClelland had no knowledge concerning selection of the prizes raffled off at the holiday party. [G.C. Ex. 1(u)]. Similarly, there was no testimony that Mr. McClelland was involved in (or even aware of) the decision to pay employees for their attendance. Yet, General Counsel simply declares, without explanation or support, that Engdahl's testimony was "self-serving and speculative" and that McClelland "would likely have knowledge" of these matters "by virtue of his position." [G.C. Br. 42]. Again, the fact that General Counsel makes an assertion is not proof of its merit. Its attempted defense of the adverse inference that the ALJ imposed therefore must fail.¹²

B. The General Counsel's Remaining Allegations Similarly Lack Merit.

The ALJ's decision that Shamrock violated the Act by not allowing D'Juan Williams ("Williams") to leave is flawed in several respects. First, in order to meet its prima facie burden under Wright Line, the GC must demonstrate that Shamrock knew of Williams' protected activity. *Am. Gardens Mgt. Co.*, 338 N.L.R.B. 644, 645 (2002). GC still has not presented any evidence that Shamrock was aware of Williams' protected activity.¹³ Second, even if GC was able to meet its burden, Shamrock's decision was lawful because it was based on legitimate, non-discriminatory business reasons (which were explained to and corroborated by Williams), including:

- Williams requested (and was permitted) to work exclusively as a "loader," a position that has less flexibility in allowing early departures due to the deadlines imposed on loaders [Tr. 348-350 (Williams); Tr. 597, 599 (Vaivao); R. Ex. 1-3, 9, 10].
- Shamrock had an increase in workload ("case counts") during this time. [Tr. 575:24-583:5 (Vaivao), R. Ex. 8; see also, Appendix "A" to Respondent's Exceptions Brief].
- Shamrock was not using temporary associates at the time who, in the past, could help cover the workload created by early departures from work [Tr. 165:20-24 (Vaivao)]
- There was a ramp up for the schools which started to receive deliveries in August, and that the case load in July had come in "a lot higher." [Tr. 165:20-24 (Vaivao)].
- In July and August 2016, Shamrock consolidated its schedule making Tuesdays and Wednesdays busier, but other days, more manageable. [Tr. 585:6-586:12 (Vaivao)].
- Shamrock acquired new business during this time from school districts and a company called Harkins. [Tr. 583:18-584:6 (Vaivao)].

¹² General Counsel has not responded to the due process/equal protection arguments that Shamrock raised in its exceptions brief.

¹³ The ALJ's attempt to impute knowledge of Williams' protected activity based on speculation is not sufficient to support a violation. The fact that an employee may have reported Union activity to Vaivao at certain times does not demonstrate Vaivao knew of Williams' protected activity, especially in light of the uncontroverted testimony to the contrary. Further, any inference that McClelland had knowledge of Williams' activity is unfounded and should be rejected for the reasons stated in Shamrock's exceptions brief as referenced in Section II.A.6., supra.

Finally, the ALJ erred in not finding that Vaivao was the decision maker that denied Williams' request.¹⁴ [ALJD 21 n. 41]. The GC's argument that Vaivao was not the decision maker, but only had the authority to override the decision, is not supported by the evidence.¹⁵ [GC Ans. Br. 29]. Indeed, Williams knew that Vaivao was the ultimate decision maker for these types of issues and treated him as such in this instance as he had for previous requests (or "as he had in the past" or "and in the past for his other requests"). For example, Williams went to Vaivao to ask if he could work some loading shifts, which Vaivao granted. [Tr. 349:25-350:8 (Williams)]. Williams went to Vaivao again to ask if he could work exclusively as a loader, which Vaivao also granted. [Tr. 350:12-25 (Williams)]. Williams confirmed that the initial decision was not final when he sought to have the issue reviewed. [Tr. 366:1-6 (Williams)]. Consistent with how decisions regarding Williams' work were handled in the past, it was Vaivao who made the final decision and explained the reasoning to Williams. [Tr. 373:20-374:3 Williams)]. Further, GC's arguments regarding comments made by Mark O'Meara are unavailing. O'Meara's comments did not exist in a vacuum.¹⁶ The alleged unlawful comments were made less than two weeks after O'Meara and Michael Meraz had both testified at a hearing where one of the issues was an unlawful change in work rules during union activity.¹⁷ O'Meara's comments reflect the law as presented in that trial and both he and Meraz were made aware that Shamrock was not permitted to change work rules or policies.

III. CONCLUSION

As outlined above, the Complaint should be dismissed in its entirety.

Dated: July 19, 2017.

Respectfully submitted,

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¹⁴ The ALJ, in part based his ruling on credibility determinations other than demeanor. As discussed in Section II.A.3 supra, the ALJ's determination therefore should be reviewed de novo, and overturned for the reasons explained in Shamrock's exceptions brief. *Starcraft Aero., Inc.*, 346 N.L.R.B. 1228, 1231 (2006).

¹⁵ In a twist of irony, GC argues that McClelland should be presumed to be a decision maker for the 2015 holiday banquet based on his title, but Vaivao should not. [GC Ans. Br. 30, 42].

¹⁶ GC attempts to argue that because Shamrock had knowledge of the union campaign in June 2016 it must have had knowledge in December 2015. [GC Ans. Br. 8]. This argument fails as it ignores all of the intervening events.

¹⁷ In determining whether oral or written statements have a tendency to coerce employees the courts and the Board have long held that the statements "must be viewed in context and not in isolation." *UARCO, Inc.*, 286 NLRB 55, 58 (1987).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of July, 2016, a true copy of RESPONDENT SHAMROCK FOODS COMPANY'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was filed electronically with the Executive Secretary.

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