United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 27, 2001

TO : Dorothy L. Moore-Duncan, Regional Director
Daniel E. Halevy, Regional Attorney
John D. Breese, Assistant to Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Wal-Mart Stores, Inc. 512-5012-1737
Case 4-CA-30484

This case was submitted for advice on whether the Employer maintained over broad no-distribution, no-solicitation rules on its internal intranet, and whether those rules, even if unlawful, violated the Act where the Employer subsequently distributed lawful rules.

FACTS

The Employer had maintained in effect the following company-wide policies on solicitation and distribution:

> Associates may not engage in solicitation and/or distribution of literature on working time. This applies to activities on behalf of any cause or organization.
>
> Solicitation and/or distribution of literature is not permitted at any time in selling areas during the hours that the store is open to the public.
>
> Distribution of literature is not permitted at any time in working areas.

Effective February 1, 2001, the Employer implemented a new company-wide policy on employee solicitation and distribution in the following respects:

> Associates may not engage in solicitation and/or distribution of literature on working time. This applies to activities on behalf of any cause or organization, with the exception of corporately sponsored charities. These charities are:
> Children's Miracle Network
> Corporate United Way Campaigns

> Solicitation and/or distribution of literature is not permitted at any time in selling or working areas.
>
> Associates are not prohibited from soliciting or distributing literature in the break room, provided all participating Associates are on a break or meal period.
>
> Associates that wish to participate in soliciting & the distribution of literature outside the facility may do so during their nonscheduled work time.

The Employer posted this policy on its own internal intranet in a publication known as the "Pipeline." The posting of corporate policies on the "Pipeline" has replaced the Employer's former practice of posting policies in binders in individual store offices. It appears that employees do not have access to the Employer's internal intranet, and thus the "Pipeline", via general access to the Internet. Rather, employees may gain access to the Employer's intranet and "Pipeline" only through the use of store computers, which appear to be readily available. The Employer avers that it neither announced nor distributed the February 2001 policy to employees and rather merely posted them in the "Pipeline."[1]

In April 2001, the Employer distributed to all employees revised copies of its Associate Handbook.[2] The revised Handbook does not contain the February "Pipeline" policy and instead contains the Employer's earlier, lawful policy on solicitation and distribution set forth above. However, the revised Handbook also states that it does not contain all the Employer's policies.[3] The Handbook, at p.9, also explicitly refers to the "Pipeline" stating that it "includes policies and procedures, on-line forms, departmental sensitive material, and other useful corporate information." The Handbook encourages employees to use the

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[1] On the other hand, the Employer adduced no evidence on whether or not individual store managers called this policy to the attention of their employees.

[2] The Employer avers that it required all employees to sign an acknowledgement indicating that the employee both received and read the revised Handbook.

[3] The Handbook's "Welcome" section on p. 3 states: "No handbook can cover everything . . ." The Handbook's "Rules" section on p. 21 states: "Violation of these rules or other policies not listed in this handbook may result in disciplinary action . . ." (emphasis added).

"Pipeline": "Please contact your personnel manager to see where Pipeline is available in your facility."

ACTION

We conclude, in agreement with the Region, that the Employer's February 2001 policies are unlawfully over broad in two respects: banning solicitation during non-worktime in nonwork areas, and banning solicitation during non-worktime in selling areas at all times, i.e., including times when customers are not normally present. We also conclude, in agreement with the Region, that the February 2001 policies are unlawful despite the Employer's subsequent distribution of the Handbook containing lawful policies because the Handbook did not rescind the February 2001 policies which still remain in effect.

In general, an employer may "ban solicitation on worktime and distribution of literature on worktime and in working areas. However, prohibitions against solicitation on nonworking time and distribution in nonworking areas are improper absent a showing of special circumstances making such rules necessary to maintain production or discipline."[4] Regarding "special circumstances", the Board has long allowed a retail store to ban employee solicitation "on the selling floor where customers normally are present" even during non-working time.[5]

We conclude that the language banning solicitation "at any time in selling or working areas" is an over broad ban on non-worktime solicitation in non-selling work areas. The rule disjunctively bans solicitation at any time in selling or working areas and is unlawful.[6]

We next conclude that the language banning solicitation "at any time in selling . . . areas" is unlawfully over broad because it includes times when customers are not normally present, i.e., when the store is not open.[7] In Bankers Club, a restaurant banned

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[4] RCN Corp., 333 NLRB No. 45, sl.op. p. 6 (2001).

[5] Marshall Field & Co., 98 NLRB 88, 92, 98-99 (1952). See also May Department Stores Co., 59 NLRB 967, 981 (1944).

[6] See, e.g., McBride's of Naylor Road, 229 NLRB 795, 796 (1977).

[7] Bankers Club, 218 NLRB 22, 26-7 (1975).

solicitation "in customers areas in the restaurant at any time, whether working or nonworking time." The Board adopted the ALJ who found the limitation "at any time" not privileged by the exception in Marshall Field and thus unlawfully over broad: "if there are no customers present or likely to be present, the employer does not need such a sweeping rule to protect his business."

The ALJ noted that employees in that case began work and took their lunch break in customer areas before the facility opened. To the extent that Wal-Mart employees here similarly work and take breaks on the selling floor during hours the store is not open and customers are not present, the Employer's February 2001 ban of solicitation in selling areas "at any time" is unlawful for the same reason.

Further, in agreement with the Region, we conclude that the limitation of solicitation in the break room to times when all employees are "on a break or meal period" is lawful. This language refers to an employee "break" without qualification, and there is no evidence that the Employer has limited break room solicitation to only "formal" breaks.[8] Thus, employees would reasonably interpret the rule to apply to all breaks rather than merely formal breaks.

Also, in agreement with the Region, we conclude that the rule allowing distribution of literature outside the facility during "nonscheduled work time" is lawful. This rule is not a prohibition but rather describes what is actually permitted. Thus even if employees could misunderstand "nonscheduled work time" to mean "work time", they would read this rule to permit distribution during work time. In any event, we conclude that employees would not reasonably interpret the rule's permission to distribute during "nonscheduled work time" as somehow tantamount to a ban on distribution during non-worktime.

Finally, we conclude that the Employer's April distribution of the revised Handbook in April 2001 does not warrant dismissal of the two violations found above. The Employer argues that its distribution of the revised

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[8] See Lafayette Park Hotel, 326 NLRB 824 (1998), where the Board held that it would not find unlawful the mere maintenance of an arguably ambiguous employer rule where the rule addressed "legitimate business concerns" and there was no evidence that the employer engaged in actions or otherwise applied the rule in a manner to lead employees to believe that the rule prohibited Section 7 activity.

Handbook shows that the Employer did not intend to change its prior lawful policies on solicitation/distribution. The Employer's subjective intent, however, is irrelevant.[9] The Employer also argues that the April 2001 revised Handbook clearly communicated to employees that they may engage in lawful solicitation and distribution.[10] We conclude to the contrary that by merely distributing a lawful rule in the Handbook, the Employer has not communicated to employees that it has effectively repudiated the unlawful "Pipeline" rules and employees therefore may freely engage in lawful solicitation.

In Ballou Brick Co.,[11] the employer's booklet of regulations contained a rule unlawfully requiring employees to report to management any employee who attempted to coerce union card signatures. The booklet regulations also were posted on two employee bulletin boards. The employer subsequently replaced the booklet with one that did not contain the unlawful requirement. The employer posted the new rules on the bulletin boards but did not provide employees with the new booklet. The ALJ, adopted by the Board, found the prior rule unlawful because the employer's "belated and unannounced rescission" of the illegal rule did not "absolve" the violation.[12] Similarly here, the Employer distribution of the revised Handbook at best merely engaged in an "unannounced rescission" of the unlawful February 2001 rules.[13]

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[9] "[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably said, tends to interfere with the free exercise of employee rights under the Act." American Freightways Co., 124 NLRB 146, 147 (1959).

[10] See, e.g., Ichikoh Manufacturing, 312 NLRB 1022 (1993)(no violation if employer communicated or applied rule in such a way as to convey an intent clearly to permit lawful solicitation).

[11] 277 NLRB 41 (1985).

[12] "Merely changing some pages in a book kept in a drawer in the personnel department, or placing some pieces of paper on two bulletin boards, with nothing more, is legally insufficient notification to employees that they were henceforth entitled to sign union authorization cards . . . without fear of reprisals by management." Id., at 54-55.

[13] Id. See also Farley Candy Co., 300 NLRB 849 (1990) (in merely promulgating a new lawful rule, employer "failed to

In Farr Co.,[14] the employer maintained in its employee handbook a Rule 41 which unlawfully banned solicitation "on company time." Upon advise of counsel, the employer in September 1987 subsequently notified employees that, effective immediately, it was modifying handbook Rule 41 to ban solicitation only on "working time." In December 1987, the employer posted a new disciplinary policy adding it to the employer's personnel manual which was maintained in employee breakrooms. The new policy contained the modified rule on solicitation, but did not flag that rule as having modified the prior Rule 41. The employer averred that, during orientation interviews of new employees, the employer showed employees the modified rule in the disciplinary policy manual contained in the breakrooms. For at least one new employee, however, the employer failed to mention that Rule 41 in the handbook had been modified. Finally, in January 1989, the employer posted, distributed, and inserted into its policy notebook a memorandum to all employees advising them to review the notebook in the breakrooms as the most current source of information on policies that are created or changed.

The ALJ, adopted by the Board, found a violation in the maintenance of Rule 41 in the handbook despite the employer's promulgation and posting of the new rule and its insertion in the policy notebook. The ALJ noted that, even if employees were aware of both versions of the rule, the result would be employee confusion between the two. Similarly here, even if employees were aware of the conflict between the unlawful "Pipeline" rules and the revised Handbook rules, employees would be confused between the two because the Employer never affirmatively and effectively rescinded the February 2001 "Pipeline" rules.

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inform employees" that prior rule was no longer in effect, and thus failed to "effectively repudiate" the prior unlawful rule); Model A and Model T Motor Car Reproductions Corp., 259 NLRB 555, note 2 (1981) (Board found prior rule unlawful even though employer promulgated a new lawful rule because employer "never explicitly repudiated" the prior rule; there was "no evidence [that] employees aware that the rule had been changed."); MGM Grand-Hotel, Inc., 249 NLRB 961 (1980) (Board found prior rule unlawful although employer promulgated a new lawful rule because the "simultaneous maintenance of both rules created an ambiguous situation"; the Board found not determinative the mere absence of evidence that employees were confused between the two rules).

[14] 304 NLRB 203, 214-216 (1991).

[*FOIA Exemption 5*

FOIA Exemption 5 continued

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B.J.K.