

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

# Advice Memorandum

DATE: March 20, 2002

TO : Ralph Tremain, Regional Director  
Leo Dollard, Regional Attorney  
Karen Rengstorf, Assistant to the Regional Director  
Region 14

Willie Vance, Officer-In-Charge  
SR-33

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

SUBJECT: Wal-Mart  
Case 33-CA-13784

512-5042-0116  
512-5042-0133  
512-5042-0175  
512-5042-0183

This case was submitted for Advice pursuant to OM-00-24, Coordination of Cases Involving Wal-Mart Stores, Inc. The issue is whether the Employer's pre-election conduct involving increased corporate surveillance, the solicitation and remedying of grievances, and the grant of benefits violated Section 8(a)(1) of the Act.<sup>1</sup> We concluded that the Employer violated the Act by unlawfully soliciting grievances and granting benefits.

### FACTS

On October 12, 2001, the United Food and Commercial Workers Local 431 (the Union) filed a petition to represent 13 tire and lube express (TLE) department employees at the Employer's Dubuque, Iowa facility.

Soon after the petition was filed, the Employer sent corporate labor relations personnel to the store to respond to the Union organizing campaign.

The labor team members stood around watching the TLE employees through a large window area that looked into the shop. The labor relations team asked employees how things were going and if they needed anything, gave cheery

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<sup>1</sup> We do not consider here the alleged change in employee Mark Puccio's working hours, which the Region has determined violated Section 8(a)(3).

greetings, and inquired about the general welfare of employees. Wal-Mart said that the labor personnel were in the department during this period to respond personally to employee questions about the union campaign and that they would sometimes assist TLE employees by moving customer cars during busy periods.

The TLE department received two new expensive wheel balancers after the petition was filed. One of the wheel balancers had been broken for a long time, and the other was hard to use and slow. TLE regional personnel manager Ross Dudney visited the store four or five days after the petition was filed and claims to have noticed that the wheel balancers were broken or damaged. He therefore ordered replacements. The district TLE manager had known that the wheel balancer machines were not working properly long before the petition was filed.

Around October 31, six new doors arrived in the TLE department. The doors had been needed several months before the petition was filed. The Employer asserts that six months before the petition was filed, it had ordered the new doors. Wal-Mart claims that the doors' installation had been delayed because the door company had erroneously provided a bid for some automatic doors, which were impermissible. Based on the documentation provided, however, it appears that corporate maintenance received the bid for automatic doors on October 16 and the bid for all manual doors on October 17. The documentation provided by Wal-Mart does not indicate what actions were taken between June and October to secure new doors.

Also during the critical period, three employees transferred into the TLE department from other parts of the store. The department had been short on employees for several months, but employees had been told that there was "nothing in the works." Wal-Mart claims that it advertised the TLE job one month before the petition was filed. To support this contention, the Employer has provided a general Wal-Mart newspaper advertisement listing "Automobile" amongst an array of other job listings.

The filing of these charges blocked the election.

#### **ACTION**

We conclude that, absent settlement, complaint should issue alleging unlawful solicitation of grievances and grants of benefits. [FOIA Exemption 5

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An employer's legal duty in deciding to grant benefits while a representation case is pending is determined by examining what the employer would have done if there was no union in the picture: If the employer would have granted the benefit without the Union, there is no violation; if the employer's course is altered by the Union's presence, there is a violation.<sup>2</sup> This analysis is applicable even when the benefit provided is required for safety or legal reasons. Thus, in Pembrook Management,<sup>3</sup> the Board held that the employer violated the Act by replacing employees' damaged coveralls and work gloves and reimbursing them for damaged shoes, despite the fact that California law required the employer to do so. The Board reasoned that the articles were damaged before the Union activity, but the employer "did not adhere to [the] state law until after learning that its employees were engaged in an organizing campaign."<sup>4</sup> Further, although an employer may, during an organizing campaign, lawfully continue a past practice of soliciting and remedying grievances, the employer must do so using the same "manner and methods" that it has utilized in the past.<sup>5</sup>

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<sup>2</sup> McCormick v. Longmeadow Stone Co., 158 NLRB 1237, 1241-42 (1966).

<sup>3</sup> 296 NLRB 1226, 1226 (1989).

<sup>4</sup> Id. See also Guerdon Industries, 255 NLRB 610, 616 (1981) (employer violated the Act by promising employee benefits in the form of lighter workloads by hiring additional personnel).

<sup>5</sup> Compare Carbonneau Industries, 228 NLRB 597 (1997) (while employer had a past practice of maintaining an "open door" policy and soliciting complaints on occasion from employees individually, employer acted unlawfully when, during union campaign, it held meetings where it solicited grievances; there was no evidence that "the employer had maintained an actual practice of remedying grievances as expeditiously as he did once the union organizing drive started") with MacDonald Machinery Co., 335 NLRB No. 27, slip op. at 1-2 (2001) (no violation for soliciting and remedying grievances where employer had done so for two months before union campaign; employer's continued discussion with employees after the campaign began was not unlawful because employer "had already promised to improve conditions in response to employee concerns" and discussion was "within

Here, the evidence indicates that the Employer engaged in a campaign to thwart unionization by soliciting grievances and granting long-needed benefits. With regard to the solicitation of grievances, the Employer did not have a past practice of utilizing corporate personnel to solicit TLE employee grievances by spending several consecutive days in close proximity to them. Further, there is no evidence that the corporate personnel would have engaged in the solicitation of grievances in this manner but for the organizing campaign.

The Employer unlawfully granted benefits by replacing long-broken and needed equipment in the critical period. The Employer admits that the decision to replace the wheel balancers was made after the petition was filed, and the Employer has failed to explain why the order for doors, which had been pending for several months, was approved within days of the petition being filed. The Employer also unlawfully eased working conditions by adding three employees to the unit within the critical period, and by having corporate personnel assist employees in moving cars.<sup>6</sup> The Employer's general newspaper advertisement is insufficient evidence that the Employer had attempted to fill the TLE positions before the petition was filed.<sup>7</sup>

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the scope of this original promise and part of an ongoing dialogue with employees").

<sup>6</sup> Although the increased presence of corporate labor relations personnel in work areas could indicate unlawful surveillance, it appears that the managers were present in order to run the company's anti-union campaign, not surveil employees, and there is no evidence of management engaging in overt acts of surveillance. See Beverly California Corp., 326 NLRB 232, 259-60 (1998) (dismissing surveillance charge where there was no specific overt act of surveillance but only an increased presence of employer's higher management representatives at facility to respond to union campaign, even though the "natural consequence of this increased presence by management officials was undoubtedly a greater opportunity to witness what was occurring inside the facility"), enfd. in rel. part 227 F.3d 817 (7<sup>th</sup> Cir. 2000). Accordingly, the Region should not allege a surveillance violation.

<sup>7</sup> Moreover, the Region should consider: whether the Employer solicited the three employees to transfer into the TLE department; whether the Employer made more of an effort to

Accordingly, the Region should issue a Complaint alleging the above Section 8(a)(1) violations [*FOIA Exemption 5*

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B.J.K.

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fill the three positions after the petition was filed than it had made before the petition was filed; whether the three transferred employees were known anti-union employees; and whether the Employer was attempting to pack the unit with anti-union employees before the union election.