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

Advice Memorandum

DATE: November 25, 2002

TO : Roberto G. Chavarry, Regional Director
Rik D. Lineback, Regional Attorney
Roger A. LaForge, Assistant to Regional Director
Region 25

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

SUBJECT: Wal-Mart Stores, Inc. (Noblesville, IN)
Case 25-CA-28170

This case was resubmitted for advice, after the Region conducted an additional investigation, for review and possible coordination with other Wal-Mart cases seeking a nationwide remedy against Wal-Mart pursuant to Memorandum OM 00-24.

We conclude, in agreement with the Region, that Wal-Mart committed the following Section 8(a)(1) violations.

1) impression of surveillance at April 19, 2001, employee meeting.

2) interrogation of employee J. Malcolm by District Manager Jackson after April 19 employee meeting.

3) granting of benefit by changing employee J. Malcolm's work schedule.

4) granting of benefit by awarding "good job" pins to the third shift.

5) creation of over broad and discriminatory rule by telling employee Goempel that he could talk about the Union only on break time.

6) threat of reprisal by Assistant Store Manager at shift meeting by stating that Wal-Mart would have to pay for defending Board charges from store resources which would reduce employee profit sharing.

We conclude that Wal-Mart also committed the following Section 8(a)(1) violation:

At the April 22 employee meeting, Bentonville representative "Garth" threatened that bargaining would be futile or that Wal-Mart would not bargain in good faith.

Union witnesses Christina Malcolm (Christina) and Eric Goempel assert that Garth stated that there are three things the Union can do once a bargaining offer is made: take the offer, walk away, or strike. Wal-Mart denies that Garth made this statement. Wal-Mart asserts that Garth's prepared script for the meeting merely states that, once a contract is negotiated, union members get one of three things: more than they had, the same as they had, or less than they had before bargaining. However, Goempel specifically recalls that Garth made the allegedly unlawful statement in addition to making the scripted statement.

Wal-Mart's scripted statement is lawful.[1] Also lawful are statements accurately describing how a union may react to a final offer or to an impasse.[2] However, Garth's statement did not involve a final or impasse offer and instead described what the Union could do once "an offer" is made. We conclude that Garth's statement unlawfully threatened to bargain in bad faith or threatened that bargaining would be futile.[3]

---

[1] See, e.g., Telex Communications, 294 NLRB 1136, 1140 (1984)(lawful to describe bargaining as involving give-and-take and employees might "win, lose or draw"); Gravure Packaging, Inc., 321 NLRB 1296, 1299 (1996)(lawful to describe bargaining process as one where employees might gain or lose benefits).

[2] See, e.g., Woodbridge Foam Fabricating, Inc. 329 NLRB 841, 842-3 (1999)(lawful to state that once employer makes final offer, union can accept or reject it, and if offer is rejected, employees can work under the terms of the final offer or go out on strike.)

[3] In Ryder Student Transportation Services, Inc., 333 NLRB No. 2 (2001), an out-of-state employer representative stated to an employee meeting that he would conduct the bargaining process as follows: the union would have a list of demands; he would come back with a list of demands; the union would counteroffer; and he would come back with a unilaterally binding contract which would be the end of negotiations. The Board adopted an ALJD who found that this description constituted an 8(a)(1) threat to not bargain in good faith, or threat that bargaining would be futile. See

Based in part upon evidence uncovered by the Region's additional investigation, we also conclude that Wal-Mart committed the following violations.

1) Solicited grievances with implied promise of remedy at April 22 employee meeting.

   Three days earlier on April 19, Wal-Mart announced that Bentonville representatives had arrived to educate employees about unions and Wal-Mart's "Open Door" policy. At such a meeting on April 22, employees complained that the "Open Door" policy wasn't working and that District Manager Jackson wasn't very good at the policy. The Bentonville representatives responded that the "Open Door" policy did work. The meeting continued with the Bentonville representatives listening to employee complaints. The purpose of this meeting was to counteract union activity by showcasing Wal-Mart's "Open Door" policy, i.e., to demonstrate that employees did not need a union because they could take their problems directly to management. We therefore conclude that the Bentonville representatives at this meeting impliedly if not expressly solicited employee grievances with an implied promise of remedy.

2) Granted a benefit to discourage union activity by transferring former store manager Harris.

   A substantial employee complaint at the April 22 meeting involved the employee scheduling system. Wal-Mart would clearly and reasonably understand that these complaints were directed at store manager Harris even though employees did not specifically name her. Harris was directly responsible for employee scheduling and employees would be understandably reluctant to name Harris since she was present at this meeting. Wal-Mart reacted to these employee complaints by quickly

---

also Forest City Grocery Co., 306 NLRB 723 (1992)(unlawful threat not to bargain in good faith by stating that it was up to employer to agree with union "suggestions" which would "probably get nowhere.")

transferring Harris to another store within the next few weeks. Wal-Mart acted so precipitously that it left the Noblesville store without a manager for three weeks until a new store manager, Durham, arrived in June. Given the timing and precipitous nature of Harris' transfer, we conclude that Wal-Mart effected the transfer in apparent reaction to employee complaints as an unlawfully granted benefit.

3) Granted a benefit to discourage union activity by transferring the Noblesville store away from District Manager Jackson.

As noted above, employees at the April 22 meeting complained that District Manager Jackson wasn't very good at Wal-Mart's "Open Door" policy. The Bentonville representatives replied that the Open Door" policy did work. Shortly thereafter, Wal-Mart transferred the store away from Jackson. Given the timing of the transfer in response to employee complaints about Jackson's failure to implement a policy that Wal-Mart considered critically important, we conclude that Wal-Mart unlawfully transferred the store away from Jackson as an unlawfully granted benefit.

4) Granted a benefit to discourage union activity by creating new position to address "back stock" complaint.

Shortly after new store manager Durham arrived, she began to meet with employees to learn about their complaints. When Durham discovered that a major employee complaint was "back stock", she immediately created a new position to address that complaint. Given the timing of Durham's immediate reaction to solicited employee complaints, we conclude that unlawfully granted this benefit.

5) Granted a benefit to discourage union activity by supplying new pallet jacks.

Another major employee complaint to new store manager Durham involved old pallet jacks. Shortly thereafter, new pallet jacks arrived at the store. Wal-Mart may argue that it replaced the old pallet jacks for safety

reasons and not in response to union activity and employee complaints. However, Wal-Mart was fully willing to tolerate the allegedly unsafe jacks until union activity arose and employees complained. Given the timing of the jacks' replacement in response to solicited employee complaints, we conclude that Wal-Mart unlawfully replaced the old jacks.

[*FOIA Exemptions* 2 and 5

.[4]

.]

B.J.K.

4 [*FOIA Exemptions* 2 and 5

.]