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

Advice Memorandum

DATE: December 23, 2005

TO : Alan B. Reichard, Regional Director
Region 32

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

SUBJECT: Wal-Mart Stores, Inc.
Case 32-CA-22175-1

512-5012-1725-1167
512-5012-1737-3300
512-5012-8300
512-5072-3900

The Region submitted this Section 8(a)(1) case for advice as to whether the Employer's solicitation and distribution rule was facially unlawful in five specific ways: (1) whether the rule imposes an unlawful 14-day-per-year time limit on nonemployee organizations' solicitation/distribution activity outside its store; (2) whether the rule unlawfully restricts the solicitation and distribution rights of leased-space tenants' employees in its store and/or the rights of the Employer's employees to receive such solicitations/distributions; (3) whether the rule unlawfully defines "working area" to include exterior sidewalks; (4) whether the rule is so ambiguous that it implicitly imposes unlawful time, place, and manner restrictions on employee solicitation and distribution activities outside the store; and (5) whether the rule unlawfully defines "solicitation" in an overbroad manner. The Region also submitted other Section 8(a)(1) allegations – regarding the facial validity of the solicitation/distribution rule and the legality of the Employer's denials of access to nonemployee Union demonstrators – for review and possible coordination with other Wal-Mart cases pursuant to Memoranda OM 05-37 and OM 00-24.

The Region should dismiss, absent withdrawal, the five specific allegations submitted for advice regarding the rule's facial validity. As to the allegations submitted for review and possible coordination under Memoranda OM 05-37 and OM 00-24, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully denied access to nonemployees engaging in peaceful expressive activity regarding a labor dispute under current Board law applying the Moscone Act.[1] However, the Region should argue

[1] See NLRB v. Calkins, 187 F.3d 1080, 1094-95 (9th Cir. 1999), enfg. Indio Grocery Outlet, 323 NLRB 1138, 1142 (1997).

that the Board should dismiss that allegation because the continued validity of California's application of the Moscone Act is in question as a result of the D.C. Circuit's decision in Waremart II.[2] The Region may proceed in its discretion and dismiss the rest of the allegations, absent withdrawal.

FACTS

Wal-Mart Stores, Inc. (the "Employer") operates a large retail and grocery store in Stockton, California. The Employer owns the store, the sidewalk adjacent to the store, and the parking lot surrounding the store. The store is essentially a free-standing facility.[3] The property is bounded on all four sides by public roads bordered by public sidewalks. The store has no exterior enclosed walkways, plazas, courtyards, or picnic areas. The Employer leases interior space to vendors, such as McDonald's.

A. The Employer's Solicitation/Distribution Rule

The Employer maintains a four-page corporate-wide solicitation and distribution rule (the "Rule") on its internal "Pipeline/WIRE" intranet system.[4] The Pipeline/WIRE system has essentially replaced the nationwide employee handbook that the Employer previously distributed to its employees.[5] The Employer's employees may access the Pipeline/WIRE system, but employees of leased-space tenants may not. The Rule is in effect at the Stockton store. The Employer provides a hard copy of the Rule to nonemployees identified as trespassing on the property and to nonemployee organizations seeking to solicit or distribute on the property.

The first page of the Rule begins with a paragraph entitled "Policy," stating:

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[2] Waremart Foods d/b/a Winco Foods, Inc. v. NLRB, 354 F.3d 870 (2004), rehearing en banc denied April 7, 2004, denying enf. 337 NLRB 289 (2001) ("Waremart II").

[3] The Employer's property also contains a free-standing Chevron gas station and a free-standing McDonald's restaurant.

[4] The Rule was last revised on January 1, 2002.

[5] The Employer refers to its employees as "associates."

> Wal-Mart Stores, Inc. strives to provide an atmosphere for our customers and Associates that is free from solicitation and the distribution of literature inside our facilities. Our Associates are to be focused on being productive and providing excellent customer service. Therefore, Wal-Mart Stores, Inc. does not allow the distribution of literature in any selling or working areas of the facility at any time. Wal-Mart Stores, Inc. also does not permit solicitation in any selling area of the facility during business hours or in working areas when Associates are on working time.

The next paragraph states that the Rule applies to "all Associates...and to non-Associates...."

The third paragraph of the Rule contains the following definitions:

> Solicitation – To request or seek, in writing or orally, donations, help, or the like for any cause. This includes charitable giving or fundraisers (e.g., Girl Scouts, Avon, Tupperware, Charity Raffles, etc.)
>
> Distribution of Literature – The act or process of giving out or delivering leaflets, pamphlets, or other written material
>
> Non-Associates – Customers, organizations, or other groups
>
> Working Areas – All areas except breakrooms, restrooms, lobbies, and Associate parking areas
>
> Working Time – Working time of both the Associate doing the soliciting and/or distributing and the Associate to whom the distribution and/or soliciting is directed against. Working time does not include break, meals and time before and after work.

The definitions are followed by "Rules for Inside Solicitation/Distribution of Literature." This section contains "Associate Guidelines" and "Non-Associate Guidelines." The Associate Guidelines prohibit employees from distributing literature during work time and at any time in selling or work areas. The Rule prohibits employee solicitation in selling areas during business hours and in work areas when employees are on working time. "This applies to activities on behalf of any cause or

organization," except corporate United Way campaigns and the Children's Miracle Network. The Non-Associate Guidelines prohibit nonemployees from soliciting or distributing literature "at all times in any area of the facility, including the vestibule." However, the Employer "reserves the right to permit solicitation by leased space tenants...per contract agreements" when in the Employer's interest.

The second page of the Rule begins with the heading "Rules for Outside Solicitation/Distribution of Literature." It is followed by instructions for facility managers regarding outside expressive activity:

> The Facility Manager may approve, in accordance with this policy, solicitation and/or distribution of literature **outside** the facility for all other groups and organizations, provided the solicitation and/or distribution of literature does not impede the flow of traffic in or out of the facility, and does not unduly harass our Associates or Customers.

Facility managers may not approve signs, handbills and other written material depicting fighting words, obscenities, pornography and the like. The manager must consider space, traffic, congestion, and safety when designating an area for "all organizations to use" at least 15 feet from entrances and exits. The Rule further requires that "[a]ny organization" seeking to solicit or distribute literature be provided two copies of the Rule, one of which must be signed by "the individual or an individual representing the organization."

The last full paragraph on page two of the Rule introduces the Employer's time, place, and manner restrictions as follows:

> The following are rules that must be followed by any individual or organization (including charities) to solicit or distribute literature upon any Wal-Mart property. All individuals and organizations (including charities) are required to follow these rules without deviation.

The actual time, place, and manner restrictions include provisions regarding "designation of area," "information content," "prior approval of date & time," "limitation on participants," and "limitation on days." In particular, the limitation-on-days requirement states that the Employer "limits an individual and/or organization to three

consecutive days and no more than 14 days per year for soliciting or distribution of literature."

On page three, the Rule lists examples of requests to engage in solicitation and/or distribution activity, each followed by the appropriate response. The first three examples involve requests from the girl scouts or a high school band seeking to solicit or distribute outside the store. The fourth example involves an "associate [who] asks to sell to associates items from a catalog to support their child's school inside the store." The four examples are followed by a sentence stating: "Associates who wish to participate in soliciting and the distribution of literature outside the facility may do so outside of their scheduled work time."[6]

Page four of the Rule deals with "Non-Compliance." It states:

> If a non-Associate is soliciting or distributing literature inside the facility, advise them of our policy, ask them to stop or immediately ask them to leave. If they refuse, call Corporate Labor Relations, Legal Team and the District Manager to report this activity.
>
> If an Associate is violating this policy, call the District Manager, Regional Personnel Manager, Legal Team or Corporate Labor Relations before taking any action.

B. The Union Demonstrations

Teamsters Local 439 (the "Union") began a consumer publicity campaign at the Stockton store on May 7, 2005. On almost every Saturday until July 16, groups of nonemployee Union demonstrators picketed and leafleted store customers from 10 a.m. until 1 p.m. Initially, the demonstrators numbered 250, but eventually dwindled to around 10-12.

Specifically, on May 7, about 250 Union demonstrators arrived at the store and drove their cars through the parking lot, honking their horns and waving picket signs outside their car windows. After parking their cars in the lot, the demonstrators picketed and leafleted customers on the public sidewalks at the perimeter of the lot. They also stood alongside the private driveways leading into the

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[6] The bottom of page three of the Rule deals with "Retailtainment."

lot and attempted to hand literature to customers driving into the lots. Some pickets would periodically walk slowly across the entrances to the driveways, which would cause customers to slow or stop their cars to let them pass.

After about a half hour, the Employer's store manager told the Union secretary-treasurer that the demonstrators had to leave the property and had no right to be there. When the pickets protested that the Employer did not own the sidewalks, the store manager replied that it did, and that the pickets would be arrested if they did not leave.[7] The store manager then went back inside the store and called the police.

A few minutes later, the police arrived and obtained a copy of the Rule from the store manager. A police lieutenant told the store manager that he would tell the Union to comply with the time, place, and manner restrictions. The lieutenant asked whether the Employer would sign a citizen's arrest form against the demonstrators that violated the Rule or disrupted traffic, but the store manager declined. The lieutenant then exited the store and told the Union secretary-treasurer and a representative from the Food and Commercial Workers, who also participated in the rally, that the demonstration violated Section 5-105 of the Stockton Municipal Code, which requires any group of people who wish to conduct an assembly on a public street, park, or sidewalk to apply for and receive a permit from the city. The lieutenant then told them about the Rule and gave them a copy. According to the lieutenant, the Union demonstrators essentially ignored him, continued to yell at customers entering the facility, and impeded traffic.[8]

The Union continued to leaflet and picket the store from May 14-July 16 without making any effort to either obtain a permit or to comply with the Employer's Rule. In June, the police lieutenant spoke with an Employer attorney on the telephone and asked whether the Employer would sign a citizen's arrest complaint. The attorney said no.

The Employer states that the only times it called police after May 7 were in response to customer complaints that their access to the facility had been impeded by the

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[7] The Employer denies that the store manager said this.

[8] The Food and Commercial Workers, on the other hand, appeared to take him seriously. The Food and Commercial Workers subsequently obtained a permit from the City of Stockton and held a peaceful demonstration on May 14.

Union demonstrators. According to the Employer, it never asked the police to arrest any of the demonstrators or to have the demonstrators removed from the public sidewalks. The Employer admits that it called police on July 9, after a group of Union demonstrators left the public sidewalk and began picketing directly in front of the store entrance, and asked police to tell the demonstrators that they could not be on the store's private property without permission.

The last day of picketing was July 16. On that date, the police lieutenant received reports from officers at the site that the Union demonstrators had caused two separate traffic accidents when they impeded traffic in an effort to leaflet customer cars. The lieutenant also received a report from an off-duty police department employee whose own access to the facility on a shopping trip was impeded by the Union demonstrators. The lieutenant then directed the officers at the site to tell the Union demonstrators that they had to leave the facility entirely, including the public sidewalks, because they had not obtained a permit under Section 5-105.[9] The police told the pickets they had five minutes to leave the property or face arrest. The Union demonstrators then ran to the area directly in front of the store entrance, where they picketed and handbilled for five minutes before driving away. The Union demonstrators have not returned to the facility since that date.

ACTION

The Region should dismiss, absent withdrawal, the five specific allegations submitted for advice regarding the Rule's facial validity. Thus, the Rule does not unlawfully (1) impose a 14-day-per-year time limit on nonemployee expressive activity outside its store; (2) restrict the solicitation or distribution rights of leased-space tenants' employees or the rights of the Employer's employees to receive such solicitations or distributions; (3) define "working area" so as to prohibit employee distribution of literature on exterior sidewalks; (4) impose unlawful time, place, and manner restrictions on employee solicitation and distribution activities in nonwork areas outside the store; or (5) define "solicitation" in an overbroad manner. With respect to the issues submitted for review and possible coordination with other Wal-Mart cases under Memoranda OM 05-37 and OM 00-24, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully denied access to

[9] The Employer states that it played no role in the lieutenant's July 16 decision.

nonemployee Union demonstrators engaging in peaceful expressive activity regarding a labor dispute under current Board law applying the Moscone Act. However, the Region should argue that the Board should dismiss that allegation because the continued validity of California's application of the Moscone Act is in question as a result of the D.C. Circuit's decision in Waremart II. The Region may proceed in its discretion and dismiss the remaining allegations, absent withdrawal.

1. The Facial Validity Of The Rule's 14-Day-Per-Year Time Limit For Non-Employee Solicitation/ Distribution Outside The Store.

The Union alleges that the 14-day-per-year time limit on nonemployee expressive activity outside the store is facially unlawful, because California law permits nonemployee union demonstrations on the Employer's exterior property and the Employer has no legitimate reason to limit that expressive activity in advance. The Employer contends that the 14-day-per-year time limit is facially lawful because it applies nationwide and, outside California, there is no question that employers may lawfully exclude nonemployees from their private property on a non-discriminatory basis. The Employer further argues that neither the California constitution nor the Moscone Act grant the Union a general right of access at its California facilities and that the 14-day limit is a reasonable time, place, and manner restriction under California law. The Region should dismiss this allegation, absent withdrawal, consistent with the following analysis.

Under Lechmere. Inc. v. NLRB,[10] an employer may generally exclude from its private property nonemployee union representatives engaged in Section 7 activity, as long as the employer has a sufficient property interest under applicable state law to exclude others and make a refusal to vacate the property a "trespass."[11] California state law establishes certain exceptions to rights of private property owners to exclude alleged trespassory union conduct from their premises.[12] Two different lines of California law limit property owners' rights to exclude individuals engaged in peaceful expressive activity related

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[10] 502 U.S. 527, 537 (1992).

[11] Bristol Farms, 311 NLRB 437, 438-39 (1993).

[12] Glendale Associates, Ltd., 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003); Bristol Farms, 311 NLRB at 438-39.

to a labor dispute. First, California courts have concluded that when private property, such as a large shopping center, has assumed the character of a "traditional public forum" or town center, the free speech provisions of the California constitution require the property owner to permit access for peaceful expressive activities.[13] In a second line of cases, California courts have relied on the Moscone Act[14] to hold that property owners are not entitled to deny access to individuals engaged in peaceful expressive activity concerning a labor dispute on exterior premises.[15]

We agree with the Region that the free speech provisions of California's constitution do not limit the Employer's right to exclude nonemployee expressive activity on its property. Recent California appellate court decisions have found large, stand-alone retail and grocery stores not to be quasi-public forums. For example, in

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[13] Robins v. Pruneyard Shopping Center, 153 Cal.Rptr. 854, 860-61 & n.5 (Cal. 1979), affd. 447 U.S. 74 (1980) (privately-owned shopping center offering amenities to attract large numbers of people assumed the character of a town center, or public forum, where speech and petition rights traditionally exercised).

[14] Cal. Code. of Civ. Proc. §527.3 ("[t]he acts enumerated in this subdivision...shall be legal, and no court [shall issue any order] which...prohibits...(1) [g]iving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace [and] (2) [p]eaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers").

[15] Sears Roebuck & Co. v. San Diego District County Dist. Council of Carpenters, 158 Cal.Rptr. 370, 374 (Cal. 1979), cert. denied 447 U.S. 935 (1980) (Moscone Act's language "leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity...[declared lawful under prior California law]"). See also In re Lane, 79 Cal.Rptr. 729, 731-32 (Cal. 1969) (allowing businesses to declare sidewalks and parking lots surrounding their premises off limits to union activity would encourage others to erect similar "[c]ordon[s] sanitaire[s]" to immunize themselves against criticism and have serious impact on free speech).

Costco Companies, Inc. v. Gallant,[16] the court found that a company could lawfully ban petitioning activity outside its stand-alone "big box" warehouse-style retail stores, primarily because the public invitation to the stores was solely to purchase goods and services, not to "meet friends, be entertained, dine or congregate." The court concluded that the stores were "in no sense 'miniature downtowns'" and were "not essential or invaluable forums for the general exercise of free speech."[17] Similarly, in Albertson's, Inc. v. Young,[18] the court found that a supermarket – which anchored an outdoor shopping center – and its private surroundings was not a quasi-public forum. The court emphasized that the store was not "a place where people choose to come and meet and talk and spend time" and there were "no enclosed walkways, plazas, courtyards, picnic areas, gardens, or other areas that might invite the public to congregate."[19]

Like Costco and Albertson's, the Employer's store exterior and parking lot does not invite or encourage the public to congregate, socialize, or be entertained. There are no enclosed walkways, plazas, courtyards, or picnic areas. Applying the above precedent, the Employer's property is not a quasi-public forum.[20]

Even assuming that the Employer's property is a Pruneyard public forum, California law permits reasonable time, place, and manner restrictions on such property.[21]

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[16] 117 Cal.Rptr.2d 344, 355 (Cal. App. 4 Dist. 2002).

[17] Ibid.

[18] 131 Cal.Rptr.2d 721, 733 (Cal. App. 3 Dist. 2003).

[19] Ibid.

[20] See also Dickinson v. Wal-Mart Stores, Inc., 2002 WL 1496008, **1, 3 (Cal. App. 4 Dist. 2002) (unpublished decision) (finding that three Wal-Mart stores at issue are not Pruneyard public forums because "the public is not invited to use the stores, or their front walkway areas, for public meetings, entertainment, or for any purpose unrelated to purchasing merchandise"). We note that an unpublished decision cannot be cited to California courts unless it is relevant under the doctrines of law of the case, res judicata, or collateral estoppel. Cal. Rules of Court, Rule 977(a), (b)(1).

[21] Macerich Management Co., 345 NLRB No. 34, slip op. at 2 (2005). See also Savage v. Trammell Crow Co., 273 Cal.Rptr. 302, 308 (Cal. App. 4 Dist. 1990), cert. denied

California courts have upheld time, place, and manner restrictions similar to the Employer's 14-day-per-year time limit.[22] The Employer states that the Stockton store receives "scores if not hundreds of requests" every year from nonemployee organizations seeking to use its property, and that the 14-day limit allows at least 26 different organizations to access the property throughout the year. Accordingly, we would not argue that the Employer's 14-day-per-year time limit is unreasonable.

In addition, the Region should not allege that the 14-day limit is unlawful under extant Board law based on the rights of access set out in the Moscone Act and interpreted in Sears for peaceful expressive activity related to a labor dispute. Neither the Board nor the California courts have decided whether and to what extent time, place, and manner restrictions may be imposed on union activity allegedly protected under the Moscone Act.[23] In the absence of precedent indicating that reasonable time, place, and manner restrictions on labor speech violate the Moscone Act, this allegation should be dismissed, absent withdrawal.

2. The Facial Validity Of The "Non-Associate Guidelines" For Interior Solicitation And Distribution.

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500 U.S. 906 (1991) (shopping center's ban on leafleting in parking lot was reasonable time, place and manner restriction).

[22] Needletrades Employees v. Superior Court of Los Angeles County ("UNITE"), 65 Cal.Rptr.2d 838, 850 (Cal. App. 2 Dist. 1997) (shopping mall lawfully imposed 14-day limitation on interior expressive activity; regulation a "legitimate effort to ensure that one group does not monopolize the area to the exclusion of others....[that was] drawn to further the center's interest of giving equal access to the many organizations which seek entry to its premises"); Costco Companies, Inc. v. Gallant, 117 Cal.Rptr.2d at 354-55 (big box warehouse-style retail store lawfully banned outdoor expressive activity during its 34 heaviest traffic days and otherwise lawfully restricted outdoor expressive activity to five consecutive days every other month).

[23] See, e.g., Daniel Silverie III, Inc., Case 32-CA-20467-1, Advice Memorandum dated July 3, 2003; Wal-Mart Stores, Inc., Case 32-CA-18427-1, Advice Memorandum dated July 30, 2001.

The Union alleges that the Rule's "Non-Associate Guidelines" for interior solicitation and distribution, which impose a blanket ban on interior solicitation and distribution by "non-Associates," unlawfully restrict the solicitation and distribution rights of leased-space tenants' employees and the rights of Wal-Mart employees to receive solicitations and distributions from leased-space tenants' employees. The Employer contends that its policy does not unlawfully restrict the solicitation or distribution rights of leased-space tenants' employees in nonwork areas because they have no right of access into employee break rooms and therefore share the same status as all other nonemployees under the Rule. For the reasons stated below, we agree with the Region that the above provision is facially lawful.

Under Republic Aviation and its progeny, employees presumptively have the right to solicit on their employer's premises during nonwork time and to distribute literature on their employer's premises during nonwork time and in nonwork areas.[24] Employers seeking to restrict such activity bear the heavy burden of showing that special circumstances exist that make the restrictions necessary to maintain production and discipline.[25] On the other hand, employers presumptively may prohibit employees from engaging in Section 7 solicitations during work time and from engaging in Section 7 distributions of literature during work time and in work areas.[26] Under the Republic Aviation framework, retail stores may also lawfully prohibit all solicitation and distribution in selling areas during hours the store is open to the public, even when employees are on their own time.[27] We further recognize that under extant Board law, the above Republic Aviation-based access rights and restrictions apply to a subcontractor's employees who work "regularly and exclusively" on another's premises, and that the General Counsel is currently urging that the Board overrule this precedent where employees are not communicating with other employees of their own employer.

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[24] Republic Aviation v. NLRB, 324 U.S. 793 (1945); Stoddard-Quirk Mfg. Co., 138 NLRB 615, 621 (1962).

[25] Ibid.

[26] Ibid.

[27] Marshall Field & Co., 98 NLRB 88, 90-91 (1952), modified on other grounds and enfd. 200 F.2d 375 (7th Cir. 1952).

The Rule does not unlawfully interfere with the Section 7 rights of leased-space tenants' employees because it has never been communicated to or enforced against them. Under extant Board law, it is unlawful to ban all interior solicitation and distribution by employees of leased-space tenants who work regularly and exclusively inside the Employer's stores. However, the Board will not find a work rule facially violative of Section 8(a)(1) if it has neither been communicated to nor been enforced against employees.[28] The Rule is only found on the Pipeline/WIRE intranet system, which leased-space tenants' employees cannot access. There is no evidence that leased-space tenants' employees have otherwise been made aware of the Rule or that it has been enforced against them.

We also agree with the Region that the Rule does not unlawfully interfere with the rights of Wal-Mart employees to receive solicitations or distributions from leased-space tenants' employees. The Rule only prohibits inside solicitation/distribution by "non-associates" and therefore does not subject employees to discipline for receiving a solicitation or distribution from a leased-space tenant's employee.[29]

3. The Facial Validity Of The Rule's Definition Of "Working Area."

The Union alleges that the Rule's definition of "working area" is unlawful because it exempts only

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[28] Waggoner Corp., 162 NLRB 1161, 1166 (1967) (rules prohibiting posting on bulletin boards or distributing unauthorized literature anywhere on company property at any time without management's permission not unlawful, when rule had never been posted, employees had never been advised of rule's existence, and foremen had not been instructed to advise employees of its existence; "in a realistic sense [the rules] were not maintained in effect, i.e., they were never published nor applied...."). See also Farah Mfg. Co., 187 NLRB 601, 602 (1970) (violation when Board found rule to be overly broad and also found it highly likely to have been disseminated to employees, implying that dissemination is required for finding violation).

[29] While one could argue that Wal-Mart employees would be hesitant to receive solicitations/distributions from leased-space tenants' employees for fear that the leased-space tenants' employees could be disciplined for violating the Rule, we conclude that argument is too attenuated to support a complaint allegation.

"breakrooms, restrooms, lobbies, and Associate parking areas," and therefore prohibits employee distribution of literature on the store's exterior sidewalks. The Employer takes the position that the definition of "working area" is not unlawfully overbroad because (1) it does not consider the sidewalks to be work areas, and (2) a sentence on page three of the Rule makes clear that employees may distribute literature outside the store during nonwork time. We conclude that the Rule defines "working area" in a facially lawful manner.

The Board evaluates the facial validity of an employer work rule by determining whether the rule explicitly restricts activities protected by Section 7.[30] If not, the Board examines whether the rule, read in context, would reasonably tend to chill employees in the exercise of their Section 7 rights.[31] The Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights."[32] It is well established that employees have a presumptive Section 7 right to distribute literature on their employer's property during nonwork time and in nonwork areas.[33]

Here, the definition of "working area" does not explicitly restrict employee distribution activity in nonwork areas. At most, the Rule *implicitly* restricts distribution in nonwork areas because it fails to expressly exclude sidewalks from the definition of "working area." Therefore, under the framework set forth in Lutheran Heritage Village-Livonia, the definition of "working area" will be found facially unlawful only if, read in context, it would reasonably tend to chill employees in the exercise of their Section 7 rights.

Given a reasonable, contextual reading, the Rule's definition of "working area" would not chill employees' Section 7 rights to distribute literature on the Employer's exterior sidewalks. A reasonable employee would understand

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[30] Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 1 (2004).

[31] Ibid.

[32] Ibid.

[33] Stoddard-Quirk Mfg. Co., 138 NLRB at 621.

that "parking areas" includes not only the asphalt parking lot but also the exterior sidewalk abutting it.[34]

In addition, the definition of "working area" must be read in context with the sentence on page three of the Rule stating that "Associates who wish to participate in soliciting and the distribution of literature outside the facility may do so outside of their scheduled work time." Read in context, reasonable employees would not believe the Rule barred them from distributing literature on sidewalks outside the store.

4. The "Outside" Rule Does Not Impose Unlawful Time, Place, And Manner Restrictions On Employees.

The Union alleges that the Rule is so ambiguous that it implicitly imposes unlawful time, place, and manner restrictions on employee solicitation and distribution activity outside the store. The Employer counters that the plain meaning of the Rule indicates that the exterior time, place, and manner restrictions only apply to nonemployees, particularly because they make no reference to "associates." The Employer further argues that a sentence on page three of the Rule makes clear that employees are free to distribute literature outside the store during nonwork time. We conclude that the Rule does not impose unlawful time, place, and manner restrictions on employees.

As discussed above, in determining whether a work rule is facially valid, the Board avoids reading phrases in isolation or presuming improper interference with employee rights, and instead reads the language in context from the perspective of a reasonable employee.[35]

A reasonable reading of the "Rules for Outside Solicitation/Distribution of Literature" indicates that the

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[34] Compare Rocky Mountain Hospital, 289 NLRB 1347, 1360, 1361 (1988), where a rule prohibiting distribution in nonwork areas and defining work areas to "not include breakrooms, restrooms, and parking lots," was found facially overbroad, because it left the impression that the listed areas were the only areas that were not work areas, while clear nonwork areas such as the cafeteria, gift shop, and lobby were not listed. Unlike here, the nonwork areas omitted from the rule in Rocky Mountain Hospital were discrete sections of the premises and clearly were not encompassed by any of the listed nonwork areas.

[35] Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 1.

time, place, and manner restrictions apply only to nonemployees. Thus, the instructions for facility managers at the top of the Rule's second page use the terms "other groups and organizations" and lists as examples the United Way, social service organizations, the Salvation Army, the Red Cross, the Literacy Council, religious organizations, and voter registration services. Furthermore, the Rule defines "Non-Associate" on page one as "[c]ustomers, *organizations, or other groups*." (Emphasis added.) Read in context, reasonable employees would not believe that "other groups and organizations" includes employees.

Furthermore, the four examples following the list of time, place, and manner restrictions on page three of the Rule indicate that those restrictions apply to outside organizations' solicitation activity, not to employee Section 7 conduct. Each listed example deals with solicitation activity on behalf of charitable organizations such as the girl scouts or a school. Granted, the fourth example involves an *employee* seeking to engage in charitable solicitation of coworkers inside the store. While this example's placement on page three, rather than page one, reflects a poorly-structured document, the example nonetheless deals with *interior non-Section 7* employee activity. Thus, notwithstanding its placement on page three of the Rule, the fourth example would not lead reasonable employees to believe that the exterior time, place, and manner restrictions apply to employee Section 7 activity. Finally, the fourth example is immediately followed by a sentence stating that employees "who wish to participate in soliciting and the distribution of literature outside the facility may do so outside of their scheduled work time." This sentence further clarifies that the exterior time, place, and manner restrictions do not apply to employees.

We recognize that the Rule was not well drafted. It makes poor use of headings and also lacks helpful punctuation, indentation, parallel structure, and demarcation between sections. The Rule is not so ambiguous, however, that a reasonable employee would believe that the Employer's time, place, and manner restrictions apply to employee Section 7 activity.[36]

Because the Rule's exterior time, place, and manner restrictions do not apply to employees, we do not pass on

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[36] Compare Teletech Holdings, Inc., 333 NLRB 402, 403 (2001) (ambiguous solicitation/distribution rules are construed against the employer who promulgated them).

whether the restrictions exceed those generally permitted under Republic Aviation and its progeny.

5. The Facial Validity Of The Rule's Definition Of "Solicitation."

The Union alleges that the Rule's definition of solicitation – "[t]o request or seek, in writing or orally, donations, help, or the like for any cause" – is unlawfully overbroad because it sweeps within its reach employees who merely request or seek "help" and is inconsistent with the definition of solicitation set forth in Wal-Mart Stores.[37] The Employer takes the position that its definition of solicitation is not overbroad because it is consistent with the definition of solicitation set forth in Washington Fruit & Produce Co.[38] We conclude that the Employer's definition of solicitation is facially lawful, for the reasons stated below.

The Board has found work rules prohibiting employees from "solicit[ing] or *promot[ing] support for* any cause or organization" during work time to be facially lawful.[39] The Employer's definition of solicitation in this case is substantially identical.[40] Moreover, the Employer's definition applies to activity for "any cause," and does not even implicitly single out Section 7 activity. Under these circumstances, the Rule's definition of solicitation is facially valid.[41]

We recognize that the Board in Wal-Mart Stores defined solicitation as activity that "prompts an immediate response from the individual or individuals being

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[37] 340 NLRB 637, 639 (2003), enfd. in pertinent part 400 F.3d 1093 (8th Cir. 2005).

[38] 343 NLRB No. 125, slip op. at 5-6 (2004).

[39] Willamette Industries, 306 NLRB 1010, n.2 (1992) (emphasis added).

[40] The noun "help" has been defined as "an act or instance of giving aid or support." Webster's Third New International Dictionary (Unabridged 1971).

[41] See also Wal-Mart Stores, Inc. (Gettysburg, PA), Case 5-CA-32580, Advice Memorandum dated October 31, 2005 (finding Wal-Mart's definition of solicitation to be "facially valid").

solicited,"[42] and that the Employer's definition of solicitation arguably covers a broader range of employee conduct. In particular, the phrase "seek[ing] help...for any cause" covers activity that does not necessarily prompt an immediate response. However, while the Board has distinguished solicitation from mere talking,[43] an employer may lawfully prohibit talking during nonwork time that is unrelated to work tasks, as long as the rule is not promulgated with a discriminatory motive or disparately enforced.[44] Thus, the definition of solicitation in Wal-Mart Stores is not controlling in this case.[45] Because the Rule permits employee solicitation – however defined – during nonwork time in nonselling areas, does not treat Section 7 activity different from other activity, was not promulgated in response to Section 7 activity, and has not been enforced discriminatorily against Section 7 activity, we would not find it facially unlawful.

B. Issues Submitted For Review And Possible Coordination With Other Wal-Mart Cases

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[42] 340 NLRB at 639. Compare Washington Fruit & Produce Co., 343 NLRB No. 125, slip op. at 6-7 (upholding warnings issued by employer to employees for conduct violative of its work time no-solicitation rule, which prohibited employee efforts to "persuade" fellow employees to support a cause); President Riverboat Casinos of Missouri, 329 NLRB 77, 82 (1999) (defining solicitation as asking another person "to do something, such as sign a card, come to a meeting, or buy merchandise").

[43] W. W. Grainger, Inc., 229 NLRB 161, 166 (1977), enfd. 5852 F.2d 1118 (7th Cir. 1978) ("It should be clear that 'solicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad").

[44] Stanadyne Automotive Corp., 345 NLRB No. 6, slip op. at 2 (2005) (employer may forbid employees from "talking about" union on work time if prohibition also extends to other topics). Cf. M. J. Mechanical Services, 324 NLRB 812, 814 (1997) ("Respondent may not prohibit discussions about a union during worktime while permitting discussions about other nonwork subjects").

[45] In any event, the issue in Wal-Mart Stores was whether or not an employee who was disciplined for violating a no-solicitation rule had actually engaged in the conduct that the rule prohibited. The issue here – whether the Rule is facially valid – is entirely different.

The Region may dismiss in its discretion the following allegations submitted for review and possible coordination with other Wal-Mart cases under Memoranda OM 05-37 and OM 00-24:

(1) Maintaining an overbroad bar on solicitation because employees would reasonably understand the Rule to bar solicitations where both the employee doing the soliciting and the employee being solicited are on break time in a break area, but where other employees in the facility are on work time.

(2) Maintaining an overbroad definition of "working area," because it excludes "Associate parking areas" but not customer parking lots.

(3) Maintaining an overbroad definition of interior working areas because it only excludes breakrooms, restrooms, and lobbies, but does not exclude additional unspecified interior nonwork areas.

(4) Maintaining an overbroad definition of "working area" because it includes the vestibule area directly inside the store entrance.

(5) Unlawfully interfering with the rights of nonemployee Union agents to engage in solicitation and distribution activities on the parking lots, driveways, and sidewalks outside the store under the theory that the property is a Pruneyard quasi-public forum under the California constitution and to the extent the demonstrators were engaging in unprotected activity.

(6) Allegedly stating on May 7 to the Union demonstrators that they did not have the right to solicit or distribute on the public sidewalks outside the Employer's property and/or that they would be arrested for soliciting or distributing on the public sidewalks.

However, the Region should issue complaint alleging that the Employer unlawfully interfered with the rights of nonemployee Union agents to engage in solicitation and distribution activities on the parking lots, driveways, and sidewalks outside the store under the theory that the demonstrators were entitled to engage in peaceful expressive activity concerning a labor dispute in those

areas under the Moscone Act and Sears.[46] In Winco Foods, Inc.,[47] the Board held that a stand-alone grocery store had no right under California labor law to exclude union organizers engaged in consumer handbilling from the parking lot and walkways adjacent to its store. The Board rejected employer contentions that the Moscone/Sears limitation on property rights was preempted or invalid on Fourteenth Amendment equal protection and taking grounds.[48] Based on this precedent, the Region should include in its complaint an allegation that the Employer unlawfully denied nonemployee demonstrators the right to access its exterior premises to engage in peaceful expressive activity regarding a labor dispute.[49] As noted above, the complaint should not attack any denials of access based on Union demonstrators' unprotected activity or activity that would not be protected under the Moscone Act.[50]

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[46] 158 Cal.Rptr. at 374.

[47] 337 NLRB 289, 292-294 (2001), enf. denied sub nom. Waremart Foods v. NLRB (Waremart II), 354 F.3d 870 (D.C. Cir. 2003) (rehearing en banc denied) (stand-alone grocery store precluded from excluding union representatives from exterior premises under Moscone/Sears). See also Indio Grocery, 323 NLRB 1138 (1997), enfd. sub nom. NLRB v. Calkins, 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000) (employer could not bar peaceful handbilling from exterior premises of stand-alone grocery store under both Pruneyard and Sears).

[48] 337 NLRB at 289, 289 n.3. Accord: NLRB v. Calkins, 187 F.3d at 1094-95.

[49] As noted above, because the Employer's property is not a Pruneyard public forum, the denial-of-access allegation should not be based on such a theory.

[50] The Moscone Act's protection has never extended to activity involving violence, breach of the peace, disorderly conduct, or the blocking of ingress or egress. Kaplan's Fruit & Produce Co. v. Superior Court, 160 Cal.Rptr. 745, 747 (Cal. 1979) (injunction of picketing involving agricultural labor dispute was not precluded where pickets blocked egress and ingress; not peaceful picketing protected by the Moscone Act); 2M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers, 177 Cal.Rptr. 690, 693-94, 700 (Cal. App. 1 Dist. 1981) (injunction limiting number and distance of pickets upheld when union obstructed access to restaurant and threatened/intimidated customers and management); Int'l Molders and Allied Workers Union v. Superior Court, 138 Cal.Rptr. 794, 800 (Cal. App. 3 Dist. 1977) (upholding

However, the validity of this theory of violation has been cast in doubt as a result of the D.C. Circuit's recent denial of enforcement in Waremart II.[51] Independently construing California law on review,[52] the D.C. Circuit concluded that California could not constitutionally accord labor activity greater latitude for trespass than other expressive activity.[53] Accordingly, the court found no basis for concluding that California property law, interpreted constitutionally, prohibited the employer from excluding the union agents from the property, and it refused to enforce the Board's Moscone/Sears-based finding of a violation.[54] Thus, the court held that, to the extent that Sears relied on any special protection accorded to labor activity under the Moscone Act, the decision could not stand because such an interpretation of the statute would constitute content regulation of speech in violation of the First Amendment.[55] Given the clear federal

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injunction limiting number and location of pickets when union engaged in threats of violence and interference with access and freedom of movement).

[51] 354 F.3d 870 (2004), rehearing en banc denied April 7, 2004.

[52] The circuit court undertook this analysis only after asking the California Supreme Court to consider the issue (Waremart Foods v. NLRB ("Waremart I"), 333 F.3d 223, 227-28 (D.C. Cir. 2003)), and after the California court declined to do so, 354 F.3d at 871.

[53] 354 F.3d at 872-75 (giving special protection to labor speech would be unconstitutional content regulation). The court also held that the site was not a functional equivalent of a traditional "public forum" on which expressive activity is allowed under the California state constitution. Id. at 876. The court acknowledged the 9th Circuit's decision in Calkins, but noted that in subsequent decisions, California intermediate courts found stand-alone grocery stores were not the functional equivalent of a public forum. Id. at 875-76.

[54] Id. at 876-77.

[55] Id. at 875, citing Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972) (exemption for labor picketing in local statute prohibiting picketing at schools during school hours unconstitutional); Carey v. Brown, 447 U.S. 455 (1980) (same; labor exemption in statute prohibiting picketing of residences).

constitutional policy, the D.C. Circuit concluded that if the meaning of the Moscone Act came before the California Supreme Court again, it would either declare the statute unconstitutional or construe it differently so as to avoid unconstitutionality.[56]

In light of the D.C. Circuit's decision, the Region should argue for Board dismissal of the complaint allegation regarding the Employer's denial of access to nonemployee Union demonstrators. Since state law is determinative of employer property interests,[57] it would not be appropriate to find a violation based on denial of access where state law regarding the property owner's right of exclusion is unclear. We believe the D.C. Circuit's analysis in Waremart II undermines any conclusion that the Moscone Act and Sears clearly prohibit private property owners from excluding individuals engaged in peaceful labor activity. Accordingly, notwithstanding issuance of complaint under extant Board law, the Region should argue to the Board that the complaint should be dismissed because the Employer restricted nonemployee access to private property and California does not have a clear policy limiting the rights of property owners to exclude nonemployees engaged in peaceful labor speech.[58]

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[56] Waremart II, 354 F.3d at 875.

[57] See, e.g., Bristol Farms, 311 NLRB at 438-39 (state, not federal, law creates and defines employer property interests; union agents' Section 7 activities on sidewalk in front of grocery store did not interfere with any property right of the store under California law). See also Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law").

[58] We previously instructed Region 21 to issue complaint to place this issue before the Board in 99 Cent Only Store, Cases 21-CA-36133, et al., Advice Memorandum dated November 10, 2004, and Handlery Hotel & Resort, Cases 21-CA-36480, et al., Advice Memorandum dated March 9, 2005, but both cases settled. In Extra Space Storage, Cases 32-CA-20774, et al., Advice Memorandum dated November 17, 2004, [*FOIA Exemptions* 2 and 5

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We recognize that the Board recently noted in Macerich Management Co.[59] that under Waremart II, the Moscone/Sears line of cases does not represent current California law as to "stand-alone" stores. However, the Board did not address the Ninth Circuit's decision in NLRB v. Calkins,[60] which relied in part on Sears to find that a property-owner could not bar peaceful union handbilling from the exterior premises of a stand-alone grocery store. Although the D.C. Circuit in Waremart II rejected the Ninth Circuit's analysis,[61] Calkins remains the law of the Ninth Circuit. Because the Board must apply state law in nonemployee access cases,[62] the Region should ask the Board to follow the D.C. Circuit's construction of California law and reject that of the Ninth Circuit.

[*FOIA Exemptions* 2 and 5

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B.J.K.

[59] 345 NLRB No. 34, slip op. at 4 (2005).

[60] 187 F.3d at 1091.

[61] 354 F.3d at 875-76.

[62] Bristol Farms, 311 NLRB at 438-39.