

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

Advice Memorandum

DATE: August 29, 2001

TO : Curtis A. Wells, Regional Director
Martha E. Kinard, Regional Attorney
Claude L. Witherspoon, Assistant to Regional Director
Region 16

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

SUBJECT: Wal-Mart Stores, Inc. 530-6067-4022-0100
Case 16-CA-20827 530-6067-4022-1100
530-6067-4022-4400
530-6067-4022-4800
530-6067-4022-5500
596-0420-5050
596-0420-8775

This 8(a)(5) and (1) case was submitted for advice as to: (1) whether Wal-Mart Stores, Inc. (the Employer) violated the Act by refusing to bargain with UFCW Local 540 (the Union) over the effects of the Employer's implementation of a case-ready meat program and, if so, (2) whether the allegations are time-barred under Section 10(b).

FACTS

The Union was elected as the collective bargaining representative for meat market employees at the Employer's supercenter in Jacksonville, Texas on February 17, 2000¹ and was certified on August 9.

On February 28, during a pre-election hearing involving the Employer's Palestine, Texas store,² the Employer announced its decision to eventually implement a case-ready meat program ("the CR program") at several of its stores, including the Jacksonville store. Traditionally, the Employer had used a box-meat system where meat was cut, wrapped, and priced in stores by store employees. Under the CR program, all meat would be produced in factories by suppliers and provided to the Employer's stores pre-packaged, priced, and ready to sell.

¹ All dates refer to 2000, unless otherwise noted.

² Case 16-RC-10181.

By letter dated March 13, Union International Vice President Rodriguez advised store manager Eckerman that the Union represented unit employees and that any changes to their working conditions must be negotiated. Rodriguez demanded that the Employer contact him within two days to schedule negotiations.

By letter dated March 14, the Employer "denied" the Union's "request for immediate recognition as the collective bargaining representative of" unit employees, as well as Rodriguez's "additional requests that would flow from representative status, e.g., your request to inspect the premises." The Employer asserted that since the Union had not yet been certified as the unit's collective bargaining representative, the Employer had no obligation to recognize the Union. The Employer did not specifically address the Union's demand to bargain about any changes to unit employees' terms and conditions of employment.

By letter dated March 17, Union counsel Wiszynski advised the Employer's legal counsel that the Union's March 13 letter was not a demand for recognition but a demand for bargaining regarding the CR program and again requested bargaining. The Employer did not respond to Wiszynski's letter.

Between June 19 and 21, the Employer implemented the case-ready meat program at the store. The Union learned of the implementation some time in late June. By letter from Rodriguez to the Employer dated June 28, the Union again made a general demand for bargaining.

The parties did not correspond again until Rodriguez sent the Employer a letter dated July 18 demanding that the Employer bargain with the Union regarding the change to case-ready meat. Rodriguez further demanded that the Employer "cease any further implementation" of the CR program until the parties met and bargained.

By letter dated July 19, the Employer rejected the Union's demands for bargaining, reiterating earlier arguments that because the Union had not been certified as the unit's collective bargaining representative, the Employer was justified in rejecting the Union's demand to bargain, as well as "any other requests that would flow from [the] union's purported status as collective bargaining representative for [the Unit]."

On July 24 the Employer's legal counsel forwarded copies of Rodriguez's June 28 letter to Wiszynski. In his cover letter, Employer's counsel advised Wiszynski that

"Wal-Mart's position on [those] issues" had not changed since the July 19 Employer letter.

After the Board certified the Union on August 9, by letter dated August 16, Rodriguez demanded bargaining for an initial contract, requested the names and addresses of unit employees, and requested information related to unit employees' terms and conditions of employment.

By letter dated August 21, Employer senior corporate counsel DeMoss advised the Union that the Employer would not to bargain over the decision to implement the case-ready program or the effects of that decision. The Employer asserted that the implementation of the CR program effectively dissolved the unit; therefore, the Employer had no obligation to bargain. The Employer also argued that bargaining was unnecessary as "none of the associates in the Jacksonville unit will feel any economic effect as a result of the case-ready program - none of them have [sic] experienced any reduction in pay or work hours and none of them will lose any benefits."

The Union filed a Section 8(a)(5) charge on August 21 regarding the Employer's general refusal to recognize and bargain.³ Although the Union did not specifically allege the Employer's refusal to bargain over the effects of its decision to implement the CR program, it did allege that "Wal-Mart violated [Section 8(a)(5) and (1) of the] Act when it: (a) refused to collectively bargain with Local 540 over the terms and conditions of employment of its Jacksonville supercenter meat department employees; and (b) failed and refused to provide relevant information and documents Local 540 requested for collective bargaining negotiations."⁴ The Union filed the instant charge on December 6, specifically alleging that the Employer refused to bargain over the implementation of the CR program and its effects on unit employees.

³ Case 16-CA-20603.

⁴ The Region initially treated the case as a test of the Union's certification and moved for summary judgment. The Board denied the Region's motion and returned the case to the Region for a hearing before an Administrative Law Judge. That case had been held in abeyance pending the General Counsel's resolution of questions regarding the continued existence of the unit. Subsequent to the Region's request for advice, the Region advised us that there is no longer any reason to hold the case in abeyance. Therefore, there no longer is any impediment to consolidate that case with the instant case.

ACTION

We conclude that the Employer violated Section 8(a)(5) by failing and refusing to bargain with the Union regarding the effects of its implementation of the CR program, and that the allegations are not time-barred.

By Advice Memorandum dated January 19, 2001,⁵ we concluded that the Employer was not obligated to bargain about the decision to implement the CR program. The Region dismissed the allegations and the Office of Appeals upheld the dismissal decision on July 30, 2001.

As to the Employer's obligation to engage in effects bargaining, the Employer argues that employees did not suffer any "economic effect" from the Employer's implementation of the case-ready meat. However, there were arguably some material and substantial changes to unit employees' working conditions, such as the type of work performed by unit employees, their new work assignments or supervision, etc. Since these were material and substantial changes, the Employer was obligated to bargain with the Union regarding the effects of its decision.⁶

The fact that the unit may no longer exist does not relieve the Employer of its obligation to engage in "effects" bargaining. The Employer's bargaining obligation began when the Union won the election on February 17, 2000. On March 13 the Union demanded bargaining over any changes to unit employees' working conditions; this would include implementation of the case-ready meat program. The continued viability of the unit is irrelevant to the Employer's obligation to engage in effects bargaining since the Employer was obliged to bargain with the Union regardless of "whether the termination was partial or

⁵ Cases 16-CA-20298 and 16-CA-20321.

⁶ See, e.g., Holly Farms Corp., 311 NLRB 273, 278 (1993) (terms under which drivers were offered employment was bargainable effect of integration decision, since terms "were not an inevitable consequence of the functional integration of the transportation departments," but merely one of several responses to changed circumstances); Paramount Poultry, 294 NLRB 867, 869 (1989) (employer obligated to bargain effects - reduced workweek and layoffs - of its decision to eliminate its beef and turkey product lines).

total."⁷ By refusing to engage in timely "effects" bargaining, the Employer denied the Union an opportunity to bargain at a time when the unit clearly was still intact and the Union had a relatively stronger bargaining position. In such circumstances, a Transmarine⁸ remedy is appropriate.⁹

We further conclude that the Union's allegations are not time-barred under Section 10(b). Section 10(b) bars a complaint based on conduct occurring more than 6 months prior to the filing of a related charge.¹⁰ The 10(b) period commences only when a party has clear and unequivocal notice that the Act has been violated, or when a party in the exercise of reasonable diligence should have been aware that there has been a violation of the Act.¹¹

The August 21 Section 8(a)(5) charge in Case 16-CA-20603, alleging a general refusal to recognize and bargain, fairly encompasses the Union's allegation that the Employer has refused to bargain the "effects" on unit employees of the Employer's decision to convert to case-ready meat. "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private law suit. Its purpose is merely to set in motion the machinery of an inquiry."¹² Accordingly, the General Counsel may

⁷ See, e.g., Globe Security Services, Inc., 229 NLRB 460, 461 (1977) (failure to bargain over effects on unit employees of contracts pursuant to which employer supplied guard services), *enfd.* 582 F.2d 1275 (3d Cir. 1978), and cases cited therein.

⁸ Transmarine Navigation Corporation, 170 NLRB 389 (1968).

⁹ See Odebrecht Contractors of California, 324 NLRB 396, 397-398 (1997); BC Industries, 307 NLRB 1275, 1283 (1992); Times Herald Printing Co., 315 NLRB 700 (1994).

¹⁰ Bryant & Stratton Business Institute, 327 NLRB 1135, 1145-46 (1999), citing to Carrier Corp., 319 NLRB 184, 190 (1995); Leach Corp., 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995).

¹¹ Bryant & Stratton, above at 1145, citing Carrier, above; Mine Workers District 12, 315 NLRB 1052 (1994); Moeller Bros. Body Shop, 306 NLRB 191, 192-193 (1992).

¹² NLRB v. Fant Milling Co., 360 U.S. 301, 307 (1959). The Court went on to explain: "The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to specific matters alleged in the charge

amend a complaint to add allegations concerning events outside the Section 10(b) period if the allegations are "closely related" to allegations included within a timely filed charge and are based upon conduct that occurred within six months of the filing of the timely filed charge.¹³

In determining whether a complaint amendment is "closely related" to the charge's specific allegations, the Board examines the following factors:

"[a] whether the otherwise untimely allegations are of the same class as the violations in the pending charge (i.e., whether they involve the same legal theory and usually the same section of the Act); [b] whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely filed charge (i.e., whether they involve similar conduct, usually during the same time period, with a similar object[;]"¹⁴ and [c] "whether a respondent would raise the same or similar defenses to both allegations."¹⁵

Thus, a broadly worded charge would encompass related violations not specifically alleged in the charge.¹⁶

would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purposes of the Act."

¹³ See, e.g., Columbia Portland Cement, 303 NLRB 880, 884 (1991), enfd. 979 F.2d 460 (6th Cir. 1992); Control Services, 303 NLRB 481, 482 (1991), enfd. mem. 961 F.2d 1568, 975 F.2d 1551 (3d Cir. 1992) (the Board rejected respondent's 10(b) defense to certain complaint allegations based on defective service of charge and noted that the allegations could have been added by amendment even in the absence of a separate charge because the issues were closely related to those in properly served charge).

¹⁴ Roslyn Gardens Tenants Corp., 294 NLRB 506, 506-507 (1989) citing Redd-I, 290 NLRB 1115, 1118 (1988).

¹⁵Redd-I, above, at 1118.

¹⁶ See Bundy Corp., 292 NLRB 671, 680 (1989) (allegation that employer refused to bargain with the union "on any issues" was "certainly broad enough to embrace any of the issues" about which the employer allegedly refused to bargain over a three month period); S&W Motor Lines, Inc., 236 NLRB 938, 952 (1978) enfd. in rel. part 621 F.2d 589

Applying the Redd-I criteria to the facts of this case, it is clear that the Union's August 21 Section 8(a)(5) charge will support a complaint allegation that the Employer refused to bargain over the effects of its decision to implement the case-ready meat program. Both allegations involve violations of Section 8(a)(5); arise out of the same set of facts, i.e., the Employer's steadfast refusal to recognize and bargain with the Union since the election; and share a single object, the Employer's expressed desire to avoid any bargaining obligation to the Union. Moreover, the Employer has presented a common defense to the allegations by arguing that it had no obligation at all to recognize and bargain with the Union, first because it was not certified, later because the unit ceased to exist.¹⁷

We further conclude in the alternative that notwithstanding the broad language of the August 21 charge, the instant charge was timely filed. The Employer's

(4th Cir. 1980) (charge alleging unlawful unilateral changes to "bonuses" considered broad enough to support complaint allegations regarding overtime); Dayton Blueprint Co., 193 NLRB 1100, 1108 (1971) (complaint allegation regarding employer's unilateral raises for two employees, though not specifically alleged in charge, sufficiently "closely related" to employer's alleged refusal to sign contract and, therefore, not time-barred under Section 10(b)).

¹⁷ See cases cited in the previous footnote. See also, Roslyn Gardens, above, 294 NLRB at 507 (charge alleging general 8(a)(5) violations along with specific allegation of refusing to execute contract was sufficient to support all 8(a)(5) allegations addressing conduct (unilateral changes, direct dealing) within the 10(b) period; allegations involved employer's refusal to bargain and attempts to circumvent the collective bargaining process); Bridgestone/Firestone, Inc., 332 NLRB No. 56, slip op. at 1 (2000) (conduct occurring within period of several months involving employer's overall plan to rid itself of the union involved same facts, legal theories, and defenses as timely filed allegations, and therefore closely related); Long Island Day Care, 303 NLRB 112, 113 (1991), enfd. sub nom. Industrial, Technical & Professional Employees Div., NMU v. NLRB, 683 F.2d 305 (9th Cir. 1982) (unilateral changes were closely related to general refusal to bargain allegation by refusing to execute contract, since all stemmed from employer's desire to circumvent the collective bargaining process).

February announcement of its decision to implement the case-ready program did not begin the 10(b) period with regard to the July 19 and August 21 refusals to bargain.¹⁸ Likewise, the Employer's March 14 and July 19 refusals to recognize the Union did not trigger the 10(b) limitations period since the Employer merely refused to recognize the Union because the Union had not yet been certified and because, in any event, the Employer had not placed the Union on notice of any specific time frame when it would implement its decision.¹⁹ It was not until August 21, in response to the Union's post-certification demand for bargaining, that the Employer asserted for the first time that the implementation of the case-ready meat program had effectively destroyed the unit and, therefore, the Employer had no legal obligation to recognize and bargain with the Union for any reason. Given this chronology, the December 6 charge, filed and served on the Employer less than five months after the Employer's first post-implementation refusal to bargain with the Union over the "effects" of the CR program (July 19), and less than four months after the Employer's first post-certification refusal to bargain for any reason (August 2), was timely.

The Employer mistakenly relies on USPS Marina Mail Processing Center²⁰ and Harcros Pigments²¹ in support of its

¹⁸ Bryant & Stratton, above, 327 NLRB at 1147 ("notice of an intent to commit an unlawful unilateral implementation does not trigger the 10(b) period with respect to the act itself" where final decision on bonus was neither made nor "clearly and unambiguously" communicated outside 10(b) period), citing Carrier, above, 319 NLRB at 191 and Howard Electrical & Mechanical, 293 NLRB 472, 475 (1989), enfd. 931 F.2d 63 (10th Cir. 1991).

¹⁹ See, e.g., Sierra International Trucks, Inc., 319 NLRB 948, 950 (1995) (a union must receive sufficient notice of a change to trigger its obligation to request bargaining; notice of an impending but uncertain change insufficient to trigger that obligation); Oklahoma Fixture Co., 314 NLRB 958, 961 (1994) enf. denied 79 F.3d 1030 (10th Cir. 1996) (union's obligation to demand effects bargaining and avoid waiver finding is not triggered by "inchoate and imprecise" announcement of future plans about which the timing and circumstances are unclear), citing Swift Independent Corp., 423, 429 n.11 (1988), enf. denied on other grounds sub nom. Esmark v. NLRB, 887 F.2d 739 (7th Cir. 1989).

²⁰ 271 NLRB 397 (1984).

²¹ Case 14-CA-22059, Advice Memorandum dated July 19, 1993.

argument. Marina Mail is an 8(a)(3) discrimination case where the Board held that the 10(b) period began to run when the employee and the union received notice of the employer's decision to terminate the alleged discriminatee on a certain date, not the effective date of that decision. The Board, however, has limited Marina Mail's application to discriminatory discharge cases, specifically holding its application is inappropriate in contract repudiation or refusal to bargain cases.²² Accordingly, we find that Bryant & Stratton and Howard Electrical are controlling.

Harcros Pigments is also distinguishable. Harcros Pigments involved a union's objections regarding unilateral changes made at approximately the same time that the employer restructured its management and resulted from that restructuring. We concluded that the 10(b) period began to run when the union received notice more than two years before the charge was filed that the Employer had restructured its plant management. In sharp contrast to the union in Harcros, however, the Union here filed its charge less than six months after the Employer refused to recognize and bargain with the Union, and two months after the Employer's unilateral change.

In sum, the Union's allegation that the Employer refused to engage in effects bargaining is not time-barred under Section 10(b). Further, the Employer unlawfully refused to bargain with the Union over the effects of implementing the case-ready meat program.

B.J.K.

²² Leach Corp., above, 312 NLRB at 991, fn. 7.