

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

DATE: November 15, 2013

TO: Martha Kinard, Regional Director  
Region 16

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

SUBJECT: Walmart Stores, Inc.  
Case 16-CA-095286

512-8301  
512-8380-6700  
512-8700

This case was submitted to Advice as to whether the Employer violated Section 8(a)(1) by unlawfully interfering with its Associates'<sup>1</sup> right to strike by telling them that they could not be on company property, and having the police escort the associates off the property when the Associates participated in OUR Walmart's picketing.

We conclude that the charges should be dismissed, absent withdrawal, because there is no evidence that the Wal-Mart Associates, who were picketing with a large group of non-employees, requested permission or otherwise attempted to stay on the Employer's property after the Employer demanded that the group cease picketing on its property, and directed them to public properly.

FACTS

This case involves picketing on November 22, 2013 at two Wal-Mart (the Employer) locations in Texas, Balch Springs and Dallas. At the Balch Springs location, around 7:45 or 8:00 pm, approximately 50 OUR Walmart picketers, consisting of UFCW organizers, community activists, and a few off site Wal-Mart Associates, arrived at the store on a coach bus. The bus pulled into the parking lot and parked in the middle of the parking lot lane to let passengers off the bus. The picketers marched toward the front of the store and formed a picket line in front of the store between the two entrances where customers enter. Wal-Mart managers, and the police who were accompanying them, told the demonstrators that they were not allowed on Wal-Mart's property. A Wal-Mart manager spoke with the UFCW

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<sup>1</sup> "Associate" is the Employer's term for an employee.

organizer about moving the demonstration to public property; at that time, he did not know that any Associate participated in the demonstration. The bus then moved to the front of the store, and all the picketers boarded the bus. The bus drove to the adjacent public sidewalk, and the demonstrators exited and picketed on the public sidewalk, without interruption.

None of the 50 demonstrators identified him or herself as a Wal-Mart Associate, and there is no evidence that managers recognized any member of the group as a Wal-Mart Associate when they were demonstrating on private property and were asked to leave. Further, no Associate participant asked or attempted to engage in separate expressive activity of any sort on Wal-Mart's property. At some later point, Wal-Mart's Labor Relations Manager recognized four Associates from another store after they were on public property. Those Associates stayed with the larger group and made no attempt to engage in any separate demonstration on Wal-Mart's property.

At about 9:30 or 10:00 pm, a OUR Walmart group of about 50 demonstrators arrived at the Dallas store after parking the bus at a Home Depot parking lot across the street. The group demonstrated for about 15 to 20 minutes on the public sidewalk adjacent to the Wal-Mart parking lot; then the 50 plus pickets began marching to the front of the store. As the group walked through the parking lot towards the front of the store, two store managers met the group in the middle of the parking lot and told the UFCW organizer that the demonstrators were not allowed to be there. Five police officers were standing behind the managers. One employee from the Dallas store was in the group. That employee attempted to give the managers a letter that stated he was going on strike, but the managers refused to accept the letter. The evidence is conflicting as to whether a UFCW organizer told the managers that the demonstrators were Wal-Mart Associates; however, the managers recognized two associates in the group. The police told the demonstrators that it was against the law for group to be on private property because they were trespassing and they needed to get off the property. The group then walked to the public sidewalk, and picketed for some time. No Associate participant identified him or herself as an Associate, and none asked or attempted to engage in any Section 7 activity on Wal-Mart's property.

Wal-Mart Stores, Inc., maintains a Solicitation and Distribution of Literature Policy that permits Associates "to participate in solicitation and/or distribution of literature outside [its] facilities during non-working time." However, the Policy requires non-Associate individuals, groups, and organizations (including non-profit, charitable, service, and religious groups) who wish to solicit on the Employer's property outside its facilities to first obtain permission from the Employer. Non-Associates wishing to solicit or distribute literature must request approval to do so by filling out a form at least three days in advance. If the Employer approves the party's request, it must remain in a designated area on the apron sidewalk (not in the parking lot for safety reasons) and have no more than fifteen individuals soliciting

and/or distributing literature at the same time. There is no evidence that Wal-Mart does not uniformly enforce its policy.<sup>2</sup>

### ACTION

The charges should be dismissed, absent withdrawal, as the Employer lawfully excluded non-employee OUR Walmart demonstrators from its property, and no Associate who was with the large group of non-employee demonstrators requested or attempted to remain on the property to assert their Section 7 rights.

Under Board law, off-duty employees and non-employee organizers have different rights of access to employer property for the purpose of solicitation and distribution of literature.<sup>3</sup> Off-duty employees have far more access rights to an employer's premises for purposes of engaging in protected conduct than do union organizers because employees are not "strangers" to the property and the workplace is a "particularly appropriate place" for employees to communicate with one another regarding organizing.<sup>4</sup> In fact, the Board has repeatedly held that an employer cannot deny off-duty employees entry to its parking lots, gates and other outside nonworking areas "except where justified for business reasons."<sup>5</sup> On the other hand, as a general rule, an employer may exclude non-employee organizers from its property.<sup>6</sup> Consistent with these principles, the Board has upheld Wal-Mart's Solicitation and Distribution policy requiring non-employees to obtain prior approval from the store manager for their solicitations and to comply with "time, place, and manner" restrictions.<sup>7</sup>

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<sup>2</sup> See *Wal-Mart Stores, Inc.*, Case 13-CA-99526, Advice Memorandum dated August 14, 2013 (Employer lawfully excluded 20 non-employee organizers from its property, along with the OUR Wal-Mart van that had a large video projection screen and stadium style speakers, pursuant to its lawful Solicitation and Distribution Policy, where it allowed the two associates who were part of the group to remain on its property, albeit absent the van.)

<sup>3</sup>See *Nashville Plastic Products*, 313 NLRB 462, 463 (1993).

<sup>4</sup> *Id.*

<sup>5</sup> *Teletech Holdings, Inc.*, 342 NLRB 924, 931 (2004), citing *Tri-County Medical Center*, 222 NLRB 1089 (1976). See *ITT Industries*, 341 NLRB 937 (2004), enf. 413 F.3d 64 (D.C. Cir. 2005), for test to be applied for **off-site** employees seeking access to their employer's private property.

<sup>6</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

<sup>7</sup> See *Wal-Mart Stores, Inc.*, 349 NLRB 1095 (2007).

Here, there is no evidence that the Employer unlawfully denied access to any of its Associates at either Balch Springs or Dallas stores. In this regard, we note that when Wal-Mart managers spoke to the UFCW organizers and told them to leave its private property and to picket on the public sidewalk, no Associate participant identified him or herself as an Associate, and none asked or attempted to picket on Wal-Mart's property; nor did the UFCW organizer tell the Employer that Associates wanted to remain on its property to picket apart from the large group of outsiders. In fact, the demonstrators remained as a cohesive group, marching together to public property at the Dallas store, and boarding the bus together at the Balch Springs store. Significantly, Wal-Mart maintains a Solicitation and Distribution of Literature Policy that permits Associates "to participate in solicitation and/or distribution of literature outside [its] facilities during non-working time." Thus, in the absence of a request by any Associate to remain on Wal-Mart's property to engage in protected activities, there is insufficient evidence to conclude that Wal-Mart denied access to its any Associates who wished to engage in Section 7 activity. Wal-Mart appears to have been merely enforcing its lawful Solicitation and Distribution policy, requiring non-employees to obtain prior approval from the store manager for their solicitations and to comply with "time, place, and manner" restrictions.

In these circumstances, we conclude that Wal-Mart did not unlawfully deny access to its Associates who wished to engage in Section 7 activity.<sup>8</sup> Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/  
B.J.K.

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<sup>8</sup> We need not decide whether either of the demonstrations resulted in unprotected activity of unlawful blocking.