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

DATE: March 6, 2014

TO: Margaret Diaz, Regional Director
Region 12

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

SUBJECT: Wal-Mart Stores, Inc. 512-5012-8300
Case 12-CA-101200

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act when its attorney sent letters to the UFCW International Union and some of its locals, as well as other affiliated groups and individuals, instructing non-Walmart employees to stay off property owned or controlled by Walmart and threatening legal action if they failed to comply. We conclude that the letters did not violate Section 8(a)(1) because an employer may lawfully restrict non-employee access to its property and the letters exclude the non-Walmart employees only from areas where Walmart has an exclusive property interest.

FACTS

Background

On October 14, 2011, the attorney for Wal-Mart Stores, Inc. (the Employer or Walmart) sent a letter to an attorney for the UFCW International Union referring to Our Walmart events that were then occurring at one of its Sacramento, California, stores.[1] The letter notified the Union that the Employer prohibits non-associates, i.e., non-Walmart employees, from soliciting or distributing literature inside or outside of Walmart facilities property, and requested that the UFCW direct all non-associates affiliated with the Union and its affiliated entities, including OUR Walmart, to cease trespassing.[2] The letter further stated that the Union could contact the attorney if it

[1] This letter is outside the 10(b) period and is not the subject of this charge.

[2] Walmart maintains a Solicitation and Distribution of Literature Policy that requires non-associate individuals, groups, and organizations who wish to solicit or distribute literature on its property outside its facilities to request prior approval by

had questions regarding the boundaries of any particular store, and that generally the closest public spaces were the sidewalks or other areas bordering the outer edge of the parking lot.

On November 1, 2011, the Union responded to the Employer's letter, stating that the activity it described involved UFCW Local 8, not the UFCW International, and that the Employer should send questions about its affiliate's actions directly to Local 8. It also stated that many organizations other than the UFCW International supported the efforts of Walmart workers to organize and to have their concerns addressed, and that the UFCW International did not direct the actions of those supporting organizations or their employees.

Instant charges

Approximately one year after these exchanges, beginning October 8, 2012,[3] the Employer's attorney sent a series of letters to various International Union representatives, local Union representatives, and officials of Jobs with Justice -- an entity that supports OUR Walmart. The letters were sent in response to ongoing actions and in anticipation of announced actions by the Union or its affiliated entities, including a "National Day of Action" to be staged at stores throughout the country on the day after Thanksgiving (Black Friday). The letters all stated that non-associates were not permitted on "Walmart owned or controlled" property for the purpose of engaging in, among other things, mass demonstrations, flash mobs, customer disruption, and picketing. Most of the letters extended the prohibition to all Walmart stores in the United States, while others extended it to the named states of Florida, Hawaii, California and Washington. Most of the letters also directed the recipients to call the Employer's attorney if they had any questions. There is no evidence that any of the recipients sought information from the attorney regarding Walmart's definition of "property controlled by Walmart" or the boundaries of any particular store.

ACTION

We conclude that the letters did not violate Section 8(a)(1) because they imposed no restrictions on the Employer's current employees; they were lawful statements of Board law with regard to an employer's right to restrict non-employee access to its

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filling out a form at least three days in advance. If the Employer approves the request, the soliciting must remain in a designated area on the apron sidewalk (not the parking lot) and limit the number of individuals. The Board has found this access policy to be lawful. *See Wal-Mart Stores, Inc.*, 349 NLRB 1095 (2007).

[3] All dates hereinafter are in 2012.

property; and there is no evidence that the Employer sought to enforce its policy in a discriminatory manner. Accordingly, these charges should be dismissed, absent withdrawal.

Except in narrow circumstances, "Section 7 guarantees do not authorize trespasses by nonemployees."[4] But, as a threshold matter, an employer must have a property interest sufficient to make the union's presence on the property a "trespass" before it can lawfully exclude the union.[5] To determine whether an employer has a sufficient property interest, the Board considers the state law delineating who can maintain a trespass action, and the lease, license, or other instrument that defines the property interest.[6] The employer bears the burden of proof in establishing the requisite property interest.[7]

If an occupant of a property has the right to "control" property, that occupant is said to have legal possession of that property, and states permit trespass actions by those with possession of property against individuals who are not otherwise authorized to be on that property.[8] Moreover, the Board consistently has used the

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[4] *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (narrow circumstances exist where union can show no alternative means of access to employees); *Davis Supermarkets*, 306 NLRB 426, 426-427 (1992), citing *Babcock & Wilcox*, 351 U.S. 105, 112 (1956) (*Lechmere* did not disturb the principle that an employer may validly post his property so long as it does not discriminate against the union by allowing other distribution). *See also Wal-Mart Stores, Inc.*, 349 NLRB at 1105 (the employer has a right to restrict nonemployees in soliciting/distributing on its property).

[5] *Snyder's of Hanover*, 334 NLRB 183, 183 (2001), *enf. denied in rel. part* 39 Fed.Appx. 730 (3d Cir. 2002), citing Indio *Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. sub nom. *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Food for Less*, 318 NLRB 646, 649 (1995), enfd. in relevant part sub nom. *O'Neil's Markets v. NLRB*, 95 F.3d 733 (8th Cir. 1996).

[6] *Johnson & Hardin Co.*, 305 NLRB 690, 690, 695 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995).

[7] *See Giant Food Stores*, 295 NLRB 330, 332 (1989).

[8] The term "control" is a term of art which deems a person in possession of land if that "intent to control" is coupled with occupancy. *See, Rest. 2d § 157 (2013) ("Definition of Possession,* [i]n the restatement of this subject, a person who is in possession of land includes only one who … is in occupancy of land with intent to control…"); *Rest. 2d § 158 (2013)* (one is liable for trespass if he "enters land in

word "control" as the equivalent of an exclusive property interest that creates a right to exclude non-employees from property.[9]

Applying these principles here, we conclude that the letters from Walmart's attorney did not violate Section 8(a)(1). As an initial matter, we note that the letters imposed no restrictions on Walmart's own employees and therefore did not implicate their Section 7 rights to access their Employer's property. Further, the wording of the letters was tailored so as to apply only to property over which Walmart had an exclusive property interest, such that it could lawfully restrict non-Walmart employee access. Specifically, the letters stated that non-employees affiliated with the Union and/or OUR Walmart were excluded from property "owned" by Walmart, or property "controlled" by Walmart; the latter a term of art that is used to signify land over which an employer has the legal authority to exclude non-employees.[10] Although the question of whether particular properties are in fact "controlled" by Walmart could be subject to dispute, the letters themselves did not refer to, or take a position, as to any particular properties. Moreover, the letters invited the recipients to contact the attorney if they had any questions, thus providing them with an opportunity to solicit Walmart's position regarding particular sites. None of the recipients did so. In sum, the letters on their face were lawful because they only purported to exclude non-

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possession of another…"). *See also Robert River Rides Inc. v. Steamboat Development Corp.,* 520 N.W. 2d 299, 300-302 (Iowa 1994), *overruled on other grounds, Bareca v. Nickolas*, 683 N.W. 2d 111 (Iowa 2004) (actual or constructive possession of land required to maintain trespass action).

[9] *See Barkus Bakery*, 282 NLRB 351, 353 (1986), enfd. mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3rd Cir. 1987) (employer had no legal authority to attempt to eject the union agents from land over which it had no control); *Johnson & Hardin Co.,* 305 NLRB 690, 690 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995) (exclusion of the union organizers from the property violated the Act where respondent's easement gave it no right to control the property but merely to use it for ingress and egress); *In re A&E Food Co. 1, Inc.*, 339 NLRB 860, 863 (2003) (nothing in the lease gives respondent exclusive control over the lot or the right to possess it to the exclusion of the other tenants). *See also Safeway/Caltex Equities/Pinkerton*, Cases 20-CA-30107-1 et al., Advice Memorandum dated March 29, 2002, at 13-14 (*Lechmere* does not apply if the employer does not possess a sufficient private property interest to control use of the property); *Gooding's Supermarkets,* Cases 12-CA-17371 et al., Advice Memorandum dated October 18, 1996, at 11.

[10] *See Barkus Bakery*, 282 NLRB at 353; *Johnson & Hardin Co.,* 305 NLRB at 690; *In re A&E Food Co. 1, Inc.*, 339 NLRB at 863.

Walmart employees from areas over which Walmart would have an exclusive property interest.[11]

Finally, there is no evidence that the letters discriminatorily applied Walmart's Solicitation and Distribution of Literature Policy against non-Walmart employee protestors. Although the written policy permits non-employees to request permission to solicit/distribute outside its facilities (and thus does not preemptively exclude non-Walmart employee solicitation or distribution on its property), the letters were aimed at events that included activities which would not, under that policy, have been authorized, such as mass demonstrations, flash mobs, customer disruptions, and picketing. And since OUR Walmart's activities were planned on a nationwide or statewide basis, it cannot be said that the Employer acted unreasonably by informing all the potential actors prior to the anticipated events of its intent to exclude non-employees for these purposes.[12]

Accordingly, the allegations should be dismissed, absent withdrawal.

/s/
B.J.K.

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[11] We note that if non-Walmart employee activists or protesters are in fact deprived access to areas where they believe Walmart lacks the requisite property interest, they may file unfair labor practice charges at that time.

[12] The letters referencing the Employer's California stores are carefully tailored to accommodate *Robins v. Pruneyard,* 23 Cal.3d 899, 153 Cal.Rptr. 854 (1979), affd. 447 U.S. 74 (1980), and California's Moscone Act, Cal. Code of Civ. Proc. §527.3, as construed by *Sears v. San Diego District Council of Carpenters*, 25 Cal.3d 317 (1979).