UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

WAL-MART STORES, INC.	**Cases 32-CA-090116**
	32-CA-092512
and	**32-CA-092858**
	32-CA-094004
THE ORGANIZATION UNITED FOR RESPECT	**32-CA-094011**
AT WALMART (OUR WALMART)	**32-CA-094382**
	32-CA-096506
	32-CA-111715

CHARGING PARTY'S ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS

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INTRODUCTION

Administrative Law Judge (ALJ) Geoffrey Carter properly determined that the sit-down strike at issue here was protected under the balancing test laid out in *Quietflex Mfg. Co.*, for the *Quietflex* standard is the appropriate one to apply to work stoppages, both in a plant setting and on a retail sales floor. 344 NLRB 1085 (2005).

Walmart erroneously claims that *Quietflex* is not the appropriate standard and that the ALJ should have relied on a line of union solicitation cases giving an employer the right to prohibit all "labor activity" on the sales floor because such activity could interfere with or disrupt serving customers, which is the "primary purpose" of a retail operation. This focus on the disruption of the customer shopping experience fails to take into account other lines of Board decisions applying standards that expressly do not allow an employer to prohibit all Section 7 activity on the sales floor. In fact, a seminal example of this is a case involving Walmart. In *Wal-Mart Stores, Inc.*, 340 NLRB 637 (2001), *mod.*, 400 F.3d 1093 (8th Cir. 2005), the Board found that Walmart could not use its no solicitation policy to prevent workers from talking about the Union on the shop floor as long as the talk did not rise to a level of disruption that impacted worker productivity rather than the customer shopping experience. Similarly, the Board's line of button cases generally allow workers to wear buttons on the retail floor even if the workers have significant customer contact and the button message could possibly offend the customer, which is an express rejection of the disruption to the customer shopping experience standard. Rather, the Board imposes on the employer the heightened burden of proving special circumstances before allowing the employer to curtail employees' Section 7 rights. Moreover, the Board has also issued a line of cases recognizing workers' rights to talk while on the sales floor, even when

the topic of discussion concerns a labor union. And this even extends to talking with customers about working conditions, collective bargaining negotiations, and strikes.

Because there exists precedent to analyze sales floor Section 7 labor activity without applying the disruption of the customer shopping experience standard, the Board should grant retail workers the same protections it gives plant workers and apply the *Quietflex* balancing test to retail sit-down strikes. Moreover, properly conducted retail sit-down strikes are generally less disruptive than those conducted in a plant because retail operations can continue during a sit-down strike while even a small segment of plant workers striking often causes production to cease in its entirety.

Finally, application of the *Quietflex* balancing test to the sit-down strike at issue here clearly indicates that the sit-down strike was protected Section 7 activity. In fact, each of the ten *Quietflex* factors cuts in favor of the workers, who struck over unlawful working conditions inflicted upon the group, engaged in a peaceful sit-down strike for about an hour and twenty minutes, tried to present their grievances to Walmart but were rebuffed when Walmart would only speak to them individually, caused no disruption, and never seized any Walmart property, to list just a few of the *Quietflex* factors. For these reasons (and the others outlined in section II), Walmart acted unlawfully when it issued each of the striking workers double discipline.

For all of these reasons, the Board should uphold Judge Carter's decision applying the *Quietflex* balancing test to the sit-down strike in which six Walmart workers engaged and finding that Walmart violated these workers' Section 7 rights when it disciplined them due to their participation in this protected activity.

ARGUMENT

I. *QUIETFLEX* IS THE PROPER STANDARD TO APPLY IN ASSESSING THE SIT-DOWN STRIKE AT ISSUE HERE.

A. THE ALJ PROPERLY APPLIED THE BOARD'S CURRENT RULE AND BALANCING TEST.

In determining that the sit-down strike at issue here was a protected work stoppage, the ALJ properly applied the Board's current standard. To assess the lawfulness of a sit-down strike, the Board utilizes the criteria laid out in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), *readopted*, 355 NLRB No. 122 (Aug. 24, 2010).

The Board has found that the "'precise contours within which [a work stoppage] is protected [are] not defined by hard-and-fast rules. Instead each requires 'a weighing of . . . factors.'" *Hilton Hotel*, 354 NLRB No. 17, slip op. at 15, *citing Quietflex*, 344 NLRB at 1056. Specifically, the Board weighs the employees' right to exercise their Section 7 rights against an employer's private property interests by examining the following criteria:

> (1) The reason the employees have stopped working.
>
> (2) Whether the work stoppage was peaceful.
>
> (3) Whether the work stoppage interfered with production or deprived the company of access to its property.
>
> (4) Whether strikers had adequate and meaningful opportunity to present grievances to management.
>
> (5) Whether the company warned strikers that they must leave the premises or face discharge.
>
> (6) The duration of the work stoppage.

(7) Whether strikers were represented by a Union or had an established grievance procedure.

(8) Whether strikers remained on the premises beyond the end of their shifts.

(9) Whether strikers attempted to seize the company's property.

(10) The reason for which the company discharged the strikers.

Quietflex Mfg. Co., 344 NLRB 1055, 1056-57 (2005).

The Board considers all of these factors but does "not give controlling weight to any one factor." *Hilton Hotel*, 354 NLRB No. 7, slip op. at 15, *citing Quietflex,* 344 NLRB at 1056. Where the balance falls depends "on the nature and strength of the respective Section 7 rights and private property rights . . . in any given context." *Hilton Hotel*, 354 NLRB No. 17, slip op. at 15, *citing Quietflex*, 344 NLRB at 1056, and *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976).

The balancing test "focus[es] on the degree of impairment of the employees' Section 7 rights if access is denied, compared to the degree of impairment of the employer's private property rights if access is granted. *Quietflex*, 344 NLRB at 1058, citing *Hudgens v. NLRB*, 424 U.S. 507 (1976). "In striking an appropriate balance between the workers' and the employees' competing interests, the duty of the Board is to accommodate both rights 'with as little destruction of one as is consistent with the maintenance of the other.'" Quietflex, 344 NLRB at 1058, quoting *NLRB v. Babcock & Wilcox Co.*, 251 U.S. 105, 112 (1956); *Hudgens*, supra, 424 U.S. at 520. Moreover, "[i]nconvenience or even some dislocation of property rights, may be necessary in order to safeguard" Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945).

B. WALMART ERRONEOUSLY CLAIMS THAT *QUIETFLEX* IS NOT THE APPROPRIATE STANDARD TO APPLY IN THE PRESENT CASE.

Quietflex is the proper standard to apply to a work stoppage that occurred on the floor of an employer's business. Walmart claims that the *Quietflex* criteria should not be applied to determine the lawfulness of its workers' sit-down strike in the present case because the strike at issue here occurred on a retail sales floor. Walmart Brief in Support of Exceptions at 26. Quoting from various union solicitation cases, Walmart argues that there is a separate category of work stoppage jurisprudence for retail settings that gives an employer the right to prohibit all "labor activity" on the sales floor because such activity could interfere with or disrupt the "primary purpose" of the retail operation, which is "to serve customers." *Id*. at 30-31 (citations omitted). [1]

However, Walmart's conclusion is far too sweeping and broad. The Board's decisions in retail cases do not prohibit all Section 7 activity in deference to the customer shopping experience. In fact, there are several categories of cases where the Board views labor activity on the floor of a retail store or business using entirely different standards.

1. *Wal-Mart Stores, Inc.*: employees may engage in protected Section 7 activity on the sales floor absent disruptive interference with production.

Even the body of solicitation case law upon which Walmart relies does not allow an employer to ban all union-related activity from the retail sales floor. In *Wal-Mart Stores, Inc.*,

[1] *See Sylvania Electric Products*, 174 NLRB 1067, 1070 (1969) (dictum finding that retail establishment has right to limit solicitation in areas of store open to public); *May Dept. Stores*, 59 NLRB 976, 980-81 (1944) (prohibiting union solicitation on selling floor because it could be disruptive of business); *Goldblatt Bros*., 77 NLRB 1262, 1263-64 (1948) (allowing employer to apply rule against union solicitation on selling floor to public restaurants on premises); *Meier & Frank Co., Inc*., 89 NLRB 1016, 1017 (1950) (finding unlawful employer rule prohibiting solicitation off selling floor outside of working time); *Marshall Field & Co*., 98 NLRB 88, 92-94 (1952) (upholding employer prohibition of solicitation in aisles, corridors, elevators, escalators, and stairways inside store); *The Times Pub. Co.*, 240 NLRB 1158, 1159 (1979) (finding that employer did not demonstrate that permitting solicitation in lobby of its building would interfere with business operations); *J.C. Penney Co.*, 266 NLRB 1223, 1224 (1983) (finding unlawful an employer rule prohibiting solicitation in store at any time).

the Board held (and the Eighth Circuit upheld) that restriction of employees' Section 7 rights can only be justified not by disruption of the customer shopping experience but by a disruption of employee productivity. 340 NLRB 637, 639 (2001), *mod. on other grounds*, 400 F.3d 1093 (8th Cir. 2005). *Wal-Mart Stores, Inc.* examines retail sales floor activities at the same employer as in the case before you. In *Wal-Mart Stores, Inc.*, a worker asked a co-worker if she had received a union authorization card and invited co-workers to a Union meeting. This occurred while all were on-duty. 340 NLRB at 638. In addition, the same worker entered the store while off-duty wearing a tee shirt that said "Union Teamsters" on the front and "Sign a card . . . Ask me how" on the back. *Id.* at 637. He then proceeded to walk around the store and speak with some of his friends. A manager told him he was soliciting, escorted him to the front door, and told him to leave. *Id.* at 637-38. Based on all these events, management subsequently disciplined the worker for violating its no solicitation policy. *Id.* at 638.

The Board found that Walmart unlawfully disciplined the worker for violating its no solicitation policy. Specifically, the Board held that the worker did not engage in activities the company could lawfully restrict under its no solicitation rule because these activities were not sufficiently disruptive. *Id.* at 639. In reaching this conclusion, the Board recognized that certain union-related activities may lawfully occur on the retail sales floor, including wearing Union insignia and "'talking about a union or a union meeting or whether a union is good or bad.'" *Id*. at 639, *citing W.W. Grainger*, 229 NLRB 161, 166 (1977). The Board found such activity permissible in part because "there is no suggestion that [employee] work was significantly interrupted" and that informing co-workers about upcoming meetings or asking brief union-related questions does not rise to the level of a work interruption in most work settings, including retail. *Id.* at 639.

The Eighth Circuit enforced the Board's decision, expressly finding that none of the worker's conversations were "uniquely disruptive" and that "'simply informing another employee of an upcoming meeting or asking a brief, union-related question does not occupy enough time to be treated as a work interruption in most settings." 400 F.3d at 1099. *See also Waste Mgmt. of Arizona, Inc.*, 345 NLRB 1339, 1349 (2005) (Board upheld ALJ finding that short interruptions of work are not disruptive).

In conclusion, the Board found it permissible for workers to talk about the Union on the retail sales floor while on-duty and wear Union insignia as well, as long as these activities did not disruptively cause interference with productivity. No where in its analysis did the Board employ (or even mention) a standard of disruption based on interference with the customer shopping experience. 340 NLRB at 639.

2. **The Board's button cases: retail employees may wear buttons on the sales floor absent special circumstances.**

Another area where the Board does not prohibit all Section 7 activity in deference to the customer shopping experience is its retail employee button cases. Buttons that employees wear on the retail sales floor convey a message that customers could potentially see and be upset by, which could affect their shopping experience. Yet the Board rejects imposing a disruption of the customer shopping experience standard and rarely permits companies to lawfully restrict this protected activity based on the message of the buttons. Rather, it imposes a higher burden on employers, making them prove special circumstances before it allows them to curtail the employees' exercise of their Section 7 rights, even if employees often come into contact with customers on the retail floor and even if the message on the buttons is potentially offensive.

While in rare cases, companies may lawfully restrict buttons to protect their public image, the Board has consistently held that an employer's status as a retail store alone does not justify a restriction on employees wearing buttons. *See Ark Las Vegas Rest. Corp.*, 335 NLRB 1284 n.1 (2001); *United Parcel Service*, 312 NLRB 596 (1993); *Nordstrom, Inc*., 264 NLRB 698 (1982). The Board sets the bar high by requiring companies to prove at least four things before they may claim special circumstances and lawfully restrict employees from wearing buttons. The employer must prove that public image is particularly important to the employer's business and that the employees' appearance contributes to the employer's public image. The employer must also prove that buttons "unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules." *Meijer Inc.*, 318 NLRB 50 (1995), *quoting UPS*, 312 NLRB 596, 597 (1993). And finally, the employer must prove that it restricted buttons only during times when employees have direct contact with the general public or remain on the sales floor. *See, for example, Starwood Hotels*, 348 NLRB 372; *Davison-Paxon Co. v. NLRB*, 462 F.2d 364, 367 (5th Cir. 1972).

Employees most often have the right to wear buttons even when they frequently come in contact with customers. For although public image may in some cases justify restricting buttons, customer contact or exposure, alone, never does. *See Burger King Corp.*, 265 NLRB 1507, 1507 (1982), *citing Va. Elec. & Power Co.*, 260 NLRB 408 (1982) ("mere contact with customers is not a basis for barring the wearing of union buttons," and without "'substantial evidence that the button affected [the employer's] business or that the prohibition was necessary to maintain employee discipline,'" requiring that such buttons be removed is unlawful). *See also P.S.K. Supermarkets*, 349 NLRB at 35; *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999); *Pioneer Hotel, Inc.*, 324 NLRB 918, 923 (1997) ("customer exposure to union insignia alone is

not a special circumstance allowing an employer to prohibit display of union insignia"), *mod. on other grounds*, 182 F.3d 939 (D.C. Cir. 1999); *Meijer*, 318 NLRB 50; *Mead Corp.*, 314 NLRB 732, 734 (1994); *Broadway*, 267 NLRB 385, 404 (1983); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982) ("mere employee contact with customers does not, standing alone, justify an employer prohibiting the wearing of union buttons").

In fact, the Board expressly rejects imposing a standard of disruption of the customer shopping experience in these button cases when it finds that companies may generally not lawfully restrict employees who are in frequent contact with customers from wearing even potentially offensive buttons. *See St. Luke's Hosp.*, 314 NLRB 434, 435 (1994) (special circumstances to ban buttons do not exist even if hospital employees' buttons may upset some patients); *Mack's Supermarkets*, 288 NLRB at 1098 (employer's speculation that it might potentially lose customers is not a special circumstance); *Holladay Park Hosp.*, 262 NLRB 278 (1982); *Howard Johnson Motel Lodge*, 261 NLRB 866, 868 n. 6 (1982) ("The lawfulness of the exercise by [employee]s of their rights under the Act, including union button wearing, does not turn on the pleasure or displeasure of an employer's customers"); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837 (6th Cir. 2003).

Thus, the Board analyzes employee button cases by utilizing a special circumstances standard rather than a disruption of the customer shopping experience standard. This most often results in employees being able to generally wear buttons while at work even if they have frequent contact with customers and even if the button's message may disrupt the customers' shopping experience by displeasing or offending them.

3. **The Board's case law regarding the right to talk: workers may talk Union to each other even in front of customers and may talk Union directly to customers, too.**

The Board has never held that employees cannot exercise their Section 7 right to talk to each other while working, even while on the retail sales floor. This applies to situations where customers are present and even when workers talk about the Union or working conditions directly with the customers. This even applies when workers say negative things about the employer that could affect the customer shopping experience. For example, in *Starbucks Corp.*, the Board adopted an ALJ decision holding that a retail employer unlawfully restricted employees from talking about the Union "while working" even though the employer did so under a no-solicitation rule purportedly because "the discussion was interfering with" customer service. 354 NLRB No. 99, slip op. at 27 (Oct. 30, 2009).

Moreover, in *Wal-Mart Stores, Inc.*, 340 NLRB 637 (2001), *mod.*, 400 F.3d 1093 (8th Cir. 2005), previously discussed in section B(1), the Board also found that workers may "'talk[] about a union or a union meeting or whether a union is good or bad,'" *id*. at 639, *citing W.W. Grainger*, 229 NLRB 161, 166 (1977), and inform co-workers about upcoming meetings or ask brief union-related questions. *Id.* at 639. And the Eighth Circuit agreed. 400 F.3d at 1099.

In addition, where an employer's policy permits casual employee conversation with customers, employees have the right to talk to and even seek "sympathy" from customers during work time. The Board affirmed an ALJ decision finding this in *Benjamin Franklin Plumbing*, 352 NLRB 525, 542 (2008), *citing NCR Corp.*, 313 NLRB 574, 576 (1993). In that case, while on assignment, a customer asked a plumber "how he liked working for his company." The ALJ held that the plumber's response that he was in the midst of a pay dispute and that "it would be

nice to work for someone who was 'honest' and had 'integrity'" constituted protected speech. 352 NLRB 543. A plumber on assignment in someone's home or business is comparable to a retail worker talking to a customer on the sales floor. Although the plumber's comments could have affected the customer's experience with the company, the Board did not limit the plumber's Section 7 rights by prohibiting them.

Similarly, in *Ferguson Enterprises*, the Board adopted an ALJ holding that a rule "prohibit[ing] bargaining unit drivers from discussing the strike with customers during business hours" was unlawful. 349 NLRB 617, 621 (2007). The ALJ held that the rule unlawfully restricted protected activity when "employees were free to discuss other subjects not related to their protected activity with customers during business hours." 349 NLRB at 612. *See also Handicabs, Inc.*, 318 NLRB 890 (1995) (rule unlawfully prohibited on-duty drivers from complaining to customers and from talking about subjects which could make customers "feel coerced or obligated to act upon or react to"), *enf'd*, 95 F.3d 681, 685 (8th Cir. 1996), *quoting Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987).

Finally, the Board has held that discussion of collective bargaining and union meetings in the presence of customers is protected activity. *Panchito's*, 228 NLRB 136 (1977), *enf'd*, 581 F.2d 204, 207 n. 3 (9th Cir. 1978). In *Panchito's*, a bartender, in the presence of two customers, told his co-worker about a recent union meeting. When his supervisor objected to the talk, the bartender countered that he had a right to talk about the Union and Union meetings. The Board agreed and overruled an ALJ's finding that an employee's "talking about the Union during working time on [the employer's] premises and in the presence of customers was not protected. 228 NLRB at 136. Here again, the Board opted to decide a case regarding workers' Section 7

rights without determining whether the bartender's comments could have disrupted the customers' shopping experience.

All of the cases cited in Section B combine to demonstrate that there is no reason to find a peaceful strike that satisfies the *Quietflex* balancing test to be unprotected. The Board does not have to apply a disruption standard that solely examines interference with the customer shopping experience.[2] The case law demonstrates that the Board has taken into account various other considerations in determining whether labor activity on the retail sales floor is protected under Section 7.

We are not arguing that sit-down strikes can be conducted without limitation. For instance, we do not take the position that the Act protects sit-down strikes that significantly "interfere" with company operations other than the interference caused by workers withholding their labor, recognized as protected by *Fortuna Enterprises, L.P.*, 360 NLRB No. 128 at slip op. at 7 (May 30, 2014). Likewise, we recognize that the Act does not protect sit-down strikers who block customers or co-workers from walking across or alongside aisles. Rather, our position is that the Act protects workers who engage in sit-down strikes at the workplace, including a retail store the employer opens to the general public, as long as the strikers:

- are peaceful,
- are orderly,
- use the sit-down strike to disseminate protected messages to companies, co-workers, and customers,
- do not block customers, co-workers or managers from walking through the store,
- leave the workplace after a reasonable amount of time, and

[2] Walmart argues that the sit-down strike was disruptive and that it lost its protected status as a result of this. Walmart Brief in Support of Exceptions at 32. As an initial matter, the facts make clear that the sit-down strike was not disruptive. *See infra Section II(B)(3).* However, even in light of Walmart's allegation of disruption, *Quietflex* is still the appropriate standard to apply to the sit-down strike because the *Quietflex* balancing test takes into consideration whether any disruption occurred. Specifically, Walmart's concern about whether the sit-down strike caused disruption is covered by the third *Quietflex* factor that weighs "whether the work stoppage interfered with production or deprived the company of access to its property." 344 NLRB at 1057.

- disrupt the company's operations only by withholding their labor.[3]

C. RETAIL WORKERS SHOULD RECEIVE THE SAME PROTECTIONS THAT PLANT WORKERS DO.

Quietflex should apply to work stoppages in both plant and retail settings. Board case law consistently protects the rights of manufacturing workers to engage in sit-down strikes as long as they meet a majority of the *Quietflex* factors the Board requires. And there is no reason why the Act should not protect the rights of retail workers to engage in sit-down strikes in the same way it protects the rights of plant workers to engage in sit-down strikes.

In fact, while Walmart repeatedly emphasizes the disruption it alleges the sit-down strike caused on the floor of its retail store, the disruption a sit-down strike can cause on the plant floor is almost always as bad or worse. In plants, sit-down strikers may impact the productivity of workers who elect not to strike merely by withholding their labor. For example, in meatpacking or food processing plants that consist almost exclusively of one continuous manufacturing line, a small number of workers who decide to shut down a limited part of the production line by striking necessarily impact the productivity of all workers – including those who choose not to strike – by shutting down the entire line.[4]

[3] Although in this case Walmart paid the sit-down strikers for the time they were on strike, we recognize that an employer need not pay employees for time they are engaging in a protected work stoppage.

[4] Of course, the Act protects the rights of strikers to directly and indirectly impact and even disrupt employer productivity and operations by withholding their labor as long as "striking employees [do not] attempt[] to prevent other employees from working." *Fortuna Enterprises, L.P.*, 360 NLRB No. 128 at slip op. at 7 (May 30, 2014). As the *Fortuna* Board recognized, "refusing "to work merely constitutes 'the means by which an employee may strike,'" which the Act protects. *Fortuna*, 360 NLRB No. 128 at slip op. at 7, *quoting Golay & Co.*, 156 NLRB 1252, 1263 (1966). Thus, as long as workers "do no more than withhold their own services," the "result[ing]" "interference [with production] and economic pressure does not render the [strike] activity [not] protected." *Fortuna*, 360 NLRB No. 128 at slip op. 7.

Assuming retail sit-down strikers do not physically prevent other workers from performing their jobs or block customers from walking through stores, the work stoppage causes no interference with work productivity and thus no disruption. Admittedly, the protected withholding of the strikers' labor may cause a customer to have to go to another department to get assistance or another cash register line to check out. However, the workers who are not striking can assist or check out customers, despite the withholding of labor of the sit-down strikers. And, as the Supreme Court held in *Republic Aviation Corp. v.* NLRB, "[i]nconvenience or even some dislocation of property rights may be necessary in order to safeguard" Section 7 rights. 324 U.S. 793, 802 n.8 (1945). Thus, retail sit-down strikers do not disrupt the store's productivity. [5] The strike at issue in this case is evidence of this. While a strike on a plant floor will often cause at least some production to cease completely, the sit-down strike at Walmart did not prevent shoppers from patronizing the store or other workers from providing customers with assistance.

Because retail sit-down strikes are less disruptive than manufacturing sit-down strikes, the Board should refrain from accepting Walmart's invitation to deny retail workers the same rights it guarantees manufacturing workers. Moreover, the cases Walmart relies on do not justify the Board imposing a standard that refrains from guaranteeing retail workers the same rights to engage in sit-down strikes as manufacturing workers.

[5] We recognize that there could be disruption if customers were unable to receive assistance due to strikers blocking non-striking workers from reaching them.

II. APPLICATION OF THE *QUIETFLEX* FACTORS TO THE CASE AT HAND SHOWS THAT THE WORKERS' SIT-DOWN STRIKE WAS PROTECTED AND WALMART VIOLATED THE ACT WHEN IT DISCIPLINED WORKERS FOR PARTICIPATING IN IT.

A. WALMART VIOLATED THE ACT WHEN IT DISCIPLINED WORKERS FOR ENGAGING IN A LAWFUL SIT-DOWN STRIKE.

The specific circumstances of the sit-down strike at issue in this case establish that the strike was protected by Section 7 of the Act. As the ALJ explained in his Decision in this case, not all such work stoppages are protected because, although workers must be allowed to exercise their Section 7 rights, there will come a point when the employer "is entitled to exert its private property rights and demand its premises back." Decision at 35, citing *Quietflex*, 344 NLRB at 1056. *Quietflex* lays out ten factors to consider in determining whether that point has been reached.

When applied to the record evidence, each of the *Quietflex* factors leads to the conclusion that the Act protected the workers' sit-down strike and Walmart therefore violated the Act when it issued discipline to those who participated in the sit-down strike. The workers stopped working to protest abusive and racially charged working conditions and unfair labor practices. The sit-down strike was peaceful and did not interfere with the operation of the store or deprive Walmart access to its property. The workers were not allowed to present their grievances to Walmart as a group. The sit-down strike lasted for only about one hour and twenty minutes. The workers were not represented by a union and there was no functional grievance mechanism in place to address their concerns, which Walmart had known about for more than two weeks. Moreover, the workers left before their shifts were over, did not linger inside the store, and never attempted to seize any of Walmart's property or prevent customers from accessing any parts of the store while they were conducting their peaceful sit-down strike. And Walmart subsequently

issued all strikers a double discipline for engaging in this protected activity. All of these factors weigh in favor of finding the workers' action protected and therefore that Walmart acted unlawfully when it disciplined them for it.

B. APPLICATION OF EACH *QUIETFLEX* FACTOR

1. The reason the employees have stopped working.

The first *Quietflex* factor to consider examines the reason the employees stopped working.[6] *Quietflex*, 344 NLRB at 1056. In the case before you, the ALJ correctly found that this factor must be construed in favor of the workers, since they stopped working to due to the threats and harassment they were forced to endure at manager Art Van Riper's hands each night. ALJD 39: 5, fn. 45. Moreover, in *Golay and Co.*, 156 NLRB 1252, 1263 (1966), the Board found that a "protest against [the company's] unfair labor practices" made an in-plant work stoppage "a lawful, protected strike." And in *City Dodge Center*, 289 NLRB 194 (1988), the Board similarly found a work stoppage protected when the workers were attempting to present work-related complaints to the president of the company. In this case, the workers were protesting their treatment at the hands of field project manager Art Van Riper, who yelled at them and called them "lazy ass workers." Jt. Ex. 49. They were protesting Van Riper's threat that he would like to shoot unions and union supporters. Vol. 1, Tsang, p. 123, l. 11-14; Vol. 2, Bravo, p. 350, l. 16-

[6] Before ruling that the Act protects a sit-down strike, the Board requires sit-down strikers to meet this factor by showing they struck for a reason Section 7 protects -- that is, a matter related to their working conditions. In *every* case where the Board has held that the Act protects a sit-down strike, the Board has found that the strikers met this factor. *See, for example, Fortuna Enterprises, L.P.*, 360 NLRB No. 128 at slip op. 3 (May 30, 2014) ("The employees withheld their labor in protest of the discipline of a coworker and thus were engaged in protected activity"); *Amglo Kemlite*, 360 NLRB No. 51 at slip op. 6. (2014) ("The employees stopped work for a reason entitled to the Act's protection); *Atlantic Scaffolding*, 356 NLRB no. 113, at slip op. 4 (2011) ("The reason for the work stoppage, a protest over wages, clearly is protected by Section 7"); *Ampersand*, 357 NLRB No. 51, slip op. at 14 (2011), *vacated on other grounds*, 702 F. 3d 51(2011) ("In *Quietflex*[], the Board comprehensively reviewed existing law concerning work stoppages by employees for the purpose of protesting their working conditions").

Conversely, the Board has never found that the Act protects a sit-down strike over an issue not related to working conditions. This makes sense because the Act only protects economic actions workers engage in for the purposes of affecting their working conditions.

21. And they were protesting Van Riper's offensive and racially charged statement that he would like to see a rope around Markeith Washington's neck. Vol. 2, Lee, p. 234, l. 9 – p. 235, l. 12; Vol. 2, Lee, p. 285, l. 21-24. Because the employees stopped working to make Walmart address these serious work-related issues, this factor weighs in favor of the workers.

2. **Whether the work stoppage was peaceful.**

The second *Quietflex* factor to be weighed is whether the work stoppage was peaceful.[7] *Quietflex*, 344 at 1056. Again, the Board should uphold the ALJ,who found that this factor also goes to the workers. ALJD 16-19, 36: 12-18. The sit-down strike at issue here was completely peaceful. In fact, there was extensive and consistent testimony that the strikers engaged in no violent behavior, loud or amplified noises, or shouting. Vol. 1, Tsang, p. 128, l. 23 – p. 129, l. 17; Vol. 2, Lee, p. 253, l. 18-23 and p. 254, l. 16-22 and p. 266, l. 13-17; Vol. 2, Bravo, p. 359, l. 2-21. Therefore, the second *Quietflex* factor to be considered weighs in favor of the strikers.

[7] Like the first factor, the Board also requires workers to meet this factor before holding that the Act protects their strike. This is consistent with the Supreme Court's decision in *NLRB v. Fansteel Metalurgical Corp.*, holding that the Act did not protect the sit-down strikes there because while those "employees had the right to strike," "they had no license to commit acts of violence." 306 U.S. 240, 253 (1939).

Thus, the Board found that *every* protected sit-down strike was peaceful. *See, for example, Fortuna*, 360 NLRB No. 128 at slip op. 6 ("The work stoppage was peaceful"); *Amglo Kemlite*, 360 NLRB No. 51 at slip op. 6 (the "work stoppage was peaceful"); *Atlantic Scaffolding*, 356 NLRB no. 113, at slip op. 4 ("The work stoppage was peaceful at all times"); *Ampersand*, 357 NLRB No. 51, slip op. at (ALJ, whose decision the Board affirmed, found that the work stoppage was "peaceful").

Like the first factor, the Board's requirement that sit-down strikers meet this factor makes sense. The Board almost always holds that workers lose the Act's protection when they engage in violent activity, for example, during strike picketing.

3. **Whether the work stoppage interfered with production or deprived the company of access to its property.**

The third *Quietflex* factor asks whether the work stoppage interfered with operations or deprived the company of access to its property.[8] *Quietflex*, 344 at 1057. The Board should uphold the ALJ's finding that this factor supports the protected nature of the workers' action because the sit-down strike did not substantially interfere with the store's business or deprive it of property access. ALJD 36, 20- 37, 5-15. All the strikers did was stop working and stay in the customer service area. Vol. 2, Lee, p. 255, l. 11-13; Vol. 3, Lilly, p. 538, l. 25 – p. 539, l. 3. The *Quietflex* Board found that it "is not . . . an interference [with] production where employees do

[8] The Board will not rule that the Act protects a sit-down strike that interferes with a company's operations other than the disruption caused by the direct or indirect impact of the strikers withholding their labor or where the strikers occupy the facility to the exclusion of the company. Again, this mandatory factor is based on *Fansteel*, where the Supreme Court held that the Act did not protect sit-down strikers who "seize[d] their employer's plant." 306 U.S. at 253. "The seizure and holding of the buildings," the Court explained, "was itself a wrong apart from any acts of sabotage." 306 U.S. at 253. The right to strike does not, the Court held, "countenance[] lawlessness or . . . acts of violence against the employer's property." 306 U.S. at 256.

The Court explained further that this was not the exercise of "'the right to strike' [because it] was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer . . . and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment." 306 U.S. at 256-57.

Consistently, two years later in early 1941, relying on *Fansteel*, the Board ruled that workers who engaged in several 10-20 minute work stoppages in the beef and sheep kill departments of a Cudahey meatpacking plant were engaged in protected activity and that the company unlawfully discharged the strikers because the "stoppages did not involve seizure or destruction of or damage to the [company's] property with resultant financial loss." *Cudahey*, 29 NLRB at 868. In *Cudahey*, workers staged three brief work stoppages in the beef and sheep kill departments to protest the elimination of nine workers from the beef kill department and a change in line speed. 29 NLRB at 865. The Board concluded that it could not "agree with [the company's] contention that the[] stoppages were . . . 'an outlaw enterprise'" because they "did not involve seizure or destruction of or damage to . . . property." 29 NLRB at 867-68.

Consequently, the Board will not protect sit-down strikes where "the striking employees interfere with production or provision of services by preventing *other* employees who are working from performing their duties." 360 NLRB No. 128 at slip op. 7. The Board in *Amglo*, however, explained that this factor does not weigh against protection where strikers do not interfere with the production of the non-striking workers "to any greater extent than if the employees. . . . had picketed outside." 356 NLRB no. 113, at slip op. 6 (2011). Likewise, the *Atlantic Scaffolding* Board found this factor in favor of protecting sit-down strikes because the strikers did nothing more than withhold their labor. 356 NLRB no. 113, at slip op. 4. Specifically, the Board rejected the company's argument that the sit-down was unprotected because the workers "timed [the strike] to maximize its effect." 356 NLRB no. 113, at slip op. 4.

no more than withhold their own services." *Quietflex*, 344 NLRB at 1057 n. 6, *citing Golay*, 156 NLRB at 1262, and *City Dodge Center*, 882 F.2d at 1358. There was no credible testimony that the sit-down strike prevented Walmart from opening the customer service area or that the customer service area was ever even open during the early morning hour the sit-down strike took place. Vol. 2, Lee, p. 265, l. 20 – p. 266, l. 12; p. 314, l. 5-19; p. 314, l. 5-19. Vol. 2, Della Maggiora, p. 444, l. 2-4. Vol. 3, Lilly, p. 540, l. 6-7. G.C. Ex. 3. Moreover, Paul Jankowski, the market asset protection manager, was the one who directed the workers to go to the customer service area. Jt. Ex. 59.

In addition, there was extensive testimony that the strikers did not prevent customers from entering, leaving, or shopping, or other employees from working. Vol. 1, Tsang, p. 128, l. 23 – p. 129, l. 17; Vol. 2, Lee, p. 253, l. 18-23 and p. 254, l. 16-22 and p. 266, l. 13-17; Vol. 2, Bravo, p. 359, l. 2-21. Indeed, the strikers took pains to conduct the sit-down strike in the least disruptive manner they could imagine. Misty Tanner informed the assistant manager on duty that the sit-down strike was going to occur and suggested that preparations be made to minimize disruption. Vol. 3, testimony of Tennille Tune, p. 626, l. 21 – p. 627, l. 17. The strikers purposely waited until near the end of their shifts so that they could prepare the store as much as possible for the grand reopening. And the strikers made sure to finish the bulk of their work and clean up their areas before they went on strike. Vol. 2. Lee, p. 303, l. 9-13.

Moreover, while the strikers chose November 2, 2012 to conduct the sit-down strike because it was the grand reopening of the store (Vol. 2, Bravo, p. 355, l. 5-11), it is well-established that a strike does not lose its protection because it is conducted at an effective time. *Atlantic Scafolding*, 356 NLRB No. 113, slip op. at 3 (rejecting argument that the strikers lost their protection because strike was timed "to maximize its effect on the . . . operations, and was .

. . 'extremely disruptive' of . . . other . . . employees['] work" because "protected nature of . . . work stoppage[s are not] vitiated by [their] effectiveness"). Thus, the third *Quietflex* factor also weighs in favor of the workers.

4. **Whether strikers had an adequate and meaningful opportunity to present grievances to management.**

The fourth *Quietflex* factor weighs whether strikers had an adequate and meaningful opportunity to present grievances to management.[9] *Quietflex*, 344 at 1057. This factor weighs in the strikers' favor. As the ALJ found, Walmart refused to speak with them about their concerns as a group. ALJD 37, 27-38, 4. It is well established that "open door policies" in which companies "address[] only individual complaints and not group grievances" do not satisfy this factor. *Hilton*, 354 NLRB No. 17, slip op. at 17-18, *citing HMY Roomstore, Inc.*, 344 NLRB 963 (2005). To have this factor weigh in its favor, a company must prove that it had "an established past practice of using the . . . open door policy as a meaningful avenue of grievance resolution" that "in reality, . . . allow[ed] for group action." *HMY*, 344 NLRB at 965. And the grievance procedure must be "effective." *Hilton*, 354 NLRB No. 17, slip op at 18. Although the strikers specifically requested it, Walmart repeatedly refused to speak with them about their concerns as a group. Vol. 2, Lee, p. 252, l. 17-24; Vol. 2, Bravo, p. 358, l. 16-23; Vol. 3, Lilly, p. 535, 17 – p. 536, l. 22. In fact, Walmart did not offer to speak with any of the strikers at all until the day of the grand re-opening, more than two weeks after the workers wrote Walmart a letter about Van Riper's conduct. Therefore, this *Quietflex* factor weighs firmly in the workers' favor.

[9] The Board views this factor as secondary or optional. Even in situations where workers have had some discussion with management about the grievance at issue, the Board has still found a subsequent work stoppage protected. For example, in *Amglo*, the Board held that the Act protected the sit-down strike even though the "employees contin[ued] to discuss their request for a wage increase with management." 360 NLRB No. 51 at slip op. 6. In *Atlantic Scaffolding*, the Board held that the Act protected the sit-down strike even though the strikers did have the chance to meaningfully present their grievances because other factors "strongly favor[ed]" protection. 356 NLRB no. 113, at slip op. 5. In *Ampersand*, the Board did not even address this factor. 357 NLRB No. 51, slip op. at 52.

5. **Whether the company warned strikers that they must leave the premises or face discharge.**

The fifth *Quietflex* factor asks whether the company warned strikers that they must leave the premises or face discharge.[10] *Quietflex*, 344 at 1057. As the ALJ concluded, this factor should also be construed in the strikers' favor. ALJD at 38. While there is testimony that Janet Lilly at one point told the strikers that she wanted them to leave rather than return to the customer service area from another area of the store (Vol. 2, Lee, p. 261, l. 1-7), neither Lilly nor any other Walmart manager ever warned the strikers that they would face discharge or even be disciplined if they did not leave the premises. And the workers were disciplined but not discharged for conducting a sit-down strike. Therefore, because the workers were never warned they would be terminated if they did not leave the premises, this factor supports the protected nature of the strike.

6. **The duration of the work stoppage.**

The sixth *Quietflex* factor considers the duration of the work stoppage.[11] *Quietflex*, 344 at 1057. In this case, this factor goes to the strikers because they conducted their sit-down strike

[10] The Board also views this factor as optional or secondary, as evidenced by the Board's decisions ruling that the Act protects sit-down strikes even though the company never warned strikers that they had to leave the premises or the company would discharge. For example, in *Atlantic Scaffolding*, 356 NLRB no. 113, at slip op. 4, the Board held the sit-down strike protected even though the company never "warned they must leave," and in *Amglo*, 356 NLRB no. 113, at slip op. 6, the Act protected the sit-down strike despite the company's failure to warn them that "they would be fired if they did not leave the facility." Similarly, in *Fortuna*, where the company warned the sit-down strikers, the Board explained that this factor carried only "little weight," and nevertheless held the sit-down strike protected. 360 NLRB No. 128 at slip op. 7. In *Ampersand*, the Board did not even mention this factor while holding that the Act protected the sit-down strikes. 357 NLRB No. 51, slip op. at 52.

That the Board deemphasizes this factor makes sense. Not only is this factor dissimilar to the *Fansteel* Court's concerns, like the availability of the grievance procedure factor, it places the company in a position of unilaterally foreclosing Section 7 rights by doing something as simple as telling the workers to leave the premises.

[11] The Board views this factor as secondary. The Board has held sit-downs as short as ten minutes and as long as 5 ½ hours protected. As long as the duration is reasonable given all the circumstances, the Board will not weigh this factor against the strikers. *See, for example, Fortuna*, 360 NLRB No. 128 at slip op. 3 (Act protected 2 1/2 hour long

for only approximately one hour and twenty minutes. (The sit-down strike commenced at approximately 5:20 a.m. Vol. 1, Tsang, p. 125, l. 3-7; Vol. 2, Lee, p. 240, l. 12-20; Vol. 2, Lee, p. 243, l. 15 – p. 244, l. 4 and p. 246, l. 4-7; Vol. 2, Bravo, p. 351, l. 19-25. It concluded at around 6:40 a.m. Vol. 2, Lee, p. 320, l. 19-21; Vol. 2, Bravo, p. 355, l. 15-18.) The *Quietflex* Board found that a "2- to 3-hour work stoppage was of limited duration" and therefore protected. *Quietflex*, 344 NLRB at 1058, *citing City Dodge*, 289 NLRB 194. Therefore, an even shorter work stoppage of only one hour and twenty minutes is clearly protected. The ALJ agreed with this conclusion, finding that the work stoppage lasted for 88 minutes. ALJD 38, 11-14.

7. Whether strikers were represented by a Union or had an established grievance procedure.

The seventh *Quietflex* factor examines whether the strikers were represented by a union or had an established grievance procedure.[12] *Quietflex*, 344 at 1057. This factor also protects the

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sit-down strikes); *Atlantic Scaffolding*, 356 NLRB no. 113, at slip op. 4 (5 1/2 hour long sit-down strike protected); *Amglo*, 356 NLRB no. 113, at slip op. 6 (the Board held Act protected the first 2 hours of the sit-down strike, but declined to determine whether the last remaining 4 hours were unprotected: "We find it unnecessary to determine whether the employees lost the protection of the Act" because the company "condoned" the strike by "invit[ing] "the strikers to return to work"); *Ampersand*, 357 NLRB No. 51, slip op. at 52 (Act protected 10-minute long sit-down strike).

That the Board considers this factor to be less significant makes sense because the Supreme Court in *Fansteel* was more concerned with the strikers seizing the company's "'key' buildings" than it was the duration of the sit-down strikes. 306 U.S. at 256. In other words, it is unlikely the *Fansteel* Court would have held long-duration strikes unprotected if they were peaceful, disrupted the company's operation only through the withholding of labor, and allowed the company to continue operations during the strikes.

[12] The Board views this factor as secondary or optional. Not only has the Board never found a sit-down strike unprotected because the strikers previously exercised their Section 7 rights to choose a collective bargaining representative, it is doubtful that the Act permits the Board to deny Union-represented workers Section 7 rights on this basis. In *Fansteel*, the Supreme Court did not hold the sit-down strikes unprotected because the object of the strike was to force the company to recognize the strikers' union, and in *Cudahey*, the Board held the Act protected the sit-down strike there even though the workers struck "pursuant to a program planned and executed by the United Packing House Workers of America Organizing Committee." 29 NLRB at 865.

Moreover, when discussing this factor, the Board simply observes that a Union does not represent the strikers, without any significant analysis. *See, for example*, *Fortuna*, 360 NLRB No. 128 at slip op. 9 (in "this case, the employees are unrepresented"); *Atlantic Scaffolding*, 356 NLRB no. 113, at slip op. 4 ("employees were unrepresented"); *Amglo*, 356 NLRB no. 113, at slip op. 6. ("employees were unrepresented"). The *Ampersand* Board did not even mention this factor. 357 NLRB No. 51, slip op. at 52.

workers' action in this case. The workers did not have union representation and had as a grievance procedure only the "open door" that Walmart would not let them use as a group. ALJD 38, 16-23. Moreover, the workers sent their initial letter to Walmart protesting Art Van Riper's conduct on October 17, 2012, more than two weeks before the sit-down strike, and had not received any response at all prior to Janet Lilly showing up at the store at 3:00 in the morning and asking workers if they wanted to meet with her individually. Therefore, in this situation, it is clear that the strikers did not have a functional mechanism to address with Walmart Van Riper's abusive conduct. The Board has found an employee work stoppage protected when the group was unrepresented and without a functional grievance mechanism. *Liberty Natural Products*, 314 NLRB 630 (1991). *See also City Dodge Center, Inc.*, 289 NLRB 194 (1988) (Board found

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Similarly, the Board views whether the strikers have access to a grievance procedure as secondary or optional. For example, the Board in *Fortuna* found that the existence of a grievance procedure factor should be given "due weight, but not decisive weight." 360 NLRB No. 128 at slip op. 6. ("[N]or has the Board or the courts ever held that the Act affords no protection to employees who engage in a peaceful, nondisruptive, on-site work stoppage without first attempting to resolve their complaint through the approved channels.") Ruling that the Act protected the sit-down strikes even though the "employees had access to an established procedure," the Board explained that neither "the Board [n]or the courts ever held that the Act affords no protection to employees who engage in a peaceful, nondisruptive, on-site work stoppage without first attempting to resolve their complaint through the approved channels." 360 NLRB No. 128, slip op. at 8.

That the Board considers the available grievance procedure factor unnecessary makes sense. First, this factor does not raise any of the concerns that were the basis of the Supreme Court's decision in *Fansteel* that the Act did not protect the sit-down strikes there.

Second, the factor does not make sense. For example, if a bargaining unit organized into a Union but the workers were not yet covered by a collective bargaining agreement, why shouldn't the Act protect those Union-represented workers' sit-down strikes to protest an action their company took or even to pressure their company to accede to their bargaining demands and sign a contract. Thus, there's no policy reason to deny workers the Section 7 right to engage in economic actions to pressure their company to accede to their demands just because they are or could pursue those demands through a unilaterally imposed grievance procedure.

Third, with respect to workers covered by a collective bargaining agreement, those workers would lose the Act's protection if they struck not because their contract contains a grievance procedure but rather because their strike violates the contract's no-strike clause.

Finally, if the Board required this factor, it would put the company in a position to effectively "foreclose" the right to engage in sit-down strikes by "unilaterally establish[ing]" a "grievance procedure." *Fortuna*, 360 NLRB No. 128 at slip op. 6.

lack of grievance procedure a factor in finding work stoppage protected). For these reasons, this factor again favors the protected nature of the strike.

8. **Whether strikers remained on the premises beyond the end of their shifts.**

The eighth factor that *Quietflex* considers is whether the strikers remained on the premises beyond the end of their shift.[13] *Quietflex*, 344 at 1057. The ALJ found that this factor weighs in favor of the strikers because they all punched out and left the inside of the store before the end of their shift. ALJD at 38, 25-30. *See also* Vol. 2, Lee, p. 320, l. 22 – p. 321, l. 1. In *Pepsi-Cola Bottling Co.*, 186 NLRB 477 (1970), the Board found a strike was protected where employees created minimal disruption and then left at the end of their shift. Because the disruption here was minimal and the strikers at issue also left at or before the end of their shifts, this factor also supports the lawfulness of the strikers' conduct.

9. **Whether the strikers attempted to seize the company's property.**

In the matter before you, the strikers made no attempt to seize the company's property, which is the ninth *Quietflex* factor to consider.[14] *Quietflex*, 344 at 1057. The ALJ recognized

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[13] The Board views this factor as secondary or optional. When strikers do not remain on the premises beyond their shift, the Board found that this factor weighed in favor of protecting the sit-down. While the Board sometimes perfunctorily notes that that strikers did not remain at the facility after their scheduled shift (*see Fortuna*, 360 NLRB No. 128 at slip op. 6; *Amglo*, 356 NLRB no. 113, at slip op. 6), the Board has never held that the Act did not protect a sit-down strike because strikers remain on the premises beyond the end of their shifts.

To the contrary, the Board in *Atlantic Scaffolding* found that the Act protected the strike even though "some of the night-shift employees stayed over" their shift. 356 NLRB No. 113, slip op at 4. The Board stated that "at most" this factor is "neutral." 356 NLRB no. 113, at slip op. 4. In *Ampersand*, the Board did not even mention this factor. 357 NLRB No. 51, slip op. at 52.

Again, this makes sense. The *Fansteel* Court focused on violence, property damage and seizure of the company's buildings more than on the scheduled shifts of strikers. 306 U.S. at 248. And there is no valid policy reason to hold that the Act protects a worker's right to engage in a peaceful, non-disruptive sit-down strike after the worker's scheduled shift any less than the Act protects any other striker who continues to strike after the striker's shift.

[14] To find the Act protects a sit-down strike, the Board requires that the workers did not attempt to seize the company's property. Of course, this factor was central to the Supreme Court's holding in *Fansteel* that the Act did not protect strikes that involve seizure of the company's facility. *Fansteel* 306 U.S. 240 ("Nor is it questioned that the seizure and retention of respondent's property were unlawful.") For this reason, the Board is careful to consider

this as well. ALJD 38, 32-36. In cases like *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939), the Supreme Court has found a strike to be unprotected when workers seize and retain possession of an employer's plant for several days. However, in the case before you, the strikers seized nothing. As stated earlier, they simply struck and sat down in the customer service area of the store for about an hour and twenty minutes, with a brief three to five minute foray to another section of the store, where they took some photographs and again seized nothing. The strikers never prevented their co-workers from continuing to work or prevented customers from accessing any part of the store. Because there was no seizure or attempted seizure of any of Walmart's property, this *Quietflex* factor should also be construed in the strikers' favor.

10. **The reason for which the company disciplined the strikers.**

The tenth and final *Quietflex* factor to be weighed is the reason the company disciplined the strikers.[15] While a company commits an unfair labor practice if it disciplines or discharges workers for striking, a company may lawfully discipline or discharge workers for seizing property, trespassing, or interfering with operations. For example, work stoppages are protected "where [companies fire strikers] for refusing to return to work, rather than **refusing** to leave the employer's premises." *Quietflex*, 344 NLRB at 1057 n. 13, *citing Molon Motor & Coil Co.*, 302

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this factor in a majority of the cases applying *Quietflex*. *See, for example, Fortuna*, 360 NLRB No. 128 at slip op. 6. (strikers did not "attempt[] to seize [employer's] the property"); *Atlantic Scaffolding*, 356 NLRB no. 113, at slip op. 4 ("there was no attempt" to seize the company's property); *Amglo*, 356 NLRB no. 113, at slip op. 6. ("employees made no attempt to seize the [employer's] property").

[15] The Board views this factor as secondary or optional. The Board has never held that the reason the company claimed it discharged sit-down strikers determined whether the Act protected their strikes. That the Board does not emphasize this factor makes sense because the Board focuses on the actual reason for the company's action, not necessarily the reason the company states for its action. The company violates the Act if it disciplines workers who engaged in protected sit-down strikes whether the company states that it disciplined the strikers because they were absent or not productive, or states a pretextual reason. In the end, the issue is not what the company states as the reason it acted against the strikers but does the evidence show that the company retaliated against workers for engaging in a protected strike.

NLRB 138 (1991), *enf'd*, 965 F.2d 523, 528 (7th Cir. 1992). In the case at hand, Walmart claims it gave the sit-down strikers two levels of discipline because of their "inappropriate conduct" and "unauthorized use of company time." However, the supposed "inappropriate conduct" and "unauthorized use of company time" at issue both directly stem from the fact that the workers stopped working and went on strike. Therefore, as the ALJ found, the reason that Walmart disciplined these workers was because they engaged in a protected work stoppage. ALJD 39, 18-26.

As the ALJ found, a balancing of all the *Quietflex* factors clearly demonstrates that the strike was protected. In fact, all of the applicable *Quietflex* factors favor the workers. The record evidence illustrates that the workers' sit-down strike was short, peaceful, and held for a valid reason. It did not cause Walmart to suffer any disruption of its operations or deprivation of its property interests. The workers were unrepresented and Walmart refused to consider their grievances as a group. And the workers seized nothing and left at the end of their shift, yet received a double discipline for engaging in protected activity. For these reasons, the Board should dyphold the ALJ's decision. The workers' interest in exercising their Section 7 rights must prevail and Walmart must be held accountable for violating the Act by disciplining the workers who participated in the sit-down strike.

CONCLUSION

For the above-referenced reasons, Charging Party the Organization United for Respect at Walmart respectfully urges the Board to uphold the entirety of the ALJ's decision, including that Walmart violated the Act when it issued double disciplines to the six workers who participated in a sit-down strike at the Richmond Walmart store on November 2, 2012.

Dated: March 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Charging Party's answering brief to the Respondent's exceptions in Cases 32-CA-090116, 32-CA-092512, 32-CA-092858, 32-CA-094004, 32-CA-094011, 32-CA-094382, 32-CA-096506, and 32-CA-111715 was served on the following parties via electronic mail on this 6th day of March, 2015:

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