

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WAL-MART STORES, INC.

Cases 32-CA-090116

32-CA-092512

32-CA-092858

and

32-CA-094004

32-CA-094011

32-CA-094381

ORGANIZATION UNITED FOR RESPECT

32-CA-096506

AT WALMART (OUR WALMART)

32-CA-111715

**WAL-MART STORES, INC.'S
REPLY TO THE CHARGING PARTY'S ANSWERING BRIEF**

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INTRODUCTION

Tellingly, neither the Counsel for General Counsel nor the Charging Party (the “Union”) tries to explain how the Act can allow an employer to lawfully discipline an employee for taking a few seconds to ask another employee to sign an authorization card while on the retail selling floor, but purportedly prohibits the same employer from disciplining the same employee for doing *this* on the selling floor for over 40 minutes during a store’s *Grand Reopening*:



(Jt. Exs. 13(e), (g), 26(a/3).) Neither the CGC nor Union tries to explain that paradox because it defies explanation. The Act simply does not give employees the right to take over portions of a sales floor to engage in customer-facing, media-seeking, publicity-driven protest demonstrations – complete with banners, signs, and t-shirts – during customer service operations. No Board – and certainly no court – has ever so held. Not one. Ever. Indeed, giving unions a carte blanche “right of way” to take over portions of retail selling floors for their own demonstration purposes would surely raise First and Fifth Amendment “Compelled Speech” and “Takings” concerns.

The United States Supreme Court tells us that “*the primary purpose* of the [retail] operation is to *serve customers*, and this is done on the *selling floor of a store . . .*” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 506 (1978) (emphasis added). For 70 years, the Board has applied that principle, holding again, and again, and again that an employer may impose a “*broad proscription of union activity* within the selling areas,” *Honda of Mineola*, 218 NLRB 486, 486 n.3 (1975), because such union activity “in this type of an area, even on nonworking time, *could*

interfere with the employer’s *main function*.” *The Times Pub. Co.*, 240 NLRB 1158, 1159 (1979), *aff’d*, 605 F.2d 847 (5th Cir. 1979) (emphasis added). Even the most union-friendly view of the Act cannot stretch so far as to find that a full-blown, sales-floor protest involving signs and banners and blocking by nearly 20 employee and non-employee demonstrators for over 40 minutes did not have at least the *potential* to disrupt Walmart’s “primary purpose” and “main function” of selling products and services to customers. Said another way, the Board can safely presume that mass protest demonstrations on the retail selling floor during customer service hours “might *conceivably* be disruptive of the respondent’s business,” *May Dep’t Stores Co.*, 59 NLRB 976, 981 (1944) (emphasis added). Thus, “*the special rule* pertaining to retail enterprises is fully applicable herein.” *Honda*, 218 NLRB at 486 n.3 (emphasis added).

ARGUMENT

The CGC and Union offer a few make-weight arguments to try and do what the ALJ did not: distinguish the Board’s 70-year-long “special rule pertaining to retail enterprises.” As discussed below, those arguments fail – as they must – because the logic of the “special rule” protecting the customer shopping experience applies *a fortiori* in the context of a full-blown, mass demonstration on the retail selling floor. However, before addressing those arguments, Walmart notes key facts and legal principles that neither the CGC nor Union deny.

I. THE CGC/UNION DO NOT DENY KEY FACTS AND LEGAL PRINCIPLES.

The CGC and Union do not dispute or deny that:

1. The sales-floor, mass-demonstration issue presented in this case raises issues of national significance that warrant input from stakeholder groups as set forth in Walmart’s Motion to Invite Amicus Briefing and Set Oral Argument.

2. The Board’s sales floor “solicitation” jurisprudence does not require evidence of actual disruption; the Board presumes the *potential* for disruption, which it holds is sufficient to justify a prophylactic ban on that sales floor conduct.

3. The Board has never applied the *Quietflex* analysis to an on-site work stoppage on a sales floor during customer service hours, much less one where the employees participated in a mass demonstration with bannering, signs, and blocking of products and services.

4. The Board’s *Quietflex* on-site work stoppage jurisprudence does not apply where the employees involved make no effort (sincere or otherwise) to meet with management to adjust their grievances. As discussed in Walmart’s Brief, the *only* reason the Board – and reviewing courts – allow employees to remain on the employer’s property after refusing to work during scheduled work hours is to try and meet with management to adjust some underlying grievance. Once that attempt comes to fruition – whether successful or not – the employees lose their right to remain on the employer’s property. Here, neither the CGC nor Union dispute that management made multiple attempts to meet with the associates and hear their grievances (albeit individually), but the six associates repeatedly *refused* to meet with management. They had a different – and unprotected – agenda.

5. If *Quietflex* did apply to an on-site work stoppage/mass demonstration on a retail sales floor (it does not), the special nature of retail sales operations “are properly considered within the *Quietflex* framework” (CGC Ans. Br. 16); an analysis the ALJ did not even consider.

6. The Union’s goal for orchestrating the on-site work stoppage and mass demonstration was to deliver the Union’s message to the public, customers, and associates.

7. The six associates expressed no store-specific complaint during their on-site work stoppage and mass demonstration. And Organizer Tanner offered to call the whole thing off in

exchange for placement of the temporary remodel associates into regular positions at the end of the remodel; having nothing to do with any existing work place grievance.

8. The six associates did not clock out when they started their work stoppage and expected to be – and were – paid for the time they participated in the sales floor demonstration.

9. Walmart told the demonstrators – including the associates – to leave the store during the demonstration. (*See, e.g.*, CGC Ans. Br. 12 n.21; “Bravo recalled that Lilly told the group to ‘return back to our shifts or clock out and leave’”)

10. The six associates’ sales floor demonstration activity – after they were told to stop and refused – served as a basis for Walmart’s decision to discipline them.

II. THE CGC AND UNION ATTEMPTS TO DISTINGUISH OR IGNORE THE BOARD’S 70-YEAR “SPECIAL RULE” FAIL.

The CGC’s and Union’s attempts to marginalize or ignore the Board’s special rule for retail sales operations fail as described below.

First, the CGC claims that the Board should ignore its 70-year special rule for retail selling floors because – according to the CGC – the “special rule” allowing an employer to “presumptively ban” potentially disruptive sales floor activity applies only to “union organizing activities.” (CGC Ans. Br. 2.) The CGC offers no authority or rationale for why the “potential business disruption” rule should apply to organizational solicitation – which enjoys some protections inside a retail store under *Babcock & Wilcox* (*e.g.*, in the break room during non-working time) – but not mass demonstrations, which enjoy no protection inside a retail store at all. None exists. Does the CGC suggest that the Board’s solicitation jurisprudence would not apply to an employee soliciting signatures on the retail sales floor for a strike commitment? Moreover, the Board rejected the “organizational” v. “non-organizational” distinction for private property access long ago in an analogous setting. *See Loehmann’s Plaza*, 316 NLRB 109, 112

(1995) (“After reviewing *Lechmere* and related Court precedent, the Board concluded that the Court intended the *Babcock* analysis to apply in nonorganizational settings.”).

Further, the Board noted in *Wal-Mart Stores, Inc.*, 340 NLRB 637, 639 (2003): “As defined, solicitation activity *prompts an immediate response* from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working.” (Emphasis added.) Given the Board’s emphasis on the potential for interference from labor activity that prompts an immediate response, mass demonstration activity involving demonstrators with a 10-foot long banner and protest signs blocking access to the customer service desk and the very first product display inside the main door creates an even greater risk of interference where such activity sends an immediate and *coercive* “stay away – do not cross” message to working associates and shopping customers. *Compare United Bhd. of Carpenters*, 355 NLRB 797, 797 (2010) (“[T]he massing of a large group of people . . . might well constitute coercion”); *Sheet Metal Workers*, 356 NLRB No. 162, **3-4 (2011) (the “core conduct” that renders picketing or picketing-equivalent conduct “coercive” is that which “create[s] a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite”).

Finally, on this point, the Board’s special protection for the retail selling floor does not rest primarily on the potential for interference with employee productivity (*e.g.*, merely stocking a shelf or taking inventory). Rather, the Board carved out the special rule for the retail sales floor “in order to prevent undue interruption or disturbance *of the customer-salesperson relationship* and the consequent disruption of store business Solicitation in areas where sales are being made, *it is patent, may have a direct, immediate, and detrimental effect* upon such sales” *Marshall Field & Co.*, 98 NLRB 88, 92-94 (1952), *modified on other grounds and*

enfd., 200 F.2d 375 (7th Cir. 1952) (emphasis added). Consequently, when analyzing the potential for disruption, the Board must be mindful that the test is whether the conduct at issue here had the potential to interfere with the customer shopping relationship and sale of products or services. With due respect, one cannot look at the demonstrators barricading the very first product display inside the main doors (Jt. Ex. 13(g)) and the customer service desk (Jt. Exs. 13(e), (f), 26(a/3)-(b/3) (6:03 to 6:52)) and not fairly conclude that the demonstrators did more than just potentially interfere with or disrupt sales operations; they *actually* disrupted the ability of customers to shop and associates to work in the demonstration areas.

Second, the CGC claims that the Board has not held that “concerted protests in public areas of retail establishments are [] unprotected per se;” claiming further that the Board engages in a case-by-case analysis of such protests to determine whether the activity “actually disrupted” operations. In support of those assertions, the CGC cites *Thalassa Restaurant* and *Goya Foods* (CGC Ans. Br. 2-3.) But neither of those cases remotely support the CGC’s claim because: (1) neither case involved a “concerted protest” demonstration with bannering, protest signs, and blocking; (2) both cases involved brief “delegations” attempting to speak *with management* about specific work place grievances, not massed protest demonstrators *refusing* to speak to management, but, instead, directing extended, generic messaging, having nothing to do with any store-specific complaint, directly to customers, working employees, and the public via social and traditional media; and (3) perhaps most importantly, neither case involved *the employees* participating in any type of demonstration activity; it was the non-employee union leaders in those cases who attempted to engage management – the employees simply stood by in the delegation group; where, as here, the six associates all actively participated in the demonstration blocking, bannering, sign-holding, and messaging activity. Similarly, the CGC’s citation to

Saddle West Restaurant and *Crowne Plaza LaGuardia* and the Union's reliance on the t-shirt case, *Wal-Mart Stores, Inc.*, 340 NLRB at 639, are inapposite; none of them involved a customer-facing, mass protest on a sales floor with banner, signs, and blocking.

In contrast, *Honda*, 218 NLRB at 486 n.3 (discussed in Walmart's Brief at 33-35), dealt with a virtually identical scenario involving massed-bodies and the potential blocking of customer access (there was no finding that any customer was actually blocked). There, the Board concluded that "*the special rule* pertaining to retail enterprises" justified the discipline of participating employees, even though those employees did not engage in the additional protest distractions present here: customer-directed bannering and protest signs. That case controls here.

Third, the CGC claims that the work stoppage did not disrupt Respondent's operations. (CGC Ans. Br. 14-15.) Not true, as discussed in Walmart's Brief. But also irrelevant. Walmart did not discipline the six associates for engaging in a work stoppage. Walmart disciplined the associates for participating in a disruptive sales floor demonstration. And, as to the disruptive effect of that demonstration, the security videos and demonstration pictures tell the "blocking" and "distraction" tale. Even the ALJ acknowledged that the demonstrators – including the six associates – blocked the customer service desk. (ALJ Dec. 17, 37.) And the Union concedes that the Act does not protect blocking activity. (Union Ans. Br. 12.) Importantly, the *absence* of video showing customers trying to force their way through demonstrators and the absence of the customer service associate from the service desk on the morning of the store's *Grand Reopening* strongly support a finding that the demonstration dissuaded customers and working associates from entering the areas in and around the massed demonstrators, not the opposite.¹

¹ Contrary to the customer service desk associate's express – and unrebutted testimony – the ALJ did not believe the massed demonstrators on the *customer* side of the customer service desk prevented the customer service associate from performing her duties. (ALJ Dec. 19.) The Board

Fourth, according to the CGC, Walmart argues that “Board law allows retail employers to prospectively ban all labor activity on retail sales floors, including concerted protests.” (CGC Ans. Br. 16.) That hyperbolic claim makes no sense and is flatly false, as evidenced by the ALJ’s finding that Walmart routinely permitted pro-Union associates to wear union buttons and pins on the sales floor during customer service hours without any problem. (ALJ Dec. at 7, 10.)

Fifth, the CGC argues that the demonstration did not carry with it the “seeds of violence.” (CGC Ans. Br. 19.) But the CGC ignores the fact that the participating associates chose to ally themselves with non-associate trespassers. And the CGC cannot dispute that the United States Supreme Court has held unequivocally that blatant acts of trespass do carry the risk of violence because they can quickly degenerate into confrontation and self-help. (See Walmart’s Brief 42.)

Sixth, the CGC claims that Walmart’s Open Door policy does not suffice under *Quietflex* as an outlet for employee complaints (if *Quietflex* applied, which it does not) because it “does not provide for resolving group complaints.” (CGC Ans. Br. 23.) Not true. Walmart’s Open Door policy absolutely does provide for resolving group complaints – as demonstrated by Lilly’s attempt to resolve the group complaint regarding Van Riper. It just does not allow for the entire group to be present when investigating the group complaint. That is a distinction with a difference and one that the Board and courts have endorsed. (See cases discussed in Walmart’s Brief at 45.) To be sure, the Act does not require an employee to meet individually with management to discuss a grievance, but neither does the Act penalize the employer for adhering to a rule – based on confidentiality concerns – that it will not meet with groups of complaining employees. Moreover, meeting and “dealing” with groups of “organized” employees about

gives no particular deference to that factual finding. *Plaza Auto Ctr., Inc.*, 360 NLRB No. 117, at *15 (2014) (standard for Board’s review of ALJ’s credibility determinations, which are based on judge’s observations of witnesses’ demeanor, “does not apply to a judge’s factual findings or the judge’s derivative inferences or legal conclusions”).

group complaints could quickly run afoul of the Act by granting preferential system “solutions” in response to group complaints at the expense of individual employees who exercise a protected choice to refrain from group activity.

Seventh, the CGC claims under *Quietflex* (if it applied) that Walmart’s failure to warn the associates that they could face discipline for failing to stop the work stoppage and leave the store “weighs against the Respondent.” (CGC Ans. Br. 24.) But that claim misses the mark for two reasons: (1) In *Los Angeles Airport Hilton Hotel & Towers* 360 NLRB No. 128, *5 (2014), the Board criticized the employer under *Quietflex* for warning the employees of discipline after only one hour of an on-site work stoppage; and (2) more to the point, Walmart did not discipline the associates for engaging in an on-site work stoppage (making irrelevant any equitable need to warn them of such discipline). Instead, it disciplined them for unprotected disruptive sales floor activity after they were told to stop that disruptive activity and they refused.

Eighth, while the Union largely echoes the CGC’s claims and arguments, it does additionally claim that dress code and union-discussion cases establish that the Board does not care about the impact of labor distractions on customers, only on worker productivity and allows potentially distracting labor activity on the sales floor. (Union Ans. Br. 7-12.) On the latter point, the Union overlooks the fact that sales floor conduct falls on a spectrum. On one side of the spectrum lies sales floor solicitation, which the Board presumes to be distracting. On the other side of the spectrum lies generic union buttons and union-related work conversations, which the Board does not presume to be distracting. The Board allows a bright-line prohibition as to sales floor solicitation because of the “immediate response” presumption of disruption, but analyzes button or conversation disruption claims on a case-by-case basis because of the lack of any unifying “disruption” factor. Here, common sense, practical reality, and the video, photo, and

testimonial evidence in this case all establish that a customer-directed, mass demonstration with bannered, protest signs, and blocking falls *even further* to the “presumption of disruption” side of the spectrum than sales floor solicitation. As to the former claim, the Union’s assertion that the Board does not care about the impact of sales floor labor activity on the customer shopping experience also flies in the face of well-settled Board law to the contrary. *See, e.g., Marshall Field & Co.*, 98 NLRB at 92-94 (Board created special rule for the retail sales floor “in order to prevent undue interruption or disturbance *of the customer-salesperson relationship* and the consequent disruption of store business Solicitation in areas where sales are being made, *it is patent, may have a direct, immediate, and detrimental effect* upon such sales . . .”).

For the foregoing reasons, including those stated in Walmart’s Brief and its Reply to the CGC Answering Brief, Walmart requests the Board to dismiss the pertinent Complaint allegations.²³

² If the Board adopted a rule that allowed unions to recruit retail employees to engage in sales floor protest demonstrations under the guise of an “on site” work stoppage, the Board would effectively force employers to endorse through acquiescence the union’s speech and would create a permanent demonstration “easement” that would interfere with employers’ intended commercial purpose for their property. Such a rule would create significant constitutional questions. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Ca.*, 475 U.S. 1, 16 (1986) (plurality opinion) (“For corporations as for individuals, the choice to speak includes within it the choice of what not to say.”); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (conditioning building permit on grant of recreational easement constituted an unconstitutional taking: “[T]he city wants to impose a permanent recreational easement upon petitioner’s property Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.”). The Board cannot overlook the union’s motive behind staging the publicity-seeking demonstration in the way it did at the time it did with the people (*i.e.*, associates) it did. The Union is trying to improperly take Walmart’s property for its own use and force Walmart to endorse its messaging, all under the guise of *Quietflex*. The Board should not go down that constitutionally-rocky road.

³ The NLRB set the deadline for Answering Briefs for March 5, 2015. The Charging Party did not file its Answering Brief until March 6, 2015, and did not request leave to file a late Brief as required by R&R § 102.111(b)(2). The Union’s Brief is, therefore, untimely.

DATED this 19th day of March, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on March 19, 2015, to:

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The undersigned certifies that I served a copy of the foregoing via U.S. Mail and Email on March 19, 2015, to:

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