

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

**WAL-MART STORES, INC.
Respondent**

and

**Cases 16-CA-096240
16-CA-105873
16-CA-108394
16-CA-113087
16-CA-122578
16-CA-124099
21-CA-105401
26-CA-093558
13-CA-107343**

**THE ORGANIZATION UNITED FOR RESPECT
AT WALMART (OUR WALMART)
Charging Party**

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel submits the following Answering Brief to Respondent Wal-Mart Stores, Inc.'s Exceptions to the Decision of Administrative Law Judge Geoffrey Carter (JD-03-16) dated January 21, 2016.¹

I. STATEMENT OF THE CASE

This case is about the fundamental employee right to take collective action, including striking, under the National Labor Relations Act (NLRA or Act).² The discriminatees are members and/or supporters of OUR Walmart (Charging Party) who did nothing more than

¹ Citations are "JD slip op. at __. __" for Judge's Decision and page:line numbers, "Tr. Vol. # at __" for Transcript Volume and page numbers, "CP Exh." for Charging Party Exhibits, "GC Exh." for General Counsel Exhibits, "JT Exh." for Joint Exhibits and "R Exh." for Respondent Exhibits.

² 29 U.S.C. §§ 151-169

exercise their statutorily protected right to strike and withhold services from their employer, whether to protest unfair labor practices, to seek better wages and work hours, to stop retaliation or for other reasons acting together to better their working conditions.

Within days of the first employee strike on October 4, 2012 in Pico Rivera, California, Respondent Wal-Mart Stores, Inc., perhaps the largest employer in the world, unleashed its corporate labor relations team and devised a plan to characterize the OUR Walmart strikes and any future OUR Walmart strikes as unprotected intermittent work stoppages (IWS). Although Respondent publicly dismissed the OUR Walmart strikes as insignificant with little to no impact on operations, internally, Respondent scoured open sourced media and meticulously tracked any and all strike activity. This included ranking stores by labor activity, logging all known employee strikers and/or OUR Walmart leaders on detailed spreadsheets and contracting Lockheed Martin for intelligence-gathering services utilizing advanced algorithms to identify what was known and visible about the OUR Walmart protests. After finalizing its IWS theory, Respondent then engaged in a pattern of conduct designed to suppress future employee protected strikes.

The Complaint, as amended [GC Exh. 1(bb)], alleges that Respondent committed numerous Section 8(a)(1) violations, including threats and coercive conduct, promulgation and maintenance of a policy treating strike-related absences as unexcused, and the discipline and/or discharge of 55 employees at 30 different stores in 12 different states for attendance resulting from strike-related absences. Respondent does not generally dispute that it treated the at-issue employee strike-related absences as unexcused or that it disciplined and/or discharged the vast majority of the at-issue employees expressly for their strike-related absences. Instead, Respondent advances its elaborate IWS theory to justify its conduct. Thus, the central issue in

the case is whether the at-issue strikes are protected under the Act or unprotected intermittent work stoppages as Respondent contends.

In a careful, well-reasoned Decision, the Judge rejected Respondent's affirmative defense(s)³ and determined that the at-issue employee strikes are protected by the Act. The Judge properly concluded that Respondent committed serious and widespread Section 8(a)(1) violations by disciplining and/or discharging 54 employees on multiple dates in 2012 and 2013 at 29 different stores as a result of their strike-related absences. [JD slip op. at 2:6-9; 101:32-34; 102:2-103:39] Respondent also violated Section 8(a)(1) by, about November 19, 2012, threatening an employee at another location, Store No. 949 in Wheatland [Dallas], Texas, that employees who went on strike would be fired. [JD slip op. at 45:41-43; 101:28-30] Finally, the Judge concluded that on various dates in February 2013, in eleven stores across the country, "by reading talking points to associates that could be reasonably construed as prohibiting protected strike activity, Respondent announced an unlawful work rule that violated Section 8(a)(1) of the Act."⁴ [JD slip op. at 49:11-14; 101:36-38]

Having found that Respondent engaged in these unfair labor practices, the Judge ordered Respondent to cease and desist its unlawful conduct and to take certain affirmative action

³ Respondent contended, *inter alia*, that certain discriminatees were statutory supervisors, personal discussions issued to employee strikers are not discipline and the Complaint should be dismissed or the record reopened due to the alleged invalid appointment of former Acting General Counsel Solomon under the Federal Vacancy Reform Act (FVRA), 5 U.S.C. §§ 3345 *et seq.* The Judge rejected these defenses.

⁴ The Judge dismissed Complaint paragraph(s) 4(B)(1)-(2) alleging that Respondent, by Vice-President Tovar, on November 19 and 20, 2012, via nationwide television on CBS and NBC, threatened employees with unspecified reprisals if they engaged in concerted activities. [JD slip op. at 44:28-29] General Counsel contemporaneously files Cross-Exceptions (1-2) regarding these findings and dismissal.

The Judge also dismissed Complaint paragraph(s) 4(A)(1)-(3) alleging that from November 17-19, 2012, at Store 471 in Lancaster, Texas, Respondent violated Section 8(a)(1) by threatening and coercing its employees that employees' striking and picketing activities were under review. [JD slip op. at 41:6-7] Finally, the Judge dismissed Complaint paragraphs 53(A)-(B) regarding the discharge of Louis Callahan. [JD slip op. at 99:6-7] General Counsel does not take exception to the Judge's determination and dismissal of paragraphs 4(A)(1)-(3) and 53(A)-(B) of the Complaint.

designed to effectuate the Act. [JD slip op. at 103:45-105:3; 108:4-111:16] In addition to traditional make-whole remedies [JD slip op. at 104:2-105:3, 108:31-109:2] and notice postings (physical posting and electronic distribution) [JD slip op. at 109:30-110:27], because of Respondent's "sufficiently serious and widespread" misconduct, the Judge ordered notice readings at "each store [29] where Respondent disciplined or discharged associates for incurring strike-related absences."⁵ [JD slip op. at 106:36-107:40; 110:30-111:16]

II. ISSUES

On March 3, 2016, Respondent filed 88 exceptions to the Judge's Decision presenting the following issues:⁶

- A. Whether the Judge made proper factual findings. (Exceptions 1-15, 41-42)
- B. Whether the Judge properly concluded that the at-issue strikes are protected and Respondent violated Section 8(a)(1) when it disciplined and/or discharged employees expressly for protected strike-related absences. (Exceptions 16-27, 60-62)
- C. Whether the Judge properly determined that Respondent violated Section 8(a)(1) by reading Talking Points to employees that announced an unlawful work rule prohibiting employee protected strike activity. (Exceptions 28-34)
- D. Whether the Judge properly determined that Respondent's attendance related personal discussions constitute discipline. (Exceptions 36-40)
- E. Whether the Judge properly determined that Respondent violated Section 8(a)(1) when it disciplined or discharged certain uniquely situated strikers as follows:
 1. Colby Harris and Mark Bowers for May 6-8, 2013 strike-related absences. (Exception 35)

⁵ General Counsel contemporaneously files Cross-Exceptions (3-9) regarding the Judge's remedial order denying search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings [JD slip op. at 104: fn. 118], denying nationwide notice postings and readings [JD slip op. at 105:41-44; 106:4-7, 8-9, 25-27], denying notice readings at Stores 949 and 2110 [JD slip op. at 106:30-34], and ordering store-specific notices [JD slip op. at 109:30-110:14; 112:-133 (Appendices)].

⁶ In Exception 75, Respondent presents an alternative argument to further support the Judge's dismissal of Complaint paragraphs 4(A)(1)-(3). As General Counsel does not take exception to the Judge's determination or dismissal of this Complaint paragraph, Respondent's Exception 75 is moot. General Counsel does not further address Respondent Exception 75.

2. Barbara Gertz and Lawrence Slowey for Ride for Respect strike-related absences. (Exceptions 43-46)
 3. Victoria Martinez for November 2012 strike-related absences. (Exceptions 47-53)
 4. Juan Juanitas for Ride for Respect strike-related absences. (Exceptions 54-59)
 5. Pamela Davis for Ride for Respect strike-related absences. (Exceptions 54-59)
 6. Shana Stonehouse for Ride for Respect strike-related absences. (Exceptions 63-74)
- F. Whether the Judge properly admitted the Tovar CBS and NBC news segments into evidence. (Exception 76)
- G. Whether the Judge properly ordered notice readings in light of Respondent's serious and widespread unfair labor practices. (Exceptions 77-80)
- H. Whether the Judge properly ordered the notices to include the names of disciplined and/or discharged associates. (Exception 81)
- I. Whether the Judge properly determined that Respondent's Vacancy Act affirmative defense lacks merit and misses the mark. (Exceptions 82-87)
- J. Whether the Judge properly granted the General Counsel's Complaint amendment adding, as part of the make-whole remedy, search-for-work expenses and work-related expenses regardless of whether they exceed interim earnings. (Exception 88)

As explained below, Respondent raises no exception or argument warranting the Board to overturn the Judge's well-reasoned decision. General Counsel respectfully requests that the Board affirm the portions of the Judge's decision to which Respondent excepts.

III. FACTS AND ARGUMENT ANSWERING RESPONDENT'S EXCEPTIONS

A. The Judge's background and factual findings are fully and substantially supported by the record (Exceptions 1-15, 41-42)

Respondent's exceptions 1-15 and 41-42 generally except to the Judge's background and factual findings. Respondent concedes that the Judge gives a high-level and largely accurate overview of the factual context surrounding the strike activity. However, Respondent contends that the Judge erred by consistently labeling the driving force behind the at-issue strikes as OUR Walmart instead of the UFCW. Respondent claims the Judge ignored various facts. Thus,

Respondent generally attempts to highlight the relationship between OUR Walmart and the UFCW and certain facts Respondent believes support its IWS theory, such as an asserted common and consistent area standards motive for the strikes.

Contrary to Respondent's exceptions, the Judge clearly articulates how he considered and synthesized the entire testimonial and documentary evidence in the voluminous record. [JD slip op. at 6:fn. 11] Respondent's exceptions and arguments are simply unfounded as the Judge's Decision and findings are well supported by the record. In this respect, not only did the Judge emphasize that his conclusions and findings are based on his review and consideration of the entire record for the case, he summarized and cited the voluminous testimonial and documentary evidence relating to, *inter alia*, Respondent's operations and management structure [JD slip 6:20-7:17], labor relations and efforts to maintain union-free status [JD slip op. at 7:19-39], open-door policy restricting employee open-door discussion with management to individuals as opposed to groups discussions with management [JD slip op. at 7:41-8:20], associate staffing, part-time and lean scheduling [JD slip op. at 8:22-9:10:3] and disciplinary attendance policy. [JD slip op. at 10:512:12] The Judge also fully considered and cited the record establishing the relationship between the UFCW, the Making Change at Walmart Campaign, and OUR Walmart. [JD slip op. at 12:14-15:12] This includes the findings of fact that the UFCW provides OUR Walmart with a wide range of support, including but not limited to, staffing and financial support; developing and setting up OUR Walmart's website; Facebook page and Twitter account; providing legal support on how to conduct strikes; assisting with publicity; financial accounting services; transportation and lodging (e.g., when OUR Walmart associates travel to Bentonville, Arkansas or other locations for campaign events or training); and a Dodge Nitro van that is used at demonstrations at Walmart stores to broadcast and display OUR Walmart messaging. [JD slip

op. at 13:25-45; Tr. Vol. 2 at 80–81; Vol. 4 at 528, 681; Vol. 6 at 874–876, 888–889, 951–953, 965–968, 988; Vol. 15 at 2711, 2832; JT Exh. 1; R Exh. 45, pp. 101, 118–120; R Exh. 100 (a)–(c) (annual reports in which the UFCW identifies OUR Walmart as a subsidiary); R Exh. 250]]

In detail, the Judge elaborated the background and factual events leading up to the employee decision to engage in collective strikes in effort to bring about change to their terms and conditions of employment. [JD slip op. at 18:4-19:4] The Judge correctly found that on May 31, 2012, prior to any strikes, approximately 25 employees and OUR Walmart members travelled to Respondent's home office where they were greeted in the parking lot by Respondent's Senior Vice-President Karen Casey. [Tr. Vol. 26 at 5170] An employee from the Pico Rivera, California store asked to read a letter and requested open door meetings. Casey arranged for the group to have individual open door meetings with HR representatives at its headquarters. [Tr. Vol. 26 at 5172-5173; GC Exh. 80] The group handed Casey copies of individually signed letters. [GC Exh. 81] Throughout the day, HR managers conducted 19 individual open door meetings with the OUR Walmart members. The common employee complaints Respondent identified were: 1. Retaliation for being a part of OUR Walmart; 2. Safety/Work Comp Claims denied, and 3. Scheduling/Hour Reductions. [Tr. Vol. 26 at 5175-5177; GC Exh. 80]

The Judge also correctly concluded that at an OUR Walmart leadership meeting on August 22-23, 2012, employees and OUR Walmart members decided to begin using strikes in efforts to bring about a change to their work conditions. In particular, employees discussed perceived retaliation against members across the country and determined to strike in an effort to stop the retaliation, unfair firing and disciplines of employees. [JD slip op. at 19:10-17; Tr. Vol. 25 at 4806-4807] Thus, commencing October 2012, the Making Change at Walmart Campaign

and OUR Walmart publicized planned nationwide one-day strikes and labor actions at Respondent's stores beginning on October 4 and ending on Black Friday, November 23, the day after Thanksgiving. [GC Exh. 114; JT Exhs. 97, 98, 104(a)-(c), 110, 111; R. Exh. 6] The Judge fully set forth the relevant facts regarding the employee strikes including consistent strike letters and return to work letters utilized by the employees during all at-issue strikes in this case. The strike letters unquestionably set forth the protected nature of the strikes including protesting "Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation against those Associates who have spoken out." [JD slip op. at 22: 9-18; JT Exh. 94(a) Tabs 1-9; R. Exh. 307] Similarly, the return to work letters identify the protected basis of the strikes "we did not work to protest Walmart in response to the retaliatory unfair labor practices. Walmart's refusal to meet with groups of Associates to address their mutual concerns about certain conditions at the company that affect all of them. Walmart's attempts to silence Associates who spoke out for better wages, hours, and other working conditions." [JD slip op. at 21:5-14; JT Exh. 94(a) (tabs 1-9); Tr. Vol. 25 at 4805-4806]

The Judge properly found that in 2012 employees participated in three series of strikes:

- October 4, 2012 Pico Rivera strike: 58 Los Angeles area employees, including 38 from Store 2886 in Pico Rivera, California, participated in a one-day strike. [JD slip op. at 20:23; Tr. Vol. 25 at 4807-4808; JT Exh. 94(a) Tabs 1-9; R Exh. 307]
- October 9-10, 2012 Financial Analysts strike: 55 employees from 24 stores in California, Florida, Maryland, Washington, Texas, Kentucky and Oklahoma. Participation ranged from one to six employees from the listed stores with some employee strikers travelling to Bentonville, Arkansas to demonstrate at Respondent's corporate office during a scheduled meeting of analysts. [JD slip op. at 21:18-23:7; JT Exh. 94(a) Tabs 10-25; R Exh. 307]
- November 2012-Black Friday strikes: Employees at various stores across the country participated in strikes for one or two days before making unconditional offers to return to work. [JD slip op. 24:29-25:3] Approximately, this included 21 employees from four stores in Federal Way, Lakewood and Renton, Washington on November

15 [JT Exh. 94(a) Tab 26; R Exh. 307]; four employees from Store 471 in Lancaster, Texas on November 16 [JT Exhs. 94(a) Tab 27; 173, 174]; three employees from a store in Greensburg, Pennsylvania on November 18 [JT Exh. 94(a) Tab 28]; 17 employees from Store 2886 in Pico Rivera, California and Store 475 in Round Rock, Texas on November 20 [JT Exh. 94(a) Tabs 29 and 30; R Exh. 307] and 66 employees from stores in Arizona, California, Florida, Kentucky, Louisiana, Maryland, New Mexico, North Carolina and Texas on November 22 (Thanksgiving), 23 (Black Friday), 24 and 27. [JT Exh. 94(a) Tabs 31-54]

The Judge correctly concluded that in 2013, some six months after the November 2012 strikes, employees participated in the following strikes:

- May 6-8: Two employees, Colby Harris and Marc Bowers, from Store 471 in Lancaster, Texas engaged in a spontaneous strike. [JD slip op. 85:13-28; Tr. Vol. 15 at 2764-2772, 2848-2849; Vol. 16 at 3111-3114, 3143-3144; JT Exhs. 170-172, 176, 207-208, 212]
- May 27-June 11 Ride for Respect strike: Approximately 100-130 employees from 55 stores (no more than eight from any one store) participated in the prolonged "Ride for Respect" strike. [JD slip op. at 28:13-33:27; JT Exh. 94(a) Tabs 55-105; R Exh. 307] Over one-half of the strikers were first-time strikers while others, according to strike letters, had struck at least once the previous fall. [JT Exh. 94(a); R Exh. 307] The strike consisted of bussing striking employees from stores across the country to protest at Respondent's home office in Bentonville, Arkansas during the annual stockholders' meeting on June 7, 2013. [JD slip op. at 28:15-32:27; JT Exh. 86]

As the Judge concluded, employees who participated in the Ride for Respect strike generally notified Respondent of their intent to strike either by delivering a letter or using the automated IVR phone hotline and reading a prepared script to a store manager. [JT Exh. 94(a) Tabs 55-105; R Exh. 307; GC Exh. 9 (scripts)] Although most strikers travelled to Bentonville, some remained home and supported the strike by withholding their services from Respondent. In all situations, OUR Walmart or the Making Change at Walmart Campaign provided transportation, lodging and prepaid debit cards for the striking employees who participated in the Ride for Respect. While in Bentonville, striking employees staged demonstrations, engaged in protests, attended planning conferences, attended the annual shareholders' meeting, and engaged in some sightseeing. [JT Exh. 86] Most strikers returned to their home stores between June 8 and

11 and submitted unconditional offers to return to work to their managers. [JT Exh. 94(a) Tabs 55-105; R Exh. 307] In each instance, the striking employee fully took on the role of a striker, did not perform any work and did not get paid or expect to be paid while on strike.⁷

The record established that Senior Vice President Casey received regular reports about employees engaged in OUR Walmart activity and strikes [Tr. Vol. 26 at 6587-6588, 6617-6618] and regularly read news and media clips in an effort to learn of the OUR Walmart activity. [Tr. Vol. at 6589, 6609-6613; R Exh. 270] Significantly, on October 7, 2012, three days after the first OUR Walmart strike, Casey, in an internal communication, set forth Respondent's plan on addressing demonstrations or strikes. Under this plan, associates who walked out would not be allowed to return to work that day. Although only one strike had occurred, Respondent began devising its theory that such a walkout was an intermittent work stoppage, which is unprotected activity and would subject the employees to discipline. [GC Exh. 54]

During the Ride for Respect strike, Respondent continued its detailed tracking and monitoring of the strikers. For example, on May 30, 2013, Kris Russell, risk program senior manager with the Risk Identification, Analysis & Assessment Team (RIAAT), with the assistance of labor managers created a map tracking the caravan movements and approximate participants. [[Tr. Vol. 26 at 5275; GC Exh. 24(c)] On June 2, 2013 the labor relations team identified a list of associates they were "tracking" in the Pacific Division. [GC Exh. 107]

Although Respondent presented countless videos of OUR Walmart demonstrations, the strikes had no significant impact on Respondent's business such that Respondent could not run its business or stores had to close. On the contrary, Respondent conducted business as usual covering any missed employee shifts under normal store procedures. The record reveals that

⁷ Tr. Vol. 3 at 417; Vol. 4 at 549, 663, 727; Vol. 5 at 843; Vol. 15 at 2889; Vol. 16 at 2946, 3047; Vol. 17 at 3166; Vol. 19 at 3824-3825; Vol. 22 at 4317-4318, 4436; Vol. 25 at 4814, 4821, 4832.

Respondent did not hire any replacements or temporary employees for purposes of the strike. [Tr. Vol. 7 at 1228; Vol. 18 at 3653-3654; Vol. 30 at 5900; Vol. 32 at 6197-6199, Vol. 33 at 6483, 6494, 6498, 6537, 6552; GC Exh. 28(a) (listing *inter alia* “impact the call had on store”)]

Following the “Ride for Respect” strike, Respondent’s labor relations and human resources departments partnered with store management to determine the appropriate disciplinary actions to be taken against employees who participated in the strike. [Tr. Vol. 7 at 1227-1228; GC Exhs. 28(a), 109; JT Exh. 29] Senior Vice President Casey admitted that employees were disciplined for attendance as a result of the Ride for Respect strike. [Tr. Vol. 26 at 6623] By the time any discipline was issued for strike absences, the labor relations team was fully aware that the employees had been on strike. [Tr. Vol. 26 at 6625-6627] If any employees missed time for strike activity, their absences were unexcused and they should have been held accountable under Respondent’s attendance policy. [Tr. Vol. 26 at 6634-6635] Treating strike absences as unexcused left employees with fewer available allowed absences under the attendance policy, and triggered warnings, disciplines, and discharges. [GC Exh. 127(a) at 22 (admission in position statement)] Respondent’s internal communications reveal the strategy: “holding the associates accountable for IWS will be something that will be more powerful than talking points.” [GC Exh. 110]

In sum, the Judge’s factual findings are fully consistent with the record evidence. Respondent’s contentions to the contrary are baseless and should be disregarded.

B. The Judge properly determined that the strikes are protected and Respondent violated Section 8(a)(1) by treating employee strike-related absences as unexcused and disciplining and/or discharging employees for protected strike-related absences (Exceptions 16-27, 60-62)

In exceptions 16-27 and 60-62, Respondent takes issue with the Judge’s rejection of its IWS theory and argues that the Judge overlooked what Respondent deems as the fundamental

IWS rationale: employees do not have the right to come and go from work anytime they see fit. According to Respondent, the Judge pointed to the factual context of a few IWS cases and summarily concluded that the context *created* a rule of law. Respondent claims the Judge created inconsistent elements of proof and determined that unprotected intermittent work stoppages are *only* (a) brief work stoppages of no more than one or two shifts (b) grouped together in some undefined temporal period, and (c) only found in a single context: a union strategy to pressure an employer during – and *only* during – collective bargaining.

Contrary to Respondent's exceptions, the Judge's legal analysis and determinations are fully consistent with and supported by Board precedent. The Judge accurately noted that for most claims in this case, the central question is whether Respondent violated Section 8(a)(1) by disciplining or terminating associates for missing work shifts while they were on strike during the Ride for Respect. The answer to this question in large part turns on whether the Ride for Respect strike was protected by the Act (as the General Counsel and Charging Party contend) or instead was not protected as an intermittent work stoppage that was part of a UFCW-orchestrated plan to pressure Walmart to change its workplace policies and conditions (as Walmart contends). [JD slip op. at 49:20-27] The Judge carefully and thoroughly summarized applicable case law [JD slip op. at 49:39-54:37] largely consisting of the same cases cited by Respondent. Ultimately, the Judge applied various factors as elaborated in the plethora of Board decisions finding the at-issue strikes protected and that Respondent failed to meet its burden to prove that the strikes were unprotected intermittent work stoppages. [JD slip op. at 54:39-56:27] As explained further below, the record and legal precedent fully support the Judge's findings.

1. The strikes are protected

The right to strike is statutorily protected and well established under Sections 7 and 13 of the Act. *NLRB v. Preterm, Inc.*, 784 F.2d 426, 429 (1st Cir. 1986) (pursuant to Section 7, “employees are granted the right to peacefully strike, picket and engage in other concerted activities”); *NLRB v. Teamsters Local 639*, 362 U.S. 274, 281 (1960) (Section 13 “provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right unless ‘specifically provided for’ by the Act itself”). “Without question employees have a protected right to withhold services from an employer,” whether to protest unfair labor practices or for other reasons, such as to enhance their bargaining position or to act together to better their working conditions. *Embossing Printers*, 268 NLRB 710, 722 (1984), enforced mem. 742 F.2d 1546 (6th Cir. 1984); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

The Board has been particularly likely to find work stoppages protected when the employees were not represented by a union. *See NLRB v. Washington Aluminum Co.*, 370 U.S. at 14-15. (employees’ work stoppage protected despite failure to make specific demand upon employer to remedy objectionable condition where they were part of a small group of unorganized employees; having no bargaining representative and no established procedure for negotiating with the company, they took the most direct course to let the company know that they wanted a warmer place in which to work); *see generally* W. Melvin Haas III & Carolyn J. Lockwood, *The Elusive Law of Intermittent Strikes*, 14 Lab. Law. 91 (1998). That is essentially because in those instances, the employees lacked a lawfully implemented grievance procedure or a recognized bargaining representative to assist them in negotiating improved working conditions and resolving grievances. *See Serendipity-Un-Ltd*, 263 NLRB 768, 775-76 (1982)

(employees' joint cessation of work to protest perceived safety violations and inadequate health insurance coverage protected, especially where there was no bargaining representative, notwithstanding the reasonableness of their perception, any lack of notification to the employer of their intent to cease work, or the existence of alternative methods of solving the problems), citing *NLRB v. Washington Aluminum Co.*, 370 U.S. at 14-15.⁸

Whether a concerted work stoppage has lost the Act's protection is an affirmative defense; thus, the employer bears the burden of showing that the stoppage is unprotected. *See, e.g., Silver State Disposal Service*, 326 NLRB 84, 85 (1998) (respondent bears burden of showing that work stoppage is unprotected) citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 277 (1956) (whether a work stoppage is unprotected because it violates a no-strike clause is an affirmative defense); *Heavy Lift Services*, 234 NLRB 1078, 1079 (1978) (the initial burden of proceeding with proof of an affirmative defense rests with Respondent), enforced 607 F.2d 1121 (5th Cir. 1979).

A work stoppage that seeks a statutorily protected goal, such as to protest unjust working conditions or employer unfair labor practices, will only lose the Act's protection in certain limited circumstances, where the Board deems the tactics used to be inconsistent with those of a genuine strike. In making that determination, the Board has made clear that the mere fact that

⁸ *See also Advance Industries Division – Overboard Door Corporation*, 220 NLRB 431, 432 (1975) (no lawfully implemented grievance procedure), enforced in part, denied in part, 540 F.2d 878 (7th Cir. 1976); *Polytech, Inc.*, 195 NLRB 695, 696 (1972); *First Nat'l Bank of Omaha*, 171 NLRB 1145, 1152 (1968), enforced 413 F.2d 921 (8th Cir. 1969); *Johnnie Johnson Tire Co.*, 271 NLRB 293, 294 (1984). Cf. *Swope Ridge Geriatric Center*, 350 NLRB 64, 67 (2007) (employees were represented by a union, whose intent was to engage in a series of recurring intermittent work stoppages as part of its underlying bargaining strategy until a contract was reached); *Permaglass Division*, 210 NLRB 184, 186-187 (1974) (employees' concerted activity not protected where its object concerned the discharge of a supervisor; nor was this a group of unrepresented employees who had to speak for themselves as best they could, and their representative had agreed that complaints would be handled according to the contractual grievance procedure); *Embossing Printers, Inc.*, 268 NLRB at 723.

employees engage in multiple work stoppages does not render their activities unprotected. *United States Service Industries*, 315 NLRB 285, 285-286 (1994) (three work stoppages in six months protected where employees not “engaged in a campaign to harass the [c]ompany into a state of confusion”), enforced mem. 72 F.3d 920 (D.C. Cir. 1995), citing *Chelsea Homes*, 298 NLRB 813, 831 (1990); *Robertson Industries*, 216 NLRB 361, 361-62 (1975) (to hold that these two work stoppages in three months were pattern of recurrent and intermittent work stoppages would disallow employees to engage in more than one instance of concerted protected activity during an indefinite time period regardless of the variety and number of conditions or occurrences protested and the identity of the individuals involved), enforced 560 F.2d 396 (9th Cir. 1976); *WestPac Electric*, 321 NLRB 1322, 1359-60 (1996) (three strikes within a two-week period were protected where they were not part of “hit and run” scheme nor intentionally planned to reap the benefit of a continuous strike, and were for separate employer acts). Moreover, employees “are not required to institute the strike at any particular time of the day or to maintain it for any particular period of time to be entitled to the protection of the Act.” *First Nat’l Bank of Omaha v. NLRB*, 413 F.2d 921, 925 (8th Cir. 1969), enforcing 171 NLRB 1145 (1968).

Further, the fact that work stoppages are designed to disrupt an employer’s operation does not render them unprotected because disruption is an inherent aspect of a strike. See *Allied Mechanical Services, Inc.*, 341 NLRB 1084, 1102 (2004) (“a requirement that a strike not be disruptive of an employer’s operations, or harassing to it, is a requirement that the strike not be conducted”), enforced 668 F.3d 758 (D.C. Cir. 2012); *Swope Ridge Geriatric Center*, 350 NLRB at 67 (“It is axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer’s business operations”).

Although the Board has not enunciated a bright-line test for when employees' strike tactics result in the loss of the Act's protection, unprotected work stoppages share a common feature of violating economic "fair play" through actions that are calculated not simply to disrupt the employer's operation, but to *prevent* the employer from exercising its managerial authority to maintain its operation through the disruption.⁹ There are essentially two overarching, and sometimes overlapping, scenarios in which work stoppages lose their protection because they are "part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by the employees of the work normally expected of them by the employer." *Polytech, Inc.*, 195 NLRB at 696. *See also, e.g., United States Service Industries*, 315 NLRB at 291 (whether strikes are intended to "bring about a condition that was neither a strike nor work"); *John S. Swift Co.*, 124 NLRB 394, 396 (1959) (finding unprotected strike where employees specified they would continue to not work mandatory overtime until their wage demands were met), enforced 277 F.2d 641 (7th Cir. 1960); *Embossing Printers*, 268 NLRB at 722-3 (finding employees' actions in leaving work three different times to attend union meetings regarding contract negotiations unprotected).

First, the Board has found work stoppages to lose their protection when they are "intentionally planned and coordinated so as to effectively reap the benefits of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement." *WestPac Electric*, 321 NLRB at 1360 (finding no evidence that strikes were planned so as to reap the benefit of a continuous strike action without

⁹ *See National Steel & Shipbuilding Co.*, 324 NLRB 499, 509 (1997) enforced 156 F.3d 1268 (D.C. Cir. 1998) (a notion of economic "fair play" under our statutory scheme seems to inform the Board's holdings that employees lose Section 7's protection where they "seek to bring about a condition that involves neither strike nor work especially when they use intermittent work stoppages or their equally unprotected partial strikes as tactics to achieve such a quasi-strike condition"). (internal citations omitted); *First Nat'l Bank of Omaha*, 171 NLRB at 1151.

assuming the economic risks), citing *John S. Swift Co., Inc.*, 124 NLRB at 396. Compare *Audubon Health Care Center*, 268 NLRB 135 (1983) (nurses' refusal to work in the open section while accepting pay for the work they remained willing to perform, unprotected).

Second, the Board has found work stoppages to lose their protection when they consisted of intermittent "'hit and run' strikes engaged in as part of a planned strategy intended to 'harass the company into a state of confusion.'" *United States Service Industries*, 315 NLRB at 285, 291, citing *Pacific Tel. & Tel. Co.*, 107 NLRB 1547, 1548 (1954) (union orchestrated a series of stoppages that were admittedly calculated to "harass the company into a state of confusion," by repeatedly striking only as long as it took for the employer to find replacements). See also *WestPac Electric*, 321 NLRB at 1360, *Dallas Glass*, 2013 WL 703258, JD(SF)-12-13, slip op. at 9-10 (February 26, 2013) (two newly hired salts engaged in unprotected work stoppages where the stoppages were not seeking to achieve improved working conditions for the employees, but were aimed solely at harassing the employer).

Respondent's affirmative defense fails under either scenario where employee strikes have been deemed intermittent work stoppages by the Board.

a. The strikes were not designed to and did not reap the benefits without the risks

Work stoppages have been found to be unprotected when they brought about "a condition that would be neither strike nor work," such that "in doing so, the [u]nion in effect was attempting to dictate the terms and conditions of employment." *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1811 (1954) quoting *Valley City Furniture Co.*, 110 NLRB 1589, 1594-95 (1954) (finding unprotected partial strike where employees specified they would continue to not work any overtime until employer bargained in good faith with their union), enforced per curiam 230 F.2d 947 (6th Cir. 1956). See also *John S. Swift Co.*, 124 NLRB at 397; *C.G. Conn, Ltd. v.*

NLRB, 108 F.2d 390, 397 (8th Cir. 1939) (finding unprotected strike where employees specified they would continue to not work overtime until their wage demands were met). The Board has reasoned that “[w]ere we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment.” *Valley City Furniture Co.*, 110 NLRB at 1595; *Audubon Health Care Center*, 268 NLRB at 136-37 (nurses were attempting to dictate the work they would perform by picking and choosing the work they wanted to do and when). Instead, “the employer may lawfully insist that the employees choose either of the two avenues available to them – either quit work or discharge the obligations for which they are hired and paid.”¹⁰ Otherwise, the employer would essentially be paying employees for work they were not performing, while being denied the opportunity to hire replacement workers willing to accept the current employment terms. *See New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973); *First Nat’l Bank of Omaha v. NLRB*, 413 F.2d at 925 (“[t]he test in each case is whether the employees have assumed the status of strikers”), enforcing 171 NLRB at 1151. As the Board explained:

what makes any work stoppage unprotected is[] the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute over [terms and conditions] may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working. *Id* at 1151.¹¹

¹⁰ *See, e.g., Honolulu Rapid Transit Co.*, 110 NLRB at 1810 (refusal to work weekends); *Valley City Furniture Co.*, 110 NLRB at 1594-95 (refusal to work overtime); *John S. Swift Co.*, 124 NLRB at 396-97 (refusal to work overtime); *Audubon Health Care Center*, 268 NLRB at 136-37 (nurses’ refusal to cover sections left unstaffed by an absent colleague constituted unprotected partial strike). *See also, National Steel & Shipbuilding Co.*, 324 NLRB at 509-510 (Board found unprotected the union’s purportedly “spontaneous” work stoppages that occurred at the same time as a series of unprotected in-plant work stoppages. The Administrative Law Judge noted that these tactics were calculated to achieve the “benefits” of strike action without assuming the vulnerabilities of a forthright and continuous strike”).

¹¹ *See also Polytech, Inc.*, 195 NLRB at 696 (the “principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all the work they were hired to do”).

Applying these principles here, there is no evidence that the employees engaged in this type of unprotected conduct, *i.e.*, that they attempted to bring about a condition that is neither strike nor work in an effort to set their own terms and conditions of employment. As an initial matter, when the employees reported to work, they worked: they did not refuse to perform any of their work duties, or insist on working only certain hours or in certain departments. Further, when they did engage in a work stoppage—whether an OUR Walmart organized action or a spontaneous employee action—it was a complete work stoppage, and the employees assumed the economic risks associated with a “continuous forthright strike.” *See WestPac Electric*, 321 NLRB at 1360; *First Nat’l Bank of Omaha*, 171 NLRB at 1151; *compare John S. Swift Co.*, 124 NLRB at 396 (employees refused to work overtime but continued to get paid for their work). Thus, the employees notified Respondent that they were going on strike, and they did not get paid for the time they were on strike. Particularly during the “Ride for Respect,” which resulted in as much as eight lost days of work, employees lost a substantial amount of wages. Finally, in their status as traditional strikers, the employees were subject to replacement by Respondent. [JD slip op. at 55:12-17]

b. The strikes were not designed to and did not harass Respondent into a state of confusion

The Board has also found multiple work stoppages to be unprotected where they involve “calculated unpredictability” such as “hit and run” tactics intended to “harass the company into a state of confusion.” *See Pacific Tel. & Tel. Co.*, 107 NLRB at 1548. In *Pacific Tel. & Tel. Co.*, the Board found the union to be engaged in unlawful intermittent work stoppages where its “scheme was designed to compel the Respondent to ‘get its defenses up’—or gather substitute workers wherever a stoppage was unexpectedly pulled— only to have the picket line gone when the emergency crews reached the picketed place.” *Id.*, at 1548-49. As the Board noted, the

union acknowledged that its multiplicity of little surprise “hit and run” tactics were deliberately calculated to “harass the company into a state of confusion,” and that it succeeded by taxing management’s ability to organize its offices, repeatedly shutting down the employer’s nationwide operations. *Id.*, at 1548 fn. 3. The Board found “no doubt that the intention of the union was to bring about a condition that would be neither strike nor work.” *Id.*, at 1549. The Board also explained that the employer had a right to know whether the operation was going to continue for the day or not, and the strikers were unwilling to give that assurance.

Applying the above principles here, the strikes, while planned, were not unlawfully designed to “harass the employer into a state of confusion” or to cripple its operations. *Id.*; see also *National Steel & Shipbuilding Co.*, 324 NLRB at 510 (union-orchestrated hit and run tactics, including work stoppages and slowdowns, in contract-bargaining game plan were “calculated not only to confuse [the employer] but to damage it economically”). Out of Respondent’s 1.3 million employees, a total of fewer than 280 employees struck. Of those employees who engaged in a strike, the majority only struck once and only a small fraction of any individual store’s employees struck at a time. See *Dallas Glass*, *supra*, slip op. at 9-10 (ALJ stated that because only two employees out of a larger workforce participated in multiple strikes, the tactics “were not geared to harass the company into a state of confusion”).

Additionally, there is little to no evidence that strikers’ absences were designed to, or did, prevent other store-level employees from performing their work. Thus, this situation bears no relation to those few cases where, despite the small number of employees involved in strike activities, the Board found that the nature of the union’s tactics nonetheless had the effect of harassing the employer into a state of confusion, such as when the striking employees’ absences

inevitably prevented other employees from performing their work.¹² In that regard, it is noteworthy that the employees in those cases were represented by a union that had the ability to coordinate a high-impact strike utilizing only a small number of key employees.¹³ Indeed, Counsel for the General Counsel is aware of no case where the Board has found multiple work stoppages unprotected based on the theory that they involved “calculated unpredictability” such as “hit and run” tactics intended to “harass the company into a state of confusion” where the employees were not represented by a certified or recognized union as in this case.

Of course, Respondent attempts to argue that this matter involves the UFCW, which is one and the same as OUR Walmart. Notwithstanding the UFCW’s involvement in this matter, contrary to any Respondent contentions, this is not a situation in which employees were represented by a certified or recognized collective bargaining labor organization, such that a union could effectively communicate with unit members in order to orchestrate a complex plan designed to maximize employer disruption while minimizing employee risk, or to harass Respondent into a state of confusion.¹⁴ Just as importantly, although UFCW/Making Change at Walmart Campaign assisted and coordinated some of the employees’ concerted activities, there is no evidence that it intentionally orchestrated those strikes in such a way as to shield employees from the risks associated with the status of strikers. The fact that the employees are not

¹² See *Pacific Tel. & Tel. Co.*, 107 NLRB at 1549 (even with a majority of employees not striking, employer “compelled to suspend some of its toll service activities”); *National Steel & Shipbuilding Co.*, 324 NLRB at 526-528 (11 electricians struck and prevented many laborers from being able to perform their work).

¹³ See *Pacific Tel. & Tel. Co.*, 107 NLRB at 1548, fn. 3 (union published article indicating that “hit and run” strikes “will beat the telephone industry” because when only a small group of employees strike, the employer “can’t function efficiently in its nation-wide operations if any part of its circulation is cut off”); *National Steel & Shipbuilding Company*, 324 NLRB at 509-510.

¹⁴ Cf. *National Steel & Shipbuilding Company*, 324 NLRB at 509-510 (because the employees were represented by a union, the union was able to apply its “inside game” strategy, which was well documented in union literature, consisting of actions such as work stoppages and slowdowns by workers remaining on the job inside the employer’s facility); *Pacific Tel. & Tel. Co.*, 107 NLRB at 1548.

unionized, and thus have no exclusive representative to speak on their behalf or any negotiated mechanisms for resolving their grievances, increases the importance of finding these activities in support of improved working conditions to be protected.¹⁵

Further, beside the small percentage of employees who participated, the lengthy hiatus between many of the strikes further undermines any argument that they were designed to harass Respondent into a state of confusion. After a number of strikes in October and November, 2012 about six months passed before employees began striking again in May 2013. Moreover, Respondent had advance notice, sometimes months in advance, of at least the largest strikes. This gave Respondent ample time to revise its schedules and prevent any interruption to its operation, such as by simply assigning extra part-time employees to cover those days or bringing in temporary employees. This is not a situation where a union left the employer in disarray by striking multiple times in a very short amount of time.¹⁶

Moreover, Respondent's flexible business model ensured that the employees' strike activities would not force it to scramble to hire replacements or to "get its defenses up."¹⁷ Because Respondent's workforce is composed largely of low skilled, interchangeable, part-time employees, it does not need to hire replacements to maintain normal production levels; it can simply increase the hours of the non-striking employees. This case thus stands in sharp contrast

¹⁵ See *NLRB v. Washington Aluminum Co.*, 370 U.S. at 14-15; *Advance Industries Division – Overboard Door Corporation*, 220 NLRB at 432.

¹⁶ Compare, e.g., *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965) (in finding three walkouts over three-week period to be intermittent strikes, court emphasized "the repetitiousness of the intermittent walkouts within a short span of time" combined with the union's "threat to continue the activity in the future"), reversing 144 NLRB 561 (1963); *Honolulu Rapid Transit Co.*, 110 NLRB at 1808 ("bus service became seriously disorganized" because of strikes in short succession); *Pacific Tel. & Tel. Co.*, 107 NLRB at 1549-50; *National Steel & Shipbuilding Co.*, 324 NLRB at 510.

¹⁷ *Pacific Tel. & Tel. Co.*, 107 NLRB at 1548.

to unlawful intermittent strike cases where recurring unscheduled strikes of skilled employees taxed the employer's ability to hire replacement workers and keep the operation going.

Nor does the record contain any evidence to suggest that these work stoppages harassed Respondent into a state of confusion. Indeed, Respondent itself consistently and publicly stated the opposite, i.e., that very few employees participated, and that the strikes caused no disruptions. The record established that the work stoppages could not reasonably have been expected to have and did not have any significant impact on Respondent's operation, which buttresses the conclusion that they were not part of a strategy designed to bring Respondent into a state of confusion.¹⁸

Finally, contrary to any Respondent claim, the fact that the strikes occurred on some of the busiest shopping days did not render them unprotected. It is axiomatic that a strike is not rendered unprotected because it is timed to have a greater impact on an employer. *See NLRB v. Washington Aluminum Co.*, 370 U.S. at 17; *Savage Gateway Supermarkets*, 286 NLRB 180, 183-84 (1987).

c. Respondent's IWS Contentions Have No Merit

In its exceptions, Respondent focuses on the asserted "common plan" or consistent and unchanging "overall" goals behind the OUR Walmart group and the strikes: respect, stop retaliation, better wages, better hours, and better benefits. Largely citing to the same Board cases above and those cited by the Judge, Respondent erroneously contends that to be protected, the employees' work stoppages must each address a distinct employer action or problem at any

¹⁸ While evidence of impact is not necessary to finding that a series of strikes are unprotected, it may be relevant to establishing whether a union had a plan to harass the employer into a state of confusion. *See, e.g., Carpenters Southwest Regional Council Locals 184 & 1498 (New Star)*, 356 NLRB No. 88, slip op. at 4 fn.9 (2001) (in 8(b)(4)(i) context, proof of impact is not necessary but "where the question before us is whether conduct constituted [a request for employees of a secondary employer to strike], evidence of its impact (or lack thereof) is relevant").

particular store. Although work stoppages that would otherwise appear to be unprotected under the above-described standards might nevertheless be privileged if undertaken in response to distinct employer actions;¹⁹ it is not the case that, for multiple stoppages to be protected, they must have separate distinct purposes. Strikes are protected absent evidence they were for “a purpose other than to protest and seek redress for what employees considered to be unjust working conditions.” *United States Service Industries*, 315 NLRB at 291. Here, all the evidence (employees’ notification of strike letters, their testimony, and their signs, chants, and strike demands) demonstrates that employees were seeking redress for what they considered to be unjust working conditions. And the UFCW/Making Change at Walmart as well has consistently described the work stoppages as part of an overall plan to assist the employees in obtaining improved working conditions with Respondent. Further, the fact that the UFCW/Making Change at Walmart and/or OUR Walmart also sought to publicize the campaign and seek support from the public in obtaining those goals did not deprive striking employees of the Act’s protection. *The Sheraton Anchorage*, 359 NLRB No. 95, slip op. at 4 (April 24, 2013) (“Employees enjoy a Section 7 right to publicize a labor dispute”); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66, 569-70 (1978) (employees seeking to “improve terms and conditions of employment or otherwise improve their lot” have the Section 7 right to seek the support for their cause “outside the immediate employee-employer relationship”).

In addition, there is simply no merit to Respondent’s contention that the employees’ strike conduct was unprotected on a theory that they were engaged in “union business” or personal business because during the Ride for Respect strike some employees opted not to travel

¹⁹ See *Robertson Industries*, 216 NLRB at 362 (multiple work stoppages were for separate distinct employer actions); *WestPac Electric*, 321 NLRB at 1359-60 (three strikes within a two-week period were protected where each strike was “unique to its facts and circumstances”), citing *Chelsea Homes*, 298 NLRB at 831.

to Bentonville or did not participate in a protest or attended training conferences or visited museums.²⁰ Absences from work are protected strikes where employees are concertedly withholding their labor in order to seek to remedy a work-related complaint or grievance. *See, e.g., The New York State Nurses Association (The Mt. Sinai Hospital)*, 334 NLRB 798, 800-01 (2001) (finding that nurses' concerted refusal to volunteer for overtime work was a strike because it was "intended to put pressure on the [employer] to change its staffing practices"), citing *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978). Here, the express purpose of the Ride for Respect work stoppages, as explained in the strike notices, was to protest "low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation. "

[JD slip op. at 22:9-18] In these circumstances, the employees' activities were protected notwithstanding that they did not participate in a protest or engaged in those other activities.

In sum, Respondent's exceptions here fail and should be rejected.

2. Respondent unlawfully disciplined and/or discharged employees for protected strike-related absences disciplined employees

Because the strikes are protected and Respondent disciplined employees expressly for unexcused strike-related absences, the Judge correctly concluded that Respondent violated Section 8(a)(1) when it disciplined the Ride for Respect strikers. [JD slip op. at 93:15-97:6] Respondent's exceptions to the Judge's findings and conclusions in this respect are baseless.

Respondent violated Section 8(a)(1) by disciplining, and discharging employees expressly for their absences during their participation in the at-issue strikes. *See, e.g., Union Electric Co.*, 219 NLRB 1081, 1082 (1975). The express purpose of the strikes, as explained in the strike notices, employee testimony and the voluminous record, was to protest unfair labor

²⁰ Cf. *Quantum Electric*, 341 NLRB 1270, 1279 (2004) (leaving work early to attend union meeting not protected work stoppage because the employees "were not engaging in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with working conditions[;] they simply ceased work early to facilitate attendance at a union meeting").

practices, “low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart’s retaliation. ” The employees were engaged in protected activity when they struck and Respondent violated the Act when it counted the days the employees struck as unexcused absences. Absences from work are protected strikes where employees are concertedly withholding their labor in order to seek to remedy a work-related complaint or grievance. *See, e.g., The New York State Nurses Association (The Mt. Sinai Hospital), supra*, (finding that nurses’ concerted refusal to volunteer for overtime work was a strike because it was “intended to put pressure on the [employer] to change its staffing practices”), citing *Empire Steel Mfg. Co., supra*. Therefore, an employer may not discharge or discriminate against an employee for engaging in strikes or concerted work stoppages to protest working conditions. *NLRB v. Washington Aluminum, supra*. *See also Wright Line*, 251 NLRB 1083 (1980) enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) (Board finding that it is unlawful to discipline an employee for engaging in protected concerted activity).

As the Judge elaborated in the Decision and supported by the record, Respondent unquestionably applied its attendance policy to the Ride for Respect strikers. Because Respondent improperly took the position that the strikes were unprotected, Respondent admittedly counted the striker absences as unexcused. Treating strike absences as unexcused left employees with fewer available allowed absences under the attendance policy, and triggered the warnings, disciplines, and discharges issued to the striking employees including the 17 discharges here. [JD slip op. at 93-97 (listing the employees and adverse action)] By this conduct, the Judge appropriately concluded that Respondent violated Section 8(a)(1) of the Act.

3. Respondent's contentions that it consistently applied its attendance policy misses the mark

In exceptions 16-27, Respondent generally argues that it consistently applied its lawful no-fault attendance policy to the employee strikers. Respondent contends its actions are justified for a variety of reasons such as the employee strikers abandoned work or did not provide advance notice of their strikes or did not comply with Respondent's call-in procedures. Respondent's rationale and exceptions are simply wrong. In *NLRB v. Washington Aluminum, supra*, the Supreme Court held that workers do not need to notify an employer with their demands prior to striking. The Court explained that:

The language of Section 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of Section 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects." 370 U.S. at 14 (emphasis added).

Based on this precedent, the Board has long held that an employer violates the Act by terminating or disciplining an employee who went out on strike for unexcused absences during the strike even if the employer was unaware that the employee was absent because they were striking. The Board has further held that an employer violates the Act by terminating or disciplining an employee for unexcused absences, if the employer thought the employee was absent due to striking. *Comfort Inc.*, 152 NLRB 1074, 1076-77 (1965). The Board imputes that an employer did have notice of the workers' protected activity (constructive notice), if the employer does not avail itself of the opportunity to learn of the nature of the activity. *Virginia Manufacturing Company, Inc.*, 310 NLRB 1261, 1261-2 (1993). The failure of the employees to report to work is "a concerted action for mutual aid and protection." *Lisanti Foods Inc.*, 227

NLRB 898, 902 (1977). *See also Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003). Whether the employees gave advance notice of their intention is immaterial as Respondent was indisputably aware of and tracking all the strike activities.

Board precedent clearly runs counter to any Respondent argument that it simply applied its lawful attendance policy consistent with its practices for non-strike attendance. “The existence of or lack of unlawful animus” is not material when “the very conduct for which employees are disciplined is itself protected concerted activity.” *CGLM, Inc.*, 350 NLRB 974 (2007) citing *Burnup S. Sims, Inc.*, 256 NLRB 965 (1981).

C. The Judge properly determined that Respondent violated Section 8(a)(1) by reading Talking Points to employees that announced an unlawful work rule prohibiting employee protected activity (Exceptions 28-34)

Contrary to Respondent’s argument set forth in exceptions 28-34, the Judge correctly found that on various dates in February 2013, in eleven stores across the country, Respondent announced an unlawful work rule that violated Section 8(a)(1) of the Act “by reading talking points to associates that could be reasonably construed as prohibiting protected strike activity.” [JD slip op. at 49:11-14; 101:36-38] According to Respondent, it did not violate the Act by telling employees that it would apply its work rules to unprotected activity and the Judge misquoted the record to find otherwise. Notwithstanding Respondent’s arguments, the Judge’s factual and legal conclusions are fully supported by the record and legal precedent.

1. Respondent announced that future strike absences would be unexcused subjecting employee strikers to discipline

The Judge correctly found that in February 2013, Respondent store managers, pursuant to corporate labor relations directive, held individual meetings with employees who had engaged in Black Friday 2012 strikes. [JD slip op. at 26:10-21; Vol. 18 at 3475-3476, 3649; Tr. Vol. 26 at 5244; Vol. 29 at 5770] Store managers read scripted Talking Points prepared by the labor

relations team along with “Facility Manager Instructions: Resolving Attendance Occurrences Related to Intermittent Work Stoppage (“IWS”) Activity.” [JT Exh. 6(a)] The purpose of the Talking Points and meetings was to set forth and clarify Respondent’s policy regarding strikes and inform employees who had been involved in the 2012 strikes that should they engage in strike activity under similar circumstances their absences would be unexcused and they would be subject to discipline. [Tr. Vol. 26 at 5245-5246, 5247; Vol. 18 at 3653; Vol. 32 at 6360] The Talking Points [JT Exh. 6(a) at 3] describe the absences as “union-orchestrated work stoppages” and state:

it is very important for you to understand that the Company does not agree that these hit-and-run work stoppages are protected, and now that it has done the legal thinking on the subject, it will not excuse them in the future. Should you participate in further union-orchestrated intermittent work stoppages that are part of a common plan or design to disrupt and confuse the Company’s business operations, you should expect that the Company will treat any such absence as it would any other unexcused absence. [T]he Company does not believe that these union-orchestrated hit-and run work stoppages are protected activity.

Thereafter, on various dates in February 2013, store management met with and read the talking points to known employee strikers at the following stores:²¹

- February 8 and 11 at Store 471 Lancaster, Texas [Tr. Vol. 15 at 2762-2764; Vol. 17 at 3214-3216, 3291-3293; JT Exhs 180, 217; GC Exh. 471-7]
- February 23 at Store 1985 Laurel, Maryland [JT Exh. 1328 (stipulation of fact)].
- February 9, 12 and 18 at Store 2110 Paramount, California [JT Exh. 1328 (stipulation of fact); GC Exh. 128]
- Mid-February at Store 2418 Placerville, California [Tr. Vol. 7 at 1218-1222, 1291-1292; JT Exh. 6(b); GC Exh. 127(a) at 16 (admission in statement of position)]
- February 7, 8, 12 and 18 at Store 2571 Federal Way, Washington [Tr. Vol. 18 at 3472-3478; JT Exh. 307; GC Exh. 127(a) at 16 (admission in statement of position)]
- February 20 at Store 2989 Fremont, California [Tr. Vol. 7 at 1374-1375, 1380; R. Exh. 272 (factual stipulations)]

²¹ The evidence reflects that the talking points were read to employees at other stores as well. *See. e.g.* Tr. Vol. 33 at 6439-6440.

- February 6 at Store 3455 Richmond, California [Tr. Vol. 8 at 1491-1493; GC Exh. 127(a) at 17 (admission in statement of position)]
- February 15 at Store 5404 Glenwood, Illinois [Tr. Vol. 29 at 5769-5775, 5825-5831; JT Exhs. 983, 993]
- February, exact date unclear, at Store 5485 Evergreen Park, Illinois [Tr. Vol. 31 at 6027 (stipulation of fact); JT Exh. 975]
- February 8 at Store 5781 Chicago, Illinois [Tr. Vol. 30 at 6005-6010, 6016-6018; GC Exhs. 5781-1, 127(a) at 17 (admission in statement of position)]
- February 8 at Store No. 2196 Port Angeles, Washington [Tr. Vol. 18 at 3648-3651; JT Exh. 447; R. Exh. 272 (factual stipulations)]

2. The Judge's findings and conclusions are substantially supported by the record and legal precedent

The Judge properly concluded that Respondent violated Section 8(a)(1) by the February 2013 Talking Points. The express text of the Talking Points establish that Respondent managers announced a policy that interferes with employee rights to strike by informing employees that future strikes would be unexcused absences and subject them to discipline. In his Decision, the Judge quoted the text of the Talking Points [JD slip op. at 26:20-27:12; 46:15-47:8] and in no manner misquoted the record as Respondent argues.

Further, the Judge's legal conclusion is fully supported by Board precedent. The Board has long held that "the day [a worker] was on strike cannot be counted as an unexcused absence, because participation in a strike is protected by Sec. 7 and Sec. 13 of the National Labor Relations Act." *USSI*, 324 NLRB 834, fn. 17 (1997). *See also, CGLM, Inc.*, 350 NLRB 974 (2007) ("Calling a strike an absence from work justifying discharge is to write Section 13 out of the Act." citing *Anderson Cabinets*, 241 NLRB 513, 518, 519 (1979). "Section 13 of the Act provides that "[n]othing in this Act shall be construed so as either to interfere with or impede or diminish in any way the right to strike. "). Although Respondent attempts to justify its Talking Points by pointing to language from Board cases such as *National Steel &*

Shipbuilding, supra, its argument fails as the strikes in this case are protected and the Judge properly determined such.

Respondent's policy as set forth in the February Talking Points impermissibly interferes with employee rights to strike. By such conduct, Respondent violated Section 8(a)(1) as properly determined by the Judge.

D. The Judge properly determined that Respondent's attendance related personal discussions constitute discipline (Exceptions 36-40)

Contrary to Respondent's exceptions 36-40, the Judge correctly found that personal discussions under its attendance policy constitute discipline. [JD slip op. at 64:18-65:24] Respondent claims that employees suffer no adverse employment action because personal discussions are merely courtesy reminders about employee attendance-occurrence status under the attendance policy. Respondent cites various cases including *Lancaster Fairfield Comm. Hosp.*, 311 NLRB 401, 403 (1993) to support its argument. However, *Lancaster* and numerous Board cases, including *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), as the Judge properly concluded, do not support Respondent's position under the facts of this case. [JD slip op. 64:18-65-24]

In *Lancaster*, the Board concluded that the issuance of a conference report "constituted nothing more than counseling and no discipline was being imposed. " because " .There was no evidence that the report was part of the employer's formal disciplinary procedure or that it was a preliminary step in the progressive disciplinary system." Contrary to *Lancaster*, under Respondent's progressive discipline and attendance policy, the "personal discussion" clearly serves as a warning to employees that future discipline will follow if they engage in similar or other misconduct. The personal discussion is the first or preliminary step in the attendance progressive discipline process. The record contains ample evidence where employees were

issued a personal discussion, instead of a first written coaching, because they did not have a personal discussion on their record. Respondent, in a position statement [GC Exh. 127(a)] exemplifies how the personal discussion is factored into the progressive discipline. With regard to Sara Gilbert, Patricia Locks and Michael McKeown at Store 2571 Federal Way, Washington, Respondent explained that Gilbert had no active coachings in her personnel file, but she had a prior personal discussion so she received a personal first written coaching; Locks had a prior personal discussion, but managers inadvertently overlooked that fact so she received a personal discussion; and McKeown had no active coachings, but because he had prior personal discussion on attendance, he received a first written coaching. [GC Exh. 27(a) at 35] Similarly, with regard to Mariah Williams in Store 1102 Baker, Louisiana, because store records reflected she had received a prior personal discussion, management issued Williams a first written coaching based on her unexcused strike absences. [GC Exh. 127(a) at 30 (admission in position statement)] Further, Respondent's own summary of disciplines issued to Ride for Respect Strikers clearly identifies a "personal discussion" as a coaching level of accountability issued to the employee strikers. [GC Exh. 29 (West BU Intermittent Work Stoppage Associate Accountability)] Under the "Coachings" section, employees received discipline ranging from personal discussions to a 1st, 2nd or 3rd written coaching for attendance. [GC Exh. 29] Clearly, a personal discussion is a preliminary step in Respondent's attendance progressive discipline process.

The Judge properly concluded that personal discussions are part of and the preliminary phase in Respondent's progressive disciplinary attendance process. Respondent's exceptions to the contrary are belied by the record evidence and Board precedent.

E. The Judge properly determined that Respondent violated Section 8(a)(1) by disciplining certain uniquely situated individual strikers

Based primarily on its IWS theory, Respondent excepts to the Judge's findings of unlawful discipline regarding certain employee strikers with factually unique or contested situations. [JD slip op. at 97-101] The Judge's findings and conclusions with respect to these violations are well supported by the record and established Board law. Respondent's exceptions fail and should be disregarded.

1. Respondent unlawfully disciplined Colby Harris and Mark Bowers for their May 6-8, 2013 protected strike-related absences (Exception 35)

In exception 35, with little argument, Respondent merely asserts that the Judge erred in finding that Respondent unlawfully disciplined Colby Harris and Mark Bowers for their May 6-8, 2013 strike-related absences because they engaged in the same ongoing IWS campaign. [JD slip op. at 85:13-28, 102:2-4]

As correctly determined by the Judge, on May 6, 2013 Colby Harris and Marc Bowers from Store 471 in Lancaster, Texas engaged in a spontaneous strike. The same day as the strike, Harris overheard Shift Manager Alex Mireles making derogatory comments about the OUR Walmart organization, which caused Harris to spontaneously decide to go on strike. Harris solicited co-worker Bowers support in striking and Bowers agreed. Harris went on strike to protest continued retaliation and derogatory treatment from management toward him and the OUR Walmart organization. [Tr. Vol. 15 at 2765-2766] Bowers went on strike to protest respect in the workplace and to support Harris. [Tr. Vol. 16 at 3112-3113] Before striking, Harris and Bowers informed the store manager that they were going on an unfair labor practice strike and submitted strike letters to Respondent. [JT Exhs. 212, 176] Both submitted return to work letters to the store manager upon their return. [JT Exhs. 214, 177] Harris and Bowers struck for two

days, returning on May 9, 2013. Harris and Bowers did not do any work for Respondent and fully accepted the role of strikers. [Tr. Vol. 15 at 2774; Vol. 16 at 3115-3116]

As a direct result of their strike-related absences, on May 9, 2013, Store Manager Delicino issued Harris a second written coaching for attendance/punctuality for unexcused absences during his May 6 strike. [JT Exh. 205] The discipline document expressly and only cites Harris' prior strike absences (10/11/2012, 11/17/2012, 11/22/2012 and 5/6/2013) stating "Colby has now walked off the job or failed to report to work on at least four occasions as part of a common union plan of intermittent work stoppages to disrupt business." [JT Exh. 205] On May 10, 2013, Delicino issued Bowers a third written coaching for attendance/punctuality for unexcused absences during his May 6 strike. [JT Exh. 169] The discipline document only cites Bowers' prior strike absences (11/22/2012 and 5/6/2013) stating "Marc has now walked off the job or failed to report to work on at least two occasions as part of a common union plan of intermittent work stoppages to disrupt business" and "Be a worker or striker but please do not try to be both at the same time in pursuit of a third party's scheme that disrupts customer service and associate staffing." [JT Exh. 169]

The record clearly established that Respondent counted Harris' and Bowers' May 6-8 strike-related absences unexcused triggering the basis for the disciplinary action each received. The disciplinary actions run afoul of Section 8(a)(1) and the Judge properly concluded such.

2. Respondent unlawfully disciplined Barbara Gertz and Lawrence Slowey for their Ride for Respect strike-related absences (Exceptions 43-46)

In exceptions 43-46, Respondent argues that the Judge erred in finding that Respondent disciplined Barbara Gertz and Lawrence Slowey by issuing them personal discussions. [JD slip op. at 97:31-34] Respondent continues its argument that personal discussions are not discipline. Citing inapplicable Board law, Respondent also claims that under a totality of the circumstances

approach, Respondent did not discipline Gertz and Slowey because management later informed them that the personal discussions were withdrawn.

The Judge fully considered Respondent's arguments in this respect and properly concluded that the asserted totality of the circumstances analysis misses the mark generally applying to alleged coercive employer statements under Section 8(a)(1). [JD slip op. at 97:27-31] The issue here is whether Respondent unlawfully disciplined Gertz and Slowey. The Judge properly concluded that personal discussions constitute discipline under Respondent's attendance discipline policy and rejected Respondent's totality of the circumstances approach for disciplinary actions. As the Judge noted, Respondent could have proffered a repudiation argument under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). However, *Passavant* places a heavy burden on employers that wish to cure their violations and thereby avoid liability. Respondent does not proffer such a defense as it undoubtedly cannot meet the heavy burden. The Judge's legal conclusions and analysis are fully supported by the record and law. Respondent's exceptions are baseless and should be rejected.

3. Respondent unlawfully disciplined Victoria Martinez for her November 2012 strike-related absences (Exceptions 47-53)

In exceptions 47-53, Respondent contends that the Judge erred in holding that Respondent violated Section 8(a)(1) by giving Victoria Martinez, employee at Store 2886 in Pico Rivera, California, a personal discussion for her November 2012 strike-related absences. [JD slip op. at 99:38-40, 101:32-34]

Contrary to Respondent's exception, the Judge properly concluded a violation was present. In this respect, the record established that on December 17, 2012, Assistant Manager Craig Pasillas disciplined Martinez for unexcused absences incurred on strike dates. [JT Exh. 860, GC Exh. 2886-5] On October 4, 2012, Martinez participated in the first OUR Walmart

strike. She struck in effort to get Respondent to resolve store work issues and to listen to the associates. [Tr. Vol. 25 at 4944] Upon her return to work, Martinez submitted a return to work letter. [JT Exh. 94(a) Tab 8, 765] Martinez fully took on the role of a striker and did not perform any work for Respondent and did not expect to be paid. [Tr. Vol. 25 at 4946]

On November 20, 2012, Martinez engaged in a one-day strike at her home store with approximately 10 associates. Martinez' name was listed on both a strike notification letter and an unconditional offer to return letter submitted to Respondent. [Tr. Vol. 25 at 4948-4950; JT Exhs. 94(a) Tab 29; 756, 854] Martinez went on this strike to stop Respondent's retaliation against associates across the country. [Tr. Vol. 25 at 4950] She protested in front of the store and was observed by store management including the store manager. [Tr. Vol. 25 at 4951] Martinez again took on the role as a striker and did not perform any work for Respondent and did not expect to be paid. [Tr. Vol. 25 at 4953]

On November 23, 2012 (Black Friday), Martinez participated in another one-day strike and protest. On this occasion, Martinez engaged in a protest at Respondent's Paramount, California store. Her name was on both a strike notification letter and an unconditional offer to return letter submitted to Respondent. [JT Exh. 94(a) Tab 47; GC Exhs. 2886-2 and 2886-3] Martinez went on this strike because she believed Respondent was retaliating against her by cutting her work hours. [Tr. Vol. 25 at 4956-4957]

Thereafter, on December 17, 2012, Assistant Manager Craig Pasillas called Martinez to a meeting to discuss her attendance. During this meeting, Pasillas issued Martinez a written warning for absences. [JT Exh. 860, GC Exh. 2886-5] Pasillas informed Martinez that she had "tardies and absences that resulted in four absences." The discipline document states: "On 12/17/2012, my manager reminded me that I have 4 active occurrences under the time and

attendance policy. My manager also told me that my next occurrence could result in discipline and that I could receive formal discipline under that policy right now, but that the management team decided to give me an extra one-time reminder notice instead. ” [JT Exh. 860] The December 17, 2012, discipline document differs in form from personal discussion forms utilized at Store 2886. [JT Exhs. 857, 858 and 859] Although there was no discussion of strikes, Pasillas provided Martinez a computer printout titled “Associate Information Line Absences and Tardies” citing Martinez’ strike-related absences on November 20 and 23. [Tr. Vol. 25 at 4960-4961; GC Exh. 2886-5]

Based on the record evidence, the Judge properly concluded that Respondent violated Section 8(a)(1) by issuing a written discipline to Victoria Martinez for unexcused absences during her protected strike activity. Respondent’s attempt to question why Manager Pasillas only gave Martinez a truncated copy of her IVR attendance report or why Martinez did not question such is unavailing. Any contention that the supervisor (Pasillas) did not have personal knowledge of Martinez’ strike activity is further unavailing. Not only were the strikes well publicized, but Martinez provided Respondent direct notice of her activity. The Board imputes that an employer did have notice of the workers’ protected activity (constructive notice), if the employer does not avail itself of the opportunity to learn of the nature of the activity. *See Virginia Manufacturing Company, Inc., supra* at 1261-1262.

As Martinez was engaged in protected concerted activity, it was unlawful for Respondent to count her November 20 and 23 absences as unexcused triggering the basis for the disciplinary action she received on December 17, 2012. The Judge properly determined that Respondent violated Section 8(a)(1) by disciplining Martinez on December 17, 2012.

4. Respondent unlawfully disciplined Juan Juanitas for his Ride for Respect strike-related absences (Exceptions 54-59)

In exceptions 54-59, Respondent argues the Judge erred in concluding that Respondent violated Section 8(a)(1) by issuing a personal discussion to Juan Juanitas, employee at Store 2989 in Fremont, California. [JD slip op. at 93-29-36] The Judge properly rejected Respondent's argument that it would have issued Juanitas a personal discussion for subsequent non-strike absences. [JD slip op. at 67:26-29; 94 fn. 108] Again, the record fully supports the Judge's conclusions and findings.

The record (including factual stipulations) established that on May 27, 2013, Juanitas notified Respondent that he was going on the Ride for Respect strike by delivering a strike letter to the store. [JT Exh. 15(a)] Juanitas missed 5 scheduled shifts from May 28 to June 4, 2013 when he engaged in the strike. Upon his return to work, Respondent met with and orally reminded Juanitas about the attendance policy because of his strike absences. [R. Exh. 272 (factual stipulations)] Juanitas is one of employee strikers Respondent was tracking on the "SoCal Strike Letters" [GC Exh. 107] and is listed as receiving a "personal discussion" on the "West BU Intermittent Work Stoppage Associate Accountability" and Respondent's position statement. [GC Exhs. 29, 127(a) at 22 (admission in position statement) (Although his unexcused absences warranted the next level of discipline, management determined that it had not consistently applied the attendance policy at the store during the prior few months. Consequently, store management reminded him about the attendance policy as part of a personal discussion.)]

Respondent attempts to sidestep its factual stipulations and admissions by arguing that it only admitted that it issued Juanitas a personal discussion "upon his return to work" and claims

the personal discussion could have been for subsequent absences. Respondent's argument was properly rejected by the Judge. The record evidence fully supports the Judge's findings.

5. Respondent unlawfully discharged Pamela Davis for her Ride for Respect strike-related absences (Exceptions 54-59)

In exceptions 54-59, Respondent argues the Judge erred in holding that Respondent violated Section 8(a)(1) by discharging employee Pam Davis, employee Store 3455 in Richmond, California. [JD slip op. at 93:29-36] Similar to its exceptions regarding Juanitas, Respondent contends that it would have discharged Davis for subsequent non-strike absences. As with Juanitas, the Judge properly rejected this argument. [JD slip op. at 72:12-14, 94 fn. 109]

The record (including party factual stipulations) established that on June 2, 2013, Davis called into the IVR system and obtained a confirmation code. [JT Exh. 22(d)] On June 9, 2013, Davis notified Respondent that she had been on a strike/work stoppage by delivering a return to work letter to the store. [JT Exh. 21(a)] On June 2 and June 3, 2013, Davis did not work and engaged in the Ride for Respect strike. About July 30, 2013, Respondent, by Store Manager Robert Wainana, discharged Davis because of her strike absences as well as other absences. [R. Exh. 272 (factual stipulations)] Davis is identified on the "SoCal Strike Letters" as an employee Labor Relations was tracking as of June 2, 2013. [GC Exh. 107] Respondent's effort to sidestep its stipulation that it discharged Davis "because of her strike absences as well as other absences" is suspect and properly rejected. The record evidence fully supports the Judge's findings.

6. Respondent unlawfully disciplined Shana Stonehouse for her Ride for Respect strike-related absences (Exceptions 63-74)

In exceptions 63-74, Respondent contends that the Judge erred by finding that Respondent's June 12, 2013 decision to treat employee Shana Stonehouse's strike-related absence as an unexcused absence was a form of discipline because it laid a foundation for future discipline. [JD slip op. at 101:13] In an attempt to circumvent well-settled Board precedent,

Respondent claims the Judge on his own accord determined that unexcused absences constitute discipline, but he could not, consistent with due process, find that unexcused absences constitute discipline under Section 8(a)(1) when the General Counsel's Complaint alleged that Respondent issued Stonehouse a personal discussion. Respondent's exceptions and argument are meritless.

a. Well established Board Precedent permits the Judge to find alternative theories and related discipline

Contrary to Respondent's arguments, it is well established, as explained in *Pergament United Sales, Inc.*, that the Board may find and remedy an unalleged unfair labor practice that: (1) is "closely connected to the subject matter of the complaint," and (2) "has been fully litigated." 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130, 134 (2d Cir. 1990); *accord Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1200 (D.C. Cir. 2003) (quoting *Pergament*). The Judge's decision here easily satisfies both requirements.

First, the Section 8(a)(1) violation found here is closely connected to the Section 8(a)(1) violation alleged. Both turn on the same issue—whether Stonehouse engaged in protected strike activity and whether Respondent disciplined Stonehouse for unexcused strike-related absences—and on the same set of facts. Cases like this one, where both violations plainly "focus on the same set of facts," epitomize the close connection that *Pergament* requires. 296 NLRB at 334.

Second, the parties fully litigated the unfair labor practice found. Over the course of the hearing, the parties introduced evidence on how Respondent handled Stonehouse's June 2013 strike absences and the disciplinary action Respondent took against her. In this respect, the record established that on May 28, 2013, Stonehouse delivered a strike letter to store management at Store 3098 in Bellevue, Washington. [JT Exh. 537; GC Exhs. 3098-1, 3098-2] On May 30, Stonehouse called the IVR to further report her strike absence. [Tr. Vol. 20 at 3980; JT Exh. 538] Stonehouse engaged in the Ride for Respect strike and did not work from May 30

to June 8. [Tr. Vol. 20 at 3978; JT Exh. 539] On June 9, Stonehouse returned to work and spoke to the store manager. [Tr. Vol. 20 at 3984; JT Exh. 535] About June 12, Store Manager Shane McNeil called Stonehouse to his office and informed her that she would be charged with one unexcused absence, instead of eight, for her Ride for Respect strike-related absences. McNeil made computer entries recording Stonehouse's strike-related absences as unexcused. [JD slip op. at 100:35-39; Tr. Vol. 20 at 3985-3987; JT Exh. 539] Stonehouse believed McNeil disciplined her during the June 12 meeting. [Tr. Vol. 20 at 3987] Finally, Respondent identified Stonehouse as receiving a "personal discussion for time & attendance" on Respondent's "West BU Intermittent Work Stoppage Associate Accountability." [GC Exh. 29]

In the Complaint, General Counsel alleged that Respondent unlawfully disciplined Stonehouse on or about June 18, 2013, by issuing her a warning for absences. [GC Exh. 1(bb) (par. 51)] In the post-trial brief, General Counsel further argued that Respondent issued Stonehouse a third written coaching for attendance that was "based on **unexcused** absences that included her **unexcused strike absences**." [GC Post-trial Br. at 71 citing JT Exhs. 29 (Walmart memo) and 531 (Third Written Coaching)].

Contrary to Respondent's contentions, the parties fully litigated how Respondent handled Stonehouse's strike-related absences after she returned to work in June 2013. The disciplinary action Respondent took against Stonehouse on June 12 is closely related to, if not squarely within, the Complaint allegation that Respondent unlawfully disciplined Stonehouse for being absent from work while on strike during the Ride for Respect. Furthermore, Respondent cannot show any prejudice to its case from the asserted change of theory, if any, distinguishing this case from other cases such as *Lamar Advertising of Hartford*, 343 NLRB 261 (2004) where the Board held that due process precluded consideration of a violation under a theory alleged for the first

time in the General Counsel's exceptions, because that theory required different evidence than the alleged theory and thus was not fully litigated. *See* 343 NLRB at 265-66.

b. The Judge properly concluded that unexcused absences constitute meaningful discipline

Contrary to Respondent's exceptions, the Judge properly held and Board precedent fully supports the conclusion that by announcing to Stonehouse that her strike-related absences would be treated as an unexcused absence, Respondent disciplined Stonehouse in violation of Section 8(a)(1). [JD slip op at. 101:1-24] It does not matter that an associate must accumulate a certain number of unexcused absences before Respondent will issue a written coaching as the fact remains that the unexcused absence itself can lead to future discipline. *See Ohmite Manufacturing Co.*, 290 NLRB 1036, 1037 (1988) (explaining that an unexcused absence was a form of meaningful discipline because it could lead to a written disciplinary warning, even though three unexcused absences in a month were required before the employer would issue such a written warning); *see also Mid-Mountain Foods*, 332 NLRB 251, 271 (2000) (finding that an employer violated Section 8(a)(4) and (1) of the Act when it told an employee that he would receive an unexcused absence because he did not give sufficient notice that he would miss work to attend an NLRB hearing pursuant to subpoena, where an unexcused absence may result in disciplinary action), *enfd.* 11 Fed. App. 372 (4th Cir. 2001).

Respondent disciplined Stonehouse in violation of Section 8(a)(1) by announcing that her strike absences were unexcused. The Judge's findings are well founded.

F. The Judge properly admitted the Tovar CBS and NBC news segments into evidence (Exception 76)

In the Decision, the Judge dismissed paragraphs 4(B)(1)-(2) of the Complaint alleging that Respondent, by Vice-President Tovar, on November 19 and 20, 2012, via nationwide television on CBS and NBC, threatened its employees with unspecified reprisals if they engaged

in concerted activities. [JD slip op. at 44:28-29] As noted previously, General Counsel has filed contemporaneous cross-exceptions regarding the dismissal.

Notwithstanding the dismissal, in exception 76, Respondent asserts the Judge erred by admitting the CBS and NBC Tovar news segments in the first place. Undoubtedly, Respondent seeks to sidestep the question of whether Tovar's interview comments conveyed a cognizable threat to employees. With little to no supporting argument, Respondent claims (1) General Counsel did not meet authentication requirements for TV interviews; (2) the news broadcasts are not probative to any violation of the Act; (3) Respondent cannot be held liable for the editing choices of third party media broadcasters; and (4) admitting the broadcasts runs afoul of the First Amendment and Section 8(c) of the Act. Respondent made these same arguments at trial and upon full consideration, the Judge properly ruled that the CBS and NBC news broadcasts were admissible. [JD slip op. at 44 fn. 52; Tr. Vol. 18 at 3380-3382, 3524; R. Exh. 227; GC Exh. 77]

First, establishing the authenticity of news broadcasts is a straightforward concept requiring only a reasonable probability that the item in dispute is what its proponent claims. *Asociacion De Periodistas De Puerto Rico v. Mueller*, 680 F.3d 70, 79 (1st Cir. 2012) citing Fed. R. Evid. 901(a); *United States v. Cruz*, 352 F.3d 499, 506 (1st Cir. 2003). The proponent "need not rule out all possibilities inconsistent with authenticity," so long as the "evidence is sufficient to allow a reasonable person to believe the evidence is what it purports to be," it is left to the factfinder to determine what weight it deserves. *Asociacion De Periodistas De Puerto Rico v. Mueller*, supra; *United States v. Alicea-Cardoza*, 132 F. 3d 1, 4 (1st Cir. 1997).

Here, there is no serious basis for Respondent to dispute the authenticity of the CBS and NBC news segments that aired portions of the Tovar interviews. Significantly, General Counsel did not offer the Tovar segments into evidence at the time of the Judge's ruling on admissibility.

[Tr. Vol. 18 at 3380-3382; 3524] Instead, General Counsel advised the record would be developed to address any authenticity concerns including calling Tovar to testify if necessary. The Judge acknowledged that the General Counsel would be permitted to develop the record on the issue and any gaps in the interviews could be addressed “with the witness, if he’s called.” [Tr. Vol. 18 at 3381:14-22] Thereafter, General Counsel and Respondent Counsel reached agreement on the admission of a series of documents involving Tovar including the CBS and NBC news broadcasts. As a result, General Counsel excused Tovar from his subpoena obligations and the Tovar CBS and NBC news broadcasts were admitted into evidence without objection as GC Exh. 43, 43(a), 44 and 44(a). [Tr. Vol. 28 at 5433:18-5434:20] The parties then offered into the record complete versions of the Tovar CBS and NBC media interviews as joint exhibits. [JT Exh. 1318(a)—(b) and 1319(a)—(b); Tr. Vol. 28 at 5437:18-5438:13] As the Tovar CBS and NBC news broadcasts were admitted into evidence without objection, Respondent’s arguments and exceptions regarding authenticity herein are suspect and disingenuous at best.²²

Second, with little supporting precedent, Respondent contends that the Tovar televised interviews are not probative of any violation of the Act. Respondent’s bald arguments fails as Rule 401 of the FRE provides that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Here, the Complaint expressly alleges that Respondent, by Tovar, violated Section 8(a)(1) of the Act by, via television, threatening its employees with unspecified reprisals if they engaged in concerted activities and/or engaged in activities for mutual aid and protection. The CBS and NBC TV news broadcasts communicating Tovar’s alleged unlawful threats form the basis for the relevant Complaint allegations. The Board has long found that

²² Further, in a statement of position, Respondent provided copies of and full background on the news broadcasts and the Tovar interviews. [GC Exh. 77 Attachment A at 12-14]

unlawful statements by Respondent agents to the news media may constitute unlawful threats under the Act. *See, e.g., Graphic Arts International Union, Local No. 32B, AFL-CIO-CLC*, 250 NLRB 850, 857-858 (1980), overruled in part on other grounds, (finding statements made by Respondents' agents to the news media constituted threats to fine former members for conduct occurring after their effective resignation from Respondent Locals in violation of the Act); *TRW-United Greenfield Div.*, 245 NLRB 1135, 1135 fn. 1, 1145 (1979) (finding manager's statement, during a televised interview the night before the election, that employer closed two of its plants where the employees had been represented by the union to be coercive and objectionable because it gave the false impression that the union was responsible for the plant closings). The Tovar news segments are directly relevant to the express Complaint allegations.

Third, contrary to any Respondent contention, this case does not implicate third-party agency cases or editing choices of third parties. The at-issue statements here were made by Vice President Tovar, an admitted statutory supervisor and agent of Respondent. As the Judge properly determined [JD slip op. at 43:35-45], the Board has long found that an employer or union violates the Act if it makes threatening statements that are publicized by the media, particularly if the speaker had reason to know that the statements would be reported and that employees would hear (or read) the statements. *See Graphic Arts International Union, Local No. 32B*, supra at 861; *Typographical Union*, 270 NLRB 1386, 1386-1387 (1984); *TRW-United Greenfield Division*, supra. Respondent's reliance on third party agency Board cases is simply misplaced as General Counsel does not seek to impose liability on Respondent for editorial decisions of NBC or CBS. Vice President Tovar's comments alone constitute the violation.

Fourth, contrary to Respondent's bald assertion, admitting the Tovar news broadcasts into evidence does not implicate the First Amendment or Section 8(c) of the Act. Respondent's assertion without supporting argument is baseless and should be disregarded.

G. Respondent's serious and widespread unfair labor practices require a notice reading (Exceptions 77-80)

In exceptions 77-80, Respondent excepts to the remedial Order requiring a notice reading asserting it did not commit outrageous or flagrant violations of the Act. Apparently, Respondent does not consider the discipline and/or discharge of 54 employees across the country as outrageous or flagrant. Respondent's contentions are unfounded and fully addressed in General Counsel's contemporaneously filed Cross-Exceptions (7-8).

H. The remedial notices must contain consistent language addressing all Respondent violations across all locations (Exception 81)

In exception 81, Respondent takes issue with the remedial notices listing "all associates that Respondent disciplined and/or discharged, instead of just the associates in the particular store where the notice will be posted." [JD slip op. at 107 fn. 120] Again, Respondent's exception is unfounded. As elaborated in General Counsel's contemporaneously filed Cross-Exceptions (9), the notices do not go far enough because Respondent's serious and widespread misconduct cannot be viewed in isolation. To effectively address and fully ensure employees of their rights, the notices must consistently address all Respondent violations across all locations.

I. The Judge properly deemed Respondent's Vacancy Act affirmative defense as lacking merit and missing the mark (Exceptions 82-87)

Based on its claim that former Acting General Counsel Lafe Solomon served in violation of the FVRA and citing to *SW Gen., Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), Respondent excepts to the Judge's refusal to dismiss the Complaint or to reopen the record so Respondent may conduct discovery into Solomon's involvement in the decision to issue the Complaint.

Respondent's attempt to reopen the record or remand this matter should be summarily rejected as an improper attempt to delve into mental processes of a government decision-maker. Respondent has shown no grounds to question the validity of complaints issued under General Counsel Griffin or his ratification of actions under former Acting General Counsel Solomon.

In this respect, the Judge properly found that Respondent's arguments "miss the mark." [JD slip op. at 3:6-4:16, fn. 9] The Judge certainly did not ignore material evidence, as Respondent avers, even allowing Respondent to supplement the record on this issue after the close of hearing. [JD slip op. at 3:24-27, fn. 7; Tr. Vol. 36 at 6770-6779; R. Exh. 308] Upon due consideration, the Judge first properly concluded that the three Consolidated Complaints (the first, amended, and second amended) in this matter all issued in 2014,²³ after Richard Griffin was unquestionably validly serving as the General Counsel. Thus, regardless of whatever Acting General Counsel Solomon's involvement may have been in this case during his tenure as Acting General Counsel, Solomon's actions are not relevant because Griffin ultimately authorized and issued the Consolidated Complaints. [JD slip op. at 3:20-4:2] Second, the Judge reasoned that although the Board has not adopted the D.C. Circuit's reasoning in *SW General*, on October 5, 2015, Griffin took the precautionary step of ratifying the issuance and continued prosecution of the Complaint in this case. By taking that step, Griffin resolved any FVRA concerns by making it clear that the General Counsel has duly authorized the complaint allegations in this case. [JD slip op at 3:6-4:16 citing *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 2 (2015) (finding that Griffin's decision to ratify the issuance and continued prosecution of the complaint rendered moot any argument that the D.C. Circuit's decision in *SW General* precluded further litigation); *Boeing Co.*, 362 NLRB No. 195, slip op. at 1-2, fn. 1 (2015) (same)] The

²³ Consolidated Complaint issued on January 14, 2014. [GC Exh. 1(q)]. Amended Complaint issued on March 31, 2014. [GC Exh. 1(y)] Second Amended Complaint issued on May 5, 2014. [GC Exh. 1(bb)]

Judge's findings herein are fully supported by the record and legal precedent. Respondent has shown no grounds to question the validity of the Complaints issued under General Counsel Griffin or his ratification of actions under Former Acting General Counsel Solomon.

In an effort to sidestep the fact that General Counsel Griffin issued the Complaint, Respondent terms the underlying charges as the "Solomon charges" and speculates that Solomon may have made the initial decision to issue the Complaint. Respondent seeks a remand so it may conduct discovery into Solomon's role in the decision making process. Since the Complaint issued shortly after General Counsel Griffin assumed office, Respondent speculates that Griffin could not in such a short time "get up to speed on th[e] investigation and approve the issuance of five complaints on complicated charge allegations that had been pending" for 4 to 10 months. That argument provides no basis to counter the presumption that GC Griffin and his subordinates properly discharged their duties. *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (courts are to presume that public officials, absent "clear evidence to the contrary," have properly discharged their official duties). Further, Courts have consistently rejected attempts to delve into administrative agencies' decision-making processes based on how quickly the agency carried out its duties. *See, e.g., National Nutritional Food Ass'n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued new regulations 13 days after he took office; court rejects claims that it was impossible for the Commissioner to have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations); *see also, Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) ("A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues.").

Respondent's attempt to delve into the deliberative processes of former Acting General Counsel Solomon independently constitutes an improper attempt to probe into his involvement in the decision making process on charges pending during his tenure. Courts are not to probe the mental processes of agency decision-makers. *United States v. Morgan*, 313 U.S. 409, 422 (1941). *See Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) ("Since *Morgan*, federal courts have consistently held that, absent 'extraordinary circumstances,' a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, 'including the manner and extent of his study of the record and his consultations with subordinates.'") (quoting *Morgan*, 313 U.S. at 421-22).

Respondent Exception 82-87 should be summarily rejected.

J. The Judge properly allowed the General Counsel's Complaint amendment adding, as part of the make-whole remedy, search-for-work expenses and work-related expenses regardless of whether they exceed interim earnings (Exception 88)

In its final exception, Respondent excepts to the Judge allowing the General Counsel's Complaint amendment adding, as part of the make-whole remedy, search-for-work expenses and work-related expenses regardless of whether they exceed interim earnings. Respondent contends that the amendment was untimely and raises due process concerns.

Notwithstanding Respondent's argument, the Judge properly granted the General Counsel's motion to amend the Complaint. Section 102.17 of the Board's Rules and Regulations gives the judge wide discretion to grant motions to amend the Complaint once the hearing has begun and until the Board has issued an Order. There is simply no question that the Judge possessed the authority to grant the General Counsel's motions at hearing. The Judge explained to the parties that the request for relief was a legal issue that would not require Respondent to present any evidence at trial and the amendment was a permissible attempt by the General Counsel to seek a change to existing precedent. Respondent and Charging Party could address on

brief the propriety of the make whole remedy that included search-for-work and work-related expenses as part of the remedy. [JD slip op. at 104:fn. 118; Tr. Vol. 36 at 6813-6816]

The Judge fully considered the timing of the Complaint amendment and determined that it was not a basis for denying the motion in the absence of any showing of prejudice. With regard to any due process concerns, the Judge properly allowed the amendment because it was a legal issue for the parties to brief and there was no prejudice to Respondent by allowing the amendment; indeed, the amendment simply provided Respondent notice to brief the issue if it wished to do so. *See, e.g., Katch Kan USA, LLC*, 362 NLRB No. 162 (2015). The Judge properly allowed the Complaint amendment and Respondent's exception should be rejected.

IV. CONCLUSION

In conclusion, the Judge's Decision is fully supported by the record evidence and legal authority. The Judge properly determined that Respondent committed multiple violations of Section 8(a)(1) of the Act and Respondent has raised no exception or argument that warrants the Board overturning the Judge's well-reasoned decision. General Counsel respectfully requests that the Board affirm the portions of the Judge's decision to which Respondent excepts. Counsel for the General Counsel also requests any such further relief that the Board deems appropriate.

DATED at Fort Worth, Texas this 24th day of March 2016.



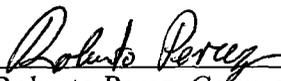
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing General Counsel's Answering Brief to Respondent Wal-Mart Stores, Inc.'s Exceptions to the Decision of the Administrative Law Judge has been electronically filed and served this 24th day of March 2016 upon each of the following:

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