

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WALMART STORES, INC.

And

Case 21-CA-150416

**ORGANIZATION UNITED FOR
RESPECT AT WALMART
(OUR WALMART)**

**REGIONAL DIRECTOR'S MOTION
FOR CLARIFICATION OF THE BOARD'S DECISION AND ORDER**

In accordance with Section 102.49 of the Board's Rules and Regulations, the Regional Director for Region 21, files this Motion for Clarification of the National Labor Relations Board's Decision and Order (Order) issued on February 10, 2016, denying the Employer's petition to revoke the Region's subpoena duces tecum B-1-OPMCGH.

I. Background

The charge in this matter was filed on April 20, 2015, by Charging Party OUR Walmart. The charge alleges, in summary, that the Employer violated Section 8(a)(1) and (3) of the Act, on about April 13, 2015, by closing its Pico Rivera, California store location, which OUR Walmart alleges was the most active store in terms of its support for and activities on behalf of OUR Walmart. The charge further alleges that that in order to mask its alleged unlawful conduct, the Employer closed four other stores operated by the Employer including its stores located in Brandon, Florida; Midland, Texas; Livingston, Texas; and Tulsa, Oklahoma.

After months of seeking the Employer's voluntary cooperation in providing documents responsive to the Region's investigation, the Region issued subpoena duces tecum B-1-OPMCGH (subpoena) to the Employer's Custodian of Records on October 15, 2015. The Region's subpoena request no. 13 calls for the, "Document titled 'Potential Blitz Weekend Activity,' covering the period October 1, 2012, through April 13, 2015" and its subpoena request No. 15 calls for the, "Document titled, 'Walmart AES FYE13: Stores Full Labor Report;' and any subsequent updated versions of this document covering the period October 1, 2012, to April 13, 2015."

On October 22, 2015, the Employer filed its petition to revoke the Region's subpoena and on October 29, 2015, the Regional Director filed her opposition to the Employer's petition to revoke. In its petition to revoke, the Employer argued that subpoena requests Nos. 13 and 15 are subject to the Protective Order issued by ALJ Geoffrey Carter in Cases 16-CA-096240 et al., and that the Region's request of these documents violates the Protective Order issued in that proceeding.

On February 10, 2016, the Board issued its Order in this matter denying the Employer's petition to revoke in its entirety. With respect to the Region's subpoena requests numbered 13 and 15, the Board stated in footnote 3 of its Order as follows:

With respect to subpoena paragraphs 13 and 15, we find that the General Counsel's request for the documents described therein does not violate the protective order issued in Case 16-CA-096240. Accordingly, we deny the Employer's request that the attorneys in Region 21 or any subsequent Regions be prohibited from using the requested documents at any time in this or any related proceeding. The General Counsel shall again enter into a protective order with the Employer covering

the documents in this proceeding, if the Employer so requests. See, e.g., *EEOC v. Morgan Stanley & Co., Inc.*, 132 F.Supp.2d 146, 160 (S.D.N.Y. 2000).

II. Argument for Clarification

Pursuant to Section 102.49 of the Board's Rules and Regulations, the Regional Director requests that the Board issue a clarification of footnote 3 of its Order in light of the contrasting interpretations that the Region and the Employer have taken with respect to footnote 3 of the Board's Order. Based on the Employer's interpretation of footnote 3, the Employer has yet to fully comply with the Region's subpoena, despite the Board's Order.

Since the Board's Order issued, the Employer has taken the position that footnote 3 of the Board's Order requires the Region to enter into a protective order or a confidentiality agreement with the Employer, during the Region's investigation stage of its proceedings, covering all documents responsive to the Region's subpoena which the Employer deems to be "confidential."

The Region contends that footnote 3 of the Board's Order applies only to subpoena requests numbered 13 and 15 and does not extend to any other paragraphs of the Region's subpoena. Moreover the Region interprets footnote 3 as requiring the Region to enter into a protective order *only* if this matter proceeds to a formal judicial proceeding, i.e. an unfair labor practice hearing heard by an administrative law judge, or subpoena enforcement proceedings heard by a district court judge. In the Region's view it is only during a formal judicial proceeding that there will be a judge to order and oversee compliance with a protective order. In addition it is only during a judicial proceeding that the documents at issue are at risk of becoming part of a public record and thus made accessible to the public.

During the investigative phase of the Board's proceedings, where this case is currently, there are already standard safeguards in place which keep documents obtained during the investigation both confidential and protected from the public's view.¹ The Region feels that its interpretation is consistent with the case cited by the Board in footnote 3 of its order *EEOC v. Morgan Stanley & Co., Inc.*, 132 F.Supp.2d 146, 160 (S.D.N.Y 2000). In *Morgan Stanley*, supra at page 160, the United States District Court for the Southern District of New York stated in relevant part,

“[I]t would be particularly unseemly to allow the EEOC to escape the rigors of a protective order entered in one case by seeking the same protected documents in a different case. The matter need not be resolved, however because the EEOC has agreed on the record that any documents covered by the protective order in the prior case will be held subject to similar prohibitions under the instant subpoenas.

Morgan Stanley supra involved, in part, a district court judge from the Southern District of New York, order that the EEOC enter into a second protective order covering subpoenaed documents that were already subject to a protective order. In that case, the protective order was ordered by and overseen by a district court judge. Here we are in the investigative phase of these proceedings and there is no judicial authority who can order or oversee a protective order. The Region is willing to enter into a protective order covering the documents requested in paragraphs 13 and 15 of its subpoena if and when this matter proceeds to a judicial forum, but not at the investigative stage of the process.

¹ See NLRB Casehandling Manual Part 1, Unfair Labor Practice Proceedings, Sec. 11820 (Policy on Disclosure of Documents and Board Agent Testimony).

Argument for Clarification

For the reasons set forth above, the Regional Director for Region 21 respectfully requests that the Board issue a clarification of footnote 3 of its Order and direct the Employer to provide all documents responsive to the Region's subpoena. Specifically the Regional Director requests that the Board clarify whether: footnote 3 of its Order applies to the Region's entire subpoena or only to subpoena requests 13 and 15; whether during the investigation stage of the unfair labor practice charge the Region is obligated to enter into a confidentiality agreement regarding documents responsive to the subpoena the Employer deems to be confidential; and whether the Region is obligated to enter into a protective order during the Region's investigation stage of the unfair labor practice charge or only if and when the matter proceeds to a judicial forum.

Dated: April 6, 2016



Olivia Garcia, Regional Director
National Labor Relations Board, Region 21

STATEMENT OF SERVICE

I hereby certify that a copy of the Regional Director's Motion for Clarification of the Board's Decision and Order has been submitted by E-filing to the Executive Secretary of the National Labor Relations Board, on April 6, 2016, and that each party was served with a copy of the same document by e-mail.

I hereby certify that a copy of the Regional Director's Motion for Clarification of the Board's Decision and Order was served by e-mail on April 6, 2016, on the following parties.

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Respectfully submitted,



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