

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

WAL-MART STORES, INC.

Case 21-CA-150416

and

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

**WAL-MART STORES, INC.'S RESPONSE TO REGIONAL DIRECTOR'S MOTION
FOR CLARIFICATION OF THE BOARD'S DECISION AND ORDER**

The Region's motion for clarification is procedurally and substantively improper and should be denied. Contrary to what the Region says, Walmart voluntarily provided, over a period of six months, more than 25,000 documents – and multiple position statements – in connection with the Region's investigation into Walmart's closure of five stores (which reopened in November 2015) for massive renovations to fix serious, chronic plumbing problems.

Nevertheless, the Region issued Subpoena No. B-1-OPMCGH, which sought various confidential business records, many of which Walmart previously produced. Walmart is ready to produce more records, but in its Petition to Revoke, it asked for, among other things: (i) an order barring the Region from using in this case two documents that are subject to the Protective Order in the parties' on-going intermittent work stoppage (IWS) litigation; and (ii) a confidentiality agreement to protect proprietary information contained in some of the responsive documents. It is worth noting that Walmart has already produced 38 non-confidential, non-privileged documents in response to the Subpoena.

On February 10, 2016, the Board denied Walmart's Petition, but directed the General Counsel to "enter into a protective order with the Employer covering the documents in this

proceeding.” [Ex. 1 at n.3.] Despite the plain language of the Board’s directive, *the Region refused even to consider Walmart’s proposed confidentiality agreement*. Instead, in its April 6, 2016 motion, the Region asserts that the Board’s directive applies to only two of the Subpoena’s requests (regarding IWS documents) *and* only if a formal judicial proceeding is commenced.

The Region artfully titled this motion as one brought under section 102.49, but it is really a motion for reconsideration pursuant to section 102.48(d). And the latter fails because the Region filed it 56 days *after* the Board’s February 10, 2016 Order, well beyond the 28-day deadline in section 102.48(d)(2). There also are no extraordinary circumstances warranting reconsideration, another requirement of section 102.48.

In fact, section 102.49 does not authorize a motion of any kind. Rather, it provides that *the Board* may, until such time as a court obtains jurisdiction of a case, modify or set aside its decisions. Even this authority, however, is not as broad as it may seem: section 102.49 subjects the Board’s authority thereunder to the limitations of section 102.48. Thus, whatever section applies, there was a 28-day deadline.

And even if the Board has discretion to consider untimely post-decisional motions, the Region makes no effort to explain how it acted diligently (it did not), nor does its motion seek to modify *an error in the remedy* provided to alleged discriminatees (ADs), which is the purpose of section 102.49. This is an investigatory subpoena – not enforcement efforts after a Board decision on the merits of a ULP – and thus the Region’s recourse is a subpoena enforcement proceeding in federal court.

The Region fares no better on the merits. As the Board previously recognized, the subpoenaed records at issue contain sensitive business information and are worthy of protection. Moreover, the General Counsel already agreed to far *broader* protections for similar records in

the parties' IWS case. The Region offers no basis – factual or legal – for why it has no obligation to enter into a confidentiality agreement during an investigation. To the contrary, where appropriate, courts have the authority to enforce subpoenas on the condition that the agency agree to additional confidentiality protections. This is one such case.

I. THE REGION'S MOTION IS UNTIMELY.

The Region's motion for "clarification" is nothing more than a motion for reconsideration, barred by the 28-day deadline in section 102.48(d)(2). *See NLRB v. Selvin*, 527 F.2d 1273, 1276 (9th Cir. 1975) (applying § 102.48, not § 102.49, and its deadline for post-decisional motions; § 102.49 "says nothing more than that the Board may modify or set aside its findings" before the filing of the record in court). The Region referred Walmart's Petition to the Board and argued in its opposition that no confidentiality agreement was warranted and that it had every right to use the IWS documents in the case. [10/29/15 Mem. at 1, 6, 10-11.] In its February 10, 2016 Order, the Board accepted the latter argument, but rejected the former.

The Region disagrees with the Board's ruling, but that doesn't justify a second bite at the apple. It is black-letter law that motions for reconsideration/modification/clarification (whatever title is used) are improper where, as here, they simply rehash failed arguments. *E.g., Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001).

Moreover, nothing in the Region's motion raises "extraordinary circumstances," a prerequisite for relief under section 102.48(d)(1). *See, e.g., Lourdes Health Sys., Inc.*, 320 NLRB 97, 97 (1995) ("General Counsel contends that Rule 102.48 covers *all* extraordinary postdecisional motions, including motion for clarification...." (emphasis added)); *see also Selvin*, 527 F.2d at 1277-78 ("[T]he record before us contains no showing of extraordinary circumstances which might excuse this failure [to meet the deadline]."). There has been no intervening change in the law. Nor has the Region discovered any new facts that bear upon the

Subpoena or the need for confidentiality protections. Whatever unspecified arguments the Region had against such protections, it had to make them in its opposition to Walmart's Petition, not in a new motion after the Board ruled on the Petition and offered clear directions to the parties about the appropriateness of a protective order in this case. *See Zimmerman*, 255 F.3d at 740 (disregarding arguments "made for the first time on a motion to amend").

Even if section 102.49 applied here (which it does not), the Region is still not entitled to any relief. Section 102.49 authorizes the Board to "modify or set aside, in whole or in part, any ... order made or issued by it," but only "*within the limitations of the provisions of ... § 102.48,*" which includes the 28-day deadline in section 102.48(d)(2). Thus, no matter which regulation it invokes, the Region's motion is time-barred. *See, e.g., Cmty. Med. Servs. of Clearfield, Inc.*, 239 NLRB 1244, 1244 (1979) (denying motion for reconsideration filed beyond deadline).

Although the Board has previously stated that it has discretion to consider motions beyond the 28-day deadline, those were cases in which the Region either provided compelling reasons for the delay or sought to correct inadvertent errors in the remedy that the Board provided to ADs. *E.g., Lourdes*, 320 NLRB at *1 (counsel's misconduct caused Region to miss deadline); *Raven Gov't Servs., Inc.*, 336 NLRB 991, 991-92 (2001) (noting that Rule 102.49 motions are limited to "remedial issue[s]" and concluding that "[t]he remedial modifications we make today properly correct inadvertent errors by the Board and the judge"). This case presents neither scenario.¹ Section 102.49 simply does not apply to reconsideration of "a *substantive* Board ruling" like the one at issue here. *Raven*, 336 NLRB at 991 (emphasis added).

¹ On February 18, 2016 – a week after the Board's order – Walmart notified the Region that the Board had directed the parties to enter into a confidentiality agreement. The Region had plenty of time to take up the issue with the Board (before the 28-day period expired), but instead it simply told Walmart it would not enter into any agreement. [Ex. 2.]

Finally, under the Region's logic, there would never be a time limit for it to seek reconsideration (or "clarification") of a Board ruling on an investigatory subpoena. Section 102.49 can be invoked up until the record in a case is filed with a court; the Region, however, has unilateral control over whether an investigatory subpoena, which is *not* self-executing (*see infra* at 8), ends up in federal court. *E.g., Atl. Richfield Co. v. FTC*, 546 F.2d 646, 649-50 (5th Cir. 1977) (rejecting subpoenaed party's attempt at pre-enforcement relief in court). Thus, if the Region's expanded reading of section 102.49 were correct, it could file motions *in seriatim* for months or years and litigate the terms and conditions of its subpoena in piecemeal fashion – all before there is any chance at judicial review. That is an arbitrary and irrational reading of section 102.49. *Systech Env't'l Corp. v. EPA*, 55 F.3d 1466, 1470-71 (9th Cir. 1995) (rejecting agency's reading of regulation where it would "produce results that are both irrational and perverse").

II. THE BOARD CORRECTLY RECOGNIZED THAT CONFIDENTIALITY PROTECTIONS ARE WARRANTED AT THIS STAGE OF THE PROCEEDINGS.

Aside from its untimeliness, the Region's motion fails on the merits. The Subpoena requests confidential and proprietary business records, beyond the specific IWS documents sought in Request Nos. 13 and 15. For instance, Request No. 10 seeks construction contracts that contain information related to terms and conditions Walmart is able to negotiate with its vendors, and if made available to Walmart's competitors, could give them an unfair advantage in the market. Those contracts are not a matter of public record.

Moreover, Request No. 7 seeks certain documents that reflect Walmart's strategies and internal business practices in dealing with labor-related issues, most notably the illegal and disruptive demonstrations OURWalmart members and supporters have conducted at Walmart stores (including the Pico Rivera store), at Walmart managers' homes, and in other locations; the documents also raise issues concerning associate pay and Walmart's efforts to engage its

associates on other issues that concern them. Again, these practices are not a matter of common knowledge, and if these proprietary documents ended up in the hands of competitors, they could misappropriate that information for their own use despite the time and money that Walmart expended in developing it over time. *See, e.g., Bethlehem Steel Co.*, 61 NLRB 854, 856 (1945) (part of long line of cases recognizing that employers may possess confidential labor and grievance-related information); *Mike Hammer Prods.*, 1998 WL 1181917, at *3 (Mar. 31, 1998) (Advice Mem.; same). Moreover, Walmart's labor relations strategies and practices include ensuring safety during demonstrations and similar activities; if those were made public, customers and associates could be put at risk.

A third category of confidential documents is the "system-wide survey" described in Request No. 8. That survey is a compilation of plumbing data that reflects pricing information and Walmart's internal deliberations on how to prioritize its resources in addressing maintenance and repair issues across its U.S. fleet of stores. The same concerns discussed above apply here.

A. The Region refused to agree to the limited confidentiality protections Walmart proposed.

Walmart proposed the same confidentiality protections for the above categories of documents that the Region previously agreed to in the IWS case. [Ex. 3.] According to the Region, the IWS case is related to this case in so far as both involved allegations of retaliation against OURWalmart supporters. [10/29/15 Mem. at 1, 11.] Still, the Region rejected Walmart's proposed agreement.

Seeking to find a compromise, Walmart asked the Region to propose an alternative agreement; the Region refused. Walmart proposed a provision whereby the Region could challenge Walmart's designation of a particular document (or documents) as confidential; the Region rejected that. Walmart even proposed an agreement that would have allowed the Region

to use confidential documents in this proceeding *and* any other proceeding, *anywhere* in the U.S., in which Walmart is a party.² [Ex. 4.] That was an eminently reasonable proposal.

Nevertheless, the Region rejected that proposal as well. [*Id.*] Its reason? *The Region insists it has no obligation to enter into any confidentiality agreement.* Not only is it hard to conceive of any legitimate reason why the Region would need to use a confidential Walmart document in a case in which Walmart is *not* a party, the Region's legal argument goes too far.

B. Courts, not the General Counsel, dictate whether confidentiality protections are warranted with an investigatory subpoena.

The Region's policies and procedures do not afford Respondents like Walmart sufficient protection from unfettered dissemination of confidential documents. Indeed, the Region's motion makes only one passing reference to such internal safeguards [Mot. 4], but the NLRB Casehandling Manual provision it cites in footnote 1 deals with the separate issues of a party (or non-party) compelling discovery of agency files and testimony of agency personnel. There is nothing about protecting a *Respondent's* confidential business information. Nor is it apparent whether or how a Respondent could even enforce that provision in the Manual.

And there is nothing in the NLRA or the Region's rules that prohibit agency personnel from sharing confidential materials with charging parties like the UFCW and OURWalmart as part of its investigation (e.g., during witness interviews). *Once it has a hold of such materials, a charging party is under no obligation to safeguard them.* Case in point: in the IWS case, the UFCW leaked to a media outlet (Bloomberg Businessweek®) confidential Walmart documents

² In the IWS case, the Region agreed to, and ALJ Carter entered, a Protective Order that specifically states that documents "marked or designated 'Confidential' shall only be used for purposes directly related to this proceeding." [Ex. 3 at 2.] It further provides: "All Confidential Information shall be used only for the prosecution and/or defense of this action." [*Id.*]

that were *not* in the public record. [Ex. 5, Mot. to Enforce Protective Order.]³ The Region says nothing to address this hole in its (alleged) confidentiality obligations, and certainly has not assured Walmart that it will take steps to ensure that doesn't happen in this ULP investigation.

It is not the Region's prerogative to dictate whether and when confidentiality agreements are warranted. Investigatory subpoenas are not self-executing; if the Region wants to compel compliance with the Subpoena, it must seek enforcement in federal district court. *Jerry T. O'Brien, Inc. v. SEC*, 704 F.2d 1065, 1067 n.4 (9th Cir. 1983). "Since the enforcement of a subpoena is an independent judicial action, and not merely an action ancillary to an earlier agency action, a court is free to change the terms of an agency subpoena as it sees fit." *U.S. v. Exxon Corp.*, 628 F.2d 70, 77 (D.C. Cir. 1980) (enforcing subpoena subject to "the precise terms of a protective order").

"It therefore necessarily falls within the Court's discretion to provide additional confidentiality protections *beyond* those offered by the agency when [as in this case] it concludes that the agency, in the exercise of its discretion, has not provided safeguards sufficient to protect the interests of those at risk." *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1119 (D.D.C. 1994) (emphasis added) ("It is a legitimate exercise of the court's authority to modify the terms of an agency subpoena by providing additional confidentiality protections..."); *see also EEOC v. C&P Tel. Co.*, 813 F. Supp. 874, 876-77 (D.D.C. 1993) (requiring confidentiality order based on respondent's "strong interest" in preventing disclosure of subpoenaed documents to union and noting that agency's reference to internal policy "has not adequately assured respondents ... that the information will not be disclosed"); *EEOC v. Bashas' Inc.*, 2011 WL 6098788, at *2 (D. Ariz.) (citing *C&P Telephone* and requiring confidentiality order for wage and hour

³ Judge Carter granted Walmart's motion to enforce the protective order against the UFCW/OURWalmart as to those IWS documents. [Ex. 6.]

information). Thus, courts have entered protective orders in NLRA subpoena enforcement actions to protect confidential business information. *E.g.*, *NLRB v. Cemex, Inc.*, 2009 WL 5184695, at *1-2 (D. Ariz.) (customer lists and profit/loss statements); *NLRB v. Friedman*, 352 F.2d 545, 546-47 (3d Cir. 1965) (order protecting information which might lead to the identification of respondents' customers and suppliers).⁴

It is irrelevant that no judge is presently presiding over the investigatory phase of this ULP charge. The parties can enter into a confidentiality agreement, and any disputes arising out of that agreement can then be directed to either the ALJ (in the event a complaint is issued) or a federal district court, which has jurisdiction over any subpoena enforcement action.

C. The Board's order is consistent with *EEOC v. Morgan Stanley*.

Like here, *Morgan Stanley*, cited by the Region (Mot. 4), involved an agency's investigation into a charge. 132 F. Supp.2d 146 (S.D.N.Y. 2000). The district court noted that certain subpoenaed documents were subjective to a prior protective order, and the agency agreed to keep them confidential. *Id.* at 157. But here, the Region refuses to honor the IWS Protective Order. Moreover, unlike the employer in *Morgan Stanley*, Walmart has justified the need for a confidentiality agreement – UFCW/OURWalmart's illegal dissemination of confidential documents, to which they obtained access in the IWS case. And in *Morgan Stanley*, the employer sought to deny charging parties access to confidential documents. *Id.* Walmart's request is far more narrow: it simply wants to prevent the Region (and the UFCW/OURWalmart) from disclosing or using its confidential business records in cases *where it is not a party*.

⁴ In fact, the Federal Rules authorize Rule 26(c) protective orders in subpoena enforcement actions. "The[] rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings." Fed. R. Civ. P. 81(a)(5). There is no such exception "otherwise provided" in the NLRA.

Finally, the *Morgan Stanley* court recognized that “the owners or possessors of ... information have a legitimate interest, recognized by law, in ensuring that government officials use subpoenaed information only for the purposes for which the power is granted.” *Id.* at 154 (“People and corporations have legitimate interests in protecting the privacy of information.”). It also noted that information, like the Walmart records at issue here, “can also have *substantial economic value*—as the current catch-phrase “Information Economy” constantly reminds us.” *Id.* (emphasis added).

There is no need here for a time-consuming subpoena enforcement action – the Board can and should uphold its prior, unambiguous order requiring the Region to agree to confidentiality protections, especially since Walmart’s proposed restrictions are very limited and reasonable.

CONCLUSION

For the reasons stated above, Walmart respectfully requests that the Board deny the Regional Director’s Motion for Clarification.

DATED this 12th day of April, 2016.

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