

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 REPLY TO WALMART'S RESPONSE TO
MOTION FOR CLARIFICATION OF THE BOARD'S DECISION AND ORDER**

The Regional Director for Region 21 files this short reply to the Response to Regional Director's Motion for Clarification of the Board's Decision and Order (Response) filed by Walmart Stores, Inc. (Employer) on April 12, 2016. The Regional Director maintains that its Motion for Clarification (Motion) is timely filed and that the Employer's own Response demonstrates the need for clarification due to the parties' differing interpretations of the Board's Order.

I. The Motion is timely and properly filed under Section 102.49.

Contrary to the Employer's contentions, the Motion is timely and properly filed under Section 102.49 of the Board's Rules, which provides that the Board may modify its order at any time before the record in the case is filed in court. See *Raven Government Service, Inc.*, 336 NLRB 991, 991 (2001), *enfd.* 315 F.3d 499 (5th Cir. 2002), citing *Dorsey Trailers*, 322 NLRB 181 (1996). Here, the Region has not yet filed enforcement proceedings with the court.

The Employer mischaracterizes the Motion claiming that it is a motion for reconsideration, arguing that therefore it is untimely under Section 102.48. However, the Regional Director did not file a motion under that section; she simply has no need to do so. The

Employer seems to ignore the fact that the Board ruled in favor of the Regional Director by denying the Employer's petition to revoke the subpoena. The Regional Director is not asking the Board to reconsider this favorable decision. Such request would be illogical. Instead, as set forth in the Motion, the Regional Director is merely seeking that the Board clarify footnote 3 of its Order.

The time limitations of Section 102.48, which would prohibit a motion for reconsideration, do not apply to motions filed under Section 102.49. See *Dorsey Trailers*, 322 NLRB at 181; *Raven Government Service, Inc.*, 336 NLRB at 991 (motion to modify filed well after 28 days from initial Board Order, but before record filed in Circuit Court, granted). While Section 102.49 of the Board's Rules states that the Board may modify its order "within the limitations of the provisions of Section 102.48," nothing in Section 102.48 prohibits the filing of the Regional Director's Motion. *Id.* at fn. 3. The Board has noted that, "Sec. 102.48 contains limitations on motions for reconsideration, rehearing and reopening, but it contains no limitations on modification." *Id.* The Regional Director's Motion is not seeking reconsideration, rehearing, nor reopening; only that the Board clarify footnote 3 of its Order, to enable the Region's investigation to move forward. Therefore, the Motion should be granted.

II. The Employer's Response demonstrates the need for clarification of the Order.

Notably, the Response itself plainly illustrates the need for clarification as the parties interpret the meaning of footnote 3 of the Board's Order differently, which is preventing the Region's investigation from progressing. Although the Employer accuses the Region of rehashing its argument, it is actually the Employer who spends pages 5-6 of its Response raising certain confidentiality arguments with respect to subpoena request Nos. 10, 7, and 8, which it

never before presented to the Board. The Employer's attempt to reargue its petition to revoke is improper and should be disregarded. Nevertheless, the Response shows that the Employer construes footnote 3 of the Board's Order to apply to other paragraphs beyond paragraph requests Nos. 13 and 15 of the Region's subpoena. The Region disagrees with this interpretation of the Board's Order.

Furthermore, the Employer loosely interchanges the terms "confidentiality agreement" and "protective order." The Board's Order, at footnote 3, explicitly refers to a protective order—not a confidentiality agreement. The Employer interprets this footnote as meaning that the Regional Director must enter into a "confidentiality agreement." As set forth in its Response, the Employer maintains that the Region must enter into a confidentiality agreement covering not only subpoena paragraphs 13 and 15, but rather all documents responsive to the subpoena which the Employer deems to be confidential. Thus, the Employer has insisted that the Regional Director enter into the confidentiality agreement attached as Exhibit A. However, the Employer has failed to cite to any case law requiring the Regional Director to enter into a confidentiality agreement at this stage of the proceeding (i.e. during the investigative phase, before the commencement of subpoena enforcement proceedings). As explained in the Motion, the Regional Director disagrees with the above interpretation. This disagreement is part of the basis for Region's motion for clarification of the Board's Order.

III. Conclusion

The Regional Director has properly requested a clarification of the Board's Order pursuant to Section 102.49. The request is timely since Section 102.48 is not implicated in this

matter. The Employer's own Response shows that there is a need for clarification of the Board's order, to allow for the continuation the Region's investigation.

For the above-noted reasons, and for the reasons set forth in the Regional Director's Motion, it is respectfully submitted that the Motion should be granted.

Dated: April 19, 2016



Olivia Garcia, Regional Director
National Labor Relations Board
Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017

Exhibit A

Hernandez, Irma

From: Janicik, Douglas <DJanicik@steptoe.com>
Sent: Thursday, February 18, 2016 3:28 PM
To: Hernandez, Irma; Parker, Lindsay
Cc: Wheeless, Steven; Feldman, Alan
Subject: Walmart/Pico
Attachments: Revised Final Privilege Log 2-18-2016.pdf; REVISED Confidentiality Agreement for Investigative SDT.doc

Hello Lindsay/Irma: Thank you for your e-mail on the order on Walmart's Petition to Revoke. Having reviewed the order, we thought we'd touch base with you on a few issues. For starters, attached is a privilege log for the executive team e-mails that we have pulled and reviewed to date. To the extent we go back and pull additional e-mails (as I explain below), we reserve the right to supplement this privilege log with additional entries.

Also attached is the latest version of a confidentiality agreement that we sent over to you for consideration (this one allows the Region to use confidential documents in any case in which Walmart is a party). In line with the Board's instructions in its order, we propose that this agreement govern the proceedings in this case. Please take a look and let us know if this agreement is acceptable to the Region. If you have any proposed revisions, we'd be happy to consider them.

Regarding a response to subpoena request nos. 9 and 12 (relating to the dates individuals were "installed to" the executive team and stores permanently closed by the executive team), we previously produced certain documents after conferring with you on the potential breadth of those requests. Can you confirm that those documents are sufficient for those two requests? We assume that is the case since we have not heard anything more from the Region on this issue.

Regarding an additional e-mail review, Walmart will go back and pull executive team e-mails for the time period between the Region's issuance of its initial subpoena and its issuance of a replacement subpoena. As you may recall, we extracted executive team e-mails upon receiving that initial subpoena, and objected to going back and doing a second extraction because the Region decided to withdraw its first subpoena. In light of the Board's order, though, Walmart will do that second extraction (through the date of the replacement subpoena), and, as Walmart did with the first batch of e-mails, review for items concerning the decision to close the Five Stores.

Before doing that, however, we would like to discuss the scope of the Region's request for e-mails concerning "other protected concerted activity" (PCA). (This way, we can try to avoid piecemeal extractions.) Walmart has already searched the executive team's e-mails for items relating to associate involvement with OURWalmart (for the specified time period). If we go broader than that, without any search parameters, it seems a trained labor lawyer would have to review all of the executive team's e-mails—which, given the time frame, could easily total tens of thousands of e-mails—for any embedded information about PCA or any nuances that suggest possible PCA. And then, additional investigation may be required to confirm that a particular e-mail does in fact reflect PCA. We assume that the Region does not want a massive dump of tens of thousands of e-mails on a litany of associate issues that have no bearing on the store closure issues. Are there certain search terms you could propose that will hone in on the documents you consider important for your investigation? Or, we'd be happy to put together a list of search terms if you could provide some parameters to what you are looking for.

Perhaps we can set up a call to discuss these items once you've had a chance to consider these issues. Many thanks for your time.

Best,
Doug J.

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

WAL-MART STORES, INC.

Respondent,

Case 21-CA-150416

and

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

Charging Party.

CONFIDENTIALITY AGREEMENT

Region 21 issued an investigative subpoena duces tecum seeking substantial quantities of documents from the Respondent Walmart Stores, Inc. (“Walmart”) for production. Walmart reports that the production contains confidential and particularly sensitive proprietary business information – created solely for Walmart’s business purposes – which competitors could use to their immediate financial advantage or Walmart’s disadvantage.

Given the investigative status of this case, Region 21 and Walmart enter into this Confidentiality Agreement to govern the use of confidential documents Walmart discloses in response to Subpoena Duces Tecum No. B-1-OPMCGH and any other subpoenas or document requests in this case. This Confidentiality Agreement also governs the use of confidential documents Walmart previously voluntarily disclosed to the Region in this case (which were designated as “Confidential”). Region 21 and all those working on the investigation or review of this case (collectively, “the Region”) agree to comply with the following:

1. Subject to paragraph 5 below, the Region shall use documents marked “Confidential” only for purposes directly related to investigating this case or in any other case in which Walmart is a named Respondent. In particular, the Region may not use Confidential documents in connection with its investigation into unfair labor practice charges against other companies or business entities, and it may not permit other Regions of the NLRB to use or review Confidential documents except as described in paragraphs 3 and 4.

2. The Region shall secure and maintain all Confidential documents in a manner so as to avoid disclosure or dissemination of their contents in a manner not specifically authorized by this Agreement or to anyone not specifically identified in this Agreement, including the Charging Party or any witnesses.

3. Subject to paragraph 5 below, the Region may permit its counsel, investigators, representatives, staff, or agents to review Confidential documents only if those individuals have direct functional responsibility for the investigation or review of this case or any other case in which Walmart is a named Respondent. Before disclosing Confidential documents to any such individual, the Region shall provide him or her a copy of this Agreement and inform the individual they will be subject to the provisions of this Agreement.

4. Should the Region wish to disclose Confidential documents to any person not specifically authorized by this Agreement to review Confidential documents, including other Regions, it must first confer with Walmart and seek Walmart’s written consent. If Walmart consents, before making the disclosure the Region must:

- a. provide a copy of this Agreement to the person to whom the Region is making the disclosure, and

b. obtain the person's written agreement to be subject to the provisions of this Agreement.

5. This Confidentiality Agreement shall continue to be binding throughout the investigation and final disposition of this case or until an administrative law judge or federal district court judge enters a superseding Protective Order. If the Region issues a Notice of Withdrawal or Notice of Dismissal or once the case is otherwise concluded, the Region agrees to return all documents subject to this Confidentiality Agreement (that are not otherwise admitted into evidence in a formal proceeding) within fifteen (15) calendar days.

Olivia Garcia
Regional Director, Region 21
National Labor Relations Board

Steven D. Wheelless
STEPTOE & JOHNSON LLP
Attorney for Wal-Mart Stores, Inc.

Date

Date

STATEMENT OF SERVICE

I hereby certify that a copy of the **Regional Director's Reply to Walmart's Response to 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 19, 2016, and that each of the following parties was served with a copy of the same document by email on April 19, 2016:

Steven Wheelless, Esq.
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Respectfully submitted,



Aide Carretero
Aide Carretero
Secretary to the Regional Attorney
National Labor Relations Board, Region 21