

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

WAL-MART STORES, INC.

Respondent,

**Case 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**

and

**THE ORGANIZATION UNITED FOR RESPECT
AT WALMART (OURWALMART),**

Charging Party.

**WAL-MART'S ANSWER TO THE
GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

The Counsel for General Counsel takes exception to the ALJ's decision regarding the NBC and CBS broadcasts of heavily edited interview snippets and the ALJ's remedial order.

As to the first issue, the CGC's exception lacks merit because the CGC (a) seeks to impose liability on Walmart for the broadcast of heavily edited and spliced snippets of much longer interviews that two media outlets used in creating their own Black Friday 2012 news coverage; wholly ignoring the Board's "totality of the circumstances" test; and (b) ignores the entire body of Board law holding that conditional language (*e.g.*, could, maybe, depends, if) – such as that used here – does not constitute a "threat."

As to the second issue, the CGC's exception lacks merit because this case does not involve any national policy or flagrant, pervasive, and outrageous unfair labor practices. Rather, the central issue in this case – application of the Supreme Court's and Board's intermittent work stoppage jurisprudence to specific associates at a few specific stores – involved complex factual and legal issues, which Walmart navigated with calm, measured restraint despite a massive, sustained IWS campaign by UFCW/OWM targeting its brand and reputation over two years. Indeed, the CGC acknowledged the complexity of the issues in this case, stating: "Yeah, I acknowledge the intermittent work stoppage issue was a very difficult issue. So I completely acknowledge that." [RT 5129:23-24.] On that "very difficult issue," Walmart took no action in response to wave after wave of choreographed intermittent work stoppages and ultimately did no more than apply its attendance policy to yet another wave of IWS based on well-established Supreme Court and Board authority, and only then after UFCW/OWM leaders expressly threatened to continue the IWS campaign for the same, unchanging objectives and delivered on that promise. Board law does not provide for extraordinary remedies under those circumstances.

ARGUMENT

I. **WALMART DID NOT VIOLATE THE ACT WHEN NBC AND CBS AIRED HEAVILY EDITED INTERVIEW EXCERPTS IN LARGER NEWS STORIES.**

In the Complaint, the CGC alleged that Walmart violated the Act with threats of unspecified reprisals when NBC and CBS aired heavily edited and spliced interview excerpts from longer interviews with Walmart representative Dave Tovar as part of the media outlets' Black Friday 2012 news coverage. [GC Ex. 1(bb) ¶¶ 4(B)(1), (2).] The ALJ found no merit to the allegation. [ALJ Dec. 41-44.] The CGC challenges the ALJ's finding (Cross-Exceptions 1, 2) based on two analytical errors. First, the CGC acknowledges the Board's "totality of the circumstances" test, but then refuses to apply it to the heavily edited and spliced snippets of larger interviews that NBC and CBS did not air. Second, the CGC ignores the repeated "conditional" language involved here, which invokes an entire body of Board law that the CGC, again, ignores. The ALJ did not ignore the applicable law and reached the right result.

A. **The ALJ Applied The Board's "Totality of the Circumstances" And "Conditional Language" Standards.**

Both the ALJ and the CGC set forth the entire interview segments and the heavily edited excerpts that NBC and CBS used in their news stories. [ALJ Dec. 41-42; CGC Cross-Exceptions Brief [Cross Ex. Br.] 6-7, 9-10.] Walmart will not repeat the interviews here. However, Walmart does note that the broadcast snippets did not happen on "live" TV. NBC and CBS sought out Walmart for comment on November 16 and 19 respectively as they created their Black Friday 2012 news stories. [ALJ Dec. 41-42.] They interviewed Walmart representative Dave Tovar remotely, and the record does not contain any evidence of the questions asked in either interview; giving no context for the answers. [ALJ Dec. 41:18-19, 42:15-16.] Moreover, in the CBS news story, CBS inserted a snippet in its report that *it spliced together* from its longer interview with Tovar, in which Tovar says (in the CBS snippet):

I think this is just another union publicity stunt and the numbers that they're talking about are grossly exaggerated. If associates are scheduled to work on Black Friday, we expect them to show up and to do their job and if they don't, *depending on the circumstances*, there *could* be consequences.

[*Id.* (emphasis added).] CBS created that snippet by splicing together *two different* sections of its longer interview of Tovar. [Jt. 1319(a), Jt. 1319(b).] The first sentence of the snippet (“I think this is just another union publicity stunt and the numbers that they're talking about are grossly exaggerated.”) came from the very first part of the interview; in response to an inaudible question. [*Id.*] Whereas the second sentence of the snippet (“If associates are scheduled to work . . . depending on the circumstances, there could be consequences.”) comes later in the interview, right after Tovar said (edited out by CBS), “Look, we have strict policies that prohibit retaliation in anyway.” [*Id.*] CBS chose not to air that part of Tovar's statement in its broadcast. [*Id.*]

When reviewed in context, Tovar made all of the following statements during the interviews:

- We have strict policies that *prohibit retaliation* in any way
- *Depending* on the circumstances, there *could* be consequences
- It's going to *depend* on each individual circumstance like I said
- We'll take those on a *case-by-case basis* and handle them *depending* on the actions
- They do have rights and we *respect those rights*
- Just like *if* you didn't show up for work one day, I think your bosses would want to have a conversation with you about why
- You know, *every circumstance is going to be different* on Black Friday
- We're going to take those on a *case-by-case basis*

[ALJ Dec. 41-42 (emphasis added).] And as noted by the ALJ, Walmart *did not* take any action in response to the UFCW/OWM's Black Friday work stoppages. [ALJ Dec. 26:15-16.]

Given the totality of the circumstances when viewing Tovar’s comments in context, the ALJ concluded “In his extended remarks to both NBC and CBS, Tovar explained that associates **could** face consequences for missing work, but emphasized that Walmart would evaluate those issues on a case-by-case basis and based on the relevant circumstances. Further, in his CBS interview, Tovar added that Walmart does not tolerate retaliation against associates who engage in protected activity. Because the NBC and CBS news segments omitted those portions of Tovar’s remarks [along with the others referenced above], the news segments gave a potentially misleading impression of how Walmart planned to respond to the anticipated Black Friday strikes. Therefore, this is not a case where the news reports fully conveyed the meaning and context of Tovar’s remarks. And, since Walmart did not exercise any control over which portions of Tovar’s remarks that NBC and CBS chose to include in their news segments, I do not find that Walmart is liable for any misunderstandings of Walmart’s position that flow from the editing decisions made by NBC and CBS.” [ALJ Dec. 44:12-29 (emphasis in original) (citing *U.S. Electrical Motors*, 261 NLRB 1343, 1344 (1982) (employer not liable under the Act for statements in a newspaper editorial and article where the newspaper did not act as the employer’s agent).] Notably, the ALJ references only one associate seeing either snippet. [ALJ Dec. 42:6.]

B. The CGC Ignores The “Totality Of The Circumstances” Test.

The CGC states expressly that he seeks to impose liability on Walmart based solely on the interview snippets excerpted, spliced, and chosen by NBC and CBS to include in their larger news stories: “Tovar’s comments alone in the relevant portion of the interview that aired constitute the violation.” [Cross Ex. Br. 13.] But that approach completely ignores the Board’s “totality of the circumstances” test, which the CGC acknowledges before ignoring it. [*Id.* 7 (“The Board considers the totality of the circumstances in making that determination, including the context in which the statement is made. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994),

quoting *NLRB v. Gissel Packing* 395 U.S. at 617.”.)] How can the CGC acknowledge that the Board must evaluate the alleged threatening statement “in the context in which the statement is made” and then argue in the next breath that the context of the alleged threatening statements, *i.e.*, the *rest* of the interview comments, does not matter? That approach flies in the face of black-letter Board law *requiring* the assessment of any alleged unlawful threats in the context of the surrounding statements.¹ It also flies in the face of relevant Board and court law holding that liability cannot be based on edited interview excerpts because they are – by definition – “out-of-context”; *i.e.*, they do not show the “totality of the circumstances.”

1. The CGC’s Specific And Exclusive Focus On The Third-Party-Selected Excerpts Eliminates Any “In Context” Review.

As discussed below, the CGC cannot establish liability based on out-of-context interview snippets created and packaged by independent news agencies under authenticity, relevance, and agency principles. In addition, the CGC effectively withdraws the entire interview issue from the Board’s review because the Board must review the CGC’s allegation in the “totality of the circumstances” under the *Mediplex* rule, but the CGC expressly states that his allegation *excludes* any review of the totality of the circumstances: “Tovar’s comments *alone* in the relevant portion of the interview that aired constitute the violation.” [Cross Ex. Br. 13 (emphasis added).]

¹ See *In re Kroger Co.*, 339 NLRB 740 (2003) (affirming the ALJ’s finding that a supervisor’s statement – indicating that, if unionized, the company had a contingency plan in the event of a strike that could require transferring employers - was “based on objective facts,” and when viewed in the totality of the circumstances was couched in terms of customer service and economic necessity and did not violate the act because when “considered in context, [the supervisor’s] comments cannot reasonably be viewed as a threat...”); *American Thread Co.*, 270 NLRB 526 (1984) (affirming ALJ’s finding that a supervisor’s statement to a union-member employee that he should not be “bunching up talking [after attending a ULP hearing], just go ahead and run his job as usual,” was not a threat of discipline because the context of the conversation indicated that supervisor’s concern was over job performance not union activity).

2. The Board And Courts Do Not Rely On Out-Of-Context, Third-Party Edited Materials.

Walmart did not say anything on “live” TV. Tovar did not speak to any associate covered by Section 7 when answering the NBC and CBS interview questions. No associate saw the entire interview responses. Walmart did not draft or ask the questions. It did not make any broadcast decisions. It did not select the off-air interview snippets. It did not package the snippets into the larger broadcast stories. It did not know how or if NBC and CBS would cut and splice and excerpt the interviews. And Walmart did not air the snippets to anyone. Consequently, the use of such out-of-context snippets does not even meet the Board’s threshold standards for “evidence.”

The NLRB’s ALJ Benchbook recognizes the unique difficulties of authenticating television interviews. *See* ALJ Benchbook § 13-212 (“Newspaper/Television Reports”). The ALJ Benchbook notes that “TV videotapes are not listed in FRE 902 as self-authenticating. Questions are more likely to arise over the integrity of a TV news clip (*has it been edited?*) than whether a page from a newspaper is a forgery.” *Id.* (emphasis added). In fact, just establishing the basic authenticity of taped recordings requires the proponent to prove the “*absence of material deletions, additions, or alterations in the relevant part of the tape.*” *See United States v. Sarro*, 742 F.2d 1286, 1292 (11th Cir. 1984) (emphasis added). Here, the CGC could not make even that threshold showing because there is no dispute that NBC and CBS did not broadcast the entire interviews with Tovar. Rather, they used heavily edited and spliced snippets in their TV broadcast stories. In fact, the CBS broadcast clip contains an edited snippet CBS created by combining sentences taken from two separate answer responses. [R. 227; Jt. 1318(a), Jt. 1318(b), Jt. 1319(a), Jt. 1319(b); GC 43, GC 44.] Moreover, no one even knows what questions were asked, which creates additional ambiguity about the meaning of the edited materials. As

the ALJ found, Walmart cannot be “liable for any misunderstandings of Walmart’s position that flow from the editing decisions made by NBC and CBS.” [ALJ Dec. 44:21-22.]

In addition to basic authentication issues, both the GC and the courts observe that snippets of televised interviews on labor matters do not serve as probative evidence of underlying events. Again, this is because interviews may be edited and played out of context.

In *General Electric Co. v. UAW*, 568 F. Supp. 1138 (S.D. Ohio 1983), an employer sued a union under 29 U.S.C. § 301 for allegedly instigating an illegal strike in violation of a collective bargaining agreement. The parties’ CBA generally prohibited the union from holding strikes, but created an exception for mid-term strikes held for an “unresolved grievance,” *i.e.*, a grievance that remained deadlocked after completing each step in the adjustment process. *Id.* at 1139. A dispute arose between the employer and the union regarding the cause of a strike. The employer contended that the strike arose from a fight between an employee and a supervisor, and therefore was illegal because the fight had not been presented through the grievance process. *Id.* at 1138. The union, on the other hand, contended that the strike would have occurred regardless of the fight because the strike resulted from unresolved grievances that existed prior to the fight. *Id.* The employer attempted to prove the cause of the strike by offering television and newspaper reports that contained interviews and statements by the union president indicating that the fight caused the strike. *Id.* at 1143. However, the court found that “it is likely that the [union president’s] interviews were edited so as to eliminate or minimize references to unresolved grievances” while emphasizing “the far more vivid—and we suspect easily reported” fight. *Id.* The court explained that television and newspaper reports were “at best equivocal evidence.” *Id.*

In *Allied International*, 1984 WL 47422 (NLRBGC), an employer filed a Section 8(b)(4) charge against a union for encouraging a secondary boycott after the court issued a *Boys Market*

TRO. On the steps of the courthouse after the TRO, the union's attorney stated he was not sure if the members would honor the TRO because the employees were an "independent lot." *Id.* at *3. The attorney also questioned whether the Thirteenth Amendment allowed a court order requiring employees to report for work. *Id.* The employer filed a ULP charge claiming that the union sought to continue the boycott with implicit direction for further strike activity as evidenced by the attorney's televised comments. *Id.* at *4. In deciding not to issue a complaint, the GC concluded that the attorney's statements were not a "wink and a nod" encouraging a strike. *Id.* at *5. Rather, the GC noted that the statements were "taken from [t]ranscripts of [the attorney's] interviews as edited by the respective TV and radio stations." *Id.* at n. 5. The GC found it was "therefore, uncertain whether such statements reflect different edited renditions of one interview or whether [the attorney] gave several interviews to the press." *Id.*

Wright and Graham in *Federal Practice and Procedure* (Vol. 21A) highlight the "problem of incomplete evidence." Evidence 2d § 5072, n. 8 (2013 Suppl.). They note that in the 2012 presidential election, the President said in a speech: "There are a whole bunch of hardworking people out there. If you were successful, somebody along the line gave you some help. There was a great teacher somewhere in your life. Somebody helped create this unbelievable American system that allowed you to thrive. Somebody invested in roads and bridges. *If you've got a business, you didn't build that.*" *Id.* The President's "opponents took the last line and ran it repeatedly in ads portraying the President as anti-business." *Id.*

The CGC here seeks to similarly and unfairly use "incomplete evidence" that does not accurately reflect what Walmart did or said; no different than offering a carefully "cropped" photograph to inaccurately portray past events. We do not even know what questions were asked in the interviews. The ALJ specifically found that "the news segments gave a potentially

misleading impression of how Walmart planned to respond to the anticipated Black Friday strikes. Therefore, this is not a case where the news reports fully conveyed the meaning and context of Tovar's remarks." [ALJ Dec. 44:17-19.] Given (1) the materially incomplete and out-of-context nature of the edited snippets, (2) the Board's black-letter-law requirement for evaluating employer comments "in context," and (3) the inability to evaluate the impact of the snippets "in context" on any listening associate (because the broadcasters aired only the snippets), the snippets do not make any liability question more or less likely.

3. NBC and CBS Editing Choices Cannot Create Liability For Walmart.

Offering snippets of off-air interviews gives rise not only to authenticity and relevance issues, but also to serious "agency" issues. Indeed, agency is a central and threshold question in assessing an employer's potential liability for statements published via third-party media. Under Board law: "In order to find that an employer has violated the Act, it is unambiguously provided therein that it must be conduct engaged in by the employer or its agent. . . [A]n employer is not responsible for conduct . . . if an agency is not established or ratification, express or implied, has not been proved." *Monroe Auto Equipment Co.*, 159 NLRB 613, 617 (1966). Here, it is undisputed that NBC and CBS did not act as Walmart's agent in seeking the interviews, drafting the (unknown) questions, creating the heavily excerpted snippets, or packaging the snippets in their larger news stories. [ALJ Dec. 44:19-21 ("Walmart did not exercise any control over which portions of Tovar's remarks NBC and CBS chose to include in their news segments.")]. See *U.S. Electrical Motors*, 261 NLRB 1343, 1344 (1982) (no agency and no employer liability for newspaper article describing employer remarks at a civic luncheon).

Federal courts routinely refuse to hold parties liable for edited, out-of-context versions of interviews broadcasted by independent media outlets. In *Kolodziej v. Mason*, the court granted an attorney's motion for summary judgment against a viewer who brought a claim alleging that

interview excerpts on a NBC Dateline broadcast created a unilateral contract for attorney services. 996 F. Supp. 2d 1237, 1252 (M.D. Fla. 2014). The NBC broadcast included an edited version of an off-air interview the attorney gave to a NBC reporter. *Id.* at 1240. The attorney argued that he could not be liable for the edited interview because he had nothing to do with the way that NBC edited the actual interview, or with the decision to produce that edited version. *Id.* at 1248. The court agreed with the attorney and dismissed the claim. *Id.* at 1252.

Likewise, the Ninth Circuit affirmed the dismissal of various claims, including defamation and slander, brought by an herbal supplement manufacturer against a professor for his edited statements that aired on a local television about the manufacturer's weight loss and energy supplement. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 847 (9th Cir. 2001). A local reporter conducted an off-air interview with the professor about the supplement and included only a small portion of the interview in the broadcasted three-part report. *Id.* at 847. The edited portion of his statement simply included the statement, "You can die from taking this product." *Id.* The court held that the professor "[was] not responsible for the subsequent editing of his interview – he [was] only responsible for his comments in their full and complete form [as to publication of the alleged defamatory comments to the reporter], *not the sound bites they became*" [as to the general public]. *Id.* (emphasis added).

And in *In re PEC Solutions*, the court directly addressed "whether companies can be held liable based upon statements contained in articles published by the news media or other third-parties." 2004 WL 1854202, *11 (E.D. Va. 2004). A Dow Jones Business News article published *selected statements* by a company's officers and directors made in a press release and on a conference call. *Id.* The court held that "[i]t is well settled that companies cannot be held liable for the independent statement of a third party, where the company does not exercise

control over the third party. Without control over the third party publication, the company's statements can be taken *out of context, misquoted, or stripped of important qualifiers.*" *Id.* (citing *Raab v. General Physics Corp.*, 4 F.3d 286, 288 (4th Cir. 1993)) (emphasis added). The court also held that the officers and directors of the company could not be held liable based upon the Dow Jones article because as the court stated, they "do not control what is published by this third party." *Id.*

The foregoing Board and federal court authority controls the result here. The Complaint contains no allegation that Walmart controls NBC or CBS or that either broadcast company served as Walmart's agent when they created, chose, and packaged the interview snippets in their larger news stories.

4. The Two Cases Cited By The CGC Do Not Involve Spliced Excerpts.

In response to all the foregoing authority, the CGC offers one sentence: "The Board has long found that unlawful statements by Respondent agents to the news media may constitute unlawful threats under the Act." [Cross Ex. Br. 13.] In support of that statement, the CGC drops a footnote citing *Graphic Arts International Union, Local No. 32B*, 250 NLRB 850, 857-858 (1980) and *TRW-United Greenfield Division*, 245 NLRB 1135, 1135, 1145 (1979). [*Id.* 13, n.7.] However, those cases do not apply because they did not involve media-created, out-of-context excerpts cherry-picked by the news media. Indeed, in *Graphic Arts International Union*, the employer contended just the opposite, arguing that the media presented *a balanced account* of the employer's statements. 250 NLRB at 861. Also, unlike here, in *TRW-United Greenfield Division*, the media broadcast the *complete* employer interview to the public. Indeed, the employer in that case introduced a verbatim transcript of the complete televised interview seen by the public as evidence to support its argument that its statements were not unlawful. 245 NLRB at 1144-1145. Neither of those cases remotely resembles this one. The CGC does not

cite any case from any source holding an individual or entity liable for out-of-context snippets independently excerpted by a third-party and then published to the public as part of a story created and packaged by the third-party for the third-party's own purposes. To Walmart's knowledge, none exist. Liability does not attach as a matter of law under those circumstances.

C. The CGC Ignores The Repeated Conditional Language Used By Tovar And The Relevant Board Law.

1. The CGC Starts From A False Predicate.

The CGC starts from the false predicate that Tovar's "vague comments" failed to identify "the activities that *would* run afoul of Respondent's policies." [Cross Ex. Br. 10-11.] Similarly, he complains that the Tovar snippets violate the Act "because they were vague, first, as to whether the actions that could result in consequences included protected concerted activities, and second; as to what those consequences *would* be." He concludes that those "warnings of consequences" constituted "a threat of unspecified reprisal." [*Id.* 11.] Thus, although the CGC couches his legal argument in terms of the vagueness of the aired snippets, he really bases his entire argument on the false assumption that Tovar predicted that some bad (albeit unknown) consequence *would* follow from associates going on strike. From there, the CGC builds an argument on Board cases dealing with employer statements that something bad (even if undefined) *would* happen to employees if they engage in protected activity. Every "threat" case the CGC cites [Cross Ex. Br. 8, 11-12] involved an unqualified, unconditional statement, suggestion, or implication that something bad *would* happen in the event of protected activity.²

² *Atlas Logistics Group*, 357 NLRB No. 37, slip op. at 1, n.2 (2011) (employer statement that "there *would* be problems" arising from protected activity constituted threat); *ITT Fed. Services Corp.*, 335 NLRB 998, 1002-03 (2001) ("When they turned back to head toward the base, Cabral told Candelario that 'whoever's doing this better watch out.' The 'this' part of his statement, reasonably construed, referred to the protected activity of posting union signs The 'better watch out' part of the statement, reasonably construed, referred to potential reprisals ITT *would take* against employees who opposed ITT's labor policies and supported the Union."); *L.S.F.*

That is not the situation here, where Tovar repeatedly stated, including in the CBS snippet, that Walmart’s response to any associate who did not do his or her job at Black Friday was completely conditional. Even in the CBS snippet, Tovar made clear that Walmart’s response, if any (there was none), “depend[ed] on the circumstances” and only that “there “*could be*” consequences. Moreover, in the NBC snippet, Tovar did not reference any strike, work stoppage, or scheduling issue, and we do not know what the interviewer asked or was referring to that prompted Tovar’s response, “there are some actions that we will take if people don’t follow our company policies.” But we do know that the CGC simply skips over the fact that Tovar made clear the “conditional” “to be determined” and “to be considered” nature of any Walmart response in both interviews:

NBC:

- They do have rights and we *respect those rights*
- Just like *if* you didn’t show up for work one day, I think your bosses would want to have a conversation with you about why
- You know, *every circumstance is going to be different* on Black Friday
- We’re going to take those on a *case-by-case basis*

CBS:

- We have strict policies that *prohibit retaliation* in any way

Transp., Inc., 330 NLRB 1054, 1066 (2000) (“Crohan made it clear to Holland that a strike *was inevitable* by telling him that Respondent intended to hire replacement workers “*when*” (*not “if*”) employees went on strike.”); *Yale University*, 330 NLRB 246, 248-49 (1999) (finding statement “[f]ailure to perform any aspect of a graduate teaching assignment—e.g. meeting all classes, grading and returning all papers, holding regular office hours, submitting final grades, etc.—*would (1) be* a de facto dereliction of professional duties to our students . . .” gave rise to a *prima facie* showing of an unlawful threat and remanding for further proceedings); *Blue Bird Body Co.*, 251 NLRB 1481, 1488 (1980) (“By describing the employees’ choice in the election as a matter of life or death for the [metaphorical] ‘bird,’ Luce *would* in effect be implying that a strike or strikes *would be inevitable* if the employees voted for a union”); *J.P. Stevens & Co.*, 245 NLRB 198, 218 (1979) (supervisor’s statement that engaging in union activities “*would*” have serious consequences constituted threat). (Emphasis throughout.)

- *Depending* on the circumstances, there *could* be consequences
- It's going to *depend* on each individual circumstance like I said
- We'll take those on a *case-by-case basis* and handle them *depending* on the actions

Thus, the CGC's argument fails because an unlawful threat must state, suggest, predict, or at least imply that something bad *will* happen (even if unspecified) in the event of protected activity. *See L.S.F. Transp., Inc.*, 330 NLRB 1054, 1066 (2000) (affirming the ALJ's decision that "rather than expressing his view as to what *might possibly* occur following the give and take of negotiations, Crohan made it clear to Holland that a strike *was inevitable* by telling him that Respondent intended to hire replacement workers "*when*" (not "*if*") employees went on strike.") (emphasis added). Here, Tovar's interview responses establish just the opposite. *See also Chrysler Airtemp South Carolina, Inc.*, 224 NLRB 427, 431, 433 n.11 (1976) (no unlawful threat when employer told employees that bringing in the union "could be the straw that broke the camel's back" as it related to possible economic impacts, while at the same time acknowledged its employees' freedom to vote as they wished and that "*the company and its supervisors will respect those rights*" (emphasis added)).

Consequently, when the CGC argues "had the CBS or NBC broadcasts retained or aired Tovar's complete statements, the additional comments would have done nothing to remove the unlawful ambiguities in the statement regarding whether protected concerted activities *would be subject to discipline*, and what consequences *would* result from the activities" [Cross Ex. Br. 13 (emphasis added)], he merely reiterates his false predicate that Tovar predicted something bad *would* happen in response to protected activity. But that argument ignores the undisputed evidence that Tovar repeatedly stated the opposite.

2. The CGC Ignores The Board’s Rule That Statements Of Possibility Or Other Conditional Statements Do Not Constitute A Threat.

Not surprisingly then, the CGC does not cite any of the multitude of Board cases holding that conditional statements of possibility or uncertainty about future events – such as those made here – do not violate the Act. If one could evaluate Tovar’s comments in their entirety for purposes of a “threat” analysis (one cannot because NBC and CBS chose to air only excerpted and spliced snippets in their story), that authority would control here. Even with respect to the CBS snippet, that snippet included one of Tovar’s repeated conditional statements that “*depending* on the circumstances there *could be* consequences.” For example, in *Whirlpool Corporation*, 337 NLRB 726, 735 n.26 (2002), the Board affirmed the ALJ’s finding that “Holtgreven sa[ying] that the Respondent *could* close the plant if the Union came in is simply not the same as saying that it *would* close the plant. A statement of possibility is not a threat....”). In *Miller Indus. Towing Equip.*, 342 NLRB 1074, 1075 (2004), the Board found no threat or coercion where a supervisor’s alleged statement that it was “possible” there could be a layoff if the union came in was “in all respects too vague and insubstantial to support a finding of any unlawful threat.” Likewise, in *Einhorn Enterprises*, 279 NLRB 596, 591-92 (1986), a comment that the union demands would *probably* force the employer to close did not constitute an unlawful threat. In *Bo-Ed Inc.*, 281 NLRB 225, 226 (1986), the Board found that an employer’s statement that “he *did not know* whether the problems with these [other closed] restaurants were related to unionization” did not constitute a threat to close if the union won the election. Also, in *Pinkerton’s, Inc.*, 226 NLRB 837, 838 (1976), there was no threat or coercion where a manager told employee, “You *could* be in trouble over this,” and “I *hope* you don’t get in trouble over this.” In *Sports Coach Corporation of America*, 203 NLRB 145, 151 (1973), there was, similarly, no unlawful implied threat where a supervisor responded “probably” and

“he guessed so” to an employee’s suggestion that two other employees “probably were going to be fired” because of their union activities. Also, in *Mt. Ida Footware Company*, 217 NLRB 1011, 1013 (1975), the Board found that telling employees not to sign cards because “it *could* be fatal to a business” was not a threat, but merely “a reference to the possibility that unionization could lead to difficulties....” The Board came to the same conclusion in *Montgomery Ward & Co.*, 219 NLRB 1196, 1197 (1975), where it held: “[W]e find no reason to find a threat of reprisal in Muir’s statement that he *did not know* what would happen with wage classifications at the administrative service center....” And, finally, in *Rutter-Rex, J.H. Mfg. Co.*, 115 NLRB 388, 404 (1956), the Board affirmed the ALJ’s finding that a supervisor’s “reference to *possible* loss of jobs appears to be a mere prediction of a *possibility* which might eventuate lawfully, not a threat of unlawful action on his part.” All those decision demonstrate that Tovar’s conditional statements of unknown possibilities did not constitute any prediction that something bad *would* happen if associates engaged in protected activity.

3. The CGC’s Attempt To Hedge His Bets By Describing The News Story “Context” Only Proves The “No Liability” Point.

Despite expressly confining his allegations to “Tovar’s [broadcast excerpt] comments alone” [Cross Ex. Br. 13], the CGC apparently wants to hedge his bets by claiming, “Additionally, the context in which the statements were made, directly following videos of demonstrating employees and Respondent statements linking those demonstrations to its filing of unfair labor practice charges against the Union, further strengthened the message that engaging in protected activities would result in repercussions.” [Cross Ex. Br. 11.] But who selected and aired the “videos of demonstrating employees”? And who selected and aired comments about Walmart “filing unfair labor practice charges against the Union,” included in the NBC video (GC Ex. 44)? The *news broadcasters* selected and packaged that information into its story. [GC Exs.

43, 44.] *Tovar said nothing* about demonstrating employees or ULP charges. [See Interview Responses at Cross Ex. Br. 9-10.] Those were the sole and unilateral editorial additions of NBC and CBS. Thus, even if the CGC could retreat from his “context is irrelevant” position, the CGC only proves the ALJ’s point that “any misunderstandings of Walmart’s position [] flow[ed] from the editing decisions made by NBC and CBS.” [ALJ Dec. 44:21-22.]

Similarly, the CGC misses the relevancy boat when he cites *Harrison, Concepts & Designs*, and *Ebenezer Rail Car Serv.*, for the proposition that a “background of other unlawful conduct or union animus represents significant context for evaluating lawfulness of employer statements.” [Cross Ex. Br. 7-8.] The CGC tellingly points to no such evidence. The record contains none. The CGC did not allege, offer evidence of, or make any argument at any time in this case that Walmart engaged in any “other unlawful conduct or union animus” prior to or during the Black Friday 2012 time period that would have made any associate listener view Tovar’s remarks (had his remarks been broadcast in their entirety) as anything other than a statement by Walmart that it would review the Black Friday events on a “case-by-case” basis.

D. Relying On Excerpted Snippets As The Sole Evidence Of An Alleged Act Violation Would Improperly Burden § 8(C) And The First Amendment.

Section 8(c) states: “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.” If the CGC can establish an Act violation based solely on a third-party’s decision to disseminate out-of-context snippets from an off-air interview, employers will naturally refrain from sharing their lawful views, arguments, and opinions on labor-related matters, as is their right under Section 8(c) and the First Amendment right to freedom of speech.

The Supreme Court held in *Chamber of Commerce of U.S. v. Brown*: “From one vantage, § 8(c) merely implements the First Amendment, in that it responded to particular constitutional rulings of the NLRB. But its enactment also manifested a congressional intent to encourage free debate on issues dividing labor and management. It is indicative of how important Congress deemed such free debate that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB’s decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that freewheeling use of the written and spoken word ... has been expressly fostered by Congress and approved by the NLRB.” 554 U.S. 60, 67-68 (2008) (internal citations and quotations omitted). Admitting the snippets as substantive evidence – the only evidence – of an Act violation would impermissibly interfere with Walmart’s Section 8(c) and First Amendment right to engage in “uninhibited, robust, and wide-open debate in labor disputes.”

Similarly, allowing the CGC to try and impose liability on an employer for a broadcaster’s editorial decision to air select snippets from an off-air interview will ultimately burden the First Amendment guarantee of a free press. If employers refuse to speak to the media about workplace issues for fear of being held liable in a government action for snippets edited, packaged, and broadcast by the media, the freedom of the press to obtain and report on matters of public interest will suffer. *Compare Santa Barbara News-Press v. NLRB*, 702 F.3d 51, 56 (D.C. Cir. 2012) (“Where enforcement of the Act would interfere with a newspaper publisher’s ‘absolute discretion to determine the contents of [its] newspaper[],’ the statute must yield. Given the publisher’s First Amendment rights, issues of what is published and not published are not generally a legitimate employee concern [] for purposes of § 7’s protection. . . . The choice

of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press.”) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (internal citations and quotations omitted)).

Thus, for all the foregoing reasons, Walmart did not violate the Act when NBC and CBS made the independent editorial choice to include heavily excerpted and spliced snippets from Tovar’s off-air interviews as a part of their news stories at Black Friday 2012.

II. THE CGC MISSTATES AND EXAGGERATES THE RECORD, WHICH PROVIDES NO SUPPORT FOR EXTRAORDINARY REMEDIES.

As discussed in Walmart’s Brief in Support of Exceptions and its Answer to UFCW/OWM’s cross-exceptions on the IWS issue, Walmart acted lawfully and well within the scope of the Supreme Court’s and the Board’s IWS jurisprudence when it applied its attendance policy to UFCW/OWM’s fifth wave of intermittent work stoppages. Thus, no remedy should apply to Walmart’s restrained, measured, and lawful response to UFCW/OWM’s carefully choreographed IWS campaign.

The ALJ disagreed and developed a discriminatory IWS rule that applies only to union-represented employees who engage in one- or two-shift IWS in a short (undefined) temporal period in the context of collective bargaining. As discussed in Walmart’s (and UFCW/OWM’s) briefs, that discriminatory rule – granting a new “economic weapon” to some employees/unions, but not others – cannot coexist with Supreme Court and Board authority. However, assuming for the sake of argument, that the ALJ could develop and apply such a discriminatory rule, the ALJ did properly apply controlling Board law that “confines the notice-posting requirement of

[Board] orders ‘to the facilities at which the violations were committed.’ Thus, if a respondent commits unfair labor practices at ten of its facilities, the remedy should include a notice posting only at those ten facilities.” [ALJ Dec. 105:16-19 (citing *Consolidated Edison Co.*, 323 NLRB 910, 911-12 (1997)).]

Here, the CGC acknowledges that the core issue in this case – Walmart’s response to the fifth wave of UFCW/OWM’s carefully orchestrated IWS campaign – affected associates in 30 stores. [Cross Ex. Br. 17 (“30 stores identified in the Complaint”).] And the ALJ addressed his remedial order to those 30 stores. [ALJ Dec. 106:6-7 (“We are therefore left with a record that establishes that Walmart’s ‘policy’ concerning OURWalmart’s strikes only affected 30 stores.”).] Yet, the CGC urges the Board to expand the scope of the ALJ’s remedy beyond just the 30 stores at issue to all of Walmart’s “4,300+ stores,” to include not only notice posting, but notice reading and broad “one-size-fits-all” notice language as well. [ALJ Dec. 106:8-9 (“I do not find a sufficient basis for me to recommend that Walmart post a notice at each of its 4,300+ stores”).] The CGC advances two arguments in support of that “extraordinary” request. [CGC Cross-Exceptions 4-9; Cross Ex. Br. 17-23.] Both lack merit.

A. The Record Contains No Evidence Of Any “Nationwide Policy.”

The ALJ found there was no “nationwide” policy regarding how Walmart dealt with participants in UFCW/OWM’s IWS campaign; rather the “record [] establishes that Walmart’s ‘policy’ concerning OURWalmart’s strikes only affected 30 stores.” [ALJ Dec. 106:6-7.] In his Answer to Walmart’s Exceptions, the CGC repeatedly urges that “the Judge’s Decision and findings are well supported by the record” and “the Judge’s factual findings are fully consistent with the record evidence.” [CGC Ans. Br. 6, 11.] Here, he changes course.

The CGC does not claim that Walmart’s associate-specific response to the June 2013 wave of IWS at 29 stores created any “nationwide” policy. Instead, the CGC claims that the

February 2013 Talking Points – read to specific associates at 11 stores [ALD Dec. 47, n.55] – somehow created such a “national” policy. He bases that claim on an exaggerated characterization of testimony from Walmart manager, Karen Casey. [Cross Ex. Br. 17-18.] The ALJ heard that testimony and clearly did not ascribe to it the strained interpretation the CGC now tries to give it. Indeed, even with his exaggeration of the record in hand, the CGC does not actually claim that there was any “nationwide” policy, only that “Respondent’s policy concerning OURWalmart’s strikes . . . encompass many more stores beyond the 30 stores identified by the Judge.” [Id. 18.] But the record does not support that claim either.

The CGC claims “Karen Casey . . . testified that Respondent’s corporate labor relations sent a directive to *all stores* to meet with any known striker and cover the February 2013 Talking Points.” [Id. 17-18 (emphasis added).] The CGC further claims that “Casey further testified that store management tried and did meet with all employees known to have gone on strikes in October and November 2012.” [Id. 18.] Finally, the CGC claims “Respondent identified employee strikers at numerous stores and locations beyond those identified by the Judge.” [Id., n.9 (citing Jt. Ex. 94(a)).] Wrong on all accounts.

At RT 5244-47, the CGC asked Casey about the February 2013 Talking Points (Jt. Ex. 6(a) (b)) delivered to specific associates at specific stores, which explained Walmart’s position – based on well-established Board law – that the Act does not protect intermittent work stoppage campaigns. The CGC explained his understanding that the Talking Points “were read to employees that had gone on the February -- or I’m sorry, on the Black Friday 2012 strikes, and that these were read to employees approximately February or so of 2013” [Id.] Casey confirmed that the February Talking Points were intended for “discussions with associates who had engaged in the Black Friday strikes in 2012.” [Id.] Casey agreed that “direction went out to

the stores to actually meet with any known striker at that point in time and cover these talking points with them.” [Id.] Casey explained that after Black Friday 2012, it took time for the Company to figure out who had done what at Black Friday and how to respond: “the purpose of that was time for us to research the circumstances around whether associates had engaged in a strike or not, the circumstances around them leaving, because of the time it took to research the circumstances around people leaving work as well as taking that information, and gathering it, and submitting it, and consulting with counsel, it took us time to -- because it took us time [to] determine the fact we believed that these were intermittent work stoppages.” [Id.] The CGC confirmed that the purpose of the February 2013 talking points was “to make it clear to the employees that were known to have involved in – been involved in *some of these strikes* in October and November of 2012, that – your position on this kind of strike activity.” [Id. (emphasis added).] The CGC asked, “And so that was the company policy as of that time?” Casey responded “That was, again, a message point to them to put them on notice.” [Id.] Casey further testified she had no personal knowledge of who talked to whom, but “to the best of my knowledge, they [local management] tried, and they did.” [Id.]

From that testimony, it is clear that Walmart did not send out the February 2013 Talking Points to “all stores” in the 4,300+ chain nationwide. The Talking Points only went to stores where there was to be “a discussion[]s with associates who had engaged in the Black Friday strikes in 2012.” And when the CGC invited Casey to confirm that the Talking Points created a “Company Policy,” she declined and, instead, made clear that the Talking Points were simply a message to the specific associates who received them: “a message point to them to put them on notice.”

And Casey also made clear that the question of who was a “known striker” involved “research[ing] the circumstances around *whether associates had engaged in a strike or not*, the *circumstances around them leaving*, because of the time it took to research the circumstances around people leaving work.” The CGC did not ask Casey about the results of that research or how she defined “known striker” for identifying which stores got the February Talking Points. He did not define the term. Thus, the record does not reflect what either the CGC or Casey meant by the term “known striker.” And the term is particularly susceptible to different meanings given that Walmart only applied its IWS thinking at stores with an otherwise solid track record of consistent enforcement of the attendance policy.

The CGC attempts to bridge that evidentiary gap with the inaccurate statement that “Respondent identified employee strikers at numerous stores and locations beyond those identified by the Judge.” [Cross Ex. Br. 18, n.9 (citing Jt. Ex. 94(a)).] Not true. Joint Exhibit 94(a) is a compilation of walk-out/walk-out letters created by UFCW/OWM, not a list of strikers created by Walmart. And the CGC did not connect any dots between Jt. Ex. 94(a) and Casey’s understanding of the CGC’s term “known striker.” Indeed, the record establishes at least one example where UFCW/OWM submitted a walk-off letter at Black Friday 2012 for an associate who was not scheduled to work, and, consequently, was not a “striker.” [ALJ Dec. 68:25, n.77; Jt. Ex. 853, 856 (Martinez).] There is no evidentiary basis for the CGC’s leap of logic.

It strains credulity to suggest that Walmart read the Talking Points to IWS participants at stores listed in Cross Ex. Br. n.9, but not one of them reported it to UFCW/OWM for inclusion in the Complaint? That makes no sense. Rather, per Casey, there were myriad different individual circumstances involving individual absences at Black Friday 2012, and the record shows Walmart sent the February Talking Points to 11 stores. Accordingly, the ALJ correctly found that

“although the parties presented extensive evidence about how Walmart communicates to its associates, there is no evidence that Walmart communicated the February 2013 talking points to associates nationwide. We are therefore left with a record that establishes that Walmart’s ‘policy’ concerning OURWalmart’s strikes only affected 30 stores.” [ALJ Dec. 106:6-7.]

Consequently, there is no basis to entertain the CGC’s unsupported extraordinary request for a nationwide posting or reading or one-size-fits-all notice language at thousands of Walmart stores that had no involvement in and no knowledge of any of the issues in this case.

B. The Record Contains No Evidence Of Any History Of ULPs At Multiple Facilities And The CGC Waived Any Such Argument.

The ALJ found that the CGC did not introduce any evidence or make any argument to him that extraordinary nationwide posting or reading or one-size-fits-all notice language is warranted based on “a record of committing unfair labor practices in multiple facilities (but not necessarily all of its facilities).” [ALJ Dec. 105:35-41.] The CGC does not deny that he did not advance that argument before the ALJ, but simply urges it now for the first time in his Cross-Exceptions. By not raising the argument with the ALJ, he waived it and cannot urge it now. *Auto Workers Local 594 v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985) (“Since the Union failed to raise this issue in a timely fashion before the ALJ, we hold that it waived this defense.”), *enfg.* 272 NLRB 705 (1984); *Operating Engineers Local 520 (Mautz & Oren)*, 298 NLRB 768 fn. 3 (1990); *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) (“A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.”), *enfd.* 922 F.2d 832 (3d Cir. 1990); *Camay Drilling Co.*, 254 NLRB 239, 240 fn. 9 (1981) (“[T]o determine an issue of this magnitude when it is raised for the first time [by the General Counsel] as a post-hearing theory would place an undue burden on Respondent and deprive it of an

opportunity to present an adequate defense.”), *enfd. sub nom. Operating Engineers Pension Trust v. NLRB*, 676 F.2d 712 (9th Cir. 1982).

Even if the CGC had not waived this new post-hearing theory, he offers no evidence to support it. First, the CGC points to the Tovar snippets as evidence that Walmart “has a record of committing unfair labor practice in multiple facilities.” [Cross Ex. Br. 19, 22.] But – as discussed above – the ALJ found that those snippets *did not* violate the Act. And the ALJ noted only one associate who actually saw either snippet. And NBC and CBS did not broadcast their news stories at Walmart stores. Second, the CGC strains even further when he claims that “[a]t the same time, Respondent store managers [plural] threatened to discharge employees [plural] who participated in the strikes.” [*Id.*] That is simply false. As described by the ALJ, the referenced allegation involved one alleged sentence by one low-level manager to one associate at one store *in a closet* in November 2012 (disseminated to no one else). [ALJ Dec. 45:19-24.] Third, in a footnote, the CGC cites to two pending “local cases” heard by the same ALJ, involving three stores already at-issue in the pending case. [Cross Ex. Br. 19, n.10.] Given that the CGC’s first and second points are inaccurate and his third point involves three stores already at-issue in the case, the CGC does not come close to meeting the extraordinary threshold required for the extraordinary and unwarranted nationwide posting and remedy he seeks; contrary to the ALJ’s specific findings.

Indeed, in the one Board case the CGC cites, *Albertson’s Inc.*, 351 NLRB 254, 259-60 (2007), the Board *rejected* extraordinary relief and none of the requested relief involved any proposed Company-wide remedy or notice reading. Thus, that case lends no support to the CGC’s strained arguments. Thus, again, there is no basis to entertain the CGC’s unsupported extraordinary request for a nationwide posting or reading or one-size-fits-all notice language at

thousands of Walmart stores that had no involvement in and no knowledge of any of the issues in this case.

C. **The Record Contains No Evidence Of Flagrant, Pervasive, And Outrageous ULPs Anywhere At Any Time; The Standard For A Notice Reading.**

The Board routinely recognizes the extraordinary nature of the notice-reading remedy and reserves that remedy for cases involving flagrant, pervasive, and outrageous unfair labor practices. *Edro Corp.*, 362 NLRB No. 53 (Mar. 31, 2015) (declining to order notice reading because that remedy applies to “unfair labor practices [that] are ‘so numerous, pervasive, and outrageous’ that such remedies are necessary ‘to dissipate fully the coercive effects of the unfair labor practices found’”); *McGuire Steel Erection, Inc.*, 324 NLRB 221, 221 (1997) (finding that employer’s unfair labor practices were not “so flagrant, aggravated, persistent or pervasive, as to warrant the imposition of [an] extraordinary remedy”). Additionally, the Board does not order extraordinary remedies in cases that involve difficult questions of fact, law, and policy. *See, e.g., New Process Co.*, 290 NLRB 704, 750 (1988) (declining to order extraordinary remedy because the case involved “difficult questions of fact, law, and policy”); *Hanover House Indus.*, 233 NLRB 164, 178 (1977) (declining to order extraordinary remedy because the case raised “close questions of law, giving rise to fairly debatable issues”).

Here, Walmart’s actions do not warrant the imposition of any notice reading – much less at 4,300+ stores that had no involvement in any of the conduct at issue – because Walmart did not commit any flagrant or outrageous or pervasive violations of the Act. Instead, Walmart earnestly tried to comply with a nuanced area of Board law. In fact, even the CGC acknowledged the complexity of the issues in this case, stating: “Yeah, I acknowledge the intermittent work stoppage issue was a very difficult issue. So I completely acknowledge that.” [RT 5129:23-24.] And the ALJ acknowledged with respect to the February 2013 Talking Points

that he felt “the question is a close one.” [ALJ Dec. 48:27.] Walmart disagrees that the question is close, but one can hardly view the record and not see that Walmart acted with calm, measured restraint based on the controlling law governing the IWS issue as set forth in its Brief in Support of Exceptions at 54-65. In fact, after the first wave of work stoppages in early-October 2012, Walmart sent Talking Points to Store Management teams on October 8, 2012, specifically instructing them that “A walkout or work stoppage is a form of a strike and is generally considered protected concerted activity. Associates have a general legal right to engage in a walkout or other forms of work stoppage. . . . **Do not** discipline associates for walking off the job or if they say they intend to walk out or participate in a work stoppage.” [GC Ex. 21(a) (emphasis in original).] Walmart then took no action after any of the October and November waves of IWS. And when it spoke to certain prior IWS participants in February 2013, it expressly stated “the Company respects your right to support a union and to engage in other protected, concerted activity.” [Jt. Ex. 6(a).] That hardly constitutes a flagrant, pervasive, or outrageous disregard for Section 7 rights. Just the opposite.

Walmart’s careful, measured, and restrained response to UFCW/OWM’s massive IWS campaign targeting its brand and reputation stands in sharp contrast to the conduct at issue in the “notice reading” case cited by the CGC, *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, *21 (Oct. 30, 2014). [Cross Ex. Br. 21-22.] In that case, “as soon as [the respondent] learned of the union organizing campaign, [it] took swift and certain action by discharging four union supporters . . . , three of whom were the earliest union supporters, and two of whom . . . openly worked with Union organizers to encourage employees to support the Union.” 361 NLRB No. 83, *21. The Board held that such misconduct “was sufficiently serious and widespread” to warrant a notice-reading order. *Id.* In contrast, here, Walmart did nothing of the sort. As

described above, it took no action in response to wave after wave after wave of intermittent work stoppages and only acted in accordance with well-established Board authority on the IWS issue. A substantial difference exists between Walmart's actions and the actions of an employer who discharged top union supporters at the first hint of an organizing campaign. *Farm Fresh* does not support the CGC's request at all, but rather supports Walmart's position that there is no basis for a notice reading in this case. [WM Br. 94-96.]

III. THE BOARD SHOULD NOT CHANGE ITS LONG-STANDING RULE REGARDING SEARCH-FOR-WORK AND WORK-RELATED EXPENSES.

At the last hour of the last day of the 17 month-long trial in this case, the CGC sought to amend the Complaint to add search-for-work and work-related expenses as a separate remedy. The ALJ allowed the CGC to amend the Complaint over Walmart's objection. Walmart takes exception to that decision, which violated Walmart's due process rights, as described in its Exception 88. [WM Br. 99-100.] However, the ALJ denied the requested relief on the merits as Board law specifically rejects that remedy as an available option. [ALJ Dec. 104, n.118.]

In his Cross-Exception 3, the CGC includes the General Counsel's now-familiar "canned" request that the Board change its long-standing rule that search-for-work and work-related expenses reduce the amount of any interim-earning offset (thus increasing the amount of a back-pay award by the amount of the expenses and, thus, making the claimant whole). Instead, the General Counsel wants the Board to award search-for-work expenses and work-related expenses as a separate, affirmative damage award, unconnected to interim earnings. [Cross Ex. Br. 13-16.] The Board asked for amicus briefs on the subject in February 2015 as part of its consideration of the *King Soopers* case, 27-CA-129598 (search-for-work/work-related expense brief filed 3/18/15), and currently has this issue before it with extensive briefing in numerous other cases (*e.g.*, *Tinley Part Hotel* (13-CA-141609; brief filed 8/25/15); *Component Bar*

Products, Inc. (14-CA-145064; brief filed 11/13/15); *Con-way Freight, Inc.* (21-CA-135683, et al.; brief filed 1/25/16)). Walmart joins with and urges the legal arguments expressed in the employer briefs currently before the Board, as outlined below.

The Board should not change its long-standing rule on search-for-work and work-related expenses because:

- Such separate expenses constitute compensatory damages, and the Act (specifically 29 U.S.C. § 160(c)) does not allow for such damages; only Congress can amend the Act to provide for such damages.
- The CGC does not point to any changed circumstances in the American workplace generally (or in this case in particular) that warrant a departure from the Board's long-standing rule that the Act does not allow for such separate compensatory damages.
- The Board cannot grant compensatory damages under the Act simply because the EEOC and DOL have that authority. Congress specifically amended Title VII to allow for such damages and the FLSA and EPA (DOL) statutes and regulations (authorized by Congress) specifically provide for such damages. The NLRB cannot unilaterally grant such damages.
- The Board's remedial power to award medical and hospitalization expenses that flow directly from a loss of health benefits due to a discriminatory discharge does not include the power to separately award compensatory damages unconnected to the prior employment relationship.
- The Board's power is remedial, not punitive or penal and awarding such separate expenses would grant claimants an unwarranted windfall, which, by law, is penal in nature. Claimants could easily obtain a windfall by "seeking" unrealistic employment opportunities in the vacation destination of their choice, taking interim employment in unaffordable residential areas and charging the excess rent to the former employer, submitting receipts for personal travel, internet, or phone use under the guise of a "work search"; to name just a few.
- Granting such damages would be inherently speculative and impossible to police given the myriad incentives claimants would have to invent or exaggerate such expenses if wholly disconnected from the interim work earning inquiry.

CONCLUSION

On the Tovar issue, the CGC asks the Board to impose liability on Walmart based solely on out-of-context, heavily excerpted interview snippets where the Board does not even know the questions that NBC and CBS posed. No Board or court has ever imposed liability in those circumstances. There is no basis to do so here. Likewise, if the ALJ were authorized to create a discriminatory IWS economic weapon for some employees/unions, but not others (he is not), there would be no basis for the Board to impose extraordinary remedies for Walmart's response to the fifth wave of UFCW/OWM's IWS campaign. Walmart carefully tailored its response to only those associates involved in the IWS campaign at 30 stores and followed well-established Supreme Court and Board law in doing so. For all the foregoing reasons, Walmart respectfully requests that the Board deny the CGC's Cross-Exceptions.

Respectfully submitted this 21st day of April, 2016.

s/ Steven D. Wheelless

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