

**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  
CHARGING PARTY'S CROSS-EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **THE KEY QUESTION: WHO CONTROLS THE WORK SCHEDULE?**

In its Cross-Exceptions (3-8), the UFCW/OWM calls the obvious question presented by this case: Who controls the work schedules of America? Employers? Unions? Employees?

For the past 60 years, the United States Supreme Court, the federal courts of appeals, and the Board have all consistently held that employers control the work schedules of America. [Walmart Exception Br. (WM Br.) 54-62.] After all, employers raise and invest the capital. Employers take the entrepreneurial risks. Employers create the jobs. And employers develop and manage the work schedules needed to get the work done. Accordingly, for the past 60 years, the United States Supreme Court, the federal courts of appeals, and the Board have all consistently held that when unions or employees use a campaign of repeated start/stop, start/stop, start/stop, same-purpose striking to usurp control over the work schedule, they do so at their own risk under the “free play of market forces” *Machinists* rule. [See WM Reply to UFCW/OWM Ans. Br. 2-6.] But why? Why does the Act protect a continuous strike, but not intermittent, same-purpose striking? The answer lies in the respective roles of management and labor.

When employees attempt to pressure their employer with a continuous, forthright strike, they leverage their role *as employees*, withholding their labor *as employees* on a continuous basis until they get what they want or they give in and accept the existing working conditions; a straightforward contest of wills and relative economic power. In contrast, when employees (often at the direction of an interested union) attempt to pressure their employer with a campaign of intermittent, same-purpose striking, they take on – and intentionally usurp – the role of *the employer*, unilaterally determining when employees will come and go from work at the employees’ or the union’s whim. However, nothing in the Act grants employees or unions the power to “arrogat[e] the [employer’s] right to determine their schedules and hours of work,”

*Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1809-10 (1954); a right that flows from the fact that employers – not employees nor interested unions – raise and invest the capital, take the entrepreneurial risks, create the jobs, and develop/manage the work schedules to get the business of America done. [See, e.g., UFCW/OWM Cross-Exceptions Br. 26 (acknowledging that IWS participants “seize the employer’s right ‘to determine their schedules and hours of work’”).]

Yet, UFCW/OWM wants the Board to not just ignore that 60-year-old rule of law; it wants the Board to reject it and give employees and unions an entirely new, federally-protected economic weapon to use in labor disputes. But based on what? What possible argument could justify the Board turning its back on 60-years of well-settled law that finds its foundation in the United States Supreme Court? [See discussion at Part I.H below.] UFCW/OWM essentially offers only one basic idea; its logic proceeds as follows: (a) the Act generally protects strikers who completely cease work for a protected purpose; (b) protected strikers forego wages and risk replacement; thus, (c) the Act protects anyone who foregoes wages and risks replacement for a protected purpose. That’s like saying: (a) an apple is generally red; (b) an apple has seeds; therefore; (c) any object with seeds must be a red apple. Not really. As discussed below, the Board has specifically rejected UFCW/OWM’s logic; indeed, every reported IWS case involves participants who lost wages and risked replacement for a protected purpose. Every one.

Rather, the IWS distinction arises from the “inherent character” of the tactic. In a protected, continuous strike, employees leverage their role as employees. In an unprotected IWS campaign, they usurp the role of their employer, unilaterally dictating when they will come and go from work; “a kind of worker insubordination.” *National Steel and Shipbuilding Co.*, 324 NLRB 499, 509 (1997). The Board and courts all hold that the Act does not give employees and unions the right to usurp the role of the employer to set the work schedules of America.

## ARGUMENT

### I. SUPREME COURT AND BOARD LAW PRECLUDE THE RADICAL POSITION URGED BY UFCW/OWM AND ILLUSTRATE THE ALJ'S ERROR.

The UFCW/OWM urges the Board to jettison 60-plus years of well-settled law and “clarify” that the Act gives employees/unions the right to wage campaigns of repeated, same-purpose, intermittent work stoppages, regardless of “frequency, duration, and subject matter” so long as the IWS participants “strike for [(a)] a protected motivation, [(b)] completely cease work, and [(c)] do not engage in serious threatening misconduct while on strike.” [UFCW/OWM Cross-Exceptions Brief (Cross Ex. Br.) 3-4.] None of those criteria, individually or in the aggregate, justify extending the Act’s protections to IWS because they do not change the unprotected “inherent character” of IWS: “an arrogation of the [employer’s] right to determine their schedules and hours of work.”

#### A. The IWS Rule Does Not Turn On The Participants’ Motive.

UFCW/OWM argues that the Act protects *all* strikes if participants “were motivated to protest working conditions and ULPs,” “even when they do not articulate a demand prior to or during the strike,” “regardless of whether the workers’ demands and the strike itself were reasonable,” and regardless of whether participants “are motivated to strike for multiple and different reasons.” [Cross Ex. Br. 4-10.] Those principles may apply in a non-IWS context, but they do not apply here.

#### 1. Board Law Specifically Holds That Motive Does Not Matter.

The Board specifically holds that the Act does not protect (nor prohibit) the IWS tactic *regardless* of motive. In *Embossing Printers*, the Board affirmed the ALJ’s finding that “if employees had the right to engage in the activity they did, they had that right *regardless of whether* it was to protest the Company’s unfair labor practices or to achieve some other end. If,

on the other hand, their concerted activity was unprotected, *their purpose does not change* the unprotected nature of the act.” 268 NLRB 710, 723 (1984) (“Though the objective was lawful, the method was not protected, because intermittent work stoppages transgress the bounds of a genuine strike.”) (emphasis added). Likewise, in *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1549-50 (1954), the Board held: “However lawful *might have been the economic objective* which CWA sought to achieve by its hit-and-run technique . . . , the inherent character of the method used sets this strike apart from the concept of protected union activity envisaged by the Act.” (Emphasis added.) Indeed, every unprotected IWS case on the books involved employees who ceased work for a “protected purpose.” See, e.g., *Briggs-Stratton, Insurance Agents, Swope Ridge, Pacific Telephone, Honolulu Rapid Transit* (IWS to achieve economic concessions), and *Embossing Printers, Wirebound, and Blades* (IWS to protest purported ULPs). [WM Br. 54-62.] Consequently, the IWS rule does not – and cannot – turn on whether the participants engaged in a campaign of repeated, same-purpose strikes for a protected motivation.

## **2. The UFCW Miscites The Case Law And The Record.**

The UFCW cites a number of non-IWS, and, thus, irrelevant cases for its unsupportable argument that the Act protects all “properly motivated” work stoppages. [Cross Ex. Br. 4-10.] Three citations merit mentioning.

First, UFCW/OWM appears to try and analogize this case to *Robertson Indus.*, suggesting that the Board extended the Act’s protections in that case to a “protected motivation” strike even though it “was part of a larger campaign seeking to improve working conditions.” [*Id.* 5.] That attempted analogy fails because the Board in *Robertson* specifically found that the two work stoppages at issue there *did not* involve a strategy of repeated, same-purpose striking because they “involved different situations and different people. While the November incident was a protest concerning overtime, the February incident *involved other issues.*” 216 NLRB

361, 362 (1975) (emphasis added). Here, it is undisputed that UFCW/OWM planned and orchestrated all the waves of intermittent work stoppages at issue to pressure Walmart on the same, unchanging issues.

Second, UFCW/OWM misstates the holding of the only IWS case it cites in this section. UFCW/OWM claims that “the ALJ in *Dallas Glass* held that the Act did not protect work stoppages by two union salts because they were not properly motivated to protest working conditions,” but only “ceased work (and filed ULPs) merely to harass the company.” [Cross Ex. Br. 6, n.1.] False. UFCW/OWM admits that the two employee-salts engaged in IWS to address “their own [complaints] about wages or working conditions.” [*Id.*] Is that not “concerted” activity for mutual aid and protection? Additionally, the ALJ specifically found that the two employees sought a protected “goal of union recognition and/or area standards pay and benefits.” 2013 WL 703258 (Div. of Judges). Also, the ALJ – contrary to UFCW/OWM’s characterization – specifically held that “It is clear James’ and Ramos’ tactics *were not* geared to harass the company into a state of confusion.” *Id.* And, finally, the ALJ specifically found that the Act did not protect the employees’ work absences because they had a “plan to strike, return to work, and strike again” on a “repeated” basis for a constant, unchanging purpose of gaining “union recognition and/or area standards pay and benefits,” *id.* (emphasis added); a classic “manner, not motive” IWS case.

Third, UFCW/OWM cites *NLRB v. Insurance Agents* for its holding that “as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.” [Cross Ex. Br. 7.] True. But UFCW/OWM fails to mention that the Supreme Court in *Insurance Agents* also held that the Act *neither protects*

*nor prohibits* the “economic pressure” tactics at issue in that case – intermittent work stoppages and partial strike activity. 361 U.S. 477, 492-97 (1960) (first noting that the Court held in *Briggs-Stratton* that the Act does not protect IWS tactics and then extending that holding to find that the Act, also, does not prohibit the IWS tactic; the Board is not “an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands” and cannot try to “introduce some standard of properly ‘balanced’ bargaining power”). The Court then completed the “neither protected nor prohibited” circle in *Machinists* where it held that no one – including States – may regulate IWS/partial strike activity. Instead, the free play of market forces governs the use of that tactic. [WM Reply to UFCW/OWM Ans. Br. 2-6.]

UFCW/OWM also makes one factual misrepresentation in its “protected motivation” section. It claims that “Walmart workers [] went on strike did so for multiple reasons . . . .” [Cross Ex. Br. 10.] False. As discussed in Walmart’s Reply to UFCW/OWM’s Answering Brief at 8-9, the ALJ found that the IWS participants all shared a common, unchanging objective, and UFCW/OWM did not take exception to that factual finding. Not surprising. Because the record evidence establishes that all the IWS participants went on strike in support of UFCW/OWM’s unchanging objectives, in contrast to various reasons for *joining* UFCW/OWM. [*Id.*] UFCW/OWM tries, but fails, to mix apples and oranges in an attempt to confuse the issue.

In any event, UFCW/OWM offers no argument to support the idea that striking for a protected reason gives employees or unions the right to usurp the employer’s rightful control over the work schedule. There is simply no relationship between those two ideas.

**B. “Ceasing Work” Does Not Convert Unprotected IWS To A Protected Strike.**

UFCW/OWM repeatedly claims – as if simply repeating the words would bring them to life – that “ceasing work” cloaks every work stoppage with the Act’s protections. [Cross Ex. Br. 11-13.] According to UFCW/OWM: (1) the Act protects all properly motivated strikers if “they

also completely ceased work while striking, thus foregoing pay and subjecting themselves to a risk of replacement”; (2) “the Act protects workers’ strikes when workers completely cease work, such that they accept the economic consequences of a genuine strike by foregoing pay and subjecting themselves to a risk of replacement”; (3) “the deciding factor for whether the Act protects work stoppages is that the employees absented themselves from work”; (4) “workers who completely cease work engage in a protected work stoppage because doing so subjects them to the consequent loss of pay and risk of being replaced”; and (5) “the Act protects the strikes at issue here because the Walmart workers all completely ceased working while on strike and thus surrendered their wages and subjected themselves to the risk of Walmart replacing them.” [Cross Ex. Br. 11.] That claim is so far off the mark that one cannot see the target.

#### **1. The Supreme Court Rejects UFCW/OWM’s Theory.**

First, the United States Supreme Court expressly rejected the flip side of the same argument. In *Insurance Agents*, the Board argued that a union violated its collective bargaining duty in violation of § 8(b)(3) by using IWS and partial strike tactics to pressure the employer during bargaining. 361 U.S. 495-496. The Board argued “these [IWS/partial strike] activities, as opposed to a ‘normal’ strike, are inconsistent with § 8(b)(3) because they offer maximum pressure on the employer at a minimum economic cost to the union.” *Id.* at 496. The Court rejected that “risk” analysis, holding “the matter does not turn on that. Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them. The catalog of union and employer weapons that might thus fall under ban would be most extensive.” *Id.* Instead, the Court held that the Board’s attempt to regulate IWS/partial strike tactics constituted “a movement into a new area of regulation which Congress had not committed to it. . . . We see no indication here that Congress has put it to the Board to define through its processes

what economic sanctions might be permitted negotiating parties in an ‘ideal’ or ‘balanced’ state of collective bargaining.” *Id.* at 499-500. Thus, in *Insurance Agents*, the Supreme Court rejected the idea – advanced by the UFCW/OWM here – that the Board can regulate the IWS tactic merely because participants incur some risk or “disadvantage to the party using them.” To the contrary, “the matter does not turn on that.”

## **2. The Board Rejects UFCW/OWM’s Theory.**

Second, the Board expressly rejects the idea that merely ceasing work – with its loss of pay and risk of replacement – transforms unprotected IWS into protected conduct. In *Swope Ridge*, 350 NLRB 64, 67-68 (2007), the Board affirmed the ALJ’s finding that the Act *did not* protect a union’s intermittent work stoppage campaign, even though when the participants ceased work, they did so for only a very short period of time, making it difficult if not impossible for their employer to actually hire replacements. The ALJ noted that “there appears to be no legal impediment to permanently replacing such economic strikers regardless of the length of each strike.” *Id.* at 67. Thus, merely “ceasing work” with its concomitant loss of pay and risk of replacement cannot serve as the basis for determining whether the Act protects a work stoppage. Strangely, UFCW/OWM cites *Swope Ridge* for the proposition that “ceasing work” includes ceasing work for “so short a time that it would be difficult for their employer to hire replacements” [Cross Ex. Br. 11], but apparently fails to realize that *Swope Ridge* went on to hold that the Act did not protect the work stoppages at issue in that case under the IWS rule. Indeed, *every* unprotected IWS case involved employees who completely ceased work, lost pay, and subjected themselves to risk of replacement. [WM Br. 54-62 (*Embossing Printers* (unprotected IWS participants completely ceased work repeatedly for one shift); *Briggs-Stratton* (unprotected IWS participants completely ceased work repeatedly for one shift over multiple shifts covering a full 24-hour period); *Excavation-Constr.* and *Honolulu Rapid Transit*

(unprotected IWS participants completely ceased work repeatedly for an entire weekend); *Home Beneficial Life Insurance* (unprotected IWS participants planned to completely cease work repeatedly for five out of seven days each week); *Pennsylvania Am. Water Co.* and *Pacific Telephone* (unprotected IWS participants committed to completely cease work repeatedly whenever a picket line went up, regardless of the duration).] UFCW/OWM does not discuss any of those cases or explain its argument in light of their uniformly contrary holdings.

### **3. Cases Cited By UFCW/OWM Do Not Support Its Theory.**

Third, UFCW/OWM confusingly cites partial strike cases – where employees *do not* completely cease work, but refuse some part of their work tasks or schedule – to support its argument that completely ceasing work automatically grants the Act’s protections. [Cross Ex. Br. 11-12 (citing partial strike cases *Polytech*, *Audubon*, *First Nat’l Bank of Omaha*).] According to UFCW/OWM, the logic proceeds as follows: (1) the Act does not protect partial strike conduct, (2) partial strike conduct does not involve a complete cessation of work, so (3) the Act must protect all complete cessation of work. Under that approach: (1) the Act does not protect strike violence, (2) strike violence does not involve handing out flowers, so (3) the Act must protect handing out flowers. Clearly, that logic does not follow because UFCW/OWM mixes apples and oranges. The IWS and partial strike tactics both usurp an employer’s rightful authority, but they do so in different ways. Indeed, even in the refusal-of-overtime partial strike scenario presented in *First Nat’l Bank of Omaha*, 171 NLRB 1145, 1151 (1968), cited by UFCW/OWM, the ALJ made clear that “Employees who choose to withhold their services because of a dispute over scheduled hours may properly be required to do so *by striking unequivocally*.” (Emphasis added.) By definition, the start/stop, start/stop, start/stop, start/stop character of the IWS tactic is the antithesis of “striking unequivocally.”

Fourth, *Robertson*, 216 NLRB at 362, does not say anything like “the deciding factor for whether the Act protects work stoppages is that the employees ‘absented themselves from work.’” [Cross Ex. Br. 11.] Instead, the Board held that the work stoppage participants were trying to “find a way to resolve work-related problems of the employees, and to seek help in securing a resolution,” which did not constitute unprotected IWS because “the November and February incidents involved different situations and different people. While the November incident was a protest concerning overtime, the February incident involved other issues.” *Id.* Similarly, *WestPac Electric.*, 321 NLRB 1322, 1360 (1996), does not say anything remotely like, the “workers . . . engaged in protected work stoppages because they completely ceased work, thereby assuming a loss of wages and risk of replacement.” “Rather, based on details noted elsewhere below, [the ALJ, affirmed by the Board] judge[d] that each strike was ‘unique to its facts and circumstances,’ *i.e.*, that each strike had its distinct origins and motivating antecedent features.” Thus, the work stoppages were protected because – unlike here – there was no “support in the record for the notion that these strikes were conducted in furtherance of a single, underlying plan or scheme by the Unions or the strikers.” *Id.*

**C. The IWS Rule Does Not Turn On Strike Misconduct.**

UFCW/OWM devotes much ink arguing that it did not engage in egregious strike misconduct so as to forfeit the Act’s protections for that reason. [Cross Ex. Br. 13-20.] All irrelevant.

The IWS issue in this case does not turn on whether the IWS participants engaged in any strike misconduct. The IWS issue turns on whether UFCW/OWM planned and orchestrated a series of intermittent work stoppages for a common plan or purpose. The ALJ found it did. Thus, the IWS issue does not turn on whether UFCW/OWM intended to disrupt operations by striking “around Black Friday and [at] Walmart’s shareholder meeting to intensify pressure on

Walmart to address their concerns” [*Id.* at 14]; although that admission confirms the obvious truth that UFCW/OWM did everything in its power to time its IWS events to maximize reputational and brand damage to Walmart. Likewise, the IWS issue does not turn on how many associates participated in the IWS campaign or whether UFCW/OWM participants joined in related demonstrations, were “overly spirited,” sought publicity, or coordinated with community allies. [*Id.* 15-20.] None of those background facts support the rejected idea that the Act gives employees the power to unilaterally usurp the employer’s rightful authority to control the work schedule. However, UFCW/OWM does notably acknowledge that the ALJ, affirmed by the Board, in *National Steel* distinguished the unprotected IWS tactic from a protected continuous and forthright strike. [Cross Ex. Br. 15, n.4 (“union strategy was that ‘*in lieu of striking*’ . . . [the employees would engage in unprotected tactics] such as ‘work stoppages, slowdowns, and the like.’”) (emphasis in original).]

**D. Board Law Does Not Give Employees The Right To Engage In A Campaign Of Repeated, Same-Purpose Strikes.**

Despite 60-years of IWS law to the contrary, UFCW/OWM claims that “the Act protects the right of workers to strike multiple times regarding the same protected workplace issue.” [*Id.* 20.] In support of that inaccurate proposition, UFCW/OWM cites *WestPac Electric, U.S. Service Industries, Robertson, Farley Candy, City Dodge Center, Union Electric, Chelsea Homes, and Empire Gas*. But every one of those cases specifically found – unlike here – that there was no evidence of any plan or scheme to conduct a series of intermittent work stoppages for a common plan or purpose. See *WestPac Elec.*, 321 NLRB 1322, 1360 (1996) (three strikes in one week did not constitute unprotected IWS because “I can find no substantial support in the record for the notion that these strikes were conducted in furtherance of a single, *underlying plan or scheme* by the Unions or the strikers . . . . I judge that each strike was ‘unique to its facts and

circumstances,' *i.e.*, that each strike had its distinct origins and motivating antecedent features”); *U.S. Service Industries.*, 315 NLRB 285, 289-90 (1994) (two strikes in two months by non-union employees, assisted by union, were not “part of a *planned strategy* intended to harass the company,” where first strike on May 30 was conducted to generically protest “their working conditions” while second strike vote and strike on July 26 came after employer gave non-striking employees a bonus and employer made unlawful threats to prior strikers); *NLRB v. Robertson Industries*, 560 F.2d 396, 397-99 (9th Cir. 1976), *sub nom*, *Robertson Industries*, 216 NLRB 361, 362 (1975) (two, one-day work stoppages in three months did not arise from “a *repeated pattern* of half-strikes,” but, instead, arose from separate distinct complaints); *Farley Candy Co.*, 300 NLRB 849, 849 (1990) (two strikes in two days did not constitute “a *plan to strike, return to work, and strike again*” where second strike was “a [direct, spontaneous] reaction to the Respondent’s decision the previous day [after the first strike] to address the packaging department employees’ demands after refusing [the spokespersons’] earlier, similar request on behalf of the pan department employees”); *Roseville Dodge v. NLRB*, 882 F.2d 1355, 1358-59 (8th Cir. 1989), *sub nom City Dodge Center*, 289 NLRB 194 (1988) (second work stoppage in four days did not qualify as unprotected IWS because it grew out of the employer’s new “help wanted advertisement [foreshadowing the employees’ replacement] and not because the mechanics had a *preconceived plan* of action”; “They did not have a *preconceived plan* to engage in a series of strikes to harass the petitioner”); *Union Electric*, 219 NLRB 1081, 1082 (1975) (subsequent work stoppage by two employees in protest over discipline against two earlier strikers was “protest against, *the separate actions taken by the Respondent* in furtherance of its own purposes’); *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990) (“[T]wo work stoppages, even of like nature, are insufficient to constitute evidence of a *pattern of recurring*,

*and therefore unprotected, stoppages.”*); *NLRB v. Empire Gas, Inc.*, 566 F.2d 681, 686 (10th Cir. 1977) (finding one work stoppage with a potential for a second “did not give rise to a repeated pattern of half-strikes”). (Emphasis added throughout.)

Notably, UFCW/OWM does not discuss any of the numerous IWS cases – from *Honolulu Rapid Transit* to *Dallas Glass* – holding that the Act *does not* protect a plan or pattern of repeated striking over the same issue.

**E. UFCW/OWM’s Attempt To Distinguish Controlling IWS Law Only Demonstrates Its Applicability Here.**

Try as it might, UFCW/OWM cannot avoid the fact that the Board and courts have held for over 60 years that the Act does not protect intermittent work stoppages for a common plan or purpose. Consequently, UFCW/OWM attempts to shove the entire body of unhelpful IWS law into an “improper, unprotected motivation” box; remembering UFCW/OWM’s claim that the Act protects any and all work stoppages as long as the participants cease work *for a protected motive* and do not engage in strike misconduct. [Cross Ex. Br. 25-28.] As a threshold matter, UFCW/OWM’s “improper motive” theory fails – as discussed above – because the Board expressly holds that the motive for a work stoppage is irrelevant to the IWS analysis, it is the *manner* of the tactic that determines its status. But, assume for the sake of argument, that UFCW/OWM’s “improper, unprotected motivation” label serves as the linguistic equivalent of “improper, unprotected manner,” UFCW/OWM’s attempt to distinguish the IWS case law on that basis does just the opposite, it proves that authority applies here.

In its Cross Exceptions Brief at 25-26, UFCW/OWM admits that the Act does not protect an “arrogation [by employees] of the [employer’s] right to determine their schedules and hours of work,” citing IWS cases *Honolulu Rapid Transit* and *Swope Ridge (Care Center of Kansas City)*. In discussing those two cases, UFCW/OWM acknowledges that the IWS participants

there engaged in a series of intermittent work stoppages to pressure the employer for a common plan or purpose where the participants (as directed by a union) unilaterally dictated when they would come and go from work. [*Id.*] UFCW/OWM further specifically acknowledges that “the Union was intending to ‘designate the workdays’ and [participants sought to] ‘impose upon the employer their own chosen conditions of employment’” (quoting *Honolulu Rapid Transit*, involving repeated, same purpose striking on weekends), and the IWS participants “seize[d] the employer’s right ‘to determine their schedules and hours of work’ and ‘establish[ed] and impose[d] upon the employer their own chosen conditions of employment’” (quoting *Swope Ridge*, involving two one-day same-purpose strikes with notice of a third). [Cross Ex. Br. 26.] The UFCW/OWM openly acknowledges that the Act does not protect the IWS campaigns in those cases. [*Id.*]

In the same vein, UFCW/OWM goes on to cite *Audubon Health Care* (a partial strike case) and *Embossing Printers* (an IWS case), for the fundamental rule underlying all IWS and partial-strike cases: the Act does not protect employees who “usurp [the employer’s] prerogative to assign work” or attempt to “dictate the terms and conditions of employment.” [Cross Ex. Br. 27.] As affirmed by the Board in *Embossing Printers*, where employees engaged in three, same-purpose work stoppages: “They did not have a right under the Act to come and go as they pleased. They were entitled to strike. But they were not entitled to walk out and return and to engage in this activity repeatedly.” 268 NLRB 710, 723 (1984).

All true. Each of those cases – cited by UFCW/OWM – proves Walmart’s point. UFCW/OWM employed a virtually identical – and likewise unprotected – IWS tactic here.

Here, UFCW/OWM – at its whim – repeatedly and unilaterally “designated the workdays” that its IWS participants would not work, “seizing the employer’s right to determine

their schedules and hours of work.” UFCW/OWM directed its IWS participants “to come and go as they pleased.” Thus, if, as UFCW/OWM admits, the Act did not protect a union’s plan to pressure an employer with “three consecutive 10-day strike notices” (one rescinded) in *Swope Ridge*, which resulted in two one-day, same-purpose strikes, how much more compelling is that rule of law here, where the UFCW planned and orchestrated an exquisitely choreographed series of wave after wave of one-, two-, or (in one case) a few-shift work stoppages at multiple stores across the entire country over a period of two calendar years to pressure Walmart for the same, unchanging purpose? Contrary to UFCW/OWM’s protestations [Cross Ex. Br. 28], the IWS participants here absolutely did “strike in a manner that determined their schedules [and] hours of work.” They repeatedly decided when they would work and when they would not, all at UFCW/OWM’s whim based solely on UFCW/OWM’s agenda and purposes. Consequently, UFCW/OWM admits the IWS rule and the rationale for that rule. That rule applies to the IWS campaign here every bit as much as it did in *Honolulu Rapid Transit* and *Swope Ridge*.

**F. The Absence Of Actual Disruption Does Not Convert Unprotected IWS To Protected Conduct.**

UFCW/OWM further attempts to distinguish unhelpful IWS case law – this time *Pacific Telephone* and *National Steel* – by claiming that the IWS rule only applies if participants engage in “strike activity [that] itself serves to prevent the employer from defending itself by continuing operations with replacement workers.” [Cross Ex. Br. 28-31.] But that argument fails given the Board’s rule that the IWS analysis does not turn on whether the IWS prevented the employer from defending itself with replacement workers. Indeed, *Pacific Telephone* dealt directly with that issue, holding, “[R]egardless of the success or failure of the Respondent in its efforts to defend against the intermittent and unpredictable strike and picket attacks, the inherent character of the method used sets this strike apart from the concept of protected union activity envisaged

by the Act.” 107 NLRB 1547, 1549-50 & n.6 (1954); *see also Swope Ridge*, 350 NLRB at 66 (“The record also shows that the Respondent was well prepared for the strikes [as the union gave ample advance notice] and that there was no disruption of services and care for the residents.”); *Dallas Glass*, 2013 WL 703258 (“It is clear James’ and Ramos’ tactics were not geared to ‘harass the company into a state of confusion’”). Indeed, the UFCW long ago conceded that the IWS rule does not require a showing of operational disruption. [ALJ Dec. 53 n. 64.]

UFCW/OWM also claims that the Act somehow did not apply to the IWS participants in *Pacific Telephone* because they “barely lost any pay and avoided risk of replacement by returning to work before replacements arrived.” [Cross Ex. Br. 30.] Yet, UFCW/OWM argues just the opposite earlier in its brief when it claims – citing *Swope Ridge* – that the Act should protect very short duration IWS even though “they cease work for so short a time that it would be difficult for their employer to hire replacements.” [*Id.* 11, 29.]

UFCW/OWM’s attempt to distinguish *National Steel* fares no better. UFCW/OWM affirmatively admits that the intermittent work stoppages at issue in that case did not constitute a “forthright and continuous strike” and that intermittent work stoppage participants do not “assume the status of strikers.” [*Id.* 31.] Further, neither the ALJ nor the Board in *National Steel* made any mention of the employer’s ability to replace the IWS participants – or lack thereof – in its analysis. It simply was not a factor. To be sure, the IWS tactic in that case was intended to pressure and harass the employer; every protected strike has the same intent, per *Swope Ridge*, discussed above. Rather, the ALJ there, affirmed by the Board, noted that the “repeated condemnation delivered by both the Board and the courts against such less-than-complete strike activities appears to be grounded in the notion that they involve a kind of worker insubordination.” 324 NLRB 499, 509 (1997). *National Steel* could not say it any clearer:

“intermittent strike activity” is not “a forthright and continuous strike.” The IWS analysis does not turn on whether participants successfully prevent an employer from replacing them. That is surely one of the advantages of the tactic, and surely one of the reasons that unions periodically employ the tactic, but it simply does not enter into the legal analysis equation in any IWS case.

Predictably, UFCW/OWM completes its analysis of the IWS issue by repeating its mantra over and over again that the Act must protect any and all strikes if participants “fully withheld their labor to protest their issues, such that the strikers faced the economic risks of loss of pay and risk of replacement.” [Cross Ex. Br. 31.] That view of the law cannot coexist with 60-years of Board and court cases that repeatedly hold the Act does not protect IWS even though participants all “faced the economic risks of loss of pay and risk of replacement.” [*Id.*]

**G. UFCW/OWM’s Policy Arguments Lack Merit.**

UFCW/OWM predicts a parade of horrors should the Board not jettison 60-years of well-settled Board and court law. [Cross Ex. Br. 33-38.] Those predictions lack merit.

UFCW/OWM begins by claiming that it does not urge “a new standard.” It asserts that granting protection to any and all strikes as long as participants cease work for a protected purpose and do not engage in strike misconduct merely “adheres to the holdings in the existing strike-related case law.” [*Id.* 33.] As discussed above, nothing could be further from the truth. UFCW/OWM asks for nothing less than a brand new economic weapon that requires the complete reversal of every IWS case ever recorded.

UFCW/OWM claims that § 13 of the Act – as discussed by the Supreme Court in *Erie Resistor* – gives employees the right to engage in IWS and “prohibits the Board from limiting the right to strike.” [*Id.* 34-35.] Not true. Obviously, the Board and the courts place many limits on the right to strike, notwithstanding § 13; *e.g.*, allowing employers to temporarily or permanently replace and lockout striking employees; denying protection to sit-down, partial, intermittent,

wildcat, and violent strikes as well as those that run afoul of contract or federal law; and prohibiting strikes altogether if in violation of Sec. 8(b), (d), or Sec. (g). Indeed, the Supreme Court rejected this same argument in *Briggs-Stratton*. 336 U.S. 245, 258-64. Thereafter, the Court expressly declined to revisit *Briggs-Stratton's* analysis of Sec. 7, 13, and 501(2) in *Insurance Agents and Machinists*. See *NLRB v. Insurance Agents*, 361 U.S. 477, 493 n. 23 (1960) (“However, we will not here re-examine what was said in *Briggs-Stratton* as to §§ 13 and 501.”); *Machinists, Lodge 76, v. Wisconsin Empl. Rel. Commn.*, 427 U.S. 132, 150 n.12 (1976) (“In this case we need not and do not disturb the holding of *Briggs-Stratton*, later remarked in *Insurance Agents*, that § 13 of the NLRA, 29 U.S.C. Sec. 163, which guarantees a qualified right to strike, is not an independent limitation on state power apart from its context in the structure of the Act. Nor need we determine the vitality of the implication in *Briggs-Stratton*, also remarked in *Insurance Agents*, that § 501(2) of the Taft-Hartley amendments to the NLRA, 29 U.S.C. § 142(2), is not to be considered in connection with § 13, but rather is only an aid to construction of § 8(b)(4), 29 U.S.C. § 158(b)(4), of the NLRA.”).

UFCW/OWM further predicts that if the Board applies its 60-year-old IWS rule here, employers will: punish “any worker who attempts or even considers a strike,” “pervasively threaten workers whom they believe are considering striking and terminate workers for having struck,” and “punish strikers in the future.” [Cross Ex. Br. 33, 36, 37.] UFCW/OWM offers up as proof of this “terrifying chilling effect” a statement by a Walmart representative that Walmart would review work stoppage activity “on a case by case basis.” Terrifying? Hardly. Particularly where the ALJ found that the referenced statements did not violate the Act. [ALJ Dec. 44.] UFCW/OWM’s chicken-little prediction also fails completely in light of Walmart’s restraint in dealing with wave after wave of the UFCW/OWM IWS campaign in 2012, taking no

action against scores of intermittent work stoppage participants until after UFCW/OWM leaders threatened more of the same and then delivered, again, in 2013, on that promise. For the same reason, UFCW/OWM's cites to *U.S. Serv. Indus.* and *Argenbright Security* [Cross Ex. Br. 37] offer no assistance here. UFCW/OWM cites those two cases for the proposition that a generic prohibition on any future strikes violates the Act. True. And unremarkable. At no time did Walmart issue any such generic prohibition.

**H. The IWS Rule Comes Directly From The United States Supreme Court.**

UFCW/OWM seeks to avoid the fact that the United States Supreme Court's decision in *Briggs-Stratton* underlies the Board's IWS rule. [UFCW/OWM Ans. Br. 28-29.] But that effort fails as all parties cite to *Pacific Telephone* and *Honolulu Rapid Transit* as controlling authority, and both cases relied on *Briggs-Stratton*.

Citing *Briggs-Stratton*, the full Board held in *Honolulu Rapid Transit*, "Furthermore, the United States Supreme Court, in finding that intermittent work stoppages *did not fall within the protection of Section 7* of the Act and could therefore be enjoined by the State courts of Wisconsin, stated that:... We find no basis for denying to Wisconsin the power in governing her internal affairs, to regulate a course of conduct *neither made a right under federal law nor a violation of it* and which has the coercive effect obvious in this device." 110 NLRB 1806, 1810-11 (1954) (citing *Briggs-Stratton*, 336 U.S. 245, 264-65 (1949) ("We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal Statute *nor was it legalized and approved thereby.*") (emphasis added).

Likewise, in *Pacific Telephone*, the Board held, "Our conclusion here finds support in the Supreme Court decision in [*Briggs-Stratton*], holding that similar intermittent work stoppages did not fall within the protection of the National Labor Relations Act and could therefore

properly be enjoined by the State courts of the State of Wisconsin.” 107 NLRB 1547, 1549-50, n.6 (1954).

And *Swope Ridge*, the most recent Board IWS decision, relied almost exclusively on *Honolulu Rapid Transit*, which relied directly on *Briggs-Stratton*. 350 NLRB 64, 68 (2007) (holding that the IWS rule applied – as in *Honolulu Rapid Transit* – where the evidence established “the Union’s similar intent to engage in a series of recurring intermittent work stoppages; such work stoppages were implemented; the Union’s intent to continue engaging in repeated work stoppages as part of its underlying bargaining strategy until a contract was reached, . . . and the strikes were in furtherance of this strategy”). Moreover, the ALJ in *National Steel* (1997), affirmed by the Board, expressly cited to and relied on the IWS reasoning of *Briggs-Stratton* in finding that the Act does not protect “intermittent work stoppages or their equally unprotected kin, partial strikes.” 324 NLRB 499, 509, n.19 (1997). Thus, the Board must follow the precedential and controlling effect of Supreme Court authority when applying the IWS rule, including the Court’s proscription that the free play of market forces must govern the use of the IWS tactic (as established in *Briggs-Stratton* and reiterated in *Insurance Agents and Machinists*).

**I. UFCW/OWM Offers Numerous Other Irrelevant Arguments.**

In its Answer to Walmart’s Exceptions, UFCW/OWM offered several additional arguments in support of its request that the Board jettison the IWS rule, and cross-referenced those arguments to its Cross-Exceptions. For the sake of completeness, Walmart addresses those arguments here, although they are irrelevant to key issues already discussed.

For example, UFCW/OWM asserts that “Walmart’s firing and discipline of workers who struck, whether they struck once or more than once, did nothing to assist Walmart in maintaining its operations during the strike.” [UFCW/OWM Ans. Br. 19.] Walmart does not know what that

sentence means or how the application of an attendance policy weeks *after* an IWS wave could help an employer deal with operational disruptions *during* the IWS.

UFCW/OWM claims that the IWS rule somehow causes “workers [to] forfeit their right to strike because they also exercised their right to act through their union.” [UFCW/OWM Ans. Br. 22-23.] Again, Walmart is not sure what those words might mean, but it certainly makes no such argument. The IWS rule applies to IWS campaigns run by unions with represented employees (*Swope Ridge, National Steel, Pacific Telephone*), unions directing unrepresented employees (*Blades, Embossing Printers, Dallas Glass*), and employees acting on their own (*Home Beneficial, Excavation-Constr., Wirebound*). [WM Ex. Br. 54-62.]

UFCW/OWM also claims that the IWS rule “defies common sense and the dictates of practical bargaining.” [UFCW/OWM Ans. Br. 23.] However, the UFCW does not explain how that statement squares with multiple IWS cases where the federal courts and the Board all applied the IWS rule in the context of collective bargaining; *e.g., Briggs-Stratton, Insurance Agents, Swope Ridge, National Steel, Pacific Telephone, Honolulu Transit*. The UFCW does not mention any of those IWS “collective bargaining” cases. Instead, it points to *Texas Gas Corp.* for the proposition that it is “a lawful and common ‘accepted bargaining technique’” to strike more than once over an issue that remains unresolved. [*Id.* 23.] *Texas Gas Corp.* doesn’t say anything like that. To the contrary, in *Texas Gas Corp.*, 136 NLRB 355, 364-65 (1962), the Board affirmed the ALJ’s finding that “the striking employees were willing and ready to return to work with a genuine desire to continue their former working relationship with the Respondent and not for the *purpose of securing a tactical advantage* over the Respondent to enable it to engage in a surprise strike in the future.” (Emphasis added.) Further, in finding no evidence of an IWS plan, the ALJ noted that the union representative’s statement regarding potential future

strikes (depending on bargaining results) was highly ambiguous: “whether or not the employees would actually authorize or support another strike, and if one were called, who would support it, is highly speculative, particularly in view of their prior unsuccessful strike venture.” *Id.*

Finally, UFCW/OWM also tries to avoid the import of its disingenuous use of “unconditional” offers to return to work by mischaracterizing Walmart’s argument. Walmart does not – as suggested by UFCW/OWM [UFCW/OWM Ans. Br. 33] – argue that “strikers who make an unconditional offer to return to work make a [generic] promise not to strike again.” Instead, Walmart cites on-point Board law for the rule that an unconditional offer to return to work carries with it an implied promise that the author of the unconditional offer does not intend to use that offer as a subterfuge to gain reinstatement only to strike again on the same issue. [WM Br. 75-77.] That is exactly what happened here.

**J. UFCW/OWM’s (And The ALJ’s) Proposed Rule Would Constitute An Unlawful “Taking” Under The Fifth Amendment.**

Throughout its Cross-Exceptions Brief (1-38) and its Answer to Walmart’s Exceptions (1-36), UFCW/OWM urges the Board to give *all* employees and *all* unions the power to unilaterally usurp and interfere with the work schedules of America for any duration at any interval with repeated start/stop, start/stop, start/stop intermittent work stoppages in pursuit of a constant, unchanging objective. The ALJ would likewise give that power – albeit on a discriminatory basis – to some employees, but not others. If the Board were to adopt either UFCW/OWM’s or the ALJ’s proposed rule, that rule would constitute an unlawful taking under the Fifth Amendment to the U.S. Constitution.<sup>1</sup>

Walmart’s right to operate a lawful business is a property right for purposes of the Takings Clause. In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court held

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<sup>1</sup> The Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

that the First Amendment did not protect union organizers soliciting on a retailer's private property. The Court recognized that a retailer's right to conduct its business without unwarranted interference was a property right subject to constitutional protections. *Id.* at 547; *see also Lee & Eastes, Inc. v. Public Serv. Comm'n*, 328 P.2d 700, 702 (Wash. 1958) ("Property is a word of very broad meaning and ... may reasonably be construed to include obligations, rights and other intangibles as well as physical things. ... The right to operate a lawful business is a property right."); *Local Union No. 313, Hotel & Rest. Emps. v. Stathakis*, 205 S.W. 450, 452 (Ark. 1918) ("The right to carry on one's lawful business without obstruction is a property right.").<sup>2</sup>

"[T]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word. ... [I]t is sufficient if the action by the government involves a direct interference with or disturbance of property rights." *Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871)).

A Board rule granting federal protection for repeated, same-purpose intermittent work stoppages (including the ones conducted in this case) would create *government-sanctioned* direct interference with an employer's right to carry on its business. According to UFCW/OWM and the ALJ, Walmart associates should be free to come and go from work at their (or UFCW/OWM's) whim (again and again and again) whenever they have an ongoing complaint about their employment. There can be no repercussions, UFCW/OWM urges, so associates – whether off work for one shift, one week, or one month (or more) – can come and go from work at any time of *their choosing*, subject only to the employer's ability to temporarily replace them (as UFCW/OWM scripted all its IWS in "ULP strike" terms). But the "right to replace" start/stop, start/stop, start/stop

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<sup>2</sup> Federal courts look to state law to define and determine "the range of interests that qualify for protection as 'property' under the Fifth Amendment." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

alleged ULP strikers is no right at all as the massive logistical burden associated with moving temporary employees in and out of the workforce only creates more interference with operations.

This is not a chicken-little, sky-is-falling scenario. In *Briggs-Stratton*, the union engaged in 27 IWS events in five months. Here, UFCW/OWM orchestrated four waves of IWS in the span of a few weeks during the busiest shopping period of the year in late-2012. In *Honolulu Rapid Transit*, the union ran its IWS campaign every weekend for a few weeks and then intermittent weekends thereafter over the course of months. If the Board gave employees and unions carte blanche to pressure an employer with repeated hit-and-run IWS, what would stop a union or employees from running an IWS campaign on randomly selected shifts twice a week, year round, with rotating, randomly-selected participants, such that a facility manager would never know who would show up for work or for how long? That is just a recipe for constant operational interference; in the customer service industry, manpower is one of the business' most valuable assets. A rule granting IWS rights, however, would strip the business of control over that asset; giving employees and unions the unfettered ability to interfere with business operations at their whim.<sup>3</sup> See *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 13 (1949) (an exercise of governmental authority “which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable ‘taking’ of property”); see also *Huntleigh USA Corp. v. U.S.*, 63 Fed. Cl. 440, 444-45 (2005) (following *Kimball* and concluding that law federalizing airport security “makes it impossible for [plaintiff] to conduct its security business at the nation’s airports” and plaintiff cannot simply “exploit its intangible assets elsewhere”).

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<sup>3</sup> The temporary, intermittent nature of IWS “strikes” does not take them outside of the Fifth Amendment’s protections. See, e.g., *Arkansas Game & Fish Comm’n v. U.S.*, 133 S. Ct. 511, 515 (2012) (“[T]his Court’s decisions confirm, if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking.”).

“Federalizing” the IWS tactic goes too far in infringing on employers’ property right to run its business without undue government-sanctioned interference. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326-27 (2002) (recognizing “partial regulatory takings” where a regulation “goes too far”; courts must weigh “economic impact of the regulation,” the “character of the [government] action and ... the nature and extent of the interference with [claimant’s property] rights”); *E. Enters. v. Apfel*, 524 U.S. 498, 522-23 (1998) (“a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change”); *see also Purple Commc’ns, Inc.*, 361 NLRB No. 126, at \*48 & n. 51 (2014) (Member Johnson, dissenting) (commenting on Board’s decision that employees’ have right to use their employer’s email system for section 7 purposes; “[r]egulatory takings can also occur as the result of large government-imposed property injuries to private parties”). In contrast, employees and unions already have the protected right to engage in continuous, forthright strikes, picketing, hand-billing, and other informational outreach efforts, which give them ample opportunities to pressure employers to make desired changes in the work place.

“[T]he process for evaluating a regulation’s constitutionality involves an examination of the ‘justice and fairness’ of the governmental action.” *Apfel*, 524 U.S. at 523. The rule that UFCW/OWM (as well as the ALJ) urges is neither just nor fair.

**K. The IWS Rule Applies To This UFCW-Orchestrated IWS Campaign.**

Every IWS case cited in Walmart’s Brief in Support of Exceptions [54-62] holds that the Act does not protect (nor prohibit) a campaign of intermittent work stoppages for a common plan or purpose. Not one of those cases holds (or even suggests) that the IWS rule discriminates for or against certain IWS campaigns based on the frequency, duration, or subject matter of the campaign, as urged by the ALJ and CGC. Thus, the ALJ’s finding that the Act creates a discriminatory framework granting a new economic IWS weapon to some employees and some

unions, but not others, cannot coexist with the Board's non-discrimination mandate (the Act applies equally to *all* employees) and cannot stand in harmony with the *Machinists* Court's "free play of market forces" rule. As important, the ALJ's decision contradicts the Board's 60-year-old rule that the Act does not give *any* employees or *any* unions the right to usurp control over the work schedule with a series of repeated, start/stop, start/stop, same-purpose work stoppages.

Indeed, UFCW/OWM admits that the Act does not protect an IWS tactic that usurps the employer's rightful authority to control its own work schedule. [UFCW/OWM Cross Ex. Br. 25-27.] The ALJ found, and no party disputes, that the UFCW planned and orchestrated a multi-year campaign of intermittent work stoppages in this case to pressure Walmart for the same, unchanging objectives. No party disputes that by doing so, UFCW/OWM sought to and did repeatedly usurp control over Walmart's work schedule, unilaterally dictating when participating associates would work and when they would not; at UFCW/OWM's whim, and solely for its own agenda and purposes. Consequently, the IWS rule applies here, and the Board should dismiss the related allegations as set forth in Walmart's Brief in Support of Exceptions. For the same reason, the Board must decline the UFCW/OWM request that the Board discard the 60-year-old IWS rule and grant UFCW/OWM a new economic weapon contrary to *Machinist*.

## **II. UFCW/OWM MISSTATES THE ALJ'S "UNDER REVIEW" FINDINGS.**

In its Cross-Exception 1, UFCW/OWM argues that the ALJ erred by finding that manager LaJuan Stewart did not violate the Act when she shared with several protest/strikers that their protest/strike conduct was under review. [Cross Ex. Br. 38-39.] UFCW/OWM's exception fails because it does not accurately portray what the ALJ decided or why.

UFCW/OWM claims that the protesters/strikers at issue "conducted a prayer vigil and picketed in the parking lot." [*Id.* 38.] Not true. As the ALJ found, the protesters/strikers conducted their protest "near the front of the store" where they "picketed and chanted outside the

store.” [ALJ Dec. 39:25-26.] UFCW/OWM also falsely claims – without citation – that the ALJ’s decision “discounts the ALJ’s finding that the strikers engaged in no misconduct while on strike and that the manager’s comment reasonably tended to interfere with and restrain these workers from exercising their right to strike again in the future.” [Id.] Disturbingly false.

The ALJ did not find that the strikers engaged in no misconduct. To the contrary, he found that “I need not address Walmart’s alternative argument that Stewart’s statement was permissible because it related to certain picketing activity that is not protected by the Act”; *i.e.* “picketing that blocked access to Walmart’s facility and/or was confrontational. . . .” [ALJ Dec. 41 n.50.] Likewise, the ALJ did not find that Stewart’s comment reasonably interfered with anyone’s rights. To the contrary, he found just the opposite: “Walmart did not violate the Act because Stewart’s statement to associates did not have a reasonable tendency to interfere with, restrain or coerce associates in their union or protected activities . . . .” [Id.] Thus, UFCW/OWM bases its Cross Exception 1 on several false predicates.

As noted by the ALJ, the picket/strike activity occurred in front of the store and involved chanting and picketing. The record establishes that much of that protest activity occurred directly in front of the store’s main entrance and in the parking spaces and drive ways in front of the store where it blocked traffic and access and disrupted business. [RT 2728-29, 3201-02, 3255-56; Jt. Ex. 290(a)-(f).] Consequently, as noted by the ALJ, Walmart had a right to conduct an investigation into the potentially unprotected protest activity [ALJ Dec. 40:14-46], and did not violate the Act simply by letting the associate-protesters know that the activity was “under review” [Id. 41:1-8], particularly so as to avoid any later claim of condonation. *See, e.g., Quality Limestone Products, Inc.*, 153 NLRB 1009, 1011 (1965) (under the doctrine of condonation, if an employer fails to give notice to or take action against an employee for strike misconduct and

continues his/her employment status, the employer waives the right to later discipline that employee).

As found by the ALJ, Walmart “did not suggest in any way that its review would lead to adverse consequences for the associates.” [ALJ Dec. 41:2-3.] And Walmart did not take any action based on its review. [*Id.* at 39:39-40.] Thus, Board law makes clear that vague, conditional statements expressing uncertainty or possibility do not constitute unlawful threats or coercion because they do not predict that something bad will happen. *See Pinkerton’s, Inc.*, 226 NLRB 837, 838 (1976) (no threat or coercion where manager told employee, “You could be in trouble over this,” and “I hope you don’t get in trouble over this”); *Sports Coach Corporation of America*, 203 NLRB 145, 151 (1973) (no threat where 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); *see also, Miller Indus. Towing Equip.*, 342 NLRB 1074, 1075 (2004) (no threat or coercion where 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”).

Accordingly, the ALJ did not err in finding that Stewart could lawfully let the associates know about the review.

### **III. UFCW/OWM OFFERS ONLY CONCLUSORY RHETORIC IN RESPONSE TO THE ALJ’S “TOVAR” FINDING.**

In its Cross-Exception 2, UFCW/OWM argues the ALJ erred by finding that Walmart representative David Tovar did not violate the Act when CBS and NBC broadcast several heavily excerpted quotes they unilaterally selected from longer interviews with him to include in their Black Friday 2012 news coverage. [Cross Ex. Br. 39-40.] That exception fails for want of any substantive argument.

**A. UFCW/OWM Offers No Legal Analysis, Only Rhetoric.**

UFCW/OWM simply engages in conclusory posturing. It does not cite a single case. Nor does it address the substantial body of law cited by the ALJ on how the Board deals with the nuances of broadcast snippets. UFCW/OWM just claims that Tovar “went on television” and “threatened those workers with unspecified consequences if they [went on strike].” [*Id.* 39.] He did no such thing. As the ALJ found – to which UFCW/OWM does not except – NBC and CBS interviewed Tovar for their Black Friday programming and “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 relevant circumstances. Further, in his CBS interview, Tovar added “that Walmart does not tolerate retaliation against associates who engage in protected activity.” [ALJ Dec. 44:12-16.]

Similarly, UFCW/OWM argues that when Tovar gave “employee illness” as an example of a potentially valid excuse for absence, that “just reinforced his implied threat that workers who engaged in a lawful strike activity had the type of excuse that would indeed violate Walmart company policies.” [Cross Ex. Br. 39.] Walmart does not understand that logic, and it makes no sense in light of Tovar’s subsequent broadcast statement that “every circumstance is going to be different on Black Friday and we’re going to take those on a case-by-case basis.” [ALJ Dec. 41:32-34.] Reviewing absences on a “case-by-case” basis is the opposite of any purported – and non-existent – threat to treat all absences the same.

Finally, UFCW/OWM argues that Tovar’s actual words mean nothing because unknown and unnamed “Walmart associates had heard Walmart managers and officials make this [no retaliation] statement before” and Walmart always “retaliate[s] against the workers,” which is the very reason for “which workers were striking.” [Cross Ex. Br. 40.] As a threshold matter, UFCW/OWM does not offer a single record citation for any of those unsupported and false

claims. Not one UFCW/OWM Black Friday 2012 work stoppage participant identified any specific unfair labor practice as motivating his or her participation. Not one. To the contrary, they all made common cause with the UFCW/OWM “raise the bar” objectives. [WM Ex. Br. 9.] More to the point, UFCW/OWM offers no legal authority for the odd proposition that saying “Walmart does not tolerate retaliation against associate who engage in protected activity” transforms into an unlawful threat of retaliation if a listener does not believe the words.

**B. The Board and Courts Make Clear That A News Broadcaster’s Unilateral Editing Decisions Do Not Create Liability For An Interviewee.**

The ALJ set forth applicable law dealing with broadcast excerpts. [ALJ Dec. 44.] Given that UFCW/OWM does not except to the ALJ’s finding that “Walmart did not exercise any control over which portions of Tovar’s remarks that NBC and CBS chose to include in their news segments” [*id.*], and it does not dispute the controlling legal authority holding that liability does not attach in those circumstances [Cross Ex. Br. 39-40], it can hardly argue with the ALJ’s conclusion that “I do not find that Walmart is liable for any misunderstandings of Walmart’s position that flow from the editing decision made by NBC and CBS.” [ALJ Dec. 44:19-23.]

The Board dealt with a closely analogous situation in *Monroe Auto Equipment Co.*, 159 NLRB 613, 617 (1966). There, the Board affirmed the dismissal of a charge involving alleged threats made in a media interview due to a lack of an agency relationship between the employer and the media outlet. *Id.* at 614, 617. The GC argued that the newspaper “was used as a vehicle through which [the employer] expressed its policies concerning the Union to its employees . . . .” *Id.* at 616. The GC based this claim on the employer having previously granted an interview to the media outlet, where it discussed the union’s organizing drive. *Id.* at 617. The Board rejected the GC’s argument. The Board affirmed: “Clearly the granting of an interview to a newspaper or the issuance of a press release to a radio station by a corporation, absent evidence of any other

relationship or affirmative action, does not establish either the newspaper or the radio station as the corporation's agent in communicating with its employees." *Id.* The Board explained that the media covered the campaign because "it was of general interest to the community," not because it served as the employer's "vehicles of communication with its employees." *Id.*

Federal courts also refuse to hold parties liable for edited 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. 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 snippet of the interview in the broadcasted report. *Id.* at 847. The edited portion 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 given to the reporter], *not the sound bites they became* [as to the general public]." *Id.* (emphasis added).

Notably, 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)). 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.*

All of that authority applies here. CBS and NBC decided what snippets of the Tovar interviews they wanted to broadcast based on their own journalistic agendas. Walmart cannot be liable for their independent editing decisions as a matter of law. For his part, “Tovar’s complete remarks to NBC and CBS (which, based on the evidentiary record, were not communicated to associates) do not violate Section 8(a)(1) of the Act. Since Tovar’s complete remarks make it clear that Walmart planned to evaluate any strike-related absences on a case-by-case basis based on the attendant circumstances, his complete remarks do not have a reasonable tendency to deter associates from engaging in protected activity.” [ALJ Dec. 44, n.52.]

#### **IV. UFCW/OWM CITES NO AUTHORITY AND OFFERS NO EVIDENTIARY SUPPORT FOR ITS PROPOSED EXTRAORDINARY REMEDIES.**

In its Cross-Exceptions 9-19, UFCW/OWM objects to virtually every aspect of the ALJ’s remedial order. However, in its Cross-Exceptions brief, UFCW/OWM offers no more than a “fly by” laundry list of all the extraordinary remedies it seeks with virtually no analysis and

certainly no legal or evidentiary support. [Cross Ex. Br. 40-41.] Neither the facts of this case nor the applicable law justify those extraordinary remedies. Indeed, UFCW/OWM cites (or miscites) *Albertson's, Inc.* 351 NLRB 254, 384 [sic] (2007), in support of its extraordinary remedy requests [Cross Ex. Br. 41], but the Board rejected extraordinary remedies in that case (notably none of them involved any proposed Company-wide remedy or notice reading).

As a threshold matter, 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 nearly 5,000 stores that had no involvement in any of the conduct at issue – because Walmart did not commit a flagrant or outrageous violation 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 its reasonable interpretation of the law governing the IWS issue as set forth in its Brief in Support of Exceptions at 54-65.

Additionally, UFCW/OWM starts from a false premise for its laundry list of extraordinary remedies, claiming that “Walmart’s *pattern* of retaliating against *all those* who went on strike, up to and including termination, is sufficiently serious and widespread to warrant the remedial requirements that the Notices be posted nationwide and read aloud (and not at just the 30 stores involved in this case). [Cross Ex. Br. 40.] Wrong. To the contrary, Walmart had no “pattern” of applying its attendance policy to “all those who went on strike”; rather it took *no action* in response to a wave of strikes in early-October 2012. It took *no action* in response to a wave of strikes in mid-October 2012. It took *no action* in response to a wave of strikes in mid-November 2012. And it took *no action* in response to a wave of strikes in late-November 2012. [ALJ Dec. 20-25.] It was only after UFCW/OWM leaders threatened to continue the same pattern of repeated, same-purpose striking [ALJ Dec. 38:39-46] that Walmart concluded that UFCW/OWM engaged in unprotected IWS activity as established by 60 years of well-settled Board law. [WM Br. 54-62.] And even then, it only applied its attendance policy to those few and specific individuals who participated in the continuing IWS campaign in June 2013. 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 only

“notice reading” case cited by UFCW/OWM, *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, \*21 (Oct. 30, 2014). [Cross Ex. Br. 40.]

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 UFCW/OWM’s request at all, but rather supports Walmart’s position that the Board should not order a notice reading in this case. [WM Br. 94-96.]

As significant, *Farm Fresh* involved only one facility. UFCW/OWM cites absolutely no authority or any evidentiary support for its novel proposition that a nationwide notice reading is warranted based on a restrained, measured response to IWS activity involving 30 stores (out of 5,000). UFCW/OWM baldly claims that Walmart’s response to the fifth wave of IWS activity at 30 stores “constitutes a company-wide policy of Walmart refusing to recognize its workers’ rights to engage in lawful strikes . . . .” [Cross Ex. Br. 40-41 (misciting *Albertson’s*).] Hardly. To the contrary, 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. When it spoke to 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 “company-wide policy of Walmart refusing to recognize its workers’ rights.” Just the opposite.

Notably, the Board rejected extraordinary remedies in *Albertson’s* cited by UFCW/OWM, 351 NLRB 259-60, and the case did not deal at all with notice reading or a Company-wide posting. However, the Board did address another aspect of UFCW/OWM’s laundry list of requested extraordinary remedies, the replacement of “any manner” versus “any like or related manner” language. The Board in *Albertson’s* noted that the broader “any manner” language “is warranted only when a respondent ‘is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.’” *Id.* (citing *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979)). There, “In our view, the Respondent’s failure to respond to the Unions’ information requests that were routinely generated in the course of investigating and pursuing grievances, while unlawful and a persistent problem, does not manifest ‘egregious or widespread misconduct ... demonstrat[ing] a general disregard for the employees’ fundamental statutory rights.’” *Id.*

Even more so here, UFCW/OWM offers no evidence of any “proclivity to violate the Act” or any “general disregard for the employees’ fundamental statutory rights.” Quite the

contrary. At every step in the process of dealing with UFCW/OWM's IWS campaign, Walmart acted in a restrained and measured manner to respect associate rights under the Act. Walmart has no history of dealing with any other strike or IWS campaign issues and there is certainly no evidence of any widespread violations or even any evidence that any associates at any store outside the 30 at issue here knew about the IWS issue or the application of the attendance policy to the IWS activity in June 2013.<sup>4</sup>

**V. UFCW/OWM WAIVED ITS CONFIDENTIALITY ARGUMENTS AND CANNOT AVOID ITS OWN AGREEMENT.**

In its Cross-Exceptions 20-26, UFCW/OWM complains that the ALJ required UFCW/OWM to comply with the terms of a Protective Order to which it voluntarily agreed. [ALJ Protective Order Ruling ("Ruling"), attached to Cross Ex. Br. ("Each of the parties, including Charging Party, agreed to the terms of the protective order.")] UFCW/OWM seeks to avoid the terms of the Protective Order to which it agreed by claiming: (1) the confidential documents at issue are not confidential; and (2) the Protective Order requirements applicable to UFCW/OWM evaporated when the confidential documents at issue were entered into the record, but not placed under seal. [Cross Ex. Br. 42-48.] Neither argument has merit.

**A. UFCW/OWM Waived Any Confidentiality Designation Objection.**

With respect to the first claim, UFCW/OWM waived any argument that the documents it improperly disclosed to a reporter were not confidential. As the ALJ found in his Ruling, "to the extent that the Charging Party believed that the confidential labels were not warranted, the Charging Party should have raised that issue during trial (*as called for in paragraph 5 of the*

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<sup>4</sup> UFCW/OWM also claims that the Board's standard Notice language is inadequate in various respects, but all those claims seem to be a cut-and-paste from an old brief, for the standard remedial language appears to cover the UFCW/OWM's textual references; *e.g.*, electronic distribution (if the employer customarily communicates with its employees electronically), reasons for attendance actions, remedial actions, etc. [Cross Ex. Br. 41-42.]

*protective order*) when it or another party offered the exhibit into evidence. The Charging Party did not do so, and thus waived any objection that it might have raised about whether the exhibits were properly marked confidential.” (Emphasis added.) *Compare Pacific Lutheran Univ.*, 361 NLRB No. 157, slip op. at 32, n.65 (Dec. 16, 2014) (“We reject PLU’s contention that this case should be remanded to determine the managerial status of the regular faculty. The burden of proving managerial status is on PLU. . . . PLU did not raise that issue at the hearing.”). Moreover, UFCW/OWM’s claim that the documents are not marked confidential is simply false. [Ruling (“Both of those documents are marked confidential”).]

**B. UFCW/OWM Cannot Avoid Its Own Promise To Maintain Confidentiality Before, During, And After Trial.**

With respect to the second claim, UFCW/OWM skates on even thinner ice. UFCW/OWM baldly claims that “Documents admitted into the record of an NLRB hearing are in the public record and no longer subject to protective orders, unless a party moves to seal the record.” That bald claim certainly fails where – as here – a party *agrees* in advance to remain subject to a Protective Order before, during, and after trial. It is UFCW/OWM’s *agreement* at the beginning of this case to treat confidential materials confidential before, during, and after trial that gave rise to the understanding by all parties that the cumbersome “sealing” process was not necessary. Had UFCW/OWM objected to the Protective Order or refused to voluntarily maintain confidentiality through and after trial, Walmart would surely have invoked that cumbersome process. But UFCW/OWM did not. As the ALJ found in his Ruling, “Based on the protective order, and in the absence of any contemporaneous objection by the Charging Party to the protective order applying to Charging Party Exhibit 110 and General Counsel Exhibit 102, Walmart reasonably expected that confidential documents would retain that status even if admitted into the evidentiary record during trial.” That was the whole purpose of gaining

advance agreement: to avoid the hugely cumbersome and logistically difficult process of litigating with sealed documents.

As a result, the *Littlejohn* and *Poliquin* cases cited by UFCW/OWM [Cross Ex. Br. 45-47], do not provide useful guidance here because they did not involve the parties' mutual agreement in advance to treat confidential documents confidential before, during, and after trial. The ALJ likewise distinguished those cases in his Ruling at note 2.

UFCW/OWM also misstates the language of *GTE Southwest, Inc.*, 329 NLRB 563, 567 (1999); changing the meaning of that case by “ellipsis” omission. That case does not say – as represented by UFCW/OWM – that “to the extent that any parts of . . . exhibits [subject to a protective order] are . . . contained in the record those portions are not affected by the protective order.” [Cross Ex. Br. 47.] Instead, the case actually says, “By this decision the Union has now been granted access to the test materials. No party objected to the protective order. In order to protect the above noted exhibits from being generally disclosed *they shall remain sealed*. To the extent that any parts of these exhibits *are otherwise* contained in the record those portions are not affected by the protective order.” 329 NLRB at 567 (emphasis added). Thus, the protective order in that case dealt only with the specific documents under seal. The protective order here is completely different and applies to UFCW/OWM's agreement to treat confidential documents confidentially before, during, and after trial without any requirement for placing them under seal. Likewise, UFCW/OWM's cite to *UPS*, 304 NLRB 693, 694 (1991), is misplaced. As the ALJ noted in his Ruling, that case involved a Protective Order that by its terms did not extend past the “date of [the ALJ's] decision on the merits of the case,” thus “an attorney did not violate the protective order when he obtained a copy of a confidential document *after* the ALJ issues his

decision . . . .” That case clearly does not apply here where UFCW/OWM voluntarily agreed to maintain confidential documents confidential before, during, and after trial.

The ALJ correctly found that UFCW/OWM must abide by its agreement.

### **CONCLUSION**

For the foregoing reasons, Walmart respectfully requests that Board reject UFCW/OWM’s request that the Board overrule 60 years of Board IWS law that is grounded in a rule set down by the United States Supreme Court. Instead, Walmart requests that the Board apply that well-settled law to the IWS issue presented here and find that Walmart lawfully applied its attendance policy to the fifth wave of intermittent work stoppages orchestrated by UFCW/OWM for the same, constant, never-changing objectives. Walmart further requests that the Board decline UFCW/OWM’s other Cross-Exceptions for the reasons discussed above.

Respectfully submitted this 21st day of April, 2016.

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