

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WAL-MART STORES, INC.
Respondent,

and

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

Charging Party.

Case Nos. 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

**CHARGING PARTY'S REPLY IN SUPPORT OF ITS CROSS-EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
(RESPONDING TO WALMART'S ANSWERING BRIEF)**

DEBORAH J. GAYDOS
JOEY HIPOLITO
**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL
UNION**
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 466-1520
Fax: (202) 728-1803
E-Mail: dgaydos@ufcw.org
jhipolito@ufcw.org

Attorneys for Charging Party

In the case before you, Charging Party the Organization United for Respect at Walmart (OUR Walmart) asks the National Labor Relations Board to uphold the decision of Administrative Law Judge (ALJ) Geoffrey Carter that the Act protects the strikes that members of OUR Walmart engaged in against Walmart for the reasons set forth in our previous briefs. In doing so, we urge the Board to affirm the principles of existing case law to clarify any perceived ambiguity. We do not seek a new standard or an expansion of employee rights, but simply urge the Board to clearly affirm the determinative factors derived from existing cases, which is that the Act protects a worker who:

- (1) strikes for a protected purpose and not to unilaterally impose a working condition;
- (2) completely ceases work, thus subjecting the worker to the risk of replacement, and does not prevent the employer from attempting to defend itself; and
- (3) does not engage in strike misconduct.

Reiterating these principles would not provide workers and unions with a new economic weapon because these are already the settled Board factors that workers rely upon to engage in protected strikes. Clearly affirming these principles though is critical because doing so would ensure that all workers fully understand their statutory right to strike. Moreover, doing so would better ensure that employers respect workers' right to strike. Particularly, it would prevent employers from exploiting perceived ambiguity in the case law to unlawfully threaten workers, discipline them, and even terminate them if they dare exercise their right to strike.

This is precisely what Walmart did when it exploited this perceived ambiguity to discipline and fire dozens of worker activists, some of whom only struck once. Moreover, Walmart now seeks to upturn settled case law by arguing for a rule that would prohibit a worker from striking

more than once even if, for example, the worker strikes in response to a specific issue and is unaware that co-workers had struck over a similar issue in the past.

Affirming the principles of existing case law would not suddenly allow workers to come and go to work as they please. Rather, as fully discussed in Charging Party's Brief in Support of its Cross-Exceptions and below, a worker's strike must adhere to each requirement to reap the Act's protection. Moreover as discussed below, the Supreme Court has wholly overruled *Briggs-Stratton*, affirmed the Board's authority to determine protected strikes, and highlighted that the Board could find "that some partial strike activities . . . are 'protected' activities within the meaning of § 7." *Lodge 76, Int'l Assoc. of Machinists v. Wisc. Emp. Relations Comm'n*, 427 U.S. 132, 153 n.14 (1976).

The Act protects the OUR Walmart workers' strikes because they were motivated to protest working conditions and were not an attempt to unilaterally impose working conditions.

Contrary to Walmart's assertion, a worker's motivation to strike is always a key element of finding a strike protected, regardless of what type of strike the worker undertakes. Here, the Act protects the OUR Walmart members who struck during the Ride for Respect, and indeed all of the workers' strikes, because each strike was to protest their working conditions and the retaliation Walmart engaged in against those who spoke out. "[E]mployees may not be discharged for engaging in concerted work stoppages to protest working conditions." *GK Trucking Corp.*, 262 NLRB 570, 572 (1982); see also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) and other cases discussed in Charging Party's Brief in Support of its Cross-Exceptions at 4-8.

The Act also further protects OUR Walmart workers who struck because they did not strike in an attempt to unilaterally impose working conditions. To engage in a protected strike, a worker must not only strike for a protected purpose, but also strike in a manner that does not

unilaterally impose working conditions on the employer. Thus, worker a may not strike in a manner that determines their schedules and hours of work or that allows the worker to perform some duties but precludes the worker from performing others. See *Honolulu Rapid Transit*, 110 NLRB 1806, 1809 (1954); *Audubon Health Care*, 268 NLRB 135, 136-37 (2002), and other cases cited in Charging Party's Brief in Support of its Cross-Exceptions at 24-32.

The Act protects the OUR Walmart workers' strikes because they completely ceased working, thereby subjecting themselves to replacement, and never prevented Walmart from attempting to continue its operations.

For the Act to protect a strike, a worker must also strike in a manner that subjects the worker to replacement by the employer, as fully discussed in Charging Party's Brief in Support of its Cross-Exceptions at 28-32. In other words, a worker must cease work unequivocally, thereby subjecting the worker to loss of pay and risk of replacement.

Walmart errs in asserting that the Board somehow made this factor irrelevant in *Care Center of Kansas City* simply because the ALJ noted that the workers could have been replaced and later found their strike unprotected. 350 NLRB 64, 67 (2007) (Board adopted ALJ decision); Walmart's Answer at 8. Walmart's logic overlooks that the requirement to cease work is but one of several requirements that a worker's strike must fulfill for the Act to protect the strike. Moreover, *Care Center* actually specifically affirmed that to engage in a protected strike a worker needs to completely cease work, putting the worker at risk of replacement. The *Care Center* ALJ specifically cited the Board's holding in a prior case that "employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do." 350 NLRB at 68 (citing *Polytech, Inc.*, 195 NLRB 695 (1992)).

The OUR Walmart workers here always struck unequivocally and never prevented Walmart from defending itself by replacing them. Furthermore, they never sought to harass and confuse Walmart so that they could reap the benefits of striking while avoiding loss of pay or risk of replacement. For these reasons and the reasons stated in Charging Party's Brief in Support of its Cross Exceptions at 24-32, the Act protects the workers' strikes.

The Act protects the OUR Walmart workers' strikes because the Act allows workers to strike more than once over the same issue.

As fully discussed in Charging Party's Brief in Support of its Cross-Exceptions, the Act allows a worker to strike multiple times even if the strikes are over the same issue and occur over a short period of time, as long as the workers completely cease work, engage in no misconduct, and do not strike in a manner that prevents the employer from defending itself.

Walmart misinterprets the case law when it argues that the Board has not permitted workers to strike more than once over the same purpose. *See* Walmart's Answer to Charging Party's Cross-Exceptions at 11-13.

To the contrary, as fully discussed in Charging Party's Brief in Support of its Cross-Exceptions at 20-24, Charging Party's cited cases do support that the Act protects workers who strike more than once over the same issue, even during a short period of time. For example, the Board in *U.S. Service Industries* rejected Walmart's assertion and held that the Act protected three work stoppages over six months even though the workers were motivated to strike by the same economic issues (as part of the union's "Justice for Janitors" campaign). 315 NLRB 285, 285-86 (1994). In *Chelsea Homes*, which Walmart itself noted at page 12-13 of its Answer, the Board held two work stoppages protected and the ALJ explained that "[e]ven if the two incidents could be said to be related and to have arisen from [the same] objection . . . the Board has concluded

that two stoppages, even of like nature, are insufficient to constitute evidence of . . . unprotected, stoppages." *Chelsea Homes*, 298 NLRB 813, 831 (1990).

Put simply, the frequency of work stoppages alone does not determine whether the Act protects them. See discussion at pages 20-22 in Charging Party's Brief in Support of its Cross-Exceptions. Nor does the fact that a worker strikes more than once over the same subject. See discussion at pages 22-24 in Charging Party's Brief in Support of its Cross-Exceptions.

The defunct *Briggs-Stratton* case has no controlling effect.

Contrary to Walmart's assertion, the *International Union v. Wisconsin Employment Relations Board (Briggs-Stratton)*, 336 U.S. 245, 249 (1949), has no controlling effect because, as fully discussed on pages 28-29 of Charging Party's Answer to Walmart's Exceptions, the Supreme Court expressly overruled *Briggs-Stratton* and any of its holdings. The *Briggs-Stratton* Court dealt only with NLRA preemption, holding that preemption did not apply to prohibit a state agency from enjoining a particular strike. 336 U.S. at 249. Ten years later though, the Supreme Court in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon* overruled *Briggs-Stratton*, holding that the "approach taken in [*Briggs-Stratton*], in which the Court undertook for itself to determine the status of the disputed activity . . . is no longer of general application." 359 U.S. 236, 246 (1959). *Briggs-Stratton* erred in interpreting the Act because NLRA preemption should have applied such that the Board could exercise its expertise. When "an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [Board]. . . [C]ourts are not primary tribunals to adjudicate such issues. . . . [T]hese determinations [must] be left in the first instance to the [Board]." *Garmon*, 359 U.S. at 244-45 (emphasis added). Thus, any purported conclusions from *Briggs-Stratton* are invalid.

The Supreme Court later in *Machinists* left no doubt that *Briggs-Stratton* was wholly defunct when it emphasized that the Court "expressly overruled" *Briggs-Stratton* and that "*Briggs-Stratton* stands as a significant departure from our emphasis upon the congressional policy central to the statutory scheme it has enacted." *Machinists*, 427 U.S. at 154 (1976). In fact, the last time the Supreme Court cited *Briggs-Stratton* was to again underline that *Machinists* "explicitly overruled statutory precedent[]" of *Briggs-Stratton*. *Patterson v. McLean Credit Union*, 485 U.S. 617, 618 (1988).

The Supreme Court holds that the Board has the clear authority to determine protected intermittent strikes.

Walmart similarly misconstrues the Supreme Court when it asserts that *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960) somehow stripped the Board of its authority to regulate intermittent strikes. Walmart's Answer to Charging Party's Cross-Exceptions at 7-8. All that the *Insurance Agents* Court did was overturn the Board's finding that a union violated the Act when, during bargaining, it sought to put economic pressure on the employer by engaging in a series of slow-downs and sit-ins. In doing so, the Court found that the union's tactics were not inconsistent with Section 8(b)(3) of the Act merely because they did not conform with what the Board perceived as a "normal" strike. *Id.* at 496. The Court directed the Board to accept the use of union tactics that ranged beyond the "traditional" or "normal" even if the tactics receive "the public's moral condemnation." *Id.* at 495. In essence, the Court found that the Board should not find tactics to be unlawful merely because they are new or outside of the perceived norm. Ultimately, if anything, *Insurance Agents* supports the conclusion that the Act protects OUR Walmart strikers' actions.

Contrary to Walmart's flawed interpretations of *Briggs-Stratton*, *Insurance Agents*, and *Machinists*, the Court has repeatedly empowered the Board to determine whether the Act protects these strikes. Moreover, the Court envisioned that the Board would hold that the Act protects some "intermittent" strikes. Specifically, consistent with the principles of *Garmon*, the Court in *Machinists* highlighted that it "may be that case-by-case adjudication by the federal Board will ultimately result in the conclusion that some partial strike activities . . . are 'protected' activities within the meaning of § 7." 427 U.S. at 153 n.14. Thus, Walmart cannot rely on *Briggs-Stratton* or its progeny to argue that the Board cannot find that the OUR Walmart workers' strikes were protected.

The Board should take this opportunity to clarify any perceived ambiguities in its strike-related case law.

The right to strike is a fundamental right guaranteed by the Act, but workers may not always understand under what conditions the Act protects a strike. The Board should clearly affirm the determinative factors underlying the strike-related case law so that workers may confidently exercise this right and not be frightened by purported negative consequences. And such a clarification would prevent employers from using the perceived ambiguity in the case law as an opportunity to fabricate draconian legal interpretations that serve to deprive workers of this fundamental right.

Consider Walmart, which told those workers who had previously struck that any future strike would be intermittent and unprotected by the Act, so striking again would subject the workers to potential discipline and discharge. That alone chilled the rights of the workers and forced them to question whether to exercise their right to strike. Then Walmart followed up on its threat, disciplining and discharging more than 60 workers who dared to strike over poor working

conditions and retaliation against those who spoke out. Once again, Walmart's drastic actions resulted in a complete chilling of the workers' right to strike. This manipulation of the case law cannot be allowed to stand.

As fully discussed in Charging Party's Answer to Walmart's Exceptions, Walmart is urging the Board to create a new radicalized rule that violates the Act and case law, a rule that would eviscerate the worker's protected right to strike. At its heart, Walmart is championing a “two strikes and you’re out” rule:

A number of relevant principles emerge from the [intermittent] cases discussed above: (1) two, same-purpose work stoppages plus a threat (or no disavowal of an evident intent) to continue constitutes IWS; (2) the IWS rule applies to employees who participate only once in an orchestrated strategy of repeated, same-purpose striking, regardless of any individual motive or lack of knowledge about the orchestrated strategy; (3) the IWS rule applies equally to economic and ULP-related objectives; and (4) the IWS rule applies equally to pre-conceived and evolving repeated, same-purpose striking.

Walmart’s Brief in Support of its Exceptions at page 78, n.37.

Thus, Walmart asserts that a worker who has struck one time is at risk of inadvertently becoming an unprotected intermittent striker if she strikes again, even if it is in response to an evolving issue and even if the worker has no knowledge that other workers have struck over the same issue before. This formulation of the “relevant principles” surrounding the right to strike clearly shows that it is not the Charging Party but Walmart that is seeking “an entirely new, federally-protected economic weapon to use in labor disputes.” Walmart’s Answer to Charging Party’s Cross-Exceptions at 2.

For the reasons stated here and in Charging Party's Answer to Walmart's Exceptions, the Board should reject Walmart's unprecedented proposal to gut the workers' right to strike.

The ALJ's Order granting Walmart's Motion to Enforce the Protective Order should be reversed.

The ALJ granted Walmart's Motion to Enforce the Protective Order and Charging Party excepted to this finding. See Charging Party's Cross-Exceptions 20-26 and its Brief in Support of its Cross-Exceptions at 42-48. Walmart errs when it asserts that OUR Walmart waived its right to object to the confidentiality of exhibits entered in a public hearing because OUR Walmart did not make those objections during the public hearing. Walmart's Answer to Charging Party's Cross-Exceptions at 37-40. OUR Walmart did not waive its objections to the confidentiality of the hearing exhibits because both the First Amendment of the U.S. Constitution, case law, and the Protective Order itself require the exhibits be publicly available unless a party moves to seal the exhibits and the judge so orders. Proceedings before the Board are open to the public and exhibits are presumed to be part of the public record. NLRB Rules and Regs. Section 101.10(a). Moreover, while OUR Walmart did agree to a Protective Order, Walmart fails to mention that the Order included a sealing procedure, specifically required to maintain confidentiality of exhibits entered during a public hearing. This sealing provision was not irrelevant, but was the mandated process for Walmart to assert confidentiality for these exhibits. Walmart though failed to exercise its right to seal exhibits at the time they are entered into the public record.

In short, it was not Charging Party that waived its right to object to the hearing exhibits' confidentiality. Rather, Walmart waived its right to the confidentiality of those hearing exhibits, when it failed to move to seal exhibits at the time those exhibits were entered into evidence during the course of the public hearing. For these reasons and the reasons stated in Charging Party's Brief in Support of its Cross-Exceptions at 42-48, the ALJ erred in granting Walmart's motion to enforce the Protective Order.

CONCLUSION

For these reasons, Charging Party respectfully requests that the Board grant its cross-exceptions.

Dated: May 5, 2016

Respectfully submitted,

/s/ Deborah J. Gaydos
Deborah J. Gaydos
Joey Hipolito
United Food and Commercial Workers
International Union
1775 K Street, N.W.
Washington, D.C. 20006
dgaydos@ufcw.org
jhipolito@ufcw.org

Attorneys for Charging Party

CERTIFICATE OF SERVICE

I certify that I served a copy of the Charging Party's Reply in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge via the Board's electronic filing service on May 5, 2016, to:

Gary Shiners
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570

I also certify that I served a copy of the foregoing via email and U.S. Mail on May 5, 2016, to:

Roberto Perez
David A. Foley
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6178
Roberto.perez@nlrb.org
David.foley@nlrb.org

Steven Wheelless
Alan Bayless Feldman
Steptoe and Johnson LLP
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382
swheelless@steptoe.com
afeldman@steptoe.com

/s/ Deborah J. Gaydos
Deborah J. Gaydos
United Food and Commercial Workers
International Union
1775 K Street, N.W.
Washington, D.C. 20006
dgaydos@ufcw.org