

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

**WAL-MART STORES, INC.
Respondent**

and

**Cases 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**

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

**GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
(RESPONDING TO RESPONDENT'S ANSWERING BRIEF)**

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel submits this Reply Brief in Support of General Counsel's Cross-Exceptions to the Decision of Administrative Law Judge Geoffrey Carter (JD-03-16) dated January 21, 2016.

I. STATEMENT OF THE CASE AND GC CROSS-EXCEPTIONS

Rejecting Respondent's affirmative defenses, the Judge properly concluded that the at-issue strikes are protected and that Respondent committed serious and widespread Section 8(a)(1) violations by disciplining and/or discharging 54 employees at 29 different stores across the U.S. as a result of their strike-related absences [JD slip op. at 2:6-9; 101:32-34; 102:2-103:39], unlawfully threatening an employee at another store that employees who went on strike would be fired [JD slip op. at 45:41-43; 101:28-30], and announcing an unlawful work rule at eleven stores across the country "by reading talking points to associates that could be reasonably

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

**WAL-MART STORES, INC.
Respondent**

and

**Cases 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**

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

**GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
(RESPONDING TO RESPONDENT'S ANSWERING BRIEF)**

Roberto Perez
David Foley
Counsel for the General Counsel
National Labor Relations Board, Region 16
Room 8A24, Federal Office Bldg.
819 Taylor Street
Fort Worth, Texas 76102

Date: May 5, 2016

construed as prohibiting protected strike activity. ” [JD slip op. at 49:11-14; 101:36-38] Because of Respondent’s “sufficiently serious and widespread” misconduct, in addition to traditional make-whole remedies [JD slip op. at 104:2-105:3, 108:31-109:2] and notice postings [JD slip op. at 109:30-110:27], the Judge ordered notice readings at “each store where Respondent disciplined or discharged associates for incurring strike-related absences.” [JD slip op. at 106:36-107:40; 110:30-111:16]

As elaborated in the previously filed post-trial and answering briefs, General Counsel largely concurs with the Judge’s findings and conclusions concerning the unfair labor practices and proposed remedy. However, as set forth in previously filed cross-exceptions 1 through 9 and supporting brief, General Counsel urges the Board to reverse the Judge’s dismissal of paragraphs 4(B)(1)-(2) of the Complaint [Tovar allegations], to modify the Judge’s proposed remedy to require search-for-work and work-related expenses regardless of whether these amounts exceed interim earnings, and to order nationwide notice postings and readings with consistent notice language.

II. VICE-PRESIDENT TOVAR UNLAWFULLY THREATENED EMPLOYEES WITH REPRISAL DURING THE NATIONALLY TELEVISED INTERVIEWS

Although Respondent has disagreed with and filed exceptions to almost every one of the Judge’s legal conclusions in this matter, with regard to the Tovar allegations, Respondent changes course and fully supports the Judge’s conclusion—apparently, according to Respondent, the Judge got this one right but everything else wrong.

Contrary to the Judge’s conclusion, the record established that Respondent, by Vice-President David Tovar, on November 19 and 20, 2012, via nationally televised interviews on CBS and NBC, unlawfully threatened employees with unspecified reprisals if they engaged in protected activity as alleged in Complaint paragraphs 4(B)(1)-(2). [GC Exh. 1(bb)] Prior to the

publicized OUR Walmart Black Friday 2012 strikes, CBS and NBC/CNBC conducted interviews with Tovar, an admitted statutory supervisor [GC Exh. 1(ff) at 3] who was responsible for Respondent's media relations for its U.S. stores. [Tr. Vol. 26 at 5105:10-17], wherein Tovar discussed the publicized strikes and set forth Respondent's planned response. [JD slip op. at 41:15-18; 42:13-16] On November 19 and 20, CBS and NBC aired news broadcasts on OUR Walmart's planned Black Friday protests including portions of the Tovar interviews. On the November 19, CBS News broadcast, Tovar stated:

I think this is just another union publicity stunt and the numbers that they're talking about are grossly exaggerated.

If associates are scheduled to work on Black Friday, we expect them to do their job. And if they don't depending on the circumstances, there could be consequences. [JD slip op. at 42:1-14; GC Exh. 43 (1:30 minute mark of video)]

On the November 20, 2012, NBC News broadcast, Tovar stated:

[W]e think our workers are getting some really bad advice from the unions because while they do have rights and we respect those rights, you know, there are some actions that we will take if people don't follow our company policies. [JD slip op. at 41:38-42:6; GC Exh. 44 (1:31 minute mark of video)]

Contrary to Respondent's attempts to justify Tovar's statements to CBS and NBC (that "if associates are scheduled to work on Black Friday, we expect them to do their job. And if they don't depending on the circumstances, there could be consequences;" and "there are some actions that we will take if people don't follow our company policies"), his comments were clearly coercive threats of unspecified reprisals if employees engaged in protected activity.

Respondent argues that the interviews are incomplete and it cannot be held liable for editing choices of third parties. The Judge reasoned that CBS and NBC omitted or did not air Tovar's complete statements to the effect that "associates **could** face consequences for missing

work, but emphasized that Respondent would evaluate those issues on a case-by-case basis and based on the relevant circumstances” and that “Walmart does not tolerate retaliation against associates who engage in protected activity.” He further concluded that “because the NBC and CBS news segments omitted those portions of Tovar’s remarks, the news segments gave a potentially misleading impression of how Walmart planned to respond to the anticipated Black Friday strikes.” [JD slip op. at 44:11-19] However, even if the full unaired statements were included, Tovar’s vague comments (consequences would depend on the “circumstances”) did nothing to narrow the scope or reassure employees that the “circumstances” did not include protected activities. Similarly, Tovar’s statement “we have strict policies that prohibit retaliation in any way” is insufficient to cure the published statement’s effect. Notably, in the unaired portion of the NBC interview, Tovar stated, “We think our workers are getting some really bad advice from the unions because while they do have rights and we respect those rights, you know, there are some actions that we will take if people don’t follow our company policies.” [JD slip op. at 41:21-25] In either the CBS or the NBC interview, Tovar does not specify the policies to which he refers. Employees watching the news broadcast would not know what activities run afoul of Respondent’s policies. Tovar’s warnings of “consequences” or “actions” if employees failed to do their jobs, or acted against Company policy, would reasonably be understood by employees as a threat of reprisal for engaging in protected activities because they provide no clarity as to what those “consequences” might be. *See Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB No. 37, slip op. at 1, fn. 2 (2011) (employer violated Section 8(a)(1) where it said “there would be problems” if an employee did not return to work because the employee would “reasonably believe that he was being threatened with unspecified reprisals if he did not cease engaging in union activity”) citing *Belle of Sioux City, L.P.*, 333 NLRB 98, 106

(2001) (employer's statement must be viewed from employees' perspective in determining whether the statement was an unlawful threat); *J.P. Stevens & Co.*, 245 NLRB 198, 218 (1979) (supervisor's statement that engaging in union activities would have serious consequences constitutes an unlawful threat), enforced in relevant part 638 F.2d 676 (4th Cir. 1980). Given Respondent's attendance policy, which provides that "excessive absences" subject employees to "disciplinary action up to and including termination," Tovar's vague threats of consequences if employees failed to report to work had the natural tendency to coerce employees from engaging in protected activities.

Throughout this matter and again in its Answering brief, Respondent has argued that the work stoppages here involve "complex factual and legal issues" and on that "very difficult issue" it "ultimately did no more than apply its attendance policy." [R Ans. Brf. at 1, 26] Respondent even points to Counsel for the General Counsel's questioning of Respondent Vice-President Karen Casey and argues that Counsel for the General Counsel acknowledged the intermittent work stoppage issue is a difficult issue.¹ The complexity of the issue only bolsters the

¹ Of course, Respondent selectively omits the record leading up to the statement:

Q Okay. If you didn't receive any inquiry from the media, any reason to keep or track employees that are involved with OURWalmart?

A Yes, sir. There's other reasons to track folks who were involved in OURWalmart. And that was leading up to the intermittent work stoppages. We had to do our best to try to track who may be engaged in the demonstrations and strikes to figure out who was working and who wasn't. And for that reason, in order to research information and provide it to our counsel --

Q Okay.

A -- we would track the associates.

Q Okay. Now you mentioned intermittent work stoppages. What is that and you mentioned it. What is that?

A Intermittent work stoppages and again it's a term that frankly we worked on understanding with counsel. And that is unprotected activity where associates at the direction of the Union engage in start and stop work stoppages designated [sic] to disrupt the business.

Q Okay. Disrupt the operations in some manner?

impermissible nature of Tovar's vague statements as employees cannot be expected to decipher what activities Respondent deemed protected and not. Tovar's vague statements on the nature of activities that could result in "consequences" are reasonably interpreted to encompass activities protected by the Act. Tovar's broad statement to CBS that employees scheduled for work on Black Friday were expected to "do their job" is reasonably understood to mean that employees are expected to forego protected work stoppages, including unfair labor practice strikes. Tovar did not target his threats of discipline at unprotected activity; rather, the threats are reasonably understood to apply to *any* Black Friday activities, including such protected activities as unfair labor strikes. It is of no import if Respondent did not intend the statements to apply to protected activity, since the test is an objective one of whether employees would reasonably conclude that the employer was threatening them with reprisal at the time the statements were made.

Contrary to the Judge's conclusion and Respondent's arguments, had the CBS or NBC broadcasts aired Tovar's complete statements, the additional comments would not have removed

A Pardon me?

Q Disrupt the operations of the business in some manner?

A Disrupt operations or disrupt customer service.

Q Okay.

A Not having associates there to serve the customer.

Q Okay. And so you're tracking associates that were involved in those kind of activities? That you deemed to be those activities?

A Again, leading up to Black Friday, we started to maintain lists either in response to media inquiries or those that had put us on notice that they may be engaging in some form or fashion in a demonstration or strike. So that we could truly determine whether they engaged in a walkout or not. It was a very confusing time --

Q I understand.

A -- to understand as to who was doing what.

Q Yeah, I acknowledge the intermittent work stoppage issue was a very difficult issue. So I completely acknowledge that. See if I have any other different questions.

Tr. Vol. 26 at 5128:12 – 5129:25.

the unlawful ambiguities in the statements regarding whether protected concerted activities would be subject to discipline, and what consequences would result from those activities.

Respondent, via Tovar's statements during the CBS and NBC TV news broadcasts, (that "if associates are scheduled to work on Black Friday, we expect them to do their job. And if they don't, depending on the circumstances, there could be consequences;" and "there are some actions that we will take if people don't follow our company policies") constitute coercive Section 8(a)(1) threats of unspecified reprisals if employees engaged in protected activity.

III. THE BOARD SHOULD AWARD SEARCH-FOR-WORK AND WORK-RELATED EXPENSES REGARDLESS OF INTERIM EARNINGS

Citing current Board law, the Judge denied the General Counsel's request for a make-whole remedy that includes reimbursement to discriminatees for search-for-work and work-related expense regardless of whether these amounts exceed interim earnings. [JD slip op. at 104, fn. 118] In its Answering Brief, Respondent does nothing more than point to arguments made by other employers in amicus briefs in *King Soopers*, 27-CA-129598, currently pending before the Board. As set forth in the previously filed cross-exceptions and supporting brief, General Counsel urges the Board reconsider its position on search-for-work and work-related expenses.

Aside from being inequitable, the current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8, slip op. at 3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj*, 361 NLRB No. 57 slip op. at 2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses

fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

General Counsel contends that a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. When the Board's remedies are insufficient to effectuate the policies of the Act, the Board "must draw on enlightenment gained from experience" to fashion remedies that will serve this dual purpose of making discriminatees whole and deterring future violations. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Even where there is "a substantial body of Board decisions" upholding a customary Board rule, when the Board is convinced that a customary rule does not effectuate the policies of the Act, that rule should be abandoned. *A.P.W. Prods. Co.*, 137 NLRB 25 (1962), *enf'd* 316 F.2d 899 (2d Cir. 1963). The Board has continued to "draw on enlightenment gained from experience" to modify backpay orders when those orders no longer effectively carry out the purpose of the Act. *Seven-Up Bottling Co.*, 344 U.S. at 346. The Board's first published order awarded backpay as the amount the discriminatees "would normally have earned as wages during the period from the date of his discharge to the date of such offer of reinstatement less the amount each earned subsequent to discharge" *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935). Fifteen years later, the Board changed its practice to calculating backpay quarterly because "[t]he cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act." *F.W. Woolworth Co.*, 90 NLRB 289, 291 (1950).

When it became clear that lost wages alone were not enough to make the worker whole, the Board included in its award amounts equal to the value of lost vacation benefits, bonuses, employee-owned housing, employee discounts on purchases, car allowances, and tips. *See Kartarik, Inc.*, 111 NLRB 630 (1955) (vacation benefits); *United Shoe Mach. Corp.*, 96 NLRB 1309 (1951) (bonuses); *Kohler Co.*, 128 NLRB 1062 (1960) (employee-owned housing); *Central Ill. Pub. Serv. Co.*, 139 NLRB 1407 (1962) (employee discounts on purchases); *Garment Workers*, 300 NLRB 507 (1990) (car allowances); *Ji Shiang, Inc.*, 357 NLRB 1292 (2011) (tips). In the past, where a remedial structure failed to achieve its objective, “the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. ” *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 3 (Aug. 8, 2014). (revising Board policies to require respondents file reports with the SSA allocating backpay awards to the appropriate calendar quarter and adding a tax compensation remedy).

The Board should, drawing on those developments in its remedial jurisprudence and its experience remedying violations of the Act, recognize that the current practice is contrary to the Act’s remedial principles and insufficient to further the public policy of the Act. In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.² These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.*, supra, slip op. at 1 (interest compounded daily in backpay cases).

² Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 (1953).

IV. THE BOARD SHOULD ORDER NATIONWIDE NOTICE POSTINGS AND READINGS WITH CONSISTENT LANGUAGE

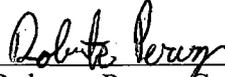
In its Answering Brief, Respondent argues that this matter “does not come close to meeting the extraordinary threshold required for the extraordinary and unwarranted nationwide notice posting and remedy” and “the record contains no evidence of flagrant, pervasive and outrageous ULPs anywhere at any time; the standard for a notice reading.” [R. Ans. Brf. at 25-26] Respondent apparently does not consider the discipline and/or discharge of 54 employees at 29 stores across the U.S. as flagrant, pervasive and outrageous. [JD slip op. at 2:6-9; 101:32-34; 102:2-103:39] General Counsel disagrees.

As detailed in General Counsel’s brief in support of cross-exceptions, Respondent threatened employees on national television, threatened an employee that employees who went on strike would be discharged, promulgated an unlawful rule prohibiting protected strike activity and thereafter followed through on those threats by firing and disciplining employees who sought to exercise their Section 7 rights. Respondent’s agents intended those threats and resulting disciplines/terminations to send a message more powerful than words. The powerful message of discharge and discipline warrants an equally powerful Board remedy. A notice posting and reading with consistent language across all facilities nationwide is necessary to assure employees that they may exercise their Section 7 rights free of coercion. General Counsel urges the Board to order a notice with consistent language addressing all violations to be posted and read by a high level official at all Respondent facilities nationwide.

General Counsel urges the Board to adopt the Judge’s findings in this matter except as modified based on the matters raised in the General Counsel’s Cross-Exceptions 1 through 9 and the argument in support thereof. Counsel for the General Counsel also requests any further relief deemed appropriate by the Board.

DATED at Fort Worth, Texas this 5th day of May 2016.

Respectfully submitted,



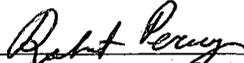
Roberto Perez, Counsel for the General Counsel
David Foley, Counsel for the General Counsel
National Labor Relations Board
Region 16
Room 8A24, Federal Office Bldg.
819 Taylor Street
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing General Counsel's Reply Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge (Responding to Respondent's Answering Brief) has been electronically filed and served this 5th day of May 2016 upon each of the following:

Steven D. Wheelless
Alan Bayless Feldman
STEPTOE & JOHNSON LLP
201 E. Washington Street, Suite 166
Phoenix, AZ 85004-2382
VIA FIRST CLASS MAIL
VIA EMAIL TO: swheelless@steptoe.com
 afeldman@steptoe.com

Deborah J. Gaydos
Joey Hipolito
UFCW International Union
1775 K Street, NW
Washington, DC 2006
VIA FIRST CLASS MAIL
VIA EMAIL TO: dgaydos@ufcw.org
 jhipolito@ufcw.org



Roberto Perez, Counsel for the General Counsel
David Foley, Counsel for the General Counsel
National Labor Relations Board
Region 16
Room 8A24, Federal Office Bldg.
819 Taylor Street
Fort Worth, Texas 76102