

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

**WALMART STORES, INC.**

**and**

**Case 21-CA-150416**

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

**ORDER CLARIFYING<sup>1</sup>**

The Regional Director for Region 21 filed a Motion to Clarify the Board's February 10, 2016 Order denying the Employer's petition to revoke subpoena duces tecum B-1-OPMCGH. The motion indicates that the Regional Director and the Employer have differing interpretations of footnote 3 of the February 10, 2016 Order and asserts that, consequently, the Employer has failed fully to comply with the subpoena.

Footnote 3 of the Order states:

With respect to subpoena paragraphs 13 and 15, we find that the General Counsel's request for the documents described therein does not violate the protective order issued in Case 16-CA-096240. Accordingly, we deny the Employer's request that the attorneys in Region 21 or any subsequent Regions be prohibited from using the requested documents at any time in this or any related proceeding. The General Counsel shall again enter into a protective order with the Employer covering the documents in this proceeding, if the Employer so requests. See, e.g., *EEOC v. Morgan Stanley & Co., Inc.*, 132 F.Supp.2d 146, 160 (S.D.N.Y. 2000).

Specifically, the Regional Director requests that the Board clarify (1) whether footnote 3 applies to all of the subpoena requests or only to requests 13 and 15; (2) whether during the investigatory stage of this proceeding the Regional Director is obligated to enter into a confidentiality agreement regarding documents the Employer

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<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

deems to be confidential; and (3) whether the Regional Director is obligated to enter into a protective order during the investigation of this matter, or only if and when the case proceeds to a judicial forum.

The Employer filed a response to the motion, and the Regional Director filed a reply to the response.

As a threshold matter we find that the Regional Director's motion for clarification was appropriately filed under Section 102.49 of the Board's Rules and Regulations and was not untimely.<sup>2</sup> Although the Employer contends that the Regional Director is actually moving for reconsideration under Section 102.48(d) and, as such, has not complied with the requirements of that Section,<sup>3</sup> it is clear that the Regional Director is not contending that the Board's Order contains material errors.<sup>4</sup> Therefore, the requirements for motions for reconsideration filed pursuant to Section 102.48(d) of the Board's Rules and Regulations are not controlling here. See *Raven Government Services*, supra, 336 NLRB at 991-992, fn. 3 (finding that no provision of Section 102.48

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<sup>2</sup> Under Sec. 102.49 of the Board's Rules, the Board may modify an order, either sua sponte or in response to a party's request, at any time before the record has been filed in court. *Raven Government Services, Inc.*, 336 NLRB 991, 991 (2001), enf'd. 315 F.3d 499 (5th Cir. 2002).

<sup>3</sup> The Employer contends that Regional Director's motion does not identify "extraordinary circumstances" warranting reconsideration and that his motion was not filed within 28 days of the Board's February 10, 2016 Order, as required under Sec. 102.48(d).

<sup>4</sup> Motions for reconsideration filed pursuant to Sec. 102.48(d)(1) of the Board's Rules "shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." A party's motion, brief, or other pleading asserting such allegations after the Board decision and order issues may be treated as a motion for reconsideration, even if it is filed under another caption. See, e.g., *Clean and Shine*, 255 NLRB 1144, 1144 fn. 4 (1981) (respondent's brief in opposition to the General Counsel's motion for summary judgment treated as a motion for reconsideration based on when the brief was filed and the nature of the allegations it raised).

would foreclose consideration of a motion filed under Section 102.49). Accordingly, we find that the General Counsel's motion is properly before the Board and that the requested clarification is warranted.

With respect to the merits of the Regional Director's motion, we make the following clarifications.

*Scope of the Board's Order.* The Regional Director indicates that a dispute has arisen with the Employer regarding the scope of footnote 3. The Regional Director maintains that the Board's directive in footnote 3 to enter into a protective order with the Employer covers only the documents requested in subpoena paragraphs 13 and 15, and does not extend to any other subpoena requests. The Employer's position is that footnote 3 applies to all documents responsive to the subpoena which the Employer deems to be confidential. We clarify that footnote 3 applies only to subpoena paragraphs 13 and 15.<sup>5</sup>

*Stage of proceedings.* The Regional Director's motion indicates that she interprets footnote 3 as requiring her to enter into a protective order with the Employer only if and when this matter proceeds to a formal judicial proceeding. The Employer argues that footnote 3 requires such an agreement be entered into during the investigative stage of this proceeding. We clarify that any portion of the documents requested in subpoena paragraphs 13 and 15 that were subject to the protective order

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<sup>5</sup> We express no view as to the Employer's contention that other subpoena requests require the production of confidential documents. The original petition to revoke raised only a general objection to "the production of confidential or proprietary information concerning Walmart's operations and business that is not necessary to the resolution of the issues in this case." (Petition to Revoke, p. 12.) Thus, any arguments about particular documents alleged to be confidential, presented here for the first time, are not properly before the Board in this motion for clarification.

in Case 16-CA-096240, are also subject to a protective order during the investigative stage of this proceeding.<sup>6</sup> When and if a formal proceeding, such as a hearing before an administrative law judge or a subpoena enforcement proceeding in district court, takes place, the General Counsel shall seek a further appropriate protective order for those documents from the judge.

Dated, Washington, D.C., June 9, 2016

MARK GASTON PEARCE,	CHAIRMAN
PHILIP A. MISCIMARRA,	MEMBER
KENT Y. HIROZAWA,	MEMBER

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<sup>6</sup> Consistent with our February 10, 2016 Order, quoted above, the protective order issued in this investigation will not prohibit attorneys in other Regions from using the requested documents in related proceedings.