

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 20**

WAL-MART STORES, INC.

And

THE ORGANIZATION UNITED FOR RESPECT AT WALMART,	Cases 12-CA-121109 12-CA-124847 16-CA-124905 20-CA-126824
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And

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION AND ORGANIZATION UNITED FOR RESPECT AT WALMART	20-CA-138553 32-CA-153782
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**WALMART'S PARTIAL MOTION TO DISMISS
AND REQUEST FOR EXPEDITED CONSIDERATION**

Introduction

One or both of the Charging Parties filed the six Charges referenced above; primarily alleging that Walmart “retaliat[ed] against employees because they engaged in unfair labor practice strikes.” The First Amended Consolidated Complaint contains numerous surveillance, threat, interference, insignia, interrogation, and other allegations that the Charging Parties did not include in any Charge and do not “closely relate” to any Charge. The Counsel for General Counsel bears the burden of proving the Region had § 10(b) jurisdiction to issue a Complaint on the uncharged allegations. *Teamsters Local 955*, 325 NLRB 605, 607 (1998) (“Section 10(b) of the Act is jurisdictional and the General Counsel has the specific burden of establishing this statutory requirement.”); *A-Niv Cab Co.*, 340 NLRB 1005, 1009 (2003) (same). But the CGC cannot meet that burden here as a matter of law. Accordingly, the Board (or, if so delegated, the assigned

Administrative Law Judge) should dismiss the following uncharged and “unrelated” Complaint allegations: ¶¶ 9(a)-(b); 11(a)(i); 11(d) regarding 11(a)(i); 12(a)-(b); 14(a)(ii); 14(d) regarding 14(a)(ii); 15(a)(i); 15(a)(iii)-(v); 15(d) regarding 15(a)(i), (iii)-(v); 17(d); 21(a)(ii); 21(e) regarding 21(a)(ii); 24-26; and 27(a)-(c).

To promote the efficient litigation of the Consolidated Complaint (with trial scheduled to start on January 30, 2017), Walmart requests expedited consideration.

Procedural Background

I. CHARGE ALLEGATIONS.

A. 12-CA-121109.

On January 24, 2014, OURWalmart (“OWM”) filed 12-CA-121109, which alleged: “On about November 25, 2013, Walmart unlawfully gave Associates an unexcused absence for a day where Associates had not worked because they were engaged in lawful strike activity.” [Ex. 1.] Region 12 dismissed a second allegation in that charge. [Ex. 2.]

B. 12-CA-124847.

On March 20, 2014, OWM filed 12-CA-124847, which alleged: “On about January 7, 2014, Walmart management unlawfully recorded an Associate’s absence on Nov. 23, 2013 as a ‘no call, no show’ on the Associate’s attendance record, even though management was aware the Associate was on a protected strike that day.” [Ex. 3.] OWM withdrew a second allegation in that charge. [Ex. 4.]

C. 16-CA-124905.

On March 20, 2014, OWM filed 16-CA-124905. [Ex. 5.] On April 11, 2014, OWM amended the Charge; the First Amended Charge alleged: “[1] Around late November 2013, Manager Viviana Garcia [at the Grand Prairie, TX store (*see* Ex. 13 ¶¶ 8(g)-(j))] restrained and coerced an associate by (i) dropping boxes he had folded up on the floor, (ii) giving the impression that employees’ protected concerted activities were under surveillance; and (iii) interrogating employees about their protected concerted activities; [2] About a month after November 20, 2013, Manager Ashley Livingston, issued Jimmy Lozano a verbal discussion by telling him that his absence on November 20, 2013 would be counted against him in accordance with the Employer’s progressive disciplinary absence policy, even though he was participating in a protected concerted strike on that day; [3] On or about December 17, 2013, Manager Ashley Livingston, issued employee Qulima Knapp a verbal discussion in accordance with its absence policy, even though her November 20, 2013 absence was when she was engaged in a protected concerted strike; and [4] On or about February 7, 2014, Manager Lisa issued Ms. Knapp a coaching, which included the absence counted against her when she was involved in a protected concerted strike.” [Ex. 6.]

D. 20-CA-126824.

On April 16, 2014, OWM filed 20-CA-126824. [Ex. 7.] OWM filed a First Amended Charge. [Ex. 8.] On August 28, 2014, OWM amended that Charge; the Second Amended Charge alleged: “In or about November 2013, and continuing thereafter, the

Employer has interfered with, restrained, and coerced its employees by issuing an employee an unexcused absence on the day of an unfair labor practice strike.” [Ex. 9.]

E. 20-CA-138553.

On October 9, 2014, the UFCW and OWM (collectively “Charging Parties” or “CPs”) filed 20-CA-138553. [Ex. 10.] On February 4, 2015, CPs amended the Charge; the First Amended Charge alleged: “Within the last six months immediately preceding the filing of this charge[,] the above named employer, by and through its officers and/or agents, violated Section 8(a)(1) of the Act by retaliating against employees because they engaged in unfair labor practice strikes.” [Ex. 11.]

F. 32-CA-153782.

On June 8, 2015, CPs filed 32-CA-153782, which alleged: “Within the last six months immediately preceding the filing of this charge, the above named employer, by and through its officers and/or agents, violated Section 8(a)(1) of the Act by discriminating against Associate Victoria Noguera because she engaged in unfair labor practice strikes.” [Ex. 12.]

II. UNCHARGED AND UNRELATED COMPLAINT ALLEGATIONS.

On April 26, 2016, the Region issued a Consolidated Complaint, and on November 1, 2016, the Region issued a First Amended Consolidated Complaint (the “Complaint”). [Ex. 13.] The Complaint makes the following allegations that do not appear in any Charge and do not “closely relate” to any Charge allegation:

Surveillance Allegations

- “About August or September 2014 [at La Quinta, CA Store 1805], Respondent, by Assistant Manager Maria (last name unknown), by taking photographs, engaged in

surveillance of employees who were engaged in protected concerted activities.” [Id. at ¶ 9(a).]

- “About October 16, 2014 [at La Quinta, CA Store 1805], Respondent, by Co-Managers Theresa Palmer and Mariel Gonzalez, and Assistant Manager Sunstrong, by taking pictures and video recording, engaged in surveillance of employees engaged in protected concerted activities.” [Id. at ¶ 9(b).]

Threat Allegations

- “About November 22, 2014 [at Sacramento, CA Store 2735], Respondent, by Assistant Manager Detra Nevarez, threatened employees with unspecified reprisal[s] if they went on strike.” [Id. at ¶ 12(a).]
- “About February 15, 2015 [at Sacramento, CA Store 2735], Respondent, by Assistant Manager Angelina Gonzalez, threatened employees with unspecified reprisals if they went on strike.” [Id. at ¶ 12(b).]

Interference Allegations

- “About May 31, 2014 [at Clovis, NM Store 821], Respondent, by Store Manager Susi Moore told employees they could not chant, speak to customers, or hand out flyers while they engaged in protected concerted activities outside of Respondent’s store.” [Id. at ¶ 24.]
- “About June 4, 2014 [at Apple Valley, MN Store 2642], Respondent, by Co-Manager Eric Nopola, Store Manager Heidi Crowel, and Market HR Manager Deb Becker, denied its off-duty employees access to the store.” [Id. at ¶ 27(a).]
- “About August 2014 [at Apple Valley, MN Store 2642], Respondent, by Manager Chad Fercho, threatened to call the police on employees who engaged in protected concerted activities.” [Id. at ¶ 27(b).]

Insignia Allegations

- “On various dates in October and November 2014 [at Sturtevant, WI Store 2668], Respondent, by Shift Manager Dawn Reed and Assistant Manager Christina May, prohibited employees from wearing union insignia while permitting employees to wear other insignia.” [Id. at ¶ 25.]
- “About November 15, 2014 [at Apple Valley, MN Store 2642], Respondent, by Store Manager Heidi Crowel and Co-Manager Kyle Kaszubowski, prohibited employees from wearing union insignia while permitting employees to wear other insignia.” [Id. at ¶ 27(c).]

Interrogation Allegations

- “About January 3 and 14, 2015 [at Marina, CA Store 4488], Respondent, by Assistant Manager Stormi Maxey, interrogated employees about their protected concerted activities.” [*Id.* at ¶ 17(d).]
- “About May 2014 [at Tampa, FL Store 1960], Respondent, by Co-Manager Tammy Jackson, interrogated employees about their protected concerted activities.” [*Id.* at ¶ 26.]

Non-Strike-Related Retaliation Allegations

The Region also alleges that Walmart took various adverse employment actions against three associates (*id.* at ¶¶ 11(d), 14(d), 15(d), 21(e)) for alleged protected activity unrelated to any strike or work stoppage:

- “[A]bout May 2014, near the Phoenix, AZ, home of Rob Walton, participating in a protest of wages and working conditions.” [*Id.* at ¶ 15(a)(i).]
- “[A]bout early July 2014, at Respondent’s Pico Rivera, CA store, presenting Respondent with a petition about employee sick leave.” [*Id.* at ¶¶ 14(a)(ii), 15(a)(iii).]
- In October 2014, “near the Phoenix, AZ, home of Rob Walton, participating in a protest of wages and working conditions.” [*Id.* at ¶¶ 11(a)(i), 15(a)(iv).]
- “[A]bout October 30, 2014, at Respondent’s Pico Rivera, CA store, participating in a protest of wages and working conditions.” [*Id.* at ¶¶ 15(a)(v).]
- “About November 15, 2014, at Respondent’s Apple Valley, MN store, requesting to accompany an employee to an Open Door Meeting.” [*Id.* at ¶ 21(a)(ii).]

III. THE REGION NEVER SOUGHT ANY CHARGE AMENDMENTS DESPITE REPEATED NOTICE OF THE JURISDICTIONAL DEFECTS.

The Region investigated the above-referenced Charges by sending Walmart eleven separate EAJA letters over a period of almost two years. [Exs. 14-24.] The Region also sent Walmart at least thirteen separate email requests for additional information. [Exs. 25-37.] Ultimately, the Region sought evidence concerning more than 125 issues at

dozens of Walmart stores across the country involving more than 65 alleged discriminatees, dozens of managers, and numerous alleged violations outside the scope of the filed Charges. [Exs. 14-37.] Walmart cooperated with the Region's investigation, providing thirteen position statements, additional information via email responses, and thousands of pages of business records. And all along the way, Walmart repeatedly objected that much of the Region's investigation did not relate to any Charge allegation. [See Exs. 38-41 (Position Statement Excerpts).] Walmart raised the same objection in its Answers to the original and First Amended Consolidated Complaint. [Exs. 42-43.]

Despite those repeated objections over nearly two years, the Region never obtained an amended Charge or Charges from the CPs to encompass the unrelated Complaint allegations described above. The Region failed to do so despite NLRB Casehandling Manual § 10062.5, which instructs: (1) when “the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents . . . must determine whether the charge is sufficient to support complaint allegations covering the apparent unfair labor practices found,” (2) “variances between the allegations of the charge and the allegations of the complaint *will require appropriate amendments*,” *id.* at §10264.1, and (3) the Region should, thus, give the charging party “the opportunity to file an amended charge.” *Id.* at § 10062.5 (emphasis added). In providing the opportunity to amend the charge, the Board Agent should advise “the charging party or its representative . . . that any complaint can cover *only* matters closely related to the allegations of the charge.” *Id.* (emphasis added); *see also Towne Ford, Inc.*, 327 NLRB 193, 199 (1998) (“The Board’s own Casehandling Manual requires that if on investigation it appears that

‘the allegations of the charge are too narrow, an amendment should be sought, and . . . *if amendment is not filed*, the case should be reappraised in this light, and the complaint issued, if any, should cover *only matters related to the specifications of the charge.*’) (emphasis added). The Region failed to follow Board procedure and applicable law.

In fact, Casehandling Manual § 10264.1 specifically requires the Regional Director to seek an amended charge where, as here, the allegations involve “discrete categories of independent 8(a)(1) violations.” *See also* § 10062.5 (“[T]o support complaint allegations covering the apparent unfair labor practices found” in the investigation, “the charge should allege the type of conduct” at issue such as “[i]nterrogation” or “[t]hreats of discharge.”). Therefore, when the Region determined that it wanted to pursue allegations concerning surveillance, threats, interference, insignia, interrogation, or non-strike-related retaliation, “the proper procedure was to seek an amended charge and in the absence of such an amendment, issue a complaint *without* the [new] allegations.” *Towne Ford, Inc.*, 327 NLRB at 199 (emphasis added). Walmart *repeatedly* notified the Region of the jurisdictional defect in its investigation and Complaint(s). Thus, the jurisdictional obstacle presented here is of the Region’s own making.

Argument

I. THE REGION LACKS JURISDICTION TO ISSUE UNCHARGED COMPLAINT ALLEGATIONS ON ITS OWN INITIATIVE.

Section 10(b) of the Act gives the Board jurisdiction to issue a complaint *only* after a party files a charge and *only* as to “the charges in that respect.” 29 U.S.C. § 160(b)

(“Whenever *it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating *the charges in that respect.*”) (emphasis added); *see also* NLRB R&R § 102.15 (providing that the Regional Director may issue a complaint “[a]fter a charge has been filed”). In other words, “the General Counsel and the Board lack independent authority to initiate unfair labor practice proceedings in the absence of a charge filed by an outside party.” *Carney Hosp.*, 350 NLRB 627, 628 (2007); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989); *Concrete Haulers, Inc.*, 106 NLRB 690, 697-98 (1953); *see also Precision Concrete v. NLRB*, 334 F.3d 88, 90-93 (D.C. Cir. 2003) (“The Board . . . may not initiate a charge on its own; it may prosecute only conduct about which someone else has filed a charge.”). The Board has no “power to initiate or expand unfair labor practice proceedings, at the Board’s initiative.” *Allied Waste Svcs. of Fall River*, 2014 WL 7429200 (NLRB) (discussing the legislative history of the Act and explaining that Section 10(b) limitations are “no accident”).

II. THE COUNSEL FOR GENERAL COUNSEL BEARS THE BURDEN OF PROVING JURISDICTION ONCE IT IS CALLED INTO QUESTION.

The CGC bears the burden of proving that the Region possessed jurisdiction to issue the Complaint on the uncharged allegations. *Teamsters Local 955*, 325 NLRB at 607; *In Re A-Niv Cab Co.*, 340 NLRB at 1009. Indeed, “it is incumbent upon the Board to establish its authority to act, at least once its jurisdiction has been put in issue.” *Precision Concrete v. NLRB*, 334 F.3d 88, 90, 91 (D.C. Cir. 2003) (“Because the issue

before the Board in this case was jurisdiction, the Board erred by placing the burden of proof upon the Company.”); *see also Drug Plastics v. NLRB*, 44 F.3d 1017, 1022 (D.C. Cir. 1995) (“Where the Board is unable to connect the allegations in its complaint with the charge allegation, we are unable to find that the Board has jurisdiction over the unrelated complaint allegations.”).

III. UNCHARGED COMPLAINT ALLEGATIONS MUST CLOSELY RELATE TO A CHARGE ALLEGATION.

A critical principle flows from the Section 10(b) jurisdictional requirement: The Act requires that “the complaint allegation be *related to and arise out of the same situation* as the conduct alleged to be unlawful in the underlying charge.” *Nickles Bakery*, 296 NLRB at 927 (emphasis added); *see also Fant Milling Co.*, 360 U.S. 301, 308-309 (1959) (Board does not have “carte blanche to expand the charge as [it] might please”). To determine whether an uncharged Complaint allegation “closely relates” to a Charge allegation, the Board asks whether (1) the allegations “involve the same legal theory,” (2) the allegations “arise from the same factual circumstances or sequence of events,” and (3) “a respondent would raise similar defenses to both allegations.” *Nickles Bakery*, 296 NLRB at 928 (discussing *Redd-I, Inc.*, 290 NLRB 1115 (1988)).

Here, with the exception of one interaction between one associate (Walmart’s term for employees) and one manager at one store on one date involving one unique “box dropping” allegation, *every* Charge at issue in this case alleges solely and only that Walmart imposed an adverse attendance-related action on various associates *because* (and *after*) they participated in a “strike.”

IV. THE UNCHARGED COMPLAINT ALLEGATIONS DO NOT CLOSELY RELATE TO THE UNIQUE BOX-DROPPING CHARGE ALLEGATION.

The uncharged Complaint allegations listed above (pp. 4-6) involve surveillance (8-10/14 (CA)), threat (11/14, 2/15 (CA)), solicitation/distribution (5/14 (NM)), property access (6/14, 8/14 (MN)), insignia (10-11/14 (WI, MN)), interrogation (5/14 (FL), 1/15 (CA)), and non-strike-related retaliation (5/14 (AZ), 7/14 (CA), 10/14 (AZ/CA), 11/14 (MN)) allegations. None of them “arise from the same factual circumstances or sequence of events” as the factually unique “box dropping” allegations against one manager in one aisle of one store (Grand Prairie, TX) on one date in November 2013. Those uncharged allegations did not even happen in the same year or the same store or the same state and did not involve any of the same people or any issue remotely similar to the unique “box dropping” claim. Moreover, the uncharged Complaint allegations (save the two interrogation claims) rely on different legal theories and different bodies of Board law from the unique “box dropping” coercion and impression-of-surveillance allegations. Thus, by definition, the uncharged Complaint allegations do not closely relate to the unique and distinct box-dropping Charge allegations. *See, e.g., Carney Hosp.*, 350 NLRB at 631-32 (factual circumstances prong not met where separate 8(a)(1) allegations involved different individuals, timing, and events).

V. THE STRIKE-RETALIATION CHARGE ALLEGATIONS INVOLVE A UNIQUE LEGAL THEORY AND DEFENSES.

With the single exception just noted, *every* Charge alleges solely and only that Walmart imposed an adverse attendance-related action on various associates *because* (and *after*) they participated in a “strike.” As discussed below, many of the uncharged

Complaint allegations had nothing to do factually with any “strike” as evidenced by the relative dates and/or the specifics of the allegations; meaning they did not “arise from the same factual circumstances or sequence of events.” Moreover, *none* of the uncharged Complaint allegations “involve the same legal theory” or “similar defenses” as the strike-retaliation Charge allegations.

On their face, the strike-retaliation Charge allegations assert that Walmart unlawfully “retaliated” against various associates (with some attendance-related consequence) *because* and *after* they went on “strike.” Accordingly, in the abstract, those retaliation allegations would call for application of the Board’s *Wright Line* burden-shifting framework to determine liability. *See, e.g., Praxair Distrib. Inc.*, 357 NLRB 1048, 1058 (2011) (affirming ALJ’s application of *Wright Line* after ALJ noted that “[a]n employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. An employer violates Section 8(a)(1) of the Act when it discharges an employee, or takes some other adverse employment action against him, for engaging in protected concerted activity”) (citations omitted). Thus, here, one could conceptually compare the body of law applying the *Wright Line* legal theory and various stand-alone strike-related defenses to the bodies of law and related defenses for surveillance, (8-10/14 (CA)), threat (11/14, 2/15 (CA)), solicitation/distribution (5/14 (NM)), property access (6/14, 8/14 (MN)), insignia (10-11/14 (WI, MN)), interrogation (5/14 (FL), 1/15 (CA)), and non-strike-related retaliation claims for purposes of the “same legal theory” and “similar defenses” factors of the *Nickles Bakery* test. As discussed below, none of the uncharged Complaint allegations rely on the same legal

theory or would call for similar defenses as the strike-retaliation Charge allegations under *Wright Line* and its progeny.

But, more to the point of this case, the Charging Parties, Region, CGC, and Board know well that this case continues the litigation started in 16–CA–096240, et al., which poses the question of whether the Act protects the multi-year intermittent work stoppages the Charging Parties planned, coordinated, conducted, and participated in for a common plan or purpose. Thus, even more fundamentally than the *Wright Line* analysis and its various stand-alone strike-related defenses, this case involves the application of the United States Supreme Court’s and the Board’s intermittent work stoppage (IWS) doctrine, legal theories, and embedded defenses.

The IWS legal theory and defenses involve multiple considerations such as – to name just a few – whether (1) the work stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer; *Pacific Telephone and Telegraph Co.*, 107 NLRB 1547, 1549 (1954); (2) the employees engaged in a pattern of recurring work stoppages, and/or demonstrated their intent to engage in future recurring work stoppages; *Swope Ridge Geriatric Center*, 350 NLRB 64, 68 (2007); (3) the work stoppages arose in response to separate and distinct or continuing concerns that employees had about the terms and conditions of their employment; *Westpac Electric*, 321 NLRB 1322, 1359–1360 (1996); and (4) the work stoppages arose from a common plan or strategy to exert pressure on the employer; *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1806, 1807–1811 (1954).

As discussed below, none of the uncharged Complaint allegations rely on or involve any legal theory or defense remotely similar to the IWS theories and defenses.

VI. THE UNCHARGED COMPLAINT ALLEGATIONS DO NOT CLOSELY RELATE TO THE STRIKE-RETALIATION CHARGE ALLEGATIONS.

A. The Uncharged Surveillance Complaint Allegations Do Not Closely Relate To Any Charge Allegation.

The surveillance allegations in paragraphs 9(a) and 9(b) of the Complaint do not closely relate to any “retaliation because of a strike” Charge allegation. First, the surveillance allegations do not arise from the same factual circumstances as the strike-retaliation Charge allegations. Paragraph 9(a) alleges that a manager at Store 1805 in La Quinta, CA, took a photograph of associates engaged in protected concerted activity in August or September 2014. Paragraph 9(b) alleges that two managers at the La Quinta store took pictures and video of associates engaged in protected concerted activity on October 16, 2014. No work stoppages occurred in August, September, or October 2014 [*see* Ex. 13 ¶¶ 7(a)-(e)]; indeed, the Complaint does not allege that the surveillance occurred during a work stoppage or had any connection to a work stoppage. Consequently, the factual circumstances from which the surveillance allegations arose did not involve similar conduct and were not part of the same chain or progression of events as the charged retaliation allegation. *See, e.g., Carney Hosp.*, 350 NLRB at 631-32 (where Complaint allegations did not involve similar conduct and were not part of same chain or progression of events as charged allegations, dismissal held appropriate under § 10(b)); *see also Drug Plastics*, 44 F.3d at 1021-22; *Nippondenso Mfg. U.S.A.*, 299 NLRB 545, 546 (1990).

The Board recently affirmed Judge Etchingham in a case involving a similar closely related inquiry. *See Wal-Mart Stores, Inc.*, 2016 WL 4547576 (Aug. 31, 2016). There, Judge Etchingham determined that three uncharged *Weingarten* Complaint allegations did not closely relate to a charged discriminatory discharge allegation because “there [wa]s no basis alleged in the complaint to conclude that Respondent’s decision to discharge [CP] was related at all to the new 3 *Weingarten* allegations.” *Id.* at *11.

Second, the surveillance allegations do not involve the same legal theories or defenses as the strike-retaliation Charge allegations. “The test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer’s conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.” *Contempora Fabrics, Inc.*, 344 NLRB 851, 865 (2005). To defend against the surveillance allegations, Walmart could show that it did not engage in the alleged surveillance or possessed a legal justification for doing so, such as to document trespassory activity. *See Aladdin Gaming*, 345 NLRB 585, 586 (2005); *Sonoma Mission Inn & Spa*, 322 NLRB 898, 902 (1997) (employers do not violate the Act when they photograph activity “to document trespassory activity for the purpose of making out a trespass claim”).

Those legal theories and defenses bear no relation whatsoever to the IWS legal theory and defense, as described in Part V. Nor do they relate in any way to the *Wright Line* legal theory and defenses. *See, e.g., Praxair Distrib. Inc.*, 357 NLRB at 1048 n.2,

1058-59 (under *Wright Line*, the Region must initially show that: (1) employees engaged in protected activity, (2) the employer knew of the protected activity, and (3) the employer bore animus toward such protected activity; the burden then shifts to the employer to show that it would have taken the same action in the absence of the protected activity); *see also Wal-Mart Stores, Inc.*, 2016 WL 4547576 at 11 n.8 (“Nor do I believe that the new [uncharged] *Weingarten* claims call on the Respondent to raise the same or similar defenses as required for the withdrawn discriminatory discharge claim, which is the 3rd prong of *Redd-I*. They require entirely different defenses, factually and legally.”). Similarly, the surveillance allegations do not require the Region to show that Walmart took adverse employment action against associates, much less that Walmart did so because the associates engaged in a work stoppage. Nor must Walmart show that it would have taken the same action absent an associate’s participation in a work stoppage.

Significantly, the mere fact that a party alleges two or more violations arising under the same section of the Act does not mean they share the same legal theory. *See Air Contact Transport, Inc.*, 340 NLRB 688, 690-691 (2003) (finding that an untimely 8(a)(1) allegation (*i.e.* that the employer told employees that another employee was terminated for union activity) did not closely relate to the 8(a)(1) charge allegation of unlawfully disciplining that terminated employee because they rely on different legal theories and defenses).

B. The Uncharged Threat Complaint Allegations Do Not Closely Relate To Any Charge Allegation.

The threat allegations in paragraphs 12(a) and 12(b) of the Complaint do not pass the three-part closely related test. As a threshold matter, paragraph 12(b) alleges that a manager at Store 2735 in Sacramento threatened unspecified reprisals in February 2015 if employees went on strike. But that allegation cannot factually relate to any strike-retaliation Charge allegation because there is no Complaint allegation alleging any strike activity after November 2014. [See Ex. ¶¶ 7(a)-(e).] Compare *Randell Mfg. of Ariz., Inc.*, 345 NLRB 209, 209 n.2, 211-12 (2005) (“threat of replacement” complaint allegation did not arise from same factual circumstances as unlawful discharge charge allegation; a “supposed statement . . . regarding strikers’ replacement rights ha[s] little to do with supporting a charge/complaint arising out of circumstances occurring in a November discharge”).

Second, the threat allegations do not involve the same legal theories or defenses as the strike-retaliation Charge allegations. The test for determining whether an employer’s statement constitutes an impermissible coercive threat is whether an employee could reasonably interpret the statement under the totality of circumstances to predict an adverse consequence within the employer’s control if the employee engages in protected activity. See, e.g., *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). To defend against the threat allegations, Walmart could show, for example: that management did not make the alleged statement or that the statement did not violate the Act because it was a factual statement, an opinion, or too vague. See *Gissel Packing Co.*, 395 U.S. 575, 617 (1969);

Pinkerton's, Inc., 226 NLRB 837, 838 (1976) (no threat or coercion where manager's statement was uncertain).

Those legal theories and defenses bear no relation whatsoever to the IWS legal theory and defense. Nor do they relate in any way to the *Wright Line* legal theory and defenses. See *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) (finding that a threat allegation did not closely relate to a retaliatory discharge allegation in part because the two did not share the same legal theory). For example, the threat allegations do not require the Region to show that Walmart took adverse employment action against associates, much less that Walmart did so because the associates engaged in a work stoppage. Nor must Walmart show that it would have taken the same action absent an associate's participation in a work stoppage.

C. **The Uncharged Interference Complaint Allegations Do Not Closely Relate To Any Charge Allegation.**

The interference allegations in paragraphs 24, 27(a), and 27(b) of the Complaint do not pass the three-part closely related test. As a threshold matter, Paragraph 27(b) alleges that management threatened to call the police on associates demonstrating at the Apple Valley store in August 2014. But no work stoppages occurred in August 2014 or the months before or after. [*See* Ex. 13 ¶¶ 7(a)-(e).] Thus, that allegation does not arise from the same factual circumstances as any strike-retaliation Charge allegation.

Second, Paragraph 24 further alleges that management at Store 821 in Clovis, NM told employees that “they could not chant, speak to customers, or hand out flyers” while engaged in a demonstration. Paragraph 27(a) alleges that management denied off-duty

associates access to Store 2642 in Apple Valley, MN. None of the interference allegations involve the same legal theories or defenses as the strike-retaliation Charge allegations. To prove that Walmart violated the Act with respect to the interference allegations, the Region must show that associates (as opposed to non-associates) engaged in a lawful demonstration and that management's conduct interfered with that right. *See, e.g., Carpenters Local No. 1506 (Eliason & Knuth of Ariz., Inc.)*, 355 NLRB No. 159, *7 (2010); *Nations Rent, Inc.*, 342 NLRB 179, 181 (2004); *Giant Eagle, Inc.*, G.C. Mem., 2011 WL 2960967, at *2 (June 16, 2011). To defend against those allegations, Walmart could show that it did not engage in the alleged conduct, that management took action only toward non-associates, associates engaged in unprotected blocking, or that management had reasonable concerns for safety or about trespass. *See, e.g., Eliason & Knuth of Ariz., Inc.*, 355 NLRB No. 159 at *7 (the Act does not protect blocking ingress and egress); *Nations Rent, Inc.*, 342 NLRB at 181 (employer lawfully "involved police based on a reasonable concern that the pickets were trespassing on its property"); *Giant Eagle, Inc.*, G.C. Mem., 2011 WL 2960967, at *2 ("[T]he Board does not recognize a statutory right of offsite employees to enter the interior of the Employer's stores for Section 7 activity.").

Those legal theories and defenses bear no relation whatsoever to the IWS legal theory and defense. Nor do they relate in any way to the *Wright Line* legal theory and defenses. For example, the interference allegations do not require the Region to show that Walmart took adverse employment action against associates, much less that Walmart did

so because the associates engaged in a work stoppage. Nor must Walmart show that it would have taken the same action absent an associate's participation in a work stoppage.

D. The Uncharged Insignia Complaint Allegations Do Not Closely Relate To Any Charge Allegation.

The insignia allegations in Paragraphs 25 and 27(c) of the Complaint do not pass the three-part closely related test. First, the insignia allegations do not arise from the same factual circumstances as the strike-retaliation Charge allegations. Paragraphs 25 and 27(c) allege that in October and November 2014, management at Store 2668 in Sturtevant, WI and Store 2642 in Apple Valley, MN prohibited associates from wearing union insignia while permitting other associates to wear non-union insignia. Whether Walmart permitted associates to wear "other" insignia but not union insignia bears no factual relation to any strike-retaliation claim. Indeed, the insignia issue alleged in Complaint ¶ 25 regarding Montreissa Williams happened (according to the Complaint) *a month or more before* she allegedly participated in any work stoppage. [Ex. 13 ¶ 29(a).]

Second, the insignia allegations do not involve the same legal theories or defenses as the strike-retaliation Charge allegations. To determine if an employer improperly prohibited employees from wearing union insignia, the Region must show that the insignia qualified as protected activity, that Walmart prohibited associates from wearing the protected insignia, and – if Walmart established a "special circumstance" to prohibit all non-work-related insignia – it applied the rule in a non-discriminatory manner. *See, e.g., Starbucks Corp.*, 354 NLRB 876, 896-97 (2009), *adopted in* 355 NLRB 636 (2010), *enf. denied in part, and remanded on other grounds*, 679 F.3d 70 (2d Cir. 2012). To

defend against the insignia allegations, Walmart could show that the insignia did not constitute protected activity, for example because they “raise[d] the genuine possibility of harm to the customer relationship.” *Pathmark Stores, Inc.*, 342 NLRB 378, 378-80 (2004). Walmart could also show that it had a safety or brand image basis for prohibiting all insignia and did not permit other associates to wear non-union insignia, but rather acted uniformly. *See Starbucks Corp.*, 354 NLRB at 896-97; *Synergy Gas Corp.*, 290 NLRB 1098, 1103 (1988) (alleged instances of disparate treatment were so few as to be an anomalous or insignificant departure from a general consistent past practice).

Those legal theories and defenses bear no relation whatsoever to the IWS legal theory and defense. Nor do they relate in any way to the *Wright Line* legal theory and defenses. For example, the insignia allegations do not require the Region to show that Walmart took adverse employment action against associates, much less that Walmart did so because the associates engaged in a work stoppage. Nor must Walmart show that it would have taken the same action absent an associate’s participation in a work stoppage.

E. The Uncharged Interrogation Complaint Allegations Do Not Closely Relate To Any Charge Allegation.

The interrogation allegations in paragraphs 17(d) and 26 of the Complaint do not pass the three-part closely related test. First, the interrogation allegations do not arise from the same factual circumstances as the strike-retaliation Charge allegations. The Complaint alleges that on January 2 and 14, 2015, a manager at Store 4488 in Marina, CA, interrogated associates and that in May 2014, a different manager at Store 1960 in Tampa, FL, interrogated associates. The Complaint does not allege that any of the

interrogations had anything to do with any work stoppage or strike; indeed, the Complaint does not allege that any work stoppage occurred during, near, or after January 2015. [See Ex. 13 ¶¶ 7(a)-(e).]

Second, the interrogation allegations do not involve the same legal theories or defenses as the strike-retaliation Charge allegations. To determine if an employer engaged in unlawful interrogation, the Board considers whether management's words, or the context in which they were used, suggest an element of coercion or interference with employees' Section 7 rights. See, e.g., *Rossmore House*, 269 NLRB 1176, 1177-78 (1984). Relevant considerations include the background of the questioning, the nature of the information sought, and the place and method of questioning. *Id.* To defend against the interrogation allegations, Walmart could show that management did not engage in the conduct alleged or that management's words or the context of their words did not suggest an element of coercion or interference with employees' Section 7 rights. See *id.*; see also *Frito Lay, Inc.*, 341 NLRB 515, 517 (2004) (one question in the context of an "amicable and casual" conversation did not violate the Act); *Exterior Sys.*, 338 NLRB 677, 698 (2002) (no unlawful interrogation where manager "merely followed up [on employee's] own statement during a brief and friendly lunch conversation").

Those legal theories and defenses bear no relation whatsoever to the IWS legal theory and defense. Nor do they relate in any way to the *Wright Line* legal theory and defenses. For example, the interrogation allegations do not require the Region to show that Walmart took adverse employment action against associates, much less that Walmart

did so because the associates engaged in a work stoppage. Nor must Walmart show that it would have taken the same action absent an associate's participation in a work stoppage.

F. The Uncharged Non-Strike-Related Complaint Retaliation Allegations Do Not Closely Relate To Any Charge Allegation.

The non-strike-related retaliation allegations in paragraphs 11(a)(i), 11(d), 14(a)(ii), 14(d), 15(a)(i), 15(a)(iii), 15(a)(iv), 15(a)(v), 15(d), 21(a)(ii), 21(e) fail the closely related test. First, the non-strike related retaliation allegations do not arise from the same factual circumstances as the strike-retaliation Charge allegations. Instead, each one alleges retaliation for distinct activities completely unrelated to any work stoppage. Two allegations (15(a)(i), 15(a)(iv), 15(d)) claim that Walmart disciplined a Pico Rivera, CA associate for participating in two demonstrations that occurred at former Walmart Chairman Rob Walton's home in Phoenix, AZ, in May and October 2014 (not during, around, or related to any work stoppages); others (14(a)(ii), 14(d), 15(a)(iii), 15(a)(v), 15(d)) claim that Walmart disciplined two Pico Rivera associates for delivering a petition to the Pico Rivera, CA Store in July 2014 and participating in a demonstration at that store in October 2014 (no work stoppages occurred in July or October 2014; and the Complaint does not allege that any work stoppages happened at the Pico store after June 2014); the last one (21(a)(ii), 21(e)) claims that Walmart disciplined an associate at the Apple Valley, MN for allegedly "requesting to accompany an employee to an Open Door Meeting" (again not during any work stoppage). None of those allegations factually relate to any associates going on strike or allegedly being retaliated against because they went on strike. [See Ex. 13 ¶¶ 7(a)-7(e).]

Thus, even if the non-strike-related Complaint retaliation allegations shared the same legal theory as the strike-retaliation Charge allegations (they do not), they would still not satisfy the closely related test. *See, e.g., Carney Hosp.*, 350 NLRB at 631-32 (2007) (under settled Board law, “allegations which are related by mere legal theory are not ‘closely related’ for purposes of § 10(b)” if factually unrelated); *accord Nippondenso Mfg. U.S.A.*, 299 NLRB at 546 (concluding that the Board could not justify “finding the allegations closely related based on legal theory alone”); *Drug Plastics*, 44 F.3d at 1021-22 (discussing same); *Precision Concrete*, 334 F.3d at 93 (Board lacked jurisdiction to adjudicate threat allegations in complaint despite charge alleging same legal theory within similar timeframe; complaint allegations did not share significant factual affiliation with, or grow out of, charged conduct; temporal proximity “add[ed] nothing” without requisite factual relationship).

And, of course, the non-strike-related Complaint retaliation allegations do not involve the same legal theories or defenses as the strike-retaliation Charge allegations. *All* of the strike-retaliation Charge allegations invoke the IWS doctrine and related defenses, while *none* of the uncharged, non-strike-related retaliation Complaint allegations have anything to do with the IWS doctrine or its defenses.

Conclusion

Based on the foregoing, none of the uncharged Complaint allegations discussed above closely relate to the Charge allegations. Walmart repeatedly notified the Region of the foregoing jurisdictional defects. But the Region did not follow Board rules and regulations and did not obtain the necessary Charge amendments required by applicable

law. Consequently, the Region lacked jurisdiction to issue a Complaint on the uncharged and unrelated allegations, and the Board (or ALJ) should dismiss ¶¶ 9(a)-(b); 11(a)(i); 11(d) regarding 11(a)(i); 12(a)-(b); 14(a)(ii); 14(d) regarding 14(a)(ii); 15(a)(i); 15(a)(iii)-(v); 15(d) regarding 15(a)(i), (iii)-(v); 17(d); 21(a)(ii); 21(e) regarding 21(a)(ii); 24-26; and 27(a)-(c).

Respectfully submitted this 14th day of December, 2016.

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ORIGINAL of the foregoing efiled with the Executive Secretary of the National Labor Relations Board, and the Original and eight copies sent via Federal Express this 14th day of December, 2016, to:

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COPIES of the foregoing sent via email and Federal Express this 14th day of December, 2016 to:

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