

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: November 15, 2013

TO: Martha Kinard, Regional Director  
Region 16

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: United Food and Commercial Workers                   177-8520-1600  
International Union   378-4270-6705  
(Wal-Mart Stores, Inc.)   536-2501-7000  
Case 16-CB-099612   536-2519-2529  
   536-2514-4000  
   712-5042-5000  
   712-5042-6701-2500  
   712-5070-7000

This case was submitted for advice as to whether the Union violated Section 8(b)(1)(A) of the Act by threatening or making other coercive statements to, or in the presence of employees; and offering a \$50 gift card to employees who participate in the 2012 Black Friday job action.

We conclude that the charges alleging unlawful threats should be dismissed, absent withdrawal, either because the alleged “threats” were too ambiguous to constitute restraint or coercion, or employees were not restrained or coerced because there is no evidence that employees heard the statement or had knowledge that the alleged threat was attributable to the Union. Further, we conclude that the Union’s offer of a \$50 gift card to employees who participate in the 2012 Black Friday job action did not constitute unlawful restraint or coercion of employees.

### FACTS

Since at least 2011, the UFCW, through its subsidiaries Making Change for Walmart and OUR Walmart (collectively “the Union”), has been involved in various campaigns against Walmart (the Employer) and has conducted numerous actions at its stores throughout the country. The Union maintains that its intention is to help the Employer’s employees as individuals or groups in their dealings with the Employer over labor rights and standards, and in employees’ efforts to have the Employer publically commit to adhering to labor rights and standards. As part of its

efforts, in October 2012,<sup>1</sup> the Union announced that it was planning nationwide strikes and labor actions at the Employer's stores on Black Friday, November 23, the day after Thanksgiving. It continued to publicize these strikes and actions over the following few weeks leading up to Black Friday.

1. Alleged threats by the Union: Ennis, Texas and Arlington, Texas stores

Sometime during the week before November 23 (Black Friday), at the Ennis, Texas facility, a UFCW union organizer assigned to the Making Change and Our Walmart campaign, along with a former Walmart employee who was an open OUR Walmart supporter approached two employees inside the Walmart store, and told them about the planned Black Friday strike to help improve working conditions. They asked them to join the Black Friday job action. The Union representative and the former Walmart employee spoke generally to the two employees about the upcoming Black Friday job action. One employee with whom they spoke denies that anyone made any threatening statements or gestures to her. Another employee asserts that when approached by them, she stated that she didn't want to talk, and when asked by the Union representative if the Employer had scared her, she said it had not. The Union representative then said "Well, then y'all better watch out for Black Friday". This employee states that she was not frightened by what the Union representative had said, but reported the conversation to the Store Manager anyway.

On or about November 13, at the Arlington, Texas facility, an individual who was assigned by the UFCW to hand out flyers, attempted to give a folded up flyer to a meat manager, who refused to accept it. According to the meat manager, the man said "You know there's a bomb threat on Black Friday, I'm just trying to help you." The meat manager later asked a co-worker statutory employee for the flyer, read it, and recalled that the flyer said something about Black Friday. The meat manager did not tell this co-worker about the bomb statement. The meat manager gave the Shift Manager a copy of the flyer and told him that a man was distributing flyers to associates. She did not, however, tell the Shift Manager of the bomb statement. A statutory employee co-worker, noticing that the meat manager was upset, approached her and asked what was wrong. The meat manager stated that a man was distributing flyers and told her of the bomb statement. This co-worker then exited the store to get something from her car. While outside, a car, with five or six people, pulled up, one man exited and tried to give her a flyer. She refused to accept it, and then flagged down a police car, told the officer of the Employer's no solicitation policy, pointed out the car, and told the officer of the bomb statement. This employee never read the flyer; nor did she mention the bomb statement to any other employee. After

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<sup>1</sup> All dates hereafter are in 2012.

the police conducted an investigation, the district attorney elected not to prosecute, noting that the allegations were unfounded.

## 2. Alleged threats by Jobs with Justice organizer at the Orlando, Florida store

Jobs with Justice (JWJ) is a national network of local coalitions that bring together labor unions, community organizations and like organizations to advocate for workers and their communities. Upon learning from a discharged employee that he had been fired from Walmart, the executive director of JWJ called the UFCW to find out the circumstances surrounding the discharge. The UFCW confirmed that it was the Union's position that Walmart had discharged the employee on September 22 for activities on behalf of OUR Walmart.<sup>2</sup> The JWJ executive director then circulated an email to JWJ members soliciting signatures in support of the discharged employee's reinstatement. On or about October 25, a delegation of 12-15 individuals organized and led by JWJ confronted the store manager in the store with the petition. No representatives of the UFCW or OUR Walmart were present; nor did they have advanced knowledge of this demonstration.

The discharged employee was at the October 25 demonstration. The Employer's representatives refused to accept the JWJ petition. A JWJ representative made the following statements to Walmart's managers: "Are you hearing me, because if you are not hearing me I can get a whole lot louder"; you don't care what the community thinks... you need to think about what the community needs." The discharged employee made the following statements to the store manager: "How do you feel now? "How do you feel about Black Friday"? When the manager responded that he was "OK", the discharged employee stated, "We'll see how you feel then because we're going to attack you and hit you hard then." The discharged employee stated to the group at large that something big was going to happen at the facility on Black Friday, but did not give specifics. He also stated that Walmart did not treat employees right and things were going to change.

The nearest cashier was 10 to 15 feet away from the group. One employee recalled JWJ speaking loudly and asking why the employee was fired. Other employees were watching what was going on, but there is no evidence that any employees heard the above exchanges.

## 3. Offer of a \$50 gift card to Black Friday strikers

Prior to the Black Friday events, the Union advertised a \$50 gift card to the first 700 employees who walked off the job on Black Friday. The Union solicited donations from supporters and posted on its OUR Walmart's web domain an email from a

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<sup>2</sup> The Union ultimately withdrew the charge alleging the unlawful discharge.

Walmart employee explaining his support for the Black Friday strike and telling employees of the \$50 gift card, noting, “Going on strike is never an easy decision. We are all barely getting by as it is. ... the first 700 Associates who sign up to strike will get a \$50 gift card for us to use to buy groceries for our families”. At least one employee received the email directly (Norman, Oklahoma facility). Others were told of the offer by fellow employees or by a union representative (Fort Worth, Texas facility). This gift card was available to anyone who struck, not just members of OUR Walmart.

### ACTION

We conclude that the charges should be dismissed, absent withdrawal, either because the alleged “threats” were too ambiguous to constitute restraint or coercion, or employees were not restrained or coerced because there is no evidence that employees heard the statement or had knowledge that the alleged threat was attributable to the Union. Further, the Union’s offer of a \$50 gift card for employees who participate in the 2012 Black Friday job action was to a strike fund, and, thus, did not constitute unlawful restraint or coercion of employees.

A union violates Section 8(b)(1)(A) by engaging in activities that reasonably tend to restrain or coerce employees in the exercise of their Section 7 rights to choose for themselves, free of any coercion, whether to support a union or to refrain from supporting a union. “This includes, among other things, the right to work in the face of a strike.”<sup>3</sup> The Act contains no affirmative definition of the terms “restraint” or “coercion”, but they consistently have been held to proscribe threats of physical harm. However, not all statements rise to the level of unlawful threats. In Local 810, Fabricators & Warehousemen,<sup>4</sup> a statement “to tell his boss to come to his senses” that the union had more money than the company and that “they’re foolish, they will blow the joint” was too ambiguous to indicate that the union would blow up the company. Further, statements asking a company president during a strike whether he was “worried yet” and predicted “you’ll worry” was vague and did not rise to the level of an implicit threat.<sup>5</sup>

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<sup>3</sup> Service Employees District 1199 (Staten Island University Hospital), 339 NLRB 1059, 1060 (2003).

<sup>4</sup> 200 NLRB 575, 583-84 (1972),

<sup>5</sup> Id. at 584. See also Operating Engineers Local 150 (Builder’s Assn. of Chicago), 165 NLRB 159, 160-61 (1960) (comment by union president about dissident union member during a union meeting “I don’t know what I am going to do with O’Brien, but I will get him in my own way”, although a threat, too ambiguous to find it violative of Section 8(b)(1)(A); Bonnaz Embroideries Tucking, Etc., Local 66, 134 NLRB 879

In addition, threats and other acts of intimidation directed at nonemployees may be unlawful under Section 8(b)(1)(A), but only if other employees would be likely to hear about them.<sup>6</sup> In Casino Royale, for example, a picketer's threat to a non-employee to "kick this white bitch's ass" was a clear threat of injury, but in circumstances where no employees observed or heard what was said or ever became aware of the incident, did not violate Section 8(b)(1)(A).<sup>7</sup>

#### 1. Statements at Ennis, Texas facility

As in the above cited cases, the statement made at the Ennis, Texas facility to an employee to "watch out for Black Friday", is too ambiguous to constitute an unlawful threat. Of particular significance is the fact that the only employee to whom the statement was made denies being frightened or thinking that anything bad would happen. Further, that statement was made when the Union was merely advising employees that there would be a strike on "Black Friday", and there was no other union conduct surrounding that statement that would lead an employee to view that statement as a threat.<sup>8</sup> Thus, we conclude that the statement "Well, you all better watch out for Black Friday" is too ambiguous to constitute restraint or coercion.

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(1961) ("today we let you go to work because this is payday, but tomorrow nobody go upstairs", too ambiguous to be an unlawful threat; also too ambiguous, "we are going to do something that you will be sorry."); Service Employees Intl. Un., Loc. 254, 218 NLRB 1399, 1400 (1975) (statement to supervisor, communicated to employee, that if he continued to work during the strike, they would be "in a lot of trouble", too ambiguous.)

<sup>6</sup> In re 1199, Nat'l Health & Human Service Employees Union, 339 NLRB 1059, slip op. at 4 (2003); North American Meat Packers Union (Hormel & Co.), 291 NLRB 390, 395 (1988), citing Teamsters Local 298 (Schumacher Electric), 236 NLRB 428 (1978); Culinary Workers Local 226 (Casino Royale, Inc.), 323 NLRB 148, 159 (1997).

<sup>7</sup> 323 NLRB at 159. Accord: Local 810, Fabricators & Warehousemen, 200 NLRB at 583-84 (statements to the company president that there would be "a lot of [union] violence" in connection with the strike, and that the vice president's home and that of the other company offices would be destroyed, no violation as not made in the presence of, or otherwise conveyed to, statutory employees.)

<sup>8</sup> Cf. Local 30, Roofers (Kitson Bros., Inc.) 228 NLRB 652, 656 (1977) (threat to "blow you head off", in context of a violent strike, unlawful); Teamsters Local 115 (Oakwood Chair), 277 NLRB 694 (1985) (statements to a supervisor that he would be "sorry" and "something could happen" to his car, in the context of a violent strike with mass picketing, blocking, assaults, found to be unlawful threats of harm).

## 2. Statements at Arlington, Texas facility

We also conclude that the Union did not violate Section 8(b)(1)(A) when it stated to the meat manager, “you know there’s a bomb threat on Black Friday. I’m just trying to help you”. Clearly, a bomb threat would restrain and coerce employees in the exercise of the Section 7 rights.<sup>9</sup> However, the Region has concluded, and we agree, that the meat department manager is a statutory supervisor. In this regard, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia set forth in Section 2(11) of the Act, using independent judgment in the interest of the employer. The burden of proving supervisory authority falls on the party asserting it.<sup>10</sup>

Here, in the past for several years, the meat department manager reviewed applications, selected applicants for interviews and conducted interviews. In consultation with a co-departmental manager, she selected over 20 employees for hire. About a year ago, the Employer decided that an Assistant Manager would also be present at the interviews. The meat department manager effectively recommended one hire after participating in two interviews with the Assistant Manager.<sup>11</sup> Thus, in order to find a Section 8(b)(1)(A) violation for the union’s organizer’s “bomb on Black Friday” statement to the meat manager, a statutory supervisor, statutory employees must have heard or were likely to hear the statement.

There is no evidence that this statement was heard by any statutory employees. No employees were in the vicinity to hear the union’s organizer’s statement to the meat manager. Although the meat manager did tell one employee that a man was passing out flyers, and then relayed his statement about a bomb on Black Friday, she did not associate that statement with the Union. Nor did the employee to whom the statement was relayed know that the person distributing flyers and who made the

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<sup>9</sup> See Local 810, Fabricators and Warehousemen, 200 NLRB at 583.

<sup>10</sup> Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006).

<sup>11</sup> Connecticut Humane Society, 358 NLRB No. 31, slip op. at 19 (April 12, 2012); Sheraton Universal Hotel, 350 NLRB 1114 (2007) (front desk employee statutory supervisor where he reviewed applications, interviewed applicants and made hiring recommendations); Union Square Theater Management, 326 NLRB 70, 71 (1998), reconsideration denied, 327 NLRB 618 (1999) (Section 2(11) supervisor status found where hiring authority is neither routine nor clerical, but involves the use of independent judgment).



statement was associated with the Union. Further, the employee stated that she never read the flyer so did not know what group, if any, was responsible for the statement. Absent employees making some connection of the bomb threat to the Union, it cannot be concluded that employees were restrained or coerced in the exercise of Section 7 rights.

### 3. JWW demonstraton at Orlando, Florida facility

Initially, we conclude that none of the statements made at the October 25 demonstration constitute unlawful threats sufficient to restrain or coerce employees in the exercise of their Section 7 rights. In addition, even if unlawful threats were made, no employees heard or were reasonably likely to hear the threats. Finally, even if unlawful threats were made to statutory employees, JWW was not an agent of the Union when it enaged in the October 25 demonstration.

JWW brought a group of 10-15 community members, and one discharged Walmart employee, to the Orlando facility in order to present a petition to the Employer requesting reinstatement of the discharged employee. During this meeting/demonstration, a JWW representative made the following statements to Walmart's managers when they refused to receive the petition or discuss reinstatement for the discharged employee: "Are you hearing me, because if you are not hearing me I can get a whole lot louder"; You don't care what the community thinks... you need to think about what the community needs." The discharged employee made the following statements to the store manager: "How do you feel now? "How do you feel about Black Friday"? When the manager responded that he was "OK", the discharged employee stated, "We'll see how you feel then because we're going to attack you and hit you hard then." The discharged employee stated to the group at large that something big was going to happen at the facility on Black Friday, but did not give specifics. He also stated that Walmart did not treat employees right and things were going to change.

Based on the cases discussed earlier, these statements are too ambiguous to constitute any unlawful threat. The statement made by the discharged employee, "We'll see how you feel then because we're going to attack you and hit you hard then", and "something big was going to happen at the facility on Black Friday", references the upcoming Black Friday strike, which could hit the Employer hard in its pocketbook. Further, notwithstanding the ambiguous nature of these statements, they were directed to statutory supervisors, and no employees heard or were likely to hear these statements. The nearest cashier was 10 to 15 feet away from the group. One employee recalled JWW speaking loudly and asking why the employee was fired. Other employees were watching what was going on, but there is no evidence that any employees heard the above exchanges.

Finally, assuming *arguendo* any of the statements could be considered unlawful threats to employees, neither the JWJ, which organized this demonstration, nor the discharged employee, who attended the demonstration, was an agent of the Union. “The Act does not regulate the conduct of individuals acting in a private capacity; only employer or labor organizations or their agents can commit unfair labor practices.”<sup>12</sup> A labor organization is only held responsible for the acts of its agents when committed within the scope of general authority and employment. In determining agency status, the Board applies the ordinary law of agency.<sup>13</sup>

The only contact JWJ had with the Union preceding this demonstration was a telephone call from JWJ’s executive director to the UFCW to learn the circumstances surrounding the employee’s discharge. The UFCW confirmed that it was the Union’s position that the employee was discharged for activities on behalf of OUR Walmart; however, there is no evidence that the UFCW knew that JWJ circulated a petition or planned a demonstration at Walmart. Nor was any Union representative present at the demonstration. There is no other affiliation of JWJ with the Union other than its status as a national network of local coalitions that bring together labor unions, community organizations and like organizations to fight for workers and their communities. In these circumstances, we conclude that JWJ was not an agent of the Union during the October 25 demonstration.

#### 4. Offer of \$50 gift cards to striking employees

We agree with the Region that the Union’s offer of a \$50 gift card to striking employees did not restrain or coerce employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act. There is no dispute that the Union offered a \$50 gift card to the first 700 employees who walked off the job on Black Friday. The Union solicited donations from supporters and posted on its OUR Walmart’s web domain an email from a Walmart employee explaining his support for the Black Friday strike and telling employees of the \$50 gift card, noting, “Going on strike is never an easy decision. We are all barely getting by as it is. ... the first 700 Associates who sign up to strike will get a \$50 gift card for us to use to buy groceries for our families”. At least one employee received the email directly (Norman, Oklahoma facility). Others were told of the offer by fellow employees or by a union representative (Fort Worth, Texas facility). This gift card was available to anyone who struck, not just members of OUR Walmart.

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<sup>12</sup> Longshoremen & Warehousemen Local 6 (Sunset Line & Twine Co., 79 NLRB 1487, 1507, n. 37 (1948).

<sup>13</sup> Longshoremen ILA (Coastal Stevedoring Co.), 313 NLRB 412, 415 (1993), remanded by International Longshoremen’s Ass’n, AFL-CIO v. N.L.R.B., 56 F.3d 205 (D.C. Cir. 1995), cert. denied 516 U.S. 1158, on remand 323 NLRB 1029 (1997).



The Board is often called upon to analyze payment of strike benefits and hardship relief in objection to election cases, where it looks to see if the payments were improper economic inducements to the eligible voters. In those cases, the Board has held that non excessive payments for services or lost time do not interfere with the employees' free choice in an election. Thus, in Servomation, the Board held that the strike payments, in addition to the picket line strike benefits, made both before and after the election "to relieve some financial hardship resulting from their being on strike", did not influence the election or impair a free choice on the part of employees.<sup>14</sup>

Here, the \$50 gift card was a non excessive strike benefit, designed to reimburse employees for some of their lost wages if they struck, and was non discriminatory. Anyone who struck was eligible for the gift card, not just OUR Walmart member.

The cases cited by the Employer are not to the contrary. In Flatbush Manor<sup>15</sup>, the Board concluded that the union violated Section 8(b)(1)(A) when, during the preelection period, it made payments to 48 of the 64 unit employees ranging in amounts of \$4.80 to \$114. The Board noted that "[s]ome employees were told that the money was to supplement their salaries, which were too low, and some were told the money was to reimburse them for lunch and carfare."<sup>16</sup> However, not all employees receiving them had complained of low wages and that the union did not request statements of expenses for meals and transportation. Thus, there was no legitimate reason for making the payments. In these circumstances, the Board reasoned that a large number of employees were given the impression shortly before the election that the supplement to their wages would continue if the Union were selected as their bargaining representative. Similarly, in General Cable<sup>17</sup>, the Board sustained an election objection concerning the union's preelection \$5 gift certificate to all employees and wives who attended a union meeting, and later to all other employees who did not attend the meeting. The Board reasoned that the gift was not presented to encourage attendance at the union meeting, but rather as an inducement to support the union which impaired employee free choice.

Unlike the above cited cases, in the instant matter there is no evidence to indicate that the gift card was meant to buy support for OUR Walmart. To the

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<sup>14</sup> Servomation of Columbus, 219 NLRB 504, 505 (1975), and cases cited therein.

<sup>15</sup> 287 NLRB 457 (1987)

<sup>16</sup> *Id.* at 457.

<sup>17</sup> 170 NLRB 1682, 1682-83 (1968)

contrary, the Union's \$50 gift card was available to any employee who joined the Black Friday strike, as a way to supplement lost wages. This was clearly communicated to all employees. Thus, the Union's \$50 gift card was more akin to non objectionable election conduct and therefore not coercive.

### CONCLUSION

The charges alleging unlawful threats should be dismissed, absent withdrawal, either because the alleged "threats" were too ambiguous to constitute restraint or coercion, or employees were not restrained or coerced because there is no evidence that employees heard the statement or had knowledge that the alleged threat was attributable to the Union. Further, the Union's offer of a \$50 gift card for employees who participate in the 2012 Black Friday job action was similar to a lawful "strike fund", and thus, did not constitute unlawful restraint or coercion of employees.

/s/  
B.J.K.