

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

# Advice Memorandum

DATE: August 14, 2013

TO: Peter S. Ohr, Regional Director  
Region 13

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

SUBJECT: Wal-Mart Stores, Inc.  
Case 13-CA-99526

512-5012-1725-0100  
512-5012-1725-0150  
512-5012-1725-2200  
512-5012-1725-3300  
512-5012-6712-6700  
512-5012-8301

This case was submitted to Advice to determine whether an employer retail store violated Section 8(a)(1) by requesting that the police remove non-employee organizers from its parking lot, consistent with its lawful rule, where the officers allowed the employee involved in the demonstration to stay on the premises, albeit while depriving him of the use of the OUR Walmart van to carry on the demonstration. In the circumstances, where the van was covered with the OUR Walmart logo and other graphic images, and where the participants in the demonstration--save the one identified employee allowed to stay on the property--were non-employee organizers, we cannot conclude that the Employer's conduct interfered with employees' section 7 rights, and hence the charge should be dismissed absent withdrawal.

## FACTS

The Employer, Wal-Mart Stores, Inc., maintains a Solicitation and Distribution of Literature Policy that permits Associates<sup>1</sup> "to participate in solicitation and/or distribution of literature outside [its] facilities during non-working time." However, the Policy requires non-Associate individuals, groups, and organizations (including non-profit, charitable, service, and religious groups) who wish to solicit on the Employer's property outside its facilities to first obtain permission from the Employer. Non-Associates wishing to solicit or distribute literature must request approval to do so by filling out a form at least three days in advance. If the Employer approves the party's request, it must remain in a designated area on the apron

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<sup>1</sup> "Associate" is the Employer's term for an employee.

sidewalk (not in the parking lot for safety reasons) and have no more than fifteen individuals soliciting and/or distributing literature at the same time. There is no evidence that the Employer does not uniformly enforce its policy.

Since early 2012, the Wal-Mart Associate involved herein, an employee of the Crestwood, Illinois store, has been a member of the Organization United for Respect at Walmart (OUR Walmart). This is a national organization whose goal is to educate employees about the Employer's work rules and their rights under labor laws. It has held numerous rallies and demonstrations at the Employer's corporate headquarters and retail stores nationwide.

On October 16, 2012, at about 9:45 p.m., the Wal-Mart Associate was not scheduled to work, but he drove to the Employer's store in a minivan that is owned by OUR Walmart, accompanied by an OUR Walmart organizer. This van has OUR Walmart logos and other graphic images wrapping around the entire vehicle. The top of the van is equipped with a large video projection system and stadium-style speakers. When the duo arrived at the store, they parked the van two rows from the front entrance to the store. The OUR Walmart organizer then immediately began to set up the audio and video projection systems. Once this was done, the Associate began to play very loud music, including the song "We're Not Gonna Take It" and various union songs from the 1920's and 1930's. After about five minutes of loud songs, the Associate next began to project video clips onto the store's façade from OUR Walmart's earlier protests at the Employer's headquarters in Bentonville, Arkansas. The Wal-Mart Associate contends that the purpose of this action was to recruit for OUR Walmart and to educate employees about overtime laws.

After the video had been playing for about five minutes, the Assistant Store Manager and Support Manager walked outside the store. When the Associate attempted to approach them, the Assistant Store Manager went back inside the store so there was no conversation between them. The Support Manager, however, asked the Associate what was going on. The Associate replied that he was holding an action that was protected under a document from the corporate office entitled "Response to Walkout/Work Stoppage – Salaried Management Talking Points." On the second page of this document, the first bullet point stated "[i]f Associates congregate at the fringes of the sales floor, in non-sales-floor interior areas, or outside, contact labor relations immediately for instructions. Do not tell them they must leave Wal-Mart property." (emphasis supplied). The Associate then handed the Support Manager a copy of the first page of the document and asked him to give it to the Assistant Store Manager. At that point, the Support Manager glanced at the document and went back inside without any further comment.

About ten minutes later, two police cars arrived at the store.<sup>2</sup> The police report states that a responding police officer initially observed that a large group of demonstrators were congregated around an SUV from which the demonstrators were “projecting a video on the side of the Wal-Mart building and had very loud music playing through the speakers.” There were approximately 20 demonstrators on the site, of which the Associate and his wife were the only ones identified as Wal-Mart employees. At that time, the Associate identified himself to the officer as an off-duty employee and the individual who was running the action. He also stated that he had a letter from the Employer’s corporate office that allowed him to be in the parking lot protesting. However, upon inspection, the officer noted that the letter was a photocopy from a Wal-Mart manual with no authorizing signatures on it. He then informed the demonstrators that the music volume was in violation of the city’s local ordinance. Another officer then went inside the store and briefly spoke to the Assistant Store Manager, who stated that the Employer owned the parking lot and did not permit outside groups to solicit on its property without prior approval.

Afterwards, the second officer came back outside and informed the demonstrators “that they were to pack up their projector, speakers, and vehicle and exit from the Wal-Mart parking lot due to the fact that it is private property and the business wishes them to leave.” An exception, however, was made for the Associate and he was allowed to remain on the premises because he was a current employee.<sup>3</sup> The officer also stated that the demonstration could be moved to the shoulder of the road that runs adjacent to the Employer’s parking lot. Upon hearing the officer’s instructions, the Associate discussed the matter with some of the OUR Walmart organizers who were nearby and it was decided that the demonstrators would leave as they had already made their point.

The Associate, nevertheless, remained on the premises for another 30 minutes and went into the store looking for the Assistant Store Manager in order to show him the corporate document that he had given to the Support Manager and one of the officers. The Associate eventually left without speaking to the Assistant Store Manager and chose not to remain in the parking lot by himself and engage other employees as he had done before the police officers arrived. He was not issued any citation by the officers, nor was he ever issued any discipline for his involvement in the demonstration.

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<sup>2</sup> The Employer denies calling the police and its assertion is un rebutted in the record.

<sup>3</sup> By this time, his wife had reported back to work.

ACTION

We conclude that since the demonstrators were predominantly non-employee “OUR Walmart” organizers and congregated around a van emblazoned with the “OUR Walmart” logo, it was reasonable for the Employer to conclude that this was a non-employee demonstration, despite the presence of two of its employees. In these circumstances, we cannot conclude that the Employer interfered with its employees’ Section 7 rights by applying its lawful rule to exclude non-employee organizers from its property, notwithstanding that the police also required that the organizers take the van off the property, thereby depriving the sole remaining employee demonstrator of its use.

Under Board law, off-duty employees and non-employee organizers have different rights of access to employer property for the purpose of solicitation and distribution of literature.<sup>4</sup> Off-duty employees have far more access rights to an employer’s premises for purposes of engaging in protected conduct than do union organizers because employees are not “strangers” to the property and the workplace is a “particularly appropriate place” for employees to communicate with one another regarding organizing.<sup>5</sup> In fact, the Board has repeatedly held that an employer cannot deny off-duty employees entry to its parking lots, gates and other outside nonworking areas “except where justified for business reasons.”<sup>6</sup> On the other hand, as a general rule, an employer may exclude non-employee organizers from its property.<sup>7</sup> Consistent with these principles, the Board has upheld Wal-Mart’s Solicitation and Distribution policy requiring non-employees to obtain prior approval from the store manager for their solicitations and to comply with “time, place, and manner” restrictions.<sup>8</sup>

In the instant matter, the Employer--by advising the police that it did not permit outside groups to solicit on its property without prior approval--was merely enforcing its lawful Solicitation and Distribution Policy. Given the circumstances, the Employer reasonably concluded that the demonstration constituted solicitation by an outside organization. Thus, the Employer only recognized one or two of its employees among a much of larger group of non-employees and organizers engaging in a

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<sup>4</sup>See *Nashville Plastic Products*, 313 NLRB 462, 463 (1993).

<sup>5</sup> *Id.*

<sup>6</sup> *Teletech Holdings, Inc.*, 342 NLRB 924, 931 (2004), citing *Tri-County Medical Center*, 222 NLRB 1089 (1976).

<sup>7</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

<sup>8</sup> See *Wal-Mart Stores, Inc.*, 349 NLRB 1095 (2007).

demonstration that emanated from a vehicle that prominently displayed the OUR Walmart logo and other identifying images. Applying the Employer's lawful policy, the police permitted the one employee who attended the demonstration to remain on the premises and advised the non-employees that they could take their demonstration to the shoulder of the road that runs adjacent the Wal-Mart property. While the action of the police deprived the employee of the use of the van, the Employer did not unreasonably conclude that the van was owned and operated by OUR Walmart, and was an instrument of non-employee solicitation requiring prior approval.<sup>9</sup>

In these circumstances, we cannot conclude that the Employer interfered with the Section 7 rights of its employees. Accordingly, the charge should be dismissed, absent withdrawal.

/s/  
B.J.K.

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<sup>9</sup> In any case, the record does not reveal that Wal-Mart instructed the police to require the removal of the OUR Walmart van.