

## Article

# How Wal-Mart Fights Unions

Nelson Lichtenstein<sup>†</sup>

Wal-Mart is America's most controversial corporation, not only because of its sheer size and global reach, but because the Bentonville, Arkansas-based company has been highly assertive in keeping its labor costs among the lowest in the retail industry. Pioneering technological and organizational innovations account for a portion of Wal-Mart's advantage, but the nation's largest private employer has also been hostile to labor regulations. It has often violated the phalanx of laws, administrative rulings, and enforcement mechanisms that constitute the governmental regulation of work and labor established in the United States during the decades of social reform that stretched from the Progressive Era, through the New Deal, and on into the 1960s and early 1970s. For nearly two decades Wal-Mart has faced a stream of litigation charging that company policies violate and distort state and federal laws covering overtime pay, workers' compensation, the minimum wage, fair employment practices, and various health and safety regulations.<sup>1</sup>

Even more important, Wal-Mart has successfully fought unionization in every one of its more than four thousand stores and distribution centers in the United States, which collectively employ almost 1.3 million "associates."<sup>2</sup> Like the federal minimum wage, American labor law was designed to raise wages, albeit through a collective bargaining relationship between a group of employees and the firm for which they work. But com-

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<sup>†</sup> Professor of History, University of California, Santa Barbara. Copyright © 2008 by Nelson Lichtenstein.

1. See Nelson Lichtenstein, *Why Working at Wal-Mart Is Different*, 39 CONN. L. REV. 1652, 1675–76 (2007); see also LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKER'S RIGHTS AT WAL-MART 200–03* (2004).

2. Wal-Mart, Inc., *Employment and Diversity Fact Sheet 1–2*, [http://www.walmartfacts.com/FactSheets/Employment\\_and\\_Diversity.pdf](http://www.walmartfacts.com/FactSheets/Employment_and_Diversity.pdf) (last visited Apr. 14, 2008).

panies like Wal-Mart have found trade unionism far more obnoxious than any federal mandate that boosted wages or insured payment of overtime and lunch breaks. By its very nature a trade union challenges managerial authority. It questions the moral, paternal claim that executives and managers speak and act on behalf of an essentially harmonious enterprise. The absence of a collective employee voice at Wal-Mart and the dozens of retail chains and the thousands of other firms that follow its lead generate an essentially authoritarian organizational culture within a huge sector of the economy and distorts the political and economic discourse of the larger polity.

This Article traces the historical origins of Wal-Mart anti-unionism and identifies some of the National Labor Relations Board (NLRB) decisions that proved crucial to this corporate strategy. It then explores the way that key Wal-Mart figures, including founder Sam Walton and personnel executive John Tate, developed a corporate labor-relations regime that they used with such effectiveness against union efforts to organize warehouses and stores in the 1970s and early 1980s. Finally, this Article looks at the United Food and Commercial Workers campaign to organize a scattered set of Wal-Mart stores in the late 1990s and in the early years of the twenty-first century. The corporate response to a unionization effort at a Kingman, Arizona discount store provides a glimpse of why, under current legal and business conditions, unionization is virtually impossible at Wal-Mart. The Article concludes with some thoughts on how this condition might be transformed.

### I. WAL-MART'S HISTORIC HOSTILITY TO UNIONISM

“We have never had a union in Wal-Mart and don't need one now to represent our associates,” Sam Walton told readers of the company's internal publication, *Wal-Mart World*.<sup>3</sup> “We resent outsiders coming in and saying things which aren't true and trying to change the Company that has meant so much to all of us . . . .”<sup>4</sup> This proved a sentiment heartily endorsed throughout the Wal-Mart managerial hierarchy. In the 1970s and 1980s, Larry English, one of Walton's best young managers, was something of a maverick when it came to Bentonville's increasingly systematic rationalization of the discount sales

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3. Sam Walton, *Keeping Our Partnership Strong*, WAL-MART WORLD (Wal-Mart, Inc., Bentonville, Ark.), Oct. 1989, at 3, 3.

4. *Id.*

floor. But that did not mean that he would tolerate any challenge to his authority as a store manager. English's disdain for unions was apparent: "I hated them because they wanted to tell me how to take care of my people and I know how. I don't need someone to manage my store for me—I'll go to my grave believing that."<sup>5</sup>

Such sentiments flourished in Northwest Arkansas, the rural, small-town, Ozark-flavored section of the state where Sam Walton built his first dozen discount stores in the 1960s.<sup>6</sup> In the United States, a militant hostility to trade unionism arose not where union labor was strong and pervasive, but where it seemed a threat to a regional economy structured around cheap labor, competitive enterprises, and a local elite.<sup>7</sup> That, of course, was Arkansas in the second half of the twentieth century. In this region, the fear of union organization united the plantation owners of the Mississippi delta, the Ozark branch plant managers whose only competitive advantage lay in cheap labor, and entrepreneurs of Northwest Arkansas, like John Tyson, J. B. Hunt, and Sam Walton, who saw their booming firms as an extension of their paternalism and fiercely held autonomy.<sup>8</sup> Led by the delta planters, who remembered well the biracial uprising led by the Southern Tenant Farmers Union in the 1930s, Arkansas in 1944 became the first state to pass a "right-to-work" referendum that made the union shop contract illegal.<sup>9</sup> Such right-to-work laws weak-

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5. Interview with Larry English, Former Wal-Mart Store Manager, in Diamond Head, Ark. (June 7, 2006).

6. See BOB ORTEGA, IN SAM WE TRUST 166 (1998).

7. JAMES C. COBB, THE SELLING OF THE SOUTH: THE SOUTHERN CRUSADE FOR INDUSTRIAL DEVELOPMENT, 1936–1990, at 61–63, 226–28 (1993); TIMOTHY J. MINCHIN, FIGHTING AGAINST THE ODDS: A HISTORY OF SOUTHERN LABOR SINCE WORLD WAR II, at 4–5 (2005); GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 262–64 (1986); Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 298–99 (1993).

8. See BEN F. JOHNSON III, ARKANSAS IN MODERN AMERICA, 1930–1999, at 195–99 (2000); cf. Bethany Moreton, *It Came from Bentonville: The Agrarian Origins of Wal-Mart Culture*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 57, 72–74 (Nelson Lichtenstein ed., 2006) (examining Wal-Mart's roots in Arkansas and how the "world's largest corporation gr[e]w from the most violently antimonopoly section of America").

9. See GILBERT J. GALL, THE POLITICS OF RIGHT TO WORK, at xi (1988); MARTIN HALPERN, UNIONS, RADICALS, AND DEMOCRATIC PRESIDENTS 150 (2003); see also Gilbert J. Gall, *Southern Industrial Workers and Antiunion Sentiment: Arkansas and Florida in 1944*, in ORGANIZED LABOR IN THE TWENTIETH CENTURY SOUTH 223, 228–30 (Robert H. Zeiger ed., 1991).

ened existing unions because they made dues collection much more difficult. But, their greatest impact came in the realm of political symbolism and plebian ideology where, throughout the South and Mountain West, they were taken as a sign of governmental hostility to the existence of trade unionism.<sup>10</sup>

Wal-Mart, however, would not remain a regional employer for long, nor would its stores and distribution centers be confined to the small-town South where the absence of trade unionism seemed almost naturalistic. If the company were to take its Southern-born paternalism, low wages, and hostility to organized labor beyond Northwest Arkansas, the company would have to develop a more sophisticated, systematic, and ostensibly legal *modus operandi*. This would require a revolution in American labor law.

When the Wagner Act was drafted in 1935, its provisions provided employees in any given enterprise the right to select “representatives of their own choosing” who could speak for them in the collective negotiations with the management of the firm.<sup>11</sup> To make sure this happened, drafter Robert Wagner inserted a section that defined a set of “unfair labor practices” of which employers, but not unions, might be held accountable.<sup>12</sup> When conservative critics of his law complained that the Wagner Act was one-sided, the New York Senator replied that this was a “false equation.”<sup>13</sup> The kind of “unfair labor practices” in which workers might engage—physical or verbal intimidation of their workmates, punched noses, and nasty threats—all had been illegal for centuries, since the birth of the common law itself.<sup>14</sup> But when it came to economic coercion of the sort that shouted “You’re fired if you mess with the union,” that was almost exclusively an employer weapon, which Wagner and other labor partisans sought to proscribe.<sup>15</sup> The New Dealers that President Franklin Roosevelt first appointed to the NLRB interpreted the new Wagner Act to make the foreman and manager nonparticipants, when the workers they supervised

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10. See GALL, *supra* note 9, at 19; HALPERN, *supra* note 9, at 150.

11. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 158–169 (2000)).

12. National Labor Relations (Wagner) Act § 8, 49 Stat. at 452–53; Kenneth Casebeer, *Drafting Wagner’s Act: Leon Keyserling and the Pre-Committee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 123 (1989).

13. DAVID BRODY, LABOR EMBATTLED 151 (2005).

14. See *id.* at 152.

15. See *id.*

decided for or against forming a union.<sup>16</sup> Indeed, the NLRB ruled that given the imbalance of power in an unorganized factory, mine or mill, any kind of employer speech, presumably directed toward convincing their employees to reject a union, was inherently coercive and therefore an unfair labor practice.<sup>17</sup>

When the Republicans won the 1946 elections, it was just a matter of time before resentful employers got the Wagner Act fixed to their liking. Soon Congress passed the Taft-Hartley Act over President Harry S. Truman's veto in June 1947.<sup>18</sup> This Taft-Hartley revision of the Wagner Act particularly affected retail unions, which made a major push to organize chain supermarkets and department stores. At a 1951 conference of the Retail Clerks, union organizers attributed major losses in NLRB union elections to "captive-audience speeches"—antiunion presentations that employers ordered their employees to attend.<sup>19</sup> Initially, the NLRB insisted that unions get equal time on company property if management held such compulsory meetings, but once the Republicans gained control of the NLRB after President Dwight D. Eisenhower's election, employers got almost everything they wanted.<sup>20</sup> As one of the conservative businessmen appointed to that Board said in his confirmation hearing when referencing one of his successful campaigns against unionism, "we 'free-speeched' them. . . . Now, you could say, if you like, in that instance I was a union buster."<sup>21</sup>

Labor law still forbade employers from retaliating against workers who voted for a union by threatening them with firing or plant closure. But this doctrine became increasingly formalistic. Thus, in *Chicopee Manufacturing Corp.*, the NLRB enunciated a "prophecy doctrine" that permitted employers to state

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16. See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 527–29 (1993).

17. See, e.g., *Am. Tube Bending Co.*, 44 N.L.R.B. 121 (1942); see also James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 868–74 (2005).

18. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.); see also MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 205 (1994).

19. SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* 203 (1997).

20. See Becker, *supra* note 16, at 560–61.

21. KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (forthcoming 2008) (quoting an Eisenhower-era NLRB member).

that voting for a union might result in a plant being moved.<sup>22</sup> *Mt. Ida Footwear Co.*<sup>23</sup> further refined the employer advantage. In this case, executives of an Arkansas-based shoemaker asserted that if employees signed union cards, it would “be fatal to a business such as Mt. Ida Footwear.”<sup>24</sup> But the NLRB ruled that such threats could be rendered permissible if an executive “sanitized” this kind of coercive and threatening speech by merely inserting a catch-phrase like “We are here to stay,” which was the stratagem of Mt. Ida management.<sup>25</sup> Meanwhile, in two rulings from the early 1950s, the NLRB transformed employer free speech into a powerful managerial weapon. In *Livingston Shirt Corp.* the NLRB ruled that an employer “does not commit an unfair labor practice if he makes a preelection speech on company time and premises to his employees and then denies the union’s request for an opportunity to reply.”<sup>26</sup> Further, in *Esquire Inc.* employers won the right to threaten that a pro-union vote would generate lengthy legal proceedings instead of the collective bargaining mandated by the original Wagner Act.<sup>27</sup>

#### A. JOHN TATE AND MANAGEMENT “FREE SPEECH”

Enter John Tate, the man who would sharpen these legal tools, stock them in Wal-Mart’s arsenal, and deploy them in furious combat with the unions. A man of Sam Walton’s generation, he was born in North Carolina, earned his law degree from Wake Forest Law School, and became a bitter foe of trade unionism, all before he enlisted in the Army.<sup>28</sup> Tate acquired his bitter hostility to unionism in the labor wars of the late 1930s, when he crossed through a union picket line established around the Reynolds Tobacco Company in Winston-Salem.<sup>29</sup> Aside from the catcalls, Tate took a blow on the head that he would never forget.<sup>30</sup> “I hate unions with a passion,” he would later remark after he had established a pioneering law firm

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22. See *Chicopee Mfg. Corp.*, 107 N.L.R.B. 106, 107 (1953).

23. 217 N.L.R.B. 1011 (1975).

24. *Id.* at 1012.

25. *Id.* at 1013.

26. 107 N.L.R.B. 400, 416 (1954).

27. 107 N.L.R.B. 1238, 1242 (1954); see Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 455 (1995) (discussing these cases).

28. See ORTEGA, *supra* note 6, at 88.

29. See *id.*

30. See *id.*

dedicated to what, in the 1950s and 1960s, was a newly aggressive “union avoidance” stratagem.<sup>31</sup>

Tate perfected his antiunion skills in Nebraska where he battled the Teamsters and the Packinghouse Workers<sup>32</sup> and traveled in right-wing political circles that linked a militant anti-unionism to a libertarian rejection of the welfare state, fair employment legislation, and regulatory oversight on the part of the federal government.<sup>33</sup> Tate saw himself as a crusader for “freedom” who would rally the business class of Omaha and Lincoln in order to turn back this union invasion and put some ideological stiffness into the backbone of local employers.<sup>34</sup> Tate sought to convince his clients that it was not enough to keep a union out of their shops alone. Rather, a decline in union density and influence was essential to give businessmen a strong hand, even if they were so unfortunate as to be stuck with an existing collective bargaining contract.

But Tate was not just a propagandist. He was a pioneer in the nascent union-avoidance industry. He realized that the fight against unionism had to be fought simultaneously on multiple fronts: before the NLRB and the courts, in the political arena, and most importantly, within the firm itself. Tate developed a whole repertoire of programs, techniques, and interventions designed to generate employee loyalty to management and hostility to third-party representation. “The issues that are most frequently [the] cause of company-union disputes today are philosophical, not economic,” claimed Tate in 1960.<sup>35</sup> “The battle is for the minds of employees . . .”<sup>36</sup> Backstopped by a phalanx of expert antilabor law firms, this has become commonplace employer behavior in recent years, but in the 1950s and early 1960s it was so audacious, innovative, and in the hands of John Tate, so successful, that a St. Louis unionist la-

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31. Steve Jordon, *Antiunion Attorney Took ‘Golden Rule’ to Wal-Mart*, OMAHA WORLD-HERALD, May 5, 1991, at 8M; *see also* ORTEGA, *supra* note 6, at 87–88.

32. *See* ORTEGA, *supra* note 6, at 87–88.

33. Jordon, *supra* note 31.

34. *See id.*; John Tate, Executive Vice-President, Midwest Employers Council, Remarks at FCC Hearing (Jan. 31, 1963) (transcript available at the Rare Book and Manuscript Library, Butler Library, Columbia University).

35. *Communications*, BULL. FOR BETTER MEC LAB. REL. (Midwest Employers Council, Inc., Omaha, Neb.), Feb. 19, 1960, at 3 (on file with the Rare Book and Manuscript Library, Butler Library, Columbia University).

36. *Id.*

beled the Midwest Employers Council, along with the John Birch Society, a “fascist trend” in the United States.<sup>37</sup>

Tate codified for his clientele all the key antiunion tactics that Wal-Mart and so many other firms would later deploy. Among these were profit-sharing schemes designed to give employees a stake in the productivity of the enterprise,<sup>38</sup> NLRB election delays that demoralized union advocates,<sup>39</sup> a tough negotiating posture that leaves the workforce in limbo and without a contract,<sup>40</sup> and aggressive efforts to decertify unions already representing the workforce.<sup>41</sup> Employer “free speech,” was the key element that made this strategy work, enabling executives to conduct compulsory meetings of the workforce and hold one-on-one interviews with employees.<sup>42</sup> In addition, although the courts had ruled that an outright threat would be illegal, the free-speech doctrine allowed employers to imply that unionism would have disastrous consequences for the lives of all concerned.<sup>43</sup>

Tate’s combativeness, soon standard fare for all his clients, was manifest in a 1959 captive audience speech he prepared for a warehouse employer facing a Teamster organizing drive:

Remember this—*no union can guarantee you anything!* The law says that if you force us to deal with some outside third party—some union strangers, we have to bargain, but they law does not say we have to *agree to a single solitary thing!* If these union salesmen call you off of your jobs so you can’t pay your bills—the law says we can go right out and hire someone else to take your place. If we never reach an agreement with the union, we never have to hire you back!<sup>44</sup>

To all this divisiveness, Tate counterpoised a friendly and informal community, or as he wrote in a talk for employees of another business client who sought to decertify an existing union, “You can do as you wish. It is, thank God, a free country. I

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37. AFL-CIO, UNITED PRESS INST., Sept. 24, 1963 (on file with the Rare Book and Manuscript Library, Butler Library, Columbia University).

38. See ORTEGA, *supra* note 6, at 89.

39. See PAUL C. WEILER, GOVERNING THE WORKPLACE 39–40 (1990).

40. See Kate Bronfenbrenner, *Raw Power: Plant-Closing Threats and the Threat to Union Organizing*, MULTINATIONAL MONITOR, Dec. 2000, at 24, 28.

41. Telephone Interview with Duane Acklie, Former Partner, Nelson, Harding, Acklie, Manchese, Leonard, & Tate, in Lincoln, Neb. (May 29, 2007).

42. See, e.g., F.W. Woolworth Co., 251 N.L.R.B. 1111, 1113 (1980); see also Becker, *supra* note 16, at 560.

43. See *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945); *Fischer Governor Co.*, 71 N.L.R.B. 1291, 1295–96 (1946); *Oval Wood Dish Corp.*, 62 N.L.R.B. 1129, 1139 (1945); Telephone Interview with Duane Acklie, *supra* note 41.

44. John Tate, Address at Employee Meeting (June 1, 1959) (on file with the Rare Book and Manuscript Library, Butler Library, Columbia University).

do hope—and I don't mind telling you, that you vote *No Union*, and we can sit down together to work out any problems we have."<sup>45</sup>

Tate's reputation as an effective union fighter spread throughout the Midwest, especially after he founded Omaha's largest labor relations law firm in 1967.<sup>46</sup> Sam Walton called on him in 1972 when Wal-Mart faced union trouble at two stores in central Missouri.<sup>47</sup> In truth, the St. Louis-based Retail Clerks Local had not put together much of an organizing drive. It threw together informational picket lines at a couple of stores, but the union put few resources into organizing them.<sup>48</sup> Wal-Mart executives, however, had made an embarrassing and illegal hash of their efforts to squash the union.<sup>49</sup> As the NLRB would later note, Jack Shewmaker, one of Walton's rising stars, had been overheard telling store manager Robert Haines that "if he caught any employees with union cards, he should fire them even if he had to hire all new employees."<sup>50</sup> Then, when Connie Kreyling, a young but highly competent office manager, began to talk up the union idea among her workmates, she was summarily fired by Haines when she arrived for work on a Monday morning.<sup>51</sup> The Retail Clerks took her firing to the NLRB.<sup>52</sup> There Haines was shown to be a liar—he claimed that he had fired Kreyling for poor work habits rather than "protected" union activity.<sup>53</sup> The NLRB ordered Wal-Mart to rehire Kreyling and post "in conspicuous places" a "Notice to Employees" that asserted, "WE WILL NOT discourage membership in or activities on behalf of Retail Store Employees' Union, Local No. 655 . . . by discharging, or in any other manner discriminating in regard to hire or tenure of employment of any of our employees because of their union activities."<sup>54</sup>

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45. Bill Hoppe, Address at Employee Meeting (1961) (on file with the Rare Book and Manuscript Library, Butler Library, Columbia University).

46. Telephone Interview with Duane Acklie, *supra* note 41.

47. *See* ORTEGA, *supra* note 6, at 87–88.

48. *Id.* at 88–89.

49. *See id.*

50. Wal-Mart Stores, Inc., 201 N.L.R.B. 250, 251 (1973).

51. *See id.*

52. *See id.* at 250.

53. *See id.* at 252.

54. *Id.*

## B. PROFIT SHARING: THEORY AND PRACTICE

By this point Tate was in the store where his well-tested spiel, plus the judicious transfer of Haines to another store, ended once and for all the union buzz.<sup>55</sup> However, the incident worried Walton, who asked Tate what could be done,<sup>56</sup> especially now that his chain was rapidly establishing stores outside of Arkansas where rural poverty and Southern mores had made so many clerks grateful for a job with Mr. Sam.<sup>57</sup> Tate told Walton, "You can hire me or someone like me to hold these people down, and fight them the rest of your life. Or you can decide to get them on your side."<sup>58</sup> This was the script Tate had long perfected. He proposed that Wal-Mart expand its profit-sharing plan, codify an open-door policy, and give the employees access to much store-level information on sales, profits, and inventory "shrinkage."<sup>59</sup> This became the kernel of Wal-Mart's famous "We Care" program, an updated but inexpensive version of the corporate welfare schemes that had first flourished in the years immediately after the great strike wave of 1919.<sup>60</sup>

Sam Walton and his publicists would later attribute much of the impulse for this idea to Walton's spouse Helen, who told her husband that unless the clerks and cashiers "were on board, the top people might not last long either."<sup>61</sup> Profit sharing was a generous yet common-sense way to spread Sam's wealth among his hardworking and devoted employees.<sup>62</sup> But in the early 1970s almost all policy makers, corporate benefit managers, and trade unionists considered the very idea of such a scheme economically problematic and ideologically retrograde. Most companies, unionized or not, offered their employees defined-benefit pension plans, which paid out a fixed monthly stipend at retirement based on their salary and years of service.<sup>63</sup> Social Security was a fixed-benefit plan that the

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55. *Id.*

56. *Id.*

57. *Cf.* Moreton, *supra* note 8, at 80–82 (discussing the economic rationalization and employment appreciation in early Wal-Mart culture).

58. *See* ORTEGA, *supra* note 6, at 88.

59. *Id.* at 90.

60. *Id.*

61. SAM WALTON WITH JOHN HUEY, *SAM WALTON: MADE IN AMERICA* 129 (1992).

62. *See* ORTEGA, *supra* note 6, at 349.

63. *See* Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*,

Nixon administration had just strengthened by indexing it to inflation.<sup>64</sup> In 1974 came the Employee Retirement Income Security Act, designed to regulate private pension plans in order to make them a secure counterpart to Social Security.<sup>65</sup> The individually controlled private retirement account—now ubiquitous as the 401(k)—would not come into legal existence until 1978 or into popular use until the mid-1980s.<sup>66</sup>

Profit-sharing plans were not unknown in the early 1970s, but they had a distinctly right-wing odor, especially when substituted for a traditional pension. In an era when the idea of security—national, social, or union—still held much credence, profit-sharing schemes were a radical innovation, shifting risk to the employee and linking his or her fortunes directly and exclusively to that of the firm for which they labored.<sup>67</sup> In the 1960s, Tate put together a number of such schemes for undercapitalized Nebraska firms who were determined to prevent union activity inexpensively.<sup>68</sup> One of the most famous plans, with which John Tate must have been familiar, was that of Sears, Roebuck & Co.,<sup>69</sup> then the greatest retailer in the land.<sup>70</sup> With most of its assets invested in Sears stock, the plan paid out at least ten percent of all profits, with long-service employees, largely male, reaping the largest corporate contributions.<sup>71</sup> Everyone watched the stock price, which Sears posted daily at every store and warehouse.<sup>72</sup> The investment plan generated a sense of shared purpose and community, in the words of one executive, it was “the central unifying symbol around which the entire organization revolved.”<sup>73</sup> The plan and the

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91 MINN. L. REV. 938, 948 (2007) (discussing the predominance of defined-benefit savings plans in the 1970s).

64. See William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461, 476 (1996); Michael Alan Paskin, *Privatization of Old-Age Pensions in Latin America: Lessons for Social Security Reform in the United States*, 62 FORDHAM L. REV. 2199, 2202 n.30 (1994).

65. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.).

66. See JACOB S. HACKER, *THE GREAT RISK SHIFT* 118–19 (2006).

67. For a discussion of the rise of “security” as a social good, see JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE* 78–115 (2003).

68. Telephone Interview with Duane Acklie, *supra* note 41.

69. See JACOBY, *supra* note 19, at 39.

70. See ORTEGA, *supra* note 6, at 160.

71. See JACOBY, *supra* note 19, at 108.

72. See *id.* at 109.

73. *Id.* (quoting James C. Worthy, Assistant to Clarence B. Caldwell, Head of Sears’ Personnel Department from the 1930s to the 1950s).

ideology it embodied proved a bulwark against efforts by the Retail Clerks and the Teamsters to organize the big store in the 1950s and early 1960s.<sup>74</sup>

Wal-Mart's scheme was a discount version of the Sears plan. It was not actually a profit-sharing plan. Rather, Wal-Mart contributed approximately six percent of an employee's wage to its plan<sup>75</sup> dependent upon the degree to which Wal-Mart hit certain predetermined earnings and profit targets.<sup>76</sup> It required one year of service to kick in<sup>77</sup> and seven years to fully vest. By the turn of the millennium the corporate contribution had dropped to about four percent as Wal-Mart growth slowed, "[t]hus only one Wal-Mart associate out of 50 ever accumulated \$50,000 in stock."<sup>78</sup> Still, for those employees who remained with the company during the 1970s and 1980s, when the stock price leaped upward, the profit-sharing plan reaped huge dividends.<sup>79</sup> In 1990, *Wal-Mart World* bragged that ninety-three associates had retired in the past year with more than \$100,000 in each of their accounts.<sup>80</sup>

But as Tate understood, the most important impact of the profit-sharing scheme was ideological, linking the employees to the fate of the company,<sup>81</sup> but also justifying the self-exploitation that was integral to the Wal-Mart culture. "Store associates are willing to work long years for modest pay and slim wage hikes content on knowing they will hold small fortunes in Wal-Mart stock upon retirement."<sup>82</sup>

A company profit-sharing executive put it even more pointedly in 1990:

Your profit sharing account balance will depend upon how well you and every associate in our company does his or her job. There is no place for coasters or people just half-way doing their jobs—just as there is no place for shrinkage or other needless expenses. People who don't do their jobs take dollars out of your profit sharing . . . .<sup>83</sup>

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74. *Id.*

75. See WALTON WITH HUEY, *supra* note 61, at 132.

76. See *id.* at 132; ORTEGA, *supra* note 6, at 349.

77. WALTON WITH HUEY, *supra* note 61, at 132.

78. See ORTEGA, *supra* note 6, at 349.

79. See *id.* at 209–10, 349.

80. Debbie Davis Cambell, *Wal-Mart Associates Receive Largest Company Contribution Ever! \$90 Million Added to Our Profit Sharing Fund!!*, WAL-MART WORLD (Wal-Mart, Inc., Bentonville, Ark.), Apr. 1990, at 16, 17.

81. See ORTEGA, *supra* note 6, at 349.

82. *Still the Darling of Wall Street*, DISCOUNT STORE NEWS, June 15, 1992, at 137, 137.

83. Cambell, *supra* note, 80, at 18.

Although Walton boasted that more than four out of five Wal-Mart workers owned company stock,<sup>84</sup> massive turnover at the bottom of the organization made profit sharing a scheme that enriched only those with long tenure or high wages,<sup>85</sup> especially after 2000 when Wal-Mart's stock price went nowhere.<sup>86</sup> Thus, a store manager complained to Wal-Mart officer H. Lee Scott in 2005, "My associates—especially the long-term ones—would really like a full explanation as to why we as the largest company on the planet cannot offer some type of reduced benefits. All we really get aside from our hard-earned profit sharing and 401(k) is a discount card."<sup>87</sup> Scott's uncharacteristically hostile response, offered on an ostensibly confidential corporate e-mail hookup, found the very question something close to treasonous. Scott replied, "this is a store manager who has a problem. . . . I worry about him representing all of us in management to his associates."<sup>88</sup> Wal-Mart was not going to go the way of General Motors, argued Scott and become "a benefit company that sells cars to fund those benefits."<sup>89</sup> Sure, there is "a health care mess in this country," admitted Scott, but until the government gets involved, managers who wanted to "take billions of dollars out of earnings and put this in retiree health benefits . . . should look for [another] company where you can do those kinds of things."<sup>90</sup>

### C. STICKS AND CARROTS IN LOGISTICS

Profit sharing was never going to be enough to keep Wal-Mart union-free, especially among those young, blue-collar men whose labor was absolutely vital to the company's rapidly expanding logistics system. Indeed, the 1970s had been an Indian summer for unionism in the south-central states. The Teamsters, among the most powerful unions in this region, still had

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84. See WALTON WITH HUEY, *supra* note 61, at 132.

85. See ORTEGA, *supra* note 6, at 90.

86. Parija B. Kavilanz, *Wal-Mart Slows U.S. Expansion; Stock Jumps*, CNNMONEY.COM, June 1, 2007, <http://money.cnn.com/2007/06/01/news/companies/walmart/index.htm>. ("Wal-Mart's stock price has been stuck in a range between \$45 and \$60 over the past seven years.")

87. Posting of H. Lee Scott to Lee's Garage (Apr. 1, 2005), *available at* [http://walmartwatch.com/blog/archives/wal\\_mart\\_managers\\_leak\\_more\\_documents/](http://walmartwatch.com/blog/archives/wal_mart_managers_leak_more_documents/) (follow "2005" hyperlink).

88. *Id.*

89. *Id.*

90. *Id.*; see also Steven Greenhouse & Michael Barbaro, *On Private Web Site, Wal-Mart Chief Talks Tough*, N.Y. TIMES, Feb. 17, 2006, at C1.

more than two million members nationwide.<sup>91</sup> In Little Rock, St. Louis, and Kansas City, aggressive locals were organizing the warehousemen and truckers who worked for the wholesalers and supermarkets of the region. Despite much well-publicized corruption at the top of their organization,<sup>92</sup> these locals were vigilant enforcers of their contracts, which for over-the-road drivers were not much inferior to those negotiated by the militants of Chicago and Detroit.<sup>93</sup> And this was an era of unprecedented visibility, even prestige, for the long-distance trucker, whose CB radio slang and working-class persona became, for a brief moment, brightly textured threads in the culture of popular, populist Americana.<sup>94</sup>

But at Wal-Mart, these blue-collar drivers and warehousemen felt themselves slighted, their dignity and manhood called into question. In the 1970s, when Walton and his CEO Ron Meyer, were setting up the company logistics system, confusion, speed-up, and poor wages dogged the rapidly expanding system of distribution centers and the trucks that serviced them.<sup>95</sup> “We were always behind with our distribution,” remembered Thomas Jefferson, who was in charge of the first distribution centers,<sup>96</sup> “We never opened a warehouse soon enough, and we always had too many stores to service before the warehouse would get opened.”<sup>97</sup> As a consequence, sixty-hour weeks were routine, trailers and trucks were backed up, and the drivers were expected to lend a hand with the loading and unloading, even after a hard day on the road.<sup>98</sup> Warehouse wages were far lower than those blue-collar workers could command in nearby Missouri and Texas, while the wages of truck drivers were pegged to those who hauled product for Ty-

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91. International Brotherhood of Teamsters, *The Teamster Century: 1970s: Growth Slows*, <http://www.teamster.org/resources/members/1970s.htm> (last visited Apr. 14, 2008) (“In 1976, Teamsters membership topped the two million mark.”).

92. See ORTEGA, *supra* note 6, at 106.

93. See generally DAN LABOTZ, *RANK-AND-FILE REBELLION: TEAMSTERS FOR A DEMOCRATIC UNION* 19–150 (1990) (discussing the negotiations and contracts of the Teamsters).

94. SHANE HAMILTON, *TRUCKING COUNTRY: THE ROAD TO AMERICA’S WAL-MART ECONOMY* (forthcoming 2008); Telephone Interview with Ronald Heath, Former Teamsters Organizer, in Bentonville, Ark. (Aug. 22, 2006).

95. WALTON WITH HUEY, *supra* note 61, at 121–25.

96. See *id.* at 122.

97. *Id.*

98. See ORTEGA, *supra* note 6, at 100.

son Farms, the nonunion, hard-scrabble, chicken-processing operation also headquartered in Northwest Arkansas.<sup>99</sup>

The Teamsters therefore launched organizing efforts at company distribution centers in Bentonville and Searcy during the late 1970s and early 1980s.<sup>100</sup> Each of these distribution centers employed about eight hundred warehousemen in conditions that were more akin to a fast-paced factory than a pink-collar store. Accidents were frequent and overtime was enormous.<sup>101</sup> In 1980 and 1981 some Searcy distribution center employees “even slept in their cars in the parking lot between double shifts.”<sup>102</sup> At Searcy, where the Teamsters were most active, warehouseman Randy Powell told reporters, “all we’re asking right now is the right to negotiate hours, wages, and working conditions. They claim we have that now on an individual basis, but when you’re one of 38,000 [employees] they’re not going to hear you.”<sup>103</sup> The Teamsters seemed to have made a decisive inroad; nearly half the workers at Searcy had signed union cards.<sup>104</sup>

Wal-Mart executives took off the gloves. An NLRB election was scheduled for February 1982,<sup>105</sup> so the shadow cast by Ronald Reagan’s destruction of the Professional Air Traffic Controllers Organization the previous August remained long, deep, and dark.<sup>106</sup> When Walton and his brother Bud flew down to Searcy just before the election, the company founder assembled the workers to tell them “he’d strip them of their profit-sharing if they voted for the union.”<sup>107</sup> Walton told them he had five hundred job applications on file, some from the evangelical, anti-union students at nearby Harding College.<sup>108</sup> Warming to the subject, he offered a threat that was then and now an explicit violation of the labor law: “He told us that if the union got in,

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99. See Telephone Interview with Ronald Heath, *supra* note 94.

100. See ORTEGA, *supra* note 6, at 93.

101. See *id.* at 106.

102. *Id.* at 105.

103. *Id.* at 106.

104. *Id.*

105. See *id.* at 107.

106. See generally Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983) (recounting the history and legal ramifications of President Reagan’s handling of the PATCO strike).

107. See ORTEGA, *supra* note 6, at 107.

108. See VANCE H. TRIMBLE, SAM WALTON: THE INSIDE STORY OF AMERICA’S RICHEST MAN 230 (1990); Telephone Interview with Ronald Heath, *supra* note 94.

the warehouse would be closed. . . . He said people could vote any way they wanted, but he'd close her right up."<sup>109</sup>

Meanwhile, John Tate stirred this fearful pot with a propaganda barrage that has since become a classic in the anti-union arsenal. Workers want justice, but not divisiveness; they seek harmony and cooperation, as well as dignity at work; they organize for a voice on the job, not a strike that puts them outside on the picket lines.<sup>110</sup> Antiunion strategists like Tate had long been well aware of these social and psychological needs, so they turned them against the union impulse, promising violence, division, conflict, and an immediate strike if workers cast their lot with the union.<sup>111</sup> Workers arriving at the Searcy distribution center one morning found Tate's rendition of this antiunion stratagem in the form of a ninety-foot-long bulletin board, covered with four decades worth of newspaper clippings describing "every Teamster strike, violent incident and allegation of criminality that Tate's researchers had been able to piece together."<sup>112</sup> It was headlined, "Walk the 90-Foot Walk of Teamster Shame," according to former Teamster Organizer Ronald Heath, who ran the Teamster's local "organizing campaign" in Little Rock.<sup>113</sup>

Not unexpectedly, the Teamsters lost the election, after which Walton gloated in *Wal-Mart World*, "our good associates at our Searcy distribution center rejected the union by an overwhelming margin of over three to one. Bless them all. . . . We will never need a union in Wal-Mart if we work with and for one another and keep listening to each other."<sup>114</sup> It was a decisive, historic defeat. The Teamsters failed to contest the election and the hard-core unionists were soon eased out of the Searcy distribution center.<sup>115</sup> The Arkansas labor movement and the Teamsters never renewed the struggle. That, in turn, sent a signal to the AFL-CIO in Washington that, for the moment, Wal-Mart was too difficult to tackle and that company

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109. ORTEGA, *supra* note 6, at 107 (conveying one of the worker's recollections); see also TRIMBLE, *supra* note 108, at 230; Telephone Interview with Ronald Heath, *supra* note 94.

110. For an overview of Walton and Tate's view of unions, see generally WALTON WITH HUEY, *supra* note 61, at 129–31.

111. See ORTEGA, *supra* note 6, at 88.

112. *Id.* at 106.

113. Telephone Interview with Ronald Heath, *supra* note 94.

114. TRIMBLE, *supra* note 108, at 230 (quoting an *Arkansas Gazette* story reprinting Walton's *Wal-Mart World* statements).

115. See ORTEGA, *supra* note 6, at 108.

employees, in both the distribution centers and the stores, were too satisfied, complacent, or fearful to organize.

But this turmoil in the Arkansas distribution centers did have a lasting consequence for at least a slice of the Wal-Mart workforce. The truck drivers were an absolutely vital link in Wal-Mart's increasingly sophisticated supply chain.<sup>116</sup> Each day they followed a carefully plotted road script that got them from the distribution center to the store and back in the shortest time, burning the least amount of gas.<sup>117</sup> The timely completion of their task was vital since these drivers—who would eventually number more than ten thousand—needed to arrive at their designated Wal-Mart store at an appointed moment each evening so that the overnight stocking staff could unload the truck.<sup>118</sup> If they were not on schedule, money was lost and confusion reigned.<sup>119</sup>

Wal-Mart management was therefore determined to consolidate their allegiance and commitment. Even as the deregulation of the larger trucking industry turned many over-the-road trucks, especially those of the owner-operators, into “sweatshops on wheels,” Wal-Mart drivers were elevated to something close to a labor aristocracy.<sup>120</sup> By the early 1980s, Wal-Mart put their wages at a scale equal to that of union drivers. In Mississippi and some other southern states, this meant that they were earning triple the pay of a state highway patrolman, or five times that of an hourly sales clerk. Equally important to many truckers, the word went out that drivers were no longer required to help load and unload their shipment. Their uniforms were now always clean, their equipment the best in the business.<sup>121</sup> “We drop, hook, and drive. We don't load and unload,” bragged a self-satisfied driver when interviewed by *Discount Store News* late in the 1990s.<sup>122</sup>

The drivers, an almost entirely white, male fraternity, developed a strong esprit de corps, even a certain arrogance to-

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116. See HAMILTON, *supra* note 94.

117. See *Delivering Low Prices*, DISCOUNT STORE NEWS, Oct. 1999, at 115, 169 (recounting a day in the life of a Wal-Mart truck driver).

118. See ORTEGA, *supra* note 6, at 128–29.

119. *Delivering Low Prices*, *supra* note 117, at 169.

120. See generally MICHAEL H. BELZER, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION (2000) (describing the effects of massive deregulation in the trucking industry).

121. Interview with Morgan “Chip” Welch, Esq., Partner, Welch & Kitchens, L.L.C., in Little Rock, Ark. (June 5, 2006).

122. *Delivering Low Prices*, *supra* note 117, at 169.

ward rival truckers or other Wal-Mart employees, both managers and associates.<sup>123</sup> Turnover rates for these long-haulers, which sometimes reached one hundred percent in the non-union cartage industry, never left the single digits at Wal-Mart.<sup>124</sup> Accidents involving Wal-Mart trucks, frequently a costly and litigious affair, were rare, with Wal-Mart drivers prideful of their safety record.<sup>125</sup> And even more vital to the company, Wal-Mart achieved a 99.8% on-time delivery standard for its stores, a truly astounding figure.<sup>126</sup>

But not all who worked in logistics were admitted to this labor aristocracy. Wal-Mart's growing list of distribution centers required a lot of staffing, and unlike the truck drivers, who always enjoyed a degree of highway autonomy, the blue-collar men who ran the fork lifts and threw boxes into the truck trailers were not going to receive any special privileges.<sup>127</sup> As the depth and precision of logistic computerization leaped forward, their work was increasingly supervised, their every working hour monitored and regulated.<sup>128</sup> They were paid more than the cashiers and clerks, enough to avoid a debilitating labor shortage at the distribution centers, but no more than necessary.<sup>129</sup> When a Searcy warehouseman asked Walton why they were getting paid \$1.50 less an hour than those in a newly opened Texas facility, Sam replied forthrightly that he could hire them for less in Arkansas.<sup>130</sup> Wal-Mart has often sited its distribution centers in rural areas with a high degree of underemployment, even if this puts them at a considerable distance from the interstate.<sup>131</sup>

#### D. WAL-MART V. UNION AMERICA

In the stores, Wal-Mart's strategy followed a similar path. Until the mid-1980s, Wal-Mart avoided metropolitan America

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123. Interview with Morgan "Chip" Welch, Esq., *supra* note 121.

124. *Supply Chain Power Heart of EDLP Success*, MASS MARKET RETAILERS (Dec. 17, 2001).

125. *See Delivering Low Prices*, *supra* note 117, at 169.

126. *See Supply Chain Power Heart of EDLP Success*, *supra* note 124.

127. *See ORTEGA*, *supra* note 6, at 106.

128. For a more extensive discussion of trucking Taylorization, see generally BELZER, *supra* note 120.

129. *See TRIMBLE*, *supra* note 108, at 230.

130. ORTEGA, *supra* note 6, at 107.

131. *See* James R. Held, *Distribution Center: Site Selection*, ECON. DEV. J., Summer 2003, at 31, 33–34.

whenever possible,<sup>132</sup> where U.S. trade unions had their greatest strength.<sup>133</sup> In Missouri, for example, where trade unionists were strong enough to defeat a “Right-to-Work” referendum in 1978,<sup>134</sup> Wal-Mart built scores of stores, but all were in small towns or in the ex-urban ring that skirted union strongholds like St. Louis and Kansas City. And this was the Wal-Mart pattern throughout the Midwest, even as U.S. trade unionism encountered an increasingly hostile political and social environment, first sent reeling by the deindustrialization of the old union strongholds and then slapped hard by Ronald Reagan.<sup>135</sup>

Wal-Mart had a great deal of success in dealing with unions. By the 1990s the battle was about to be joined as the nation’s largest retailer put its grocery-selling “Supercenters” in traditional union strongholds like Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania, and California.<sup>136</sup> Supermarkets were a big, successful business in the postwar United States. By the end of the twentieth century they employed nearly 2.5 million workers.<sup>137</sup> With 1.3 million members, the United Food and Commercial Workers (UFCW) had organized about 800,000 of these workers in chains that represented just over half of all supermarket sales.<sup>138</sup> Union wages in this industry never approached those once paid in the muscular core of the old manufacturing economy, but they were enough to sustain a modest, recognizably middle-class standard of living.<sup>139</sup> Most surveys put labor costs in the unionized grocery stores at about thirty percent above those paid by Wal-Mart.<sup>140</sup> Wages were indeed

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132. See ORTEGA, *supra* note 6, at 149.

133. Cf. DANIEL NELSON, *SHIFTING FORTUNES: THE RISE AND DECLINE OF AMERICAN LABOR, FROM THE 1820S TO THE PRESENT* 149–52 (1997) (recounting the general decline in the fortunes of trade unions in the 1970s and 1980s).

134. GALL, *supra* note 9, at 202.

135. See Meltzer & Sunstein, *supra* note 106, at 731.

136. See ORTEGA, *supra* note 6, at 231.

137. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *MAY 2004 NATIONAL INDUSTRY-SPECIFIC OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES* (2004), [http://www.bls.gov/oes/2004/May/naics4\\_445100.htm](http://www.bls.gov/oes/2004/May/naics4_445100.htm) (last visited Apr. 14, 2008).

138. United Food and Commercial Workers International Union, *Who We Are*, [http://www.ufcw.org/about\\_ufcw/who\\_we\\_are/index.cfm](http://www.ufcw.org/about_ufcw/who_we_are/index.cfm) (last visited Apr. 14, 2007); see also ERIN JOHANSSON, *WAL-MART: ROLLING BACK WORKERS’ WAGES, RIGHTS, AND THE AMERICAN DREAM: AN AMERICAN RIGHTS AT WORK REPORT* 15 (2005), available at <http://www.wakeupwalmart.com/facts/amrightsatwork.pdf>.

139. See JOHANSSON, *supra* note 138, at 15.

140. See ARINDRAJIT DUBE & KEN JACOBS, *HIDDEN COST OF WAL-MART JOBS: USE OF SAFETY NET PROGRAMS BY WAL-MART WORKERS IN CALIFORNIA*

higher, but the qualitative difference between Wal-Mart and its unionized competitors came in terms of those elements of the paycheck that made a real career possible: full-time jobs, defined benefit pensions, adequate family health insurance, and a seniority system that facilitated a steady progression through a series of higher paying and more responsible jobs.<sup>141</sup>

The UFCW, which was itself the product of a series of mergers in the 1960s and 1970s among unions representing packinghouse and food processing workers, furriers, meat cutters, and retail clerks, had succeeded in quietly organizing much of the postwar era's booming supermarket industry.<sup>142</sup> Many supermarket chains, which had established a near monopoly within their own metropolitan region, were not adverse to unionization, especially if a modest wage standard applied both to themselves as well as their competitors.<sup>143</sup> Thus for more than half a century, locals of the UFCW, or one of its predecessor unions, bargained uneventfully with regional chains such as Giant in the Washington area, Pathmark in New York and New Jersey, Stop and Shop in New England, Ralph's in Southern California, Fred Meyer in Seattle, and the Star Markets of Boston. The union won excellent health insurance benefits and a good pension scheme.

But this regional success had a downside. The UFCW remained highly decentralized.<sup>144</sup> It did little to coordinate organizing among its jealously autonomous locals.<sup>145</sup> Indeed, since Wal-Mart was not on the radar of most of the big metropolitan locals, the UFCW barely noticed the rapidly growing discounter. In the early 1990s, however, when Wal-Mart began to build hundreds of grocery-selling Supercenters, often sited in the suburbs right down the street from a union supermarket, the UFCW became alarmed.

Wal-Mart's Supercenters were a sensation, something genuinely new in a supermarket business approaching middle age.

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4–5 (U.C. Berkeley Center for Labor Research and Education, Aug. 2, 2004), available at <http://laborcenter.berkeley.edu/retail/walmart.pdf>.

141. See JOHANSSON, *supra* note 138, at 15–16.

142. See ORTEGA, *supra* note 6, at 229.

143. See RICHARD TEDLOW, *NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA* 220–21 (1990).

144. See ROGER HOROWITZ, "NEGRO AND WHITE, UNITE AND FIGHT!": A SOCIAL HISTORY OF INDUSTRIAL UNIONISM IN MEATPACKING, 1930–1990, at 265 (1997); Tim W. Ferguson, *Food Union Tastes Gains Even as Trends Eat at Base*, WALL ST. J., Feb. 16, 1993, at A15.

145. See HOROWITZ, *supra* note 144, at 265–75.

By adding a full line of groceries to the discount store format, Wal-Mart not only burst onto the scene in a trillion-dollar industry, but it also ramped up its general merchandise sales by about thirty percent in each grocery-selling store. This was truly one-stop shopping.<sup>146</sup> Wal-Mart put Supercenters on the map at a furious clip: 113 in 1998, 157 in 1999, and 167 in 2000.<sup>147</sup> By the end of the next year, a thousand Supercenters has been built and Wal-Mart commanded the number one spot in the U.S. grocery market.<sup>148</sup> “Wal-Mart Is Eating Everybody’s Lunch,” pronounced *Business Week*.<sup>149</sup> And its cost advantage over traditional supermarkets was potentially even greater than that which it enjoyed against traditional retail chains like Woolworth and Penny’s. The supermarkets had once been the epitome of efficient mass retailing, whose executives boasted of the industry’s one or two percent profit margin.<sup>150</sup> But the big grocery chains had never really taken control of their supply chains; indeed, their suppliers often controlled a large slice of the display space within the supermarket itself.<sup>151</sup> A Byzantine system of “vendor allowances,” which were really kickbacks, determined everything: how an item was promoted, the shelf space it commanded, sales volume, and price.<sup>152</sup> Although profitable in the short run, these allowances added enormous complexity and rigidity to the procurement process. Wal-Mart would have nothing to do with them.<sup>153</sup>

Even more important, Wal-Mart held a decisive competitive advantage over the supermarkets when it came to labor costs, which were often nearly seventy percent of the operating budget.<sup>154</sup> When Wal-Mart was competing against nonunion Kmart and Target, its cost of labor was marginally lower, but in the grocery business, unionized stores paid wages and benefits that were at least thirty percent higher than those paid at

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146. See Jack Neff, *Bentonville or Bust: As Wal-Mart’s Presence in Food Grows, Will All Career Paths Lead to Arkansas?*, FOOD PROCESSING, Mar. 2003, at 30, 30–33.

147. *Id.* at 32.

148. See Robert Brenner, *Wal-Mart Is Eating Everybody’s Lunch*, BUS. WK., Apr. 15, 2002, at 43.

149. *Id.*

150. Julie Rawe, *Supermarket Smackdown*, TIME, May 3, 2004, Bonus Section, at A2, A2.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

Wal-Mart.<sup>155</sup> The UFCW was caught in the squeeze, both by Wal-Mart, which put unionized firms out of business, and by the old-line grocery chains themselves, who were determined to hold the line on their wage-and-benefit costs to meet the challenge from Wal-Mart.<sup>156</sup> In the Midwest, Kroger was hurting; in the South, Piggly Wiggly would soon be forced out of business; and, in California, Safeway began to slash office staff and prepare for battle with its unions. In Las Vegas, Wal-Mart opened sixteen stores in the 1990s, which led to the demise of Raley's, a unionized, California-based grocery chain that operated eighteen supermarkets in southern Nevada.<sup>157</sup> All were shuttered by the end of 2002, leading to the loss of 1400 jobs.<sup>158</sup> In all, Wal-Mart proved the catalyst for the closure of thirteen thousand traditional supermarkets and the bankruptcy of at least twenty-five regional grocery chains between 1992 and 2003.<sup>159</sup>

The UFCW effort to organize Wal-Mart was therefore essentially defensive. And like any entrenched formation, the big grocery union had certain tactical advantages. It was one of the few U.S. trade unions that could still organize. The work of its members could not be outsourced to Mexico or China, so the fear of job loss was not an immediate worry when organizers approached potential new recruits.<sup>160</sup> Safely ensconced within the booming service sector, UFCW membership actually grew by one hundred thousand during the 1980s and early 1990s.<sup>161</sup> At Wal-Mart, the union adopted an opportunistic organizing strategy, supporting workers wherever a few union sparkplugs could be found.<sup>162</sup>

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155. *Id.*

156. *Id.*

157. Abigail Goldman & Nancy Cleeland, *An Empire Built on Bargains Remakes the Working World*, L.A. TIMES, Nov. 23, 2003, at 1.

158. *Id.*

159. See Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUS. WK., Oct. 6, 2003, at 100, 108 ("The Wal-Mart supercenter . . . is a non-union dagger aimed at the heart of the traditional American supermarket 13,000 of which have closed since 1992."); Patricia Callahan & Ann Zimmerman, *Price War in Aisle 3—Wal-Mart Tops Grocery List with Supercenter Format*, WALL ST. J., May 27, 2003, at B1 ("In the past decade, 29 chains have sought bankruptcy-court protection, with Wal-Mart as a catalyst in 25 of those cases . . .").

160. See Ferguson, *supra* note 144.

161. *Id.*

162. Telephone Interview with Stan Fortune, Former Wal-Mart Store Manager, in Dallas, Tex. (Jan. 17, 2006).

On its face, this strategy could never win, certainly not in terms of traditional union-management conflict and compromise. UFCW organizing victories at a handful of scattered sites were unlikely to make much of an impression on corporate executives. But the union hoped that the publicity that the campaign generated would force Wal-Mart to raise wages, improve its health insurance, and encourage the growth of union-community collaborations against the giant retailer.<sup>163</sup> Even more important, the UFCW wanted to demonstrate that Wal-Mart's violation of the labor law was so widespread and so systematic that the NLRB should impose an "extraordinary nationwide remedy" against the company.<sup>164</sup> The NLRB's sanctions in unfair labor practice cases are generally local and narrowly drawn, but when an employer repeatedly uses the same stratagems across the country, the NLRB may impose broader, nationwide penalties.<sup>165</sup> Such sanctions could have had a real impact on the way Wal-Mart deployed its antiunion phalanx. Thus, the UFCW barraged the NLRB with allegations of unfair labor practices against the company.<sup>166</sup> By 2001 it seemed possible that the NLRB could have given Wal-Mart a serious company-wide penalty.<sup>167</sup> But Wal-Mart circumvented the entire process by appealing straight to the White House, where the Bush Republicans disliked a highly politicized labor movement almost as much as the big retailer.<sup>168</sup> Just days before Wal-Mart was set to defend itself before the NLRB, Leonard Page, the union-friendly general council for the NLRB, took a phone call from the White House.<sup>169</sup> He had "36 hours to clear out his office."<sup>170</sup> Page's more conservative "successor decided against bringing a national complaint against Wal-Mart."<sup>171</sup>

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163. See WakeUpWalMart.com, <http://wakeupwalmart.com/> (last visited Apr. 14, 2008) (detailing a grassroots campaign, supported by the UFCW, to raise public awareness of Wal-Mart's business practices).

164. See ANTHONY BIANCO, *THE BULLY OF BENTONVILLE: HOW THE HIGH COST OF WAL-MART'S EVERYDAY LOW PRICES IS HURTING AMERICA* 130 (2006).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*; see also Telephone Interview with Allen Y. Zack, Former Assistant Dir. of Strategic Programs, United Food and Commercial Workers Int'l Union, in Bethany Beach, Del. (Aug. 24, 2005) (noting the timing of Page's dismissal).

Indeed, the deck was stacked against the union. Although Wal-Mart could not move its stores overseas, it could transform the technology or organization of a job to eliminate the workers who were potential union recruits.<sup>172</sup> This was an old management stratagem that had eviscerated trade unionism in newspaper press rooms, tobacco processing factories, wireless telecommunications, and a large slice of the broadcast industry. Wal-Mart adopted the same kind of technological fix after nine meat cutters won a 2000 NLRB election in a Jacksonville, Texas Supercenter.<sup>173</sup> When Wal-Mart got word of the unexpected union inroad at Jacksonville, the company cauterized the wound in the most radical fashion. Henceforth, Wal-Mart announced that it would cease cutting meat in its stores altogether.<sup>174</sup> This was almost certainly a form of illegal retaliation against its newly union-certified butchers.<sup>175</sup> But for Wal-Mart, that was an insignificant detail that could and would languish in the courts. Of far greater import was the company's decision to become the first big grocery chain to adopt a new system of buying "case-ready" beef and pork prepackaged by the meat-packer.<sup>176</sup> For Wal-Mart, this technological fix tightened up the corporate supply chain even as it eliminated a point of union vulnerability.<sup>177</sup> *The Cattle Buyers Weekly* called Wal-Mart's move "the single biggest change in the history of meat retailing."<sup>178</sup>

But Jacksonville was the exception. When it came to trade unionism, Wal-Mart rarely had to make such a structural readjustment to fight the threat from organized labor. Its defenses were elaborate and multilayered, like the intersecting lines of cannon fire that protected a well-constructed fortress. By the time the UFCW began its effort to organize Wal-Mart in the late 1990s, union-avoidance strategies, at Wal-Mart and other corporations, had advanced since John Tate and Sam Walton browbeat the Searcy warehousemen two decades before. An en-

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172. See Callahan & Zimmerman, *supra* note 159.

173. See Ann Zimmerman, *Butchers Claim a Victory in War with Wal-Mart, but Battle in Texas Far from over*, ARK. GAZETTE, Apr. 16, 2000, at G1.

174. *Id.*

175. *Cf.* 29 U.S.C. § 158(a)(1) (2000) (prohibiting employers from "interfere[ing] with, restrain[ing], or coerce[ing] employees in the exercise of the rights" guaranteed by the Taft-Hartley Act).

176. See Zimmerman, *supra* note 173.

177. Interview with Chuck Webb, Former Wal-Mart Executive, in Bentonville, Ark. (May 31, 2007).

178. Zimmerman, *supra* note 173.

tire antiunion industry had grown up in the United States since the 1970s when the lawyers and consultants who orchestrated such work were thought to be just a step or two above ambulance chasers and bail-bond salesmen.<sup>179</sup> But President Reagan's celebration of the market and the entrepreneur during his White House years legitimized an ideological and operational hostility to organized labor at just the moment when sharper competition at home and abroad had convinced many businessmen that the unionized workplace was both too expensive and too inflexible.<sup>180</sup> So a flourishing set of consultants, law firms, personnel psychologists, and strike management firms peddled their services during an era when it was finally possible, in the north and west as well as the rural south, to promote what one consultant called the "morality of a union-free environment."<sup>181</sup>

Most companies outsource antiunion work. When corporate executives get wind of a union-organizing drive or some other indication of discontent, they pick up the phone, negotiate a price, sign the contract and let the consultants and lawyers play a large role in running the company until the threat passes.<sup>182</sup> At a cost that often reaches several million dollars for a few months' work, these union busters deploy a well-tested set of stratagems to ensure that their new client is kept union-free.<sup>183</sup> First, the lower-level supervisory staff is assembled and told that they have been drafted into the antiunion effort: any equivocation or desertion will result in instant dismissal, if only because these "managers" have no protection under existing interpretations of U.S. labor law. Then comes a barrage of leaflets, videos, personnel shifts, and meetings with individual employees, often climaxed with an on-site visit by top corporate executives. Captive-audience assemblies become more frequent and more intimidating as the presumptive date of the NLRB election draws near. Should the union manage to eke out an election victory, another round of delay and resistance begins, often continued by the same law firm that orchestrated the antiunion campaign in the first place.<sup>184</sup> This process is expensive

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179. See John Logan, *The Union Avoidance Industry in the United States*, 44 BRITISH J. INDUS. REL. 651, 651–52; Kris Maher, *Unions' New Foe: Consultants*, WALL ST. J., Aug. 15, 2005, at B1.

180. See Logan, *supra* note 179, at 654.

181. *Id.* at 653–54.

182. See Maher, *supra* note 179.

183. *Id.*

184. Logan, *supra* note 179, at 655–57.

but highly effective: union organizing efforts using traditional labor law procedures have almost ground to a halt in the United States. Only about one union campaign in twenty ends with a signed collective bargaining contract.

## II. HOW WAL-MART WINS

Wal-Mart does all this and more, in-house, with its own people taking on the key tasks, thus making all the techniques and stratagems developed by the union avoidance experts an integral, organic part of the Wal-Mart culture.<sup>185</sup> This begins with a forthright assertion that Wal-Mart is antiunion, codified for Wal-Mart managers in training manuals.<sup>186</sup> As Wal-Mart came under high levels of scrutiny in the 1990s, the company ritually announced, “We are not antiunion; we are pro-associate.”<sup>187</sup> But company manuals for store and distribution center managers were otherwise far more explicit, “Staying union free is a full-time commitment,” announced a 1991 version of a distribution center training manual.<sup>188</sup> “[F]rom the Chairperson of the ‘Board’ down to the front-line manager,” reads the manual, “[n]o one in management is immune from carrying his or her ‘own weight’ in the union prevention effort. The entire management staff should fully comprehend and appreciate exactly what is expected of their individual efforts to meet the union free objective.”<sup>189</sup>

Wal-Mart CEO Tom Coughlin, who in 2000 was number two in the corporate hierarchy, embodied an approach that was truly that of the iron fist inside the velvet glove. Coughlin, who had been tutored by the hard-line John Tate in Wal-Mart’s antiunion ethos, continued Wal-Mart’s efforts to defeat the UFCW whenever it reared its head inside Wal-Mart’s world.<sup>190</sup> To his staff and to middle-level management he was uncompromising:

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185. See Maher, *supra* note 179.

186. See, e.g., WAL-MART, INC., A MANAGER’S TOOLBOX TO REMAINING UNION FREE (1997), available at <http://www.reclaimdemocracy.org/walmart/antiunionman.pdf> (detailing Wal-Mart’s union-busting strategies).

187. *Id.*

188. See ORSON MASON, LABOR RELATIONS AND YOU AT THE WAL-MART DISTRIBUTION CENTER #6022, at 7 (1991), available at <http://reclaimdemocracy.org/walmart/distribctr6022manual.pdf>. The manual was designed to tutor and energize first-line managers in a region, central Indiana, where unionism had been historically robust. See *id. passim*.

189. *Id.* at 7.

190. BIANCO, *supra* note 164, at 83; Michael McIntyre, *The Real Deal*, CLEVELAND PLAIN DEALER, Apr. 28, 2002 (Magazine), at 10.

“These union issues are going to get worse,” he told a Bentonville staff meeting in March 2000, so managers should quickly identify the most “fertile ground for unions” amongst the Wal-Mart associates and immediately report back to Bentonville.<sup>191</sup> Then the regional vice presidents and district managers must ensure that all labor relations directives are “executed 100%! [There is n]o room or tolerance for slippage.”<sup>192</sup>

Coughlin and other Wal-Mart executives always referred to unions as “third-party representatives.”<sup>193</sup> This was a world view driven home during a new employee’s very first day on the payroll. A Wal-Mart training video, “You’ve Picked a Great Place to Work!” effectively makes the point.<sup>194</sup> Through a conversation among a human resources manager; two newly hired workers, including a former union member; and two current workers, of whom one also previously belonged to a union, the video pounds home Wal-Mart’s disdain for trade unionism and the terrible consequences that befall workers and businesses that succumb to union blandishments. In just twenty-seven well-acted minutes the video encapsulates a generation of right-wing imagery and propaganda designed to demonize and marginalize the trade union idea. Absent is any denunciation of unions as Communist or radical; rather they are portrayed as essentially corrupt and parasitical institutions, marginal businesses, not unlike pawn brokers or pay-day lenders, who are primarily concerned with the dues income generated by any set of naïve workers seduced by their promises.

Wal-Mart’s video portrays the unions as “political” but not ideological, spending dues money on “political campaigns” for candidates who workers “don’t even vote for,” and “to pay union bigwigs and their lawyers.” And the “politics” extends to the internal life of the workplace itself: work rules base promotions on “seniority or union politics,” rather than merit; union procedures prohibit members from communicating directly with management and require workers “to go to your union steward,” who will relay the message to management only “if he

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191. Meeting Notes from Eddie Lindsey, Operating Coordinator, Wal-Mart Stores, Inc., to Don Harris (Mar. 24, 2000) (on file with the Impact Fund, Berkeley, Cal.).

192. *Id.*

193. See, e.g., HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART’S VIOLATION OF U.S. WORKERS’ RIGHT TO FREEDOM OF ASSOCIATION 150 (2007), available at <http://www.hrw.org/reports/2007/us0507>.

194. Videotape: You’ve Picked a Great Place to Work! (Wal-Mart, Inc. 1999) (on file with author).

likes what you say.” And most importantly, the union is ineffective or worse. Strikes—frequent, violent, and divisive—are certain to be lost, likewise “every benefit . . . could go on the negotiating table” and “unions will negotiate just about anything to get the right to have dues deducted from your paychecks.”

Of course such propaganda is hardly enough, so Wal-Mart kept a close watch on what its workers think about their jobs, their bosses, the company, and themselves. The “employee attitude survey” had long been a staple of the nonunion workplace. Sears had perfected the system in the 1950s when it employed skilled social scientists to ferret out nodes of discontent, and discontented employees, before they could metastasize into a spreading union cancer.<sup>195</sup> Antiunion consulting firms made heavy use of such surveys from the 1980s onward.<sup>196</sup>

Wal-Mart adopted a down-home approach to such surveys, which may well have made them even more effective. In the early 1970s, Sam Walton’s company took the pulse of its workers by hosting an annual “grass roots” meeting for selected associates, during which top management heard complaints and exchanged ideas.<sup>197</sup> Meetings were eventually held in every store.<sup>198</sup> By 1994, Wal-Mart replaced these grass-roots meetings with a sixty-eight question survey of the same name.<sup>199</sup> This scientifically designed, web-based survey provided data on employee morale according to job, gender, ethnicity, age, length of service, and hours of work. The top-five problems uncovered were always inadequate pay, the cost of health insurance, management favoritism, poor training, and the company policy that forced employees to relocate if they wanted a promotion into management ranks.<sup>200</sup>

Bentonville’s computers also manipulated the data to generate something Wal-Mart called a “UPI,” which originally stood for Union Probability Index, later renamed Unaddressed People Issues.<sup>201</sup> About twenty percent of all Wal-Mart stores generate a UPI high enough to signal low morale, and therefore

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195. JACOBY, *supra* note 19, at 111–13; Logan, *supra* note 179, at 664.

196. JACOBY, *supra* note 19, at 111–23; Logan, *supra* note 179, at 664.

197. History of Grass Roots (Jan. 29, 2001) (on file with the Impact Fund, Berkeley, Cal.).

198. *Id.*

199. *Id.*

200. E-mail from Allen Y. Zack, Assistant Dir. of Strategic Programs, United Food and Commercial Workers Int’l Union, to Katherine Ali (Apr. 4, 2003, 15:01 EST) (on file with the Impact Fund, Berkeley, Cal.).

201. *Id.*

require the attention of company executives whose job it was to keep unionism at bay.<sup>202</sup> “Maintaining high morale in a facility is crucial to remaining union free,” is the way Wal-Mart’s Pipeline, its Intranet for store managers, put it in a confidential message to all store managers.<sup>203</sup> “If a union organizer approaches an associate in a facility with low morale, the associate may believe the organizer’s ‘sales pitch.’”<sup>204</sup> Store managers who presided over a facility with a high UPI were vulnerable to transfer or demotion.

Of course, actually raising morale was either far too expensive or far too disruptive for the Mart-Mart business model. The top two worker grievances were all about money, and the rest challenged corporate authoritarianism. The Manager’s Toolbox did identify “Wal-Mart’s Open Door policy [as] our greatest barrier to union influences trying to change our corporate culture and union-free status.”<sup>205</sup> But the open door was but another part of the paternalistic culture, “a morale tool to enhance the Wal-Mart family image” according to one disgruntled store manager who was advised to minimize the time she spent on the “typical Associate concern or complaint.”<sup>206</sup>

Wal-Mart’s own store managers and assistant managers were both the front line troops and potential traitors in the battle against the unions. Like foremen in the factories and supervisors in the office, they were men and women in the middle, required to “execute 100 percent” of the directives that came from above, but also tasked with the creation of a productive and harmonious workplace. Although they may have been intensely hostile to “outside” union organizers, managers and assistant managers were enmeshed within a world of friendships and relationships that made them unreliable union fighters.<sup>207</sup> Trained for their entire career to conceive of the store as a communal family, they may well have been reluctant to insti-

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202. Memorandum from Laura Pope to Tom Coughlin & Dan Harris, Wal-Mart Stores Grass Roots Results ITD (May 7, 2001) (on file with the Impact Fund, Berkeley, Cal.); Memorandum from Allen Y. Zack, Assistant Dir. of Strategic Programs, United Food and Commercial Workers Int’l Union, to Roger K. Doolittle, Esq. (Dec. 11, 2003) (on file with the Impact Fund, Berkeley, Cal.).

203. Memorandum from Allen Y. Zack, *supra* note 202.

204. *Id.*

205. WAL-MART, INC., *supra* note 186.

206. Posting of Drop to <http://www.walmartsucks.com/employe1.html> (Dec. 12, 1998) (on file with author).

207. Telephone Interview with Stan Fortune, *supra* note 162.

tute the divisive tactics necessary to split the workforce, create internal tensions, and thereby defeat the union campaign.<sup>208</sup> Thus, Brent Rummage, a former youth minister with the Church of God of Prophecy, who had been admitted to the Wal-Mart management training program, was supposed to report any union talk to his store manager.<sup>209</sup> But when his own mother, who worked in the same Hillview, Kentucky store to which he was assigned, ventured that unions might not be so bad, Rummage balked.<sup>210</sup> “I wasn’t going to report my mother,” Rummage told a reporter.<sup>211</sup> Likewise, Stan Fortune, a Wal-Mart manager in Weatherford, Texas, refused a command to fire an employee suspected to talking to a union.<sup>212</sup> According to Fortune, “I told him, ‘I’m not firing him. That’s illegal.’ . . . He got in my face and said, ‘You fire him or I’m going to fire you.’”<sup>213</sup> The UFCW later hired both Rummage and Fortune as part of its organizing drive at Wal-Mart.<sup>214</sup>

Almost as troublesome to the company were those managers who took their hostility to unionism all too personally. In the late 1990s and early years of the twenty-first century Wal-Mart faced hundreds of unfair labor practice charges from the UFCW and other unions.<sup>215</sup> They were expensive, time-consuming and sometimes embarrassing to litigate, so Wal-Mart tried to teach lower-level managers to walk a fine line between militant but legal antiunionism and those tactics that would generate an NLRB charge.<sup>216</sup> This was the TIPS program, spelled out in Wal-Mart’s “Manager’s Toolbox to Remaining Union Free.”<sup>217</sup> “Know your TIPS. As long as you do not threaten, interrogate, promise, or spy on your associates, Wal-Mart, through your efforts, will be able to share its views on unionization in an open, honest and legal manner.”<sup>218</sup> Natural-

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208. See Lichtenstein, *supra* note 1, at 1670–72.

209. Anthony Effinger, *Wal-Mart Spares No Effort to Defeat Unionization Bid*, L.A. BUS. J., Feb. 9, 2004, at 6.

210. *Id.*

211. *Id.*

212. Christopher Hayes, *Symbol of the System*, IN THESE TIMES, Nov. 21, 2005, at 22, 22.

213. *Id.*

214. See Effinger, *supra* note 209.

215. See Letter from Conrad B. MacKerran et al., to H. Lee Scott, Jr., CEO Wal-Mart Stores, Inc. (Mar. 20, 2006) (on file with author).

216. See WAL-MART, INC., *supra* note 186 (providing managers with a list of “Dos and Don’ts” in responding to union activity).

217. *Id.*

218. *Id.*

ly, it proved impossible to adhere to such admonitions in practice. How could managers warn workers of the union danger if they did not implicitly threaten them on the one hand and promise a better future, either individually or collectively, on the other? And how were managers to know when they should pick up the Wal-Mart “union hotline” to Bentonville, unless they interrogated or spied on those who worked for them?

Thus trade unions lodged 288 unfair labor practice charges against Wal-Mart between 1998 and 2003.<sup>219</sup> These included forty-one charges claiming improper firings, forty-four instances in which Wal-Mart threatened employees if they joined a union, fifty-nine charges involving improper surveillance, and another fifty-nine asserting that Wal-Mart illegally interrogated its associates to determine their views on sensitive labor-related issues.<sup>220</sup> In all, ninety-four of these complaints were weighty enough to generate a formal NLRB complaint against the corporation.<sup>221</sup>

When notice of union-organizing activity reached the company’s headquarters in Bentonville, Wal-Mart immediately put key members of its “labor team” on a corporate jet and dispatched them to the troubled store.<sup>222</sup> At the height of the UFCW organizing campaign there were about twenty mid-level Wal-Mart executives assigned to this corporate office. Although some had law degrees, their function was not to litigate before the NLRB or any other agency of the government. That was left to one of many well-established, employer-side law firms on retainer with the corporation. Instead, the labor team directed itself exclusively toward the “education” of store management and the associates who might have sparked the union drive or become subject to its siren song.<sup>223</sup> Until the union drive was defeated, the labor team’s skilled operatives sidelined local management and effectively took over the store, orchestrating the antiunion effort to stay on legally justifiable terrain.<sup>224</sup> As a manager in Colorado told Human Rights Watch, “We have a union activity hotline. If you hear associates, you don’t confront

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219. Letter from Conrad B. MacKerran et al., *supra* note 215.

220. *Id.*

221. *Id.*

222. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 193, at 93; Hayes, *supra* note 212.

223. *See* Wal-Mart Stores, Inc. and United Food and Commercial Workers Int’l Union, Local Union 99R, No. 28-CA-16832, 2003 WL 935323 (N.L.R.B. Feb. 28, 2003).

224. *See id.*

2008]            *HOW WAL-MART FIGHTS UNIONS*            1493

them. You or the store manager calls the hotline. Then higher-up management takes care of it.”<sup>225</sup> Liz Boyd, a department manager at the Aiken, South Carolina Wal-Mart, reported that during the union campaign there, “[I]t was our duty . . . to report any union activity and call the Union Hotline. Even now, if I hear of a union rumor, I’m supposed to notify management or call the hotline.”<sup>226</sup>

### III. BLITZKRIEG AT KINGMAN

The labor team was extremely active during the first years of the twenty-first century when the UFCW organizing campaign was at its height. Thanks to the work of Human Rights Watch, which has made a thorough and devastating study of Wal-Mart’s antiunionism, there is an exceptionally well-documented account of how this specialized unit operated to propagandize workers and thwart a union organizing effort at a typical Wal-Mart during those years. In many stores, the young men who work in the Tire and Lube Express (TLE) department have always been among those most receptive to the union idea.<sup>227</sup> They get their hands dirty, they have few prospects for promotion, and they are well aware that similar blue collar jobs in garages and car dealerships pay a lot more. Such was the case in the Kingman, Arizona store, where an otherwise humane manager, under corporate pressure to keep labor and maintenance costs down, refused to spend the \$200 needed to repair an air cooling system essential in the 110 degree summer heat.<sup>228</sup> Throw in an arrogant, young—and female—TLE department head and all the ingredients were present for a union gambit.<sup>229</sup> So TLE workers got in touch with the UFCW, which on August 28, 2000, filed a petition with the nearby Phoenix office of the NLRB to represent approximately eleven automotive service technicians.<sup>230</sup>

The reaction from Wal-Mart was immediate, and little short of overwhelming. Within forty-eight hours, a Bentonville-

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225. HUMAN RIGHTS WATCH, *supra* note 193, at 92.

226. *Id.*

227. *See, e.g., id.* at 146, 170, 191 (discussing union-organizing campaigns of TLE technicians at three Wal-Mart stores).

228. Telephone Interview with Tony Kuc, Former Assistant Wal-Mart Store Manager, in Kingman, Ariz. (Aug. 31, 2007).

229. *See id.*

230. Wal-Mart Stores, Inc. and United Food and Commercial Workers Int’l Union, Local Union 99R, No. 28-CA-16832, 2003 WL 935323 (N.L.R.B. Feb. 28, 2003); HUMAN RIGHTS WATCH, *supra* note 193, at 146.

based labor team was in Kingman, along with district and regional managers.<sup>231</sup> In all, more than twenty outside managers flooded the store, some to keep tabs on the mood of the associates via the Wal-Mart CBWA system, or “Coaching By Walking Around”; others to help out with the time-consuming annual inventory while the regular staff watched antiunion videos and attended near-daily captive meetings.<sup>232</sup> At the TLE, Wal-Mart replaced the manager with a high-level personnel executive, untutored in changing oil or tires, but well versed in the corporation’s union avoidance program.<sup>233</sup> Loss Prevention was also busy, training a new set of cameras on work areas in the tire and lube shop.<sup>234</sup> “I had so many bosses around me, I couldn’t believe it,” remembered Larry Adams, a union supporter who worked in the TLE at that time.<sup>235</sup> “They weren’t there to help me. They were there to bug me. It was very intimidating.”<sup>236</sup>

The key labor team figures were Vicky Dodson, a thirteen-year veteran in Wal-Mart’s People division, and Kirk Williams, a young law school graduate from Chicago that Wal-Mart had hired just a few months before. Dodson was a pro, a forceful and controlling “pistol” remembered one of the assistant managers who came under her authority;<sup>237</sup> she was “an intelligent, articulate, sophisticated individual” in the more judicious words of an NLRB administrative law judge.<sup>238</sup> Williams, who had worked his way through Kent State as a Wal-Mart assistant store manager<sup>239</sup> was a coldly ambitious functionary who would soon spend enormous amounts of time on the corporate jet putting out union fires throughout the company’s retail empire. Most people in the store, management and worker alike, called the Bentonville labor team the “union busters.”<sup>240</sup> The

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231. HUMAN RIGHTS WATCH, *supra* note 193, at 146.

232. *Id.* at 146, 148.

233. *Id.* at 154–56.

234. *Id.* at 156–58; Telephone Interview with Tony Kuc, *supra* note 228.

235. HUMAN RIGHTS WATCH, *supra* note 193, at 154.

236. *Id.*

237. Telephone Interview with Tony Kuc, *supra* note 228.

238. Wal-Mart Stores, Inc. and United Food and Commercial Workers Int’l Union, Local Union 99R, No. 28-CA-16832 (N.L.R.B. Mar. 30, 2007) (Supplemental Decision).

239. Transcript of Hearing at 459–61, Wal-Mart Stores, Inc. and United Food and Commercial Int’l Workers Union, Local Union 99R, No. 11-CA-19105-1 (N.L.R.B. Feb. 3, 2003).

240. HUMAN RIGHTS WATCH, *supra* note 193, at 146.

“Nazi SS” was another phrase used by some workers.<sup>241</sup> Not unexpectedly, Dodson and Williams were contemptuous of the existing store management, whose maladroit handling of layoffs and scheduling issues they blamed for precipitating the union uprising. “They took us out of the store for a couple of days,” remembered Assistant Manager Tony Kuc, “took us to a hotel, telling us how to handle the union, how to stop them from coming in . . . what to say, what not to say.”<sup>242</sup> Within a few weeks the store manager had been transferred and demoted, his two assistant managers marked for dismissal, and the TLE district manager fired outright.<sup>243</sup>

Within less than a week Dodson and her confederates met with ninety-five percent of all workers eligible to participate in the NLRB certification vote.<sup>244</sup> Meanwhile, the labor team held meetings with all the salaried managers, as well as the hourly department heads, who they said were part of the store “management” and therefore ineligible to take part in an NLRB certification election.<sup>245</sup> “We were basically spies, spies for the store, spies for the company,” remembered a disenchanted associate.<sup>246</sup> “We had to run our departments, do everything normally, and then be spies for them. The stress level was so high.”<sup>247</sup> Unionists complained, at Kingman and elsewhere, that “Wal-Mart has tricked hourly department managers into thinking they were part of the management team and, therefore, obligated to report any signs of union activity,” even though the NLRB ruled repeatedly against the company on the status of these hourly employees.<sup>248</sup> Observed Michael Leonard, a UFCW official, “Wal-Mart’s M.O. is to test the limits of the

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241. See Wal-Mart Stores, Inc. and United Food and Commercial Workers Int’l Union, Local Union 99R, No. 28-CA-16832, 2003 WL 935323 (N.L.R.B. Feb. 28, 2003); Telephone Interview with Tony Kuc, *supra* note 228.

242. HUMAN RIGHTS WATCH, *supra* note 193, at 151.

243. Telephone Interview with Tony Kuc, *supra* note 228.

244. Voicemail from Kirk Williams, Labor Relations Manager, to Wal-Mart Stores, Inc. (Sept. 6, 2000, 11:18:16 MST) (transcript on file with author).

245. Voicemail from Vicky Dodson, Senior Labor Relations Manager, to Wal-Mart Stores, Inc. (Sept. 28, 2000, 8:30:29 MST) (transcript on file with author).

246. HUMAN RIGHTS WATCH, *supra* note 193, at 153.

247. *Id.*

248. Press Release, United Food and Commercial Workers Int’l Union, UFCW Labor Board Tells Wal-Mart: Stop Tricking Employees, Respect the Rights of Hourly Managers to Organize (Nov. 1, 2000), available at [http://www.ufcw.org/press\\_room/archived\\_press\\_releases/2000](http://www.ufcw.org/press_room/archived_press_releases/2000) (follow “Labor Board Tells Wal-Mart to Respect Rights” hyperlink).

law, and to only change its prepackaged antiunion program when it is forced to . . . ”<sup>249</sup>

The labor team screened one of five different antiunion videos every day. “Wal-Mart Under Attack” was a lurid depiction of union thuggishness and disruption directed toward a company that was portrayed as merely trying to provide inexpensive goods for ordinary working people. “Sign Now, Pay Later” urged Wal-Mart workers to resist the siren song of the union organizers, who would do and say anything to win another signature on a union card, all the while ensnaring the hapless retail worker in a world of burdensome dues and serf-like subservience to an alien, boss-ridden organization. These videos, always followed by a question and answer session with a member of the labor team, were highly effective. A worker later interviewed by Human Rights Watch remembered, “I actually had fears after seeing videos of Molotov cocktails and rocks, pelting rock, hurling bottles.”<sup>250</sup> Another said, “After those meetings, minds started changing” as former union supporters turned against the UFCW.<sup>251</sup>

On one alarmist charge Wal-Mart was at least partially correct. If the union got in, the “store would run with a steward . . . . The union will run the store. They will dictate the store. The store manager [will] respond to the steward, not the district manager . . . .”<sup>252</sup> Indeed, unionization of even part of a Wal-Mart store would curb managerial authority, it might reduce their bonus, and it would introduce the seniority principle into the making of assignments and schedules.<sup>253</sup> For example, Jon Lehman was a successful Wal-Mart store manager in the 1990s who never made less than \$140,000 a year during that decade.<sup>254</sup> When he briefly left Wal-Mart late in the decade to manage a unionized Meijer store in Louisville, he found that while his pay was not as high as at Wal-Mart, the headaches were a lot less.<sup>255</sup> “Meijer’s contract with the UFCW circumscribed the store manager’s power to assign work, hours and to offer raises, instead providing a well-defined matrix of job descriptions, grade levels, and pay categories that existed only in

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249. *Id.*

250. HUMAN RIGHTS WATCH, *supra* note 193, at 152.

251. *Id.* at 147.

252. *Id.* at 151.

253. *Id.*

254. BIANCO, *supra* note 164, at 119.

255. *Id.* at 120.

rudimentary and contingent form at Wal-Mart.”<sup>256</sup> Likewise, unionized stores had a far higher proportion of full-time workers on schedules pegged to their seniority, a system that Wal-Mart executives declared would “fundamentally change the store’s business model.”<sup>257</sup>

Dodson, Williams, and other top managers from the Southwest stayed in Kingman for two solid months. This was the period during which the local NLRB held hearings to determine the size and composition of the TLE unit and in which both the UFCW and the Wal-Mart labor team marshaled their forces for the certification election itself. In minutely detailed reports back to Bentonville, labor team members described every instance of possible union talk, every wavering worker, and every meeting. Dodson and Williams kept track of the workers who wore union pins and the ones who took them off, what comments were made at the captive meetings, and the degree of union sentiment in various departments of the store.<sup>258</sup> The labor team authorized raises for a number of workers.<sup>259</sup> On October 9, Tom Coughlin jetted into Kingman to tell a group of TLE workers that the Wal-Mart “Open Door,” not the UFCW, was the solution to their problems.<sup>260</sup> This was a clear violation of the spirit, if not the letter, of the existing labor law, which forbade management efforts to bribe, promise, or cajole employees in the midst of an organizing effort.<sup>261</sup> “If you have any questions or problems,” Coughlin told his grease-stained listeners, “don’t hesitate to call me, and I will get you

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256. *Id.*

257. *Id.* at 235.

258. See Voicemails from Vicky Dodson, Senior Labor Relations Manager, to Wal-Mart Stores, Inc. (Sept. 1, 2000, 13:13:11 MST; Sept. 5, 2000; 12:51:05 MST; Sept. 13, 2000, 10:36:16 MST; Sept. 28, 2000, 8:30:29 MST; Oct. 2, 2000, 10:58:47 MST; Oct. 3, 2000, 9:21:11 MST) (transcript on file with author); Voicemails from Kirk Williams, Labor Relations Manager, to Wal-Mart Stores, Inc. (Sept. 6, 2000, 11:18:16 MST; Sept. 25, 15:25:52 MST) (transcript on file with author).

259. See Voicemail from Kirk Williams, Labor Relations Manager, to Wal-Mart Stores, Inc. (Sept. 25, 15:25:52 MST) (transcript on file with author). In all the labor team made eighty-four reports to Bentonville, all within less than two months.

260. Wal-Mart Stores, Inc. and United Food and Commercial Workers Int’l Union, Local Union 99R, No. 28-CA-16832, 2003 WL 935323 (N.L.R.B. Feb. 28, 2003).

261. See 29 U.S.C. § 158(a) (2000) (“It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization . . .”).

some results. . . . I can override anybody.”<sup>262</sup> Then with a flourish Coughlin put his telephone number on the white board and told store managers to leave it there.<sup>263</sup>

Given all this, it is hardly surprising that the UFCW organizing drive collapsed in inglorious defeat. Although the NLRB ruled that the TLE was an appropriate bargaining unit,<sup>264</sup> the union lost key supporters there within weeks of the labor team’s arrival in town.<sup>265</sup> Union partisans had virtually no opportunity to counter the propaganda barrage unleashed by the Bentonville labor team.<sup>266</sup> If they sought the telephone numbers of undecided associates, this violated Wal-Mart’s “no solicitation” rule. If they distributed leaflets in the parking lot or break room in the store, managers immediately called Loss Prevention and then patrolled the facility to pick up any stray literature. And when UFCW organizers made evening house calls, Wal-Mart denounced this tactic as harassment and intimidation. On October 24, UFCW lawyers filed a broad set of unfair labor practice complaints against Wal-Mart, thus postponing indefinitely the NLRB election scheduled for just a few days later.<sup>267</sup> Working life for the remaining prounion people in the Kingman store became increasingly intolerable.<sup>268</sup> Within little more than a year virtually all would be fired, forced to quit, or simply leave in disgust.<sup>269</sup>

As with Kingman, the UFCW organizing effort hit a brick wall wherever it mustered enough support to organize a few house meetings or file for an NLRB election. The NLRB eventually ruled, at Kingman and elsewhere, that Wal-Mart had systematically harassed and spied on numerous workers, that it had threatened employees with a loss of benefits and raises if they supported the union, and that the company had fired outright key labor partisans.<sup>270</sup> But none of this had any real impact on Wal-Mart’s antiunion operation, if only because the penalties were so trivial: a few thousand dollars in back pay for a

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262. *Wal-Mart Stores, Inc.*, 2003 WL 935323.

263. *Id.*

264. HUMAN RIGHTS WATCH, *supra* note 193, at 167.

265. *Wal-Mart Stores, Inc.*, 2003 WL 935323.

266. HUMAN RIGHTS WATCH, *supra* note 193, at 167.

267. *Id.*

268. *See, e.g., id.* at 160–67.

269. *See Wal-Mart Stores, Inc.*, 2003 WL 935323 (describing evidence that union supporters were held to a higher standard until they “weed[ed] themselves out”).

270. HUMAN RIGHTS WATCH, *supra* note 193, at 167.

few unjustly fired employees, plus a formal notice briefly posted in the break room pledging to obey the labor law.<sup>271</sup> In its authoritative report on Wal-Mart, *Discounting Rights: Wal-Mart's Violation of U.S. Workers' Rights to Freedom of Association*, Human Rights Watch concluded that the company "has translated its hostility towards union formation into an unabashed, sophisticated, and aggressive strategy to derail worker organizing at its U.S. stores that violates workers' internationally recognized right to freedom of association."<sup>272</sup>

### CONCLUSION

Wal-Mart's capacity to prevent unionization of its stores has three consequences. As the largest private employer in the United States and the dominant corporation in the rapidly expanding retail sector, Wal-Mart has strengthened and invigorated the militant antiunionism that has long characterized American retailing. With the partial exception of the old-line grocery stores, a union-free work regime is the norm within a sector of the economy that now employs more workers than manufacturing.<sup>273</sup> From Starbucks to Kmart, from Home Depot to Target, retail management has put in place personnel policies and procedures that mirror those pioneered or perfected at Wal-Mart.<sup>274</sup> As the Limited Brands' employee handbook puts it, "The very best employer-Associate relationships are one-on-one. . . . We have proven consistently that there is no need for a labor union to represent our Associates in any matter. Our dedication to and practice of fair and equal treatment of all Associates makes the need for a labor union unnecessary."<sup>275</sup>

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271. *Id.* at 167–68.

272. *Id.* at 203.

273. See Wayne F. Cascio, *Decency Means More than "Always Low Prices": A Comparison of Costco to Wal-Mart's Sam's Club*, ACAD. MGMT. PERSP., Aug. 2006, at 26, 26–36; Moira Herbst, *The Costco Challenge: An Alternative to Wal-Martization?*, LAB. RES. ASS'N ONLINE, July 5, 2007, <http://www.laborresearch.org/print.php?id=391>.

274. See Steven Greenhouse, *Board Accuses Starbucks of Trying to Block Union*, N.Y. TIMES, Apr. 3, 2007, at B2; Greta Guest, *Home Depot Crew to Vote on Union; Harper Woods Site Would Be the First*, DETROIT FREE PRESS, July 29, 2004, at 1E; Eric Ruth, *Kmart Streamlines at Workers' Expense*, DEL. NEWS J., Feb. 9, 2006, at B7; David Segal, *Coffee Break: 'Top Employer' Starbucks Has a Crack in Its Image*, WASH. POST, Apr. 12, 2007, at C1; Chris Serres, *Teflon Target: While Wal-Mart Is Seen as the "Evil Empire," Target Has a Sterling Image. But Labor Groups Say the Two Giants Treat Their Workers Much the Same*, STAR TRIB. (Minneapolis), May 22, 2005, at 1D.

275. LIMITED BRANDS, THE GUIDE 20 (2007) (on file with author).

Wal-Mart's gravitational impact on the retail world had its most dramatic manifestation in Southern California when the expectation that the corporation would build scores of Supercenters, staffed by low-wage workers, helped ignite a four-month UFCW strike and employer lockout by fifty-nine thousand unionists in the old-line supermarkets, who sought to preserve their wage and benefit standards.<sup>276</sup> The work stoppage of 2003–2004 ended in a clear, if temporary, defeat in which Safeway, Albertsons, and other chains forced the union to accept a new contract that slashed starting wages, capped health insurance payouts, and reduced overall labor costs.<sup>277</sup> Turnover soared, health care coverage declined, and employee morale plummeted, as the Wal-Martization of the supermarket workforce seemed well advanced even within a retail sector where unions still enjoyed much formal recognition.<sup>278</sup>

But such union setbacks were not the end of the story. Wal-Mart's aggressive antiunionism has advanced a general repoliticization of what Progressives and New Dealers used to call "the labor question."<sup>279</sup> Because the union effort to build a collective bargaining system at Wal-Mart has proven such a complete defeat, the labor movement and its liberal allies have shifted tactics and venues. In an echo of the century old debates over the twelve-hour day at U.S. Steel, unsanitary conditions in the Chicago packinghouses, and child labor in the textile industry, Wal-Mart's wage and health benefit policies have become the subject of intense debate in hundreds of cities and in dozens of states.

In scores of community "site fights," most notably in New England, California, New York and Chicago, labor and its allies have used zoning regulations, environmental studies, and traffic controls to prevent or delay the construction of one of Wal-Mart's huge, 180,000 square foot Supercenters. In California, such tactics have stymied Wal-Mart's growth, which relieved

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276. See Joel Jordan, 'With Such Victories, Who Needs Defeats?,' 13 NEW LAB. F., Fall 2004, at 47, 47–49.

277. *Id.*

278. Summary Findings, Ken Jacobs et al., U.C. Berkeley Ctr. For Labor Research & Educ., Declining Health Coverage in the Southern California Grocery Industry (Jan. 2007), available at <http://laborcenter.berkeley.edu/healthcare/grocery-industry07.pdf>.

279. See, e.g., NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 12–16 (2002); Steve Fraser, *The 'Labor Question,' in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980*, at 55, 55–84 (Steve Fraser & Gary Gerstle eds., 1989).

2008]            *HOW WAL-MART FIGHTS UNIONS*            1501

competitive pressure on the old-line supermarkets, thus enabling the UFCW to avoid another strike in 2007 and actually negotiate a new contract that won back for its members some of the wage-and-benefit concessions the union had made four years before.<sup>280</sup> Even more ambitiously, states and cities with a bright blue political coloration have sought to directly legislate a minimum level of wages and health benefits for big-box employers, if only because of the policy stalemate at the federal level. Their efforts have generated but a mixed and partial outcome, ensuring that Wal-Mart's labor relations regime will remain a subject of political contestation, at both the national and metropolitan levels, for years to come.<sup>281</sup>

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280. See Scott Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927 *passim* (2007) (focusing on the Los Angeles area).

281. See Kim Chipman & Lauren Coleman-Lochner, *Wal-Mart Girds for Showdown with New Congress on Unions, Trade*, BLOOMBERG.COM, Dec. 4, 2006, <http://truthout.org/cgi-bin/artman/exec/view.cgi/67/24261>.