

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

RALPHS GROCERY COMPANY

and

Cases 31-CA-027160
31-CA-027475
31-CA-027685

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 135,

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 324,

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 770,

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 1036,

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 1167,

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 1428,

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 1442

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for the General Counsel.

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SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

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WILLIAM G. KOCOL, Administrative Law Judge. This case concerns events that began after a contract between Ralphs Grocery Company (Ralphs) and local unions of the United Food and Commercial Workers Union (the Unions). The Unions' contract expired on October 5, 2003. During negotiations for a new contract, Ralphs locked out its 19,000 bargaining unit employees for over 4 months during which time Ralphs continued operating by using temporary replacements for the unit employees. However, Ralphs also rehired several hundred unit employees under false names and false social security numbers. Sometime before September 2004 the U.S. Attorney began an investigation into Ralphs' rehiring of the unit employees with false identities. Thereafter, Ralphs directed a law firm to conduct an internal audit/investigation of its hiring practices during the lockout. On December 15, 2005, a Federal grand jury indicted Ralphs for various counts relating to its rehiring of employees during the lockout under false names, false W-4s, false I-9 forms, and false social security numbers (the Corporate case.) On June 30, 2006, Ralphs entered into a Plea Agreement with the U.S. Attorney. As part of the Plea Agreement, Ralphs entered into a document entitled "Limited Waiver of Attorney-Client Privilege and Protection of Attorney Work Product Doctrine" with the U.S. Attorney's office. On July 26, 2006, Ralphs pled guilty to certain felony counts, including concealing material facts in matters within Federal agency jurisdiction, including the National Labor Relations Board (the NLRB).

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Among other things, the Unions requested that Ralphs provide the audit/investigation information; Ralphs refused to do so, claiming that it was covered by the attorney-client privilege and attorney work-product doctrine. This case was originally heard by Judge Lana Parke on February 27, 2007. The General Counsel and the Unions contended in that hearing that the audit/investigation information was not covered by either privilege and that in any event Ralphs waived its rights by disclosing the audit/investigation information to the U.S. Attorney as part of the Plea Agreement pursuant to the terms of the Limited Waiver. Judge Parke issued her decision on June 14, 2007, finding that Ralphs violated Section 8(a)(5) by refusing to provide several items of information to the Unions, including the audit/investigation material. Judge Parke indicated that the issues of privilege could be litigated in a compliance proceeding.

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A two-member Board issued its decision on February 19, 2008. *Ralphs Grocery Co.*, 352 NLRB 128 (2008). The Board reversed Judge Parke's conclusions concerning the audit/investigation information. It stated that there was "no reason why these issues are better suited to resolution at the compliance stage." The Board concluded that the audit/investigation information was covered by the attorney work-product doctrine; it found it unnecessary to decide whether that information was also covered by the attorney-client privilege. The Board next rejected the argument made by the General Counsel and Unions that Ralphs waived the privilege under the terms of the Limited Waiver. This was so, according to the Board, because "the Limited Waiver document, by its terms, applies only to 'material requested or inquired into by the [U.S. Attorney],' and there is no evidence that the audit information was requested or inquired into by the U.S. Attorney." After balancing Ralphs' confidentiality interests against the

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Unions' need for the audit/investigation information, the Board found that Ralphs did not violate the Act by withholding that information.

The Board's decision was enforced. *NLRB v. Ralphs Grocery Co.*, No. 08-71507 (9th Cir. 2009). On August 23, 2010, the Ninth Circuit vacated its prior order as well as the Board's decision in light of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010); the case was remanded to the Board. On September 28, 2010, while the case was still before the Board on exceptions, the Unions filed with the Board a "Motion to Reopen and Supplement the Record" (motion to reopen). On September 30, 2010, a panel of the full Board adopted the decision of the earlier two-member Board. *Ralphs Grocery Co.*, 355 NLRB 1279 (2010). In that decision, the Board did not address the Unions' motion to reopen. On October 8, 2010, the Unions filed "Motions for Reconsideration and to Reopen the Record" (motion for reconsideration). In that motion, the Unions argued that the Board erred in issuing its decision without first ruling on its motion to reopen. On November 30, 2011, the Board issued a notice to show cause why the motion for reconsideration should not be granted.¹ On April 3, 2012, the Board issued an Order granting the motion for reconsideration and indicated that "[T]his matter is remanded to the Regional Director for Region 31 for appropriate action." On April 17, 2012, the Board issued an amended Order that again granted the motion for reconsideration, ordered the matter be assigned to an administrative law judge, and that

[T]he administrative law judge designated shall reopen the hearing on the matters raised in the motions, and prepare a supplemental decision setting forth findings of fact, conclusions of law, and a recommended Order.

On August 3, 2012, the Chief Administrative Law Judge issued an order assigning this case to me, and on August 17, 2012, the reopened hearing was held in Los Angeles, California.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Ralphs, and the Unions, I make the following

FINDINGS OF FACT

I. BACKGROUND

On September 18, 2008, a Federal grand jury indicted Patrick McGowan, Charles Vance, Scott Drew, Randall Kruska, and Karen Montoya, all officers or managers of Ralphs, on 23 criminal counts arising from Ralphs' rehiring of the locked out employees (the McGowan case).

In their brief, the Unions argue that documents in the Corporate case and McGowan case:

¹ In the meantime, on March 3, 2011, the Regional Director determined that Ralphs had fully complied with the Board's Order and closed the case. The Unions appealed that determination but on June 22, 2011, the General Counsel denied that appeal. On July 25, 2011, the Unions requested that Board review and reverse the General Counsel's denial of its appeal; that matter is apparently still before the Board. At the hearing and in their brief, the Unions raised issues concerning whether there has been compliance with the Board's Order in this case and request that I "vacate the existing compliance order." I conclude that those issues are not before me and I do not resolve them.

[E]stablish that Ralphs waived its attorney-client privilege over documents relating to its internal investigation through two occurrences: (1) the USAO requesting, inquiring into, receiving, and reviewing the documents from Ralphs pertaining to its internal investigation of the lockout hirings, and (2) the USAO giving the documents to the *McGowan* defendants pursuant to their discovery requests.

At the reopened hearing, the General Counsel relied solely on the documents attached to the Unions' motion to reopen to establish the waiver; no additional evidence was adduced at the hearing. I received those documents into evidence with the reservation that I would later determine what portions are not hearsay, what portions are hearsay but nonetheless were reliable evidence, and what portions are simply inadmissible.

In the sections of this decision that follow, I first give a general description of the documents, then I address procedural objections raised by Ralphs, then I describe the document in more detail and make specific findings from them, and finally, I address the issue of the admissibility of the Plea Agreement (and whether the Board erred in finding no waiver based upon the pleadings in the Corporate case).

II. The Documents

What follows is a brief description of the six documents attached to the Unions' motion to reopen and admitted into evidence in this case. All of the documents are pleadings in the *McGowan* case and all relate were created after Judge Parke closed the hearing in this case on February 27, 2007.

Document No. 1	Indictment in the <i>McGowan</i> case. Date Filed: September 8, 2008
Document No. 2	Declaration of Michael M. Amir In Support of Defendant Scott Drew's Notice of Motion and Motion for an Extension of Time to File Discovery Motions. Date Filed: January 12, 2009
Document No. 3	Defendant Scott Drew's Notice of Motion and Motion for an Extension of Time to File Discovery Motions. Date Filed: January 12, 2009
Document No. 4	Government's Consolidated Response to the Motions of Defendants <i>McGowan</i> and Drew for Pretrial Discovery. Date Filed: January 23, 2009
Document No. 5	Government's Trial Memorandum. Date Filed: May 21, 2009
Document No. 6	Defendant Scott Drew's Response to Evidentiary Arguments Raised in the Government's Trial Brief. Date Filed: May 26, 2009

III. Procedural Issues

A. Section 102.48(d)(1)

Because Ralphs has raised this matter, the first procedural issue I address is whether the documents described above are "newly discovered" within the meaning of Section 102.48(d)(1) of the Board's Rules and Regulations. That rule provides, in pertinent part:

A party to a proceeding before the Board may, because of extraordinary circumstances, move for . . . reopening of the record after the Board decision or order. . . . Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

On the one hand, as Ralphs points out the Board has held that “newly discovered” evidence must be evidence that existed at the time of the trial. In *APL Logistics, Inc.*, 341 NLRB 994 (2004), the respondent sought to offer testimony of Michelle Gehm, the union’s election observer, as newly discovered evidence. The Board stated, “Newly discovered evidence is evidence which was in existence at the time of the hearing” *Id.* The Board continued:

To the extent that Gehm’s testimony pertains to facts arising after the hearing, it does not constitute newly discovered evidence. *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 fn. 1 (1990), *enfd.* 934 F.2d 1288 (2d Cir. 1991).

Id. fn. 2. “Newly discovered evidence is evidence which was in existence at the time of the hearing” *Fitel/Lucent Technologies*, 326 NLRB 46 fn. 1 (1998) (quoting *Owen Lee Floor Service*, 250 NLRB 651 fn. 2 (1980)). In *Allis-Chalmers, Corp.*, 286 NLRB 219 fn. 1 (1987), the Board stated:

Following submission of this case to the Board, the Respondent filed a motion to reopen the record to consider a bankruptcy petition, which it filed in the United States Bankruptcy Court for the Southern District of New York on 29 June 1987. The Respondent contends that the bankruptcy petition should be considered as further evidence of its poor financial condition, which excuses its otherwise unlawful action. The Respondent further argues that even assuming its economic defense is rejected and it is found in violation of the Act, the bankruptcy petition should be considered in determining whether the Board should provide for a remedy of monetary relief. We deny the motion as it proffers evidence concerning an alleged event that occurred after the close of the hearing *K & E Bus Lines*, 255 NLRB 1022 fn. 2 (1981)

I note, however, that none of the cases cited by Ralphs involve an issue of waiver of privilege. As the General Counsel and the Unions point out, the Board has more specifically addressed the issue of waiver of privilege in *Wal-Mart Stores*, 348 NLRB 833 (2006). In that case, the General Counsel had served a subpoena on Wal-Mart requiring it to produce documents concerning its “Remedy System.” Wal-Mart filed a petition to revoke the subpoena, contending that the documents were protected from disclosure by the attorney-client privilege and as attorney work product. The judge granted the petition to revoke and the General Counsel filed exceptions with the Board concerning that ruling after the judge issued his decision. The Board indicated:

While the case was pending at the Board on August 26, 2004, the Respondent filed a motion to supplement the record, which advised that, in January 2004, pursuant to a court order in an unrelated State court proceeding, the Respondent had produced the Remedy System documents subpoenaed by the General Counsel.

Id. at 834. The Board continued:

5 Once waived, the attorney-client privilege is lost in all forums for proceedings running
 concurrent with or after the waiver occurs. See, e.g., *Genentech, Inc. v. U.S. International
 Trade Commission*, 122 F.3d 1409, 1416–1417 (Fed. Cir. 1997) (waiver in district court
 proceeding operated as a waiver in concurrent International Trade Commission
 10 proceeding). See also *Centuori v. Experian Information Solutions, Inc.*, 347 F.2d 727,
 729 (D. Ariz. 2004). Here, as stated earlier, the Respondent concedes that the production
 of the subpoenaed documents and files in the State court proceeding constituted a waiver
 of applicable privileges. It argues, however, that the waiver can have no effect in this
 proceeding because it occurred months after the judge here ruled that the documents were
 15 privileged. We disagree. The Respondent’s admitted waiver in the State court proceeding
 operates concurrently here, and not retroactively (as the Respondent argues), because the
 judge’s ruling was not final when the waiver took place. In Board proceedings, a judge’s
 decision and *recommended* order do not become final until after the time for the filing of
 exceptions expires, provided that no exceptions are filed. Board’s Rules and Regulations,
 Section 102.48(a) and (b). Here, the General Counsel filed timely exceptions to the
 judge’s decision, including his evidentiary ruling on this issue, thereby preserving the
 20 issue for Board review. The Respondent’s disclosure took place while the case was
 pending before the Board on exceptions. Because litigation of this unfair labor practice
 case is an ongoing matter, the Respondent’s waiver of the privilege in the State court
 proceeding precludes the Respondent from asserting it in this unfair labor practice
 proceeding.

25 Id. In other words, so long as the issues of attorney-client privilege or attorney work product are
 still pending before the Board disclosure of the underlying documents will serve as a waiver
 even if the waiver occurred after the hearing had closed. In this case, at the time the Unions
 submitted the motion to reopen, that matter was still pending before the Board on exceptions
 30 because the earlier two-member decision had been vacated as a result of *New Process Steel*,
supra, and the Unions (and Ralphs) had filed exceptions to the judge’s ruling on the waiver issue.

Ralphs argues:

35 *Wal-Mart Stores, Inc.*, 348 NLRB [833] No. 46 (2006), stands for a different proposition,
 namely that privilege can be waived at any point. In *Wal-Mart*, the Board was not
 considering any evidence proffered under the Board’s Rules because the Respondent
 “concede[d], for purposes of this proceeding, that the State court disclosure constitutes a
 40 prospective waiver of the privilege.” In this case, the Charging Parties are trying to
 reopen the matter. To do so without running afoul of the ample authority Ralphs cites
 here, the Charging Parties must provide evidence that was in existence at the time of the
 February 27, 2007 hearing.

45 This argument is not persuasive. Both *Wal-Mart* and this case involve efforts to reopen the
 record and submit evidence of waiver that occurred after the hearing in the unfair labor practice
 proceeding had closed. Both involve situations where the issue was still pending before the Board

on exceptions. I conclude *Wal-Mart* is authority for allowing consideration of the Unions' evidence of waiver even though that evidence occurred after the close of the hearing.

B. Section 102.48(d)(2)

5 Next, I address the issue of whether the Unions' motion was filed "promptly" within the meaning of Section 102.48(d)(2). That rule provides, in pertinent part:

10 Any motion filed pursuant to this section shall be filed within 28 days . . . after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence.

15 As indicated above, the last document submitted by the Unions in support of the motion to reopen was filed in the McGowan case on May 26, 2009. On August 23, 2010, the Ninth Circuit vacated its earlier order as well as the earlier two-member Board decision. On September 28, 2010, the Unions filed the motion. Within days after the Board issued its second decision in this case without mentioning the Unions' motion to reopen, the Unions filed their motion for reconsideration. Under the unique circumstances of this case, I conclude the Unions acted "promptly" both after the first Board decision was vacated and after the second Board decision
20 issued.

IV. Waiver

25 I now finally address the issue of whether Ralphs has disclosed the material thereby waiving the privileges. In this section, I address only whether Ralphs did so in the McGowan case; the issue of whether it did so in the Corporate case is tied up in a separate series of issues and motions that I address in the next section of this decision.

30 First, I point out that Ralphs does not object to the authenticity of the documents attached to the Unions' motion: I conclude they are authentic. Next, I address evidentiary issues. The General Counsel argues that the documents are not hearsay under Rules 807, Residual Exception, Federal Rules of Evidence. I disagree. That rule, among other things, requires that:

35 [T]he statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.

40 Here, the General Counsel and the Unions have not explained why they could not have obtained more probative evidence through the cooperation of persons having such evidence or through use investigative or trial subpoenas. The Unions argue that the documents are not hearsay under Rule 803(8), the public records exception to the hearsay rule. As described above, the documents involved here are the indictment, letters, and motions. These are not the type of public records covered by Rule 803(8) that would allow introduction for the truth of the matters asserted therein. Finally, Ralphs argues that some of the statements in the documents are hearsay within hearsay and that "[d]ouble hearsay is not admissible." However, contrary to this assertion, Rule
45 805 clearly indicated that hearsay within hearsay is admissible if each layer falls within an exception to the hearsay rule. And in any event, in my analysis that follows, I rely only on the first level of hearsay, that is, statements by the parties in the McGowan case that indicate a

general knowledge of the content of Ralphs' internal investigation. Having resolved the evidentiary issues, I conclude that the statements in the documents described below are hearsay in nature.

5 However, in *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980), the Board stated:

10 Courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence. *N.L.R.B. v. Imparato Stevedoring Corporation*, 250 F.2d 297 (3d Cir. 1957). The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance. *Georgetown Associates, d/b/a Georgetown Holiday Inn*, 235 NLRB 485, fn. 1 (1978). See, generally, *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978).

15 See also *Midland Hilton & Towers*, 324 NLRB 1141 fn. 1 (1997). I assess what follows in light of these cases.

Document 1 is the indictment filed on September 18, 2008. Included in the indictment are the following allegations:

20 **Overt Act No. 45:** On or about March 23, 2004, MCGOWAN falsely told lawyers for Ralphs investigating allegations of unlawful hiring during the lockout that MCGOWAN learned of a locked-out employee working at Store No. 108 in La Jolla, California on October 18, 2003, and instructed the Zone Manager for Zone 5 to dismiss the employee.

25 **Overt Act No. 47:** On or about May 20, 2004, VANCE falsely told lawyers for Ralphs investigating allegations of unlawful hiring during the lockout that VANCE had not encouraged any of his Store Directors to hire locked-out workers during the lockout; that he was not aware of stress in his zone swapping locked-out workers who were working under false identities; and that his wife, who was a locked-out worker, had not worked at Ralphs stores during the lockout.

30 **Overt Act No. 48:** On about October 13, 2004, DREW falsely told lawyers for Ralphs investigating allegations of unlawful hiring during the lockout that DREW had heard rumors that his half-brother, a locked-out worker from Store No. 745 in Newport Beach, was working in Store No. 705 in Los Angeles, and that DREW did not know whether his half-brother worked during the lockout.

35 Although I am careful not to accept as fact the assertions contained in these allegations, they do tend to show that the Government has learned of the information provided to Ralphs' lawyers during its internal audit of hiring during the lockout². I infer that it is unlikely that the Government obtained this information from the defendants named in the criminal indictment; rather, it appears more likely than not that the Government obtained this information from
40 Ralphs, especially given the information that is described below.

² The record in this case describes one, and only one, internal investigation conducted by Ralphs concerning its hiring practices during the lockout. I reject any suggestion made by Ralphs in its brief that these documents may be referring to a similar but different investigation; this suggestion is not supported by any record evidence, is entirely speculative, and based on the record as a whole, is not credible.

Document 2 contains a letter dated November 17, 2008, on the letterhead of the U.S. Department of Justice, United States Attorney Central District of California, 1100 United States Courthouse, 312 North Spring Street, Los Angeles, California, 90012, Stephen A. Cazares, Assistant United States Attorney, Major Fraud Section; it appears to bear the signature of Cazares. That letter is addressed to counsels for the defendants “Re: United States v. Patrick McGowan et al., CR 08-1116-PA Discovery Letter #3” The letter indicates:

Dear Counsel:

As part of the government’s rolling production of discovery in the above-referenced matter, please find a CD titled “US v. McGowan et al., CR 08-1116-PA,” dated November 17, 2008. The enclosed CD contains 283 written statements generated in the internal investigation conducted by Ralphs Grocery Company (“Ralphs”) bearing production title “RAL-PRIV” and page numbers 1-1355. For your convenience, I have attached an index of the enclosed witness statements provided to the government by Ralphs’ counsel.

This letter is but one of a number of other letters that appear to be a comprehensively listing of the information that the U.S. Attorney has provided to the defendants pursuant to discovery requests. Clearly, the assertions in the letter that the information was provided and that it was generated as a result of Ralphs’ internal audit are hearsay statements. But I note that they were made by the U.S. Attorney’s office, an officer of the court, in compliance with its legal obligations to provide such information. Document 2 in its entirety paints a picture of a comprehensive effort to provide information. Importantly, there is no evidence that any of the defendants responded to the letter in a manner challenging the assertions made therein. I conclude that under these circumstances the assertions in the letter concerning the description, production, and source of the information being provided are reliable hearsay, and I so find.

Document 3 is a motion filed in U.S. District Court by attorneys for Defendant Drew. It appears to be a comprehensive summary of documents that have been provided by the Government in discovery as well as documents that may not have been produced. That motion contained the following paragraph:

O.All Documents relating to Ralphs’ Internal Investigation. The defense has requested all written or recorded statements, transcripts of such statements, reports prepared by Ralphs, and other documents relating to Ralphs’ internal investigation of the activities that form the basis of the indictment. (Amir Decl., p.2, Ex. A, pp15-17.) This request also includes witness statements made to Ralphs during its internal investigation and any communications between Ralphs and the government concerning such statements. The government has produced a substantial number of documents responsive to these requests. To the extent that additional responsive materials have not been produced, the defense requests their immediate production.

Again, the statements in this concerning the request and receipt of information concerning Ralphs’ internal investigation are hearsay. But I note that the statements were made as part of a criminal proceeding, the document was filed with the court and was signed by an attorney as an officer of the court. I regard it highly unlikely that the defendant would admit to receipt of internal audit material if this were not true. I consider these statements to be reliable hearsay. I

conclude both that Defendant Drew requested, in discovery, for information concerning Ralphs' internal investigation and that the Government had provided information to Defendant Drew.³

5 Document 4 is the Government's 14-page response, filed in U.S. District Court, and signed by Assistant U.S. Attorneys. It contains the following statement:

16. All Documents Relating to Ralphs' Internal Investigation

10 Defendant Drew seeks "all written or recorded statements, transcripts of such statements, reports prepared by Ralphs, and other documents relating to Ralphs' internal investigation of the activities that form the basis of the indictment." (Drew Mot. at 11). The government has produced all such material in its possession, and insofar as it obtains other such material, will produce them consistently with its discovery obligations.

15 For reasons previously stated, I consider the statements contained in the document that the Government had receive information from Ralphs concerning its internal investigation and that it has provided that information to Defendant Drew to be reliable hearsay, and I so find.

20 Document 5 is the Government's trial memorandum filed in U.S. District Court. It contains the following:

A. Privilege Issues

...

2. Attorney-Client Privilege

25 Other than the statements made by the defendants to Ralphs' attorneys or investigators during the internal investigation, the government does not intend to introduce testimony or evidence implicating Ralphs' attorney-client privilege.

30 I again conclude that this is reliable hearsay, and I find that the Government possessed statements made by the defendants to Ralphs' attorneys or investigators during Ralphs' internal investigation. Document 5 also includes the following:

8. The Results of the internal investigation

35 The ultimate results of Ralphs' internal investigation appear to be irrelevant. In addition to presenting serious hearsay problems, and distracting the jury with matters having to do principally with the corporate case, it is irrelevant what conclusions that Ralphs' lawyers may have reached during the internal investigation relating to the merits of the present charges against the defendants. Such evidence would also require lengthy and wasteful discussion of how the general internal investigation was conducted, and whether the
40 manner in which it was conducted was flawed. The merits of the charges against the defendant should be decided by the jury without the influence of what findings may have

³ In its brief, Ralphs argues that the information supplied may have been nonprivileged portions of its internal investigation. But remember that Ralphs had taken the position that the entire investigation was privileged; it did not provide the Unions with any nonprivileged portions. Even at the resumed hearing Ralphs failed to provide, or even identify, any nonprivileged portions. I therefore reject this argument.

been reached in the internal investigation, whether or not those findings support or undermine the present charges.

5 I delay analysis of this portion of document 5 until after setting forth the response described below.

Document 6 is Defendant Drew's response to document 5. It states:

10 **8. Ralphs' Internal Investigation**

Ralphs' internal investigation tends to disprove the government's allegations about the scope of the allegedly illegal activity. Ralphs' investigation found far fewer locked out workers than did the government and further found that Drew's zone was not a problem area. If the evidence is otherwise admissible, there is no reason why it should be excluded. Any objections to the methodology employed by Ralphs' counsel go to the weight, not admissibility. Again, the government cannot have it both ways. That is, it cannot introduce dozens of memoranda that Ralphs' lawyers drafted reflecting witness interviews, some of which form the basis for the overt acts specified in the conspiracy count, and then state that the investigation is irrelevant. If the investigation is irrelevant, then the memoranda likewise should be irrelevant.

I conclude that the detailed discussion between the Government and a defendant in the criminal case about Ralphs' internal investigation is very reliable hearsay that both parties have seen that internal investigation. To conclude otherwise would mean that the Government and a defendant are discussing the relevance of material to be introduced in a criminal trial that neither has seen! And the statement in document 6 concerning the overt acts provides some linkage to the overt acts themselves described in above in document 1.

30 All these statements taken together lead me to conclude that Ralphs has indeed disclosed the contents of its internal investigation to the Government and the Government has, in turn, disclosed the contents to other persons. It follows that Ralphs has waived any privilege it might have had to withhold providing the information that the Unions had requested concerning Ralphs' internal investigation.

35 Ralphs argues that it has been deprived of the opportunity of cross-examination concerning the hearsay statement. While this is true, it is beside the point: this is what happens when reliable hearsay is used. Ralphs argues that it has been prejudiced as a result. I disagree. Ralphs knew for months the contents of the documents. And Ralphs was advised at the hearing that I would determine whether the documents contained reliable hearsay. It therefore had every opportunity to rebut any portions of the documents that could be deemed reliable; it chose not to present any evidence. Similarly, Ralphs complains that the General Counsel and the Unions could have provided direct evidence of disclosure of its internal investigation. But by the same token, so could Ralphs have provided direct evidence of nondisclosure. It could have, for example, called the attorney involved in litigation with the Government to testify under oath that Ralphs did not provide that information to the Government. It did not do so. Under these circumstances, I deal with the record as it has been developed.

By failing to provide the Unions with the information concerning the contents of its internal audit of hiring practices during the 2003-2004 lockout, Ralphs violated Section 8(a)(5) and (1).

V. Plea Agreement

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In the motion to reopen, the Unions also argue that Judge Parke (and necessarily thereafter the Board, twice) erred in concluding that the Limited Waiver did not encompass the internal investigation material. The Limited Waiver, which was received into evidence, was part of the Plea Agreement (C.P. Exh. 2), but the remainder of the Plea Agreement was placed in the rejected exhibit file. Remember, in reversing Judge Parke's determination to allow the compliance process to sort out the issue of what, if any, portions of the internal investigation were privileged from disclosure, the Board found that there was "no evidence that the audit information was requested or inquired into by the U.S. Attorney." The Unions argue that they offered such evidence (C.P. Exh. 2, the Plea Agreement), but the judge rejected it. And they then filed exceptions to the judge's ruling but the Board erroneously failed to consider that evidence. The Unions argue:

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The Plea Agreement specifically required that Ralphs produce all documents relating to its internal audit. The Plea Agreement states, in part:

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82. As part of its voluntary production under subparagraph 8 1 (k)(i) above, RALPHS will produce to the USAO all documents, other tangible evidence, and information created, prepared, obtained, or discovered during, in connection with, or as a result of any and all investigations conducted by or on behalf of RALPHS, Kroger, or any other Kroger subsidiary or affiliate into any of the hiring practices, events, acts, policies, practices, courses of conduct, statements, omissions, falsifications, concealment, or cover-ups set forth in subparagraph 81 (k)(i)(d) above.

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[C.P. Exh. 2, p. 41, 82.]

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The Plea Agreement further specifies that Ralphs will produce all interview reports, summaries, memoranda, and notes of interviews conducted by any private investigation firm or by any law firm in connection with, or as a result of any investigations, including any documents or tangible evidence previously withheld on the basis of attorney-client privilege or work product protection. (CP Exh. 2, p. 42, T 82(a).) The Plea Agreement clearly waives any attorney-client privilege regarding Ralphs' internal audit.

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In its exceptions, the Charging Parties have argued that the ALJ's decision to exclude the Plea Agreement was erroneous.

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I first thought that I would simply point out that the Board may want to address this issue itself, depending on how it disposed my recommendations above. But on September 26, 2012, Ralphs filed a motion to strike the Unions' posthearing brief in its entirety because it referred to the Plea Agreement, and that exhibit is not part of the record in this case. On October 1, 2012, the Unions filed a response to Ralphs' motion to strike. The Unions argue that, with only two exceptions, all the references to the Plea Agreement in their brief were either consistent with references made to that exhibit made by Judge Parke or the Board, or that were made by the Unions in their motion to reopen. In the latter regard, the Unions argue that Ralphs waived any objection to consideration of those portions of the exhibit because Ralphs did not object to

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Board's consideration of those references contained in its motion to reopen and the Board later granted the motion to reopen. As to the two exceptions not encompassed by these arguments, the Unions argue that it is more appropriate to strike those two references rather than strike its entire brief. That same day the Unions filed a cross-motion for admission of the Plea Agreement into the record. The Unions argue that I have been instructed by the Board to resolve all issues raised in its motion to reopen, and that the admissibility of the Plea Agreement was raised in that motion to reopen. Further, the Unions argue that because the Board granted its motion for reconsideration, the case is before me as if its exceptions concerning the Plea Agreement are still an unresolved issue. On October 5, 2012, the General Counsel filed a response joining the Unions' opposition to Ralphs' motion to strike and joining the Unions' cross-motion. On October 9, 2012, Ralphs filed a response and opposition to the Unions' cross-motion. I conclude it is no longer an option for me to simply pass all these matters back to the Board. I therefore resolve them.

In its response and opposition to the Unions' cross-motion to admit the Plea Agreement, Ralphs argues that the Plea Agreement already has been rejected by the judge and the Board and for that reason I should also reject it. I disagree. It seems to me that portions of the Plea Agreement pertain to the issue of whether or not the U.S. Attorney "requested or inquired into" the audit information. It seems the better approach is to consider Plea Agreement, especially because the Board's ruling rests on an incomplete understanding of that document. Next, Ralphs argues that the Plea Agreement is inadmissible hearsay. Again I disagree. Because the Plea Agreement was executed by an agent of Ralphs in the Corporate case, it is an admission of a party-opponent and is not hearsay under Rule 801(d)(2).

Turning to the Unions cross-motion, I grant the cross-motion and receive the Plea Agreement into evidence. I do so because due process requires that the record contain all relevant material so that issues can be properly decided. Having received the Plea Agreement into evidence, I deny Ralphs' motion to strike.

Analyzing the record in light of the Plea Agreement, I conclude that in the portions that document quoted above in this section of the decision, the U.S Attorney in fact "requested and inquired into" the audit information. It follows that under the terms of the Limited Waiver and the other portions of the Plea Agreement, Ralphs waived its right to withhold the information from the Unions.

In sum, I conclude Ralphs waived its privilege under both the Corporate case and the McGowan case.

CONCLUSION OF LAW

By failing to provide the Unions with the information concerning the contents its internal audit of hiring practices during the 2003-2004 lockout, Ralphs has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Ralphs Grocery Company, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide the Unions with the requested information described herein that is necessary and relevant to their responsibilities as exclusive collective-bargaining representatives of Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, provide the Unions with the information requested by them and described herein.

(b) Within 14 days after service by the Region, post at its facilities throughout California copies of the attached notice⁵ marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 23, 2004.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If the notice previously described by the Board has not yet been posted then the contents of this notice may simply be added to the original notice.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C. October 24, 2012

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William G. Kocol
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide the Unions with the requested information the information concerning the contents our internal audit of hiring practices during the 2003-2004 lockout, information that is necessary and relevant to their responsibilities as exclusive collective-bargaining representatives of Respondent's employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, provide the Unions with the information described above.

Ralphs Grocery Company

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.