BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ralphs Grocery Company and **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, and** **United Food and Commercial Workers Union, Local No. 1442**	**Case Nos.** **31-CA-27160** **31-CA-27475** **31-CA-27685**

Ralphs Grocery Company's Exceptions to the Honorable William G. Kocol's Decision and Brief in Support of its Exceptions

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I.
EXCEPTIONS

Respondent Ralphs Grocery Company ("Ralphs") respectfully excepts to the factual findings and legal conclusions reached in the Honorable William J. Kocol's Decision issued October 24, 2012 ("Decision"), as follows:

1. Exception is taken to Judge Kocol reaching the legal conclusion that *Wal-Mart*, 348 NLRB No. 46 (2006), controlled the analysis under Section 102.48(d)(1) of the Board's Rules and Regulations. Decision, pg. 5, ln. 34-47; pg. 6, ln. 1-47; pg. 7, ln. 1-2.
2. Exception is taken to Judge Kocol admitting the plea agreement filed with the United Stated District Court dated approximately June 30, 2006 ("Plea Agreement") as evidence in this matter. Decision, pg. 13, ln. 25-29.
3. Exception is taken to Judge Kocol admitting the Plea Agreement "because due process requires that the record contain all relevant material so that issues can be properly decided." Decision, pg. 13, ln. 26-28.
4. Exception is taken to Judge Kocol concluding that Ralphs waived the work product privilege in light of Exceptions 1 through 3.

II.
FACTS AND PROCEDURAL HISTORY

Following a labor dispute which lasted from October 12, 2003 through February 2004, Ralphs Grocery Company ("Ralphs"), other employer members of a multi-employer bargaining group, and the Southern California UFCW Locals ("Charging Parties" or "Unions") reached an agreement for a new collective bargaining agreement.

Sometime before September 2004, the Office of the United States Attorney ("USAO") began investigating allegations that during the labor dispute Ralphs had re-hired locked-out unit

employees under false identities. Ralphs retained an outside law firm to conduct an audit of its hiring practices during the labor dispute. The Respondent refused to provide this audit information in response to the request of the UFCW Unions ("Unions" or "Charging Parties"), asserting the attorney-client and attorney work product privileges. *Ralphs Grocery Company,* 352 NLRB 128 (2008) ("*Ralphs I*").

After hearing the matter on February 27, 2007, Administrative Law Judge Lana Parke concluded that the Respondent violated Section 8(a)(5) by refusing to provide the audit information and ordered Ralphs to do so. Judge Parke also held that Ralphs could litigate its privilege contentions at the compliance phase of the case. *Id.* Before Judge Parke and on exceptions before the Board, Ralphs contended that the audit information was subject to the attorney-client and attorney work product privileges and the Unions claimed it was not.

In its Decision and Order, the Board concluded that Ralphs had timely raised its privilege contentions and that the parties had an adequate opportunity to litigate issues relating to those contentions. The Board also found that "the audit information was within the attorney work product privilege." *Id.* at 129.

The Board next examined a contention made by the Charging Parties and the General Counsel that Ralphs had waived the attorney work-product privilege. This contention arose out of a settlement of a corporate indictment ("Corporate Indictment") issued against Ralphs in connection with the labor dispute by a federal grand jury in Los Angeles. As part of the settlement, Ralphs had entered into an agreement entitled "Limited Waiver of Attorney-Client Privilege and Protections of Attorney Work Product Doctrine by Ralphs Grocery Company" ("Limited Waiver"). (Charging Parties February 27, 2007 Hearing Exhibit 4.) The waiver provided, in part:

Limited Waiver of Protections of Attorney Work-Product Doctrine

> 4. Except as set forth in paragraph 5 below, RALPHS expressly and completely waives and gives up any and all rights that it may have to assert the protections of the attorney work-product doctrine *as to any material requested or inquired into by the USAO . . .*
>
> 5. Notwithstanding paragraph 4 of this Limited Waiver, RALPHS does not waive or give up any rights, and in fact retains all rights, to assert the protections of the attorney work-product doctrine as to: . . . (c) all work-product *not requested or inquired into by the USAO*"

(Limited Waiver, ¶¶ 4,5 (emphasis added).) The Limited Waiver was entered into by Ralphs on June 30, 2006.[1]

In rejecting the General Counsel's and the Unions' waiver contention, the Board stated "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. Accordingly, the record does not demonstrate that the Respondent waived the attorney work-product privilege regarding the audit information." *Ralphs I*, 352 NLRB at 129.

While the Union sought review of the two member Decision of the Board in the Ninth Circuit Court, the Decision of the U.S. Supreme Court issued in *New Process Steel L.P. v. NLRB*, 130 S. Ct. 2635 (2010). As a result, *Ralphs Grocery Company* was remanded to the Board on August 23, 2010. The Board issued a new Decision on September 30, 2010 which adopted the judge's recommended Order "to the extent and for the reasons stated in the decision reported at 352 NLRB 128 (2008) which is incorporated herein by reference." *Ralphs Grocery Company*, 355 NLRB No. 210 (2010) ("*Ralphs II*").

[1] Although a dated copy of the Limited Waiver is not in the record, the parties stipulated during the hearing that it is dated June 30, 2006. (Hr'g Tr. 31:1-9 Feb. 27, 2012.)

On October 8, 2010, after the Board's Decision in *Ralphs II* had issued, the Charging Parties filed their Motion to Reopen and Supplement the Record. (Board Order; General Counsel Ex. 1(j).) The Motion requests that the Board reopen the record to allow the Charging Parties to supplement the record with "newly discovered evidence" consisting of six specific snippets from certain documents.[2] This new evidence was offered by the Charging Parties solely for the purpose of showing ". . .that Ralphs waived any attorney-client privilege as to the internal audit when it produced the internal audit to the USAO and that the USAO in turn produced the internal audit to third parties." (Mot. to Reopen at 2.) Thus, the Charging Parties made two claims of waiver: 1) Ralphs was requested to and did give privileged documents to the USAO; and 2) the USAO gave the privileged documents to the attorneys representing individual defendants. (As noted in the Motion, individual employees of Ralphs were indicted by the Grand Jury in September 2008 ("*McGowan* Defendants" and "*McGowan* Indictment"), long after the Corporate Indictment was settled and the Limited Waiver signed on June 30, 2006.) *All* the evidence offered by the Charging Parties at the time of the hearing before Judge Kocol related to the second prong of evidence of waiver, *i.e.*, that the USAO gave privileged documents it had to attorneys for the *McGowan* Defendants.

When Judge Parke first addressed this matter, she rejected the Plea Agreement. (Ruling on Charging Parties' Motions: For Admission of Charging Parties' Exhibits 1 through 6; To Add Allegations That the Respondent Engaged in Independent Violations of Section 8(a)(1) of the Act, April 9, 2007 ("April 2007 Ruling"), pg. 3.) In Judge Parke's final decision of June 14, 2007, she noted that although the Charging Parties had requested reconsideration of her ruling excluding, *inter alia*, Charging Parties' Exhibit 2 (the Plea Agreement), that motion was denied.

[2] At the hearing conducted on August 17, 2012 before the administrative law judge, the General Counsel agreed that only those parts of the documents attached to the Motion to Reopen which are cited in the Motion itself are offered as evidence in this matter. (Mot. Hr'g Tr. 30:10-31:3 Aug. 17, 2012.)

Ralphs I, 352 NLRB 129, 131 fn. 2 (2008). But in the Brief of the Charging Parties in Support of Reconsideration of the Board's September 30, 2010 Order and Reopening the Record filed *after* the hearing before Judge Kocol, the Charging Parties relied extensively on the Plea Agreement. Ralphs moved to strike the Charging Parties brief given its extensive quoting of and citation to this disallowed evidence that is outside of the record in this case. The Charging Parties opposed this Motion and, in addition, moved for the admission of the Plea Agreement. The Charging Parties opposed the motion for admission of the Plea Agreement.

On October 24, 2012, Judge Kocol issued his Decision. First, Judge Kocol concluded that, under *Wal-Mart*, 348 NLRB No. 46 (2006), the "evidence of waiver could be admitted even though that evidence occurred after the close of the hearing", and based on this evidence, Ralphs had waived its privilege. Because Judge Kocol erroneously concluded that the after-created evidence could be admitted, his further conclusion that Ralphs waived its privilege was also erroneous. Second, Judge Kocol concluded that he could admit the Plea Agreement and, based on that Agreement, that Ralphs had waived the its privilege. Again, since Judge Kocol erroneously concluded that the Plea Agreement was admissible, his conclusion that Ralphs' waived its privilege must also fail.

III.
ISSUES PRESENTED

A. Exceptions 1 & 4.

Section 102.48(d)(1) of the Board's Rules and Regulations only allows the consideration of "newly discovered evidence" that was in existence at the time of the original hearing in determining a motion for reconsideration. Judge Kocol acknowledged that the evidence offered by the Unions was "created after Judge Parke closed the hearing in this case on February 27, 2007" but based his Decision on this after-created evidence. Decision, pg. 7, ln. 1-

2. Was it permissible to rely on after-created evidence to conclude that Ralphs' waived its privilege?

B. Exceptions 2, 3 & 4.

The law of the case prohibits re-litigation of settled matters except in extraordinary circumstances. *Teamsters Local 75*, 349 NLRB No. 14 (2007). Judge Kocol admitted the Plea Agreement despite the fact that Judge Parke twice rejected admission of the Plea Agreement, first at the hearing and second on the motion for reconsideration, and the Board affirmed that rejection—also twice. April 2007 Ruling, pg. 3; *Ralphs I*, 352 NLRB 129, 131 fn. 2 (2008) (Board adopting Judge Parke's second rejection); *Ralphs II*, 355 NLRB No. 210 (2010) (adopting *Ralphs I*). Was it proper for Judge Kocol to admit the Plea Agreement and rely on it to conclude that Ralphs' waived its privilege?

IV.
ARGUMENT

Judge Kocol made two errors that require reversal. First, he ignored Section 102.48(d)(1) when he admitted after-created evidence, and second, he ignored the law of this case when he admitted the Plea Agreement. Judge Kocol's subsequent findings of waiver were premised on these two erroneous admissions, and thus the finding of waiver cannot be upheld.

A. Judge Kocol Impermissibly Relied On Evidence That Was Created After The Hearing To Conclude That Ralphs Waived Its Privilege.

The Board's Rules and Regulations at Section 102.48 (d)(1) provide:

> 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. . . . A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. *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. (emphasis added)

The law is quite clear that "newly discovered evidence" is "evidence which was in existence" at the time of trial. "Newly discovered evidence is evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Fitel/Lucent Techs., Inc.* 326 NLRB 46, 46 fn. 1 (1998) (quoting *Owen Lee Floor Serv.*, 250 NLRB 651, 651 fn. 2 (1980)). *See also APL Logistics, Inc.*, 341 NLRB 994 (2004) ("Newly discovered evidence is evidence of facts in existence at the time of the hearing which could not be discovered by reasonable diligence." (citations omitted)); *Pacific Bell*, 330 NLRB 271, 271 fn. 1 (1999) (motion to reopen record denied because motion involved evidence of events occurring after the close of the hearing); *Machinist Lodge 91 (United Technologies)*, 298 NLRB 325, 325 fn. 1 (1990), *enf'd* 934 F.2d 1288 (2d Cir. 1991) (attempt to introduce affidavit concerning events that occurred after hearing did not fall into category of newly discovered evidence); *Allis-Chalmers Corp.*, 286 NLRB 219, 219 fn. 1 (1987) (motion to reopen record to consider fact of bankruptcy petition filed after hearing denied); *NLRB Division of Judges Bench Book* (August 2010) Section 11-900 (evidence that did not exist at the time of trial because it relates to events that occurred after the close of the trial is not "newly discovered").

The wisdom of this Rule was explained in a thoughtful analysis by Administrative Law Judge Raymond P. Green, appended to his Decision in *A.N. Electric Corp.,* 276 NLRB 887 (1985). Judge Green noted that Rule 102.48(d)(1) is "parallel" to Rule 60(b) of the Federal Rules of Civil Procedure and cites to *NLRB v. Decker & Sons*, 569 F.2d 357 (5th Cir. 1978):

> Petitions to the Board to reopen a case when based upon an allegation of newly discovered evidence, are controlled by the same considerations that control motions for a new trial or to reopen a case under Rule 59(b) and 60(b)(2) of the Federal Rules of Civil Procedure.
>
> That the evidence must be in existence at the time of the trial has often been stated. [citation] The Court in *Prostrollo v. University of South Dakota*, 63 F.R.D. 9, 11 (D.S.D. 1974) restated the principle and its rationale: "There can be no Rule 60(b)(2) relief for evidence which has only come into existence after the trial is

> over for the obvious reason that to allow such a procedure could mean the perpetual continuation of all trials. 'Newly discovered evidence' under Rule 60(b) refers to evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant."

A.N. Electric Corp., 276 NLRB at 897.

It was error to conclude that *Wal-Mart Stores, Inc.*, 348 NLRB No. 46 (2006), is authority for allowing consideration of the "Unions' evidence of waiver even though that evidence occurred after the close of the hearing." Decision, pg. 7, ln. 1-2. The after-created evidence rule bars *the admission of evidence*, it does not affect the substantive law of waiver or otherwise. Further, the purpose of the after-created evidence rule is to prevent unending litigation. Therefore, the authority discussed above was not applicable in *Wal-Mart* because no evidence was offered and the issue of waiver was not litigated. Instead, in *Wal-Mart*, the Respondent "concede[d], for purposes of this proceeding, that the State court disclosure constituted a prospective waiver of the privilege." Therefore, the charging party in *Wal-Mart* was *not* attempting to introduce evidence created after the hearing—it had no need to offer any evidence at all because *Wal-Mart* conceded the relevant fact. In this case, the Charging Parties are trying to reopen the matter and in so doing they are trying to *admit evidence that was created after the hearing*—in direct contravention of the precedent cited above. *Wal-Mart* did not address this circumstance and is inapposite.

Further, to supplement the record, the Charging Parties are required to show they were "excusably ignorant" of the evidence they now offer. *Fitel/Lucent Techs.,* 326 NLRB at 46 fn.1. "Excusable ignorance" exists when a moving party can show "facts from which it can be determined that movant acted with reasonable diligence to uncover and introduce evidence." *Owen Lee Floor Serv.,* 250 NLRB 651, 651 fn. 2 (1980) (citation omitted). Here, the Charging Parties need to offer "evidence" to establish that at the time of the hearing the USAO had

"requested or inquired into" the audit conducted by outside counsel, and that the Respondent had produced work-product documents related to the audit. The fact of a waiver occurring at any other time after the hearing is not relevant because the Board's Rules do not treat such evidence as "newly discovered".

It was error to admit these documents because they were created after the hearing. Judge Kocol relied upon the documents in direct contravention of this Board's rules and precedent to conclude that Ralphs waived its privilege. Decision, pg.7-12. Without these improperly admitted documents, there is nothing in the record to support Judge Kocol's conclusion. This result cannot stand.

B. Judge Kocol Improperly Admitted And Relied On The Plea Agreement In Concluding That Ralphs Waived Its Privilege.

The law of the case applies to prior Board decisions to bar subsequent reconsideration of the same issue absent "extraordinary circumstances." *Teamsters Local 75*, 349 NLRB No. 14 (2007). Extraordinary circumstances exist when the initial decision was "clearly erroneous and would work a manifest injustice." *Id.* This rule promotes finality and judicial efficiency by "protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). In this matter, the law of the case applies to bar admission of the Plea Agreement, and there are no extraordinary circumstances that require admission.

The law of the case precludes admission of the Plea Agreement. The parties fully briefed the admissibility of the Plea Agreement, and Judge Parke twice rejected admission of the Plea Agreement, first at the hearing and second on the motion for reconsideration. April 2007 Ruling, pg. 3; *Ralphs I*, 352 NLRB 129, 131 fn. 2 (2008). The Board twice affirmed that rejection. *Ralphs I*, 352 NLRB 129, 131 fn. 2 (2008); *Ralphs II*, 355 NLRB No. 210 (2010) (adopting

Ralphs I). April 2007 Ruling, pg. 3; *Ralphs I*, 352 NLRB 129, 131 fn. 2 (2008). The rejection of the Plea Agreement is unquestionably the law of the case.

There are no extraordinary circumstances that would require admission despite the law of the case because there is no clear error resulting in manifest injustice. Judge Kocol admitted the Plea Agreement because "due process requires that the record contain all relevant material so that issues can be properly decided." Decision, pg. 13, ln. 26-27. This cannot be an extraordinary circumstance. If it were, all relevant evidence would always be admissible after every hearing to provide subsequent reconsideration of the issues. Judge Kocol's ruling is contrary to the spirit and letter of the Federal Rules of Evidence, the bulk of which limit the admissibility of otherwise "relevant" material. *See, e.g.*, Fed. R. Evid. 403 (limiting admission of relevant evidence for prejudice, confusion, and waste of time); Rules 407-409 (excluding relevant subsequent remedial measures, offers of compromise, and offers to pay medical expenses); Rules 501-502 (limiting admission of relevant privileged material).

Judge Kocol erred in admitting the Plea Agreement despite the law of the case. His finding of waiver based on the Plea Agreement cannot stand.

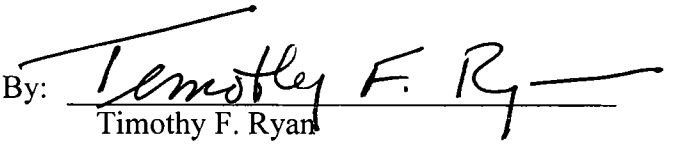
V.
CONCLUSION

Both the after-created evidence rule and the law of the case serve the same purpose: to avoid the perpetual continuation and re-litigation of settled issues. This case has being going on for nearly a decade—but nonetheless the Charging Parties continue to challenge long-settled decisions. This case needs to be put to rest. Ralphs's Exceptions should be granted.

Respectfully submitted,

Dated: November 21, 2012

MORRISON & FOERSTER LLP

By: 
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I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, this 20th day of November, 2012.

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