

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**

**RESPONDENT'S REPLY TO ANSWERING BRIEFS OF GENERAL
COUNSEL AND CHARGING PARTIES**

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I. INTRODUCTION

Ralphs Grocery Company (“Ralphs”) filed exceptions amounting to two errors: First, Section 102.48(d)(1) of the Board’s Rules and Regulations only allow 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 evidence regardless. (Decision, pg. 7, ln. 1-2.) Second, although the law of the case prohibits re-litigation of settled matters, *Teamsters Local 75*, 349 NLRB No. 14 (2007), Judge Kocol admitted the Plea Agreement despite the fact that Judge Parke twice rejected it, first at the hearing and next on a 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*).

The General Counsel and the Charging Parties answered the Employer’s Exceptions primarily by asserting that years of precedent interpreting Board Rule 102.48(d)(1), which provides that in extraordinary circumstances a record may be reopened after a Board decision in order to take “newly-discovered” evidence, is vitiated when the newly-discovered evidence involves the attorney work product privilege. In doing so, they rely on a case, *Wal-Mart Stores*, 348 NLRB 833 (2006), which provides no such support for their position.

II. RESPONDENT’S EXCEPTIONS

Exception 1

“The Board is required to conduct its proceedings, ‘so far as practicable,’ in accordance with the Federal Rules of Evidence and Federal Rules of Civil Procedure.” *NLRB v. Decker and*

Sons, 569 F.2d 357, 362 (1978) (citing 29 U.S.C. 160(b); 29 C.F.R. §101.10(a), 102.39 (1976)). And, if fact, Board Rule 102.48(d)(1) is analogous to Federal Rules of Civil Procedure 59 and 60. *Id.* at 363.

The purpose of FRCP Rule 60 and Board Rule 102.48 is to control motions to reopen a case to receive new evidence. The standards under both rules is that the new evidence must have been in existence at the time of the hearing and the party making the motion must be excusably ignorant of the existence of the evidence at the time of the hearing. *Fitel/Lucent Techs., Inc.*, 326 NLRB 46, 46 fn. 1 (1998).

The reason Board Rule 102.48(d)(1) and FRCP Rule 60(b) do not permit evidence that comes into existence after a hearing is completed is “for the obvious reason that to allow such a procedure could mean the perpetual continuation of all trials”. *Decker and Sons*, at 364 (citing *Postrollo v. University of South Dakota*, 63 F.R.D. 9, 11 DSD (1974)). And that’s just what has happened here.

Three years after the hearing closed in this matter, the Charging Parties dredged up two-year-old documents, identified by the parties and the Administrative Judge as the “*McGowan* documents”, and offered them into evidence at a hearing conducted under Board Rule 102.48(d)(1). The Administrative Law Judge erred in receiving this evidence into the record. To excuse this error, the General Counsel and Charging Parties rely on *Wal-Mart*. This reliance is misplaced for several reasons.

First, *Wal-Mart* is inapposite. It is important to note that in *Wal-Mart*, the Board did not grant a Section 102.48(d)(1) hearing to reopen the record to take new testimony and litigate issues. Rather, *Wal-Mart* involved a motion to supplement the record. The respondent in *Wal-Mart* conceded that it had waived the attorney-client privilege as to certain documents months

after the close of the hearing. The only issue in the case was whether that waiver was prospective or retroactive. There was no testimony taken by the Board in reaching its decision in the case and no evidentiary issues were litigated – the factual issue (whether the attorney-client privilege had been waived) was conceded.

But here, there were no such conceded facts which the Board could use to reconsider its decision. Here, the procedure was quite different. Reopening the record, conducting a hearing, allowing direct testimony and cross-examination, and making findings of fact and conclusions of law is a significantly different process – and is the type of process that Board Rule 102.48 and FRCP Rule 60(b) permit under very limited circumstances, none of which exist here. Allowing facts to be offered and litigated to determine their admissibility when the facts did not exist at the time of the hearing is exactly what FRCP Rule 60(b) and Board Rule 102.48 were created to prevent and is contrary to *all* cases reported by the Board on this subject.

In *Wal-Mart* (and unlike the facts in this case), a party did not file a motion to reopen the record under Board Rule 102.48 and present “newly-discovered evidence” through the litigation process. Rather, Wal-Mart moved to supplement the record, without the need for a hearing. In fact, Board Rule 102.48(d)(1) is not even mentioned in *Wal-Mart*, except in footnote 7 where the Board notes that “parties may also file a motion to reopen the record after it has closed based on newly discovered evidence. Rule 102.48(d)(1).” The reliance of the Charging Parties, the General Counsel and the Administrative Law Judge on *Wal-Mart* for the proposition that the restrictions of Board Rule 102.48 do not apply where the issue involves attorney work product is unwarranted. *Wal-Mart* did not discuss the application of Board Rule 102.48 to the facts in that case. It is axiomatic that a case cannot stand for a proposition not presented or decided in it.

The Charging Parties misstate Ralphs' position on this matter to be "... that *Wal-Mart* does not permit the Board to admit or consider evidence of a waiver of privilege that occurred *after the initial trial hearing before the Administrative Law Judge...*". The Charging Parties grossly mischaracterizes Ralphs' position. Ralphs does not argue that the Board cannot admit or consider evidence of a waiver that occurs *after* the hearing before the administrative law judge which is conceded by a party. Instead, Ralphs agrees that such evidence *can* be considered—but that does not resolve the issue currently before the Board because the facts here are different than in *Wal-Mart*. What Ralphs argues is that any new waiver evidence created after a hearing can only be considered when such evidence is not contested and therefore its admission will not have to be litigated and subject to the limitations of the procedures of Board Rule 102.48. The requirements of Board Rule 102.48 that evidence be newly-discovered, must have been in existence at the time of the hearing and be evidence of which the moving party was excusably ignorant do not apply when dispositive facts adverse to the party offering them are conceded by that party. Under those circumstances, which are exactly the circumstances in *Wal-Mart*, there is no need for factual litigation and a complete replay of the hearing already held. The concern inherent in Board Rule 102.48 that matters not be litigated endlessly is not threatened when new facts are conceded and *not* litigated.

Distinguishing between reopening a record and reconvening a hearing is not nitpicking. There are substantial policy reasons for not permitting *contested* evidence which develops after the close of a hearing into evidence. All the case law both before the Board and the federal appellate courts support this proposition and none of them are implicated in the very different facts in *Wal-Mart*. Ralphs is not arguing that *Wal-Mart* was wrongly decided. Instead, it argues that *Wal-Mart* is inapposite because it dealt with a motion to reopen the record and receive,

without further litigation, facts which were not in dispute between the parties. None of the risks and burdens of allowing a case to be reopened to accept evidence that was not in existence at the time of the hearing are involved in that process.

Exceptions 2 and 3

A. The Administrative Law Judge Improperly Relied on Inadmissible Evidence to Analyze the Plea Agreement.

The General Counsel and Charging Parties argue that the Plea Agreement was properly admitted into evidence. An analysis of the record shows that the reasons relied upon by the Administrative Law Judge to accept the Plea Agreement are without merit.

Judge Kocol admitted the Plea Agreement because he believed that “due process requires that the record contain all relevant materials so that issues can be properly decided” (Decision, pg. 13). After admitting the document, the judge reached his decision that Ralphs had waived its attorney work product privilege after “analyzing the record in light of the Plea Agreement...”. In other words, Judge Kocol used the *McGowan* documents which he had previously admitted into the record to interpret the Plea Agreement and determine that Ralphs had waived its attorney work product privilege. As noted above, the Administrative Law Judge should never have admitted the *McGowan* documents in the record because Board Rule 102.48(d)(1) does not allow the admission of evidence which was not in existence at the time of the hearing. In the absence of the *McGowan* documents, the record cannot support the analysis of the Plea Agreement made by Judge Kocol.

B. The Law of the Case Precluded the Admission of the Plea Agreement.

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 should not stand.

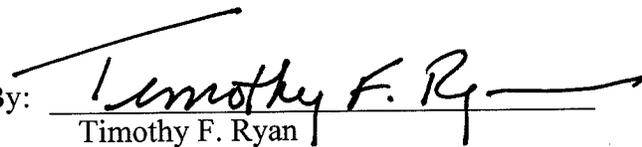
III. CONCLUSION

Ralphs Grocery Company's Exceptions to the decision of the Administrative Law Judge should be granted and this nearly decade-long case should be finally resolved.

Respectfully submitted,

Dated: December 21, 2012

TIMOTHY F. RYAN
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By: 
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I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on the date hereof, I served a copy of:

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by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 555 West Fifth Street, Los Angeles, California 90013-1024 in accordance with Morrison & Foerster LLP's ordinary business practices.

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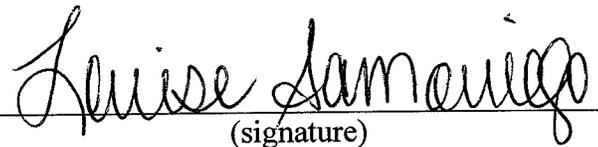
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I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, this 21th day of December, 2012.

Louise J. Samaniego
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