

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ralphs Grocery Company

and

Case Nos. 31-CA-27160
31-CA-27475
31-CA-27685

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

CHARGING PARTIES' CROSS EXCEPTIONS
TO THE HONORABLE WILLIAM G. KOCOL'S DECISION
-AND-
BRIEF IN SUPPORT OF CROSS EXCEPTIONS

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I.
CHARGING PARTIES' CROSS-EXCEPTIONS

Charging Parties United Food and Commercial Workers Union Locals submit the following cross-exceptions to the Honorable William G. Kocol's Decision:

1. Judge Kocol's legal conclusion that the documents related to *U.S. v. McGowan, et al* – exhibits admitted at the hearing on August 17, 2012 – are not admissible as a hearsay exception under Federal Rules of Evidence Rule 807, the Residual Exception. (Judge Kocol's October 24, 2012 Decision, p. 7)
2. Judge Kocol's legal conclusion that the documents related to *U.S. v. McGowan, et al* are not admissible as public records pursuant to the hearsay exception at Federal Rules of Evidence Rule 803(8). (Judge Kocol's October 24, 2012 Decision, p. 7)

II.
INTRODUCTION

What remains of this seven-year dispute is Ralphs' persistent refusal to disclose the documents related to the internal audit and investigation it conducted pending a criminal investigation by the United States Attorney's Office. Ralphs continues to *claim* that the documents are privileged from disclosure, despite its disclosure of the documents to the USAO – a condition of its Plea Agreement – *and* the USAO's subsequent disclosure of those same documents *to third parties* in the subsequent criminal case, *U.S. v. McGowan, et al*.

The initial dispute arose from Ralphs' unlawful rehiring of locked out employees from October 12, 2003 through February 26, 2004, under false names, false W-4s, false I-9 forms, and false Social Security numbers. The United Food and Commercial Workers Union Locals in Southern California requested the investigation documents among other information the Board has already compelled Ralphs to disclose, in order to

enforce the rights of its locked out members. Although Ralphs presented no evidence of its privilege claim, Judge Parke accepted its claims of privilege and referred the matter to Compliance Proceedings, where the Board affirmed Ralphs' claim of privilege.

Judge Kocol correctly admitted the documents from *U.S. v. McGowan, et al*, establishing the second-degree disclosure of the allegedly "privileged" documents. He erred, however, in concluding that the documents were not admissible under the residual hearsay exception of FRE Rule 807 or the public records hearsay exception of FRE Rule 803(8). The Board should reverse his conclusions and accept Charging Parties' cross-exceptions.

III. STATEMENT OF THE FACTS

The matters at issue arose from serious criminal conduct by Ralphs when it locked out more than 19,000 employees from October 12, 2003 through February 26, 2004, pending negotiations with Unions for a new Collective Bargaining Agreement. During that time, to continue operations, Ralphs rehired over 1,000 of the locked-out employees under false names, false W-4s, false Social Security numbers and false I-9 forms. The U.S. Attorneys Office commenced an investigation into Ralphs' unlawful activities in January 2004. (GC Exh. 1(a))

During this period, Ralphs directed its attorneys from an outside law firm to conduct an investigation and audit of the unlawful rehiring of locked out employees. The internal investigation generated hundreds of witness statements and other documents. Charging Parties requested these documents, but Ralphs refused to furnish *anything*. It continued to deny Charging Parties' subsequent requests, so Charging Parties filed charges with Region 31 of the National Labor Relations Board.

On December 15, 2005, a federal grand jury indicted Ralphs for numerous felony counts related to the rehiring of employees under false names, false W-4s, false I-9 forms and false Social Security numbers. Then on June 30, 2006, Ralphs entered into a Plea Agreement with the USAO. This required that Ralphs produce all documents related to the internal investigation and audit it had conducted. Specifically, it stated:

82. As part of its voluntary production under subparagraph 81(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.*

(emphasis added) *Plea Agreement for Defendant Ralphs Grocery Company at 12, 52, U.S. v. Ralphs Grocery Company, No. CR 05-1210-PA (C.D. Cal. June 30, 2006).*

Further, the Plea Agreement specified that Ralphs will produce “all interview reports, interview summaries, interview memoranda, and notes of interviews conducted by any private investigation firm or by any law firm during, in connection with, or as a result of any and all such investigations,” including any documents or tangible evidence previously withheld from the USAO on the grounds of a claim of attorney-client privilege or work product protection. *Plea Agreement for Defendant Ralphs Grocery Company at 12, 52, U.S. v. Ralphs Grocery Company, No. CR 05-1210-PA (C.D. Cal. June 30, 2006), p. 42, ¶ 82(a)-(b).*

Ralphs also entered into a Limited Waiver of Attorney-Client Privilege and Protections of Attorney Work Product Doctrine (hereinafter “Limited Waiver”) *as part of the Plea Agreement.* In accordance with the Limited Waiver, Ralphs agreed to waive any attorney-client privilege and protections of attorney work product doctrine with regard to “material requested or inquired into by the [U.S. Attorney].” (GC Exh. 1(a))

Pursuant to the Plea Agreement and the Limited Waiver, the requested documents were no longer attorney-client privileged at that or any other time thereafter.

On June 14, 2007, Administrative Law Judge Lana H. Parke issued a decision finding that Ralphs violated Sections 8(a)(1) and (5) of the Act, but that the documents related to the investigation may be privileged from disclosure. She then deferred the determination of “privilege” to the compliance phase. Judge Parke also refused to admit the Plea Agreement into evidence, even though the document specifically established that Ralphs waived *any claim of privilege* over the investigation documents by producing them to the USAO.

On February 19, 2008, a two-member Board issued a decision affirming Judge Parke’s conclusion that the documents related to Ralphs’ internal investigation were protected from disclosure by the attorney-client privilege; the Board failed, however, to address Charging Parties’ exception to Judge Parke’s refusal to admit the Plea Agreement into the record. On August 23, 2010, the Ninth Circuit Court of Appeals invalidated the Board’s February 19, 2008 order in response to the Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), nullifying all decisions that had issued through the two-member Board.

The matter was now on exceptions pending a valid Board decision. Sometime in September 2010 directly after the decision was vacated, Charging Parties reviewed pleadings filed in *United States of America v. Patrick Anthony McGowan, Charles Robert Vance, Scott rew, Randall Paul Kruska, Karen Montoya*, Case No. CR-08-1116-PA (hereinafter “*McGowan*”) – a separate criminal matter relating to Ralphs’ rehiring of over 1,000 bargaining unit employees under false names, false W-4s, false Social Security numbers and false I-9 forms from October 12, 2003 until February 26, 2004. The defendants were all Ralphs executives during the period of the lockout. Six of the pleadings explicitly referenced the USAO’s possession of documents from Ralphs related to its internal investigation. The pleadings further established that the USAO

disclosed those documents to the *McGowan* defendants. Those pleadings were as follows:

- Document No. 1 Indictment in the *McGowan* case.
- 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.
- Document No. 3 Defendant Scott Drew's Notice of Motion and Motion for an Extension of Time to File Discovery Motions.
- Document No. 4 Government's Consolidated Response to the Motions of Defendants McGowan and Drew for Pretrial Discovery.
- Document No. 5 Government's Trial Memorandum.
- Document No. 6 Defendant Scott Drew's Response to Evidentiary Arguments Raised in the Government's Trial Brief.

On September 28, 2010, Charging Parties timely filed a Motion To Reopen And Supplement The Record with the Board pursuant to Section 102.48(d) of the Board Rules and Regulations, notifying the Board of the *McGowan* pleadings and requesting that they be entered into the record.

On September 30, 2010, the Board issued a decision adopting the February 19, 2008 Board decision. It failed to address Charging Parties pending Motions, so Charging Parties set forth the same arguments in a Motion For Reconsideration And To Reopen The Record filed October 8, 2010.

On April 17, 2012, the Board granted Charging Parties' October 8, 2010 Motions and ordered that the proceeding be remanded to the designated administrative law judge who 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." (GC Exh. 1(l))

On October 24, 2012, Judge Kocol – the designated administrative law judge – issued a decision in which he admitted the *McGowan* pleadings as reliable hearsay. He

also admitted the Plea Agreement as a statement against interest under the hearsay exceptions.

Judge Kocol concluded therefrom that Ralphs had waived its claim of attorney-client privilege over the documents related to its internal investigation when it (1) disclosed the documents to the USAO pursuant to its Plea Agreement, and (2) when the USAO disclosed those same documents to the *McGowan* defendants. Judge Kocol recommended a new compliance order consistent with his findings, including an order that Ralphs produce all documents related to its investigation and audit to Charging Parties as requested over eight years ago.

IV. ARGUMENT

Judge Kocol concluded that the *McGowan* documents did not fall under the residual or public records exceptions of the rule against hearsay; FRE 807 and 803(8), respectively. This was erroneous. Judge Kocol properly admitted the documents, but his legal conclusion was misguided. Rather, all of the *McGowan* documents should be admitted under the residual exception and most of them are public records exempted from the hearsay exception. Accordingly as a matter of law, they are admissible.

A. The *McGowan* Documents Are Admissible Under The Residual Exception Of The Federal Rules of Evidence Rule 807.

As Judge Kocol stated, Rule 807, Residual Exception, requires that:

The statement is more probative on the point for which it is offered than any other evidence, which the proponent can procure through reasonable efforts.¹

¹ By pointing out only the third condition required for the residual exception, Judge Kocol properly determined that the *McGowan* pleadings met the remaining three conditions: (1) they had the equivalent circumstantial guarantees of trustworthiness; (2) they were offered as evidence of a material fact; and (3) admitting them would best

Judge Kocol then reasons that the *McGowan* documents do not fall under the residual exception because “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.” [sic] Kocol Decision at 7.

Judge Kocol’s statement is not consistent with the record. The Unions explained in our post-hearing brief that under the Jencks Act – established after *Jencks v. United States*, 353 U.S. 657 (1957) – no materials relied upon by the prosecution and its witnesses could be the subject of a subpoena, discovery, or inspection by any party until the witness is called whose testimony relates to the content of the materials. See 18 U.S.C. § 3500.² In other words, even if Charging Parties had subpoenaed the USAO to testify regarding the documents they received from Ralphs relating to its internal investigation and audit, the Jencks Act would have prevented the USAO from responding.

The unfair labor practice was heard on February 27, 2007. Judge Parke issued a decision on June 14, 2007. The criminal prosecutions related to Ralphs’ unlawful hiring

serve the purposes of the federal rules of evidence and the interests of justice. Federal Rules of Evidence Rule 807.

² The Board has adopted similar procedures; Section 102.118 of the Board Rules and Regulations states, “no present or former Regional Director, field examiner, administrative law judge, attorney, specially designated agent, General Counsel, Member of the Board, or other officer or employee of the Agency shall produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, ... [n]or shall any such person testify in behalf of any party to any cause pending in any court or before the Board, ... with respect to any information... coming to that person’s knowledge in his or her official capacity... whether in answer to a subpoena or otherwise, without the written consent of the Board or the Chairman of the Board... or of the General Counsel.” See also *Harvey Aluminum Inc. v. National Labor Relations Board*, 335 F.2d 749 (9th Cir. 1964); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

of over 1,000 locked-out bargaining unit members under false names, false Social Security numbers, false W-4s, and false I-9 forms continued through the criminal case against senior Ralphs' executives in *U.S. v. McGowan, et al.* The indictment in that case was filed September 18, 2008, and the proceedings continued past September 22, 2009, when the case went before a jury.

The USAO was precluded from testifying at the initial hearing on February 27, 2007. The Jencks Act further precluded the USAO from producing any documents related to its criminal proceedings against Ralphs and in the *McGowan* case, even pursuant to a subpoena duces tecum. Charging Parties were unable to request testimony or documents directly from the USAO in preparation for the February 27, 2007 hearing. Charging Parties' inability to acquire the relevant documents until *after* the *McGowan* proceedings demonstrates that the documents Charging Parties presented were the most probative evidence reasonably obtainable at the time. The USAO would not have cooperated with Charging Parties to provide more direct evidence; federal law made sure of this.

The *McGowan* documents were admissible under the residual exception. The Board should accept Charging Parties' cross-exception.

B. The *McGowan* Documents Authored By the USAO Are Admissible Under The Public Records Hearsay Exception Of FRE 803(8).

Judge Kocol erroneously concluded that the *McGowan* documents – an indictment, letters, and motions – were “not the type of public records covered by Rule 803(8) that would allow introduction for the truth of the matters asserted therein.” Kocol Decision at 7. He provided no authority to support this finding. In fact, the relevant passages within the six *McGowan* documents of which Charging Parties seek

consideration are precisely the types of statements for which this exception was designed.

Hearsay is admissible under the Public Records exception if it involves “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth... the activities of the office or agency...” FRE 803(8). The purpose of the exception is (1) the “practical necessity for the use of such records to which is attached the presumption of a proper performance of official duty” and (2) the “great likelihood that a public official would have no memory at all respecting his action in hundreds of entries that are little more than mechanical.” *Wong Wing Foo v. McGrath*, 196 F.2d 120, 123 (9th Cir. 1952).

Rule 803(8) creates a “presumption of admissibility and the party opposing the admission of such a report must prove the report’s untrustworthiness.” *Id*; see also *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988)(the rule calls for “[a] broad approach to admissibility” that “assumes admissibility in the first instance”). Courts have found that the *McGowan* documents are *precisely* the type of documents the public records exemption was designed to admit. For example, courts have admitted the indictment and docket entries of criminal proceedings. *U.S. v. Jones*, 671 F.Supp.2d 182, 184-185 (D.Me. 2009); see also *Wright v. Lewis*, 777 S.W.2d 520, 524 (C.A. Tex. 1989)(documents generated as part of an assistant U.S. Attorney’s duties could be public records). Indeed under this rule, records are generally trustworthy as long as the recording official has no reason to be other than objective. See *Smith v. Ithaca*, 612 F.2d 215, 222 (5th Cir.1980).

Judge Kocol’s reasons for finding the *McGowan* documents reliable are the same reasons the documents fall under the public records hearsay exception. He repeatedly states that statements within the *McGowan* documents are trustworthy because many of the statements are made by the USAO through an Assistant U.S. Attorney. Further, *all*

documents were authored and filed by an officer of the court in compliance with its legal obligations to provide the information therein, and there was no indication of any desire or motive to provide any false information. Kocol Decision at 9. As Judge Kocol pointed out, Ralphs *did not* provide such evidence. *Id.* at 11. It is for these same reasons that the *McGowan* documents generated by the USAO – specifically Document Nos. 1, 2, 4, and 5 – constitute public records exempt from the hearsay exclusion under Rule 803(8).

V. CONCLUSION

For all of the foregoing reasons, the Charging Parties respectfully request that the Board grant its cross-exceptions. Considering the Unions' inability to subpoena or seek the cooperation of the U.S. Attorney's Office – as a matter of law – to testify to the documents produced by Ralphs in its criminal proceedings, the pleadings in the later *McGowan* case are the most probative on that point. All documents therefore fall under the residual exception of the hearsay rule. Those documents generated by the USAO also constitute public records and are further exempt on that point. Charging Parties' cross-exceptions should be granted.

Dated: December 11, 2012

Respectfully submitted,

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PROOF OF SERVICE

*Ralphs Grocery Company -and-
United Food and Commercial Workers Union Locals 135, et al.
NLRB Case Nos. 31-CA-27160, 31, CA-27475 & 31-CA-27685*

DIANE ROSS certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5268.

On December 11, 2012, I served the foregoing document(s) described as

**CHARGING PARTIES' CROSS EXCEPTIONS TO THE HONORABLE
WILLIAM G. KOCOL'S DECISION -AND- BRIEF IN SUPPORT OF CROSS
EXCEPTIONS**

X **BY PLACING FOR COLLECTION AND MAILING:** By placing a true and correct copy (copies) thereof in an envelope (envelopes) addressed as follows:

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And by then sealing said envelope(s) and placing it (them) for collection and mailing on that same date following the ordinary business practices of Schwartz, Steinsapir, Dohrmann & Sommers LLP, at its place of business, located at 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5268. I am readily familiar with the business practices of Schwartz, Steinsapir, Dohrmann & Sommers LLP for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to said practices the envelope(s) would be deposited with the United States Postal Service that same day, with postage thereon fully prepaid, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing in the affidavit. (C.C.P. §1013a(3))

X **BY E-MAIL:** By transmitting a copy of the above-described document(s) via e-mail to the individual(s) set forth above at the e-mail addresses indicated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 11, 2012, at Los Angeles, California.



DIANE ROSS