

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

**Ralphs Grocery Company**

**and**

**Case Nos. 31-CA-27160**

**31-CA-27475**

**United Food and Commercial Workers  
Union, Local No. 135,**

**31-CA-27685**

**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**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO JUDGE WILLIAM G.  
KOCOL'S OCTOBER 24, 2012 SUPPLEMENTAL DECISION**

To: Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street N. W., Room 11602  
Washington DC 20570

Submitted by:  
Rudy L. Fong-Sandoval, Esq.  
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National Labor Relations Board  
Region 31  
11150 West Olympic Boulevard, Suite 700  
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## I. INTRODUCTION

Counsel for the Acting General Counsel (General Counsel) files this Answering Brief opposing the exceptions filed by Ralphs Grocery Company (Respondent) on November 21, 2012 to Administrative Law Judge William G. Kocol's October 24, 2012, Supplemental Decision (Judge Kocol's decision). As detailed below, Respondent's exceptions to Judge Kocol's decision are based on erroneous interpretations of applicable Board law. The procedural posture and statement of facts for this case are accurately detailed in Judge Kocol's decision and are not restated here.

As set forth herein, Judge Kocol's decision, findings of fact, and conclusions of law are squarely based on both the record and applicable law. Specifically as to Respondent's exception No. 1, Judge Kocol appropriately concluded that *Wal-Mart Stores*, 348 NLRB 833 (2006) controls the underlying facts of this dispute for allowing consideration of the Charging Parties' evidence of waiver even though that evidence came into existence after the close of hearing. At the August 17, 2012 hearing Judge Kocol examined six documents which are pleadings in the McGowan criminal proceedings introduced by Charging Parties (McGowan documents). Although Judge Kocol found the McGowan documents to be hearsay in nature, he nevertheless found statements in those documents to be reliable hearsay proving that Respondent provided the audit information herein at issue to the U.S. Attorney Office (USAO) (Kocol decision, p. 8:1; 10:15; 11:22-35) With respect to Respondent's exceptions Nos. 2 and 3, Judge Kocol acted within his authority in admitting the Plea Agreement into evidence and as he was responsible for developing a full, complete, and integrated record. (Kocol decision, p. 13:25-29) Consequently, and contrary to Respondent's final exception No. 4, Judge Kocol correctly concluded that Respondent waived the asserted attorney work product privilege and ordered Respondent to provide said information to the Charging Parties Unions. (Kocol decision, p. 13:30-37)

## II. ARGUMENT AND ANALYSIS:

### THE BOARD SHOULD DENY RESPONDENT'S EXCEPTIONS

1. Judge Kocol Correctly Ruled That *Wal-Mart* Is Controlling Authority For Allowing Evidence Of Respondent's Waiver Of Its Asserted Attorney-Work Product Privilege Defense Into The Record [Respondent's Exception No. 1]

As Judge Kocol correctly ruled, and contrary to Respondent's exception No. 1, as to a waiver of a privilege raised by the attorney-client relationship, evidence which came into existence after the closing of the hearing but while litigation of the unfair practice case was still ongoing operates as a waiver of that privilege. *Wal-Mart, Inc.*, 348 NLRB 833, 834-835 (2006).

Respondent's exception No. 1 continues to misinterpret application of the Board's Rules and Regulations Section 102.48(d)(1)'s definition of "newly discovered evidence" as applied to the facts of this case. In its simplest terms, Respondent's own argument that the purpose of the "newly discovered evidence" rule is to prevent unending litigation (Respondent's Exception No. 1, p. 9) only proves to explain why *Wal-Mart*, supra, is controlling authority for allowing Charging Parties' evidence of waiver into the record here. This is so because litigation in this case never ended. Although the record in the administrative unfair labor practice hearing before Judge Lana Park had closed, the matter was still pending before the Board on exceptions when the Board, in April 2012, granted Charging Parties' Motion to Reconsider and Reopen the record to introduce evidence showing that Respondent had waived its asserted privilege. (Kocol decision, p. 3:4-20; 4:26-39; 7:1-2) As such, and noting that none of the cases cited by Respondent involved the issue of waiver of privilege, Judge Kocol correctly concluded that *Wal-Mart* is controlling authority for this case.

(Kocol decision, p. 5:34-35; 7:1-2) Consequently, as reasoned in *Wal-Mart*, supra, Respondent's production of its internal audit to the USAO in unrelated criminal proceedings is controlling authority for Judge Kocol to have properly concluded that Respondent waived its privilege. (Kocol decision, p. 7:1-2; 13:30-37) As such, Respondent's exception No. 1 should be rejected.

2. The Procedural Posture Of This Case Granted Judge Kocol The Authority To Properly Admit Into The Record And Rely Upon The Plea Agreement [Respondent's Exceptions Nos. 2 and 3]

Respondent's exceptions 2 and 3 attempt to exclude Judge Kocol's admission of the Plea Agreement into the record and fail to consider that the instant hearing was on remand from the Board's April 17, 2012 grant of Charging Parties' Motion for Reconsideration and to Reopen the Record. Properly viewed from this procedural posture, Respondent's exceptions must fail.

Respondent's argument that prior Board decisions bar subsequent reconsideration of the same issue absent "extraordinary circumstances" (Respondent Exceptions 2 and 3, p. 2 and p. 10) fails to consider the fact that the instant hearing was set due to the Board's April 17, 2012 grant of Charging Parties' Motion for Reconsideration and to Reopen the record (Kocol decision, p. 3:15) where the Charging Parties argued for inclusion of the Plea Agreement into the record. (General Counsel Exhibit 1(b), Charging Parties' Motion to Reopen at 5) The Board's Order granting Charging Parties' Motion for Reconsideration and to Reopen the record assigned the matter to an administrative judge and ordered 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.

(Kocol decision, p. 3:17-30)

As such, on August 17, 2012, Judge Kocol reopened the instant hearing, considered all arguments, and pursuant to the Charging Parties' cross-motion for admission of the Plea

Agreement, admitted said Plea Agreement into the record. (Kocol's decision, p. 13:5-29) Judge Kocol ruled as such "because due process requires the record contain all relevant material so that issues can be properly decided." (Kocol Decision, p. 13:26-27). In so ruling to include the Plea Agreement into the record, Judge Kocol acted well within his duties as administrative judge in developing a complete and integrated record. See *Teamsters Local 722 (Kasper Trucking)*, 314 NLRB 1016, 1017 (1994), *enfd. Mem. 57 F3d 1073 (7<sup>th</sup> Cir. 1995)*; and *U.S. v. Filani*, 74 F3rd 378, 386 (2d Cir. 1996) (discussing administrative law judge's role in clarifying ambiguities and obtaining information needed to make rulings.)

Consequently and as so ordered by the Board in reopening the instant hearing, because the issue of the Plea Agreement was a matter raised by Charging Parties' Motion, and because Judge Kocol acted well within his duties in admitting such Plea Agreement to develop a full record, Respondent's Exceptions Nos. 2 and 3 should be rejected.

3. Judge Kocol Properly Concluded That Respondent Waived The Attorney Work Product Privilege As a Defense For Non-Production [Respondent's Exception No. 4]

As noted above, having properly ruled that the *Wal-Mart* decision is controlling authority for allowing consideration of the Union's evidence of waiver even though that evidence was created after the close of hearing, and having correctly ruled in admitting the Plea Agreement into the record, it follows that Judge Kocol properly found that Respondent waived its privilege raised by the attorney client relationship. (Kocol Dec., p. 13:36) Consequently, Respondent's objection No. 4 must fail.

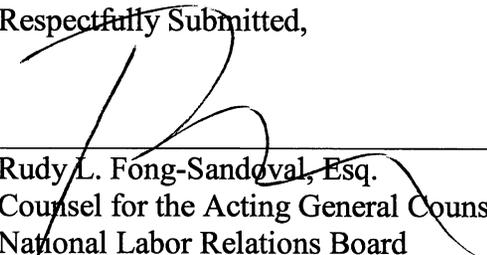
III. CONCLUSION

Judge Kocol's decision, findings of fact, and conclusions of law are supported by the record and applicable Board law. As such, Counsel for the General Counsel respectfully requests that all

four of Respondent's exceptions be denied and that Judge Kocol's decision and recommended order be adopted in its entirety.

Dated at Los Angeles, California this 11th day of December, 2012.

Respectfully Submitted,



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Re: Ralphs Grocery Co.  
Case Nos. 31-CA-27160; 31-CA-27475; 31-CA-27685

CERTIFICATE OF SERVICE

I hereby certify that a copy of: **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO JUDGE WILLIAM G. KOCOL'S OCTOBER 24, 2012 SUPPLEMENTAL DECISION** was served on the 11<sup>th</sup> day of December, 2012.

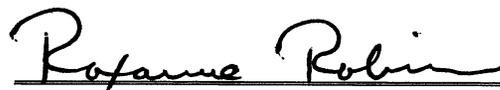
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