UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CALHOUN FOODS, LLC d/b/a KEY FOOD
Employer

and

Case Nos.: 29-CA-30878
29-CA-30861

LOCAL 338, RETAIL WHOLESALE DEPARTMENT STORE UNION, UNITED FOOD AND COMMERCIAL WORKERS

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPSONSE TO RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL THE FEBRUARY 10, 2012, ORDER OF JUDGE LAUREN ESPOSITO

1. On February 1 and February 7, 2012, a hearing in the above-referenced matter was held. On February 1st, Respondent and Counsel for the Acting General Counsel entered into certain fact stipulations, which were received in evidence by Administrative Law Judge Lauren Esposito. The stipulations involved Respondent being in its normal business operations in early May 2011, with 50% of its job classifications filled and 30% of its ultimate employee complement hired. Respondent further stipulated that in early May 2011, a majority of its workforce in the bargaining unit had been employed by its predecessor and represented by Local 338, RWDSU, UFCW (the Union). Respondent's counsel further stated at the opening of the hearing that Respondent was admitting all complaint allegations other than that a demand for recognition was made, and that certain Section 8(a)(1) statements were made.

2. On February 8, 2012, Respondent sought to withdraw from or modify the stipulations described above in paragraph 1, and to amend it Answer.

3. On February 10, 2012, Administrative Law Judge Lauren Esposito denied Respondent's request to amend its Answer and withdraw from or modify certain factual stipulations. Respondent's request should be denied for the reasons set forth below, and those outlined by Judge Esposito in her Order.

4. As set forth by the Judge, after all parties presented their direct cases at the unfair labor practice hearing in this matter, Respondent sought to amend its Answer, and to modify or withdraw from significant factual stipulations its counsel entered into with Counsel for the Acting General Counsel at the start of the hearing. Respondent claims that it should be permitted to amend its Answer and withdraw from these stipulations because counsel was not informed during the administrative investigation, or in the pre-trial period, of the Acting General Counsel's evidence regarding one of two demands for recognition which was made upon Respondent.

5. Respondent filed an Answer to the initial Consolidated Complaint, as well as an Answer to the Amendment to the Consolidated Complaint and, specifically, denied the following allegation about which it now claims counsel had insufficient information: On or about two dates in late April 2011, the Union requested that Respondent recognize it as the exclusive collective bargaining representative of the Unit.

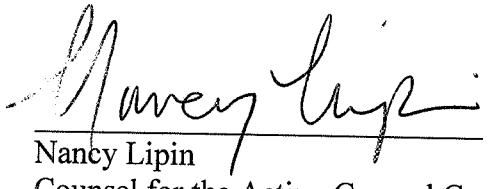
6. Respondent's special appeal has no merit. The allegations in the initial Complaint and the Amendment to the Complaint provided sufficient notice to Respondent of the allegations against it. It is well established that the General Counsel is not required to plead evidence or the theory of the case in the complaint. See e.g. North American Rockwell Corp. v. NLRB, 389 F.2d 866, 871 (10th Cir. 1968). It is the Acting General Counsel's position that, even if a Bill of Particulars was sought, such would have been denied inasmuch as the Complaint and Amended Complaint were pleaded with sufficient particularity. However, as noted by Judge Esposito, Respondent had the opportunity to file a Bill of Particulars if it believed those allegations to be insufficient, but it did not do so. That counsel was unaware of Respondent's right to request a Bill of Particulars is of no moment here. Rather, Respondent, by its counsel, filed and signed an

Answer, and by so doing certified that he read that answer and that, to the best of his knowledge information and belief there was good ground to support it. *See* RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, Secn. 102.21.

7. Further, Respondent claims that the evidence about which he purportedly was unaware and first learned of at trial -- that a Union agent made a demand for recognition on April 26, 2011, upon Mike Hassen -- changes his position concerning certain factual stipulations. Specifically, Respondent now wishes to withdraw from its stipulation that the Union had majority status in early May 2011 as it relates to the April 26th demand for recognition. Respondent states that it also wishes to withdraw from, "whatever stipulations/admissions it made in this case" as they relate to the April 26th demand. (See paragraphs 15 & 16 of Respondent's Request for Permission to Appeal). Respondent does not, however, appear to seek withdrawal from any fact stipulations as they relate to an April 29, 2011, demand for recognition. The evidence relating to the Union's demand for recognition, and the evidence relating to the Union's majority status and Respondent's continued operation of its predecessor's business in largely unchanged form, are separate matters and evidence concerning the former has no bearing on evidence concerning the latter.

For these reasons, and those set forth by Judge Esposito in her Order, it is the Acting General Counsel's position that Respondent's Request for Permission to Appeal should be denied.

Respectfully Submitted



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