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February 16, 2012

National Labor Relations Board

1099 14th St. N.W.

Washington, D.C. 20570-0001

Attn: Executive Secretary

Re: Calhoun Foods, LLC d/b/a Key Food
-and- Local 338, Retail, Wholesale and
Department Store Union, UFCW
Case Nos. 29-CA-30861
29-CA-30878

Dear Executive Secretary:

On behalf of Calhoun Foods LLC d/b/a Key Food (“Respondent”), I hereby Reply to the Counsel for the Acting General Counsel’s Response (“Response”) to Respondent’s Request for Special Permission to Appeal the February 1, 2012, Order of Judge Lauren Esposito.

**REPLY TO THE RESPONSE OF COUNSEL FOR THE
ACTING GENERAL COUNSEL**

1. As stated in Regional counsel’s Response, at the opening of the hearing, Respondent stipulated that it was admitting to all of the complaint allegations relating to the refusal to recognize and bargain charges other than that a demand for recognition had actually been made. Said admission, however, was based on what Respondent believed to be the facts pursuant to the information it had been given as of that time – i.e., a charge filed on July 6, 2011, which referred to a demand for recognition made on April 29, 2011, and an e-mail provided by the Region on September 29, 2011, which referred to two (2) alleged visits made by the Union to Respondent’s facility to demand recognition on or after April 29, 2011. By continuing to focus on what Respondent agreed to prior to learning of the alleged April 26, 2011 demand for recognition, Regional counsel ignores the gravamen of Respondent’s argument.

2. Whatever stipulations/admissions Respondent entered into prior to learning of the demand for recognition allegedly made on April 26, 2011, were entered into with uniformed consent and were not intended to apply to said alleged demand. To allow Regional counsel to establish her case through the use of inapplicable and uniformed stipulations/admissions, without actually having to prove the Union’s right to represent the employees involved herein, would not

promote the fact finding process inherent in a Board-conducted hearing, nor would it further the intentions of the Act.

3. As reflected in the record, it was clearly Respondent's understanding that the only issue in dispute as to the refusal to recognize and bargain allegations was whether or not a demand for recognition had been made on April 29, 2011. Upon learning for the first time at hearing that the Region was claiming that a demand for recognition had been made on April 26, 2011, Respondent's counsel vehemently objected to the admissibility of Jeff Laub's testimony in this regard. None of this is denied in Regional counsel's Response. Moreover, Respondent's counsel specifically objected to the admissibility of said testimony based on the fact that it constituted evidence of an additional alleged demand for recognition which was submitted more than six (6) months after its alleged occurrence, thereby making it time barred under Section 10(b) of the Act. At no time while making these objections did Regional counsel ever argue that Respondent had waived the right to do so based on entering into the stipulations/admissions involved herein.

4. Respondent's motion to clarify its stipulations and to amend its Answer was filed within five (5) business days of first learning of newly presented evidence as to an alleged demand for recognition made on April 26, 2011.

5. The case cited by Regional counsel [American Rockwell Corp. v. NLRB] is inapplicable to the case at bar. Respondent is not suggesting that Regional counsel was required to plead evidence or the theory of its case in the complaint. Respondent does claim, however, that due process required it to plead the fundamental elements of its charge in such a way as to adequately put Respondent on notice of what it was being accused of, particularly in a situation such as this where Respondent had been previously provided with evidence as to two (2) meetings which took place on or after April 29, 2011, and the relevant CA Charge filed in this matter made no reference to a demand allegedly made three (3) days prior to April 29, 2011. The fact that Respondent's counsel certified that he read his answer is really not the point. The point is whether or not the Respondent was put on notice as to what it was being accused of at the time the answer was filed and the subject stipulations were discussed and entered into.

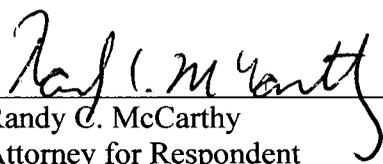
6. As suggested by Regional counsel, Respondent does not seek to withdraw from any stipulations as they relate to an April 29, 2011, demand for recognition. Rather, as I thought it was clear, Respondent seeks to clarify that said stipulations did not apply to a demand for recognition allegedly made on April 26, 2011. Contrary to Regional counsel's statement as set forth in paragraph 7 of her undated Response, the facts and circumstances surrounding Respondent's obligation to recognize and bargain with the Union as a *Burns* successor had a demand for recognition been made on April 29, 2011, are very different from those that would be applicable to Respondent's obligation to recognize and bargain with the Union as a *Burns* successor based on demand for recognition allegedly made on April 26, 2011.

7. As Respondent understands the law, in order to make an effective demand for recognition, a Union must actually possess a majority in a substantial and representative compliment of employees at the time of the demand. This was not the case on April 26, 2011. While Respondent admits that it employed a substantial and representative compliment of employees as of early May, 2011, it fails to see how this fact is relevant to the issue involved herein. In any event, the Respondent does not acknowledge that the Union represented a majority of employees in a substantial and representative compliment of employees (or in any group of employees maintained by Respondent) as of April 26, 2011, a date on which the Respondent didn't even own the store. If these facts are irrelevant to the Region's claim and it only needs to prove that a demand was made to an agent of Respondent on April 26, 2011, facts which are also in dispute, why is the Region contesting Respondent's motion to clarify its stipulations and to amend its Answer?

8. Other than as it relates to the unclear and arguably misleading allegations contained in the Amended Consolidated Complaint, no where in Regional counsel's Response does she deny that Respondent was given no notice of the alleged April 26, 2011, demand for recognition until after the subject stipulations/admissions were secured, even in the conversations between her and Respondent's counsel which resulted in same. Clearly, at best, there could have been no meeting of the minds as to any stipulations/admissions that were entered into as they apply to an alleged demand for recognition made on April 26, 2011.

9. In the interest of arriving at a verdict based on actual facts rather than on misapplied and unformed stipulations/admissions, an outcome which would not further the intentions of the Act or the enforcement thereof, Judge Esposito's February 10, 2012, Order should be reversed and Respondent should be permitted to clarify its stipulations and to amend its Answer as requested.

Respectfully Submitted



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