UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIEFT BROTHERS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673

and

JAIME NIEVES,

An Individual

and

CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25

CASES 13-CA-45023
13-CA-45058
13-CA-45062
13-CA-45194

COUNSEL FOR THE GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ARGUMENT IN SUPPORT THEREOF

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby files these limited cross exceptions to the Decision of Administrative Law Judge Arthur J. Amchan dated July 21, 2009 submitting as follows:

1. The ALJ's recommendations failed to find that the Employer failed and refused to provide information subject to the Teamsters properly served February 2, 2009 request.

In his Decision, Judge Amchan neglected to find that Respondent violated Section 8(a)(1) and (5) of the Act when it failed to provide information subject to the Teamsters' properly served February 2nd request for information. Specifically, the Judge found that "[g]iven the fact that it has not been established the Respondent was aware of the request

for financial records until two to three weeks prior to the hearing, I decline to find that it had violated Section 8(a)(5) in this regard as of April 15." (ALJD pg 15, line 29-32).

The record however is replete with evidence that Teamsters properly served Respondent with its request on February 2. Teamster Principal Officer Roger Kohler testified that he first sent the request, identified as GC Ex. 27, by mail on February 2. (Tr. 284.) He also testified that he then sent the same request again on February 26 by fax. (Tr. 285, 300, GC Ex. 28). Kohler even clarified that GC Ex 30 was the cover sheet to this February 26 fax. (Tr. 286).

Indeed, even Respondent's correspondence and testimony does not refute these facts. In GC Ex. 31, Respondent's counsel, Linda Doyle, wrote on March 24 to the Teamsters that "[w]ith regard to the February 2, 2009 request for information, I will follow up and respond as soon as possible." That statement does not take issue with the lack of service or intimate in any way that this was the first time she or her client had ever heard of the request. Further, although George Smith testified that he first became *aware* of the document two to three weeks before the trial, this denial does not thereby show that this was the first time that Respondent was served. (Tr. 518-19). Smith in fact testified that his offices were down the street from the address one used by the Company. (Tr. 647). Thus the fact that he didn't see the request until two to three weeks before trial is inconsequential. This is especially true when it is considered that Smith admitted that he didn't know if anyone else at Kieft Brothers received the request for information before he saw it. (Tr. 519). His lack of information is not the same thing as a strict denial that the request was never received. None of Respondent's witnesses, ever denied that they had received the letter on February 2 by mail, or February 26 fax request. Larry

Kieft never testified about this matter, although presumably, he would be in the best position to know whether such a document was received as his office which is located at the address identified on GC Ex. 27. (GC. Ex. 27, Tr. 740).

Based upon the lack of a denial from anyone in a position to know whether the request was received, it is presumed from Kohler's testimony that Respondent received the request on about February 2, 2009. The Board has found that the failure of the U.S. Postal Service to return documents sent by regular mail indicates actual receipt of those documents. See, e.g., *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003), *Express Gourmet*, 338 NLRB No. 114, fn. 1(2003), *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987). Based upon this case law and Kohler's record testimony that he first mailed the February 2, 2009, request for information at that time, it is presumed that Respondent received the document the day after it was mailed and not two or three weeks before the hearing, and was then under an obligation to provide this information.

From this, it follows that Respondent's delay in producing any documents as of the time of the hearing was sufficiently long to establish a violation of Section 8(a)(5). At the time of the hearing, April 13-16, the Teamsters had been waiting two and a half months for the information and had made multiple reminders to Respondent. (ALJD pg. 8 lines 45 – 53).

Accordingly, Counsel for the General Counsel respectfully requests that the Remedy, Order and Notice provisions of Judge Amchan's recommended Decision be amended to include provision that Respondent violated Section 8(a)(5) by failing and refusing to provide information relevant and necessary for bargaining found in the Teamsters' February 2 request for information.

2. <u>The ALJ failed to rule on General Counsel's Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge dated July 1, 2009</u>

On July 1, 2009, Counsel for the General Counsel filed a Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge. See Attachment 1. As is addressed in greater detail in the Motion, Respondent attached several documents to her post hearing brief to the ALJ. Most alarming is one which she refers to as EXHIBIT A. By this document, a letter purportedly of April 20, 2009, Respondent attempts to use thie letter to argue that it had complied with the Teamsters' request for information and thereby did not commit the 8(a)(5) violation. See Attachment 2. However, this letter was never entered in the record and was not subject to cross examination at trial. Beyond the normal concerns, this document becomes especially troubling when, in his Decision, Judge Amchan mentions in dicta that "I would note, however, that if Respondent has not satisfied this request as of the date of this decision, its failure to do so would be unreasonable." (ALJD pg. 15, line 33-34). Respondent cannot attempt to bootstrap evidence not a part of this record and thereby relieve itself of liability under the Act.

Based upon the foregoing, Counsel for the General Counsel respectfully requests that the Board review and rule upon the Motion to Strike Attachments and reject Respondent's improperly attached letter as not part of this record in this case.

DATED at Chicago, Illinois, this 28th day of August, 2009.

Brigid Garrity
Counsel for the General Counsel
National Labor Relations Board, Region Thirteen
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of August, 2009 the **Counsel for the General Counsel's Cross Exceptions to the Decision of the Administrative Law Judge and Argument in Support Thereof** has been electronically filed with the Board's Office of Executive Secretary and that, pursuant to Section 102.114 of the Board's Rules and Regulations as revised January 23, 2009, true and correct copies of that document have been served upon the following parties of record via electronic mail to the e-mail address listed below on that same date:

McDermott, Will & Emery
Attn: Linda M. Doyle, Esq.
227 West Monroe Street
Chicago, IL 60606
ldoyle@mwe.com

Arnold & Kadjan
Attn: Mr. John Toomey, Esq
19 W. Jackson Blvd.
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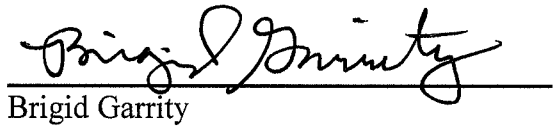

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

KIEFT BROTHERS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673

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CASES 13-CA-45023
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GENERAL COUNSEL'S MOTION TO STRIKE ATTACHMENTS AND CORRESPONDING ARGUMENTS IN RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

NOW COME, Brigid Garrity and Neelam Kundra, Counsel for the General Counsel who file this Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge and state the following:

The hearing in this case was held on April 13-16, 2009 but on April 16, the record was left open, in part, to permit Respondent to comply with General Counsel's subpoena. Following Respondent's failure to produce documents pursuant to the General Counsel's subpoena, General Counsel filed a Motion For Sanctions under *Bannon Mills* and to Close the Record. Respondent's Counsel Linda Doyle did not object to the closing of the record and so on May 15, Administrative Law Judge Amchan granted the motion to close the record.

Attachment 1

After a brief extension of time, the parties filed their briefs to the Administrative Law Judge on June 26. Upon receipt of the Respondent's brief, Counsel for the General Counsel noted that Respondent's Counsel attached two attachments to her brief which were never received into evidence by the Administrative Law Judge. Respondent did not offer these documents nor did she authenticate them at the hearing.

NLRB Rules and Regulations, Section 102.45(b) defines what constitutes "the record" in a proceeding as:

> "[t]he charge upon which the compliant was issued and any amendments thereto, the compliant and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46..."

Board law has further clarified that documents attached to briefs may not be considered if not authenticated at the hearing. *EDP Medical Computer Systems,* 284 NLRB 1286, 1287 (1987); *Inland Steel Co.,* 259 NLRB 191, 192 (1981); *Washington Hospital Center,* 270 NLRB 396 (1984); *Operating Engineers Local 18 (Ohio Contractors),* 220 NLRB 147 (1975).

Throughout Respondent's brief, Ms. Doyle attempts to bootstrap evidence not produced, offered, or cross-examined at the hearing. Such evidence and all corresponding arguments should be stricken from the record. For example, she relies upon Attachment A, a letter dated April 20, 2009,[1] to demonstrate that Respondent did not refuse to supply information to the Teamsters. At the hearing, Respondent put forth a vigorous defense with respect to the 8(a)(5) refusal to provide information allegation made at the hearing. General Counsel's witness, Roger Kohler, was cross examined at length by Ms. Doyle about the facts concerning the sequencing of events resulting in Respondent's refusal to provide information. Respondent called witnesses Larry Kieft and George Smith to testify about this allegation as well. Although Respondent had the additional opportunity to call a witness to authenticate Attachment A when the parties were supposed to resume the hearing, she chose not to. Instead, she never objected to the closing of the record.

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[1] If one were to accept the date of this letter as true, this evidence also cannot be considered newly acquired. *Washington Hospital Center*, 270 NLRB 396 fn.1 (1984).

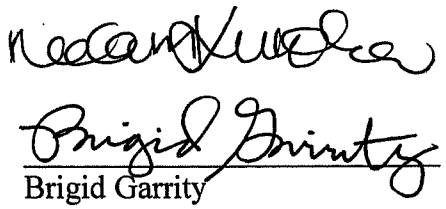
No evidence exists in the record supporting or corroborating the Respondent's claim in her brief that Respondent has complied with any of the information requests made by the Teamsters. Attachment A was never offered or authenticated and it cannot be considered as proof of Respondent's conduct regarding the 8(a)(5) refusal to provide information allegation for the reasons as stated above. Further Respondent's unilateral and unsubstantiated claim of its alleged post-hearing compliance simply does not suffice to warrant any consideration of its mootness claim. Nor, in any event, would a finding of mootness be warranted even if, as claimed by the Respondent, it turned over some of the requested information after the hearing closed. The Board has held that "subsequent compliance with a request for information does not cure the unlawful refusal to supply the information in a timely manner and belated compliance with a request for such information does not render moot a complaint of an unlawful refusal ...to supply the requested information." *Teamsters Local 921 (San Francisco Newspaper)*, 309 NLRB 901, 902 (1992); *Amersig Graphics, Inc.*, 334 NLRB 880, 897 (2001). Accordingly, Respondent's argument on brief of its alleged post-hearing compliance should be rejected and Respondent's Attachment A, along with all subsequent arguments flowing from it, should similarly be stricken from the record.

Next, Respondent attached Attachment B to her brief to attempt to explain her client's lack of cooperation with the subpoena. General Counsel asserts that the evidence contained in Attachment B should have been produced at the opening of the hearing on April 13. However, insofar as this evidence is also being offered to augment Respondent's *Wright Line* defense, this compilation of supposed facts is not in evidence and cannot be relied upon to make any determinations about the state of Respondent's operation. *WHLI Radio,* 233 NLRB 326, 331 (1977).

In sum, because Respondent did not offer either Attachment A or Attachment B or authenticate them at the hearing, they are not part of the record and may not appropriately be considered. Therefore, Counsel for the General Counsel respectfully requests that the all exhibits attached to Respondent's brief and all arguments associated with those arguments be stricken from the record.

Dated at Chicago, Illinois, this 1st day of July 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certify that true and correct copies of the Counsel for the General Counsel's Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge have this 1st day of July, 2009 been served in the manner indicated below upon the following parties of record:

Via Certified Mail
Administrative Law Judge
Arthur Amchan
1099 14th St., N.W., Rm 5400 East
Washington, D.C. 20005

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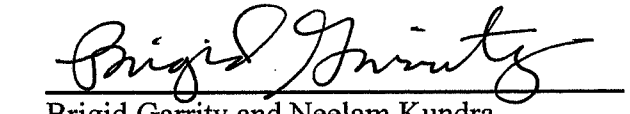

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EXHIBIT A

Attachment 2

McDermott
Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Munich
New York Orange County Rome San Diego Silicon Valley Washington, D.C
Strategic alliance with MWE China Law Offices (Shanghai)

Linda M. Doyle
Attorney at Law
ldoyle@mwe.com
+1 312 984 6905

April 20, 2009

VIA OVERNIGHT MAIL

Mr. Roger Kohler
Secretary Treasurer/Business Manager
General Teamsters, Chauffeurs, Salesdrivers
& Helpers, Local Union No. 673
1050 W. Roosevelt Rd.
West Chicago, Illinois 60185

Re: *Kieft Brothers, Inc.*

Dear Roger:

I enclose information in response to your written request. I apologize for the delay. I did not receive your written request until Jeff Ward sent it directly to me on March 24, 2009. George Smith did not receive the request until I sent it to him. I do not believe that anyone at Kieft Brothers Inc. with authority received the request until I sent it to George Smith. As you are aware, George Smith, Larry Kieft and I have been involved in a hearing before the National Labor Relations Board through April 16, 2009.

The following documents are enclosed:

1. Financial Statements for 2008;

2. A Vehicle List;

3. Information regarding the Health Insurance Plan;

4. Payroll records for 2008 and 2009 (containing attendance information);

5. A document regarding bonuses and raises to employees; and

6. The Handbook.

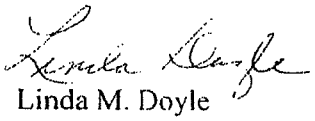
We do not have documents regarding customer complaints. We do not believe that "contracts with customers, suppliers and contractors" is relevant. Moreover, typically we do not enter into "contracts" with customers, contractors or suppliers. We do not maintain documents regarding "discipline records" for employees. We do not maintain EEO-1 reports. We do not have written

"job descriptions." We do not understand what you mean by "Health and safety audits." Likewise, beyond information in the health insurance plan (enclosed), we do not understand what you mean by "Insurance records." Beyond the Vehicle List enclosed, we do not understand what you mean by "Equipment specifications."

Please let me know if you would like to discuss any of these items or any of the enclosed documents.

Finally, please let me know when you are available to resume negotiations.

Sincerely,



Linda M. Doyle
LMD/sb
Enclosures
cc: George Smith (w/o encls.)
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