

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

CALHOUN FOODS, LLC d/b/a KEY FOOD

and

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

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

Nancy Lipin, Esq., for the Acting General Counsel
Randy C. McCarthy, Esq., for the Respondent
Jae W. Chun, Esq., Friedman & Wolf, for the
Charging Party

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon charges filed on June 28, 2011 and on July 26, 2011 by Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (“Local 338” or “the Union”), a Consolidated Complaint and Notice of Hearing issued on October 31, 2011, and an Amendment to the Consolidated Complaint issued on January 13, 2012. The Consolidated Complaint, as amended, alleges that Calhoun Foods, LLC d/b/a Key Food (“Calhoun Foods” or “Respondent”) violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Local 338 as the exclusive representative of an appropriate bargaining unit of employees, despite its obligations as a successor employer. The Consolidated Complaint also alleges that Respondent violated Section 8(a)(1) by coercively interrogating and threatening employees, and by creating the impression that its employees’ union activities were under surveillance. Respondent filed Answers to the Consolidated Complaint and the Amendment, admitting and denying the material allegations as discussed below. This case was tried before me on February 1 and 7, 2012, in Brooklyn, New York.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the “General Counsel”), Respondent, and the Charging Party I make the following

¹ Counsel for the Acting General Counsel’s motion to correct the transcript is granted, with the exception of the proposed correction to page 127, line 19, which was withdrawn.

Findings of Fact

I. Jurisdiction

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Respondent is a domestic corporation with an office and place of business located at 135-46 Lefferts Boulevard, South Ozone Park, New York, and is engaged in the operation of retail grocery stores. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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Respondent admits and I find that at all material times Local 338 has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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A. Operation of the 135-46 Lefferts Boulevard store by PSK Supermarkets, Inc.

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Prior to early May 2011,² the grocery store at 135-46 Lefferts Boulevard was operated by PSK Supermarkets, Inc. (“PSK”) as a Foodtown. For many years, PSK has had a collective bargaining relationship with Local 338 covering employees at its Foodtown stores in the New York City area. The collective bargaining agreement between PSK and Local 338, effective from July 1, 2006 to September 30, 2011, applied to “all employees...including but not limited to Grocery, Deli, Bakery, Porters and Front-End personnel, Store Managers, Assistant Store Managers and excluding all guards, office and clerical employees.”

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B. Purchase of the 135-46 Lefferts Boulevard store by Respondent

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Calhoun Foods, LLC, purchased the 135-46 Lefferts Boulevard store as of April 28, and the store opened for business as a Key Food on April 30 or May 1. Calhoun Foods, LLC, is owned by Sam Hassen and his father, Abdel Hassen. Sam Hassen testified that he runs the store’s day to day operations.

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Respondent stipulated at the hearing that as of the beginning of May 2011, it was engaged in its normal business operations at the 135-46 Lefferts Boulevard store. Respondent stipulated that at that time, at least fifty percent of the job classifications at the store were filled, and that the size of the bargaining unit was at least thirty percent of the ultimate complement of employees. Respondent stipulated that an appropriate bargaining unit consists of all full-time and regular part-time cashiers, produce, dairy, grocery, deli and frozen food employees, excluding all butchers, office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act. Respondent further stipulated that a majority of the bargaining unit employees at that time consisted of former employees of PSK, who had been represented by Local 338.³

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² All subsequent dates are in 2011 unless otherwise indicated.

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³ Respondent stated at the hearing that it admitted the Consolidated Complaint’s allegations, except for the allegations that a demand for recognition and bargaining was made, and that Sam Hassen made certain statements violating Section 8(a)(1) of the Act.

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After the last day of the hearing, Respondent sought to withdraw from or modify these stipulations, such that the stipulations would apply only with respect to the alleged demand for recognition made on April 29, as described below, and not to any demand for recognition made on April 26. I denied Respondent’s request in an Order dated February 10, 2012, and on April 8, 2012 the Board denied Respondent’s Request for Special Permission to Appeal.

C. Evidence regarding the agency status of Mike Hassen

5 General Counsel contends that Mike Hassen is an agent of Respondent within the meaning of Section 2(13) of the Act. At the hearing, Respondent declined to stipulate that Mike Hassen was its agent.

10 Mike Hassen, Sam Hassen’s brother, owns a Key Food store located at 114th Street and Lefferts Boulevard in Brooklyn (hereinafter the “Foot Hills store”). Sam Hassen manages the Foot Hills store in addition to the store at 135-46 Lefferts Boulevard. Sam Hassen testified the he operates the 135-46 Lefferts Boulevard store using an office in the basement of the Foot Hills store. This office is adjacent to an office used by Mike Hassen, and the two offices share a fax machine and e-mail address. As part of the Purchase Agreement through which
15 Respondent assumed the business at the 135-46 Lefferts Boulevard location, Mike Hassen agreed to endorse a promissory note and execute a guarantee in connection with the purchase, both individually and on behalf of the entities 700 Foothill Food Co., LLC and Seven & One Foods, LLC. The Purchase Agreement also provides for notices to be sent to Respondent at the Foot Hills store.

20 Former employee Nadira Mangal testified that Mike Hassen was directly involved with the hiring of employees at the 135-46 Lefferts Boulevard store when Respondent purchased the business. Mangal began working at the Foodtown at 135-46 Lefferts Boulevard in 2001 as a cashier. Mangal testified that she learned that the store had been sold from the store manager Dave in February. Dave told Mangal that the new owner was Key Food, and that the store
25 would change ownership in a short time. On a Saturday in April, at about 11:30 a.m., Mangal noticed Mike Hassen in the store, and asked Dave whether she could speak with Hassen, because she was unsure as to whether her employment could continue with the new business. Mangal and another cashier and bookkeeper named Inja then met with Mike Hassen in the storage room.

30 Mangal testified that she told Mike Hassen that she would like to stay on with the new company, and asked whether she had a job with him. According to Mangal, Hassen said yes, and Mangal asked him whether she could continue to work the same hours, with perhaps some additional hours as well. Hassen told Mangal he would give her the same hours. Mangal asked
35 Hassen for the same pay rate, and Hassen agreed to that as well. Hassen then said that the company did not have insurance coverage for the employees. Hassen also said, “Let me tell you up front, we don’t have a union.” Mangal assented, and asked whether she would still receive two weeks’ vacation per year. Hassen said that he would only provide one week’s vacation, and that after Mangal worked with him for a year she would receive two weeks’
40 vacation time. Mangal thanked Hassen for giving her the opportunity to work with the company, and the meeting ended.

45 Mangal testified that both she and Inja continued working at the 135-46 Lefferts Boulevard store after it was sold and became a Key Food. According to Mangal, she was not required to complete a new employment application, only a new W-2 form. Her schedule remained the same, and her uniform changed. Mangal testified that after the store was sold she and the other cashiers attended about 2 ½ hours of training at the Foot Hills store in order to learn to operate the new cash registers.

50 Mike Hassen appeared and testified at the hearing, but did not address the hiring of employees for the 135-46 Lefferts Boulevard store or any conversation with Mangal. Sam

Hassen testified that he hired the employees for the 135-46 Lefferts Boulevard store, but did not provide any details.

5 Documents in connection with the representation petition, discussed below, and the investigation of the unfair labor practice charges against Respondent were sent by Region 29 to Mike Hassen at the 135-46 Lefferts Boulevard address. These documents included the docketed petition for an election in Case No. 29-RC-12070, and letters dismissing and/or approving requests to withdraw the charges in Case Nos. 29-CA-30861, 29-CA-30881, 29-CA-62405, and 29-CA-64335. Respondent's counsel, Randy McCarthy, Esq., also provided a carbon copy of a letter to the Region regarding relief pursuant to Section 10(j) of the Act to Mike Hassen, and referred to Mike Hassen as one of his "clients" in this matter when requesting an adjournment of the hearing. No effort was made prior to the hearing to clarify that Mike Hassen was not a principal or did not otherwise hold a position of authority with Respondent.

15 D. Evidence Regarding the Union's Demand for Recognition

20 Mike Caffey, Local 338's Field Director, and Jeff Laub, a representative for the Union, testified regarding visits to the 135-46 Lefferts Boulevard store in April. Laub testified that some time late in that month, supervisor Ed Hunt of PSK informed him that the 135-46 Lefferts Boulevard store was going to be sold to a Mr. Mike Hassen. Hunt also told Caffey which of the employees would be moving to other PSK stores, and which would be remaining at the 135-46 Lefferts Boulevard store after the purchase. Laub testified that he knew of Mike Hassen, because Local 338 had previously had a collective bargaining agreement covering the employees at the Foot Hill store.

25 Laub testified that on April 26, he went to visit the employees at the 135-46 Lefferts Boulevard store – at that point still Foodtown – to see whether the employees wished to transfer to another PSK store or remain at the 135-46 Lefferts Boulevard location. Laub also went to the Foot Hills store that day, to visit the new owners of the 135-46 Lefferts Boulevard store.

30 Laub testified that when he arrived at the Foot Hills store at approximately 2 p.m., he identified himself as a Union representative to one of the employees, and stated that he wanted to speak with Mike Hassen. The employee called Mike Hassen, and told Laub that he could proceed to Mike Hassen's office in the basement. Hassen was on the phone, and when he finished his call Laub introduced himself again and gave Hassen his card. Laub testified that he told Hassen that he had come to see Hassen because Hassen was buying the 135-46 Lefferts Boulevard Foodtown, and he wanted to set up contract negotiations. According to Laub, Hassen responded that "there will never be a union there," because the company "can't afford a union." Laub told Hassen that the Union had represented the employees at the 135-46 Lefferts Boulevard location for a long period of time, and could not "just walk away." Laub stated that the Union and the company could negotiate a contract that works for everyone involved. Hassen responded that he would not be available that week, because he would be busy with the bank and the sale. Laub gave Hassen his card and cell phone number, and asked Hassen to contact him or Caffey. Laub testified that during this conversation Hassen never stated that he lacked authority to speak on behalf of Respondent.

45 Laub testified that after leaving the Foot Hills store, he called Caffey and reported the conversation to him. Laub also made a note regarding his April 26 discussion with Hassen in his electronic calendar.

Mike Hassen testified that he had never seen Laub before the hearing in this case, and never had a discussion with Laub regarding a collective bargaining agreement covering the employees at the 135-46 Lefferts Boulevard store.

5 Caffey and Laub also testified regarding a visit to the 135-46 Lefferts Boulevard store on April 29 at approximately 10 a.m. At this point, the store was being prepared for its re-opening as a Key Food. Various vendors were replacing signs and cash register equipment, and the store was being restocked. Caffey and Laub entered the store, and Caffey asked Dave, the store manager, whether Mike Hassen was there. Dave said that Mike Hassen was not at the store, but Sam Hassen was there, so Laub asked to see Sam. Caffey and Laub waited, and after some time Sam Hassen approached them.

15 Caffey testified that Laub introduced him to Sam Hassen, and the conversation began with small talk regarding competitive retail businesses and vendors. Caffey and Sam Hassen then began discussing the employees, and Caffey told Hassen that the Union was demanding recognition, because the majority of the store's employees had been part of the bargaining unit when PSK owned the business. According to Caffey, Hassen claimed that there were only twelve employees at the store, and Caffey disputed that figure. Caffey then said that the parties needed to sit down and negotiate a specific contract. Hassen said that the company could not afford the Foodtown contract, and Caffey stated that the parties could negotiate a new contract acceptable to everyone. Sam Hassen then said that he needed to speak to Mike Hassen, and Caffey said that they could do so immediately. Sam replied that Mike Hassen wasn't there. Caffey responded that the Union wanted to speak to Mike Hassen sooner rather than later, because they were receiving phone calls from employees who wanted to be working under a union contract. Caffey gave Sam Hassen his card and cell phone number, and asked Sam to have Mike call him as soon as possible.

25 Laub was present for portions of this conversation. Laub testified that he heard Caffey tell Sam Hassen that Local 338 had always represented the employees, and that the parties needed to negotiate a contract. Laub testified that he heard Sam Hassen respond that he needed to speak to his brother.

30 Sam Hassen testified that on April 29 he initially encountered Local 338 representative Nelson Resto, who told him that his boss wanted to speak with him. According to Hassen, Caffey and Laub then approached him. Hassen testified that he was familiar with Laub, who introduced him to Caffey. Caffey then told Sam Hassen that he wanted to speak with Mike Hassen, and Sam said that Mike was not at the store. Caffey asked Sam if he knew where Mike was, and Sam responded that he did not. Caffey also asked Sam whether Mike was at the Foot Hills store, and Sam replied that he was not. Caffey asked Sam to call Mike, and Sam attempted to do so but could not reach him. When Sam reported to Caffey and Laub that he could not reach Mike, Laub wrote his number on a business card, and gave the card to Sam. Laub asked Sam to have Mike call him, and Laub and Caffey then left. Sam Hassen testified that during this conversation Caffey and Laub did not claim they represented a majority of the employees or state that they were interested in negotiating a collective bargaining agreement. He also did not ask Caffey and Laub why they wanted to speak with Mike Hassen.

45 Caffey testified that approximately two weeks later he visited the 135-46 Lefferts Boulevard store, and told the store manager, Dave, that he wanted to speak to Sam or Mike Hassen. Dave said that Sam and Mike were not there, and after waiting for some period of time Caffey left. Caffey testified that he also directed his organizing staff to visit the store and ask Mike Hassen to contact him.

It is undisputed that Sam and Mike Hassen never contacted the Union regarding recognition or the negotiation of a contract after April 29. Sam Hassen testified that he never informed Mike Hassen that Laub had asked him to call.

5 E. The Representation Petition and Other Union Activities

On June 14, the Union filed a petition for a representation election in Case No. 29-RC-12070 in a bargaining unit of all full-time and regular part-time cashiers, produce, dairy, grocery, deli and frozen food employees, excluding butchers, office clerical employees, guards, and supervisors as defined in the Act. The petition does not indicate that any demand for recognition was made on Respondent.⁴ A Stipulated Election Agreement was entered into on June 22, and an Excelsior list was served on the parties on June 29. The election was scheduled to take place on July 26.

15 In early May, the Union began picketing and distributing leaflets outside of the 135-46 Lefferts Boulevard store. Initially, the leaflets stated as follows:

PLEASE DO NOT PATRONIZE
KEY FOOD
 THIS IS A NON-UNION STORE!

The previous store at this location,
PSK Foodtown, had a contract with
 Local 338 RWDSU/UFCW but
 The current supermarket, *KEY FOOD*, does not
 Employ members of or have a contract with
 Local 338 RWDSU/UFCW.

Please shop at these nearby UNION stores instead:

30 In September, the Union began distributing leaflets which stated as follows:

PLEASE DO NOT PATRONIZE
KEY FOOD

WE ARE PROTESTING THIS STORE'S
 VIOLATION OF FEDERAL LABOR LAW

KEY FOOD IS ENGAGING IN AN
 UNFAIR LABOR PRACTICE BY REFUSING
 TO RECOGNIZE AND BARGAIN WITH
 LOCAL 338, AND BY UNLAWFULLY
 HARASSING AND TERMINATING
 EMPLOYEES WHO EXERCISE THEIR U.S.
 LABOR RIGHTS

50 ⁴ Caffey testified that the petition was prepared by Union organizer Nelson Resto, and that he had not told Resto about the recognition demand prior to the petition's being filed. It is apparently the Union's practice in a typical organizing situation to forego demanding recognition until after the filing of a petition and Union authorization cards.

Please shop at these nearby UNION stores instead:

F. Evidence Regarding Statements Allegedly Violating Section 8(a)(1) of the Act

5 Mangal testified that on June 17, while she was working at the cash register, the
bookkeeper told her that Sam Hassen wanted to see her in the office. When Mangal went to
the office, Hassen told her that he wanted to speak to her about insurance, and said that the
company already had a health insurance plan in place. Mangal said that she had insurance
10 through the Samera Group, and Hassen replied that he had better insurance for the employees
through Neighborhood. Then, according to Mangal, after some “kidding around,” Hassen said
he wanted to ask her something. Hassen asked her how many union cards the other
employees had given her to fill out. Mangal responded that she did not know what Hassen was
15 talking about, and Hassen said “I know you’re helping the guys to fill[] out cards to get the union
back in the store.” Mangal said that she was not doing anything wrong, just working with the
company. Hassen responded that he had “an insider in the union,” who had given the company
a list of the names of employees who had already filled out the cards. Mangal responded that
her name was not on a card or on the list. Hassen said that if he sent Mangal outside to ask the
20 union to find her a job, the union would turn its back on her. Mangal said that she already had a
job with Respondent. Hassen then said that at the previous store there was a union, and that
when he had asked the workers whether they wanted a big check or they wanted the union to
take their \$35, the workers had preferred a big paycheck. Hassen then told Mangal he could
give her more hours immediately; all she had to do was go outside and tell the union to go
25 away, and he could give her a big paycheck. Mangal testified that she and Hassen resumed
joking around, with Hassen asking her whether she had a boyfriend, and that when she left the
office she was laughing.

Sam Hassen testified that he did not speak with Mangal on June 17. He testified that he
had a conversation with Mangal regarding insurance when she was hired on May 1. At that
time, Mangal asked whether Respondent had insurance, and Hassen responded that the
30 company had either Neighborhood or Health Plus. Hassen testified that he never spoke to
Mangal regarding the union.

Mangal further testified that on June 19 she was called off of her register by Sam
Hassen, who said that he wanted to talk to her about her schedule. Hassen said that the
35 cashiers and bookkeeper had seen Mangal writing down schedules. Mangal stated that she
was writing down her own schedule. Hassen asked Mangal whether she had the schedule in
her possession at the moment, and Mangal said that it was at home. Hassen then directed her
to return to her register. Mangal testified that although the employees’ schedules had
previously been posted on the wall by the time clock, after this conversation they were posted
40 inside the office door.

Sam Hassen testified that on June 19 he approached Mangal after one of the cashiers
told him that Mangal was writing down all of the employees’ schedules. Hassen testified that he
asked Mangal whether she was writing the schedule down, and she said no. Hassen told
45 Mangal that she should only write down her own schedule, because other employees didn’t like
it when she recorded their schedules as well.

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III. Analysis and Conclusions

A. Respondent Violated Sections 8(a)(5) and (1) by Refusing to Recognize and Bargain with the Union

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The evidence overall establishes that Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, despite its obligations as a successor employer under *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27 (1987). The record establishes that Respondent, as a successor to PSK, was required to recognize and bargain with the Union regarding the terms and conditions of employment for the bargaining unit employees as of early May 2011. At that point, Respondent had hired a substantial and representative complement of employees in an appropriate bargaining unit, the majority of which were former employees of PSK. The evidence further demonstrates that the Union made a valid demand that Respondent recognize it and engage in bargaining, and that Respondent failed to do so, in violation of Sections 8(a)(1) and (5) of the Act.

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1. Substantial Continuity and Majority Status

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As a general matter, an employer “succeeds to the collective-bargaining obligation of a predecessor” where there is “substantial continuity” between the business enterprises, and where the majority of a “substantial and representative complement” of the successor entity’s employees in an appropriate bargaining unit are former employees of the predecessor. *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 41-43 (1987), quoting *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In order to determine whether substantial continuity of the business exists, the Board considers a variety of factors, including whether the business of both employers is the same, whether the employees of the alleged successor and predecessor perform the same jobs in the same working conditions with the same supervision, and whether the new entity has the same production processes, products, and body of customers as did its predecessor. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 43; see also *Grane Healthcare Co.*, 357 NLRB No. 123 at p. 6 (2011), *reconsideration denied*, 2012 WL 313699 (February 2, 2012).

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The substantial continuity component of the analysis is satisfied here. Respondent admitted in its Answer and in its stipulations at the hearing that it continues to be engaged in the operation of a retail supermarket, at the same location and operating in a basically unchanged form. As a result, the record establishes that there is substantial continuity between Respondent and its predecessor, PSK. Respondent is therefore a successor to PSK under the relevant case law.

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The Board evaluates the second criterion – whether the successor’s workforce consists of a majority of the predecessor’s employees in an appropriate unit – based upon the successor’s staffing as it assumes the business’s operations. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 46. Where the successor gradually initiates its operations and amasses the desired staff, the Board considers majority as of the time that the successor employs a “substantial and representative complement” of employees. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 40; *Grane Healthcare Co.*, 357 NLRB No. 123 at 6. In such situations, the Board has found that a substantial and representative complement exists where thirty percent of the total employee complement is employed in fifty percent of the job classifications. *Paramus Ford*, 351 NLRB 1019, 1026-1027 (2007); *Shares, Inc.*, 343 NLRB 455, n. 2 (2004), *enfd*, 433 F.3d 939 (7th Cir. 2006).

Respondent stipulated at the hearing that as of early May 2011, at least fifty percent of the job classifications at the 135-46 Lefferts Boulevard store were filled, and that the bargaining unit consisted of at least thirty percent of the ultimate complement of employees. Respondent further stipulated that the majority of the bargaining unit employees employed at that time in an appropriate unit⁵ were former employees of PSK, covered under the collective bargaining agreement between PSK and Local 338. As a result, the record establishes that Local 338 attained majority status at the 135-46 Lefferts Boulevard store in early May 2011.

2. The Union's Demand for Recognition and Bargaining

It is well-settled that a valid demand for recognition and bargaining “need not be made in any particular form...so long as the request clearly indicates a desire to negotiate and bargain” on behalf of the bargaining unit employees regarding terms and conditions of employment. *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2007), *quoting Marysville Travelodge*, 233 NLRB 527, 532 (1977); *MSK Corp.*, 341 NLRB 43, 45 (2004). Any oral or written statement constituting a valid demand for recognition may trigger the bargaining obligation, and there are no “magic words” necessary to create a valid demand. *See Paramus Ford*, 351 NLRB at 1028 (union’s assertion that it represented employees, together with request for information regarding the status of employees’ employment applications and successor’s reasons for declining to hire them, constituted a valid bargaining demand); *Cadillac Asphalt Paving Co.*, 349 NLRB at 10 (union president demanded bargaining by complaining during phone conversation that successor was discriminating against union, requesting that successor continue to pay union benefits, and offering to provide a copy of a the new collective bargaining agreement with employer association); *MSK Corp.*, 341 NLRB at 45 (union president demanded bargaining during meeting with predecessor employees regarding business transition, by telling company official that the union represented predecessor’s employees, and giving official a copy of the predecessor’s collective bargaining agreement, directing official’s attention to the successor clause). Contrary to Respondent’s contentions, there is no requirement that a union confirm an oral demand for recognition in writing, make a written record of an oral demand, or suggest specific dates for negotiations.

Given this standard, the statements of Laub and Caffey would clearly establish that the Union demanded recognition and bargaining on April 26 and 29. Laub testified that on April 26 he told Mike Hassen that he wanted to arrange contract negotiations, that the Union had represented the employees at the 135-46 Lefferts Boulevard store for a long time and could not “just walk away,” and that the Union and the company could negotiate a contract that satisfied the concerns of all parties involved. Caffey and Laub testified that on April 29 Caffey told Sam Hassen that the Union was demanding recognition because the majority of the 135-46 Lefferts Boulevard store’s employees had been part of the PSK bargaining unit, and that the parties needed to negotiate a specific contract that worked for everyone. Such statements would be clear demands for recognition and bargaining.

Respondent counters that the April 26 conversation between Laub and Mike Hassen did not occur, and that in any event Mike Hassen was not an agent of Respondent. With respect to the April 29 conversation, Respondent argues that, as Sam Hassen testified, Caffey and Laub did not in fact demand recognition or bargaining, but only asked to speak to Mike Hassen, and

⁵ The bargaining unit at that time consisted of all full-time and regular part-time cashiers, produce, dairy, grocery, deli, and frozen food employees, excluding all butchers, office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

left the store when Sam Hassen was unable to get in touch with him. These arguments are not ultimately substantiated by the record.

5 Overall, I find that the testimony of Caffey, Laub and Mangal regarding the critical events was more credible and probative than that of Sam and Mike Hassen. Caffey, Laub, and Mangal provided specific, detailed descriptions of the material events, which were generally consistent on direct and cross examination. By contrast, Mike Hassen’s testimony consisted of a general denial that he had ever seen Laub prior to the hearing, and Sam Hassen’s testimony was often vague and conclusory, and at other times evasive or implausible. *See, e.g., Precoat Metals*, 10 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). I have therefore generally credited Caffey, Laub and Mangal in connection with the events which were the subject of their testimony.

15 With respect to the conversation between Laub and Mike Hassen on April 26, I find that Laub’s specific testimony, confirmed by his recording of the incident in his daily calendar,⁶ to be more probative and reliable than Hassen’s assertion that he had never seen Laub prior to the hearing. Other evidence in the record also tends to corroborate Laub’s testimony, as opposed to Mike Hassen’s. I note for example that Sam Hassen testified that he was familiar with Laub 20 from Laub’s visits to the Foot Hills store (Tr. 236-237, 240). Given that Mike Hassen owns that store and has always been Sam Hassen’s “boss” there, and that both Hassens worked out of adjacent offices in its basement, I find it less than plausible that Mike Hassen had never seen Laub prior to the hearing in this matter. In addition, documentary evidence establishes that as part of the Purchase Agreement for the 135-46 Lefferts Boulevard business, Mike Hassen 25 agreed to endorse a promissory note and execute a guarantee, both individually and on behalf of two corporate entities. The Purchase Agreement also provides for notices to be sent to Respondent at the Foot Hills store, which Mike Hassen owned and operated, and where he maintained his office. This evidence corroborates Laub’s testimony that when he spoke to Mike Hassen on April 26, Hassen told him that he would not be available for negotiations later that 30 week, because he would be busy with finalizing the purchase and interacting with the bank, as was necessary in order to complete the transaction.

35 For all of the foregoing reasons, the weight of the probative evidence establishes that on April 26, at the Foot Hills store, Laub informed Mike Hassen that the Union was seeking to set up contract negotiations, and, after Hassen responded that there “will never be a union” at the Foodtown being purchased, told Hassen that the union had represented the Foodtown employees for a long period of time and could not “just walk away.” After Laub stated that the parties could negotiate a contract that works for everyone, Hassen said that he would not be available that week because he was busy finalizing the purchase, and Laub gave Hassen his 40 contact information. These statements on Laub’s part constitute an effective demand for recognition and bargaining. *Cadillac Asphalt Paving Co.*, 349 NLRB at 10; *MSK Corp.*, 341 NLRB at 45.

45 The record also establishes that Mike Hassen was an agent of Respondent within the meaning of Section 2(13) of the Act. It is well-settled that the Board applies common law agency principles to determine whether an employee is acting with apparent authority on behalf of the employer when making a particular statement. *Pan Oston Co.*, 336 NLRB 305, 305-307 (2001); *see also Facchina Construction Co.*, 343 NLRB 886, 886-887 (2004). The Board

50 ⁶ The evidence establishes that Laub kept this electronic calendar in the ordinary course of business to record his schedule and appointments.

evaluates whether, under the particular circumstances involved, “employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management.” *Facchina Construction Co.*, 343 NLRB at 887. The Board also considers family relationships relevant when determining whether the conduct of a particular individual may be imputed to the employer. See, e.g., *Scotts IGA Foodliner*, 223 NLRB 394, 400-401 (1976), *enf’d*, 549 F.2d 805 (7th Cir. 1977) (son of Respondent’s owner not employed by Respondent nevertheless Respondent’s agent, where he worked in Respondent’s business regularly, enlisting employees to assist him, and participated in unlawful conduct with an admitted supervisor); *South Shore Pontiac Co.*, 203 NLRB 928, 932-933 (1973) (salesperson and son of Respondent’s owner an agent given Respondent’s funding of son’s managerial training, son’s participation in Board procedures on Respondent’s behalf, and Regional Director’s Decision and Direction of Election excluding son from the bargaining unit based upon the family relationship).

There is sufficient evidence in the record to establish that Mike Hassen acted as an agent of Respondent under Section 2(13). The evidence establishes that Mike Hassen played a direct role in hiring employees to staff the Key Food store at 135-46 Lefferts Boulevard. Mangal credibly testified that Mike Hassen hired her and bookkeeper Inja, former Foodtown employees, to continue working at the 135-46 Lefferts Boulevard store once it became a Key Food, and negotiated with her regarding her hours, pay rate, health insurance, and vacation time with the new company. Although Mike Hassen testified for Respondent at the hearing, he was not questioned regarding this conversation with Mangal, and as such Mangal’s testimony is unrebutted on this point.⁷ Mike Hassen’s role in hiring Mangal and Inja establishes that he acted as Respondent’s agent within the meaning of Section 2(13). See *Grimmway Farms*, 314 NLRB 73, 73-74, n. 6, 88, n. 25 (1994), *enf’d in relevant part*, 85 F.3d 637 (9th Cir. 1996) (providing information to applicants during hiring process sufficient to establish agency status); *Enterprise Aggregates Corp.*, 271 NLRB 978, 979-980, n. 2 (1984) (employee responsible for hiring “at least” an agent under Section 2(13)).

The evidence also establishes that Mike Hassen was directly involved, and assumed a financial role, in the purchase of the assets comprising the retail grocery business at 135-46 Lefferts Boulevard by his father and brother. As part of the transaction, Mike Hassen agreed to endorse a promissory note and execute a guarantee, both individually and on behalf of two entities which own and operate the Foot Hills store. In addition, as discussed above, under the Purchase Agreement notices were to be sent to Respondent at the Foot Hills store, which Mike Hassen owned and operated, and where he maintained his office. Mike Hassen’s financial involvement in the purchase of Respondent’s business, and extant the family relationships, militate in favor of a finding that Mike Hassen acted as Respondent’s agent. *Scotts IGA Foodliner*, 223 NLRB at 400-401.

Furthermore, the evidence establishes that Respondent, its attorneys, and Sam Hassen, treated Mike Hassen as a principal of Respondent, and that Mike Hassen considered himself as such. When Laub approached him on April 26 in order to arrange contract negotiations, Mike Hassen did not direct Laub to speak to Sam Hassen, or deny in any way that he had the authority to speak for Respondent on the matter. Instead, he told Laub that, “there will never be a union there,” because Respondent “can’t afford a union.” Similarly, when Laub and Caffey visited the 135-46 Lefferts Boulevard store on April 29 to demand bargaining, Sam Hassen never told them that he, as opposed to Mike Hassen, was responsible for the store’s operations.

⁷ Sam Hassen’s contention that he in fact hired Mangal (Tr. 233-234), devoid of any meaningful elaboration, is not sufficient to contradict her account of her conversation with Mike Hassen, as Respondent argues.

5 Sam Hassen said instead that he needed to speak to Mike Hassen regarding the issue. Finally, when Respondent's counsel presented its written position to Region 29 regarding relief pursuant to Section 10(j) of the Act, he sent a copy to Mike Hassen. Respondent's counsel also referred to Mike Hassen as one of his "clients" in this matter when requesting that the hearing be adjourned. In response, Respondent's attorney contends in effect that he was misled by Counsel for the Acting General Counsel as to the identity of his own client's principals, a claim not worthy of serious consideration.

10 For all of the foregoing reasons, the evidence establishes that Mike Hassen was an agent of Respondent within the meaning of Section 2(13) of the Act at the time that Laub made his demand for recognition and bargaining.

15 Finally, Respondent's argument that the April 26 recognition demand was ineffective because it had not yet begun to operate the 135-46 Lefferts Boulevard store is unavailing. It is well-settled that demands for recognition made prior to the hiring of a substantial and representative employee complement, and even prior to the consummation of the business transaction creating the successor entity, are deemed to be continuing until the bargaining obligation matures. See, e.g., *MSK Corp.*, 341 NLRB at 44 (demand for recognition and hiring of substantial and representative complement "need not occur in any particular order"); *Paramus Ford*, 351 NLRB at 1028-1029 (valid recognition demand sent prior to sale of business triggered bargaining obligation upon hiring of substantial and representative complement of employees by the new entity). As a result, the Union's April 26 demand for recognition and bargaining was continuing, and effective when Respondent had hired a substantial and representative complement of employees in early May.

25 With respect to the April 29 recognition demand, I credit the consistent testimony of Caffey and Laub regarding their interaction with Sam Hassen at the 135-46 Lefferts Boulevard store. Caffey and Laub provided specific detail regarding their visit to the store that day, and both testified that Caffey told Hassen that the Union had always represented the employees, and that the parties had to sit down and negotiate a contract. Caffey and Laub also both testified that Sam Hassen responded that he needed to speak with Mike Hassen. Sam Hassen also admitted that Laub and Caffey gave him contact information, and asked him to have Mike Hassen to get in touch with them. The record therefore establishes that the Union made an effective demand for recognition during this conversation. *Cadillac Asphalt Paving Co.*, 349 NLRB No. 5 at p. 5; *MSK Corp.*, 341 NLRB at 45.

40 I do not credit Sam Hassen's contention that Caffey and Laub did not demand recognition or bargaining during this discussion, and only asked that Sam call Mike Hassen. Sam Hassen's testimony regarding the involvement of Mike Hassen in the 135-46 Lefferts Boulevard store was by turns vague, evasive, and flatly contradicted by other evidence in the record. Sam Hassen's contention that Mike Hassen was not "involved at all in the purchase" of the business (Tr. 283) was directly contradicted by the Purchase Agreement itself, which requires that Mike Hassen endorse a promissory note and execute a guarantee in connection with the transaction. When asked at the hearing whether he ever spoke to Mike Hassen regarding Caffey and Laub's April 29 visit, Sam Hassen initially denied doing so, then stated that he had only done so the week before the hearing, then contended that he told Mike Hassen about Caffey and Laub's visit in November or December (Tr. 246-247). When asked what they discussed, Sam Hassen testified that, "I spoke to Mike or whatever about – what did we speak about? I spoke to him about the contents of this or whatever" (Tr. 247). Asked again, Sam Hassen continued with, "Told him that I got a letter saying that these guys came to the store or whatever and this and that" (Tr. 247-248). Changing his testimony again to deny ever having told Mike Hassen about Caffey and Laub's visit, Sam Hassen stated, "No, I said that Jack and

Jeff came to the store or whatever. It was in – I think it was in an affidavit or whatever. I was talking to him about it” (Tr. 248). Sam Hassen’s propensity for vague and evasive testimony regarding the critical events in this matter, and the involvement of Mike Hassen in Respondent’s business operations, indicates that his testimony regarding these central issues in the case is not reliable. I therefore credit Caffey and Laub’s more detailed and consistent testimony regarding their visit to the 135-46 Lefferts Avenue store on April 29, and find that the Union made a valid demand for recognition and bargaining on that occasion.

3. The Union’s Conduct Following its Recognition Demands

Respondent argues that, for several reasons, the Union’s activities after making the recognition demands described above were fatally inconsistent with the demands’ ever having been made. Some of its contentions are legally void, and the remainder are insufficient to establish, given the evidence overall, that the Union did not in fact make a valid demand for recognition and bargaining. Nor does the existing case law support Respondent’s claim that the Regional Director, Region 29, erred by permitting the Union to withdraw its petition for a representation election while pursuing a charge alleging an unlawful refusal to recognize and bargain.

Respondent argues, for example, that the Union never reiterated its demands in writing, and initially picketed and distributed informational leaflets which did not assert that Respondent was unlawfully refusing to recognize it. However, Laub and Caffey’s oral demands for recognition and bargaining on April 26 and 29 are legally sufficient to trigger a successor’s obligations; contrary to Respondent’s contention there is no requirement that a demand for recognition and bargaining be reiterated in writing, or that some sort of written “follow-up” to an oral demand exist. *See, e.g., Cadillac Asphalt Paving Co.*, 349 NLRB at 10. The first of the leaflets referred to by Respondent, which the Union began distributing days after demanding recognition, specifically informed the public that Respondent had no collective bargaining agreement with the Union.⁸ The Union was not required to include statements that Respondent was refusing to negotiate or that it believed that Respondent’s failure to recognize and bargain with it was unlawful.

Respondent also claims that the Union’s having filed a petition for a representation election without completing the portions of that form stating that a recognition and bargaining demand had been made indicates that it never in fact demanded recognition and bargaining. However, I credit Caffey’s testimony that the petition was prepared by a different Union representative, who followed the Union’s typical practice of not completing the portions of the petition form regarding a demand for recognition and bargaining. In addition, giving the recognition demand portion of the petition form the legal import that Respondent suggests is at odds with settled Board law permitting the simultaneous pursuit of a representation election and an unfair labor practice charge alleging an unlawful refusal to bargain, as will be discussed below.

Finally, Respondent asserts that the Union’s filing a petition for a representation election and entering into a Stipulated Election Agreement was sufficiently inconsistent with having made a recognition demand that this conduct should effectively nullify any evidence of a valid demand for recognition. This contention, however, is at odds with well-settled law. Since its decision in *Bernel Foam Products Co.*, 146 NLRB 1277, 1280 (1964), the Board has held that a

⁸ Leaflets the Union began distributing in September explicitly contended that Respondent had unlawfully refused to recognize it and bargain.

Union does not waive its right to file a charge alleging an unlawful refusal to recognize and bargain by filing a petition for a representation election, or even by proceeding to an election. *See also Dauman Pallet, Inc.*, 314 NLRB 185, 207-208 (1994) (rejecting employer’s contention that union waived any right to obtain a remedial bargaining order by proceeding to an election despite alleged employer misconduct, citing *Bernel Foam Products*); *Avecor, Inc.*, 296 NLRB 727, 749-750 (1989), *enf. denied on other grounds*, 931 F.2d 924 (D.C. Cir. 1991) (same); *Colson Corp. v. NLRB*, 347 F.2d 128, 138-139 (8th Cir. 1965) (Board within its statutory authority in rejecting employer’s contention that union waived any right to prosecute refusal to bargain allegations by proceeding to an election). As a result, there is no legal support for Respondent’s contention that the Union somehow waived its right to proceed with a refusal to bargain charge by filing a petition for a representation election.⁹ Under *Bernel Foam Products Co.*, the Union was permitted to pursue an unfair labor practice charge alleging that Respondent unlawfully refused to recognize it and bargain, a petition for a representation election, or both simultaneously. Thus, the Regional Director did not err in approving the Union’s request to withdraw that petition when it elected to proceed with the charge alone, as Respondent claims.

For all of the foregoing reasons, I find that Respondent, as a successor to PSK, was legally obligated to recognize and bargain with the Union as the exclusive collective bargaining representative of the employees at the 135-46 Lefferts Boulevard store, as of early May 2011. By failing and refusing to do so, Respondent violated Sections 8(a)(1) and (5) of the Act.

B. Respondent Violated Section 8(a)(1) of the Act by Interrogating Employees and Creating the Impression of Surveillance of the Employees’ Union Activities

The evidence establishes that Respondent, by Sam Hassen, coercively interrogated Nadira Mangal and created the impression that employees’ Union activities were under surveillance during their conversation on June 17. Mangal testified that on that day Hassen called her into the office while she was working on the register. After some discussion regarding health insurance, Hassen asked Mangal how many union cards the other employees had given her, and told her, “I know you’re helping the guys to fill[] out cards to get the union back in the store.” Hassen went on to state that he had “an insider in the union” who had given the company a list of the names of employees who had filled out cards.

I credit Mangal’s testimony in this regard over that of Sam Hassen, who claimed the entire conversation never took place. Mangal’s testimony regarding the conversation was detailed and comprehensive, while Hassen gave no specific rationale for his purported recollection that he did not speak to Mangal on June 17. In addition, although Sam Hassen claimed that he only discussed insurance with Mangal on May 1, when he hired her, the record establishes, as discussed above, that Mike Hassen in fact hired Mangal in early May and discussed health insurance with her at that time. The evidence also does not bear out Respondent’s contention that Mangal was paid to fabricate her testify for the Union, as she clarified on redirect examination that she was paid for her time while picketing, as opposed to preparing her affidavits. While Respondent’s conduct toward Mangal was the subject of several charges which were ultimately dismissed, overall I find her testimony regarding the June 17 conversation to be more credible than Sam Hassen’s contention that it never occurred.

⁹ Indeed, if Respondent had complied with its legal obligation as a successor to recognize and bargain with the Union, the Union would have been entitled to a reasonable period of bargaining prior to the filing of a petition for an election based upon an alleged loss of majority support. *See UGL-UNICCO Service Co.*, 357 NLRB No. 76, at p. 9 (2011).

Based upon Mangal's testimony, I find that Sam Hassen coercively interrogated her on June 17, in violation of Section 8(a)(1) of the Act. The Board determines whether questioning regarding union activity is unlawfully coercive by considering any background of employer hostility, the nature of the information, the status of the questioner in the employer's hierarchy, the place and method of questioning, and the truthfulness of the employee's answer. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Board also considers whether the employee in question was an open union supporter at the time of the disputed conversation. See, e.g., *Evergreen America Corp.*, 348 NLRB 178, 208 (2006), *enfd*, 531 F.3d 321 (4th Cir. 2008)

Here these factors overall establish that Hassen's questioning of Mangal was impermissibly coercive. The Board has held that questions similar to those posed by Hassen constitute coercive interrogation. See, e.g., *Green Valley Manor*, 353 NLRB 905, 905, n. 1, 910 (2009) (supervisor's statement to employee that "there was a rumor that she was recruiting women for the union" constituted a coercive interrogation); see also *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001), *enfd* 53 Fed.Appx.171, 172 LRRM 3312 (2d Cir. 2002) (company President's statement "I know you are the one that is disbursing union cards out" created the impression of surveillance). Although Mangal testified that at certain points during the conversation she and Hassen joked about personal matters, there is no evidence that they had some sort of ongoing personal friendship, and in fact Mangal was eventually discharged. See *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 1, n. 3, and at p. 17 (2010), *enfd*, 661 F.3d 1139 (D.C. Cir. 2011) (questioning impermissible where no evidence of personal friendship between agent and employees); compare *Smithfield Packing*, 344 NLRB 1, 2 (2004). Nor was Mangal an open supporter of the Union at the time of the conversation. Hassen specifically called Mangal into his office for the conversation; it was not a brief, casual interaction in the work area. *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 18 (questioning coercive where interaction was "neither casual nor accidental"). Respondent's refusal to recognize and bargain with the Union, and the Union's ongoing picketing at the time, evince a contentious, hostile atmosphere. Hassen followed his questioning of Mangal by telling her that an "insider" in the Union had informed him as to which employees had signed authorization cards, a remark which, as will be seen below, unlawfully created the impression of surveillance. See *Evergreen America Corp.*, 348 NLRB at 208 (questioning accompanied by statements evincing hostility toward union activities more likely to be coercive); *Demco New York Corp.*, 337 NLRB 850, 851 (2002). Finally, Mangal was sufficiently uncomfortable with Hassen's questioning to provide untruthful responses, despite his repeated efforts to obtain information from her. As a result, the evidence establishes, and I conclude, that Hassen's questioning of Mangal on June 17 was unlawfully coercive.

The evidence also establishes that during his June 17 conversation with Mangal, Hassen created the impression that employees' Union activities were under surveillance, in violation of Section 8(a)(1). In order to determine whether an employer has created the impression of surveillance, the Board analyzes whether employees would "reasonably believe" from the disputed statement that their union activities were under surveillance by the employer. See, e.g. *U.S. Coachworks, Inc.*, 334 NLRB at 958. Hassen's statement to Mangal that he had an "insider" at the Union who had provided him with a "list" of employees who had signed union cards easily meets this standard. See *La Reina, Inc.*, 279 NLRB 791, 800 (1986), *enfd*, 823 F.2d 1552 (9th Cir. 1987) (supervisor's statement that "he had two employees who attended the [union] meeting and kept him informed" created the impression of surveillance); *Martech MDI*, 331 NLRB 487, n. 4 (2000), *enfd* 6 Fed.Appx.14 (D.C. Cir. 2001) (supervisor's statement that she "heard that there was a list circulating with 80 names" created the impression of surveillance).

5 The evidence does not establish, however, that Respondent created the impression of surveillance when Hassen asked Mangal whether she had written down other employees' schedules on June 19. Hassen admitted that this conversation with Mangal occurred, and testified that he approached her regarding copying the schedule because other employees had complained about it. Regardless, the creation of the impression of surveillance is only unlawful under the Act when it applies to union and protected concerted activities. Here, there is insufficient evidence to establish that Mangal's copying of the work schedules constituted activity on behalf of the Union, or protected concerted activity. As a result, Hassen's discussion with her regarding the issue did not create the impression that any union or protected concerted activity of Mangal's was under surveillance. See *Jurys Boston Hotel*, 356 NLRB No. 114 at p. 1, 12 (2011) (supervisor's comment, "I know everything," devoid of any context, inadequate to establish unlawful creation of the impression of surveillance). I will therefore recommend that this allegation be dismissed.

15 Conclusions of Law

20 1. At all material times, the Respondent, Calhoun Foods, LLC d/b/a Key Food, has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

25 2. At all material times, the Charging Party, Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers, has been a labor organization within the meaning of Section 2(5) of the Act.

30 3. At all material times, the following employees have constituted an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time and regular part-time cashiers, produce, dairy, grocery, deli, and frozen food employees, excluding all butchers, office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

35 4. Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Charging Party Union as the exclusive collective bargaining representative of the bargaining unit employees since on or about May 1, 2011.

40 5. On or about June 17, 2011, Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their Union activities.

45 6. On or about June 17, 2011, Respondent violated Section 8(a)(1) of the Act by creating the impression that its employees' Union activities were under surveillance.

7. Respondent has not violated the Act in any other manner.

8. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Remedy

50 Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes. Respondent shall recognize the Union as the exclusive collective bargaining representative of the bargaining unit of employees described above and, upon request of the Union, bargain with

the Union in good faith regarding the employees’ terms and conditions of employment, and, if an understanding is reached, embody that understanding in a signed agreement.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

10 Respondent Calhoun Foods, LLC d/b/a Key Food, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Failing and refusing to recognize and bargain in good faith with Local 338 as the exclusive collective bargaining representative of the bargaining unit employees.

(b) Coercively interrogating employees regarding their Union activities.

20 (c) Creating the impression that employees’ Union activities are under surveillance.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

25 (a) Recognize and, on request of the Union, bargain in good faith with the Union regarding the terms and conditions of employment for the employees in the following appropriate unit, and, if an understanding is reached, embody that understanding in a signed agreement:

30 All full-time and regular part-time cashiers, produce, dairy, grocery, deli, and frozen food employees, excluding all butchers, office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

35 (b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked “Appendix.”¹¹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In
40 addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken

45 ¹⁰ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50 ¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

5 by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2011.

10 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

15 IT IS FURTHER ORDERED that the Consolidated Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

20 Dated: Washington, DC May 8, 2012

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Lauren Esposito
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize and, upon request, bargain with Local 338, RWDSU/UFCW as the exclusive collective bargaining representative of the employees in the following unit:

All full-time and regular part-time cashiers, produce, dairy, grocery, deli, and frozen food employees, excluding all butchers, office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT coercively interrogate you regarding your Union activities.

WE WILL NOT create the impression that your Union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL recognize and, upon request, bargain with Local 338, RSDSU/UFCW as the exclusive collective bargaining representative of the bargaining unit employees described above regarding terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

CALHOUN FOODS, LLC d/b/a KEY FOOD

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346