

20-0731-cv(L), 20-1009-cv(XAP), 20-1028-cv(XAP)

United States Court of Appeals for the Second Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

– v. –

KEY FOOD STORES CO-OPERATIVE, INC., 1525 ALBANY AVE MEAT LLC,
HB FOOD CORP., PARAMOUNT SUPERMARKETS INC., RIVERDALE
GROCERS LLC, SEVEN SEAS UNION SQUARE, LLC, 100 GREAVES LANE
MEAT LLC, JAR 259 FOOD CORP.,

Respondents-Cross-Petitioners.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

**FINAL BRIEF FOR RESPONDENTS-CROSS-PETITIONERS
1525 ALBANY AVE MEAT LLC, HB FOOD CORP.,
PARAMOUNT SUPERMARKETS INC., RIVERDALE
GROCERS LLC, SEVEN SEAS UNION SQUARE, LLC,
100 GREAVES LANE MEAT LLC and JAR 259 FOOD CORP.**

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Corp., Paramount Supermarkets Inc.,
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Square, LLC, 100 Greaves Lane Meat LLC
and Jar 259 Food Corp.*

CORPORATE DISCLOSURE STATEMENT

The Member Stores Albany Avenue, Greaves Lane, HB84, Riverdale, JAR 259, Paramount, and Seven Seas, hereby state, pursuant to FRAP 26.1, that they each do not have a parent corporation, or publicly held corporation, that holds more than 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Respondents/Cross-Petitioners 1525 Albany Avenue Meat LLC ("Albany Avenue"), 100 Greaves Lane Meat Lane LLC ("Greaves Lane"), HB Food Corp. ("HB 84"), Riverdale Groceries, LLC ("Riverdale"), JAR 259 Food Corp. ("JAR"), Paramount Supermarkets ("Paramount"), and Seven Seas Union Square, LLC ("Seven Seas") (collectively the "Member Stores"), hereby Cross-Petition for review of a final Decision and Order of the National Labor Relations Board ("NLRB"), dated October 16, 2019, which affirmed the Decision of Administrative Law Judge Benjamin Green pursuant to 29 U.S.C. § 160(b). Pursuant to 29 U.S.C. § 160(f), this Court has jurisdiction to review final orders of the NLRB and, accordingly, the instant Petition of the NLRB was filed by the NLRB on February 27, 2020, and the Cross-Petition of the Member Stores was filed on March 20, 2020.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

As set forth herein, the main issues presented upon the respective Petition and Cross-Petitions are as follows:

1. Whether there was substantial evidence in the record to find that the Member Stores were not permitted to set initial terms and conditions of employment, particularly in light of a bankruptcy court order to the contrary, per Judge Drain, as well as with regard to an option to "buy out" the employment of individuals formerly employed by The Great Atlantic & Pacific Tea Co., Inc. ("A&P");

2. Whether there was substantial evidence in the record to find that Seven Seas discriminated against various individuals in choosing not to extend them offers of employment, based upon Judge Green's conclusion, unsupported by the record, that Seven Seas solely relied upon the recommendations of Sharon Gowon, a store manager who allegedly had displayed an animus toward the discriminatees while she had been previously employed by A&P;

3. Whether there was substantial evidence in the record to find that motions to dismiss by the Member Stores were properly denied;

4. Whether there was substantial evidence in the record to find that the Member Stores were not permitted to implement a "limited agreement," which the Board specifically found upon which the stores could be opened, and which included a "buy-out" provision;

5. Whether there was substantial evidence in the record to find that HB84 discriminated against Nelson Quiles due to his alleged Section 7 activity;

6. Whether there was substantial evidence in the record to find that Greaves Lane unlawfully terminated Anthony Venditti due to his alleged Section 7 activity;

7. Whether there was substantial evidence in the record to find that Albany Avenue unlawfully terminated Stephen Fiore, and changed his terms and conditions of employment, due to his alleged Section 7 activity; and

8. Whether there was substantial evidence in the record to find that Albany Avenue instituted unlawful employment policies.

STATEMENT OF THE CASE

A. Nature of the Case and Procedural History

In September, 2016 the NLRB issued a Consolidated Complaint against Key Food Stores Co-Operative, Inc. ("Key Food" or the "Co-Op") and, among others, the Member Stores (JA 375),¹ alleging, among other things, violations of the National Labor Relations Act (the "Act") concerning alleged unilateral lay-offs, discriminatory refusals to hire, and a failure to bargain.

Hearings began before the ALJ (Benjamin W. Green) on February 8, 2017, and concluded on April 27, 2017. On February 9, 2018, the ALJ

¹ Citation to the Deferred Joint Appendix is made as "JA"; to the Special Appendix is made as "SPA."

issued his Decision, holding that certain Key Food members, including the Member Stores, violated Sections 8(a)(1) and 8(a)(3) of the Act. *Seven Seas Union Square, LLC and Key Food Stores Co-Operative, Inc., et al.*, 2018 WL 818125 (Feb. 9, 2018) (the "ALJ Decision"). The Member Stores timely appealed the ALJ Decision to the Board, a three-member panel of which issued its Order affirming the ALJ Decision, as modified, on October 16, 2019. *NLRB v. Seven Seas Union Square, LLC, et al.*, 368 N.L.R.B. No. 92 (Oct. 16, 2019). The Board agreed with the ALJ that the Member Stores violated the Act, provided remedies, and directed that they cease and desist from a number of actions, including refusing to bargain with the Union and unilaterally laying off unit employees.

On February 27, 2020, the Board filed in this Court an Application for Enforcement of its Order (the "Application for Enforcement") (Case No. 20-731) seeking to enforce the Board Order against the Member Stores, and the Member Stores thereafter filed a Cross-Petition.

B. The A&P Transaction

In 2015, A&P filed for bankruptcy and announced that it would be selling its stores in an auction process. (JA 9-10; 12; 276). In July 2015, prior to the A&P auction, Key Food entered into an Asset Purchase Agreement with A&P (as amended, the "Stalking Horse APA"), under which Key Food agreed on behalf of certain of its members to buy 16 A&P stores. (JA 757-867). In October 2015, Key Food and A&P entered into an amended Asset Purchase Agreement (as amended, the "Amended APA" and

together with the Stalking Horse APA, the "APAs"), which amended the Stalking Horse APA and covered eight additional stores as to which Key Food was the winning auction bidder. (JA 496-512). Immediately upon closing with A&P on its purchase of twenty-two of the stores covered by the APAs, Key Food transferred ownership of the Member Stores to the prospective owners. (JA 873-882).

C. The Collective Bargaining Process

A&P had collective bargaining agreements ("CBAs") with multiple union locals, including Locals 338, 342, 464(a), and 1500 of the UFCW. (SPA 30). Local 342 largely represented employees in the meat, seafood, and/or deli departments. *Id.* Because the Member Stores were unwilling to assume the CBAs (which they believed were largely responsible for the financial woes that drove A&P into bankruptcy), Key Food and the Member Stores opted to negotiate for modified CBAs and bargaining sessions among Key Food, the Member Stores, and the four union locals began in late July 2015. (JA 14-16; 279).

D. The Members and Key Food Reach Agreement With Locals 338, 464(a), and 1500, But Not With Local 342

In September 2015, the Member Stores reached agreements with all unions except Local 342, which refused to accept the terms that were agreed to by the other locals. (JA 347, lns 4-10; 638-647; 650-663; 664-675). Negotiations with Local 342 continued and the Member Stores reached a collective bargaining agreement with Local 342 on October 21, 2015, but the Union thereafter contended otherwise, and

the ALJ, accepting the Union's position, held that no enforceable agreement was reached. (SPA 73-75).

In accordance with the October 21 negotiating session, the Member Stores offered employment, layoffs, wage reductions, buy-outs and took such other steps they believed were in accordance with the agreed-upon collective bargaining agreement. (SPA 47-50). The Union and the General Counsel then filed the charges described above that culminated in the Order from which the Member Stores have Cross-Petitioned.

SUMMARY OF THE ARGUMENT

As noted above, the underlying proceeding was brought by General Counsel of the NLRB against, among others, the Member Stores, for alleged unfair labor practices, in which it was claimed that the prospective purchasers of the bankrupt A&P Stores were not permitted to set initial terms and conditions of employment in compliance with an order of the U.S. Bankruptcy Court, discriminated against various individuals with respect to hiring decisions in violation of Section 8(a)(3) of the Act, and made certain changes to terms and conditions of employment or failed to hire, in violation of Section 8(a)(5) of the Act. On February 9, 2018, Administrative Law Judge Benjamin W. Green issued a Decision finding a number of alleged violations of the Act. Significantly, that Decision, subsequently affirmed by the NLRB, is replete with findings that, in certain instances, have no support at all in the record and, in the same vein, include various conclusions of law which, even if supported by some factual evidence in the record, are incorrect and contrary to the relevant caselaw.

ARGUMENT

POINT I
STANDARD OF REVIEW

As reviewed in *NLRB v. Starbucks Corp.*, 679 F.3d 70, 77 (2nd Cir. 2012), the standard of review is well established. “Factual findings of the Board will not be disturbed if they are supported by substantial evidence in light of the record as a whole.” *National Labor Relations Board v. Caval Tool Division, Chromalloy Gas Turbine Corporation*, 262 F.3d 184, 188 (2nd Cir. 2001). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (internal quotation marks omitted). Legal conclusions “based upon the Board’s expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference.” *Id.* (internal quotation marks omitted).

However, the substantial evidence inquiry does not “leave factual questions wholly to the NLRB.” *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2nd Cir. 1998) (citation omitted). It requires the Court “to take account of the evidence that undermines the NLRB’s conclusions.” *Id.* The Board “is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). Thus, the Court must “set aside” the Board’s decision if it “cannot conscientiously find that the evidence supporting the decision is substantial, when viewed

in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Bon-R Reprods., Inc. v. NLRB*, 309 F.2d 898, 903 (2nd Cir. 1962) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

This Court will reverse the Board's legal determinations when they are arbitrary and capricious. *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2nd Cir. 2008). The Board must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Long Island Head Start Child Dev. Servs. v. NLRB*, 460 F.3d 254, 257 (2nd Cir. 2006) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). This Court's "'hard look' will also examine whether an agency decision accurately reflects its own caselaw." *Id.*

In short, in the judicial review of NLRB decisions, this Court does not function as a mere "rubberstamp." *Laborers Local 104 v. NLRB*, 945 F.2d 55, 58 (2nd Cir. 1991), citing *NLRB v. Local 584, International Brotherhood of Teamsters*, 535 F.2d 205, 208 (2nd Cir. 1976) (referencing standard of review of NLRB decisions in context of work dispute claims).

POINT II
MEMBER STORES WERE PERMITTED TO SET INITIAL
TERMS AND CONDITIONS OF EMPLOYMENT

A. Members Stores Were Entitled Under *Spruce-Up* to Set Initial Terms and Conditions

In *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), it was established that an employer becomes a successor only upon hiring a substantial and representative complement of the workforce of the predecessor. (JA 873-882). In *Spruce-Up*, *supra* at 195, the Board interpreted *Burns* as follows:

In *Burns*, the Supreme Court enunciated the principle that "a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor" without first bargaining with the employees' bargaining representative. In the same paragraph, however, it recognized an exception to that principle in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit..."

As such, the Member Stores appropriately set the initial terms and conditions of employment for the former employees of A&P when they opened in October and November, 2015, including the buy-out provisions that underlie the complained-of refusals to hire and layoffs.

The Board recently addressed the perfectly clear successor standard in *Nexeo Solutions*, 364 NLRB No. 44 (2016). In order to avoid perfectly clear successorship status, citing *Spruce-Up* and *Canteen Co.*, 317 NLRB 1052, 1053-54 (1995), the *Nexeo* decision summarized that a "new employer must clearly announce its intent to

establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees." In *Nexeo*, the Board majority relied on the Purchase Agreement, *together with* communications to employees without any mention of a change in terms or conditions of employment, to conclude that the buyer was a "perfectly clear" successor.

In *Nexeo*, the Board found that the Purchase Agreement made "clear as a factual matter" that the buyer intended to retain all of the predecessor's employees, with the buyer making at-will offers of employment. *Nexeo*, at 2. The Board in *Nexeo*, however, relied on several terms of the Purchase Agreement which find no similarities herein:

- The Purchase Agreement in *Nexeo* expressly provided that the transaction would not result in the severance of any employees.
- The Purchase Agreement in *Nexeo* specifically included the names of all employees to which offers of employment needed to be extended.
- The Purchase Agreement in *Nexeo* required the buyer to provide each predecessor employee with at least the same level of wages and "substantially comparable" levels of benefits."

In *Nexeo* the Board also noted that *Burns* permits deferral of the duty to bargain because "it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees." *Nexeo*, at 5. In *Spruce-Up*, as the *Nexeo* majority noted, the Board found that even where an employer expresses a willingness to hire its predecessor's employees, it is not a perfectly clear successor. *Nexeo*, at 5. If

employees are presented with an offer of employment with new terms and conditions, it creates “the possibility that many of the employees will reject employment under the new terms, and therefore the union’s majority status will not continue in the new workforce.” *Nexeo*, at 5.

Ridgewell’s, Inc., 334 NLRB 37 (2001), *enf’d*, 38 Fed.Appx. 29 (D.C.Cir. 2002), is significant—in *Ridgewell’s*, during an initial bargaining session with the union the employer stated that it would retain the predecessor’s employees, but on an independent contractor basis. As a result, the *Ridgewell’s* Board found that the employer had “clearly signaled” that the terms and conditions of employment would be different, and that the buyer was not a perfectly clear successor.

B. Federal Bankruptcy Court Mandated Terms of the Sale

The bankruptcy proceedings herein are vital, as the acquisition of the A&P stores pursuant to an Asset Purchase Agreement was subject to Orders of the Honorable Robert D. Drain of the U.S. Bankruptcy Court of the Southern District of New York. Thus, the A&P July 19, 2015 Court-ordered asset purchase agreement (JA 757-867) contained certain terms, including a requirement that the prospective buyer had to either accept the existing A&P labor contracts, or to enter into a Modified Labor Agreement. (JA 823-824).

Notably, that A&P Asset Purchase Agreement provided that if an affected labor union did not agree to a Modified Labor Agreement, the purchase of the A&P stores might not occur. Additionally, the initial Asset Purchase Agreement required the prospective buyer to make

"offers" of employment to all non-supervisory employees. (JA 824). Significantly, however, the asset purchase agreement was materially amended on September 30, 2015, immediately prior to the award of superbid status, or purchase, of any A&P stores by the Member Stores, as follows:

"If no Affected Labor Agreements or Modified Labor Agreements are in effect [at the time of closing], the offer of employment to Affected Union Covered Employees will be on terms as are reflected in the Buyer's last best offer." (JA 843).

As a result, Judge Drain now directed that the offers of employment could be made either: (1) in accordance with a Modified Labor Agreement, or (2) the "last best offer" made to the affected union.

The amended asset purchase agreement was approved by order of Judge Drain on October 21, 2015. (JA 757-780).² Importantly, in connection with that Order, Judge Drain stated:

- All interested parties were provided with an opportunity to object. (JA 759).
- The transaction was for a "sound business purpose," including providing relief to A&P's creditors in a way to maximize the value of the assets to be acquired. (JA 760).
- The asset purchase agreement does not provide a basis for any finding of successor or derivative liability. (JA 761; 774). (emphasis supplied).
- The Co-Op "would not have entered into the Purchase Agreement and would not consummate the transactions contemplated thereby...

² Another amended asset purchase agreement, with substantially the same terms and applicable only to the acquisition of the Greaves Lane store, was also approved by separate order of Judge Drain on October 21, 2015. (JA 539-632).

if the sale of the Acquired Assets was not free and clear of all Claims [defined earlier to include, inter alia, "any of the Debtor's [A&P] collective bargaining agreements]." (JA 764-765).

- "The unions affected by the sale of the Acquired Assets did not file an objection to such sale and have waived their rights to assert... any claims or other rights arising under the successorship provisions of any collective bargaining agreement." (JA 767-768; 777).
- "The terms and provisions of the Purchase Agreement and this Order shall be binding in all respects upon . . . any affected third parties (including the affected unions)." (JA 778).
- "The terms of the purchase agreement may only be modified in a writing signed by both the Co-Op and A&P, and then only to the extent the change is immaterial. (JA 778-779).

In short, in order to incentivize the purchase of the more than 100 A&P stores which were not to be purchased as of September, 2015, and to foster employment, Judge Drain directed that bidders were now authorized to purchase former A&P stores contingent on making employment offers based upon the purchaser's "last, best offer."

C. The Member Stores Immediately and Repeatedly Announced That Employment, If Any, Would Be on Different Terms and Conditions

From the initial meeting with the four unions regarding the A&P stores upon which the Co-Op (on behalf of the Member Stores) was placing a bid, it was made clear that the Member Stores would be changing terms and conditions of employment of the former A&P employees. As testified to by Ms. Konzelman, "from the very first meeting . . . we made clear at that meeting that we were hopeful and were available to negotiate until the closing . . . to get to new agreements . . ." (JA 340, lns 9-18).

In fact, according to Local 342 (or "Union"): "the coop wants an arrangement with the union asap. They operate with a different structure than A&P, and there is the opportunity to have the coop purchase more stores, or the opposite effect, dependent on an agreement. If there is no agreement in a short fashion, there may not be the coop purchases of the stores and they may turn into TD Banks." (JA 378). To that effect, Lisa O'Leary, Local 342's Secretary-Treasurer, testified that during this opening negotiating session Mr. Catalano stated that the Member Stores "would not take the A&P pension, though they would talk about other sorts of retirement benefits, . . . and that Key Food would be proposing reductions in pay and lump-sum bonuses." (JA 47, lns 1-13; 48, lns 8-16). Further, Ms. O'Leary testified that Catalano stated that the Member Stores had no interest in any existing Key Food labor contracts with Local 342. (JA 53, lns 11-15).

During this first meeting, Mr. Catalano also began discussing "involuntary buy-outs" to both full and part-time employees of A&P. (JA 49, lns 6-16; 56, lns 7-12). In her December 14, 2015 NLRB affidavit, Ms. O'Leary stated:

"So their concept was going to be a proposal which had reductions in pay, and that he would throw in some lump-sum bonuses. And then he announced his concept of buying out senior A&P employees . . . And Key Food was going to give us a proposal for an involuntary buy-out because they did not want to make offers of employment, and [had] no intention of keeping all the full-time senior people that worked in the stores."

(JA 50, lns 7-15).

President Richard Abondolo of Local 342 also testified:

“Q. Did the Co-Op (can we use that word) make it clear that they believed that there were too many full-timers in the stores?

A. Yes, that they believed, right.

Q. And did they also say right from the inception of the bargaining that they did not want all of these full-time employees to be hired and that rather, they would be given a so-called buy-out? . . . Was that ever made clear right --

A. Sure.

Q. -- from the inception?

A. Sure.”

(JA 152, lns 13-19).

Additionally, and as noted above, the Court-ordered amended Asset Purchase Agreement, dated October 21, 2015, only called for offers of employment to be made to “substantially” all (rather than all) of the union-represented employees. (JA 843). Unlike Nexeo, however, the A&P Asset Purchase Agreement also provided that the terms of those offers might be different than those that had been in effect in the A&P stores.

Judge Green’s subsequent, and incorrect, finding that the A&P employees had “the understanding” that the A&P terms and conditions of employment would continue (SPA 76) was a total mis-statement of the evidence adduced during the hearings. In fact, General Counsel’s case rested solely upon a legally deficient standard—that the Purchase

Agreement called for offers of employment to be made—without evidence of any implied or express assurance by the Member Stores that the terms and conditions of employment of the former A&P employees would remain the same, or that any employees had such an understanding. Not only did collective bargaining negotiations with the four (4) Unions (Locals 338, 1500, 464(a) and 342) representing A&P employees begin in July 2015, but three (3) Unions other than Local 342 had executed MOA's in November, 2015 with the Member Stores, with far different terms and conditions than those with under the A&P CBA's. As a result, the Member Stores lawfully established initial terms and conditions of employment for the former A&P employees as set forth in the October 22, 2015 Memorandum of Agreement. (JA 525-536).

Judge Green's finding that the Member Stores were "perfectly clear successors" in July, 2015 is also bereft of the identity of the Member Stores which would purchase the A&P stores, or the identity of any such A&P employees. In that regard, Judge Green found, based upon no facts in the record, that "between July 27 and October 21 (when Judge Drain approved the APA, as amended on September 30), the employees worked for the predecessor with the understanding that they would be retained by the Member Stores under their old terms of employment unless their bargaining representative agreed to something different." (SPA 76). (emphasis supplied). Not only is there no such record evidence (who are these employees?), but the only communications were by the Member Stores at the bargaining table, commencing on

July 28, 2015, which statements explicitly confirmed that employees would be offered employment on different terms and conditions. (JA 719-725).

Moreover, Judge Green's finding that the Member Stores were perfectly clear successors as of July 19, 2015 was over two months before the bankruptcy court approved a bid by Key Food and Member Stores to acquire any of the A&P stores, and three (3) to four (4) months before the Member Stores purchased the applicable stores. The Member Stores were not granted stalking horse protection on their bids until September 30, 2015, and during the time between July 19 and September 30 the complement of possible owners (and putative Member Stores) changed. In short, Judge Green's finding that there was "perfectly clear successor" status on July 19, 2015 is meaningless, as he could have chosen any arbitrary date in so holding.

D. The Board Cannot Countermand Judge Drain's Order

Judge Drain's order, dated October 21, 2015, requiring that employees be offered employment based on a Modified Labor Agreement, if one had been reached, or the buyer's "last, best offer," was a final order of the U.S. Bankruptcy Court pursuant to 28 U.S.C. § 158(a). (JA 760). The NLRB has no legal authority to countermand or otherwise avoid that requirement, and must honor the separation of powers between the Executive and Judiciary branches. The powers of the U.S. Bankruptcy Court are set forth in 11 U.S.C. § 105, which provides, *inter alia*, that the bankruptcy court "may issue any order, process

or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In contrast, the powers of the U.S. National Labor Relations Board as an administrative agency are set forth in 29 U.S.C. § 160, which provides, *inter alia*, that the NLRB is empowered "to prevent any person from engaging in any unfair labor practice (listed in Section 8 [section 158 of this title]) affecting commerce."

If a matter does not involve the "particular expertise" of the NLRB, jurisdiction must yield. As reviewed in *Robertson v. Nat'l Basketball Ass'n*, in a matter involving a different area of federal law (antitrust), when such matters are not with the "special competence" of the NLRB, the Board does not have jurisdiction to decide the matter. 389 F. Supp. 867, 877 (S.D.N.Y. 1975); *see, also, U.S. v. Western Pac. R. Co.*, 352 U.S. 59 (1956) (discussing the issue of primary jurisdiction). The NLRB does not have special competence over matters of federal bankruptcy law, and has no authority to make an order, after the bankruptcy transaction has closed, amending the terms of the bankruptcy order. Indeed, the isolated labor provisions of the October 21, 2015 court-ordered Amended Asset Purchase Agreement were the product of the negotiation and trade-offs of thousands of other, non-labor related terms during the bankruptcy court proceeding. (JA 757-867). In short, the Member Stores have been extraordinarily prejudiced by Judge Green's ad hoc and, worst, post hoc, modification

of the Court-ordered basis upon which the Member Stores were entitled to purchase the A&P stores.

Regardless of whether it is categorized as a Modified Labor Agreement or as a "last, best offer" in compliance with Judge Drain's order, the decision to implement the Member Stores' October 22, 2015 Memorandum of Agreement cannot be found to be unlawful by the Board. (JA 525-536). Without any basis in fact or law, however, Judge Green concluded that the purchases of the A&P stores could only be on the basis of either a Modified Labor Agreement or a good faith "impasse," as defined under the NLRA - yet Judge Drain made no such order or mention of an "impasse" as defined by the NLRA. (SPA 77). In fact, a "last, best offer," necessarily differs from the parties having reached an "impasse."

A lawful "impasse" has long been held to be a complicated analysis based on a number of criteria, such as bargaining history, good faith of the parties during negotiations, the length of negotiations, the importance of the issues over which there is disagreement, and the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). A last, best and final offer is only one indicator of whether a labor law "impasse" has been reached. *See, e.g., Henderickson Trucking Company*, 365 NLRB No. 139 (2017) (announcement of a last, best and final offer does not necessarily equate to an "impasse").

The Board's decision, injecting an "impasse" requirement into the order of the bankruptcy court to make offers of employment only

after reaching an "impasse" improperly amended the Order of Judge Drain. Plainly, the Order of Judge Drain to permit offers of employment based on the last, best and final offer authorized the Member Stores to do so, and the Board has cited no legal authority that the NLRB can take an action directly contrary to both the plain language and intent of an Order of the U.S. Bankruptcy Court.

POINT III

EVEN WITHOUT A FULL LABOR CONTRACT IN PLACE, MEMBER STORES WERE PERMITTED TO PUT INTO EFFECT THE AGREED-UPON BUY-OUT PROVISION

Even assuming, *arguendo*, perfectly clear successor status and the absence of a complete collective bargaining agreement with Local 342, the Member Stores were legally entitled to establish the "buy-out" of A&P employees, as Local 342 concededly confirmed that it agreed to the "buy-outs," or a layoff framework, applicable to the A&P employees upon which the Member Stores would open.

Judge Green's Order Provides an Inappropriate Remedy

In his remedial order, Judge Green set forth the Board's standard remedies for unlawful discrimination including, but not limited to, reinstatement and backpay. However, the order ignores the fact that each of the employers—Seven Seas, HB84, Greaves Lane and Albany Avenue—alleged to have violated Section 8(a)(3) of the Act—had an independent basis to terminate or not hire each of the discriminatees. Pursuant to the buy-out provision of the "last, best and final" offer made by the Member Stores to Local 342, upon which offers of employment were actually extended to the A&P employees, each of the employers had

the right to separate the alleged discriminatees upon payment of severance or a "buy out." See, *Wright Line, supra*. But for that last, best and final offer, General Counsel is unable to show that any of the Member Stores would have hired any employees. Indeed, by Local 342 agreeing to a buy-out, when coupled with Judge Green's incorrect Decision, the Member Stores detrimentally relied upon that last, best agreed-upon final offer in purchasing the stores, and making offers of employment.

An employer and a union need not have a complete, final labor contract. Parties can agree to limited terms while negotiations for a full contract are ongoing. *E.g., In re Triangle Sheet Metal Works, Inc.*, 238 NLRB 517, 529 (1978) (permissible for parties to reach limited agreement while bargaining continues on broader issues); *Teledyne Specialty Equipment Landis Machine Co.*, 327 NLRB 928, n. 13 (1999) (noting the parties reached an agreement on a "less than complete" package, with additional bargaining thereafter); *Bobbie Brooks, Inc. v. Int'l Ladies' Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987) (parties can form a binding agreement which they intend to be final, despite leaving certain terms open for future negotiation).

Moreover, in the instant matter, the Union specifically agreed to the buy-out provision, as evidenced by a November 27, 2015 e-mail from the President of the Union, Richard Abondolo (JA 436-438), wherein he advised Sharon Konzelman, Chief Financial Officer of the Co-Op,

that he would be sending her a list of the names of employees who were entitled to severance pursuant to the buy-out provision, with either \$800 or \$400 per year of service with A&P. (JA 436-438), and he specifically also stated that other terms of a contract remained to be negotiated.

While the General Counsel argued, and Judge Green found, the lack of a complete contract, there was no finding that a buy-out provision was not independently agreed to. To the contrary, Judge Green specifically found, particularly with regard to the October 21 conversation between Richard Abondolo and Douglas Catalano, representing the Member Stores, as follows: "I would not conclude that Abondolo clearly communicated anything more than the Union's willingness to accept the Member Stores' concept of discretionary layoffs (as opposed to an acceptance of the Member Stores' entire contract proposal) in exchange for an increase in the amount of payment (i.e., \$800 per year of service without a cap in the years)." (SPA 74, emphasis supplied). Judge Green further found evidence of an independent agreement: "The interaction between the parties when Catalano and Abondolo returned from their side-discussion suggests they believed they had reached agreement on a buy-out provision and were hopeful that this breakthrough on what had been a prominent dispute between the parties would allow them to conclude negotiations." (SPA 74). Lastly, Judge Green specifically found that, in November 2015, while there were a number of outstanding issues, the terms of

the buy-out were not a disputed issue. (SPA 75). The buy-out was a part of the agreement upon which Local 342 agreed that the stores could open. Under these circumstances, it is unfathomable to suggest that the Member Stores could not implement the buy-out provision, thereby debunking any claim by General Counsel that there was a violation of Section 8(a)(5) by the Member Stores.

Lisa O'Leary also verified that Local 342 intended to reach a partial agreement upon which the stores could open, with "the other portions" to be finished at a later time. (SPA 40; JA 394), which was consistent with Judge Green's conclusions that, "throughout the negotiations," the Union requested identification of the A&P employees who would be subject to a buy-out provision. (SPA 43). There was no argument presented, General Counsel did not assert, and Judge Green did not find, that agreement on the buy-out provision was contingent upon the reaching of an overall agreement. Consequently, the *Wright Line* defense is applicable to the alleged discriminatees, who would be subject to, and a payment required for, the buy-out amounts.

Indeed, the record evidence also showed that Local 342 repeatedly applied the buy-out provision with respect to certain Member Stores, including the buy-out of an employee, without regard to seniority, at Park Plaza Food Corp. (JA 283-285). Further, Local 342 representative Lou Loiacono was provided with a list of individuals whom Seven Seas would not hire (again, without regard to seniority), which went unchallenged by Local 342. (JA 236-238; 537-538). Finally, the buy-out

agreement is punctuated by Abondolo's comments at the conclusion of the October 21, 2015 negotiating session, where he said: "We're done. Write it up," and inquired as to when the stores would be opening. (JA 280, lns 6-10). Thereafter, on November 2, 2015, Abondolo expressed his willingness to "sit with [Mr. Catalano] any times to discuss the terms and conditions for the rest of the agreement." (JA 413, emphasis supplied).

In fact, on November 23, 2015 Local 342 confirmed in writing that a buy-out agreement, unrelated to seniority, was in place. In its "Transition Agreement" of that date, Local 342 confirmed that a buy-out could be offered "to any full-time employee who was employed by A&P, prior to being hired by the employer, who is terminated for any reason during the probationary period..." (JA 427). Those substantive terms are identical to the buy-out terms provided by Mr. Catalano in the October 22, 2015 Memorandum of Agreement. (JA 526-527).

Thus, as relevant to the instant proceeding, the Member Stores had windows of time to choose not to hire or separate individuals, with such action being governed by the payment of a buy-out:

- a) Before store opening, by choosing not to hire former A&P employees;
- b) After store opening, during the probationary period; and
- c) After the probationary period if a person were discharged (which is not relevant to the instant facts).

Therefore, the following individuals, who were laid off, or not hired, by the Member Stores cannot be found to have been subject to an

employment action violative of Section 8(a) (5), as Local 342 not only agreed to those failures to hire or layoffs, but Local 342 in November, 2015 continued to request the buy-out payments.

- HB84 -Richard Maffia, Venus Nepay, Khadisha Diaz;
- Greaves Lane - Michael Fischetti, Anthony Venditti, Gina Cammarano, Debra Abruzzese;
- Albany Avenue - Joseph Batiste, Calvin Harris, Robert Jenzen, Stephen Fiore; and
- Seven Seas - All alleged discriminatees.

(SPA 79-80).

Finally, the buy-out provisions proffered by the Member Stores to the Union is not impermissibly discretionary under *McLatchy Newspapers Inc.*, 321 NLRB 1386 (1996). *McLatchy* is inapposite, as it addresses the implementation of terms in an effort to break an NLRA impasse. In such circumstances, the Board found it inappropriate to permit an employer to continue to exercise discretion over the implemented change (wage increases). In the instant matter, the last, best offer of employment included a finite period of time during which the Member Stores could assess whether to hire the workers (October and November, 2015), subject to a severance (i.e., "buy-out") for those chosen to be separated, either before or after the opening of the stores. If Local 342 had sought the framework for the Member Stores' purchases to be subject to "impasse," under NLRA law, prior to the Member Stores making such offers, the Union could have either

made those arguments to Judge Drain, or sought to appeal his Order to the District Court, but it did neither.³

POINT IV

A. Judge Green's Decision Relating to Seven Seas is An Incredible Violation of Law and A Perversion of Justice

The decision of Judge Green relating to Seven Seas was the product of his ignoring rules of evidence and caselaw, and permitting the introduction of rank hearsay testimony relating to the alleged acts of Sharon Gowon while she was an agent, e.g., the store manager, of Food Emporium (and not while employed by Seven Seas)—as noted above, Food Emporium was a division of A&P which was, of course, an altogether different corporation and employer than Seven Seas. As a preliminary matter, therefore, Judge Green's Decision erred as a fundamental principle of law under the Federal Rules of Evidence. FRE 801(d) (2) (D) (statement may be offered against an opposing party when it "was made by the party's agent or employee on a matter within the scope of that relationship and while [the agency] existed.") (emphasis supplied). In sum, the acts of Gowon (which were innocuous in and of themselves), were inadmissible, let alone inappropriate, to establish a *prima facie* case by General Counsel. See *Feis v. United States*, 484 Fed. Appx.

³ Under Judge Green's rationale, no offer of employment could be made, absent the reaching of a contract, until a labor law impasse was reached. That conclusion finds no support in the bankruptcy-approved asset purchase agreement and, indeed, runs contrary to the October 21, 2015 Order that permitted offers of employment to be made absent the reaching of an agreement.

625, 627-28 (2nd Cir. 2012) (“We have previously affirmed the exclusion of testimony offered under Rule 801(d)(2)(D) where, as here, there was little evidence to establish that the declarant was an agent or employee of the opposing party.”). See, e.g., *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 128-29 (2nd Cir. 2005).

Further, Seven Seas and its owners, Paul and Pat Conte, had no relationship with A&P, they had no shareholder interest in that company, and they had no knowledge of, or have a role in, A&P’s employment policies or supervision. More egregiously, the ALJ went one incorrect step further by inferring (and contradicting himself in other rulings), that all subsequent acts of Sharon Gowon during her employment at A&P (even in the absence of unfair labor practices) or, even more absurdly, after becoming employed at Seven Seas, should somehow create an issue of fact ripe for trial relating to an alleged anti-union animus previously possessed by her by at A&P.

B. The Board Erred in Adopting The ALJ’s Denial Of The Seven Seas’ Motion to Dismiss

At the close of General Counsel’s case before Judge Green Seven Seas made a motion to dismiss the complaint (JA 250-275) under the authority of *Yale University*, 330 NLRB 246, 246-47 (1999). In *Yale University*, the Board held:

“In reviewing the Respondent’s motion to dismiss the complaint for failure of proof as to an essential element of the General Counsel’s case, we are guided by Fed.R.Civ.P. 52(c), which permits the trial judge to enter judgment against a party when the evidence shows that that party

has not sustained its burden of proof. *Auto Workers Local 122 (Chrysler Corp.)*, 239 NLRB 1108, 1112 (1978). In order to overcome a motion to dismiss at the close of his case-in-chief, the General Counsel must satisfy his duty to establish a prima facie case by presenting evidence sufficient to demonstrate the occurrence of an unfair labor practice. *Id.* at fn. 3." (emphasis supplied).

The motion was denied by Judge Green. (JA 275). At the time the motion was denied by Judge Green, however, General Counsel had only produced limited testimony from Pat Conte, who was plainly concerned about the staffing levels at the store, but who also stated that "I don't actually do the hiring." (JA 262; Tr. 387:1-4).⁴ In that regard, Pat Conte testified as follows:

- "Q. Okay. So you asked Sharon, though, to decide which of the employees would be hired and who wouldn't; is that correct?
- A. Yeah. Well, what we did ask [Sharon Gowon] is which employees held promise and which seemed to be lackluster in their performance.
- Q. Okay. And so she made a list of you -- for you of these lackluster employees?
- A. She didn't make a list. She told us who she thought would not work out so well probably, and who was an excellent worker.
- Q. Okay. So -- and you relied on her representations?

⁴ The lack of involvement by Pat Conte in the actual decisionmaking process was confirmed by General Counsel's own witness, Local 342 representative Lou Loiacono, who testified that Pat Conte had advised him that Pat did not know why certain individuals at Seven Seas were not being hired and that he would need to speak with Paul [Conte] to get that information. (JA 236-237).

A. In most cases.”

(JA 61, lns 16-25).

Significantly, General Counsel failed to elicit any evidence on the meaning of “most cases” and, particularly, whether **any** of those cases involved the alleged discriminatees. At the time of the motion to dismiss, therefore, General Counsel failed to produce sufficient or, indeed, any, evidence to satisfy his burden of proof that, more likely than not, Seven Seas relied upon Gowon’s recommendations with specific regard to the decision not to offer employment to each of the alleged discriminatees. General Counsel could have inquired of the Contes about each alleged discriminatee but chose not to and merely relied upon unknown statements purportedly made by Gowon to the Contes.

See the case of *In re Fruehauf Trailer Co.*, 162 NLRB 195 (1966): (When “[c]ountless lawful and reasonable explanations may exist for the failure of [] employees to have been employed, [] the burden falls on the General Counsel to establish that Respondent selected an unlawful one.”). Further, speculation that Gowon exercised animus in making her decisions at A&P is insufficient for General Counsel to maintain his burden to prove a *prima facie* case. *Gen. Elec. Corp.*, 256 NLRB 753, 757 (1981) (an adverse action the days after a visit from union representatives “is insufficient to establish *prima facie* discriminatory motive.”). As set forth in *Yale University*, there was no evidence whatsoever of Ms. Gowon having committed an unfair labor practice, even at A&P, let alone at Seven Seas.

C. **The "Evidence" Relating to Gowon While Employed by Food Emporium⁵**

1. **Gowon "Did Not Like Schedule Changes" Does Not Equate to Union Animus**

By Judge Green's own finding, Gowon allegedly disliked making changes to a schedule once she made it. (SPA 90). *A fortiori*, Gowon's alleged "animosity" was not towards the Union but, rather, towards schedule changes irrespective of whether the employee was, or was not, non-supervisory, supervisory, a member of Local 342, a member of some other union, or a co-manager of that store.

2. **Gowon's Reaction to Union Conversations Does Not Show Animus**

Likewise, purportedly "storming off" (whatever that means) after allegedly speaking with a Union representative while Gowon was employed by A&P does not, without more, offer any indication of union animus, and General Counsel offered no evidence that Gowon treated any other conversation, whether union-related or otherwise, differently. Simply engaging in activity which is claimed to be somehow "protected" is insufficient to establish a *prima face* case of discrimination. General Counsel must proffer evidence that unlawful animus *motivated* the complained-of actions. *See, Wright Line, infra* (a discrimination claim

⁵ There is no dispute that Seven Seas had a legitimate, non-discriminatory basis to reduce the number of full-time employees. Indeed, as Judge Green found, the President of the Charging Party, Richard Abondolo, "conceded that the Union Square store being purchased by Respondent Seven Seas was 'heavy' in that it has a lot of full-time employees." (SPA 53).

must establish, among other things, that the discharge *was motivated* by the employee's protected conduct).

Judge Green's own findings concerning Gowon cut against any finding of animus in Gowon's unproven, unknown recommendations to the Contes, for Judge Greed found that Gowon was tolerant of certain union activity—further Judge Green held: "Seven Seas did not hire certain employees who engaged in no union activity (and were not the subject of Union activity on their behalf) also undermines a claim that Gowon was hostile toward any employee who was associated with the Union and exclusively concerned with removing such employees from the workforce." (SPA 92). With this astounding conclusion, therefore, Judge Green's decision to find that Gowon somehow discriminated in only some of her unknown recommendations (the only limit of those recommendations being those that the General Counsel sought to prosecute) can be categorized as nothing other than arbitrary.

In sum, General Counsel did not present a single piece of evidence that Gowon ever took an adverse employment action against any of the alleged discriminatees, including any disciplinary action. Indeed, testimony from Ms. Iturralde that Gowon, at some point in time, had said that the Union was "full of shit" because it was not there for its members diminishes the idea that Gowon was "anti-union" (JA 79, lns 3-7) - that comment is actually a "pro-union" statement, as it implies that Local 342 was not supportive of its members as any effective union might be, and should be.

3. Gowon's Question Concerning the Presence of the Union Representative During Bankruptcy

Judge Green's finding concerning the "Bankruptcy Court" (SPA 90), is significant to demonstrate Judge Green's bias against Seven Seas. Thus, Judge Green concluded that an alleged comment made at the Bankruptcy Court proceeding "suggests" that Gowon perceived the A&P bankruptcy as a mechanism "for ridding" the store of the Union. That guesswork by Judge Green was not only purely speculative, but it is beyond dispute that Gowon was aware that non-supervisory A&P Local 342 employees were to continue to be members of the Union's bargaining unit—thus, how might Judge Green surmise that Gowon would be finally "rid" of Local 342, since all non-supervisory employees of A&P hired by Seven Seas were to be, and were, Local 342 members? In short, it is equally speculative to infer that Gowon would have had no motivation under such circumstances to discriminate against the non-hired employees, as Local 342 would no longer represent these employees at Seven Seas.

D. The Board Holds Seven Seas to an Unlawful Standard of Proof

Judge Green found that "the record does not contain evidence that Respondent Seven Seas hired any employees who were the subject of Union complaints." (SPA 90). First, Judge Green found elsewhere in his Decision that Seven Seas had no knowledge of any of the individuals who had been employed by A&P at the Union Square store, including, of course, any knowledge of Section 7 activity. But in order to show

that Seven Seas hired employees who did, or did not, engage in Section 7 activity, Seven Seas would have been required to ask the prospective employees whether they had engaged in Section 7 activity while employed at A&P, an uncontradicted unfair labor practice. But even more egregiously, and contrary to Judge Green's finding, General Counsel's own evidence showed that Seven Seas hired seven (7) individuals who had engaged in Section 7 activity—specifically, employees who had made complaints to the Union. (JA 537-538) (listing A&P employees not being offered employment by Seven Seas); Esteban Acevedo, JA 211, lns 3-11; Richard Allcroft, JA 212, lns 9-15; Abdouie Secka, JA 214, lns 2-6; Jeanette Knight, JA 214-215; Donna Levy, JA 215, lns 4-11; Michael Webb, JA 215, lns 15-20; Momar Cisse, JA 216, lns 5-6).

Further, the General Counsel presented, and Judge Green found, that Union representative Margaret Monier raised multiple other complaints to Gowon on behalf of A&P Union Square employees (JA 178-183, SPA 62), at least "several times a week" once Gowon started working at the store in January 2015. Stated otherwise, Monier (as a matter of math) fielded (approximately) 126 complaints from a myriad of employees apart from the nine (9) discriminatees. (JA 182, lns 7-10; 183, lns 4-10). Indeed, Pat Conte had forwarded a list of persons whom Seven Seas would not hire to Lou Loiacano of Local 342 on November 9, 2015, which did not give rise to a claim that the A&P

union employees would not be hired because of an anti-union animus. (JA 537-538).

Finally, when a different Member Store (Greaves Lane) offered evidence that it had maintained the employment of an individual engaged in Section 7 activity, Judge Green found such evidence to be insufficient to negate a *prima facie* case of discrimination. (SPA 111, n. 44). In short, Judge Green's logic was lacking and applied in an arbitrary manner that, it is necessarily inferred, favored the General Counsel.

E. The Board Incorrectly Applied the Wright Line Defense

Judge Green incorrectly concluded that Seven Seas did not make out a *Wright Line* defense because Seven Seas relied on the recommendations of Gowon in choosing which individuals not to hire. Judge Green's analysis focused on his conclusion dismissing Pat Conte's uncontradicted testimony that he "relied primarily on the recommendations of Union Square Director of Security Mac McBrien." Rather, Judge Green found that Gowon was involved in the hiring decisions and there was some level of reliance on Gowon's alleged recommendations. Based on these findings, Judge Green concluded that Seven Seas was unable to establish its *Wright Line* defense.

Judge Green's analysis, however, confuses General Counsel's *prima facie* case with the defense available to Seven Seas. The *Wright Line* defense was recently discussed in *Novato Healthcare Center*, 365 NLRB No. 137 (2017). Citing *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662

F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board noted that “the burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer’s decision to take an adverse employment action against an employee was the employee’s union or other protected activity.” The issue of what was the “substantial or motivating factor in the employer’s decision” is, therefore, not an element of the *Wright Line* defense. Rather, it is an essential element of the General Counsel’s *prima facie* case.

In the instant matter, Judge Green only addressed the issue of the motivation for the selection of the alleged discriminatees e.g., Gowon’s alleged recommendations or McBrien’s feedback. Judge Green concluded that it was the recommendations of Gowon which allegedly harbored an anti-union animus which, in his speculative and unfounded view, proved to be the motivating factor for the hiring decisions made by Seven Seas. While such a finding addresses the General Counsel’s *prima facie* case, it wholly avoids an analysis of the *Wright Line* defense.

As analyzed in *Novato Healthcare Center, supra*, “Once the General Counsel has met his initial burden [which did not occur in this matter] that the protected conduct was a motivating or substantial reason in the employer’s decision to take the adverse action, the employer has the burden of production by presenting evidence the

action would have occurred even absent the protected concerted activity.”

First, there is *no evidence* of any statements made by Gowon relating to a specific discriminatee, and Judge Green made no conclusion that, but for Gowon’s alleged animus, Seven Seas would not have reached the same conclusion regarding the individuals to whom offers of employment would be extended. Pat Conte testified extensively about how he entered the store, prior to its acquisition, to identify poor performers. Likewise, he offered considerable testimony on his conversations not only with McBrien, but also with Santos Garcia, a produce clerk who had previously worked for Pat Conte at a different store. (JA 303-304; 305, lns 6-18; 306, lns 18-24).

Notably, Judge Green found Pat Conte to be credible on the dismissed claim of unlawful surveillance and, in agreement with the General Counsel, Judge Green decided that he harbored no “rabid anti-union animus.” His sole finding of credibility against Pat Conte was on the question of what *motivated* Seven Seas to make its hiring decisions. For the sake of argument on this point, if it is assumed: (1) that the store relied upon the recommendations of Gowon; and (2) that Pat Conte did not mention either McBrien or Santos while giving an affidavit to the Board Agent, those facts are irrelevant to the *Wright Line* defense. As to the first point, the assumed fact serves only to infer a claim that the General Counsel made out a *prima facie* case, although he did not, as there are no Gowon statements in the

record relating to the alleged discriminatees. As to the second point, General Counsel implied that Pat Conte was questioned about what information the store *relied upon* in making its hiring decisions (JA 309, lns 10-17), but the record evidence is completely devoid of any indication that, in taking Pat Conte's affidavit, the investigating agent explored whether there was any other basis upon (regardless of whether relied upon) which the individuals would not have been extended offers of employment.

With regard to the issue of the Conte affidavit before the NLRB, Judge Green also explicitly set a double standard in his decision. While charging Conte with alleged omissions in his affidavit, Judge Green fully credited the testimony of Margaret Monier concerning her rank hearsay as to what the non-agent of Seven Seas, Gowon, had said to Monier, despite the fact that Monier offered no such details in the affidavit that she had provided to General Counsel. (JA 224-225).

Further, Pat Conte never testified that Seven Seas did not rely on the recommendations of Gowon. To the contrary, he testified that the store did rely on them "in most cases." (JA 61, lns 24-25).⁶ *C.f.*, *Southern Bakeries, LLC*, 364 NLRB No. 64 (2016), citing *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005) (finding that "dual motivation" analysis under *Wright Line* is not

⁶ Again, General Counsel never offered any evidence that Gowon's recommendations were ever relied upon with respect to the specific discriminatees, which numbers a mere 10% of the total unionized workforce hired by Seven Seas.

required only if it is shown that the employer proffered a pretextual reason for the hiring decision.). In the instant matter, Judge Green expressly found that "Pat [Conte] admitted that Gowon was involved in the hiring decisions." Pat Conte's testimony that he had additional information that informed his decisions is entirely consistent with a *Wright Line* defense. Because Judge Green only somehow discredited [without any reason] Pat Conte's testimony that he relied upon information from McBrien and Santos, as well as his own personal observation, but not that Pat Conte actually possessed that information, the evidence in support of the *Wright Line* defense is clear. In short, Seven Seas had independent reasons not to hire the alleged discriminatees, and Judge Green committed prejudicial error in failing to properly apply the *Wright Line* defense.

F. General Counsel Failed to Prove Concerted Activity Among the Alleged Discriminatees

General Counsel alleged, and Judge Green found, that Seven Seas Union Square violated Section 8(a)(3) of the Act by refusing to hire certain individuals. Those individuals, together with their alleged protected, concerted activity, while at A&P, are listed below.

- Madeline Gomez: The evidence on Gomez was entirely hearsay and all that was presented was her desire to be trained on a meat-slicer. (JA 198, lns 7-22). The argument based on hearsay relates solely to a purely personal issue, and no evidence exists that a ULP was filed against A&P by Local 342 on her behalf, as was the case with *all other* alleged discriminatees.
- Rosa Silverio: The evidence presented on Silverio is entirely hearsay and all that was presented was that she requested a schedule adjustment because she had an apartment problem. (JA

122, lns 8-11). This is a second example of an argument based on hearsay that relates solely to a purely personal issue which does not constitute Section 7 activity.

- Elena Pagan: The evidence on Ms. Pagan is also entirely hearsay and all that was presented was that she had an issue with her scheduling, which was eventually resolved. (JA 203-204).
- Keesha Fields: Ms. Fields testified that she took a leave of absence which was approved, and she did not know if the union ever got involved. (JA 80-81). This is another purely personal issue that does not constitute Section 7 activity.
- Jose Carlos Colon: The evidence on Jose Carlos Colon is also entirely hearsay and all that was presented was that he did not want split shift schedules. (JA 69, lns 3-23).

In each of the above examples, therefore, there was no allegation of the assertion of a labor contract right or other indicator of concerted activity. With regard to the alleged "shop steward" discriminatees—Tamika Jones, Dena Iturralde and Juana Diaz (only one of whom—Diaz—was an actual steward, although she was permitted by Gowon to informally play the role of a third steward), Judge Green found no Section 7 activity other than being the messengers for the complaints of other employees, save for a single complaint by Diaz about an assignment of Sunday overtime. (SPA 62-63, 94). Under Judge Green's reasoning, therefore, Judge Green believed that without any evidence whatsoever, Gowon sought to discriminate against the "messengers." *See, Wright Line* (a causal connection must be shown between Section 7 activity and an adverse employment action; Section 7 activity alone is insufficient); *Reinhart Foodservice, L.L.C., d/b/a Agar*, 1-CA-106712, ALJ Decision JD (NY)-12-14 (2014), *citing, Affiliated Foods,*

Inc., 328 NLRB 1107 (1999) (General Counsel failed to establish *prima facie* case of discrimination, despite employee being shop steward, union election observer and most vocal pro-union employee during election campaign, where employer knowledge of Section 7 activity did not satisfy General Counsel's burden of proving that Section 7 activity motivated the complained-of action, particularly where the employer owns other unionized facilities and there was no allegation of Section 8(a)(1) comments towards any of the alleged discriminatees). Similarly, in the instant matter, there is no evidence or allegation that Seven Seas, which owns several other stores where employees are represented by Local 342, or Gowon (while employed by A&P or otherwise), made any comments exhibiting animus towards any of the purported discriminatees.

G. Time-Barred Acts

The unwarranted and far-reaching efforts by Judge Green to find against Seven Seas is underscored by the General Counsel's reliance upon the following outdated reactions by Gowon (while at A&P) to alleged Section 7 conduct:

1. Actions That Occurred At least One Year or More Prior to Seven Seas Making Hiring Decisions in November 2015⁷

⁷ For some alleged discriminatees, General Counsel's evidence was based on a reference point as to when Gowon started working for A&P at its Union Square store. Gowon's transfer to that store took place approximately one year prior to the store's acquisition by Seven Seas, or in late 2014. (JA 180, lns 6-8).

- Juana Diaz, "Hours Being Taken Away Two Times," 2013-2014 (JA 184-186).
- Natalie Tirado, "Job Assignment," prior to Gowon becoming A&P store manager at Union Square (JA 196-197) (at more than one year prior to November 2015).
- Elena Pagan, "Reduction of Hours," when Gowon started at Union Square (JA 203-204) (one year prior to November 2015).
- Ricardo Nunez, "Incorrect Pay," prior to Gowon becoming A&P store manager at Union Square (JA 205, lns 6-16).
- Jerry Simpson, "Work Schedule," 2014 (JA 213, lns 11-19).

2. **More than Eight Months Prior to Seven Seas Making Hiring Decisions in November 2015**

- Maria Ortega, "Cold Door," Winter 2014-2015 (JA 192-195).
- Lucy Maldonado, "Vacation Entitlements," early 2015 (JA 206-207).

3. **General Counsel Failed to Establish Timing of Alleged Conduct**

- Rosa Silverio, "Scheduling Issue" (JA 190-191).
- Keesha Fields, "Time Off From Work" (JA 191-192).
- Madeline Gomez, "Work Assignment" (JA 197-203).
- Carlos Colon, "Shift Change" (JA 208-210).

It is well-established that comments remote in time cannot be relied upon to establish unlawful conduct (let alone by an employee of a different company). E.g., *R&L Cartage and Sons, Inc.*, 292 N.L.R.B. 530, n. 12 (1989) (comment concerning futility of individuals to seek employment made eight months prior to hiring decisions being made is "too far removed"); see also, *New Otani Hotel & Garden*, 325 NLRB 928, 939 (1998) (declining to rely on employer's alleged expression of

antiunion animus 8 months before discharge in part because temporally remote); *Magic Pan, Inc.*, 242 NLRB 840, 853 (1979) (finding employer's alleged antiunion statements made 6 months before discharge too remote to support finding of animus); *Permaneer Corp.*, 214 NLRB 367, 369 (1974) (statements of union animus made one year before discharge did not evidence discrimination).

As reviewed in *In Re St. Vincent Med. Ctr.*, 338 NLRB 888, 892-94 (2003), "The General Counsel must establish unlawful motive or union animus as part of the *prima facie* case. Unless animus is found to exist, the General Counsel's case must fail." In the instant matter none of the conduct attributed to Gowon while she was employed by A&P amounted to a Section 8(a)(1) violation, and there was no claim of General Counsel that the acts were a basis for an unfair labor practice charge against A&P.

Finally, among the alleged discriminatees, Judge Green found that four of them - Lucy Maldonado, Ricardo Nunez, Jerry Simpson and Natalie Tirado - were not the subject of unlawful recommendations by Gowon, despite the proffer of evidence by General Counsel of purported animus by Gowon. By making this finding, Judge Green was necessarily confirming that Gowon, in some of her alleged recommendations decided to exercise animus, while on other occasions involving employees who complained about working conditions, she allegedly possessed no such animus. In sum, to impose hundreds of thousands, if not millions, of

dollars, in purported remedies against Seven Seas, based upon Judge Green's irrational Decision, is completely unjust and incorrect.

POINT V

A. GENERAL COUNSEL'S FAILED PRIMA FACIE CASE AGAINST HB84

The General Counsel alleged, and Judge Green found, that Member Store HB84 violated Section 8(a)(3) of the Act with regard to the failure to hire Nelson Quiles. In order to analyze the General Counsel's *prima facie* case on this claim, it is significant to note the following undisputed record evidence:

1. HB84 hired all other Local 342 members (JA 295, lns 17-23).
2. HB84 offered evidence that being a Local 342 member did not figure into any hiring decisions, as detailed below.
 - "Q. Did being a Local 342 member figure into your decisions at all in terms of deciding to either not hire or let go any of these individuals?
 - A. The pool we had to choose from was all 342 so that wasn't an issue for us. (JA 299, lns 12-16)."
3. Perhaps most significantly, A&P separated Quiles from employment prior to HB84 acquiring the store. (JA 1453, para. 86); and
4. There is no evidence that Quiles expressed any interest in or made any application for employment with HB84. (JA 515-520).

The General Counsel's *prima facie* case rests on the speculative assumption that HB84 was involved in a conspiracy with A&P to cause A&P to lay Quiles off from employment. Judge Green's sole finding in support of this conclusion is that HB84 told Davis Britt, a manager

for A&P, that HB84 "preferred Maffia instead of Quiles as the meat manager."⁸ From this singular finding, Judge Green went on to extrapolate that Britt, on behalf of A&P, terminated Quiles' employment. There is no evidence, and Judge Green did not find, that an HB84 representative directed Britt to take any action at all with respect to Quiles. Rather, as found by Judge Green, HB84 only expressed its preference for Maffia (who, it must not go unnoted, was also alleged to have been the victim of HB84 anti-union animus—a claim which was rejected by Judge Green). Judge Green's conclusion rests on the faulty logic that the expression of preference for one potential applicant necessarily means an intent to discriminate unlawfully against another applicant. HB84 had no ability to control the alleged actions of Britt, who was a manager of A&P (as also with Judge Green's inappropriate "reliance" upon Sharon Gowon to find against Seven Seas), and not an agent of HB84.

In short, General Counsel woefully failed to prove that, more likely than not, Britt was acting as an agent of HB84 in the decision to lay off Quiles. Further, General Counsel presented no evidence that, by preferring another Local 342 meat manager who was recommended by Britt (against whom no allegations or animus were made), and who

⁸ Judge Green also found that counsel for HB84, Douglas Catalano, expressed animus on behalf of HB84 in refusing to reinstate Quiles for engaging in union handbilling (SPA 58-59). However, a reading of the transcript confirms that this was a reference to illegal trespass, and not of handbilling. (JA 281, lns 19-22).

was also an alleged Section 8(a)(3) discriminatee, HB84 was denying employment to Quiles. Indeed, there is no evidence that Quiles even attempted to seek employment with HB84. Even if the General Counsel had established that Quiles had applied for employment with HB84, HB84 preferred to hire another Local 342 member, Richard Maffia, as the meat manager, rather than Mr. Quiles, as Mr. Maffia came highly recommended by A&P management.

B. Judge Green Erred in Denying HB84's Motion to Dismiss

For the reasons stated in the record, Judge Green erred in not dismissing the complaint due to the failure of the NLRB's General Counsel to establish a *prima facie* case that Quiles was terminated in violation of Section 8(a)(3) of the Act. (JA 266-268; 275).

POINT VI

**JUDGE GREEN INTENDED TO FIND VIOLATIONS
AGAINST GREAVES LANE AND ALBANY AVENUE**

A. The Lack of a Section 8(a)(3) Prima Facie Case Against Greaves Lane⁹

The General Counsel alleged, and Judge Green found, that Respondent Greaves Lane violated Section 8(a)(3) of the Act by laying

⁹ With respect to Greaves Lane and Albany Avenue, the record evidence amply demonstrates that both stores were immediately and grossly underperforming as compared to the sales information that had been provided to the stores by the seller, A&P. (JA 312-313, Evidence that, even before taking the stores, Greaves Lane and Albany Avenue advised the Union that the stores were too overstaffed for the volume of business). See, also, JA 315-316; 318) (For Greaves Lane's Meat Department, the first week sales were \$25,000; Greaves Lane was told by A&P that average weekly meat sales were \$60,000; Albany Avenue's meat department had first week sales of \$20,817.37); (JA 686-718; 726-735). There is no dispute that the actions to reduce

off Anthony Venditti because of his Section 7 activity. Venditti was a meat cutter at Greaves Lane until his employment was terminated on Monday, November 30, 2015 for purely economic reasons. (JA 125, lns 4-5; 133-134). General Counsel failed to present sufficient evidence to establish a *prima facie* case of discrimination under the *Wright Line* analysis.

First, the only evidence that General Counsel presented of Venditti's alleged Section 7 activity is testimony that he worked as a "backup shop steward," and that on Sunday, November 29, 2015 he went outside during his fifteen-minute break to join the union demonstrators at the Greaves Lane store. (JA 126, lns 7-13; 130-131). During his break, he spoke with one of the Union representatives who told him that there was not anything that they wanted him to do, and that he should just go inside and continue working. (JA 131, lns 5-8). Venditti further testified that he was not sure if the store owner saw him with the group of union demonstrators. (JA 131, lns 22-24).

General Counsel did not present any evidence to establish that the employer was aware of any of Venditti's protected conduct, and Venditti's testimony was not sufficient evidence to establish the employer's knowledge of Venditti's Section 7 activity, especially where one of the owners, Sam Abed, indicated that he had no idea what role Venditti played at A&P prior to taking over the store. (JA 322,

staff were economically motivated. The only issue at hand is the selection of the particular individuals for layoff.

lns 10-12). Furthermore, General Counsel did not present any evidence of a connection between Venditti's Section 7 activity and the termination of his employment.

In fact, a General Counsel witness, Justin Conti, an employee in the meat department, testified that after participating in approximately seven to eight Union demonstrations outside the Greaves Lane store, and being seen by the owners while he was demonstrating, he was offered a promotion to a meat manager position. (JA 365, lns 5-24; 366, lns 16-24; 368, lns 12-18). The promotion of Conti, along with the fact that Greaves Lane hired and retained all but a few of the other Local 342 members (factors relevant to Judge Green somehow in a negative sense with respect to the claims against Seven Seas), further undermines any argument that Greaves Lane possessed an anti-union animus.

B. Judge Green's Erroneous Analysis of the Wright Line Defense Relating to Greaves Lane

Judge Green dismissed the *Wright Line* defense of Greaves Lines upon three conclusions: (1) Greaves Lane failed to prove, "through appropriate [store] records," that payroll was reduced by laying off Venditti; (2) Venditti was selected for layoff by seniority, but two other butchers (Conti and Young) had less seniority; and (3) Greaves Lane hired new butchers instead of recalling Venditti, in violation of recall rights established by the MOA. Each of these erroneous conclusions are addressed, below.

With regard to the reduction in payroll costs, it was inappropriate for Judge Green to limit Greaves Lane's proof only to payroll records. As found by Judge Green with respect to his analysis of Albany Avenue, one of the butchers eventually hired by Greaves Lane (O'Neil Lyons), who was originally working at Albany Avenue, "accepted the non-[Union] contractual rate of about \$25 per hour without complaint." As found by Judge Green, "Albany Avenue transferred Lyons back from Greaves Lane to replace Fiore as meat manager." Lyons was a specific example, ignored by Judge Green, of Greaves Lane bringing in lower-wage butchers. With regard to the seniority issue, General Counsel's case, and Judge Green's finding, relies on the convoluted (as a product of General Counsel's own questioning) and ambiguous testimony offered by Randy Abed, where in the span of two questions from General Counsel Abed testified that employees were laid off by what he believed to be their seniority, only to immediately follow with testimony that he was unsure of their actual seniority. (JA 103-104).

On a preliminary note, General Counsel never developed evidence that seniority was, in fact, the basis upon which the decision to lay off Venditti was based, nor was it required to be under the buy-out provision. Rather, General Counsel's questioning of Randy Abed was based on Abed's "belief" of who was least senior. In sum, Judge Green was plainly wrong when he concluded that "Randy Abed testified that

Venditti was laid off because he [actually] has less seniority in the store than other employees.”

Lastly, Judge Green dismissed the *Wright Line* defense based on Greaves Lane’s failure to recall Venditti from layoff “despite a provision for recall rights in the MOA.” Judge Green’s rationale is entirely inconsistent with his earlier finding that no MOA existed. The internal inconsistency in Judge Green’s reasoning provides an additional, independent reason not to adopt his conclusions.

C. Judge Green Erred in Denying the Motion to Dismiss Against Greaves Lane

Greaves Lane moved to dismiss the claim that it violated Section 8(a)(3) of the Act by separating Venditti from employment. (JA 264-265; 275). For the reasons stated above, General Counsel had failed to establish a *prima facie* case to withstand the motion and, as such, it was improperly denied.

D. **The Lack of a Section 8(a)(3) Prima Facie Case Against Albany Avenue**

General Counsel alleged, and Judge Green found, that Respondent Albany Ave violated Section 8(a)(3) of the Act with regard to Stephen Fiore, a former butcher at Albany Ave, by demoting him, reducing his hourly wages and hours of work, and terminating his employment on January 30, 2016. All of these actions, however, were taken because of economic and productivity reasons, undermining General Counsel's case.

At the time of the transition, there were four full time butchers and two full time wrappers in the meat department. (JA 317, lns 22-25). During the October 14, 2015 bargaining session with Local 342, the owners of the Albany Ave store indicated they would be reducing one meat wrapper position and two butcher positions. (JA 318, lns 12-19). Albany Ave decided to hire all of the meat department employees and evaluate their productivity before deciding who would be let go. (JA 319, lns 6-8). Sam Abed testified that the reason he let certain employees go had no connection to anti-union animus and that, in fact, all of his employees were represented by Local 342. (JA 319, lns 9-17).

Sam Abed testified that Fiore was let go only because of business reasons. (JA 321, lns 1-2; 323, lns 2-5). Fiore also had a history of being written up. (JA 136-137). Furthermore, Sam Abed had no knowledge whether the individuals who were laid off supported the Union or had a position with the Union while A&P ran the stores. (JA 321, lns

10-13). The entirety of General Counsel's evidence of Fiore's Section 7 activity is that he went outside to a Union demonstration and passed out leaflets. (JA 160, lns 9-11). However, Fiore testified that none of the managers, supervisors or owners of the store ever said anything to him about the leafletting. (JA 160, lns 5-8). General Counsel also did not establish that the other employees who were participating in the demonstrations were terminated or were subject to adverse employment actions. Therefore, General Counsel failed to establish a *prima facie* case of 8(a)(3) discrimination.

Even if the General Counsel had presented sufficient evidence of Albany Ave's knowledge of Mr. Fiore's Section 7 activity and demonstrated the connection between his Section 7 activity and the changes in his terms of employment, or the termination of his employment, Albany Ave would have taken the same action irrespective of the alleged protected conduct, as detailed more fully below.

E. Judge Green Errs in Finding a Section 8(a)(3) Violation

Judge Green credited General Counsel's allegation, in part, because he found that Albany Avenue had not "reduced meat department personnel and payroll." However, inconsistent with that finding Judge Green thereafter found that Albany Avenue, in fact, did reduce payroll by bringing in a lower-wage butcher – O'Neil Lyons. As found by Judge Green, Albany Avenue was "attempting to cut payroll." The fact that headcount may not have been reduced is irrelevant where, as found by Judge Green, Albany Avenue was bringing in less-costly butchers.

As raised in the Albany Avenue motion to dismiss, and noted, *supra*, Fiore testified that no one ever made any comments about his alleged involvement in leafletting (the Section 7 activity underlying the instant matter (JA 160, lns 5-8)), and there was no evidence that Albany Avenue was aware of this activity. Judge Green's sole finding on this point was merely that "the Abeds were in a position to see him doing so [the leafletting]."

Stated otherwise, Judge Green is seeking to establish new law by imputing knowledge of Section 7 activity by the simple fact that an individual may have been in a position to observe it. Judge Green would not even go so far as to identify who was supposed to have been in such a position—Sam Abed, Randy Abed, or both—leaving his conclusion to a generic "the Abeds." Based on the record evidence, it cannot be reasonably said that, more likely than not, a particular Abed had knowledge of Fiore's alleged Section 7 activity. Without that requisite finding, there can be no Section 8(a)(3) violation.

F. Judge Green Erred in Denying the Motion to Dismiss Relating to Fiore

Albany Avenue moved to dismiss the claim that it violated Section 8(a)(3) of the Act by separating Fiore from employment. (JA 265-266; 275). Judge Green denied that motion and erred in doing so.

G. Independent Reasons for the Separation of Venditti and Fiore

It became clear through the course of the hearing that certain alleged 8(a)(3) discriminatees¹⁰ engaged in unprotected conduct under the Act. The conduct related to the participation of these individuals in various demonstrations outside of certain Member Stores, and was in violation of the duty of loyalty to one's employer. *NLRB v. Local 1229, IBEW*, 346 U.S. 464, 472 (1953) ("*Jefferson Standard*") ("there is no more elemental cause for discharge of an employee than disloyalty to his employer."). The participation in those demonstrations forms the basis of General Counsel's proof of Section 7 activity. In that such participation was unprotected, assuming arguendo the truth of General Counsel's theory, those employees are entitled to neither reinstatement nor backpay due to the fact that they were discharged for cause. 29 U.S.C. § 160(c). At the hearing, it was established that Venditti and Fiore were distributing flyers to potential customers of Member Stores urging them to not shop at the employer's store. (JA 513-514).

¹⁰ Anthony Venditti (JA 130-131; 231, lns 23-25) and Stephen Fiore (JA 157, lns 19-20; 158-159; 160, lns 9-12; 171, lns 14-16; 514).

The crux of the analysis of *Jefferson Standard* is whether the conduct intended to cause the employer financial harm. It is clear that, as is the case here, where an employer is attempting to resurrect a bankrupt business, public pleas for potential customers to shop elsewhere can be considered nothing but a reckless effort to economically harm one's employer. See, *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006) (comments made against employer during a crucial time when management was "struggling to get up and running under new management" found to be unprotected).

The issue of the flyers should be considered in the context of their distribution - amidst unlawful and misleadingly incorrect signs that Local 342 members were "on strike." (JA 35, ln 7; 149, ln 11; 151, lns 8-9; 226, lns 8-12 (witness implies use of "on strike" poster at Greaves Lane outside of her presence); JA 230, lns 8-17 (according to Local 342 representative Steven Booras, "on strike" signs were used at Greaves Lane even though no strike was occurring)). In fact, there is no evidence the employees withheld labor from any of the Member Stores, and the communication that a "strike" was occurring at these stores was an absolute falsehood with the clear intent to malign the newly opened stores. Judge Green's reliance on *Medina Super Duper*, 286 NLRB 728, 729 (1987), a case which did not involve employee attacks against a newly purchased, bankrupt store, was palpably wrong. In short, the communications of a "strike" to the public at the time of the store openings, together with demands to the public not to shop

at these stores, were a plainly false, malicious effort to attack the financial viability of the Member Stores in retaliation for refusing to re-negotiate the October 22 MOA. Consequently, the employees lost the protection of the Act by participating in that inappropriate conduct and are unable to avail themselves of the remedies precluded under Section 10(c) of the Act. Judge Green did not address these issues. Rather, he summarily cited the general proposition that leafletting to contest unlawful conduct is protected activity.

H. Albany Avenue's Political Activity Rule was not Unlawful

Judge Green found unlawful a rule that encouraged "participation in the political process" but required activities related to the political process to be done on an employee's own time and away from the store's premises. It further prohibited the circulation of political or legislative petitions on company property. Addressing the rule under *The Boeing Co.*, 365 NLRB No. 154 (2017), Judge Green candidly admitted that "it is less clear to me in what group the Board would place the sweeping rule against participation in the political process." Judge Green's admitted inability to apply Board law on this issue, in and of itself, is reason to reject his subsequent analysis.

In that analysis, he faults Albany Ave for failing to explain the significance of a retail establishment, which depends on sales to a diversity of customers for its very existence, prohibiting the use of its premises for political activities. Judge Green's failure to appreciate the commonsense facts of this case - that permitting

political advocacy on its property could alienate customers—underscores a continuing theme of choosing to select certain record evidence, while turning a blind eye to contrary evidence, when attempting to reach a particular conclusion against the Member Stores. Unable to identify which *Boeing* category under which to address this issue, then summarily and seemingly arbitrarily addressing it as a Category 2 issue, Judge Green fundamentally erred in his role as a judge which, in turn, gives grave reason to question the soundness of the conclusions through his Decision.

CONCLUSION

For the foregoing reasons, this Court should grant review of the National Labor Relations Board's Decision and Order of October 16, 2019 and deny enforcement of same.

Dated: November 24, 2020
New York, New York

Respectfully submitted,
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