

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 REPLY 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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SUMMARY OF THE ARGUMENT

As set forth in the main Brief submitted to this Court by the Respondents/Cross-Petitioners Member Stores, the Decision of Administrative Law Judge Benjamin W. Green, largely adopted without comment by the National Labor Relations Board (the "Board"), is replete with findings that, in any number of 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 relevant caselaw. Indeed, it is respectfully submitted that the fact that Judge Green's Decision is materially incorrect is confirmed by the failure of the General Counsel of the National Labor Relations Board on the instant appeal to have either contradicted, or even sought to contradict, various of the facts and conclusions of law set forth in the Member Stores' main brief.

The most startling and significant omission by the Board in its Brief is its failure to dispute the legal underpinning of the Order of United States Bankruptcy Judge Robert D. Drain. Thus, in order to incentivize the purchase of stores from the bankrupt The Great Atlantic & Pacific Tea Co., Inc. ("A&P"), and thereby cause A&P employees to be offered the opportunity to avoid the loss of thousands of jobs, Judge Drain ordered, on October 21, 2015, that purchasers of the A&P stores (if any) only needed to offer employment to those former A&P employees on a Modified Labor Agreement, if one had been reached, or

upon the buyer's "last, best offer." That Bankruptcy Court Order was unlawfully and literally countermanded by Administrative Law Judge Green and the Board, thereby causing the Member Stores to possibly incur millions of dollars in damages in having opened their stores by complying with the uncontradicted and valid Court Order of Judge Drain. That failure by Administrative Law Judge Green, as adopted by the Board, to also adhere to the Bankruptcy Court's Order was egregiously compounded by his mis-application of the "perfectly clear successor" standard, a doctrine which cannot possibly be applied in light of Judge Drain's Order. Finally, certain of Judge Green's "factual findings," such as his finding against Seven Seas based upon what a witness, Sharon Gowon, allegedly stated while employed by an altogether different company, A&P, are palpably incorrect as a matter of law.

In its Summary of Argument, at page 22 of its Brief, the Board has stated that "the member stores also breached their duty to bargain by unilaterally laying off 12 employees" —that incredible statement flies in the face of the facts that the Member Stores actually proposed a buy-out, rather than laying off prospective or hired A&P employees, the President of Local 342 agreed to, at a minimum, the buy-out on the final day of negotiations, representatives of Local 342 inquired of the Member Stores as to who would receive the "buy-out," and Judge Green found that such a buy-out was agreed to by Local 342—indeed, in a November 2015 Memorandum of Agreement, after the Member Stores opened their doors, Local 342 conceded that the buy-out had been agreed

to during the negotiations. In short, the Decision of Judge Green is rife with error and, most bluntly, was the product of his effort to reach a conclusion in favor of Local 342. Most respectfully, that Decision should be vacated by this Court.

ARGUMENT

POINT I
THE FAILURE OF THE BOARD TO ADDRESS THE IMPACT
OF THE BANKRUPTCY COURT ORDER

The Board does not refute the fact that the Member Stores purchased the former A&P properties upon the mandated bases set forth by Bankruptcy Judge Drain in his October 21, 2015 Order (JA 561; 780). Indeed, the Member Stores could not have purchased the stores other than in conformity with Judge Drain's Order, and it may be asked, as an example, were the Member Stores free, when opening the purchased stores, to make offers to less than "substantially" all of the Union-represented employees as mandated by Judge Drain? Of course not, and the Board does not provide any rational reason why it was somehow lawful for Administrative Law Judge Green to disregard Judge Drain's Order, but not for the Member Stores to do so.

A. The Violation of Judge Drain's October 21, 2015 Order

The Board actually admits that Judge Drain's Order was ignored by Administrative Law Judge Green because it states, in side-stepping the issue, at page 47 of its Brief and in totally irrelevant fashion, that the "the bankruptcy court's only involvement was issuing an order approving the amended Asset Purchase Agreement" (emphasis supplied),

as if the reasoning utilized and multiple factors considered by Judge Drain in arriving at his Order have no relevance. In any event, nowhere in the "amended Asset Purchase Agreement," if it is to be referred to, is there any mention of "impasse," as it was never contemplated by any party or Judge Drain (and there is no evidence to the contrary) to be a basis for opening the purchased stores.

As noted above, in its Brief the Board also does not address the statutory framework set forth in 11 U.S.C. § 3105, as cited by the Member Stores at pages 12, *et seq.* of their Brief. That statute provides the Bankruptcy Court with the power to issue any "judgment that is necessary or appropriate to carry out its mandate" — and in the case at bar, that mandate included the sound decisions of Judge Drain in September and October, 2015 to foster employment by incentivizing the purchase of the still-unsold A&P stores and only requiring that an offer of employment to be made to substantially all A&P employees upon either a Modified Labor Agreement, or merely the "last, best offer" of the purchasers.

Nor did the Board address in its Brief the cases of *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) and *U.S. v. Western Pac. R. Co.*, 352 U.S. 59 (1956), cited by the Member Stores at pages 19 and 20 of their Brief, and it cannot be gainsaid that Judge Drain had the compelling reason of fostering employment in issuing his October 21, 2015 Order. Even more destructive of Judge Drain's Order is that Administrative Law Judge Green went one step

further in his incorrect holding by adding a "time component" to the "impasse." According to Judge Green, the "impasse" between the Member Stores and Local 342 had to have additionally occurred at the time that "offers of employment" were to be made to the A&P employees. (SPA 79). That staggering claim is contrary to the law pertaining to "impasse," as there is no time to be fixed in reaching an "impasse," even if the concept of "impasse" applied to the hiring of the A&P former employees, which it did not. *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) ["[T]he Board has no fixed definition of an 'impasse.'"]. That holding, of course, undercuts Judge Green's requirement that an "impasse" was to have been reached upon the hiring of the A&P employees, as there is no definite time by which an "impasse" might be reached under Board law.

The dramatic and prejudicial effect of Judge Green's belated holding years after the Member Stores opened cannot be overstated. In its Brief, the Board sets forth no basis or justification for Administrative Law Judge Green's violation of law, and the Board merely states, at page 46 of its Brief, that the "Board reasonably concluded that the amended Asset Purchase Agreement . . . should be read as incorporating its well-settled meaning" (emphasis supplied). The phrase "should be read" is, of course, not equivalent to Judge Drain having literally ordered that an "impasse" must be reached (which he did not).

Further, the "should be read" conclusion reached by the Board necessarily ignores the express condition Judge Drain placed on the obligation of the Member Stores to make offers of employment. The original APA required that "Buyer shall make an offer of employment, which shall be effective as of the Closing Date and contingent upon the Closing, and shall be consistent with the terms and conditions required by the governing Affected Labor Agreements [if assumed, which they were not] or Modified Labor Agreements, to the extent applicable." (JA 823-824, ss. 6.3-6.4(a)).

In the Amendment to Asset Purchase Agreement, the obligation to make offers of employment changed in relevant part by adding the following provision: "if no Affected Labor Agreements or Modified Labor Agreements are in effect, the offer of employment to Affected Union Covered Employees will be on terms as are reflected in the Buyer's last best offer (the "Employment Offer"). (JA 843, amending Section 6.4(a) of APA). The Amendment, approved by Judge Drain, placed an express condition on the mandatory offers of employment being based on the "last, best offer" if an Affected Labor Agreement or Modified Labor Agreement were not in effect. The Bankruptcy Court was not silent on the condition precedent to making offers of employment based on the last, best offer. Therefore, the Board had no place in attempting to interpret the condition precedent in any way other than expressly set forth in the Bankruptcy Court Order.

Indeed, on September 30, 2015, when the amended Asset Purchase Agreement was executed, the Member Stores were contemplating the near-term expenditure of millions of dollars to purchase failing A&P stores, as well as the possible hiring of hundreds of A&P employees who would otherwise become unemployed. It is this exact situation that the U.S. Supreme Court previously sought to address in limiting the applicability of the labor law. *NLRB v. Burns Int'l Security Svcs.*, 406 U.S. 272, 287-88 (1972) ["A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible, and may discourage and inhibit the transfer of the capital."].

It is self-evident that the Member Stores would never have contemplated on September 30, 2015 that they could, or should, reach an "impasse" with Local 342 over all terms and conditions of employment that would relate to the hired A&P employees when these stores ultimately opened (which occurred a few weeks later, e.g., in October and November, 2015). Pursuant to Board law, an "impasse" may only be reached when it is "futile" to continue to negotiate for an overall employment, a high bar which, it is submitted, might not have been acceptable to the Member Stores when deciding if they should purchase the unsold A&P stores. See, *Bottom Line Enterprises*, 302 NLRB 373, 374

(1991), *enf'd*, 15 F.3d 1087 (9th Cir. 1994) [an employer's obligation to refrain from unilateral changes . . . encompasses a duty to refrain from implementation at all unless and until an overall 'impasse' has been reached on bargaining for the agreement as a whole"].

Judge Green's failure to adhere to the clear words of Judge Drain's Order is also stunningly contradictory to his other findings. Thus, in finding that there was not a finalized collective bargaining agreement between the Member Stores and Local 342 as a result of the October 21, 2015 meeting between the President of Local 342 and the Member Stores, Judge Green stated, in referring to a side-bar communication, in his Decision:

"[Counsel for the Member Stores] did not recall Abondolo's exact words and the exact words are important." (emphasis supplied). (SPA 74).

In that instance, Administrative Law Judge Green found for Local 342 in holding that a complete collective bargaining agreement between Local 342 and the Member Stores had not been entered into because "words matter;" but words obviously "did not matter" to him when he then paradoxically found, again for Local 342, that an "impasse" had to have been reached by the parties upon the hiring of the A&P employees.

In fact, the actual testimony of counsel for the Member Stores during the hearing is as follows:

"We go off into a side room. I actually remember the table. It was either oval or octagon shape with big backs. It was very comfortable. So he and I sit down.

And he said, 'We have an agreement. We'll agree to what you want,' in so many words.

Do I remember the exact sentence? No, but we were talking about our proposal. And he said, 'We have an agreement. We're good to go. I want to raise one thing with you, though.'

'What is that?'" (emphasis supplied).

. . . .

"THE WITNESS: Only with regard to the people who were present and those are the names, and yes, I remember them, but I want to be exhaustive, so that's why I referred to the document -- thank you.

Okay, so we have an agreement. He says, 'We're done, but I need this.'" (JA 279.1-279.2).

In short, the testimony of counsel for the Member Stores was misrepresented by Judge Green, as he accented that counsel said that he did not remember the "exact sentence," relating to the first time Abondolo said that the parties had an agreement not that counsel did not remember the words. The actual testimony was that Mr. Abondolo repeatedly said: "We have an agreement. We'll agree to what you want."

In sum, Judge Green chose, again for the benefit of Local 342, not to accent the clear testimony that Mr. Abondolo said, "We have an agreement," and utilized the candid statement of counsel that he would not recite the "exact sentence," as if one could repeat "the exact sentence" from a conversation which had occurred years earlier.

The faulty approach taken by both Judge Green and the Board should be viewed in the context of their limited expertise – interpreting the National Labor Relations Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883,

891 (1984); see also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (“Like other administrative agencies, the Board is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers.”); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) (“[W]e have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute.”); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (“Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute”).

A fundamental error and departure from law is that the Board took it upon itself to interpret bankruptcy law, which is not administered by the Board. The Board applied a concept – “impasse” – under the National Labor Relations Act and concluded that the “well-settled meaning” of a last, best offer of employment is one that is the product of a labor law impasse. One might expect no other conclusion given the limited authority of the Board. To coin the common phrase, when all you have is a hammer, everything looks like a nail. When all one does is enforce the labor law (as does the Board), then the solution to every dispute rests in the labor law.

Significant issues beyond that of the nation’s labor law are at issue when it comes to the bankruptcy law, including the balancing of

the interests of creditors, efficient use of assets and, at a more fundamental level as applicable to the instant matter, the ability to find suitors willing to continue operating grocery stores (and employing thousands of workers, even if they are not necessarily those employed by the bankrupt company) for dozens, if not hundreds, of local communities.

Therein lies the danger of permitting an administrative agency of limited scope and authority, such as the Board, to interpret the orders of a U.S. Bankruptcy Court. The Board is substituting its own limited-scope judgment for that of a U.S. Bankruptcy Judge, who must consider issues far beyond the labor law in making determinations under the Bankruptcy Code. The fact that the Board's opposition brief is largely silent on the issue of Judge Drain's order only underscores the limited jurisdiction of the agency and that its interpretations of the Bankruptcy Code should be given no weight upon review by this Court.

B. In Any Event, An "Impasse" Occurred

While it was a violation of law by Judge Green to have held that an "impasse" was required before terms of employment of the former A&P employees could be set, Local 342 inferentially admitted that on October 21, 2015 an "impasse" had been reached, and that the Member Stores would no longer negotiate additional or different terms. Thus, the Local 342 bargaining notes of that October 21, 2015 negotiating session, which were not turned over to the Regional Director until a

subpoena had been served upon Local 342, reflect that the President of Local 342 communicated that he necessarily understood the Member Stores' "last, best offer" to have been made on that date. First, Richard Abondolo specifically stated to counsel for the Member Stores in a side-bar discussion: "We have an agreement." (JA 279.3). Additionally, in connection with that final negotiating session with the parties, and according to the Local 342 notes, the parties had this colloquy:

"Doug: I will put an MOA together and send it to you guys . . . this afternoon.

RA: Okay. By that point we can put it to bed. When are the transitions taking place."

(JA 400.3-400.4). In sum, the bargaining was recognized by Local 342 to have been concluded on that date, and for the Board to deny that fact is evidence of its desire to rule against the Member Stores.

POINT II
HOW COULD THE MEMBER STORES BE "PERFECTLY
CLEAR SUCCESSORS" IN OCTOBER, 2015?

In suggesting that the Member Stores were "perfectly clear successors" both Administrative Law Judge Green and the Board not only ignore material facts, but then characterize certain facts in a way that is not at all accurate or relevant. In that regard, the Board states at page 43 of its Brief that the Member Stores "gave no indication that they intended to unilaterally impose new terms and conditions of employment." First, it is self-evident, as thoroughly set forth in the Member Stores' main Brief, pages 14-17, that the

Member Stores stated from day “one” of the negotiations in June, 2015 that they would definitely not agree to the terms and conditions of the A&P collective bargaining agreements, a fact not disputed by Local 342 or the Board—as a result, under what possible theory could the Member Stores be “perfectly clear successors” in October or November, 2015? The Board does not provide such a theory, and there is none, as the President of Local 342, Richard Abondolo, stated on October 21, 2015 that the Union and the Member Stores were finished with the bargaining and agreed (“okay” was the word he used) that counsel for the Member Stores should draft a Memorandum of Agreement that afternoon resulting from their five (5) months of negotiations. It is also outstandingly inexplicable, of course, for the Board to have claimed in its Brief that the Member Stores had not even “bargained with Local 342” regarding initial terms and conditions of employment.” See the Board’s absurd statement at page 44 of its Brief.

A. To What End Is The Board Making The “Perfectly Clear Successor” Claim?

The Board’s claim that the then unknown (in July, 2015) Member Stores (and without employees) were somehow “perfectly clear successors” at some point in July, 2015 flies in the face of the Member Stores’ expressed intent during the bargaining with Local 342 that they would not agree the terms of the A&P collective bargaining agreements. Indeed, the Member Stores expressed their view in the first bargaining session that the A&P contracts were unworkable, which

statements were confirmed by Local 342. See both the testimony and affidavit of Lisa O'Leary of Local 342, referred to at pages 15 and 16 of the Member Stores' Brief. It was for sound reasons, therefore, that Judge Drain did not make any mention of the A&P contracts in his October 21, 2015 Order, and that he only required a Modified Labor Agreement or the "last, best offer" to be the bases upon which the sale of the unsold A&P stores might occur. Administrative Law Judge Green's holding that the Member Stores were "perfectly clear successors" in July, 2015, was therefore a non-sequitur and irrelevant.

In its own bargaining notes referred to above (JA 400-1.400.4) (which the Member Stores do not vouch for), and which were subpoenaed by the Member Stores, Local 342 wrote that the following colloquy occurred during the final bargaining session on October 21, 2015:¹

"[Concerning the buy-out]

. . . .

Doug: You suggested a different model. . . .

RA [Local 342 President]: I was concerned about getting into an understanding about part-timers.

. . . .

RA: We will work through the language.

Doug: I will put an MOA together and send it to you guys. . . . by this afternoon.

¹ This evidence is in addition to the testimony of counsel for the Member Stores where, in the side-bar with Mr. Abondolo on that date, the parties agreed that the buy-out was the only issue remaining, and Mr. Abondolo said: "We have an agreement." (JA 279.3).

RA: Okay. By that point we can put it to bed. When are the transitions taking place [the purchase of the stores].

Sharon [Representative of the Member Stores]:
. . . Closing on three stores on Monday morning starting at 6:00 a.m. . . .

LO [Representative of Local 342]: You guys will go into the store before it happens so the people in the store will know. . ." (emphasis supplied).

Those remarkable statements by Local 342 as reflected in its bargaining notes totally debunk the fatuous "perfectly clear successor" claims of the Board—prior to October 21, 2015 the Member Stores had not had an opportunity to speak to the A&P employees (as they did not own the stores prior to October 21, 2015), the employees were still employed by A&P, and the new Local 342 collective bargaining agreement terms were only concluded on October 21, 2015. Moreover, and with the express approval of Local 342, the Member Stores were asked by Local 342 to advise A&P employees represented by Local 342 of the status of the purchases and contract terms in the week before [the closing] "when [the Member Stores] have more time." See JA 400.4, the Local 342 notes referring to the discussion between Sharon Konzelman and Lisa O'Leary on October 21, 2015.

Finally, to what end is the Board pressing this issue? Whether the non-identifiable Member Stores (who had no employees) were "perfectly clear successors" in July, 2015 has no relevance to the subsequent bargaining that was engaged in through the eve of the opening of the Member Stores in October and November, 2015. The only

issue in October, 2015 was whether a complete agreement was reached, or only a partial collective bargaining agreement, and/or whether the Member Stores might open only upon the basis of an "impasse," an incorrect concept urged by the Board. On the other hand, neither Judge Green, Local 342, nor the Board ever suggested that the A&P collective bargaining agreements should apply on or after October, 2015. This issue, it is therefore submitted, is only being asserted because of the Board's improper desire to find against the Member Stores.

Further, the Board's analysis of perfectly clear successorship relies on the original APA language in July, 2015 as the record evidence is clear that, from day one of meetings with the Union, the Member Stores expressed their intent not to make offers of employment based on the existing terms and conditions of employment. The original APA July 2015 language required, in relevant part, offers of employment based on the Affected Labor Agreement (if "assumed," which it had not been) or upon a Modified Labor Agreement. At the very outset, therefore, only two things were "perfectly clear." First, that there was no assurance that offers of employment would be based on existing terms (due to the right of the Member Stores to negotiate a Modified Labor Agreement). Second, there was no assurance of what the terms of a Modified Labor Agreement might be. The Member Stores and the Union, particularly in light of the bankruptcy, could have negotiated significantly different terms than had existed. *A fortiori*, there was no assurance that employees would be retained upon their existing

terms and conditions of employment and no legal basis upon which the Board could make a perfectly clear successor finding. *In re Spruce Up Corp.*, 209 NLRB 194 (1974), *enf'd*, 529 F.2d 516 (4th Cir. 1975). [employers are not perfectly clear successors unless they have indicated their intent to retain employees without changing their terms or conditions of employment]. Indeed, the language in the original APA as well as the amendment to the APA conveyed the same message — that there was no assurance as to the terms and conditions of employment upon which the offers of employment would be made.

The point is significant, as the entirety of the perfectly clear successor doctrine relies upon an assumption that a majority of the successor's workforce will be composed of workers from the predecessor. When there is no assurance that offers of employment will be based on the same terms and conditions, there is no assurance that a sufficient number of workers will accept employment. *NLRB v. Burns Int'l Security Services, supra* at 294-295 [duty to bargain about terms and conditions of employment matures when it is evident that new employer will actually employ a majority of its workforce from those employed by the old employer].

Absent a finding of perfectly clear successorship status, the Board's conclusions on that point as well as the unlawful implementation of initial terms and conditions of employment (including, but not limited to, with respect to buy-out of laid off employees) must necessarily fail as employers who are not perfectly

clear successors are legally entitled to establish initial terms and conditions of employment. *Burns, supra* at 294-295.

POINT III
THE MEMBER STORES WERE PERMITTED TO PUT
INTO EFFECT THE BUY-OUT PROVISIONS

At a minimum, and as set forth in Point III of its main brief, the Member Stores were permitted to lay off, or not hire, A&P employees in consideration of the "buy-out" provisions that were agreed upon by Local 342 on October 21, 2015. That fact is uncontradicted, according to Local 342—as noted above the President of Local 342 specifically stated on October 21, 2015, when referring to the "buy-out" discussions held in a side-bar, that he had previously been "concerned about getting into an understanding about part-timers'" severance, which had now been resolved. See JA 400.3-400.4, which are Local 342's own notes.

In agreeing to "work through the language" after receipt of the MOA that "afternoon," Local 342 asked (again in their notes), when the stores would be purchased and advised the Member Stores to "go into the store[s] . . . so that the people in the store will know." These admissions, in Local 342's own notes, must be coupled with Judge Green's holding that "Abondolo clearly communicated . . . the Union's willingness to accept the Member Stores' concept of discretionary layoffs." (SPA 74).

As a result, the parties canceled the negotiations after October 21, 2015 ("tomorrow, rather than meet . . .") in anticipation of the preparation of MOA that afternoon (JA 400.3), and thereafter,

as reflected on pages 25-27 of the Member Stores' main brief, Local 342 repeatedly confirmed the existence of the "buy-out" agreement. As an example, JA 436-438 was an affirmation by Richard Abondolo of the existence of the "buy-out" agreement in asking for the names of the proposed recipients of the buy-outs.

Significantly, in its Brief, at pages 48 and 49, the Board did not even attempt to refute the caselaw cited by the Member Stores at pages 22 and 23 of their Brief that a complete agreement need not have been entered into for the "buy-out" to be effective. Nor did the Board contradict the fact that "buy-out" offers were extended to A&P employees, as exemplified by, among other examples, the communications between the Local 342 representative, Lou Loiacano, and Seven Seas, which provided him with the list of individuals entitled to a "buy-out." (JA 236-237; 238, lns 11-22; 537-538).

Under such circumstances, the subsequent refusal of Local 342 to fulfill its obligation concerning the buy-outs cannot, and does not, vitiate the requirement that the 8(a)(5) charges be dismissed against the Member Stores. As noted at page 26 of the Member Briefs', therefore, the following individuals cannot therefore be held to have unlawfully been laid off or not hired:

- (1) HB84 - Richard Maffia, Venus Nepay, Khadisha Diaz;
- (2) Greaves Lane - Michael Fischetti, Anthony Venditti, Gina Cammarano, Debra Abruzzese;
- (3) Albany Avenue - Joseph Batiste, Calvin Harris, Robert Jenzen, Stephen Fiore; and

- (4) Seven Seas - All alleged discriminatees.

POINT IV
JUDGE GREEN'S DECISION RELATING TO SEVEN SEAS
IS AN INCREDIBLE VIOLATION OF LAW

As noted in the Member Stores' main Brief, at pages 27, *et seq.*, the Decision of Judge Green relating to Seven Seas ignored rules of evidence and caselaw, and permitted 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. Thus, Administrative Law Judge Green necessarily violated Federal Rule of Evidence 801(d)(2)(D): (a 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 purported acts of Gowon were legally inadmissible in the unfair labor practice hearing, let alone sufficient to establish a *prima facie* case by General Counsel. See *Feis v. United States*, 484 Fed. Appx. 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).

In its Brief the Board stunningly states, at pages 32 and 33, as follows:

"For example, the fact that the evidence of Gowon's anti-union hostility was formed before Seven Seas took over the store is inconsequential [as her] hostility directly influenced the subsequent hiring decisions because they were based on her recommendations. . . ."

In other words, the Board has asserted that statements allegedly made by Gowon while employed by another company should somehow serve as the only, and sufficient, basis in making out a *prima facie* case against Seven Seas, as General Counsel presented no other evidence to Administrative Law Judge Green.

The Board incorrectly claims that at page 29 of its Brief that each of the nine (9) employees not hired by Seven Seas "engaged in concerted activity in the weeks and leading up to Seven Seas' decision not to hire them." That mis-statement of the record is appalling:

- (1) there is no proof that any such alleged act occurred while employed by Seven Seas;
- (2) no proof was adduced that the Contes, the owners of Seven Seas, knew of such alleged acts;
- (3) no proof exists that Seven Seas did not hire these employees because of these acts;
- (4) no proof was produced by General Counsel that Gowon did, or did not, made any recommendations (about which individual?) based upon on anti-union *animus* she allegedly possessed while employed by Food Emporium;
- (5) all employees hired by Seven Seas were members of Local 342, so any A&P employees not hired were necessarily also members of Local 342 and, finally;
- (6) there was no finding against Gowon, or a filed unfair labor practice charge, or any proof that Gowon had an anti-union animus — the anecdotal claims of Food Emporium employees, by themselves, cannot possibly be binding upon Seven Seas.

To attenuate the argument, without any proof of an anti-union act having been committed by Seven Seas could it be at all rational to suggest, as the Board has done, that a new employee of Seven Seas (Gowon) will cause Seven Seas to be "responsible" for all her prior acts at Food Emporium, whether they be "anti-union," "criminal," "reprehensible," "cordial," "loving" or otherwise? The Board's bias against rational thought and Seven Seas must, it is respectfully submitted, not be condoned by this Court.

POINT V
WHAT IS "UNCONTESTED"?

At Point I of its Brief, the Board states that the Court should "summarily enforce" the "uncontested portions" of the Board's Order.

Thus, the Board claims, at page 24 of its Brief, that the Member Stores did "not dispute" that they did not bargain in July, 2016—as repeatedly noted in the Members' Store Briefs, however, the Member Stores have proven that the terms upon which the purchased stores could be opened stemmed from a "last, best offer" of the Member Stores. As a result, the July, 2016 request for bargaining was of no moment.

POINT VI
THE MEMBER STORES DID NOT RETALIATE
AGAINST ANYONE BASED UPON THEIR "UNION ACTIVITY"

The Board erroneously claims at Point II of their Brief, page 24 and following, that the Member Stores "retaliated" against employees based upon their Union activity. First, and most importantly, all employees hired from A&P were former members of Local 342. Secondly, as in the case of Seven Seas, any acts engaged in by these employees prior to their hiring, or not, by the Member Stores cannot possibly be binding upon, or form a predicate in establishing a *prima facie* case against the Member Stores, unless the Member Stores' representatives knew of, and acted upon "acts" which did not occur.

(a) **HB84**

The Board claims at page 27 of its Brief that Nelson Quiles was not hired because of his "Union activity" before HB84 opened. Yet the Board did not respond to the undisputed fact, set forth at page 45 of its Brief, that Judge Green found that Davis Britt, a manager of A&P, "preferred [Local 342 member] Maffia, instead of Quiles as the meat manager." The Board states that a finding of an anti-union animus may stem from "a difference in kind" between the Union involvement of two groups of employees. See the Board's Brief, page 28. Yet there is no proof whatsoever that Britt's "preference," or that of the owners of HB84, stemmed from this unknown "difference in kind" of alleged "Union activity." In sum, General Counsel necessarily did not, and could not, make out a *prima facie* case against HB84.

Further, General Counsel does not urge any opposition in its brief to the argument of the Member Stores that Judge Green erred in denying the motion to dismiss at the conclusion of the Counsel for the General Counsel's case-in-chief. (Member Stores' Principal Brief, p. 46).

(b) Greaves Lane

With respect to the discharge of Venditti by Greaves Lane, there is no evidence offered in the Board's brief that Greaves Lane was aware of alleged protected activity by Venditti (i.e., handbilling) around the time of his termination. Rather, it argues that one of the owners observed the handbilling and, since Venditti was involved in the handbilling, the store had knowledge of Venditti's protected activity. (Board's Brief, p. 35).

However, when faced with the undisputed fact that the store promoted another individual who engaged in handbilling activity, the Board argues that "there was no evidence that management was aware of that employee's union activity." (Board's Brief, p. 36). The Board makes this bald argument despite testimony from the actual employee, Justin Conti, that he had been observed by management while handbilling. (Member Stores Principal Brief, p. 48).

The Board cannot have it both ways, arguing that generic observation of handbilling was sufficient to demonstrate knowledge of Venditti's protected activity, but then admitting that observation of

Conti's activity was insufficient. The Board cannot justifiably conclude that an employee who engaged in 7-8 demonstrations against the store (Conti) was promoted, but Venditti (who joined the handbillers for far less time) was discriminated against. The internal inconsistency in the Board's findings render them unenforceable.

Further, General Counsel does not urge any opposition in its Brief to the argument of the Member Stores that Judge Green erred in denying the motion to dismiss at the conclusion of the Counsel for the General Counsel's case-in-chief. (Member Stores' Principal Brief, p. 50).

(c) Albany Avenue

Similar to the arguments it makes with respect to Greaves Lane, the Board asserts generally that Albany Avenue had knowledge of Fiore's alleged protected activity because it monitored certain handbilling. That argument ignores Fiore's admissions that no one from Albany Avenue ever said anything to him concerning his participation in handbilling, undercutting the conclusion that a store with such a high level of union animus (as argued by the Board) had any knowledge that Fiore even engaged in such conduct. (Member Stores Principal Brief, pp. 51-52).

Further, General Counsel does not urge any opposition in its Brief to the argument of the Member Stores that Judge Green erred in denying the motion to dismiss at the conclusion of the Counsel for the

General Counsel's case-in-chief. (Member Stores' Principal Brief, p. 54).

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

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CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

Certificate of Compliance With Type-Volume Limitation,

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1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because this brief contains 6,254 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(f), as counted by the Word Count function of Microsoft Word, the word processing system used to prepare this brief.
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November 24, 2020