

# 20-731, 20-1009, 20-1028

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**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 AVENUE MEAT LLC;  
HB 84 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**

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**ON APPLICATION FOR ENFORCEMENT AND  
CROSS-PETITIONS FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**FINAL-FORM BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**PETER B. ROBB**

*General Counsel*

**ALICE B. STOCK**

*Deputy General Counsel*

**RUTH E. BURDICK**

*Acting Deputy Associate General Counsel*

**DAVID HABENSTREIT**

*Assistant General Counsel*

**National Labor Relations Board**

---

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**ELIZABETH HEANEY**

*Supervisory Attorney*

**JOEL A. HELLER**

*Attorney*

**National Labor Relations Board**

**1015 Half Street SE**

**Washington, DC 20570**

**(202) 273-1743**

**(202) 273-1042**

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## **STATEMENT OF JURISDICTION**

This case is before the Court on the National Labor Relations Board's application to enforce, and Key Food Stores Co-Operative, Inc.'s and seven of its member stores' cross-petitions to review, a final Board Order issued against those entities on October 16, 2019. (368 NLRB No. 92.) The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). The application and petitions are timely, as the Act provides no time limits for such filings.

## **STATEMENT OF ISSUES**

- I. Whether the Board is entitled to summary enforcement of uncontested portions of its Order.
- II. Whether substantial evidence supports the Board's findings that the member stores discriminated against employees for engaging in union activity.
- III. Whether substantial evidence supports the Board's findings that the member stores unlawfully refused to bargain by unilaterally laying off employees.
- IV. Whether substantial evidence supports the Board's finding that Key Food and the member stores are joint employers.

## STATEMENT OF THE CASE

This case involves a wide-ranging campaign of unfair labor practices against employees at numerous Key Food member stores. As detailed in the next section, the stores listed below committed the following violations:

- HB84: interrogation; discriminatory layoff and failure to hire; unilateral layoffs; refusal to bargain
- Seven Seas: discriminatory failure to hire; unilateral layoff; refusal to bargain
- Greaves Lane: discriminatory layoff; unilateral layoffs; unilateral reduction in hours; refusal to bargain
- Albany Avenue: unlawful rules; discriminatory layoff, demotion, and reduction in wages and hours; unilateral layoffs; unilateral reduction in hours and wages; refusal to bargain
- Riverdale Grocers; Jar 259; Paramount: refusal to bargain

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Key Food Purchases Grocery Stores on Behalf of Its Members**

Key Food is a cooperative whose corporate members own grocery stores in New York City. Key Food's members include Seven Seas Union Square, LLC; 100 Greaves Lane Meat LLC; HB84 Food Corp; 1525 Albany Avenue Meat LLC; Riverdale Grocers LLC; Jar 259 Food Corp; and Paramount Supermarkets Inc. (collectively, the "member stores"). (SA 29-30; JA 330-31.)<sup>1</sup>

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<sup>1</sup> Citations in this brief are to the Deferred Joint Appendix ("JA") and the special Appendix ("SA"). Citations preceding a semicolon are to the Board's findings;

On July 19, 2015, Key Food entered into an Asset Purchase Agreement with the bankrupt supermarket chain A&P to purchase several of the chain's stores. Employees at those stores were represented by United Food and Commercial Workers, Local 342 and covered by collective-bargaining agreements. (SA 30-31; JA 11-12.)

The Asset Purchase Agreement provided that:

Buyer shall either (a) agree to assume the Affected Labor Agreement without modification ... or (b) engage in good faith negotiations ... toward reaching mutually satisfactory modifications to the relevant Affected Labor Agreement with each of the Affected Unions and to enter into a Modified Labor Agreement with each of the Affected Unions.

(JA 823.) The Asset Purchase Agreement further provided that:

With respect to Covered Employees who are represented by an Affected Union ..., Buyer shall make an offer of employment, which ... shall be consistent with the terms and conditions required by the governing Affected Labor Agreements or Modified Labor Agreements, to the extent applicable.

(JA 824.) Those obligations bound both Key Food and its assigns. (JA 833.)

A&P filed a motion to approve the Asset Purchase Agreement with the United States Bankruptcy Court for the Southern District of New York on July 20. The international United Food and Commercial Workers learned of the Asset

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cites following a semicolon are to supporting evidence in the record. "Br." cites are to the member stores' opening brief to the Court, and "KF Br." cites to Key Food's opening brief.

Purchase Agreement when it was filed, and informed Local 342 of its terms. (SA 32, 77; JA 27, 277.)

Key Food conducted an internal auction among its members to determine which members would purchase the stores from Key Food once the A&P sale was finalized. Key Food also retained two stores for itself. (SA 31; JA 328, 334-36.)

**B. Key Food and Local 342 Negotiate for a Collective-Bargaining Agreement**

In late July, Key Food and Local 342 began negotiating for modifications to the existing collective-bargaining agreements. Key Food sought to reach a common agreement that would cover both its own stores and the member stores. Key Food hired attorney Douglas Catalano to serve as lead negotiator for all of the stores. Catalano did most of the talking at the bargaining sessions, speaking for both Key Food and the member stores. Local 342 contacted Catalano about scheduling bargaining sessions. (SA 34, 97; JA 19, 41, 43, 54, 145-46, 278-79, 341.) Key Food Chief Financial Officer Sharon Konzelman also attended all or nearly all bargaining sessions, and was authorized to speak on behalf of the member stores. (SA 34; JA 343-44, 345-46.)

Over the course of several months, Key Food and Local 342 bargained over issues such as hiring, wages, benefits, hours, leave, and grievance arbitration. Catalano or Konzelman made proposals on behalf of the member stores and received and responded to Local 342's counterproposals. Konzelman also

responded when Local 342 requested information regarding all of the member stores, including what positions they would fill with current employees. (SA 34-53; JA 24-25, 38-39, 345-46, 401-25, 436-38, 522-24.)

Representatives from three of the member stores served on the negotiating committee, and other member-store owners attended occasionally. When present, the owners would speak every once in a while. Some of the bargaining sessions were attended only by Catalano or Konzelman, without any representatives from the member stores. Other times, the member-store owners would be in and out of the session, but did not attend the entire time. (SA 34, 97; JA 17-19, 23, 28-29, 144, 341.)

Key Food refused to allow Local 342 to negotiate directly with the member stores. When Local 342 wrote to the member-store owners and requested bargaining, for example, Catalano responded that it had no right to contact the stores and that Key Food was their representative for Local 342. No member-store owner responded. (SA 72; JA 41-42, 633-34.) Member-store owners likewise informed Local 342 that they could not negotiate or sign an agreement individually but had to do so with Key Food. (SA 43, 67; JA 101, 143, 149-50, 286-87.)

As the closings to acquire the stores approached, Konzelman wrote to the member-store owners and told them to contact her or Catalano with questions

regarding union employees. She also explained that Key Food would meet with them to present the terms of any collective-bargaining agreement. (JA 870-72.)

**C. Key Food Signs an Amended Asset Purchase Agreement and Purchase Agreements with the Member Stores**

On September 30, Key Food and A&P amended the Asset Purchase Agreement. The language regarding Key Food's obligation either to assume an Affected Labor Agreement or engage in good-faith negotiations towards and enter into a Modified Labor Agreement remained the same as in the initial Asset Purchase Agreement. (SA 33, 77; JA 841-46.) The provision related to employment at the purchased stores now read:

Buyer shall make an offer of employment to substantially all Covered Employees who are represented by an Affected Union .... Such offer of employment ... shall be consistent with the terms and conditions required by the governing Affected Labor Agreements or Modified Labor Agreements, if any, that may then be in effect. 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 Buyer's last best offer.

(JA 843.) The bankruptcy court approved the Asset Purchase Agreement on October 21. (SA 34; JA 757-80.)

Key Food closed on the stores between October 26 and November 24. Once Key Food closed on a store, it transferred ownership to the member that had agreed to purchase that store. Key Food and each member signed a purchase agreement, which provided that:

Member acknowledges that pursuant to ... the A&P Asset Purchase Agreement, Key Food is obligated to engage in good faith negotiations ... toward reaching mutually satisfactory modifications to the relevant Affected Labor Agreement with each of the Affected Unions and to enter into a Modified Labor Agreement with each of the Affected Unions. Member hereby agrees to be bound by any such Modified Labor Agreement that is negotiated by Key Food or make any offers of employment as required by the A&P Asset Purchase Agreement.

(SA 33; JA 486, 874-82.)

**D. The Parties Fail To Reach an Agreement**

After several months of negotiations, many issues remained unresolved. For example, Catalano had proposed at the outset that member stores have the ability to buy out employees with a severance payment rather than make offers of employment. He included such a provision in a proposed agreement on October 22. (SA 47-48; JA 402.) Local 342 countered on November 2 with a proposal that buyouts be available for seafood-department employees in stores that were closing such departments. (SA 51; JA 415.) After Key Food rejected that offer, Local 342 offered a broader buy-out provision as part of its November 24 proposal. (SA 70; JA 57, 427-28.) Key Food did not agree to that proposal. Konzelman responded that the buyout provision was ambiguous, and countered that buyouts would be available only for employees who were not hired rather than employees who were discharged before the member stores took over. (SA 71; JA 58-59, 436-37.) Referencing severance, Local 342 told Konzelman that the parties “need to get that agreed on” before it would discuss any other changes to its proposal. (SA 71; JA

436.) None of the employees whose layoffs are at issue in this case received severance payments. (SA 70.)

On several occasions, Key Food suggested that the parties reach a partial agreement and work out the remaining details after the stores opened. Local 342 consistently rejected such proposals and informed Key Food that they needed a complete agreement. (SA 73-74; JA 21, 26, 153.) The parties never reached such an agreement. (SA 73-75; JA 147, 464.)

**E. HB84 Questions and Refuses To Hire Nelson Quiles, and Lays Off Employees**

In early September, Local 342 demonstrated in front of a grocery store in Queens owned by Frank Almonte. Among the employees who attended the action was Nelson Quiles, a meat manager and union steward at a different store and an active union member. The following day, Almonte visited the store where Quiles worked and asked to speak with him. Almonte asked Quiles, “do you think that was a nice thing that you did?” and “do you think that was a nice thing to do?” Almonte also asked who from Local 342 sent Quiles to the demonstration. (SA 55-56; JA 30, 140-42, 243, 515-21.)

Almonte and his cousin were also the owners of HB84, the Key Food member that purchased the store where Quiles worked. On October 23, the Almontes returned to the store and spoke with the current manager—whom they had hired to stay on—about which employees they should keep once they took

over. They wanted Richard Maffia as meat manager instead of Quiles, but the store manager told them Maffia no longer worked there. Later that day, the manager laid off Quiles and told him his position as meat manager was no longer available. Around the same time, the Almontes also asked Local 342 to make Maffia available instead of Quiles. Local 342 responded it could not do so because Maffia worked at a different store. (SA 56; JA 138, 249, 296-98, 302, 519.)

On October 26, HB84 assumed operations of the store. It hired all employees who had been working there except Quiles. HB84 brought in Maffia to serve as meat manager, but laid him off two days later. During that same period, HB84 also laid off meat-department employees Venus Nepay and Khadisha Diaz. Local 342 received no notice of the layoffs before they occurred. (SA 57-58; JA 36-38, 232-35, 239-42, 876.)

Local 342 complained to Catalano about HB84's treatment of Quiles. Catalano told them that the Almontes did not want Quiles back, but that Quiles could work at a different Key Food member store. Quiles worked at the other store for one day, then was told not to return. (SA 57-58; JA 31-34, 371-74.)

**F. Seven Seas Refuses To Hire Employees Who Had Sought Union Assistance**

On November 9, Key Food member Seven Seas purchased a former A&P store in Manhattan. Sharon Gowon had worked as the store manager since the prior February. In the months leading up to Seven Seas taking over, employees

had complained to Local 342 about Gowon cutting hours (especially Sunday overtime) and switching days and departments. Local 342 representative Margaret Monier had difficulty resolving such issues with Gowon, who often grew angry when Monier or the store's union stewards raised them with her. In particular, Gowon did not like to make changes to the schedule once she set it. Sometimes she would walk away from such conversations without responding. On multiple occasions, Gowon stated that she did not know why employees had to call Monier and could not just talk to her. During a visit to the store in September, Gowon asked Monier, in front of a group of employees, "why are you even here?" In October, she told union steward Dena Iturralde that "the union was full of shit." (SA 60-66; JA 78, 110-11, 173-77, 180-81, 202-02, 874.)

Seven Seas hired Gowon to continue as store manager after it took control. Prior to formally assuming control, Seven Seas owner Pat Conte asked Gowon which employees he should retain. Gowon provided Conte with a list of which employees she thought were good and which were not. Conte relied on Gowon's recommendations in deciding who to hire. (SA 60-62; JA 60-61, 308-09.)

The employees not hired included Jose Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio. (SA 61; JA 537-38.) Jones served as the store's union steward, and reported employee complaints to Gowon or Local 342. Iturralde and Diaz served

similar roles. Local 342 representative Monier spoke with the stewards when she visited the store, which happened about once a week. The stewards also accompanied Monier when she spoke with Gowon. (SA 62-63; JA 62-63, 71-74, 78, 112, 116, 182-83.) Gowon frequently asked Diaz why Diaz came to her with other employees' problems. Diaz also raised her own scheduling issues with Local 342, telling Monier that she lost her Sunday overtime hours once Gowon was hired. (SA 63; JA 118-21, 187-89.)

Although not a formal steward, Ortega regularly informed management or Local 342 about her own or other employees' workplace issues and was very vocal about getting the issues resolved. She also translated for Spanish-speaking employees in conversations with Gowon about workplace issues. On one occasion in September when Ortega raised another employee's complaint, Gowon told Ortega that it was not her business and that she should go back to work. Ortega called Monier about once a month. For example, she reported the health-and-safety issue of a door being left open during the winter. Throughout the summer, Monier or the stewards told Gowon that Ortega was losing Sunday overtime to less senior employees. A few days before Seven Seas took over, Ortega and Iturralde asked Gowon to schedule Ortega for the following Sunday, but Gowon laughed at the request and walked away. Ortega also attended Local 342 meetings and

distributed union material at the store during breaks. (SA 63-64; JA 75-78, 83-96, 192-95.)

Gomez contacted Local 342 about a variety of safety issues during 2015, ranging from a lack of training for operating the deli slicers to the safety-switch on the slicers not working to exposed wires in the workplace. She showed Monier and Gowon the problems when Monier came to investigate. During one such visit, Gowon asked Gomez why she had to call Monier and did not come talk to Gowon about the issue. Gowon refused Gomez's request for slicer training, but human resources agreed to provide it after Monier went to them. Gomez also reported to Monier about her and others' shift scheduling; Jones spoke to Gowon several times a month about Gomez not getting assigned Sunday work. (SA 64; JA 64-67, 198-202.)

Silverio regularly spoke to Diaz about her schedule, and Diaz raised the issue with Gowon every week. She also went to Diaz on one specific occasion about needing a schedule adjustment for a housing inspection. Jones and Diaz had a meeting on the topic with Gowon, who saw the adjustment as a problem. (SA 65; JA 113-14, 122-23, 190-91.)

Colon, Pagan, and Fields also brought scheduling issues to Local 342. Colon told Monier that the store kept changing his shifts, possibly without following the proper contractual procedure. (SA 64; JA 69, 115-16, 208-09.)

Pagan reported that her hours were being cut and that she was no longer receiving contractually guaranteed hours. (SA 65; JA 203-04.) Fields complained to Monier and Jones in April or May that Gowon refused to grant her time off for surgery and, later, that Gowon treated her more harshly after she returned. (SA 64; JA 67-68, 80-82, 191.) Monier brought those matters to Gowon, who refused or otherwise failed to address them. Monier then went to human resources and was able to resolve the issues. (SA 64-65; JA 191, 203-04, 208-09.)

At the end of December, Seven Seas laid off scanner Ayanna Jordan. Local 342 received no notice of Jordan's layoff before it occurred. (SA 62; JA 36, 248.)

#### **G. Greaves Lane Reduces Hours and Lays Off Employees**

Key Food member Greaves Lane purchased a former A&P store in Staten Island and took control on November 24. Brothers Sam and Randy Abed were co-owners of the store. (SA 66; JA 99-100, 875-77.)

A few days after taking over, Greaves Lane reduced hours for all employees from six days a week to five without notifying or bargaining with Local 342. Meat cutter and backup union steward Anthony Venditti asked the store manager about the new hours and whether other changes were forthcoming. (SA 66; JA 101-02, 126-28, 227.) On November 28, Greaves Lane laid off deli manager Gina Cammarano and seafood manager Debra Abruzzese. Local 342 received no notice

of the layoffs before they occurred. Venditti questioned management about the layoffs. (SA 66; JA 36-38, 108, 129-30.)

On November 29, Local 342 began handbilling in front of the store. About 10-12 people participated on the first day. Participants distributed flyers describing layoffs and changed working conditions, referencing unfair-labor-practice charges before the Board, and requesting that customers not shop at the store. (SA 66; JA 130-31, 217-18, 514.) Venditti joined the demonstration on his break and handed out leaflets. Randy Abed watched the handbilling throughout the day and took pictures of the handbillers. He was outside, directly across from the handbillers, while Venditti was participating. The Abeds also called the police on the handbillers. (SA 66, 70; JA 106-07, 130-31, 219-22.) Later that day, Local 342 president Richard Abondolo called Sam Abed and asked whether they could fix the situation by signing a collective-bargaining agreement. Abed responded that he was not allowed to do so on his own because Key Food would not let him. (SA 67; JA 101, 149-50.)

The day after the handbilling began, Greaves Lane laid off Venditti and fellow union steward and meat cutter Michael Fischetti. In the meeting announcing the layoffs, Randy Abed asked Venditti whether he had spoken to Local 342 president Abondolo. (SA 67; JA 103, 126, 133-34.)

The handbilling resumed about a week later. Sam Abed told several employees that they would be fired if they joined the handbilling. The Abeds came outside during the demonstrations and called the police on multiple occasions. (SA 67, 70; JA 106-07, 139, 223, 362-66, 370.) Greaves Lane hired additional meat-department employees in the weeks and months after laying off Venditti and Fischetti. (SA 67-68; JA 367-68.)

#### **H. Albany Avenue Reduces Hours and Wages, Lays Off Employees, and Imposes New Work Rules**

Albany Avenue, also owned by the Abeds, took over operations of a former A&P store in Brooklyn on November 16. About two weeks later, Albany Avenue laid off butcher and union steward Joseph Batiste and meat cutter Calvin Harris. Local 342 received no advance notice of the layoffs. In late December, Albany Avenue reduced deli manager Robert Jenzen's hours and removed him from the Sunday overtime schedule without notifying or bargaining with Local 342. (SA 66, 68; JA 37-38, 97-98, 154-55, 229, 246-47, 876-77.)

Local 342 began handbilling at Albany Avenue in late December or early January. The handbills referenced discrimination and the pending unfair-labor-practice proceedings, and asked customers to shop elsewhere. Sam Abed told a group of employees, including meat manager Stephen Fiore, that they could not handbill on company time and that doing so was "going to be a problem for you." (SA 68; JA 156-57, 513-14.)

Fiore joined the handbilling six or seven times on his breaks and after work. On one of those days, Randy Abed stood outside the store across from the handbillers and shouted through a megaphone that they were lying. Sam Abed would pass by the handbillers on his way into the store. Fiore also handbilled outside of Greaves Lane on his day off. (SA 68; JA 157-61.)

On January 16, Fiore was demoted from meat manager to butcher. Albany Avenue reduced his hours from 40 to 35 per week and removed him from the Sunday overtime schedule. Fiore's replacement as meat manager continued to work 40 hours and Sundays. Albany Avenue also reduced Fiore's pay by six dollars an hour, which was lower than the contractual rate for a butcher. He raised that issue with the store manager, who told him to contact Sam Abed. Fiore called and texted Abed several times, but got no response. Albany Avenue did not notify or bargain with Local 342 regarding Fiore's reduction in wages and hours or his demotion. (SA 69; JA 166-69, 229.)

On January 30, Albany Avenue laid off Fiore and Jenzen. Local 342 received no notice of the layoffs before they occurred. (SA 69; JA 37-38, 169, 244-45.)

Also in January, Albany Avenue distributed a "Key Food Rules & Regulations" handbook to all employees and required that they sign it as a condition of continued employment. The handbook prohibited employees from

“solicit[ing] other associates for any purpose during scheduled work hours while on company property” and directed them to report any non-employee solicitation to management. It also instructed that “political ... activity should be restricted to your own time and be conducted away from company property” and “there is to be no loitering in any specific department at any time,” and contained a catch-all ban on “improper conduct or matters.” (SA 68-69; JA 165-66, 466-78.)

### **I. Key Food and the Member Stores Refuse To Bargain**

Starting in February 2016, Catalano rebuffed Local 342’s efforts to set up additional bargaining dates, stating that he believed the parties already had reached an agreement. Local 342 reached out again in June and July, but received no response. (SA 72; JA 43-46.)

### **II. PROCEDURAL HISTORY**

Following unfair-labor-practice charges filed by Local 342, the Board’s General Counsel issued a complaint and the case went to a hearing before an administrative law judge. The judge found numerous violations as alleged and dismissed other allegations that are not at issue in this appeal. Specifically, the judge found that the members stores violated Section 8(a)(1) of the Act when HB84 coercively interrogated Quiles and Albany Avenue maintained overly broad no-solicitation and political-activity rules. The judge further found that Section 8(a)(3) was violated by HB84 causing Quiles’ layoff and refusing to hire him,

Greaves Lane laying off Venditti, Albany Avenue demoting and laying off Fiore and reducing his wages and hours, and Seven Seas refusing to hire Colon, Diaz, Fields, Gomez, Iturralde, Jones, Ortega, Pagan, and Silverio.

In addition, the judge found that HB84, Seven Seas, Greaves Lane, and Albany Avenue were “perfectly clear” successors with an obligation to bargain with Local 342 over initial terms and conditions of employment, and therefore violated Section 8(a)(5) by unilaterally laying off the following employees: Nepay, Maffia, and Diaz (HB84); Jordan (Seven Seas); Cammarano, Abruzzese, Fischetti, and Venditti (Greaves Lane); Batiste, Harris, Fiore, Jenzen (Albany Avenue). Greaves Lane also violated Section 8(a)(5) by unilaterally reducing hours for all employees and Albany Avenue by unilaterally demoting Fiore and reducing his wages and unilaterally reducing hours for Fiore and Jenzen. All of the member stores violated Section 8(a)(5) by refusing to bargain with Local 342 in July 2016.<sup>2</sup> Finally, the judge found that Key Food was a joint employer with its member stores of the employees at issue, applying the Board’s then-current standard from *Hy-Brand Industrial Contracts, Ltd.*, 365 NLRB No. 156 (2017).

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<sup>2</sup> The judge also found unfair labor practices committed by two other stores—Key Food CS2, LLC and Park Plaza Food Corp.—that are not at issue in this appeal.

### III. THE BOARD'S CONCLUSIONS AND ORDER

In a Decision and Order that issued on October 16, 2019, the Board (Chairman Ring; Members McFerran and Emanuel) largely affirmed the judge's decision. In addition to the violations found by the judge, it also found that Albany Avenue unlawfully promulgated its no-solicitation, political-activity, loitering, and catch-all disciplinary rules in response to employees' union activity, but did not pass on whether the political-activity rule was unlawfully overbroad. In finding Key Food and the member stores to be joint employers, the Board applied the standard from *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (2015), rather than *Hy-Brand*, as the latter had been vacated after the judge's decision.

The Board's Order requires Key Food and the member stores to cease and desist from the violations found and from interfering with employee rights in any like or related manner. Affirmatively, HB84, Seven Seas, Greaves Lane, and Albany Avenue must offer to reinstate the employees they unlawfully laid off or refused to hire, and must make those employees whole for any loss of earnings and benefits suffered as a result of the violations. Greaves Lane and Albany Avenue must rescind the unilateral changes in hours and wages and make whole employees for any losses resulting from those changes. Albany Avenue also must rescind its unlawful work rules. The Order requires that the member stores bargain with

Local 342 and post a remedial notice. The Order further provides that Key Food, as a joint employer, is jointly responsible with each member store for the remedies imposed.

### STANDARD OF REVIEW

The Court’s “review of Board orders is quite limited.” *NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole,” 29 U.S.C. § 160(e); *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008), and the Court “may not displace the Board’s choice between two fairly conflicting views” of the evidence, *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 473 (2d Cir. 2009) (internal quotation omitted). The Board’s credibility determinations “cannot be overturned unless they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony.” *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 96 (2d Cir. 1985) (internal quotation omitted). Its legal conclusions are upheld if they have a “reasonable basis in law.” *Cibao Meat Prods.*, 547 F.3d at 339 (internal quotation omitted).

“An employer’s motivation is a factual question committed in the first instance to the Board.” *NLRB v. Bridgeport Ambulance Serv.*, 966 F.2d 725, 730 (2d Cir. 1992). Accordingly, “the Board’s finding of discriminatory motivation ...

cannot lightly be overturned on review.” *NLRB v. Gladding Keystone Corp.*, 435 F.2d 129, 132 (2d Cir. 1970). Regarding the duty to bargain, the “Board’s interpretations of the ‘perfectly clear’ successor doctrine are entitled to considerable deference.” *First Student, Inc. v. NLRB*, 935 F.3d 604, 617 (D.C. Cir. 2019). The Board’s finding of joint-employer status is “essentially a factual issue” that “cannot be disturbed if it is supported by substantial evidence.” *NLRB v. Solid Waste Servs., Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

### **SUMMARY OF ARGUMENT**

The Board’s finding that Key Food and the member stores were responsible for almost three dozen unfair labor practices was based largely on factual findings, credibility determinations, and the application of settled law.

Substantial evidence supports the finding that the member stores retaliated against employees for engaging in union activity. Across the member stores, employees who openly and actively engaged in union activity were laid off, demoted, or not hired. The member stores failed to show that union activity was not a motivating factor in those actions.

The member stores also breached their duty to bargain by unilaterally laying off 12 employees. Substantial evidence supports the Board’s finding that, based on the clearly expressed intent in the Asset Purchase Agreement that they would hire

current employees and not change employment terms unilaterally, the member stores were “perfectly clear” successors with an obligation to bargain before setting initial terms. Nor did any agreement permit the layoffs.

Similarly supported is the Board’s conclusion that Key Food and the member stores are joint employers. Key Food wielded extensive control over the setting of terms and conditions of employment, both by exercising authority on behalf of the member stores during collective bargaining and binding the member stores to its decisions.

Unsuccessful before the administrative law judge and the Board, Key Food and the member stores now attempt to relitigate nearly the entire case before the court of appeals. They advance a jumble of claims, but many of their arguments rely on incomplete or discredited versions of the facts, and others are irrelevant or not properly before the Court.

## ARGUMENT

### **I. The Court Should Summarily Enforce the Uncontested Portions of the Board's Order**

The Board is entitled to summary enforcement of those aspects of its Order related to violations that Key Food and the member stores do not challenge on appeal. As the Court has explained, “[t]he Board is entitled to summary affirmance of portions of its order identifying or remedying ... uncontested violations of the Act.” *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009); *see also Poupore v. Astrue*, 566 F.3d 303, 306 (2d Cir. 2009) (“[A]rguments not made in an appellant’s opening brief are waived.” (internal quotation omitted)).

The Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for ... mutual aid or protection.” 29 U.S.C. § 157. Neither Key Food nor the member stores contest that HB84 and Albany Avenue “interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of” those rights” in violation of Section 8(a)(1). 29 U.S.C. § 158(a)(1). Specifically, they do not deny that HB84 unlawfully interrogated Nelson Quiles about his union activity and that Albany Avenue maintained an overly broad no-solicitation rule and promulgated no-solicitation,

political-activity, loitering, and catch-all-discipline rules in response to its employees' protected activity.<sup>3</sup>

In addition, neither Key Food nor the member stores dispute that they refused to bargain with Local 342 in July 2016, and they do not challenge the Board's finding that no collective-bargaining agreement had been reached at that time. It is thus undisputed that Key Food and the member stores violated Section 8(a)(5) of the Act by "refus[ing] to bargain collectively with the representatives of [their] employees." 29 U.S.C. § 158(a)(5). Likewise, Key Food and the member stores do not even mention, let alone contest, the Board's findings that Greaves Lane violated Section 8(a)(5) by unilaterally reducing hours for all employees and that Albany Avenue committed a similar violation by unilaterally demoting Stephen Fiore, reducing his wages and hours, and reducing Robert Jenzen's hours.

## **II. The Member Stores Retaliated Against Employees Based on Their Union Activity**

Substantial evidence supports the Board's finding that HB84, Seven Seas, Greaves Lane, and Albany Avenue each discriminated against employees for

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<sup>3</sup> Although the member stores argue that the political-activity rule was not unlawfully overbroad (Br. 56-57), that was not the basis for the Board's finding of a violation (SA 14-15 n.5). Even a facially lawful rule violates the Act if it was promulgated in response to union activity. *UAW v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008). The member stores do not dispute that the political-activity rule was so promulgated.

engaging in union activity. That series of retaliatory layoffs, demotions, and refusals to hire thus violated the Act.

**A. The Act Prohibits Anti-Union Discrimination**

An employer violates Section 8(a)(3) of the Act “by discrimination in regard to hire or tenure of employment ... [to] discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).<sup>4</sup> The analysis for such violations is set forth in the Board’s *Wright Line* test, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), which the Supreme Court approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *See also NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001) (applying *Wright Line*). A violation occurs when union activity is a “motivating factor” in the employer’s decision to take adverse action against an employee. *Wright Line*, 251 NLRB at 1089. The Board can rely on either direct or circumstantial evidence of motivation. *G&T Terminal*, 246 F.3d at 116. Relevant evidence includes timing, expressions of anti-union hostility, false reasons for the action, and other unfair labor practices. *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988); *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 99-99 (2d Cir. 1985).

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<sup>4</sup> An employer that violates Section 8(a)(3) also derivatively violates Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

If union activity was a motivating factor, the adverse action was unlawful unless the record shows that the employer would have taken the same action regardless of the employee's union activity. *Transp. Mgmt.*, 462 U.S. at 400; *Wright Line*, 251 NLRB at 1089. To establish that affirmative defense, an employer must have done more than present an abstractly legitimate reason for its actions; it must have shown "not merely that it *could have* discharged the employee for legitimate reasons, but also that it actually *would have* done so." *Manor Care of Easton, Pa., LLC*, 356 NLRB 202, 225 (2010), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011); *see also NLRB v. Bridgeport Ambulance Serv.*, 966 F.2d 725, 730 (2d Cir. 1992) (employer must show that "it would in fact have taken the same action"). An employer has failed to make out that defense if the reasons it proffered for the adverse action were pretextual—that is, if the reasons were either false or not in fact relied upon. *Abbey's Transp.*, 837 F.2d at 579.

The analysis for a discriminatory refusal-to-hire violation is similar. If the employer was hiring, the individual not hired was qualified for the position, and union activity was a motivating factor in the decision not to hire, the failure to hire was unlawful unless the record compels acceptance of the employer's defense that it would not have hired the individual even in the absence of union activity. *Nelson Elec. Contracting Corp.*, 332 NLRB 179, 179-80 & n.7 (2000), *enforced*, 51 F. App'x 33 (2d Cir. 2002).

**B. HB84 Caused the Discharge of and Refused To Hire Nelson Quiles Based on His Union Activity**

The record evidence supports the Board’s finding that HB84 caused meat manager Nelson Quiles’ layoff and that the decision was motivated by Quiles’ union activity. Quiles participated in a Local 342 demonstration in which he passed out leaflets at another store owned by HB84 owner Frank Almonte. The next day, Almonte coercively interrogated Quiles about his union activity—an unfair labor practice that the member stores do not challenge. Just weeks later, Almonte and his brother told the current store manager that they wanted someone else in Quiles’ position when they took over. Quiles was discharged that same day. Such suspicious timing and anti-union hostility are long-recognized evidence of an unlawful motive. *Abbey’s Transp.*, 837 F.2d at 580. The fact that HB84 did not yet own the store at the time of the layoff (Br. 44) is of no moment, because one employer can violate Section 8(a)(3) “with respect to employees not its own when it urge[s] or cause[s] [another] employer to discharge specific individuals who were engaged in union activity.” *Airborne Freight Co.*, 338 NLRB 597, 604 (2002).

After causing Quiles’ layoff, HB84 unlawfully refused to hire him when it took over the store. Quiles was clearly qualified for the meat-manager position for which HB84 was hiring, because he had served in that exact role under the old management. The Board reasonably found that HB84’s proffered reasons for not

hiring Quiles were pretextual. (SA 83.) The Almontes claimed they did not hire Quiles because they wanted Richard Maffia in the meat-manager role (Br. 45), but they had been told on multiple occasions—by both the store’s current management and by Local 342—that Maffia was not available because he worked at a different store. Moreover, HB84’s professed desire for Maffia is undermined by the fact that it laid him off after only one day of work.

The member stores contend that Quiles did not apply for employment. (Br. 46.) But an employer cannot blame an employee for not reapplying after the employer had him fired “as a way to avoid hiring him.” (SA 82.) Moreover, Key Food had misled Quiles into believing he had a job at a different store.

Here and elsewhere, the member stores repeatedly note that they hired other employees who were members of or represented by Local 342. (Br. 34, 44, 48, 51.) It is well established, however, that an employer’s “hiring of union personnel d[oes] not rebut the evidence that [it] discriminated against union members on the basis of their union membership” where there is a “difference in kind” between the union involvement of the two groups of employees. *NLRB v. Nelson Elec. Corp.*, 51 F. App’x 33, 35 (2d Cir. 2002); *see also H.B. Zachry Co.*, 332 NLRB 1178, 1183 (2000) (employer’s “willingness to employ [an applicant] who has only attenuated union links[] is insufficient to refute a finding of hostile motive”). For example, hiring union *members* does not cut against a finding that the employer

discriminated against other employees because of their union *activity*. Here, there is no evidence that the Local 342 members that HB84 hired actively engaged in union activity like Quiles. Even if the employees who were hired had similar union connections to those who were not, moreover, it is likewise settled law that “an employer’s failure to discriminate against all applicants in a class is not a defense” to discrimination against some of them. *Fluor Daniel, Inc.*, 333 NLRB 427, 440 (2001), *enforced in relevant part*, 332 F.3d 961 (6th Cir. 2003).

**C. Seven Seas Refused To Hire Nine Employees Because of Their Union Activity**

Likewise supported by substantial evidence is the Board’s finding that Seven Seas discriminatorily refused to hire nine employees (Jose Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio) because of their union activity. All of those employees were qualified for the positions for which Seven Seas was hiring, because they all served in those positions immediately before Seven Seas took over the store. Yet none of them were hired.

Each of those employees engaged in concerted activity in the weeks and months leading up to Seven Seas’ decision not to hire them. Jones, Iturralde, and Diaz served as official or de facto union stewards, working as liaisons between employees who had workplace concerns and management or Local 342. Ortega served a similar role, relaying or translating Spanish-speaking employees’

complaints to Local 342 or store manager Gowon. *See, e.g., Roadway Express, Inc.*, 355 NLRB 197, 211 (2010) (employee’s “duties as union steward clearly constitute concerted activity”). Diaz and Ortega also brought their own scheduling and overtime issues to Local 342. Fields and Silverio went to Local 342 for help with needed scheduling adjustments, as did Colon and Pagan when their hours were cut or changed contrary to the contract. Gomez called Local 342 on multiple occasions with workplace safety concerns. The member stores’ description of those actions as “purely personal” (Br. 39-40) is incorrect. Seeking assistance or protection from one’s union is concerted activity. *See All Brite Window Cleaning*, 235 NLRB 596, 601 (1978) (“[B]y going to the Union and requesting the Union’s assistance ... [an employee] was engaged in protected concerted activity.”).

As the Board detailed, Seven Seas’ refusal to hire those employees was unlawful because it was based on the “tainted recommendation” of Gowon. (SA 90.) Gowon was openly hostile towards employees seeking support from Local 342. For example, she derided Gomez for going to Local 342 with her concerns about ongoing safety and scheduling issues, asking Gomez why she went to the union rather than bringing the matter directly to her. She repeated the refrain that employees should come to her rather than their union on multiple occasions, both to Local 342 representative Monier and to the employees themselves. Gowon likewise questioned Diaz about why she was helping her co-workers bring their

concerns to management, and told Ortega to mind her own business when she raised her fellow employees' workplace problems. She ignored or mocked Local 342's and the stewards' efforts to raise employee concerns with her, such as by laughing at Ortega's request for Sunday work. Those responses created an additional layer of tension, because Monier frequently went over Gowon's head to human resources to reverse Gowon's decisions. Gowon also had particular disdain for dealing with scheduling, which was the precise issue for which Diaz, Colon, Pagan, Fields, and Silverio repeatedly sought Local 342's assistance. And she told Iturralde point-blank that "the union was full of shit." (JA 78.)

Seven Seas owner Pat Conte acknowledged that he asked Gowon for her recommendations on who to hire, and that he relied on those recommendations in making his decision. (JA 61.) Such reliance on the recommendations of an anti-union official for employment decisions is strong evidence of unlawful motivation. *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000), *enforced*, 24 F. App'x 1 (D.C. Cir. 2001). The member stores try to disentangle Gowon from the failure to hire these particular nine employees by claiming Seven Seas relied on her recommendations only as to "most" of the hiring decisions. (Br. 30, 37-38.) But there is no credited evidence that Seven Seas had any other source for its decisions. Rather, the Board reasonably discredited Conte's contention, repeated here (Br. 35-37), that he instead based his hiring decision on input from Mac McBrien or Santos Garcia.

(SA 62, 95.) He did not mention those individuals in either his initial testimony or an affidavit given closer in time to the events in question. (JA 61, 308-09.) The member stores do not meet their high burden of overcoming that credibility finding, as discrediting inconsistent testimony hardly “contradict[s] ... the law of nature.” *J. Coty*, 763 F.2d at 96.

Further, Seven Seas did not hire any employees who were the subject of Local 342 complaints to Gowon. Such selective hiring further supports a finding that the decisions were unlawfully motivated. The member stores contend that the hiring was non-discriminatory because some of the employees Seven Seas hired had also engaged in union activity by seeking Local 342’s assistance. (Br. 34.) But they provide no evidence that Seven Seas was aware of that activity when it hired those employees. Some of the employees they identify had specifically asked Local 342 not to raise their issues with management. (JA 214-15.) Further, all of the examples the member stores cite had occurred several years before Seven Seas took over and pre-dated Gowon’s tenure at the store. (JA 211-16.) The member stores’ claim that Seven Seas hired these individuals is also factually incorrect, as several of them had retired by the time Seven Seas took over. (JA 212-14.)

The member stores advance a mishmash of other claims, none of which detract from the soundness of the Board’s findings. For example, the fact that the

evidence of Gowon's anti-union hostility was from before Seven Seas took over the store (Br. 27-28) is inconsequential. The theory of the violation is not that Gowon was acting as Seven Seas' agent when she made those statements, but that her hostility directly influenced the subsequent hiring decisions because they were based on her recommendations. And at the time she made those recommendations, she did work for Seven Seas. Moreover, evidence of hostility from before Seven Seas took over is the only possible evidence here, because the failure-to-hire unfair labor practices were simultaneous with the opening of the store.

No more availing is the member stores' claim that some evidence of Gowon's hostility was "outdated." (Br. 41-42.) Most of the evidence they point to relates to other employees (Tirado, Nunez, Simpson, and Maldonado), not the nine that the Board found were the targets of Seven Seas' discrimination. Even as to the relevant individuals, the examples the member stores identify were not the only evidence of Gowon's hostile reactions to their protected activity; her pattern of hostility continued up to the hiring decisions. Gowon had a dispute with Ortega and Iturralde about scheduling two days before the hiring decisions were announced, for example. And the union activity of employees such as Silverio, Gomez, and Colon was ongoing, not one-time events. Some of the member stores' statements are also factually incorrect. The credited evidence is that Gowon started at the store in February 2015 (SA 60), so none of the examples of her anti-

union hostility there occurred “at least one year or more prior” (Br. 41-42) to the November 2015 hiring decisions.

The member stores also note that not all of the employees whom Seven Seas declined to hire had engaged in union activity and that the Board dismissed allegations of retaliation against other employees who were not hired. (Br. 32, 43.) Just because *some* of the hiring decisions were lawful does not mean that *all* of them were, however. The Board explained why the instances where it found no violation were factually distinguishable. (SA 92-93.) Moreover, the variety of outcomes shows that the Board properly evaluated the facts of each particular allegation rather than making the kind of all-or-nothing judgment the member stores appear to suggest.

Finally, the member stores wrongly claim (Br. 35-39) that the Board failed to analyze Seven Seas’ affirmative defense that it had “independent reasons” other than Gowon’s recommendations for its hiring decisions. But the only reason they proffered is that Seven Seas relied instead on recommendations by McBrien and Garcia—an argument that the Board did consider and, as discussed above (pp. 31-32), discredited (SA 95). Similarly, the members stores’ complaint that the Board focused on Seven Seas’ reliance on Gowon’s recommendations in rejecting its affirmative defense (Br. 35-36) ignores that the only proffered defense was that Seven Seas relied on someone else. The member stores have the burden of proof

to make out a *Wright Line* defense; the Board analyzed what the member stores presented, and found it lacking.<sup>5</sup>

**D. Greaves Lane Laid Off Anthony Venditti and Albany Avenue Demoted, Cut Wages and Hours, and Laid Off Stephen Fiore Because of Their Union Activity**

Greaves Lane and Albany Avenue continued the pattern of retaliation by taking action against meat cutter Anthony Venditti and meat manager Stephen Fiore based on their union activity. Substantial evidence supports the Board's finding of both violations.

Venditti engaged in union activity by serving as shop steward and by handbilling outside the store. Greaves Lane clearly knew of Venditti's activity because he questioned management about reduced hours and layoffs in his role as steward at least twice in the first week after Greaves Lane took over, and because owner Randy Abed watched and photographed the handbillers. Timing is strong evidence of an unlawful motivation, as Greaves Lane laid off Venditti just one day after the handbilling. The Abeds also expressed hostility towards union activity, both by referencing Local 342 in the course of discharging Venditti and by threatening other employees with discharge if they joined the handbilling effort.

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<sup>5</sup> The member stores' suggestion that Seven Seas had too many employees (Br. 31 n.5) does not explain why it failed to hire these particular employees—at most, Seven Seas shows “merely that it *could have* [acted] for legitimate reasons.” *Manor Care*, 356 NLRB at 225. But any general need to reduce staffing is irrelevant if the specific hiring decisions were discriminatory.

Greaves Lane notes that a different employee who had handbilled was later named meat manager (Br. 48), but that action occurred months later and there is no evidence that management was aware of that employee's union activity; he testified that he attempted to disguise himself by changing clothes, donning sunglasses, and rearranging his hair before joining the demonstration. (JA 365-66.) And again, Greaves Lane's "failure to discriminate against all ... is not a defense." *Fluor Daniel*, 333 NLRB at 440.

The Board reasonably rejected Greaves Lane's purported justifications for the discharge as unsupported by the record evidence. (SA 86.) Greaves Lane claimed it needed to cut staffing to save money, but there is no evidence that payroll was reduced as a result of Venditti's layoff. Instead, Greaves Lane actually hired more employees after laying off Venditti.<sup>6</sup> In addition, the proffered rationale that Venditti was the least senior employee (JA 108-09) is simply incorrect. Two other employees had less seniority than Venditti, some by multiple years. (JA 361.) The member stores apparently now disclaim reliance on seniority (Br. 49-50), but providing shifting rationales for a layoff is itself evidence of an unlawful motive. *Abbey's Transp.*, 837 F.2d at 581.

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<sup>6</sup> The member stores claim that one of the replacement employees (O'Neil Lyons) was paid less than Venditti (Br. 49), but the wage rate for Lyons that they cite is what he was paid at Albany Avenue, not Greaves Lane. (SA 86.)

A similar story unfolded at the Abeds' other store on Albany Avenue. Like Venditti, Fiore participated in the handbilling that the Abeds actively monitored. He also engaged in protected activity by complaining to management (including Abed) on multiple occasions that he was not receiving the contractual wage rate for his position. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829-30 (1984) (invoking rights under collective-bargaining agreement is protected activity). Also like Venditti, adverse action came hard on the heels of his union activity. Albany Avenue demoted him and reduced his wages and hours within two weeks after he started handbilling, and proceeded to lay him off another two weeks later (and shortly after he complained about his sub-contractual wages). Sam Abed's threats regarding the handbilling further support a finding of unlawful motive.

The record evidence contradicts Albany Avenue's contention (Br. 51) that it would have cut Fiore's wages and hours and laid him off even absent his union activity because it needed to save on personnel costs. Albany Avenue replaced Fiore after his demotion and discharge, and scheduled his replacements for more hours than Fiore had been working. As the Board calculated, meat-department payroll actually increased after Fiore's layoff. (SA 69; JA 883-92.) Albany Avenue also claimed it laid off Fiore because he had been written up in the past (Br. 51), but the record contains no evidence of prior discipline (JA 136-37), and

Fiore denied that he had received any (JA 163-64). The Board rightfully dismissed those reasons as pretextual.

Finally, the Board reasonably rejected the argument (Br. 54-56) that Venditti's and Fiore's handbilling lost the protection of the Act. (SA 86-87.) The Act protects employees' right to communicate with the public about workplace issues, including by asking customers to boycott their employer. *DirectTV, Inc. v. NLRB*, 837 F.3d 25, 33 (D.C. Cir. 2016); *Arlington Elec., Inc.*, 332 NLRB 845, 846 (2000). Such third-party communications are protected so long as "the communication indicate[s] it is related to an ongoing dispute between the employees and the employers and ... is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *DirectTV*, 837 F.3d at 34 (quoting *Am. Golf Corp.*, 330 NLRB 1238, 1240 (2000)). The communications found unprotected in the cases cited by the member stores (Br. 54-55) either did not reference a labor dispute or contained an overly "disparaging attack upon the quality of the company's product." *NLRB v. Elec. Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 471, 476 (1953); *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006). By contrast, the run-of-the-mill handbills that Venditti and Fiore circulated referred directly and exclusively to a labor dispute, and said nothing about the member stores' product at all. *Cf. NLRB v. Owners Maint. Corp.*, 581 F.2d 44, 49-50 (2d Cir. 1978) (leaflets protected that "disclosed

the nature of the pending labor dispute” and “did not disparage the employer’s products”). Further, nothing on the handbills was false, let alone maliciously untrue. Even if other signs incorrectly referred to a strike (Br. 55-56), the handbills did not (JA 172, 513-14).

The possibility that the handbills could result in economic harm to the member stores is not enough for them to lose the protection of the Act. Rather, “[t]he presence of economic weapons . . . , and their actual exercise on occasion by the parties, is part and parcel of the system that the [Act] has recognized.” *NLRB v. Ins. Agents Int’l Union*, 361 U.S. 477, 489 (1960). Such advocacy “does not lose its protected status simply because [it is] prejudicial to the employer”—indeed, “[t]o hold otherwise would be to render meaningless the rights guaranteed to employees” under the Act. *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 815 (2d Cir. 1980) (internal quotation omitted).

### **III. The Member Stores Breached Their Duty To Bargain By Unilaterally Laying Off Employees**

Substantial evidence supports the Board’s finding that the member stores had an obligation to refrain from unilaterally setting initial terms and conditions of employment upon taking over operations of the former A&P stores. Accordingly, HB84, Seven Seas, Greaves Lane, and Albany Avenue violated the Act by laying off 12 employees without bargaining with Local 342.

**A. A “Perfectly Clear Successor” Must Bargain over Initial Terms and Conditions of Employment**

An employer violates the Act by “refus[ing] to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). Unilaterally imposing terms and conditions of employment constitutes an unlawful refusal to bargain. *Banknote Corp. of Am., Inc. v. NLRB*, 84 F.3d 637, 643 (2d Cir. 1996). The duty to bargain attaches for an employer that acquires an existing business if it hires a majority of its employees from the predecessor and operations remain substantially the same. *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 278 (1974).

The makeup of a successor employer’s workforce is often not known at the outset, so the employer typically can set initial terms and conditions of employment unilaterally, and must bargain only going forward. *Id.* at 294-95. An exception exists, however, if “it is perfectly clear that the new employer plans to retain all of the employees in the unit,” *id.*, or otherwise “plan[s] to retain enough of the predecessor’s employees so that the union’s majority status will continue,” *Creative Vision Res., LLC v. NLRB*, 882 F.3d 510, 523 (5th Cir. 2018). Because the union’s majority status is already known in such circumstances, the duty to bargain attaches prior to the outset of operations. A “perfectly clear successor” thus violates the Act by “unilaterally establishing initial terms and conditions.” *Nexeo Solutions, LLC*, 364 NLRB No. 44, 2016 WL 3903008, at \*10 (2016).

Successorship is not perfectly clear if the new employer “announces new terms prior to or simultaneously with [its] invitation to the previous work force to accept employment under those terms.” *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.*, 529 F.2d 516 (4th Cir. 1975); *see also Creative Vision*, 882 F.3d at 517 (no perfectly-clear status where employer “giv[es] employees prior notice of its intention to institute its own initial terms” (internal quotation omitted)). The makeup of the successor’s workforce is unclear in such situations because of the possibility that employees who know that their terms will change might not accept employment. *Spruce Up*, 209 NLRB at 195. No such uncertainty exists when the successor “expresses an intent to retain the predecessor’s employees without making it clear that employment will be conditioned on acceptance of new terms.” *Nexeo*, 2016 WL 3903008, at \*6.

A successor that initially expresses an intent to hire the predecessor’s employees without indicating it will impose new terms cannot avoid perfectly-clear status by thereafter announcing that it will, in fact, change initial terms and conditions. *First Student, Inc. v. NLRB*, 935 F.3d 604, 613 (D.C. Cir. 2019); *Nexeo*, 2016 WL 3903008, at \*8. That principle operates to prevent situations where employees are lulled into believing that employment will continue at the same terms and conditions and thus forego the opportunity to search for other work before accepting a job with the successor. *First Student*, 935 F.3d at 616.

**B. The Member Stores Were Perfectly Clear Successors and Unlawfully Set Initial Employment Terms**

Substantial evidence supports the Board's finding that the member stores were perfectly clear successors as of July 20. (SA 75-77.) The Asset Purchase Agreement made known that the member stores (as Key Food's assigns) would offer employment to all employees currently working at the purchased stores. That explicit intent to hire made it clear from the outset that Local 342 would represent a majority of the workforce, thus triggering the duty to bargain over initial terms and conditions of employment. Local 342 knew of the Asset Purchase Agreement's promise of employment, and "[i]n 'perfectly clear' successor cases, communications with the employees' union are regarded as communications with the employees through their representative." *Elf Atochem N. Am., Inc.*, 339 NLRB 796, 796 n.3 (2003) (internal quotation omitted).

As the Board held in *Nexeo*, the terms in a purchase agreement can constitute the necessary expression of intent to designate an employer a perfectly clear successor. 2016 WL 3903008, at \*1, 9. Like the Asset Purchase Agreement, the contract in that case required that the successor "shall ... make offers of ... employment" to the predecessor's employees. *Id.* at \*1. Although the identity of the specific owner of any given store was not yet known at the time Key Food signed the Asset Purchase Agreement (Br. 17-18), the agreement bound Key Food *and* its assigns, making clear that whoever the ultimate owner was would be

subject to the obligation to make employment offers. (JA 833.) Further, courts and the Board long have held that perfectly-clear-successor status can be established before the successor has formally acquired the predecessor or while the parties are still negotiating the terms of purchase. *See, e.g., First Student*, 935 F.3d at 616 (citing cases); *Elf Atochem*, 339 NLRB at 799 (perfectly clear successor had signed “nonbinding letter of intent” to purchase predecessor).

The member stores also gave no indication that they intended to unilaterally impose new terms and conditions of employment. Instead, they agreed that employment offers either “shall be consistent with the terms and conditions” in existing collective-bargaining agreements or the product of negotiations with Local 342. (JA 824); *cf. Nexeo*, 2016 WL 3903008, at \*1 (successor had to offer “substantially comparable” terms). That contractual commitment to bargain with Local 342 “necessarily presume[d] ... that [Local 342] would have majority support and represent the successors’ employees.” (SA 77.) As the Board explained, employees thus “worked ... 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” and that Local 342 “effectively had veto power over any change in terms and conditions of employment.” (SA 76.) With that understanding, employees had no incentive to

look for work elsewhere—establishing the very reliance interest that the perfectly-clear-successor doctrine is meant to address.

As perfectly clear successors, the member stores had a duty to bargain with Local 342 regarding initial terms and conditions of employment. Layoffs are a term and condition of employment that fall within an employer’s bargaining obligation. *Tri-Tech Servs., Inc.*, 340 NLRB 894, 894 (2003). Yet it is uncontested that HB84, Seven Seas, Greaves Lane, and Albany Avenue did not notify or bargain with Local 342 before laying off the 12 employees at issue here. Those layoffs thus violated the Act.

The member stores’ contrary arguments find no support in successorship law or the facts of this case. As the Board explained (SA 77), the member stores’ claim that statements made during contract negotiations made clear that employment terms would change (Br. 14-17) misconstrues the perfectly-clear-successor doctrine. The statements that they cite—that Key Food would “negotiate,” “talk about,” or “propos[e]” modifications—indicate only an intent to *bargain*, not to set initial terms unilaterally. Indeed, an employer’s “expressions of intent to negotiate with the Union suggest[] that it would *not* make changes unilaterally.” *First Student*, 935 F.3d at 619. Statements that “contain no mention or reservation of the right to act unilaterally” do not undercut perfectly-clear-successor status. *Road & Rail Servs., Inc.*, 348 NLRB 1160, 1162 (2006). Rather,

announcing an intent to bargain actually *confirms* perfectly-clear-successor status, because it is precisely what a perfectly clear successor is required to do. Such an announcement “conveys nothing more than a statement of law—that the status quo may change as a result of negotiations, but not in advance of them.” *First Student, Inc.*, 366 NLRB No. 13, 2018 WL 741500, at \*4 (2018), *enforced*, 935 F.3d 604 (D.C. Cir. 2019); *see also id.* (finding perfectly-clear-successor status despite “successor’s announcement that it will not be adopting the predecessor’s bargaining agreement and that certain terms of employment would be subject to negotiations”).

Likewise wrong on multiple fronts is the member stores’ reliance on the amended Asset Purchase Agreement. (Br. 12-14.) As an initial matter, the Board found that successorship “was still perfectly clear” under the amended agreement. (SA 77.) That agreement still required the member stores to make employment offers to “substantially all” employees and retained the provision that employment terms “shall be consistent” with any existing or negotiated collective-bargaining agreement. (JA 843); *see C.M.E., Inc.*, 225 NLRB 514, 514-15 (1976) (employer that plans to hire “substantially all” employees is perfectly clear successor).

The member stores point out (Br. 13-14) that the amended Asset Purchase Agreement also allowed them to offer employment on the terms of their “last best offer” if no collective-bargaining agreement was in place. As the Board explained,

however, “last best offer” is a labor-law term of art that incorporates a requirement of good-faith negotiations. (SA 78-79.) An employer can impose its last, best offer only after good-faith negotiations have reached an impasse—meaning the parties have “no realistic prospect that continuation of discussion ... would [be] fruitful,” *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990). *See e.g.*, *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 142 (2d Cir. 2013) (employer’s “unilaterally impos[ing] its LBFs [last, best, and final] before bargaining to a lawful impasse ... constituted an unfair labor practice”); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 350 (D.C. Cir. 2011) (“Only ... when there has been a complete breakdown in the entire negotiations, is the employer free to implement its last, best, and final offer.” (internal quotation omitted)). The Board reasonably concluded that the amended Asset Purchase Agreement’s use of that particular phrase should be read as incorporating its well-settled meaning. After all, the phrase was chosen by sophisticated parties represented by counsel and appeared in a section of the agreement related to collective-bargaining obligations. As under the original Asset Purchase Agreement, therefore, new employment terms could come about only after bargaining. Moreover, the member stores do not contend that negotiations were at impasse, so the “last best offer” provision did not permit them to act unilaterally.

The member stores misframe the issue as implicating bankruptcy law. (Br. 18-21.) Contrary to the member stores' characterization, the "last best offer" provision came from the parties, not the bankruptcy court. The bankruptcy court's only involvement was issuing an order approving the amended Asset Purchase Agreement. The stores' suggestion that the Board somehow exceeded its jurisdiction (Br. 19) is thus misplaced. In any event, it is not a "modification" (Br. 19-20) of the agreement (or the order approving it) to give a phrase its established meaning for the context in which it appears.

Even if the amended Asset Purchase Agreement augured an intent to set new terms unilaterally, it was not a timely expression of that intent for purposes of the perfectly-clear-successor analysis. There is no evidence that Key Food or the member stores communicated the terms of the amended Asset Purchase Agreement to employees or Local 342 before it was approved by the bankruptcy court on October 21—three months after communicating to Local 342 that they would hire employees on existing or negotiated terms. The member stores cannot renege on their earlier expression of intent. *First Student*, 935 F.3d at 613. As the Board held, employees who continued to work at the stores after the original Asset Purchase Agreement was signed "had no way of knowing that, at the eleventh hour in negotiations, the rules would suddenly change and they would be subject to ... unilateral layoff." (SA 76.) At that point, the employees would have lost the

opportunity to seek work elsewhere and thus detrimentally relied on Key Food's earlier representations.

**C. No Agreement Permitted the Layoffs**

Finally, the member stores' contention (Br. 21-26) that the parties had reached an agreement permitting them to lay off employees upon payment of a buyout is neither relevant nor accurate. Even if there were such an agreement, the member stores were not acting pursuant to it when they laid off these 12 employees. There is no evidence that any of the laid-off employees at issue received a buyout from Key Food or the member stores. Indeed, all of the laid-off employees who testified at the hearing expressly denied that they received any such payment. (SA 70; JA 124, 135, 170, 242, 245, 300-01.) Any purported agreement on buyouts is simply irrelevant.<sup>7</sup>

In any event, the record shows that the parties had not reached agreement. As the Board explained (SA 73), any agreement that the member stores could lay off employees unilaterally would constitute a waiver of Local 342's right to bargain, and evidence of waiver must be "clear and unmistakable." *IBEW, Local 36 v. NLRB*, 706 F.3d 73, 81 (2d Cir. 2013). The member stores have failed to meet that exacting standard. The last communications on the issue were

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<sup>7</sup> The one employee that the member stores identify as having received a buyout worked at a different store not at issue in this case. (Br. 24.)

Konzelman's assertion that Local 342's November 24 proposal was "ambiguous" regarding offers of employment (JA 436) and Local 342's response that severance was something the parties still "need to get ... agreed on" (JA 436). Ambiguity is the opposite of clear and unmistakable, and a statement that agreement is needed indicates that no such agreement yet exists.

Contrary to the member stores' suggestion (Br. 23-24), moreover, the Board did not find that Key Food and Local 342 reached an agreement on buyouts or layoffs. The Board noted that the parties may have "believed" in late October that they had reached agreement (Br. 23), but went on to explain how that belief was subsequently rebutted when the parties exchanged proposals with substantively different terms on the issue. (SA 74.) And any agreement on the "concept" of buyouts (Br. 23) is not an agreement on the actual terms. In addition, the Board credited Local 342 president Abondolo's testimony (JA 153) that he never agreed to a provision that would allow the member stores not to hire some employees. (SA 74, 110 n.32.) Moreover, the credited testimony is that Local 342 refused to accept an agreement on individual terms without a complete contract. (SA 73-74.) The Board's undisputed finding that no complete contract had been reached thus

further undermines the member stores' claim that the parties adopted a standalone agreement on buyouts.<sup>8</sup>

#### **IV. Key Food and the Member Stores Are Joint Employers**

As with its unfair-labor-practice findings, substantial evidence supports the Board's determination that Key Food and the member stores are joint employers of the member stores' employees.

Courts and the Board long have held that two legally distinct entities can be joint employers of the same group of employees for purposes of the Act's bargaining obligations and unfair-labor-practice liability. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964); *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB 1599, 1608 (2015), *remanded on other grounds*, 911 F.3d 1195 (D.C. Cir. 2018). A joint-employer relationship exists where the two entities "share or codetermine those matters governing the essential terms and conditions of employment." *Browning-Ferris*, 362 NLRB at 1600; *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982). The touchstone for that inquiry is "the

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<sup>8</sup> The member stores make several irrelevant references to having a "Wright Line defense" or an "independent basis" for the layoffs. (Br. 21-22, 24.) Those concepts go to Section 8(a)(3) violations (*see* pp. 25-26), not Section 8(a)(5); a refusal-to-bargain violation has no motive element. Similarly misplaced is the member stores' extraneous discussion (Br. 26-27) of *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996). The Board did not rely on that case to find a violation, and expressly did not pass on the administrative law judge's alternative argument based on it. (SA 14 n.5.)

existence, extent, and object of the putative joint employer’s control” over employees’ work and terms of employment. *Browning-Ferris*, 362 NLRB at 1600. As part of that analysis, the Board considers an employer’s contractually reserved right to control as well as its actual exercise of control. *Id.* at 1600; *Retro Envtl., Inc.*, 364 NLRB No. 70, 2016 WL 4376615, at \*4-5 (2016), *affirmed*, 738 F. App’x 200 (4th Cir. 2018). Both aspects of control are part of the common-law definition of an employment relationship. *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1209-12 (D.C. Cir. 2018).<sup>9</sup>

Based on the facts of this case, the Board reasonably found that Key Food was a joint employer that “exercised direct and immediate control over essential terms and conditions of employment.” (SA 2, 96-97.) Key Food controls the member-store employees’ terms and conditions of employment because it controls the collective-bargaining process by which those terms are set. Indeed, the record supports the Board’s factual finding that Key Food “exercised near-absolute control over negotiations for a common collective-bargaining agreement.” (SA 2.) When they purchased the stores from Key Food, the member stores acknowledged

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<sup>9</sup> Key Food refers to a subsequent Board rule regarding joint-employer status (KF Br. 17, 20), but that rule took effect in April 2020—months after the Board’s decision—and applies only prospectively. In any event, because the Board found that Key Food “exercised direct and immediate control” (SA 2) over working conditions at the member stores, which is the same standard set forth in the rule, there is no basis to suggest that the result would be different under the rule.

that “Key Food is obligated to engage in good faith negotiations” with Local 342 and expressly “agree[d] to be bound by any ... Labor Agreement that is negotiated by Key Food.” (JA 486.)

As the Board further explained, Key Food’s primary role in collective bargaining was “confirmed by the parties’ conduct.” (SA 2.) Key Food attorney Catalano and Chief Financial Officer Konzelman led negotiations on behalf of both Key Food and the member stores, and spoke for both groups. One or both were present at every bargaining session, and were sometimes the only employer representatives. Catalano also did the majority of the talking for the employer side. Key Food was the point of contact when Local 342 requested information and scheduled bargaining sessions. When Local 342 asked what positions the member stores would fill with current employees, for example, it was Konzelman who responded on behalf of all of the member stores. Catalano and Konzelman also made contract proposals and responded to Local 342’s counterproposals. There is no evidence in the record of any member store serving such a role. Those proposals covered matters such as pay rates, healthcare, pensions, breaks and leave, job classifications, layoffs, how many employees the member stores would hire, the circumstances under which a member store could discharge employees, just-cause protections, and grievance procedures. Accordingly, it was Key Food

that worked to set essential terms and conditions of employment such as hiring and firing, wages, benefits, hours, and discipline.

By contrast, Key Food repeatedly refused to allow Local 342 to bargain with the member stores individually, and the member-store owners likewise told Local 342 that they were not permitted to bargain on their own without Key Food. When Key Food believed the parties had reached an agreement, Konzelman reported to the member stores what they “need to know” about hiring and what terms and conditions would be in place when the stores opened. (JA 348-49, 870-72.) She informed them that Key Food would meet with them regarding what “we have agreed to” and “to present all of the contract details and provide guidance in how to operate a union store.” (JA 870.) Key Food’s status as the primary actor in negotiations is bolstered by the fact that Key Food was the sole signatory to agreements reached at former A&P stores purchased by other members. Likewise, Key Food referred to itself as an “employer” in those contracts. (JA 638-75.)

Such control over how terms and conditions are set supports joint-employer status. For example, the Board has found a joint-employer relationship where one employer controlled day-to-day operations but the other had “the right to ... fully participate in any and all collective-bargaining sessions” and its “consent must be obtained before [the first employer] can enter into any labor agreement.” *Jackson Manor Nursing Home, Inc.*, 194 NLRB 892, 893 (1972); *see also Red-More Corp.*,

169 NLRB 426, 427 (1968) (joint employer had right to attend collective-bargaining negotiations and receive advance notice before any agreement signed), *enforced*, 418 F.2d 890 (9th Cir. 1969). Here, Key Food not only participated in or attended collective-bargaining negotiations, it controlled them. *See G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1531 (7th Cir. 1989) (joint employer was “primarily responsible for establishing the terms of the ... contract”). None of the cases that Key Food cites (KF Br. 18-19) involved that level of control over collective bargaining. *See AT&T v. NLRB*, 67 F.3d 446, 449-51 (2d Cir. 1995) (employer did not attend bargaining and no evidence that it negotiated wage rates); *Clinton’s Ditch Coop. Co.*, 778 F.2d 132, 139 (2d Cir. 1985) (employer “did not attend the ... bargaining negotiations” and no “evidence that more extensive consultations about the bargaining agreement actually occurred”); *Int’l House v. NLRB*, 676 F.2d 906, 909, 915 (2d Cir. 1982) (union met with employer only once and negotiated solely with other employer). In each of those cases, the Court found “no basis for concluding that [the employer] controlled or manipulated the bargaining to an extent indicative of joint employer status.” *Clinton’s Ditch*, 778 F.2d at 139. Yet it recognized that joint-employer analysis is case-specific, and that an employer’s role in bargaining “may be probative ... under different fact patterns.” *Int’l House*, 676 F.2d at 915.

As the Board detailed (SA 2), evidence away from the bargaining table further supports joint-employer status. Under their purchasing contract, the member stores “agree[d] to ... make any offers of employment” agreed to by Key Food. (JA 486.) The scope of that obligation was magnified given that Key Food had bound the member stores to offer employment to current employees by signing the Asset Purchase Agreement. As closing approached, Konzelman likewise told the member stores that they “must hire” a certain number of employees for certain positions. (JA 871.) The power to shape the workforce by directing the other employer whom to hire is indicative of joint-employer status. Evidence of shared control exists where the employer that formally hires employees does so pursuant to instructions from the other. *See, e.g., G. Heileman Brewing*, 879 F.2d at 1531 (joint employer agreed that other employer would hire all current employees).

The dynamic of Key Food acting on behalf of the member stores continued outside of the bargaining context, as well. Catalano handled hiring and layoff issues as the stores were preparing to open by responding to Local 342’s complaints about Quiles’ layoff from the soon-to-open HB84 and finding him a job at a different store. Similarly, when Local 342 approached Sam Abed about resolving a dispute over hours at Greaves Lane, Abed responded that Local 342 would have to talk to Key Food because he “couldn’t do anything without the[m].” (JA 101.) In addition, Albany Avenue distributed a “Key Food Rules &

Regulations” handbook to its employees, setting forth the policies that would govern the workplace. (JA 466-78.) Konzelman also told the member stores that they should contact her or Catalano for instructions on “what you can or should do with respect to union associates” on matters such as “hiring, employing, training, scheduling, termination, paying, benefits.” (JA 870-71.)

Much of Key Food’s brief is devoted to arguments raised for the first time on appeal and thus not properly before the Court. For example, Key Food never argued to the Board that joint-employer status was precluded because the parties did not reach an agreement (KF Br. 20-21), that the Board should not have considered the terms of the Asset Purchase Agreement or the member purchase agreements (KF Br. 22-23), or that it was not liable for the violations even if it were a joint employer (KF Br. 26-27). Nor did it contend, as it does now, that only five factors are relevant to the joint-employer analysis or that all of those factors must be present. (KF Br. 17-19.) To the extent it now suggests that a different standard than *Browning-Ferris* applies, it did not raise that argument before the Board, either. Instead, it stated expressly that “the governing legal authority is ... *Browning-Ferris*.” (JA 1522-27.)

The Board was not on notice of any of those arguments and did not have an opportunity to address them. The Court is thus jurisdictionally barred from considering those arguments in the first instance. Under Section 10(e) of the Act,

“[n]o objection that has not been urged before the Board ... shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e). The Section 10(e) requirement is jurisdictional in nature, such that courts “lack[] jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982); *see also KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996) (“[A] party’s failure to raise an issue before the Board prevents consideration of the question by the courts.”). That statutory bar aligns with the bedrock administrative-law principle that “orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.” *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Key Food offers no extraordinary circumstances to excuse its untimely arguments.

In any event, Key Food’s new arguments misconstrue the Board’s decision and the record evidence. As detailed above (pp. 54-55), Key Food is incorrect that the Board relied only on Key Food’s role in collective bargaining. (KF Br. 19.) That argument is also premised on a false dichotomy between bargaining and the other factors Key Food lists (KF Br. 17-18) as evidence of joint-employer status. Bargaining deals with many of those factors, including hiring and firing, hours, wages and benefits, and discipline, and thus necessarily impacts employees’ day-

to-day working experience. Likewise wrong is the claim (KF Br. 22) that the Board looked only to the terms of the purchase agreements. Instead, the Board emphasized that the member stores' "contractual surrender of bargaining authority to Key Food is confirmed by the parties' conduct." (SA 2.) The record also shows how, contrary to its blanket denial (KF Br. 26-27), Key Food was connected to the unfair labor practices. Konzelman gave member stores the go-ahead to reduce staffing (including by refusing to hire current employees) and cut wages, which served as the impetus for their unlawful actions. (JA 871.) Moreover, Key Food's instruction impacted employees even though no collective-bargaining agreement had been reached. Although based on the erroneous belief that the parties had reached agreement, it nonetheless laid the groundwork for the member stores' hiring decisions.

The remainder of Key Food's arguments consist simply of challenges to the Board's factual findings, but it cannot overcome the deference owed the Board on such determinations. Instead, it just presents its own preferred version of the facts. Even if there are "two fairly conflicting views" of the evidence, however, the Court "may not displace the Board's choice." *Consol. Bus*, 577 F.3d at 473.

Key Food overstates the member stores' role in bargaining. At most, some of the member-store owners were present some of the time. They did not attend every bargaining session. Even when they did, they played a secondary role. In

contrast to Key Food attorney Catalano, the owners spoke only “every once in a while.” (JA 19.) Also, the member stores’ participation appears largely limited to a single issue. All of the examples Key Food gives (KF Br. 10-12) involved member stores stating how many employees they wanted to hire. Even with regards to that issue, the stores simply provided information. It was Key Food that bargained over whether, and under what circumstances, the member stores actually could decline to hire employees. Moreover, the member stores made the hiring decisions Key Food describes only after Konzelman told them they could do so and the guidelines they needed to follow. (JA 870-71.) Finally, even if both Key Food and the member stores ultimately would sign any agreement (KF Br. 11-12), that joint role is not inconsistent with joint-employer status. Indeed, an employer that negotiates a contract can be a joint employer even if only the other employer signs it. *G. Heileman Brewing*, 879 F.2d at 1531.

Ultimately, Key Food at most identifies evidence that it and the member stores *shared* control over terms and conditions of employment, not that Key Food had no control. But sharing control is evidence of joint-employer status, as joint employers “share or codetermine” working conditions. *Browning-Ferris*, 362 NLRB at 1600. Given Key Food’s control over employees’ terms and conditions in the workplace, it is rightfully responsible to them under the Act.

## CONCLUSION

The Board respectfully requests that the Court deny the member stores' and Key Food's petitions for review and grant the Board's application for enforcement.

s/ Elizabeth Heaney

ELIZABETH HEANEY

*Supervisory Attorney*

s/ Joel A. Heller

JOEL A. HELLER

*Attorney*

*National Labor Relations Board*

1015 Half Street SE

Washington, DC 20570

(202) 273-1743

(202) 273-1042

PETER B. ROBB

*General Counsel*

ALICE B. STOCK

*Deputy General Counsel*

RUTH E. BURDICK

*Acting Deputy Associate General Counsel*

DAVID HABENSTREIT

*Assistant General Counsel*

National Labor Relations Board

November 2020

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 20-731
	)	20-1009
v.	)	20-1028
	)	
KEY FOOD STORES CO-OPERATIVE, INC.;	)	
1525 ALBANY AVENUE MEAT LLC; HB 84	)	
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	)	
	)	

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 13,956 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570

Dated at Washington, DC  
this 25th day of November, 2020

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	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 25, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570

Dated at Washington, DC  
this 25th day of November, 2020