

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

RITE AID OF NEW YORK, INC., and
RITE AID OF NEW JERSEY, INC.,

and

1199SEIU UNITED HEALTHCARE
WORKERS EAST.

Case Nos. 02-CA-182713
02-CA-189661

**CHARGING PARTY’S OPPOSITION TO RESPONDENT’S
REQUEST FOR SPECIAL PERMISSION TO APPEAL
ALJ GREEN’S SUPPLEMENTAL ORDER ON PETITIONS TO REVOKE**

Pursuant to Section 102.26 of the National Labor Relations Board’s (“Board”) Rules and Regulations (“Rules”), Charging Party 1199SEIU United Healthcare Workers East (“Charging Party,” “Union” or “1199”) respectfully submits this Opposition to Respondent’s Request for Special Permission to Appeal certain rulings made by Administrative Law Judge Benjamin W. Green (“ALJ Green” or “Judge Green”) in his September 15, 2017 Supplemental Order on Petitions to Revoke (“Order”).¹ Specifically, Respondent appeals ALJ Green’s rulings revoking subpoenas ad testificandum issued to Union Senior Executive Vice President Yvonne Armstrong (A-1-XOQP7B), Union Executive Treasurer Maria Casteneda (A-1-XOSSWL), President of the League of Voluntary Hospitals and Homes of New York Bruce McIver (A-1-XRAXQH), 1199SEIU National Benefit Fund (“NBF” or “Fund”) Administrator Mitra Behroozi (A-1-

¹ Judge Green’s September 15, 2017 Order is attached hereto as Exhibit 1. A copy of Respondent’s Request for Special Permission to Appeal Judge Green’s Order is attached hereto as Exhibit 2. A copy of the Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (“Complaint”) in this proceeding is attached hereto as Exhibit 3.

XRAPXN), and NBF General Counsel Jeffrey Stein (A-1-XRAFPV).² For the reasons discussed below, Charging Party respectfully submits that the Board should deny Respondent’s Request to Appeal.³

ARGUMENT

POINT I RESPONDENT’S APPEAL SHOULD BE DENIED BECAUSE THE SUBPOENAS WILL NOT LEAD TO EVIDENCE THAT WOULD SUPPORT ITS CONTENTIONS OF COLLUSION

The Complaint in this case alleges, inter alia, that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (“NLRA”) by (i) failing to make required contributions to the NBF; (ii) unilaterally withdrawing from the NBF and replacing NBF benefits with a Rite Aid sponsored health benefits plan; and (iii) imposing, prior to reaching a lawful impasse in bargaining, its “last, best and final” proposal. Respondent attempts to excuse and justify these unlawful acts by arguing that the Union and the NBF—a Taft-Hartley fund that provides health care and other benefits to employees of more than 300 participating industry employers—somehow colluded to use Respondent’s deliberate refusal to pay required contributions to create an unforeseen exigency that required Respondent to make unilateral changes to employees’ terms and conditions of employment. Not only does this argument fail to constitute a valid defense to the Complaint’s allegations, as Judge Green recognized, but perhaps more pertinent, *there is not a single shred of evidence supporting Respondent’s conspiracy*

² Additionally, Respondent seeks to appeal ALJ Green’s decision not to order production of a delinquency report under subpoenas duces tecum issued to Charging Party (B-1-XO27B9) and non-party NBF (B-1-XO2JPX). Charging Party is not in possession of the delinquency report at issue. However, we agree with Judge Green’s determination that it has no potential relevance to Rite Aid’s asserted defense of a foreseeable exigency and could not reasonably lead to other evidence potentially relevant to the issues in this case.

³ Respondent submitted a single filing which it titled “Request for Special Permission to Appeal” but which it treats as the Appeal. Accordingly, this Opposition is to both Respondent’s Request for Permission to Appeal and the Appeal itself.

theory that would warrant the appearance of the witnesses Respondent is seeking. Respondent's Appeal is riddled with mischaracterizations of the testimony, significant omissions, and unsupported assertions. It is lacking in any basis for Judge Green or the Board to conclude that the subpoenaed witnesses and documents would lead to any evidence to support Rite Aid's contentions.

In its appeal, Respondent contends "the NBF's communications to Rite Aid's bargaining unit members were attributable to the Union and evinced an attempt by the Union to strong arm Rite Aid's continued participation in the NBF rather than bargaining over the withdrawal." (App., p. 7). Respondent makes this bold assertion without *any* supporting evidence that the NBF's communications were directed, or even requested, by the Union. Similarly, Rite Aid asserts that "the Union colluded with the NBF to arbitrarily implement deficiency proceedings against it in an attempt to coerce Rite Aid into returning to the NBF" (App., p. 8). Again, Respondent does not cite to a single fact in the record, or any other document, to support this assertion. Even if these purported acts of collusion could somehow undermine the General Counsel's bad faith bargaining allegations, Respondent must have more than a hunch that evidence of collusion exists to warrant enforcement of its subpoenas. See Morrison Turning Co., 83 NLRB 687, 689 (1949) ("Moreover, the record, the Employer's brief, the petition, and the offer of proof in support of the request for subpoena, furnish no facts, directly or inferentially, upon which we may reasonably believe that the desired records contain evidence of a collusive arrangement. Under these circumstances, we are satisfied that the Employer's broad and inclusive request for the production of records is a mere "fishing expedition" for which it is not entitled to a subpoena from the Board"); Modern Upholstered Chair Co., 84 NLRB 95, 99 n. 2 (1949); and, e.g., SR-73 & Lakeside Avenue Operations, 365 NLRB No. 119 (2017) (denying request for

review of ARD’s decision to deny enforcement of subpoena); 800 River Road Operating Co., 359 NLRB 522, 523 (2013) (“The hearing officer acted well within his authority to preclude from testifying the eight already subpoenaed witnesses for whom the Employer could not make an offer of proof.”); Kentucky River Medical Center, 352 NLRB No. 33, at fn. 2 (2008) (adopting ALJ’s ruling that “Respondent’s desire to probe into the discriminatees’ net worth in hopes of unearthing relevant information is “pure conjecture” and clearly only a “fishing expedition” that would not justify its subpoena”); Plumbers, Local 562 (C & R Heating & Service Co.), 328 NLRB 1235 (1999) (“Sheet Metal Workers has brought forth no evidence to support its allegation that the threats were not genuine or were made in collusion with the Employers. In the absence of any evidence contradicting the testimony in the record, the hearing officer properly refused to permit Sheet Metal Workers to engage in a fishing expedition through the use of the Board’s subpoena authority”) (internal citations omitted).

Unable to come forward with even a scintilla of evidence that the Union and the NBF improperly colluded, Respondent simply asks the Board to allow it to mandate the production of documents and the appearance of five witnesses—including three non-party witnesses—so Respondent can engage in a fishing expedition.

Respondent’s contention that the subpoenaed witnesses can provide testimony that will show (or lead to other evidence that will show) that the Union and Fund together manufactured an unforeseen exigency that justified its unilateral changes is similarly based on nothing more than conjecture. Moreover, its assertions in this regard are internally inconsistent and nonsensical. On the one hand, Respondent argues that the NBF instituted delinquency proceedings “at the behest of the Union”, but it also asserts, *in the same paragraph*, that it was Bruce McIver—an Employer Trustee of the NBF—who initiated delinquency proceedings over

the objection of Union Trustee Maria Casteneda (App., p. 11). That is, Respondent makes the baffling assertions that the delinquency proceedings were instituted only as a result of the Union's directive *and* that an Employer Trustee initiated delinquency proceedings over the Union's objection. The clear conflict between these contentions demonstrates that Respondent is simply grasping at straws; indeed, it cannot even articulate a consistent theory of the alleged conspiracy. Moreover, Respondent's argument regarding the meeting between Mr. McIver and Ms. Casteneda is in direct conflict with the record evidence which establishes that this meeting of the NBF's Collections Committee occurred in October 2016, more than a month after the parties' last bargaining session and Respondent's declaration of an impasse in negotiations, more than seven (7) months after an arbitrator ruled that Respondent was required to pay delinquent contributions to the NBF, and roughly a year after the Union first initiated delinquency proceedings against Respondent. Under these facts, Respondent cannot reasonably argue that an unforeseeable exigency existed when the NBF notified it in July 2016 that unless its delinquency was cured, benefits would have to be terminated. Judge Green certainly did not abuse his discretion when he declined Respondent's demand for the appearance of five (5) witnesses, including non-parties, where there was and is no basis to even suggest that their testimony would have any probative value.

POINT II
RESPONDENT HAS MADE SIMILAR ALLEGATIONS IN
OTHER PROCEEDINGS AND HAS YET TO COME FORWARD WITH
ANY EVIDENCE OF COLLUSION BETWEEN THE UNION AND THE NBF

Notably, this is not the first time that Respondent has alleged, unsuccessfully, that the NBF has acted as an agent of the Union. In no fewer than four prior proceedings, including three Board investigations, Rite Aid asserted that the Union and the Fund maintained an agency relationship such that the actions of one should be imputed to the other. And in each such

proceeding, the assertion was rejected because Respondent was unable to come forward with any evidence in support of its stated belief that the Union and the Fund were acting in concert.

In NLRB Case No. 2-CB-122230, the Regional Director dismissed Rite Aid's charge against the Union for alleged failure to provide information regarding the NBF and other Funds. Rite Aid appealed the Regional Director's dismissal and the NLRB Division of Appeals denied the appeal, finding insufficient evidence to support Rite Aid's contention that the Union has de facto control over the Funds or that the Funds acted as the agent of the Union. Rather, the Division of Appeals determined that the Union and the Funds are independent entities and maintain an arm's length relationship.⁴ Rite Aid also alleged failure to provide information regarding the 1199SEIU/Employer Child Care Fund and the 1199SEIU Training & Upgrading Fund in Case No. 2-CB-136699. The Regional Director dismissed that charge as well, finding that "the Union and the Funds are separate and distinct entities" and that, contrary to Rite Aid's assertion, there is no evidence that the Union is in de facto control of the Funds.⁵ Finally, in Case No. 2-CB-184444, the Division of Appeals upheld the Regional Director's dismissal of Rite Aid's charge alleging the very thing Respondent alleges as a defense in this case, namely that the Union and the NBF conspired in the issuance of delinquency notices and termination of benefits.⁶ In rejecting Rite Aid's argument, the Division of Appeals found that

[T]he evidence failed to establish that the [NBF] was an agent of the Union. The probative evidence indicates that the NBF is a jointly-administered health and welfare fund. The NBF's trustees are comprised of [sic] representatives of both the Union and member employers, including a representative of [Rite Aid]. The

⁴ The Division of Appeal's denial of Rite Aid's Appeal of the Regional Director's dismissal of its charge in Case No. 2-CB-122230 is attached hereto as Exhibit 4.

⁵ The Regional Director's dismissal of Rite Aid's charge in Case No. 2-CB-136699 is attached hereto as Exhibit 5.

⁶ The Division of Appeal's denial of Rite Aid's Appeal of the Regional Director's dismissal of the charge in Case No. 2-CB-184444 is attached hereto as Exhibit 6.

evidence fails to establish that the NBF was acting on the Union's behalf when it issued its delinquency notices.

In addition to these NLRB proceedings, Rite Aid alleged improper collusion before Arbitrator Alan Viani in the underlying delinquency proceedings. As in this matter, Rite Aid attempted to subpoena documents and witnesses in support of its collusion theory. Arbitrator Viani rejected that effort and refused to enforce such subpoenas. In an Award issued on December 22, 2016 ("Viani Award")⁷, Arbitrator Viani found that even if he had authority to decide the question of collusion,

[T]he Company's belie[f]s and assertions in this matter lack any *prima facie* foundation. Essentially, the Company relies, almost exclusively, on conjecture and surmise in support of its suspicions. The only tangible issue raised by the Company in support of its collusive theory is the fact that a generalized delinquency report issued by the Fund in March 2015 did not list the Company as being delinquent in its contributions to the Fund. From this occurrence, the Company appears to have constructed an elaborate theory that has little support in the facts adduced in this hearing. . .

Given that an officer of the Company serves as a trustee of the Fund, I would be hard pressed to conclude that had any impropriety been engaged in by the Fund, the Company would not have been alerted [to] such impropriety by its own Fund trustee . . .

Other than the Company attributing some ominous meaning to the failure of the Fund to list it on its March 2015 delinquency report, there is simply no indication in the record of this matter that the Fund, its trustees, or the Union engaged in any type [of] activity that might be considered inappropriate or improper.

Given the complete absence of *prima facie* evidence of any impropriety on the part of the Fund, its trustees, or the Union . . . I view the subpoenas and the information they seek, which were issued by the Company, to be irrelevant to a proper disposition of this dispute. I view the issuance of the subpoenas by the Company as dilatory and essentially a fishing expedition to further delay a prompt resolution of this dispute.

⁷ The Viani Award is attached hereto as Exhibit 6.

Viani Award at pp. 18-19.

Thus, in each and all of these cases, Rite Aid failed to come forward with any evidence to suggest collusion between the Union and the Fund. If any such evidence existed, Respondent certainly would have produced it in at least one of these proceedings. Its inability to do so demonstrates it has no real prospect of uncovering any such evidence now.

POINT III
EVEN IF RESPONDENT IS PERMITTED TO CALL
WITNESSES REGARDING ITS THEORY OF ALLEGED
COLLUSION, THERE IS NO BASIS FOR REQUIRING THE TESTIMONY
OF UNION SENIOR EXECUTIVE VICE PRESIDENT YVONNE ARMSTRONG

1199 Senior Executive Vice President Yvonne Armstrong had absolutely no involvement in the negotiations with Rite Aid that occurred between March 2015 and September 2016, is not a member of the NBF Collections Committee and, did not have any involvement in NBF decisions as to whether and when to terminate NBF benefits. Respondent does not contend otherwise; indeed, it does not even mention Ms. Armstrong in any of the arguments in support of its Appeal. At other points in these proceedings, Respondent has argued Ms. Armstrong's testimony is relevant to its contention that Respondent should not have been required to pay the increased contribution rate that Arbitrator Viani determined it was contractually obligated to pay. Specifically, Respondent asserts that Ms. Armstrong participated in the parties' negotiations in 2009 and that the bargaining history from those negotiations—which occurred six years prior to the negotiations at issue in this case and about which Arbitrator Viani heard testimony from both parties—will show that Respondent did not waive its right to bargain over the NBF Trustees' change to the contribution rate and, accordingly, that Arbitrator Viani's award was repugnant to the NRLA. Respondent moved to dismiss the Complaint allegations related to the time period covered by Arbitrator Viani's awards under the theory of Spielberg deferral. In doing so,

Respondent implicitly concedes the validity of those awards and cannot also argue that they are repugnant to the Act. Accordingly, Ms. Armstrong cannot possibly provide testimony that would have any bearing on the claims and defenses in this case and Judge Green's decision to revoke the subpoena issued to Ms. Armstrong was entirely correct.

CONCLUSION

Based on each and all of the arguments set forth herein, Charging Party respectfully requests that Respondent's Request for Special Permission to Appeal, and its appeal, be denied.

Dated: September 22, 2017
New York, NY

LEVY RATNER, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on September 22 2017, I caused the foregoing CHARGING PARTY'S OPPOSITION TO RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL ALJ GREEN'S SUPPLEMENTAL ORDER ON PETITIONS TO REVOKE to be served electronically upon the following individuals:

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/s/Allyson L. Belovin
Allyson L. Belovin

Exhibit 1

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

**RITE AID OF NEW YORK, INC.,
RITE AID OF NEW JERSEY, INC.,**

and

**02-CA-182713
02-CA-189661**

**1199SEIU UNITED HEALTHCARE
WORKERS EAST**

**Order on the Respondents' Motion to Dismiss Paragraph 10 of the Complaint
and Revised Supplemental Order on Petitions to Revoke**

In addition to ruling upon the Respondents' motion to dismiss paragraph 10 of the complaint, this order will replace and expand upon my order of September 13, 2017.¹ On August 18, the Charging Party (Union) filed a Petition to Revoke subpoena *duces tecum* and 33 subpoenas *ad testificandum*, including subpoenas for the appearance of Union Executive Treasurer Maria Castaneda and Senior Executive Vice President Yvonne Armstrong, which were issued by the Respondents. On the same day, third party 1199SEIU National Benefit Fund (Fund) filed a Petition to Revoke a subpoena *duces tecum* and subpoenas *ad testificandum* issued to Fund CEO Mitra Behroozi and General Counsel Jeffrey Stein. On August 16, third party Bruce McIver, President of the League of Voluntary Hospitals and Homes of New York (League), filed a petition to revoke a subpoena *ad testificandum* issued by the Respondents.²

On August 28, I issued a preliminary order on the petitions to revoke subpoenas *duces tecum* that Respondents served on the Union and the Fund, whereby I ruled on certain subpoena disputes and withheld ruling on others. I did not rule on the petitions to revoke subpoenas *ad testificandum* that were issued to agents of the Union, the Fund, and McIver.

On August 31, the record in this case opened by telephone and issues were addressed with regard to subpoenas. No evidence was taken. The trial resumed for the production of evidence on September 11 and continued through September 14. The General Counsel has not formally rested, but has no current plans to call additional witnesses.

The complaint alleges that the Respondents violated Section 8(a)(5) and (1) of the Act by insisting on a change in unit scope, failing to make contractually required contributions at the rate determined by the Fund (before and after the last collective bargaining agreement expired),

¹ All dates herein refer to 2017, unless stated otherwise.

² The League is an association of employers that has bargained with the Union for collective bargaining agreements. The Respondents are not members of the League.

enrolling unit employees in a new healthcare plan, and implementing a last, best, and final offer upon the premature declaration of impasse.

With regard to allegations that the Respondents failed to make fund contributions at the proper rate, the complaint expressly cites and relies upon a March 6, 2016 arbitration award issued by Arbitrator Alan R. Viani. The Viani award concludes, in part, as follows:

The Employer, Rite Aid, violated the Collective Bargaining Agreement by failing and refusing to pay the National Benefit Fund the rate required by the Trustees for the period January of 2015 through September of 2015.

In so holding, Arbitrator Viani interpreted Section E of the parties' most recent collective bargaining agreement (2009 CBA), which states, in part, "during the life of this Agreement and any extension hereof, the employer agrees to adopt, be bound by and to implement any changes in the Fund's contribution rates (including diversions and suspensions thereof)..." Arbitrator Viani found that "the clear and unambiguous language of Section E absolutely requires the Company to comply with the contribution rates established by the Funds." Although Arbitrator Viani found the contract language unambiguous, he considered parole evidence and determined it was insufficient to require a different result. The 2009 CBA expired on August 6, 2016.

It is undisputed that Arbitrator Viani issued two additional arbitration awards on the same contractual issue, including a December 22, 2016 award that confirmed and extended the contract violation through August 2016 (upon the same rationale as the March 6, 2016 award). It is also undisputed that the original Viani award has been enforced in United States District Court and that the subsequent awards are pending enforcement. Further, it is undisputed that the Respondents have paid outstanding contributions owed to the Fund for the period from January 2015 to September 10, 2016.

With regard to the contribution allegations, the Respondents have moved for dismissal on the grounds of *Spielberg* deferral. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Alternatively, if the contribution allegations are not dismissed, the Respondents contend that they are entitled to contest the Viani award and relitigate that arbitration as necessary in the instant unfair labor practice case.³ Accordingly, the Respondents have subpoenaed certain documents and witnesses that would allow them to do so, including subpoenas *ad testificandum* which issued to Armstrong and McIver.

³ In an opposition to petitions to revoke subpoenas, the Respondents indicated that "one of the issues before the Board is whether the Board should defer to the Viani award" and, citing *Malrite of Wisconsin, Inc.*, 198 NLRB 241, argued that an allegation based on noncompliance with the Viani award is "for the courts, not the Board." However, the Respondents also asserted that *Spielberg* deferral is not appropriate where an arbitration award is repugnant to the Act and that, here, the arbitrator did not apply the Board's standard with regard to a waiver of their right to bargain over changes to contribution rates. On the record, at trial, the Respondents clarified that they were asserting *Spielberg* deferral as a defense, moved to amend their answer to that effect, and subsequently moved to dismiss the contribution allegations on the grounds of deferral.

With regard to all the complaint allegations, the Respondents have asserted as a defense that the Union attempted to exert pressure during negotiations by causing the Fund to threaten to terminate employee healthcare benefits on the pretextual grounds of delinquent contributions (the actual reason being to force the Respondents to concede to the Union's contract proposals). The Respondents subpoenaed documents and witnesses to explore this defense, including subpoenas *ad testificandum* which issued to Castaneda, Behroozi, Stein and McIver.

In this supplemental order, I address the Respondents' motion to dismiss paragraph 10 of the complaint. I also address whether the petitions to revoke should be granted to the extent the Respondents' subpoenas seek evidence to (1) contest and relitigate the Viani arbitration award and (2) establish a defense based on collusion and bad faith by the Union and the Fund. Finally, I address certain issues with regard to subpoenaed documents, including paragraphs 2 and 3 of the subpoena *duces tecum* the Respondents issued to the Union and paragraphs 1 and 2 of the subpoena *duces tecum* the Respondents issued to the Fund.

The Respondents' Motion to Dismiss Paragraph 10 of the Complaint

In the interest of judicial efficiency and to avoid the time and cost of unnecessary litigation, it is appropriate to rule on a motion to dismiss on grounds of deferral before the conclusion of a hearing. See e.g., *IAP World Services*, 358 NLRB 33 (2012); *Southern California Edison Co.*, 310 NLRB 1229 (1993), rev. denied 39 F.3d 1210 (D.C. Cir. 1994); *Specialized Distribution Management, Inc.*, 318 NLRB 158 (1995).

The complaint in this case contains the following allegations at paragraphs 10, 13 and 14:

10. (a) Since on or about March 6, 2016, and continuing each month thereafter during the term of the 2009 Agreement and Extension Agreement, Respondent failed to make health insurance contributions to the 1199SEIU National Benefit Fund for Healthcare Employees (the "NBF") at the rate required by the parties' collective-bargaining agreement, as ordered by a March 6, 2016 Arbitrator's Award and enforced and confirmed by a September 1, 2016 decision of the United States District Court for the Southern District of New York.

(b) Since the expiration of the Extension Agreement on or about August 6, 2016, and continuing each month thereafter, Respondent failed to make health insurance contributions to the NBF at the rate required by the parties' collective-bargaining agreement, as ordered by a March 6, 2016 Arbitrator's Award and enforced and confirmed by a September 1, 2016 decision of the United States District Court for the Southern District of New York.

(c) The subject set forth above in subparagraphs (a) and (b) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purposes of collective bargaining.

(d) Respondent engaged in the conduct described above in subparagraph (a) without the Union's consent.

(e) Respondent engaged in the conduct described above in subparagraph (b) without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

13. By the conduct described above in paragraph 10 (a), (c) and (d), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

14. By the conduct described above in paragraphs 9, 10 (b), (c) and (e), 11, and 12, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Thus, the complaint alleges that the Respondents violated 8(a)(5) and 8(d) by unilaterally modifying a provision of the 2009 CBA with regard to the Fund contribution rate (as interpreted by the Viani award), and thereafter violated Section 8(a)(5) by unilaterally failing to comply with the proper contribution rate as an ongoing term and condition of employment.

“[I]n its formulation of the *Spielberg* standards, the Board did not contemplate its assumption of the functions of a tribunal for the determination of arbitration appeals and the enforcement of arbitration awards.” *Malrite of Wisconsin, Inc.*, 198 NLRB 241, 242 (1972). See also *15th Avenue Iron Works, Inc.*, 301 NLRB 878, n.11 (1991) (partial deferral appropriate where delinquencies in benefit fund contributions arose under the contract and were arbitrated, but inappropriate for periods not covered by an arbitration award or after the contract expired). The *Malrite* Board quoted *Spielberg* in noting that, where “the proceedings appear to be fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act,” the Board will defer to an arbitration award. 198 NLRB at 241.

The Board’s decision in *15th Avenue Iron Works, Inc.* is directly on point and controlling. Thus, I will dismiss paragraph 10(a) of the complaint, but not dismiss paragraph 10(b). In *15th Avenue Iron Workers, Inc.*, the complaint alleged, “in part, that the [employer] ... violated Section 8(a)(5) and (1) by failing to make fringe benefit fund contributions since on or about December 30, 1987, as required by the collective-bargaining agreement, and by engaging in unilateral conduct since June 30, 1988 (the expiration date of the collective-bargaining agreement) by its failure to make such fringe benefit fund contributions.” Two arbitration awards were entered into evidence and those awards addressed the employer’s contribution delinquency for a three month period during the term of the contract then in effect. The Board affirmed the judge’s deferral and dismissal of the complaint allegations to the extent they were factually parallel and concerned the same time period covered by the arbitration awards, but refused to extend deferral beyond those periods or to any time after the expiration of the contract.

The General Counsel has not asserted that the Viani arbitration proceedings were anything other than fair and regular, based upon an agreement by the parties to be bound by

arbitration, and consistent with the Act. In fact, the complaint expressly relies on the Viani award for its interpretation of the 2009 CBA and the clarification of a disputed term and condition of employment with regard to the contribution rate.⁴

The General Counsel does assert that the remedy in the unfair labor practice case would differ from enforcement of the Viani awards because the former would require a return to the status quo and the latter does not.⁵ I reject this contention as a reason not to defer. First, complaint paragraph 10(b) will not be dismissed and a remedy of that allegation would arguably require a return to the status quo. Further, “with respect to remedy, an arbitration award that otherwise meets *Olin/Spielberg* standards can be appropriate for Board deferral even if the award provides a lesser remedy than the Board would have ordered.” *Aramark Services, Inc.*, 344 NLRB 549, 550 (2005).

The General Counsel further asserts that “deferral is not appropriate where failure to comply with an arbitrator’s award puts the bargaining relationship at risk” and, “[h]ere, unlike in *15th Avenue Iron Works*, the Respondent still denies it had any contractual obligation to pay the contribution amount required by the [Fund].” However, in *15th Avenue Iron Works*, the Board found “no merit to the General Counsel’s reliance on the failure of the [employer] to comply with the existing arbitration awards.” Further, unlike in that case, the Respondents here have actually paid the contributions due for the period from January 1, 2015 to September 10, 2016, which includes the period covered by complaint paragraph 10(a). There is no suggestion that the Respondents have simply repudiated any obligations they may have accrued under the 2009 CBA or the bargaining relationship in general.

Accordingly, I dismiss paragraphs 10(a), 10(c) (to the extent it refers to 10(a)), 10(d) and 13 of the complaint.

Contesting and Relitigating the Viani Award – Subpoenas *Ad Testificandum* Issued by the Respondents to Armstrong and McIver

Having partially dismissed the contribution allegations, it is my understanding that the Respondents will not attempt to relitigate the Viani award. However, for clarity and to specifically address the petitions to revoke certain subpoenas, I note that such dual litigation would not be permitted. The Board has held that an arbitration award is “as much a part of the

⁴ It was only the Respondents, previously, who questioned whether the arbitrator properly applied the Board’s “clear and unmistakable” standard with regard to contractual bargaining waivers. However, the Respondents are not pressing that argument at this time and the Board has refused to find arbitration awards repugnant even though they do not expressly read in terms of the statutory standard of clear and unmistakable waiver. See e.g., *Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005); *Southern California Edison Co.*, 310 NLRB 1229 (1993).

⁵ The General Counsel also contends that the Arbitrator made no decision regarding whether the Respondents’ failure to pay the contractually required rate to the Fund constituted a mid-term modification of the contract. I believe this is exactly what Arbitrator Viani found.

contract... as if it has been written in *nunc pro tunc*.” *Int’l Sound Technicians Local 695*, 234 NLRB 811, 816 (1978) quoting *International Union, United Mine Workers of America (Westmoreland Coal Company)*, 117 NLRB 1072, 1075 (1957). Further, the Board disfavors dual litigation and favors arbitration as an agreed upon method of resolving contractual labor disputes. In *L. A. R. Elec.*, 274 NLRB 702, 703 (1985), the Board adopted the decision of the judge, which states as follows with regard to post-arbitration deferral:

Spielberg Mfg. Co., 112 NLRB 1080 (1955), recognizes the traditional notion that it is not the function of judicial or administrative tribunals to relitigate issues which previously had been heard and decided under fair and final and binding procedures. It further recognizes that both national labor policy and congressional mandate establish consensual grievance-arbitration procedures as the preferred method for the resolution of labor disputes between parties to a labor contract. *Spielberg* and its progeny establish four general criteria for Board deferral to arbitral decisions....:

See also *Elec. Reprod. Serv. Corp.*, 213 NLRB 758, 761 (1974) (“in deciding *Spielberg* and *Collyer*, the Board sought to discourage dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created (*Collyer*), and to permit the dispute resolution achieved through those procedures to stand in the absence of procedural irregularity or statutory repugnancy (*Spielberg*)”).

Since the Board discourages dual litigation of contract disputes which were previously heard and decided through the parties’ agreed upon method of arbitration, it would not be appropriate to relitigate the contributions arbitration absent some showing of procedural irregularity or statutory repugnancy. Such irregularity or repugnancy has not been established.

Accordingly, the petitions to revoke are granted with regard to subpoenas *ad testificandum* issued to Armstrong (who the Respondents describe as a Union trustee of the Fund who participated in negotiations and proposed the language in Section E of the 2009 CBA) and McIver (who the Respondents describe as a person who negotiated the original change in Fund contribution methodology).⁶

Alleged Bad Faith Bargaining by the Union and the Fund - Subpoenas *Ad Testificandum* Issued by the Respondents to Behroozi, Stein, Castaneda, and McIver

The Respondents cited a number of cases in support of their position that a bargaining partner’s bad faith can be a valid defense to an alleged violation of Section 8(a)(5) and (1) of the Act, but none of those cases involve the type of conduct allegedly engaged in here by the Union

⁶ It is not clear to me that the testimony of McIver would be relevant to the instant case even if I did allow for the relitigation of the contributions arbitration. Nevertheless, the Respondents contend that McIver is not only necessary to contest the Viani arbitration, but to explore the defense of collusion and bad faith by the Union and the Fund. As discussed below, I do not believe there is a valid basis or rationale for such a defense under Board law. Accordingly, neither reason proposed by the Respondents is sufficient to compel the appearance of McIver.

and the Fund (as conduct that would remove the possibility of good-faith negotiations or otherwise excuse the Respondents' alleged unlawful unilateral action). For example, the Union is not accused of having refused to bargain, orchestrated an unprotected slowdown or breached a material provision of the 2009 CBA.

Moreover, it does not appear that the reasoning in the cases cited by the Respondent would logically extend to the alleged conduct at issue here. Parties are generally entitled to exert economic pressure in support of a bargaining position prior to impasse. See e.g., *Darling & Co.*, 171 NLRB 801, 803 (1968) (Board found lockout before impasse in support of a bargaining position to be lawful if an employer's motivation is not to discourage union activity or avoid its bargaining obligation). The object of such economic tactics are to successfully conclude negotiations (not prevent it) on favorable terms. This being the object the Respondents attribute to the Union, the production of evidence to that effect would not establish a valid defense.

The Respondents nevertheless contend that the Union's alleged collusion with the Fund to threaten the termination of employee benefits created an economic exigency which permitted the implementation of unilateral changes. The Respondents may prove to be correct that the anticipated termination of employee benefits created such an exigency. *RBE Electronics*, 320 NLRB 80, 82 (1995); *Bottom Line Enterprises*, 302 NLRB 373 (1991); *Eugene Iovine, Inc.*, 353 NLRB 400 (2008). In order to excuse bargaining altogether, the Respondents must establish that extraordinary unforeseen events beyond their control had a major economic effect that required the company to take immediate action. *RBE Electronics*, 320 NLRB at 81. In the event of a less extraordinary unforeseen exigency beyond an employer's control, negotiations regarding the issue may be expedited (if not excused entirely). *Id.* at 81-82. However, this line of cases does not require the Respondents to prove that an exigency was caused by the Union and/or the Fund. Thus, to the extent the Respondents have subpoenaed witnesses to establish causation and collusion, they seek evidence that is not relevant.

The Respondents have asserted that they require the appearance of Castaneda, Behroozi, Stein, Castaneda and McIver in order to establish a defense based on collusion and bad faith by the Union and the Fund. I grant the petitions to revoke the subpoenas *ad testificandum* issued to those individuals.

Subpoenaed Documents

In my preliminary order, I addressed and refused to revoke the Respondents' subpoena *duces tecum* to the Union and Fund for communication regarding collective bargaining between the Union and the Respondents, the Viani arbitration, and the Respondents' contributions to the Fund.⁷ However, for reasons described above, I do not believe that relitigation of the Viani arbitration or alleged collusion between the Union and Fund with regard to employee benefits are valid reasons to compel the production of subpoenaed witnesses or documents. Accordingly, I

⁷ These requests were in paragraph 2 and 3 of the Respondents' subpoena *duces tecum* to the Union and paragraph 1 and 2 of the Respondents' subpoena *duces tecum* to the Fund.

grant the Union's and the Fund's petitions to revoke the Respondents' requests for communication, except to the extent the subpoenas request communication regarding collective bargaining.

Based upon representations of counsel, it appears that the Union and the Respondents have largely agreed upon a method of producing communication regarding collective bargaining, but disagree as to the proper temporal scope and whether the Union should be required to search the emails of Castaneda.

With regard to temporal scope, the Union seeks to limit production for the period June 2016 through September 2016. The Respondents assert production should not be so limited because many of the proposals at issue in this case were a topic of bargaining since March 2015 and that the Respondents are alleged to have implemented a last, best and final offer on an ongoing basis since September 6, 2016. However, the negotiations (from March 2015 to June 2016) were the subject of an unfair labor practice trial before Administrative Law Judge Steven Davis and the parties had an opportunity to subpoena documents in connection with that proceeding. Further, it is not my understanding that the Respondents are asserting a change after September in the terms it implemented or the bargaining posture of the parties. Accordingly, I will limit the time period for production to the period June 1, 2016 to October 1, 2016.

In addition to her position with the Union, Castaneda is the Union-designated trustee on the Fund's collections committee. We have heard evidence that, in the latter capacity, Castaneda was a decision maker with regard to a Union request that the Fund not terminate the health benefits of the Respondents' employees due to the Respondents' partial contribution delinquency. Union counsel has represented that Castaneda "had absolutely no involvement in Rite Aid negotiations," and perhaps this also means Union counsel has no knowledge of any communications by Castaneda regarding collective bargaining. However, I can conceive of a reason why Castaneda might be kept apprised of events and discussions at collective bargaining, and the additional search of her emails during a reduced period of time has not been shown to be unduly burdensome. Accordingly, I will order that a search be conducted of Castaneda's emails for responsive documents.

Finally, during the hearing on September 12, the Respondents sought production as an outstanding subpoenaed document of a Fund delinquency report. The delinquency report was referenced during a conversation between counsel for the Union, Allyson Belovin, and Counsel for the Fund, Suzanne Hepner, regarding contribution delinquency of the Respondents (apparently, the report showed that the Respondents were not delinquent at some point in time). Hepner and Belovin have both been called by the General Counsel to testify. Respondents' counsel claims the delinquency report is relevant to the foreseeability of the asserted exigency with regard to the possibility that employee health benefits would be terminated. Respondents' counsel also claims that production of the document was necessary for the cross-examination of the General Counsel's witnesses.

I originally ruled that the delinquency report be turned over and that the failure to do so might be a basis for recalling Hepner for additional cross-examination. However, I have

reconsidered that ruling. It is not clear to me how the delinquency report is relevant to foreseeability if there is no suggestion by the Respondents that they were ever presented with or relied upon it as a basis for believing that they were not in arrears and that employee benefits would not be terminated. Accordingly, I will not order the production of the delinquency report at this time.

Dated this 15th day of September, 2017
at New York, New York.

/s/ Benjamin W. Green
Benjamin W. Green
Administrative Law Judge

Exhibit 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

RITE AID OF NEW YORK, INC., RITE AID OF NEW JERSEY, INC., ECKERD CORPORATION, GENOVESE DRUG STORES, INC., AND THRIFT DRUG, INC., A SINGLE EMPLOYER,

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST.

Case Nos. 02-CA-182713
02-CA-189661

**RESPONDENT’S REQUEST FOR SPECIAL PERMISSION TO APPEAL
JUDGE GREEN’S SUPPLEMENTAL ORDER ON PETITIONS TO REVOKE**

Pursuant to Section 102.26 of the National Labor Relations Board’s (“Board”) Rules and Regulations, Respondents RITE AID OF NEW YORK, INC., RITE AID OF NEW JERSEY, INC., ECKERD CORPORATION, GENOVESE DRUG STORES, INC., AND THRIFT DRUG, INC. (“Rite Aid”) hereby respectfully submit this Request for Special Permission to Appeal the following rulings made by Administrative Law Judge Benjamin W. Green in his Supplemental Order on Petitions to Revoke (“Order”)¹:

1. Revoking subpoena *ad testificandum* Nos. A-1-XOQP7B issued to Charging Party 1199SEIU United Healthcare Workers East (“Union”) Senior Executive Vice President Yvonne Armstrong;
2. Revoking subpoena *ad testificandum* No. A-1-XOSSWL issued to Union Executive Treasurer Maria Castaneda;
3. Revoking subpoena *ad testificandum* No. A-1-XRAXQH issued to President of the League of Voluntary Hospitals and Homes of New York Bruce McIver;
4. Revoking subpoena *ad testificandum* No. A-1-XRAPXN issued to 1199SEIU National Benefit Fund (“NBF” or “Fund”) CEO Mitra Behroozi;

¹ Attached hereto as Exhibit 1.

5. Revoking subpoena *ad testificandum* No. A-1-XRAFPV issued to NBF General Counsel Jeffrey Stein; and
6. Declining to order production of the “delinquency report” sought by subpoenas *duces tecum* Nos. B-1-XO27B9 and B-1-XO2JPX.

In the interests of justice and judicial economy, Rite Aid respectfully requests that the Board grant this interlocutory appeal and stay the proceedings as Judge Green’s rulings severely prejudice Respondent’s ability to defend against the Complaint’s allegations and prove its affirmative defenses.

PROCEDURAL BACKGROUND

On August 23, 2016 and December 8, 2016, the Union filed ULP charges (Case Nos. 02-CA-182713 and 02-CA-189661) with Region 2 alleging that Rite Aid violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5) by: (1) insisting to impasse on a permissive bargaining subject; (2) declaring an unlawful impasse; (3) unilaterally discontinuing contributions to the Fund; and (4) unilaterally enrolling employees in Rite Aid’s healthcare plan. The Regional Director subsequently issued a Consolidated Complaint on behalf of the General Counsel on May 31, 2017. Rite Aid filed its Answer to the Consolidated Complaint on June 29, 2017 denying the material allegations contained therein and asserting various affirmative defenses.

On August 11, 2017, Rite Aid served subpoena *duces tecum* No. B-1-XO2JPX and subpoenas *ad testificandum* Nos. A-1-XO38F3, A-1-XO4P7D, A-1-XOLZXP, A-1-XOQEOF, A-1-XOQP7B, A-1-XOR7IR, A-1-XOSEON, A-1-XOSSWL, A-1-XOTFZ5, A-1-XOTQ31, A-1-XOU0F9, A-1-XR67UD, A-1-XR6LFJ, A-1-XR753B, A-1-XR7F45, A-1-XR89NB, A-1-XR8BB1, A-1-XR8K3P, A-1-XR8OYF, A-1-XR5PZB, A-1-XR8T5J, A-1-XR8ZJJ, A-1-XR91LP, A-1-XR966F, A-1-XR9GUL, A-1-XRL9L1Z, A-1-XR9NMH, A-1-XR9T49, A-1-

XRA40R, A-1-XRA669, A-1-XRAAIN, A-1-XRABM3, and A-1-XRAGTL on the Union, its staff, and its General Counsel. Also on August 11, 2017, Rite Aid served subpoena *duces tecum* No. B-X-O27B9 and subpoenas *ad testificandum* Nos. A-1-XRAPXN and A-1-XRAFPV on the NBF (“NBF”). Both the Union and the NBF responded by filing petitions to revoke.

On August 28, 2017, Judge Green issued a preliminary Order on the Union and the Fund’s Petitions to Revoke Subpoenas and Third Party 1199SEIU National Benefit Fund’s Petition to Revoke Subpoenas (the “Preliminary Order”). *See* Preliminary Order attached as Exhibit 2. The Preliminary Order collectively addressed Rite Aid’s subpoenas *duces tecum* while declining to rule on Rite Aid’s subpoenas *ad testificandum*. In response to the Union’s and the Fund’s objections to Rite Aid’s requests to the extent they sought irrelevant information premised upon a “theory that the Union and the Fund have improperly colluded to engage in some ambitious wrongdoing”, the Preliminary Order advised that the requests “reference documents related to a collective bargaining process that is central to the complaint allegations as well as fund contributions and an arbitration that, the Petitioners admit, will be relevant to this case.” The Preliminary Order further instructed the parties to file all oppositions or motions for reconsideration by no later than the opening of the hearing record at noon on August 31, 2017.

On September 1, 2017, Judge Green requested that Rite Aid submit further explanations as to the evidentiary requests of the subpoenas. Rite Aid responded to Judge Green’s request in a letter dated September 5, 2017.

On September 11, 2017, the first day of the ULP trial, Judge Green informed the parties that he was inclined to revoke nearly all of Rite Aid’s subpoenas. Citing to the Board’s decision in *Darling & Company*, 171 NLRB 801 (1968), Judge Green reasoned that proof of any alleged collusion between the Union and the NBF would establish only that the Union engaged in lawful

economic tactics to successfully conclude (rather than prevent) negotiations on favorable terms, and production of evidence to that end would not establish a valid affirmative defense. He further explained that, because the economic exigency exception only requires proof that the exigency was unforeseeable as opposed to arising out of the Union's misconduct, testimony as to the former proposition would be irrelevant.

Also on September 11, 2017, the General Counsel called NBF Counsel Suzanne Hepner ("Hepner") to testify. Hepner's attached affidavit references a series of emails and the Fund's Delinquency Report with exhibits. *See* Affidavit of Suzanne Hepner attached as Exhibit 3. Hepner provided the attached affidavit to the NLRB which references a series of emails and the Fund's Delinquency Report with exhibits. While Judge Green permitted Rite Aid to cross-examine Hepner as to the substance of her conversations and interactions with Union Counsel Allyson Belovin ("Belovin"), he refused to require the production of the referenced documents. This restricted Rite Aid's ability to properly cross-examine the witnesses.

On September 12, 2017, the General Counsel called Belovin to testify. It was at this time that Rite Aid again sought production of the "delinquency report", an outstanding document requested by Rite Aid's subpoenas *duces tecum* that Belovin referenced in her affidavit as forming the basis for her conversation with Hepner about Rite Aid's contribution delinquency. Judge Green thereafter ordered the General Counsel to produce the delinquency report, advising that its failure to do so might warrant recalling Hepner for additional cross-examination.

On September 13, 2017, Judge Green issued the Order containing the rulings which form the basis for this Appeal. The Order clarifies that he revoked the subpoenas *ad testificandum* to Castaneda, Behroozi, Stein, and McIver based on his determination that such testimony would not establish a defense based on collusion and bad faith by the Union and the Fund. The Order

further advised that Judge Green had reconsidered his September 12, 2017 instruction to the General Counsel to produce the delinquency report. He explained that he would not order its production as it was not clear to him “how the delinquency report is relevant to foreseeability” of Rite Aid’s asserted economic exigency absent any indication that Rite Aid was ever presented with or relied upon the document.

LEGAL ARGUMENT

Given Rite Aid’s clear right to prove that the Union bargained in bad faith as a valid affirmative defense to the General Counsel’s bad faith bargaining charge, Judge Green abused his discretion when he revoked Rite Aid’s subpoenas out of pure speculation as to the irrelevancy of the requested evidence. Judge Green similarly abused his discretion by refusing to enforce Rite Aid’s unrevoked subpoenas *duces tecum* as to a document he considered irrelevant to Rite Aid’s economic exigency defense. Though Rite Aid’s entitlement to enforcement of its unrevoked subpoena *duces tecum* is by no means limited by the admissibility of the requested evidence, there is simply no reasonable basis for Judge Green’s conclusion that a document which the General Counsel relied upon and referenced in his case-in-chief is irrelevant to the proceedings. Cumulatively and separately, these rulings constitute grave denials of due process to the extent that they preclude Rite Aid from relying upon available and admissible evidence to establish its affirmative defenses. Grant of this Special Appeal is accordingly necessary to protect Rite Aid’s rights under the Act and to avoid the delays that will ensue if the matter is remanded to include the evidence Judge Green has precluded Rite Aid from obtaining and introducing into the record.

I. The information sought by the NBF subpoenas is “reasonably relevant” to Rite Aid’s affirmative defenses.

Generally, subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant

to an allegation in the complaint. *See* NLRB Rules and Regulations, Sec. 102.31(b); and *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd. in relevant part* 144 F.3d 830, 833-834 (D.C. Cir. 1998) (“Information sought in an administrative subpoena need only be ‘reasonably relevant.’”) This rule applies to both subpoenas *duces tecum* and subpoenas *ad testificandum*. NLRB Division of Judges Bench Book § 8-230. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, which the Board has referred to for guidance in deciding such issues, information sought in a subpoena must only be “reasonably calculated to lead to the discovery of relevant evidence.” *See Brink’s, Inc.*, 281 NLRB 468 (1986). This standard is notably less onerous than the FRE 401 “Test for Relevant Evidence” used to evaluate whether evidence may be admitted at trial. Under FRE 401, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.

Here, Judge Green revoked Rite Aid’s subpoenas *ad testificandum* issued to the NBF officials based upon his determination that proof of the conduct Rite Aid attributes to the Union “would not establish a valid defense”, and that, “to the extent [Rite Aid] ha[s] subpoenaed witnesses to establish causation and collusion, they seek evidence that is not relevant.” Judge Green’s ruling misapplies the “reasonable relevance” standard in a way that conditions enforcement of subpoenas upon a showing of relevancy for purposes of admissibility at trial. Moreover, by presuming the factual insufficiency of evidence he never received to establish otherwise valid affirmative defenses that may not be assessed absent conduct of a fact-intensive inquiry, Judge Green committed an abuse of discretion amounting to a violation of Rite Aid’s right to due process.

- A. The testimony sought from NBF officials regarding the organization’s collusion with the Union is “reasonably relevant” to a determination as to whether the Union bargained in good faith.**

Established Board precedent recognizes that bad faith bargaining by a union is a valid affirmative defense to allegations of bad faith bargaining by an employer. *See, e.g., Times Publishing Co.*, 72 NLRB 676, 683 (1947) (union's bad faith precludes testing employer's good faith); *Continental Nut*, 195 NLRB 841 (1972) (same); *Chicago Tribune Co.*, 304 NLRB 259 (1991) (holding that ALJ improperly excluded evidence of Union bad faith when such allegations, if proven, warranted dismissal of the complaint.) The Board said in *Times Publishing Company*:

“ . . . the question of whether an employer is under a legal duty to bargain with a union that contemporaneously declines to negotiate on certain subjects with that employer has been so earnestly briefed by counsel that the Board cannot let it pass without comment. The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that . . . a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.”

72 NLRB 676, 682-683.

The Board has found that an employer who negotiates with a fixed purpose, a "take it or leave it" attitude, without any genuine effort to reconcile differences, bargains in bad faith, and the Supreme Court has held that the provisions of Section 8(d) setting forth the duty to bargain apply equally to unions and employers. *Herman Sausage Co.*, 122 NLRB 168 (1958); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 487 (1960). Moreover, the “actions of a collective bargaining benefit or trust fund can be attributed directly to a union” when the “trustee’s actions were in fact directed by union officials” or the trustee’s acts were “undertaken in their capacity as union officials rather than as trustees.” *Electrical Workers Local 429*, 357 NLRB 332 (2011).

Here, Rite Aid contends that the NBF’s communications to Rite Aid’s bargaining unit members were attributable to the Union and evinced an attempt by the Union to strong arm Rite Aid’s continued participation in the NBF rather than bargaining over the withdrawal. Rite Aid

further contends that the Union colluded with the NBF to arbitrarily implement deficiency proceedings against it in an attempt to coerce Rite Aid into returning to the NBF, again without bargaining over the terms and conditions of the newly contemplated plan. Taken together and, assessed under the totality of the circumstances, these acts of collusion would be relevant to establish that the Union bargained with a "take it or leave it" attitude that the Board has repeatedly held amounts to a refusal to bargain in good faith. *See, e.g., Herman Sausage Co.*, 122 NLRB 168 (1958); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 487 (1960). If established, such bad faith bargaining by the Union might "preclude existence of a situation in which [Rite Aid's] own good faith can be tested", and "if it cannot be tested, its absence can hardly be found". *See Times Publishing Company*, 72 NLRB 676, 682-683 (1947).

B. Judge Green abused his discretion by presuming that the Union bargained in good faith without considering any evidence of its bargaining conduct.

To make a charade or sham of conducting negotiations by acting with the intention of evading an actual agreement violates section 8(a)(5) and is tantamount to "bad faith" bargaining. *Cont'l Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974). It is one thing, however, to declare that sham negotiations are prohibited, and another entirely to actually determine whether the negotiations are, in fact, a sham. Judge John R. Brown cogently described the difficulty in making such a determination: "to sit at a bargaining table . . . or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960).

As part of its determination of good faith, the Board employs a "totality of the circumstances" test when examining the various indicia of bad faith bargaining, reviewing party's conduct as a whole both at and away from the bargaining table. *Regency Serv. Carts, Inc.*, 345 NLRB No. 44, at 1 (Aug. 27, 2005) (citing *Pub. Serv. Co. of Okla.*, 334 NLRB 487, 487 (2001),

enforced, 318 F.3d 1173 (10th Cir. 2003); *Overnite Transp. Co.*, 296 NLRB 669, 671 (1989), *enforced*, 938 F.2d 815 (7th Cir. 1991)). From the context of a party's total conduct, it must be decided whether the party is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (citing *J.D. Lunsford Plumbing*, 254 NLRB 1360, 1370 (1981), quoting from *West Coast Casket Co.*, 192 NLRB 624, 636 (1971), *enfd.* in relevant part 469 F.2d 871 (9th Cir. 1972)).

Under these established principles, no determination as to whether the Union bargained in good faith could be made absent a thorough examination of the Union's conduct as a whole both at and away from the bargaining table. Judge Green's determination that the Union was entitled to collude with the NBF at Rite Aid's expense in the manner alleged by Rite Aid as a lawful exertion of economic pressure without considering *any* evidence of the Union's actual bargaining conduct contravenes these established principles. Moreover, Judge Green's citation to the Board's decision in *Darling & Company* is inapposite. 171 NLRB 801 (1968). There, the Board applied the test for the legality of a lockout as articulated by the Supreme Court's in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) to a situation involving a pre-impasse lockout. Judge Green relies upon *Darling & Company* and *American Ship Building Co.* for the proposition that the Union was entitled to collude with the NBF prior to impasse as a valid exertion of economic pressure, and a finding to that effect "would not establish a valid defense".

The Board expressly condemned this sort of universal categorization of specific bargaining behaviors as generally lawful or unlawful exertions of economic pressure. *Daily News of L.A.* 315 NLRB 1236, 1242-1243 (1994). In *Daily News of L.A.*, the Board explained:

Thus, while the Supreme Court has made clear in *American Ship* and *Insurance Agents* that the Board is not warranted in becoming involved in the substantive

aspect of the bargaining process by "functioning as an arbiter of the sort of economic weapons the parties may use in seeking acceptance of their bargaining demands," it is also clear that not all economic weapons seriously affecting employee rights may be employed with impunity merely because employed in aid of one's bargaining position. This point was emphasized in *Katz* where the Court was careful to note that the availability of economic weaponry under *Insurance Agents* is subject to one crucial qualification--the party utilizing it must at the same time be engaged in lawful bargaining. Thus, while recalling that in *Insurance Agents* it found that the Board may not decide the legitimacy of economic pressure tactics "in support of genuine negotiations," *Katz* made clear that the Board "is authorized to order the cessation of behavior which is in effect a refusal to negotiate." 369 U.S. at 747.

Id.

The Board's decision in *Daily News of L.A.* dispels any notion that a finding of bad faith bargaining is precluded by a party's otherwise lawful use of economic weapons to advance its bargaining position. Though the Board is not to decide the legitimacy of the Union's collusion with the NBF to advance its bargaining position, it is unquestionably tasked with evaluating whether the Union employed this economic weapon "in support of genuine negotiations" or in a manner evincing a refusal to bargain in good faith. Thus, Judge Green's decision to revoke Rite Aid's Subpoenas was erroneous to the extent premised upon an impermissible presumption as to the Union's entitlement to collude with the NBF to advance its bargaining position regardless of its conduct both at and away from the bargaining table.

C. The testimony sought from NBF officials regarding the Union's influence over the NBF's discontinuation of its employees' health benefits is "reasonably relevant" to Rite Aid's economic exigency defense.

The Union's collusion with the NBF also created an economic exigency which permitted Rite Aid to implement unilateral changes. See *RBE Electronics of S.D.*, 320 NLRB 80 (1995); see also *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542 (2004) (permitting interim bargaining over healthcare when Employer became aware four months in advance that its healthcare plan would be terminated by insurer). In July 2016, the Union and Rite Aid were approaching an impasse in

negotiations over contributions to the NBF. Days before the next bargaining session, the NBF informed Rite Aid that health benefits for bargaining unit associates would terminate unless Rite Aid complied with a delinquency assessed in a collections arbitration. At the time, Rite Aid's appeal of the arbitrator's decision was pending in federal court, and the threat arrived with no advance warning and in violation of the NBF's own policy.

Rite Aid cannot be held responsible for the loss of health benefits to the extent any such loss resulted from the NBF's unforeseeable institution of delinquency proceedings at the behest of the Union. Belovin's very limited testimony on the matter suggests that the NBF did in fact deviate from its own policies when it decided to discontinue Rite Aid's employees' health benefits. She described a meeting with Hepner, McIver, and Castaneda wherein they discussed whether the Fund would forbear on Rite Aid's deficiency and continue to provide coverage to its employees. Belovin stated that McIver overruled Castaneda at the meeting and unilaterally declined to continue forbearance. McIver's decision to initiate delinquency proceedings notwithstanding Castaneda's objection would seemingly contravene the NBF's delinquency policy to the extent such split-votes would ordinarily be submitted to arbitration. That McIver's otherwise inexplicable deviation from the policy happened to coincide with an approaching bargaining impasse between Rite Aid and the Union warrants a close examination into the role played by the Union in the NBF's deficiency proceedings. Testimony of Union Executive Treasurer Maria Castaneda and the NBF's officers and counsel at the time—Mitra Behroozi, Maria Acosta, and Jeffrey Stein—will accordingly provide reasonably relevant information as to the as to the circumstances surrounding Rite Aid's asserted economic exigency.

- D. Judge Green abused his discretion by limiting the means by which Rite Aid could establish that the asserted economic exigency was unforeseeable.**

As noted by Judge Green in his Order, an economic exigency must be caused either by external events, be beyond the employer's control, or not be reasonably foreseeable. *See RBE Electronics of S.D.*, 320 NLRB at 81. In spite of his recognition of this fact, Judge Green revoked Rite Aid's subpoenas *ad testificandum* because "this line of cases does not require [Rite Aid] to prove that an exigency was caused by the Union and/or the Fund", and any testimony to that effect would not be relevant. Judge Green's analysis is not supported by any standard of relevance recognized under Board law. Regardless of whether the economic exigency defense *requires* proof of causation by the charging party, evidence to that effect would *necessarily* make it more likely than not that Rite Aid did not cause the exigency, an essential element of the defense. Judge Green accordingly abused his discretion by revoking Rite Aid's subpoenas based upon a clearly erroneous application of the standard for evaluating evidentiary relevance.

E. Judge Green abused his discretion by refusing to enforce Rite Aid's unrevoked subpoena *duces tecum* as to the delinquency report.

Notwithstanding the fact that the delinquency report is concededly responsive to Rite Aid's unrevoked subpoenas *duces tecum*, Judge Green declined order the General Counsel to produce it because it was "not clear to [him] how the delinquency report is relevant to the foreseeability" of Rite Aid's asserted economic exigency. Again, under the applicable "reasonable relevance" standard, subpoenaed information should be produced if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. *See* NLRB Rules and Regulations, Sec. 102.31(b); and *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd. in relevant part* 144 F.3d 830, 833-834 (D.C. Cir. 1998) ("Information sought in an administrative subpoena need only be 'reasonably relevant.'")

Judge Green abused his discretion by declining to enforce Rite Aid's subpoena *duces tecum* as to a document he considered irrelevant notwithstanding that the General Counsel relied upon

and saw fit to reference in his case-in-chief. *See PPG Industries, Inc.*, 339 NLRB 821, 821-822 (2003). In *PPG Industries*, the Board reversed an ALJ's revocation of the General Counsel's subpoena that sought production of documents that the respondent introduced into the record to explain his personal disciplinary history and to provide context for its disciplinary policies. *Id.* The Board stated that the ALJ had failed to provide "a reasonable basis" for denying production of the records to the General Counsel that "Respondent found significant in litigating the unfair labor practice allegations" in the proceeding. *Id.* Judge Green's position that the delinquency report is irrelevant under the "reasonable relevancy" standard cannot be reconciled with the General Counsel's decision to make reference to the document during its case-in-chief. Like the ALJ in *PPG*, Judge Green has provided no reasonable basis for refusing to order its production, and has accordingly abused his discretion.

II. Due process requires the reversal of Judge Green's rulings as Rite Aid has an absolute right to litigate all valid affirmative defenses which "could" affect the unfair labor practice findings.

Under established Board law, "a party is privileged to present, and the judge is bound to hear, receive, and consider its defense, notwithstanding the fact that the General Counsel ha[s] previously considered the same evidence in refusing to issue an unfair labor practice complaint." *Hotel & Restaurant Employees Local 274 (Warwick Caterers II)*, 282 NLRB 939 (1987). This due process requirement "mandate[s] litigation of the Respondent's affirmative defenses if, as a legal matter, proof of such defense could affect the judge's unfair labor practice findings." *Chicago Tribune Co.*, 304 NLRB 259, 259-261 (1991) (reversing ALJ's decision to strike employer's assertion of bad faith bargaining by the union as affirmative defense to bad faith bargaining charge). By revoking Rite Aid's subpoenas seeking production of information as to its valid affirmative defenses, Judge Green has violated the due process requirement mandating the

full litigation of such affirmative defenses. Further, unless Judge Green's revocation of Rite Aid's subpoenas is reversed, Rite Aid's right to present its case will be all-but vanquished by virtue of Union's shockingly irresponsible 30-day auto-deletion policy.

Specifically, the Union claims that it automatically deletes all emails older than 30 days, and inexplicably maintained this policy notwithstanding the fact that nearly all of the events relevant to this case occurred more than a year ago. Moreover, as the Union noted during the conference call on August 31, 2017, Rite Aid alleged unlawful coordination between the Union and NBF in an unfair labor practice charge filed on September 16, 2016. *See* Charge No. 02-CB-184444, attached as Exhibit 4. That Charge was not finally dismissed until August 21, 2017. *See* Denial Letter, attached as Exhibit 5. Despite this notice of potential litigation over its conduct at bargaining, the Union apparently took no steps to preserve emails in the accounts of individuals it knew were involved in the negotiations subject to the earlier complaint and the subject of this hearing. The NBF has not provided an explanation for its failure to produce documents and email communications between itself and the Union – even though it was also put on notice and named in Rite Aid's unfair labor practice charge. *See* Amended Charge No. 02-CB-184444, attached as Exhibit 6.

In particular, the Union, NBF, and their counsel (they share attorneys – Levy Ratner, P.C.) should have preserved emails and their attachments in the accounts of all officials involved in bargaining, including George Gresham, Yvonne Armstrong, Laurie Vallone, Berta Silva, Allyson Belovin, Suzanne Hepner, and Daniel Ratner. Rite Aid believes that those email accounts contained highly relevant communications and information flowing between the Union and the NBF regarding the very bargaining that is the crux of this case. Rite Aid believes that those communications support its allegation that the Union and NBF illegally coordinated threats to

terminate benefits to place the Union at an advantage in bargaining, and further coordinated a systemic denial of information to Rite Aid. This left Rite Aid with no effective choice but to propose termination of contributions to the NBF.

Judge Green's misapplication of the controlling relevancy tests has all but crippled Rite Aid's ability to defend itself in this case. In light of the Union's unjustifiable failure to preserve evidence essential to Rite Aid's defenses, the Board should grant this interlocutory appeal and stay the proceedings to avoid further resulting prejudice to Rite Aid.

CONCLUSION

For the aforementioned reasons, and for all the reasons set forth above, Respondent respectfully requests that the Board grant this Request for Special Permission to Appeal Judge Green's September 13, 2017 Order.

Each of Judge Green's rulings contained therein irrevocably hampers Respondent's ability to prove its affirmative defense. In the interest of justice and judicial economy the Board should rule on the instant matters before the record closes and the Parties submit closing arguments. A decision in Respondent's favor would require a re-opening of the record to receive substantial evidence that likely will alter the complexion of the case and influence the ultimate decision.

Dated: September 15, 2017

Respectfully submitted,

/s/Laura A. Pierson-Scheinberg
Stephen M. Silvestri
Laura A. Pierson-Scheinberg
Jackson Lewis P.C.
2800 Quarry Lake Drive
Suite 200
Baltimore, Maryland 21209
(410) 415-2000
Stephen.Silvestri@jacksonlewis.com
Laura.PiersonScheinberg@jacksonlewis.com

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on September 15 2017, I caused the foregoing REQUEST FOR SPECIAL PERMISSION TO APPEAL JUDGE GREEN'S SUPPLEMENTAL ORDER ON PETITIONS TO REVOKE to be served electronically upon the following individuals:

Allyson L. Belovin
Levy Ratner, P.C.
80 Eight Avenue
New York, New York 10011
Attorney for 1199SEIU United Healthcare Workers

Nicole Oliver, Field Attorney
National Labor Relations Board, Region 2
26 Federal Plaza, Rm 3614
New York, NY 10278

Benjamin W. Green, Administrative Law Judge
National Labor Relations Board - Division of Judges
New York City Office
26 Federal Plaza, 17th Floor
New York, NY 10278

/s/Laura A. Pierson-Scheinberg
Laura Pierson-Scheinberg

Exhibit 3

NOTICE

The Complaint attached hereto alleges that the Respondent has violated certain sections of the National Labor Relations Act and a formal hearing has been scheduled with respect thereto. By this notice I wish to call the attention of all parties to the policy of this Agency favoring a settlement of cases notwithstanding that a Complaint has issued. It is the position of the Agency that an early settlement will be an advantage to all parties because it eliminates, among other things, the time and expense involved in formal litigation of a matter. In furtherance of this policy the Board agent with whom you have dealt or the attorney to whom the matter has been assigned for trial, will contact the representatives of the Respondent and the Charging Party within a matter of days for the purpose of engaging in intensive discussions to determine whether or not a settlement can be achieved. All of the facilities of this office are available to the parties in furthering the achievement of a satisfactory disposition of the matter which will be consistent with the purpose and policies of the National Labor Relations Act.

Karen P. Ferubach

Regional Director
National Labor Relations Board
Region 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

RITE AID CORPORATION, RITE AID OF NEW YORK, INC., RITE AID OF NEW JERSEY, INC., ECKERD CORPORATION, GENOVESE DRUG STORES, INC., AND THRIFT DRUG, INC., A SINGLE EMPLOYER

and

Case 02-CA-182713

Case 02-CA-189661

1199SEIU, UNITED HEALTHCARE WORKERS EAST

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case no. 02-CA-182713 and Case no. 02-CA-189661, which are based on charges filed by 1199SEIU, United Healthcare Workers East (“1199” or “Charging Party”), against Rite Aid Corporation, Rite Aid of New York, Inc., Rite Aid of New Jersey, Inc., Eckerd Corporation, Genovese Drug Stores, Inc., and Thrift Drug, Inc., as a single employer (collectively, “Rite Aid” or “Respondent”) are consolidated.

This Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, that is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the “Act”), 29 U.S.C. § 151 *et seq.* and Section 102.15 of the Board’s Rules and Regulations, and alleges Respondent has violated the Act as described below.

1. (a) The charge in Case no. 02-CA-182713 was filed by the Charging Party on August 23, 2016, and a copy was served on Respondent by U.S. mail on August 24, 2016.

(b) The charge in Case no. 02-CA-189661 was filed by the Charging Party on December 8, 2016, and a copy was served on Respondent by U.S. mail on December 12, 2016.

2. (a) At all material times, Respondent has been a domestic corporation that operates retail drug stores in and around New York State.

(b) Annually, Respondent, in the course and conduct of its operations described above in sub-paragraph 2(a) derives gross revenues in excess of \$500,000.

(c) Annually, Respondent, in the course and conduct of its operations described above in sub-paragraph 2(a) purchases and receives at its New York facilities goods valued in excess of \$5,000 directly from suppliers located outside New York State.

3. (a) At all material times, Rite Aid Corporation, Rite Aid of New York, Inc., Rite Aid of New Jersey, Inc., Eckerd Corporation, Genovese Drug Stores, Inc., and Thrift Drug, Inc. have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have interchanged personnel with each other; and have held themselves out to the public as a single-integrated business enterprise.

(b) Based on the operations described above in paragraph 3(a), Rite Aid Corporation, Rite Aid of New York, Inc., Rite Aid of New Jersey, Inc., Eckerd Corporation, Genovese Drug Stores, Inc., and Thrift Drug, Inc. constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. At all material times, the following individuals held the positions set forth opposite their names and have been agents of Respondent within the meaning of Section 2(13) of the Act:

Traci Burch Vice President, Labor Relations and Employment Counsel

Gordon Hinkle Senior Manager, Labor Relations

David Gonzalez Manager, Labor Relations

7. (a) The following employees of Respondent (the "Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All of the professional and nonprofessional employees of the Employer in the drug stores in the City of New York, the New York Counties of Nassau, Suffolk, Westchester, Orange, Putnam, Ulster, Dutchess, Sullivan, and Rockland, the City of Albany, and the New Jersey Counties of Passaic, Bergen, Essex, Hudson, and Union, and the Cities of Edison, Perth Amboy, Carteret and Woodbridge in Middlesex County, New Jersey.

Excluded: Guards, store managers, pharmacy managers, supervising pharmacists, pharmacists-in-charge, New Jersey staff pharmacists and New Jersey pharmacy interns.

(b) Since in or around the 1960's and at all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit and since then, Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, including the agreement effective October 11, 1998, through October 10, 2002, as amended by subsequent memoranda of agreement, the most recent of which was effective from October 30, 2009, to April 18, 2015 (2009 Agreement).

(c) The 2009 Agreement was extended on May 5, 2015 ("Extension Agreement"), until either party provided ten days written notice to terminate the Extension Agreement or until a new collective-bargaining agreement was reached and ratified.

(d) On or about July 27, 2016, Respondent provided written notice of its intent to terminate the Extension Agreement to the Union. The Extension Agreement terminated on or about August 6, 2016.

(e) At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

8. (a) At various times between the months of March and December 2015, Respondent and the Union met for the purposes of negotiating a successor collective-bargaining agreement, and those negotiations were the subject of a prior Complaint in Case 02-CA-160384, which is presently pending before the Board.

(b) At various times between June 2016 and September 2016, Respondent and the Union met for the purposes of negotiating a successor collective-bargaining agreement to the 2009 Agreement described above in paragraph 7(b) and (c).

9. (a) Since about June 2016, and continuing thereafter, Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to remove newly hired pharmacists working in its stores in New York State from the bargaining unit.

(b) Since about March 2015, until on or about August 30, 2016, Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to remove pharmacy interns working in its stores in New York State from the bargaining unit.

(c) The conditions described above in subparagraphs (a) and (b) are not mandatory subjects for the purposes of collective bargaining.

(d) By the conduct described above in subparagraphs (a) and (b), Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

10. (a) Since on or about March 6, 2016, and continuing each month thereafter during the term of the 2009 Agreement and Extension Agreement, Respondent failed to make health insurance contributions to the 1199SEIU National Benefit Fund for Healthcare Employees (the "NBF") at the rate required by the parties' collective-bargaining agreement, as ordered by a March 6, 2016, Arbitrator's Award and enforced and confirmed by a September 1, 2016, decision of the United States District Court for the Southern District of New York.

(b) Since the expiration of the Extension Agreement on or about August 6, 2016, and continuing each month thereafter, Respondent failed to make health insurance contributions to the NBF at the rate required by the parties' collective-bargaining agreement, as ordered by a March 6, 2016, Arbitrator's Award and enforced and confirmed by a September 1, 2016, decision of the United States District Court for the Southern District of New York.

(c) The subject set forth above in subparagraphs (a) and (b) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purposes of collective bargaining.

(d) Respondent engaged in the conduct described above in subparagraph (a) without the Union's consent.

(e) Respondent engaged in the conduct described above in subparagraph (b) without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

11. (a) In or around July 2016, and on various dates thereafter, the Respondent enrolled Unit employees in a new healthcare plan.

(b) The subject set forth above in subparagraph (a) relates to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(c) Respondent engaged in the conduct described above in paragraph (a) without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

12. (a) On or about August 17, 2016, Respondent provided the Union with a set of proposals purporting to be its last, best and final offer.

(b) On or about August 30, 2016, Respondent provided the Union with a modified last, best and final offer.

(c) On or about September 6, 2016, Respondent orally informed the Union that it was making further modifications to its last, best and final offer.

(d) On or about September 7, 2016, Respondent prematurely declared impasse and announced its intention to implement its last, best, and final offer described above in subparagraph (c).

(e) On or about September 10, 2016, and on various dates thereafter, Respondent unilaterally implemented its last, best and final offer, making unilateral changes to terms and conditions of employment, including but not limited to ending healthcare and pension contributions to the NBF, enrolling Unit employees in a new healthcare plan, and changing the unit scope.

(f) Respondent engaged in the conduct described above in sub-paragraphs (a) through (d) without first bargaining to a good-faith impasse, and at a time when there were serious, unremedied unfair labor practices that affected negotiations.

13. By the conduct described above in paragraph 10 (a), (c) and (d), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

14. By the conduct described above in paragraphs 9, 10 (b), (c) and (e), 11, and 12, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

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

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before June 14, 2017, or postmarked on or before June 13, 2017.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon

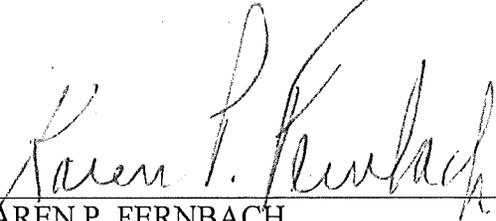
(Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **July 10, 2017, at 9:30 a.m.** , at the **Mary Walker Hearing Room at 26 Federal Plaza, Room 3614** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668.

The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: May 31, 2017



KAREN P. FERNBACH
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 02
26 Federal Plz Ste 3614
New York, NY 10278-3699

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 02-CA-182713

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in **detail**;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Traci L. Burch, Esq., VP,
Labor Relations and Employment Counsel
RITE-AID
30 Hunter Lane
Camp Hill, PA 17011-2400

Laura A. Pierson-Scheinberg, Esq.
Jackson Lewis, P.C.
2800 Quarry Lake Drive, Suite 200
Baltimore, MD 21209

Andrew Baskin
Jackson Lewis, P.C.
2800 Quarry Lake Drive, Suite 200
Baltimore, MD 21209

Susan J. Cameron, Esq.
80 Eighth Avenue, 8th Floor
New York, NY 10011

1199 SEIU United Healthcare Workers East
310 West 43rd Street
New York, NY 10036

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

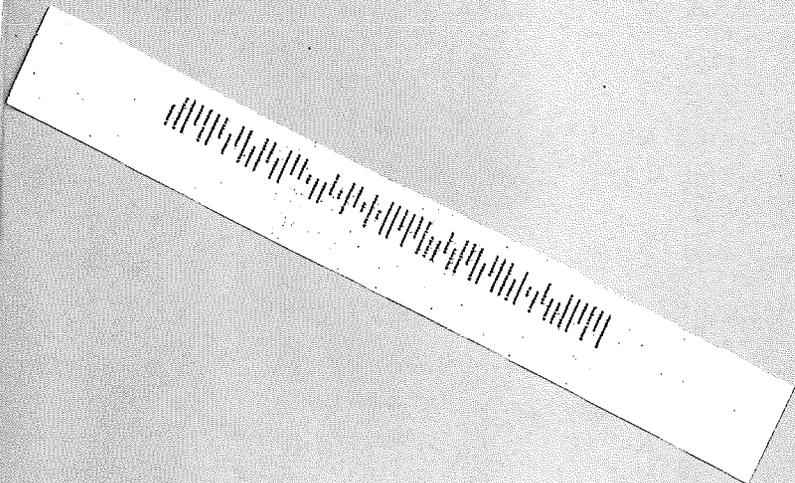
- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 2
26 FEDERAL PLAZA - SUITE 3614
NEW YORK, NY 10278-0104
An Equal Opportunity Employer
OFFICIAL BUSINESS



1199 SEIU United Healthcare Workers East
310 West 43rd Street
New York, NY 10036

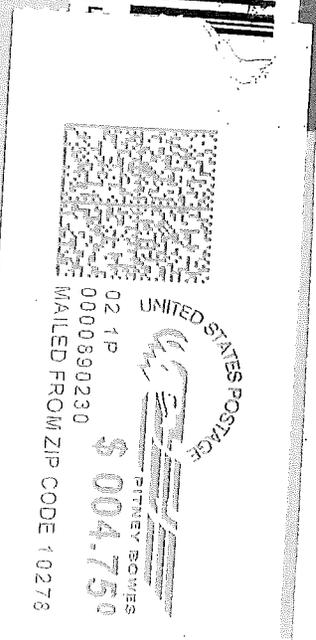


Exhibit 4



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

January 20, 2015

STEPHEN M. SILVESTRI, ESQ.
JACKSON LEWIS, P.C.
2800 QUARRY LAKE DR STE 200
BALTIMORE, MD 21209-3763

Re: 1199 SEIU Healthcare Workers East and
1199 SEIU Benefit and Pension Funds
(Rite Aid of New York, Inc.)
Case 02-CB-122230

Dear Mr. Silvestri:

This office has carefully considered the appeal from the Regional Director's refusal to issue complaint. We agree with the Regional Director's decision and deny the appeal substantially for the reasons in the Regional Director's letter of June 18, 2014.

Insufficient evidence was presented to establish that the Union has possession of the remaining information. Rather, we could not overcome evidence that the information is within the exclusive possession of the Funds. Further, insufficient evidence was presented to establish that the Union has de facto control over the Funds. The evidence established that the Union and the Funds are independent entities and maintain an arms' length relationship. In contrast, see *Teamsters Local 122 (August A. Busch)*, 334 NLRB 1190, 1228 (2001). In addition, because the Union does not have de facto control of the Funds, it does not have an affirmative obligation to seek the remaining requested information. See *Plasterers Local 346 (Browner Plastering)*, 273 NLRB 1143, 1144 (1984).

The probative evidence failed to establish that the Union prevented Rite Aid from obtaining this information. Also, the evidence indicated that Rite Aid has been in communication with the Funds' administrators and Rite Aid has access to the information through its trustee. Thus, Rite Aid has not been foreclosed from obtaining this information.

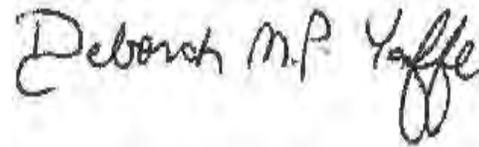
Also, insufficient evidence was presented to establish that the Funds acted as the agent of the Union or had a statutory obligation to provide the requested information. Therefore, assuming, without deciding, that the remaining requested information is relevant, the evidence failed to establish that the Union or the Funds violated Section 8(b)(3) of the Act.

Finally, we concluded that oral argument would not materially advance the resolution of the issues in this case. Accordingly, further proceedings are unwarranted.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

By:



Deborah M.P. Yaffe, Director
Office of Appeals

cc: KAREN P. FERNBACH
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS
BOARD
26 FEDERAL PLZ STE 3614
NEW YORK, NY 10278-3699

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LEVY RATNER PC
NEW YORK, NY 10011-7175

RITE AID OF NEW YORK, INC.
30 HUNTER LN
CAMP HILL, PA 17011-2400

JUDITH A. SCOTT
GENERAL COUNSEL
SERVICE EMPLOYEES
INTERNATIONAL UNION.
1800 MASSACHUSETTS AVE NW FL 6
WASHINGTON, DC 20036-1806

1199 SEIU BENEFIT AND PENSION FUNDS
330 W 42ND ST 24TH FL
NEW YORK, NY 10036-6902

1199 SEIU UNITED HEALTHCARE
WORKERS EAST
330 W 42ND ST
NEW YORK NY 10036

Exhibit 5



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 02
26 Federal Plaza, Room 3614
New York, NY 10278-3699

Agency Website:
www.nlr.gov
Telephone: (212)264-0300
Fax: (212)264-2450

February 13, 2015

Stephen Silvestri, Esq.
Jackson Lewis P.C.
2800 Quarry Lake Drive
Suite 200
Baltimore, Maryland 21209

Re: 1199 SEIU, United Healthcare Workers East
(Rite Aid of New York, Inc.)
Case No. 02-CB-136699

Dear Mr. Silvestri:

We have carefully investigated and considered the charge you filed on behalf of Rite Aid of New York, Inc. (the Employer) against 1199 SEIU, United Healthcare Workers East (the Union), alleging that the Union violated Section 8(b)(3) of the National Labor Relations Act (the Act) by refusing to provide the Employer information that is relevant and necessary to its duty to bargain collectively with the Union.

Decision to Partially Dismiss: Based on that investigation, I have decided to partially dismiss your charge. With respect to the remainder of your charge regarding the relevant information, I have decided to conditionally dismiss.

With regard to the Employer's request for copies of mass communications that the Union sent employees of other employers concerning the benefits available to them through the collectively-bargained Child Care Fund (CCF) and Training and Upgrading Fund (TUF), such communications are not presumptively relevant because the request does not seek information about the bargaining unit. The Employer has failed to demonstrate relevance. Accordingly, I am dismissing this allegation.

The Employer also requested copies of the same mass communications that the 1199 SEIU Funds (the Funds) sent to unit and non-unit employees. The Union is not in possession of this information. The investigation disclosed that the Union and the Funds are separate and distinct entities. Absent evidence the Union is in *de facto* control of the Funds, the Union is not obligated to obtain, or attempt to obtain, such information. Accordingly, I am dismissing this allegation.

Finally, the Employer requested data showing the prescription utilization of all participants in the 1199 SEIU National Benefit Fund (NBF). Again, the Union does not possess this information, and for the reasons stated above, the Union is under no obligation to provide or attempt to obtain such data. Further, utilization data is unrelated to the terms and conditions of employment of bargaining unit employees and is therefore, irrelevant. Accordingly, I am dismissing this allegation.

Because the evidence fails to support the allegation that the Union has refused to provide the Employer information relevant and necessary to its obligation to bargain collectively, or has violated the Act in any other manner encompassed by the charge, I am dismissing these portions of the charge.

Conditional Decision to Dismiss: I have concluded that the portion of the charge regarding the Employer's request for copies of all mass communications that the Union sent to bargaining unit members, since January 1, 2011, concerning their status as participants in the collectively-bargained Child Care Fund and Training and Upgrading Fund, is relevant information that the Union has a duty to provide. I have further concluded that, after the filing of the charge, the Union has provided this information to the Employer. Accordingly, this portion of the charge is being held in abeyance because, while merit has been found to the allegation, it would not effectuate the purposes of the Act to proceed on the case at this time. Please note that if, within a 6-month period, a new meritorious charge is filed against the Union, I will reconsider whether further proceedings on this charge are warranted.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlr.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on **E-File Documents**, enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **February 27, 2015**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than **February 26, 2015**. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the

appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before February 27, 2015**. The request may be filed electronically through the *E-File Documents* link on our website www.nlr.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after **February 27, 2015, even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

KAREN P. FERNBACH
Regional Director

Enclosure

cc: ALLYSON L. BELOVIN, ESQ.
LEVY RATNER, P.C.
80 EIGHTH AVENUE, 8TH FLOOR
NEW YORK, NY 10011

DANIEL RATNER, ESQ.
1199 SEIU HEALTHCARE WORKERS EAST
80 EIGHTH AVENUE
8TH FLOOR
NEW YORK, NY 10011

RITE AID OF NEW YORK INC
ATTN: STEPHEN SILVESTRI
30 HUNTER LANE
CAMP HILL, PA 17011-2400

JUDITH A. SCOTT, GENERAL COUNSEL
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 MASSACHUSETTS AVE NW
FL 6
WASHINGTON, DC 20036-1806

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 - 14th Street, N.W.
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Case Name(s).

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

(Signature)

Exhibit 6

OFFICE OF THE IMPARTIAL ARBITRATOR

Case Number V-16-09046

-----X
In the Matter of the arbitration

- between -

1199 SEIU, United Healthcare Workers East

- and -

Rite Aid of New York, Inc
-----X

Before: Alan R. Viani, Arbitrator

**OPINION
AND
AWARD**

Appearances:

For the Union

Levy Ratner, P.C.,
by Allyson Belovin, Esq.

For the Company

Littler Mendelson, P.C.,
by Jedd Mendelson, Esq.

For the National Benefit Fund

Levy Ratner, P.C.,
by Suzanne Hepner, Esq.

For the League of Voluntary Hospitals and Homes of New York

Putney, Twombly, Hall & Hirson, L.L.P.,
by Daniel F. Murphy, Jr. Esq.

The undersigned, pursuant to parties' collective bargaining agreement (Joint Exhibit) was duly designated to hear and decide the issues in dispute between the parties as described herein. The primary parties to this matter are Rite Aid of New York, Inc., referred to herein as the "Company" and the 1199 SEIU, United Healthcare Workers East, referred to herein as the "Union." A transcribed hearing in this matter was held at the offices of the National Benefit Fund, New York, NY on October 28, 2016 and November 2, 2016 at which time the parties were afforded the opportunity to submit documentary evidence, to examine and cross examine witnesses and make argument in support of their respective positions.

The parties should be aware that all matters of record, while not necessarily cited herein have been considered in the formulation of this opinion and award.

THE ISSUES

The parties disagree as to the issues to be decided here:

The Union poses the issue as: (Tr p 55, 56)

Did Rite Aid violate the collective bargaining agreement by failing and refusing to pay contributions [to the National Benefit Fund] due from October 2015 through August 2016? And, if so, what shall be the remedy?

The Company poses the issues as: (Tr. 56, 57)

When did the Fund first report internally and externally that the contribution increase in issue was applicable to the Employer?

Did the company violate the collective bargaining agreement by failing to pay increased contributions about which the Union gave notice in its November 5, 2014 letter?

Does the Arbitrator have the power to impose a contribution rate that is not a uniform required rate ("URR")? ¹

If arguendo the arbitrator decides the contribution increase is applicable to the employer, must he nonetheless refrain from issuing an award because the award would violate federal labor law?

Should the arbitrator refrain from issuing his award pending the Second Circuit decision?

If the arbitrator issues an award for the Fund, what should be the remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE XXV ²

Enforcement of Articles IXA, XXII, XXIII, XXIV, XXXVII and XLII (the Funds)

1. The Employer shall remit the contributions required under Articles IXA, XXII, XXIII, XXIV, XXXVII and XLII to the Funds on a monthly basis, based upon the previous month's payroll. Payments shall be due no later than thirty (30) days following the payroll month on which they are based. By way of example, an August contribution shall be based on the payroll for the month of July and shall be made no later than the 30th day of August. The

¹ By letter of clarification from the Company dated November 26, 2016.

² Article XXV, Sections 1, 3 and 5 cited above are contained in the collective bargaining agreement between the League of Voluntary Hospitals and Homes of New York and 1199 SEIU United Health Care Workers East for the period June 1, 2009 through April 30, 2015 (Union Exhibit 2).

Employer shall submit regular monthly reports with its contributions in such form as may be necessary for the sound and efficient administration of the Funds and/or to enable the Funds to comply with the requirements of Federal and applicable State law and for the collection of payments due pursuant to Articles IXA, XXII, XXIII, XXIV, XXXVII, and XLII of this Agreement.

* * *

5. Alan R. Viani is hereby designated as the Impartial Arbitrator to hear and determine any disputes which may arise between the parties with regard to payment of contributions and/or interest under Articles IXA, XXII, XXIII, XXIV, XXXVII and/or XLII and the enforcement thereof under Article XXV. Such arbitration shall be heard no later than ten (10) days after written request for arbitration is submitted to the Arbitrator. The Award of the Arbitrator shall be issued within five (5) days thereafter. In the event of a vacancy in this position for whatever cause, the parties shall expedite the selection of an arbitrator to fill the vacancy. If the parties are unable to agree, such disputes shall be handled in accordance with Article XXXII until such time as the parties do agree on a replacement.

ARTICLE 28³
ENFORCEMENT

* * *

C. In the event that an Employer fails to make payment of contributions as required by Articles 26 and 27, there shall be prompt arbitration thereof before the Impartial Arbitrator designated under this Article. The Arbitrator is hereby empowered to:

- (1) direct the remedying of such violations up to the date of hearing that have not been cured;
- (2) direct that there be no further violations of such provision(s) of these Articles;
- (3) direct that the following amounts, being the reasonable costs and expenses in connection with each Fund arbitration proceeding, be paid to the Fund(s) by the Employer:
 - (a) for an uncontested proceeding, the lesser of ten percent (10%) of the amount found due to each Fund or five hundred dollars (\$500) to each Fund involved.
 - (b) for a contested proceeding, the lesser of twenty percent (20%) of the amount found due to each Fund or one thousand dollars (\$1,000) to each Fund involved.

³ Article 28, Sections C and D cited herein are contained in the Collective Bargaining Agreement between the Rite Aid Corporation and the Union for the period October 11, 1998 through October 10, 2002 (Joint Exhibit 2C).

- (4) In the event that an Employer fails to make payment of contributions as required by Articles 26 and 27, the Arbitrator shall also have the power to require the properly authorized agent of the Employer to sign a Confession of Judgment in the amount of the Award including interest, costs and expenses as herein above provide within (10) days from the issuance of the Award.

Memorandum Of Agreement

* * *

V. Article 28 – Enforcement ⁴

Modify this Article to adopt League enforcement language.

1199SEIU UNITED HEALTHCARE WORKERS EAST (Joint Exhibit 2N) ⁵
RITE AID OF NEW YORK, INC.

* * *

Extension Agreement

WHEREAS, 1199 and the Employer are parties to a collective bargaining agreement which expired on April 18, 2015 ("09-15 Agreement"); and, the parties are in the process of negotiating for a successor agreement; and,

WHEREAS, the parties wish to maintain an orderly continuation of all terms and conditions affecting workers during the period of negotiations for a successor agreement;

NOW THEREFORE, the parties agree as follows:

1. Extension of Terms: The Employer and 1199 hereby agree to extend all terms and conditions of the 09-15 Agreement until either party gives ten (10) days written notice to terminate the 09-15 Agreement, or until a new Agreement is reached and ratified. The parties further agree that no further written notice, pursuant to § 8(d) of the National Labor Relations Act or under any other state or federal statute, is required to terminate the 09-15 Agreement.

⁴ This language is included in a memorandum of agreement between the parties extending and modifying the terms of the parties' collective bargaining agreement through April 18, 2015 (Joint Exhibit 2C).

⁵ This agreement was executed May 5, 2015.

2. Resolution of Extension Agreement Disputes: If there is any dispute concerning the implementation or application of this Extension Agreement, such dispute shall be resolved pursuant to the grievance and arbitration procedure set forth in Article 31 of the collective bargaining agreement between 1199 and the Employer, as modified by the 09/15 Agreement.

BACKGROUND

The instant dispute concerns, as a primary matter, whether the Company's is obligated to contribute to the National Benefit Fund (hereinafter "Fund") for the period October 2015 through August 2016. This matter follows a previous Union claim for contributions to the Fund for the period January 2015 through September 2015, and which was decided by the undersigned on March 6, 2016. The previous dispute had its genesis in a change in the Company's contribution rates to the Fund, which were established by the Fund's trustees on or about October 27, 2014.⁶

The March 6, 2016 award sustained the Union's grievance as follows:

The Employer, Rite Aid, violated the Collective Bargaining Agreement by failing and refusing to pay the National Benefit Fund the rate required by the Trustees for the period January of 2015 through September of 2015.

The question of the amounts owed the National Benefit Fund is referred to the parties for resolution. I will retain jurisdiction over this question in the event the parties are unable to agree on the amount due and payable by virtue of this award.

Shortly thereafter, on March 10, 2016, the Company moved in United States District Court (Southern District of New York), to vacate the the March 6, 2016 award (Employer Exhibit 5). However, on September 1, 2016, the Court issued an Opinion and Order denying the Company's motion for summary judgment and granting the Union's cross motion to deny the Company's request to vacate the award and to confirm the award (Union Exhibit 3).

On September 21, 2016 the Company filed an appeal of the District Court's Opinion and Order to the United States Court of Appeals for the Second Circuit (Joint Exhibit 2KK). That appeal is currently pending.

⁶ See the body of the March 6, 2016 decision for the basis of my award.

On October 27, 2016, the parties agreed on the amount owed the Fund for the period January 1, 2015 through September 2015. Therefore, on November 1, 2016, by award, I denied the Company's request that payments to the Fund should be delayed pending completion of judicial review of my March 6, 2016 decision and I directed that the Company remit to the Fund the sums of \$2,911,141.58 in principal and \$938,249.65 in interest. At that time I opined that in light of the District Court's confirmation of my award, "An open ended delay of these payments possesses the potential to inflict financial harm to the Fund and jeopardize benefits to covered employees."

Testifying for the Company concerning the instant dispute, David Gonzalez, Manager of Labor Relations, described the nature and tenor of the Company's negotiations with the Union for a successor collective bargaining agreement to its prior agreement which expired on April 11, 2015.

According to Gonzalez, the Company received a "delinquency report" at the end of March 2015 from the Fund for various employers in which it claimed it was owed contributions for the period January 15, 2015 to March 15, 2015 (Company Exhibit 1). He testified that after he received and reviewed the report he noted that Rite Aid was not listed in it as being delinquent in its contributions to the fund.

Gonzalez said negotiations began at the end of March 2015 and continued until September 2015 when bargaining "became less productive and more stagnant." Around that same time the Union began demonstrations in front of the Company's regional office and it also began distributing leaflets to its members and customers at more than one location on Long Island.

Gonzalez testified that the Union filed unfair labor practices charges against the Company with the National Labor Relations Board in August and September 2015 (Company Exhibit 2).⁷ Gonzalez said that in early October 2015 the Union also distributed a leaflet that was "much more detailed and thorough on the

⁷ This exhibit consists of three alleged unfair labor practices charges ("ULPs"). The first ULP appears to be time stamped twice by the Company on 9/18/15 and 9/21/15. However, I note it is unsigned by any Union representative or counsel albeit it contains the date of 9/17/15. The second ULP is signed by Union counsel and is dated 8/4/16. The third ULP is signed by Union counsel and is dated 8/23/16.

issues in bargaining...” (Employer Exhibit 4) He said that from October until late November 2015 there were few bargaining sessions but negotiations resumed with more frequency after the Company “introduced a totally new economic proposal to try to get things moving.” Also, according to Gonzalez, a Federal mediator entered the talks in the middle of December 2015 but by the end of December 2015 the mediator expressed doubt concerning the parties’ ability to reach an agreement.

Gonzalez stated that the Company initiated three ULPs against the Union during the course of negotiations (Company Exhibit 3).⁸ On cross examination he acknowledged that its first ULP charge was dismissed by the NLRB. As to its third ULP charge, Gonzalez agreed that this charge is essentially an amendment to the Company’ second ULP which, in part, alleges that the Fund, acting as agent of the Union, violated the act by threatening and coercing Rite Aide’s bargaining unit associates in the exercise of their Section 7 rights. He also conceded that the Company’s amended charge was not initiated until October 21, 2016, some six days prior to the first scheduled hearing in this matter.

POSITION OF THE PARTIES⁹

The Union¹⁰

This case involves the Union's claim against Rite Aid. Corporation-NY (“the Employer” or “Rite Aid”) for delinquent contributions to the 1199 SLIT.; National Benefit Fund for Health and Human Services employees (“NBF”) due for the period October 2015 through August 2016. For the reasons set forth below we believe a hearing on the merits of this matter is unnecessary.

⁸ These charges were filed on 5/23/16, 9/15/16 and 10/21/16.

⁹ Derived from the transcript of this proceeding as well as communications received from the parties, and which were edited for brevity, continuity and attribution.

¹⁰ Most judicial and arbitral citations have been omitted here for purposes of brevity.

The Union points out that the parties were previously before the undersigned to argue the precise issue that would be heard on September 30, 2016, *i.e.*, whether Paragraph E of the 2009-2015 Memorandum of Agreement ("2009-2015 MOA and, together with the predecessor agreements and extensions thereof, the "Collective Bargaining Agreement" or "CBA") obligates Rite Aid to adopt the Trustees' determination of contribution rates and methodology (Case No. V-15-10057). On March 6, 2016, after examining the relevant contract language and considering both parties' interpretations of the language, you issued an award finding Rite Aid is bound by the Trustees' decision, and that Rite Aid's failure to contribute to the NBF at the Trustees' determined contribution rate for the period January 2015 to September 2015 violates the CBA.

Based on the prior decision and the fact that Rite Aid can advance no new facts or arguments, we respectfully request that you apply the principles of *res judicata* to the instant case and issue a decision finding that Rite Aid's failure to contribute to the NBF at the Trustees' determined contribution rate for the immediately subsequent period of October 2015 through August 2016 also violates the collective bargaining agreement.

The Union argues that the doctrine of *res judicata*, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from re litigating issues that were or could have been raised in that action. Generally, a valid and final arbitration award has the same effect under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of the court.

To prove a claim is precluded under this doctrine, the Second Circuit's established standard requires the asserting party show that (1) the previous action involved adjudication on the merits; (2) by a court of competent jurisdiction; (3) in a case involving the same parties or their privies; and (4) involving the same cause of action. The doctrine has been similarly applied in the arbitral context to give a prior award preclusive effect, "if the dispute in question is between the same parties raises the same factual situation,

pertains to the same contractual provision, is supported by the same evidence and concerns an interpretation of the same collective bargaining agreement.

Applying the above stated standards established by both the Second Circuit and through arbitral, jurisprudence, the doctrine of *res judicata* should apply to the September 30, 2016 arbitration, such that you need not, and should not, hold a hearing on the merits, as it would be merely re litigation of the precise question decided in your Award. The issue being heard is identical to the issue previously presented, argued, and decided: whether Rite Aid was required under Paragraph of the 2009-2015 MOA to adopt the Trustees' determined contribution rates and methodology. The Union submits that the arbitrator has already examined the relevant contract language, considered both parties' interpretations of the language and interpreted the contract to obligate Rite Aid to abide by the "Trustees' contribution rates and methodology. There is no new evidence that can be presented, as there are no additional facts even potentially material to the issue before you. The parties are identical and the present action arises from the exact cause of action as that previously decided.

The only difference between the two cases is the time period. The Award addressed the period January 2015 to September 2015, while the September 30, 2016 arbitration addresses the immediately subsequent period, October 2015 to August 2016. This variance, however is immaterial, As Arbitrator Celetano noted, "an arbitration award is not conclusive only with respect to the outcome of a particular grievance. Rather, it is also dispositive of the underlying issue presented by the grievance. The consequence is that a decision of the validity of a particular interpretation or application of the contract has continuing effect."

As to the Company's assertion that the Benefit Fund acted as an agent of the Union during collective bargaining, the Union maintains that the Company is going far afield as to whether in fact this case is any different from the first case. The Union argues that the arbitrator's imperative here in determining

disputes which may arise between the parties with regard to payment of contributions and/or interest under Articles 26 and 27 and the enforcement thereof, and it specifically lists the powers of the arbitrator, which are "to direct the remedying of such violations up to the date of hearing that have not been cured, direct that there be no further violations of such provisions of these articles, and direct that specific costs be paid to the Fund, and finally, require the employer to sign a Confession of Judgment within ten days of the issuance of the award."

The Union maintains that these are the powers that the collective bargaining agreement endows the arbitrator with. The arbitrator may only hear and determine any disputes regarding delinquent contributions. Notwithstanding the attempt of Rite Aid to say that they found out something afterwards about the Union's motivation that they didn't know by November 30th that somehow that lifts today's argument -- enables them to make a different argument today because they didn't have availability of those facts.

Partly just to disabuse the Company of his kind of apparently central theory, the Union could just avail the parties of the central fact about why the arbitration was brought. The reason that the arbitration was brought in October is exactly the following, which is that Tracy Birch, in-house counsel of Rite Aid, said to Allyson Belovin (Fund Counsel), across the table, that her estimation of Rite Aid's underpayments of the rate for that period were about \$4½ million and she laid it out in an e-mail to Allyson (Joint Exhibit 14).

With respect to Gonzalez's testimony that in March 2015 the Fund did not identify Rite Aid as being delinquent in its contributions to the Fund, the union points out that notwithstanding his testimony the delinquency report he reviewed actually did indicate a contributory delinquency for pharmacists. According to the Union there are various tabs on the report and a mistake was made and Rite Aid's delinquency was on the pharmacy tab but not on the main active employer tab. After confirming the contributory delinquency with the Fund, the Union received a schedule of the underpayment and sent its notice of intention to arbitrate.

According to the Union, conspiracy theories aside, there was a mistake and that's the whole nugget. It has nothing to do with anything going on with bargaining. However, all of that said, the Union believes that the Company has not presented anything that counters the clear fact that this arbitration is exactly the same as the first case and only the months at issue are different.

Accordingly, the Union respectfully submits that the doctrine of *res judicata* requires the arbitrator to issue a decision without a hearing (on the merits), apply the arbitrator's prior award to the instant case, and finding that Rite Aid violated the collective bargaining agreement by failing and refusing to make contributions to the National Benefit Fund at the rates required by the Trustees for the period October 2015 through August 2016.

The Company¹¹

It is the Company's position that the doctrine of *res judicata* should not apply when any of the following circumstances exist: First, that the prior decision was issued without the benefit or consideration of certain important facts or circumstances, second and relatedly, that there are new conditions or circumstances that bear on the applicability of the previous decision and third, stated respectfully, that the prior judgment is deficient and warrants reexamination.

Dealing with the third factor first. It's always difficult to ask any trier of fact, a judge, an arbitrator, in a different setting to reconsider their decision, because judges have been heard to say, "Well, you're asking me on motion to reconsider. How would I reconsider my decision? I know what I decided, I believe I'm correct." The Company notes that there is pending a Second Circuit appeal, and based on that, there are

¹¹ In conjunction with its argument that the Fund acted as an agent of the Union by issuing its delinquency claims, the Company has issued subpoenas seeking data and information from officers and officials of the Benefit Fund, The League of Voluntary Hospitals and Homes and the Union (Company Exhibits 8 through 13). Counsel for each individual and entity has asked that that these subpoenas be "quashed." The question concerning the motions to quash these subpoenas will be addressed later in this decision.

circumstances that warrant reconsideration. At the time of the November 2015 hearing in the prior case it was not apparent to the company, as it became after that, that the Union's frustration with collective bargaining had reached a point that it did, such that the company now believes that the Union prompted the Fund in October of 2015 to bring this case, and that is what we intend to show, or at least attempt to establish, is that the Fund, did not genuinely believe that the change in methodology was applicable to Rite Aid.

Rite Aid's position that under the collective bargaining agreement the parties were required to bargain over the contribution methodology as opposed to having imposed upon it. Therefore, the company believes that the Fund did not genuinely believe that the company was required to comply with its methodology as evidenced by the failure of the Fund to list the Company on its delinquency report in March 2015 and the Company has reason to believe that the Union prompted the Fund to pursue that avenue and to notice the hearing that took place on November 30, 2015 a delinquency report of the Fund that is dated in March 2015, but covers the period January 2015 to March 2015.

The Fund may have explanations as to why that might be the case but from the Company's standpoint, the emergence of that delinquency report is notable, because if it was delinquent from January to March 2015 we think it would have been recorded on the delinquency report. The absence of the Company from that document is a *res ipsa loquitur*. It speaks for itself.

In sum, it is the Company's position that Union was in negotiation for a new collective bargaining agreement at the time of the November 30, 2015 hearing and as a result of its frustrations in collective bargaining, it improperly pressured the Fund to make a determination that Rite Aid had to comply with a newly established rate of the Fund's trustees, and that the Fund's trustees never really believed that Rite Aid was obligated to pay those new rates until the end of its collective bargaining agreement.

Possibly, the omission of Rite Aid on the report of March 2015 was a mistake or possibly wasn't on the deficiency report in a place where a person reasonably could look at the report and believe that it was so. Or maybe it wasn't a mistake but the Company has to be able to test that. Therefore, according to the Company, the invocation of *res judicata* to foreclose the Company from being able to check the circumstances surrounding the Company's omission from the March 2015 delinquency report would be a mistake, a prejudicial mistake. The Company points out that under the Federal Arbitration Act, a ground for vacation of an award is a failure of an arbitrator to receive evidence.

The Company argues, therefore, that the concept of *res judicata* is trumped by the interest in ascertaining whether the Fund itself, in promulgating its November 2014 memorandum amending the Company's contribution rate truly intended for Rite Aid to be covered. And, indeed, a determination of that question without regard to the intent of the Fund would be a flawed determination.

The company reiterates that wasn't positioned in November of 2015 to make this argument because events have unfolded that led to the examination of this very question. It goes to the question of the motive of the Fund's trustees in promulgating in November of 2014 change of methodology.

There is another branch to the Company's argument. The related argument is that the Company maintains that because the consequence of your decision so great or extreme, the change in methodology has a significant economic impact, that to the extent the Union has prompted the Fund to so proceed it's a unilateral change, essentially, under the federal labor law and while the Fund and/or Union will argue it's an acceptable unilateral change because the contract language or the extension agreement permits it, the Company submits it's such a grave change that it is effectively a unilateral change and that it offends federal labor law.

Finally, the Company contends that the "mixing" of the Union and the Fund in this proceeding, where it is the Union that essentially is prosecuting the claim before you even though you're a fund arbitrator, suggests that the application of *res judicata* is not appropriate.

THE SUBPOENAS¹²

On October 28, 2016, counsel for the Company issued six subpoenas which were directed to the following individuals officers, or institutions; Custodian of Records 1199 SEIU Funds (Employer Exhibit 8), Maria Acosta, Chief Financial Officer, 1199 SEIU Funds (Employer Exhibit 9), Custodian of Records, 1199 SEIU United Healthcare Workers East (Employer Exhibit 10), Laurie Valone, 1199 SEIU United Healthcare Workers East (Employer Exhibit 11), Custodian of Records, League of Voluntary Hospitals (Employer Exhibit 12), and Bruce McIver, [President], League of Voluntary Hospitals. These subpoenas essentially demand the following information those individuals or institutions subpoenaed:

1. Any emails or other documents, whether maintained in hard copy or electronic or digital format, that concern or relate to the change in contribution rate (including the change in methodology for computing contributions) about which the 1199SEIU Funds notified Rite Aid of New York, Inc. in or about November 5, 2014 as well as September 30, 2015 (see appended letters).¹³
2. Any emails or other documents, whether maintained in hard copy or electronic or digital format, that concern or relate to imposition, institution, and/or implementation of the change in contribution rate (including the change in methodology for computing contributions) referenced in no. 1 above by Rite Aid of New York, Inc.
3. Any emails or other documents, whether maintained in hard copy or electronic or digital format, that concern or relate to the 1199SEIU Funds **not** imposing, instituting, and/or implementing the change in contribution rate (including the change in methodology for computing contributions) referenced in no. 1 above by Rite Aid of New York, Inc.
4. Any emails or other documents, whether maintained in hard copy or electronic or digital format, that concern or relate to the 1199SEIUFunds engaging in conduct or refraining from conduct because of the collective bargaining negotiations between 1199 SEIU United Healthcare Workers East and Rite Aid of New York, Inc.
5. Any emails or other documents, whether maintained in hard copy or electronic or digital format, that concern or relate to the 1199SEIUFunds engaging in conduct or

¹² The positions of the parties concerning these subpoenas have only been briefly summarized here but have been carefully reviewed by the undersigned.

¹³ This demand was withdrawn at the instant hearing for the League of Voluntary Hospitals by counsel for the Company.

refraining from conduct because of the labor relations situation between 1199 SEIU United Healthcare Workers East and Rite Aid of New York, Inc.

The Company submits that the subpoenas are directed in part to seek to establish that the Fund's trustees did not believe that it was subject to the change in methodology adopted by the Fund's trustees in 2014. It contends that the Company was not in the position to make this judgment at the time of the November 2015 hearing (in the prior case) but it believes that this point should be pressed. With respect to its belief that the Fund did not genuinely believe that the methodology was applicable to Rite Aid, it maintains that circumstances as they evolved subsequent to the November 30th hearing warrant that the concept of *res judicata* not be applied in this matter and that it be allowed to elicit its evidence in support of its belief that the Union improperly pressured the Fund to make a determination that Rite Aid had to comply with a newly established rate of the Fund's trustees, and that the Fund's trustees never really believed that Rite Aid was obligated to pay those new rates until the end of its collective bargaining agreement.

Responding to the demands for information from the Company, counsels for the League of Voluntary Hospital, the Benefit Fund and the Union ask that the subpoenas be "quashed."

Counsel for the League of Voluntary Hospitals & Homes contends that the LVHH is not a party in the pending proceeding. The *subpoenas* that have been served upon LVHH are not only facially and procedurally defective. They are, more importantly, over broad, burdensome, unreasonable and seek evidence that cannot be relevant to proceeding. Rite Aid has acted in a vexatious manner by serving *subpoenas* that call for voluminous amounts of information without any explanation for its need or purpose as required by statute. Moreover, while the *subpoenas* are invalid for their facial and procedural defects, the LVHH appears in this matter for the limited purpose of seeking a substantive dismissal of the *subpoenas* as being overbroad, burdensome, unreasonable and vexatious and also an instruction by the Arbitrator that Rite Aid may not issue a similar *subpoena* in connection with this matter. LVHH objects to any claim of *in personam* jurisdiction and reserves all rights with respect to all challenges to the *subpoenas*. (From the LVHH Memorandum of Law submitted at the instant hearing).

Counsel for the 1199 SEIU National Benefit Fund ("Fund") and its officer's objects to the *subpoena* served on it via email by Rite Aid of New York, Inc. ("Rite Aid") on October 28, 2016. As outlined herein, the information requested by Rite Aid is wholly unrelated to the issue before the arbitrator, which is Rite Aid's obligation to contribute to the NBF at rates determined by the Fund Trustees, in accordance with the Collective Bargaining Agreement between the parties ("CBA"). The subpoena's wide ranging document production request seeks impermissibly broad and intrusive discovery having no relevance to the proceedings before the Arbitrator and subjects the Fund to the unreasonable burden and expense of producing voluminous records. As such, the Fund respectfully moves that the *Subpoena* be quashed in its entirety, or alternatively, significantly tailored to permit the Fund to comply with the request.

Counsel for 1199 SEIU, United Health Care Workers East and its officer's objects to the subpoena served on it via email by Rite Aid of New York, Inc., ("Rite Aid") on October 28, 2016. As outlined herein, the information requested by Rite Aid is wholly unrelated to the principal matter before the arbitrator -- Rite Aid's contractual obligation to contribute to the National Benefit Fund ("NBF") at rates determined by the NBF Trustees. The Subpoena seeks impermissibly broad and intrusive discovery and requests documents that have no relevance to the proceedings before the Arbitrator. Moreover, the Subpoena subjects the Union to the unreasonable burden and expense of producing voluminous records which are not likely to have any bearing on the issue at hand. As such, the Union respectfully moves that the Subpoena be quashed in its entirety, or alternatively, significantly narrowed to request only such documents that are relevant to this arbitration and would not place an undue burden on the Union to produce.

DISCUSSION

The extent of my authority in this matter is enunciated in Article 28, Sections C and D of the parties' agreement for the period October 11, 1998 through October 10, 2002 (as extended by the parties by agreement on May 5, 2015. See language herein).

This provision states:

C. In the event that an Employer fails to make payment of contributions as required by Articles 26 and 27, there shall be prompt arbitration thereof before the Impartial Arbitrator designated under this Article. The Arbitrator is hereby empowered to:

- (1) direct the remedying of such violations up to the date of hearing that have not been cured;
- (2) direct that there be no further violations of such provision(s) of these Articles;
- (3) direct that the following amounts, being the reasonable costs and expenses in connection with each Fund arbitration proceeding, be paid to the Fund(s) by the Employer:
 - (a) for an uncontested proceeding, the lesser of ten percent (10%) of the amount found due to each Fund or five hundred dollars (\$500) to each Fund involved.
 - (b) for a contested proceeding, the lesser of twenty percent (20%) of the amount found due to each Fund or one thousand dollars (\$1,000) to each Fund involved.
- (4) In the event that an Employer fails to make payment of contributions as required by Articles 26 and 27, the Arbitrator shall also have the power to require the properly authorized agent of the Employer to sign a Confession of Judgment in the amount of the Award including interest, costs and expenses as herein above provide within (10) days from the issuance of the Award.

My understanding of the above provision clearly limits my decision making solely to questions of whether the Company violated the parties' collective bargaining agreement by failing to make required contributions to the Benefit Fund. I do not view my authority as extending to questions of whether the Union improperly pressured the Fund or its Trustees to issue a delinquency report to the Company, or whether the Union acted in a collusive manner with the Fund, or whether the Fund acted as an agent of the Union in pursuing delinquent contributions, or whether the Fund's Trustees truly believed that the Company was not required to remit increased contributions to the Fund until the end of its agreement with the Union.

Two things are certain and uncontested by the Company, the first that on October 27, 2014 the Fund's Trustees adopted a revised and increased contribution rate for the Company (Joint Exhibit 2G) and second,

that an evidentiary hearing was held by the undersigned on November 30, 2015 and award issued on March 6, 2016 which found that the Company was liable for the increased contributions established by the Fund's Trustees (See my award in Case Number V-15-10057).

As to those assertions or questions raised by the Company in the instant matter, I believe I do not possess the authority, nor do I seek the authority, to determine whether the Fund or the Union acted in an improper manner by increasing the Company's contributions to the Benefit Fund or demanding payment of delinquencies based on the new contributions rates. My role here is to interpret and enforce the parties' collective bargaining agreement as written and agreed upon by the parties.

It is apparent to me that the Company has raised its allegations and concerns in the wrong forum. Certainly, if the Company believed that the Union or Fund's Trustees acted improperly, inappropriately or illegally the Company could have at some point sought judicial relief or pursued its allegations with the National Labor Relations Board, but not in this proceeding.

However, even should I have authority to decide the questions raised by the Company, the Company's beliefs and assertions in this matter lack any *prima facie* foundation. Essentially, the Company relies, almost exclusively, on conjecture and surmise in support of its suspicions. The only tangible issue raised by the Company in support of its collusive theory is the fact that a generalized delinquency report issued by the Fund in March 2015 did not list the Company as being delinquent in its contributions to the Fund. From this occurrence the Company appears to have constructed an elaborate theory that has little support in the facts adduced in this hearing.

While the Union conceded it was a mistake to omit the Company from the generalized section of the report, it asserted, without contradiction, that the Company's delinquency was indeed noted under the Pharmacy section of the same report. Moreover, the Union points out that the Company's in-house counsel acknowledged in September 2015 that the Union was seeking payment in excess of four million dollars in

delinquent contributions to the Fund. Therefore, it is clear that the Company was on notice prior to the Union's October 2015 request for arbitration that the Union was seeking payment of alleged delinquent payments to the Fund.

I also take note of the fact that it was only six days before the scheduling of the instant hearing that the Company first raised, in its Unfair Labor Practices charge, its allegation that the Fund was acting as an agent for the Union. Suffice it say that given that an officer of the Company serves as a trustee of the Fund, I would be hard pressed to conclude that had any impropriety been engaged in by the Fund the Company would not have been alerted such impropriety by its own Fund trustee. Moreover, I take note that the Company's trustee was not called to testify in this matter. Had the Union or the Fund engaged in some collusive or improper activity she may have been able shed some light on the Company's assertions.

Nonetheless, I also note that the Company's ULP charge on October 21, 2016 was not raised in temporal proximity to October 2015, when the Company alleged that the Union, out of frustration with progress of the negotiations, prompted the Fund to issue its delinquency report to the Company.

Other than the Company attributing some ominous meaning to the failure of the Fund to list it on its March 2015 delinquency report, there is simply no indication in the record of this matter that the Fund, its trustees, or the Union engaged in any type activity that might be considered inappropriate or improper.

Given the complete absence of *prima facie* evidence of any impropriety on the part of the Fund, its trustees or the Union and given my lack of authority to address questions of motivation on the part of the parties, I view the subpoenas and the information they seek, which were issued by Company, to be irrelevant to a proper disposition of this dispute. I view the issuance of the subpoenas by the Company as dilatory and essentially a fishing expedition to further delay a prompt resolution of this dispute. Accordingly, I will direct that all of the subpoenas issued by the Company need not be complied with by any of the subpoenaed parties.

Turning to the essential question before me, and one that is within scope of my authority, to wit, whether the Company violated the collective bargaining agreement by failing and refusing to pay contributions to the National Benefit Fund due from October 2015 through August 2016, I find that the concept of *res judicata* is fully applicable to the facts and circumstances of this matter. I fully agree with the position of the Union that the doctrine of *res judicata*, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from re litigating issues that were or could have been raised in that prior action. Here the Company failed in its burden to elicit any new facts or circumstances that might warrant a reexamination or a relitigation of the original determination concerning of the meaning of the parties' contractual requirements. In sum, the Company has not presented anything that counters the clear fact that this arbitration is exactly the same as the first case and only the months at issue are different. Accordingly, for all the reasons stated herein, I will sustain the Union's grievance in its totality.

Now, therefore, after carefully considering the testimony and documents in evidence, and considering the parties' arguments in support of their respective positions, I hereby make the following award:

AWARD

The Union's grievance is sustained. Rite Aid of New York violated the collective bargaining agreement by failing and refusing to pay contributions to the National Benefit Fund due from October 2015 through August 2016.

The Company shall immediately remit to the National Benefit Fund the sums of \$6,039,500.57 in Principal and \$737,755.77 in Interest.

The motions by the League of Voluntary Hospitals & Home, the Union and the 1199 National Benefits to dismiss or "quash" the subpoenas issued by the Company to them and their officers are granted. These institutions and their officers need not comply with the demands for information contained in these subpoenas.

Dated: December 22, 2016



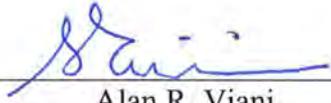
Alan R. Viani, Arbitrator

AFFIRMATION

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss:

The undersigned, under the penalty of perjury, affirms that he is the arbitrator in the within proceeding and signed same in accordance with the arbitration law of the State of New York.

Dated: December 22, 2016



Alan R. Viani