

**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

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

**1199SEIU, UNITED HEALTHCARE
WORKERS EAST.**

**GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S REQUEST FOR A STAY
PURSUANT TO ITS REQUEST FOR SPECIAL PERMISSION TO APPEAL JUDGE
GREEN’S SUPPLEMENTAL ORDER ON PETITIONS TO REVOKE**

Introduction

Pursuant to Section 102.26 of the National Labor Relations Board’s (“Board”) Rules and Regulations (“Rules”), General Counsel for the National Labor Relations Board (“General Counsel”) hereby respectfully submits this Opposition to Respondent’s request for a stay contained in its special permission to appeal Administrative Law Judge Benjamin W. Green’s (“ALJ Green” or “Judge Green”) September 15, 2017 Supplemental Order (“Order”) granting certain petitions to revoke subpoenas.¹ Respondent has not offered any reason it should be granted a stay. Further, in light of (1) the likelihood of continued and additional harm to employee rights and the bargaining process which would be caused by further postponing proceedings in this matter, (2) Respondent’s repeated postponement requests and unavailability thus far, and (3) the weakness of Respondent’s argument for granting its appeal, the equities weigh heavily against allowing Respondent to further delay the General Counsel’s attempt to remedy Respondent’s pervasive and long-running unfair labor practices.

¹ Judge Green’s September 15, 2017 Order is attached as Exhibit 1 to Respondent’s Request for Special Permission to Appeal.

Chronology of Relevant Events

1. Rite Aid filed the initial charge in Case No. 02-CB-122230 with Region 2 of the Board (“Region 2”) on February 10, 2014 and amended it on April 29 the same year. The Regional office dismissed the charge by letter dated June 18, 2014 and the Board’s Office of Appeals affirmed that dismissal on appeal by letter dated January 20, 2015. The charge, amended charge, dismissal letter, and denial of appeal are attached hereto as Exhibits 1(a)–(d) hereto.
2. Rite Aid filed a charge in Case No. 02-CB-136699 on September 12, 2014. The Region 2 office dismissed all aspects of the charge but one by letter dated February 13, 2015 and held the remaining allegation in abeyance for six months, then dismissed that by letter dated August 14, 2015. Respondent appealed the initial dismissal of the charge allegations and the Office of Appeals denied that appeal by letter dated April 23, 2015. The charge and dismissal letters are attached hereto as Exhibits 2(a)–(d).
3. In October 2014, the trustees of the National Benefit Fund (“Fund” or “NBF”), the fund which formerly provided health care benefits to Respondent employees represented by Charging Party 1199SEIU, United Healthcare Workers East (“Union” or “1199”), changed the rate at which Respondent Rite Aid and other employers were required to contribute to the Fund. See March 6, 2016 Viani arbitration award, attached hereto as Exhibit 3, at 3–4.
4. The Union and Respondent began negotiations for a successor collective bargaining agreement in March 2015. *Id.* at 6.
5. On about September 17, 2015, the Union filed a charge, Case No. 02-CA-160384, alleging that Respondent had, *inter alia*, insisted on changing the scope of the bargaining

unit during negotiations for a new contract. The Board's Region 2 office investigated that charge and issued a complaint in the matter on about January 29, 2016. Copies of the charge and complaint are attached hereto as Exhibits 4(a)–(b).

6. On about October 8, 2015, the Union submitted a grievance to arbitration, alleging that Respondent had not contributed to the Fund at the proper rate. See Exhibit 3 at 3.
7. At about the end of 2015, the Union and Respondent ceased bargaining for a new contract.
8. On about March 6, 2016, Arbitrator Viani issued his award regarding the rate at which Respondent was required to contribute to the NBF, rejecting Respondent's position. Exhibit 3. Respondent filed an action seeking to vacate that award in the United States District Court for the Southern District of New York ("the District Court") a few days later.
9. In June 2016, the Union and Respondent resumed negotiations for a successor collective bargaining agreement.
10. The Union filed its initial charge in this matter, Case No. 02-CA-182713, on August 23, 2016, with Region 2. See Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, attached hereto as Exhibit 5, at ¶ 1(a).
11. The District Court denied Respondent's motion to vacate the March 6, 2016 arbitration award. See November 1, 2016 award from Arbitrator Viani, attached hereto as Exhibit 6, at 2.
12. Respondent filed a charge against the Union with Region 2, Case No. 02-CB-184444, on September 16, 2016, alleging that the Union had engaged in bad-faith bargaining. A

copy of that charge is attached to Respondent's Request for Special Permission to Appeal as Exhibit 4.

13. The Union and Respondent appeared before Arbitrator Viani October 28 and November 2, 2016 to address Respondent's alleged failure to make Fund contributions at the rate declared correct by the March 6, 2016 award for months not covered by that award and Respondent's claims that the Fund and Union had colluded or otherwise impermissibly acted to pressure Respondent. See December 22, 2016 award by Arbitrator Viani, attached hereto as Exhibit 7. Despite having a company officer as a Fund Trustee—who was not called as a witness at the arbitration—Respondent presented no evidence to support its allegations of collusion or improper pressure. Exhibit 7 at 18–19.
14. The Administrative Law Judge assigned to hear Case No. 02-CA-160384 issued a decision on about November 30, 2016 concluding that Respondent had unlawfully insisted on changing the scope of the bargaining unit, a copy of which is attached hereto as Exhibit 8.
15. On May 30, 2017, the Region dismissed Respondent's charge against the Union. A copy of the dismissal letter is attached hereto as Exhibit 9.
16. The following day, the Region issued the Complaint in this matter, a copy of which is attached hereto as Exhibit 10. The Complaint set trial for July 10, 2017.
17. Respondent asked for an extension of time to July 7, 2017 to file an appeal of the Region's dismissal of the charge in Case No, 02-CB-184444. See June 5, 2017 letter from the Office of Appeals, attached hereto as Exhibit 11, granting that request.

18. On June 26, 2017, Respondent submitted a request to postpone the trial for roughly three months, to October 2, 2017. See Order of Associate Chief Administrative Law Judge Mindy Landow, dated June 28, 2017, attached hereto as Exhibit 12.
19. Respondent filed its appeal of the Region 2 dismissal of its charge against the Union on July 7, 2017.
20. Respondent repeated its request to postpone the trial by motion dated July 12, 2017. That motion and the General Counsel's opposition thereto are attached as Exhibits 13 and 14.
21. The Office of Appeals denied Respondent's appeal of the dismissal of Case No. 02-CB-184444 by letter dated August 21, 2017, a copy of which is attached as Exhibit 15.
22. The Second Circuit denied Respondent's appeal of the District Court decision on August 22, 2017. A copy of that order is attached hereto as Exhibit 16.
23. The Acting Regional Director for Region 2 filed a petition for preliminary injunctive relief in connection with this case on August 28, 2017 and served Respondent the same day. That request was made in order to prevent the irreparable harm that will, absent such injunction, occur to the collective bargaining process and employees' Section 7 rights prior to issuance of a Board order in this matter.
24. The administrative record in this case opened by telephone on August 31, 2017 to address subpoena matters, including petitions to revoke subpoenas. See, e.g., Charging Party's Petition to Revoke Subpoena *Duces Tecum* B-1-XO2JPX and Thirty-Three Subpoenas *Ad Testificandum*, attached hereto (less exhibits) as Exhibit 17, stating that the subpoenas were served August 11, 2017, i.e., more than two months after the Complaint issued.

25. Although Respondent has not yet fully complied with the subpoena *duces tecum* served upon it, testimony in this case, including extensive cross-examination, was presented September 11–14, 2017.
26. Respondent submitted its answering papers to the petition for preliminary injunction September 18, 2017. The Region’s reply brief is due September 25, 2017 and oral argument is scheduled for October 5, 2017.
27. Respondent has asserted that it is unavailable for any dates to continue the administrative hearing in this matter before November 6, 2017.

Argument

Respondent’s request for a stay pending resolution of its appeal should be denied. As is apparent from the foregoing chronology, Respondent has been making unsupported claims that the Union and Fund are colluding to its detriment for years now, but has failed to uncover a single piece of evidence to support those assertions, even though Respondent has an officer in the role of Fund trustee. That chronology also reveals that Respondent has been responsible for repeated delays in this matter by virtue of, for instance,

- Respondent’s appeal of nearly every decision by any tribunal, including multiple appeals of an arbitration award, despite the very limited bases for reversing such decisions;
- Respondent’s requests for extension of time and postponements, including a request to file its appeal of dismissal of its charge to July 7 while simultaneously using that delayed appeal as a reason for postponing the trial scheduled for July 10;
- Respondent’s unavailability for trial; and
- Respondent’s decision to postpone issuing subpoenas, thereby delaying petitions to revoke and rulings thereon, for months after issuance of the Complaint in this matter.

Exhibit 1

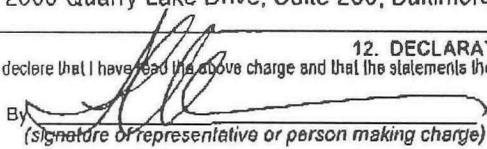
INTERNET
FORM NLRB-508
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 02-CB-122230	Date Filed 2/10/14

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT			
a. Name 1199SEIU Healthcare Workers East ("Union") AND 1199SEIU Benefit and Pension Funds ("Fund")		b. Union Representative to contact Daniel Ratner, Esquire ("Union") Jeffrey Stein, Esquire ("Fund")	
c. Address (Street, city, state, and ZIP code) 80 Eighth Avenue, 8th Floor, New York, NY 10011 ("Union") 330 West 42nd Street, New York, NY 10036 ("Fund")		d. Tel. No. 212-582-1890 (Union)	e. Cell No.
		f. Fax No.	g. e-Mail danr@1199.org Jeffrey.Stein@1199unds.org
h. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (list subsections) 3 of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.			
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since on or about September 5, 2013, 1199SEIU ("the Union"), a labor organization, and 1199SEIU Benefit and Pension Funds, acting as the agent of the Union, have failed and refused to bargain in good faith with Rite Aid, an employer, by refusing to provide information that is relevant and necessary to Rite Aid's duty to bargain collectively with the Union, despite numerous and repeated requests for such information.			
3. Name of Employer Rite Aid of New York, Inc.		4a. Tel. No.	b. Cell No.
		c. Fax No.	d. e-Mail
5. Location of plant involved (street, city, state and ZIP code) 30 Hunter Lane, Camp Hill, PA 17011-2400		6. Employer representative to contact Stephen Silvestri	
7. Type of establishment (factory, mine, wholesaler, etc.) Retail Stores	8. Identify principal product or service Pharmacy/retail	9. Number of workers employed 500+	
10. Full name of party filing charge Stephen Silvestri, Jackson Lewis PC		11a. Tel. No. 410-415-2006	b. Cell No. 410-303-7207
		c. Fax No. 410-415-2001	d. e-Mail Stephen. Silvestri@jacksonlewis.com
11. Address of party filing charge (street, city, state and ZIP code.) 2800 Quarry Lake Drive, Suite 200, Baltimore, MD 21209			
12. DECLARATION I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief. By  Stephen Silvestri, Labor Counsel (signature of representative or person making charge) (Print/type name and title or office, if any)		Tel. No. 410-415-2006	
		Cell No. 410-303-7207	
		Fax No. 410-415-2001	
Address 2800 Quarry Lake Drive, Suite 200 Baltimore, MD 21209		e-Mail Stephen.Silvestri@jacksonlewis.com	(date) 02/10/2014

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

INTERNET
FORM NLRB-508
(2-08)

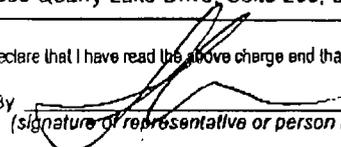
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
**CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS**

FORM EXEMPT UNDER 44 U.S.C. 3512

A REVOKED

DO NOT WRITE IN THIS SPACE	
Case 02-CB-122230	Date Filed April 29, 2014

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT			
a. Name 1199SEIU Healthcare Workers East ("Union") AND 1199SEIU Benefit and Pension Funds ("Fund")		b. Union Representative to contact Daniel Ratner, Esquire (Union) Jeffrey Stein, Esquire (Fund)	
c. Address (Street, city, state, and ZIP code) 80 Eighth Avenue, 8th Floor, New York, NY 10011 (Union) 330 West 42nd Street, New York, NY 10036 (Fund)		d. Tel. No. 212-582-1890 (Union)	e. Cell No.
		f. Fax No.	g. e-Mail danr@1199.org
h. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (list subsections) ; are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.			
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since on or about September 5, 2013, the Union, a labor organization, and the Fund, acting as the agent of the Union, have failed and refused to bargain in good faith with Rite Aid, an employer, by refusing to provide information that is relevant and necessary to Rite Aid's duty to bargain collectively with the Union, despite numerous and repeated requests for such information On or about February 10, 2014, Rite Aid filed a Charge regarding these failures by the Union and the Fund (Case No. 02-CB-122230). On or about April 22, 2014, the Union and the Fund responded to Rite Aid's September 7, 2013 request. This response, however, was deficient and contradictory to positions previously taken by the Union and the Fund. As of April 29, 2014, the Union has still not completely or adequately responded to Rite Aid's September 5, 2013 request for information.			
3. Name of Employer Rite Aid of New York, Inc.		4a. Tel. No.	b. Cell No.
		c. Fax No.	d. e-Mail
5. Location of plant involved (street, city, state and ZIP code) 30 Hunter Lane, Camp Hill, PA 17011-2400		6. Employer representative to contact Stephen Silvestri	
7. Type of establishment (factory, mine, wholesaler, etc.) Retail Stores	8. Identify principal product or service Pharmacy/Retail	9. Number of workers employed 500+	
10. Full name of party filing charge Stephen Silvestri, Jackson Lewis PC		11a. Tel. No. 410-415-2006	b. Cell No. 410-303-7207
		c. Fax No. 410-415-2001	d. e-Mail stephen.silvestri@jackson
11. Address of party filing charge (street, city, state and ZIP code.) 2800 Quarry Lake Drive, Suite 200, Baltimore, MD 21209			
12. DECLARATION I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief. By  Stephen Silvestri, Labor Counsel (signature of representative or person making charge) (Printtype name and title or office, if any)		Tel. No. 410-415-2006	
		Cell No. 410-303-7207	
		Fax No. 410-415-2001	
Address 2800 Quarry Lake Drive, Suite 200, Baltimore, MD 21209 (date) 4/29/2014		e-Mail stephen.silvestri@jacksonlewis.com	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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

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

June 18, 2014

Stephen M. Silvestri, Esq.
Jackson Lewis, P.C.
2800 Quarry Lake Drive, Suite 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 No. 02-CB-122230

Dear Mr. Silvestri:

We have carefully investigated and considered your charge that 1199 SEIU Healthcare Workers East and 1199 SEIU Benefit And Pension Funds have violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

The charge alleges that the above-named Union and the above-named Funds, as agents of the Union, have failed and refused to provide certain requested information regarding the operation of the Funds.

Taft-Hartley benefit funds and their trustees are not agents of an associated union unless the evidence establishes that “a collective bargaining representative...is in de facto control of a nominally independent trust fund.” *Food & Commercial Workers Union Local 1439 (Layman’s Market)*, 268 NLRB 780, 781 (1984). Unless a union possesses the requested information or is in such de facto control of the associated trust fund, it does “not have an affirmative obligation to make a reasonable attempt to obtain the information, to investigate reasonable alternative means for obtaining it, or to explain its unavailability.” *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143, 1144 ((1984). Where an employer has equal access to the information, the Board has found “no reason for imposing additional burdens on the [u]nion’s collective bargaining representative[,] since he would have had to secure the information from the administrator, which the [e]mployer could do equally well.” *American Commercial Lines*, 291 NLRB 1066, 1085 (1988) (quoting *Layman’s Market*) (overruled in irrelevant part by *J.E. Brown Electric*, 315 NLRB 620 (1994)).

In the present case, the available evidence fails to establish that the Union is either in de facto control of the Funds or in possession of the information requested. Although you submitted evidence that the Union and Funds are represented by the same law firm, that relationship does not establish that the Union is either in control of the Funds or in possession of the information requested. See *Brawner Plastering, supra*, 273 NLRB at 1144, n.5 (union officer who is also trustee does not thereby give union possession of fund information).

Finally, because the Funds do not have a collective bargaining relationship with the Charging Party employer, the Funds also do not have a bargaining obligation to the Charging Party subject to the National Labor Relations Act. I am therefore refusing to issue a complaint in this matter.

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 **July 2, 2014**. 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 July 1, 2014. **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 July 2, 2014**. 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 July 2, 2014, **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: Michael R. Hickson, Esq.
Levy Ratner, P.C.
80 Eighth Ave., 8th Floor
New York, NY 10011-7175

1199 SEIU Healthcare Workers East
310 West 43rd St., 12th Floor
New York, NY 10036-3981

1199 SEIU Benefit and Pension Funds
330 West 42nd St., 25th Floor
New York, NY 10036-6902

Rite Aid of New York, Inc.
30 Hunter Lane.
Camp Hill, PA 17011-2400

Judith A. Scott, General Counsel
Service Employees International Union.
1800 Massachusetts Ave., NW, 6th Floor
Washington, DC 20036-1806



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 (Brawner 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.

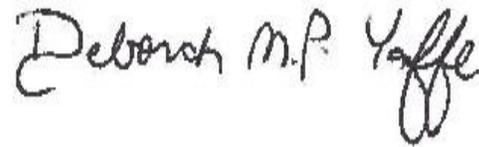
Also, insufficient evidence was presented to establish that the Funds acted as the agent of the Union or had a statutory obligation to provide the requested information. Therefore, assuming, without deciding, that the remaining requested information is relevant, the evidence failed to establish that 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
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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 2

INTERNET
FORM NLRB-508
(2-08)

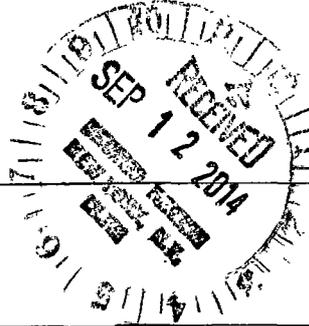
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS

FORM EXEMPT UNDER 44 U.S.C 3512

DO NOT WRITE IN THIS SPACE	
Case 02-CB-136699	Date Filed 09/12/14

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		f. Fax No.	g. e-Mail dani@1199.org
h. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (list subsections) <u>3</u> of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.			
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<p>Since on or about about May 22, 2014, 1199SEIU, a labor organization, has failed and refused to bargain in good faith with Rite Aid, an employer, by refusing to provide information that is relevant and necessary to Rite Aid's duty to bargain collectively with the Union, despite multiple requests for such information.</p>			
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10. Full name of party filing charge Stephen Silvestri, Jackson Lewis PC		11a. Tel. No. 410-415-2006	b. Cell No. 410-303-7207
		c. Fax No. 410-415-2001	d. e-Mail Stephen.Silvestri@jacksonlewis.com
11. Address of party filing charge (street, city, state and ZIP code.) 2800 Quarry Lake Drive, Suite 200, Baltimore, MD 21209			
<p>12. DECLARATION I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief</p> <p>By <u>Stephen Silvestri</u> Stephen Silvestri, Labor Counsel (signature of representative or person making charge) (Print type name and title or office, if any)</p> <p>2800 Quarry Lake Drive, Suite 200 Address Baltimore, MD 21209 (date)</p>		<p>Tel. No. 410-415-2006</p> <p>Cell No. 410-303-7207</p> <p>Fax No. 410-415-2001</p> <p>e-Mail Stephen.Silvestri@jacksonlewis.com</p>	



WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



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)



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

April 23, 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
(Rite Aid Of New York, Inc.)
Case 02-CB-136699

Dear Mr. Silvestri:

This office has carefully considered the appeal from the Regional Director's partial 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 February 13, 2015.

Insufficient evidence was presented to establish that the Union violated Section 8(b)(3) of the Act, as alleged. The investigation established that Rite Aid asked the Union to provide prescription utilization information concerning the participants in the National Benefit Fund. No information was provided. It was concluded Rite Aid requested this information to increase its business, not as part of any negotiations with the Union regarding terms and conditions of employment of unit employees. Thus, it was determined that the Union has no obligation to provide this information, and Rite Aid did not sustain its burden of establishing that the Union violated the Act.

Finally, we conclude that oral argument would not materially advance the resolution of this issue. Accordingly, further proceedings are unwarranted on this allegation.

Sincerely,

RICHARD F. GRIFFIN, JR.
General Counsel



By:

Mark Arbesfeld, Acting Director
Office of Appeals

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

DANIEL RATNER, ESQ.
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kf



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 02
26 Federal Plz Ste 3614
New York, NY 10278-3699

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

August 14, 2015

Stephen M. Silvestri, Esq.
Jackson Lewis, P.C.
2800 Quarry Lake Drive, Suite 200
Baltimore, MD 21209-3763

Re: 1199, SEIU Healthcare Workers East
(Rite Aid of New York, Inc.)
Case 02-CB-136699

Dear Mr. Silvestri:

We have carefully investigated and considered your charge that 1199 SEIU HEALTHCARE WORKERS EAST has violated the National Labor Relations Act.

Decision to Dismiss: On February 13, 2015, I informed you I would dismiss this charge unless I decided that the Charged Party had committed additional violations of the Act that would make dismissal of your charge inappropriate. Since that has not happened, I am dismissing your charge.

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, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **August 28, 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 August 27, 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 August 28, 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 August 28, 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: DANIEL RATNER, ESQ.
LEVY RATNER, P.C.,
80 EIGHTH AVENUE
8TH FLOOR
NEW YORK, NY 10011-5126

1199, SEIU HEALTHCARE WORKERS - 3 -
EAST (Rite Aid of New York, Inc.)
Case 02-CB-136699

ALLYSON L. BELOVIN, ESQ.
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80 8TH AVENUE
FL 8
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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 AVENUE NW
6TH FLOOR
WASHINGTON, DC 20036-1806

Exhibit 3

OFFICE OF THE IMPARTIAL ARBITRATOR

Case Number V-15-10057

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

- between -

1199 SEIU, United Healthcare Workers East

- and -

Rite Aid of New York, Inc.

**OPINION
AND
AWARD**

-----X
Before: Alan R. Viani, Arbitrator

Appearances:

For the Union

Levy, Ratner & Behroozi, PC,
By: Suzanne Hepner, Esq.

For the Company

Jackson Lewis, PC,
By: Laura A. Pierson-Scheinberg, Esq.

The undersigned, pursuant to the parties' collective bargaining agreement (Joint Exhibit 2) was duly designated to hear and decide the issue in dispute between the parties as described herein. The parties to this matter are Rite Aid of New York, referred to herein as the "Company" or "Employer" and the 1199 SEIU 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 November 30, 2015 at which time the parties were afforded the opportunity to submit documentary evidence and examine and cross examine witnesses. The parties elected to submit post- hearing briefs, received by me on or about January 12, 2016, at which time the record in this matter was closed.

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 ISSUE

The parties do not agree upon the issue before me:

The Union proposes the issue as being:

Did the Employer Rite Aid violate 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 Company proposes the issue as being:

Did Rite Aid violate the parties' 2009 Memorandum of Agreement by failing to pay the flat rate adopted by the Fund's Trustees and, if so, what shall be the remedy?

RELEVANT CONTRACTUAL LANGUAGE

The parties' Memorandum of Agreement (hereinafter "MOA") for the period October 30, 2009 through April 18, 2015¹ (Joint Exhibit 4) states in relevant part:

D. National Benefit Fund

Effective as of the following dates the NBF required contribution rate (NBF URR²) shall be increased to the following corresponding percentages of gross payroll:

Effective Dates	Contribution Percentage
December 1,	26.88%
December 1,	28.38%
February 1,	23.50%

* * *

E. Adoption of 1199-League Economic Changes

The duration, wage pattern and contribution rates to the 1199SEIU National Benefit Fund for Health and Human Service Employees, the 1199SEIU Health Care Employees Pension Fund, the League/1199SEIU Training and Upgrading Fund, and the 1199SEIU/Employer Child Care Fund (collectively the "Funds") set forth in this Agreement are adopted from the July 19, 2009 Memorandum of Agreement between 1199 and the

¹ Extended by mutual agreement of the parties while negotiations for a successor agreement are ongoing. (Joint Exhibit 13).

² URR refers to Uniform Required Rate

League of Voluntary Hospitals and Homes (“League MOA”). 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 Funds' contribution rates (including diversions and suspensions thereof), without waiving any of its rights to challenge those diversions that inure to the benefit of only the League, League-specific Funds, and Funds that do not include as their beneficiaries the Employers' Associates (such as the Contract Administrators, RNLMI, RNJSF and CIPC) in the amounts and on the dates agreed to by the President of the League and the President of the Union, as determined by CIPC or as set by the Funds' Trustees. If the Employer challenges such diversions, it shall continue to pay the URRs set by the Trustees until such time as the merits of that challenge are determined by a tribunal of 'competent jurisdiction. Nothing in this paragraph is an admission by either party concerning the merits or defenses of any such challenge.

BACKGROUND

The Union represents Pharmacists, Pharmacy Technicians, Shift Supervisors, Cashiers and other categories of employee of the Company and it has enjoyed a collective bargaining relationship with the Company for many years.

The instant dispute arose when the Union initiated a request for arbitration on October 8, 2015 in which it alleged that the Company was in arrears in its contributions to the National Benefit Fund (hereinafter “NBF”), a jointly administered Taft-Hartley trust. The Union asserts that the Company has failed to contribute to the NBF at rate of contribution required by the parties’ collective bargaining agreement for the period January 2015 through September 30, 2015. Currently at issue is a sum in excess of \$3,000,000 which, ostensibly, is owed the NBF as of the date of the instant hearing.

This dispute has its genesis in a change in the methodology adopted by the NBF’s Trustees on October 27, 2014 (Joint Exhibit 10) in determining the Employer’s contributions to the Fund, the application of which is in dispute under the meaning of the language of Sections D and E of the parties’ 2009 MOA cited above.

Essentially, the Company maintains that it is not required to modify its contributions to the NBF in accordance with the rates established under a new payment methodology³ but rather is only obligated to continue to contribute to the NBF based on the percentages specified in Section D of the parties 2009 MOA until or unless these payment percentages are modified through collective bargaining.

The Union disputes the Company's interpretation of the parties' agreement and maintains that the agreement requires the Company to comply with any modified contribution rates adopted by the Fund's trustees under Section D of the parties MOA.

An explanation of the change in payment methodology (and new "flat payment" percentages) was sent to the Company on November 5, 2014 (Joint Exhibit 11). A letter signed by NBF Chief Financial Officer Maria Acosta states in relevant part the following:

Re: Changes to Your Contribution Rates

On October 27, the Trustees of the 1199SEIU National Benefit and Pension Funds approved two resolutions to implement new contribution requirements. The resolutions (1) reduce the current contribution rate to the Pension Fund, (2) change contribution rates to the National Benefit Fund and (3) create a new payment methodology for computing your National Benefit Fund contribution.

Under the new payment methodology, the Fund's actuaries will calculate a flat monthly payment for your institution based on the new rates described below and your projected payroll, and maintain the current HWE and RN credit structure ("Flat Payment"). This Flat Payment calculated by the actuaries will be the required contribution payment to the National Benefit Fund: Your contribution will be set and will not change each month. It will only change each October.

The Agreement also allows for a transition period from October 1, 2014, through December 31, 2014. This transition period will provide time for the actuaries to calculate each institution's new National Benefit Fund contribution payment and for employers and the Fund to update the necessary systems. Through your December 2014 contribution, you should continue paying at your current rate of 28.05% of gross payroll, including your HWE and RN credits.

Your 2015 National Benefit Fund contribution payment, which will include a reconciliation of amounts that would otherwise have been due under the new rate for the last three months of this year, will go into effect in January 2015.

³ Referred to as a "Flat Payments"

The Flat Payments will be calculated based on projections of the following rates:

- October 2014 — September 2015: 28.75%
- October 2015 — September 2016: 30.00%
- October 2016 — September 2017: 32.23%
- October 2017 — September 2018: 33.00%

Subsequent Flat Payment calculations will include reconciliations between the Flat Payments and the above rates.

* * *

If your Collective Bargaining Agreement has expired, you must sign a new one that provides for contributions at the new required rates on the dates indicated for both the Benefit and Pension Funds. If your Collective Bargaining Agreement is still in effect, your next Agreement will need to provide for contributions at the new rates, retroactive to these dates. And if your current Collective Bargaining Agreement provides for contributions at the rate set by the Trustees, you will need to contribute at the new rates.

The practical impact the above change would have on the Company would be to increase the contribution rate by the Company as follows:

January 1, 2015 to January 30, 2015 from 28.38 % to 28.75 %
February 1, 2015 to September 30, 2015 from 23.50 % to 28.75 %⁴

POSITION OF THE PARTIES⁵

The Company

According to the Company, the issue in this case is whether the 2009 Memorandum of Agreement (“2009 MOA”) between Rite Aid and 1199SEIU, United Healthcare Workers East (the “Union”) requires Rite Aid to contribute to “the 1199SEIU National Benefit Fund for Health and Human Service Employees (the “NBF” or the “Fund”) at a rate set by the Trustees of the NBF which is not a Uniform Required Rate

⁴ I believe I have interpreted Acosta’s letter correctly. Nonetheless, in the event my interpretation is incorrect, the net result to the Company would be a significant increase in its contributions to the NBF

⁵ Excerpted from the parties’ post hearing briefs and edited for brevity, continuity, and attribution.

(“URR”) for all contributing employers. It argues that the plain language of the 2009 MOA, the evidence of the bargaining to reach that agreement, and subsequent interpretive conduct by the parties establish that the answer is no.

The Company notes that in July 2014, the League of Voluntary Hospitals and Homes of New York (the “League”) and the Union agreed to establish a new methodology for contributions to the NBF, which it points out, it was not a participant in those negotiations. (Jt. Exh. 8). On October 27, 2014, the Trustees to the NBF decided to abandon their only previous methodology for setting contribution rates – the Uniform Required Rate (“URR”). The Trustees, almost all of whom are appointed by either the Union or the League, adopted a methodology of setting separate contribution rates for the League employers and for each of the non-League contributing employers. (hereinafter referred to as the “flat” rate methodology). (Jt. Exh. 10). There was no bargaining between the Union and Rite Aid with respect to the abandonment of the URR based rates or the change in rate calculation methodology.

Thereafter, on November 5, 2014, the NBF's CFO, Maria Acosta, informed Rite Aid in relevant part that, “If your Collective Bargaining Agreement is still in effect, your next Agreement will need to provide for contributions at the new rates, retroactive to these dates.” (Jt. Exh. 11). Rite Aid acted exactly as the NBF's own CFO expected at this time. Rite Aid continued to pay contributions at the previous URR based rate and began collective bargaining negotiations With the Union for a new agreement in March 2015.

Rite Aid began negotiations with the Union in March 2015 and made its position clear that the URR rates in the 2009 MOA controlled and that Rite Aid would continue to pay the last URR adopted by the Trustees from the outset of bargaining. In contrast, the Union has stated in negotiations that it will not accept or discuss any modifications to the rate for Rite Aid developed by the NBF and it has insisted that Rite Aid pay that rate retroactive to November 2014.

By fall, 2015, when the Union and Rite Aid reached a point in bargaining where one of the few significant open issues was contribution to the NBF, this claim then commenced.

The timing of the commencement of this claim - at a crucial point in negotiations-- and the lack of definitive identification of which entity is prosecuting it, suggests strongly that the Union, acting in concert with the NBF or controlling it, is using this claim and the threat of an order to commence payment to coerce Rite Aid to reach agreement on a contract.

Fundamentally, this is a case where the NBF⁶ is asking the Arbitrator to write the agreement between the Union and Rite Aid, which of course, is beyond the scope of the Arbitrator's authority. The Company contends that there is no reference in the 2009 MOA to any other type of rate than URR based. This case should turn on whether this language requires Rite Aid to accept and pay contributions rates other than URR based without having the right to bargain over such a significant change.

The Company argues that the NBF's claim must be dismissed because the 2009 MOA does not require Rite Aid to pay any contribution rate which is not a Uniform Required Rate. The resolution of this dispute requires an interpretation of the meaning of Section E of the 2009 MOA. That section, quoted in full above, requires Rite Aid to “adopt, be bound by and to implement any changes in the Funds' contribution rates” in the amount agreed to by the Funds' Trustees. (Jt. Exh. 4, p. 4). At the time of the 2009 MOA, and indeed, throughout its entire history up until October 27, 2014, the collective bargaining parties (the Union and all the contributing employers to the NBF, including the League), had agreed upon a single contribution rate applicable to all employers. (Jt. Exh. 4) “Development of Contribution Methodologies”). Throughout all of this time, the NBF set and mandated a uniform required rate (“URR”) for all contributions for all contributing employers. (Jt. Exh. 4).

On October 27, 2014, the NBF's Trustees abolished the URR and adopted a new methodology whereby each contributing employer would have a separate contribution rate determined and adjusted by historical contributions and cost experience (Jt. Exh. 10). The Union maintains that the Section E language

⁶ The only parties to this dispute are the Union and Rite Aid notwithstanding Rite Aid's assertion.

requires Rite Aid to immediately change its contributions from the previously set URR to a rate set for Rite Aid individually and which is different than the rates for the League and other contributing employers.

The Company contends that as the Union's claim depends upon interpretation of the 2009 MOA, the NBF bears the burden of proof. The NBF must prove, by a preponderance of the evidence, that the MOA requires Rite Aid to contribute to the NBF at the non-uniform "flat rate". To the extent that the Arbitrator determines that the language in the 2009 MOA is ambiguous, the relevant sections must be construed against the drafter, the Union.

According to the Company, basic contract principles require interpretation of section E in context of the entire 2009 agreement. It notes that, "Disputed portions [of a contract] must be read in light of the entire agreement." (Elkouri and Elkouri, *How Arbitration Works*, Sixth ed. 2003, p. 462). The Company points out that Section E itself describes contribution rates as a URR. Under Section E, if Rite Aid challenges diversions² from one of the Funds, "it shall continue to pay the URRs set by the Trustees" during the challenge. *Id.* This language, according to the Company, is critical to the resolution of this dispute and it is an express and clear indication that the Parties agreed that rates applicable to Rite Aid would be URR based. Any other interpretation of the 2009 MOA would nullify or require rewriting of this language. These words appear in the very section cited by the NBF as the basis for its case. This language is forward looking like the remainder of this Section - it requires Rite Aid to pay whatever URRs are set by the Trustees. Certainly, this provision is substantial evidence that the Union and Rite Aid only contemplated changes in the URR. The parties did not contemplate a completely different rate setting methodology that was subsequently agreed to by the League and which the NBF now seeks to unilaterally impose on Rite Aid.

Moreover, the Company argues that it is well settled that the arbitrator does not have the authority to rewrite the 2009 MOA. Acceptance of the Union's position would require the Arbitrator to ignore the 2009 MOA's plain meaning. The Arbitrator cannot guess or legislate as to the Parties' intentions.

The Company argues that the remaining relevant sections of the MOA support the conclusion that there is no requirement to pay a rate which is not URR based. Other sections of the 2009 MOA dealing with

benefit contribution rates refer to such rates as URR based. For example, Section C, which sets forth pension fund contribution rates, uses the two terms synonymously. (Jt. Exh. 4, p. 3) (“...the benefits provided by and the contribution rate (URR) to, the PF [Pension Fund]...). Section C refers to the monthly contributions as the “URR percentages.” Id. Section C further allows for the Funds' Trustees to “modify the Preferred Schedule by reducing the URR.” Id. Section D likewise describes the NBF rate solely as a URR. (Jt. Exh. 4, p. 4) (“...effective as of the following dates the NBF required contribution rate (NBF URR) shall be increased to...). To interpret “contribution rates” in Section E as permitting changes to a non-URR would render much of Section C and D's explicit language regarding contribution rates superfluous.

In addition, the only descriptive word used in the 2009 MOA to reference rates is “URR.” The 2009 MOA defines “contribution rates” exclusively in terms of a “URR.” There is no language which states or implies that the rates are “individual” applicable only to Rite Aid. There is no reference to “contribution methodology changes.” “Contribution rates” and “URR” are used interchangeably and exclusively throughout the 2009 MOA.

When read in light of the whole agreement, the changes in “contribution rates” contemplated by Section E refer only to adjustment in the URR agreed upon and specified in Sections C, D, and E. Indeed, the NBF admitted that the language and contribution rates in Sections C and D of the 2009 MOA, provided above, were lifted in their entirety from the July 19, 2009 League MOA. (Transcript 87:2-22); (Jt. Exh. 3, p. 3-5).

The Company also contends that the bargaining history establishes that both parties understood that Rite Aid would pay any changes to URR based rates. Gordon Hinkle, Rite Aid's second chair during negotiations over the 2009 MOA, testified that the Union discussed Rite Aid's contributions to the Funds only as URR based. Mr. Hinkle stated that the Union explained “there was one URR and everyone had to pay the URR” and “[t]here was one URR and [Rite Aid] needed to pay the URRs for the Pension and the National Benefit Fund.” (Transcript 38:16-25; 42:18-22). Likewise, Mr. Hinkle testified that Rite Aid agreed to the language in Section E based on the understanding that “[Rite Aid] agreed to adopt any changes to the

URR.” (Transcript 49:18-19). According to Hinkle, the Union NEVER made any reference to rates calculated or to be paid on bases other than the URR. (Transcript 65:622). There was no discussion that the League or the BF would ever abandon the URR that had been in place for many years.

The NBA's witness testified consistently and similarly to Hinkle. The Union's bargaining representative in 2009, attorney and chief spokesperson Allison Beloved, testified that she drafted and proposed the language in Sections E and E, which referred to “contribution rates” and “URR” interchangeably. (Transcript 83:17-21; 87:2-7). Ms. Belovin acknowledged that all the rates at the time of the 2009 MOA “were URRs.” (Transcript 88:5-6). Ms. Belovin also stated that Yvonne Armstrong, the Executive Vice President of the Union explained “[t]he Trustees have a URR...in order for you to be in that Fund 12/1/09, it costs you 26.88% because that is the URR.” (Transcript 91:21-25). The Union represented that the contribution rates were URRs, and Rite Aid agreed to the 2009 MOA based on that understanding.

The NBF witness did not contradict Hinkle's testimony as to the representations on URR. In addition, the NBF did not introduce any evidence that Rite Aid knew or assumed that the rate change language in Section E would permit the NBF to change its contribution rate methodology from URR based to the current individual employer based methodology.

After the commencement of the 2009 MOA, the Union and Rite Aid acted consistently with their agreement to make changes to URR based rates. The Company submits that on February 11, 2014, the Trustees changed the contribution rates to the NBF for the first time following adoption of the 2009 MOA. The Trustees also provided credits at this time to certain League employers. (Jt. Exh. 6). The Trustees acted in response to a January 2014 agreement between the League and the Union to modify early expiration provisions of their CBA. (Jt. Exh. 6). This is precisely the scenario contemplated by the 2009 MOA; rates were adjusted based on bargaining, not arbitrarily imposed by the NBF. In a letter to the Union's counsel on March 14, 2014, Rite Aid acknowledged its responsibility to change its contribution rate so long as the Trustees maintained a URR. (RA Exh. 1). However, Rite Aid did object to the credits on the grounds that they effectively created two unequal rates instead of a URR. Rite Aid noted that “[t]he 2009 MOA between

Rite Aid and the Union was based on the understanding that there would be one uniform required rate for ALL employers contributing to the Fund.” Id. Rite Aid did not dispute its obligation to adopt an adjusted URR. As with the current arbitration, Rite Aid only objected to a change away from a URR entirely.

In addition, the NBF has acted consistently with the understanding of the Union and Rite Aid in the 2009 MOA that changes would be to URR based rates. On November 5, 2014, Maria Acosta, the Chief Financial Officer for the NBF, sent Rite Aid a letter explaining the change to the contribution rate. In that letter, Ms. Acosta laid out three scenarios for employers:

If your Collective Bargaining Agreement has expired, you must sign a new one that provides for contributions at the new required rates on the dates indicated for both the Benefit and Pension Funds. If your Collective Bargaining Agreement is still in effect, your next Agreement will need to provide for contributions at the new rates, retroactive to these dates. And if your current Collective Bargaining Agreement provides for contributions at the rate set by the Trustees, you will need to contribute at the new rates.

The Union contends that it falls under the second circumstances articulated by Acosta. It maintains that its agreement remains in effect and, therefore, there is no agreement to pay rates set by the NBF Trustees other than the URR.

Lastly, the Company argues that the claim made by the Union is premature. It submits that if the 2009 MOA does not contemplate changes to rates which result in non-URR based contributions, the NBF cannot unilaterally change this presumption absent bargaining between parties to the 2009 MOA. The Union and Rite Aid currently remain in negotiations over a new CBA and new contribution rates to the Funds, including the possibility of retroactive payments based on the unequal contribution rates. (Jt. Exh. 14). The parties have not yet reached an agreement. Therefore, the Union has prematurely demanded arbitration and Rite Aid does not deny the NBF expects Rite Aid to contribute to the NBF at the new rates if it agrees to remain a contributing employer. It argues, therefore, that the instant claim undermines the collective bargaining process, which is currently ongoing.

Therefore, the Union's contentions should be rejected and the Arbitrator should conclude that the Union has not satisfied its burden of proof in this matter. For the foregoing reasons the Arbitrator should deny the NBF's claim and dismiss this matter in its entirety.

The Union

The Union submits that the Company violated the parties' collective bargaining agreement by failing to implement changes to the contribution rates for the NBF determined by the NBF Trustees for the period January 1 through September 30, 2015. Rite Aids failure to implement these changes violates the clear, express, and unambiguous language of Paragraph E of the parties' 2009-2015 MOA, which obligates Rite Aid to implement any changes to the contribution rates that the NBF Trustees adopt during the life of the CBA or any extension thereof. (See 2009 MOA, J. Ex. 4, pg. 4)

According to the Union, this case is about Rite Aid's attempt to wriggle out from under its clear and unambiguous contractual obligation to contribute to the NBF in accordance with the Trustees' October 27, 2014 Resolution ("October 2014 Resolution"). As a result of Rite Aid's failure and refusal to comply with the CBA and contribute to the NBF at the required rate, Rite Aid is delinquent to the NBF in the amount of more than \$3 million.

The Union argues that the contract language at issue explicitly requires Rite Aid to "adopt, be bound by and to implement any changes in the Funds' contribution rates in the amounts and on the dates . . . set by the Funds' Trustees." While the CBA sets forth NBF contribution rates and effective dates during the life of the agreement, it is undisputed that during the term of that agreement, the Trustees changed the NBF contribution rate for non-League employers, such as Rite Aid, to 28.75% of gross payroll. Additionally, the October 2014 Resolution changed the methodology for calculating NBF contributions such that, based on its projected payroll for the year, Rite Aid was required to remit monthly NBF contributions of approximately \$2.7 million. It maintains that notwithstanding the Trustees' directives, and the CBA's mandate that it

comply with those directives, Rite Aid instead remitted NBF contributions at the significantly lower rate of 23.5% of gross payroll and refused to adopt the Trustees' change in methodology.

The Union argues that Rite Aid resorts to interpretative acrobatics in an effort to justify its flagrant disregard for its contractual obligations. Specifically, Rite Aid argues that while it agreed to pay a Uniform Required Rate ("URR") and any changes to that URR, once the Trustees moved away from a single URR and set a different required rate for non-League employers in the October 2014 Resolution, Rite Aid was no longer bound by the obligation to adopt the Trustee-set rates. This argument has absolutely no basis in the contract language. The relevant language is as expansive as imaginable in its requirement that Rite Aid adopt the Trustees' determined rates. It unequivocally obligates Rite Aid to implement any changes to the contribution rates in the amounts and on the dates set by the Trustees. The phrase "any changes" necessarily includes not only changes to a specific URR, but also changes to the required rates for non-League employers; it manifestly denotes not only changes contemplated by the parties at the time the agreement was executed, but also unanticipated changes that the Trustees later determine are needed to provide benefits.

Moreover, the Union asserts, that while the clear and unambiguous nature of the contract language at issue renders consideration of parol evidence inappropriate, the record evidence regarding the parties' bargaining history and past practice in fact provides further support for the Union's position. Even if the Arbitrator accepts Rite Aid's version of the bargaining history, there is no evidence that, at the time the language was proposed and accepted, the parties' mutually understood the phrase "any changes" to be limited in any way, much less limited only to changes to the then-existing URR.

The Union made no commitment that there would be a single URR for all employers going forward, nor did the Union make a commitment as to continuing the method of calculating contributions used at that time. [See TR. pp. 72-73] and Rite Aid agreed to the language contained in Paragraph E of the MOA. In addition to increasing the rates, the methodology for calculating NBF contributions changed effective January 1, 2015 to a so-called "flat rate" methodology. [See October 2014 Resolution, J. Ex. 10]. Under this methodology, for the first year in which the rate increases, the Fund calculates each contributing employer's

flat monthly contribution amount for the period January 1 through September 30, 2015, by applying the underlying rate of 28.75% to the employer's projected payroll for the same period, which is based on actual payroll for the period July 1, 2013 through June 30, 2014, and then by dividing the resulting amount by nine. [See October 2014 Resolution, J. Ex. 10; November 5 2014 Letter, J. Ex. 11]). Thus, as Belovin explained in testimony, employer contributions continue to be based on a percentage of gross payroll, as under the previous methodology, but “rather than looking at it month by month, it is looked at on a yearly basis....”

According to the Union, the clear and unambiguous language of the CBA requires Rite Aid to adopt the changes to the NBF rates. The terms of the 2009-2015 MOA could not be clearer as to Rite Aid's NBF contribution obligations: Rite Aid is required to “adopt, be bound by, and to implement any changes in the Funds' contribution rates (including diversions and suspensions thereof) . . . in the amounts and on the dates agreed to by the President of the League and the President of the Union, as determined by CIPC or as set by the Funds' Trustees.” [Paragraph E, 2009-2015 MOA, J. Ex. 4 (emphasis added)]. Here, the clear and unambiguous language of the contract supports the Union's contention that the employer is required to implement the Trustees' changes to both the calculation methodology and the underlying rate, and that Rite Aid violated the contract by failing to do so.

The Union submits that it is a well-settled arbitral principal that a term is ambiguous only if “plausible contentions may be made for conflicting interpretations.” It is similarly well settled that where contract language is clear and unambiguous, parol evidence is inadmissible for the purpose of contract interpretation. As the terms of the 2009-2015 MOA are clear and unambiguous, the Arbitrator should not consider the bargaining history or the parties' prior conduct.

Rite Aid nevertheless argues that that “any changes to the Funds' contribution rates” is limited only to changes to the URR, as long as the rate remains a URR. [See Laura Pierson-Scheinberg Opening Statement, Tr. p. 20, 11. 7-14]. The contract's clear language provides no basis for that argument. Paragraphs C and D of the contract set rates for the PF and the NBF, respectively. At the time the Parties negotiated the contract, the Trustees required all employers to contribute to these Funds at the same rate — known as URRs -- and the

language of paragraphs C and D reflect this requirement. However, Paragraph E, entitled “Adoption of 1199-League Economic Changes,” explicitly requires Rite Aid to adopt any changes to the contribution rates that the Trustees require for all Funds, including mid-contract changes. Where the paragraph 1 goes on to refer to URRs, it is specifically in the context of challenging diversions.

Paragraph E, on the other hand, refers to Trustee changes to the contribution rates in the most expansive manner possible: (1) by encompassing rates for all five Funds to which Rite Aid contributes; (2) by stating that the Trustees can change the rates themselves, but can also, among other things, create diversions, or suspend them, or modify the dates on which contributions are due; and (3) by using the broadest modifier to describe the changes the Trustees can make and that Rite Aid must adopt: “any.”

Thus, according to the Union, when the NBF Trustees changed the methodology for calculating contributions, and the underlying rates to be used in these calculations, Rite Aid was obligated, by the terms of its agreement with 1199, to adopt, be bound by, and to implement these changes.

The bargaining history and Rite Aid's past practices support the union's contention that Paragraph E Requires Rite Aid to Implement All Changes to the Contribution Rates Set Forth In The October 2014 Resolution.

To the extent the Arbitrator determines the language of Paragraph E is ambiguous with regard to Rite Aid's contribution obligations, the bargaining history and the parties' past conduct support the Union's contention that Rite Aid must remit contributions to the NBF at the rate of \$2,713,208.08 per month, in accordance with the October 2014 Resolution.

As both Hinkle and Belovin testified, during bargaining on October 28 through 29, 2009, the Union proposed paragraphs C, D, and E to Rite Aid in a form virtually identical to the provisions found in the 2009-2015 MOA. [See Tr. pp. 3233; Tr. pp. 68-71]. When reviewing paragraphs C and D, the parties discussed the URRs. Nevertheless, Belovin's unrebutted testimony is that, with regard to the contribution rates, 1199 never made a commitment to Rite Aid that the Trustees would select any particular contribution rates or that the Trustees would maintain a URR in perpetuity. [See Tr. p. 72-73].

Thus, Rite Aid's obligation to implement any changes the Trustees made to the contribution rates for all Funds was clear from the Union's initial proposal, and Rite Aid adopted that language in all relevant respects. Hinkle testified that he believed fell into the second category of employers spelled out in Acosta's November 5, 2014 letter -- i.e., those with collective bargaining agreements still in effect, but which do not provide for contributions at the rates set by the Trustees. [See Tr. p. 44, 11. 2-13]. Rite Aid argues, therefore, that it is not required to adopt the new NBF contribution rate or methodology until its next agreement, which the parties are currently negotiating. However, Rite Aid either misreads or deliberately misrepresents the November 5, 2015 letter. In fact, because Paragraph E of the 2009-2015 MOA clearly obligates Rite Aid to adopt and implement any rate changes the Trustees require, Rite Aid falls into the third category of employers -- those with current collective bargaining agreements that provide for contributions at the rates set by the Trustees. Accordingly, as the letter instructs, Rite Aid "will need to contribute at the new rates. [See, November 5, 2014 Letter, J. Ex. 11].

Based on each and all of the reasons set forth above, the Union argues that Rite Aid violated the 2009-2015 MOA by failing to pay the required NBF contribution rate of \$2,713,208.08 per month (based on 28.5% of gross payroll) for the period January 1 through September 30, 2015. The clear and unambiguous language of Paragraph E of the 2009-2015 MOA requires Rite Aid to adopt "any changes" to the contribution rates "in the amounts and on the dates . . . set by the Funds' Trustees."

Moreover, even if the Arbitrator were to consider evidence of bargaining history or past practice — which should not be considered due to the clear and unambiguous nature of the contract language at issue — such evidence supports the Union's position that Rite Aid was required to adopt the changed rate and methodology. The testimony regarding bargaining history demonstrates that the Union proposed the language of Paragraph E, and Rite Aid adopted it without any relevant modifications. At no time did the Union promise anything about what the Trustees (or the League and Union) would decide in the future. Rather, the parties bargained for language that would guarantee that Rite Aid bargaining unit employees would be entitled to Fund benefits for the duration of the agreement.

Accordingly, the Union respectfully request that the Arbitrator issue an award holding that Rite Aid was required to pay the NBF contribution rate of \$2,713,208.08 per month for the period January 2015 through September 2015 and requiring Rite Aid to pay the NBF all delinquent contributions for that period, any interest accrued thereon, plus costs. As agreed to at the hearing, the Arbitrator should retain jurisdiction to resolve any disputes regarding the amounts owed or other aspects of the parties' implementation of the Arbitrator's Award.

DISCUSSION

There can be no doubt that the question of whether Rite Aid must contribute at the rate established by the trustees of the National Benefit Fund on October 27, 2014 turns on the meaning of the language contained in Section E of the parties' 2009 Memorandum of Agreement.

The language of Section E in relevant part states, "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 Funds' contribution rates ... in the amounts and on the dates agreed to by the President of the League and the President of the Union, as determined by CIPC or as set by the Funds' Trustees. "

At the heart of its argument is the Company's contention that the language of Section E was specifically intended to bind it to any changes in contributions set by the Fund's Trustees of the Uniform Required Rate (URR). According to the Company, it never contemplated or agreed to a contribution formulation other than the URR and, therefore, Section E. must be read and understood in this context. According to the Company, basic contract principles require interpretation of section E in context of the entire 2009 agreement. It notes that, "Disputed portions [of a contract] must be read in light of the entire agreement." (Elkouri and Elkouri, *How Arbitration Works*, Sixth ed. 2003, p. 462). It argues that the remaining relevant sections of the MOA support the conclusion that there is no requirement to pay a rate which is not URR based and it points out that other sections of the 2009 MOA dealing with benefit contribution rates refer only to such rates as URR based

For its part, in sum and substance, the Union maintains that that at no time did it provide assurances to the Company that the Fund's methodology for arriving at a contribution rate would remain unchanged. It maintains that the language of Section E of the parties MOA clearly and unambiguously requires the Company "... to adopt, be bound by and to implement any changes in the Funds' contribution rates...." established by the Fund's Trustees

Both parties to this dispute have advanced cogent and persuasive arguments in support of their respective positions to which I have given considerable thought and consideration.

If this proceeding were one of equity I would be hard put to deny the Company's position in this matter. I am persuaded that when it entered into the 2009 MOA with the Union, the Company truly believed that the methodology for computing its contribution rates would remain unchanged as a URR for the duration of its agreement. That the Company felt "blindsided" by the methodological change adopted by the Fund's Trustees during the term of its agreement is understandable, especially because the adopted change would result in a very substantial increase in the amount that it would have to contribute to the Fund in order to maintain benefit levels.

This being said, this proceeding is not one based on equity and, therefore, I am constrained to agree with the Union that the clear and unambiguous language of Section E absolutely requires the Company to comply with the contribution rates established by the Fund's Trustees. The language of Section E is broad and all encompassing and leaves no doubt about the Trustees authority to establish the methodology by which it would arrive at contribution rate required of the Company.

Significantly, parol evidence offered in this matter does not support a finding that the Company was ever given assurances by the Union that the URR would be maintained by the Trustees. Neither Gordon Hinkle, the Company's Senior Manager of Labor Relations nor Allyson Belovin, the Union's counsel and chief spokesperson in negotiations of the agreement testified that such an assurance was ever given. Though the Company did not anticipate the abandonment of the URR by the Fund's Trustees, the language to which it agreed does not offer it any assurance that the URR or the methodology for arriving at a contribution rate

would remain unchanged. Quite the contrary, the disputed language requires the Company to adopt and be bound by any changes in contribution rates. If the parties' intent was to maintain a URR during the term of their agreement or negotiate over methodology at arriving at a rate then it became incumbent upon them to unequivocally so state that intent in the body of their agreement. That they did not is instructive.

As fiduciaries, the Fund's Trustees are duty bound to adopt contribution rates and the methodology for arriving at such rates so as to protect the viability of the Fund they serve. I am not privy to the reasons why the Fund adopted the rates it did for the Company and neither do I possess the authority to question the Trustee's judgment here. Nonetheless, my sole obligation is to enforce the parties' agreement as written and, therefore, for the reasons stated herein, I will uphold the Union's grievance.

Because the Company's agreement was in full force and effect on October 27, 2014 when the Fund's Trustees adopted the new rates and it provided for contributions at the rate set by the Trustees, I will find that the Company was delinquent in making full contributions to the Fund for the period January 1, 2015 to September 30, 2015.

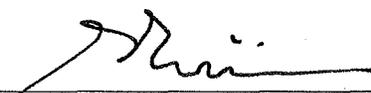
Now, therefore, after carefully considering the testimony and documents in evidence, and considering the parties' arguments in support of their respective positions, I hereby make the following award:

AWARD

The 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.

Dated: March 6, 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: March 6, 2016



Alan R. Viani

Exhibit 4

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

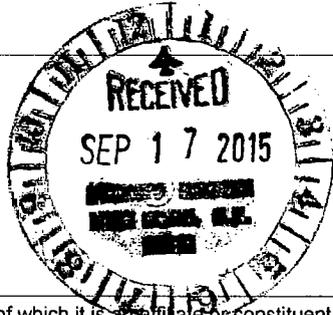
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Case	Date Filed
02-CA-160384	9-17-2015

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Rite Aid Corporation	b. Tel. No. 717-731-6531
	c. Cell No.
	f. Fax No. 717-975-5945
d. Address (Street, city, state, and ZIP code) 30 Hunter Lane Camp Hill, PA	e. Employer Representative Traci L. Burch, Esq. Vice President, Labor Relations
	g. e-Mail tburch@riteaid.com
	h. Number of workers employed 5,000+
i. Type of Establishment (factory, mine, wholesaler, etc.) Retail Pharmacy	j. Identify principal product or service Retail Pharmacy
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the last six months, the employer, by its officers, agents and representatives, has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act by engaging in bad faith bargaining, including but not limited to: (1) engaging in regressive bargaining; and (2) conditioning agreement upon the Union's acceptance of changes to the scope of the bargaining unit.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) 1199SEIU United Healthcare Workers East	
4a. Address (Street and number, city, state, and ZIP code) 310 West 43rd Street New York, NY 10036-6451	4b. Tel. No. 212-582-1890
	4c. Cell No.
	4d. Fax No. 212-627-8182
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union, Change to Win Federation	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By <u>Allyson F. Belu</u> (signature of representative or person making charge)	Allyson Belovin, Attorney (Print/type name and title or office, if any)
Tel. No. 212-627-8100	
Office, if any, Cell No.	
Fax No. 212-627-8182	
e-Mail abelovin@levyratner.com	
Address <u>Levy Ratner, PC, 80 8th Ave. 8th Floor, New York, NY 10011</u>	<u>Sept. 17, 2015</u> (date)



WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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

RITE AID CORPORATION

and

Case 02-CA-160384

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST**

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by 1199 SEIU UNITED HEALTHCARE WORKERS EAST (the Union). It 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 Rules and Regulations of the National Labor Relations Board (the Board) and alleges that RITE AID Corporation (Respondent) has violated the Act as described below.

1. The charge in this proceeding was filed by the Union on September 17, 2015, and a copy was served on Respondent by U.S. mail on September 22, 2015.

2. (a) At all material times, Respondent has been a domestic corporation which through various subsidiaries, operates retail drug stores in and around New York State and New Jersey among other places.

(b) Annually, Respondent, in the course and conduct of its operations as described above in subparagraph (a), derives gross revenue in excess of \$500,000.

(c) Annually, Respondent, in the course and conduct of its operations as described above in subparagraph (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. 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.

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

5. At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Tracy Burch Labor Relations and Employment Counsel

Gordon Hinkle Senior Manager Labor Relations

David Gonzalez Manager Labor Relations

6. (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All of the professional and nonprofessional employees in the City of New York, and the New York Counties of Nassau, Suffolk, Westchester, Orange, Putnam, Ulster, Dutchess, Sullivan and Rockland and the City of Albany, New York, and the New Jersey Counties of Passaic, Bergen, Essex, Hudson, Union and the cities of Edison, Perth Amboy, Cateret 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 on or about the 1960's and at all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit and since then the Union has been recognized as the representative by Respondent. This recognition has been

embodied in successive collective bargaining agreements, including the agreement effective from 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.

(c) The terms of memorandum of agreement which expired on April 18, 2015 as described in subparagraph (b) were extended on May 5, 2015, until either party gives ten (10) days written notice to terminate the Agreement or until a new Agreement is reached and ratified.

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

7. (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 to the agreement described above in paragraphs 6(b) and (c).

(b) During the period described above in subparagraph (a), Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit.

(c) The condition described above in subparagraph (b) is not a mandatory subject for the purposes of collective bargaining.

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

8. By the conduct described above in paragraph 7, 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.

9. 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 complaint. The answer must be **received by this office on or before February 12, 2016, or postmarked on or before February 11, 2016.**

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 complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT **April 5, 2016**, at **9:30 a.m. at the Mary Walker Taylor Hearing Room, at 26 Federal Plaza Room 3614, New York, New York** on 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 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: January 29, 2016



Karen P. Fernbach
Regional Director
National Labor Relations Board
Region 02
26 Federal Plz Ste 3614
New York, NY 10278-3699

Attachments

Exhibit 5

**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

Exhibit 6

OFFICE OF THE IMPARTIAL ARBITRATOR

Case No. V-15-10057

-----X
In the Matter of the Arbitration

- between -

1199 SEIU, Health Care Workers East

**OPINION
AND
AWARD**

-and-

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

Before: Alan R. Viani, Arbitrator

Appearances:

For the Union

Levy, Ratner & Behroozi, P.C.,
By: Suzanne Hepner, Esq.

For Rite Aid of New York

Littler Mendelson, PC,
By: Jedd Mendelson, Esq.

The undersigned, pursuant to the parties' collective bargaining agreement was duly designated to hear and decide the issue in dispute between the parties as described herein. The parties to this matter are Rite Aid of New York, referred to herein as the "Company" or "Employer" and the 1199 SEIU 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 27, 2016 at which time the parties were afforded the opportunity to submit documentary evidence. In addition, the Employer moved that I stay my decision in this matter pending a judicial decision on the Employer's appeal of a prior Federal District Court's decision in this matter.

As background to the issue before me, it should be noted that on March 6, 2016 I issued a decision in this matter concerning the obligation of the Employer to make increased payments to the National Benefit Fund pursuant to the parties' collective bargaining agreement.

After a November 30, 2015 hearing in this dispute, I issued my decision on March 6, 2016 in which I decided 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.

Thereafter, the Employer moved in the U.S. District Court (Southern District) to vacate my award. On September 1, 2016, the District Court denied the Employers motion for a summary judgement vacating the award and it granted the Union's motion to confirm the award and it also awarded the Union attorney's fees.¹

On September 30, 2016, a hearing was held to determine the exact amount owed the Benefit Fund pursuant to paragraph two of my March 6, 2016 award and to hear the question of the amount of the Employer's obligation to contribute to the Fund commencing on October 1, 2016 and thereafter. On September 30, 2016 a representative of the Employer appeared at the scheduled hearing without counsel. Accordingly, I granted the Employer's request for an adjournment of the hearing to October 27, 2016.

On October 3, 2016, the Employer appealed the U.S. District Court's decision to the U.S. Court of Appeals (Second Circuit) (Employer Exhibit 2)

On October 27, 2016, the parties met prior to the commencement of the hearing and agreed on the precise amount the Benefit was owed for the period January 1, 2015 to September 30, 2015 pursuant to paragraph two of my award. However, the Employer asked that I stay my decision awarding the agreed upon amount due and payable the Benefit Fund pending a decision on its appeal the Court of Appeals.

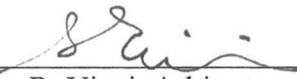
¹ The issue of Attorney's fees is currently not before me.

At the October 27, 2016 hearing I informed the parties that I would decline to stay payment of the amounts owed the fund for the period January of 2015 through September of 2015. As I explained to the parties, in paragraph two of my March 6, 2016 award I stated that I would retain jurisdiction over the amounts owed the Benefit Fund in the event the parties were unable to agree on the amounts due and payable by the Employer. Given that the parties have now agreed on the amounts due and payable, to wit, \$2,911,141.58 in principal and \$938,249.65 in interest, the unequivocal obligation to immediately remit these amounts is embodied in paragraph one of my March 6, 2016 award. My decision has been confirmed by the U.S. District Court and I can find no compelling reason to further delay payments to the Fund. An open ended delay of these payments possesses the potential to inflict financial harm to the Fund and jeopardize benefits to covered employees.

AWARD

Rite Aid of New York, Inc. shall without further delay remit to the National Benefit Fund the amounts agreed upon as spelled out above.

Dated: November 1, 2016



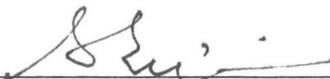
Alan R. Viani, Arbitrator

AFFIRMATION

State of New York)
County of Westchester) ss:

The undersigned, under 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: November 1, 2016



Alan R. Viani

Exhibit 7

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



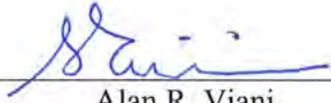
Alan R. Viani, Arbitrator

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

Exhibit 8

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

**RITE AID OF NEW YORK, INC. AND
RITE AID OF NEW JERSEY, INC.,
A SINGLE EMPLOYER**

and

Case 02-CA-160384

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST**

Rhonda Gottlieb, Esq., for the General Counsel.
Laura A. Pierson-Scheinberg, Esq., (*Jackson Lewis, P.C.*)
Baltimore, MD, for the Respondent.
Allyson L. Belovin and Susan J. Cameron, Esqs.,
(*Levy Ratner, P.C.*) New York, NY, for the Union.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed by 1199 SEIU United Healthcare Workers East (Union) on September 17, 2015, a complaint, as amended, was issued against Rite Aid of New York, Inc. and Rite Aid of New Jersey, Inc., a Single Employer (Respondent).

The Union has for many years been the admitted exclusive collective-bargaining representative of the Respondent's professional and nonprofessional employees in its New York and New Jersey stores. The staff pharmacists and the pharmacy interns who work in the New York stores are included in the unit. However, the staff pharmacists and pharmacy interns who work in the New Jersey stores are excluded from the unit.

Specifically, the unit description expressly excludes the store managers, pharmacy managers, supervising pharmacists, pharmacists in charge, New Jersey staff pharmacists and New Jersey pharmacy interns.

The complaint alleges that during the lengthy negotiation sessions in which the parties discussed the terms of a successor collective-bargaining agreement, the Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit. It is alleged that such a condition is not a mandatory subject of bargaining. The complaint alleges that by such conduct, the Respondent refused to bargain in good faith with the Union.

The Respondent's answer denied the material allegations of the complaint and on May 25 and June 6 and 7, 2016, this case was heard before me in New York, NY. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following:

Findings of Fact
I. Jurisdiction and Labor Organization Status

5 The parties stipulated that, for the purpose of this hearing, Rite Aid of New York, Inc.,
 and Rite Aid of New Jersey, Inc. (Respondent) will be treated as a single employer with all of
 the obligations that single employers have in Board proceedings. It was also agreed that in the
 event of a ruling against the Respondent, Rite Aid of New York, Inc., and Rite Aid of New
 Jersey, Inc. agree to be jointly and severally liable for any Board Order or Court mandate with
 respect to this proceeding or any supplemental proceeding in this case.

10 The Respondent, domestic corporation operating retail drug stores in and around New
 York State and New Jersey, has derived annual gross revenues in excess of \$500,000, and has
 purchased and received at its New York and New Jersey facilities goods valued in excess of
 \$5,000 directly from suppliers located outside those states.

15 The Respondent admits and I find that it is an employer engaged in commerce within the
 meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits and I find that the
 Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Bargaining

20 The most current collective-bargaining agreement was effective from October, 1998 to
 October, 2002.

25 The collective-bargaining unit, as set forth in the 2009 Memorandum of Agreement
 which modified the 1998 contract, is as follows:

30 All the professional and non-professional employees of the
 Employer in drug stores set forth in Article I hereof [the coverage
 clause of the contract such as certain counties in New York and
 certain counties in New Jersey but excluding staff pharmacists
 and supervising pharmacists from the unit], but excluding guards,
 store managers, co-managers, pharmacy managers, supervising
 pharmacists, pharmacist-in-charge, New Jersey staff pharmacists
 and pharmacy interns, and supervisors as defined by the National
 Labor Relations Act, as amended, in respect to rate of pay,
 35 wages, hours and other conditions of employment.

40 The contract was extended through several memoranda of agreement, and at the time of
 the hearing, continued in effect. Section 23 of the Memorandum of Agreement entered into in
 October, 2009 which was effective through April, 2015, states that "the employer agrees not to
 file a unit clarification petition or otherwise seek to remove pharmacists from the bargaining unit
 before or around the next round of collective bargaining negotiations in 2015."

The March 31, 2015 Session

45 Bargaining for a new contract began on March 31, 2015. Seventeen sessions were held
 thereafter. Present for the Union were Allyson Belovin, its attorney, and Laurie Vallone, its
 executive vice president, other officials and certain of the Respondent's employees. Present for
 the Respondent was Traci Burch, its senior vice president for labor relations, Gordon Hinkle, its
 50 senior labor relations manager, and David Gonzalez, a labor relations manager, and other
 managers.

The Respondent and the Union presented their proposals that day. Union official Vallone began the first session by stating that the Union made many “sacrifices” in the last contract because the Respondent was in a “precarious” financial position, but inasmuch as the Respondent’s economic situation has greatly improved, the Union looked forward to a good contract. Hinkle agreed that the Respondent’s financial picture had improved greatly but maintained that it still faced financial challenges which must be addressed.

The Respondent presented its proposals to modify the contract. The proposal at issue here was that the unit description be changed to state that the Union would be recognized as the representative of only certain specified positions, excluding pharmacists and pharmacist interns hired in New York stores after the ratification of the contract.

The effect of this proposed change was to remove future pharmacists and interns from the current recognized unit. Future pharmacists and interns are defined as those hired after the ratification of the contract. As noted above, the contract included pharmacists and pharmacy interns who worked in stores located in New York. The Respondent has for many years told the Union that it wanted to have the pharmacists excluded from the unit.

Respondent’s spokesperson Burch told the Union that the removal of future pharmacists and interns from the unit was “tied directly into the economics,” explaining that the proposal was a business initiative in which it sought to (a) save money to offset the costs of the National Benefit Fund for Hospital and Health Care Employees (NBF), the Union’s plan which funds medical benefits for its members and (b) have pharmacists act as managers.

Burch said that this proposal was based on what is occurring in the industry – the Respondent sought to have the pharmacists “leading” their stores and undertaking supervisory responsibilities. It must be noted that the recognition clause in the 2009 Memorandum of Agreement was amended to exclude supervisory pharmacists and pharmacy managers.

Hinkle testified that the business was growing in different directions and the Respondent needed to have its pharmacists involved with hiring, firing, disciplining and directing other pharmacy employees, and also act as managers in dealing with “wellness initiatives” including counseling of patients, handling customer issues, scheduling, performing outreach into the community and medical therapy management, and not just “counting pills and filling prescriptions.” He noted that this “transition” from a pharmacist’s “medical dispensing to wellness” began three to five years ago.¹

Hinkle further stated that in northern California the Respondent successfully negotiated the removal from the unit of pharmacists hired after the ratification of that contract, and it sought to do that here.

Hinkle explained that a typical Rite-Aid pharmacy has a pharmacy manager, a staff pharmacist, pharmacy techs and pharmacy cashiers. On the days that the pharmacy manager is not at work the staff pharmacist is on duty.

Hinkle stated that when the staff pharmacist is at work in the absence of a pharmacy manager, the pharmacist must have supervisory responsibility over the pharmacy techs and

¹ Edsel Geddes, a New York pharmacist, testified to his supervisory duties when he worked in New Jersey. He stated that his inability to discipline other employees for lateness or absences in New York could be very disruptive to the pharmacy’s workflow.

cashiers. He noted that a staff pharmacist represented by the Union would be unable to discipline or counsel another employee represented by the Union.

5 Union attorney Belovin testified that Vallone objected to that proposal which would change the scope of the unit by removing the pharmacists. She noted that the Union was founded by pharmacists. Vallone was quoted by Belovin as saying that such a proposal “was not something we are willing to entertain.” She added that the Union “said from the outset that it was not willing to entertain changing the scope of the unit to remove future pharmacists or interns from the unit.”

10 Similarly, Hinkle quoted Vallone as saying that the Union was not willing to listen to such a proposal. Belovin testified that, nevertheless, the Respondent repeated its proposal at every session, giving explanations as to why it sought the exclusion of future pharmacists and interns.

15 Belovin denied that the Union “shut down discussion” of the proposal, claiming that the Union did not do so because the Respondent continuously repeated it. She also stated that the Respondent did not state that it wanted to have pharmacy interns assume supervisory or managerial duties. She also noted that the Respondent made no specific proposal to add specific job duties to the position of future pharmacists.

20 Belovin stated that she did not recall Vallone asking what Burch meant concerning that proposal. She further stated that the Union did not make a request for information concerning it and that the Union never made a counter offer to that proposal, other than to have it removed from the bargaining table.

25 The Respondent made three other proposals which are relevant here:

30 1. It sought to institute “Rediclinics” in its stores. Rediclinics would provide non-emergency healthcare by nurse practitioners or physicians assistants.

35 2. It sought to institute the operation of concessions in its stores at its discretion without the Union’s consent, and that employees working in those concessions be excluded from the unit. The current contract provided that the Respondent was not permitted to open any concessions in its stores without the Union’s consent.

40 3. It sought to institute “Central Fill” in which prescriptions brought into a store would be sent to another Respondent’s location where they would be filled by non-union pharmacists rather than by the unit members in the store in which the prescriptions were originally brought.

45 The Union presented its proposals which were discussed.

The April 1 Session

50 Belovin began the session by stating that the Respondent’s proposal regarding future pharmacists and interns was a “nonstarter for the Union.” According to Hinkle, Belovin repeated that the Union would not entertain any package that included the removal of future pharmacists or interns from the unit.

The Union expressed a willingness to bargain about the Respondent's ability to establish concessions in the stores if the Union had notice and an opportunity to bargain about it. The Union did not agree to exclude from the unit employees working for the concessions. The Respondent said that it adhered to its four proposals without change.

5

An off the record discussion took place before the next bargaining session. During that meeting, Belovin explained to Burch and Hinkle that she recognized that the cost of the NBF was very high. She offered to work with the Respondent to find ways to offset that cost. However, she asked for "assurance" from the Respondent that if the Union engaged in that effort the Respondent would withdraw its proposal regarding future pharmacists and interns.

10

Burch responded that she could not say that the Respondent would withdraw its proposal, adding that she first wanted to see what the Union proposed regarding the cost of the NBF. Belovin repeated that before she undertook the effort to come up with a proposal, she wanted to be certain that the Respondent's proposal would be rescinded. Burch said that she could not make that commitment.

15

Burch asked Belovin if the Union would consider a change from the NBF to the Respondent's benefit plan. Belovin responded that the Union wanted to maintain the NBF.

20

The May and June Bargaining Sessions

At the May 5 bargaining session, the Respondent again proposed the removal of future pharmacists and interns from the New York unit. Its Negotiation Summary dated May 5 states "Article 2: Recognition – proposed to remove New York interns and staff RPH [pharmacists] from bargaining unit going forward. Current NY interns and RPH remain in."

25

At the June 22 session, Vallone remarked that the Union had been successful in obtaining a benefit which the Respondent had long sought. The Union had arranged with the NBF that employees could bring their mail order prescriptions to a Rite-Aid store. The store would send the prescriptions out to be filled and the employee could pick up the drugs at the store. This arrangement benefited the Respondent because it brought employees into the store where they may make other purchases.

30

Vallone told Burch that in return for this benefit for the Respondent, the Union asked that the Respondent's proposal to remove future pharmacists and interns from the unit be withdrawn. The Respondent refused.

35

At that session, the Respondent made an "economic proposal" for a one-year contract instead of a four year contract. According to Belovin, the parties had previously tentatively agreed to a four year contract.

40

The proposal included contributions to the NBF and the other Union Funds for one year. It specifically referred to the New York pharmacists and interns only in the following respect:

45

Article 5 - Wages

b. The following minimum hourly wage is hereby established for the categories herein below listed:

7. Pharmacy Interns Hired Before Ratification of this Agreement: \$9.50

50

8. Staff Pharmacists Hired Before Ratification of this Agreement: \$54.16.

5 The proposal contained no wage rates for pharmacists and interns hired after the ratification of the contract. Belovin testified that the Respondent's spokesperson stated that the omission of any wage rates for pharmacists and interns hired after the date of the ratification of the agreement was consistent with its original proposal not to have those persons included as part of the unit.

10 Belovin stated further that the Respondent did not offer to withdraw the future pharmacist and intern proposal if the Union agreed to a one-year contract.

15 Belovin testified that Hinkle began the session by saying that the Respondent proposed a one year contract in order to give the parties time to "figure out what the situation was" and try to deal with the economics. According to Belovin, later in the session the Respondent proposed a one-year contract because the Union's four year contract proposal was not agreeable to it because of the NBF and its other benefits. Burch said that she was trying to find creative ways to work together but the Respondent could not agree to the Union's economic proposal. She noted that she was not opposed to a four year contract but the economics of such a contract must be dealt with.

20 Belovin testified that Burch told the Union that there had been no change in its wage proposal from its prior proposal. The Respondent adhered to its proposal that future pharmacists and interns be removed from the New York unit.

25 Hinkle testified that the Respondent's one-year proposal made that day was to maintain the status quo. The Respondent would pay the requested rates for the NBF and for that year the pharmacists and interns would remain in the unit, and no one would be removed from the unit. However, during that year the parties would attempt to find offsets to the cost of the NBF.

30 However, the Respondent's written proposal did not expressly provide that the future pharmacists and interns would remain in the unit for that one-year period. Further, Hinkle conceded that the offer did not withdraw its previous requirement that the future pharmacists and interns be removed from the unit. As noted above, Belovin testified that the absence of the future pharmacists and interns from the proposal was consistent with the Respondent's position that they be removed from the unit.

35 Belovin testified that the one-year proposal did not include a provision that the Respondent would withdraw its proposal to remove future pharmacists and interns from the unit. She added that such a commitment was never communicated to the Union. Hinkle denied Belovin's testimony that the one-year deal included the Respondent's proposal to have future pharmacists and interns removed from the unit. He claimed that the purpose of the one-year contract was to maintain the status quo so that the parties could have additional time to find ways to offset the cost of the NBF.

45 This, of course, differs from Belovin's view of the Respondent's position. She stated that the proposal's failure to provide for wage rates for the future pharmacists and interns clearly shows that the Respondent made no change in its original proposals that they be removed from the unit. When asked about the omission, Hinkle stated that it was a "cut and paste" prepared by Gonzalez from a previous document.

50 Hinkle conceded that the Respondent's bargaining notes do not state that it was withdrawing its proposal to eliminate future pharmacists and interns from the unit. He further conceded that the notes state that it is "our intention to remove them in the future." According to

Hinkle, the Respondent intended, after the end of the one-year contract, to seek the removal of pharmacists because it needed them to assume supervisory responsibilities. He conceded, however, that such intent was not reflected in the Respondent's bargaining notes. Those notes do not reflect that the Respondent was changing its proposal to withdraw its proposal that future pharmacists and interns be removed from the unit.

Although Hinkle claimed that the Respondent's proposal for a one-year contract included the current pharmacists and interns in the unit for that one year, the proposal itself did not reflect that. Hinkle conceded as such, and further admitted that the Respondent made no correction to that proposal during bargaining.

The Union's bargaining notes reflect that Vallone remarked that the only change the Respondent made was to offer a one-year contract which was "regressive bargaining" with no other change.

Hinkle testified that he had no opportunity to correct Vallone's remarks because the Union continued talking. However, the Respondent's bargaining notes that day indicate that it continued to insist that future pharmacists and interns be removed from the unit. Moreover, the Union's notes indicate that Vallone asked for an explanation of how the one-year proposal differed from the four-year offer. She asked Hinkle "I have looked at your proposal, and where I am confused can you show me what is different than your proposal the first time. I went over it in detail, I can't see what is different in your economic proposal, and maybe you can help me? Tell me what is different?" Vallone added "the only change you did, in the tentative agreement ... you list a 4 year ... now you come back with a one year agreement and I call [that] regressive bargaining."

Further, the Union's notes indicate that that session lasted at least five hours – more than enough time for the Respondent's bargainers to interrupt the Union's alleged continuous talking to correct an important part of the one-year proposal – if it was indeed part of that proposal.

Hinkle noted that the Union's charge which alleged that the Respondent engaged in regressive bargaining was withdrawn because the bargaining was not regressive in that it offered a one-year contract that did not include the removal of the future pharmacists and interns from the unit. There was no proof, however, that that was the reason the Union withdrew its charge.

Belovin testified that although the Respondent explained its reasons for a one-year contract, it did not say that it was withdrawing its proposal to remove future pharmacists and interns from the unit.

The Union's original proposal included progressions in the minimum wage for certain job classifications each year until a certain rate was reached, after which employees in that job classification receive an across the board wage raise applicable to all employees.

The Respondent made a proposal to eliminate all progressions and to establish a single minimum rate within a job classification which all employees would receive whatever across the board wage increases were agreed to.

The Union's counteroffer agreed to eliminate all progressions in wage raises for cashiers going forward. The Respondent proposed to eliminate all wage progressions for all employees. The Union responded that it would agree to that proposal in exchange for a four year contract

which included all the Funds, an across the board wage raise and the retention in the unit of the future pharmacists and interns.

The July, August and September Sessions

5

At the July 15 session, the Respondent spoke about its proposal to modify the layoff and discharge clauses of the contract. Vallone said that she did not want to address that proposal until the Union's Funds were "secured." Burch said that she was waiting for the Union to be responsive to its business needs. The Union again asked that the Respondent withdraw its proposal to remove future pharmacists and interns from the unit and Burch refused.

10

15

At the July 16 session, the Respondent claimed that its employees were not using the Training and Upgrading Fund and sought ways to increase their participation in that Fund. The Union made a "package proposal" which included greater participation in the Fund, a four year contract with all the funds secured, and the inclusion of the future pharmacists and interns in the unit. In addition, the Union would permit the Respondent to engage in the Central Fill procedure it proposed if it did not result in any layoffs, and would also agree that the Respondent establish Rediclinics with the understanding that the Union would not seek to add employees to the unit, such as nurse practitioners and physicians assistants who had not historically been part of the unit.

20

25

At the August 11 session, the Respondent submitted a written proposal dated August 3. It offered a four year contract with participation in the NBF at the same rates as provided in the League of Voluntary Hospitals contract. However, its contribution to the NBF was conditioned on the Union's agreement that (a) the Respondent's delinquent retroactive contributions to the Funds be waived and (b) Employer contributions not be made based on overtime wages.

30

The Union refused to agree to those conditions because the Funds and not the Union could waive delinquent contributions, and it was the Funds' rules, not the Union's, which required that contributions be made based on overtime wages.

The proposal further provided that the Respondent:

35

a. Holds on its proposal to eliminate the staff pharmacist position from the bargaining unit going forward. All current staff pharmacists shall remain in the union, and

b. Holds on its proposal to remove all interns from the bargaining unit.

40

Belovin noted that this proposal differed from previous offers in that it proposed that all interns be removed from the unit, not all future interns as had been provided in prior proposals. However, she stated that, during the bargaining, the Respondent's proposal was clarified to state that it referred to future interns.

45

Both Burch and Gonzalez said that the Respondent maintained its proposal that future pharmacists and interns be removed from the unit.

50

Hinkle testified that at the August 11 session, Burch said that the NBF was very costly, estimated at \$35 million. She said that in order to assume that cost over the four year contract, the Respondent needed something to offset that expense. She suggested that offsets would include its proposed business initiatives of opening a Central Fill location and Rediclinics.

According to Hinkle, Burch described the removal of future pharmacists and interns from the unit as another business initiative it sought. The Union said that it was not interested in the latter proposal.

5 The Union responded that the change in the scope of the unit to remove future pharmacists and interns from the unit was a “nonstarter,” and that there could not be a contract that excluded those classifications. The Union asked the Respondent to withdraw that proposal and that it would then speak about the Respondent’s “real business needs.”

10 According to Belovin, Burch said that it was difficult for her to address the Union’s economic proposals when the Union had not addressed its business initiatives. According to Belovin, for the first time, Burch identified three of its prior proposals as “business initiatives” - Rediclinics, Central Fill and the removal of future pharmacists and interns from the unit.

15 Belovin noted that Burch commented that it was very important to the Respondent that pharmacists manage the store’s business and that it “doesn’t work to have managers in the Union.”

20 At the August 12 session, the Union asked for a response to its last economic proposal. Burch replied that she could not respond because the Union had not addressed the Respondent’s three business initiatives: Rediclinics, Central Fill and the removal of the future pharmacists and interns from the unit. As to the last initiative, Burch repeated that pharmacists were managers who should be performing managerial duties and should not be in the unit. The Union again insisted that that proposal be withdrawn and that it would then address the
25 Respondent’s business initiatives.

After this session the Respondent sent its employees an update of the bargaining. It stated, in relevant part:

30 Question: Why does Rite-Aid want Interns and Future Pharmacists out of the Union?

35 FACT: The business of pharmacy is changing in retail. To keep up with the changes, we need our pharmacists to actively participate in managing our stores and new business initiatives. Managers are never part of a Union. Interns will someday be Pharmacists, so they should be treated like management, too.

40 At the September 16 session, Belovin presented a “package proposal” pursuant to which the Union would agree to permit the Respondent to have a Central Fill procedure even if it resulted in layoffs. The Union repeated its agreement to permit Rediclinics if the Respondent gave the Union notice and an opportunity to bargain over the effects of that new operation. The Union also agreed to exclude from the unit those classifications of professional Rediclinic employees who had historically not been included in the unit. However, the Union refused to
45 agree to a waiver of retroactive contributions to the NBF and would not agree that contributions not be made on overtime wages.

50 Belovin asked whether a contract settlement was possible within those parameters. Burch replied that the Respondent needed all three initiatives.

The November and December Sessions

At the November 17 session the Respondent presented a written economic proposal which was identical to that presented at the August 11 session: the removal from the unit of future pharmacists and the removal from the unit of “all interns.”

Belovin testified that Gonzalez said that the offer was “contingent on agreement by the Union to all three of Rite Aid’s business initiatives,” one of which was the removal from the unit of the future pharmacists and interns. He said that it was also contingent on the waiver of retroactive contributions and that no contributions be made on overtime wages. Gonzalez added that if all three were not agreed to, “then this is not the offer.” Finally, Gonzalez said that its offer was contingent on the agreement being ratified by late December.

Belovin asked whether the proposal regarding NBF was contingent upon the waiver of retroactive contributions and no contributions on overtime and Gonzalez said that it was.

Belovin testified that she replied that the proposal was contingent on a number of things that the Union “can’t and won’t agree to” including the proposal to remove future pharmacists and interns from the unit.

Belovin quoted Vallone as saying that the Union could not waive the retroactive contributions to the NBF. She also quoted Vallone as remarking that the Respondent’s proposal regarding wages was very close to the Union’s proposal, and that while the Union had agreed to the Respondent’s Central Fill and Rediclinics proposal, the Union believed that the future pharmacists and interns’ proposal was not a business initiative but was instead “union busting.” Burch disagreed with that characterization.

The Union agreed to present a counteroffer at the next session which would not include an agreement to eliminate future pharmacists or interns from the unit. Burch replied that in exchange for the Respondent’s agreement on NBF it was “insisting on all of its business initiatives,” adding that she would not meet the Union’s demands without the business initiatives.

At the November 19 session, the Union presented a proposal in which it agreed to nearly all the Respondent’s demands regarding the Training and Upgrading and Child Care Funds. It accepted the Respondent’s wage proposal in its entirety, and also agreed to make significant modifications to the discharge and layoff contract clauses. Belovin testified that Gonzalez thanked the Union for the proposal which, according to him, “came a long way towards getting a final contract.” Indeed, in its brief the Respondent states that in the final four bargaining sessions, the parties “reached a tentative agreement on wages, aspects of grievance and discipline language, prior benefits language, drugfree workplace language, and changes to the training fund and outreach programs.”

According to Belovin, Gonzalez said that the Respondent would not withdraw its business initiatives proposal which included the removal of future pharmacists and interns from the unit. Belovin said that the Union’s agreement to the Respondent’s Central Fill and Rediclinics proposals was contingent on a four year contract with the Funds being secured and the maintenance of the scope of the unit as is, without the removal of the future pharmacists and interns. She repeated that such a proposal was not a business initiative, but was an example of “union busting.”

Hinkle stated that Burch denied the “union busting” charge, noting that the Respondent simply wanted its pharmacists to take on additional roles. According to Belovin, Burch restated that the stores must be managed and pharmacists needed to act as managers. Hinkle stated that Burch added that the management role that pharmacists should have was inconsistent with their being union members, and that the Respondent sought to have its pharmacists take on supervisory roles.

On November 23, 2015, the Respondent submitted a position statement in response to the Union’s charge of bad faith bargaining. That charge is not before me. In its statement, the Respondent stated:

Rite Aid’s proposal agreed to the majority of the union’s economic demands in exchange for the Union’s accepting certain business initiatives, including the removal of Interns and Pharmacists from the bargaining unit on a going forward basis. Only as regards to this one particular package has Rite Aid conditioned its acceptance of some mandatory subjects on the Union’s acceptance on a permissive subject.”

A federal mediator was present at the December 15 session. Belovin told him that the Union’s major concern was with the NBF and the other Funds. She advised the mediator that the Respondent made continued participation in the Funds contingent upon things that the Union was unable to agree to including a waiver of retroactive contributions, no contributions on overtime wages and the removal of future pharmacists and interns from the bargaining unit.

Belovin told him that the Union had already agreed to two of those proposals, Rediclinics and Central Fill, and the elimination of progressions. She also noted that the Union had made significant modifications to the layoff and discharge language of the contract.

The mediator reported to the Union that the Respondent posited the problem in negotiations as the Union’s refusal to bargain over the scope of the unit or over the methodology of the Funds, which made the economics “untenable.” Belovin told the mediator that the Union would consider a reduced economic package in exchange for an assurance that the Respondent would withdraw its proposal on the future pharmacists and interns.

Belovin stated that the mediator also reported to the Union that the Respondent refused to withdraw its proposal concerning the future pharmacists and interns, adding that it would agree to the Union’s Funds proposal but that it must “sacrifice” the pharmacists. Belovin refused to do that. Hinkle denied that the Respondent told the mediator that, explaining that its proposal related to future pharmacists and interns who were not yet in existence so they could not be “sacrificed.”

When the parties met following their separate sessions with the mediator, Vallone said that the Union and the pharmacists were not “going away ...it’s not going to happen now or ever.” The Union offered a reduced wage package to offset the cost of the NBF. A tentative agreement was made to a 3% across the board wage increase in each year of the contract.

The Final, March 29, 2016 Session

The mediator was present at this session. Burch asked whether (a) new employees could enroll in a medical plan other than the NBF (b) the Funds would give the Respondent a credit for those employees who did not enroll in the NBF (c) employees could make

contributions to the NBF through payroll deductions and (d) the Union had any other ideas for offsetting the costs of the NBF.

5 Belovin answered "no" to all the questions but indicated the Union's willingness to work with the Respondent to find ways to offset the cost of the NBF. She said that she recognized that the NBF is expensive but the Respondent's proposal to eliminate future pharmacists and interns from the unit was problematic. She said that the Union "repeatedly" told the Respondent that the Union was not required to bargain over that issue, and that the Respondent's insistence on that proposal was interfering with the Union's ability to bargain about anything else. She
10 urged Burch to take that proposal off the table and then "we can move on."

Hinkle stated that Belovin denied that the Union had any obligation to bargain over that proposal, saying that the Union would not entertain that proposal and would not bargain with the Respondent over the scope of the unit.
15

Burch refused to take the proposal off the table. She stated that "it's linked to the NBF. We're insisting on that proposal." Belovin asked her to make a proposal which did not include the removal of the future pharmacists and interns from the unit. Burch refused to do so because of the Union's insistence on retaining the NBF and its refusal to consider a substitute medical plan.
20

Belovin stated that she answered that the Union wanted the Respondent to continue to participate in the NBF but would consider any proposal the Respondent offered.

25 Hinkle testified that Belovin asked if there was any contract Burch was willing to sign that did not include removal of the future pharmacists and interns. Burch answered "no," explaining that as long as the Union continued to propose that the Respondent must stay in the NBF with no offsets to the \$35 million increase in cost over the four years of the contract, the Respondent would not agree to accept the NBF under those terms. Accordingly, the Respondent insisted on
30 its business initiatives which included removing the future pharmacists and interns from the unit.

The parties discussed the program, referred to above, in which the Union arranged to have the Respondent's employees submit their mail order prescriptions at a Rite-Aid store which would then mail the prescription to the NBF and the drug could be picked up at the store by the employee.
35

The Respondent asked that the Union and the NBF designate the Respondent's stores as the only ones to which employees could present their mail order prescriptions. Vallone asked the Respondent to withdraw its proposal regarding the future pharmacists and interns and that she would speak to the Funds regarding the Respondent's request for exclusivity.
40

Belovin testified that Burch replied that if the Union wanted the NBF "then we need to take the pharmacists and interns out of the unit."

45 The Respondent again requested that employees make contributions to the NBF through payroll deductions. The Union's bargainers replied that this was something the Union has not done, but in the interest of reaching agreement on a contract they could contact the highest Union officials and make such a request if they received assurances from the Respondent that if they sought such approval the Respondent would withdraw its proposal to
50 remove future pharmacists and interns from the unit.

While Burch did not say that the Respondent would withdraw its proposal if the Union obtained such approvals, she told the Union that it would be “worthwhile” for it to seek to obtain the Union’s agreement.

5 Hinkle testified that the Union continued to state that it was not interested in the Respondent’s proposal to remove the future pharmacists and interns from the unit. The Respondent asked the Union if it would entertain any other offsets that could change the Respondent’s \$35 million NBF cost. The Union agreed to ask whether Union officials would permit employees to make a contribution toward the NBF. Thereafter, the Union informed the
10 Respondent that that could not be done and the Union was not interested in the Respondent’s proposals. Hinkle further stated that the Union did not offer any other offsets to that “economic challenge.”

15 III. Events Following the March 29 Session

On April 21, Vallone wrote to the Respondent that it would not modify its proposal regarding the NBF and maintained its proposal that the Respondent continue to contribute to that Fund. Vallone further stated that the Union was not willing to bargain over any changes to the contract’s recognition clause that would modify the scope of the unit to exclude pharmacists
20 or interns.

Gonzalez replied to the letter, stating that the Respondent was “not seeking to modify the scope of the bargaining unit to exclude pharmacists or pharmacy interns.” He stated that “as we have explained repeatedly during bargaining, retail pharmacists should not be mere pill
25 counters; as such we have proposed to remove future pharmacists and interns from the unit, so that they may properly be engaged in management and supervisory responsibilities, in addition to their current bargaining unit functions. Because future pharmacists and interns will become 2(11) statutory supervisors, they will of course also be excluded from the bargaining unit, consistent with the CBA’s recognition clause.” He concluded by stating that despite Vallone’s
30 unwillingness to bargain, the Respondent believed that the Union had a good faith obligation to negotiate over this proposal.

Hinkle testified that Vallone’s letter did not accurately reflect the Respondent’s bargaining proposal. The letter claimed that the Respondent sought to modify the scope of the
35 unit to exclude future pharmacists and interns but, according to Hinkle, the Respondent did not seek to modify the scope of the unit. Rather, the Respondent’s proposal to remove future pharmacists and interns from the unit was a transfer of work, noting that it sought to transfer work because it wanted the pharmacists to continue doing the same work and, in addition, assume supervisory responsibilities.

40 However, Belovin testified that the Respondent did not make a proposal regarding the transfer of unit work or even refer to the transfer of such work during the negotiations. Indeed, Hinkle testified that there was no discussion during bargaining concerning whether its proposal was a modification of the scope of the unit because the Union refused to entertain the proposal
45 and would not discuss “anything” until the Respondent took it off the table.

Belovin stated that during negotiations, when she referred to the Respondent’s proposal to modify the scope of the unit by excluding the future pharmacists and interns, the Respondent’s agents did not correct her in her assertion that this was a “scope of the unit”
50 issue. Indeed, Belovin quoted Burch as saying that the Union would not bargain over the “scope of the unit.” According to Belovin, this was an acknowledgement by the Respondent that this was a “scope of the unit” issue and not a “transfer of work” issue.

Hinkle conceded that the Respondent's proposal did not specify "work." He further conceded that during the bargaining sessions the Respondent's agents did not use the words "transfer of work." Rather, they explained what work the Respondent wanted the future pharmacists and interns to perform. He stated that the Respondent did not make any written explanations about the transfer of work because each time it tried to discuss it the Union said that it was not interested in the proposal

Hinkle conceded that the Respondent's proposal would not take the work that the New York pharmacists did and transfer it outside the unit. Indeed, during bargaining the Respondent did not describe any task performed by current pharmacists that it sought to reclassify as non-bargaining unit work. However, Hinkle maintained that the work of the future pharmacists and interns would be removed from the unit.

Hinkle noted that the Respondent did not seek to remove a classification from the unit because the classification exists as "staff pharmacists." Rather, the Respondent sought to transfer unit work and he conceded that it is required to negotiate the issue of transfer of work.

Hinkle stated that the Union's main issue was the maintenance of the NBF without change, and its desire to have the Respondent agree to the changes that the League of Voluntary Hospitals agreed to. He noted that the Union did not agree to an alternative to the NBF or the creation of a new, less expensive Fund. In fact, according to Hinkle, the Union rejected all of the Respondent's ideas and did not offer any proposal to reduce or offset the economic cost of the NBF.

Hinkle testified that the Respondent's priorities are its business initiatives including Rediclinics, Central Fill locations and the future pharmacists and interns.

Hinkle stated that the Respondent never conditioned its proposal regarding future pharmacists and interns to an agreement on the NBF. However, he maintained that the Respondent linked its three business initiatives to the Union's NBF proposal. He noted that, in addition to the Respondent's belief that its pharmacists are supervisors and must act as such, its linkage relates to the cost of maintaining the pharmacists and interns in the unit. He explained that removal of the future pharmacists and interns from the unit will result in less cost because it would not have to contribute to the NBF in their behalf. He further stated that he expected that the pharmacists would have a positive impact on store sales since they would be leading new initiatives and acting as wellness store leaders. Such improvement in store sales would help the Respondent offset the costs of the NBF.

Belovin testified that the Respondent's bargaining agents at no time during negotiations said that the Respondent would withdraw its proposal to eliminate future pharmacists and interns from the unit, and the Respondent never made a proposal that did not include the elimination of future pharmacists and interns from the unit.

On June 2, 2016, the Respondent wrote to the Union that the Union has "shut down all discussion of Rite Aid's proposal from the beginning of negotiations."

IV. The Positions of the Parties

The complaint alleges that the Respondent failed to bargain in good faith with the Union by insisting, as a condition of reaching any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from

the bargaining unit.

5 The General Counsel asserts that the issue of the removal of positions from a bargaining unit constitutes a change in the scope of a unit, a permissive subject of bargaining as to which a party is not required to bargain.

10 The Respondent makes several arguments. First, it contends that its proposal to remove the future pharmacists and interns from the unit is an issue concerning a transfer of bargaining unit work out of the unit, a change in the terms and conditions of employment and thus a mandatory subject of bargaining, and not a scope of the unit issue. Second, it asserts that it did not insist on the removal of the positions at issue from the bargaining unit. Third, it maintains that it was permitted to link or package a permissive subject of bargaining, the removal of the future pharmacists and interns from the unit, with economic terms which are mandatory subjects of bargaining.

15

Analysis and Discussion

I. Permissive or Mandatory Subject of Bargaining

20 Section 8(d) of the Act defines the scope of the duty to bargain collectively as encompassing “wages, hours, and other terms and conditions of employment.” Those are the mandatory subjects of bargaining—the ones over which a party must bargain if requested to by the other party.

25 “Permissive” subjects of bargaining are those not involving wages, hours, or other terms and conditions of employment. Parties may bargain over those subjects if they choose to do so. Because neither party is required to bargain at all over a permissive subject, a party may not lawfully bargain to impasse over a permissive subject. *Antelope Valley Press*, 311 NLRB 459, 460–62 (1993).

30

The Board has long held that “bargaining unit description clauses, sometimes called bargaining unit scope clauses, are nonmandatory bargaining subjects.” *Bremerton Sun Publishing Co.*, 311 NLRB 467, 474 (1993) and cases cited therein.

35 In *Hill-Rom Co., Inc., v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992), the court defined permissive subjects of bargaining as those “which fall outside the scope of Section 8(d) of the Act and cannot be implemented by the employer without union or Board approval.” The court stated that “there is no doubt that the scope of the employees’ bargaining unit is a permissive subject of bargaining, regardless of whether the unit has previously been certified by the Board or voluntarily agreed upon by the parties.”

40

II. The Alleged Transfer of Work out of the Unit

45 The Respondent also argues that its proposal at issue is not a proposal to modify the scope of the bargaining unit but is a proposal to transfer work out of the unit to the future pharmacists and interns who will be performing work as statutory supervisors.

50 The Respondent correctly notes that the transfer of work outside the bargaining unit is a mandatory subject of collective bargaining, and the employer’s right to effect such a lawfully motivated transfer after impasse is not negated by a showing that upon such a transfer, a job classification within the unit will have no incumbents and, therefore, will be dormant at best. *Hill-Rom Co.*, 297 NLRB 351, 357–59 (1989).

5 But as the Board held in *Somerset Valley Rehabilitation and Nursing Center*, 364 NLRB No. 43, slip op. at 4 (2016), eliminating a unit classification alters the scope of the unit, and such an action is a permissive subject of bargaining. See, e.g., *Shell Oil Co.*, 194 NLRB 988, 995 (1972). Accordingly, once a specific job has been included in the bargaining unit, it cannot be removed from the unit absent the union's consent or a Board order. *Wackenhut Corp.*, 345 NLRB 850, 852 (2005).

10 Similarly, in *Aggregate Industries*, 359 NLRB No. 156 (2013), the Board stated that “an employer may not, under the guise of transferring unit work, alter the scope of the bargaining unit. *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 975-976 (10th Cir. 1990); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73, 77-78 (4th Cir. 1979). The Board has rejected attempts by employers to characterize a change in unit scope as a transfer of work when the same employees continue to do the work. See, e.g., *Beverly Enterprises, Inc.*, 341 NLRB 296, 296 (2004) (“the same employees continue to do the work. The respondent attempted to change the scope of the bargaining unit by taking the position that these represented employees and their work were now outside the bargaining unit.”); *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140-1141 (1982).

20 However, Hinkle conceded that the Respondent’s written proposals did not refer to the work duties of the future employees or a transfer of work out of the unit. Indeed, Hinkle stated that “in my opinion, we’re transferring work because we want them to continue doing the same work. In addition to that take on supervisory functions.” Nevertheless, Belovin testified that the Respondent did not make a proposal regarding the transfer of unit work or even refer to the transfer of such work during the negotiations.

25 The Respondent’s proposal was always that the pharmacists and interns be excluded from the unit. However, it must be noted that in its claim that future employees would assume supervisory responsibilities the Respondent only referred to the pharmacists and not the pharmacy interns as taking on that role. Thus, Hinkle testified that the Respondent’s business model contemplated that in the absence of the pharmacy manager it was expected that the “pharmacist,” not the pharmacy intern, would supervise the other store employees.

30 Thus the Respondent’s argument that its proposal contemplated the transfer out of the unit of employees who were expected to exercise supervisory duties cannot stand because the interns, who were also to be removed, were never intended to perform supervisory duties upon their exclusion from the unit.

40 In attempting to accommodate the rights of the parties concerning questions of a change in the scope of the unit versus the employer’s right to transfer work out of it, the Board has stated that it will first determine whether the employer has insisted on a change in the unit description. It held that “in accord with long-established precedent, we shall continue to find any such insistence to be unlawful, even if the unit is described in terms of work performed. The union is the representative of the employees who currently perform the work. A proposal to change the actual unit description would raise questions regarding the union’s right to represent those employees. The employer consequently may not insist on such a proposal.” *Antelope Valley Press*, above.

50 Here, inasmuch as the Respondent has insisted on a change in the unit description, the removal of the future pharmacists and interns therefrom, a violation has been proven.

The Board has acknowledged that “it is sometimes difficult to determine whether a change affecting a classification of unit employees is an alteration in the scope of the unit or a transfer of unit work. See *Antelope Valley Press*, 311 NLRB 459 (1993).

5 Where the employer effectively eliminates positions by reclassifying unit, nonsupervisory positions as supervisory positions in order to remove them from the bargaining unit, the employer alters the scope of the unit.

10 In *Holy Cross Hospital*, 319 NLRB 1361, 1364-1365 (1995), the employer created a supervisory shift manager’s position. That position, which was not part of the unit, included many of the duties of the existing house supervisors. The employer’s plan resulted in the virtual elimination of the unit house supervisor position. The Board, citing *Hill-Rom*, above, noted that the employer’s action resulted in the “virtual elimination of the house supervisor position,” adding that “once a specific job has been included within the scope of the unit by either Board
15 action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board.” 319 NLRB at fn. 2. Accordingly, the Board held that the employer’s action was a scope of the unit question and not a transfer of work issue.

20 In *Mt. Sinai Hospital*, 331 NLRB 895, 908 (2000), the Board found that by reclassifying unit sous chefs as non-unit supervisors, the employer “altered the scope of the unit and violated Section 8(a)(5) and (1) of the Act.” The Board emphasized that the employer reclassified the existing unit position in order to remove it from the bargaining unit. It further noted that the employees “continued to perform essentially the same work they had previously performed.” Here, too, it is contemplated by the Respondent that the pharmacists would continue to perform
25 their regular work while, in addition, they would perform supervisory duties. Accordingly, the Respondent did not create a new position but reclassified an existing, unit job.

 The Respondent’s reliance on *Hampton House*, 317 NLRB 1005 (1995) is misplaced.. After the union demanded that certain LPNs be terminated for nonpayment of dues, the employer promoted them to a new position of LPN supervisor and insisted that they were no
30 longer in the unit. The LPN supervisors continued to perform the work they had done as unit LPNs, although they were assigned additional supervisory responsibilities.

 The Board held that the effect of the employer’s conduct was to transfer work out of the unit and not a change in the scope of the unit caused by the promotion of the LPNs to
35 supervisors. The Board further held that when an employer promotes an employee to a supervisory position and the new supervisor continues to perform former bargaining unit work, the work is removed from the bargaining unit. That is a change in the bargaining unit’s terms and conditions of employment, giving rise to the employer’s bargaining obligation under Section 8(d) of the Act.
40

 The distinguishing feature of *Hampton House* and the instant case is that, in *Hampton House* the employer created a new position, that of LPN supervisor. Here, the Respondent did not propose the creation of a new position. It simply reclassified the existing position of pharmacist to that of supervising pharmacist for the New York stores. Accordingly, by doing so
45 the Respondent seeks to change the scope of the unit. *Mt. Sinai*, above.

 The Respondent’s reliance on *Wackenhut Corp.*, 345 NLRB 850, 851(2005), is also misplaced. In that case, the employer employed unit member “security officers” and non-unit “lieutenants” among other classifications, to protect a nuclear power plant. The security officers and lieutenants performed CAS/SAS operations.
50

In negotiations with the union, the employer proposed that all its security officers would become lieutenants who would be non-unit supervisors. It posted “new supervisory positions.” Fifteen employees were promoted from the unit to the new supervisory positions.

5 The Board held that the employer violated Section 8(a)(5) and (1) of the Act by eliminating the CAS/SAS operators from the bargaining unit and by reclassifying the CAS/SAS operators as nonunit lieutenants. The Board noted that the employer violated the Act when it “unilaterally removes a position from a bargaining unit, without first securing the consent of the bargaining representative or the Board.

10 In *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542, 544 (1993), also relied on by the Respondent, the Board held that the employer’s conferring supervisory responsibilities on the captains of its boats did not violate Section 8(a)(5) and (1) because the employer did not seek to undermine the Union. Rather it represented a “sincere effort to provide onsite supervision of its vessels through the performance of supervisory duties by its captains.”

15 The Board held that the assignment of supervisory duties to captains was not an alteration of the scope of the bargaining unit, but rather a mandatory subject of bargaining.

The Board stated that the “duties of the captains who were promoted to supervisors had changed. The Respondent did not merely retitle bargaining unit employees who, despite the classification change, would merely have continued to perform solely bargaining unit work.
20 Instead, the Respondent required the captains to perform supervisory tasks and imbued them with the authority of statutory supervisors and managers-powers and responsibilities that they had not clearly exercised in the past.”

25 Thus, *Bridgeport* stands for the proposition that the promotion of unit employees to supervisory positions and who perform purely supervisory duties is a mandatory subject of bargaining and not an alteration of the scope of the bargaining unit.

Here, however, the Respondent’s plan for the future pharmacists was to have them continue to perform their current pharmacist’s duties and, in addition, assume supervisory responsibilities. Hinkle’s testimony and Gonzalez’ letter in reply to Vallone confirmed that the supervisory duties of the future pharmacists were “additional” duties to those they already
30 exercised. This, this case differs from *Bridgeport* in that the pharmacists are intended to perform their regular duties in addition to supervisory roles.

I also note that in *Bridgeport* and the cases cited therein, an *actual*, demonstrated need for unit employees to perform supervisory responsibilities was established by those employers. Here, the Respondent set forth, at most, a speculative need for such an addition to their duties.
35 Thus, the New York stores had operated for many years with just a supervisory pharmacy manager in charge. The New York pharmacists never had supervisory duties.

In *Aggregate industries*, above, the Board held that by unilaterally moving a classification of drivers and the work they performed from coverage under one contract to coverage under a less-favorable contract, the Respondent violated the Act. It found that the employer’s movement
40 of the drivers was a change in the scope of the bargaining unit--a permissive subject of bargaining--and therefore could not be implemented without first reaching agreement with the union. The Board further found that even if the Respondent's action was properly characterized as a transfer of unit work, and therefore constituted a mandatory subject of bargaining, the respondent violated the Act by acting without giving the union sufficient notice and an
45 opportunity to bargain concerning the change.

Based on the above, I find that the Respondent, in proposing that future New York pharmacists and interns be excluded from the bargaining unit in fact proposed an alteration in the scope of the unit, a permissive subject of bargaining, and not a transfer of work from the bargaining unit.

III. The Respondent's Insistence on the Exclusion from the Unit of the Future Pharmacists and Interns

It has consistently been held that although a party may bargain regarding a permissive subject it is not required to do so. While the parties are permitted to bargain over a change in the scope of a unit, they are not obligated to do so. Each party is free to make proposals on nonmandatory subjects, "to bargain or not to bargain, and to agree or not to agree." However, a party may not insist upon agreement to a nonmandatory subject as a condition precedent to entering any collective-bargaining agreement. Such conduct violates Section 8(a)(5) because it is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

Here, the Respondent continually, at each bargaining session, repeated its demand that the future pharmacists and interns be excluded from the contract being negotiated. At each session the Union repeated its refusal to consider or even speak about the Respondent's proposal as it was a permissive subject of bargaining. The Union continually asked the Respondent to withdraw its proposal but the Respondent refused to do so.

In *Borg-Warner*, the Court noted that the employer, as here, made its offer of a contract "contingent" on the union's acceptance of the nonmandatory terms. Also, as here, the union asked the employer if it would withdraw its demand for the permissive subject. Here, the Union also asked the Respondent if it would make any other offer that did not include the exclusion of the future pharmacists and interns from the unit and the Respondent replied that it would not.

The Board, citing *Borg-Warner Corp.*, above, found that a union unlawfully refused to bargain with an employer by insisting that a previously excluded class of employees be included in the unit. *District 50, United Mine Workers of America*, 142 NLRB 930, 939 (1963). Similarly, an employer's insistence that shipping and receiving clerks be excluded from the unit in the face of the union's "repeated rejection of the proposal" constituted the employer's insistence on its proposal. The Board held that it is well settled that a violation of Section 8(a)(5) occurs if one party insists upon such a change as a condition to finalizing a contract. *Antelope Valley Press*, above, at 460-462.

The Board has long held that it is unlawful for a party to condition its agreement concerning a mandatory subject of bargaining on the union's consent to a nonmandatory subject. *Borg-Warner*, above; *Smurfit-Stone Container*, 357 NLRB 1732, 1735-1736 (2011).

In *Smurfit-Stone*, the Board reposed the question decided in *Borg-Warner*. "The proper legal test in this case for unlawful insistence under *Borg-Warner* is "whether agreement on the mandatory subjects of bargaining [was] conditioned on agreement on the nonmandatory subject of bargaining." The Board found that the employer unlawfully refused to bargain by conditioning any agreement upon the union's consent to a nonmandatory subject.

An element in a finding of unlawful insistence is where the objecting party has refused to bargain over the nonmandatory subject. *Laredo Packing Co.*, 254 NLRB 1, 19 (1981). Here it is

undisputed that the Union repeatedly refused to bargain over the exclusion of the future pharmacists and interns from the bargaining unit.

5 A party may not insist on the acceptance of a nonmandatory proposal as a condition of reaching agreement once the other party has refused to bargain over the nonmandatory subject. See *KCET-TV*, 312 NLRB 15, 1–16 (1993); *Laredo Packing Co.*, 254 NLRB 1, 19 (1981).

10 The controlling factors in determining whether a party insisted unlawfully upon a subject in the course of bargaining are (1) whether the demand was on a mandatory or voluntary subject of bargaining and (2) whether the insisting party persisted in demanding the nonmandatory provision in the face of continuing rejection by the other party. Furthermore...it is
15 sufficient that the nonmandatory subject be one of the subjects preventing agreement on a contract; it need not be the sole issue remaining unresolved. *National Fresh Fruit and Vegetable Company and Quality Banana Co., Inc.*, 227 NLRB 2014, 2015, (1977).

20 It is therefore well established that a party “ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum.” *Longshoremen ILA v. NLRB*, 277 F.2d 681, 683 (D.C. Cir. 1960); *Detroit Newspaper Agency*, 327 NLRB 799, 800 (1999).

25 I reject the Respondent’s contention that it did not insist that the Union agree to its proposal to exclude future pharmacists and interns from the unit in the contract being negotiated. Belovin credibly testified that Gonzalez said during bargaining that its offer was “contingent” on the Union’s agreement to all three of its business initiatives. Gonzalez did not
30 testify and therefore did not contradict Belovin’s testimony that he made the Union’s agreement to the removal of the future pharmacists and interns “contingent” on agreement to the other terms of the proposal.

35 In addition, as set forth above, the Respondent’s position statement maintains that “as to this one particular package [the three business initiatives] Rite Aid conditioned its acceptance of some mandatory subjects on the Union’s acceptance on a permissive subject.”

40 In order to rebut the General Counsel’s evidence that the Respondent insisted on the removal of the future pharmacists and interns from the unit, the Respondent claims that it offered a one-year contract maintaining the “status quo.”

Hinkle testified that the Respondent’s one-year proposal was intended to retain the future pharmacists and interns in the unit for the one year term of the proposed contract. However, I find that such a claim is contradicted by documentary and other evidence.

45 As set forth above, the written proposal did not expressly provide that the future pharmacists and interns would remain in the unit for that one-year period. Further, Hinkle conceded that the offer did not withdraw the Respondent’s previous requirement that the future pharmacists and interns be removed from the unit. As noted above, Belovin testified and I agree that the absence of the future pharmacists and interns from the proposal was consistent with the
50 Respondent’s position that they be removed from the unit.

Further proof that the one-year proposal did not include the future pharmacists and interns is seen in the absence therein of any wage rates for those two classifications. Hinkle's attempt to blame the absence of any reference to the future pharmacists and interns on Gonzalez' "cut and paste" preparation of the proposal falls short of establishing that the one-year proposal, in fact, preserved their presence in the unit that year.

In addition, as noted above, the Respondent's bargaining notes contemporaneously recorded that day state that it continued to insist that future pharmacists and interns be removed from the unit. In this regard, the Respondent's attempt to disavow Gonzalez' notes of the bargaining meetings on the ground that they differed from Hinkle's post-meeting testimony must be rejected. Contemporaneous notes taken at the meetings must be regarded as more reliable than testimony received one year later.

I reject Hinkle's testimony that the Respondent did not have an opportunity to correct Vallone's challenge that he explain how the proposal differed from its prior offer. That session consumed at least five hours – more than enough time for its agents to interject that the one-year proposal included the retention of the two categories of employees in the unit for that one year. Moreover, as set forth above, Vallone practically begged Hinkle to explain how the Respondent's one-year contract proposal differed from its prior four-year offer. Hinkle could not do so and he definitely did not state that the pharmacists and interns would remain in the unit that year.

I accordingly find and conclude, as alleged, that the Respondent insisted on the exclusion of the future pharmacists and interns from the unit as a condition of its agreeing to a contract containing mandatory terms and conditions of employment.

IV. Linkage of the Permissive Subject with the Mandatory Subject of Bargaining

The Respondent maintains that it was permitted to link or package a permissive subject of bargaining, the removal of the future pharmacists and interns from the unit, with economic terms which are mandatory subjects of bargaining. The Respondent identified the mandatory subject of bargaining as its seeking offsets to the NBF and the Union's agreement to its three business initiatives.

The Board has held that a nonmandatory bargaining subject may become mandatory based on the nature of its relationship with mandatory subjects under negotiation. It has held that a "sufficient nexus" between the permissive subject and the mandatory subject may convert the permissive subject into a mandatory subject for bargaining. *Smurfit-Stone*, above at 1734.

However, the Board emphasized that the permissive subject must be "so intertwined with and inseparable from the mandatory terms and conditions for the contract currently being negotiated as to take on the characteristics of the mandatory subjects themselves." *Smurfit Stone*, above, at 1734, citing *Sea Bay Manor Home for Adults*, 253 NLRB 739 (1980).

The Board has considered linkage where a proposal that employees sign a general liability release upon receiving severance pay, a nonmandatory subject, is linked with a severance pay proposal, a mandatory subject. The question was whether the connection between the two was sufficient to convert the permissive subject to a mandatory subject of bargaining. The Board also considered whether the proposal for a release was "sufficiently specific to the employer's potential liability arising out of the layoffs that a cost/benefit linkage with severance pay was evident." *Smurfit-Stone*, above.

5 It must be noted that such a finding of a nexus of a permissive subject to a mandatory subject is “rare.” The Board noted that simply offering the nonmandatory term as a “quid pro quo” for the mandatory term was insufficient to establish the necessary nexus. In that case the Board noted that simply “pairing the two would become a device to circumvent the general rule that one may not insist on a [permissive subject] to impasse.” *Smurfit-Stone*, above.

10 I cannot find that a sufficient nexus has been established between the permissive subject, the proposal to exclude the pharmacists and interns from the unit, and the mandatory subject, the Respondent’s seeking offsets to the NBF and the Union’s agreement to its business initiatives.

15 Here, as in *Smurfit-Stone*, I find that the Respondent’s proposal that the Union offer offsets to the NBF and the Union’s agreement to the Respondent’s business initiatives were simply part of the Respondent’s proposal which constituted the consideration it requested in exchange for the Union’s agreement to exclude the future pharmacists and interns from the unit. This “quid pro quo” was insufficient, as it was in *Smurfit-Stone*, to establish the requisite nexus.

20 The permissive subject and the mandatory subject were not interdependent, nor were they factually linked. *Borden, Inc.*, 279 NLRB 396, 399 (1986). See *Regal Cinemas, Inc.*, 334 NLRB 304, 305 (2001). The two proposals, permissive and mandatory, are distinct and unrelated. The exclusion of the future pharmacists and interns from the unit concerns the scope of the unit and whether certain categories should be included therein in a new contract.

25 On the other hand, the Respondent’s mandatory subject, its request for offsets to the NBF, is purely economic. The Respondent sought ways in which it could reduce its payments to the NBF. The Respondent asked the Union if it (a) would consider a different benefit plan (b) waive the Respondent’s delinquent retroactive contributions to the NBF and (c) would agree that its contributions not be made based on overtime wages.

30 Thus, the permissive subject and this mandatory subject have no relation to each other. The Union’s agreement to offsets to the NBF are independent, rather than interdependent on the exclusion of the future pharmacists and interns from the unit.

35 Offsets to the NBF could be agreed on regardless of the removal of the future pharmacists and interns from the unit. Stated another way, offsets to the NBF could be made without the Union’s agreement to the permissive scope of unit proposal. The two proposals are not factually linked. If the Respondent’s argument is accepted a permissive subject would become mandatory wherever it was simultaneously presented with a mandatory one. *Borden, Inc.*, 279 NLRB 396, 399 (1986).

45 The mandatory subjects proposed by the Respondent, that the Union agree to its business initiatives which it also claims was linked to the Union’s NBF proposal also lacked interdependence with the permissive subject. Rediclinics and Central Fill related to the ability of the Respondent to provide non-emergency health care to customers and permit prescriptions brought into its stores to be filled at other stores. I cannot find that those two initiatives are intertwined with and inseparable from the permissive subject. They are unrelated to the exclusion from the unit of the two contested categories of employees. If both initiatives were agreed to they would have no bearing and no relation to the exclusion of the future pharmacists and interns from the unit, the permissive subject insisted upon by the Respondent.

Labor Relations Act, as amended, in respect to rate of pay, wages, hours and other conditions of employment.

5 4. By insisting, as a condition of reaching an agreement on any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit, a nonmandatory bargaining proposal, the Respondent violated Section 8(a)(5) and (1) of the Act.

10 5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

Remedy

15 Having found that the Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

20 Having found that the Respondent insisted, as a condition of reaching an agreement on any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit, a nonmandatory bargaining proposal, the Respondent shall be ordered to bargain with the Union without conditioning agreement on the Union's agreement to a nonmandatory bargaining subject.

25 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

30 The Respondent, Rite Aid of New York, Inc., and Rite Aid of New Jersey, Inc., a Single Employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

35 (a) Insisting, as a condition of reaching an agreement on any collective-bargaining agreement, that 1199 SEIU United Healthcare Workers East agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit.

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

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

45 (a) Upon request, bargain in good faith with 1199 SEIU United Healthcare Workers East in the following appropriate collective-bargaining unit and reduce to writing and sign any agreement reached as a result of such bargaining:

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.,

5 All the professional and non-professional employees of the
 Employer in drug stores set forth in Article I hereof [the coverage
 clause of the contract such as certain counties in New York and
 certain counties in New Jersey but excluding staff pharmacists
 and supervising pharmacists from the unit], but excluding guards,
 store managers, co-managers, pharmacy managers, supervising
 pharmacists, pharmacist-in-charge, New Jersey staff pharmacists
 and pharmacy interns, and supervisors as defined by the National
 Labor Relations Act, as amended, in respect to rate of pay,
 10 wages, hours and other conditions of employment.

15 (b) Within 14 days after service by the Region, post at its facilities in all its stores in New
 York State, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms
 provided by the Regional Director for Region 2, after being signed by the Respondent's
 authorized representative, shall be posted by the Respondent and maintained for 60
 consecutive days in conspicuous places including all places where notices to employees are
 customarily posted. In addition to physical posting of paper notices, the notices shall be
 distributed electronically, such as by email, posting on an intranet or an internet site, and/or
 20 other electronic means, if the Respondent customarily communicates with its employees by
 such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are
 not altered, defaced, or covered by any other material. In the event that, during the pendency of
 these proceedings, the Respondent has gone out of business or closed the facility involved in
 these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the
 notice to all current employees and former employees employed by the Respondent at any time
 25 since March, 2015.

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

Dated, Washington, D.C. November 30, 2016



 Steven Davis
 Administrative Law Judge

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the
 notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted
 Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National
 Labor Relations Board."

**APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government**

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

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

WE WILL NOT insist, as a condition of reaching an agreement on any collective-bargaining agreement, that 1199 SEIU United HealthCare Workers East, agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit.

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

WE WILL upon request, bargain in good faith with 1199 SEIU United Healthcare Workers East in the following appropriate collective-bargaining unit and reduce to writing and sign any agreement reached as a result of such bargaining:

All the professional and non-professional employees of the Employer in drug stores set forth in Article I hereof [the coverage clause of the contract such as certain counties in New York and certain counties in New Jersey but excluding staff pharmacists and supervising pharmacists from the unit], but excluding guards, store managers, co-managers, pharmacy managers, supervising pharmacists, pharmacist-in-charge, New Jersey staff pharmacists and pharmacy interns, and supervisors as defined by the National Labor Relations Act, as amended, in respect to rate of pay, wages, hours and other conditions of employment.

**RITE AID OF NEW YORK, INC. AND RITE AID OF
NEW JERSEY, A SINGLE EMPLOYER**

(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to

file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

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

The Administrative Law Judge's decision can be found at www.nlr.gov/case/02-CA-160384 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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

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

Exhibit 9



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 02
26 Federal Plz Ste 3614
New York, NY 10278-3699

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

May 30, 2017

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

Re: 1199SEIU Healthcare Workers East
(Rite Aid of New York, Inc.)
Case 02-CB-184444

Dear Ms. Pierson-Scheinberg:

We have carefully investigated and considered your charge that 1199SEIU Healthcare Workers East has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

You have alleged that the Union violated Section 8(b)(3) of the Act by failing to bargain in good faith with Rite Aid of New York (the Employer). First, the charge alleges that the Union acted in bad faith by directing the 1199SEIU National Benefit Fund (the Fund) to threaten cancellation of employee benefits, in order to coerce the Employer at the bargaining table. However, it is well-established that trustees of jointly administered funds, such as the Fund at issue here, are generally not considered agents of their respective parties. The investigation produced no evidence to support a finding that the Union had the authority or ability to control the Fund, or that the Fund was acting on behalf of the Union when it sent cancellation notices to the Employer or the employees. Rather, the evidence shows that the Fund took steps to cancel benefits due to the Employer's delinquency after months of underpayment.

Second, you have alleged that the Union violated Section 8(b)(3) of the Act by refusing to bargain over the Employer's proposals to change the unit description. However, the evidence establishes that the Employer's proposals are a change in the unit scope, which is a permissive subject of bargaining. Accordingly, the Union may lawfully refuse to bargain over these proposals.

Third, you have alleged that the Union violated Section 8(b)(3) of the Act by refusing to bargain over the Employer's proposed health care plan, which would replace the Fund. However, the evidence shows that the Employer prematurely declared impasse without exhausting the possibility of further movement by the Union.

Finally, you have alleged that the Union violated Section 8(b)(3) of the Act by failing to provide information to the Employer. A union's responsibility to provide information regarding a jointly administered benefit fund is ordinarily limited to providing information that it actually possesses. A union generally does not have an obligation to request or obtain information not in its possession from a jointly administered fund, unless it is shown to be *de facto* in control of the nominally independent fund. Here, the evidence does not support a finding that the Union controlled the Fund, and there is no evidence that the Union possessed any responsive information that it did not provide to the Employer.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlr.gov and:

- 1) Click on E-File Documents;
- 2) Enter the NLRB Case Number; and,
- 3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlr.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. 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, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

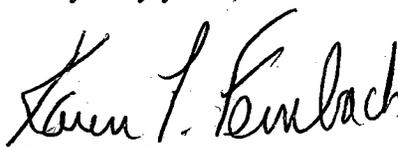
Appeal Due Date: The appeal is due on June 13, 2017. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than June 12, 2017. **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** June 13, 2017. 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 June 13, 2017, **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: 1199SEIU United Healthcare Workers East
Attn: George Gresham, President
310 West 43rd Street
New York, NY 10036-6407

Allyson L. Belovin, Esq.
Levy Ratner, P.C.
80 8th Avenue, 8th Floor
New York, NY 10011-7175

Traci Burch, Labor Counsel
Rite Aid of New York, Inc.
30 Hunter Lane
Camp Hill, PA 17011-2400

Nicole Berner, General Counsel
Service Employees International Union
1800 Massachusetts Avenue, N.W.
Washington, DC 20036-1806

Exhibit 10

**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

Exhibit 11



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

June 5, 2017

LAURA A. PIERSON-SCHEINBERG, ESQ.
JACKSON LEWIS, P.C.
2800 QUARRY LAKE DR STE 200
BALTIMORE, MD 21209

Re: 1199SEIU Healthcare Workers East (Rite
Aid of New York, Inc.)
Case 02-CB-184444

Dear Ms. Pierson-Scheinberg:

We are granting your request for an extension of time to file an appeal to July 7, 2017. You must file your appeal electronically through the Agency's e-filing system or by U.S. mail or by private delivery service. Do not fax or email your appeal. This office will not process faxed or emailed appeals.

To ensure that your appeal is processed, please read and follow carefully the instructions below. We encourage you to file your appeal electronically through the Agency's e-filing system on the website www.nlr.gov. If you choose to e-file your appeal, remember to allow enough time to complete the e-filing process by 11:59 pm (E.T.) on July 7, 2017. Otherwise, your appeal will be late.

- 1) Click on E-File documents;
- 2) Enter your NLRB Case Number; and,
- 3) Follow the detailed instructions.

If you file by mail or by delivery service, your appeal will be timely if it is postmarked or given to a delivery service no later than July 6, 2017. If your appeal is postmarked or given to a delivery service on the due date or after, this office will reject it as untimely. The Region must receive a copy by the same date. If hand delivered, an appeal must be received by the General Counsel in Washington, D.C. by 5:00 p.m. E.T. on the appeal due date.

If you do not submit an appeal in accordance with this paragraph, this office will reject it.

Sincerely,

Richard F. Griffin, Jr.
General Counsel



By:

Elicia L. Watts, Acting Director
Office of Appeals

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

ALLYSON L. BELOVIN, ESQ.
LEVY RATNER, P.C.
80 8TH AVE 8TH FL
NEW YORK, NY 10011-7175

cl

Exhibit 12

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

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

and

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

1199 SEIU United Healthcare Workers East

ORDER

On June 26, 2017, the above named Respondent submitted a request for a postponement of the hearing in this matter, currently scheduled to commence on July 10, 2017. The Respondent has cited a number of reasons supporting its request: it's pending appeal of the Region's dismissal of charges filed against the Charging Party union; the relocation of Respondent's counsel and her family to another location, scheduled to occur in late-July and early August; the number of witnesses anticipated to testify on behalf of Respondent and their involvement with an impending merger with another entity anticipated to occur in late-August and early-September; an arbitration scheduled for September 6 and 7, 2017 and vacation plans during the week of September 18.

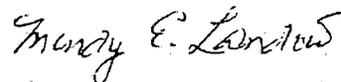
In light of the foregoing, Respondent has requested that the hearing be postponed to October 2, 2017. Although neither the General Counsel nor the Charging Party have formally submitted any response to this request to date, Respondent has represented that the General Counsel opposes any postponement past July 25, 2017 and the Charging Party would consent to a postponement to late August or early September.

Based upon the foregoing, I conclude that the postponement sought by Respondent is unnecessary and unwarranted. I have, however, carefully considered the nature of the conflicts cited and conclude that it would be appropriate and fair to all parties to adhere to the following trial schedule:

The hearing will commence on August 28, 2017, and will continue that week; it will then adjourn and recommence, if necessary, during the week of September 11, 2017.

After the hearing is opened, the scheduling will fall within the discretion of the assigned trial judge.

Dated at New York, New York
June 28, 2017



Mindy E. Landow
Associate Chief Administrative
Law Judge

Exhibit 13

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 02**

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

and

1199SEIU United Healthcare Workers East.

Cases 02-CA-182713;
02-CA-189661

REQUEST FOR RESCHEDULING OF HEARING

The Employers/Respondents, Rite Aid of New York, Inc., and Rite Aid of New Jersey, Inc., (collectively "Rite Aid")¹, request rescheduling of the Unfair Labor Practice Hearing in this matter, currently scheduled to begin on August 28, 2017. Rite Aid requests that the Parties schedule a conference call to discuss alternative dates. As grounds therefore, Respondents state that:

1. On June 22, 2017, Rite Aid filed a motion to postpone the Unfair Labor Practice Hearing until October 2, 2017. Rite Aid cited several factors in support of its motion, including the unavailability of counsel due to relocation, vacation schedules for key witnesses, the pending merger between Rite Aid and Walgreens Boots Alliance, and pre-scheduled arbitrations between Rite Aid and 1199SEIU United Healthcare Workers East ("1199").

2. On June 28, 2017, Mindy E. Landow, Associate Chief Administrative Law Judge, postponed the Unfair Labor Practice Hearing until August 28, 2017.

¹ The National Labor Relations Board and Respondent are in the process of working out a stipulation as to the appropriate employer names in this matter. Rite Aid of New York, Inc. and Rite Aid of New Jersey, Inc. are the appropriate entities in this case and therefore this Motion is filed on their behalf.

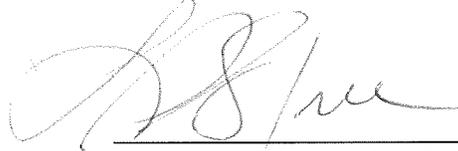
3. Rite Aid's counsel is unavailable for a hearing the week of August 28, 2017, due to family concerns, specifically her children's first week of school following their move from Maryland to California. Rite Aid's counsel is also a witness in this matter whose absence would unfairly prejudice Rite Aid.

4. Rite Aid has contacted counsel for 1199 regarding this request for rescheduling. Counsel for 1199 informed Rite Aid that 1199 does not consent to rescheduling.

WHEREFORE, Respondent respectfully requests rescheduling of the Unfair Labor Practice Hearing in this matter, currently scheduled to begin on August 28, 2017. Rite Aid requests that the Parties schedule a conference call to discuss alternative dates for the Unfair Labor Practice Hearing.

Dated: July 12, 2017

Respectfully submitted,



Laura A. Pierson-Scheinberg
Jackson Lewis P.C.
2800 Quarry Lake Drive
Suite 200
Baltimore, Maryland 21209
(410) 415-2011
Laura.PiersonScheinberg@jacksonlewis.com

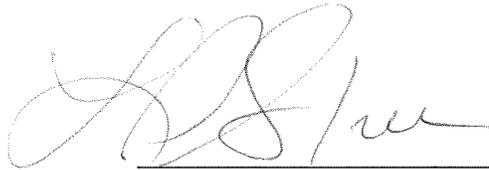
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2017, I caused the foregoing *Request for Rescheduling of Hearing* to be served electronically upon the following individuals:

Allyson L. Belovin
Levy Ratner, P.C.
80 Eight Avenue
New York, New York 10011
(212) 627-8100
(212) 627-8182 (fax)
Attorney for Respondent 1199SEIU United Healthcare Workers

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



Laura Pierson-Scheinberg

Exhibit 14



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 2
26 Federal Plz Ste 3614
New York, NY 10278-3699

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

July 12, 2017

Via E-file

Chief Administrative Law Judge Mindy Landow
26 Federal Plaza, 17th Floor
New York, NY 10278

Re: 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.
Case Nos. 02-CA-182713 & 02-CA-189661

Dear Chief Judge Landow,

I am writing to oppose Respondent's July 12, 2017, request for a second adjournment of the trial in the above-captioned case, which is attached hereto.

Initially, the hearing in this case was scheduled to begin on July 10. On June 26, Respondent requested a postponement of the hearing until October 2, which Your Honor considered fully before issuing a June 28 Order Rescheduling the Hearing granting a seven week postponement to August 28 ("June Order"). Respondent now resubmits its request for a further postponement but offers no reasons not previously considered in support of its request.

Further, on June 21, the Board authorized the Region to seek injunctive relief pursuant to Sec. 10(j) of the Act. The Region, on behalf of the Board, will file a petition for 10(j) relief as soon as the Office of Appeals makes final determination on the merits of Respondent's appeal of the Region's dismissal of its charge filed against 1199SEIU United Healthcare Workers East in Case No. 02-CB-184444. Therefore, Counsel for the General Counsel continues to urge expeditious treatment of this case and deny Respondent's request for a further postponement of the trial.

Sincerely,

/s/

Nicole Oliver
Counsel for the General Counsel

Exhibit 15



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

August 21, 2017

LAURA A. PIERSON-SCHEINBERG, ESQ.
JACKSON LEWIS P.C.
2800 QUARRY LAKE DR STE 200
BALTIMORE, MD 21209

Re: 1199SEIU Healthcare Workers East
(Rite Aid of New York, Inc.)
Case 02-CB-184444

Dear Ms. Pierson-Scheinberg:

Your appeal from the Regional Director's refusal to issue complaint has been carefully considered. The appeal is denied.

Contrary to your appeal, the evidence failed to establish that the Union engaged in bad faith bargaining when it rejected the Employer's proposal to change the unit description. There was insufficient evidence that the Union refused to bargain over this matter, or engaged in bad faith bargaining, prior to the Employer declaring impasse on September 7, 2016.

Additionally, the evidence failed to establish that the National Benefit Fund (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 representatives of both the Union and member employers, including a representative of the Employer. The evidence fails to establish that the NBF was acting on the Union's behalf when it issued its delinquency notices. Accordingly, the evidence failed to establish that the Union used the NBF to threaten bargaining unit associates as alleged.

Finally, there was insufficient evidence that the Union failed to provide information that was under the control of the NBF. The evidence indicates that the Union responded to the Employer's information request by providing the information it possessed, and directed the Employer to the NBF for the additional information.

Furthermore, the evidence failed to establish that the Union unlawfully delayed providing information to the Employer. Accordingly, further proceedings are unwarranted.

Sincerely,

Richard F. Griffin, Jr.
General Counsel



By: _____

Mark E. Arbesfeld, Acting Director
Office of Appeals

cc: NICHOLAS H. LEWIS
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS
BOARD
26 FEDERAL PLZ STE 3614
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Exhibit 16

16-3342-cv

Rite Aid of New York, Inc. v. 1199 SEIU United Healthcare Workers East

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

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of August, two thousand seventeen.

PRESENT: REENA RAGGI,
RAYMOND J. LOHIER, JR.,
Circuit Judges,
JOAN M. AZRACK,
*District Judge.**

RITE AID OF NEW YORK, INC.,
Petitioner-Appellant,

v.

No. 16-3342-cv

1199 SEIU UNITED HEALTHCARE WORKERS EAST,
Respondent-Appellee.

APPEARING FOR APPELLANT: JEDD MENDELSON, Littler Mendelson, P.C.,
Newark, New Jersey.

APPEARING FOR APPELLEE: ALLYSON L. BELOVIN, Levy Ratner, P.C.,
New York, New York.

* Judge Joan M. Azrack, of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on September 21, 2016, is AFFIRMED in part, and the appeal is DISMISSED in part for lack of appellate jurisdiction.

Plaintiff Rite Aid of New York, Inc. (“Rite Aid”) appeals from a judgment denying its petition to vacate and granting defendant 1199 SEIU United Healthcare Workers East’s (“the Union’s”) cross-motion to confirm an arbitral award of benefits contributions owed by Rite Aid under a 2009 collective bargaining agreement (“CBA”) and its motion for an award of attorneys’ fees. On appeal from the confirmation or vacatur of an arbitration award under Section 301 of the Labor Management Relations Act (“LMRA”), *see* 29 U.S.C. § 185, we review a district court’s legal conclusions *de novo* and its factual findings for clear error. *See National Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 536 (2d Cir. 2016). In reviewing an award of attorneys’ fees pursuant to a contract, we review the district court’s interpretation of the contract *de novo* and its decision to award attorneys’ fees for abuse of discretion. *See Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 177 (2d Cir. 2005). In so doing, we assume the parties’ familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm confirmation of the arbitration award and to dismiss the appeal of attorneys’ fees for lack of appellate jurisdiction.

1. Confirmation of the Arbitration Award

A federal court’s review of labor arbitration awards is “among the most deferential in the law.” *National Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d at 532. We may not ourselves “weigh[] the merits of [the] grievance.” *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 172 (2d Cir. 2004). “We must simply ensure that the arbitrator was ‘even arguably construing or applying the contract and acting within the scope of his authority’ and did not ‘ignore the plain language of the contract.’” *National Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d at 532 (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). “[E]ven if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.” *Id.* An arbitrator acts within that authority if the award “draws its essence from the collective bargaining agreement,” *id.* at 537, and is supported by at least a “barely colorable” interpretation of the contract, *id.* at 539, rather than the arbitrator’s “own brand of industrial justice,” *id.* at 537. In reviewing the district court’s confirmation of the award under this highly deferential standard, we identify no error.

In urging otherwise, Rite Aid first contends that the arbitrator misunderstood CBA provisions restricting the methodology for calculating contributions to the National Benefit Fund for Health and Human Service Employees (“NBF”). Rite Aid argues that the interchangeable use of the terms “contribution rate” and “uniform required rate” in Sections (C) and (D) of the CBA reflected the parties’ understanding that, so long as the

CBA remained in effect, they would use only that methodology, which imposed the same contribution rates on all employers, and not the employer-specific “flat rate” methodology under which Rite Aid was later required to make more substantial contributions. We are not persuaded.

The arbitrator’s determination that the CBA authorized the NBF’s Trustees to alter Rite Aid’s contribution rate neither ignored the plain language of the contract nor exceeded the scope of his authority. *See National Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d at 532. The arbitrator merely construed Section (E) of the CBA, which stated that Rite Aid agreed to “be bound by and to implement any changes in the Funds’ contribution rates . . . in the amounts and on the dates . . . set by the Funds’ Trustees,” App’x 31, as authorizing the NBF’s Trustees to alter Rite Aid’s contribution methodology. Although Rite Aid argues that Section (E) was implicitly limited by the interchangeable use of the terms “contribution rate” and “uniform required rate” in preceding sections, particularly in light of the Union’s bargaining history and enforcement practices, the arbitrator rejected that argument based on the broad language of Section (E). We cannot ourselves reweigh the merits of the grievance submitted to the arbitrator, and we cannot conclude that his reasoning in reaching the challenged conclusion was insufficiently “colorable” to “withstand judicial scrutiny.” *National Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d at 539 (internal quotation marks omitted). Rite Aid’s citation to an NBF letter stating that changes to contribution rates would become effective in “your

next [CBA],” App’x 53, warrants no different conclusion. That same letter explains that Rite Aid would also be required to “contribute at the new rates” imposed by the NBF if its CBA “provide[d] for contributions at the rate set by the Trustees,” *id.*, as the arbitrator here concluded it did.

Second, Rite Aid suggests that the arbitrator may have been biased, or unduly influenced in the Union’s favor, by concerns regarding NBF solvency. *See National Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d at 548 (explaining that award may be vacated if reasonable person would “have to conclude that [the] arbitrator was partial”). Rite Aid did not raise this argument in the district court, and has, therefore, forfeited it. *See, e.g., Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 615 (2d Cir. 2016) (reiterating that appellate court will not consider argument raised for first time on appeal). In any event, no bias is evident from the arbitrator’s observations that the NBF’s Trustees were “fiduciaries” who were bound to “protect the viability of the Fund.” App’x 33.

Third, Rite Aid argues that the arbitrator’s construction of Section (E) “[d]eviated [f]rom” his reasoning in a different arbitration. Appellant’s Br. 37. Even if we were to agree with Rite Aid’s understanding of the other arbitration, the argument is defeated by precedent rejecting the notion that “an arbitrator has a duty to follow arbitral precedent,” or that “failure to do so is reason to vacate” an arbitration award. *Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 32 (2d Cir. 1997).

Fourth, Rite Aid urges vacatur because it was “perplexed as to whether it was litigating with the Union or the NBF,” as “the same law firm” represented both entities. Appellant’s Br. 38–39. The argument is unconvincing because, as the arbitrator observed, the “only parties to this dispute [were] the Union and Rite Aid notwithstanding Rite Aid’s assertion.” App’x 21 n.6. In any event, Rite Aid offers no reason why its purported confusion warrants vacatur.

Accordingly, Rite Aid’s challenges to confirmation fail on the merits.¹

2. Motion for Attorneys’ Fees

Rite Aid challenges so much of the judgment as concluded that the Union should be “awarded reasonable attorney’s fees” pursuant to a contractual fee-shifting provision in the CBA. App’x 80. We may not review that determination here because the district court held in abeyance its computation of those fees pending the outcome of this appeal. Although the “pendency of a ruling on [the] award for fees and costs does not prevent . . . the *merits* judgment from becoming final for purposes of appeal,” *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs & Participating Emp’rs*, 134 S. Ct. 773, 777 (2014) (emphasis added), “a non-quantified award of attorneys’ fees and costs is not appealable until the amount of the fees has been set by the district court,” *Berlin v. Renaissance Rental Partners, LLC*, 723 F.3d 119, 128

¹ We need not address Rite Aid’s passing assertion that the district court erred in denying as moot its motion to strike portions of the Union’s briefing, as to which it has offered no supporting arguments. See *Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009) (“Merely mentioning the relevant issue in an opening brief is not enough; issues not sufficiently argued . . . will not be considered on appeal.” (internal quotation marks and alterations omitted)).

(2d Cir. 2013) (alteration and internal quotation marks omitted). Nor did the district court compute the fees owed to the Union after the filing of the notice of appeal so as to provide an “appealable final order regarding fees and costs” that would be “ripe for review.” *Id.* (internal quotation marks omitted). We therefore lack appellate jurisdiction to address Rite Aid’s challenge to the unquantified fees award. *See O & G Indus., Inc. v. Nat’l R.R. Passenger Corp.*, 537 F.3d 153, 167 (2d Cir. 2008).

3. Conclusion

We have considered Rite Aid’s other arguments and conclude that they are without merit. Accordingly, we AFFIRM so much of the district court’s judgment as denied Rite Aid’s petition to vacate and granted the Union’s cross-motion to confirm the disputed arbitration award, and we DISMISS for lack of jurisdiction Rite Aid’s appeal from the grant of attorneys’ fees.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court

A circular seal of the United States Second Circuit Court of Appeals is positioned over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS". The signature "Catherine O'Hagan Wolfe" is written in cursive across the seal.

Exhibit 17

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
BEFORE ADMINISTRATIVE LAW JUDGE BENJAMIN GREEN

-----X
RITE AID OF NEW YORK, INC. AND
RITE AID OF NEW JERSEY, INC.,
ECKARD CORPORATION, GENOVESE
DRUG STORES, INC., AND THRIFT DRUG, INC., AS
A SINGLE EMPLOYER

and

02-CA-182713
02-CA-189661

1199SEIU UNITED HEALTHCARE WORKERS EAST.

-----X

CHARGING PARTY 1199SEIU'S PETITION TO REVOKE
SUBPEONA DUCES TECUM NO. B-1-XO2JPX AND THIRTY-THREE
SUBPOENAS AD TESTIFICANDUM

Charging Party 1199SEIU United Healthcare Workers East (“1199SEIU” or “Union”) hereby petitions pursuant to Rule 102.31(b) to revoke the subpoena duces tecum No. B-1-XO2JPX, served on it August 11, 2017 by Jackson Lewis, Counsel for Rite Aid of New York, Inc. and Rite Aid of New Jersey, Inc. (“Rite Aid” or “Respondent”) (Exhibit 1, attached hereto). 1199SEIU also petitions pursuant to Rule 102.31(b) to revoke 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 issued to its staff and General Counsel (Exhibit 2 attached hereto). Copies of the Consolidated Complaint in this matter (“Complaint”), and

Respondent's Answer to the Consolidated Complaint ("Answer") are attached hereto as Exhibits 3 and 4, respectively.

This case is about whether Rite Aid engaged in bad faith bargaining in the course of its negotiations with 1199SEIU for a successor collective bargaining agreement. Specifically, the Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the act by (a) unlawfully insisting upon a permissive subject of bargaining; (b) failing to pay the 1199SEIU National Benefit Fund for Health and Human Service Employees ("NBF") at the contractually required rate; (c) unilaterally implementing new health insurance coverage; and (d) prematurely declaring impasse and implementing changes to terms and conditions. *See* Ex. 3. Respondent's subpoenas seek documents and testimony that go far beyond these limited issues and are not relevant to any matter in question in the unfair labor practice hearing. The breadth of these subpoenas is yet another attempt by Rite Aid to delay the proceedings in this matter. There is simply no way the Union could produce responsive documents by the scheduled opening of the hearing of this matter on August 31, 2017, or even by the beginning of trial on September 11, 2017. Moreover, notwithstanding Respondent's representation to the Administrative Law Judge that it anticipated no more than five (5) witnesses at trial and expected to be able to complete the full trial in one week, it now seeks to draw out these proceedings by compelling the testimony of 36 Union officers, staff, and legal representatives, most of whom have had no involvement in negotiations with Rite Aid or whose testimony, in any event, would be substantially cumulative and burdensome to the record. Rite Aid's delay tactics should not be sanctioned.

Legal Standard

In NLRB proceedings, a subpoena “shall [be] revoked” if it meets any of three criteria: (1) it requests information that “does not relate to any matter under investigation or in question in the proceedings”; (2) it “does not describe with sufficient particularity the evidence whose production is required”; or (3) it is “otherwise invalid” “for any other reason sufficient in law.” 29 C.F.R. § 102.31(b). This rule applies both to subpoenas duces tecum and ad testificandum. See National Labor Relations Board Division of Judges, Bench Book § 8-230 (November 2016) (“NLRB Trial Manual”).

As to the first prong, a subpoena must be “reasonably relevant” to a “matter in question.” See NLRB Trial Manual § 8-310 (November 2016); *ConAgra Foods, Inc.*, 347 NLRB 1016, 1021 fn. 12 (2006) (opinion of ALJ) (revoking subpoena because it sought union material that was not “reasonably relevant” to the question in the case); *Station Casinos, LLC*, 358 NLRB No. 153, JD slip op. at 31 (2011) (same).

As to the third prong, the Administrative Law Judge can look to the Federal Rules of Civil Procedure for other bases in law for revoking a subpoena. *Brinks, Inc.*, 281 NLRB at 468-69 (1986); see also NLRB Trial Manual § 8-230. These include the limitation of discovery to non-privileged information, *Brinks* at 469 fn. 4 (quoting Fed.R.Civ.P. 26(b)(1)), as well as the rule against “unreasonable and oppressive subpoenas,” *id.* at 469 fn. 3 (quoting Fed.R.Civ.P. 45(b)(1)).

I. The Subpoena Duces Tecum Must Be Revoked As to Request Nos. 3, 5, and 6, and Portions of Request No. 2.

This case requires the Administrative Law Judge to determine whether Rite Aid committed the unfair labor practices described in the Complaint. As noted above, the Complaint's allegations involve Rite Aid's conduct during the parties' negotiations for a successor collective bargaining agreement. The specific allegations – insisting on a non-mandatory subject of bargaining, failing to make required contributions to the NBF, unilaterally changing employees' health insurance coverage, and prematurely declaring impasse and imposing new terms and conditions of employment – are limited in nature. Respondent's Subpoena Duces Tecum, on the other hand, is incredibly broad, seeks information unrelated to the matters in question in this proceeding, and would impose a significant burden on the Union.

Nor do any of the affirmative defenses raised in Respondent's Answer justify the production of much of the information sought. In its Answer, Rite Aid largely denies the allegations of the Complaint and raises eighteen (18) affirmative defenses, none of which implicates the Requests that 1199SEIU is petitioning to revoke. While affirmative defenses numbers 6 and 7 assert that the Union's "conduct, actions and omissions" estop it from making the allegations charged, such broad and undefined defenses do not entitle Respondent to documents or information regarding *the Charging Party's* conduct. That is, even if the document requests were proper, which most of them are not, it is well settled that neither the Board's allegations nor a respondent's defenses can turn on a charging party's actions, which is exactly what Rite Aid appears to assert with defenses number 6 and 7. Rite Aid cannot seek to

obtain information through its subpoenas to support a theory that the charges are estopped based on the Union's conduct.¹

As a general matter, the conduct of charging parties makes no difference in unfair labor practice proceedings because those proceedings “are not for the vindication of private rights but are brought in the public interest and to effectuate the statutory policy.” *Teamsters Local 294*, 145 NLRB 484, 492 fn. 9 (1963) (internal citations, quotation marks omitted).² Accordingly, the Board regularly rejects employers' attempts to prosecute charging parties by making their actions the focus of an unfair labor practice case against the employer. In discrimination or retaliation cases, for example, “[w]hile the motive of the employer for discharge or discipline is a critical factor . . . the motive of an employee who engages in union or protected concerted activity is not.” *UPMC*, Case 06-CA-102465, JD slip op. at 1-2 (2014) (revoking a subpoena seeking union material) (citing *Design Technology Group*, 359 NLRB No. 96, slip op. at 5 fn. 5 and accompanying text (2013) (concluding that employees' motivations are irrelevant to a claim of retaliatory discharge, based on longstanding Board precedent), *aff'd* 361 NLRB No. 79 (2014)). Similarly, Rite Aid attempts to pursue an “unclean hands” defense which the Act does not permit. *See California Gas Transport*, 347 NLRB 1314, 1326 fn. 36 (2006); *see also Transp. Workers Union of Am., Local 100, AFL-CIO v. New York City Transit Auth.*, 341 F. Supp. 2d 432, 452 (S.D.N.Y. 2004), appeal dismissed and remanded, 505 F.3d 226 (2d Cir. 2007).

¹ The proper mechanism for addressing any concerns Rite Aid has about improper conduct by 1199 is to file charges with the NLRB or initiate litigation. It cannot use the instant matter to obtain information to serve other purposes.

² Consistent with the broad public policy of facilitating protected activity, charges are prosecuted by the Board and can be brought to the Board's attention by any person for any reason. *Apex Investigation & Security Co.*, 302 NLRB 815, 818 (1991) (“The simple fact is that anyone for any reason may file charges with the Board.”).

A. The Subpoena Duces Tecum is Overly Broad and Burdensome

As a general matter, the subpoena duces tecum is overly broad and burdensome. Each of Rite Aid's requests violates the clear direction in the NLRB's Casehandling Manual that "A subpoena duces tecum . . . should be drafted as narrowly and specifically as is practicable [and the use of the word 'all' in the description of records should be avoided wherever possible." NLRB Casehandling Manual § 11776.

Moreover, the subpoena's "Definitions" section exponentially compounds the already significant burden on 1199 to collect, process, host, review, and produce responsive documents and electronically stored information ("ESI").

1. Restoration and Review of Back-up Tapes

The subpoena's "Definitions" place extensive, time-consuming requirements upon 1199 and establish a protocol for the production of ESI that is inefficient and out-of-step with widely accepted best practices recognized by the Board, the courts, and electronic discovery experts. The subpoena defines "Document" to include data that is not reasonably accessible due to undue burden or cost. For example, the definition includes "any other possible sources of active or inactive electronic or digital data or information" and "any kind of data that has been archived, backed-up, resides on obsolete hardware, or is information that is residual or otherwise may have been deleted but is or may be present or residing in any way within computer systems or is retrievable in any way." *See* Definitions 6(b)(10), (d). This request far surpasses anything reasonably retrievable. The Board and the courts have routinely found that backup disks and tapes are not reasonably available ESI and should not be restored and reviewed absent a particularized showing of need.

Backup tapes contain copies of data stored on network servers and typically are maintained for disaster recovery purposes only. As the former General Counsel recognized, the process of restoring data on a backup tape is “a time consuming and costly process.” Office of the General Counsel, Memorandum GC 07-09, at 5 (June 22, 2007). It is unsurprising, therefore, that “the current state of the law is that only in very exceptional circumstances is there a need to produce information from back-up tapes that exist solely for disaster recovery.” *Id.* at 7 fn. 9. The Sedona Principles echo the former General Counsel’s position, stating that materials whose production may require “undue burden or cost” include “backup tapes that are intended for disaster recovery purposes.” *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2005 Edition) (“Sedona Principles”), Comment 2.c. *See also* Sedona Principles, Principle 8 (“Resort to [production of] disaster recovery backup tapes . . . requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources.”); *Aubuchon Co. v. Benefirst, LLC*, 2007 U.S. Dist. LEXIS 44574, at *10-11 (D. Mass. Feb. 6, 2007) (backup tapes are “inaccessible” by definition); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319-20 n. 61 (S.D.N.Y. 2003) (noting the difference between discovery of “accessible” information and “inaccessible” information such as backup tapes, and holding that cost-shifting may be appropriate when a party seeks to discover the latter). Here, Rite Aid has not articulated any need for data stored on back-up tapes. Thus, the demand in the subpoena that 1199 review back tapes would be exceptionally costly and add little if anything of value to the proceedings. To the extent required, Rite Aid should bear the cost of restoring, reviewing, and producing data from the back-up tapes.

2. Cell Phone Data

The subpoena commands 1199 to produce digital pictures, video and audio, text messages and other information stored on “Palm Pilot, Blackberry, iPhone and/or similar devices” which is exceptionally burdensome to collect, process, host, review, and produce. The burden imposed by this request cannot possibly be justified by the minimal relevance of the responsive documents.

A subpoena is burdensome if it will “disrupt or seriously hinder normal operations of [the] business.” *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d. Cir. 1979). In *CNN America*, the Board instructed a special master to review the burdensomeness of the GC’s subpoena using two authoritative sources: the Federal Rules of Civil Procedure and the Sedona Principles. *CNN America, Inc.*, Special Master’s Report & Recommendations, Case Nos. 05-CA-31828 & 05-CA-33125, at 10 (Dec. 1, 2008).

As the special master in *CNN America* noted, “[o]f the two, it is appropriate to begin with the standard articulated in Fed. R. Civ. P. 26(b)(2)(C) because that standard is specifically incorporated into the balancing test described by the Sedona Working Group.” *Ibid.* Federal Rule 26’s balancing test requires limitations on requests for discovery where “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Fed.R.Civ.P. 26(b)(2)(C)(iii). Here, the balancing test clearly establishes that the burden and expense to 1199 of attempting to comply with the subpoena outweighs the limited benefits to Rite Aid of the documents and other ESI sought.

Reasonable projections of the time and expense the Union would incur to comply with the subpoena as drafted suggest that compliance with the subpoena could take hundreds of person hours and involve extensive costs for an ESI vendor to extract ESI and for legal counsel to review it. This time and cost outlay would create an unreasonable burden on 1199's normal business operations. A party's normal business operations are disrupted when it would take a large number of person hours to comply with a subpoena. *See, e.g., SEC v. Brady*, 238 F.R.D. 429, 438 (N.D. Tex. 2006) (subpoena quashed where company estimated that it would take 226 hours to review the hard copy files for responsiveness and privilege and 16,111 hours to review the electronic data for responsiveness and privilege); *Flatow v. Islamic Republic of Iran*, 202 F.R.D. 35, 37 (D.D.C. 2001) (quashing subpoenas issued to two company-defendants where the court found that to comply with the subpoenas would take one company 885 person hours (111 eight-hour days) and the other approximately 335 person hours (42 eight-hour days)). Moreover, both the Federal Rules of Civil Procedure and the Sedona Principles require consideration of the "realistic costs of preserving, retrieving, reviewing, and producing electronically stored information" when assessing a party's burden. Sedona Principles, Principle 3; *see* Fed.R.Civ.P. 26(b)(2)(B)-(C), 26(c).

The issues in this case will not likely turn on what is contained in text messages or photos on the iPhones of possible custodians or records encompassed by this subpoena's requests. That type of ESI will simply not be relevant to the material issues in this case. The balancing of any benefit to Rite Aid to obtain this type of ESI when compared to the cost and burden to 1199 to produce it, weighs heavily in favor of revoking the subpoena. Not only will it be impossible for

1199 to search devices, review the ESI and produce it prior to the start of this case, but there is no justification for the extreme cost to 1199 of doing so.

B. Objections to Specific Requests in the Subpoena Duces Tecum

Document Request No. 2

Document Request Number 2, which seeks production of any communications between the Union and the NBF, is overbroad in multiple respects and seeks information that has no relevance to the questions before the ALJ in this proceeding. As an initial matter, while the Complaint allegations are limited to the period June 2016 through the present, Request Number 2 seeks documents going back to October 2014— a full 20 months prior to the events giving rise to the Complaint. Additionally, it seeks *any* communications between the Union and the Fund *regarding Rite Aid*. The Union should not be required to produce communications relating to Rite Aid *on any* topic, including topics unrelated to the issues in this case.

Request Number 2 also seems to seek irrelevant information to which Respondent is not entitled. It is Charging Party's understanding that Respondent will attempt to argue that the Union and the NBF have somehow engaged in improper collusion. Presumably, Request Number 2 seeks to illicit information in support of that assertion. However, to the extent that it seeks to illicit information regarding evidence of "wrongdoing as yet unknown," instead of "information relating to specific allegations of wrongdoing contained in the [][C]omplaint" (*Perdue Farms, Inc., Cookin' Good Div. v. N.L.R.B.*, 144 F.3d 830, 834 (D.C. Cir. 1998)), the request is inappropriate, particularly where, as here, Rite Aid presents no particularized assertion that any such communications between the parties ever occurred. See *Morrison Turning Co.*, 83 NLRB 687, 689 (1949) (where employer sought evidence of "collusion" and "fronting" in subpoenaed

communications between labor organizations, subpoena revoked based on the Board's finding that "...the record, the Employer's brief, the petition, and the offer of proof in support of the request for subpoena [sic], furnish no facts, directly or inferentially, upon which we may reasonably believe that the desired records contain evidence of a collusive arrangement.")

Document Request No. 3

Nowhere is the overbreadth of the subpoena duces tecum more evident than in Request Number 3 which seeks, inter alia, "any communication made between the Union and any other person or entity regarding Rite Aid..." Here, Rite Aid does not even attempt to tailor the requests to any pertinent issue. Requesting all communications made between the Union and "any other person or entity regarding Rite Aid" is such an overbroad request as to be meaningless. To comply with this request the Union would be forced to scour its records for any communication made by anyone at 1199 to anyone outside the Union concerning Rite Aid on any topic, doubtlessly generating volumes of irrelevant information.

Additionally, the request is totally irrelevant. Rite Aid is on trial in this case. It is simply irrelevant what anyone at the Union may have said to someone outside the Union concerning the issues in dispute. The only arguably relevant communications with outside parties concerning Rite Aid are encompassed by portions of Request Number 2, to the extent that the Respondent seeks specific communications between the Union and the NBF regarding the arbitration before Alan R. Viani, Case No. V-15-10057 and related litigation, or specific communications between the Union and the NBF regarding Rite Aid's contributions to the NBF from the period of June 2016 forward.

Document Request No. 5

Request Number 5 violates the Board's rule that evidence to be used in an unfair labor practice proceeding cannot be disclosed, except for witness statements disclosed after the witness's direct testimony. Under Board rules, evidence in the NLRB's files will not be disclosed to the public, including to a party defending against an unfair labor practice charge. 29 C.F.R. 102.118(a)(1). There is only one narrow exception to this rule: witness statements may be disclosed after the completion of the witness's direct testimony, also known as "*Jencks* material." 29 C.F.R. 102.118(b)(1); NLRB Trial Manual § 8-500. As the Supreme Court held in rebuffing employers' attempts to use the Freedom of Information Act to circumvent this longstanding prohibition, the rule serves to "prevent premature disclosure . . . so that the Board can present its strongest case," and to facilitate "uninhibited and non-evasive statements" from potential witnesses. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 226 (1978). In short, pre-trial disclosures of evidence from the Board's files "necessarily would interfere . . . with the Board's enforcement proceedings." *Id.* at 243 (internal quotation marks omitted).

This rule would be rendered meaningless if employers could avoid it simply by requesting the same information from the private party that provided the information to the Board. *See H.B. Zachry Co.*, 310 NLRB 1037, 1038 (1993) (noting that "the protections of confidentiality [from Section 102.118] would be lost" if an employee had to produce affidavits provided to the General Counsel). Consequently, a subpoena must be revoked if it seeks evidence from a union that, as to the Board, would be protected by Section 102.118. *See ibid. Hqm of Spencer County*, Case 9-CA-41323, 2005 NLRB LEXIS 190, *125-126 (Apr. 20, 2005).

Document Request No. 6

Document Request Number 6 seeks documents that are not relevant to the allegations of the complaint and should be revoked. The Board may revoke such subpoenas "if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings." 29 U.S.C. § 161(1). In making determinations of relevance, the Board looks to Rule 401 of the Federal Rules of Evidence which defines relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." The documents sought in this demand fall far short of the broad standard set by the Federal Rules. In accordance with Board practice, *Golden State Bottling* letters are sent as a matter of routine procedure "in any case in which it appears that actual or potential third parties may be engaging in significant asset transactions with a respondent." NLRB Casehandling Manual, Part 3, Compliance Proceeding, §10674.8. The purpose of the letter is to alert third parties to potential exposure as related to pending proceedings before the Board. *Id.* Its contents provide no background on the charges asserted in the complaint, nor can it be argued that its existence serves to make any allegation alleged in the complaint any more or less probable. In the instant case, the questions before the ALJ are specific to Rite Aid's conduct during bargaining, Rite Aid's failure to pay contributions to the NBF, Rite Aid's unilateral changes to employees' health benefits, and Rite Aid's unlawful declaration of impasse and implementation of its Last, Best and Final offer. No documents or communications concerning the *Golden State Bottling* letter, including the letter itself, nor any other communications related

to the sale of Rite Aid stores to Walgreens, have any discernable nexus to the charges asserted against Rite Aid in this case.

Furthermore, Request Number 6 is overbroad and should be revoked, as it seeks to circumvent the Board Rule prohibiting disclosure of evidence used in an unfair labor practice proceeding, without properly seeking the consent of General Counsel. 29 C.F.R. 102.118(a)(1). The Respondent has failed to show any attempt to obtain the General Counsel's consent to produce the *Golden State Bottling* Letter and all documents related to the letter. Without said consent the information sought in this demand is privileged and cannot be compelled by subpoena. *U.S. v. Bizzard*, 674 F.2d 1382 (11th Cir. 1982).

As such, Document Request Number 6 should be revoked.

II. 33 of the 36 Subpoenas Ad Testificandum Must Be Revoked.

A. General Objections

Of the 36 Union representatives that Rite Aid subpoenaed for testimony in a trial that Respondent's Counsel indicated would last only one week and require no more than five Employer witnesses, only three individuals -- 1199SEIU attorney Allyson Belovin (A-1-XO3PZL), 1199SEIU Executive Vice President Laurie Vallone (A-1-XO4RAD) and 1199SEIU Vice President Berta Silva (A-1-XR9N7H)³ -- could have information reasonably relevant to this case. The other 33 subpoenaed Union representatives -- including 1199's President, General Counsel, Executive Vice Presidents and staff organizers -- have had no involvement in negotiations with Rite Aid and have no knowledge of facts relevant to any of the issues before

³ While the Union does not object to the subpoena of Berta Silva, this witness has a prescheduled vacation and will not be available from August 23 through September 12, 2017.

the ALJ in this case. Furthermore, to the extent that any of these witnesses possess relevant information, it would be duplicative of the testimony that could be elicited from Ms. Belovin, Ms. Vallone and Ms. Silva, would substantially burden the record, and would unreasonably delay these proceedings.

B. Objections to Specific Requests in the Subpoenas Ad Testificandum

1. The Union objects to the subpoena of Union Counsel, Daniel J. Ratner, Esq. (A-1-XO38F), on the ground that it seeks attorney-client communications or attorney work product material. *See, e.g., Central Tel. Co. of Tex.*, 343 NLRB 987, 989-90 (2004) (recognizing the work product privilege); *Station Casinos, LLC*, 358 NLRB No. 153, JD slip op. at 32 (2011) (revoking subpoena to the extent it sought work product material).
2. The Union objects to the subpoena of 1199SEIU President George Gresham (A-1-XO4P7D) on the ground that the witness has no information relevant to the case.
3. The Union does not object to the subpoena of 1199SEIU Executive Vice President Laurie Vallone (A-1-XO4RAD).
4. The Union objects to the subpoena of 1199SEIU Executive Vice President Jacqueline Alleyne (A-1-XOLZXP) on the ground that the witness has no information relevant to the case.
5. The Union objects to the subpoena of 1199SEIU Executive Vice President Norma Amsterdam (A-1-XOQEOF) on the ground that the witness has no information relevant to the case.
6. The Union objects to the subpoena of 1199SEIU Senior Executive Vice President Yvonne Armstrong (A-1-XOQP7B) on the ground that the witness has no information relevant to the case.
7. The Union objects to the subpoena of Saily Cabral (A-1-XOR7IR) on the ground that the witness has no information relevant to the case.
8. The Union objects to the subpoena of 1199SEIU Vice President Gerard Cadet (A-1-XOSEON) on the ground that the witness has no information relevant to the case.
9. The Union objects to the subpoena of 1199SEIU Secretary Treasurer Maria Castaneda (A-1-XOSSWL) on the ground that the witness has no information relevant to the case.

10. The Union objects to the subpoena of 1199SEIU Vice President Donald Crosswell (A-1-XOTFZ5) on the ground that the witness has no information relevant to the case.
11. The Union objects to the subpoena of 1199SEIU Frances Gentle (A-1-XOTQ31) on the ground that the witness has no information relevant to the case.
12. The Union objects to the subpoena of 1199SEIU Tracey Harrison (A-1-XOU0F9) on the ground that the witness has no information relevant to the case.
13. The Union objects to the subpoena of 1199SEIU Lena Hayes (A-1-XR67UD) on the ground that the witness has no information relevant to the case.
14. The Union objects to the subpoena of 1199SEIU Vice President Antonio Howell (A-1-XR6LFJ) on the ground that the witness has no information relevant to the case.
15. The Union objects to the subpoena of 1199SEIU Vice President Brian Joseph (A-1-XR753B) on the ground that the witness has no information relevant to the case.
16. The Union objects to the subpoena of 1199SEIU Maria Kercado (A-1-XR7F45) on the ground that the witness has no information relevant to the case.
17. The Union objects to the subpoena of 1199SEIU Executive Vice President Steve Kramer (A-1-XR89NB) on the ground that the witness has no information relevant to the case.
18. The Union objects to the subpoena of 1199SEIU Vice President Manuel Leon (A-1-XR8BB1) on the ground that the witness has no information relevant to the case.
19. The Union objects to the subpoena of 1199SEIU Vice President Winslow Luna (A-1-XR8K3P) on the ground that the witness has no information relevant to the case.
20. The Union objects to the subpoena of 1199SEIU Vice President Dalton Mayfield (A-1-XR8OYF) on the ground that the witness has no information relevant to the case.
21. The Union objects to the subpoena of 1199SEIU Aida Morales (A-1-XR5PZB) on the ground that the witness has no information relevant to the case.
22. The Union objects to the subpoena of 1199SEIU Executive Vice President Joyce Neil (A-1-XR8T5J) on the ground that the witness has no information relevant to the case.
23. The Union objects to the subpoena of Isaac Nortey (A-1-XR8ZJJ) on the ground that the witness has no information relevant to the case.

24. The Union objects to the subpoena of Vasper Phillips (A-1-XR91LP) on the ground that the witness has no information relevant to the case.
25. The Union objects to the subpoena of 1199SEIU Bruce Richard (A-1-XR966F) on the ground that the witness has no information relevant to the case.
26. The Union objects to the subpoena of 1199SEIU Vice President Helen Schaub (A-1-XR9GUL) on the ground that the witness has no information relevant to the case.
27. The Union objects to the subpoena of 1199SEIU Assistant Division Director Allan Sherman (A-1-XR9L1Z) on the ground that the witness has no information relevant to the case.
28. The Union objects to the subpoena of 1199SEIU Executive Vice President Neva Shillingford (A-1-XR9NMH) on the ground that the witness has no information relevant to the case.
29. The Union does not object to the subpoena of 1199SEIU Vice President Berta Silva (A-1-XR9N7H).
30. The Union objects to the subpoena of 1199SEIU Executive Vice President Estela Vazquez (A-1-XR9T49) on the ground that the witness has no information relevant to the case.
31. The Union objects to the subpoena of 1199SEIU Vice President Julio Vives (A-1-XRA40R) on the ground that the witness has no information relevant to the case.
32. The Union objects to the subpoena of 1199SEIU Vice President Margaret West-Allen (A-1-XRA669) on the ground that the witness has no information relevant to the case.
33. The Union objects to the subpoena of 1199SEIU Assistant Division Director Daine Williams (A-1-XRAAIN) on the ground that the witness has no information relevant to the case.
34. The Union objects to the subpoena of 1199SEIU Vice President Gladys Wrenick (A-1-XRABM3) on the ground that the witness has no information relevant to the case.
35. The Union has no knowledge of any individual named Veronica Gresham (A-1-XRAGTL).

Conclusion

For each and all of the foregoing reasons, 1199SEIU respectfully requests that this petition be granted and that the subpoenas be revoked as requested.

Dated: August 18, 2017
New York, New York

Respectfully Submitted,



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**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.
Case Nos. 02-CA-177237 & 02-CA-177271**

**AFFIDAVIT OF SERVICE OF: GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S REQUEST FOR A STAY PURSUANT TO ITS REQUEST FOR
SPECIAL PERMISSION TO APPEAL JUDGE GREEN'S SUPPLEMENTAL ORDER
ON PETITIONS TO REVOKE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn and deposed, say that on the date indicated below, I served the above-entitled document **by electronic mail** upon the following persons, addressed to them at the following addresses:

Judge Benjamin Green
Benjamin.green@nrlb.gov

Allyson Belovin
abelovin@levyratner.com

Stephen M. Silvestri
Stephen.Silvestri@jacksonlewis.com

Laura Pierson-Scheinberg
Laura.PiersonScheinberg@jacksonlewis.com

Signed and sworn to this:
22nd day of September, 2017

Designated Agent:
_____/s/ Jamie Rucker_____
National Labor Relations Board