

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

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

and

1199SEIU UNITED HEALTHCARE
WORKERS EAST.

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

**CHARGING PARTY’S BRIEF IN SUPPORT OF GENERAL COUNSEL’S APPEAL OF
JUDGE GREEN’S ORDER DISMISSING PORTIONS OF THE COMPLAINT**

Pursuant to Section 102.26 of the National Labor Relations Board’s (“Board”) Rules and Regulations (“Rules”), Charging Party 1199SEIU United Healthcare Workers East (“Charging Party,” “Union” or “1199”) respectfully submits this Brief in Support of General Counsel’s Appeal of the ruling made by Administrative Law Judge Benjamin W. Green (“ALJ Green” or “Judge Green”) in his September 15, 2017 Supplemental Order (“Order”) dismissing paragraphs 10(a), 10(c) (to the extent that paragraph refers to paragraph 10(a)), 10(d), and 13 of the Complaint in this proceeding. For the reasons discussed in the General Counsel’s Appeal, as elaborated upon below, Charging Party respectfully submits that the Board should grant the General Counsel’s Request to Appeal and the Appeal itself.

ARGUMENT

**RESPONDENT IMPEDED THE COLLECTIVE BARGAINING PROCESS BY
REFUSING TO PAY REQUIRED BENEFIT FUND CONTRIBUTIONS AFTER AN
ARBITRATOR RESOLVED THE PARTIES’ DISPUTE AS TO THAT OBLIGATION**

The Complaint in this case alleges, inter alia, that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (“NLRA”) by (i) failing to make required contributions to the 1199SEIU National Benefit Fund for Healthcare Employees (“NBF”) as

ordered by an arbitrator and the District Court; (ii) unilaterally withdrawing from the NBF and replacing NBF benefits with a Rite Aid sponsored health benefits plan; and (iii) imposing, prior to reaching a lawful impasse in bargaining, its “last, best and final” proposal.

As the General Counsel has argued, Judge Green incorrectly based his decision to dismiss the allegation in Paragraph 10(a) of the Complaint on *15th Ave. Iron Works*. The General Counsel points out a key distinction between that case and ours, in that “Rite Aid’s conduct undermined negotiations and frustrated the statutory objective of establishing working conditions through collective bargaining,” (App. at 9, citing *NLRB v. Katz*, 369 U.S. at 747), whereas the Board in *15th Ave. Iron Works* recognized that it was not faced with a situation where “the bargaining process itself was at stake,” 301 NLRB No. 124, n. 11 (1991). Indeed, in the very next sentence in that footnote, the Board elaborated: the employer “[did] not deny its obligations under the contract but claim[ed] a lack of funds to meet them. *Id.*”

Unlike the employer in *15th Ave. Ironworks*, Rite Aid never claimed it could not afford to pay the contributions owed, it simply refused to, i.e., it denied its obligation under the contract. The testimony of Gordon Hinkle, Senior Manager of Labor Relations for Rite Aid, about his own statements *at the bargaining table* on July 11, 2016, well past March 6, 2016 when the Arbitration Award should have settled the Parties’ dispute over the contribution rate, was that:

[T]hey were telling me what they claimed we – the back monies. That if we would pay that, that [NBF benefits] wouldn’t be canceled, even a portion of it. And my comment to them was that we had a Good Faith Disagreement and in our opinion we didn’t owe any back. So why would I pay that money?

(Testimony of G. Hinkle, Tr. 110). Hinkle also testified that at that same bargaining session on July 11, he gave the Union four days to agree to Rite Aid’s proposal for a new healthcare plan (Tr. 112). Allyson Belovin, Counsel and chief negotiator for Charging Party, testified that at the

July 13, 2016 bargaining session, she “said you can pay a portion of the contributions that you owe to the fund to forestall benefit termination as well. And that we don’t need to be bargaining under such a tight timeline.” (Tr. 358.) Then, at the July 20 bargaining session, Belovin reiterated that “they didn’t need to pay the full delinquency...so that they wouldn’t be at the critical point of delinquency where...the NBF needed to terminate the benefits” and that “if Rite Aid were to win [their petition in the District Court] and the award were to be vacated, that any overpayments it would have made to the fund as a result would be credited to future contributions, so that it wouldn’t be out the money” (Belovin Testimony, Tr. 362-63). Still, at the bargaining session on July 20, Hinkle “told the Union that the District Court Case didn’t matter because [Rite Aid was] proposing the new Healthcare Plan for the life of the CBA so there [would be] nothing to credit” (Hinkle Testimony, Tr. 117).

As the above testimony shows, Rite Aid’s stubborn refusal to pay even a small portion of what was owed was in support of and strengthened its bargaining position. It not only imperiled employees’ healthcare coverage, but went to the core of the parties’ negotiations by altering the relative positions of the parties. In that regard, the Complaint allegations in this case are entirely distinguishable from those in the mere “collections cases” of *Malrite of Wisconsin*, 198 NLRB 241 (1972) and *15th Ave. Ironworks*. Rite Aid did not merely fail to cure the contract violation found by Arbitrator Viani in his March 6, 2016 Award, but did so as part of its strategy to pressure and rush the Union to accept its bargaining proposals. In fact, Rite Aid’s ultimate payment of the amounts awarded by the Arbitrator, (but not until August 30, 2017 after losing its appeal to the Second Circuit Court of Appeals), could do nothing to remedy the corrosive impact of its refusal to pay on either the Union members whose health benefits were terminated, or on

the collective bargaining process itself. Accordingly, dismissal of the allegation only serves to undermine the integrity of the bargaining process.

CONCLUSION

Based on the above, as well as each and all of the arguments set forth in the General Counsel's Appeal, Charging Party respectfully requests that General Counsel's Request for Special Permission to Appeal, and its Appeal, be granted.

Dated: September 29, 2017
New York, NY

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CERTIFICATE OF SERVICE

I hereby certify that on September 29 2017, I caused the foregoing CHARGING PARTY'S BRIEF IN SUPPORT OF GENERAL COUNSEL'S APPEAL OF JUDGE GREEN'S ORDER DISMISSING PORTIONS OF THE COMPLAINT to be served electronically upon the following individuals:

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