

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

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

Respondent,

And

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

Charging Party

Case No. 02-CA-182713
02-CA-189661

The above-entitled matter came on for hearing pursuant to Notice, before THE HONORABLE BENJAMIN GREEN, Administrative Law Judge, before the National Labor Relations Board, Region 2, 26 Federal Plaza, Suite 3614, New York, New York 10278 on Monday, September 11, 2017, at 9:30 a.m.

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1 On Behalf of the Agency:

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10 On Behalf of the Respondent:

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22 On Behalf of the Charging Party:

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2I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>	<u>VOIR</u> <u>DIRE</u>
Gordon Hinkle	97	--	--	--	--

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E X H I B I T S

<u>EXHIBIT NUMBER</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
GENERAL COUNSEL'S		
GC-1	55	55
GC-2	111	111
GC-3	134	134
GC-4	136	137
JOINT		
J-1 (a)	55	61
J-1 (b)	56	61
J-1 (c)	56	61
J-1 (d)	56	61
J-1 (e)	56	61
J-2	56	61
J-3 (a)	56	61
J-3 (b)	56	61
J-3 (c)	57	61
J-3 (d)	57	61
J-4 (a)	57	61
J-4 (b)	57	61
J-4 (c)	57	61
J-4 (d)	57	61
J-4 (e)	58	61
J-4 (f)	58	61

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J-5 (a)	58	61
J-5 (b)	58	61
J-5 (c)	58	61
J-5 (d)	58	61
J-5 (e)	58	61
J-5 (f)	59	61
J-5 (g)	59	61
J-6 (a)	59	61
J-6 (b)	59	61
J-6 (c)	59	61
J-6 (d)	59	61
J-6 (e)	59	61
J-6 (f)	60	61
J-6 (g)	60	61
J-7	60	61
J-8	60	61
J-9	60	61
J-10	60	61
1		
2		

1 (Joint Exhibit J-1(b) identified.)

2 MS. OLIVER: J-1(c) is the 2006 to 2010 Memorandum of
3 Agreement extending previous Memorandum of Agreement, extending
4 the CBA.

5 (Joint Exhibit J-1(c) identified.)

6 MS. OLIVER: Joint Exhibit J-1(d) is a 2009-2015
7 Memorandum of Agreement also extending the CBA.

8 (Joint Exhibit J-1(d) identified.)

9 MS. OLIVER: Joint Exhibit J-1(e) is a 2015 Extension
10 Agreement, also extending the 1998 CBA.

11 (Joint Exhibit J-1(e) identified.)

12 MS. OLIVER: I do have copies for the Court Reporter. I
13 just need to find them.

14 JUDGE GREEN: Okay.

15 MS. OLIVER: Joint Exhibit J-2 is a July 11th Proposal from
16 Rite Aid to the Union on Health and Welfare Benefits.

17 (Joint Exhibit J-2 identified.)

18 MS. OLIVER: Proposal J-3(a) is an August 17th Proposal from
19 the Employer, Rite Aid, to the Union on Pension.

20 (Joint Exhibit J-3(a) identified.)

21 MS. OLIVER: Joint Exhibit J-3(b) is a - to me it's a full
22 proposal. I think they called it a Strike Through Agreement.

23 (Joint Exhibit J-3(b) identified.)

24 MS. OLIVER: Joint Exhibit J-3(c) -

25 MR. SILVERSTRI: What's the date of J-3(b)?

1 MS. OLIVER: August 17th - all of J-3 is 17.

2 MR. SILVERSTRI: Okay.

3 MS. OLIVER: Joint Exhibit J-3(c) is the second Strike
4 Through Agreement that was provided to the Union from Rite Aid
5 on August 17th.

6 (Joint Exhibit J-3(c) identified.)

7 MS. OLIVER: And J-3(d) is a Wage Proposal provided to the
8 Union from Rite Aid on August 17th.

9 (Joint Exhibit J-3(d) identified.)

10 MS. OLIVER: Joint Exhibit J-4(a) is an August 30th letter
11 sent from Rite Aid to the Union. That is Bates Stamped Rite Aid
12 376 to 377.

13 (Joint Exhibit J-4(a) identified.)

14 MS. OLIVER: Joint Exhibit J-4(b) is a Health and Welfare
15 Proposal provided by Rite Aid to the Union on August 30th. And
16 that's Bates Stamped 378 to 380.

17 (Joint Exhibit J-4(b) identified.)

18 MS. OLIVER: Joint Exhibit J-4(c) is a Full Strike Through
19 Agreement proposed by Rite Aid to the Union on August 30th. That
20 is Bates Stamped Rite Aid 381 to 464.

21 (Joint Exhibit J-4(c) identified.)

22 MS. OLIVER: Joint Exhibit J-4(d) is a Summary Strike
23 Through Agreement provided by Rite Aid to the Union on August
24 30th. And that is Bates Stamped 465 to 485.

25 (Joint Exhibit J-4(d) identified.)

1 MS. OLIVER: Joint Exhibit J-4(e) is a Pension Proposal
2 provided to the Union by Rite Aid on August 30th. And that's
3 Bates Stamped Rite Aid 486.

4 (Joint Exhibit J-4(e) identified.)

5 MS. OLIVER: Joint Exhibit J-4(f) is a Wage Proposal
6 provided by Rite Aid to the Union on August 30th. And that is
7 Bates Stamped Rite Aid 487 to 488.

8 (Joint Exhibit J-4(f) identified.)

9 MS. OLIVER: Then we have Joint Exhibit J-5(a) is the
10 Employer's Bargaining Notes from June 13th. And that is Bates
11 Stamped 489 to 498.

12 (Joint Exhibit J-5(a) identified.)

13 MS. OLIVER: Joint Exhibit J-5(b) is the Employer's July
14 11th Bargaining Notes. And that is Bates Stamped 499 to 509.

15 (Joint Exhibit J-5(b) identified.)

16 MS. OLIVER: Joint Exhibit J-5(c) is the Employer's July
17 13th Bargaining Notes. And that is Bates Stamped 510 to 513.

18 (Joint Exhibit J-5(c) identified.)

19 MS. OLIVER: Joint Exhibit J-5(d) is the Employer's July
20 20th Bargaining Notes. That's Bates Stamped Rite Aid 514 to 521.

21 (Joint Exhibit J-5(d) identified.)

22 MS. OLIVER: Joint Exhibit J-5(e) is the Employer's August
23 17th Bargaining Notes, Bates Stamped 522 to 527.

24 (Joint Exhibit J-5(e) identified.)

25 MS. OLIVER: Joint Exhibit J-5(f) is the Employer's August

1 18th Bargaining Notes and that's Bates Stamped 528 to 532.

2 (Joint Exhibit J-5(f) identified.)

3 MS. OLIVER: Joint Exhibit J-5(g) is the Employer's
4 September 6th Bargaining Notes. That Bates Stamp is 533 to 539.

5 (Joint Exhibit J-5(g) identified.)

6 MS. OLIVER: Joint Exhibit J-6(a) is the - I'm sorry - the
7 Union's Bargaining Notes from June 13th and that's Bates Stamp
8 CP, I believe that you said?

9 (Joint Exhibit J-6(a) identified.)

10 MS. BELOVIN: Yes.

11 MS. OLIVER: CP-1 to CP-22 - Joint Exhibit J-6(b) is the
12 Union's July 11th Bargaining Notes. And that's Bates Stamped CP-
13 23 to CP-36.

14 (Joint Exhibit J-6(b) identified.)

15 MS. OLIVER: Joint Exhibit J-6(c) is the Union's July 13th
16 Bargaining Notes, Bates Stamped CP-37 to CP-46.

17 (Joint Exhibit J-6(c) identified.)

18 MS. OLIVER: Joint Exhibit J-6(d) is the Union's July 20th
19 Bargaining Notes. And that is Bates Stamped CP-47 to CP-54.

20 (Joint Exhibit J-6(d) identified.)

21 MS. OLIVER: Joint Exhibit J-6(e) is the Union's August
22 17th Bargaining Notes, Bates Stamped CP-55 to CP-65.

23 (Joint Exhibit J-6(e) identified.)

24 MS. OLIVER: Joint Exhibit J-6(f) is the Union's August
25 18th Bargaining Notes, Bates Stamped CP-66 to CP-70.

1 (Joint Exhibit J-6(f) identified.)

2 MS. OLIVER: Joint Exhibit J-6(g) is September 6th and that
3 is Bates Stamped CP-71 to CP-77.

4 (Joint Exhibit J-6(g) identified.)

5 MS. OLIVER: Joint Exhibit J-7 is a September 7th letter
6 from Gordon Hinkle to Allyson Belovin regarding the Last, Best,
7 and Final Proposals.

8 (Joint Exhibit J-7 identified.)

9 MS. OLIVER: Joint Exhibit J-8 is a September 10th from
10 Gordon Hinkle to Allyson Belovin regarding the Employer's Last,
11 Best, and Final Proposals.

12 (Joint Exhibit J-8 identified.)

13 MS. OLIVER: Joint Exhibit J-9 is a September 14th Letter
14 from Gordon Hinkle to Ms. Belovin of the Union. And that is
15 regarding implementation of the Last, Best, and Final Proposals.

16 (Joint Exhibit J-9 identified.)

17 MS. OLIVER: Joint Exhibit J-10 is a Stipulation entered
18 into between the General Counsel and Counsel for Respondent
19 regarding the appropriate named entities of the Respondent in
20 this case.

21 (Joint Exhibit J-10 identified.)

22 MS. OLIVER: Having no objection to those documents -

23 MR. SILVERSTRI: I'm fine with them, Your Honor.

24 JUDGE GREEN: Okay.

25 MS. OLIVER: I would like to move Joint Exhibits J-1

1 through J-10 and their various subparts into the record at this
2 time.

3 JUDGE GREEN: Okay, Joint Exhibits J-1 through J-10 are
4 entered into evidence.

5 (Joint Exhibits J-1 through J-10 received.)

6 JUDGE GREEN: And is there an Amendment or Amendment to the
7 Complaint that are being considered?

8 MS. OLIVER: Yes, Your Honor, based upon the Stipulation
9 entered into by the parties that was entered into the record as
10 Joint Exhibit J-10, the General Counsel moves to amend the
11 Respondents named in the Complaint to only Rite Aid of New York
12 Incorporated and Rite Aid of New Jersey Incorporated as a Single
13 Employer.

14 The other named entities should be removed from the
15 caption and elsewhere in the Complaint. I believe that would be
16 the Introduction of Paragraphs 3(a) and 3(b).

17 There's two further Amendments.

18 JUDGE GREEN: Is there any objection?

19 MR. SILVERSTRI: So, we would agree to the Stipulation for
20 the proposals of this case only. We would want that noted on the
21 record.

22 JUDGE GREEN: Okay - so you have two other?

23 MS. OLIVER: Yes, Your Honor, Paragraph 7(b), Respondent
24 denied the allegations in this paragraph in so far as the Unit
25 described in 7(a) has changed since the 1960's. General Counsel

1 agrees with that. So we would like to omit the language
2 referring to the 1960's so that Paragraph 7(b) would start from
3 'At all material times'.

4 MR. SILVERSTRI: No objection.

5 JUDGE GREEN: Okay.

6 MS. OLIVER: And then the last one is Paragraph 12(f). it
7 says that 'Respondent engaged in a conduct described above in
8 subparagraphs A through D, without first bargaining to impasse,
9 but it should say A through E.

10 MR. SILVERSTRI: No problem with correcting the error,
11 Your Honor.

12 JUDGE GREEN: Okay, so the Complaint is amended as
13 described by Ms. Oliver.

14 So, in an off the record discussion we had - there was a
15 discussion about the Respondent's concerns about going forward
16 with cross examination based on subpoenaed records that were not
17 produced and you were describing, Mr. Silvestri, the reasons why
18 you needed the subpoenaed materials and the reasons that you had
19 a concern about cost. So, could you describe that for the record
20 again?

21 MR. SILVESTRI: Yes, Your Honor -- so, there are a number
22 of reasons why we need that material. First of all, obviously
23 one of the reasons why we commenced proposing a change from the
24 National Benefit Fund to the Rite Aid Plan was in response to
25 threats to terminate the benefits that were surfaced at the tail

1 end of bargaining, actually after almost all of the proposals
2 had been agreed to, except for a very few. And the threat to
3 terminate triggered a write in obligation to the Collective
4 Bargaining Agreement to supply benefits if the National Benefit
5 Fund wasn't going to supply them.

6 And the threat was - the first threat that came in was
7 that benefits would terminate in 30 days. So, we had 6,000
8 Associates with benefits that would terminate in 30 days. That
9 exigent circumstance that required us to scramble to get
10 replacement benefit coverage or agree to the Union's demand that
11 we contribute at a rate different than what we had otherwise
12 agreed to. And this is hardly the subject beyond the
13 arbitration, but until that point and time we were still very
14 much in dispute of that.

15 So, it's our contention, first of all, that demand -
16 excuse me - the threat to terminate was part of a manipulative
17 effort by the National Benefit Fund that's direct from the Union
18 to force Rite Aid to continue in the National Benefit Fund
19 because it had here to for not agreed on that proposal. And the
20 Union had not buried its proposal from the beginning of
21 negotiation that Rite Aid contribute to the National Benefit
22 Fund at the rate set by the Trustees. There was no
23 counterproposal from the Union in connection with that.

24 So the first reason why we need that is obviously to help
25 our defense with respect to the extensive circumstances. And we

1 believe that correspondence will show a couple of things.

2 One, in early July we received the first threat. There's
3 already a piece of correspondence that we have in our possession
4 to indicate that there were prior communications between the
5 Union and the Fund in connection with the threat that surfaced
6 in negotiations. So, we don't have those communications. We have
7 no emails whatsoever from the Fund to the Union or from Counsel
8 to the Fund to Counsel to the Union. We would claim that those
9 emails are not privileged.

10 I don't think - did I get the Privilege Log? I haven't
11 seen a Privilege Log from either Ms. Apter or Ms. Belovin in
12 connection with that. And that they were done for the purposes
13 of helping the Union foster its demands that Rite Aid can
14 continue trip - so basically we were put in a position of having
15 to either create a plan or agree to the Union's demands. And we
16 believe that is illegal and inappropriate.

17 JUDGE GREEN: I'm correct in you have letters which
18 constitute what you call a threat to terminate Employee
19 benefits. You have all of that correspondence.

20 MR. SILVESTRI: I have no correspondence directly from the
21 Union to us. I have correspondence from the Union to the
22 Employees advising them at first that their benefits would be
23 terminated as of a particular date. And second, they were be
24 terminated as of another date. And third, that it would be
25 terminated as of still of a third date. All of which coincided

1 with collective bargaining negotiations meetings. I have no
2 correspondence absent that the exchange of information going
3 back and forth to the Union about information that Rite Aid
4 needed in connection with creating a plan from the Union
5 announcing that there would be a termination of benefits to us.
6 That was all oral, my understanding, between Ms. Apter and Ms.
7 Pierson-Scheinberg, who is sitting here to my left.

8 So the answer to your question is there's very little
9 correspondence directly from the Union to the Employer saying
10 that benefits are going to be terminated.

11 JUDGE GREEN: Is there any dispute here that the Fund told
12 Employees that their benefits were going to be terminated as of
13 a certain date based on -

14 MS. BELOVIN: Your Honor, there's no dispute that the
15 Funds told Employees that their benefits were initially in
16 jeopardy of being terminated. I don't believe the initial
17 correspondence gave a date certain on which the benefits would
18 be terminated, I think in part because the Fund wasn't sure of
19 how much it was going to pay or had paid and didn't know exactly
20 when the critical point would be reached that its delinquency
21 policy would require the termination of benefits.

22 The reason that there's no communication between the Union
23 and Rite Aid about the termination of benefits is because the
24 Union doesn't control the termination of benefits. That was
25 controlled entirely by the Fund and based entirely on the Fund's

1 Delinquency Policy. So it's not surprising that there isn't
2 correspondence between the Union and Rite Aid about benefit
3 termination. That's not within the Union's curfew.

4 MR. SILVESTRI: Nonetheless, Your Honor, there is
5 indications and emails, at least one email that we've had, that
6 there was communication between the Union and the Fund prior to
7 the time that Rite Aid was advised that the benefits would be
8 terminated. In addition, we expect to show through
9 communications that the initial threat to terminate benefits,
10 the subsequent threat to terminate benefits, were all in
11 violation of the Funds own delinquency policies. So essentially
12 the dates were accelerated or I would say manufactured to buy
13 the Fund at the request of the Union to put pressure on Riet Aid
14 to agree to the National Benefit Fund.

15 JUDGE GREEN: Do you feel that you have in or possession
16 sufficient evidence to put on of - I guess - your Notice of this
17 Exigency? See in exigency - you don't - the exigency is
18 relevant. You don't - but you don't need to prove that it was by
19 the Union or by the Fund or some kind of collusion between them.
20 There was - you know - if there was threat in termination of
21 benefits, that could be an exigency and that could be a valid
22 defense.

23 The issue of whether the Union and the Fund colluded to
24 put pressure on the Employer in support of their bargaining
25 position by making these threats, that's a different issue.

1 MR. SILVESTRI: Well, I don't think that it's a different
2 issue. I think that it's connected to the issue because it
3 basically forces us to in effect to go forward with our plan. If
4 we have separate dates of termination or threat to termination
5 and the situation is very much in the - in suspense. We, at that
6 point and time, went forward and made a proposal to have Rite
7 Aid have its own plan for the duration of the contract. So part
8 of the issue that we have in connection with not only making the
9 proposal, but also in connection with declaring impasse and
10 implementing impasse exist because of the manufactured exigency
11 of the situation.

12 I believe that motive - which the proof of the motive for
13 creating exigency is a valid defense and I want to put on
14 evidence of that. And like all conspiracies, they may not be a
15 smoking gun, but you uncover the circumstance evidence, not only
16 in connection with the timing of the threats, but also in
17 communication between the Union and the Fund in connection with
18 those threats. And there's no doubt in my mind, sitting here
19 today, that there had to be communication between the Fund and
20 the Union about those.

21 You don't terminate benefits for 6,000 people without
22 calling up the Union and saying, "Hey, your benefits are going
23 to get terminated."

24 Or if you don't have the Union have communications about
25 those terminations of benefits with the National Benefit Fund.

1 And whether they were legit, whether they were not legit, we
2 won't know until we look at communications. And to date now, I
3 have not seen a single email going back and forth between the
4 Fund and the Union on termination of these benefits. I haven't
5 seen a single communication.

6 And the two Lawyers who control this sit in adjacent
7 offices at Levy Ratner. I just can't believe that there's no
8 communication of this.

9 MS. BELOVIN: If I could just address that point, which
10 is, of course there was communications between the Union and the
11 Fund prior to the termination or potential termination of health
12 insurance benefits for 6,000 Union Members. Mr. Silvestri is
13 absolutely right about that. But the fact that there was
14 communications is no indication that those communications were
15 in anyway collusive or manipulative or inappropriate.

16 And I would suggest that Mr. Silvestri has to come forward
17 with some kind of Offer of Proof or something more than just the
18 fact that there were communications in order to delve into what
19 those communications were. It's not - this can't be a fishing
20 expedition in which the Respondent can look through all
21 communications between the Union and the Fund about the issue of
22 benefit termination without some at least showing that there was
23 something inappropriate about those communications. And they had
24 the opportunity to do this at the arbitration.

25 They made this argument. It didn't work there. It dint'

1 work at the District Court. It didn't work in the Second
2 Circuit. They're trying to do it again here today. It's simply
3 inappropriate and it shouldn't be permitted.

4 JUDGE GREEN: Okay.

5 MR. SILVESTRI: May I speak to that, Your Honor?

6 JUDGE GREEN: Sure.

7 MR. SILVESTRI: Number one, we're not required to put on
8 any proof of this. It's our allegation. Number two, there's
9 plenary proof this.

10 So, the first demand came two days before a bargaining
11 date. The second threat - excuse me - the first threat came two
12 days before our bargaining date. The second threat came the day
13 before the next bargaining date. The third threat came five days
14 before the third bargaining date.

15 The connection between the bargaining dates and the
16 threats is palpable. It's more than enough to convince a Federal
17 Court any place to remit discovery of that evidence, more than
18 enough.

19 JUDGE GREEN: Okay, so I have all your - you know - I
20 received a lot of materials in support of your various positions
21 on the issue. I've heard some more arguments today. Essentially,
22 I agree that an economic exigency could be a valid defense. And
23 that you need to establish that the motivation of the Union or
24 the Fund - I think that you just established the major of the
25 exigency, which would be sufficient to establish a defense.

1 I think that if you were to get subpoenaed records
2 establishing that the Union and the Fund were engaged in the
3 conduct that you contend. And they were trying to put pressure
4 on the Employers to concede to the Union's bargaining position.
5 That is not a valid defense, even if you establish it.

6 And I'm not going to order the production of subpoenaed
7 witnesses and materials on that basis. I'm not going to postpone
8 cross examination or the trial on that basis.

9 I started reading - I started preparing an Order. And I'm
10 actually going to read a section of the Order, which is relevant
11 because I'd like you to have it. If you want to make a - file a
12 Special Appeal, I'd rather you have it sooner rather than later,
13 but I will be issuing an Order on the subject.

14 MR. SILVESTRI: Can I say one more thing, Your Honor,
15 before you start ruling?

16 JUDGE GREEN: Sure.

17 MR. SILVESTRI: So, one of the principal points that the
18 Counsel for the General Counsel is going to raise here is that
19 Rite Aid was responsible for creating the exigency. Rite Aid's
20 alleged failure to pay the difference between what it had been
21 paying under the old URR Rate and the new flat rate was
22 responsible for creating the exigency, notwithstanding the
23 Arbitration Award and not withstanding District Court case,
24 notwithstanding the Union already a Collection Action already
25 going and could collect under that eventually.

1 Our position is that the violation of the delinquency
2 policy by the Union - excuse me - by the fund proves not only
3 that it was acting at the Union's behalf, but also destroys the
4 foreseeability of that exigency that the Counsel for the General
5 Counsel is going to argue. So if we didn't expect to get a
6 termination of benefits because there was no Delinquency Policy
7 calling for that, then our defense with respect to exigency, the
8 reason for the exigency should be put on the record and we
9 should be allowed discovery in connection with that. So, that's
10 another point that we make.

11 JUDGE GREEN: Okay, well I think that's a different issue.

12 MR. SILVESTRI: Yes, Your Honor, it is a different issue.
13 But it is the same evidence that we're talking about.

14 MS. BELOVIN: If I could just address that, Your Honor.

15 JUDGE GREEN: Okay.

16 MS. BELOVIN: If Mr. Silvestri wants to make the argument
17 that the exigency wasn't foreseeable because the Fund violated
18 the Delinquency Policy, he can make that argument. He's been
19 provided, I believe, with a copy of the Delinquency Policy. So,
20 he knows what the Delinquency Policy is.

21 And he can certainly make the argument that there was some
22 violation of the Delinquency Policy and that caused him not to
23 be able to foresee that benefits would be terminated and the
24 exigency would create it. He certainly doesn't need
25 communications between the Union and the Funds to make that

1 argument.

2 JUDGE GREEN: Okay, so let me read this section of the
3 Order and then we'll move on.

4 'So, the Respondent has cited a number of cases in support
5 of their defense, but none of those cases involve the type of
6 conduct allegedly engaged here by the Union and the Fund as
7 conduct that would remove the possibility of Good Faith
8 Negotiations or otherwise excuse the Respondent's Alleged
9 Unlawful Unilateral Action. For example, the Union has not
10 accused of having refuse to bargain, orchestrate an unprotected
11 slow down, or briefed the material provision the most recent
12 Collective Bargaining Agreement.

13 Moreover, it does not appear that the reasoning in the
14 case is cited by the Respondent would logically extend to the
15 allege conduct at issue here. Parties are generally entitled to
16 exert economic pressure in support of a bargaining position
17 prior to impasse.

18 See example, Darling and Company, 171-NLRB-801 1968, where
19 the Board found that a lock out for impasse in support of a
20 bargaining position is lawful if an Employer's motivation is not
21 to discourage an activity or avoid its bargaining obligation.

22 The object of such economic tactics are to successfully
23 conclude negotiations, not prevent it. This being the object of
24 Respondent's attribute to the Union. The production of the
25 evidence to that effect would not establish a valid defense.

1 The Respondent nevertheless contend that the Union's
2 alleged collusion with the Fund to threaten the termination of
3 Employee benefits created an economic exigency, which permitted
4 the implementation of unilateral changes. The Respondent made
5 proof to be correct that the anticipated termination of Employee
6 benefits created such an exigency.

7 However, this line of cases is not required to prove that
8 the exigency was caused by the Union and/or the Fund. Thus to
9 the extent that the Respondent has subpoenaed witnesses to
10 establish causation and collusion, they seek evidence that is
11 not relevant.'

12 Accordingly, it's my understanding that it's - we have the
13 subpoena add tests that were issued to - let's see -- Maria
14 Castaneda and Mitra Behroozi and Jeffrey Stein are essentially -
15 those were based on Respondent's attempt to establish this
16 defense. Am I correct?

17 MR. SILVESTRI: For the most part, yes, Your Honor.

18 JUDGE GREEN: Okay, and I guess you also in that
19 supplemental over the weekend you indicated that was valid also
20 - this reasoning, this defense, would be a basis for subpoenaing
21 Mr. McIver, as well.

22 MR. SILVESTRI: Yes, Your Honor.

23 JUDGE GREEN: Okay, so I'm not going to order those
24 subpoenaed - I'm not going to order the appearance of those
25 individuals at this time. And I will issue a more Formal Order,

1 hopefully tomorrow morning, on the issue.

2 MS. BELOVIN: Your Honor, if I could ask for some
3 clarification on that? The Respondent had subpoenaed 34, 35
4 Union witnesses -

5 JUDGE GREEN: I understand -

6 MS. BELOVIN: All of whom, I believe, go to that same
7 question.

8 JUDGE GREEN: So -

9 MS. BELOVIN: So, what are we doing about the rest of
10 those folks?

11 JUDGE GREEN: So, in the papers submitted by the
12 Respondents it sounds like you had narrowed that down, but maybe
13 I'm wrong.

14 MR. SILVESTRI: No, so we were exploring the possibility
15 of doing a Stipulation with respect to those people who served
16 on the Collections Committee of the Board of Trustees. But,
17 since you're going to rule against us on the theory, I'm not
18 sure we need any Situation in connection with that.

19 However, there are witnesses that are being subpoenaed for
20 defense that still exist, including the exigence defenses. And
21 that would be Ms. Apter being subpoenaed. Ms. Belovin has been
22 subpoenaed. So those subpoenas, I would say, need to be
23 enforced.

24 MS. OLIVER: We didn't Petition to Revoke the subpoena of
25 Ms. Belovin. And I'm not -

1 MS. BELOVIN: I don't believe that Ms. Apter petitioned to
2 revoke -

3 MR. SILVESTRI: But she did. Maybe I'm wrong. If she
4 didn't, I stand corrected.

5 MS. BELOVIN: Yeah.

6 JUDGE GREEN: Okay, and if we can just discuss the
7 parties' position on new litigation of the arbitration - beyond
8 the Arbitration Award. Now the Respondent - in your papers you
9 indicated that - essentially you cited Malrite.

10 And you stated: 'One of the issues before the Board is
11 whether the Board should defer to beyond the Award.'

12 And citing Malrite, you argued: 'that an allegation based
13 on noncompliance with the Viani Award is for the Courts, not the
14 Board.'

15 However, the Respondent has also asserted: 'that Spielberg
16 Deferral is not appropriate where an Arbitration Award is
17 repugnant to the Act'. And Respondent has asserted that 'the
18 Arbitration Reward was repugnant because it does not apply to
19 Board's Standard with regard to bargaining waivers.'

20 So, I'm just a little bit confused about the position
21 because if Malrite applies, then at least - then the
22 constrictions allocation - allegations - should be dismissed.
23 You have Spielberg - Malrite applies to Spielberg and Spielberg
24 essentially says that the Award should defer to the Arbitration
25 Award and dismiss on that basis.

1 If you're arguing that the Award was repugnant, you're
2 essentially arguing that Spielberg shouldn't apply and that the
3 allegation should not be dismissed on that basis. And so I just
4 want still clarification.

5 MR. SILVESTRI: So, we're responding to an element of the
6 Complaint, where I believe Counsel for the General Counsel has
7 alleged that the refusal by Rite Aid to contribute that the rate
8 determined by the Trustees as enforced by Arbitrator Viani is an
9 Unfair Labor Practice. And they're basing their theory on the
10 Arbitration's Findings.

11 JUDGE GREEN: Correct.

12 MR. SILVESTRI: So, if I'm not mistaken, Your Honor has to
13 look at whether or not that constitutes a separate or a
14 violation because Arbitrator Viani didn't rule that it was an
15 Unfair Labor Practice. That wasn't an issue before him. In fact,
16 he wasn't even proceeding under the Collective Bargaining
17 Agreement in this case. He was proceeding under a separate
18 Collective Bargaining Agreement.

19 JUDGE GREEN: Okay.

20 MR. SILVESTRI: So it wasn't even a -

21 MS. OLIVER: Can you clarify that?

22 MR. SILVESTRI: Yes, his - our Collective Bargaining
23 Agreement refers to the Lead Contract as the enforcer mechanism
24 for the Collections Action. And specifically, he was proceeding
25 under the provisions of the Lead Contract that enforced his

1 right to go in and enforce a failure to pay contributions. So
2 that's the first point.

3 MS. OLIVER: But isn't that contract incorporated into
4 your contract by reference?

5 MR. SILVESTRI: It's referenced in it, but the Standard
6 that he was using was from the Lead Contract, which is not the
7 same Standard in the Grievance and Arbitration Provision in this
8 contract. So that's number one.

9 Number two, I believe that the decision as to whether this
10 is an Unfair Labor Practice stands on a number of things. One is
11 whether or not there was a clear and unmistakable Waiver of the
12 Right to Bargain in the event that the Trustees decided to
13 change the right. That wasn't addressed before Arbitrator Viani.
14 It wasn't part of the process. And we want it to be part of the
15 process here because there was no clear and unmistakable waiver.
16 That's what we said. It's not part of the Viani Case.

17 We're not seeking to retry the case in front of you. But
18 we are seeking to determine whether or not Rite Aid made its
19 Right to Bargain over that change.

20 While we continue to believe that the interpretation is
21 correct, we can't do anything about the interpretation and it's
22 there, because the Award exists. It exists. And it was enforced.
23 And it's been paved.

24 JUDGE GREEN: I guess what I'm asking really is are you
25 asking for Spielberg for dismissal on the grounds of Spielberg?

1 MR. SILVESTRI: Give me two minutes.

2 JUDGE GREEN: Okay, I'm not saying that you have to tell
3 me right now.

4 MR. SILVESTRI: I want to consult with my Colleagues
5 before I answer that question because -

6 JUDGE GREEN: Okay, we're going to break. We're going to
7 break anyway. So you can talk about it.

8 And I'm assuming you're - you know - the material
9 submitted by the General Counsel relied on some Spielberg Cases,
10 but I take it you're not taking - obviously you're not taking
11 the position that Spielberg is a basis for dismissal. You're
12 simply saying that it's a basis for deferring to the
13 Arbitration's Decision as a matter of contract interpretation.

14 MS. OLIVER: Yes, it was somewhat in response to the
15 Respondent's Submission. And it was mostly for the overarching
16 principle that the Board generally does not get involved in
17 contract interpretation unless it's necessary. In this case,
18 it's not necessary. The Arbitrator already made its Decision.
19 The Arbitrator already decides what the contract means and the
20 language itself is clear and ambiguous. So even have I looked at
21 it, we would have agreed with the Arbitrator. There's just no
22 basis for re-litigating any of those issues.

23 MR. SILVESTRI: I'm not sure that I've characterized the
24 Award as saying that. But that's okay, I understand her position.
25 I don't think that's my position.

1 JUDGE GREEN: Unless we have anything else that you would
2 like to discuss, we're going to break early for - I guess that
3 we break for lunch. And you have to look at some documents.

4 MS. OLIVER: Yes, and I have to make copies of the
5 documents that were entered into the record for the Court
6 Reporter, as well.

7 MR. SILVESTRI: I would propose like 1:30ish or something
8 like that.

9 MS. OLIVER: I would like to eat.

10 JUDGE GREEN: Okay.

11 MR. SILVESTRI: I mean, I need to eat and we've got to
12 discuss.

13 JUDGE GREEN: Okay, very good - so we'll break until 1:30
14 and we'll go on the record at that time.

15 MR. SILVESTRI: Thank you.

16 MS. OLIVER: Thank you.

17 JUDGE GREEN: Thank you very much - off the record.

18 (Whereupon, at 11:01:50 a.m., a lunch break was taken.)

19

1 MR. SILVESTRI: 'On September 10th, 2016 on various dates
2 throughout the Respondent unilaterally implemented its Last,
3 Best, and Final Offer, making unilateral changes to terms and
4 conditions of employment linked to not eliminating healthcare
5 and pension contributions to the MBF for all Unit Employees in a
6 new Healthcare Plan in changing the Union scope.'

7 Now as worded, Your Honor, we can deny that. We could deny
8 it today because it doesn't - the inclusion isn't correct with
9 respect to pension contributions for existing Employees. And
10 this reads - this doesn't read that way.

11 JUDGE GREEN: Okay.

12 MR. SILVESTRI: Alright - in addition, part of the Last,
13 Best, and Final Proposal - and I'll just explain the Amendment
14 that I would make to the Answer. I've already shown Ms. Oliver
15 what I would suggest be the Answer - Amended Answer - and she
16 wasn't happy with that.

17 So, part of the Last, Best, and Final Proposal that we
18 delivered on September 6th included an attachment that was the
19 track changes version. In the track changes version there was a
20 mistake in connection with Article II. The prior version of
21 Article II, which had been proposed long prior to that - like a
22 year prior to that - it stayed in that draft. Okay, so we didn't
23 implement the Article II revision. That was a revision to the
24 scope - to the Bargaining Unit definition. That we didn't
25 implement.

1 So, what I was not to do because the Allegation is kind of
2 specific and then general, was to answer that we implemented the
3 Last, Best, and Final -- Rite Aid's September 6th, 2016 Last,
4 Best, and Final Proposal, which is a document - and I'm
5 referring to a specific document without the attachments -- and
6 essentially deny everything else because there's some
7 allegations in here that are not accurate. We didn't do the
8 pension contribution. So -

9 JUDGE GREEN: Okay.

10 MR. SILVESTRI: -- the evidence will all come out on that.
11 And maybe we could - after the evidence is out, maybe we could
12 conform the Answer at some point.

13 JUDGE GREEN: Okay, well you've denied all of 12 before
14 this and -

15 MR. SILVESTRI: I have. I have.

16 JUDGE GREEN: And so you're essentially admitting a little
17 something.

18 MR. SILVESTRI: I'm admitting that we implemented our
19 Last, Best, and Final Proposal. But there's' going to be a
20 debate in transparency --

21 JUDGE GREEN: I get it.

22 MR. SILVESTRI: Your Honor, there's going to be a debate
23 between the parties about what that proposal was.

24 JUDGE GREEN: Understood, but you're making a Motion to
25 Solomon your Answer.

1 MR. SILVESTRI: To Solomon my Answer as I've just
2 explained it to you.

3 JUDGE GREEN: Right - any objection?

4 MS. OLIVER: I don't have an objection to the Amendment
5 itself, but that does bring up subpoena issues because General
6 Counsel's Subpoena Request Number 17 requested documents showing
7 the implementation of the Last, Best, and Final Offer. Rite Aid
8 had informed me that they were going to draft a Stipulation
9 listing what was actually implemented. And I never got that.

10 This morning was the first time that he showed me -- we'll
11 amend to say that we implemented, except for Article II.

12 The problem is that there is a debate about Article II and
13 I don't have documents regarding the implementation.

14 JUDGE GREEN: Okay, off the record; 2:09:52 p.m.

15 (Discussion off the record.)

16 JUDGE GREEN: On the record; 2:13:24 p.m. So, could you
17 just tell me again real quick?

18 MS. OLIVER: Absolutely, so Respondent's Counsel and I
19 have agreed to table discussion of subpoena production in
20 response to General Counsel's Subpoena Request Number 17. I'm
21 going to proceed with questioning of Mr. Hinkle this afternoon.
22 And just reserve my Right to Argue about Subpoena Production if
23 we can't come to an agreement. And to recall Mr. Hinkle if it
24 becomes necessary for him to get these documents into evidence
25 or if we need to ask questions of him about the documents that I

1 end up receiving.

2 JUDGE GREEN: Okay.

3 MR. SILVESTRI: I'm fine with that, Your Honor.

4 JUDGE GREEN: Okay, very good - so do we have anything
5 else that we need to deal with?

6 MR. SILVESTRI: So you had asked a question about Malrite.

7 JUDGE GREEN: Right.

8 MR. SILVESTRI: So, I went back and I reread Malrite and I
9 reread Paragraph 12 of the Complaint. And our position is that
10 Paragraph 12 of the Complaint is nothing more than an
11 Enforcement Provision to the Arbitration Award. It's 10(a)
12 through (e).

13 JUDGE GREEN: Okay.

14 MR. SILVESTRI: And as I read Malrite, those allegations
15 should be dismissed because there's already an Arbitration
16 Award. It's already been enforced and it's already been paid.

17 JUDGE GREEN: Okay.

18 MR. SILVESTRI: And so it shouldn't be an Unfair Labor
19 Practice.

20 JUDGE GREEN: Okay, so I thought that's what you were
21 saying in the Supplemental Position. And the Answer, I guess,
22 could be read that way. But would you like to make a Motion at
23 this time to Amend the Answer to that effect?

24 MR. SILVESTRI: Yes, I will make a Motion to Amend the
25 Answer to the effect that Paragraphs 10(a) through (e) should be

1 dismissed as they are intended to be an Enforcement of the
2 Arbitration Award.

3 JUDGE GREEN: Okay, any objection to that Amendment?

4 MS. OLIVER: The Amendment, no.

5 JUDGE GREEN: So the Answer is amended to that extent.
6 Okay, so without further ado, if you'd like to call your first
7 witness, we can get going.

8 MS. OLIVER: I'd like to make an Opening Statement first.

9 JUDGE GREEN: Yes.

10 MR. SILVESTRI: I think that we should do Opening
11 Statements and also sequester witnesses.

12 JUDGE GREEN: Okay.

13 MR. SILVESTRI: If there are any witnesses in the room.

14 JUDGE GREEN: Alright, hold on just one moment. Now are
15 you going to - is Respondent going to make an Opening now or are
16 you going to reserve -

17 MR. SILVESTRI: My plan was to do that.

18 JUDGE GREEN: Okay, so 'a Sequestration Order is being
19 issued in this case. This means that all persons who expect to
20 be called as witnesses in this proceeding, other than individual
21 Charging Party and the person designated as a Representative,
22 one per party, will be required to remain outside of the
23 Courtroom whenever testimony or other proceedings are taking
24 place.

25 The Sequestration Order also prohibits all witnesses from

1 discussing with any other witness or possible witness the
2 testimony that they've already given or will be giving.
3 Likewise, Counsel for a Party may not disclose to any witness
4 the testimony of any other witness. Counsel may, however, inform
5 his or her own witness of the content of the testimony given by
6 the Opposing Parties' witness to prepare them for that
7 testimony.

8 It is Counsel's responsibility to make sure that they and
9 their witnesses comply with this Sequestration Order.'

10 Okay, and General Counsel, if you'd like to make your
11 Opening Statement.

12 MS. OLIVER: Could we go off the record for a second?

13 JUDGE GREEN: Sure - off the record; 2:17:22 p.m.

14 (Discussion off the record.)

15 JUDGE GREEN: On the record; 2:20:27 p.m. So, for the
16 record, we have designations of Representatives for the
17 Sequestration Order. The Respondents have designated Gordon
18 Hinkle. The Charging Party Union has designated Ms. Belovin.
19 General Counsel has not designated anyone.

20 Okay, so Opening Statements.

21 MS. OLIVER: Thank you - good afternoon, Your Honor.

22 Rite Aid likes to make this sound complicated, but it's
23 not. The simple fact is and the evince will show that Rite Aid
24 committed numerous Unfair Labor Practices throughout bargaining
25 that made its Declaration of Impasse an implementation of

1 changes to wages, hours, and other terms of conditions of
2 employment unlawful.

3 First, Rite Aid insisted to impasse on changing the scope
4 of the Bargaining Unit. It permits the subject of bargaining.
5 Rite Aid insisted not only on changing the Recognition Clause
6 language itself, but on excluding a historically included job
7 classification, as well. No matter what Rite Aid tries to argue
8 now, the plain language of the proposals and the statements made
9 during bargaining will show that unlawful throughout the entire
10 course of negotiations.

11 Second, Rite Aid failed to pay for Employee benefits at
12 the contractually required rate before and after the contract
13 expired, during bargaining, and without a lawful impasse. Rite
14 Aid claims they had a Good Faith dispute over the correct
15 contribution amount. However, the evidence will show that on
16 that on March 6th, 2016 a Final and Binding Arbitration Award,
17 based on the clear and unambiguous language of the Collective
18 Bargaining Agreement decided that issue in the Union's favor.

19 Third, when Rite Aid's failure to pay for Employee
20 benefits at the contractually required rate led to a delinquency
21 so large that Employee benefits were in jeopardy, rather than
22 paying any of its delinquency Rite Aid created and implemented
23 an entirely new Healthcare Plan. Again, Rite Aid took this
24 action while negotiations were ongoing. In fact, Rite Aid began
25 enrolling Bargaining Unit Employees in the new Healthcare Plan

1 before August of 2016, before even bothering to declare impasse,
2 lawful or otherwise.

3 And fourth, Rite Aid rushed to impasse when it presented
4 its modified Last, Best, and Final Offer to the Union on August
5 30th, threatened to declare impasse on September 7th and actually
6 declared impasse on September 14th, all within about two weeks'
7 time. Any one of these actions taken by Rite Aid is an Unfair
8 Labor Practice that prevents lawful impasse. Yet, on September
9 14th, 2016 Rite Aid informed the Union that the proposals
10 contained in its so called Last, Best, and Final Offer,
11 including the proposal to change the scope of the Bargaining
12 Unit would be implemented that day. And, as Rite Aid has
13 previously stated and as the evidence will show, they did in
14 fact, follow through.

15 Among other changes newly hired Staff Pharmacists are
16 excluded from the Bargaining Unit and Rite Aid has stopped all
17 contributions to the Benefit Fund, fully implementing a new
18 Healthcare Plan for Bargaining Unit Employees.

19 Rite Aid has attempted to assert a number of defenses
20 thought the course of the investigation, but none of them hold
21 water. There was no economic exigency that permitted Rite Aid to
22 implement this new Healthcare Plan. Simply stating that a
23 proposal is a transfer of work and evidence said otherwise,
24 cannot make it true.

25 And the Union did not refuse to bargain over mandatory

1 subjects. In fact, they even willingly bargained over some non-
2 mandatory subjects in the interest of coming to an overall
3 agreement. The only party that acted in Bad Faith here during
4 negotiations was Rite Aid.

5 Thank you.

6 JUDGE GREEN: Thank you very much - does the Union have
7 anything that it would like to add to that?

8 MS. BELOVIN: No, Your Honor, the Union adopts General
9 Counsel's Opening Statement.

10 JUDGE GREEN: Okay, and Respondent's?

11 MR. SILVESTRI: Thank you - Stephen Silvestri for
12 Respondents.

13 This case isn't complicated. I agree with Ms. Oliver. It's
14 not really complicated at all. It's all about trying to get in
15 the Unfair Labor Charge, but the Union couldn't get to
16 bargaining.

17 The true definition of impasse is seeking on your proposal
18 and not changing it. And if that definition of impasse exists,
19 the practical definition - but if that definition exists, then
20 this case should be over now. From the very beginning of
21 negotiations the Union insisted on Rite Aid contributing to the
22 National Benefit Fund or rate set by the Trustees. And that
23 insistence stayed from every single negotiation session to the
24 end. It's never varied once its proposal in connection with the
25 National Benefit Fund, not once.

1 So the impasse wasn't manufactured by Rite Aid. The
2 impasse existed because the parties were built into their
3 positions with respect to the - specifically the Union was built
4 into its position.

5 The Case Law supports us when we say that we change the
6 proposal, that in August, on Pharmacists. The proposal in the
7 beginning was spoke with Bargaining Unit Work Proposal. That was
8 first mentioned in 2015. The parties never discussed that
9 proposal or Proposal Change Article II at all during any parts
10 of the negotiations after that, not once. Instead of talking
11 about the scope of the Bargaining Unit Workers, the parties
12 spent a number of different bargaining sessions talking about
13 the work of the Pharmacists and how it was changing and evolving
14 and how Pharmacists had to act as Supervisors in some
15 situations. There was numerous discussions about that and you'll
16 hear testimony about that and you'll see it in the notes, as
17 well.

18 And so at the very end, not at the very end, but near the
19 end of bargaining Rite Aid recognizing that it could not insist
20 the impasse on the scope of Unit Work Proposal propose the
21 transfer of Bargaining Unit Work, which the Case Law supports.
22 There is cases citing that when that change is in effect, the
23 change converts the proposal from a subject of bargaining to a
24 mandatory subject to bargaining. The Union did not accept at
25 proposal. In fact, refused to discuss it after asking questions

1 about it.

2 Ms. Oliver is absolutely incorrect -- and this is where
3 the two ships pass in the night - about the bargaining that
4 occurred. Rite Aid was constantly asking the Union to meet with
5 it with respect to the National Benefit Fund and the exigency
6 that existed that I described earlier on the record and I'll
7 describe it now.

8 So, the parties were negotiating and the only true dispute
9 here was whether or not Rite Aid would contribute to the
10 National Benefit Fund. They agreed on language changes. They
11 agreed on pay increases. They agreed on other economics, all the
12 way to the process.

13 You'll see in the bargaining notes and proposals that you
14 have in front of you as Joint Exhibits that there were many TA's
15 in this negotiation, many TA's. This wasn't a situation where
16 there was a refusal to bargain whatsoever. This was a bargaining
17 - this was a bargaining session or sessions by two sophisticated
18 parties, who had been bargaining for many years and many times.
19 The relationship between Rite Aid and the Union goes back many
20 generations and multiple Memorandums of Agreement and Collective
21 Bargaining Agreements. You have a small portion of them in front
22 of you as Joint Exhibits.

23 So, in July of 2016, about a year, maybe a little bit more
24 than a year after bargaining commenced, Rite Aid's Legal
25 Counsel, who wasn't even at the table, got a phone call that

1 said that the fund would be terminating benefits to 6,000
2 Employees as of August 15th, 2016. I think that it was August
3 15th. It may have been August 30th. Anyway, it was between 30 and
4 45 days ahead of time. So, under the contract and you can read
5 this, Rite Aid has an obligation with its permanent funds to
6 provide benefits.

7 So after that telephone call, which wasn't really
8 communicated directly to Rite Aid, it was communicated to its
9 Counsel, Rite Aid at the next session, which happened the next
10 day, came in and said, "Okay, we will supply benefits since the
11 NBF is going to terminate benefits to our Associates," and began
12 the process of trying to request information from the Union and
13 get Fund so that it could construct a Plan.

14 Despite many efforts to get that information, both the
15 Union and the Fund stonewalled those requests. And it's really
16 easy to see why you stone wall those because you don't want
17 there to be a Rite Aid Plan. The Union wants Rite Aid to be in
18 its plan. So, the stonewalling was really very easy and
19 foreseeable to see. In any event, I think that it frustrated
20 Rite Aid.

21 The next bargaining session was the next month in - later
22 the next month in July. Right before that bargaining session the
23 Fund called up and said, "We made a mistake in calculating the
24 termination date for 6,000 Employees. It really isn't August,
25 it's now September."

1 That caused another series of questions and rounds for
2 information. And also request for bargaining dates, none of
3 which occurred. We asked the Fund - and you'll see testimony
4 about this - the Company asked the Fund for dates on a daily
5 basis - to the Union on a daily basis and the Union did not
6 supply those dates. Instead they said, "Okay, we'll meet in mid
7 to late August." So, another month went by.

8 And low and behold, right before that session the Fund
9 called up again and said, "Well, wait a minute. We made another
10 mistake. And now you don't have to - we're not terminating the
11 benefits until November."

12 In the meantime, Riet Aid had already started, because it
13 was on a 30 day schedule, already started to create its plan. So
14 this wasn't a plan that was something that they could buy out of
15 pocket. This was a plan that required them to find and design
16 the benefits, find the exclusions, do the formulary on the
17 drugs, get open enrollment started because if you're going to
18 terminate in 30 days, Associates have a right to choice with
19 respect to benefit plans.

20 So, that's what Rite Aid did. The implementation that Ms.
21 Oliver is talking about was an implementation caused by that
22 threat and termination. And once that was underway, once Rite
23 Aid heard that we have three separate dates for terminating the
24 plan, we'll see evidence that each date the Union and the Fund
25 informed the Employees that their benefits would be terminated

1 or could be terminated, thus causing turmoil in connection with
2 Rite Aid's Associates.

3 Rite Aid proposed it terminating benefit contributions to
4 the NBF and going forward with its plan for the duration of the
5 contract. And that first proposal was made in August.

6 It would be no surprise and it should be no surprise to
7 you that the Union said, "We disagree with that. We want you to
8 contribute to the National Benefits."

9 Its position never changed. Except in late August it said,
10 "Well, we're working on a counter-proposal. We need some time."

11 So, Rite Aid said, "Okay, we'll wait for your counter-
12 proposal."

13 The next day they met. Rite Aid said, "Well, where's your
14 counter-proposal?"

15 And they said, "We don't have it yet."

16 Three days later the Union filed the charge. Right after
17 it filed the charge, on September 6th, 2016 the Union came in
18 and said, "We're refusing to bargain with you because you
19 committed Unfair Labor Practice Charge. So we're not going to
20 provide you with a response on your National Benefit Fund
21 Proposal."

22 So the Union tactically engineered a Refusal to Bargain
23 and didn't provide any discussion to us prior to the filing of
24 this charge and after the filing of this charge. It stuck on its
25 proposal. I don't think that there's any doubt that impasse,

1 whether it's lawful or not existed with respect to the National
2 Benefit Fund. I doubt very much that there's a person here
3 that's going to approve that the parties were at impasse. The
4 Union had not changed its proposal from day one.

5 So, Rite Aid was legally justified in creating its own
6 plan by the emergency created by the threat to terminate
7 benefits. It was legally justified in changing that - I'll say -
8 temporary plan to a permanent plan by being in effect jerked
9 around by the Union and the Fund in connection with its multiple
10 letters and shifting times of termination. And it was legally
11 justified because the Union was at impasse with respect to the
12 National Benefit Fund.

13 There's nothing unlawful, Your Honor, the last point that
14 I'll say is that there's nothing unlawful in connection with
15 proposing a transfer of Bargaining Unit Work out of the
16 Bargaining Unit into supervision. There's nothing unlawful about
17 proposing that Bargaining Unit Employees adopt supervisory
18 duties. The parties have been discussing that for probably more
19 than the negotiations, probably beyond the negotiations.

20 And the Union knew that, Your Honor, because you'll see
21 evidence that in New Jersey that's what happens. The Pharmacists
22 are out of the Unit there. You'll see that the Union knows that
23 pretty much happens all over the country in pharmacies. There is
24 no double layer in pharmacies anymore. And you'll rule on the
25 side from us.

1 We believe that the remedy that the Union seeks in this
2 case is for you to put Rite Aid back in the NBF and that's
3 something that they couldn't achieve in bargaining. That's why
4 we think this case is not appropriate.

5 Now, I'll say one more thing about this. We've talked
6 about the issue of the Viani Award and whether that's an issue
7 in the case. I've thought a lot about how that proceeds here.
8 And our position is that you can't refuse to bargain over
9 perspective benefit because of a debt owed. Because if that was
10 true, then that would excuse bargaining in a whole variety of
11 circumstances.

12 And what we were proposing here in the NBF had nothing to
13 do with Viani Award. What we were proposing is we want Rite Aid
14 to supply the same benefit plan that the NBF supplied and that's
15 what happened here.

16 So the Policy of the Act promotes Collective Bargaining.
17 And it shouldn't commit a party to insist on not bargaining over
18 a proposed plan, perspective plan of benefits, by resting on the
19 fact that the Company owes a debt in the past.

20 Thank you.

21 JUDGE GREEN: Okay, thank you very much.

22 Ms. Oliver, are you prepared to begin the General
23 Counsel's case?

24 MS. OLIVER: Yes, I am.

25 JUDGE GREEN: So, go ahead.

1 MS. OLIVER: Your Honor, I would like to call Gordon
2 Hinkle, the Senior Manager of Labor Relations for Rite Aid to
3 the stand.

4 Whereupon,

5 GORDAN HINKLE
6 having been first duly sworn, was called as a witness and
7 testified herein as follows:

8 JUDGE GREEN: Thank you very much - please have a seat and
9 state and spell your name for the record.

10 THE WITNESS: Gordon Hinkle: G-O-R-D-O-N; H-I-N-K-L-E.

11 DIRECT EXAMINATION

12 BY MS. OLIVER:

13 Q Good afternoon, Mr. Hinkle. Who is your Employer?

14 A Rite Aid.

15 Q And is that Rite Aid of New York and Rite Aid of New
16 Jersey?

17 A Yes.

18 Q So I'll just refer to them as Rite Aid, as well. And what
19 is your job title?

20 A Senior Manager of Labor Relations.

21 Q And how long have you held that position?

22 A Six years.

23 Q And what are your job duties as Senior Manager of Labor
24 Relations?

25 A Anything related to the Unions in our Company, from

1 processing step grievances to drafting language for negotiations
2 and contracts, First Year Negotiator in contracts throughout the
3 country, training on implementation of the new agreement,
4 liaison between the different departments in the Company to
5 implement the plans, wage increases, any of the changes that
6 take place. I help our Field Leaders interpret language and
7 contracts and make sure that they're applying it correctly. As I
8 said, I have to train our Managers and our stores. Anything
9 related to Unions, this Unit, I might participate in it.

10 Q And who do you report to?

11 A I report directly to Abraham Breslin(ph).

12 Q And what's Abraham Breslin's job title?

13 A Senior Director of Labor Relations.

14 Q And what does he do, just briefly?

15 A He's responsible to make sure that I do everything that I
16 just said and he participates in some of it, as well, and other
17 further functions.

18 Q And who does he report to?

19 A Tracy Birch(ph).

20 Q And what's Tracy Birch's job title?

21 A Vice President of Labor Relations and Employment Counsel.

22 Q Are you familiar with 1199 SEIU United Health Care Workers
23 East?

24 A Yes, I am.

25 Q I'm going to refer to them as either the Union or 1199.

1 And how are you familiar with 1199?

2 A I've been working in New York City with Rite Aid for all
3 of my career for the last 17 years. And I actually started with
4 the Company about 30 some years ago with their rates. I don't
5 want to be confused here.

6 Q That's okay.

7 A Over the last 17 years right now I've worked in New York
8 City in different capacities, but it's definitely one.

9 Q Have you been involved in negotiations between Rite Aid
10 and 1199?

11 A Yes, I have.

12 Q And you represented Rite Aid during those negotiations?

13 A Yes, not all of them, no.

14 Q For the last six years?

15 A Yes.

16 Q And when you prepare for bargaining do you prepare with
17 other Managers of Rite Aid? For example, do you consult with
18 Tracy Birch or Abraham Breslin before going to the negotiating
19 table?

20 A Yes.

21 MS. OLIVER: With Your Honor's permission I intend to
22 examine Mr. Hinkle with leading questions as a hostile witness
23 and a witness identified as an adverse party pursuant to the
24 Federal Rule of Evidence 611(c).

25 JUDGE GREEN: Go ahead.

1 MS. OLIVER: Thank you.

2 BY MS. OLIVER:

3 Q Mr. Hinkle, the full Collective Bargaining Agreement
4 between Rite Aid and the Uno was effective from 1998 to 2002.
5 Correct?

6 A Correct.

7 Q And the Contractual Unit in that Bargaining Agreement was
8 Wall to Wall Unit, meaning it included all Professional and non-
9 Professional Employees at certain stores. Correct?

10 A In certain stores, yes.

11 Q The stores covered by the agreement. Correct?

12 A I don't remember off of the top of my head if that
13 included New Jersey at the time.

14 Q The 1998 Collective Bargaining Agreement had an
15 Arbitration Provision. Correct?

16 A Yes.

17 Q And arbitration was final and binding?

18 A Yes.

19 Q This agreement was extended through a series of
20 Memorandums of Agreement. Correct?

21 A Yes.

22 Q And none of the Memorandums excluded Staff Pharmacists
23 from the Bargaining Unit in New York. Right?

24 A Correct.

25 Q And none of the Memorandums of Agreement list the Unit by

- 1 specific classifications. Right?
- 2 A Correct.
- 3 Q And all of the Memorandums contained an Arbitration
4 Provision. Correct?
- 5 A Yes.
- 6 Q And that arbitration remained final and binding?
- 7 A Yes.
- 8 Q The last Memorandum expired on August 2016. Correct?
- 9 A Yes -- 16, 15, yes.
- 10 Q Which one was it? Do you remember?
- 11 A It ended in 2015. Didn't it?
- 12 Q I'll specify it. The last Memorandum - we might be talking
13 about two different things. So there was one from 2009 to 2015
14 and then there was Extension Agreement from 2015 to 2016. Right?
- 15 A Yes.
- 16 Q And the parties began negotiating for a Successor
17 Collective Bargaining Agreement in March of 2015. Correct?
- 18 A Yes.
- 19 Q In September 6th, 2016 was the last time that the parties
20 met for bargaining before Rite Aid declared impasse. Right?
- 21 A Yes.
- 22 Q And yup attended every bargaining session?
- 23 A Yes.
- 24 Q If you can recall, approximately how many bargaining
25 sessions were held?

1 A There were a lot. I don't know the number.

2 Q That's okay.

3 A There were a lot. We met in March 31st was the first date -
4 I believe - because that was my birthday and then I think that
5 we met further in May, May or June. There were big lapses in
6 time in between bargaining sessions.

7 Q Okay.

8 A And then July - the dates don't -

9 Q If you don't recall, that's fine. You just remember that
10 there was a lot. Correct?

11 A Well, there could have been a lot more, but it's over a
12 year and a half.

13 Q The question was were there how many and you said a lot -
14 okay. Tracy Birch was the Lead Negotiator during the early
15 bargaining sessions. Right?

16 A Yes.

17 Q And you took over as Lead Negotiator in June 2016.
18 Correct?

19 A Yes.

20 Q And you participated in a bargaining session between Rite
21 Aid and 1199 on June 13th, 2016. Right?

22 A Yes.

23 Q And that was the first bargaining session since March
24 2016. Correct?

25 A Yes.

1 Q The parties had taken a couple of months break to litigate
2 another case before the NLRB. Correct?

3 A There was another case. I don't foresee that's why we took
4 a break.

5 Q At the beginning of the meeting did you say that Rite
6 Aid's proposals remained the same as the last bargaining
7 session?

8 A On which date?

9 Q June 13th, 2016.

10 A I believe that I made a statement similar to that, yes. Q
11 And isn't it true that Rite Aid proposed remaining in the
12 NBF as the quick pro quo for Rite Aid's Business Initiatives?

13 A Yes.

14 Q And the NBF refers to the 1199 SEIU National Benefit Fund
15 for Health and Human Service Employees. Correct?

16 A Yes.

17 Q And they provide Healthcare benefits. Right?

18 A They do, yes.

19 Q And Rite Aid had three main Business Initiatives. Correct?

20 A Yes.

21 Q And one of them was Central Fill?

22 A Yes.

23 Q And that's having prescriptions filled by non-Unit
24 Pharmacists at a central location. Correct?

25 A Correct.

1 Q And the Union had already tentatively agreed to that
2 proposal. Correct?

3 A Yes.

4 Q And another one of the Business Initiatives was Ready
5 Clinics. Is that correct?

6 A Yes.

7 Q And is that where people can come into the store and get
8 things like flu shots?

9 A That's minimalizing it, but yes.

10 Q Okay, but that's one of the things. It's like a small
11 clinic set up inside the store.

12 A Clinics are inside stores now and get some shots. I mean,
13 the Ready Clinic isn't proposed just to flu shots.

14 Q Okay, if you could briefly tell me for the record what a
15 Ready Clinic is.

16 A I don't think that I can go into depth. It's not my forte.

17 Q Okay, that's fine.

18 A But I just know that it does more than that. It's for
19 quick service for medical needs.

20 Q Okay, quick service for medical needs - that's the basis
21 for it - thank you. And the Union had already tentatively agreed
22 to that proposal. Right?

23 A Yes.

24 Q And the third Business Initiative was removing new hired
25 Staff Pharmacists and Interns from the Bargaining Unit. Right?

1 A The original proposal was that.

2 Q On June 13th was the proposal. Correct?

3 A Without looking at an actual note from that day, I get my
4 dates confused because we did change our proposal at one point.
5 So I don't know that it's that date or not.

6 Q I can show you your notes from that date.

7 A I don't think that you need to - I mean - yes. I would say
8 yes to that because I know that was originally our proposal
9 because of a later time that I changed that proposal.

10 Q So you're saying yes, that was the proposal. That was the
11 Business Initiative on June 13th.

12 A Yes.

13 Q And had the Union previously rejected that proposal?

14 A Yes.

15 Q The Union actually said that they would not bargain over
16 removing Pharmacists from the Union. Correct?

17 A Yes.

18 Q And the Union asked Rite Aid to take that proposal off the
19 table. Correct?

20 A Yes.

21 Q And at the June 13th session you told the Union that Rite
22 Aid was not interested of the cost of the NBF if the Union would
23 not agree to remove Pharmacists from the Unit. Right?

24 A Say that again? I'm sorry.

25 Q You told the Union that Rite Aid was not interested in the

1 cost of the NBF if the Union would not agree to remove
2 Pharmacists from the Unit. Correct?

3 A Again, I don't know if I used those words. And when we
4 talk about the removal of the Pharmacists there was a transfer
5 of work that we were talking about, the removal of the Interns.
6 I'm assuming that you asked that question because you already
7 looked at the notes, so they were probably my words.

8 MS. OLIVER: Okay, can we show the witness Joint Exhibit
9 J-5(a)?

10 BY MS. OLIVER:

11 Q If you can read over your statement right there, the first
12 time where it says 'considering'.

13 JUDGE GREEN: He just did.

14 MS. OLIVER: Oh, he did? Okay.

15 THE WITNESS: I just read it.

16 BY MS. OLIVER:

17 Q Okay, so did you tell the Union that Rite Aid was not
18 interested in the cost of the NBF if the Union would not agree
19 to remove Pharmacists from the Unit?

20 A Yes, well it says 'considering our proposal on
21 Pharmacists.'

22 Q Okay.

23 A There's a big difference there, though.

24 Q And Rite Aid was very clear that they were concerned about
25 - you can give that exhibit back - Rite Aid was very concerned

1 about the cost of the NBF.

2 A Yes.

3 Q And that was a main concern for Rite Aid throughout
4 bargaining. Correct?

5 A Yes.

6 Q And you told the Union that the cost of the NBF was a
7 concern for Rite Aid at every bargaining session or nearly every
8 bargaining session?

9 A Yes.

10 Q And Rite Aid had proposed various ways to offset the cost
11 of the NBF. Right?

12 A Well, that was - we proposed our Business Initiatives as
13 important to us enough to deal with whatever cost that the NBF
14 was being proposed. We didn't say that our Business Initiatives
15 covered the cost.

16 Q I thought that I said offset the cost, not covered the
17 cost. But I'm actually not referring to the Business
18 Initiatives. Rite Aid proposed over ways to reduce or offset the
19 cost of the NBF. Correct?

20 A Yes, we had conversations.

21 Q So, one proposal was to have the NBF waive the delinquency
22 that it claimed Rite Aid owed. Correct?

23 A Yes.

24 Q And Rite Aid had also proposed to not include overtime in
25 gross payroll calculations towards contributions. Correct?

1 A Yes.

2 Q And Rite Aid had also proposed having Employees pay a
3 portion of the premium. Correct?

4 A I don't know that we proposed that. That was a side bar
5 conversation.

6 Q And the Union rejected all of these proposals or
7 conversations. Correct?

8 A Yes.

9 Q And the Union told you that the Fund Rules do not allow
10 such changes. Correct?

11 A Yes.

12 Q And was Tracy Birch on the Board of Trustees at the NBF
13 during this time?

14 A I don't know. I think that she was on there before
15 negotiations, but I'm not on there, so I don't know.

16 Q Okay, and did Rite Aid and the Union meet again on July
17 11th, 2016?

18 A Yes, we did.

19 Q And prior to this meeting the NBF called Rite Aid's
20 Counsel to let them to know that they would be sending letters
21 to the Employees. Right?

22 A That's what I think happened.

23 Q And that letter was going to tell Employees that benefits
24 will be terminated. Correct?

25 A Yes.

1 Q And the NBF told Rite Aid that benefits may terminate
2 because Rite Aid reached the equivalent of three months
3 delinquency. Correct?

4 A Yes.

5 Q And at the July 11th meeting Rite Aid proposed moving
6 Employees into a new Healthcare Plan. Right?

7 A Yes.

8 Q And this is the first time that Rite Aid had proposed a
9 specific Healthcare Plan, other than the NBF. Correct?

10 A Yes.

11 Q And it was actually shown there that Rite Aid did not have
12 all of the details of the plan available on July 11th to provide
13 to the Union. Correct?

14 A Yes.

15 Q And you told the Union that you didn't have all of the
16 details yet. Correct?

17 A I believe that I told them that we were going to need to
18 create a plan and that I was going to need a lot of information
19 from them. I told them that I think we have SPB currently for
20 our other Rite Aid Associates, but that this was going to have
21 to be a creation of a new plan, so we needed more information in
22 order to do that.

23 Q Okay, and you had a - Rite Aid had a contractual
24 obligation to provide benefits equal to the NBF if the NBF
25 cancelled benefits. Correct?

1 A Yes.

2 Q And at the July 11th bargaining session the Union told Riet
3 Aid that benefits through the NBF could be maintained if Rite
4 Aid paid a portion of its delinquency to the NBF. Correct?

5 A Yes, well they - yes, they were telling me what they
6 claimed we - the back monies. That if we would pay that, that it
7 wouldn't be canceled, even a portion of it. And my comment to
8 them was that we had a Good Faith Disagreement and in our
9 opinion we didn't owe any back. So why would I pay that money?

10 Q So, were you aware of an arbitration between Rite Aid and
11 the Union over the delinquency?

12 A Yes, that we were appealing that decision.

13 Q And you were aware that - we hadn't talked about that
14 decision yet - were you aware that the Arbitrator issued a
15 Decision? I assume from your answer that yes.

16 A Yes.

17 Q And that Decision issued on March 6th. And you're aware
18 that Decision was in the Union's favor. Correct?

19 A Yes.

20 JUDGE GREEN: You referenced an SPB as a plan?

21 THE WITNESS: Yes.

22 MS. OLIVER: Your Honor, I'd like to show the witness what
23 I am marking as GC-2.

24 BY MS. OLIVER:

25 Q Can you just take a minute to look at this document? And

1 let me know, are you familiar with it?

2 A I've seen it before.

3 Q And is this the Arbitration Award?

4 A Yes, it is.

5 (General Counsel's GC-2 identified.)

6 MS. OLIVER: Your Honor, I'd like to move GC-2 into
7 evidence at this time, the Arbitration Award.

8 JUDGE GREEN: Any objection?

9 MS. PIERSON-SCHEINBERG: Yes, Your Honor, I object.

10 JUDGE GREEN: What's the objection?

11 MS. PIERSON-SCHEINBERG: The objection is that this is
12 only the opinion. I want - if this is going to be entered into
13 evince I think the entire record should be entered.

14 JUDGE GREEN: What is the entire record of the
15 Arbitration? Are they transcripts?

16 MS. OLIVER: Your Honor --

17 MS. PIERSON-SCHEINBERG: They're transcripts and they're
18 also exhibits.

19 JUDGE GREEN: I don't think that we have to have them in
20 order to have the Viani Award entered into evidence. So, I'm
21 going to admit the Viani Award into evidence, but I'm not going
22 to necessarily exclude the introduction of the transcripts and
23 exhibits from the Arbitration.

24 MS. PIERSON-SCHEINBERG: Okay.

25 (General Counsel's GC-2 received.)

1 BY MS. OLIVER:

2 Q And at the March - I'm sorry at the July 11th, 2016
3 bargaining session Rite Aid gave the Union a July 15th deadline
4 to agree to a Healthcare Plan. Right?

5 A We told them that we need it at least 30 days to be able
6 to implement and what we except a cancellation on August 15th on
7 the table.

8 Q So, you told them that they had until July 15th. That's the
9 question. Correct?

10 A I don't know that I used those words. I believe that I was
11 trying to say to them that we needed to come to some sort of
12 decision by July 15th to make sure that the benefits could be
13 implemented in time for the cancellation.

14 Q At the July 11th meeting you told the Union that Rite Aid
15 would stay in the NBF if the Union agreed to its Business
16 Initiatives. Correct?

17 A The same thing that we've been saying from the beginning
18 that we were still willing to consider things if we could come
19 to an agreement.

20 Q And at the July 11th meeting do you ask the Union to allow
21 Rite Aid to implement the Central Full Business Initiatives
22 prior to an overall Collective Bargaining Agreement?

23 A That I don't remember.

24 Q And you attended a bargaining session between Rite Aid and
25 the Union on July 13th. Correct?

1 A Yes.

2 Q And at this bargaining session did the Union inform Rite
3 Aid that benefits would not terminate until at least some time
4 in September?

5 A Yes.

6 Q And you were or were you aware that benefits termination
7 would not happen on August 15th. Right?

8 A We had found out just beforehand, yes.

9 Q And did the Union ask for more time to negotiate?

10 A Yes.

11 Q And you gave them an extra week. Correct?

12 A I explained to them that even though it went on another
13 month, all that was going to do for us was allow us to be more
14 effective in implementing the benefits correctly so that they
15 could go more than another week. That we would do everything in
16 our power to come to an agreement as quickly as possible.

17 Q So, the answer is yes, you gave the Union an extra week.
18 Correct?

19 A Again, I don't know what you mean by an extra week. I told
20 them that we were on a deadline to -

21 Q But you extended the deadline.

22 MS. PIERSON-SCHEINBERG: Objection, she keeps interrupting
23 the witness.

24 JUDGE GREEN: Sustained - I don't think that it's
25 responsive. So, you can answer.

1 THE WITNESS: We were trying to say to them that - you
2 know - with the 30 day deadline originally for the August 15th
3 we were just going to have to do an automatic enrollment
4 possibly with not effective open enrollment and then try to fix
5 mistakes as they came up because it was so - so unexpected that
6 we had anything for this.

7 So, finding out that we had an additional month before
8 this was going to happen, we said to the Union that we could
9 extend it by one more week, but we couldn't go on another month
10 because all this was doing was allowing us to implement
11 correctly -- that's the wrong word - to create a plan that
12 people enroll in the fashion. So, we should find out information
13 about their dependents. So that we could find out information
14 about them. It went back to all of the Information Requests that
15 I had asked for from the Union and from the NBF that they were
16 just being unresponsive about.

17 BY MS. OLIVER:

18 Q Well, this was only two days later. Correct?

19 A Yes, but when they ask me for things, I had them within a
20 couple hours later. So I did my best, but I didn't feel they
21 were doing their best.

22 Q And on July 13th you still didn't have all of the details
23 of the new Healthcare Plan for the Union. Correct?

24 A On which day?

25 Q July 13th.

1 A No, I explained to them that we were creating it and we
2 needed information from them and we have to be able to be as
3 effective as possible.

4 Q And since you didn't have the information from the NBF you
5 didn't have cost information to provide to the Union at this
6 time. Right?

7 A I explained to them that we were - that we are self-
8 insured and to come up with an exact cost we needed, again, more
9 information, claims information, from the NBF. That no, we could
10 not just give a standard COBRA rate that this is definitely the
11 cost. I said at this point it's not an issue. I explained to
12 them. I said although cost is extremely important to us, I can't
13 tell you today that this is going to be less expensive or more
14 expensive because we're self-insured.

15 Q When you say less expensive or more expensive you mean
16 than the NBF?

17 A Yes.

18 Q Okay.

19 A And so again I offered the current SPB to give them a
20 guideline of how our benefits were and urged them to give me the
21 information that was needed because we didn't even know who was
22 enrolled at that point and time.

23 Q It took the NBF about three weeks to respond to you.
24 Right?

25 A Yes, it did. And then they didn't give me the information

1 that we asked for. There was statements that it was over too
2 much requests. There were just statements on every line that
3 basically they answered maybe two minor questions that I had and
4 the overall Information Requests and everything else had wait on
5 it.

6 Q And did you participate in bargaining between Rite Aid and
7 1199 on July 20th?

8 A Yes, I did.

9 Q And at this bargaining session the Union objected to the
10 Rite Aid sponsored Healthcare Plan. Right?

11 A Yes, it did.

12 Q And again you were aware that the NBF said that they would
13 not terminate benefits until at least mid-September. Correct?

14 A Yes.

15 Q And again at this meeting did the Union ask Rite Aid to
16 pay some of its delinquency to keep benefits?

17 A I don't recall.

18 Q And at this meeting did the Union offer to credit Rite Aid
19 for any overpayment to the NBF if Rite Aid were to win in
20 Federal Court?

21 A I think that they did, which made no sense to me, though,
22 because it's like you kept telling me at different points and
23 time that I couldn't get information that I was asking for
24 because it was the NBF. But yet you can tell me that you can
25 credit me.

1 And I was like how does this work? I mean - I was at a
2 loss.

3 Q Well, you rejected that proposal -

4 A I did. I said, "Why would I want to give you money that
5 you don't owe for you to hold?" I said, "That doesn't make good
6 business sense." I specifically - I remember saying that to
7 them.

8 Q And you told the Union that the District Court Case didn't
9 matter. Right?

10 A What?

11 Q You told the Union that the District Court Case didn't
12 matter because you were proposing the new Healthcare Plan for
13 the life of the CBA so there was nothing to credit.

14 A I think that it was taken way out of context. I did say
15 that, but it was in reference to that we were now at a proposal
16 that we felt that we were never going to come to an agreement,
17 that we were not going to get where we needed to be. So our new
18 proposal was the Rite Aid Benefits Plan.

19 Q For the life of the contract.

20 A Yes.

21 Q And at the July 20th meeting did you tell the Union that
22 Rite Aid would begin to start the process of enrollment on July
23 22nd -- for moving Associates to the Rite Aid Plan? It's not
24 enrollment.

25 A Again, I'd have to review my notes. I don't think they

1 were my exact words. I don't think that's being - whatever I
2 said that wasn't - we were talking about the need and what work
3 needed to be done to get people enrolled before the deadline of
4 the benefit - of the NBF cancelling. So, I'm not sure exactly
5 what I said that I needed to do to do that.

6 Q Okay, I guess essentially that you weren't going to waste
7 any time. That you were going to start the process immediately.

8 A Well, we had already started creating the plan. We weren't
9 enrolling anybody in the plan at that point. We had told him
10 that we were going to mean to enroll people. But we didn't
11 enroll anybody until after September 11th, I believe that it
12 was.

13 I may be confusing these. The September 11th was the date
14 that we said that we were implementing our Last, Best, and Final
15 and no one was covered under Rite Aid Insurance prior to that.
16 Is that a better way of saying it?

17 Q At the July 20th meeting you asked the Union if they agreed
18 that the parties were at impasse. Correct?

19 A Yes.

20 Q And the Union disagreed with you. Correct?

21 A Yes.

22 Q And were there other open areas of negotiation at the
23 time?

24 A We were still talking about the transfer of work for
25 Pharmacists. There were minor issues, but nothing that either of

1 us had discussed. It seemed like it would be getting done.

2 Q And you asked the Union if they agreed that the parties
3 were at impasse over just the issue of Healthcare. Right?

4 A Yes.

5 Q And the Union said that you couldn't be at impasse on a
6 single subject. Correct?

7 A Probably.

8 Q And you agreed. Right?

9 A I don't think that I agreed. I don't think that I said
10 anything. I probably said okay or something along that line. I'm
11 not an Attorney, so I don't know the exact clause on those types
12 of things. So, I wouldn't act as though.

13 Q Okay, and did you agree that you had set further dates for
14 bargaining with the Union?

15 A Yes, we did. I'm sorry. What date are we on now?

16 Q We're still talking about July 20th.

17 A And did we do what?

18 Q Agree that you would set further dates for bargaining.

19 A Yes, we were asking for dates.

20 Q And did the Rite Aid and Union meet for bargaining on
21 August 17th, 2016?

22 A Yes, we did.

23 Q And you presented the Union with a few proposals on this
24 date. Correct?

25 A There were different documents, yes.

1 Q Different documents, right, but I'm actually - altogether
2 you called that your Last, Best, and Final Offer. Correct?

3 A Yes.

4 Q So I'm going to refer to all of proposals in Joint
5 Exhibits J-3(a) through J-3(d) as the August 17th Proposal just
6 for clarity so we know.

7 MR. SILVESTRI: Hold on a second.

8 MS. OLIVER: Sure.

9 BY MS. OLIVER:

10 Q And one of the proposal documents was a complete
11 Collective Bargaining Agreement. Correct?

12 A That was what we call a Strike Through.

13 Q A Strike Through, okay.

14 A It's not a proposal. It's a document that reflects the
15 proposals. It reflect TA's that we had made up to that point.
16 Basically we were trying to get a document that reflected
17 everything that was going on because like you said already we
18 didn't have a contract, a written contract since 1998 and we had
19 several meetings after 2009 to try to get that done. And at one
20 point we actually thought we were done with the Union because
21 the NBF wouldn't give us the finalization. So we never got done
22 then.

23 So, with this meeting I was trying to get a draft or
24 Strike Through again. So at that end we could all agree, "Okay,
25 here's the language. We don't need to argue or fight any longer,

1 bargain any longer. We're done. Let's all sign off on this
2 document."

3 But it - the proposals - I never used that document to say
4 this is my proposal. I used that document to say this is my
5 Strike Through.

6 Q Okay, so the Strike Through reflects what the proposals
7 are.

8 A It should. It's a work in progress.

9 Q And the August 17th proposal included - did not include
10 participation in the NBF. Correct?

11 A Correct.

12 Q And the August 17th proposal did include participation in
13 the Rite Aid Sponsored Healthcare Plan?

14 A Yes.

15 Q And you told the Union that your proposal regarding future
16 Pharmacists and Interns remains the same as it had been since
17 the beginning of bargaining. Correct?

18 A On?

19 Q August 17th.

20 A I may have used those type of words, but I explained my
21 proposal thoroughly and that the Interns were no longer part of
22 that proposal of changing the Bargaining Unit. That we were
23 sticking with the transfer of the Pharmacists and then the other
24 proposal that we just discussed.

25 MS. OLIVER: I would like to show the document the

1 document that's marked Joint Exhibit J-5(e).

2 BY MS. OLIVER:

3 Q When you get the document if you could turn to Bates
4 Number RA-523.

5 MS. PIERSON-SCHEINBERG: Can you say it one more time?

6 MS. OLIVER: It's Bates Number RA-523.

7 THE WITNESS: I see it.

8 BY MS. OLIVER:

9 Q So can you read that for me?

10 A 'Let me be clear. Our proposal stays the same for future
11 Pharmacists and Interns will not be part of the Bargaining
12 Unit.' I'm mistaken on the dates.

13 Q And Rite Aid and the Union met again to bargain on August
14 18th. Correct?

15 A Yes.

16 Q And by August 18th you were aware that benefits would not
17 terminate on September 15th. Correct?

18 A Yes.

19 Q And by August 18th you were aware that the NBF had
20 explained that they did not have a date certain for benefit
21 termination at that time. Correct?

22 A I'm not sure of the dates. At some point I became aware of
23 that.

24 Q Of that?

25 A I questioned that. Actually, I must have been aware of it

1 because I remember questioning that and saying to them how does
2 the date keep changing.

3 When we came in here a few weeks ago you told me that it
4 definitely ended on this date. You said the rules were the rules
5 were the rules.

6 And then all of a sudden I come back and it's extended by
7 a month. And I try to get an explanation.

8 And then now finding out that it was there, I was like,
9 "How do you expect me to bargain with you - you know - anything
10 different than what I'm proposing here is the Rite Aid Benefit
11 Plan when your benefit plan can't give me information and can't
12 tell me when or what's happening with that plan?"

13 I believe that I said to them something to the effect of,
14 "Why would I want to pay a Company, so to speak, millions of
15 dollars to cover our Associates, when we can't even talk to them
16 or find out anything up to and including this money that you
17 said that you calculated several times and now the date is
18 unknown?"

19 I mean -- I was outraged, quite honestly. I'm getting
20 outraged now. I'm sorry.

21 Q So I think the summary of that is yes, you were aware that
22 there was no date certain?

23 A Yes.

24 MS. PIERSON-SCHEINBERG: Objection.

25 JUDGE GREEN: Overruled.

1 BY MS. OLIVER:

2 Q And you told the Union that the August 17th proposal must
3 be ratified by September 2nd. Right?

4 A Again, when you hit me with dates, I get confused. I'm
5 sorry. But yes, I know that I was trying to get to a point where
6 we said that we had to have a final decision.

7 Q And you said that deadline was so short because Rite Aid
8 wanted its Employees to get a wage increase. Right?

9 A I'm a little confused as to where you are right now in the
10 order of things.

11 Q You're at August 18th when you were explaining to the Union
12 why you needed to have a date - a drop dead deadline to ratify
13 this agreement. You said that it was because Rite Aid Associates
14 had gone too long without a wage increase. Right?

15 A That was one of the reasons that we wanted an agreement
16 because - you know - our Associates - we didn't want to have
17 turnover with our Associates. It's not fair to them.

18 Q And the parties tentatively agreed to the 3% wage
19 increase. Right?

20 A We had previously had a proposal that was a 3% wage
21 increase if the proposal was accepted and the whole agreement
22 was ratified by December - I want to say of 2015. And we were
23 very clear that if we couldn't come to an agreement by that time
24 that wage proposal was not going to continue on the table.

25 Q And it didn't. Right? The August 2017 -

1 A Right, we withdrew that proposal because we never had an
2 agreed upon agreement and it was never ratified. So at that
3 point we withdrew that proposal because that - it was specific -
4 you have to do this by this date. It was like an incentive to
5 try to get a ratified agreement.

6 Q And the August 17th proposal included a 2% wage increase.
7 Correct?

8 A Correct.

9 Q And on August 30th Rite Aid made changes to the August 17th
10 proposal. Right?

11 A On August 30th, yes, we wrote a letter.

12 Q And you sent that letter via email to let them know of the
13 changes. Correct?

14 A Yes, I did.

15 Q And that email had a new draft of your Last, Best, and
16 Final Proposal, the Strike Through, and the Agreements attached?

17 A I believe that it did.

18 Q And the heading on that proposal is dated September 6th,
19 2016. Correct?

20 A Yes.

21 Q Is that because that was the next scheduled bargaining
22 session?

23 A Yes.

24 Q And I'm going to refer to this proposal as the modified
25 proposal just for clarity when we're talking about it. Okay?

1 MS. OLIVER: I would like to show the witness what has
2 already been entered as Joint Exhibits J-4(a) through J-4(f),
3 the packet.

4 BY MS. OLIVER:

5 Q If you could just take a minute to look through it because
6 my question is this an accurate representation of Rite Aid's
7 proposal on August 30th?

8 A I believe that it is.

9 Q And Rite Aid and the Union did meet to bargain on
10 September 6th, 2016. Right?

11 A Yes, we did.

12 Q And the Union told you that they considered your modified
13 proposal? You can give it back to the Reporter if you don't want
14 it in front of you.

15 A No, it's not that.

16 Q And the Union told you that they considered your modified
17 proposal. Correct?

18 A That they considered it?

19 Q Yes.

20 A I -

21 Q It's okay.

22 A I mean - I can't remember the words they used. I remember
23 that on that date - we're talking about September 6th?

24 Q September 6th, the last bargaining session.

25 A On that date what I remember is that I felt like I was

1 being deposed because a million questions were coming at me from
2 an Attorney, not from a Negotiator, is the way that I felt at
3 that point. So I was very apprehensive about what I saying and
4 how we were explaining things and felt like I was being set up
5 for an Unfair Labor Practice, quite honestly.

6 Q So these million questions were related to the specific
7 job duties that the new hired Staff Pharmacists. Correct?

8 A Yes, they started asking me about Management
9 responsibilities and how we hired people and how many people it
10 took to hire people and who had the authorization and what forms
11 we used. And I went for some time answering as many questions as
12 I could and then openly expressed that I didn't feel like this
13 had anything to do with bargaining because we were talking about
14 Management functions and not part of the Bargaining Unit.

15 Which at that time the Lead Negotiator, Allyson, expressed
16 to me that, "Oh, well we thought your proposal was that the
17 Staff Pharmacist in the Union would do these things."

18 And I said, "No, that's never been our proposal. We've
19 proposed a transfer of work for new hires going forward. And as
20 such those people would be considered Management and as such,
21 they would not be covered by the Union and as such the things
22 that you're asking me are not related to anything we're asking
23 of the Bargaining Unit."

24 And that's when the questions stopped. And again - you
25 know - I just - it was extremely uncomfortable because you could

1 tell that it was very specific and that there was a purpose in
2 her line of questioning to me. And not being an Attorney it was
3 very uncomfortable for me because I felt like she was trying to
4 set me up for something that I didn't realize that I was being
5 set up for.

6 JUDGE GREEN: When you refer to Allyson, you're talking
7 about Allyson Belovin?

8 THE WITNESS: Yes.

9 BY MS. OLIVER:

10 Q So when she was asking you these questions you told her
11 that Rite Aid's proposal would not have an impact in anyone in
12 the Union. Right?

13 A On the positions in the Unit that were still covered. The
14 Management functions that we were asking for the new hires were
15 not going to be effected from the existing Associates.

16 Q I'm not sure if that's responsive. Did you tell the Union
17 that the proposal would not impact anyone in the Bargaining
18 Unit?

19 A Again, to remember exact words I can't tell you. I'm sure
20 that it's in the notes here that you provided. That may be a
21 word that I used. But the intent of whatever I was saying was to
22 express that the existing Staff Pharmacist of anybody else
23 covered under the agreement were not going to be expected to do
24 any of the managerial functions. They never have been. And the
25 Union would never accept them doing that. So I was trying to say

1 only the new hires.

2 Q And - let's talk about the functions for a second. You
3 also told the Union that newly hired Staff Pharmacist, aside
4 from having authority to hire and fire and what was listed in
5 the modified proposal, that they be required to perform whatever
6 Management deems as a managerial responsibility. Right?

7 A Probably, yes.

8 Q And you also told the Union that the only change to the
9 Union regarding future Staff Pharmacists since 2015 is that
10 Interns are no longer included in the proposal. Correct?

11 A Correct, we had always anticipated a transfer of work for
12 the Pharmacists. But initially we had said that we wanted to
13 remove the Interns. And then it was changed.

14 Q And on September 7th did you send a letter to the Union
15 stating that Rite Aid plans to implement its modified Last,
16 Best, and Final Offer on September 11th?

17 A Yes, I did.

18 Q And on September 10th did you send a letter to the Union
19 also regarding the modified Last, Best, and Final Proposal?

20 A Yes.

21 Q And this letter didn't declare impasse. Correct?

22 A I don't know what words I used in the letter without
23 reading it. I guess if you're saying that it didn't, I assume
24 that it didn't.

25 Q We can show you.

1 MS. OLIVER: I'd like to show the witness what's been
2 previously marked as Joint Exhibit J-8.

3 BY MS. OLIVER:

4 Q Can you just read it over?

5 A What was your question again?

6 Q Did you declare impasse in this letter?

7 A Yes.

8 Q Where?

9 A The third line after the comma: 'it has failed to present
10 any' - this is the end of a sentence, but it says 'has failed to
11 present any that would break our impasse.'

12 Q And did you state that you would immediately implement the
13 terms of your Last, Best, and Final Offer?

14 A Not in those words in this letter.

15 Q You can give it back to the Court Reporter. Thank you.

16 And on September 14th did you send a letter to the Union
17 declaring impasse?

18 A I believe that I sent another letter.

19 MS. OLIVER: If we could show the witness what is Joint
20 Exhibit J-9.

21 BY MS. OLIVER:

22 Q What is this letter titled?

23 A Implementation of Last, Best, and Final Offer.

24 Q And in this letter did you inform the Union that you would
25 be immediately implement the Last, Best, and Final Offer?

1 A Yes.

2 Q And this letter states that you're implementing all of the
3 proposals contained in your advised Last, Best, and Final
4 Proposal as to which there's no agreement, as well as, all of
5 the tentative agreements that were previously made.

6 A Correct.

7 Q Did a wage increase for Bargaining Unit Employees go into
8 -

9 A Can I say? To be clear because you asked me this before,
10 we were implementing our proposals. The Strike Through Document
11 reflected what we believed were the proposals, not only from
12 Rite Aid, but from the Union. And we were providing that
13 document in an attempt to ensure that we all understood the
14 language.

15 But that, again, I want to be clear is not the drafted
16 proposal. It also included the Union's language that they
17 proposed that we had agreed to.

18 Q Right, so it included all of the tentative agreements 00

19 A We were trying to capture their language and our language,
20 everything that was agreed to up to that point. It wasn't just
21 our proposals. We had separate documents, as you just gave a
22 minute ago, that were just our proposals.

23 Q And did a wage increase for Bargaining Unit Employees go
24 into effect on September 14th?

25 A A wage freeze?

1 Q Increase, sorry.

2 A Oh, on which date?

3 Q September 14th - I don't know if it's in this document, I'm
4 just asking you from your memory. You can actually look at it.

5 A I think that it's in this document. Again, that was a wage
6 offer about having a ratification by a certain date and because
7 the Union refused to allow its Members to go on our offer. We
8 state in the letter in the last paragraph that was part of
9 offer. That didn't take place, the raises wouldn't take place
10 until December 31st, I believe, at the same time that minimum
11 wage was going up in New York State.

12 Q Okay, and you can give that back to the Court Reporter.
13 And in most Rite Aid stores, if you know, how many Staff
14 Pharmacist are on duty at one time?

15 A At one time?

16 Q Yes.

17 A One.

18 Q And how many Staff Pharmacists at a home store has Rite
19 Aid hired since September 2016, if you know?

20 A I don't know for sure. At last look I think that I saw a
21 number around 30ish but I don't know exactly.

22 Q And are any of those 30 included within the Bargaining
23 Unit?

24 A There would be probably some Floaters hired that would be
25 part of the Bargaining Unit.

1 Q I said with home store.

2 A Not everybody has a home store. A Floater has a home
3 store, but they float.

4 Q Okay, so a non-Floating Pharmacist, then.

5 A How?

6 Q How many non-Floating Pharmacists has Rite Aid hired since
7 impasse?

8 A I don't know for sure.

9 Q Has Rite Aid added any non-Floating Pharmacists to the
10 Bargaining Unit since impasse?

11 A No.

12 Q Do you know when Employees were first notified of the Rite
13 Aid sponsored Healthcare Plan?

14 A When they were notified?

15 Q Yes, by Rite Aid.

16 A Yes, when we started doing the open enrollment and the
17 implementation. I know that we created some information on cards
18 and things like that. The exact dates, I don't know.

19 Q And the enrollment period was from August 26th to September
20 6th, 2016. Right?

21 A That sounds correct.

22 MS. PIERSON-SCHEINBERG: Can you say those dates one more
23 time?

24 MS. OLIVER: August 26th to September 6th, 2016.

25 I would like to show the witness what I'm marking as GC-3.

1 BY MS. OLIVER:

2 Q Have you ever seen this email before?

3 A I believe that I have.

4 Q Would you say that this is accurate the enrollment will be
5 from August 26th, 2016 to September 6th, 2016?

6 A Enrollment for an effective date of September 11th.

7 Q Right.

8 (General Counsel's GC-3 identified.)

9 MS. OLIVER: I would like to move GC-3 into evidence at
10 this time.

11 JUDGE GREEN: Any objection?

12 MS. PIERSON-SCHEINBERG: No.

13 JUDGE GREEN: GC-3 is admitted.

14 (General Counsel's GC-3 received.)

15 MS. OLIVER: I'd also like to show what I'm marking as GC-
16 4.

17 JUDGE GREEN: Could you just identify, fi you know, who
18 the recipients of the email are, their positions?

19 THE WITNESS: Erik Groves on the copy line is a Pharmacy
20 District Manager. I'm not - I should know who he is, but I can't
21 think of who he is right now. The other two I believe are Store
22 Managers that he was sending this to directly. But I don't know
23 them.

24 BY MS. OLIVER:

25 Q This is GC-4. Do you know what this document is?

1 A It would appear to be a spreadsheet of all of our
2 Associates - well, I don't know if that's all of them - but a
3 spreadsheet of our Associates and showing that they were
4 enrolled in our Health Fund, Plus Plan, and what other plans
5 they were enrolled in.

6 Q And does it show the enrollment date for each Associate?

7 A None of the columns that I see have any headings, so it
8 would be an assumption without a corresponding email or
9 something of who did this. But an assumption would be that it's
10 saying 9/11/2016 was the effective date.

11 Q Right, but what about enrollment date?

12 MS. PIERSON-SCHEINBERG: Objection, it doesn't have a
13 heading.

14 MS. OLIVER: You provided this document to me.

15 MS. PIERSON-SCHEINBERG: I understand, but it doesn't have
16 a heading.

17 JUDGE GREEN: Understood, but can we have a Stipulation?

18 MS. PIERSON-SCHEINBERG: That's my point. You can't sit it
19 in front of him and the headings for some reason we're looking
20 at the back of the Hearing Room.

21 MS. OLIVER: Yes, it doesn't show up on my -

22 MS. PIERSON-SCHEINBERG: It shows up on the electronic
23 version.

24 MS. OLIVER: Oh.

25 THE WITNESS: I mean -

1 MS. OLIVER: You can tell us -

2 MS. PIERSON-SCHEINBERG: That's fine. Just tell them what
3 each column is, the first columns are, the headings.

4 THE WITNESS: One is EID.

5 MS. OLIVER: E being Employee, I assume.

6 MS. PIERSON-SCHEINBERG: Employee ID, yes.

7 THE WITNESS: Two is Enrollment Date.

8 JUDGE GREEN: There's your answer. Column Two shows the
9 enrollment date.

10 THE WITNESS: Three is last name. Four is first name.
11 Column Five is Union. Column Six is Benefit Eligibility. Seven
12 is Medical Plan Coverage. Column Eight is -

13 BY MS. OLIVER:

14 Q Can you slow down? Sorry, Medical Plan Coverage, yes.

15 A Column Eight is Medical Tier Coverage. Nine is Medical
16 Coverage to begin.

17 Ten is Dental Coverage. Column Eleven is Dental Tier
18 Coverage. Column Twelve is Dental Coverage Begin Date.

19 Column Thirteen is Vision Coverage. Column Fourteen is
20 Vision Tier Coverage. Column Fifteen is Vision Coverage begin
21 date.

22 Column Sixteen is Life Insurance Coverage. Column
23 Seventeen is Life Insurance Coverage Begin Date.

24 (General Counsel's GC-4 identified.)

25 MS. OLIVER: I would like to move GC-4 into evidence at

1 this time.

2 MS. PIERSON-SCHEINBERG: No objection.

3 JUDGE GREEN: Okay, GC-4 is entered.

4 (General Counsel's GC-4 received.)

5 JUDGE GREEN: It would probably be best to swap this out
6 for a version that actually has the column headings. I don't
7 know that it has to be done buy hard copy.

8 MS. OLIVER: So I don't know why it didn't print with
9 headings.

10 MR. SILVESTRI: If you don't mind, when it goes into a PDF
11 sometimes the headings don't get printed out because a
12 configuration. I do it all the time.

13 JUDGE GREEN: Okay.

14 MS. OLIVER: It wasn't a PDF. It was actually sent as an
15 Excel file. I can - I just don't want to -

16 JUDGE GREEN: You might consider putting in the electronic
17 version. You can put it on a disk.

18 MS. OLIVER: Sure.

19 JUDGE GREEN: But GC-4 is admitted.

20 BY MS. OLIVER:

21 Q Do you know approximately how many Rite Aid New York
22 stores are represented by 1199?

23 A The exact number to date, it's over 400 stores.

24 Q That's fine, an appropriate is fine.

25 MS. OLIVER: Can we just have one minute off the record?

1 JUDGE GREEN: Off the record; 3:37:35 p.m.

2 (Discussion off the record.)

3 JUDGE GREEN: On the record; 3:48:35 p.m.

4 BY MS. OLIVER:

5 Q So, I'd just like to return to what you refer to as a
6 Strike Through Document for some clarification. So you said that
7 the August 17th Proposal and the Modified August 30th Proposal
8 contained Strike Through Documents. Correct?

9 A Yes, we've had this since the first - I think since March
10 31st of 2015 you can see - like I said, it says 'Draft' on every
11 page because it was really intended to capture everything that
12 was going on.

13 Q So, I don't know if you have it in front of you, but -

14 MS. PIERSON-SCHEINBERG: Time out. Can I just get in front
15 of you?

16 MS. OLIVER: Sure, I'm looking at the August 17th Proposal
17 - General Counsel - I'm sorry, Joint Exhibit J-3(a). It's the
18 whole -- it's all J-3. So it's J-3(a) to J-3(b), J-3(c), and J-
19 3(d). Well, I'm looking at the whole document, so 272 to Bate
20 Number 374, so the whole packet of documents.

21 BY MS. OLIVER:

22 Q Can you look through this document and tell me what is
23 inaccurate, if this is a work in progress that you believe did
24 not reflect?

25 A So I found out much later on after negotiations had ended

1 that we had a Strike Through wrong on the first Article II. Even
2 though we changed our proposal in the letter on August 30th and
3 talked about it on September 6th -

4 Q We're just at August 17th right now though.

5 A Oh, well it's the same thing because we changed our
6 proposals, we never changed that particular Strike Through.

7 Q Okay, so did you tell - is it what you're saying that you
8 were unaware of the inaccuracy on August 17th when you were
9 bargaining?

10 A I was unaware of the inaccuracy until well after we
11 stopped negotiating. This document was never discussed across
12 the table during negotiations. When we refer to documents at the
13 table this was not the document being ever referred to.

14 In fact, I remember because I tried to supply a lot of
15 copies to hand out so that everybody would have everything and I
16 couldn't - I didn't print enough and we all made jokes that I
17 was killing trees and that I didn't have enough and that they
18 weren't willing to print any for me.

19 Q So what document was discussed, if not your written
20 proposals?

21 A We spoke specifically about the proposal documents that
22 were prior to August 17th that had actual proposals in them. We
23 talked about the new proposal documents, that are included here,
24 I believe, where it says 'Article XXVII Pension Fund'. We
25 reviewed that document. And then

1 Q So your testimony is that you presented the Union with
2 Written Proposals that were not discussed.

3 MS. PIERSON-SCHEINBERG: Objection.

4 JUDGE GREEN: Okay - sustained. I don't think that
5 accurately reflects what the testimony is. You can try that
6 again.

7 BY MS. OLIVER:

8 Q So, you're saying that when you discussed the Article II
9 Proposal with the Union on August 17th that you were not
10 referring to the documents that you handed them.

11 MS. PIERSON-SCHEINBERG: Objection.

12 JUDGE GREEN: Well - overruled.

13 BY MS. OLIVER:

14 Q On August 17th.

15 A May I say something now? we handed out - and I think that
16 I'm looking here I'm trying to catch up with myself - we handed
17 out the Benefit Proposal, a Pension Proposal, a Wage Proposal,
18 and this overall document that we thought were things that we
19 were already discussing and had already discussed. At no time
20 during the negotiations did we from Day One to Day End did we
21 ever sit at the bargaining table and go through this document
22 page by page and say this is our proposal or this isn't our
23 proposal or this is tentatively agreed to or this is not
24 tentatively agreed to. Each of us had throughout the whole year
25 or two years of bargaining actual proposals that you also have

1 copies of.

2 So again, this was an overall document with the sole
3 purpose in my mind of trying to capture everything that we had
4 been talking about and to get in the end an agreement that we
5 had a real document that wouldn't have to sit for years later
6 arguing over whether or not it was accurate.

7 So we had come into negotiations early on, even after the
8 first few bargaining sessions and provided the Union with
9 specifics, saying "Okay, here are the things we discussed.
10 Here's what we TA'd."

11 And we wanted to get signatures on them so there would be
12 no confusion later on and the language was set. And the Union
13 would not sign them. They told us they did not recognize those
14 document and there was no agreement about anything until
15 everything was agreed to. I think that was pretty much their
16 exact words.

17 So, rather than continuing trying to do the actual TA
18 documents, we continued to update -

19 MS. OLIVER: Objection, this is not responsive, and I
20 would move to strike that. So I'll ask the question again.

21 BY MS. OLIVER:

22 Q On August 17th when you discussed the proposal regarding
23 future Staff Pharmacists is it your testimony that you were not
24 discussing the proposal that you actually handed to them?

25 A I never discussed that piece of paper. I discussed the

1 transfer of work. I said my proposal verbally. And I discussed
2 everything that I intended to do verbally. And at no time did we
3 touch that document, refer to that document, or have anything to
4 do with that document.

5 Q Okay, let's talk about touching that document. So on
6 August 30th you sent out the Modified Last, Best, and Final
7 Offer and that is Joint Exhibit J-4(a) through J-4(f).

8 A Okay.

9 Q So, Joint Exhibit J-4(a) is your letter to the Union
10 regarding the changes to the proposal. Correct?

11 A Correct.

12 Q And you note that you withdrew the proposals that future
13 Pharmacy Interns would be excluded from the Bargaining Unit.
14 Correct?

15 A Correct.

16 Q And if you could look at J-4(c), the Bate Number is RA-
17 384.

18 A Okay.

19 Q Do you see Number One there? I guess that it's Article
20 2.1.

21 A Yes.

22 Q And you see that the Strike Through, it still strikes
23 through Professional and non-Professional Associate of the
24 Employer. Correct?

25 A I see that.

1 Q But Interns is no longer struck through. Correct?

2 A Correct.

3 Q So you did make a change to the document to reflect your
4 current proposal as of August 30th. Correct?

5 A No, I did not. I didn't draft this.

6 Q But Rite Aid made a proposal, edited their proposal to -

7 A This was edited, yes, but again, it clearly says that it's
8 a draft and clearly says - you know - again, if you don't see
9 the line or recognize where I'm saying that we haven't' had a
10 formal document since 1998. So we were trying to capture
11 everything that took place in this bargaining, as well as,
12 everything that took place in -

13 MS. OLIVER: Objection.

14 JUDGE GREEN: Sustained - let me ask you. So were you
15 aware that this was - that this document struck the exclusion of
16 Interns?

17 THE WITNESS: Originally - I mean, when we first created
18 the document on March 31st when we opened up, we had this
19 document.

20 JUDGE GREEN: Right.

21 THE WITNESS: So I could review the document at that time
22 and believe that everything was captured for our pros pals and
23 the previous language from MOA's. But then as negotiations
24 continued, a gentleman that worked for me, David Gonzalez,
25 continued to update this document for me.

1 So going into the September 6th date that they're talking
2 about or August 17th, in my mind he had updated this and there
3 were no errors. It was never discussed across the table -

4 JUDGE GREEN: Okay.

5 BY MS. OLIVER:

6 Q Mr. Gonzalez was with you at the bargaining table during
7 these sessions. Correct?

8 A Yes, he was.

9 Q And he never told the Union that there were any
10 inaccuracies. Correct?

11 A None of this at that time realized that we had an
12 inaccuracy.

13 Q And you had I think previously testified that you told the
14 Union that your proposals remained the same. Correct?

15 A Yes, I did.

16 Q And your March 2015 proposal looks very similar to -- the
17 Article II of the March 2015 proposal is the same as the August
18 17th -

19 MS. PIERSON-SCHEINBERG: Objection, the documents speak
20 for themselves.

21 JUDGE GREEN: I'm going to allow it.

22 THE WITNESS: Can you say it again, then?

23 JUDGE GREEN: If you know.

24 BY MS. OLIVER:

25 Q If you know is the March 2015 proposal, the Article II

1 language, the same as on August 17th?

2 A Without looking at them next to each other I can't answer
3 that. Again, David was updating this for me under the idea that
4 he was capturing the agreements that we had. And I did not catch
5 that error. And the error was never discussed. We talked about
6 the transfer of work for Pharmacists.

7 MS. OLIVER: Can we go off the record for a second?

8 JUDGE GREEN: Yes, off the record; 4:01:46 p.m.

9 (Discussion off the record.)

10 JUDGE GREEN: On the record; 4:11:18 p.m.

11 BY MS. OLIVER:

12 Q Joint Exhibit J-5(e), do you still have that in front of
13 you? That's' the August 17th bargaining notes. If you don't then
14 - you do?

15 A It doesn't say that.

16 Q What do you mean that it doesn't say that?

17 A I don't see the GC-5.

18 Q Oh, it's Joint Exhibit J-5. Can you look at the document
19 that's Bates Number RA-523?

20 MS. PIERSON-SCHEINBERG: Can you say the Bate again?

21 MS. OLIVER: 523.

22 THE WITNESS: I don't know if I have the right document
23 because these are all - this is 522, and this is 520.

24 BY MS. OLIVER:

25 Q You're going backwards.

- 1 A Oh wait, here.
- 2 Q Can you read the second time it says Gordon?
- 3 A Yes -- you want me to read that?
- 4 Q Yes, please.
- 5 A 'We have a document in Article II. We rephrased it.'
- 6 Q What does it say in between 'Article II' and 'we rephrased
7 it'?
- 8 A 'Reading the proposal'. Can I say what I was reading?
- 9 Q Sure.
- 10 A The - in that draft document the last portion of after the
11 Strike Through, I believe I read that.
- 12 Q I'm sorry. Which Bates Number is it?
- 13 JUDGE GREEN: So this is - we're back to Joint Exhibit J-
14 3?
- 15 MS. OLIVER: I believe so.
- 16 BY MS. OLIVER:
- 17 Q Is that what you're referring to?
- 18 A I'm looking at J-4(a) to J-4(f) on August 30th?
- 19 Q It should be Joint Exhibit J-3 because we're talking about
20 the conversation on August 17th.
- 21 A The notes that you just had me read from are -
- 22 Q I'm sorry. You're right. You're right, August 30th.
- 23 A The notes are from June 13th, 16.
- 24 Q No.
- 25 JUDGE GREEN: I'm sorry. Just to be clear, it looks like

1 they're the notes from August 17th.

2 MS. OLIVER: Yes, August 17th, sorry - I had it right the
3 first time.

4 THE WITNESS: I'm lost right now with documents.

5 JUDGE GREEN: What do you have there?

6 THE WITNESS: This is Note 1316.

7 JUDGE GREEN: Alright, so if you go to 523 Bates Stamp RA-
8 523 -

9 MS. OLIVER: Your Honor, actually if you look at 522, it
10 has the heading of notes from 8/17 and then 523 is the next
11 page.

12 THE WITNESS: And so were' talking about?

13 BY MS. OLIVER:

14 Q We're talking about August 17th.

15 A Okay, and which draft document?

16 Q That would be the August 17th Last, Best, Final Proposal,
17 Joint Exhibit J-3(a), J-3(b), J-3(c), J-3(d). And the question
18 is? Well, I didn't have to question anyone to explain.

19 JUDGE GREEN: So the notes say that you were reading the
20 proposal. What proposal were you reading?

21 THE WITNESS: That's what I'm trying to look at, what I
22 gave them that day, because there were documents, boxes of
23 documents. The proposal starts on 353 and goes through 375.

24 BY MS. OLIVER:

25 Q That's one of the Strike Through Documents. Correct?

1 A No, that was an actual proposal. We're seeking out the
2 proposals.

3 Q Okay, so -

4 A Then the document that says 'draft' is the Strike Through.
5 Some of the proposal contained some of the language from the
6 'draft' that is duplicated.

7 Q So the proposal that you read in relation to Article II
8 was Bates Stamped 353, Number One on there, where is says
9 'Article II'?

10 A Yes, I believe so.

11 MS. OLIVER: No further questions.

12 JUDGE GREEN: Do you have any questions?

13 MS. BELOVIN: Yes, I have a couple of questions.

14 BY MS. BELOVIN:

15 Q Mr., Hinkle, after you read that proposal that you
16 testified about on August 17th on that page that's Bates Stamped
17 353 - right - 353, you didn't tell the Union that there was
18 anything inaccurate about that proposal. Did you?

19 A In this proposal - this proposal was before my letter
20 dated August 30th.

21 Q But the question that I asked you was after you read this
22 proposal, you didn't tell the Union that there was anything
23 inaccurate about it. Did you?

24 A No, because I still didn't realize myself that there was
25 any problem with it. And that's - you know - in the proposal

1 document itself to clarify my proposals I wrote the letter on
2 August 30th to outline everything that I intended.

3 Q Okay, so the answer is no. On August 17th you didn't tell
4 the Union there was anything inaccurate about the proposal.
5 Correct?

6 MS. PIERSON-SCHEINBERG: Objection, asked and answered.

7 JUDGE GREEN: I agree. I think that we got that.

8 MS. BELOVIN: Okay.

9 BY MS. BELOVIN:

10 Q And on August 18th the parties met again. Correct?

11 A Yes.

12 Q And on August 18th you didn't clarify to the Union that
13 there was anything inaccurate about the proposal that you made
14 on August 17th with respect to Article II. Did you?

15 A If we're continuing to talk about the Strike Through, I
16 never realized that was an error through the entire bargaining
17 session.

18 Q I'm not talking about the Strike Through. Mr. Hinkle, you
19 testified that -

20 A What Strike Through language is it?

21 Q Let me ask the question again. When the parties met on
22 August 18th you didn't tell the Union that there was anything
23 inaccurate about the proposal that you made on August 17th, did
24 you with respect to the Recognition Clause, in particular?

25 A No.

1 Q And between August 17th - I'm sorry - between August 18th
2 and August 30th, when you made a modified proposal, you didn't
3 communicate to the Union that there was anything inaccurate
4 about the August 17th Recognition Proposal in Article II.
5 Correct?

6 A In between those two dates?

7 Q Correct.

8 A We didn't speak in between those two dates.

9 Q You didn't write to the Union to clarify anything about
10 the proposal. Correct?

11 A I clarified on August 30th.

12 Q Okay, and you didn't - I'm talking about the period of
13 time between August 18th and August 30th, between those dates you
14 didn't write to the Union to clarify your proposal. Correct?

15 A I already said that.

16 Q And you didn't call the Union to clarify your proposal?

17 A No, I wrote a letter on August 30th.

18 Q On August 30th you wrote a letter and you also included
19 with that letter a number of documents. Correct?

20 A Yes.

21 Q And one of those documents was the Strike Through
22 Document. Correct?

23 A Yes.

24 Q Another one of those documents was a document that you
25 just referred to as a Proposal Document. Right?

1 A Yes.

2 Q And both the Strike Through Document and the Proposal
3 Document that you sent to the Union on August 30th include
4 eliminating the language that said that the Bargaining Unit
5 would include all Professional and non-Professional Employees.
6 Correct?

7 A I have to look at the August 30th.

8 Q Joint Exhibit J-4 and I'll direct your attention - and the
9 Strike Through Document to a page that Bates Stamped Rite Aid
10 384.

11 A It's still wrong in both documents.

12 Q Still wrong - when was it wrong before?

13 A Well, as I said, I never realized that we hadn't made the
14 appropriate correction.

15 Q Was it wrong on August 17th?

16 A Again, I'd have to refer to my notes as to which day we
17 took the Interns out. The Interns was the thing that changed -

18 Q Okay, so that changed. Am I correct that changed on August
19 30th? That was the first time that changed.

20 A Yes.

21 Q And until August 30th Rite Aid was also proposing removing
22 newly hired Pharmacy Interns from the Bargaining Unit. Correct?

23 A Correct.

24 Q And on August 30th you communicated to the Union that Rite
25 Aid was no longer proposing removing newly hired Pharmacy

1 Interns from the Unit.

2 A Correct.

3 Q Okay, and you also communicated to the Union on September
4 6th that other than that change your proposal remained the same
5 with respect to the Recognition Clause. Correct?

6 A I don't recall speaking to the Recognition Clause.

7 Q On September 6th you don't recall speaking to the
8 Recognition Clause?

9 A I spoke to the transfer of work for Pharmacists, not the
10 actual language in Article II. I don't recall speaking of the
11 exact language in Article II, other than the notes that you
12 pointed out just now saying that I read it.

13 Q But you recall speaking about your proposal.

14 A Yes, about the transfer of work for Pharmacists. I did.

15 Q And you recall on September 6th saying that it's the same
16 proposal that you've made since March of 2015. Correct?

17 A Meaning the transfer of work.

18 Q My question is didn't you communicate to the Union that
19 your proposal with respect to Pharmacists and Pharmacy Interns
20 was the same proposal that you had made since March of 2015 with
21 the sole exception being that you no longer seeking the removal
22 of Interns from the Bargaining Unit?

23 A Referring to the transfer of work for Pharmacists.

24 Q Mr. Hinkle, it's a yes or no question.

25 JUDGE GREEN: Yeah, if you could -

1 THE WITNESS: Then say it again and I'll answer yes or no
2 because you're taking our words out of context.

3 BY MS. BELOVIN:

4 Q The question is on September 6th isn't it true that you
5 communicated to the Union that your proposal with respect to
6 Pharmacists and Pharmacy Interns was the same as it had been
7 since March of 2015 with the exception being that Rite Aid was
8 no longer seeking to remove Pharmacy Interns from the Bargaining
9 Unit?

10 A Those sound similar to the words that I said and yes, but
11 I think that it was taken out of context.

12 JUDGE GREEN: Okay, you'll have an opportunity on direct.

13 MS. BELOVIN: I have no other questions.

14 JUDGE GREEN: Okay, thank you very much. Would the
15 Respondents like to ask Mr. Hinkle any questions now or would
16 you like to wait until your case?

17 MS. PIERSON-SCHEINBERG: Well, that's what I was going to
18 ask, whether I could wait until our case and put him on as our
19 witness.

20 JUDGE GREEN: You may.

21 MS. PIERSON-SCHEINBERG: Okay, may I have five minutes?

22 JUDGE GREEN: Yes, off the record; 4:24:55 p.m.

23 (Discussion off the record.)

24 JUDGE GREEN: Back on the record; 4:27:52 p.m.

25 MS. PIERSON-SCHEINBERG: Your Honor, we'd like to wait

1 until our case-in-chief to examine Mr. Hinkle.

2 JUDGE GREEN: Okay, so you're excused. Thank you very
3 much.

4 (Witness excused.)

5 JUDGE GREEN: So, it's 4:30. Is there anything that we can
6 do now or are we basically done for the day?

7 What do we have for tomorrow? Do we have a full day
8 tomorrow?

9 MS. OLIVER: I only have two more witnesses. I hope to be
10 able to do both of them tomorrow.

11 JUDGE GREEN: Okay, so -

12 MS. OLIVER: It might be tomorrow and part of the next
13 day. It honestly depends on how long cross is.

14 MS. PIERSON-SCHEINBERG: So, I have to line up witnesses.

15 MR. SILVESTRI: So, let me just kind of - we have people
16 who have been subpoenaed. Right? So I kind of want to get an
17 idea of when - a rough idea of when our case-in-chief is going
18 to start.

19 JUDGE GREEN: It sounds like Wednesday.

20 MS. OLIVER: Yes, it'll either be - I can - obviously,
21 anything can happen, but I intended to either be able to finish
22 tomorrow or by Wednesday morning. So Wednesday morning or
23 Wednesday afternoon it's you.

24 JUDGE GREEN: Okay.

25 MS. OLIVER: And also there's -

1 MR. SILVESTRI: Are you calling any witness that we've
2 subpoenaed?

3 MS. OLIVER: Yes, both of them are witnesses that you've
4 subpoenaed.

5 MR. SILVESTRI: Okay, so that makes my life easier because
6 I don't have to wait until my case-in-chief. I can cross examine
7 them.

8 MS. OLIVER: That's why I didn't know how long it would
9 be.

10 MR. SILVESTRI: Well, I might have to make some arguments
11 with respect to Ms. Heffner(ph). Any Union witness is going to
12 be a 611(c) witness.

13 JUDGE GREEN: Okay, so with regard to subpoena disputes. I
14 don't have a clear idea of what's actually in dispute. What -
15 you know -- if I go back to your emails it would determine
16 what's in dispute?

17 MR. SILVESTRI: Are you talking about the document
18 subpoenas?

19 JUDGE GREEN: Either - any, and tests.

20 MR. SILVESTRI: So, as I have heard you this morning, and I
21 obviously have a big problem with this, but it is what it is, as
22 I heard you this morning it sounds to me like you're not going
23 to enforce any subpoena with respect to the NBF. You're not
24 going to enforce the subpoena ad testificandum because these are
25 all of the Trustees and Mr. McIver and Mr. Stein and Ms.

1 LaCosta(ph) and Ms. LaRue(ph).

2 JUDGE GREEN: Right, to the extent that your reasoning for
3 requesting documents and calling witnesses is based on this
4 argument that the Union was attempting to assert pressure in
5 support of their bargaining proposal, I'm not going to order the
6 deduction.

7 MR. SILVESTRI: So remember that it was not only that
8 reason. We have also the reason that I explained to you, which
9 is also that issue about whether or not the exigency was caused
10 by us or caused by the Union at being concert with NBF.

11 Okay, so the exigency issue is a fairly principal issue in
12 this case because it starts the process that ultimately ends up
13 in the NBF being terminated and Rite Aid benefits commencing.
14 Regardless of whether or not -

15 MS. OLIVER: Are we on the record?

16 JUDGE GREEN: We are.

17 MR. SILVESTRI: We are on the record.

18 JUDGE GREEN: That's okay. We're discussing - you know -
19 we're discussing -

20 MR. SILVESTRI: I have a right to say what my defense is.

21 MS. OLIVER: No, I just wanted to know. That's all. I'm
22 sorry.

23 MR. SILVESTRI: I have a right not to be interrupted when
24 I say what my defense is.

25 MS. OLIVER: We went off twice. I'm sorry.

1 MR. SILVESTRI: So, when you issue your Order, we'll deal
2 with that Order. I just want to know from a practical
3 perspective.

4 What I heard today was NBF documents are out of the
5 question, NBF ad testificadums are out of the question.

6 JUDGE GREEN: Right - so you're essentially saying that we
7 need to know whether the Union and the fund was the case because
8 that'll establish that the Respondents were not the cause.

9 MR. SILVESTRI: It will establish that we had the right to
10 start initiating a benefit plan. We had the right to enroll
11 people in the benefit plan. We had the right to propose an
12 alternate benefit plan.

13 The Union had the obligation to respond to us with respect
14 to that. It had the obligation to produce documents with respect
15 to that. And its failure to produce documents with respect to
16 that and the delay that attended that production of information
17 with connection with that also caused an interruption in
18 bargaining that was in Bad Faith.

19 And justified us for converting - here's our band aid.
20 We're going to put a plan, put a band aid on it because you're
21 terminating our benefits to okay, enough is enough. And now
22 we're going to go forward and make our proposal. That's our
23 defense theory.

24 JUDGE GREEN: But don't you have all of that evidence?
25 Isn't that evidence that you have?

1 MR. SILVESTRI: You know, Your Honor, I have - it's
2 interesting. I tried conspiracy cases before, not necessarily in
3 NLRB context, but in many Federal context, and conspiracies are
4 difficult to prove. But they're - you can prove them by lack of
5 smoking gun. I have enough palpable evidence to establish a
6 prima-facie case of conspiracy and that's -

7 JUDGE GREEN: No, I don't actually - I actually don't
8 necessarily disagree with that. If I thought that the Case Law
9 supported in anyway the defense, I would order the production of
10 this stuff.

11 My problem is from my perspective, the Case Law just
12 doesn't establish that what you're arguing is a valid defense.

13 MR. SILVESTRI: Okay, I understand that. That's why I
14 said, "Don't agree with it. We'll figure out what we're going to
15 do with it." But that's for practical purposes.

16 The discussion here today is going to be - we're talking
17 about who's going to show up.

18 JUDGE GREEN: I get it. So, alright - so, who's
19 uncontested as far as people that are going to show up?

20 MS. BELOVIN: The Union, Charging Party, did not seek to
21 revoke the subpoenas of myself, Ms. Velon, and Mitra Behroozi
22 who is a Vice President of 1199.

23 JUDGE GREEN: And there was a Ms. LaCosta?

24 MS. BELOVIN: That's someone from the -

25 MR. SILVESTRI: The Fund.

1 MS. BELOVIN: The benefit fund.

2 JUDGE GREEN: Okay, but as far as I understand that wasn't
3 contested either.

4 MS. OLIVER: Well, Ms. Heffner is not contested and she is
5 testifying.

6 MS. BELOVIN: Right, Ms. LaCosta wasn't contested,
7 although she no longer works for the Benefit Fund.

8 MR. SILVESTRI: So there's a document that we need to talk
9 to her about and I have to think about - because the document
10 relates to the Viani Award and in light of - you haven't made a
11 Ruling, have you, about what I answered to you today.

12 JUDGE GREEN: Correct, well - what do you mean?

13 MR. SILVESTRI: So, what I said to you was since that you
14 were -

15 JUDGE GREEN: I'm not saying that the case is dismissed on
16 the grounds of Spielberg.

17 MR. SILVESTRI: Right.

18 JUDGE GREEN: I'm saying that -

19 MR. SILVESTRI: Right, you haven't made a Ruling that I'm
20 right.

21 JUDGE GREEN: Right.

22 MR. SILVESTRI: So we don't know sitting here today right
23 now whether we need to put on testimony in connection with that.
24 And I know that the Counsel for the General Counsel has put on
25 the Viani Award. So - you know -

1 JUDGE GREEN: What else do you need, other than the Viani
2 Award?

3 MR. SILVESTRI: I need testimony from - so if we're going
4 to evaluate the Award, not in the context of it's just a
5 straight enforcement action and they've already had their
6 enforcement and it should be dismissed.

7 JUDGE GREEN: Right.

8 MR. SILVESTRI: If we're going to debate the viability of
9 the Award in connection with the rest of this case, then I'm
10 entitled to put on a defense that not only is the Award
11 repugnant to the purposes the Act, I'm also entitled to put on a
12 defense that we didn't waive the right to bargain over a
13 unilateral change in the rate.

14 JUDGE GREEN: Well, that's your contention.

15 MR. SILVESTRI: That's my contention. So, I would be
16 putting on evidence in connection with that.

17 MS. BELOVIN: Ms. LaCosta had nothing to do with the
18 bargain and would have nothing to say about the question of
19 waiver at all. I mean - I don't represent the Fund, but I -

20 JUDGE GREEN: My question is would that be anything more
21 than putting in the transcripts and the exhibits.

22 MR. SILVESTRI: Yes, because the transcripts of the Viani
23 Award don't even address that. The transcripts of the Viani
24 Award deal solely with whether or not the contract required the
25 URR or gave the Trustees the power to change the rate. They

1 don't deal with the issue of whether or not there's a bargaining
2 waiver. They don't deal with the issue of whether or not there's
3 an Unfair Labor Practice. The transcripts don't deal with that.

4 That's why when you said are you going to try the Viani
5 Award again. I'm like, we're not going to try that Award again
6 because that's not really the issue here.

7 MS. BELOVIN: But there was substantial evidence of
8 bargaining history put on at the Arbitration. Both sides put on
9 witnesses who testified about the bargaining history. So to the
10 extent that you are going to argue waiver.

11 JUDGE GREEN: Well, it's an agreement -

12 MS. BELOVIN: Or anything else.

13 JUDGE GREEN: It's an argument against waiver. And it's
14 based on your repugnancy of the Arbitrator's analysis. And I
15 think that you can establish - that analysis can be fine from
16 the Award itself. You know - to the extent that there might be
17 some other - some other reason not to defer to Spielberg, I
18 think that the transcripts and the exhibits would address that.
19 For example, whether the process was fair and regular.

20 MR. SILVESTRI: I'll evaluate tonight whether or not we
21 need to call Ms. LaCosta.

22 JUDGE GREEN: Okay.

23 MR. SILVESTRI: I understand your point. I have to look at
24 whether or not we can establish a sufficient basis with the
25 witnesses and the documents that we have, including the

1 documents that are in the record of the Viani Case.

2 JUDGE GREEN: Okay, and you understand, when you're
3 arguing for repugnancy and for - you know - against fair and
4 regular - you know - you're really arguing dismissal. These are
5 in the terms of the contract.

6 MR. SILVESTRI: So, really I understand that completely,
7 Your Honor.

8 JUDGE GREEN: Okay.

9 MR. SILVESTRI: Because you don't have a Ruling - I don't'
10 have a Ruling that 12(a) through (f) is dismissed. So I have to
11 in Good Faith take the other alternative and say, "Okay, if the
12 Judge is not going to dismiss that and that's part of the case,
13 then I have to now put on a defense".

14 JUDGE GREEN: Okay.

15 MR. SILVESTRI: So, if you render a Ruling with respect to
16 that, then I don't have to do that. And I'm not saying that you
17 - you understand what I'm saying.

18 JUDGE GREEN: I get what you're saying. And I'm not
19 offering to dismiss the case with that allegation.

20 MR. SILVESTRI: This is my allegation, right.

21 JUDGE GREEN: Is that the 10(a)?

22 MR. SILVESTRI: It's 10(a), right.

23 JUDGE GREEN: It's really 10(a).

24 MR. SILVESTRI: Well, it's 10(a) through 10(f) because
25 every one of those relates to a collection. It's a collection.

1 It's entirely a collection.

2 JUDGE GREEN: I understand, but you may want to take a
3 look at 15th - everybody take a look - 15th Avenue Iron Work Inc.
4 301-NLRB-878, as it distinguishes Spielberg Dismissal of an
5 Allegation that there was a mid-term modification versus
6 contributions, which occurred after the expiration of the
7 contract.

8 MR. SILVESTRI: We'll take a look at it.

9 JUDGE GREEN: Okay, everybody take a look.

10 MR. SILVESTRI: We'll take a look at it.

11 JUDGE GREEN: Okay.

12 MR. SILVESTRI: So on the witnesses I'm going to perceive
13 - I'm going to perceive on assumption that you rendered a Ruling
14 that the Fund Witnesses are no longer in play.

15 JUDGE GREEN: Well, okay, so -

16 MR. SILVESTRI: Except for Ms. Heffner for whom there's
17 been no objection.

18 JUDGE GREEN: So, Castaneda, Behroozi, Stein, McIver -

19 MR. SILVESTRI: Right.

20 JUDGE GREEN: I'm not enforcing those.

21 MR. SILVESTRI: Right.

22 JUDGE GREEN: The - I think that it's Ms. Armstrong. I
23 need to address that.

24 MS. BELOVIN: Ms. Armstrong's only potential relevancy
25 here has to do with negotiations that occurred in 2009. That so

1 far pre-dates a period of time -

2 JUDGE GREEN: I get it. I'm not saying that I'm inclined
3 an Order to Procedure, but it's a different theory. That, if I'm
4 correct, it's a different theory of the defense. That's really
5 an issue of whether we're re-litigating the Viani Arbitration.

6 MR. SILVESTRI: Yes, sir.

7 MS. BELOVIN: Yes.

8 JUDGE GREEN: Okay.

9 MS. BELOVIN: And what about all of the other witnesses
10 subpoenaed from the Union, who other than Ms. Belovin and Ms.
11 Silva had nothing to do with bargaining. And from what I
12 understand are subpoenaed because are not on Collections
13 Committee, but were only subpoenaed because they're Trustees of
14 the NBF.

15 MR. SILVESTRI: Right, so to the extent that they're - so,
16 to the extent that we subpoenaed them as Trustees of the NBF,
17 then it's the NBF issue.

18 JUDGE GREEN: Right, so those people are going to be out
19 also.

20 MR. SILVESTRI: Right.

21 JUDGE GREEN: You know - the way that this is going to
22 play out, if you filed a Special Appeal - you know - the Board
23 would come back and say, "Listen, you're wrong. You need to
24 accept this evidence," which in that case we might very well be
25 back here in October reopening the record. But until that time,

1 that's where we're at.

2 MR. SILVESTRI: I understand that. I'm just looking at the
3 practical.

4 So, basically the witnesses - and Ms. LaCosta I have to
5 talk to Ms. Hefner about because she is in another position now
6 and I've made an agreement with her to accommodate her schedule
7 with respect to Ms. LaCosta as a witness.

8 JUDGE GREEN: Okay.

9 MR. SILVESTRI: So, if we determine that she is necessary,
10 then we'll have to figure out how we work her in. I can't
11 believe that she's going to be long.

12 JUDGE GREEN: Okay.

13 MR. SILVESTRI: Okay.

14 JUDGE GREEN: But you're good to go. You have people for
15 Wednesday.

16 MR. SILVESTRI: Yes, sir, I have people for Wednesday.

17 MS. PIERSON-SCHEINBERG: I was just trying to figure out
18 who to line up. That's why I was asking the question.

19 JUDGE GREEN: Right, that was the original.

20 MR. SILVESTRI: We don't want any gaps.

21 MS. BELOVIN: And the only people we're talking about now
22 from the Union are me, Ms. Belovin, and Ms. Silva. Correct? And
23 Ms. Armstrong is tabled.

24 MR. SILVESTRI: Right - it's still on the table, but we
25 have to -

1 MS. BELOVIN: It's still on the table, but a decision is
2 tabled.

3 JUDGE GREEN: Correct.

4 MS. BELOVIN: Okay.

5 JUDGE GREEN: Okay, so we're all good. We'll be back here
6 tomorrow and with that we'll go off the record.

7 MR. SILVESTRI: What time? 9:30?

8 JUDGE GREEN: Thank you very much; off the record.

9 (Whereupon, at 4:43:28 p.m., hearing in the above-entitled
10 matter adjourned, to reconvene on Tuesday, September 12, 2017,
11 at 9:30 a.m.)

12

1

C E R T I F I C A T E

This is to certify that the attached proceedings done before the
NATIONAL LABOR RELATIONS BOARD REGION TWO

In the Matter of:

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

Respondent,

And

1199 SEIU UNITED HEALTHCARE WORKERS EAST
Charging Party

Case No.

Date: September 11, 2017

Place: New York, NY

Were held as therein appears, and that this is the original
transcript thereof for the files of the Board

Official Reporter

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