DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me beginning on October 13, 2020, and concluding March 9, 2021, via the Zoom for Government videoconferencing platform. Charging Party filed a charge on January 27, 2020, alleging that Respondent implemented its purported last, best, and final offer for a successor collective-bargaining agreement without first bargaining with Charging Party to an overall good-faith impasse in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer to the complaint denying that it violated the Act. The parties filed post hearing briefs in the matter which were all received on April 13, 2021.

FINDINGS OF FACT

JURISDICTION

The complaint alleges, and I find that
1. The charge in this proceeding was filed by the Charging Party on January 27, 2020, and a copy was served on Respondent by U.S. mail on January 28, 2020.

2. (a) At all material times Respondent has been a Delaware corporation with a facility and place of business located at 4004 Foothills Boulevard in Roseville, California (Roseville facility), and has been engaged in the business of operating retail drug stores and pharmacies.

(b) In conducting its business operations described above in subparagraph 2(a), during the calendar year ending December 31, 2019, Respondent derived gross revenues in excess of $500,000.

(c) During the period described above in subparagraph 2(b), Respondent purchased and received from its Roseville facility products, goods, and materials valued in excess of $5000 directly from points outside the State of California.

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

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

5. At all material times the individuals responsible for bargaining on behalf of the Respondent have been agents within the meaning of Section 2(13) of the Act:

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

All employees working in the Employer's retail drug stores within the geographical jurisdiction of the Union in Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Sonoma, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba Counties, California, Southwestern Washoe County, Nevada (Tahoe Basin), and Northwestern Douglas County, Nevada (Tahoe Basin).

(b) Since at least July 14, 2013, and at all material times, Respondent has recognized the Charging Party as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from July 14, 2013, to July 13, 2019.

(c) At all times since at least July 14, 2013, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the unit.
Partial Stipulation of Facts

The parties entered into what was described as a partial stipulation of facts which offered Joint Exhibits 1-24 the authenticity of which the parties agreed to and the following factual stipulations:

1. The Union and Respondent had two collective-bargaining agreements in effect from July 1, 2016, through June 30, 2019, attached as Joint Exhibit 1 and Joint Exhibit 2.

2. The documents referred to in Joint Exhibits 3–6, 13, 16, 17, 19–23 were sent as indicated in said joint exhibits and were received by the respective addressees.


4. On June 25, 2019, the Union furnished Respondent with Joint Exhibit 7.

5. On June 25, 2019, Respondent furnished the Union with Joint Exhibit 8.

6. Respondent and the Union signed two agreements to extend Joint Exhibit 1 as set forth in Joint Exhibits 9 and 14.

7. At the collective-bargaining session held on August 12, 2019, Respondent furnished the Union with Joint Exhibit 10.

8. At the collective-bargaining session held on August 16, 2019, Respondent furnished the Union with Joint Exhibits 11 and 12.

9. At the collective-bargaining session held on September 11, 2019, Respondent furnished the Union with Joint Exhibit 15.

10. By email on October 28, 2019, Respondent furnished the Union with Joint Exhibit 18.

Background

Rite Aid and United Food and Commercial Workers Local 8 (UFCW 8) have maintained a collective-bargaining relationship for many years prior to the allegations presented in this case. As part of that relationship, the employees received health benefits under the UFCW Northern California and Drug Employers Health and Welfare Trust Fund. (Jt. Exh. 1, 2.) Rite Aid contributed to the fund at rates that it and the Union had agreed upon in the collective-bargaining process at a rate of $3.77 per employee hour. The $3.77 represented a blended rate which consisted of employees in a “Gold Plan” and a small number of employees in a “Platinum
Plan” for whom the contribution rate was $5 per hour. The fund was advised by an independent consultant, Segal Consulting. On February 27, 2018, Segal issued its quarterly report which advised the Funds board of trustees of the funds financial condition. The report written by Tracy Liang, a Segal executive, outlined its conclusion that “claims experience had quickly deteriorated” due to a loss of $6.4 million in the prior 18 months. (Jt. Exh. 3 p. 96.) The report stated as follows:

[D]uring the recent 18 months in particular the latter half of 2017, claims experience quickly deteriorated. Due to increased claims experience coupled with reduced hours, the Fund experienced a loss of over $6.4 million during the 18 months (of which approximately $4.1 million occurred in the second half of 2017). The Fund ended the 2017 plan year with approximately $4.4 million in reserves. This is roughly equivalent to the reserve level in early 2014. (Jt. Exh. 3, p. 96–97.)

The report further advised that “based on projected expenses, Fund balance as of November 30, 2017, equated to 2.2 months of reserve. Without changes to the current level of contributions and benefits, Fund expenses are expected to continue to exceed income.” (Jt. Exh. 3 p. 96–97.) Segal offered some possible solutions to the Fund to shore up its financial condition. Among the various proposals was the option of increasing deductibles and increasing contributions by .66 cents per hour in July 2018 and by an additional $1.15 per hour in July 2019 to achieve the targeted reserve. (Jt. Exh. 3 p. 101.)

The 2018 Bargaining Sessions and Fund Trustee Meeting

The chief spokesperson for the union was attorney Steve Stemerman. Attorney Laura Pierson-Scheinberg served as the chief spokesperson for Rite Aid. On May 22, 2018, the parties met to discuss the Trust Fund issues.1 At the meeting, the Union sought a contribution increase of 18 cents per year. The Union premised its position on language that appeared in the CBA in which the parties “acknowledge the on-going increasing cost of healthcare.” Section A.2 of schedule A provided as follows:

Rite Aid shall continue to contribute four dollars and ninety-three cents ($4.93) per hour (Platinum) and three dollars and seventy cents ($3.70) per hour (Gold) to the Fund until such time as the new Allied Fund is implemented. Once the new Allied Fund is implemented, Rite Aid agrees to contribute the same amounts towards similar coverage as provided for under the Fund, and to increase contributions by up to eighteen cents (18¢) per year, if such increases are determined to be necessary by the Allied Fund’s Trustees to maintain such coverage and a six (6) month reserve (emphasis added). Except for the first increase, any additional increases shall be applicable annually on July 2016, 2017, and 2018 hours.

\[\text{Added}\]

1 Although bargaining notes are relied upon in reaching the conclusions herein, it should be noted that they are not verbatim transcriptions of the discussions that took place.
The Union sought an increase in contributions of .18 cents. Stemerman explained that the .18 cents would get “at least a little infusion of money” which would then allow the parties to sit down after the contribution and “have a discussion.” He also noted the need to “modify the benefits structure.” (R Exh. 1.) The bargaining notes indicate that Pierson -Scheinberg responded that she wasn’t “giving up 18 cents until I see the end game. I want to get a proposal. See it and then respond.” (R Exh. 1.) Stemerman responded that from the union’s perspective the 18-cent request was part 1, and part 2 would be to “sit down and figure out how to make the plan viable.” (R Exh. 1.) Pierson -Scheinberg responded that she wouldn’t “have the 18-cent conversation without the proposal.” (R Exh. 1.)

On May 30, 2018 Pierson -Scheinberg emailed Stemerman asking that the parties, “resume negotiations over reopening the collective-bargaining agreement on this issue and finding a solution to the Fund’s financial problems.” (Jt. Exh. 2.) She also set forth Respondent’s position that “Rite Aid requests that any proposal address the long-term viability of the Fund.” (Jt. Exh. 2.)

Stemerman contacted Pierson-Scheinberg on August 23, 2018, to set up discussions regarding the health fund issues. In his email he stated, “as a heads up one potential solution might be for the parties to discuss reopening their current agreement so that any mutual solution concerning the Health plan can cover a period of time beyond the current expiration date of the existing CBA. As I recall, you wanted to discuss a ‘long term fix’ to the current plan before committing to the two 18 cent increase the CBA calls for. One way to accommodate your concerns would be to have a long-term fix in the context of a new CBA.” (U Exh. 1.) Pierson-Scheinberg responded that “because of other open contracts we are not able to open the entire CBA at this time” (U. Exh. 1). Stemerman clarified the union’s position by noting, “I was not suggesting we formally reopen the CBA. Rather consistent with your request, we are suggesting that the parties explore a longer-term solution, which could lead to a new CBA. Absent agreement we are not proposing to change the expiration date of the current CBA.” (U. Exh. 1.)

On October 2, 2018, the Union sent a proposal to Rite Aid. The proposal included suggested benefit modifications along with hourly contribution increases that would in the Union’s view sustain the plan benefits as well as provide for a 3-month reserve. The proposal noted that the employer had not increased its hourly contributions since June of 2011. (Jt. Exh. 5.) The parties met on November 5, 2018, and generally discussed the Union’s proposal. (R. Exh. 2(b.) The meeting concluded with an agreement that Segal’s representative Joe Sweeney would confer with Rite Aid about the union proposal. On January 3, 2019, Stemerman contacted Pierson -Scheinberg inquiring when they would receive a response from Rite Aid. She replied on January 11, 2019, advising that it wasn’t until January 2019, that they were able to reach Sweeney and that they were analyzing the information provided. She further noted, “we will continue to monitor the health of the fund to ensure that bargaining does not need to be expedited, if it does, we will of course meet.” (Jt. Exh. 6.) She finished by indicating that she would be meeting with Rite Aid officials.

The parties met to negotiate for a successor collective-bargaining agreement seven times during 2019. The first meeting took place on June 25, 2019, the chief spokespersons for the parties remained Pierson-Scheinberg and Stemerman. At the meeting, the union made a bargaining proposal that consisted of $1.4 million of benefit modifications, an increase in employer contributions from $3.77 to $5.72 per employee hour, cost shifting options, and wage increases.
The CBA was set to expire on July 13, 2019, and the Union proposed an extension wherein Rite Aid would pay the increased $5.72 hourly contribution rate that was contained in the June 25, 2019 proposal. On July 1, 2019, the parties agreed to extend the CBA with the increased hourly rate through August 31, 2019. (Jt. Exh. 9.)

The parties met again on August 12 and 16, 2019. At the August 12 meeting Rite Aid presented a chart with potential costs savings which according to Rite Aid would result in $9 million in cost savings if adopted. The Union found the suggested changes unacceptable as it perceived the potential cost savings merely as cost shifting to the employees without significant contributions from the employer. (Tr. 127.) Stemerman explained, “Rite Aid’s resistance on paying more in contributions, was to shift cost to the employee. We all know from 2011 until 2019, healthcare costs did nothing but go up.” (Tr. 127.) Rite Aid Agreed to provide information regarding what other UFCW Locals received in their 2018 agreement with Rite Aid. This information was provided at the meeting on August 16, 2019. The parties discussed the information presented by Rite Aid and discussed issues regarding the financial health of Rite Aid’s northern California stores. At this meeting Pierson-Scheinberg suggested that Rite Aid Health Plane could be the solution to the issues presented.

On August 26, 2019, the parties executed a second extension in which Rite Aid agreed to continue to pay the increased contribution rate of $5.72 to give the parties more time to bargain. (Jt. Exh. 14.) With the increased contributions by December 2019 the Fund’s reserves did in fact increase. (U. Exh. 3, Tr. 402.)

The parties met again on September 11, 2019. At this meeting the Union proposed the parties enter into a 1-year extension in which the employer would continue to make the additional contributions at $5.72, pension increase of .30 cents over 3 years, no wage increases but signing bonuses. (R. Exh. 2F p. 49). The Union’s proposal was meant to buy more time. (R. Exh. 2F p. 49.) Rite Aid suggested that the union consider a Rite Aid Health plan in lieu of the Fund suggesting that it could maintain the same benefits at lower costs. Pierson-Scheinberg questioned Stemerman about various aspects of the Union’s proposal. At one point she inquired if the Union had flexibility regarding the bonus aspect of the proposal to which according to the bargaining notes Stemerman responded, “we’ll listen to whatever thoughts you have, our thought was, we need to get this ratified, we’re telling people we will modify their benefits, they’ll be more costly starting in January and tell them no wage increase, so that’s how we came up with it.” (R. Exh. 2 p. 52.) Pierson-Scheinberg asked for time to cost the proposal and told Stemerman she, “appreciated” the Union’s “creativity.” (R. Exh. 2 p. 53.)

On September 26, 2019, the Union inquired about its proposal to roll over the contract for another year. In his letter Stemerman advised that he hadn’t received any response regarding either the proposal or the request to continue the extension that was in place. He finished his inquiry with the question, “Is it your intent to run these negotiations off a cliff?” (R. Exh. 6 p. 135.) Pierson-Scheinberg responded by saying that she was “not trying to do any such thing with negotiations,” and asked that additional dates for bargaining be proposed as Rite Aid was “interested in continuing to bargain,” although it was “not interested” in the Union’s last proposal “due to the draconian cost.” She further noted that Rite Aid would not agree to any further extension. (R. Exh. 6 p. 135.) The extension agreement expired on September 30, 2019, and the contribution rate reverted to the previous rate of $3.77. (Jt. Exh. 14.)
After the extension agreement expired the Union began boycott actions. The parties met on October 25, 2019. The meeting was contentious and began with Stemerman asking what was going on with the canceled extension. (R. Exh. 2 p. 96). He also expressed his frustration with the canceled extension asserting that Respondent had “thumbed its nose” and “canceled agreement” and put the Union in a position “where we’ve declared war.” Then he indicated that if there was no deal or extension, they “would not fight war- to get cuts on benefits.” He went on to note that “anything that involves cuts in benefits “would be off the table when we break today.” He then proposed that the Union would reiterate the roll over proposals from the last meeting and ask that Rite Aid reinstate the contribution rate in effect during the extension among other things. He also intimated that Rite Aid put the Union in the position of having to be more aggressive. Pierson-Schienberg responded with the comment, “you’ve been busy beavers—been passing out Safeway transfer coupons—what message does that send the members?” (R. Exh. 2 p. 96). When asked “where do we go from here, she responded, “I didn’t declare war you did because of passing out Safeway coupons.” (R. Exh. 2 p. 96.) The meeting ended with Pierson-Scheinberg’s agreement to communicate the union’s position to Rite Aid officials.

On October 28, 2019, Pierson-Schienberg wrote to Stemerman to communicate Rite Aid’s position. In it, she indicated that Rite Aid would not renew the extension and further offered Rite Aid’s own economic proposal. (Jt. Exh. 18.) She ended the email stating, “we believe, however that based on the Union’s position, there is nothing to talk about. But if you feel differently, we are happy to prioritize a meeting with you.” (Jt. Exh. 17.) Stemerman responded expressing the Union’s disappointment with Rite Aid’s rejection and what the Union’s perceived as mischaracterizations of its good-faith attempt at dealing with health plan issues. (Jt. Exh. 17.) He ended his email with the statement, “we can meet November 19 and/or 21.” (Jt. Exh. 17.)

The parties met again on November 19, 2019. The meeting began with Stemerman indicating that the Union was trying to come up with a comprehensive proposal but wanted to use this meeting to gauge where the parties were at and use the next meeting to present their proposal. Pierson-Schienberg responded that to get a January one start date for the Rite Aid health plan they needed to get people enrolled and declared. “We are at impasse.” Stemerman disagreed stating simply, “were not at impasse.” (R. Exh. 3 p. 99.) She countered with, “disagree.” (R. Exh. 3 p. 99.) After some back-and-forth discussions about the parties respective positions the meeting ended with the union agreeing to come up with a counterproposal. Stemerman indicated that the union was “going to come back with the best we think we can do.” (R. Exh. 3 p. 101.) At this juncture in the discussions, the Union had not yet been able to cost out Rite Aid’s proposal and make any determination regarding what the employer was willing to spend and thus was unable to respond substantively to Rite Aid’s proposal. (Tr. 117.)

On December 1, 2019, Pierson-Schienberg responding to a message from Stemerman regarding health and welfare costs under the employer’s proposal Pierson-Schienberg responded with a general outline of Rite Aid’s position and ended the email noting, “we are very interested to see what proposal the Union brings to us on December 5.” (U. Exh. 2.) On December 2, 2019, Stemerman responded by noting “my request to you was seeking what Rite Aid’s cost for its H&W proposal was expected to be. Put another way, we wanted to know what the additional increase in current H &W costs would be under your proposal.” (U. Exh. 2.) At 3:30 p.m. on December 2, 2019, Dominique Weinberg responded, “mirroring the Gold plan under Rite Aid’s current
proposal, there would be a $1.2 million-increase each year in H &W costs. (U. Exh. 2.) On the afternoon of December 2, 2019, the Union received the information it needed to cost out the plan and prepare its response.

The parties met for the last time on December 5, 2019. The morning was spent detailing aspects of Rite Aid’s proposal. At 2:54 p.m. Stemerman indicated that the Union had tried to put something comprehensive together that would be close to their perception of Rite Aid’s budget. He verbally went through the Union’s proposal outlining the details to those present. The parties caucused for 9 minutes from 3:21 to 3:30 p.m. and the bargaining concluded at 3:47 p.m. (R. Exh. 3G p. 117.) In total, the parties spent 44 minutes discussing the Union’s proposal. Respondent transcribed the proposal and emailed it to the Union at 5:17 p.m. The Union made minor corrections and returned it back to Respondent confirming that it did represent the Union’s official counterproposal. (Jt. Exh. 23.)

The counterproposal was a significant departure from the Union’s prior proposals in that it represented a decrease in the costs of its demands by 45.6 percent compared to its June 25 proposal to what amounted to a saving of $19.34 million over 3 years. The proposal reduced the demand for wage increases resulting in projected savings of $11 million over 3 years. The Union proposed forgoing any wage increases for the first year. The Union also proposed eliminating auto enrollment for new employees which would save $1.6 million annually. The Union also proposed other costs savings in the form of a Health Care Partnership. (GC Exh. 2.)

At the conclusion of the meeting, the union officials who participated were all of the opinion that significant progress had been made give what they perceived as significant concessions when compared to its prior proposals. They felt that the parties were close to a deal and that Pierson-Scheinberg was going to recommend their proposal. (Tr. 53, 124, 177.)

After the passage of 15 days, and without any further discussion, Rite Aid, on December 20, 2019, emailed the Union its response to the Union’s December 5, 2019 proposal. In the email, Pierson-Scheinberg outlined why Rite Aid thought the Union’s proposal was not a “responsible or realistic proposal,” and what Pierson-Scheinberg characterized as at the Union’s unwillingness “to compromise on the only issue of bargaining, participation in the failing union fund.” (Jt. Exh. 22.) The letter ended with the declaration “We are at impasse. We have to face reality that the Fund may not be able to pay health insurance claims from our associates. Accordingly, this letter is our notice to you that Rite Aid will implement its final offer presented to the Unions on October 28, 2019.” (Jt. Exh. 22.)

On December 24, 2019, Stemerman responded to the December 20, 2019 email. In his response, he disputed that the parties were at impasse stating, “as to your legal assertion that the parties are at impasse, that is inaccurate. The Union is highly confident that the parties are not at impasse.” (Jt. Exh. 23.) He then went on to explain the Union’s position arguing that the Union’s proposal “greatly enhances the viability of the current plan while remaining well within the money

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2 Person-Schenberg’s testimony that the parties spent 3 hours discussing the Union’s proposal is contradicted by Respondent’s own bargaining notes and cannot be credibly relied upon regarding this issue. (Tr. 290.)
Rite Aid has budgeted in its proposal to the union. And ended the communication inviting Rite Aid to ‘come to the bargaining table in good faith and resolve our differences in a mutually beneficial manner.’” (Jt. Exh. 23.). On December 24, 2019, Dominique Windberg responded to Stemerman’s email. In her correspondence she disagreed with Stemerman’s characterization that the parties were not at impasse, his characterization that the fund would be viable under the Union’s proposal, his characterization of Rite Aid’s plan in general and Rite Aid’s proposal. She further advised that Rite Aid would move forward with implementing its October 28, 2019 proposal effective January 1, 2020. On December 26, 2019, Stemerman responded to Windberg again asserting that the parties were not at a good-faith impasse. He stated, “Rite Aid has chosen to ignore the consultant it employees (sic) on the Health Fund as to the viability of the Fund and the fact that the union’s last proposal will keep the fund viable, within the budget Rite Aid has proposed.” (Jt. Exh. 23.) Windberg responded to the email on December 27, 2019, asserting that “the fact that you keep repeating your arguments and your threats shows that the parties at (sic) impasse and have been some time (sic).” (Jt. Exh. 23.) She disagreed with Stemerman’s assertions set forth in his email and ended with the statement, “your contention that we are not at impasse is without any factual basis. The facts set out in this letter, our previous letters and in our other communications establish that we are at impasse.” (Jt. Exh. 23.) On December 28, 2019, Stemerman responded by noting that Rite Aid would “pull the rug out from under its employees benefits during the holiday season and that “there will be hundreds of employees in the platinum plan who will have their benefits ripped away and replaced with lesser benefits with no time or ability to react. Retirees who have spent many years of dedicated service to Rite Aid will wake up January 1st to discover they no longer have health coverage. Most of the other employees will discover, to their dismay, that their new health plan is not the same as their current plan.” (Jt. Exh. 23.) On January 1, 2020, Rite Aid implemented its proposal.

**Analysis**

The obligation “to bargain collectively,” under Section 8(a)(5) and Section 8(d) of the Act requires, among other things, that the employer and employees “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d). See generally NLRB v. American National Insurance Co., 343 U.S. 395 (1952). If the party declaring an impasse does so in good faith, and if its conclusion is justified by objectively established facts, then the statutory duty to bargain collectively is satisfied. See Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 fn. 5 ; AMF Bowling Co., Inc. v. NLRB, 63 F.3d 1293, 1299 (4th Cir.1995).

Section 8(a)(5) of the Act prohibits an employer from unilaterally instituting changes regarding wages, hours, and other terms and conditions of employment before reaching a good-faith impasse in bargaining. NLRB v. Katz, 369 U.S. 736 (1962). An impasse exists when the collective-bargaining process has been exhausted and, “despite the parties’ best efforts to reach an agreement, neither party is willing to move from its position.” Excavation–Construction, Inc., 248 NLRB 649, 650, (1980). The Board has defined impasse as the point in which the parties are warranted in assuming that bargaining would be futile. Pillowtex Corp., 241 NLRB 40, 46 (1979). They must both believe they are at the “end of their rope.” PRC Recording Co., 280 NLRB 615 (1986), enf'd. 836 F.2d 289 (7th Cir. 1987). AMF Bowling Co., 314 NLRB 969 (1994). A genuine impasse
In negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enfd. denied on other grounds 500 F.2d 181 (5th Cir. 1974). Whether the parties have reached this point is a case-specific inquiry “[t]here is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations.” *Dallas General Drivers, Warehousemen & Helpers Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966). The relevant criteria for determining the existence of an impasse were explicitly identified by the Board in *Taft Broadcasting Co.*, 163 NLRB 475, 478, 1967 WL 18808 (1967):

The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors [the trier of fact should consider] in deciding whether an impasse [existed.]

In analyzing these factors, the Board looks at the totality of the circumstances and one or two factors alone, however, may be sufficient to demonstrate the absence of impasse. See *Monmouth Care Center v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012), *American Security Programs, Inc.*, 368 NLRB No. 151 (2019)


In examining the totality of the established facts, it is clear that Respondent has not met its burden to establish a valid impasse. This finding is not supported by mere threads of evidence parsed from the record but rather by the overwhelming weight and substance of mostly undisputed evidence. Respondent has failed to establish that the Union was unwilling to compromise further, that further bargaining would be futile, or that the parties were at the “end of their rope.” *Grinell Fire Protection Systems* 326 F.3d 187 (4th Cir. 200). On the contrary, the evidence established that after the Union had specific information from which to calculate the cost of the Respondent’s proposal it showed great interest in compromise. Not only did the Union’s proposal on December 5 amount to a $19-million concession, but it was also tailored to meet Respondent’s stated concerns. Broadly speaking, the Union’s proposal sought to address the employers concerns of controlling costs and the stability of the healthcare plan. The Union was under no obligation to make any concessions much less craft its proposal around Respondent’s stated budgetary limits. Furthermore, the Union included in its proposal suggestions from the independent third-party consulting firm one of which was the elimination of auto enrollment. No part of the Union’s proposals was separately or collectively insignificant. Any objective review of the evidence leads to the conclusion that there was significant movement on the Union’s part and the Union’s proposal on its face demonstrated a strong willingness on the part of the Union to compromise. This
significant movement was affirmed by Pierson-Scheinberg. (GC Exh. 3.)

There is evidence of the Union’s willingness to compromise throughout the record. Stemerman expressed this willingness both before and after Respondent declared impasse. For example, on September 11, 2019, he indicated the Union would “listen to whatever thoughts you have,” on October 28, 2019, when Pierson-Scheinberg suggested there was “nothing to talk about,” he countered with bargaining dates inviting further discussion. When on November 19, 2019, Pierson-Scheinberg suggested that the parties were at impasse he not only disagreed but advised that they would “come back with the best we think we can do” clearly signaling a desire to continue discussions and willingness to compromise. The Union in fact did return with significant concessions. After the second declaration of impasse in December, Stemerman not only disagreed but expressed the Union’s position that Rite Aid come to the bargaining table “in good faith and resolve our differences in a mutually beneficial manner.” (Jt. Exh. 23.) A review of the objective facts makes clear that Respondent has not met its burden of demonstrating the Union was unwilling to compromise further. The Union’s concrete actions demonstrated that they earnestly desired to reach an agreement, earnestly attempted to address Respondent’s concerns, believed an agreement

3 Subsumed with this finding is the credibility assessment that Heise and Vogt’s testimony regarding Pierson-Schenberg’s characterization of the union proposal as “significant movement” is more believable that her denial. In this vein, General Counsel asserts that GC Exh. 3 should be accorded substantial weight since it was an affidavit given closer in time to the December 5, bargaining session. I agree and further note that I credit the testimony of Vogt on this issue which is bolstered by the affidavit as truthful. Moreover, I find that the testimony of both Vogt and Heise is logically consistent with the objective facts that the Union did in fact make significant movement as discussed above. A related matter in which Pierson-Scheinberg’s testimony is not borne out by the objective record and therefore not credible is her testimony asserting that the Union’s December 5, proposal was “very similar” to the Union’s 2018 proposal. A simple comparison of the two reveals stark differences. (Jt. Exh. 5, 21). General Counsel characterized this testimony as “demonstrably false.” I concur. (GC Br. at 14).

4 It is important to highlight that in her October 28, 2019 letter Pierson-Scheinberg indicated that Rite Aid believed there is “nothing left to talk about” and at the opening of the meeting on November 19, 2019, Pierson Scheinberg declared that the parties were “at impasse.” (R. Exh. 3. p. 99.) An employer’s belief that the union would never agree to its proposal is insufficient to establish impasse. See Ford San Leandro Food Store, 349 NLRB 116 (2007). Regardless no impasse could have resulted from Pierson-Scheinberg’s first declaration since the parties agreed to meet again. See Huck Mfg. Co., 254 NLRB 739 (1981). Moreover “scare words such as impasse or “deadlock” used by the parties are legal conclusions not binding on the Board.” PRC Recording Co.,280 NLRB 615, 635 (1986).

Nevertheless, Pierson-Scheinberg’s declaration of impasse before any real discussions were had with the Union regarding Respondent’s proposal, and before the Union had any opportunity to cost out Respondent’s proposal, and or provide any meaningful response, offers some insight into the state of mind of Pierson-Scheinberg. It calls into question whether in fact Pierson-Scheinberg and Rite Aid by November 19, 2019, had already made the decision that they were going forward with their own proposal. See Huck Mfg. Co., 254 NLRB 739 (1981).

5 Disagreement with the characterization of impasse taken in context with a parties’ willingness to move toward agreement has been held by the Board to in and of itself manifest that the Union did not view the negotiations as having reached impasse. Teamsters Local 639 v. NLRB, 924 F.2d 1078 (D.C. Cir. 1991). This reasoning and rationale is directly applicable to the facts of this case.
could be reached, and believed they were very close to reaching an agreement. “During the December 5, 2019 meeting Stemerman openly invited further discussions from neutral parties to help resolve any differences they might encounter. He noted, “idea is that if we come up with something run it by the actuaries. If we don’t agree on the #’s, we have JS and your people talk rather than us fight about it.” (R. Exh. 3G p. 109,115.)

“If either negotiating party remains willing to move further toward an agreement, an impasse cannot exist: the parties’ perception regarding the progress of the negotiations is of central importance to the Board’s impasse inquiry.” Teamsters Local 639 v. NLRB, 924 F.2d 1078, 1084 (D.C. Cir. 1991). A “contemporaneous understanding” as to impasse does not, however, require the parties to reach mutual agreement “as to the state of the negotiations”; rather, each party must independently, and in good faith, believe that it is “at the end of [its] rope.” PRC Recording Co., 280 NLRB. 615, 635 (1986). Nothing about the Union’s actions or their perceptions of the progress of negotiations suggests they were unwilling to explore further options or were at the “end of their rope.” Grinnell Fire Protection Systems Co., 326 F. 3d 187 (4th Cir. 2000).

The Taft Factors

1. Bargaining history

The parties here have a relationship that goes back decades. The most recent collective-bargaining agreement expired on July 12, 2019, and the parties negotiated two separate extensions. (Jt. Exh. 1.) In past agreements, the parties provided employees with health insurance via a Taft-Hartley benefit trust fund with an equal number of employer and union representatives. Given the extensive bargaining history and historical experience of both the Union and Employer in dealing with issues related to the health plan as well as the complexity of the issues presented, ordinary prudence “would dictate giving the parties a fuller opportunity to effect an agreement than occurred here.” Grinnell Fire Protection Systems Co., 328 NLRB 585 (1999). This is especially true considering the extensive changes to the benefits of the employees that Respondent was unilaterally implementing. See Harding Glass Co., 316 NLRB 985, 991 (1995). This factor weighs against a finding of impasse.

2. Length of negotiations and bad faith

The limited duration of the relevant negotiations also supports the conclusion that no impasse existed. The evidence established that the parties spent only a matter of 44 minutes together discussing the Union’s proposal. A proposal that would significantly impact some of the most consequential elements of any workers employment. And despite the Union’s invitation to do so, Respondent did not speak with the Union’s third-party consultants to determine if its projections were in fact sufficient to address the viability issues of the Fund and or resolve any potential differences that might arise from such analysis. The limited duration of the relevant negotiations supports the conclusion that no impasse existed. Fifteen days after the December 5 meeting Respondent declared impasse without any further meetings or discussions with the Union. Forty-four minutes is a woefully inadequate amount of time and or opportunity to discuss the essential details of the plan especially without having the benefit of having the experts of both sides confer regarding the effects of the proposed concessions on the health plan. Respondent’s declaration of impasse removed the element of bargaining from the equation. This factor standing
alone is sufficient to support a finding that the parties were not at impasse.

I am not persuaded by Respondent’s assertions that because the parties met numerous times the number of meetings weighs in favor of impasse.6 The undisputed facts are that Respondent did not submit its economic proposal until late October, held its first in person discussion on November 19, and did not communicate the costs associated with such until December 2, 2019, a mere 3 days before the Union’s counterproposal. I also disagree that the characterization that the union approached bargaining with “no clear plan.” This is simply not supported by the evidence of record. From the outset, the Union was attempting to construct a framework from which to proceed starting with its first suggestions to stabilize the plan with .18-cent increases and then hash out the details. Moreover, it wasn’t until the Respondent’s economic proposal that the union had sufficient information from which to formulate a plan that would potentially meet Respondent’s demands. These facts weigh heavily against a finding of impasse.

General Counsel argues that bad faith bargaining on the part of Respondent weighs against a finding of impasse. In support of its argument, it asserts that respondent made last minute changes to bargaining goals to include a 6-month reserve for the fund instead of the 3-month reserve and improvements in employees’ wages.7 (GC Br. at 26–29.) General Counsel noted that Segal recommended a 3-month reserve, that the Union was never told of the 6-month requirement and in the position statement submitted to the Board, Respondent indicated it was seeking to establish a 3-month reserve. General Counsel persuasively argues that this and the late-stage introduction of wage increase demands infused an element of bad faith into the bargaining. (Tr. 233, 303, 306, 333–334.) I concur.

I also find an element of bad faith in Respondent’s assertions that it didn’t care whose name was on the healthcare plan if the plan met the benchmarks. (Tr. 121, 328.) When the Union submitted a proposal arguably within Rite Aid’s benchmarks it declined to engage with the Union or its experts to further discuss it. This refusal to engage in further discussions leads to the conclusion that it did in fact matter whose name was on the plan and the pronouncement that it

6 See Caravelle Boat Co., 227 NLRB 1355 (1977), (no impasse after 14 bargaining sessions); Marriott In-Flite, 258 NLRB 755 (1981) (no impasse after 37 meetings), PRC Recording Co., 280 NLRB 615 (1986) (Impasse should not be mechanically inferred because the parties have failed to reach agreement after some specified number of bargaining sessions).

7 The three-month target reserve was included according to Liang because it had “historically” been a measure in the bargaining agreement. (Tr. 449, 454.) She also testified that Respondent never objected to the 3-month reserve benchmark being used in the reports. Respondent concedes that 3 months would be sufficient in its brief noting that “at least three months of reserves, if not six months were a key element of long-term viability.” Pierson-Schienberg confirmed in the position statement submitted that “all of the actuarial documents here have a three-month target reserve, meaning that the goal is to build up the reserves to three months.” (Tr. 322.) She also testified that she did not make any reference to the necessity of a 6-month reserve. This is true even though the CBA schedule A section pertaining to the Allied Fund referenced 6 months of reserves and was premised on increased 18 cent contributions per year (the starting point of the negotiations) which Respondent rejected and inferred in its brief that they were not contractually required to pay. (R. Br. at 5, fn. 4).
didn’t matter was not made in good faith. NLRB v. Waymouth Farms, Inc., 172 F.3d 598 (8th Cir. 1999), (employer engaged in bad faith when it mislead the Union). Standing alone these elements of bad faith weigh heavily against a finding of impasse and are each sufficient in and of themselves to support a finding that no valid impasse existed.

3. Importance of the issues remaining

The issue of healthcare was important to both parties as was the continued viability of the fund. Respondent’s concerns were addressed by the Union in the counteroffer crafted around the Respondent’s own budgetary numbers. In his preface to presenting the Union’s proposal, Stemerman openly acknowledged this fact stating, “we tried to put something together. We think it will work and that it’s close to what we perceive your budget to be. Plus has the advantage of avoiding confrontation.” (R. Exh. 3G p. 112.) The Union attempted to address the long-term solution to the funds viability in a fashion that was consistent with Respondent’s budgetary concerns. Essentially the Union acquiesced to the Respondent’s fundamental demands. The Union solicited the assistance of a benefits expert to study its proposal to help craft a proposal that would align with Respondent’s demands. Stemerman after presenting the proposal expressed to Pierson-Schienberg “I think we kept faith with what we tried to do, and Liang added, “we worked really hard.” (R Exh. 3G p. 115.) The union demonstrated continuing willingness to compromise. Against this factual backdrop further negotiations could well have led to an agreement encompassing all the outstanding issues. This factor weighs against a finding of impasse.

4. Contemporaneous understanding of the parties

As discussed above, the record is clear that the Union continued to demonstrate its willingness to compromise remained open and willing to negotiate. Respondent cannot premise its argument of impasse on its own unwillingness—rather than that of the Union—to compromise.

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8 One of the pillars which Respondent’s entire argument rests upon is the assertion that the Union wouldn’t agree to a Rite Aid health plan. If in fact it didn’t matter to Respondent whose name was on the health care plan, then whether the Union agreed specifically to a Rite Aid plan (instead of a plan constructed under the framework of the existing plan) would not and cannot be outweighed by the substance of the Union’s proposal itself. As such, the mere assertion of the Union’s reluctance to accept a Rite Aid plan is insufficient to carry Respondent’s burden. Furthermore, an employer’s belief that the Union would never agree to its proposal is insufficient to establish impasse. Nor is it sufficient for a finding of impasse to simply show that the Employer had lost patience with the Union. See Ford San Leandro Food Store, 349 NLRB 116 (2007).

9 Respondent premises the crux of its entire argument on the assertion that the Union’s proposal did not address the long-term viability of the fund. This assertion is without factual foundation given Liang’s testimony that the Union’s December 5, 2019 proposal would continue to increase reserves. (Tr. 434.) Regardless, as the union noted in its brief, Respondent’s claims of nonviability ring hollow because it failed and or refused to have Rite Aid’s benefit experts analyze the plan and discuss it with the Union’s benefits experts to even determine viability and to further engage the Union if questions regarding viability remained. Assuming for the sake of argument that after rigorous analysis and discussion among the experts it was determined that the Union’s proposal fell short, the Union clearly indicated it was ready willing and able to have further discussions.
As the Board noted in *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), "whereas here, a party who has already made significant concessions indicates a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party’s unchanged terms. Further, even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so.” *Id.* at 586.

As noted above, the Union’s concessions constituted significant progress towards the goal desired by Respondent and invited further review and discussion of such from Respondent and its experts. Nevertheless, Respondent declared the existence of impasse, despite the Union’s clearly expressed intentions to reach an agreement.

The determination of whether impasse has been reached is a determination of the mental state of the parties. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982). The Union earnestly desired to reach an agreement, believed an agreement could be reached, believed they were at the precipice of reaching an agreement, and continued to explore negotiations and options in pursuit thereof. There is simply no support in the record for any other conclusion. This factor weighs against impasse and is in and of itself enough to conclude that impasse was not reached.

Respondent has not met its burden of proof. The totality of the evidence as well as the *Taft* factors examined individually, weigh against the finding of impasse. In the absence of impasse, Respondent’s unilateral implementation of its bargaining proposal on January 1, 2020, breached its duty to bargain in good faith and violates the Act.

5. Economic exigency

Respondent argues that it was privileged to implement its first offer on January 1, 2020, because the Fund’s financial status created an economic exigency citing *Bottom Line Enterprises*, 302 NLRB 3373 (1991). Respondent’s argument falls short. In the first instance, as discussed above, Respondent waited until late October to present its first proposal and didn’t provide cost information until December 2, 2019. It cannot be said that this delay and the limitations its placed upon the Union in not only crafting a proposal but doing so within the framework of the existing plan was not “reasonably foreseeable” or “beyond the control of the employer.” *RBE Electronics* 320 NLRB 80 (1995).

For approximately 35 years the Fund was able to function through the various fluctuations of claims despite not receiving any increased employer contributions for a period of approximately 11 years. (Tr. 29, 36, 48.) On December 23, 2019, there were $1,636,430.31 in reserves, a 1-month gain of $400,000. (U. Exh. 3.) Health plans by their very nature are full of uncertainty. It is impossible to predict what claims might come in and how that would impact the reserves.10 Such projections are best left to the benefits experts. Accordingly, it is unclear whether this amount of reserves was sufficient in and of itself, whether monthly infusions of cash would have stabilized the Fund as in the past, or whether if the union’s proposal was implemented any alleged “exigency”

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10 Respondent in its brief concedes this uncertainty. (R. Br. at 56.)
would even exist. The reason that it is unclear is that Respondent didn’t take the Union up on its offer to have its proposal reviewed by the experts. What is clear is that Liang testified that the Union’s proposal would increase reserves. She specifically stated, “the proposal that the Union had on that day would continue to increase the reserves.” (Tr. 434.) In light of the above, Respondent did not establish that it was “compelled” to implement the changes on January 1, 2020.

The Board in RBE Electronics, 320 NLRB 80 (1995), reiterated its characterization that the economic exigency exception requires a “heavy burden. Under these facts, a finding of economic exigency is inappropriate. To hold otherwise would allow an employer to forgo bargaining and declare impasse upon a mere declaration of economic uncertainty. In Bottom Line Enterprises, 302 NLRB 3373 (1991), the Board finding that no economic exigencies existed, noted (regarding Respondent’s declaration of impasse) that Respondent, “simply took this action because that was its proposal on the subject, and it did not wish to wait for further bargaining toward agreement or impasse.” This is an accurate description of exactly what transpired in this case.

CONCLUSIONS OF LAW

1. Respondent, Thrifty Payless Inc., d/b/a Rite Aid, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers Local 8 - Golden State, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union at all material times, was the exclusive collective-bargaining representative of the following appropriate units at Respondent’s facilities:

All employees working in the Employer’s retail drug stores within the geographical jurisdiction of the Union in Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Sonoma, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba Counties, California, Southwestern Washoe County, Nevada (Tahoe Basin), and Northwestern Douglas County, Nevada (Tahoe Basin).

4. By unilaterally implementing the terms of its offer on January 1, 2020, without bargaining with the Union to a good-faith impasse, the Respondent violated Section 8(a) (5) and (1) of the Act.

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11 General Counsel correctly points out in its brief there were various options that could keep the fund functioning and even assuming the worst-case scenario the parties could have still negotiated to cover employees under a Rite Aid plan. (GC Br. p. 6 fn. 2.) Nothing would have precluded Respondent from inquiring of the experts or negotiating with the Union to address any shortcomings. Vincent Industrial Plastics, Inc., 328 NLRB 300 (1999).

12 This is especially true given the fact that the Fund had in place stop loss coverage which limited the funds responsibility to pay large claims. In fact, only a portion of any large claim was the responsibility of the Fund. Anything above the cap was the responsibility of the stop loss insurer. (Tr. 133, 433).
Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order Respondent to upon request rescind the unlawful unilateral changes contained in its first and only offer and unlawfully implemented/made on about January 1, 2020, regarding the unit employees’ terms and conditions of employment, and to restore the status quo ante, if the Union requests, that existed prior to the changes until such time as Respondent begins to bargain with the Union in good faith to a collective-bargaining agreement or good-faith impasse. This obligation also includes that Respondent immediately begin to bargain in good faith with the Union to a new collective-bargaining agreement or bona fide impasse.

The Respondent shall be ordered to make whole any unit employees affected by the unlawful unilateral changes. This includes reimbursing the employees for any loss of earnings or benefits resulting from the changes. The make-whole remedy shall be computed in accordance with Ogle Protective Service, 183 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in New Horizons, 283 NLRB 1173 (1987), and compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB 6 (2010). It also includes making any benefit contributions on behalf of eligible unit employees that have not been made since the date of the unlawful changes, plus reimbursement of unit employees for any expenses or consequential damages incurred because of Respondent’s failure to make the required contributions to their health and welfare fund accounts, such amounts to be computed in the same manner as backpay described above. Finally, the Respondent shall be ordered to pay any other amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out because of the Respondent’s unlawful implementation of its final offer in the absence of a valid impasse.

In accordance with AdvoServ of New Jersey, Inc., 363 NLRB 1324 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file with the Regional Director for Region 5 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Finally, the Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the employer’s facilities or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2020. When the notice is issued to the employer, it shall sign it or otherwise notify Region 5 of the Board what action it will take with respect to this decision.

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

The Respondent, Thrifty Payless Inc., d/b/a Rite Aid, [city, state], its officers, agents, successors, and assigns, shall

1. Cease and desist from
   (a) Changing the terms and conditions of employment of its unit employees without first notifying United Food and Commercial Workers Local 8 - Golden State (the Union) and giving it an opportunity to bargain.
   (b) Failing and refusing to bargain on request with the Union as the exclusive collective-bargaining representative of the unit employees.
   (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.
   (a) Rescind the changes in the unit employees’ terms and conditions of employment contained in the Respondent’s first and final offer that were unilaterally implemented on about January 1, 2020.
   (b) Make the unit employees whole for any loss of earnings and other benefits, including reimbursement for any expenses incurred because of the Respondent’s failure to make the required payments since about January 1, 2020, in the manner set forth in the remedy section of this decision.
   (c) Compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.
   (d) Make all contractually-required contributions to the Union’s health and welfare and other funds on behalf of all eligible unit employees that it has failed to make since about January 1, 2020, if any, with interest, plus any other amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent’s unlawful implementation of its final offer in the absence of a valid impasse.
   (e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement: All employees working in the Employer's retail drug stores within the geographical jurisdiction of the Union in Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Kings,
Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Sonoma, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba Counties, California, Southwestern Washoe County, Nevada (Tahoe Basin), and Northwestern Douglas County, Nevada (Tahoe Basin), but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act. 5

(f) Within 14 days after service by the Region, post at its facilities in Roseville, California, a copy of the attached notice marked “Appendix.” Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2020. 15

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

Dated, Washington, D.C. December 9, 2021

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Dickie Montemayor
Administrative Law Judge

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15 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT make unilateral changes in our unit employees’ terms and conditions of employment by unilaterally implementing our offer at a time when we have not reached a valid impasse in bargaining with the UNITED FOOD AND COMMERCIAL WORKERS Local 8-GOLDEN STATE (the Union) for a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on January 1, 2020.

WE WILL, before implementing any further changes in wages, hours, or other terms and conditions of employment of our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All employees working in the Employer's retail drug stores within the geographical jurisdiction of the Union in Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Sonoma, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba Counties, California, Southwestern Washoe County, Nevada (Tahoe Basin), and Northwestern Douglas County, Nevada (Tahoe Basin),; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

WE WILL make our unit employees whole for any loss of earnings and other benefits plus interest, suffered as a result of the unlawful unilateral implementation on January 1, 2020.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL make all delinquent contributions to the applicable benefit funds on behalf of our unit employees that have not been made since January 1, 2020, including any additional amounts
due the funds.

WE WILL MAKE our unit employees whole for any expenses ensuing from our failure to make the required contributions to the applicable benefit funds, with interest.

______________________________
(Representative) (Title)

Thrifty Payless, Inc. d/b/a/ Rite Aid

(Employer)

Dated ____________________ By ________________________________

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlrb.gov
901 Market Street, Suite 400, San Francisco, CA 94102-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge’s decision can be found at www.nlrb.gov/case/20-CA-255252 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER (628) 221-8875