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Thrifty Payless, Inc. d/b/a Rite Aid and United Food and Commercial Workers Local 8-Golden State.
Case 20–CA–255252

May 31, 2024

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS KAPLAN, PROUTY, AND WILCOX

On August 11, 2022, the National Labor Relations Board issued a Decision and Order affirming Administrative Law Judge Dickie Montemayor’s finding that the Respondent, Thrifty Payless, Inc. d/b/a Rite Aid, violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally implementing its proposal for a successor collective-bargaining agreement without bargaining to an overall impasse with the Union, United Food and Commercial Workers Local 8-Golden State.¹ Among other unilateral changes, the Board found that the Respondent unlawfully replaced the unit employees’ health care plan, the United Food and Commercial Workers Northern California and Drug Employers Health and Welfare Trust Fund (the Fund), with an employer-sponsored plan and ceased making contributions to the Fund. To remedy the Respondent’s unlawful unilateral cessation of contributions to the Fund, the Board ordered the Respondent to, among other things, “[m]ake all required contributions to the . . . Fund that it has failed to make since about January 1, 2020.”²

Subsequently, the Respondent filed a petition for review of the Board’s Order with the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement. On November 3, 2023, the court granted in part and denied in part the Respondent’s petition for review, denied the Board’s cross-application for enforcement, and remanded

the case to the Board for further proceedings consistent with the court’s opinion.³

In its opinion, the court found that substantial evidence supports the Board’s findings that the Respondent and the Union were not at an impasse in their negotiations for a successor collective-bargaining agreement and that, by implementing its proposal, the Respondent violated Section 8(a)(5) and (1) of the Act.⁴ However, the court held that the Order’s requirement that the Respondent make all delinquent contributions to the Fund was not necessarily warranted.⁵ Applying in-circuit precedent, the court held that the Respondent should be given an opportunity to show that its liability to the Fund should be reduced because the Fund has paid no claims for employees covered by the unlawfully implemented healthcare plan since January 1, 2020.⁶ The court therefore remanded this case to the Board “to allow [the Respondent] to demonstrate whether its ‘contributions to the [Fund] must be reduced’ based on benefits it provided through its employer-sponsored plan, to ‘avoid an improper windfall’ for the Fund.”⁷ The court noted that any disputes over the specific calculations as to the amounts due should be resolved in a future compliance proceeding.⁸

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On February 2, 2024, the Board notified the parties to this proceeding that it had decided to accept the remand from the court and invited the parties to file statements of position with respect to the issues raised by the court’s opinion. The General Counsel filed a statement of position. The Respondent and the Union each filed a request for stay of responsive position statement.

Having accepted the court’s remand, we regard its opinion as the law of the case. In accordance with the court’s opinion, we shall remand this case to the administrative law judge for further analysis consistent with the court’s opinion, including reopening the record, if necessary, and the issuance of a Supplemental Decision.⁹

statements with respect to the court’s remand; remand this matter to the judge; and direct the Region and the judge to hold further proceedings in abeyance pending completion and ratification of the settlement agreement and approval of the settlement agreement by the Board and the United States Bankruptcy Court.

We deny the requests for a stay. All parties agree that the case should be remanded to the administrative law judge. The parties disagree only as to the specific instructions to be given the judge: the General Counsel requests the Board to instruct the judge to allow the Region to conduct an administrative compliance investigation before the record is reopened, while the Respondent and the Union request the Board to instruct the judge to hold further proceedings in abeyance pending completion and ratification of the anticipated settlement agreement. The parties may present arguments regarding whether to hold the case in abeyance pending the negotiation and approval of a settlement agreement and whether,

¹ *Thrifty Payless, Inc. d/b/a Rite Aid*, 371 NLRB No. 124 (2022).

² *Id.*, slip op. at 1 fn. 3, 2.

³ *Thrifty Payless, Inc., d/b/a Rite Aid v. NLRB*, 86 F.4th 909 (D.C. Cir. 2023).

⁴ *Id.* at 919–920.

⁵ *Id.* at 920–922.

⁶ *Id.* at 921 (citing *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 888 (D.C. Cir. 1997)).

⁷ *Id.* at 921–922 (quoting *Grondorf*, 107 F.3d at 888).

⁸ *Id.* at 922.

⁹ As noted above, the Respondent and the Union each filed a request for stay of responsive position statement. The Respondent and the Union state that the Respondent has entered bankruptcy proceedings and that the Respondent and the Union are “very close” to reaching a settlement of all claims. In light of the proximity of the completion of a settlement agreement, they request that the Board defer the parties’ filing of position

ORDER

IT IS ORDERED that the case is remanded to Administrative Law Judge Dickie Montemayor for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the remanded issue and shall prepare a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and a recommended order, as deemed necessary, consistent with this remand Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. May 31, 2024

Marvin E. Kaplan, Member

David M. Prouty, Member

Gwynne A. Wilcox, Member

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and if so when, to reopen the record, to the Division of Judges pursuant to Sec. 102.24(a) of the Board's Rules and Regulations.