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Respondent Sunbelt Rentals, Inc. (“Sunbelt”) moves the Court to stay the Court’s injunction order entered August 7, 2020, pending Sunbelt’s appeal of the injunction order to the United States Court of Appeals for the Seventh Circuit. Sunbelt files this Memorandum in support of its Motion.

As Sunbelt explains in its Motion accompanying this Memorandum, on August 7, 2020, the Court granted Petitioner National Labor Relations Board’s (“NLRB”) petition for an injunction pursuant to 29 U.S.C. § 160(j). In the Court’s Order granting the petition (“Order”), the Court requires Sunbelt to, among other things, recognize the International Union of Operating Engineers Local 139 (“Union”) as the exclusive collective-bargaining unit at Sunbelt’s Profit Center 776 in Franksville, Wisconsin; bargain with the Union with respect to wages, hours, and other terms and conditions of employment, and restore the bargaining unit work to the same position as it was on August 5, 2019. For the reasons stated herein, including that compliance with the Order will irreparably harm Sunbelt and staying the Order will not harm other interested parties, the Court should grant Sunbelt’s motion to stay the Order pending appeal.

I. STANDARD FOR GRANTING A STAY PENDING APPEAL

Federal Rule of Civil Procedure 62(d) allows a court to suspend an injunction pending an appeal:

While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.

Fed. R. Civ. P. 62(d).

The factors for the court to consider in determining whether to suspend an injunction pursuant to Federal Rule of Civil Procedure 62(d) are: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties

interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As explained below, each of these factors favors this Court granting Sunbelt’s Motion for a Stay.

II. ARGUMENT

A. Sunbelt is likely to succeed on the merits of its appeal.

The first factor for a court to consider in determining whether to stay an injunction pending appeal is whether the party seeking the stay is likely to succeed on the merits of its appeal. *See Hilton*, 481 U.S. at 776. This factor “cannot be rigidly applied,” and courts should “stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.” *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004) (quoting *Oregon Natural Res. Council v. March*, No. 85-6443-E, 1986 WL 13440, at *1 (D. Or. Apr. 3, 1986) (internal quotation marks omitted)).

The issues in this case are complicated, and Sunbelt raises several admittedly difficult legal questions in its exceptions to the Administrative Law Judge’s (“ALJ”) decision (“ALJD”) that the Court relied on in issuing the Order. Sunbelt raised fifty (50) exceptions to the ALJD, and, in Sunbelt’s exceptions, Sunbelt explained that the ALJD was based on errors in fact and law, including facts not supported by the record. For example, as specifically relates to the reorganization of the Franksville location, Sunbelt argued that the ALJ incorrectly concluded that the reorganization violated the National Labor Relations Act (“NLRA”) in part because the ALJ did not acknowledge that the Union wasted valuable negotiation time; he failed to acknowledge evidence of Sunbelt’s economic proposal, and he failed to acknowledge that Sunbelt offered to negotiate with the Union the reorganization of the Franksville location, but the Union refused to negotiate. Significantly, the ALJ did not properly assess Sunbelt’s financial statements with respect to the Franksville location. The ALJ failed to recognize that Sunbelt Regional Vice President Jason Mayfield, the chief

negotiator and decision maker for the reorganization, did not demonstrate any animus against the union. Further, the ALJ did not address the fact the Union itself, through its conduct of bannering and using inflatables, played a significant role in causing financial stress to the Franksville location leading to the reorganization. These issues raise complicated legal questions because the Seventh Circuit has not addressed whether reorganization, such as the one at issue here, during a time of financial stress violates the NLRA, particularly where the Union played a significant role in causing financial stress and the Union failed to negotiate the reorganization despite the opportunity to do so. *See Overstreet v. Thomas Davis Med. Ctr., P.C.*, 978 F. Supp. 1313, 1314 (D. Ariz. 1997) (explaining that the “likelihood of success on appeal” requires the party seeking the stay to “show that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear” (quoting *Mamula v. Satralloy, Inc.*, 578 F. Supp 563, 580 (S.D. Ohio 1983)) (internal quotation marks omitted)). The number of the exceptions Sunbelt raised also shows that difficult legal questions are at issue in this case, and Sunbelt is likely to succeed on the merits of its appeal.

Additionally, the equities of the case suggest that the status quo should be maintained. That is, as identified above, part of the Court’s order requires Sunbelt to readjust its operations at the Franksville location to reinstate the two bargaining unit members at that location, even though the Franksville location has been operating under the reorganized structure for more than a year. Requiring Sunbelt to readjust the operations and business strategy at the Franksville location before the NLRB rules on this case provides no benefit to the NLRB or the Union, but imposes a significant cost on Sunbelt because it must return the Franksville location to the structure it had in place more than a year ago. *See also supra* Section II.b. Therefore, the equities in this case favor Sunbelt continuing its current operations at the Franksville location to maintain the status quo during the pendency of the appeal.

B. Sunbelt will be irreparably injured absent a stay.

The second factor for a court to consider in determining whether to stay an injunction pending appeal is whether the party seeking the stay will be irreparably injured absent a stay. *See Hilton*, 481 U.S. at 776. One element of irreparable injury is whether the employer suffers potential economic harm. *See Overstreet v. Gunderson Rail Servs., LLC*, 587 Fed. App'x 379, 381 (9th Cir. 2014) (reversing the district court's 160(j) injunction because of "the potential economic harm caused by a reopening order").

Here, if the Court denies the stay, Sunbelt will suffer significant economic harm because it will be required to entirely readjust its operations at the Franksville location for the two former bargaining unit members. As Sunbelt explained in its Memorandum of Law in Opposition to the Petition and as supported by the record, on or around August 5, 2019, Mr. Mayfield alone decided to reorganize the Franksville location because the location was significantly under budget. *See* Sunbelt's Memorandum of Law in Opposition to the Petition, p. 4 (citing R. 634:8-635:11, 993:25-999:5, 1086:22-1087:12). Robert Bogardus, Bryan Anderson and Chris Pender, who allegedly expressed opinions against the union had no input into the reorganization decision.¹ Weeks before the decision to reorganize the Franksville location, Mr. Bogardus had transferred to a different division of Sunbelt. The reorganization resulted in the layoff of the two remaining members of the bargaining unit, to allow the Franksville location to focus on its walk-in business.² Since the reorganization, the Franksville location has focused exclusively on its walk-in business. The Court now orders Sunbelt to reorganize its Franksville location more than a year after the restructure, and

¹ Some of the Exceptions to the ALJD involve the mischaracterization of the alleged statements by Messrs. Anderson and Pender.

² Mr. Gutierrez was terminated for violating a major safety rule. Mr. Smith was terminated after receiving several disciplinary write-ups prior to failing to take a safety quiz. Gutierrez and Smith filed an unfair labor practice charge relating to their terminations that was dismissed, and their appeal was denied. (ALJD 19: 22-25 (ECF Doc. No. 16); September 23, 2019 Letter from NLRB Dismissing Charge (Exhibit A); November 14, 2019 Letter from NLRB Denying Appeal (Exhibit B)).

the Court provides Sunbelt only ten (10) business days to do so. More than a year has passed since the reorganization, and requiring Sunbelt to reinstate the bargaining unit necessitates Sunbelt investing significant resources to restructure the Franksville location. Additionally, requiring Sunbelt to restructure one of its locations during the COVID-19 pandemic imposes an additional burden on Sunbelt because, like many businesses, the COVID-19 pandemic has negatively affected Sunbelt's business across the United States. Further, the Order would require face-to-face negotiation sessions that the ALJ and NLRB demanded. As argued by the NLRB in the Board proceedings, "the obligation to bargain necessitates *face to face* meetings, not bargaining by telephone or other electronic means. *E.g., Twin City Concrete, Inc.*, 317 NLRB 1313, 1314 (1995); *Westinghouse Corp.*, 196 NLRB 306, 313 (1972)." Face-to-face negotiations in the midst of a global pandemic poses irreparable health and safety concerns to the negotiating teams and the public with whom they interact. The Court's Order will likely cause the Franksville location to operate at a loss, and Sunbelt will have no way to recoup these costs if the United States Court of Appeals for the Seventh Circuit rules in Sunbelt's favor on appeal. Therefore, Sunbelt will be irreparably injured absent a stay.

C. Issuance of the stay will not substantially injure the NLRB or other parties interested in this case.

The third factor for a court to consider in determining whether to stay an injunction pending appeal is whether the stay will substantially injure the other parties interested in the injunction. *See Hilton*, 481 U.S. at 776. Most notably, the stay will not substantially injure the two³ laid off members of the bargaining unit who immediately found other employment and, therefore, with the most interest in this case. That is, as referenced above, the Franksville location has been reorganized

³ Sunbelt respectfully submits to this Court that page 30 of the ALJ's opinion contains a typographical error. There were two, not three, bargaining unit members who were laid off based on the reorganization. *See* Order at 21.

for more than a year. The two employees who were members of the bargaining unit negotiated release agreements with the union as part of their layoff, and one of the employees chose not to apply for an open position in another Sunbelt location similar to the position he held at the Franksville location even though he had the opportunity to do so. Because the two former members of the bargaining unit have already received redress for their layoff, issuing a stay will not harm the two former members of the bargaining unit.

Likewise, issuing a stay will not harm the NLRB or the Union. Although the NLRB sought the petition and the Union is involved in the underlying labor dispute, as one court has recognized, the NLRB “is not one of the parties to the labor-management dispute, but is a representative of the Government of the United States.” *D’Amico v. U.S. Serv. Indus., Inc.*, 867 F. Supp. 1075, (D. D.C. 1994) (quoting *Penello v. Int’l Union, UMW*, 88 F. Supp. 935, 942 (D. D.C. 1950)) (internal quotation marks omitted). Additionally, “[t]he relief sought is not designed to help or protect the Union.” *Id.* The general purpose of the NLRB is to protect employees’ bargaining interest. *See* 29 U.S.C. § 151. Likewise, the Union exists to play a role in the bargaining process. A stay in this case will not harm these interests because the NLRB and the Union can fulfill their goals without Sunbelt investing significant resources to reorganize its Franksville location.

A court may only enter an injunction under 29 U.S.C. § 160(j) where the relief is “just and proper,” and it is neither just nor proper to enjoin Sunbelt while an appeal is pending where no interested party is presently being harmed. *See, e.g., Nat’l Labor Relations Bd. v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 891 (7th Cir. 1990) (“Section 10(j) directs the court to grant such relief “as it deems just and proper,” and it is not just or proper to enjoin a company in advance of trial if the injunction is unnecessary to ward off any harm to anybody.”).

D. The public interest lies in favor of the stay.

The fourth factor for a court to consider in determining whether to stay an injunction pending appeal is the public interest. *See Hilton*, 481 U.S. at 776. Public interest primarily lies “in effectuating the policies of the federal labor laws, not the wrong done the individual employee.” *Vaca v. Sipes*, 386 U.S. 171, 182 n. 8 (1967). In determining the public interest, “a court must weigh the potential public benefits against the potential public costs.” *Nat’l Labor Relations Bd. v. Electro-Voice, Inc.*, 83 F.3d 1559, 1574 (7th Cir. 1996).

Here, the stay will effectuate the policies of the federal labor laws, and the potential public costs of a stay do not outweigh the potential public benefits. Sunbelt employs a large number of unionized employees, and Sunbelt and Mr. Mayfield have relationships with numerous unions. Therefore, the public interest of effectuating the policies of federal law laws, such as the policy of allowing bargaining unit employees’ free choice, will be satisfied during the stay as Sunbelt and Mr. Mayfield continue to work with unionized employees and their unions. Further, the injunction does not benefit the public as a whole; rather, the injunction primarily benefits the two members of the bargaining unit because the injunction focuses on remedying the alleged wrong to those individuals. The public interest is not served by requiring Sunbelt to quickly reorganize its operations to potentially benefit a bargaining unit of two members. Further, the public interest is harmed by requiring Sunbelt and the union to negotiate in person during the COVID-19 pandemic because these in-person negotiations could contribute to the continued spread of the virus. Because this case only involves a two-member bargaining unit and because Sunbelt continues to work with other unions and employ unionized employees, while complying with the Order will cause a significant, irreparable harm, the public interest lies in favor of the stay.

III. Conclusion

As set forth above, the factors for the court to consider in determining whether to grant a stay pending appeal all weigh heavily in favor of a stay in this case. Most notably, requiring Sunbelt to reinstate the two bargaining unit members will cause irreparable harm to Sunbelt, while the stay will not substantially injure the NLRB or other parties' interest in this case. For these reasons, this Court should grant Sunbelt's request for a stay of the Court's August 7, 2020 Order pending the appeal to the United States Court of Appeals for the Seventh Circuit.

Dated: August 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 10, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

By: s/ Patricia J. Hill
Attorney



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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September 23, 2019

Patrick N. Ryan, Attorney
Baum, Sigman, Auerbach & Neuman, Ltd.
200 W Adams St Ste 2200
Chicago, IL 60606

Re: Sunbelt Rentals, Inc.
Case 18-CA-244986

Dear Mr. Ryan:

We have carefully investigated and considered your charge that Sunbelt Rentals, Inc. has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge because there is insufficient evidence to establish a violation of the Act.

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

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

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

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlr.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

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

Appeal Due Date: The appeal is due on **October 7, 2019**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than October 6, 2019. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the

appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

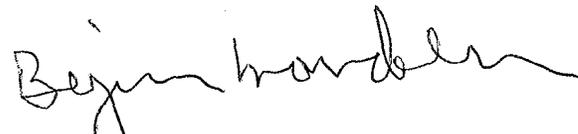
Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before October 7, 2019**. The request may be filed electronically through the *E-File Documents* link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after October 7, 2019, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me:

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

JENNIFER A. HADSALL
Regional Director

By:



BENJAMIN MANDELMAN
Officer in Charge

Enclosure

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UNITED STATES GOVERNMENT
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November 14, 2019

PATRICK N. RYAN, ESQ.
BAUM, SIGMAN, AUERBACH
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200 W ADAMS ST STE 2200
CHICAGO, IL 60606

Re: Sunbelt Rentals, Inc.
Case 18-CA-244986

Dear Mr. Ryan:

We have carefully considered your appeal from the Regional Director's refusal to issue complaint. You raise no issue that requires reversal of the Regional Director's decision. The evidence from the Regional Office's investigation established that the Employer did not violate the National Labor Relations Act (the Act) as alleged.

Your appeal asserts that the Employer violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act by terminating two unit employees for their protected activities, including participating in Board processes. Your appeal further alleged that the Employer violated Section 8(a)(5) of the Act by terminating them without providing the Union with advance notice and meaningful opportunity to bargain over their discharges.

Under the Act, an employer will be found to have discriminated against employees in violation of Section 8(a)(3) and/or 8(a)(4) of the Act if the evidence establishes that the employer took an adverse employment action against them because of their protected activities. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (C.A. 1 1981), *cert. denied* 455 U.S. 989 (1982). Protected activities include union membership or activity and participation in Board proceedings. However, if the employer can show it would have taken the same adverse action against them regardless of their protected activities, the employer will not be found to have violated the Act. *Id.* Here, the evidence disclosed that the Employer would have taken the same action with respect to the two employees even in the absence of any protected activities. The Employer discharged one of the two employees under its progressive disciplinary policy. Specifically, the Employer issued the employee a coaching in March 2019 and then a final warning and two-day suspension in May all for the same infraction. After the employee committed the same infraction in June, the Employer discharged the employee.

The evidence was insufficient that the Employer treated the employee disparately by failing to remind the employee of his affirmative duties. In addition, the evidence did not support that the employee's previous disciplines, many of which occurred more than six months before the filing and service of the underlying charge and are barred by Section 10(b) of the Act, were retaliatory for the employee's protected activities. In this regard, no charges were filed over these earlier disciplines, and except for one instance, the employee did not deny the conduct underlying the infraction. The Employer discharged the second employee for a violation of its safety policy. The evidence showed that the Employer had previously terminated employees for the same reason under a zero-tolerance policy, and it could not be established that the Employer treated the employee disparately.

In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), the Board found that an employer violates Section 8(a)(5) of the Act as a newly organized employer when it fails to bargain with a union before imposing "serious discipline" like termination on represented employees. The Board explained that an employer is not required to bargain over aspects of its policy that are non-discretionary or when exigent circumstances exist. Here, the Employer was not required to bargain over either employee's discharge because one occurred under the Employer's progressive disciplinary policy and was non-discretionary and the other under exigent circumstances. Accordingly, we deny your appeal.

Sincerely,

Peter Barr Robb
General Counsel



By:

Mark E. Arbesfeld, Director
Office of Appeals

cc: JENNIFER A. HADSALL
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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

JENNIFER A. HADSALL, Regional Director
of Region 18 of the National Labor Relations
Board, for an on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

vs.

SUNBELT RENTALS, INC.,

Respondent.

Case No. 2:20-cv-00181-JPS

**PROPOSED ORDER GRANTING RESPONDENT SUNBELT RENTALS, INC.’S
MOTION TO STAY PENDING APPEAL**

Having considered Respondent Sunbelt Rentals, Inc.’s (“Sunbelt”) Motion to Stay the August 7, 2020 Order pending appeal to the United States Court of Appeals for the Seventh Circuit, and for the reasons set forth in Sunbelt’s Motion and accompanying Memorandum of Law, the Court GRANTS Sunbelt’s Motion to Stay. The August 7, 2020 Order is stayed pending a ruling from the United States Court of Appeals for the Seventh Circuit.

SO ORDERED.