

ARGUMENT

A. Respondent demonstrated a likelihood of success on the merits.

Petitioner first argues that Respondent did not demonstrate a likelihood of success on the merits in Respondent's appeal of the Order. This argument fails because the Court based its Order granting the NLRB's petition in large part on the Administrative Law Judge's ("ALJ") faulty recommendation in the underlying Consolidated Complaint. As explained below, the Order erred in relying on the ALJ's recommendation because the recommendation does not satisfy the *Wright Line* test, and the recommendation was based on numerous factual errors.

Contrary to Petitioner's argument, Respondent will succeed on the merits of its appeal of the Order. First, the Order's assumption that Respondent committed an unfair labor practice fails to satisfy the *Wright Line* test. That is, under *Wright Line*, 251 NLRB 1083, 1089 (1980), in order to find an unfair labor practice, there must be an initial finding of evidence of anti-union animus by a decision maker. Evidence of animus by a non-decision maker is not probative of an employer's motive in making a decision. *See, e.g., LM Waste Serv. Corp.*, 357 NLRB 2234, FN 1 (2011); *TCB Sys., Inc.*, Case 12-CA-25299, 2009 WL 3550834, at *1 (Div. Judges Oct. 16, 2009).

The District Court, Petitioner, and ALJ have not met the burden to establish anti-union animus by a decision maker. Notably, the District Court relies on statements by individuals who were not decision makers in finding animus. That is, the NLRB does not dispute that Jason Mayfield, Regional Vice President, was the chief negotiator and the decision maker for the reorganization.¹ No record evidence indicates that Mayfield had any anti-union animus, and the

¹The record is clear that Mayfield, not attorney Patricia Hill, was the chief negotiator. *See* Order at 4. Mayfield was the ultimate decision maker of what the Respondent agreed to during the negotiations, and he could over-ride Bogardus's opinion. (ECF Doc. 12, Exh. A, 627-28; 930). The record is void of any anti-union animus expressed by Mayfield, the only person who made the decision to reorganize Franksville PC and lay off the last two bargaining unit employees -- two mechanics. In fact, during the previous 18 months prior to the hearing that he was the Regional Vice President, Mayfield had a track record of negotiating approximately 60 contracts for his region. One of the new CBAs took 18 months to finalize, and it occurred without an unfair labor practice charge. (ECF Doc. 12, Exh. A, 1001:11-13.)

Order and the Petitioner's Opposition to Respondent's Motion to Stay Pending Appeal ("Petitioner's Opposition") failed to address that Mayfield did not have any anti-union animus. Rather, the Order and Petitioner's Opposition rely solely on statements by Bo Bogardus, a district manager, as well as statements by Brian Anderson, the profit-center manager, and Chris Pender, another non-decision making employee. So, the District Court, relying on the ALJ's decision, failed to find a direct correlation between Mayfield's statements and actions and the adverse employment action at issue (i.e., the business restructuring and subsequent layoff of employees including bargaining unit members). The District Court's Order mentions Bogardus 16 times and most of the references relate to his alleged anti-union animus. The Order only references Mayfield, on the other hand, five times, and not once did the Order indicate that Mayfield, the decision-maker, have any anti-union animus. The record shows that by the time of the adverse employment action, Bogardus was already transferred from the General Tool Division to the Climate Control Division. So, the evidence shows that Bogardus, Anderson, and Pender had no input into the adverse employment action in August of 2019, yet the ALJ's recommendation and the District Court's Order places heavy emphasis on their alleged anti-union animus.

Further, the District Court's Order assumes that Respondent made the decision to restructure the Franksville Profit Center ("PC") based on the union election vote, even though the record clearly demonstrates that, leading up to the reorganization, Mayfield kept the PC as a regular General Tool PC, rather than change its structure as a result of the election vote. For example, in June of 2018, when Anderson and Bogardus moved between "2 and \$3,000,000 worth of [large] equipment," from the Franksville PC to other Wisconsin PCs, Mayfield instructed them to stop the transfer, and he also quashed the suggestion from Bogardus to close the Franksville PC. (Tr. 1037; 23-25; 1038: 4-

8.)² Petitioner's Opposition deftly skirted the issue of motive/anti-union animus entirely by alleging instead that "the vast majority of Respondent's Exceptions rest on overturning the Administrative Law Judge's credibility resolutions." *See* p. 3, FN 3. Respondent respectfully suggests that Petitioner failed to note that "credibility" was raised only five times in Respondent's Exceptions, and five out of 50 does not equal "the vast majority." *See* Exhibit A (Sunbelt's Exceptions to the Administrative Law Judge's Recommended Order.)

For the reasons explained above, the Order fails the *Wright Line* test in finding that anti-union animus motivated the decision to restructure the PC. However, assuming for purposes of argument only that "motive" is established, which Respondent denies it is, the evidence shows that Respondent would have taken the same actions in the absence of animus. *See Wright Line*, 251 NLRB 1083, 1089 (explaining that once the NLRB shows the employer's discriminatory animus, the employer can establish that the adverse action would have occurred regardless of any protected activity). For example, the Petitioner's Opposition fails to reference the impact of the Union's banner and use of inflatables that had and continues to have a devastating impact on the Franksville PC's profitability. The Consolidated Income Statement lays out the monthly budgeted numbers, actual revenue, and variance between the two. (GCX 30³; Tr. 672: 5-10.) The budget for 2020 would start on May 1, 2019. (Tr. 673: 11-15.) The budget for 2020 was higher than the revenue numbers for 2019 because the Franksville market was growing. (Tr. 675: 8-12.) Bogardus explained that to calculate the Franksville budget Respondent reviewed the forecast by FW Dodge reports.⁴ Respondent also spoke to the sales representatives and customers to develop all the

² The transcript from the administrative hearing is available at ECF Doc. No. 12, Exh. A. Respondent refers to transcript excerpts as "Tr." followed by the page and line reference from the transcript of the administrative hearing.

³ All of the exhibits from the administrative hearing are available at ECF Doc. No. 12. For example, GCX 30 refers to General Counsel Exhibit 30. This document is available at ECF Doc. No. 12, Exh. C.

⁴ FW Dodge is a company that has been in business for approximately 40 years, and it "tracks bidding activity, new construction starts, [and] planning statuses" for the construction industry. (Tr. 716: 20-25.)

information it could to see what the future year might look like and to be as “conservative and accurate as possible.” (Tr. 715: 14-25; 716: 1-17.) Mayfield explained how the budget numbers for fiscal year 2020 for Franksville were “derived by taking the amount of cap ex (capital expenditure) that was expected as well as the market influence of growth and then coming up with an expected rental achievement.” (Tr. 675: 24-25; 676: 1-9.)

The Order at 21 and the Petitioner’s Opposition at 5 ignored the expected rental achievement and the Budget, and only concentrated on the revenue generated in June and July. (ALJD 20: 1-5; Tr. 673: 20-25; 676: 15-25; 677: 1-3.) The record demonstrates that the Budget is an extremely important financial number because it took three to four weeks to prepare as witnesses testified extensively about. (GCX 30; Tr. 671: 19-25; 672: 125; 673: 1-25; 674: 1-6; 675: 8-25; 676: 1-9; 921: 13-24; 1036: 19- 25; 1037: 1-22; 1050: 22-25; 1051: 1-25; 1052: 1-20; 1082: 10-18; 1084: 12-19.)⁵ Instead of just looking at revenue, the examination, as laid out in GCX 30, should be on the three-month period starting with May, the first month of the new fiscal year, and ending with the end of July, the last monthly numbers that Mayfield reviewed before making the August 5th reorganization decision. Additionally, the Variance between Budget and Actual Revenue for those three months in 2019 compared to the same period in 2018 is the relevant number. When comparing the total of Actual Revenue for the three months in question to the Budget numbers for those three months in total, there was a Variance of a negative 2.21 percent (i.e., \$1,746,792 – \$1,786,338 = -\$39,546 or -2.21% of \$1,786,338) for 2018 (fiscal year 2019), but the Variance grew to a concerning negative 27.71 percent (i.e., \$1,733,891 - \$2,398,663= -\$664,772 or -27.71% of \$2,398,663) in 2019 (fiscal year 2020). After the reorganization, GCX 30 demonstrates the continued drastic negative slide. As explained in the record, the capital expenditure and the market influence of growth resulted

⁵ GCX 30 was not the sole document that Mayfield relied on to make the decision to transition Franksville to a will-call facility, but he did rely on a consolidated income state to make the decision. (Tr. 669: 2-9.)

in the expected rental budget for the Franksville PC. (Tr. 676:3-6.) So not only was the Variance from Budget worsening, but the three months of Revenue declined from the same period of the previous year. Additionally, “July historically had always been a jumping-off point for strong revenue growth and equipment on rent or utilization. That July, there was [sic] no indicators that it was going to improve from the state it was at.” (Tr. 990: 23-25; 991:1.) As of the hearing on February 18, 2020 when the Union’s attorney questioned Anderson, his undisputed testimony was that the Dodge Reports showed the “Franksville market is thriving. It’s a very hot market if you will.” However, as he testified earlier, the [l]ast [he] looked, [Franksville was] at a negative 47 percent decrease rate in revenue” due to bannerling. (Tr. 1052: 4-7.) This evidence shows that even if Mayfield, the decision maker, had anti-union animus, which Respondent denies he did, Mayfield’s decision to restructure the PC was a financial decision, not one based on any anti-union animus.

In addition to having a likelihood of success on the merits because the ALJ and the District Court did not properly apply the *Wright Line* test, Respondent has a likelihood of success on the merits because the District Court’s Order is based almost entirely on the facts in the ALJ’s recommendation, even though many of the facts in the ALJ’s recommendation were not based on evidence in the record. That is, in its Order, the Court stated that it considered the ALJ’s recommendation and that “[t]he facts are largely taken from ALJ Rosas’ opinion.” *See* Order, p. 2; p. 3, FN 3. The District Court erred in relying on the ALJ’s recommendation because it contains many errors, some of which the Court directly repeated in the Order. For example, the Order, like the ALJ recommendation, states that Respondent threatened to terminate employees who unionized, even though at the hearing before the ALJ, the Union representative testified that he did not have evidence that Respondent Service Manager Chris Pender threatened employees for unionizing. *Compare* Order p. 21, *with* Exhibit A, p. 4 (citing Tr. 1252, 7-18). The Order contains the following other examples of errors based on some of the errors from the ALJ recommendation:

- The District Court found that Respondent would refuse to confirm tentative agreements in writing. *See* Order, p. 5. Instead, the Union requested “[i]n our last bargaining session I asked if you could get me Respondent’s version of the agreement in its entirety to the present. I think we are far enough along to work off of some comprehensive documents. We are requesting the summary by January 21st so that we have time to review it prior to our January 28th negotiations meeting.” (GCX 7g, p. 1 of 17.) Respondent’s response was made on January 16, 2019, five days early, with the draft CBA. (GCX 7g, p. 1 of 17.) The other instance when the tentative agreement was requested by the Union from Respondent was on February 19, 2019, 11 days after the February 8, 2019 negotiation session. Ervin asked, “Is there any chance we could get your version of the agreement thus far for review tomorrow before our meeting on Thursday (February 21, 2019)? Thanks.” (GCX 11 (emphasis added).) The Order did not disclose that Ervin made the request understanding that it was made with less than a 24-hour notice and that Respondent responded with an apology, “I am sorry, but I could not get the updated CBA done.” (GCX 11.) Respondent provided the Union on February 21, 2019 with the summary of the tentatively agreed to provisions that could not be produced on February 19, 2019. (GCX 11.)
- The Court quotes the ALJ’s recommendation in reference to “the elimination of the *three* bargaining unit employees.” Order, p. 21 (emphasis added). However, the bargaining unit consisted of only two employees. *See* Exhibit A, p. 43 (Respondent’s Exceptions and Supporting Brief to the Administrative Law Judge’s Recommended Order). The Order ignored that Respondent did bargain over wages, health insurance and pension terms. *See* at 5. Respondent provided the Union with a health⁶ and a retirement (401k) proposal before

⁶ Sunbelt’s “health” proposal included insurance plan documents for medical, life, accident, critical illness, long term and short term disability, travel, and vision and the flexible benefit plan. Sunbelt’s retirement proposal include the plan

the first negotiation and discussed the health and 401k plan on August 30, 2018, December 10, 2018, February 8, 2019, March 21, 2019, April 30, 2019, and June 5, 2019 (R. 7: 1236; R. 8: 01413-01417; R. 40: 000651, 000654, 000656; GCX 5h; Tr. 321: 9-18; 322: 19-23; 399:9-13; 400: 5-14.) Respondent also provided the Union with a list of which bargaining unit employees participated in the 401k and Respondent's health insurance plan.

- The Order misstates the events at the negotiation session on June 5, 2019 in which the Union promised the Word document of the tentatively agreed to provisions would be emailed to Respondent, but failed to do so. (R. 40: 0601; Tr. 175:7-14.) The “hardcopy of the draft” was 29 pages long (GCX 6G), and by having each article on a separate page, it was not in the format of previous drafts of tentatively agreed to provisions. (See GCX 6A and 6D.) Article 18 included Section 18.1 that merely states “TA,” but it did not include the language that was agreed to. Section 18.3 indicated it was “Deleted,” but it did not renumber the remaining sections. Section 18.4 included language in bold that is irrelevant to what the parties ultimately agreed to. The remaining sections included “TA” and then a series of numbers without any explanation. All of those sections had to be compared to negotiation notes for accuracy.
- Contrary to the Order at page 4, FN 4, Hill notified Michael Ervin that she “was just notified by Mr. Bogardus and Mr. Mayfield that the negotiations will need to be moved from January 28th.” (GCX 10, p. 3 of 3.) Even though GCX 73 indicates that Bogardus's hearing was continued, Mayfield's conflict remained, and, therefore, the negotiation session had to be rescheduled.

document for the 401k. Sunbelt also provided the Union with the plan document for the wellness plan and benefit rates. (R. 16, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, and 35)

Respondent's exceptions and corresponding brief set forth in detail the numerous errors and incorrect statements in the ALJ's recommendation. *See* Exhibit A; Exhibit B (Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Recommended Order).

In sum, Respondent has a likelihood of success on the merits on appeal because the District Court and the ALJ improperly applied the *Wright Line* analysis, the District Court's adoption of the findings of fact in the ALJ recommendation compounded the material factual errors in the ALJ's recommendation, and Respondent would have made the same decision to restructure the PC regardless of any alleged anti-union animus.

B. Respondent demonstrated irreparable harm absent a stay.

The NLRB next argues that Respondent did not demonstrate irreparable harm absent a stay because Respondent's argument that it would operate at a loss is speculative and Respondent has not shown how COVID-19 could cause irreparable harm. As Respondent explained in the Memorandum of Law accompanying its Motion, Respondent's Franksville location has focused on walk-in business for nearly one year. For Respondent to reinstate the bargaining unit and to have productive, profitable work for the bargaining unit to perform at the Franksville location, Respondent must commit significant resources to restructuring the location and marketing the new services at the Franksville location. Because the Court's Order only provides Respondent 10 business days to reinstate the bargaining unit and because developing and implementing a marketing plan normally takes weeks or months, the Franksville location will operate at a loss while Respondent pays the bargaining unit members and simultaneously invests marketing and other resources in trying to find work for the bargaining unit members. The COVID-19 pandemic will increase the loss at the Franksville location because many businesses, including Respondent, are attempting to limit spending in light of the uncertainties caused by the pandemic. Due to lost income and concern about the spread of COVID-19, not surprisingly, the number of walk-in customers is

reduced. So, the types of customers who will rent the equipment for the bargaining unit members' work are likely not adding equipment rentals during the pandemic, and Respondent will have to pay bargaining unit members without having work for them to perform.

Additionally, to reinstate the bargaining unit, Respondent will have to invest resources in posting and recruiting for the bargaining unit members' positions because the former members of the bargaining unit are unlikely to return to their former positions. In fact, one of the former members of the bargaining unit previously declined the opportunity to seek continued employment at Respondent shortly after his lay-off. The second bargaining unit member failed to testify at the hearing. Therefore, Respondent will have to post the positions, advertise the positions, and conduct interviews for the positions to create a bargaining unit. The hiring process takes time and resources at a time when many businesses, including Respondent, are strictly scrutinizing all expenditures in light of the uncertainty surrounding the coronavirus pandemic. Respondent must invest considerable resources to reinstate the bargaining unit and must do so in a matter of days. This damage is irreparable because, in the event the Court of Appeals reverses the District Court's Order, there will be no way for Respondent to recoup these costs and time. The damage is also irreparable to the future bargaining unit members because in the event Respondent restructures its business to create jobs for the bargaining unit members and the NLRB rules that Respondent properly restructured its business, those individuals may face layoffs and have to look for jobs.

Finally, as Respondent explained in its Memorandum of Law in support of its Motion, the NLRB's position has been that bargaining must occur in person, even though in-person 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. In its Response, the NLRB claims that Respondent "fails to note that this brief was submitted *prior* to the unforeseen emergency caused by the pandemic." *See* Response, p. 6, FN 5. This statement by the NLRB is demonstrably false. That is,

the NLRB brief setting forth the requirement for in-person negotiations was filed on July 1, 2020, in the middle of the pandemic. Therefore, compliance with the Order poses irreparable health and safety concerns.

For these reasons, Respondent has demonstrated that it, as well as others, face irreparable harm absent a stay of the Court's Order.

C. The NLRB will not suffer irreparable harm if the Court grants the stay.

The NLRB further argues that it will face irreparable harm if the Court grants the stay because the injunction will preserve the public interest in effective collective bargaining and because Respondent's employees are currently scared to unionize after seeing Respondent eliminate the bargaining unit at the Franksville location. This argument fails because the NLRB has not presented any evidence showing that other Respondent employees are hesitant to try to unionize based on Respondent laying off members of the bargaining unit. Likewise, the NLRB has not established that any harm, which Respondent denies any harm will occur, is imminent: "[I]t is not enough that the claimed harm be irreparable; the harm must also be imminent." *Hardy-Mahoney v. Prime Healthcare Servs.*, No. 3:17-cv-00216, 2017 WL 2192970, at *3 (D. Nev. May 18, 2017).

As identified above, the NLRB has not presented any evidence indicating that other Respondent employees are fearful of unionizing because of the lay-offs that occurred nearly a year ago due to economic business reasons. Rather, Respondent's employees at the Franksville location understood the business necessity of restructuring the Franksville location not related to the bargaining unit employees unionizing.

Further, the Union has not filed any election petition for any of the other General Tool profit centers in Wisconsin, so the Union is not facing any irreparable, imminent injury with Respondent employees because it does not have any pending elections. (Tr. at 998:12-13.) Likewise, despite the Order's statement that the Union is a fledgling union, the Union is not "fledgling." Rather, the

Union has significant resources to run a campaign against Respondent, including inflatables, bannerings, and pamphlets throughout all of Wisconsin, and, therefore the Union does not face harm by not currently having a bargaining unit at one small Respondent location. *See Nat'l Labor Relations Bd. v. J.W. Mays, Inc.*, 675 F.2d 442, 444 (2d Cir.) (explaining that a fledgling union has “no funds”). For these reasons, neither the NLRB nor the Union face irreparable and imminent harm with a stay of the Order.

Additionally, “the district court ‘must be careful that the relief granted is not simply functioning as a substitute for the exercise of the Board’s power.’” *McKinney v. Velox Express, Inc.*, No. 17-cv-2311, 2017 WL 5069112, at *5 (W.D. Tenn. June 29, 2017) (quoting *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988)). The NLRB itself has the power to adjudicate claims of unfair labor practices and, when it determines that an unfair labor practice occurred, the NLRB may require an employer to take steps to remedy the unfair labor practice. Here, Respondent and the Union are currently going through the NLRB’s administrative process, so the Order improperly substitutes the exercise of the Board’s power because the Board has the power to remedy any unfair labor practice that may have occurred, which Respondent denies any unfair labor practice occurred.

Further, to the extent the Order seeks to remedy potential future unfair labor practices by Respondent, which Respondent denies any will occur, Respondent must comply with the National Labor Relations Act (“NLRA”) regardless of the Order and if the Court grants a stay of the Order. *Osthus v. RELCO Locomotives, Inc.*, No. 4:12-cv-00205, 2012 WL 12884897, at *2 (S.D. Iowa, Oct. 4, 2020) (“As [Respondent] is already required to follow the NLRA, and any order by the Court on that issue would be redundant of [Respondent’s] current obligations, the Court declines to issue any such order.”). Should Respondent violate the NLRA at its Franksville location while the

underlying Consolidated Complaint is pending before the NLRB or any time thereafter, the NLRB can seek separate redress for those claims.

Finally, Respondent states that the former bargaining unit employees will not suffer any harm as a result of a stay because Respondent negotiated with the Union the severance packages provided as a result of the layoff. Petitioner's statement in its Opposition that the bargaining unit employees have not "received redress" is disingenuous. That is, the Union negotiated the severance package, and Petitioner does not include this fact. The fact that the Union negotiated the severance package and that the Union did not negotiate to include language such as that the bargaining unit employees have first choice at open positions or bump other employees with Respondent shows that the former bargaining unit employees have received redress for the layoff and that a stay will not harm the former employees.

For these reasons, the NLRB does not face irreparable, imminent harm if the Court grants the stay.

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

Finally, the Petitioner argues that the public interest does not favor a stay of the Order because a stay would "benefit a wrongdoer." *See* Response, p. 7. This argument fails because it is based on the improper assumption that Respondent committed a wrong. A district court cannot determine whether an employer violated the NLRA, and therefore, the Petitioner cannot base its argument on a claim that Respondent committed a wrong. *See Sharp v. Parents in Cmty. Action*, 172 F.3d 1034, 1039 (8th Cir. 1999) ("The district court in a § 10(j) proceeding does not decide whether the respondent has committed unfair labor practices. That is the province of the Board's on-going adjudicatory proceeding, subject to judicial review by a court of appeals.").

As explained above, the ALJ's recommendation contained numerous errors. *See supra* Section A. It has not been established that Respondent committed an unfair labor practice in this

case because the NLRB has not ruled in the underlying Consolidated Complaint. Respondent timely appealed the ALJ's decision, setting forth numerous errors in the ALJ's decision. *See* Exhibits A & B. The public interest and due process lies in favor of allowing the NLRB to determine whether Respondent violated the NLRA and not allowing the NLRB to base its argument on an assumption that Respondent committed a wrong when the case has not been decided.

Further, the Petitioner claims that the public interest favors compliance with federal labor law, and while that may be true, the public interest also favors a full and complete administrative process and not allowing a court to circumvent the Board's administrative process and adjudicative powers. So, here, the public interest favors allowing the Board to issue a determination in this case. Likewise, the public interest does not lie in favor of requiring businesses to invest considerable resources to reinstate the bargaining unit before the Board issues a decision, as the Order requires Respondent to do here.

Finally, the public interest lies in favor of the stay because, as referenced above, there is no record evidence that the employees at any of the other General Tool profit centers in Wisconsin has been intimidated by the reorganization of the Franksville PC. (Tr. at 998:12-13.) The public interest does not favor requiring a business to reorganize its Franksville operations for a Union that would only represent two employees in Wisconsin.

For these reasons, the public interest lies in favor of granting the stay in this case.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in Respondent's Motion and accompanying memorandum, Respondent has established that all of the factors for the court to consider in determining whether to grant a stay pending appeal weigh heavily in favor of a stay in this case. Therefore, this Court should grant Respondent'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.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18 – SUBREGION 30

SUNBELT RENTALS, INC.

and

**INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 139,
AFL-CIO**

**Case Nos: 18-CA-236643
18-CA-238989
18-CA-247528**

**RESPONDENT’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S
RECOMMENDED ORDER**

Pursuant to Section 102.46 of the Rules and Regulations for the National Labor Relations Board (“Board”), Series 8, as amended, the undersigned Counsel for Respondent, Sunbelt Rentals, Inc. (“Sunbelt”) respectfully files the following Exceptions to the Recommended Order issued by Administrative Law Judge Michael Rosas on May 13, 2020.

1. Exception 1 - The ALJ incorrectly concluded that Christopher Pender supervised the drivers. (ALJD 2: 42-44.)¹
2. Exception 2 - The ALJ incorrectly concluded that Gary Stamm, an Equipment Rental Specialist, supervised equipment deliveries by McKellips, Romanowski, Mariana River, and outside sales representatives Tyler Sadowske and Ryan Marifke. (ALJD 2:46-47; ALJD 3:1-2.)
3. Exception 3 - The ALJ incorrectly concluded that the use of trucking companies likely increased due to Smith’s unavailability for overtime deliveries and then his termination on

¹ Throughout these exceptions, abbreviated references are employed as follows: “ALJ”: Administrative Law Judge; “ALJD” followed by page and line numbers to designate ALJ Decision, and “Tr.” followed by page and line(s) to designate transcript pages and lines.

- July 1. (ALJD 3: FN 5.)
4. Exception 4 - The ALJ incorrectly concluded that Gutierrez did not have a grudge towards Sunbelt and was credible. (ALJD 4: FNs 13, 22; 16: 13-25; FN 69.)
 5. Exception 5 - The ALJ incorrectly determined that Jamie Smith's testimony was very credible, spontaneous and devoid of any indications of bias towards a company that terminated him on July 1, 2019 and is more credible than Pender's testimony. (ALJD 6: FN 18; 17: FN 72.)
 6. Exception 6 - The ALJ incorrectly concluded the testimony was not credible regarding that the "pull down" was the result of Atlwell's plan. (ALJD 7: FN 23.)
 7. Exception 7 - The ALJ incorrectly concluded that the accuracy of the union's bargaining notes was undisputed. (ALJD 7: FN 27) (Check voir dire of Ervin and two sets of rules)
 8. Exception 8 - The ALJ incorrectly determined the roles of Sunbelt's negotiation team. (ALJD 8:1-4.)
 9. Exception 9 - The ALJ incorrectly concluded that there was uncorroborated credible evidence that the Union was unprepared for negotiations. (ALJD: FN 29.)
 10. Exception 10- The ALJ incorrectly determined that Anderson was often diverted to store situations that arose. (ALJD: FN 31.)
 11. Exception 11 - The ALJ incorrectly concluded that Sunbelt lacked credence for its position that the union's initial proposal based on Michigan and Illinois contracts was a waste of time and counterproductive. (ALJD: FN 32.)
 12. Exception 12 - The ALJ incorrectly determined that Mayfield conceded that he told Sunbelt's counsel prior to the meeting that he would be unable to attend the September 27, 2018 bargaining session. (ALJD: FN 42.)
 13. Exception 13 - The ALJ incorrectly concluded that during the October 23, 2018 negotiations

that the Union negotiators were frustrated by the Company's "blanket discussions" and the length of the Company's caucuses. (ALJD: 12, 5-8; FN 47.)

14. Exception 14 - The ALJ incorrectly concluded that Sunbelt agreed only to meet again on December 10, 2018 because Bogardus and Mayfield both refused to meet more than once per month. (ALJD 12; FN 49.)
15. Exception 15 - The ALJ neglected to include in his summary of the first negotiation session that Sunbelt had provided the union with Respondent's Exhibits 16 to 33.
16. Exception 16 - The ALJ incorrectly concluded that no one from Sunbelt's negotiation team attended the funeral of a relative of another Wisconsin PC employee. (ALFD 9: 33-35; FN 36.)
17. Exception 17- The ALJ incorrectly concluded that Ervin requested a comprehensive counterproposal and that the draft collective bargaining agreement sent by Hill was the counterproposal. (ALJD 13, 1-3.)
18. Exception 18 - The ALJ incorrectly concluded that the articles did not match the union's May 22, 2018 proposal and that Hill insisted that the table of contents be done after the remaining of the contract was finalized. (ALJD 13, 4-5.)
19. Exception 19 - The ALJ incorrectly concluded that the Company's intention was to drag out negotiations. (ALJD FN 55.)
20. Exception 20 - The ALJ incorrectly concluded that in an effort to move negotiations forward, Ervin asked Hill on February 19, 2019 for the updated CBA on February 20, 2019 before the February 21, 2019 and Hill's response was "could not get the updated CBA done." (ALJD 14, 1-3; FN 59.)
21. Exception 21 - The ALJ incorrectly stated that during the February 21, 2019 sessions that Sunbelt was confused as to which version of the CBA that the parties were working with.

(ALJD 14, 13-15.)

22. Exception 22 - The ALJ incorrectly stated the Hill declined to schedule a session before March 21, 2019 because “she was too busy to meet before then.” (ALJD 14, 23-24.)
23. Exception 23 - The ALJ incorrectly stated that “According to Bogardus, the Company was not interested in such a business opportunity [Foxconn project].” (ALJD 14 FN 61.)
24. Exception 24 - The ALJ incorrectly concluded that “[o]n March 21, with Anderson’s assistance Mariano Rivera filed a petition to decertify the Union. . . .” (ALJD 15, 35-37.)
25. Exception 25 - The ALJ incorrectly stated that Mariano Rivera delivered the decertification petition to Anderson on March 22, and Anderson posted copies of it in the break room and by the time clock and shop door leading to the store. (ALJD 15, 37-39.)
26. Exception 26 - The ALJ incorrectly stated that Rivera testified that Anderson explained the decertification process, helped Rivera fill out the form, including his name and position, and the date and time for the decertification election. (ALJD FN 64.)
27. Exception 27 - The ALJ incorrectly concluded that Anderson did not dispute Mariano River’s testimony that he explained the decertification process, helped Rivera fill out the form, including his name and position, and the date and time for the decertification election. (ALJD FN 65.)
28. Exception 28 - The ALJ incorrectly concluded that the concern expressed by Sunbelt regarding the union’s fear and intimidation tactics was based only on the union’s annoyance about a “long closed door meeting that Pender had with McKellips....” (ALJD: 16, 27-30; FN 70.)
29. Exception 29 - The ALJ incorrectly stated that “Hill requested and agreed to email Hill a Word pdf version of the Union’s proposed CBA, including the agreed upon table of contents, prior to the next session on July 9.” (ALJD 19, 4-6.)

30. Exception 30 - The ALJ incorrectly stated that the union filed charges on July 16, 2019 relating to the terminations of Smith and Gutierrez and failed to include the evidence that the July 16, 2019 unfair labor practice charge involving Smith and Gutierrez was dismissed and lost on appeal. (ALJD 19, 22-25.)
31. Exception 31- The ALJ incorrectly analyzed the financial information provided during the hearing. (ALJD 19: 35-38; 20: 1-5; 23: 10-15, FN. 95; 30: 15-23.)
32. Exception 32 - The ALJ incorrectly discredited Mayfield testimony regarding the financial data in the Consolidated Income Statement. (ALJD 20, 1-5; FN 79.)
33. Exception 33 - The ALJ incorrectly discredited the charts in R. Exh. 9; GC Exh. 28-29 as being generated for the General Counsel during the investigation. (ALJD 20, FN 79.)
34. Exception 34 - The ALJ incorrectly stated that Romanowski was told after the August 8, 2019 negotiation session that Sunbelt “terminated him 83 [sic].” (ALJD 21,10-11.)
35. Exception 35 - The ALJ incorrectly stated that GC Exh. 32 indicated that Romanowski was terminated on August 8, 2019. (ALJD 21, FN 83.)
36. Exception 36 - The ALJ incorrectly concluded that the two remaining bargaining unit members were terminated. (ALJD 22: 3.)
37. Exception 37 - The ALJ incorrectly concluded that the Franksville PC continued to carry some large equipment, including large front loaders, excavators, boom lifts, backhoes skid loaders and forklifts. (ALJD 22, 11-12; FN 87.)
38. Exception 38 - The ALJ incorrectly concluded that equipment listed on the Franksville PC’s website was available to rent at the PC. (ALJD 22, FNs 88, 89.)
39. Exception 39 - The ALJ incorrectly discredited the charts in R. Exh. 9; GC Exh. 28-29 as being generated for the General Counsel during the investigation. (ALJD 20, FN 79)
40. Exception 40 - The ALJ incorrectly Determined Credibility Issues. (ALJD 4: FNs 13, 22; 6,

FN 18; 16: 13-25; FN 69; 17: FN 72; 23: FN 91.)

41. Exception 41 - The ALJ incorrectly concluded that Sunbelt should have contacted the union to reschedule negotiations because of the non-attendance at the funeral and the adoption hearing. (ALJD 24, 25-33.)
42. Exception 44 - The ALJ incorrectly concluded that the NLRA was violated because bargaining sessions were “spread out” due to Hill traveling to the session from Florida. (ALJD 24, 35-36.)
43. Exception 43 - The ALJ incorrectly concluded that the Company repeatedly engaged in surface bargaining. (ALJD 25-27.)
44. Exception 44 - The ALJ incorrectly determined that the Company failed to bargain before laying off the unit employees, Al Romanowski and Kyle McKellips, and that its obligation to bargain went beyond the effects of the layoff. (ALJD 31.)
45. Exception 45 - The ALJ incorrectly determined that the Company failed to bargain over the replacement of some equipment that resulted in the layoff of the unit employees. (ALJD 31.)
46. Exception_ - The ALJ incorrectly concluded that the Union is ... the exclusive bargaining representative in the following appropriate unit: All full-time and regular part-time mechanics, drivers, and foremen employed by the Respondent at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.” (ALJD 31: 36-40.)
47. Exception 47 - The ALJ incorrectly concluded that Sunbelt violated Section 8(a)(1) of the NLRA. (ALJD 27-29.)
48. Exception 48 - The ALJ incorrectly concluded that Sunbelt’s reorganization violated Sections 8(a)(1), (3) and (5) of the NLRA. (ALJD 32: 22.)

49. Exception 49 – The ALJ incorrectly concluded that Ervin’s prehearing affidavit could not be struck because it was “Ervin’s testimony, as refreshed, corroborated and otherwise unrefuted, that was received into the record, not his affidavit.” (ALJD 7, FN 26.)

50. Exception 50 – The ALJ incorrectly concluded that Kyle McKellips and Allan Romanowski were permanently laid off. (ALJD 32:13-14.)

Respectfully submitted,

By: /s/ Patricia J. Hill

Dated: June 10, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 10, 2019, I electronically filed the foregoing Respondent's Exceptions to the Administrative Law Judge's Decision via with the National Labor Relations Board's website and served the same on the following attorneys and the NLRB via e-mail and via U.S. Mail:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18 – SUBREGION 30

SUNBELT RENTALS, INC.

and

**INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 139,
AFL-CIO**

**Case Nos: 18-CA-236643, 18-CA-
238989, and 18-CA-247528**

**RESPONDENT’S EXCEPTIONS AND SUPPORTING BRIEF TO THE
ADMINISTRATIVE LAW JUDGE’S RECOMMENDED ORDER**

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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SUNBELT RENTALS, INC.

and

**INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 139,
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**Case Nos: 18-CA-236643
18-CA-238989
18-CA-247528**

**RESPONDENT’S EXCEPTIONS AND SUPPORTING BRIEF TO THE
ADMINISTRATIVE LAW JUDGE’S RECOMMENDED ORDER**

I. STATEMENT OF THE CASE

Respondent, Sunbelt Rentals, Inc. (“Sunbelt” or “Respondent”) files the following Exceptions to Administrative Law Judge Michael A. Rosas’s (“the ALJ”) Recommended Findings of Fact, Conclusions of Law and Order based on errors contained in same as set forth below.

II. PROCEDURAL HISTORY

This case involves Charges filed by the International Union of Operating Engineers, Local 139 (“Local 139” or “Union”) on February 26, 2019 (Case No. 236643), April 3, 2019 (Case No. 238989) and then amended on May 30, 2019, and on August 30, 2019 (Case No. 247528) and then amended on October 17, 2019 alleging that Sunbelt committed numerous violations of the Act. The General Counsel of the National Labor Relations Board (the “Board” or the “NLRB”) issued a consolidated Complaint on June 19, 2019 and again on November 1, 2019. A hearing was held before the ALJ on December 16 to 18, 2019 and February 18 and 19, 2020. The parties timely filed Post-Hearing Briefs on April 3, 2020. On May 13, 2020, the ALJ issued a Recommended Findings of Fact, Conclusions of Law and Order finding that some, but not all of Sunbelt’s conduct

at issue in the Charges constituted an unfair labor practice in violation of the Act.

III. BACKGROUND

This case does not involve Sunbelt's historical bargaining units or relationships, but rather an election petition filed by the Union to represent seven employees at the Franksville, Wisconsin PC. The seven employees held the positions of mechanics and drivers. Following an election in which the seven employees voted in favor of the Union, the Union and Sunbelt engaged in 15 months of negotiations. The dispute involves whether Sunbelt met at reasonable dates, times, and places; whether Sunbelt interrogated/threatened the bargaining unit members, and whether Sunbelt refused to bargain over wages.

Respondent's negotiation team for most of the negotiation sessions consisted of Jason Mayfield, Bo Bogardus, Bryan Anderson and Patricia Hill. (GCX 5a.). Mr. Mayfield was the General Tool Regional Vice President for Region 9. Mr. Bogardus was the General Tool District Manager for Wisconsin from February 12, 2018 to July 7, 2019. (Jt. Ex. 1: Joint Stipulation of Facts.) Mr. Bogardus was the Wisconsin Market Leader for Sunbelt's Climate Control Division starting on July 8, 2019. (Tr. 698: 19-25; 699: 1-15.) Mr. Anderson was the Profit Center Manager for Franksville, Wisconsin from May 1, 2018 to August 2019 when he became the Profit Center Manager for the Fond du Lac Profit Center ("PC"). (Tr. 909: 12-20; 1031: 10-12.) Contrary to the ALJ's determination of the roles for Sunbelt's negotiation team, Messrs. Mayfield, Bogardus, and Anderson discussed and developed the proposals for the negotiations, and Hill typed them and provided them to the Union. (Tr. 258: 25; 259: 1-2; 413: 20-24; ALJD 8:1-4.) Mr. Mayfield was the ultimate decision maker of what the Respondent agreed to during the negotiations, and he could over-ride Mr. Bogardus's opinion. (Tr. 628: 3-18.)

IV. EXCEPTIONS

A. The ALJ incorrectly concluded that Sunbelt violated Section 8(a)(1) by (a) threatening employees that it would be futile for them to select the Union as their bargaining representative; (b) instructing employees to report on the Union activities of other employees; (c) interrogating employees about their union sympathies and activities, and (d) interrogating employees without providing assurances under *Johnnie's Poultry Co.*¹

1. ALJ incorrectly found that Chris Pender threatened bargaining unit members.

The ALJ incorrectly found that bargaining unit employees were threatened by Chris Pender, the Service Manager² at the time, allegedly stating in the spring of 2019 that “the union was never going to get in and it was never going to happen.” This finding contradicts Paragraph 5(a) of the Consolidated Complaint that alleged that “About December 2018 or January 2019, Respondent, by Service Manager Pender, at Respondent’s facility, by telling employees that the Union was not going to get in and that the Union was not going to happen, threatened its employees that it would be futile for them to select the Union as their bargaining representative.” (emphasis added.) Even though the record did not support the allegations in the Consolidated Complaint, the ALJ completely ignored Jamie Smith’s statements that clearly indicated that he did not believe the alleged statements were “threats” because “the thing was is [sic] the union was already voted in for over a year and the contract was being worked on.” (Tr. 760, 3-7). He later again downplayed Mr. Pender’s alleged “threat” by stating “because like I stated the union was already voted in. Why would it not get in now.[sic]” (Tr. 760: 22-23.) Steve Buffalo,

¹ . References herein are made to the ALJ’s Recommended Findings of Fact, Conclusions of Law and Order as “ALJD,” followed by the page and line numbers, and references to the official Transcript will be “Tr.” followed by page and line numbers. References to the General Counsel’s exhibits will be “GCX,” and “R” refers to Respondent’s/Sunbelt’s exhibits.

² The ALJ incorrectly concluded that when Christopher Pender was the Service Manager, that he supervised the drivers. (ALJD 2:43-44.) Mr. Pender only supervised the mechanics. (Tr. 3: 11-12; 757: 4-5; 770: 18-19; 787: 19-21; 820: 3-25; 821: 3-4.) Mr. McKellips testified that Mr. Gary Stamm was in charge of dispatching the drivers to deliver equipment for the PC. (Tr. 824: 22-25; 825: 1-2.)

Local 139's Chief of Staff and part of the Union's negotiation team, admitted that he did not have evidence that Mr. Pender threatened employees. (Tr. 1252, 7-18.) Additionally, the ALJ ignored Mr. Pender's credible testimony and instead found it a "terse denial in response to leading questions...."³ (ALJD 6, FN 18.) Significantly, even though three of the four mechanics, Messrs. Mariano Rivera,⁴ Gutierrez and McKellips, testified during the hearing, not one testified about the statement that Mr. Pender allegedly made. (Tr. 759, 18-20.) Even if the ALJ ignored the lack of support for the allegation in the Consolidated Complaint that Mr. Pender made the alleged statements, the ALJ incorrectly determined that Mr. Smith's testimony was "very credible . . . and devoid of any indications of bias towards a company that terminated him on July 1, 2019" for failing "to take a safety quiz". (ALJD 6; FN 18; 17: FN 72.) This finding is not supported by anything in the record. The ALJ ignored the numerous admissions by Mr. Buffalo that Mr. Smith had received several disciplinary write-ups prior to the termination and Local 139 received copies of all of the discipline. (Tr. 439, 1-8; 1258, 16-24.) The ALJ ignored that in response to his termination Mr. Smith filed an unfair labor charge that was dismissed and the appeal denied. (Tr. 144, 24-25, 145, 1-8; GCX 39.)

The ALJ also had the timeline and alleged events wrong for the alleged threats. The ALJ claims that Mr. Bogardus's "outreach" to have employees report on Union activities was "around this time that Pender remarked to Smith that the Union was never going [to] get in." (emphasis added) The ALJ then immediately stated that on May 14, 2018 the Green Bay PC Manager informed Mr. Bogardus about some "union talk." The ALJ's conclusions have several errors.

³ Significantly, the alleged "leading questions" were straight out of the Consolidated Complaint, and the General Counsel's attorney failed to object to them as being leading.

⁴ Because there are two witnesses with the last name of Rivera, the brief will refer to them with their first and last names.

First, Mr. Smith stated that the alleged statement was made during the spring of 2019, not 2018. Second, Mr. Smith never claimed that Mr. Pender's alleged statement was made to him. Instead, he overheard the alleged statement made to "shop guys" in Mr. Pender's office. The third error is that the record is very clear that any information provided to the Green Bay PC Manager came from employees who were unhappy with the bargaining unit members from Franksville discussing the union during work hours. The record does not indicate that the Green Bay PC Manager was reaching out to the employees. It appears that the Green Bay employees reported it to her. (GCX 65.) Additionally, the ALJ failed to disclose the entire statement from the Green Bay PC Manager. The ALJ's extremely selective cite of the words "embarrassed" and "apologize[d] for the debacle" are taken out of context. The ALJ did not cite to the complete record for the words "embarrassed" and "apologize[d] for the debacle" and would "[...]investigate before I call [the PC manager or district manager] on this issue again." The result is that the ALJD appears to force the reader to believe that the Green Bay Manager was embarrassed and apologizing for letting the situation occur with her employees. In GCX 67, rather than the 776 driver causing the situation outlined in GCX 65, she apologized because "my driver [from the Green Bay PC] caused this whole problem with 776 driver and I apologize for the debacle. I will investigate before I call PCM or DM on this issue again."

2. ALJ incorrectly concluded that Anderson interrogated Gutierrez.

The ALJ also incorrectly concluded that Mr. Anderson interrogated Mr. Gutierrez regarding the decertification petition and requesting that he report the activities of others. The ALJ based his conclusion on his belief that Mr. Gutierrez did not have a grudge towards Sunbelt and was credible. (ALJD 4: FNs 13, 22; 16: 13-25; FN 69.) The ALJ failed to acknowledge that Mr. Gutierrez filed unfair labor practice charge relating to his termination that was dismissed and

lost on appeal. (ALJD 19, 22-25.) Additionally, Mr. Gutierrez had a case pending against Sunbelt for work-related injuries, and the ALJ failed to even mention either claim as part of his analysis of why Mr. Gutierrez was credible. Instead, the ALJ completely ignored the testimony of Mr. Anderson who testified that he did not have the alleged discussions with Mr. Gutierrez. (Tr. 106: 5-14.)

3. ALJ incorrectly stated Anderson helped Mariano Rivera with the decertification petition.

Significantly, the ALJ ignored the evidence and stated that “[o]n March 21, with Mr. Anderson’s assistance, Mariano Rivera filed a petition to decertify the Union. . . .” (ALJD 15, 35-37.) Even though the photographs of the NLRB postings clearly show that the postings came straight from the NLRB, the ALJ incorrectly stated that Mariano Rivera delivered the decertification petition to Mr. Anderson on March 22, and Mr. Anderson posted copies of it in the break room and by the time clock and shop door leading to the store. (ALJD 15, 37-39; GCX 77 (black and white photographs); R 39 (color photographs).) Without citing to it, the ALJ apparently ignored Mr. Anderson’s testimony that “[o]n or about April 22nd or 23rd of 2019” he “[a]bsolutely [did] not” interrogate any of Sunbelt employees about their union sympathies” or “union activities.” Mr. Anderson explained that interrogating employees about their union sympathies was something that he “was trained to not to do....” (Tr. 1033, 9-23.) The ALJ ignored Mr. Buffalo’s testimony that he did not have any information to support the allegation that Mr. Anderson interrogated employees about union sympathies or union activities. (Tr. 1252: 19-25; 1253: 1-2.)

The ALJ incorrectly stated that Mariano Rivera testified that Mr. Anderson explained the decertification process, helped Mariano Rivera fill out the form....” (ALJD FN 64) Instead, Mariano Rivera clearly testified in great detail that he received help from an employee with the

NLRB. (Tr. 1176, 20-25; 1177, 1-25; 1178, 1-25; Tr. 1183, 4-25; 1184, 1-7.) Therefore, the record does not support the ALJ's conclusion that Mr. Anderson asked Mr. Gutierrez about the decertification petition, helped Mariano Rivera with the decertification petition, or exhibited anti-union animus.

4. ALJ incorrectly concluded the affect of the meeting between Pender and McKellips.

The ALJ incorrectly concluded that the concern expressed by Sunbelt regarding the union's fear and intimidation tactics was based only on the union's annoyance about a "long closed door meeting that Pender had with McKellips...." (ALJD: 16, 27-30; FN 70.) The ALJ improperly included an incomplete e-mail string in GCX 80 as support for Sunbelt's alleged involvement in his section of the decision regarding the decertification process. The partial cite was, "On April 1 [2019], in the course of discussing the Union's annoyance about a long closed door meeting that Pender had with McKellips in his office earlier that day, Black [Senior Vice President of Human Resources] told the negotiating team, "I really want to go after the union."⁵ [sic] I [sic] worry about the fear and intimidation tactics they may use." (ALJD 16: 27-30.) A review of the complete e-mail string reveals that Mr. Bogardus informed Ms. Black and other Sunbelt employees that

Kyle McKellips, our Road Tech in 776, met with Chris Pender, the 776 Service Manager, for maybe 30 minutes to discuss a variety of issues related to service [military] and Kyle. Later that afternoon the Union, no idea who, called Kyle's wife at home and loudly complained to her that Kyle had a closed door meeting with Chris. There is only one way the union could have known about this meeting, Al Romanowski {mechanic}. Al had observed Kyle in Chris office having walked past more than once during Kyle's time with Chris, according to Chris." (GCX 80 (emphasis added).)

Ms. Black's initial response was, "This is ridiculous." Later she stated, "I really want to

⁵ The same incomplete cite can be found in the General Counsel's brief on page 27.

go after the union. I worry about the fear and intimidation tactics they may use.” Mr. Bogardus’s response was, “Chris is with Kyle on a service call that required two people. Kyle is a really good guy we want to keep but messing with his family will only make him leave.” Nowhere in GCX 80 is there a hint of anything related to a decertification petition as alleged by the ALJ. Moreover, Ms. Black is justifiably concerned about the employee and the wife of a valued employee, a veteran, receiving a “ridiculous” telephone complaint about her husband meeting with Mr. Pender at the Sunbelt workplace.⁶ A complete review of GCX 80 clearly demonstrates concern over Mr. McKellips and his family, not a closed door meeting.

5. ALJ incorrectly concluded Sunbelt employees were improperly interrogated pursuant to Johnnie’s Poultry.

The ALJ incorrectly concluded Sunbelt employees were interrogated without providing assurances under *Johnnie’s Poultry Co.*. The amended paragraph 5 of the Consolidated Complaints filed on February 19, 2020 alleges that:

5(d) About February 10, 2019 Respondent, by Respondent's attorney Patricia Hill, at Respondent's Waukesha General Tool location, interrogated its employees about their union membership, activities, and sympathies.

5(e) About February 10, 2019 Respondent, by Respondent's attorney Patricia Hill, at Respondent's Waukesha Climate Control location, interrogated its employees about their union membership, activities, and sympathies. (emphasis added)

The February 2020 amendment to the Consolidated Complaint references alleged 8(a)(1) violations based on testimony during the hearing. In spite of the record clearly describing that Mr. Pender and his/Respondent’s attorney met “last week,” the Consolidated Complaint was amended to allege that the questioning occurred about “February 10, 2019”—a year earlier. Additionally, the General Counsel’s attorney did not ask witnesses if Sunbelt’s attorney questioned anyone else at the General Tool or Climate Control PCs, but the Consolidated Complaint was amended to allege

⁶ Mr. McKellips considered Mr. Pender a friend and a fellow veteran. (Tr. 839: 23-25; 840: 1-2.)

that Sunbelt's attorney "interrogated its employees" at two of Sunbelt's divisions. Similarly, the record was clear that Mariano Rivera testified that he met with his/Respondent's attorney the previous week at the Climate Control Center and wanted Respondent's attorney to represent him at the hearing. (Tr. 1187: 11-24; 1191: 9-22.). Mr. Pender, who is included in the Consolidated Complaint as a supervisor who allegedly threatened bargaining unit members, asked Hill to represent him personally. (Tr. 1162: 9-23 and 25; 1163:4-8; 1164: 1-25; 1165: 1-6.) In spite of an objection based on attorney-client privilege, the judge permitted the General Counsel to question Mr. Pender. The ALJ failed to address, even with a footnote, the incorrect date in the Consolidated Complaint. Additionally, the record is void of any testimony that anyone else at the Climate Control PC was questioned, but the Consolidated Complaint was amended to allege that Sunbelt's attorney "interrogated its employees." The ALJ's report failed to address the discrepancies. Moreover, the record is clear that neither witness was asked if he had been interrogated about "about their union membership, activities, and sympathies." Additionally, Sunbelt denied the allegations on the record. (Tr. 5: 1281.)

When an employer interviews an employee about protected activity in preparation for an unfair labor practice hearing, the employer must communicate the purpose of the questioning, assure him that no reprisal will take place, obtain his participation on a voluntary basis, question must occur in a context free from employer hostility to union organization, question must not itself be coercive in nature, and the questions must not exceed the necessities of the legitimate purpose *Cayuga Med. Ctr. At Ithaca, Inc.*, 367 NLRB 21, 46 (2018); *Johnnie's Poultry Co.*, 146 NLRB 770, 774-775 (1964). The Seventh Circuit has declined "to approve a Per se rule" regarding *Johnnie's Poultry*, and instead will look at the "totality of the circumstances, including the purpose of the interview, the entire statement made to the employee, and the scope of the questioning."

A&R Transport, Inc. v. NLRB, 601 F.2d 311 (7th Cir 1979). Even though the witnesses were unable to articulate that their/Respondent's attorney had given them all of the warnings required by *Johnnie's Poultry*, they made it clear that they knew there would be no repercussions. Additionally, the witnesses referred to Respondent's counsel as "my" attorney/lawyer. (Tr. 1162: 16-20; 1187: 1924.) Therefore, the ALJ erred in finding the hearing preparation sessions between Mr. Pender and his/Respondent's attorney and Mariano Rivera and his/Respondent's attorney violated Section 8(a)(1) of the Act.

B. The ALJ Incorrectly Concluded That Sunbelt Refused To Negotiate in Good Faith

To determine whether an employer has engaged in surface bargaining, the NLRB must examine the totality of the employer's conduct to determine if it attempted to frustrate or avoid any agreement. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 742 (D.C. Cir. 1950). "[I]t is not the length of negotiations which is the key. Rather, the question is whether the parties discussed the matter at issue,..." *Nexstar Broad. Group, Inc. DBA WETM-TV and Int'l Alliance of Theatrical Stage Employees*, 363 NLRB 32 at 20 (2015). The Board will find a refusal to bargain in good faith if it determines that the employer is merely "going through the motions" of bargaining. *Unbelievable, Inc. dba Frontier Hotel & Casino*, 318 NLRB 857, 876 (1995). The following are the guidelines that the Board has used to determine whether a party is refusing to bargain in good faith:

Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith ... other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to by-pass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, 271 NLRB 1600 (1985). The Board cited *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979); *NLRB v. Wonder State Manufacturing Co.*, 344 F.2d 210 (8th Cir. 1965); *NLRB v. Holmes Tuttle Broadway*

Ford, 465 F.2d 717 (9th Cir. 1972); *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260 (2d Cir.); *Cal-Pacific Poultry*, 163 NLRB 716 (1967); *Billups W. Petroleum Co.*, 169 NLRB 964 (1968); *Valley Oil Co.*, 210 NLRB 370 (1974), and *Moore Drop Forging Co.*, 144 NLRB 165 (1963).

Based on the record, Sunbelt negotiated in good faith.

1. ALJ failed to acknowledge Sunbelt's efforts to reach a contract.

The ALJ ignored the number of key provisions that were agreed to during negotiations, and instead focused on the number of negotiation sessions. A review of each of the draft tentatively agreed to agreements disclose approximately 23 articles and numerous sections to each. Such extensive work product does not prove that Sunbelt was merely “going through the motions” of bargaining.

ALJ failed to acknowledge what each member of the negotiation team did. Messrs. Mayfield, Bogardus, and Anderson discussed and developed the proposals for the negotiations, and Hill typed them and provided them to the Union. Mayfield was the ultimate decision maker of what the Respondent agreed to during the negotiations, and he could over-ride Bogardus's opinion. (Tr. 627: 10-25; 628: 1-15).

The ALJ's conclusion that Sunbelt refused to negotiate in good faith is based on his failure to review all of the record evidence. The ALJ apparently also relied on incorrect cites in the General Counsel's brief for support of some of his conclusions.⁷ The Consolidated Complaint alleged that Sunbelt refused to meet at reasonable times and places for bargaining; Sunbelt refused to bargain about wages, insisted that all non-economic issues be resolved before

⁷ The ALJ stated without any cites that the “November session was cancelled due to vague ‘fleet issues.’” (ALJD 24.) However, apparently, the ALJ relied on the General Counsel's post-hearing brief that used the identical language and an incorrect cite to GCX 10 that had nothing to do with the November session. (GC post-hearing brief, 45, FN 20). However, the General Counsel earlier had cited to the November session with the correct cite, GCX 40, and contrary to the ALJ's statement of a “vague ‘fleet issue,’” it was very specific with respect to the fleet planning issue. Mr. Bogardus also testified that the fleet issue involved “where we were going, and what we were going to do and the size of the fleet” had to be resolved before they could go “to the next level of budgeting.” (Tr. 725: 2-13.)

bargaining about wages; Sunbelt had no intention of reaching an agreement, and Sunbelt failed to explain justifications for certain proposals. The ALJ claimed that Sunbelt raised as a “defense” that the “bargaining team was otherwise busy with operational responsibilities.” (ALJD, 24.) The ALJ’s statement is unsupported by any defense raised by Sunbelt in its Answer. (GCX 1jj.) More to the point of defenses raised by Sunbelt, the ALJ ignored one of Sunbelt’s defenses— “...the Union’s delaying tactics. . . .” (GCX 1jj, 7.) From the very first negotiation session, the Union delayed the progress of the negotiations.

The ALJ did not acknowledge that prior to the first negotiation session Sunbelt forwarded over 500 pages of benefit plan documents, the Policies and Procedures, the Safety Manual, and the Employee Information Handbook. (R 16 to R38.) Unlike the situation in *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747 (2003), Sunbelt provided the fringe benefit information to support its proposal in advance of the negotiation session. There is no reason for producing the numerous documents relating to benefit plan documents, policies, safety and the Employee Information Handbook unless Sunbelt was prepared to reach a contract with the Union. (Tr. 941: 1-25; 942: 1.)

Starting with the first session, the Union slowed the negotiations. As indicated in *M&M Contractors*, 262 NLRB 1472 (July 30, 1982), Unions have also been found to have delayed bargaining. For the first time in Sunbelt’s experience negotiating with unions, Sunbelt did not receive an initial proposal from the union before the first negotiation session. (Tr. 161, 19-24.) Instead, the Union waited until the first negotiation session to present a draft contract that the Union compiled from contracts with Sunbelt in Michigan and northern Illinois. (Tr. 153: 3-25; 154: 1-9; GCX 6a.) However, the Union could not identify which of the many contracts that Sunbelt has in Michigan was used for the draft contract for Franksville. (Tr. 164: 22-25; 165: 1-

6.) Sunbelt explained to the Union during the negotiations that each PC “stands alone” and contracts are not identical. (Tr. 167: 24-25; 168: 1-2; 401.) The Union testified that no two contracts are identical.⁸ (Tr. 401: 25; 401: 1-3.) Therefore, the contract for the Franksville PC did not have to be identical. As the record regarding the first negotiation session demonstrates, the ALJ failed to blame the union for slowing down the negotiations by not providing the draft contract until the first negotiation session.

In addition to the draft contract, the Union proposed the “Negotiating Committee Grounds Rules” (“Ground Rules”) to Sunbelt at the first negotiation session, rather than in advance of the session. (GCX 15; Tr. 28: 7-25; 29: 1-6.) These Ground Rules demonstrate the Union was unprepared. Point 3 had the wrong name of the employer, and Sunbelt informed the Union of error during the negotiation session. (Tr. 951: 2-7.) Point 4 limited caucuses to 20 minutes. Limiting caucuses to approximately 20 minutes was not acceptable to Sunbelt because some proposals take five minutes to draft and others more than 20 minutes. Sunbelt believed that whatever time is required to draft an acceptable proposal should be used. (Tr. 950: 2-25; 952: 1-23.) Point 5 required “negotiating sessions should average around 2 hours not to exceed 3 hours.” Aside from the first and the July 9, 2019 sessions, all of the sessions exceeded three hours. (GCX 5; Tr. 1204:13-20.) Point 7 requires “[t]he parties shall decide all language proposals before discussing wages.” Mr. West, the spokesperson and lead note taker for the Union, agreed that there was “no requirement for Sunbelt to negotiate wages before negotiating the noneconomic provisions of a Collective Bargaining Agreement.” (Tr. 463: 6-14.) Point 8 required the parties not to raise “[n]ew issues . . . after the second meeting between the parties, unless mutually agreed upon.” Point 8’s requirement easily could have resulted in an early

⁸ The Union agreed that one of the differences between the contracts from Illinois and Michigan was with respect to their on-call provisions. (Tr. 401: 21-24.)

impasse for the Franksville negotiations. Nothing in both versions of the Ground Rules required more than one negotiation session per month. However, the ALJ recommended order requires it. Based on the record, the ALJ's reliance upon the Ground Rules as the start to describing how "the Company continued a pattern of frustrating the negotiations. . . ." is unfounded. (ALJD 25: 12-16.)

The ALJ also incorrectly concluded that there was uncorroborated credible evidence that the Union was unprepared for negotiations. (ALJD: FN 29.) Contrary to the ALJ's decision, Mr. Ervin admitted that during one negotiation session, the Union identified 13 provisions of the CBA that it believed were open for negotiations, only to be told that many of the provisions had been TAed. (Tr. 277, 14-19.) Respondent's Exhibit 40, page 572 also clearly demonstrated how unprepared or disorganized the Union was for negotiations. Mr. Buffalo first identified Respondent Exhibit 40, page 572 as the Ground Rules given to Sunbelt on May 22, 2018, but when presented with GCX 15, he was not sure. (Tr. 1205: 14-25; 1206: 1-25; 1207: 1-13.) Arguably, the two versions of the Ground Rules and Mr. Buffalo's testimony support Mr. Anderson's statement and Sunbelt's affirmative defense that the Union was unprepared and delayed negotiations. In spite of Mr. West's statement about negotiating wages and the Union's Ground Rules, the Union, with the support of the ALJ, now complain that Sunbelt did as the Union initially proposed.

As admitted by Mr. West, the union listened to verbal proposals from Sunbelt, but demanded for them to be presented in writing before they would be considered. (Tr. 345, 12-25; 346: 1-4.) Written proposals rather than verbally providing the proposals slowed down the negotiations. The tension between Mr. West and Mr. Buffalo over whether the proposals would be provided in Word to Sunbelt as requested is laid out in Mr. West's notes from June 26, 2018.

(GCX 5b p. 3.) Mr. Buffalo agreed to sending the Word document, but Mr. West disagreed.

(GCX 5b p.3.) Significantly, the ALJ and the Union failed to explain how having the negotiations at the union hall as demanded by the Union would improve the speed of the negotiations based on the Union's demand for non-verbal proposals. Arguably, having to use a portable printer, rather than the PC's printer, for printing the required written proposals would have slowed down negotiations.

Taking the cue from the General Counsel's brief, the ALJ concluded that Sunbelt's caucuses were prolonged and "unproductive." (ALJD 26: 18; GC Brief 1.) However, the ALJ failed to review the General Counsel's exhibits 6b, 7a-f and 7h that represent only some of Sunbelt's proposals after caucuses and resulted in the lengthy tentatively agreed to provisions in GCX 7g produced by Sunbelt to the Union on January 16, 2019.⁹ As an example of how Sunbelt was "frustrating" negotiations, the ALJ states that the January 16, 2019 draft of the CBA did not contain articles that matched the Union's May 22, 2018 proposal, and the table of contents was not included. (ALJD 13: 4-5.) The ALJ neglected to point out that the parties had deleted or combined some proposals. (GCX 7g.) After January 16, 2019, Mr. West's notes contain references to numerous proposals from Sunbelt either in general terms or with specific article numbers. (GCX 5h-5k.) Sunbelt also provided during negotiations for discussions with the Union a copy of its "Take 10" safety form that all employees use on a daily basis and copies of

⁹ The ALJ incorrectly stated that "On January 7, Ervin reiterated the Union's December 10, 2018 request for a comprehensive counterproposal." (ALJD 13, 1-2 (emphasis added).) The request from Mr. Ervin instead was "In our last bargaining session I asked if you could get me Sunbelt's version of the agreement in its entirety to the present. I think we are far enough along to work off of some comprehensive documents. We are requesting the summary by January 21st so that we have time to review it prior to our January 28th negotiations meeting." (GCX 7g, p. 1 of 17.) Clearly, there was no request for a comprehensive counterproposal. Significantly, Sunbelt's response was made on January 16, 2019, five days early, with the draft CBA. (GCX 7g, p. 1 of 17.) Again, demonstrating that Sunbelt was not attempting "to drag out the negotiations" and demonstrating how Sunbelt had to respond in advance of negotiations sessions, but the Union could wait with draft contracts until the day of negotiations.

Respondent's Accommodation Form and safety quiz. (Tr. 258: 3-20; 368: 1-7; 382: 22-25; 383: 1; GCX 5f: 4; R 7: 01296, 01521: R. 8: 01412.) The ALJ claimed that on August 30, 2018, Sunbelt caucused twice for more than 90 minutes, but it did not have any new written proposals. (ALJD 25: 18-20.) However, the record contradicts the ALJ's claim. A review of GCX 7c reflects proposals dated August 30, 2018 that were given to the Union after each caucus. The ALJ also claimed that on February 21, 2019, Sunbelt allegedly caucused from 9:15 to approximately 1 pm. (ALJD 25: 21-22.) Again, the evidence contradicts the ALJ's claim. A review of Mr. West's notes indicate that there were times between 9:15 and 1 pm that Sunbelt and the Union had face-to-face negotiations. (GCX 5i.) The ALJ also ignored that Sunbelt provided the Union on February 21, 2019 with the summary of tentatively agreed to provisions that could not be produced on February 19, 2019. (GCX 11.)

The ALJ claims that on October 23, 2018, February 8, and March 21, Sunbelt spent "chunks of their caucus breaks to perform work or speak with customers." (ALJD 26: 22- 25.) The ALJ failed to define "chunks of time," and the General Counsel's exhibit 5f and the testimony from the Union do not support the ALJ's claim. For example, Mr. West's notes from the October 23, 2018 negotiation session do not reference any conversations between Sunbelt's negotiation team and customers. (GCX 5f) With respect to the negotiation session on February 8, 2019, Mr. Ervin testified that he saw Mr. Mayfield speaking/socializing with a vendor for "[a] few minutes." (Tr. 91: 8-21.) Mr. West's notes reflect that Sunbelt may have spent seven minutes at the most with the "vendor," but Mr. West was unsure if the unknown vendor had asked a business-related question of someone on Sunbelt's negotiation team. (Tr. 397: 3-23.) The evidence for Sunbelt's discussion with the "vendor" does not amount to a "chunk of time." Instead, it appears to be someone on Sunbelt's team made a brief response to an inquiry from

someone who walked up to the rental counter—not calculated to intend to impede the progress of negotiations. Mr. West agreed that getting a customer’s orders is important for keeping the business going at the Franksville profit center for all of the employees including the bargaining unit members. (Tr. 422: 13-18) The ALJ incorrectly determined that Anderson was “often diverted” to store situations that arose. (ALJD: FN 31; Tr. 370; 13-22)¹⁰ The ALJ incorrectly concluded that during the October 23, 2018 negotiations that the Union negotiators were frustrated by the Company’s “blanket discussions” and the length of the Company’s caucuses. (ALJD: 12, 5-8; FN 47.) Nowhere in Mr. West’s notes for the October 23, 2018 session is there a reference to “blanket discussions” and the “length of the Company’s caucuses.” In direct contradiction to the ALJ’s conclusion that Sunbelt had “blanket discussions” and the “length of the Company’s caucuses,” Mr. West’s notes for the October 23, 2018 state that at 11:36 the “Meeting Ends Amicable.” (GCX 5f.) The March 21, 2019 session involves an allegation that Mr. Bogardus¹¹ was “working counter/on the computer” for maybe “5, 10 minutes.” (Tr. 94: 16-23.) However, Mr. Ervin did not offer any evidence as to what Mr. Bogardus was doing.¹² Therefore, the ALJ cannot assume that Mr. Bogardus was using those few minutes for something unrelated to the negotiations. Therefore, there is nothing in the record to support the ALJ’s conclusion that Sunbelt’s alleged actions that involved a de minimus amount of time were

¹⁰ Contrary to the cite in the ALJ’s determination, Tr. 919 does not state that Mr. Anderson “was often diverted to store situations that arose.” Instead, it states that Sunbelt’s negotiation team used Mr. Anderson’s office for caucuses. The records indicates there are two times during negotiations that Mr. Anderson had to address “store situations.” During one negotiation session during the winter when the heat in the PC conference room was not warm enough so Mr. Anderson brought in a portable space heater. (Tr. 1047.) There was one negotiation session when one of the men’s toilets was not working properly after a member of the Union’s negotiation team used it even though it had never had a problem before then. Mr. Anderson simply put the chain back on the flush handle. (Tr. 1050). Obviously, these two minor issues do not amount to Mr. Anderson being “often diverted to store situations” and were not cited by the ALJ.

¹¹ GCX 5j contains the incorrect spelling, Beau, for Mr. Bogardus’s nickname, “Bo.” (Tr. 94: 18-19.)

¹² Mr. Ervin testified that he did not “believe” that Sunbelt came back with proposals after the caucus and Mr. Bogardus “working on the computer.” However, Mr. West notes clearly indicate Sunbelt provided six proposals after the caucus. (GCX 5j.)

“clearly calculated to impede the progress of negotiations.” (Tr. 26: 24-25.)

2. ALJ failed to review record evidence of Sunbelt’s economic proposals.

The ALJ’s conclusion that Sunbelt’s negotiators unlawfully refused to discuss the Union’s wage, health and pension proposals for over four months is specious. (ALJD 26: 30-31.) In *United Techs. Corp.*, 296 NLRB 524 (1989), the case cited by the ALJ, the parties had 12 bargaining sessions in which “the Respondent had not agreed to any of the Union’s proposals and had yet to submit any counterproposals.” *United Techs. Corp* is distinguishable from the current situation because Sunbelt provided the Union with a health¹³ and a retirement (401k) proposal before the first negotiation and discussed the health and 401k plan on August 30, 2018, December 10, 2018, February 8, 2019, March 21, 2019, April 30, 2019, and June 5, 2019 (R. 7: 1236; R. 8: 01413-01417; R. 40: 000651, 000654, 000656; GCX 5h; Tr. 321: 9-18; 322: 19-23; 399:9-13; 400: 5-14.) Sunbelt also provided the union with a list of which bargaining unit employees participated in the 401k and Sunbelt’s health insurance plan. (Tr. 436: 1-125.) Sunbelt’s position on its 401k and health insurance plan constituted no more than “hard bargaining” and did not violate the Act. *Pleasantview Nursing Home, Inc.*; citing *NLRB v. Gibraltar Indus.*, 653 F.2d 1091, 1096 (6th Cir. 1981)(citing *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1200 (6th Cir. 1979).

Likewise, the ALJ erroneously stated that “The Company continued a pattern of frustrating the negotiations over the noneconomic issues, which [sic] continued after the February 8 session.” (ALJD 25: 15-17.) Apparently, the ALJ did not review the negotiation

¹³ Sunbelt’s “health” proposal included insurance plan documents for medical, life, accident, critical illness, long term and short term disability, travel, and vision and the flexible benefit plan. Sunbelt’s retirement proposal include the plan document for the 401k. Sunbelt also provided the Union with the plan document for the wellness plan and benefit rates. (R. 16, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, and 35)

notes from the Union and Sunbelt that contradict his statement. The negotiation notes demonstrate that during 2018 the parties negotiated economic proposals such as boots, overtime, paid time off, holiday pay, and overtime rate for weekends and holidays during 2018. (Tr. 202: 14-18; 203: 4-9; 21-24; 210: 10-13; 214: 2-6; 216: 3-7; 377, 14-17; 410: 19-25; 411: 1-8; 414: 13-19, 25; 415: 1-7; 1208: 16-23; 1212: 17-20; 1216: 1-11; R. 8: 01414.) The ALJ incorrectly concluded that Sunbelt “refused to discuss [wages, health insurance, and pension] proposals at that session or the next three that followed and it was not until June 5, after the Region had already announced its merit determination in this matter, that it tendered a wage counterproposal.” (ALJD 25: 17-19.) Contrary to the ALJ’s conclusion, a wage proposal was made by the Union on February 8, 2019, and wages were negotiated on March 21, 2019, April 30, 2019 and June 5, 2019 (GCX 5k; Tr. 333: 14-16; 334: 11-21; R. 8: 13-14; R. 40:0656; Tr. 321:1-18; 323: 13-25; 324: 1-2; 421: 8Tr. 977: 19-25; 978: 6-8.) As demonstrated by Mr. West’s testimony, Sunbelt was engaged in a “bona fide effort to bargain collectively” by providing support for its first year wage freeze proposal through information from some economic experts. (Tr. 429: 8-25; 430: 1.) Prior to negotiating the provisions, the Union requested and received from Sunbelt the positions, hourly rate, and hours worked for the bargaining unit members. (Tr. 4: 938: 25; 939: 1-5.)

To find a violation of the Act, the Board must ultimately determine “whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Pub. Serv. Co. of Oklahoma*, 334 NLRB 487, 487 (2001). Without a basis in the record, the ALJ concluded it was the latter. In support of his conclusion, the ALJ erred by stating that “Contrary to what Hill told the Union’s negotiators that morning, Mayfield conceded that he told her prior

to the meeting that he would be unable to attend. (Tr. 59-76, 314, 1018.)” (ALJD 11, FN 42.) A review of the transcript clearly showed that Mr. Mayfield testified that he did not “recall” if he knew ahead of time that he would not be attending the September 2018 negotiation session. (Tr. 1018, 8-19.) If he could not recall if he knew ahead of time that he would not be attending the September 2018 negotiation session, he could not have told Hill prior to the meeting that he would be unable to attend. The ALJ also incorrectly found that Sunbelt’s negotiators “refused to consider, without explanation, the Union’s dues checkoff proposals.” (ALJD 26: 39-40. (emphasis added))¹⁴ It is significant that the Union made only one proposal on December 10, 2018 regarding dues check off, not proposals as indicated by the ALJ. (Tr. 79: 8-16; GCX 6e.) During the negotiation session, Sunbelt made a proposal regarding dues being paid by members directly to the Union and explained that administrative costs are associated with Respondent collecting and paying the dues to the Union. (GCX 5j: p. 6; Tr. 397: 24-25; 398: 1-25; 399: 1; 465: 7-25; 466: 1-6; 953: 20-25; 954: 1-5; 10227-13.). The Union’s position on dues deductions was that Sunbelt’s contracts with some other unions had the provision they wanted. (Tr. 111: 11-19.) On February 21, 2019, Sunbelt provided the Union a written proposal relating to dues, but it had discussed the Union’s proposal earlier. (GCX 7h.) Therefore, the ALJ incorrectly concluded that Sunbelt “refused to consider, without explanation, the Union’s dues checkoff proposals.” Moreover, Sunbelt’s “insistence on a bargaining position is not of itself a refusal to bargain in good faith....” *Atlanta Hilton & Tower*, 271 NLRB at 1603.

3. The Union wasted valuable negotiation time.

If the Union and the ALJ accuse Sunbelt of wasting time, the Union, as outlined in its negotiation notes and its refusal to allow Sunbelt to provide verbal proposals or e-mail, should be

¹⁴ Presumably, the ALJ’s statement was based on Mr. Ervin’s erroneous response to the General Counsel’s attorney’s question if Sunbelt provided a justification for rejecting the proposal. (Tr. 90: 7-11.)

accused of wasting time in negotiations.¹⁵ It repeatedly discussed topics that it admits were not relevant to negotiations, but the ALJ ignored any of the Union's delaying tactics in his decision. Mr. West acknowledged that "We [Local 139] start out bullshitting about our safty [sic] members.," and he testified that "we were diverting from the purpose of negotiating and we were generating conversation." (Tr. 394, 10-11; GCX 05h.) However, Mr. West stated that the Union did not waste time in one negotiation session when he brought up that he was a Marine and Mr. Mayfield thanked him for his service. (Tr. 463: 15-24.) However, Mr. Ervin testified that the Marine topic was not relevant to any of the negotiations. (Tr. 271:17-25; 272: 1-5.) Significantly, when Mr. Ervin discussed the Haymarket Square riot, the union believed that "a history lesson in the middle of negotiations that [it thought were] not moving along fast enough [was] appropriate." (Tr. 400: 23-25; 401: 1-11.) Mr. West further admitted that during a negotiation session he spent time accusing Sunbelt that it did not respect him, but in response, Sunbelt responded that, "Sir. You are a Marine. Sunbelt respects you." (Tr. 463: 25; 464: 1-6.) Negotiations were also delayed because several of Sunbelt's proposals, including, but not limited to, management rights and discrimination, had to be reviewed by the Union's attorney who did not attend the negotiations. (Tr. 193: 1-25; 194: 16; 362: 17-24; 241: 15-20 (June 26, 2018).) Buffalo wasted time at a negotiation session by failing to show up with his notebook and Sunbelt's proposal, and at other occasions, the Union talked amongst themselves because their negotiation notes did not match. (Tr. 920: 17-22; 1044: 9-15; GCX 5j, page 5 of 6¹⁶.) The Union's president attended one negotiation session in which, without asking if Respondent had an interest in having business on the Foxconn project (a large project in Wisconsin), he stated

¹⁵ Sunbelt respectfully requests that the Board find that the Union's delay falls within the *Bottom Line Enters.*, 302 NLRB 373 (1991).

¹⁶ Mr. West's notes state that "Steve asks for 2-21-19 proposal."

that the Union could give Respondent the Foxconn business. Respondent was not interested in pursuing the Foxconn business, and it was not in the budget prepared for the Franksville PC. (Tr. 920: 24-25; 921: 1-9; 972; 7-25; 973: 1-9.)¹⁷ During the negotiations on March 21, 2019, Sunbelt had to wait for Mr. West who was not available for eight minutes. (R. 7: 1527.) The draft CBA that the Union provided in June contained provisions that were supposedly open even though they were TAed in February 2019. (R. 7: 01374.) These numerous tactics by the Union were ignored by the ALJ.

Several times, the ALJ's decision ignored testimony. For example, the ALJ incorrectly concluded that the accuracy of the union's bargaining notes was undisputed. (ALJD 7: FN 27) By doing so, he ignored the testimony by Mr. West that not all of the Union's bargaining notes in GCS 5A and 5B were accurate and that significant statements by Sunbelt's negotiation team were not included in his notes. (ALJD 7, FN 27; Tr. 171: 12-17; GCX 5a and 5b; Tr. 343: 19-25; 344: 1-17; 347: 13-25; 348: 19-23; 349: 10-21; 351: 7-10, 20-23; 353: 12-25; 354: 1-7; 355: 2-24; 356: 14-25; 395: 18-20; 470: 8-13.) For example, Mr. West's notes in GCX 05i do not include Mr. Ervin's version of the events for February 21, 2019—that “we had to end the session because Jason Mayfield had to leave.” (Tr. 105, 5-8.) Based on the alleged “accuracy of the Union's bargaining notes, the ALJ relied solely on Mr. West's notation and no testimony to explain the notation that “Pat Hill too busy” to have a negotiation date prior to March 21, 2019. (ALJD 14, 23-24.) Mr. West conceded that his notes were not word-for-word what was spoken during the negotiations. The ALJ then ignored the testimony of Mr. Ervin regarding the Union's response to Sunbelt's request to end the negotiations for the day. The ALJ stated that “[t]he Union

¹⁷ The ALJ incorrectly stated that “According to Bogardus, the Company was not interested in such a business opportunity [Foxconn project].” (ALJD 14 FN 61) Instead, Messrs. Mayfield and Bogardus stated that Sunbelt was not interested in the Foxconn project. “Foxconn was never a project that [Sunbelt] sought out or identified as a job we intended to support. (Tr. 973: 6-9.)

objected” to ending the negotiations. (ALJD 14, 26.) However, Mr. Ervin stated in response to the General Counsel’s attorney’s question regarding ending the negotiations for the day: “How did the union respond to that? We agreed.” (The ALJ Tr. 105, 5-10.)

Because the ALJ concentrated on evidence about Sunbelt’s unavailability, he ignored evidence about the Union’s unavailability. The Union was only available on December 10 and 18, 2018 because they had holiday meetings throughout the state with members. (Tr. 270: 23-25; 271: 1-16.) Contrary to Mr. Ervin’s e-mail, Mr. West’s negotiation notes for October 23, 2018 (GCX 05f) do not reflect that the parties had agreed to December 18, 2018 for one of two negotiation dates. (GCX 9.)

Even though the ALJ failed to mention the numerous significant contract provisions that the parties agreed to, the Union agreed that all of the parts of a CBA are important, including, but not limited to, the grievance procedure, paid time off, holiday pay, overtime rate for weekends and holidays, payday, strikes and lockouts, alcohol testing, hours of work, lunch period, just cause, discrimination, management rights, times for shifts, and dues and assessments were articles for the CBA that the parties tentatively agreed to. (Tr. 202: 14-18; 203: 4-9; 21-24; 210: 10-13; 214: 2-6; 216: 3-7; 377, 14-17; 410: 19-25; 411: 1-8; 414: 13-19, 25; 415: 1-7; 1208: 16-23; 1212: 17-20; 1216: 1-11; R. 8: 01414.) The negotiation and agreement to these numerous significant contract provisions demonstrate that Sunbelt was not just “going through the motion” of bargaining.

The ALJ’s reliance on *Garden Ridge Mgmt., Inc.*, 347 NLRB 131 (2006) and *Calex Corp.*, 322 NLRB 997 (1997), enfd. 144 F.3d 904 (6th Cir. 1998) is misplaced. Unlike *Garden Ridge Mgmt., Inc.*, Sunbelt provided explanations to the union’s request to meet more frequently. In response to the initial request to negotiate, Sunbelt was facing the end of its fiscal year and

asked for the May negotiation date. (Tr. 915:12-25; 916: 1-7.) The ALJ made an unsupported claim that the July 2018 negotiation session was postponed because of a funeral for the father-in-law of a PC manager at a Wisconsin location, “but, contrary to Hill’s representations, none of the bargaining team members attended that event.” (ALJD 24: 27-28.) As he stated in the e-mail exchange that is part of GCX 26, it appeared that he requested the postponement so he “can attend and/or support the PC....” Mr. Bogardus testified that ultimately he did not attend the funeral or visitation, but he was not aware of anyone from the Sunbelt bargaining team who did attend the funeral or visitation. (Tr. 721: 6-25; 722: 1; GCX 26.) The ALJ failed to note that Mr. Bogardus did “run the office [of the PC]” while others at the PC attended the funeral. (Tr. 730: 6-13.) Mr. Bogardus also testified that due to it being “the middle of the vacation season,” he could not move employees from other PCs into the PC affected by the funeral. (Tr. 730: 6-22.) If ultimately Mr. Bogardus and other Sunbelt negotiation team members could not attend the funeral after informing Hill that they would, the ALJ had no evidence to support his conclusion that the July negotiation session was “allegedly” cancelled due to the funeral.

The ALJ found fault with Sunbelt for cancelling the January 2019 negotiation session based on the timing of an adoption hearing involving Mr. Bogardus and his grandson. (ALJD 24: 29-33.) The ALJ stated that Hill waited a week after being told by Mr. Bogardus that the hearing might “be continued” before telling the Union of the conflict. Due to the uncertainty of Mr. Bogardus’s conflict, it is not a surprise that the Union was not contacted earlier. However, the ALJ again relied on the General Counsel’s brief for his misplaced conclusion. As clearly stated in GCX 10, Hill notified Mr. Ervin that she “was just notified by Mr. Bogardus and Mr. Mayfield that the negotiations will need to be moved from January 28th.” (GCX 10, Page 3 of 3 (emphasis added).) The remaining two pages of the exhibit outline further communications

between Mr. Ervin and Hill to schedule a new negotiation session. Even though GCX 73 indicates that Mr. Bogardus's hearing was continued, Mr. Mayfield's conflict remained, and, therefore, the negotiation session had to be rescheduled.

The ALJ ignored the evidence that demonstrated that the Franksville PC was different from any other PC in Wisconsin, northern Illinois and Michigan. He ignored the evidence that every PC has its own budget and territory. (Tr. 167, 24-25; 168: 113.) The ALJ concluded that Sunbelt refused to bargain in good faith by failing to make its bargaining team available on more frequent occasions." (ALJD 24: 43-44.) However, the ALJ failed to consider why Sunbelt was not available to have the first negotiation session earlier.

4. ALJ incorrectly concluded Sunbelt did not provide justifications/explanations for its proposals.

Mr. Buffalo testified at length that every proposal that Sunbelt made was important and that Sunbelt provided explanations/justifications for its proposals. (Tr. 1207-1248.) After initially denying it, Mr. West ultimately admitted that Sunbelt provided justifications for its proposals including overtime, dues checkoff and boots. (Tr. 465: 2-25; 466: 1-23.) Mr. West admitted that Sunbelt provided specific examples of where it had contracts that did not have dues deduction provision. (Tr. 397: 24-25; 398: 1-17.) Mr. Buffalo also admitted that the union did not have any information that Sunbelt would not reach a contract with the union. (Tr. 1253.) Mr. West testified that based on rumors that Sunbelt did not intend to reach a contract he had two investigations conducted and neither one produced evidence to substantiate the rumor. (Tr. 467: 12-25; 468: 1-8.) If Messrs. Buffalo and West did not have evidence that Sunbelt would not reach a contract, the ALJ should not have concluded that Sunbelt would not reach a contract. The ALJ looked at the number of sessions to determine that there were not enough sessions. Sunbelt's negotiation team could not meet until May 22, 2018 because it was working on the

financial issues relating to the end of the fiscal year that runs from May 1st to April 30th. Jason Mayfield, the Regional Vice President and the lead negotiator for Sunbelt, is no stranger to the negotiation process. He is responsible for Region 9 that stretches as far west as the Dakotas, as far east as Michigan and every state in between, has seven district managers, numerous profit centers and has negotiated over 60 labor contracts. (Tr. 3, pp. 625, 672; Tr. 4, pp. 1000-1001, 1082.) He worked on the budgets for each profit center between February and March. (Tr.4, p. 1037.)

The ALJ has no record evidence to support his reference to *Bryant and Stratton Bus. Institut.*, 321 NLRB 1007, 1042 (1996)¹⁸ that Hill was delaying negotiations because “respondent’s counsel being a ‘busy and successful lawyer.’” The ALJ speciously claimed that “[t]he Company’s explanation for spreading out bargaining sessions was either that Hill had to travel to the sessions from Florida and the rest of its bargaining team was otherwise busy with operational responsibilities.” (ALJD 24: 35-37.) However, Mr. Ervin testified that Sunbelt never raised Hill’s travel as a reason for “spreading out bargaining sessions.” (Tr. 174: 10-15.) The ALJ also cherry-picked the words in GCX 11, rather than citing the entire exchange, to fit his goal of finding evidence to support his citing of *Bryant and Stratton Bus. Institut.* Instead of mentioning that for the first time since the February 8, 2019 negotiation session, Ervin asked Hill on February 19, 2019, “Is there any chance we could get your version of the agreement thus far for review tomorrow before our meeting on Thursday (February 21, 2019)? Thanks [sic]” (GCX 11 (emphasis added).) Instead, the ALJ did not disclose that Ervin made the request understanding that it was made with less than a 24-hour notice and that Hill responded with an apology, “I am sorry, but I could not get the updated CBA done.” (GCX 11.) Mr. West’s

¹⁸ The ALJ’s quotation from *J.H. Rutter-Rex.*, 86 NLRB 470 (1949) cannot be found in the NLRB decision.

negotiation notes do not indicate that Local 139 requested that Hill prepare the updated version of the CBA before the February 21, 2019 negotiation session. (GCX 05h.) Additionally, the ALJ's assertion that during the February 21, 2019 negotiations Hill stated that "she was too busy" is based solely on West's brief note on GCX 05i (Page 6 of 6) that did not reflect that quote and presumably the General Counsel's brief. (GC Brief at 23.) No witness was asked if it was Sunbelt or Hill who was "too busy," The pure speculation by the ALJ as to what was meant by a notation in Mr. West's negotiation notes is not sufficient to support his conclusion. Therefore, the evidence does not support the ALJ's conclusion that Hill/Sunbelt was delaying negotiations.

The ALJ incorrectly stated that during the February 21, 2019 session that Sunbelt was confused as to which version of the CBA that the parties were working with. (ALJD 14, 13-15.) Instead, the testimony is clear that Sunbelt requested clarification of the Union's version of TAed items that included open items that already had been TAed. (Tr. 403 5-25; 404: 1-25; 405: 1-2.) Sunbelt was accused of jumping around from one article to another with no real order or organization. (Tr. 493: 15-21.) However, Mr. West's notes clearly demonstrate that Sunbelt negotiated the articles in numerical order. (GCX 5i.)

Contrary to the allegations and the ALJ's conclusion, Sunbelt explained why it wanted a provision in the CBA involving GPS and a prohibition against GPS jamming devices. Sunbelt also discussed with the union the possible inaccuracies of GPS, but the proposal was tentatively agreed to. (Tr. 350, 9-25; 351: 1-11; 353: 2-25; 355: 2-24; 356: 14-21.)

Before the first negotiation session, Sunbelt also provided the union with the Employee Information Handbook and indicated that the handbook would be updated and provided in advance to the union before members received it. (Tr. 32-51: 12-25; 352: 1-2.) Sunbelt also

provided the union with a paid time off proposal for the CBA that was different from the policy in the handbook. (Tr. 354: 8-20; R 36) Mr. West's notes indicate that Sunbelt's request to have a Word document to easily make revisions could "move the negotiations along."¹⁹ Mr. Ervin also admitted that having the proposals exchanged electronically prior to the negotiation sessions would have made the negotiations move faster. (Tr. 163, 10-18.) After less than an hour and a half of meeting, it became obvious that Sunbelt could not make proposals regarding the draft CBA that it saw for the first time that day. Mr. Buffalo then suggested that Sunbelt needed to review the draft CBA and then the parties could meet, and the draft CBA was sent to Sunbelt in Word format. (GCX 05a; Tr. 357: 20-25; 358: 1-4.)

Because the Union was not familiar with Sunbelt's business, Sunbelt discussed with the Union that hiring of veterans was a priority and that it was very involved in the Gary Sinese program. The parties negotiated the bulletin board provision and tentatively agreed to it. The parties negotiated a provision that covered what would happen if a mechanic's tool broke or was stolen. (Tr. 361: 6-25; 362: 1-5.) Sunbelt proposed letting mechanics use their iPhone that was provided by Sunbelt to take photos of their tools, rather than having a written inventory list that the Union proposed. (Tr. 361: 16-25; 362: 1-5.) Sunbelt provided the Union with provisions for management's rights and just cause, but unfortunately, the Union delayed negotiations that day because it would not discuss them without first sending the proposals to their attorney who did not attend the negotiations. (Tr. 362: 13-25; 363: 1-12) Sunbelt proposed providing computer and diagnostic tools for the mechanics, and the parties discussed the proposal. (Tr. 363: 13-21.)

¹⁹ Mr. West's strong dislike for any electronic document was clearly displayed when he discussed Sunbelt's request at the first negotiation session for the union's proposal being provided to Sunbelt in the Word format. When asked if the Word document was requested so written revisions could be created, he initially stated that "What [Sunbelt] wanted to do was to be able to manipulate the proposal that we had sent, yes." He then admitted that Sunbelt did not use the word "manipulate," but he was expressing his opinion.

The parties discussed and tentatively agreed to a bulletin board for the members in the lunchroom. (Tr. 363 22-25; 364: 1-3.) Uniforms, a boots allowance, safety glasses, PPE, site specific requirements by customers, were negotiated. (Tr. 364: 6-19; 366: 5-24.) At a session, the parties discussed the Family and Medical Leave Act and paid time off; and Sunbelt provided the Union with a copy of its accommodation form. (Tr. 367: 22-25; 368: 1-10.) The Union admitted that it does not require that all of its contracts be identical. (Tr. 372: 1-3.)

The ALJ improperly blamed Sunbelt for “rejec[ting]” on June 5, 2019 the Union’s requests to sign-off on the Union’s “tendered [] written sign-off document” of the tentative agreements. (ALJD 27: 2-4.) The Union demanded that Sunbelt sign off on the document, but Sunbelt requested to sign the document after verifying the accuracy of the document. The ALJ incorrectly deemed Sunbelt’s decision not to identify the “inaccuracies in the table of contents” as a “bad faith approach [that] stymied the bargaining progress reached up to that point to a screeching halt.” (ALJD 27: 6-8.) The ALJ failed to note that the Union could have e-mailed the document prior to the session if the Union wanted the negotiations to move along quickly. The ALJ also ignored the need to verify the accuracy of the provisions behind the table of contents before signing off on the table of contents. When Mr. McGowan, the Business Manager/President of the Union, demanded to review documents before approving them because he believed he could “trust but verify.” (Tr. 1261: 17-21.) If a provision needed to be deleted or added, then the table of contents would be inaccurate. A review of the negotiation notes clearly indicate that the parties spent several hours in productive negotiations. (GCX 5L.)

The ALJ also dismissed Sunbelt’s argument that the Union delayed negotiations on July 9, 2019 as being “baseless since [sic] she [Hill] left the June 5 session with a hardcopy of the draft with the tentatively agreed to items noted.” (ALJD 27: FN 97.) To reach his dismissal of

Sunbelt's argument, the ALJ ignored several salient points. First, the Union promised the Word document would be emailed to Sunbelt. (R. 40: 0601.)²⁰ Second, the "hardcopy of the draft" was 29 pages long (GCX 6G) and was not in the format of previous drafts of tentatively agreed to provisions. (See GCX 6A and 6D.) The earlier formats did not have a separate article on each page. Third, Article 18 includes Section 18.1 that merely states "TA," but it does not include the language that was agreed to. Section 18.3 indicates it was "Deleted," but it does not renumber the remaining sections. Section 18.4 includes language in bold that is irrelevant to what the parties ultimately agreed to. The remaining sections include "TA" and then a series of numbers without any explanation. All of those sections had to be compared to negotiation notes for accuracy. The ALJ decided to ignore a broken promise from the Union and blame Sunbelt for not doing needless work. It is ironic that ALJ concluded that Sunbelt was delaying negotiations by not producing the requested draft agreement in February with less than 24-hours notice and by expecting a promised electronic version before the July 2019 session of the Union's sign-off agreement, but the Union is not blamed for failing to provide a promised electronic draft agreement with adequate advance notice. Sunbelt is not credited for e-mailing five days in advance of the January deadline the draft agreement.

Here, the undisputed evidence establishes that Sunbelt bargained in good faith. As demanded by the Union, Sunbelt provided proposals in writing and with explanation/justifications that the parties agreed to. Thus, the totality of the conduct surrounding the negotiations overwhelmingly demonstrates that Sunbelt came to the bargaining table in good faith with every intention to reach an agreement, and, therefore, the ALJ's decision should be

²⁰ The ALJ incorrectly stated that "Hill requested and agreed to email Hill a Word pdf version of the Union's proposed CBA, including the agreed upon table of contents, prior to the next session on July 9." (ALJD 19, 4-6.) The record does not contain any reference to this event.

reversed and the Sections 8(a)(1) and (5) claims dismissed in their entirety.

C. The ALJ incorrectly concluded that Sunbelt’s reorganization violated Sections 8(a)(1), (3) and (5) of the NLRA.

The background to the reorganization was the Union’s bannering and inflatables that started in February/March of 2019. (GCX 5j; 420: 5-12.) The Union was not surprised that the bannering and inflatables of the customers for the Franksville PC created a decrease in business for the Franksville location. (Tr. 1264: 13-25; 1265: 1-5.) The Union claimed that the purpose of the bannering and the inflatables was to “negotiate an agreement with five members, five employees that [sic] wanted to be union.”²¹ (Tr. 1265: 9-12.) However, the banners did not indicate there were five employees who wanted to be unionized. (Tr. 1265: 13-15.)

1. The reorganization did not violate the Act.

The ALJ incorrectly concluded that Sunbelt’s reorganization violated the Act. His decision determined there was alleged animus towards the union and “the Company’s larger concern was the potential spread of unionization to its other Wisconsin PCs.” (ALJD 30: 1-2.) Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), after the General Counsel has shown the employer’s discriminatory animus, the employer must prove that the adverse action would have occurred absent protected activities. Contrary to the ALJ’s conclusions, the General Counsel failed to demonstrate “unlawful motivation” and Sunbelt has proven that the reorganization would have occurred absent protected activity. As outlined *supra*, the ALJ cannot prove “unlawful motivation” based on:

Bogardus [sic] various threats and plans to close the Franksville PC; his termination of Torgerson after the Union won the election; Anderson’s assistance in efforts to decertify the Union and his interrogation of an employee in connection therewith; Pender’s remarks to unit employees of union futility; . . .

²¹ The bannering and inflatables are in a separate matter filed by Sunbelt against the Union, 18-CC-240299.

[sic] and the Company [sic] persistent bad faith conduct during bargaining.
(ALJD 29: 37-42.)

Instead, the reorganized would have occurred based on the decrease of business caused by the Union.

Prior to June or July of 2018 the PC had between a 30 and 40 percent growth rate. (Tr. 1052: 1-3.) There is no evidence to contradict Mr. Anderson’s description of the growth rate. Significantly, the ALJ’s decision does not conclude that Mr. Mayfield, the only person to decide to reorganize the Franksville PC and the Region 9 Vice President who negotiated over 60 contracts, exhibited anti-union animus.

In addition to Sunbelt’s arguments *supra*, the ALJ has no proof that Anderson “deplet[ed] . . . the Franksville PC’s inventory during bargaining. . . .” (ALJD 29: 41.) Ms. Torgerson, the Franksville Profit Center Manager before Mr. Anderson,²² testified at length about Sunbelt employee Dan Atwell’s review of her PC because it had a high percentage of walk-in customers. He recommended to her to create a drive-through bay of the workshop “to get equipment loaded” and “reducing the size of equipment that would be offered to—and not have anything larger than a certain size forklift or certain size boom, et cetera.” (Tr. 811: 9-12.) Mr. Atwell’s recommendation was not implemented prior to her termination. (Tr. 811: 3-4.) The ALJ incorrectly concluded the testimony was not credible regarding that the “pull down” was the result of Atwell’s plan. (ALJD 7: FN 23.) In spite of finding her version of some events to be “credible,” the ALJ’s conclusion completely ignored Ms. Torgerson’s testimony regarding her knowledge of the Atwell plan. (ALJD 7: FN 21; Tr. 810: 13-25; 811:1-19.) Even though Ms. Torgerson did not implement the plan, Messrs. Bogardus and Anderson did to a limited extent in 2018. When Mr. Anderson became the Profit Center Manager, he recognized the profitability at

²² Ms. Torgerson testified that she was terminated for an inventory shortage of approximately \$16,000.00 and “the union was not helping my cause.” (Tr. 808: 13-17; 813: 12-21.)

his Franksville PC by having “a similar contractor base [to other Wisconsin PCs], but there was a base of smaller contractors, home builders and homeowners that could rent smaller equipment because it’s a pretty handy location right there off the 94, so we had a – we had a walk-in presence there that we didn’t have in other places”[in Wisconsin].” (Tr. 923: 22-25; 924: 1-2.) Mr. Anderson testified that Franksville generated “anywhere between 100 to \$150,000 a month in revenue simply from walk-in customers swiping credit cards.” (Tr. 1031: 4-9.) At the time of the hearing, Mr. Anderson’s current Fond du Lac PC had a tenth of [the Franksville walk-in] business. (Tr. 1031: 13-16.) Mr. Robert Rivera, the Waukesha Profit Center Manager testified that the Waukesha PC had 20 to 25 percent of its business from walk-in business, and Mr. Mayfield testified that the Franksville PC had 200 percent more walk-in business than the Waukesha PC. (Tr. 695: 16-25; 696: 1-10.). The Sunbelt witnesses’ testimony was disputed by the Union, General Counsel’s attorney or the ALJ. Based on Mr. Atwell’s report, in June of 2018, Messrs. Anderson and Bogardus moved between “2 and \$3,000,000 worth of [large] equipment” before Mr. Mayfield instructed to stop the transfer. (Tr. 1037: 23-25; 1038: 4-8.) Significantly, it was Mr. Mayfield who cancelled the equipment transfer and decided not to close the Franksville PC after the union election. (Tr. 923: 2-6; 1029: 4-25; 1030: 1-25; 1031: 1-25; 1032: 1; 1037: 18-25; 1038: 1-10 1081.) GCX 30 clearly shows that after the transfer of equipment the Variance for July to be positive. Therefore, the inventory was slightly changed to the more profitable, small equipment, and the ALJ erroneously concluded that the transfer was unlawfully motivated.

The will-call format for the Franksville PC was not original to Franksville. Mr. Mayfield was familiar with the type of profit center that the Franksville PC was reorganized into. It is undisputed that Sunbelt had other will-call PCs, and a competitor of Sunbelt’s, United Rentals

where Mr. Mayfield worked, also had the “model consistently throughout a thousand plus locations.” (Tr. 991: 6-18.)

Messrs. Anderson and Mayfield testified in detail about the profitability of large equipment versus small equipment, and that “smaller equipment generates more profit...” (Tr. 1031: 4-9.) Mr. Mayfield’s undisputed testimony based on his experience was that a larger piece of equipment would rent for more money than a small piece of equipment, but the smaller pieces of equipment will generate a greater return based on the purchase price of the equipment. For example, if Sunbelt had a piece of equipment “that cost \$10,000, over its life you could generate a 100 percent or a 200 percent return in the first year of useful life. A \$200,000 piece of equipment, you may only generate \$30,000 on its first year of life. Larger dollars, lesser returns.” (Tr. 937: 18-25; 938: 1-21.) In addition to Ms. Torgerson’s testimony about the Atwell model, Mr. Mayfield also explained that in 2018 Dan Atwell created a “model where he had broken down the different types of compositions and which ones produce the greatest return, and it was identified that that was an opportunity.” (Tr. 938: 14-21.)

The ALJ incorrectly concluded that the use of trucking companies likely increased due to Smith’s unavailability for overtime deliveries and then his termination on July 1. (ALJD 3: FN 5). Sunbelt had two other drivers, Mr. Tony Schuls was a driver in the bargaining unit who was terminated in May 2019. (Tr. 1069: 4-19.) Mr. Gary Stamm also was a driver who applied for and was transferred to the position of Equipment Rental Specialist. (GCX 31; Tr. 988: 9-17; 1118: 13-18.) Mr. Smith made himself “unavailable” for deliveries, it was not due to reaching his limit on overtime hours due to Department of Transportation regulations. (Tr. 1086: 14-25; 1087: 1-22)

2. The Union failed to negotiate the reorganization of the Franksville, PC.

During the August 8, 2019 negotiation regarding the reorganization of the Franksville PC, instead of negotiating the reorganization, the Union raised two safety concern, one involving a driver and another involving Mr. Mario Rivera. (Tr. 1048: 8-25; 1049: 1-10.) Mr. Anderson reviewed “very time-consuming” surveillance footage in an attempt to investigate the Union’s safety concern involving a driver, but he could not find the alleged incident. (Tr. 1048: 16-25; 1049: 1-10.) The investigation relating to Mr. Mario Rivera was handled by Ms. Rebel Strohmeier, Region Human Resources Manager, and she could not find evidence to support the claim. (Tr. 733: 14-25; 1142: 6-25; 1143: 1-25; 1144: 1-9.)

The Union failed to ask during the August negotiation sessions where the equipment that was 10,000 pounds or greater would be transferred to. (Tr. 991: 19-25.) All of the equipment that was 10,000 pounds or greater, with the exception of a saw cutter, was transferred from Franksville to other Wisconsin PCs. (R. 6; Tr. 992: 1-25; 993: 1-25; 994: 1-25.) Only five pieces of equipment were transferred in July of 2019, and the remainder of the equipment was transferred after the first negotiation session regarding the reorganization. (R. 6.) As of October 4, 2019, the Franksville PC did not have in its inventory any pieces of equipment that weighed 10,000 or more. (R. 6; Tr. 995: 16-19.)

During the negotiation session to discuss the reorganization of the Franksville PC, the Union did not ask when the big equipment would be removed, where the big equipment would go, how the equipment would be washed, who would perform preventive maintenance on equipment, or which pieces of equipment would be left at the Franksville PC. (Tr. 4, pp. 1049-50). Before May 1, 2018, the Franksville PC spent \$50,000 to \$60,000 for a tech on loan from Terex Services to repair equipment at the Franksville PC that was outside the skill set of the

current employees. (Tr. 4, p. 1036).

The ALJ ignored the testimony that Sunbelt asked the Union during the August 2019 negotiations whether it wanted to discuss the reorganization, but the Union failed to take advantage of that opportunity to negotiate the matter. (Tr. 986: 1-25; 987: 1-25; 988: 1-25; 989: 1-24.) His flawed analysis summarized what he termed to be the animus towards the Union by Messrs. Bogardus, Pender and Anderson. He outlined Mr. Bogardus's e-mails that demonstrated Mr. Bogardus's dislike for the unions. His faulty analysis of Mr. Pender's alleged anti-union statements is outlined *supra*. His invalid statement that Mr. Anderson depleted "the Franksville PC's inventory during bargaining" is outlined below. The ALJ ignored the Joint Stipulation of Facts and testimony that Mr. Bogardus was no longer the District Manager for the GT Division as of July 7, 2019. (Jt. Ex. 1; Joint Stipulation of Facts.) The ALJ also ignored Mr. Mayfield's testimony that he was the only Sunbelt employee who made the decision to reorganize the Franksville PC on August 5, 2019. Mr. Mayfield did not receive input from Messrs. Bogardus or Anderson or Ms. Gibson, all of whom the ALJ decided were anti-union. (Tr. 990: 3-7; ALJD 29: 37-42; 30: 2-3.)

3. The Franksville PC did not continue the same operations after the reorganization.

The ALJ erred in concluding that the Franksville PC "continued the same operations after the reorganization." (ALJD: 29-30.) The Franksville PC was reorganized into a will-call PC with equipment weighing less than 10,000 pounds or to use Mr. Robert Rivera's testimony, "because of the volume of that store has such high cash transactions anyway, that we're going to basically be more or less like a satellite location." (Tr. 1095: 5-19.) At the time of the hearing, the Franksville PC had an Equipment Rental Specialist, Outside Sales Representatives, Operational Manager (Assistant Manager) and a Service Manager. The Service Manager who

was responsible for “administrative work, filing warranties, doing work orders, billing customer damage, ordering parts, checking in equipment.” (Tr. 1097: 6-13.) To check in rental equipment that is returned by a customer or transferred from a different location, the Service manager check it to be “sure everything is in safe operating conditions” and to clean it. (Tr. 1097: 14-21.) The service manager uses a Safety Data Sheet to be sure “each piece is safe and operating before the next rentals.” (Tr. 1097: 22-25; 1098: 1-2.) The Service Manager at the Waukesha PC has the same job responsibilities as the Service Manager at the Franksville PC. (Tr. 1098: 8-10.) Mr. Robert Rivera, the part-time Profit Center Manager for Franksville, Mr. Anderson, when he worked at the Franksville PC, Equipment Rental Specialist, and Outside Sales Representatives delivered equipment weighing under 10,000 pounds to customers before the reorganization and after. (Tr. 848: 17-25; 849: 1-2; 987: 10-25; 988: 21-25; 989: 1-9, 1056: 10-17; 1065: 5-22.) Mr. Buffalo agreed that the parties agreed that “non-bargaining unit members or employees for Sunbelt could deliver equipment weighing less than 10,000 pounds. (Tr. 1241: 2-14; R. 40: 642.) Non-bargaining unit employees washed and checked in equipment before and after the reorganization. (Tr. 844: 9-16; 848: 4-11; 1066: 2-24; 1-3.) Outside haulers were used extensively before and during the time period of the negotiations. (1067: 4-25; 1068: 1-5.)

The ALJ’s Decision incorrectly described the customers for the Franksville PC as solely being homeowners. (ALJD 22: 11-14; FN 89.) By doing so, he ignored Mr. Anderson’s undisputed testimony that the customer base was more than just homeowners. Mr. Anderson stated that Franksville had “a similar contractor base, but there was a base of smaller contractors, home builders and homeowners that could rent smaller equipment because it’s a pretty handy location right there off the 94, so we had a – we had a walk-in present there that we didn’t have in other places”[in Wisconsin].” (Tr. 923: 22-25; 924: 1-2.)

The ALJ incorrectly concluded that equipment listed on the Franksville PC's website was available to rent at the PC. (ALJD 22: 12-13; FNs 88, 89; GCX 22.) The ALJ also incorrectly concluded that the Franksville PC continued to carry some large equipment, including large front loaders, excavators, boom lifts, backhoes skid loaders and forklifts. (ALJD 22: 11-12; FN 87)(Tr. 1126: 3-25; 1127: 1-25; 1128: 1-25; 1129: 1-11; GCX 25.) GCX 22 was introduced through Mr. Ervin. (Tr. 142: 1-25; 143: 143; 144: 1-16.) In spite of an objection as to the relevance, the exhibit was received. Mr. Ervin claimed that each page of GCX 22 was taken from the Franksville or Waukesha websites on December 3, 2019. (Tr. 142: 6-16.) However, not a single page of the 44-page exhibit has a combination of a date and a location. Some pages do not have either a date or location. (GCX 22: See pages 2-3, 6-7, 10, 13, 16-17, 20-21, 24-26, 29-31, 34-35, and 38-39.) Therefore, those pages that are undated and without a location are not relevant. When the objection was made, the ALJ agreed that "Well, maybe his testimony is lacking," but in spite of the objection, he still admitted the exhibit and relies on it to conclude that the "large equipment similar to that also available at the Waukesha PC was still available to rent at the Franksville PC." (ALJD 22, FN 88.) The ALJ apparently forgot that in Footnote 86 he credited "the detailed and unrefuted testimony of the Company's witnesses regarding the weight of the machinery...." with respect to GCX 25. When the equipment from the testimony regarding GCX 25 is compared to the equipment that is listed on the undated, but identified as being on the Franksville web page, the equipment is under 10,000 pounds. For example, the micro backhoe weighs only 2,000 pounds. (Tr. 1105: 21-24.) Mr. Mayfield also testified about GCX 22, and clearly indicated that the equipment was under 10,000 pounds at the Franksville PC. (Tr. 650: 3-25; 652: 1-22.) In Footnote 86, the ALJ also cited to pages 992 to 994 of Mr. Mayfield's testimony that clearly stated that equipment that are 10,000 pounds or greater are not

assigned to the Franksville PC. Therefore, the ALJ concluded in error that “ Sunbelt “continued to make the rental of large equipment at the Franksville PC available on its website.” (ALJD 22: 12-13.)

The August 8, 2019 negotiation session “was to have a discussion on Thursday about what the reorganization was going to be” and the layoff of bargaining unit members “would have been negotiable.” (Tr. 641: 14-25; 642: 1-5.) After the Reorganization, if a customer called Franksville and placed an order for a piece of equipment weighing more than 10,000 pounds, the order would be passed on to another PC. (Tr. 647: 25; 648: 1-5.) If a piece of equipment weighing less than 10,000 pounds from the Franksville PC broke, then it would be serviced by an outside service or the Service Manager. (Tr. 652: 13-22.) Mr. Pender did preventive maintenance on equipment and did bigger repairs. (Tr. 1066: 22-25; 1066: 1-3.). The union never complained during negotiations that Mr. Pender took away work hours from bargaining unit members. (Tr. 1066: 18-21.) The Franksville PC used outside haulers, such as Putter’s trucking, before and after the union election, and the Union did not complain during negotiations about the use of outside haulers and did not ask to negotiate to curb the use of them even though Jamie Smith, a driver for Respondent, was on the Union’s negotiation team. (Tr. 995: 1-15; 1067: 7-25; 1068: 1-5; 1133: 21-23.)

Mr. McKellips was a road technician at the Franksville PC. As the title implies, he would go out into the field and do the repairs” on Sunbelt’s broken equipment. He was not a shop mechanic as was Mr. Romanowski. (Tr. 819: 21-25.) Because the small equipment would be serviced at a PC, his services at the Franksville PC were no longer required. Contrary to the ALJ’s conclusions, Messrs. Romanowski and McKellips were not terminated or permanently laid off and instead, were eligible for rehire. (ALJD 21, 1-11and FN83; ALJD 22: 3.) Anderson

told the two laid off bargaining unit mechanics, Romanowski and McKellips, that they were eligible for rehire and to apply for any open position that they believed they were qualified for. (Tr. 229: 17-25; 840: 3-6; 1057: 8-13) Their Separation Notices clearly state that they are eligible for rehire. (R. 5.) Mr. Robert Rivera stated that he hired a third road tech for the Waukesha GT PC in January 2020, but Mr. McKellips did not apply for it. (Tr. 849: 18-24; 1102: 9-25; 1103: 1-11.)

4. The ALJ incorrectly analyzed Sunbelt's financial information.

The ALJ incorrectly analyzed the financial information provided during the hearing. (ALJD 19: 35-38; 20: 1-5; 23: 10-15, FN. 95; 30: 15-23.) The ALJ incorrectly discredited Mayfield's testimony regarding the financial data in the Consolidated Income Statement. (ALJD 20, 1-5; FN 79.)

The ALJ incorrectly stated that Sunbelt only produced the Consolidated Income Statement for the Franksville PC as the only business record offered to demonstrate a drop in business. (ALJD 30: 15-17.) He neglected to note that Sunbelt also produced customers' contracts that reflect the lost business due to the Union's bannering and inflatables. (R. 9.) Significantly, the business lost by Sunbelt was directed to its competition, Ahern and United Rentals, that are not organized by Local 139. (Tr. 1008: 20-25; 1009: 1-24.) The ALJ incorrectly discredited the charts in R. 9 and GCXs. 28 and 29 as being generated for the General Counsel during the investigation. (ALJD 20, FN 79.) There is no testimony from Mr. Bogardus who created the chart based on a request from Mr. Mayfield that the chart was "generated for the General Counsel during the investigation." Therefore, the chart should be credited as providing evidence of the financial impact of the bannering and inflatables. In addition, the contracts included with R. 9, demonstrate some of the equipment that the Franksville PC customers

returned. (R. 9.)

The Consolidated income Statement lays out the monthly budgeted numbers, actual revenue, and variance between the two. (GCX 30; Tr. 672: 5-10.) The budget for 2020 would start on May 1, 2019. (Tr. 673: 11-15.) The budget for 2020 was higher than the revenue numbers for 2019 because the Franksville market was growing. (Tr. 675: 8-12.) Mr. Bogardus explained that to calculate the Franksville budget Sunbelt by reviewing the forecast by FW Dodge reports. Sunbelt also spoke to the sales representatives and customers to develop all the information it can to see what the future year might look like and to be as “conservative and accurate as possible.” (Tr. 715: 14-25; 716: 1-17.)²³ Mr. Mayfield explained how the budget numbers for fiscal year 2020 for Franksville were “derived by taking the amount of cap ex (capital expenditure) that was expected as well as the market influence of growth and then coming up with an expected rental achievement.” (Tr. 675: 24-25; 676: 1-9.)

The General Counsel’s attorney’s examination of Mr. Mayfield and the ALJ decision resulted in a myopic view of finances for the Franksville PC at the end of July of 2019 by ignoring the expected rental achievement, the budget, and only concentrating on the revenue generated in June and July. (ALJD 20: 1-5; Tr. 673: 20-25; 676: 15-25; 677: 1-3.) The ALJ completely ignored the Variance and the Budget that took three to four weeks to prepare and that witnesses testified extensively about. (GCX 30; Tr. 671: 19-25; 672: 125; 673: 1-25; 674: 1-6; 675: 8-25; 676: 1-9; 921: 13-24; 1036: 19- 25; 1037: 1-22; 1050: 22-25; 1051: 1-25; 1052: 1-20; 1082: 10-18; 1084: 12-19.)²⁴ Instead, as laid out in GCX 30, the examination should be on the three-month period starting with May, the first month of the new fiscal year, and ending with the

²³ FW Dodge is a company that has been in business for approximately 40 years, and it “tracks bidding activity, new constructions starts, [and] planning statuses” for the construction industry. (Tr. 716: 20-25.)

²⁴ GCX 30 was not the sole document that Mr. Mayfield relied on to make the decision to transition Franksville to a will-call facility, but he did rely on a consolidated income state to make the decision. (Tr. 669: 2-9.)

end of July, the last monthly numbers that Mr. Mayfield reviewed before making the reorganization decision. Additionally, the Variance between Budget and Actual Revenue for those three months in 2019 compared to the same period in 2018 is the relevant number. When you compare the total of Actual Revenue for the three months in question to the Budget numbers for those three months in total, there was a variance of a negative 2.21 percent (i.e. \$1,746,792 – \$1,786,338 = -\$39,546 or -2.21% of \$1,786,338) for 2018 (fiscal year 2019), but the Variance grew to a concerning negative 27.71 percent (i.e. \$1,733,891 - \$2,398,663= -\$664,772 or -27.71% of \$2,398,663) in 2019 (fiscal year 2020). After the reorganization, GCX 30 demonstrates the continued drastic negative slide. As explained *supra*, the capital expenditure and the market influence of growth resulted in the expected rental budget for the Franksville PC. So not only was the Variance from Budget worsening, but the three months of Revenue declined from the same period of the previous year. Additionally, “July historically had always been a jumping-off point for strong revenue growth and equipment on rent or utilization. That July, there was [sic] no indicators that it was going to improve from the state it was at.” (Tr. 990: 23-25; 991: 1.) As of the hearing on February 18, 2020 when the Union’s attorney questioned Mr. Anderson, his undisputed testimony was that the Dodge Reports showed the “Franksville market is thriving. It’s a very hot market if you will.” However, as he testified earlier, the [l]ast [he] looked, [Franksville was] at a negative 47 percent decrease rate in revenue” due to bannerling. (Tr. 1052: 4-7.)

Sunbelt’s customers that had bannerling and/or inflatables from the Union at their jobsites requested that Sunbelt remove its equipment, and that resulted in lost revenue for all of Sunbelt’s PC in Wisconsin and at a much high amount for the Franksville PC. (Tr. 702: 24-25; 713: 1-2; GCXs 28, 29, 30; RX. 9). However, transferring the equipment weighing more than 10,000

pounds to Waukesha did not increase business for the Waukesha PC. (Tr. 1131: 18-25; 1132: 1-3.) The hours worked by bargaining unit members in 2019 were less than the hours worked in each of the previous two years. (GCX 27.) The reorganization decision was made in order to allow the location to better focus on walk-ins that accounted for more than 80 percent of the Franksville PC's business. (Tr. 127: 3-15; Tr. 448: 1-19; Tr. 631: 8-25; 643:10-25; 645; 16-25; 646: 1-25;). On August 7, 2019, Respondent notified the Union of its decision to reorganize and invited it to participate in negotiations. (Tr. 125: 13-24; 126: 7-13; Tr. 641: 5-25; 642: 1-10; GCX. 17).

The growth in the Variance was an unforeseen occurrence that had a major economic effect beyond Sunbelt's control. As stated *supra*, the Union was not surprised that the bannering and inflatables of the customers for the Franksville PC created a decrease in business for the Franksville location. (Tr. 1264: 13-25; 1265: 1-5.)

5. Romanowski and McKellips were laid off, not terminated.

When Mr. Mayfield decided on August 5, 2019 to reorganize the Franksville PC, contrary to the ALJ's statement, there were two, not three, bargaining unit members. (ALJD 30: 19-24.) The ALJ incorrectly concluded that the two remaining bargaining unit members were terminated for union animus. (ALJD 22: 3.) The ALJ incorrectly concluded that Sunbelt discriminated by only eliminating bargaining unit employees. (ALJD 29: 44-45. However, the full-time PC Manager position was eliminated, and Mr. Robert Rivera the PC Manager for Waukesha supervised the Franksville PC on a part-time basis. (Tr. 1096:25; 1097: 1-5.) The ALJ incorrectly stated that GC Exh. 32 indicated that Romanowski was terminated on August 8, 2019. (ALJD 21, FN 83.) The ALJ incorrectly stated that Mr. Romanowski was told after the August 8, 2019 negotiation session that Sunbelt "terminated him 83 [sic]." (ALJD 21:10-11.) In

addition to Mr. Smith whose employment was terminated for safety reasons in July 2019 as described *supra*, Mr. Troy Schuls was a driver in the bargaining unit who was terminated in May 2019 for driving without a license, and the Union did not discuss Mr. Schuls termination at any negotiation session. (Tr. 1069: 4-19.) Mr. Gary Stamm also was a driver who applied for and was transferred to the position of Equipment Rental Specialist. (GCX 31; Tr. 988: 9-17; 1118: 13-18.) Before Mr. Bogardus became the Wisconsin Market Leader for Sunbelt’s Climate Control, he expressed concern that Mr. McKellips would resign from Sunbelt because someone from the Union called his wife to complain that her husband had a long meeting with Mr. Pender. Specifically, Mr. Bogardus stated, “Kyle is a really good guy we want to keep but messing with his family will only make him leave.” (GCX 80.) Such a statement made just a few months before the reorganization fails to support the ALJ’s position that Sunbelt “terminated” Mr. McKellips based on union animus.

D. The ALJ incorrectly Determined Credibility Issues

The ALJ also made numerous credibility determinations that are highly suspect and go against the preponderance of the relevant evidence. While generally an ALJ’s credibility determinations will not be reversed, the Board has reversed an ALJ’s credibility determinations where they were incorrect and without proper record evidence. *Harry Lunstead Designs*, 270 NLRB 1163 (N.L.R.B. 1984) Here, the ALJ repeatedly ignored relevant and credible testimony. First, as argued *supra* the ALJ incorrectly determined that Mr. Smith’s testimony was “very credible . . . and devoid of any indications of bias towards a company that terminated him on July 1, 2019” for failing “to take a safety quiz”. (ALJD 6; FN 18; 17: FN 72.) This finding is not supported by anything in the record except for sheer speculation. The ALJ ignored the evidence that Mr. Smith received several disciplinary write-ups prior to the termination. (Tr.

1258, 16-24.) The ALJ also ignored that Mr. Smith filed an unfair labor charge regarding his termination that was dismissed and the appeal denied. (Tr. 144: 24-25, 145: 1-8; GCX 39.)

Second, The ALJ incorrectly concluded that Mr. Gutierrez did not have a grudge towards Sunbelt and was credible. (ALJD 4: FNs 13, 22; 16: 13-25; FN 69) As argued supra, the ALJ failed to acknowledge that Gutierrez filed an unfair labor practice charge relating to his termination that was dismissed and lost on appeal, and he had a case pending against Sunbelt for alleged work-related injuries. (ALJD 19: 22-25.) Additionally, Mr. Gutierrez had a case pending against Sunbelt.

The ALJ “credited the detailed testimony of McKellips....” (ALJD 23: FN 91.) regarding Mr. Pender who also testified in response to a question as to why he did not take advantage of the job postings to look for a job with Sunbelt that he “was a little bitter about what had happened. It took me a good while to get out back on my feet.” (Tr. 849: 18-25; 850 1-4.)

E. The ALJ incorrectly denied Sunbelt’s Motion to Strike Portions of Michael Ervin’s Affidavit.

The ALJ incorrectly denied Sunbelt’s Motion to Strike Portions of Michael Ervin’s [prehearing] Affidavit (“Motion to Strike”). (Tr. 7: FN 26.) Sunbelt’s Motion to Strike was verbally made during the hearing on December 16, 2019, and the judge permitted Sunbelt to brief it.²⁵ However, the ALJ’s decision ignored the fact that Ervin’s affidavit that was used to support the underlying unfair labor practice charge and presumably was relied upon to support the Consolidated Complaint. It was not based on Ervin’s personal knowledge, and thus, the ALJ ruled

²⁵ In the Counsel for the General Counsel’s Opposition to Respondent’s Motion to Strike Portions of Michael Ervin’s Affidavit (“Opposition”), he refers to the January 2020 Administrative Law Judge’s Bench Book that did not contain the provision cited in Respondent’s original motion. (Opposition, p. 2, FN 2.) However, Mr. Ervin’s affidavit and Sunbelt’s verbal motion occurred prior to the January 2020 Administrative Law Judge’s Bench Book going into effect. The January 2020 Administrative Law Judge’s Bench Book does not indicate that it is retroactive. Therefore, the cited language was still appropriate.

improperly by not striking Mr. Ervin's affidavit and his hearing testimony.

As argued in its Motion to Strike, when the testimony is reduced into writing as an affidavit, the Board agent is to memorialize facts "as the witness knows them and the witness will be asked to swear and sign the truth of what is being said." (Case Handling Manual Part One Unfair Labor Practice Proceedings §10060.60). The Case Handling Manual prescribes both an opening and closing for the affidavit. The conclusion of the affidavit is as follows: "I have read this statement [have had this statement read to me], consisting of ___ pages, including this page, I fully understand its contents and I certify that it is true and correct to the best of my knowledge and belief." (*Ibid.*) The affiant is required to certify that the statements made are based on his/her personal knowledge and belief and not the knowledge and beliefs of another.

Accordingly, affidavits and testimony based thereon that are not actually based on the affiant's personal knowledge at the time the affidavit was given have been given little to no weight and not credited.

As noted above, the existence of the rule or the reporting requirement at any other location is speculative based on the evidence in this record. (*Gertz*, 262 NLRB 985, 993 (1982))

In making this determination, I have considered that Rauch in her affidavit to the Board, apparently mentioned that such a rule was in existence. However, it is clear from this record that Rauch, when she gave the affidavit, was not speaking from personal knowledge of the events at this location. Moreover, the maintenance and enforcement of this rule at any other location was not alleged or litigated in this proceeding and it would be therefore inappropriate to consider what may have occurred at another location. (1978). (*Id.* at 993, fn 28 (internal citation omitted))

Witnesses may only testify to topics about which they have personal knowledge. That is, Federal Rule of Evidence 602 states, "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that *the witness has personal knowledge of the matter.*"

(Emphasis added). *See also Mammoth Mtn. Ski Area*, 342 NLRB 837, 845 (2004) (barring testimony from a witness who did not have personal knowledge of the issues at hand and citing Fed. R. Evid. 602). On cross-examination regarding his initial affidavit for 18-CA-236643, Mr. Ervin admitted that he used Mr. West's notes, not his knowledge, for the dates and times he included in his affidavit. (Tr. 161: 23-25; 162: 1-14.) So, although the ALJ may not have admitted Ervin's prehearing affidavit into evidence, the ALJ improperly considered testimony that was based on the dates and times that were not based on his personal knowledge. The affidavit should be struck from the 18-CA-236643 file. Any testimony not based on Ervin's personal knowledge, including but not limited to, testimony after using an affidavit based on someone else's knowledge, should not be considered in the NLRB's decision.

F. The ALJ incorrectly concluded that “The Union is ... the exclusive bargaining representative in the following appropriate unit: All full-time and regular part-time mechanics, drivers, and foremen employed by the Respondent at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.”

The ALJ incorrectly found that because of alleged violations of the Act, that Local 139 is the exclusive bargaining representative for the full-time and regular part-time mechanics, drivers and foremen. As outlined *supra*, Sunbelt did not violate the Act and the two mechanics who were laid off in August of 2019 have not expressed interest in working for Sunbelt.

V. CONCLUSION

For the foregoing reasons, the ALJ's findings that Sunbelt violated the Act should be reversed and the Consolidated Complaint dismissed in its entirety.

Dated: June 10, 2020

By /s/ Patricia J. Hill

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 10, 2019, I electronically filed the foregoing Respondent's Exceptions to the Administrative Law Judge's Decision via with the National Labor Relations Board's website and served the same on the following attorneys and the NLRB via e-mail and via U.S. Mail:

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