

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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

Case No. 20-2482

Petitioner-Appellee,)

vs.)

SUNBELT RENTALS, INC.,)

Respondent-Appellant.)

**RESPONDENT-APPELLANT SUNBELT RENTALS, INC.’S
MOTION TO STAY PENDING APPEAL**

Pursuant to Federal Rule of Appellate Procedure 8, Respondent-Appellant Sunbelt Rentals, Inc. (“Respondent-Appellant”) respectfully moves this Court to stay the District Court’s injunction order entered August 7, 2020, pending Respondent-Appellant’s appeal to this Court of the August 7, 2020 order. In support thereof, Respondent-Appellant states as follows:

I. GROUNDS FOR THE MOTION

This case arises out of the labor dispute between Respondent-Appellant and Petitioner-Appellee National Labor Relations Board (“Petitioner-Appellee”). On August 7, 2020, the District Court granted Petitioner-Appellee’s petition for an injunction pursuant to 29 U.S.C. § 160(j). The Court’s Order granting the petition (“Order”) requires Respondent-Appellant to, among other things, recognize the

International Union of Operating Engineers Local 139 (“Union”) as the exclusive collective-bargaining unit at Respondent-Appellant’s Profit Center 776 in Franksville, Wisconsin; bargain with the Union with respect to wages, hours, and other terms and conditions of employment, and restore the bargaining unit work to the same position as it was on August 5, 2019. Respondent-Appellant filed a Notice of Appeal on August 10, 2020. That same day, Respondent-Appellant filed a Motion to Stay the District Court’s Order Pending Appeal with the District Court on August 10, 2020. The parties finished briefing the Motion to Stay on August 26, 2020, and, as of the filing of this Motion, the District Court has not ruled on Respondent-Appellant’s Motion to Stay.

Respondent-Appellant moves this Court to stay the District Court’s Order even though the District Court has not yet ruled on Respondent-Appellant’s Motion to Stay because of the time sensitive nature of the requirements of the injunction. That is, as noted above, the Order requires Respondent-Appellant to, among other things, restore the bargaining unit work to the same position it was more than a year ago. Such a restoration requires Respondent-Appellant to invest significant resources in restructuring its business at its location in Franksville, Wisconsin, and Respondent-Appellant would have no way to recoup these resources if this Court reverses the District Court’s Order. Therefore, waiting for the District Court to rule

on the Motion to Stay will harm Respondent-Appellant in this case, and Respondent-Appellant seeks relief pursuant to Federal Rule of Appellate Procedure 8(a)(2).

II. RELIEF SOUGHT

Respondent-Appellant respectfully asks the Court to stay the District Court's August 7, 2020 Order pending appeal in this matter. Respondent-Appellant is willing to post a bond during the stay. *See* Fed. R. App. P. 8(a)(2)(E). The bond should be set at an amount reflecting the fact that Petitioner-Appellee and the Union will not suffer any harm as a result of the stay.

III. LEGAL ARGUMENT

The Court should grant Respondent-Appellant's Motion to Stay the District Court's Order for the reasons stated herein, including that compliance with the Order will irreparably harm Respondent-Appellant and staying the Order will not harm other interested parties.

A. STANDARD FOR GRANTING A STAY PENDING APPEAL

In determining whether to stay an order pending appeal, an appellate court considers four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). As explained below, each of these factors favors this Court granting Respondent-Appellant's Motion to Stay.

B. RESPONDENT-APPELLANT MAKES A STRONG SHOWING THAT IT IS LIKELY TO SUCCEED ON THE MERITS

The first factor for this Court to consider in determining whether to stay an injunction pending appeal is the likelihood of success on the merits of the appeal. *See Hilton*, 481 U.S. at 776. Here, Respondent-Appellant has a strong likelihood of success on the merits of the appeal because the District Court's Order was based on the Administrative Law Judge's ("ALJ") faulty recommendation in the underlying administrative action. In the underlying administrative action, the ALJ improperly determined that Respondent-Appellant violated the National Labor Relations Act ("NLRA") when it restructured one of its profit centers based on financial concerns relating to the Union's banner and inflatables at construction work sites where Respondent-Appellant's equipment was being used. Respondent-Appellant appealed the ALJ's recommendation and now awaits a decision from the National Labor Relations Board ("NLRB" or "Board"). Respondent-Appellant is likely to succeed in the appeal of the ALJ's recommendation because the ALJ's recommendation failed to properly apply the *Wright Line* test, and the recommendation was based on numerous factual errors. The District Court's Order appears to be entirely based on the ALJ's recommendation, and therefore, the errors in the ALJ's recommendation are duplicated in the District Court's Order.

First, the District Court's Order failed to consider 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 a finding that a decision maker's anti-union animus caused the adverse employment action. *See Autonation, Inc. v. Nat'l Labor Relations Bd.*, 801 F.3d 767, 775 (7th Cir. 2015); *Tschiggfrie Props.*, 368 NLRB No. 120, at *5-*7 (2019). 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).

Here, the District Court, Petitioner-Appellee, and the ALJ did not establish that a decision maker had any anti-union animus, much less that anti-union animus caused any adverse employment action. The District Court Order and the ALJ recommendation do not make any finding that the decision maker had any anti-union animus, nor do they make any finding that the anti-union animus by non-decision makers caused the adverse action. For example, the District Court Order states that Petitioner-Appellee is "likely to succeed on showing that there was a strong antiunion animus," but does not connect any alleged animus to any adverse action. *See* District Court ECF Docket No. 18, Order, p. 24.

Notably, the District Court relies on statements by individuals who were not decision makers in finding animus by Respondent-Appellant. That is, Petitioner-Appellee does not dispute that Jason Mayfield, Regional Vice President, was the

chief negotiator and the decision maker for the reorganization of the Franksville Profit Center (“PC”). No record evidence indicates that Mayfield had any anti-union animus, and the Order failed to address that Mayfield did not have any anti-union animus. Rather, the Order relies 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. Bogardus, Anderson and Pender, who allegedly expressed opinions against the union had no input into the reorganization decision. 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: the business restructuring and subsequent layoff of employees including bargaining unit members in August 2019. This failure means that the District Court did not properly apply the *Wright Line* test. See *Autonation, Inc.*, 801 F.3d at 775.

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-Appellant 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. (District Court ECF Doc. 12, Exh. A, Tr. 1037; 23-25; 1038: 4-8).

For the reasons explained above, the Order fails the *Wright Line* test in finding that anti-union animus caused the decision to restructure the PC. However, assuming for purposes of argument only that "motive" is established, which Respondent-Appellant denies it is, the evidence shows that Respondent-Appellant 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 Union's

bannering and use of inflatables had and continues to have a devastating impact on the Franksville PC's profitability. Additionally, the Consolidated Income Statement offered into evidence at the administrative hearing lays out the monthly budgeted numbers, actual revenue, and variance between the two. (District Court ECF Doc. No. 12, Exh. C 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.) At the administrative hearing, Bogardus explained that to calculate the Franksville budget, Respondent-Appellant reviewed the forecast by industry standard reports. Respondent-Appellant also spoke to the sales representatives and customers to develop all the 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 District Court's Order (page 21) 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.) 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 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 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-Appellant 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-Appellant 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.” Order, 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-Appellant 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-Appellant Service Manager Chris Pender threatened employees for unionizing. *Compare* Order p. 21, with 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-Appellant 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-Appellant responded on January 16, 2019, five days early, with the draft CBA. (GCX 7g, p. 1 of 17.) The other instance when the Union requested the tentative agreement from Respondent-Appellant 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-Appellant responded with an apology, “I am sorry, but I could not get the updated CBA done.” (GCX 11.) Respondent-Appellant 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.
- Also, the Order ignored that Respondent-Appellant did bargain over wages, health insurance, and pension terms. *See* Order at 5. Respondent-Appellant provided the Union with a health 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.) Respondent-Appellant also provided the Union with a list of which bargaining unit

employees participated in the 401k and Respondent-Appellant's health insurance plan.

- The Order misstates the events at the negotiation session on June 5, 2019 in which the Union promised it would email Respondent-Appellant the Word document of the tentatively agreed to provisions, 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.

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

In sum, Respondent-Appellant has a likelihood of success on the merits on appeal because the District Court and the ALJ did not apply 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-Appellant would have made the same decision to restructure the PC regardless of any alleged anti-union animus.

**C. RESPONDENT-APPELLANT WILL BE IRREPARABLY INJURED
ABSENT A STAY**

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

Here, if the Court denies the stay, Respondent-Appellant will suffer significant economic harm because it will be required to entirely reorganize its operations at the Franksville location for the two former bargaining unit members. As Respondent-Appellant referenced above, Mayfield was the sole decision maker who decided to reorganize the Franksville location because the location was significantly under budget. (Tr. 634:8-635:11, 993:25-999:5, 1086:22-1087:12.) The reorganization resulted in the layoff of the two remaining members of the bargaining unit to allow the Franksville location to focus on its walk-in business. Since the reorganization, the Franksville location has focused exclusively on its walk-in business. The District Court ordered Respondent-Appellant to reorganize its Franksville location more than a year after the restructure, and requiring Respondent-Appellant to reinstate the bargaining unit necessitates Respondent-Appellant investing significant resources to restructure the Franksville location.

Complying with the District Court's Order would require Respondent-Appellant to find the rental equipment assigned to the Franksville location. Because the equipment was reassigned to various locations throughout the country and some equipment was sold at auction because of the downturn in business due to the pandemic, very expensive construction equipment will likely need to be purchased to comply with the District Court's Order.

Additionally, the District Court's Order only provided Respondent-Appellant 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-Appellant pays the bargaining unit members and simultaneously invests marketing and other resources in trying to find work for the bargaining unit members. To reinstate the bargaining unit, Respondent-Appellant 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 with Respondent-Appellant shortly after the lay-off. The second bargaining unit member chose to not testify at the administrative hearing. Therefore, Respondent-Appellant 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-Appellant, are strictly scrutinizing all expenditures in light of the uncertainty surrounding the coronavirus pandemic. Respondent-Appellant must invest considerable resources to reinstate the bargaining unit and must do so in a matter of days.

The coronavirus pandemic will also increase the loss at the Franksville location 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-Appellant will have to pay bargaining unit members without having work for them to perform.

This damage to Respondent-Appellant is irreparable because, if this Court reverses the District Court's Order, there will be no way for Respondent-Appellant to recoup its costs and time. The damage is also irreparable to the future bargaining unit members because in the event Respondent-Appellant restructures its business to create jobs for the bargaining unit members and the NLRB rules that Respondent-Appellant properly restructured its business, those individuals may face layoffs and have to look for jobs during the ongoing coronavirus pandemic.

Further, Respondent-Appellant faces irreparable harm because the Order requires face-to-face negotiation sessions that the ALJ and Petitioner-Appellee demanded. As Petitioner-Appellee argued in Board proceedings in a brief filed on July 1, 2020, several months into the coronavirus pandemic, "the obligation to bargain necessitates *face to face* meetings, not bargaining by telephone or other electronic means. *E.g., Twin City Concrete, Inc.*, 317 NLRB 1313, 1314 (1995); *Westinghouse Corp.*, 196 NLRB 306, 313 (1972)." Likewise, on August 28, 2020,

the Union informed Sunbelt that it wanted to negotiate face-to-face. Face-to-face negotiations in the midst of a global pandemic poses irreparable health and safety concerns to the negotiating teams and the public with whom they interact.

For these reasons, Respondent-Appellant will be irreparably injured absent a stay.

D. ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE THE OTHER PARTIES IN THIS PROCEEDING

The third factor for this Court to consider in determining whether to stay an injunction pending appeal is whether the stay will substantially injure the other parties interested in the injunction. *See Hilton*, 481 U.S. at 776. Most notably, the stay will not substantially injure the two laid off members of the bargaining unit who immediately found other employment and who have the most interest in this case. That is, as referenced above, the Franksville location has been reorganized for more than a year. The two employees who were members of the bargaining unit negotiated release agreements with the union as part of their layoff, and one of the employees chose not to apply for an open position in another Respondent-Appellant location similar to the position he held at the Franksville location even though he had the opportunity to do so. Additionally, Respondent-Appellant provided the employees a severance package that the Union negotiated. The fact that the Union did not negotiate to include language that the bargaining unit employees have first choice at open positions or bump other employees with Respondent-Appellant

shows that the former bargaining unit employees have received redress. Because the two former members of the bargaining unit have already received redress for their layoff, issuing a stay will not harm the two former members of the bargaining unit.

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

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-Appellant employees because it does not have any

pending elections. (Tr. at 998:12-13.) Likewise, despite the District Court's statement in the Order that the Union is a fledgling union, the Union is not "fledgling." Rather, the Union has significant resources to run a campaign against Respondent-Appellant, including inflatables, banner, 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-Appellant 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"). Neither Petitioner-Appellee 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)). Petitioner-Appellee itself has the power to adjudicate claims of unfair labor practices and, when it determines that an unfair labor practice occurred, Petitioner-Appellee may require an employer to take steps to remedy the unfair labor practice. Here, Respondent-Appellant and the Union are currently going through Petitioner-Appellee'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-Appellant denies any unfair labor practice occurred.

Finally, to the extent the Order seeks to remedy potential future unfair labor practices by Respondent-Appellant, which Respondent-Appellant denies any will occur, Respondent-Appellant must comply with the NLRA regardless of the Order and if the Court grants a stay of the Order. *See 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-Appellant violate the NLRA at its Franksville location while the underlying unfair labor practice complaint is pending before the NLRB or any time thereafter, Petitioner-Appellee can seek separate redress for those claims.

E. THE PUBLIC INTEREST LIES IN FAVOR OF A STAY

The fourth factor for this Court to consider in determining whether to stay an injunction pending appeal is the public interest. *See Hilton*, 481 U.S. at 776. Public interest primarily lies “in effectuating the policies of the federal labor laws, not the wrong done the individual employee.” *Vaca v. Sipes*, 386 U.S. 171, 182 n. 8 (1967). In determining the public interest, “a court must weigh the potential public benefits

against the potential public costs.” *Nat’l Labor Relations Bd. v. Electro-Voice, Inc.*, 83 F.3d 1559, 1574 (7th Cir. 1996).

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

while complying with the Order will cause a significant, irreparable harm, the public interest lies in favor of the stay.

Additionally, 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-Appellant 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.

IV. CONCLUSION

As set forth above, the factors for the court to consider in determining whether to grant a stay pending appeal all weigh heavily in favor of a stay in this case. Most notably, requiring Respondent-Appellant to reinstate the two bargaining unit members will cause irreparable harm to Respondent-Appellant, while the stay will

not substantially injure Petitioner-Appellee or other parties' interest in this case. For these reasons, this Court should grant Respondent-Appellant's request for a stay of the District Court's August 7, 2020 Order pending the appeal. Respondent-Appellant will file a bond or other security with the District Court during the stay.

WHEREFORE, Respondent-Appellant respectfully requests that the Court issue an order staying the District Court's Order pending the completion of the appeal, or in the alternative, pending the NLRB's ruling in Case No. 18-CA-236643.

Dated: August 28, 2020

Respectfully submitted,

SMITH, GAMBRELL & RUSSELL, LLP

By: _____ s/ Patricia J. Hill

Patricia J. Hill

E-mail: pjhill@sgrlaw.com

Yash B. Dave

E-mail: ydave@sgrlaw.com

50 N. Laura Street, Suite 2600

Jacksonville, Florida 32202

Telephone: (904) 598-6100

Facsimile: (904) 598-6240

Attorneys for Sunbelt Rentals, Inc.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(1) and the word limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,174 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

Dated: August 28, 2020

By: s/ Patricia J. Hill
Attorney

