

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-2482

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

Petitioner-Appellee,

v.

SUNBELT RENTALS, INC.,

Respondent-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR PETITIONER-APPELLEE
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TABLE OF CONTENTS

I.	COUNTERSTATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION	1
II.	COUNTERSTATEMENT OF THE ISSUES.....	1
III.	COUNTERSTATEMENT OF THE CASE.....	2
	A. Drivers and Mechanics at the Franksville Facility Elect the Union to Represent Them Despite Sunbelt’s Repeated Threats to Close the Store.....	2
	B. Sunbelt Terminates a Manager and Transfers Equipment Out of Franksville in Response to the Union’s Election.	3
	C. The Parties Start Bargaining and Sunbelt Negotiates in Bad Faith.	4
	D. Sunbelt Assists with a Decertification Petition, Surveils Employees’ Union Activities, and Further Demonstrates Anti-Union Animus.....	6
	E. Sunbelt Continues to Bargain in Bad Faith.....	7
	F. Sunbelt Effectuates the Threats it Made During the Organizing Campaign by “Reorganizing” Franksville and Eliminating the Entire Bargaining Unit.	8
	G. Despite “Reorganizing” the Franksville Location, Business Continues as Usual in the Following Months.....	10
	H. Sunbelt’s Retaliatory Campaign at Franksville Chills the Union’s Organizing Efforts at Other Sunbelt Locations.	11
	I. The Director Petitions the District Court for Injunctive Relief Under § 10(j).....	11
	J. The Board’s Administrative Law Judge Concludes that Sunbelt Violated the Act.....	11
	K. The District Court Grants the Requested Injunctive Relief.....	12
	L. The Seventh Circuit Denies Sunbelt’s Motion for a Stay Pending Appeal.....	13
IV.	THE STANDARD OF APPELLATE REVIEW.....	13
V.	SUMMARY OF THE ARGUMENT.....	13
VI.	ARGUMENT.....	15
	A. The Section 10(j) Standards.....	15
	1. Likelihood of success.....	16

2.	Balancing the Equities	17
B.	The District Court Correctly Concluded that the Director is Likely to Succeed in Establishing that Sunbelt Violated the Act.	18
1.	Sunbelt threatened, interrogated, and coerced employees in violation of § 8(a)(1)...	19
2.	Sunbelt bargained in bad faith in violation of § 8(a)(5).	20
a.	Sunbelt unlawfully failed to meet at reasonable times.	20
b.	Sunbelt refused to discuss wages and other economic terms for approximately four months.....	21
c.	Sunbelt bargained with no intent to reach agreement.....	24
3.	Sunbelt eliminated the Franksville bargaining unit to discourage employees’ union activity in violation of § 8(a)(3).....	26
a.	Sunbelt’s attempt to reframe the <i>Wright Line</i> analysis is fatally flawed.	27
b.	Sunbelt’s <i>Wright Line</i> defense based on financial reasons fails.	31
4.	Sunbelt fails to show the court’s factual findings were clearly erroneous.	33
C.	The District Court Correctly Concluded that There Is Likely Irreparable Harm and No Adequate Remedy at Law.....	34
D.	The District Court Correctly Balanced the Harms and Public Interest in Favor of an Injunction.	40
VII.	CONCLUSION.....	44
VIII.	REQUEST FOR ORAL ARGUMENT	44

TABLE OF AUTHORITIES

Cases

Abbey’s Transp. Servs., Inc. v. NLRB,
837 F.2d 575 (2d Cir. 1988)..... 37

Adrian Daily Telegram,
214 NLRB 1103 (1974) 22

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987)..... 18

Angle v. Sacks,
382 F.2d 655 (10th Cir. 1967) 36, 38

Atlanta Hilton & Tower,
214 NLRB 1600 (1984) 25

AutoNation, Inc. v. NLRB,
801 F.3d 767 (7th Cir. 2015) 28

Big Ridge, Inc. v. NLRB,
808 F.3d 705 (7th Cir. 2015) 29, 30

Bloedorn v. Francisco Foods, Inc.,
276 F.3d 270 (7th Cir. 2001) passim

Brandeis Mach. & Supply Co. v. NLRB,
412 F.3d 822 (7th Cir. 2005) 20

Bryant & Stratton Bus. Inst.,
321 NLRB 1007 (1996) 20, 21, 24

Calex Corp.,
322 NLRB 977 (1997) 20, 21

Chester County Hosp.,
320 NLRB 604 (1995) 24

CJC Holdings, Inc.,
320 NLRB 1041 (1996) 24

Consolidated Bus Transit,
350 NLRB 1064 (2007) 26

Contemporary Cars, Inc. v. NLRB,
814 F.3d 859 (7th Cir. 2016) 20

Dorris v. Unum Life Ins. Co. of Am.,
949 F.3d 297 (7th Cir. 2020) 40

Duffy Tool & Stamping, LLC v. NLRB,
233 F.3d 995 (7th Cir. 2000) 36

Ernst Home Centers, Inc.,
308 NLRB 848 (1992) 19

Fall River Dyeing & Finishing Corp. v. NLRB,
482 U.S. 27 42

FiveCAP, Inc. v. NLRB,
294 F.3d 768 (6th Cir. 2002) 30

Frankl v. HTH Corp.,
 (Frankl I), 650 F.3d 1334 (9th Cir. 2011)..... 36

Frankl v. HTH Corp.,
 (Frankl II), 693 F.3d 1051 (9th Cir. 2012) 44

Golden Foundry & Mach. Co.,
 340 NLRB 1176 (2003) 30

Great Chinese Am. Sewing Co. v. NLRB,
 578 F.2d 251 (9th Cir. 1978) 41

Great Lakes Warehouse Corp. v. NLRB,
 239 F.3d 886 (7th Cir. 2001) 31

Harrell v. Am. Red Cross,
 714 F.3d 553 (7th Cir. 2013) passim

Henderson v. Bluefield Hosp. Co.,
 902 F.3d 432 (4th Cir. 2018) 38

Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.,
 582 F.3d 721 (7th Cir. 2009) 16

Huck Store Fixture Co. v. NLRB,
 327 F.3d 528 (7th Cir. 2003) 28

John Ascuaga’s Nugget,
 298 NLRB 524 (1990) 24, 25

John Wanamaker Philadelphia,
 279 NLRB 1034 (1986) 22

Judge v. Quinn,
 612 F.3d 537 (7th Cir. 2010) 16

Kaynard v. Palby Lingerie, Inc.,
 625 F.2d 1047 (2d Cir. 1980)..... 42

Kinney v. Pioneer Press,
 881 F.2d 485 (7th Cir. 1989) 13, 16, 17

Lineback v. Irving Ready-Mix Inc.,
 653 F.3d 566 (7th Cir. 2011) 16

Lineback v. Spurlino Materials, LLC,
 546 F.3d 491 (7th Cir. 2008) passim

McKinney v. S. Bakeries, LLC,
 786 F.3d 1119 (8th Cir. 2015) 39

Mid-Continent Concrete,
 336 NLRB 258 (2001) 24

Midwest Stock Exch., Inc. v. NLRB,
 635 F.2d 1255 (7th Cir. 1980) 19

Miller v. Cal. Pac. Med. Ctr.,
 19 F.3d 449 (9th Cir. 1993) 18

Moore-Duncan v. Horizon House Developmental Servs.,
 155 F.Supp.2d 390 (E.D. Pa. 2001) 36

Muffley v. Voith Indus. Servs., Inc.,
 551 F.App’x 825 (6th Cir. 2014) 39

NLRB v. C & C Plywood Corp.,
 385 U.S. 421 (1967)..... 35

NLRB v. Curtin Matheson Scientific, Inc.,
494 U.S. 775 (1990)..... 42

NLRB v. Cutting, Inc.,
701 F.2d 659 (7th Cir. 1983) 43

NLRB v. Electro-Voice, Inc.,
83 F.3d 1559 (7th Cir. 1996) passim

NLRB v. GATX Logistics, Inc.,
160 F.3d 353 (7th Cir. 1998) 26

NLRB v. Jeffries Lithograph Co.,
752 F.2d 459 (9th Cir. 1984) 42

NLRB v. Louis A. Weiss Mem’l Hosp.,
172 F.3d 432 (7th Cir. 1999) 30

*NLRB v. P*I*E Nationwide, Inc.*,
894 F.2d 887 (7th Cir. 1990) 16

NLRB v. Q-1 Motor Exp., Inc.,
25 F.3d 473 (7th Cir. 1994) 37

O’Dovero v. NLRB,
193 F.3d 532 (D.C. Cir. 1999)..... 41

Overnite Transportation Co.,
296 NLRB 669 (1989) 24

Overstreet v. Gunderson Rail Services, LLC,
587 F.App’x 379 (9th Cir. 2014) 41

Park N’ Fly,
349 NLRB 132 (2007) 19

Pascarell v. Vibra Screw, Inc.,
904 F.2d 874 (3d Cir. 1990)..... 37

People Care, Inc.,
327 NLRB 814 (1999) 20, 21

Pye v. Excel Case Ready,
238 F.3d 69 (1st Cir. 2001)..... 37

Regency Service Carts,
345 NLRB 671 (2005) 24

Roland Machinery v. Dresser Industries,
749 F.2d 380 (7th Cir. 1984) 17, 18

Schaub v. W. Mich. Plumbing & Heating,
250 F.3d 962 (6th Cir. 2001) 38

Shattuck Denn Min. Corp. v. NLRB,
362 F.2d 466 (9th Cir. 1966) 25

Silverman v. Whittal & Shon, Inc.,
1986 WL 15735 (S.D.N.Y. June 6, 1986) 37

Small v. Avanti Health Sys., LLC,
661 F.3d 1180 (9th Cir. 2011) 36

Soltech, Inc.,
306 NLRB 269 (1992) 19

Squillacote v. Local 248, Meat & Allied Food Workers,
534 F.2d 735 (7th Cir. 1976) 17

Squillacote v. U.S. Marine Corp.,
 116 LRRM 2663 (E.D. Wis. 1984)..... 37

Standard Dry Wall Prods.,
 91 NLRB 544 (1950) 17

Tschiggfrie Properties, Ltd.,
 368 NLRB No. 120, slip op. at 8 (Nov. 22, 2019)..... 28

Wright Line,
 251 NLRB 1083 (1980) 26

Wyman Gordon Penn., LLC,
 368 NLRB No. 150 (Dec. 16, 2019)..... 23

Statutes

28 U.S.C. § 1291 (2018) 1

28 U.S.C. § 1292(a)(1) (2018) 1

29 U.S.C. § 151 (2018) 1, 34

29 U.S.C. § 157 (2018) 34

29 U.S.C. § 158(a)(3) (2018) 26

29 U.S.C. § 158(d) (2018) 21

29 U.S.C. § 160(c) (2018)..... 38

29 U.S.C. § 160(j) (2018) 1, 15

WIS. STAT. ANN. § 111.04 (West 2020)..... 42

Rules

Cir. Rule 10(e) 1

Cir. Rule 28(b) 1

Cir. Rule 30(f)..... 1

Fed R. App. P. 30(d)-(e) 1

Fed. R. App. P. 28(b) 2

Fed. R. App. P. 28(e) 1

Other Authorities

S. REP. NO. 105 15

I. COUNTERSTATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION¹

The district court had subject-matter jurisdiction under § 10(j) of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, 160(j) (2018) (“§ 10(j)"). Respondent-Appellant Sunbelt Rentals, Inc. (“Sunbelt”) is a North Carolina corporation with an office and place of business in Franksville, Wisconsin. On August 7, 2020, the court below entered a final judgment granting the National Labor Relations Board (“Board”) interim injunctive relief under § 10(j). No further claims remain in the district court for adjudication. Sunbelt filed its timely notice of appeal on August 10, 2020. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291, 1292(a)(1) (2018).

II. COUNTERSTATEMENT OF THE ISSUES

This case is based on allegations by the Regional Director (“Director”) that Sunbelt engaged in egregious violations of the Act before, during, and after a successful organizing campaign by Sunbelt’s employees to be represented by the International Union of Operating Engineers Local 139, AFL-CIO (“Union”). The district court issued an injunction under § 10(j) that requires Sunbelt to restore the status quo ante by, inter alia, recognizing and bargaining with the Union and restoring bargaining unit work pending final Board disposition of an administrative complaint against Sunbelt. This appeal raises the following issues:

¹ The Respondent-Appellant’s jurisdictional statement is not complete and correct. (Br. 1–2). Cir. Rule 28(b). “Br.” references Sunbelt’s initial brief to this Circuit. “A” references the pages of the Short Appendix filed by Sunbelt and “SA” the pages of Sunbelt’s Supplemental Appendix. “SAB” references the pages to the NLRB’s Supplemental Appendix filed with this brief. “Dk.” refers to the district court’s electronic case file docket. “CDk.” refers to the Seventh Circuit’s electronic case file docket. Sunbelt’s Supplemental Appendix does not appear to conform to Fed. R. App. P. 28(e), 30(d)–(e), and Cir. Rule 10(e), 30(f). Accordingly, the NLRB’s Supplemental Appendix may include documents already produced in Sunbelt’s Supplemental Appendix, but properly paginated and indexed.

1. In concluding that the Director is likely to succeed on the merits of her administrative complaint before the Board, the district court relied on the evidence in the administrative record, the decision of a Board Administrative Law Judge (“ALJ”) finding merit to the alleged violations, and established Board and Seventh Circuit law. In this circumstance, did the court properly conclude that the Director is likely to establish that Sunbelt violated the Act as alleged?

2. The Seventh Circuit has repeatedly held that an employer’s illegal discrimination and refusal to bargain threatens serious irreparable harm to employees’ rights under the Act. Here, Sunbelt’s unlawful actions have quashed employees’ ability to form a union and bargain collectively, and adversely impacted employees’ union organizing efforts at other Sunbelt stores. Given the law and evidence, did the court correctly exercise its discretion by concluding that Sunbelt’s actions threaten irreparable harm to employees’ organizing rights, and that the balance of harms and the public interest favors injunctive relief?

III. COUNTERSTATEMENT OF THE CASE²

A. Drivers and Mechanics at the Franksville Facility Elect the Union to Represent Them Despite Sunbelt’s Repeated Threats to Close the Store.

Sunbelt operates facilities throughout the United States that rent, sell, and service construction equipment through retail outlets referred to as profit centers. (A 034.) This case involves Sunbelt’s Franksville Profit Center in Racine County, Wisconsin. (A 034.)

On February 12, 2018, the Union delivered a representation petition to Franksville’s manager, Katie Torgerson. (A 035.) The Union sought to represent Sunbelt’s approximately eight drivers and mechanics at Franksville. (A 035.) Torgerson immediately informed her supervisor, Wisconsin District Manager, Bo Bogardus, who then contacted his supervisor,

² Sunbelt has not fairly stated the facts and makes numerous disingenuous factual statements. (A 025 n.1.) Fed. R. App. P. 28(b).

Regional Vice President for Region 9, Jason Mayfield. (A 035.) High level human resources managers were copied on the email Bogardus sent to Mayfield, with one manager saying in response, “FYI – this is our first [union] in Wisconsin.” (A 035.)

Despite Bogardus’ previously infrequent visits, after learning that the Union sought to represent Franksville employees, Bogardus began visiting Franksville daily, and would constantly query Torgerson about what Union activities were taking place. (A 035; SAB 46–47.) While there, Bogardus exclaimed his opposition to the Union and told employees on more than five occasions that Sunbelt would close the store if the Union’s organizing campaign succeeded. (A 035–036; SAB 47–48.) Torgerson asked Bogardus if she was going to be fired because of the Union and Bogardus replied that the Union “wasn’t helping [her] cause.” (A 036; SAB 49.)

During and after the organizing campaign, Bogardus regularly emailed Mayfield and human resources managers with updates on Union activity at Franksville and the impact on other Wisconsin locations. In February 2018, Bogardus emailed them that “the Racine [Franksville] event is beginning to spill over” to other Wisconsin facilities. (A 036.)

On March 4, 2018, two days before the scheduled representation election, Bogardus called a mandatory meeting for Franksville employees. (A 036.) At this meeting, Bogardus expressed his negative view of unions and warned employees that if the Union won, he would close the Franksville store and terminate the employees. (A 036; SAB 44–45.)

On March 6, 2018, a majority of employees voted in favor of Union representation and the Director issued a Certification of Representative on March 13. (A 036.)

B. Sunbelt Terminates a Manager and Transfers Equipment Out of Franksville in Response to the Union’s Election.

Shortly after the Union’s election, Bogardus again updated his managers about the Union’s activities, particularly that Franksville Union supporters were speaking positively of

Union membership to employees at other locations. (A 037.) Within a week of the Union's election, Bogardus met with Mayfield and proposed that Sunbelt terminate the Franksville bargaining unit employees. (A 038; SAB 40–41.) Bogardus then terminated Franksville manager Torgerson for inventory shortages “as well as the union vote.” (A 038–039; SAB 50.)

In June 2018, Bogardus started to transfer large equipment from Franksville to deprive bargaining unit employees of continued work. (A 039.) Mayfield instructed Bogardus to cease transferring equipment, but never instructed Bogardus to return the equipment that had been transferred. (A 039; SAB 54.)

C. The Parties Start Bargaining and Sunbelt Negotiates in Bad Faith.

On March 29, 2018, the Union requested bargaining and proposed several dates in April. (A 039.) Sunbelt responded that it was too “busy” and could not meet with the Union until May 22, 2018. (A 039; SAB 65.) The Union accepted the delayed bargaining date to avoid further delay. (SAB 12.) Prior to the first bargaining session, Sunbelt provided the Union with a copy of its handbook and information about its health care and retirement plans. (SAB 22–24.)

When negotiations began on May 22, 2018 at the Franksville store, Sunbelt's bargaining team consisted of labor counsel Patricia Hill, Mayfield as primary decision maker,³ Bogardus, and Franksville's new manager Bryan Anderson. (A 039–040.) At the beginning of the meeting, the Union proposed ground rules, including that the parties decide all language proposals before discussing wages. (A 040.) However, Sunbelt immediately rejected the proposed ground rules in their entirety. (A 040.) Sunbelt also rejected the Union's proposal to meet at a neutral location. (A 040.) The Union requested that the parties schedule their next bargaining session at the outset and proposed dates in mid-June. (A 040.) Sunbelt again claimed it was too busy to meet and

³ Mayfield had previously negotiated over 60 contracts with unions in other states. (A 040 n.28.)

offered only June 26. (A 040.) For caucuses (i.e., breaks in negotiations when the parties separate for private discussions), Hill claimed there was no additional space at the facility and suggested the Union negotiators caucus in their vehicles although, ultimately, Sunbelt's negotiators agreed to caucus in a nearby office and allowed the Union to remain in the negotiating room. (A 040.) The Union presented its initial noneconomic proposals and Sunbelt tendered its own. (A 040–041.) After several caucuses, Hill informed the Union that Sunbelt needed time to review the proposals and negotiations ended for the day. (A 041.)

Over the next nine months, Sunbelt repeatedly refused to meet more than once per month by claiming Sunbelt was “too busy,” delayed meetings due to Mayfield's lateness, took long caucuses, and canceled meetings. (A 041, 042–043, 044, 045.) Sunbelt sometimes explained why it was too busy, but other times it provided no elaboration. (A 044.) Mayfield was habitually late and Hill would hold up meetings until Mayfield arrived. (A 043.) When confronted, Mayfield refused to remedy his habitual tardiness and would not commit to leaving his home earlier to arrive on time. (A 045; SAB 53.) Sunbelt would frequently take long caucuses because, for example, it would often present proposals verbally, the Union would request them in writing, and Sunbelt would then caucus to put the proposal in writing. (A 041, 043.) Sunbelt canceled the session scheduled for January 28, 2019, because Bogardus had a court hearing that day; but, although the court hearing was canceled a few days before, Hill did not share that with the Union. (A 045 n.55.) Despite the delays caused by Sunbelt, the parties were able to make some progress on various non-economic provisions between May 2018 and February 2019. (A 041–045.)

On February 8, 2019, the parties again met and the Union made its first wage proposal. (A 045.) Sunbelt refused to discuss economic proposals, that is, those dealing with wages and

benefits. (A 045.) On February 21, Sunbelt rejected a Union proposal to deduct Union dues from bargaining unit employees' paychecks, referred to as "dues check-off," despite Sunbelt agreeing to similar provisions at other locations in the region, and again refused to respond to the Union's wage proposals. (A 046; SAB 13–21.) Hill ended that meeting over the Union's objections because Mayfield had to leave early. (A 046.)

On February 26, 2019, the Union filed a charge with the Board alleging Sunbelt engaged in unlawful surface bargaining and otherwise bargained in bad faith. (A 046–047; Dk. 12-2 p. 126.)

The parties met again on March 21, with Sunbelt again refusing to respond to the Union's wage proposal and also refusing to discuss any changes to Sunbelt's existing retirement and health insurance plans. (A 047.) After a long caucus called by Sunbelt, it returned to the bargaining table with only a premium pay formula proposal rather than an actual wage proposal. (A 047; SAB 25.)

D. Sunbelt Assists with a Decertification Petition, Surveils Employees' Union Activities, and Further Demonstrates Anti-Union Animus.

On March 21, 2019, unit employee Mario Rivera filed a petition with the Board to decertify the Union as the bargaining representative. (A 047.) Sunbelt manager Anderson assisted Rivera with filling out the decertification form. (A 047–048; SAB 58–59.) In late March and early April, Anderson directed employees to where the decertification petition was posted and instructed employees to inform him if they heard others discussing anything related to the petition. (A 048.) Also in April, Anderson initiated a conversation with an employee near Sunbelt's break room, about the conduct of his "buddies" outside—the "buddies" being Union officials. (A 048.)

Because of the outstanding unfair-labor-practice allegations, the Director blocked the decertification election until the charges were investigated. (A 047.) When Bogardus learned that the decertification election was blocked, he sent an email to Hill asking for “a planning session for approaches to shedding ourselves of this pariah called [Union Local] 139[.]” (A 047; SAB 87.)

Anderson also continued to monitor employees, reporting primarily to Mayfield, but copying the management team, about Union meetings that were taking place among employees and that Anderson would continue “fishing for more information.” (A 048; SAB 91.)

Bogardus sent an update in April to Mayfield and the management team that Union “goon[s]” were informing other businesses of their labor dispute with Sunbelt. (A 048–049; SAB 93.) Around this time, Franksville Service Manager Chris Pender told employees that it would be futile to support the Union because “the union was never going to get in and it was never going to happen.” (A 049; SAB 42–43.)

On April 3, 2019, the Union filed a charge with the Board alleging, inter alia, unlawful interrogations and unlawful coercive statements by Sunbelt supervisors. (A 049; Dk. 12-2 pp. 119–20.)

E. Sunbelt Continues to Bargain in Bad Faith.

The parties continued to bargain between April and July 2019. During that time Mayfield continued to be late and cut bargaining short because of his schedule (A 049), Sunbelt refused to meet more often because it was “too busy” (A 050), required frequent caucuses (A 049–050), refused to provide counter proposals to the Union’s health, pension, and dues checkoff proposals (A 049), and provided only pay multipliers while refusing to discuss actual wages or other economic proposals. (A 049.) It was not until the June 5, 2019 bargaining session that Sunbelt offered a wage counterproposal: a wage freeze citing an “economic downturn,” despite

previously giving raises to employees at all of Sunbelt's non-unionized stores in Wisconsin. (A 050; SAB 61.) At that meeting, the parties attempted to compare the tentatively-agreed proposals, but Sunbelt claimed there were inaccuracies and refused to be more specific on what the inaccuracies were. (A 051.)

By July 2019, the parties had met for only 13 bargaining sessions over 15 months. (A 056.)

F. Sunbelt Effectuates the Threats it Made During the Organizing Campaign by “Reorganizing” Franksville and Eliminating the Entire Bargaining Unit.

Although decisions about layoffs and reorganizations at Sunbelt usually take place at the store or district level, Mayfield went outside of his typical duties as Regional Vice President and decided, sometime prior to August 5, 2019, to “reorganize” the Franksville location and lay off the bargaining unit. (A 051; SAB 27–31.) This was the first time in Mayfield's Sunbelt career that he ever took part in a layoff decision; typically, he has no role in that. (SAB 29, 31.) Nevertheless, Mayfield decided to lay off the entire bargaining unit by reorganizing the Franksville store into a “will-call” facility, carrying only small equipment for pick up by customers, which would no longer require the services of the Union-represented drivers and mechanics. (A 051–052.)

Mayfield claims that his decision to “reorganize” came from his review of a financial document similar to Franksville's Consolidated Income Statement.⁴ (SAB 32, 84.) Although Mayfield does not typically concern himself with the budgets and revenues of individual locations, in this instance he did. (SAB 34.) Included on the income statement is “Actual” revenue received and “Budget” revenue, the latter being an estimated figure, created by the

⁴ The Franksville Consolidated Income Statement was the only authenticated business record provided by Sunbelt during the ALJ administrative hearing. (A 052 n.79.)

Franksville manager and district manager, of the revenue that location hopes to bring in. (SAB 33–4, 39.) Also listed on the statement is the “Variance,” which is the difference between Sunbelt’s “Budget,” or hoped-for revenue, and the Actual revenue received. (SAB 84.) Sunbelt’s fiscal year runs from May 1 through April 30, with the Budget for the upcoming fiscal year created around February. (A 052 n.78.)

In Mayfield’s review of Franksville’s revenue information, he compared financial data from May 2018 through July 2018 with May 2019 through July 2019, to make his decision to “reorganize” Franksville and lay off employees. (SAB 32.) Summarized, the financial information appears as follows:⁵

Table F-1	May-18	Jun-18	Jul-18	<i>May-June Total</i>	May-19	Jun-19	Jul-19	<i>May-June Total</i>
Actual Revenue	576,268	565,601	604,924	1,746,793	489,501	586,684	657,705	1,733,890
Actual Revenue Change from 2018:					-15.06%	3.73%	8.73%	-0.74%
	May-18	Jun-18	Jul-18	<i>May-June Total</i>	May-19	Jun-19	Jul-19	<i>May-June Total</i>
Budget Revenue	562,286	589,132	634,918	1,786,336	750,914	807,516	840,233	2,398,663
Budget Increase from 2018:					33.55%	37.07%	32.34%	34.28%
Variance (Actual vs. Budget)	2.49%	-3.99%	-4.72%	-2.21%	-34.81%	-27.35%	-21.72%	-27.71%

According to Mayfield, the Union’s use of banners and inflatables at various job sites, publicizing the Union’s labor dispute with Sunbelt, were causing a decline in revenue at several

⁵ The month-by-month Actual Revenue and Budget Revenue figures in Table F-1 rely exclusively on data found in the Consolidated Income Statement provided by Sunbelt at the ALJ hearing. (SAB 84.) The “May-June Total,” “Actual Revenue Change from 2018,” “Budget Increase from 2018,” and “Variance (Actual vs. Budget)” use simple mathematics to derive sums, differences, and percentages based solely on the figures found in the Consolidated Income Statement.

Sunbelt locations in Wisconsin. (SAB 85.) While revenue was affected statewide, Mayfield chose to lay off employees only at the unionized Franksville location. (SAB 37–38.) Although Actual revenue was up in the two months leading up Mayfield’s decision to lay off employees, Mayfield claims the negative Variance in the Sunbelt-created Budget was the reason for the decision. (A 051; SAB 35–36.)

On August 7, Mayfield informed the Union that Sunbelt would use the next day’s bargaining session to “bargain the impact for a reorganization at [Franksville].” (A 052; SAB 83.)

When the parties met on August 8, Mayfield explained the “reorganization,” stating that the bargaining unit employees’ services were no longer required. (A 052.) The Union did not challenge the layoff decision, presented as a final decision, and instead engaged in effects bargaining for the unit employees who were to be laid off that day. (A 052.) The Union was able to secure severance packages for the laid-off employees. (A 053.)

G. Despite “Reorganizing” the Franksville Location, Business Continues as Usual in the Following Months.

The Franksville location continued to rent, service, and deliver large equipment in the months following the “reorganization.” (A 054.) The increased workload for repairs was so great in the absence of the laid-off employees that Pender transferred to a non-supervisory position at another store to escape the increased workload. (SAB 51–52, 55–56.) Franksville revenue also dropped sharply after the “reorganization,” with a massive decrease of \$257,362 in total revenue in September 2019 as compared to September 2018. (A 055; SAB 84.) As seen through periodic monitoring by the Union, bargaining unit work continued until as late as December 2019 and was done by supervisors, managers, and other non-bargaining unit employees. (A 054; SAB 26.)

H. Sunbelt's Retaliatory Campaign at Franksville Chills the Union's Organizing Efforts at Other Sunbelt Locations.

Following Sunbelt's layoff of the Franksville unit, the Union attempted to organize other Sunbelt locations in Wisconsin. (SAB 62–63.) However, employees at those locations shunned the organizers. (SAB 62–63.) Many employees would not even give their names or engage in any extended conversations with the Union representatives. (SAB 62–63.)

I. The Director Petitions the District Court for Injunctive Relief Under § 10(j).

On February 6, 2020, the Director petitioned for temporary injunctive relief pending completion of the Board's administrative proceedings against Sunbelt. (SA 001.) The petition was predicated on unfair-labor-practice complaints issued by the Director on June 19 and November 1, 2019. (Dk. 12-2 pp. 47, 100.) The petition sought an interim order requiring Sunbelt to, inter alia, cease and desist from its unlawful conduct, bargain in good faith with the Union, and restore the bargaining unit work. (SA 013–015.) On February 24, 2020, the district court ruled that it would evaluate the Director's petition based on the administrative record and supplemental affidavits. (Dk. 11 p. 1.) Administrative hearings on the underlying Board complaints were held before a Board ALJ in December 2019 and February 2020. (A 033.)

J. The Board's Administrative Law Judge Concludes that Sunbelt Violated the Act.

On May 13, 2020, the ALJ issued his decision and recommended order. (A 033.) The ALJ concluded, in relevant part, that Sunbelt violated §§ 8(a)(1), (3), and (5) of the Act by threatening employees that it would be futile to select the Union as their bargaining representative; instructing employees to report on the Union activities of other employees; interrogating employees about their Union activities; permanently laying off Union employees, thereby eliminating the bargaining unit and then transferring and assigning bargaining unit work to non-Union employees; and engaging in bad-faith bargaining by, inter alia, dilatory tactics such

as refusing to meet more than once a month, insisting that all non-economic items be resolved before bargaining over wages, bargaining without intent to reach agreement, and refusing to submit proposals in writing. (A 063–064.) The ALJ’s recommended order requires Sunbelt to, inter alia, reinstate the bargaining unit, bargain in good faith with the Union on a specified schedule, and cease and desist from further violating the Act. (A 064–065.) The ALJ’s decision is currently pending review before the Board.

K. The District Court Grants the Requested Injunctive Relief.

On August 7, 2020, the district court concluded that the Director met the requirements for § 10(j) relief and issued an injunction ordering that Sunbelt bargain in good faith with the Union and restore the bargaining unit work to the status quo that existed prior to Sunbelt’s layoff of the unit employees. (A 023–024.) Noting its limited role in determining the Director’s likelihood of success on the merits, the usefulness of the ALJ’s decision, and the ALJ’s evaluation of witness credibility and the evidence, the court reviewed the administrative record and concluded that the Director established a likelihood of success on the merits. (A 002, 003 n.3, 010–011, 015–022.)

Reviewing the evidence of irreparable harm, the district court determined that Sunbelt’s actions “essentially quashed the employees’ ability to form a union and negotiate,” and that without an injunction the harm would be irreparable because of the passage of time and the fact that employees witnessed Sunbelt’s aggressive actions against the Union and Union employees. (A 011–012.) The court determined there would be no adequate remedy at law in the absence of an injunction, as a Board order would come too late to remedy the serious adverse impact on employees’ interest in unionization and the collective-bargaining process. (A 013.) Given the evidence of harm as well as the Union’s vulnerability as a new representative and the bargaining unit’s decimation caused by Sunbelt’s unlawful actions, the court concluded that irreparable harm to the labor effort was occurring, that there was no likely irreparable harm to Sunbelt from

the injunction, and that the balance of harms and the public interest favored injunctive relief. (A 013–014.) The district court ordered Sunbelt to, inter alia, cease and desist from bargaining in bad faith, discriminating against employees for their Union support, threatening and coercing employees, and to restore bargaining unit work, pending the Board’s final order. (A 022–024.)

L. The Seventh Circuit Denies Sunbelt’s Motion for a Stay Pending Appeal.

On September 9, 2020, the Seventh Circuit, without comment, denied Sunbelt’s motion to stay the district court’s order pending appeal. (CDk. 15 p. 1)

IV. THE STANDARD OF APPELLATE REVIEW

The district court’s decision is reviewed under an abuse of discretion standard. *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 500 (7th Cir. 2008). The district court’s decision to grant § 10(j) relief should not be reversed unless it depended on “faulty legal premises, clearly erroneous factual findings, or improper application of the criteria governing preliminary injunctive relief.” *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566 (7th Cir. 1996) (quoting *Kinney v. Pioneer Press*, 881 F.2d 485, 493 (7th Cir. 1989)).

V. SUMMARY OF THE ARGUMENT

The Director satisfied this Court’s standard for § 10(j) injunctive relief. The district court’s conclusions that the Director showed (1) a likelihood of success on the merits of the administrative complaint, (2) likely irreparable harm absent interim injunctive relief, (3) no adequate remedy at law, and (4) that granting interim injunctive relief was in the public interest and would not result in public harm are well supported by the record and case law.

The court’s conclusion that the Director demonstrated a likelihood of success on the merits was soundly supported by the administrative record and relevant Board and Seventh Circuit law. The evidence in the record showed that Sunbelt engaged in a panoply of bad-faith

bargaining tactics, harassed and interrogated employees about their Union support, and then discriminatorily excised the bargaining unit from Franksville. There was also strong evidence that Sunbelt's purported financial reasons for its "reorganization" were not, in fact, the actual reasons, but that, instead, the motive was to eliminate the Union from Franksville. Sunbelt mischaracterizes the *Wright Line* test by erroneously adding inapplicable requirements and fails to meet its rebuttal burden for § 8(a)(3) discrimination. Sunbelt's arguments that it did not violate §§ 8(a)(1) and (5) are also of no avail as they mischaracterize, misrepresent, and ignore well-settled Board and Circuit law. The district court's likelihood of success findings are bolstered by the ALJ's decision finding the violations and it was appropriate for the court to rely on the ALJ's credibility determinations, factual findings, and legal conclusions.

The district court's conclusion that irreparable harm was likely if interim injunctive relief were not granted was based upon the evidence and the applicable law. The nature and timing of the unfair labor practices committed by Sunbelt are recognized by the Board and the courts as those that predictably chill employees from exercising their rights under the Act. Moreover, there is record evidence that this chill was in fact occurring and linked to Sunbelt's unfair labor practices. Likewise, the district court correctly concluded that, given the proven erosion of Union support, a final Board order is unlikely to be an effective remedy and, thus, the Director has no adequate remedy at law.

The court also properly balanced the harms in favor of injunctive relief. The injunction imposes on Sunbelt no irreparable harm: it must formally restore bargaining unit work that essentially continued after its alleged "reorganization" and bargain in good faith with the Union. Because Sunbelt failed to make any substantive harm argument before the district court, it may

not present new alleged harms before this Court. In any event, Sunbelt's claimed harms are speculative and hardly irreparable as it is an economically successful national company.

Finally, the district court correctly held that an injunction serves the public interest by protecting the collective-bargaining process and the Board's ability to effectively remedy the alleged violations.

VI. ARGUMENT

A. The Section 10(j) Standards

Section 10(j) of the Act,¹ authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. *See Harrell v. Am. Red Cross*, 714 F.3d 553, 556 (7th Cir. 2013); *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 499 (7th Cir. 2008); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001). Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under legal restraint, and thereby render a final Board order ineffectual. *See* S. REP. NO. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in *I Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985) (cited

¹ Section 10(j) (29 U.S.C. § 160(j)) provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

in *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 891 (7th Cir. 1990)). Thus, § 10(j) was intended to prevent the potential nullification of the Board's remedial authority caused by the passage of time inherent in Board proceedings. See *Lineback v. Irving Ready-Mix Inc.*, 653 F.3d 566, 570 (7th Cir. 2011); *Spurlino*, 546 F.3d at 500; *Kinney v. Pioneer Press*, 881 F.2d 485, 493–494 (7th Cir. 1989).

Section 10(j) directs district courts to grant relief that is “just and proper.” This Court holds that to determine what relief is “just and proper,” district courts should apply the general equitable standards for requests for preliminary injunctions. *Spurlino*, 546 F.3d at 499–500; *Bloedorn*, 276 F.3d at 286; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566 (7th Cir. 1996); *Kinney*, 881 F.2d at 490. The Director is entitled to interim relief when: (1) the Director has no adequate remedy at law; (2) the labor effort would face irreparable harm without interim relief, and the prospect of that harm outweighs any harm to the employer by the injunction; (3) “public harm” would occur in the absence of interim relief; and (4) the Director has a reasonable likelihood of prevailing on the merits of her complaint. *Harrell*, 714 F.3d at 556; *Spurlino*, 546 F.3d at 500; *Bloedorn*, 276 F.3d at 286. The Director bears the burden of establishing the first, third and fourth prongs by a preponderance of the evidence. *Spurlino*, 546 F.3d at 500; *Bloedorn*, 276 F.3d at 286. “The second prong is evaluated on a sliding scale: The better the Director’s case on the merits, the less its burden to prove that the harm in delay would be irreparable, and vice versa.” *Spurlino*, 546 F.3d at 500 (quoting *Bloedorn*, 276 F.3d at 286, 298). See also *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010).

1. Likelihood of success

The Director makes a threshold showing of likelihood of success by showing that her chances are “better than negligible.” *Spurlino*, 546 F.3d at 502; *Electro-Voice*, 83 F.3d at 1568.

In assessing whether the Director has met this burden, a district court must take into account that § 10(j) confers no jurisdiction to pass on the ultimate merits of the unfair-labor-practice case, *Spurlino*, 546 F.3d at 502; *Electro-Voice*, 83 F.3d at 1567, and that, ultimately, the Board’s determination on the merits will be given considerable deference. *Bloedorn*, 276 F.3d at 287. Thus, under § 10(j), the district court should determine whether “the Director has ‘some chance’ of succeeding on the merits.” *Harrell*, 714 F.3d at 556; *Spurlino*, 546 F.3d at 502. The district court should not resolve credibility conflicts in the evidence. *Electro-Voice*, 83 F.3d at 1570, 1571.

When a district court has the benefit of a decision rendered by an ALJ, the court “must give some measure of deference to the view of the ALJ.” *Spurlino*, 546 F.3d at 502. The ALJ conducts the only evidentiary hearing in the administrative proceeding and their credibility determinations are given deference by the Board itself. *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951). In the § 10(j) context, courts have routinely relied upon the conclusions of ALJs, with their particularized expertise in labor law. *Spurlino*, 546 F.3d at 498–99; *Bloedorn*, 276 F.3d at 288 (reversing denial of injunctive relief).

2. Balancing the Equities

The irreparable harm to be avoided in a § 10(j) case is the threatened frustration of the remedial purpose of the Act and of the public interest in deterring continued violations.

Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 744 (7th Cir. 1976) (cited with approval in *Kinney*, 881 F.2d at 491).³ In evaluating whether irreparable injury to the

³ *Electro-Voice* notes that when equitable relief is the ultimate relief sought, an additional element “no adequate remedy at law” is part of the traditional equity analysis for which petitioner must show that an award of damages would be “seriously deficient.” 83 F.3d at 1567 (quoting *Roland Machinery v. Dresser Industries*, 749 F.2d 380, 386–87 (7th Cir. 1984)). As here, a Board proceeding resulting in permanent injunctive relief is the sole avenue of relief for

policies of the Act is threatened, as well as in balancing such harms against any threatened harm to the respondent or the public interest, the district court must “take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority.” *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1993) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)). “In appropriate circumstances, the same evidence that establishes the Director’s likelihood of proving a violation of the [Act] may provide evidentiary support for a finding of irreparable harm.” *Bloedorn*, 276 F.3d at 297–98. *See also Harrell*, 714 F.3d at 557. “[T]he interest at stake in a section 10(j) proceeding is ‘the public interest in the integrity of the collective bargaining process.’” *Bloedorn*, 276 F.3d at 300 (citations omitted). *See also Harrell*, 714 F.3d at 557.

B. The District Court Correctly Concluded that the Director is Likely to Succeed in Establishing that Sunbelt Violated the Act.

In determining whether the Director has a likelihood of success on the underlying unfair-labor-practice claims, “it is not the district court’s responsibility ... to rule on the merits of the Director’s complaint.” *Bloedorn*, 276 F.3d at 287. The Director has a strong likelihood of success when an ALJ’s decision confirms Director’s theories. *Bloedorn*, 276 F.3d at 300–1.⁶ Here, because the Director’s theories are supported by the evidence and the ALJ’s decision, she has easily met her burden of having a better than negligible chance of success.

conduct made unlawful under the Act. Thus, in § 10(j) cases, the “adequate remedy at law” inquiry is whether, in the absence of immediate relief, the harm flowing from the alleged violation cannot be prevented or fully rectified by the final judgment. *Roland*, 749 F.2d at 386; *Harrell*, 714 F.3d at 557. This inquiry effectively is the same as the question of “irreparable harm” to the petitioner. *Electro-Voice*, 83 F.3d at 1572–73.

⁶ Accordingly, Sunbelt is wrong to claim that the district court abused its discretion by relying on the ALJ’s decision, the credibility findings therein, and the administrative record. (Br. 18.)

1. Sunbelt threatened, interrogated, and coerced employees in violation of § 8(a)(1).

In early spring 2019, Service Manager Pender told a group of maintenance employees in his office that “the union was never going to get in and it was never going to happen.”

Statements like these constitute threats of futility and violate § 8(a)(1). *See, e.g., Soltech, Inc.*, 306 NLRB 269, 272 (1992) (statement that “union was not getting in” violated Act).⁷

In March 2019, Anderson questioned a maintenance employee in his work area, asking him if he was aware of the recently-filed decertification petition and requesting that he report the activities of another employee. Such conduct constitutes unlawful interrogation. *Ernst Home Centers, Inc.*, 308 NLRB 848, 855 (1992) (supervisor asking employee if he had heard of recently-filed decertification petition violated Act). In about April 2019, Anderson again questioned an employee near his work area regarding the decertification election and asked him if a suspected pro-Union employee had spoken with him. This conduct similarly violates § 8(a)(1). *Id.* In the same month, Anderson initiated a conversation with an employee near Sunbelt’s break room, about the conduct of his “buddies” outside—the “buddies” being Union officials watching Sunbelt’s facility. This conduct violates the Act. *Park N’ Fly*, 349 NLRB 132, 133 (2007) (supervisor asking employee about his interactions with a “union guy” constituted unlawful interrogation).

Sunbelt incorrectly contends that a threat must be uttered for there to be unlawful interrogation, citing *Midwest Stock Exch., Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980). (Br. 49–50.) In *Midwest*, the Court stated that an interrogation is unlawful when “either the words themselves or the context in which they are used must suggest an element of coercion or

⁷ Sunbelt mischaracterizes the district court’s decision by claiming that it incorrectly found Pender’s statement was an “interrogation.” (Br. 50.) Rather, the district court correctly found that Pender made an unlawful statement under § 8(a)(1).

interference[.]”—there is no requirement that a threat be made. *Id.* More recently, this Court explained the standard for determining whether an interrogation is unlawfully coercive:

Whether interrogation is coercive depends on the circumstances of the questioning, including the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union.

Contemporary Cars, Inc. v. NLRB, 814 F.3d 859, 870 (7th Cir. 2016) (internal citations and quotations omitted). Again, there is no threat requirement. Indeed, any statement, whether it is an interrogation or merely an utterance by a manager, can be unlawfully coercive if “it tends to interfere with the free exercise of employee rights under the Act.” *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 830–31 (7th Cir. 2005) (handbook language found unlawfully coercive by examining, inter alia, context of words used and whether they targeted union supporters).

Under *Midwest*, *Contemporary Cars*, and *Brandeis*, Anderson’s questions to employees are all unlawful interrogations because there is an element of coercion (*Midwest*) and because Anderson’s statements were to determine who supported the Union, he had authority as a manager, and Sunbelt had well-known hostility to the Union (*Contemporary*, *Brandeis*).

2. Sunbelt bargained in bad faith in violation of § 8(a)(5).

a. Sunbelt unlawfully failed to meet at reasonable times.

A party’s refusal to meet at reasonable times violates § 8(a)(5). To determine whether there is a violation, the Board considers, inter alia, the overall frequency of bargaining sessions, whether the union has requested to meet more frequently, whether the employer has cancelled bargaining sessions, and any justifications offered by the employer for its failure to meet. *See, e.g., People Care, Inc.*, 327 NLRB 814, 825–26 (1999); *Calex Corp.*, 322 NLRB 977, 977–78 (1997), *enforced*, 144 F.3d 904 (6th Cir. 1998); *Bryant & Stratton Bus. Inst.*, 321 NLRB 1007, 1042 (1996), *enforced*, 140 F.3d 169 (2d Cir. 1998).

Sunbelt's persistent unwillingness to meet more than once per month with the Union was a clear violation of § 8(a)(5). *See, e.g., Calnex Corp.*, 322 NLRB at 977 (20 sessions over 15 months violated Act). Indeed, the parties met only 13 times during the 15 months from May 2018–July 2019. Sunbelt met less frequently than once a month and consistently rejected the Union's repeated efforts to bargain more frequently, citing vaguely that it was “too busy,” which has been routinely rejected by the Board as an insufficient justification. *Bryant & Stratton Bus. Inst.*, 321 NLRB at 1042 (fact that employer “had a business to run” or that employer's counsel was a “busy and successful lawyer” does not allow employer to evade statutory obligations).

Further, Sunbelt cancelled negotiating sessions for spurious reasons, such as Bogardus' alleged need to attend a court hearing that did not occur. Sunbelt cut short meetings due to Mayfield's habitual tardiness and “busy” schedule. Indeed, Mayfield had only flip comments for the Union when it asked him to take measures to arrive on time for negotiations. *See People Care*, 327 NLRB at 825 (employers have an obligation to meet with union at appointed time and lateness due to traffic is not sufficient excuse).

Despite the clear evidence, Sunbelt disingenuously denies its once-a-month schedule by pointing out that it met twice in the months of August 2018 and February 2019. (Br. 45.) However, these lone examples are misleading and do not negate the pattern. The only reason the parties met two times in August 2018 and February 2019 was to make up for the previous month's meetings that Sunbelt cancelled. (A 041–042; 045.)

b. Sunbelt refused to discuss wages and other economic terms for approximately four months.

Section 8(d) of the Act defines the duty to bargain as requiring parties to “confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]” 29 U.S.C. § 158(d). A party violates § 8(a)(5) by conditioning bargaining over mandatory subjects of

bargaining on the resolution of other subjects of bargaining. *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034–35 (1986); *Adrian Daily Telegram*, 214 NLRB 1103, 1110–12 (1974) (a party's refusal to discuss economic issues until non-economic issues were resolved was unlawful).

The district court correctly concluded that Sunbelt refused to bargain over wages, health insurance, and pension terms for four months. (A 005.) When the parties met on December 10, 2018, the Union offered proposals on dues check-off, and pension and health care coverage, which Sunbelt flatly rejected. (A 044.) When the parties next met on February 8, 2019 the Union presented its first wage proposal, which Sunbelt refused to consider. Again the Union presented its health, pension, and dues check-off proposals, but Sunbelt refused to discuss economic items. (A 045.) At the February 21 meeting, Sunbelt refused to consider the Union's dues check-off proposal without explanation, and when the Union later renewed its request for a wage proposal, Hill refused. (A 046.) At the March 21 session, Sunbelt continued its refusal to provide a wage counter proposal, as well as refusing to consider any of the Union's proposals to change Sunbelt's existing retirement or health insurance benefits, insisting again that it would not discuss economic items. Finally, at the April 30 session, the Union again tendered its wage, health, pension, and dues check-off proposals and requested counterproposals, but Sunbelt declined. (A 049.) Sunbelt did not make a wage proposal in response to the Union's February 8 proposal until the June 5 meeting, almost 4 months later, and even then, it proposed only a wage freeze. (A 050.)

Sunbelt fails to show that the court clearly erred in finding a refusal to bargain about these economic terms for four months. Sunbelt points to evidence that it provided information to the Union, prior to the first negotiating session, about the existing plans. (Br. 30.) However, this

was only information and not submitted as a proposal nor did the parties bargain over it. Next, although Sunbelt provided a revised draft of the collective-bargaining agreement in January 2019, that draft did not include wages, retirement, health care, or dues check-off. (Br. 30; SAB 66.) Indeed, the list of open articles at the end of the draft document *that was created by Sunbelt* lists as still open: “Article 7: Health Insurance;” “Article 8: Retirement Plan;” “Article 19: Dues;” and “Article 23: Classifications and Wages.” (SAB 82.) Sunbelt’s final claim that offering premium pay multipliers, without any proposed wage rate to base them on, was still somehow bargaining over “wages” fails because the multiplier is irrelevant without the base wage rate. (Br. 30.) Sunbelt’s contention that it discussed wages at the parties’ March and April 2019 bargaining sessions therefore misrepresents the record evidence. (Br. 46.) While Sunbelt engaged in some discussions regarding overtime multipliers and daily overtime, it refused to provide any actual wage proposals or respond substantively to the Union’s wage proposals. Thus, the record supports the court’s factual findings and Sunbelt cannot show clear error.

Sunbelt is also wrong on the law; its reliance on *Wyman Gordon Penn., LLC* is misplaced. (Br. 46–47.) 368 NLRB No. 150 (Dec. 16, 2019). *Wyman Gordon* does not privilege a refusal to bargain about economic subjects over the other party’s objection. *Id.* slip op. at 3. In *Wyman Gordon*, the parties had *expressly agreed* to handle non-economic issues before turning to economic issues. *Id.* slip op. at 2, 5. Here, there was no such agreement to postpone bargaining over economics. Sunbelt expressly rejected the Union’s ground rules, which proposed bargaining non-economic issues before economic ones. Given Sunbelt’s rejection of the ground rules, there was no agreement to defer bargaining over economic terms. Rather, the Union repeatedly requested to address wages at numerous bargaining sessions.

Finally, the fact that “the parties were making progress” (Br. 47) because of various tentatively agreed-to proposals does not negate the fact that Sunbelt refused to bargain about economic terms.

c. Sunbelt bargained with no intent to reach agreement.

In order to determine whether an employer has engaged in overall surface bargaining, it is necessary to examine the *totality of the employer’s conduct*, including its actions at and away from the bargaining table. *E.g.*, *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enforced*, 938 F.2d 815 (7th Cir. 1991). Relevant factors to examine under the totality of the circumstances include: (1) refusing to meet on a regular basis and engaging in other dilatory tactics; (2) refusing to consider union proposals, without explanation; (3) refusing, without justification, to agree to a dues-checkoff provision; (4) intentionally obfuscating proposals; and (5) undermining and denigrating the union in its communications with employees. *See Regency Service Carts*, 345 NLRB 671, 672–73 (2005) (refusing to meet); *Bryant & Stratton Bus. Inst.*, 321 NLRB at 1041–42 (dilatory tactics); *John Ascuaga’s Nugget*, 298 NLRB 524, 550 (1990) (refusing to consider union proposals), *enforced in rel. part sub nom.*, *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992); *CJC Holdings, Inc.*, 320 NLRB 1041, 1046–47 (1996) (refusing dues-checkoff provision); *Chester County Hosp.*, 320 NLRB 604, 621 (1995) (obfuscating proposals); *Mid-Continent Concrete*, 336 NLRB 258, 261 (2001) (denigrating union).

Examining the totality of Sunbelt’s conduct at and away from the bargaining table, discussed above, the district court correctly found evidence that the Director is likely to succeed in showing that Sunbelt engaged in surface bargaining. (A 017–018.) As discussed above, Sunbelt’s actions spanned many indicia of overall bad faith, including dilatory tactics, refusing proposals without explanation, delaying bargaining over economic subjects, and undermining the Union in unlawful statements to employees. Sunbelt’s intent to avoid agreement is highlighted

by its habitual hindrance of the parties' progress by, inter alia, refusing to work with the Union on current and accurate lists of tentatively agreed-to items.⁸

Sunbelt unsuccessfully defends against the district court's well-reasoned surface-bargaining analysis by cherry-picking a single bad-faith bargaining case from the panoply of Board law and contrasting the non-exhaustive list of factors in that case with its own conduct. (Br. 47–48.) But, “[t]here is more than enough scripture upon the subject to enable any devil to cite some of it for his purpose.” *John Ascuaga’s Nugget*, 298 NLRB at 550 (quoting *Shattuck Denn Min. Corp. v. NLRB*, 362 F.2d 466, 469 (9th Cir. 1966)). Sunbelt fails to state the true test: totality of the circumstances. (Br. 47.) *Atlanta Hilton & Tower*, 214 NLRB 1600, 1603 (1984). The fact that it did not engage in every single act listed as indicia of bad faith in one case does not absolve it, given its display of other bad faith conduct.

In its defense, Sunbelt highlights that it provided the Union copies of its 401(k) retirement plan, health plan, and summary plan descriptions prior the start of bargaining in May 2018 “so the Union would have information about [Sunbelt’s] policies and benefits[,]” but fails to explain why it then refused to discuss economic items such as these until almost a year later. (Br. 48.) Sunbelt also attempts to blame the Union for lack of bargaining progress, but that misses the mark. (Br. 47–48.) The Union was attempting to bargain in the face of Sunbelt’s flagrant obstructionist conduct. In any event, Sunbelt never filed an unfair-labor-practice charge with the Board alleging bad-faith bargaining by the Union.

⁸ Sunbelt’s assertion that it was clearly erroneous for the district court to find that Sunbelt never confirmed tentative agreements in writing mischaracterizes the court’s finding that Sunbelt “often” would refuse to confirm agreements in writing. (Br. 31; A 018.) The ALJ’s decision, which the court relied on, identifies numerous examples of Sunbelt’s obstruction regarding tentative agreements. (A 045–046, 050–051.)

3. Sunbelt eliminated the Franksville bargaining unit to discourage employees' union activity in violation of § 8(a)(3).

An employer violates § 8(a)(3) when it terminates employees because of their union activities. 29 U.S.C. § 158(a)(3). The question of whether an employer's adverse action violates § 8(a)(3) turns on motive. In determining motive, the Board uses the burden-shifting framework of *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981); *see also NLRB v. GATX Logistics, Inc.*, 160 F.3d 353 (7th Cir. 1998) (applying *Wright Line* framework in Seventh Circuit). Under *Wright Line*, "the General Counsel [must] make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct." 251 NLRB at 1089. In establishing whether the General Counsel has met its initial burden, the Board generally requires proof of: 1) union activity; 2) employer knowledge of that activity; and 3) anti-union animus. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), *enforced* 577 F.3d 467 (2d Cir. 2009).

The district court properly applied *Wright Line* in finding that the Director "has made a strong showing" of likelihood of success that Sunbelt unlawfully eliminated the bargaining unit and laid off the unit employees. (A 020–022.) Sunbelt was undeniably aware of employees' union activity given they voted for the Union and the Union and Sunbelt were engaged in negotiations for a collective-bargaining agreement for over a year. (A 004, 016.) There was also "ample evidence" that Sunbelt harbored antiunion animus, shown by its antiunion statements, over a year of bad-faith bargaining, and a failed effort to assist employees to decertify the Union. (A 021.) There is also strong evidence that the antiunion animus motivated the reorganization

because the reorganization followed Sunbelt's threats during and after the organizing campaign to terminate Union employees. (A 004, 006, 021.)

The district court properly rejected Sunbelt's claim that the reorganization and termination of bargaining unit work was because of alleged lost revenue due to the Union's bannering and picketing at sites around Wisconsin. (A 021.) In reality, the record shows that Franksville's revenue grew in the two months leading up to the terminations in August 2019 and revenue at that time was significantly higher than the same two-month period in 2018. Despite the "reorganization" that was supposed to remedy alleged lost revenue, Franksville revenue then dropped precipitously in September 2019, calling into question the reorganization's necessity. Further, Franksville continued to do much of the same bargaining unit work Mayfield had supposedly "reorganized" away. Most critically, the Union's picketing was statewide but Sunbelt chose to "reorganize" only the unionized Franksville location. Based on these facts, the district court correctly found "that the Director has a better than negligible chance of succeeding" in its case before the Board that Sunbelt unlawfully terminated the bargaining unit. (A 021–022.)

a. Sunbelt's attempt to reframe the *Wright Line* analysis is fatally flawed.

Sunbelt incorrectly claims that the Director failed to establish animus because: (1) there is no evidence that Mayfield, the decision maker, harbored animus; and (2) evidence of animus by Bogardus is immaterial because animus must be demonstrated by the "decision maker," Mayfield. (Br. 20–22.) Sunbelt is wrong on both counts.

First, contrary to Sunbelt's contention (Br. 20–22), there is ample evidence of Mayfield's animus. Sunbelt attempts to paint Mayfield as unconnected from Sunbelt's numerous unlawful acts when, in fact, Mayfield was a key player in Sunbelt's antiunion animus from the start. For example, Mayfield's participation in Sunbelt's unlawful bad-faith bargaining violations is

sufficient evidence of his antiunion animus regarding his decision to terminate the bargaining unit. *Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 534 (7th Cir. 2003) (antiunion animus of workforce reduction decision maker sufficiently demonstrated by his participation in separate unlawful act). Contrary to Sunbelt's assertions, the district court discussed Mayfield's demonstrated antiunion animus when, as chief decisionmaker for Sunbelt, he was habitually late for bargaining sessions, repeatedly told the Union that Sunbelt was too busy to negotiate, met less than once a month over the fifteen months the parties were bargaining, took extended caucuses, refused to discuss wages, and engaged in unlawful surfacing bargaining. (A. 015–018.) Further, Bogardus gave Mayfield regular reports of his antiunion crusade, including recommending to Mayfield that bargaining unit employees be terminated. Anderson also reported his surveillance of Union activities to Mayfield. The fact that Mayfield had regularly worked with unions previously and negotiated more than 60 contracts and may have acted lawfully in the past does not disprove his animus and unlawful actions in this case. (Br. 21.) *Electro-Voice*, 83 F.3d at 1569 (rejecting employer's assertion that the director's allegations of animus were implausible simply because employer had previously worked with unions).

Sunbelt argues that the district court "failed to find a *direct* correlation" between Mayfield's conduct and his reorganization decision. (Br. 22 (emphasis added).) However, under *Wright Line*, there is no requirement to find a *direct* correlation. *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015) (one manager's display of antiunion animus in the presence of another manager who made final decision on the adverse employment action sufficient under *Wright Line* to show employer animus); *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (Nov. 22, 2019) (direct evidence not required to satisfy initial *Wright Line* burden; circumstantial evidence sufficient to infer unlawful motive). Here, there is ample evidence, based

on his bargaining conduct and the conduct of managers under his authority, to infer a causal connection between the employees' Union support and Mayfield's decision to eliminate the bargaining unit: "[t]he record shows that Sunbelt did exactly what it threatened to do and terminated Union employees." (A 021.)

The fact that Mayfield may have halted Bogardus' preliminary attempts to transfer equipment does not establish that Mayfield lacked antiunion animus, given his other conduct at the bargaining table. (Br. 23.) Similarly, it does not disprove animus that Mayfield "quashed Bogardus's suggestion to close the Franksville location" because Mayfield and Bogardus discussed the lesser action of eliminating the bargaining unit, which is exactly what Mayfield did when he "reorganized" Franksville. (Br. 23.) The fact that Mayfield may have had previous "opportunities" to eliminate the bargaining unit, but did not seize them at the time, does not change the fact that he eventually decimated the unionized unit. (Br. 23.) Indeed, the fact that Mayfield personally made the decision to "reorganize" Franksville and lay off unit employees further supports the unlawful nature of the terminations because Mayfield admitted that he is not typically involved in these types of decisions.

Second, Sunbelt is wrong that animus by Mayfield is the only relevant, required animus to establish a violation. (Br. 20–21.) Evidence of animus by the decision maker is simply not a requirement of the *Wright Line* burden-shifting analysis, as the Seventh Circuit has expressly stated. *Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 714 (7th Cir. 2015). In *Big Ridge*, the employer argued that the Board was required to find that the "decisionmakers" for the employee's discharge harbored antiunion animus in order to find a violation. *Id.* However, this Court expressly rejected that argument, stating that "even without this specific finding, there is

substantial circumstantial evidence that [the employer's] antiunion animus motivated the [adverse employment] decision[.]” *Id.*

Even if there were no evidence of animus by Mayfield, there is plentiful circumstantial evidence of animus attributable to Sunbelt in the statements and actions of Bogardus, especially, and of Anderson. Bogardus, in particular, was the Wisconsin district manager and repeatedly predicted that unionizing would lead to the elimination of the employees. He publicly expressed animosity against the Union and discussed with other managers how to get rid of the Union. He referred to the Union as a “pariah” that Sunbelt needed to get rid of and to Union agents as “goons.” It is well-settled that statements by supervisory and management officials like Bogardus are imputed to the employer. *NLRB v. Louis A. Weiss Mem’l Hosp.*, 172 F.3d 432, 442 (7th Cir. 1999). *See, e.g., Golden Foundry & Mach. Co.*, 340 NLRB 1176, 1177 (2003) (“well established” that supervisor’s antiunion animus imputable to employer even if official who actually makes discharge decision is unaware of animus). It was entirely proper for the district court to rely on this evidence of Bogardus’s animus, contrary to Sunbelt’s contention. (Br. 21–22.)

Sunbelt wrongly attempts to argue that an intervening “neutral fact” here prevents imputing Bogardus’s animus to Mayfield, relying on *FiveCAP, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002). (Br. 24.) In *FiveCAP*, the “neutral” event was an employee going out on sick leave and leaving no work for the remaining employee, which led to the remaining employee’s layoff. *Id.* at 781. The Sixth Circuit found that this event, outside the employer’s control, supported the layoff decision and prevented the Board from imputing animus to find the layoff unlawful. *Id.* Here, Sunbelt claims that the “neutral fact” for a “reorganization” and destruction of the bargaining unit was Sunbelt’s “financial concerns.” (Br. 24.) However, the financial rationale, as

discussed below, fails to hold water, because it is based on Sunbelt's fabricated projected shortfalls, unsupported by actual revenue numbers at the time of the reorganization, and assertedly caused by Union actions that would have impacted numerous facilities statewide that were, nonetheless, spared similar reorganization. Sunbelt's portrayal of its "financial concerns" as a "neutral" fact that prevents imputing animus to Mayfield is unpersuasive.

Finally, Sunbelt attempts to frame the *Wright Line* analysis regarding motivation as singularly focused on time when, in fact, timing is only one factor to examine. (Br. 24–25.) *Great Lakes Warehouse Corp. v. NLRB*, 239 F.3d 886, 891 (7th Cir. 2001) (timing alone is not sufficient to demonstrate animus and is only one factor to examine in determining employer's antiunion animus). Sunbelt, in a failed attempt to distinguish this case from *Big Ridge*, asserts that because seventeen months elapsed since the Union vote, antiunion animus could not be the motivating factor for elimination of the bargaining unit. (Br. 25.) However, Sunbelt ignores the plentiful evidence of its ongoing antiunion animus during those seventeen months when it bargained in bad faith, assisted an employee with a decertification petition, and otherwise threatened and interrogated employees. *Electro-Voice*, 83 F.3d at 1570 (timing of discharge, manner it was carried out, and evidence of employer's other anti-union practices and animus established director met burden).

b. Sunbelt's *Wright Line* defense based on financial reasons fails.

Sunbelt wrongly claims the district court failed to properly consider Sunbelt's *Wright Line* defense that it would have taken the same action in the absence of antiunion animus. (Br. 25–29.) Sunbelt's attempted financial defense rests on a fabrication of "losses" based on inflated revenue projections. (Br. 27–29.)

The only credible piece of financial evidence, as found by the ALJ and relied on by the district court, was the Franksville Consolidated Income Statement, a legitimate business record

showing Sunbelt's actual revenue received and its self-created "Budget" of projected revenue, by month, from May 2018–September 2019. Importantly, the only objective evidence contained in this document of whether Sunbelt made or lost money during the relevant period is the *actual* revenue listed on the consolidated statement; the "Budget" number is an aspirational figure, created by Sunbelt, that projects what they would like to earn in a given period.

Sunbelt makes much of the alleged "Variance" and that it was a negative value for May 2019 to July 2019. (Br. 28.) However, the "Variance" is yet another subjective creation, as it is the difference, as a percentage, of its self-styled "Budget" of hoped-for revenue during a particular month, and the actual revenue received. *See* Table F-1, *supra* at 9. Indeed Sunbelt created its own negative variance because it increased its budget projections for those three months over the previous year by +34.28%; thus, Sunbelt's claimed -27.71% variance for May 2019 to July 2019 merely reflects that it overestimated its future revenues to be significantly higher than the same period the previous year. (Br. 28.) Instead, while May 2019 showed a reduction in actual revenue from the previous year, there was a quick rebound as June and July 2019 showed a +3.73% and +8.73%, respectively, increases in *actual* revenue from the same time the previous year. Even if May 2019 to July 2019 are looked at cumulatively, as Sunbelt claims they should be (Br. 28), the Consolidated Income Statement shows only a -0.74% reduction in actual revenue from the same three-month period the previous year, which hardly necessitates complete elimination of a bargaining unit that is keeping par year over year.

Even if Sunbelt were showing legitimate revenue losses at Franksville, it claims that the Union's banner activity was causing financial losses at locations across Wisconsin. However, despite losses elsewhere, it chose to "reorganize" only its sole Union-affiliated location. Further, Franksville did not actually "reorganize" as it continued to operate as more than simply a "will-

call” location well after August 2019, while losing money in the process; it continued to do repair work and deliver large equipment, which had been the work of the bargaining unit Sunbelt claimed it no longer needed. Indeed, Pender transferred to a new, non-supervisory role at another store to escape the heavily increased workload from the “reorganization” that did not actually take place.

4. Sunbelt fails to show the court’s factual findings were clearly erroneous.

In sum, as was its proper role, and well within its discretion, the district court “relied upon some of the [ALJ’s] factual and legal determinations as a benchmark to determine the Director’s likelihood of success.” (A 028.) *Bloedorn*, 276 F.3d at 288. Sunbelt’s attacks on the court’s factual findings, based on the ALJ’s decision, merely attempt to provide an alternate view of the facts, which is not sufficient to show that the district court’s findings are clearly erroneous. (Br. 30–34.) *Electro-Voice*, 83 F.3d at 1571. Even if Sunbelt offered plausible explanations for its actions with some supporting evidence, the court’s view focuses on the strength of the Director’s evidence only, because the inquiry in § 10(j) cases is limited to whether the Director has a better than negligible chance. *Id.* at 1570. Indeed, when, as here, a district court relies exclusively on the administrative record, it has no occasion to assess the credibility of the witnesses or resolve any conflicts of the evidence and, in such instances, owes the Director a favorable construction of the evidence. *Bloedorn*, 276 F.3d at 287.

Instead, Sunbelt must show that the facts available to the district court could show nothing but a single conclusion contrary to the one made by the court and Sunbelt has failed to make that showing. *See Electro-Voice*, 83 F.3d at 1569–70; *Spurlino*, 546 F.3d at 501 (showing only alternate view of evidence presented is not sufficient to meet clearly erroneous standard). Accordingly, the district court was correct to credit the Director’s factual allegations, as

supported by the ALJ's decision, because they are plausible in light of the evidence. *Bloedorn*, 276 F.3d at 287.⁹

C. The District Court Correctly Concluded that There Is Likely Irreparable Harm and No Adequate Remedy at Law.

Congress has declared that “encouraging ... collective bargaining” is “the policy of the United States[.]” 29 U.S.C. § 151. Section 7 of the Act grants employees the right to decide whether they wish “to bargain collectively through representatives of their own choosing....” 29 U.S.C. § 157. In this case, the Franksville employees exercised that right and freely selected their representative through a Board-conducted election, but Sunbelt’s unlawful actions are thwarting that choice, contrary to the purposes of the Act. Without timely interim relief, Sunbelt’s refusal to bargain in good faith and elimination of the bargaining unit will undermine employees’ support for the Union, at this and other facilities, and deprive employees of the benefits of collective bargaining. Over time, without an injunction, these harms will be irreparable and the Board’s final remedial order will be ineffective. Sunbelt will succeed in permanently depriving its employees of Union representation through its illegal conduct, contrary to the Act’s intent. Thus, the district court properly exercised its discretion by ordering an injunction in this case.

The district court identified the relevant harms and correctly concluded that the Board could not cure the likely harms that will occur in the interim. (A 011–014.) In § 10(j) proceedings, the harm at issue is to employees’ organizational rights and the continued erosion of support for the Union over time while the case moves through the Board’s administrative process. *Spurlino*, 546 F.3d at 500; *Electro-Voice*, 83 F.3d at 1567. The court accurately

⁹ Sunbelt’s assertion that the district court erred in finding that Sunbelt assisted Rivera with the decertification petition is irrelevant as the court did not rely on that factual finding to make any legal conclusions. In any event, the court’s factual finding is supported by the record. (SAB 57–59, 86.)

highlighted that “Sunbelt’s actions have essentially quashed the employees’ ability to form a union and negotiate” and “employees saw the aggressive actions taken by Sunbelt against the Union and Union employees.” (A 011, 012.)

Without timely interim relief, Sunbelt’s bad-faith bargaining and its discriminatory elimination of the bargaining unit will undermine employees’ support for the Union, at this and other Sunbelt facilities, and deprive employees of the benefits of collective bargaining. In “the labor field, as in few others, time is crucially important in obtaining relief.” *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967). Over time, without an injunction, this loss of support for the Union will be irrevocable, preventing the Union from bargaining or organizing effectively under a final Board order. And, with the passage of time, restoration of the unit work and of the bargaining unit will become more burdensome. Absent an injunction, the harm from Sunbelt’s misconduct will therefore not be “fully rectified by the final Board order,” raising the likelihood of remedial failure and leaving the employees, their Union, and the Board without an adequate remedy at law. *Harrell*, 714 F.3d at 557.

Sunbelt’s egregious unfair labor practices, on their face, establish irreparable harm. “In appropriate circumstances, the same evidence that establishes the Director’s likelihood of proving a violation of the [Act] may provide evidentiary support for a finding of irreparable harm.” *Bloedorn*, 276 F.3d at 297–98; *see also Harrell*, 714 F.3d at 557. Those circumstances are clearly demonstrated here. The discriminatory termination of employees for union activity predictably chills union support and interferes with collective bargaining. *Electro-Voice*, 83 F.3d at 1572–73. That inherent chilling impact from discrimination is so predictable that multiple Courts of Appeals, including this Court, infer irreparable harm based on the discharges themselves. *See Bloedorn*, 276 F.3d at 297–98 (interim reinstatement of employees illegally

refused hire just and proper even where “the Director chose not to make an independent case on irreparable harm”); *Frankl v. HTH Corp. (Frankl I)*, 650 F.3d 1334, 1363 (9th Cir. 2011) (“likelihood of success” on discriminatory discharges “largely establishes” likely irreparable harm, absent unusual circumstances); *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967) (independent evidence of irreparable harm not required because illegal discharges during an organizing campaign “operate predictably to destroy or severely inhibit employee interest in union representation”). Sunbelt’s elimination of the bargaining unit completely extinguished the Union’s base of support at Franksville and chilled union activity at other Sunbelt facilities. It thereby threatens to undermine any future collective-bargaining process under a final Board order. Employee support is vital to a union’s ability to bargain effectively. *Electro-Voice*, 83 F.3d at 1573; *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1193 (9th Cir. 2011). Without it, the Union has no leverage and is “hard-pressed to secure improvements in wages and benefits at the bargaining table.” *Moore-Duncan v. Horizon House Developmental Servs.*, 155 F.Supp.2d 390, 396 (E.D. Pa. 2001); *see also Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 998 (7th Cir. 2000) (“By undermining support for the union, the employer positions himself to stiffen his demands ... knowing that if the process breaks down the union may be unable to muster enough votes to call a strike.”). The risk of irreparable loss of support is particularly acute where, as here, a newly established union was attempting to bargain for a first contract. *Spurlino*, 546 F.3d at 500–501.

After Sunbelt’s long course of surface bargaining, additional delay in bargaining is likely to further undermine the Union’s status while the case is pending before the Board. *See, e.g., Bloedorn*, 276 F.3d at 297–98. “[T]he longer that an employer is able to ... avoid bargaining

with a union, the less likely it is that the union will be able to organize and to represent employees effectively once the NLRB issues its final order.” *Spurlino*, 546 F.3d at 500–501.

This predictable loss of support is indeed occurring in this case, even beyond the terminated bargaining unit members at the Franksville facility.¹⁰ Contrary to Sunbelt’s assertion that there is no risk of loss of support given that the unit was eliminated (Br. 36), Sunbelt’s conduct has caused employee support for the Union to begin to dissipate at the other Sunbelt locations within the Union’s jurisdiction. These include facilities that the Union has attempted to organize since the elimination of the Franksville bargaining unit.

This lost support for the Union will not be restored by a final Board order in due course. By the time the Board issues its final order, it will be too late; employees will have irretrievably lost the benefit of collective bargaining. *See Bloedorn*, 276 F.3d at 299; *Squillacote v. U.S. Marine Corp.*, 116 LRRM 2663, 2665 (E.D. Wis. 1984). Any employees hired to the restored bargaining unit will have seen that workers who organized were eliminated and waited for “years to have [their] rights vindicated.” *Silverman v. Whittal & Shon, Inc.*, 1986 WL 15735, at *1 (S.D.N.Y. June 6, 1986). Both the new unit employees and any reinstated employees will reasonably view the Union as ineffective in protecting them. *See Pascarell*, 904 F.2d at 881 (even if open union supporters are “ultimately reinstated by the Board . . . [e]mployees will not risk the uncertainty and hardship attendant upon even temporary lay-off if that is the price they

¹⁰ In light of discriminatory layoffs, other employees, especially if they were not union activists, will often refrain from supporting the union for fear of also losing their jobs. *See NLRB v. Q-1 Motor Exp., Inc.*, 25 F.3d 473, 475, 481 (7th Cir. 1994) (discharge provided “chilling lesson” that will “persist and pervade . . . in the memories of those who were there and in the lore of the shop . . .”); *Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874, 880–81 (3d Cir. 1990); *Pye v. Excel Case Ready*, 238 F.3d 69, 74 (1st Cir. 2001); *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 576 (2d Cir. 1988) (“Employees are certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs.”).

must pay for union activity”); *Angle*, 382 F.2d at 660–61 (when the Board finally acts, “the employees then at the plant may not wish to exercise the rights thus secured to them”). Thus, when the Board issues a final order, the Union will not have the support it needs to bargain effectively, and may ultimately be ousted by disaffected employees (who might otherwise not have been alienated but for Sunbelt’s violations) or forced to disclaim representation. Sunbelt will succeed in permanently avoiding a bargaining obligation. The Board’s order will be an “empty formality.” *Angle*, 382 F.2d at 660.

The Board’s legal remedy, ordering Sunbelt to bargain with the Union and eventual restoration of bargaining unit work years later, cannot return to Sunbelt employees the loss they suffered to their federally guaranteed right to organize. An interim order is necessary to assure Franksville employees and employees at Sunbelt’s other Wisconsin locations that their § 7 rights will be *timely* protected. *Schaub v. W. Mich. Plumbing & Heating*, 250 F.3d 962, 971 (6th Cir. 2001). *Bloedorn*, 276 F.3d at 300 (restoration of status quo is “vital means of preserving the Board’s ultimate ability to provide meaningful redress for the wrongs alleged.”). Thus, contrary to Sunbelt’s assertions, the fact that the Board can “penalize” an employer at the end of its lengthy administrative process fails to take into account the interim irreparable harm that will render that “penalty” a nullity. (Br. 35–36.)¹¹

Sunbelt relies on cases that are factually distinguishable and conflict with Seventh Circuit case law. (Br. 35–36.) In the first two cases cited by Sunbelt, there were still bargaining unit employees left who could speak well of the union. *Henderson v. Bluefield Hosp. Co.*, 902 F.3d 432, 439–40, 441–42 (4th Cir. 2018) (remaining nurses could carry on the union’s efforts while

¹¹ Actually, the Board does not “penalize” parties. Instead, it orders only the remedial relief necessary to effectuate the policies of the Act, not punitive remedies. 29 U.S.C. § 160(c).

waiting for a final board order); *Muffley v. Voith Indus. Servs., Inc.*, 551 F.App'x 825, 836 (6th Cir. 2014) (union represented other employees in other shops at same location). Here, Sunbelt decimated the bargaining unit by terminating every unit employee, which was witnessed by unorganized employees at Franksville and other Wisconsin locations, who then refused to even talk to the Union despite initially showing interest in Franksville's organizing efforts. *Bluefield* and *McKinney v. S. Bakeries, LLC*, 786 F.3d 1119, 1123 (8th Cir. 2015), also apply an incompatible standard requiring independent proof of irreparable harm, which this Circuit does not require. (Br. 36–38.) *Cf. Bloedorn*, 276 F.3d at 297–98 (even without direct evidence of irreparable harm, such harm can be inferred from the same evidence establishing Director's likelihood of success).

Sunbelt is also wrong when it claims that the labor effort at Franksville was comprised of only two employees. (Br. 37.) Rather, at its inception, the bargaining unit was comprised of approximately eight employees that Sunbelt was able to slowly whittle down to three when it rendered its final blow to the Union, one of whom decided to transfer, leaving only two employees to lay off. Indeed, the experience of the Franksville employees did deter employees at other locations from organizing because thereafter employees refused to even acknowledge the Union.

Finally, it is absurd for Sunbelt to claim that there is “objective” evidence that the Union may have lacked majority status because an employee filed a decertification petition. (Br. 38.) The employee was assisted by Sunbelt in filling out the decertification petition after Sunbelt threatened and coerced employees and dragged its feet at the bargaining table for a year.

D. The District Court Correctly Balanced the Harms and Public Interest in Favor of an Injunction.

The district court determined that the balance of the harms favors an injunction because the Director showed that irreparable harm is likely without injunctive relief, whereas, conversely, “Sunbelt has not presented any evidence that granting the § 10(j) injunctive relief would cause Sunbelt irreparable harm.” (A 014.)

Indeed, Sunbelt’s entire assertion of harm to the district court was a vague claim that it would be required “to bargain with the Union and reverse its reorganization of its location and return work to the location all to benefit unidentified future employees who would be hired to fill the unit positions after the work was returned to the location at issue[,]” without substantive detail or evidence in support. (Dk. 14 pp. 9–10.) A party who fails to raise an argument at the district court may not assert it for the first time on appeal. *Dorris v. Unum Life Ins. Co. of Am.*, 949 F.3d 297, 306 (7th Cir. 2020). Even arguments presented to the district court can be waived “if they were underdeveloped, conclusory, or unsupported by law.” *Id.* (internal quotations omitted). Given Sunbelt’s conclusory, unsupported assertions of harm to the district court, it has waived any argument on appeal that the injunction will cause it harm.

Even if it had not waived its argument, Sunbelt cannot establish irreparable harm. (Br. 38–39, 42.) Sunbelt’s claim that it would suffer “significant economic harm” by reacquiring or “track[ing] down” transferred equipment is without merit. (Br. 39.) The district court’s order does not dictate that Sunbelt needs to bring back any particular pieces of machinery, only that it brings back equipment sufficient to provide substantially the same level of bargaining unit work as existed on August 5, 2019. (A 024.) To the extent that Sunbelt is currently auctioning or dissipating assets that would otherwise be necessary to employ bargaining unit members at the Franksville facility, this argument weighs *in favor* of interim relief, as the district court found

that the Board has a likelihood of success on the merits of its claim, and it will be more difficult to restore the status quo at the time of the ultimate Board order in the absence of interim relief. Indeed, while Sunbelt contends that some of this equipment has been transferred to other facilities, it has not contended that the equipment necessary to sustain the bargaining unit no longer exists or that the restoration of the work would otherwise endanger Sunbelt's business. *Cf. Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251, 256 (9th Cir. 1978) (reopening order unduly burdensome because, since employer's closing, industry trend to subcontract work to low cost foreign companies and requiring employer to restart domestically would create competitive disadvantage).

Even if Sunbelt has to incur some costs to comply with the court's order, there is no evidence in the record that doing so will endanger Sunbelt's overall viability. (Br. 42.) The record shows that Sunbelt is a successful national business with facilities throughout Wisconsin and the country that will not be affected by the district court's preliminary injunction. *See O'Dovero v. NLRB*, 193 F.3d 532, 538–39 (D.C. Cir. 1999) (restoration of operations not unduly burdensome where alleged losses would only be experienced by one part of larger integrated business that remains largely unaffected). Indeed, in the two months prior to the reorganization, the Franksville location experienced significant revenue growth, particularly in comparison to the same period one year earlier. *Cf. Overstreet v. Gunderson Rail Services, LLC*, 587 F.App'x 379, 381 (9th Cir. 2014) (record supported employer's claim that forcing it to reopen facility that was and would continue to be wholly unprofitable due to loss of major customer would unduly burden employer). Further, Sunbelt continued with the fraught reorganization at its peril after the Director's complaint alleging the reorganization as unlawful and even after the ALJ's decision finding a violation. Any expenses Sunbelt may incur to return to the status quo are the result of

its own decision to perpetuate an unlawful reorganization plan. (Br. 38–40.) *See Harrell*, 714 F.3d at 556–57 (employer acts at its peril by continuing unlawful conduct).

Sunbelt’s asserted burden in recouping “its costs and time,” in the event it ultimately prevails before the Board is not a basis for denying injunctive relief. (Br. 42.) Given the Director’s strong likelihood of success, there is a low probability that Sunbelt will be allowed to undo measures taken to comply with the court’s order. In any event, the risk of an erroneous interim order is attendant in all § 10(j) proceedings as a risk of “carrying out sound labor law policy.” *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1055 (2d Cir. 1980).

Sunbelt also speciously purports to be concerned for employee free choice by claiming that hired employees may not want the Union to represent them. (Br. 41.) Courts have long been skeptical of “unwanted union” arguments when raised by the employer. *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 50 n.16 (1987); *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 468–69 (9th Cir. 1984). Further, newly-hired employees are presumed to continue to support the Union in approximately the same proportion as the employees they replace. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990). This situation is no different than what would be the case if Sunbelt had not unlawfully terminated the bargaining unit in the first place and welcomed new hires into the unit. It is also entirely speculative what the new hires’ union preferences may be. The fact that Wisconsin is a right-to-work state is immaterial to Sunbelt’s duty under the interim injunction. New employees will not be required, as a condition of obtaining employment, to become a member of the Union or pay any dues or fees. WIS. STAT. ANN. § 111.04 (West 2020).

The district court’s evaluation of the public interest was similarly correct. As the court recognized, the public interest in a § 10(j) case is in protecting the collective-bargaining process

and the Board's ability to effectively remedy the alleged violations. (A 014.) *Bloedorn*, 276 F.3d at 300; *Electro-Voice*, 83 F.3d at 1574. Here, that public interest is served by restoring the bargaining unit and requiring Sunbelt to recognize and bargain in good faith with the Union.

There is no countervailing public harm from the court's injunction and Sunbelt's arguments to the contrary fail. (Br. 43–44.) Sunbelt correctly states that the public interest is to avoid harm to the collective-bargaining process, but Sunbelt then, without justification, contends that it did not attempt to disrupt the collective-bargaining process. (Br. 43.) On the contrary, the ALJ and district court discussed ample evidence that Sunbelt attempted to do just that for over a year. Sunbelt appears to focus only on its “reorganization” and apparently forgets the voluminous bad-faith bargaining tactics it engaged in to thwart agreement with the Union. Simply because Sunbelt finally decided to bargain in good faith for the laid-off employees' severance packages does not negate the fact that it bargained in bad faith from May 2018 to July 2019 before eliminating the bargaining unit, contrary to Sunbelt's suggestion. (Br. 44.) There was no reason for Sunbelt to avoid the effects bargaining over the severance agreements because it had already achieved its purpose and eroded the bargaining process. Effects bargaining was merely a pro forma step for Sunbelt to put the final nail in the Union's coffin. Sunbelt's complete disregard for the collective-bargaining process is exactly the type of harm the public interest is concerned with and the court correctly concluded that the public interest favors an injunction.

Finally, contrary to Sunbelt's argument (Br. 52–53), the district court was well within its discretion to require Sunbelt to refrain from violating the Act in “any other manner.” (A 023.) Broad cease-and-desist orders are warranted where unlawful conduct is sufficiently “egregious or widespread.” *NLRB v. Cutting, Inc.*, 701 F.2d 659, 670 (7th Cir. 1983). As described above, Sunbelt engaged in repeated flagrant violations of the Act that demonstrate it harbors a general

disregard for employees' fundamental statutory rights. *See Frankl v. HTH Corp. (Frankl II)*, 693 F.3d 1051, 1061 (9th Cir. 2012).

VII. CONCLUSION

The district court's injunction ensures that Sunbelt does not profit from its illegal conduct, protects the employees' Section 7 rights, safeguards the parties' collective-bargaining process, preserves the Board's remedial power, and effectuates the will of Congress. Accordingly, this Court should affirm the district court's order.

VIII. REQUEST FOR ORAL ARGUMENT

Although this case does not raise any unusual or novel issues under § 10(j), the Director requests oral argument as it may aid the Court in a fuller understanding of the issues.

Respectfully submitted,

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Dated at Washington, D.C.
this 28th day of October, 2020

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