

Case No. 20-2482

United States Court of Appeals for the Seventh Circuit

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

Petitioner-Appellee,

vs.

SUNBELT RENTALS, INC.,

Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin,
Judge J.P. Stadtmueller

RESPONDENT-APPELLANT SUNBELT RENTALS, INC.'S REPLY BRIEF

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A. INTRODUCTION

Appellant-Respondent Sunbelt Rentals, Inc. (“Respondent”) hereby files its Reply Brief to Appellee-Petitioner National Labor Relations Board’s (“Petitioner”) Response Brief (“Response”). In the Response, Petitioner argues that this Court should affirm the District Court’s Order granting Petitioner’s request for injunction pursuant to 29 U.S.C. § 160(j). Specifically, Petitioner argues that the District Court properly concluded that Petitioner is likely to succeed in establishing that Respondent violated the National Labor Relations Act (“NLRA”) in the underlying administrative claim, the District Court properly concluded that Petitioner is likely to suffer irreparable harm, the District Court properly balanced the potential harms with the public interest, and the District Court properly issued a broad cease and desist order. For the reasons set forth herein, as well as the reasons set forth in Petitioner’s Opening Brief, the District Court erred in granting the injunction, and this Court should reverse the District Court’s Order.

B. ARGUMENT

1. **The District Court incorrectly concluded that Petitioner is likely to succeed in establishing that Respondent violated the NLRA.**

Petitioner first argues that this Court should affirm the District Court’s Order because the District Court correctly concluded that Petitioner is likely to succeed in establishing that Respondent violated the NLRA in the underlying administrative action. Petitioner is not likely to succeed in establishing that Respondent violated

the NLRA because, as explained herein, the District Court improperly applied the record evidence to applicable law. Therefore, this Court should reverse the District Court's Order.

i. Respondent did not violate Section 8(a)(1) of the NLRA.

Petitioner argues that the District Court properly concluded that the Director was likely to succeed in establishing that Respondent violated Section 8(a)(1) of the NLRA by threatening, interrogating, and coercing employees. Petitioner's claim fails because Respondent did not violate Section 8(a)(1) of the NLRA.

First, Petitioner argues it is likely to establish that Respondent's Service Manager Chris Pender violated the NLRA by telling employees that "the union was never going to get in and it was never going to happen." Response, p. 19. In support of this argument, Respondent cites *Soltech, Inc.*, 306 NLRB 269, 272 (1992). In *Soltech*, the president of the company, a high-ranking official, told employees that "the Union was not coming in." Here, Pender, the individual who allegedly stated that the Union "was never going to happen,"¹ was not a high-ranking official; rather, Pender was a Service Manager at Respondent's Franksville location. Response, p. 19. Additionally, the evidence of Pender's statement came from the testimony of an employee who overheard Pender speaking to employees for "maybe 5, 10 seconds,"

¹ Respondent notes that Pender denied telling any employees that the Union was not going to get in or that the Union was not going to happen. (Tr. 1155:3-11).

so the employee did not even hear the conversation in its entirety, could not give context to the conversation, and could have misheard Pender's statement. (Tr. 760:8-17).² Additionally, the employee who heard the conversation testified that he dismissed Pender's statement because the Union had already been voted in. (Tr. 760:18-23). Pender did not have the authority to make any decisions, such as reorganizing or closing the Franksville location in the event of unionization, and the employee who testified regarding the statement summarily dismissed it. Therefore, the employees could not have taken Pender's statement as a threat. *See ManorCare of Kingston PA, LLC v. Nat'l Labor Relations Bd.*, 823 F.3d 81, 87 (D.C. Cir. 2016) (explaining that "[t]he Board's test for determining whether a statement constitutes a threat is an objective one"). Because Pender was a low-ranking manager when he made one comment about the Union and because the comment could not be taken as a threat, the comment did not violate the NLRA. *See, e.g., Litton Indus., Inc.*, 190 NLRB No. 140, at *758 (1971) (finding no threat when a statement was "the personal conjecture of a low-ranking supervisor who was not privy to [the employer's] decisionmaking process insofar as the size of its working force was concerned").

² The administrative record is available on the District Court Docket as Document 12. The transcript from the administrative hearing is available as Exhibit A.

Petitioner further argues that it established a likely violation of Section 8(a)(1) of the NLRA because of three interactions Profit Center Manager Bryan Anderson allegedly had with employees. Response, p. 19. Petitioner alleges that Anderson improperly: (1) questioned an employee about a decertification petition and asked the employee to report the activities of another employee; (2) questioned an employee about decertification and Anderson asked the employee if a pro-Union employee had spoken with the employee, and (3) asked an employee about an employee's Union "buddies" monitoring the Franksville location. *Id.* These instances did not violate the NLRA, and Petitioner's allegations regarding these instances are misleading. For example, when Anderson asked the employee to let him know if another employee told the employee anything, the employee said he found it funny and responded with a joke. (Tr. 774:16-775:5). Additionally, when Anderson told an employee about the "papers" in the breakroom (i.e., the decertification petition), the employee did not even know what Anderson was talking about. (Tr. 773:6-21). When Anderson asked the same employee about his union "buddies," the employee "said what buddies? I don't have no buddies in Wisconsin. I am from California. He said your union buddies and he pointed at the car outside parked at the corner. I said they are not my buddies. I just walked back to the shop." (Tr. 776:22-777:2). Anderson did not continue to try to speak with the employee or otherwise press the employee about the union. (Tr. 776:22-777:2). These were

isolated and off-handed comments that the employees who heard them did not take seriously.

“Not all questioning of an employee regarding unions by a supervisor is unlawful.” *JAMCO*, 294 NLRB No. 80, at *899 (1989).³ Rather, in determining whether questioning constitutes unlawful interrogation, the NLRB considers the totality of circumstances. Innocent questions about decertification do not constitute unlawful interrogation. *See Landis Plastics, Inc.*, Case No. 3-CA-20096, 1998 WL 1984900 (NLRB 1998). Here, Anderson’s questions and comments regarding the decertification did not constitute unlawful interrogation because the employee did not even know what Anderson was talking about when Anderson asked him about a paper posted on a door. (Tr. 773:19-774:2). Likewise, Anderson’s question about the activities of another employee was taken as a joke, and Anderson’s comment regarding the union “buddies” was an off-handed comment that the employee ignored. The employees did not feel threatened or that Respondent infringed on their NLRA rights, and therefore, Respondent did not violate the NLRA.

Because the evidence does not show that Pender, Anderson, or any other Respondent employee unlawfully threatened, interrogated, or coerced employees,

³ Petitioner’s assertion that Respondent “contends that a threat must be uttered for there to be unlawful interrogation” is misleading. Response, p. 19. In its Opening Brief, Petitioner quoted *Midwest Stock Exch., Inc. v. Nat’l Labor Relations Bd.*, 635 F.2d 1255, 1267 (7th Cir. 1980): “To fall within the ambit of [Section] 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.” Opening Brief, p. 49.

Petitioner has not shown a likelihood of success in establishing that Respondent violated Section 8(a)(1) of the NLRA.

ii. Respondent did not violate Section 8(a)(5) of the NLRA.

Petitioner argues that the District Court properly concluded that it is likely to succeed in establishing that Respondent violated Section 8(a)(5) of the Act by failing to bargain in good faith. However, the record and applicable law demonstrate that Petitioner is unlikely to succeed in establishing that Respondent failed to bargain in good faith.

a. Respondent did not unlawfully fail to meet at reasonable times.

First, Petitioner argues that Respondent unlawfully failed to meet for negotiation sessions at reasonable times. As Respondent stated in its Opening Brief, and Petitioner did not dispute in its Response, “The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times.” *Garden Ridge Mgmt.*, 347 NLRB No. 13, at *3 (2006). Here, the totality of the circumstances indicates that Respondent satisfied its duty to meet at reasonable times. For example, Respondent never refused to set a date and time for the next meeting at the beginning of a session. (Tr. 1047:8-15). Throughout the bargaining process, Respondent worked with the Union to find mutually agreeable dates to meet. When Respondent could not meet, it explained to the Union why it could not meet. *See, e.g.*, GC Ex. 26.

Petitioner further claims that Respondent “cancelled negotiating sessions for spurious reasons.” Response, p. 21. However, when Respondent had to cancel bargaining sessions, Respondent offered legitimate reasons for the cancellations, and there is nothing in record, nor in the thousands of e-mails Respondent produced to Petitioner of communications between Respondent’s bargaining team, that Respondent was intentionally delaying the bargaining process. (Tr. 86:13-20; 721:6-15). The cancellations do not constitute a violation of the NLRA because Respondent explained the reasons for the cancellations, and there is no evidence that Respondent was intentionally delaying the bargaining process. *See, e.g., Prof'l Transp., Inc.*, 362 NLRB 534 (2019) (finding a violation of the NLRA where the employer cancelled seven sessions for vague reasons such as a “major conflict,” the need to consider a new court decision, and the need to continue drafting counter proposals). Therefore, Petitioner has not established that Respondent failed to meet at reasonable times.

b. Respondent did not unlawfully refuse to discuss economic terms.

Petitioner next argues that Respondent unlawfully refused to discuss economic terms for approximately four months. Response, pp. 21-22. The NLRA does not require parties to negotiate economic terms at any particular time. *See, e.g., John Wanamaker Philadelphia*, 279 NLRB 1034 (1986). Rather, an employer

cannot refuse to negotiate economic terms in an attempt to avoid “resolv[ing] differences and reach[ing] a common ground.” *Id.* at 1035.

Respondent did not refuse to discuss economic terms to avoid making progress in the negotiations. Rather, the parties were making progress on non-economic terms, and reached tentative agreements on numerous significant provisions. *See, e.g.*, GC Exs. 5, 7. At the administrative hearing in the underlying administrative case, Union officials testified that there is no requirement for the parties to negotiate wages before anything else and that the Union negotiates wages “once everything is on the table.” (Tr. 210:14-23; 463:6-14). Therefore, even the Union acknowledged that it typically negotiates non-economic terms before moving on to economic terms. Petitioner speciously argues that Respondent cannot raise the Union’s conduct as a defense because Respondent “never filed an unfair-labor-practice charge with the Board alleging bad-faith bargaining by the Union.” Response, p. 25. However, the filing of an unfair labor practice charge is not a prerequisite in this situation. Additionally, Respondent does not claim that the Union bargained in bad faith. Instead, Respondent contends that the Union cannot claim that Respondent engaged in bad faith bargaining when the Union’s practice is to similarly not negotiate wages until after negotiating non-economic terms. Because neither party was negotiating wages and the Union’s practice was to negotiate non-economic terms first, Respondent did not violate the NLRA by not

discussing wages when the Union also was not negotiating wages. Therefore, Petitioner has not established that Respondent violated the NLRA regarding negotiating economic terms.

c. Respondent did not bargain without an intent to reach agreement.

Petitioner argues that Respondent unlawfully bargained with no intent to reach agreement based on the totality of the circumstances. Response, p. 24. However, the totality of the circumstances shows that Respondent did bargain in good faith in an attempt to reach agreement. Specifically, each of the factors to consider in evaluating the totality of the circumstances as set forth in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) indicates that Respondent bargained in good faith:

- (1) Respondent did not engage in delaying tactics. Rather, Respondent worked to negotiate a collective bargaining agreement by reaching tentative agreements and sending the Union draft versions of the tentative agreements. GC Exs. 5, 7.
- (2) Respondent never made any unreasonable bargaining demands, and Petitioner does not claim that Respondent did so. Rather, Respondent diligently negotiated to reach a collective bargaining agreement.
- (3) Respondent did not make any unilateral changes in mandatory subjects of bargaining, and Petitioner does not allege that Respondent did so.

- (4) Respondent did not engage in any efforts to bypass the Union, and Petitioner does not allege that Respondent did so.
- (5) Respondent designated an agent with sufficient bargaining authority at each meeting. (Tr. 627:10-17; 627:23-628:15).
- (6) Respondent did not withdraw any already agreed-upon provisions, and Petitioner does not allege that Respondent did so.
- (7) Respondent did not engage in any arbitrary scheduling of meetings. Rather, Respondent coordinated with the Union to set a meeting date for the next negotiation session at the beginning of each session.

The totality of the circumstances demonstrate that Respondent bargained in good faith, and therefore, Petitioner has not shown a likelihood of success in establishing that Respondent violated Section 8(a)(5) of the NLRA.

iii. Respondent did not violate Section 8(a)(3) of the NLRA.

Petitioner argues that the District Court properly concluded that it was likely to succeed in establishing that Respondent violated Section 8(a)(3) of the NLRA. Specifically, Petitioner claims that Respondent violated Section 8(a)(3) when it reorganized the Franksville location due to financial reasons and laid off the remaining two members of the bargaining unit as part of the reorganization.

Petitioner has not established that Respondent violated Section 8(a)(3) because Petitioner has not established that Respondent reorganized the Franksville

location due to antiunion animus as required by the *Wright Line* test. In its Response, Petitioner argues that because Regional Vice President Jason Mayfield made the decision to reorganize the Franksville location, “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.” Response, pp. 27-28. This argument fails because the record evidence does not show that Respondent, or Mayfield specifically, participated in bad faith bargaining and the record establishes that Respondent decided to reorganize the Franksville location based solely on financial considerations, not on any alleged antiunion animus.

Initially, Respondent notes that Petitioner did not argue to the administrative law judge or the District Court that the causal connection between the reorganization decision and alleged antiunion animus can be attributed to Mayfield’s alleged bad faith participation in the negotiation process. In fact, in its petition for injunction, Petitioner did not make any allegations regarding antiunion animus. District Court Docket No. 1. In reply to Respondent’s opposition to injunction, Petitioner alleged that it established that antiunion animus caused the reorganization because of “discussing eliminating the unit because of the Union’s victory in the initial election, interrogating employees regarding their union activity, telling employees that their union activity was futile, and engaging in unlawful conduct at the bargaining table.” District Court Docket No. 15, p. 16. The Response is the first time that Petitioner

attempts to specifically connect antiunion animus to the reorganization decision by attributing antiunion animus to Mayfield, and the District Court did not attribute any antiunion animus to Mayfield in its Order.

To support its first-time argument that Mayfield's participation demonstrated the requisite causal connection between the reorganization decision and antiunion animus, Petitioner cites *Huck Store Fixture Co. v. Nat'l Labor Relations Bd.*, 327 F.3d 528, 534 (7th Cir. 2003). Response, pp. 27-28. In *Huck Store Fixture Co.*, the Seventh Circuit ruled that layoffs were motivated by antiunion animus and that animus was established because the decisionmakers "had exhibited animus toward the workers' efforts to unionize." 327 F.3d at 534. For example, the company president "publicly voiced his disdain for the Union," and a senior-level manager "had committed an unfair labor practice by circulating and obtaining signatures to an antiunion petition." *Id.*

Unlike in *Huck Store Fixture Co.*, there is no evidence that Mayfield, the sole individual who made the decision to reorganize the Franksville location, had antiunion animus. For example, the record does not indicate that Mayfield ever made any anti-union comments. Petitioner claims that Mayfield had antiunion animus due to his late arrivals to a few of the bargaining sessions. As explained above, however, Respondent did not engage in unlawful bad faith bargaining. Further, Petitioner's argument that Mayfield's tardiness on a few occasions is

evidence of antiunion animus is nonsensical, and Petitioner's statement that "Mayfield was habitually late" is misleading. Response, p. 5. The record demonstrates Mayfield was late only on a few occasions and only by a matter of minutes. Specifically, Mayfield missed one bargaining session (September 27, 2018) and was a few minutes late to three bargaining sessions (October 23, 2018, February 8, 2019, and April 30, 2019) out of thirteen. (Tr. 59:13-16, 61:13-20; 63:7-12; 87:9-22; 109:23-110:11; 242:24-243:12; 380:11-13). Absence from one bargaining session and tardiness to three others does not qualify as "habitual." Response, p. 5. It is worth noting that Mayfield's office was in Sugar Grove, Illinois, approximately 100 miles from Franksville, Wisconsin, where the parties met for negotiations. (Tr. 624:6-7). Mr. Mayfield's commute from his home to the bargaining session included going through very congested areas, including the Chicago suburbs, so even though Mayfield allowed himself ample time to get to the negotiations on time, he faced traffic and road construction that delayed his arrival. (Tr. 971:2-8). Petitioner's allegation that "[w]hen confronted, Mayfield refused to remedy his habitual tardiness and would not commit to leaving his home earlier to arrive on time" is not supported by record evidence. Response, p. 5. Rather, the record is silent as to how Mayfield responded to the Union's statement that he needed to leave earlier, and Petitioner simply infers that Mayfield "would not

commit to leaving his home earlier.” (Tr. 971:11-19). Petitioner cannot make inferences based on evidence not in the record to support its argument.

Further, it is nonsensical to believe that Mayfield was intentionally late because of antiunion animus when his tardiness affected both Sunbelt and the Union equally. The record demonstrates Sunbelt had other negotiators, including Sunbelt’s attorney, at the bargaining sessions who, like the Union, were affected by Mayfield’s tardiness and spent time that could have been used being productive instead of Respondent waiting for Mayfield. It is absurd to believe that, out of spite of the Union, Mayfield decided to waste the time of other Sunbelt negotiators too.

Petitioner also appears to claim that Mayfield had antiunion animus because according to Petitioner, although Mayfield instructed Bogardus to stop transferring equipment away from the Franksville location in June 2018, Mayfield did not instruct Bogardus to move the equipment back. Response, p. 4. This allegation is entirely speculative and is not supported by the record. Although Bogardus testified at the administrative hearing that Mayfield instructed him to stop transferring equipment, Bogardus did not indicate whether Mayfield instructed him to return the equipment. (Tr. 1038:3-8). Petitioner cannot attribute antiunion animus to Mayfield through speculation that Mayfield did not instruct Bogardus to return the equipment where the record is silent.

Petitioner also misleadingly alleges that Mayfield generally does not participate in layoffs and that “Mayfield does not typically concern himself with the budgets and revenues of individual locations, in this instance he did.” Response, p. 8. Although Mayfield testified that the profit center managers created the budget with direction from district managers (Tr. 672:5-16), Mayfield also testified that it was “routinely part of [his] job to review consolidated income statements for facilities.” (Tr. 634:6-9). Additionally, the record evidence shows that Mayfield made the high-level decision to reorganize the facility, but the bargaining unit members were not laid off until after negotiating the effects of the reorganization with the Union. (Tr. 631:9-25). So, Mayfield did not go beyond his usual job duties in reviewing the financial statements for the Franksville location, and Petitioner cannot establish a causal connection through these allegations.

Additionally, Petitioner argues that, although Mayfield allegedly demonstrated antiunion animus due to his tardiness to three of the bargaining sessions, the District Court did not need to find a direct correlation between Mayfield’s conduct and the decision to reorganize the Franksville location. Notably, Petitioner does not dispute that Mayfield was the decision maker or that the District Court failed to find a direct correlation between the conduct and the decision to reorganize. Although the District Court may not have needed to connect antiunion animus to Mayfield specifically, the law is clear that the District Court must find a

causal connection between the decision and antiunion animus. *See, e.g., Autonation, Inc. v. Nat'l Labor Relations Bd.*, 801 F.3d 767, 775 (7th Cir. 2015). Despite this requirement, the District Court did not connect the reorganization decision to antiunion animus.

Petitioner argues that antiunion animus was established based on the statements of other Respondent employees, namely District Manager Bo Bogardus and Anderson, and that these statements are attributable to Respondent and connect Mayfield's decision to reorganize the Franksville location to antiunion animus. This argument fails, and Petitioner's allegations regarding Bogardus's comments are misleading. In its Response, Petitioner writes, "Bogardus explained 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." Response, p. 3. However, the record evidence shows that Katie Torgerson, the previous Franksville location manager, testified that Bogardus told *her* on more than five occasions that he would close the store. (Tr. 804:19-805:1). The record does not establish that Bogardus told anyone other than Torgerson, then Profit Center Manager, that he wanted to close the store, but Petitioner's Response falsely indicates that Bogardus told multiple employees.

To support its claim that the statements of Bogardus and Anderson are attributed to Respondent, Petitioner cites *Nat'l Labor Relations Bd. v. Louis A. Weiss*

Mem'l Hosp., 172 F.3d 432, 442 (7th Cir. 1999), and *In re Golden Foundry & Mach. Co.*, 340 NLRB No. 140 (2003). Response, p. 30. In *Louis A. Weiss Mem'l Hosp.*, the Seventh Circuit ruled that the employer's decision to terminate an employee was not based on antiunion animus and noted that the NLRB "presented some evidence supporting a claim of antiunion animus, but it was not particularly strong, principally because the evidence is weak concerning the principal decision-maker." 172 F.3d at 444. Therefore, the Seventh Circuit declined to enforce the NLRB's order finding that the employer terminated an employee because of anti-union animus. Similarly, here, the evidence regarding anti-union animus for Mayfield, the decision-maker, is weak. The main evidence Petitioner relies upon in claiming Mayfield's anti-union animus is his conduct during the negotiation sessions, and, as noted above, it never made that argument to the ALJ or to the District Court.

In *Golden Foundry*, the NLRB imputed a non-decision maker's anti-union animus to the decision maker where the non-decision maker provided a false report that led to the discharge of an employee. 340 NLRB No. 40, at *1177-78. The NLRB explained that if it were not for the fact that the non-decision maker made a false report based on anti-union animus, the employee would not have been discharged. *Id.* Here, on the other hand, the employees who allegedly made anti-union statements, specifically Bogardus and Anderson, did not provide false information to Mayfield in an attempt to sway his decision. Rather, Mayfield

reviewed the financials himself and decided to reorganize the Franksville facility based on his own judgment. Therefore, it is improper to attribute the statements of Respondent's other employees to Mayfield and to use those statements to establish a causal connection between the reorganization and antiunion animus.

Petitioner also alleges that Respondent "assisted an employee with a decertification petition," and that this alleged assistance establishes antiunion animus. Response, p. 31. However, as Petitioner explained in its Opening Brief, the record is clear that no Respondent employee asked Mariano Rivera to complete the decertification petition or helped Rivera with the decertification petition. (Tr. 922:22-23; 1183:22-1184:7; 1193:19-1194:3). Rather, Rivera contacted the NLRB, and an NLRB representative explained the decertification process to Rivera and helped Rivera complete the petition. (Tr. 1176:21-1177:18). Although Rivera testified at the administrative hearing that Anderson's handwriting was on the petition (Tr.1186:2-6), Anderson testified that his handwriting was not on the petition. (Tr. 1060:25-1061:1). In fact, all of the handwriting on the petition appears to be the same, from Rivera. (R. Ex. 10). Therefore, Petitioner's statement that antiunion animus can be established from Respondent's alleged assistance with the decertification process is false.⁴

⁴ Respondent notes that, although Petitioner uses the decertification petition as an example of antiunion animus to support its position that it established a likelihood of success on the merits, Petitioner admits in the Response that "the court did not rely on that factual finding to make any

Petitioner further argues that it has a likelihood of success in establishing that Respondent's stated reason for the reorganization (i.e., financial reasons) was a guise for getting rid of the union. Specifically, Petitioner argues that the claimed financial reason fails because Respondent based its determination of financial decline on its budget. This argument fails for several reasons. First, Petitioner is not in the equipment rental business and, respectfully, is wholly unqualified to offer opinions regarding the accuracy or importance of Respondent's budget-making decisions. Second, more importantly, there is no evidence in the record that Respondent intentionally inflated its budget in an evil, elaborate scheme to later use the budget as a reason to reorganize the Franksville location and rid itself of the Union. To the contrary, the evidence demonstrates that Respondent invested significant resources in determining its budget, and it is in Respondent's best interests to have an accurate budget. The budget was created over a span of three to four weeks long before the start of the fiscal year on May 1st, and the record establishes the painstaking process Respondent used to create the budget. (GC Ex. 30; Tr. 671:19-25; 672:125; 673:1-25; 674:1-6; 675:8-25; 676:1-9; 921:13-24; 1036:19-25; 1037:1-22; 1050:22-25; 1051:1-25; 1052:1-20; 1082:10-18; 1084:12-19). As part of creating the budget, Respondent used Dodge Reports, the industry standard reports for market analytics

legal conclusions.” Response, p. 34. This is another example of Petitioner attempting to bolster the District Court's Order with its own argument.

and construction forecasts. (Tr. 1052:4-7). Respondent increased the budget based on a reasonable expectation that the market would grow. (Tr. 675:8-12). Respondent relied on credible information to create the budget, and Petitioner cannot second-guess Respondent's financial decisions in the absence of evidence to the contrary.

Petitioner alleges, "While revenue was affected statewide, Mayfield chose to lay off employees only at the unionized Franksville location." Response, p. 10. This statement ignores the fact that, out of Respondent's six Wisconsin locations, the Franksville location suffered the highest total rental revenue lost due to interference by the Union. (R. Ex. 9). Additionally, due to its size, location, and significant walk-in customer base, the Franksville location was the best suited to transition to a walk-in focused location. The location was reorganized to only carry "[e]quipment that could be picked up, not requiring a CDL license so the Class C would be 10,000 pounds or less." (Tr. 693:7-10). Prior to the reorganization, the Franksville location already had the highest volume of walk-in customers compared to Respondent's other Wisconsin locations. (Tr. 694:4-7). Respondent's location closest to the Franksville location is in Waukesha, Wisconsin, and compared to Waukesha, the Franksville location had approximately 200% more walk-in business. (Tr. 696:6-10). Further, in early 2018 before the election petition was filed, Dan Atwell, a regional operations manager for Respondent, created a report identifying that small

equipment was an area of opportunity and growth for the Franksville location. (Tr. 810:13-811:2; 938:16-21). Therefore, from a business standpoint, it made the most sense to reorganize the Franksville location. Petitioner cannot second-guess Respondent's business decisions, particularly when no record evidence suggests that Petitioner made the decision to reorganize for any reason other than financial reasons.

Petitioner seems to claim that Respondent intentionally inflated its budget so that it could later make the reorganization decision based on that inflated budget. When Respondent creates a budget, it cannot account for all factors, but it strives to be realistic so that the company can meet its goals and pay its expenses. The budget is created to be conservative. (Tr. 716:3-718:4). It is in the best interest of Respondent and the managers who create the budget to meet or exceed its budget each year. Logically, managers who cannot meet or exceed the budget they created may not continue to be employed. Although revenue was up at some points in the summer 2019 compared to the summer 2018, the Franksville location was significantly under budget in 2019 to where it should have been based on the third-party industry forecasts. The fact that the Franksville location was so far behind industry projections was deeply concerning, and Respondent had to adjust its business accordingly. *See* GC Ex. 30. The Union's banner and inflatable campaign outside the Franksville location substantially harmed its business;

significantly, a Union representative testified that he was not surprised that the Union's banner and inflatables caused a decline in the Franksville location's business. (Tr. 1264:23-1254:2).

Because the Franksville location was materially under budget, Mayfield made the decision to reorganize the Franksville facility. The reorganization decision was based on a neutral factor (i.e., financial reasons), not on any antiunion animus.

Further, the decision to reorganize the Franksville location was separate from the layoff of bargaining unit members at the Franksville location. (Tr. 631:16-25). As Mayfield testified, he planned to negotiate the effects of the reorganization with the Union. (Tr. 641:25-642:5). During negotiations, the Union negotiated severance for the laid off employees. (Tr. 654:2-7). Mayfield decided to reorganize the Franksville location on August 5, 2019, and then, a few days later, after negotiations with the Union, Respondent laid off the members of the bargaining unit. (Tr. 631:16-25). Because Respondent did not concurrently lay off the employees when Mayfield decided to reorganize the Franksville location, the layoff was not a guaranteed side effect of the reorganization.

In sum, Petitioner has not shown a likelihood of success in establishing a causal connection between the reorganization decision and antiunion animus. Therefore, the District Court erred in granting the injunction.

2. The District Court incorrectly concluded that Petitioner likely faces irreparable harm.

Petitioner argues that the District Court correctly concluded that irreparable harm is likely and no adequate remedy at law exists. Specifically, Petitioner argues that Respondent's conduct "deprive[s] employees of the benefits of collective bargaining," and that "[o]ver time, without an injunction, these harms will be irreparable and the Board's final remedial order will be ineffective." Response, p. 34. Petitioner also claims that "[t]he discriminatory termination of employees for union activity predictably chills union support and interferes with collective bargaining." Response, p. 35. However, as explained above, Respondent laid off the remaining bargaining unit members due to legitimate financial considerations, and, therefore, the termination was not discriminatory. As such, the terminations did not chill union activity.

Petitioner also claims that the risk of chilling union activity was particularly high because "a newly established union was attempting to bargain for a first contract." Response, p. 36. Petitioner's statement that the Union was "newly established" is false. Rather, the Union is well-established throughout the area and has significant resources to engage in a banner campaign that lasted more than a year.⁵ As Petitioner explained in its Opening Brief, the Union's banner

⁵ When Respondent attempted to introduce evidence regarding the banner, Petitioner objected, stating that "the banner is a subject of another proceeding," referencing the unfair labor practice

campaigns played a significant role in the financial decline of the Franksville location. So, it is disingenuous for Petitioner to argue that the Union was “newly established” when the Union invested significant resources to spread anti-Sunbelt propaganda.

Petitioner further claims that the Order is necessary because, without the Order, “[a]ny 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.’” Response, p. 37 (alteration in brief). However, despite Petitioner’s assertion to the contrary, only two employees were affected by the reorganization. Petitioner claims that the Union faced irreparable harm because the bargaining unit did not consist of the two employees who were laid off as part of the reorganization, but rather of approximately eight employees. Response, p. 39. Although the bargaining unit comprised of approximately eight employees at the time of certification in March 2018, the size of the bargaining unit reduced over time due to employees voluntarily transferring locations and employees being fired for safety concerns. The Union filed unfair labor practice charges against Respondent on behalf of the two employees who were fired due to safety concerns, and the NLRB dismissed their charge. *See* District Court Docket No. 20, Exhs. A & B. The

charge Respondent filed against the Union for its ongoing, lengthy bannered campaign. (Tr. 1266:4-5).

dismissal was affirmed on appeal, and there are no allegations in this case that the termination of any bargaining unit members before the reorganization was unlawful. Therefore, the only harm at issue is to the two individuals, both of whom received severance packages negotiated by the Union and have stated that they do not want to work for Respondent. Petitioner only alleges theoretical harm and cannot establish any actual harm.

Finally, Petitioner claims that “the experience of the Franksville employees deterred employees at other locations from organizing.” Response, p. 39. Petitioner does not cite any evidence in support of this statement. There is no evidence in the record of organizing activities at other General Tool locations,⁶ and Petitioner’s arguments are wholly based on speculation and conjecture. Instead, the evidence demonstrates Respondent has unionized employees throughout the country. Some employees may choose not to unionize, but their choices are not reflective of Respondent’s actions with regard to the Franksville location. For these reasons, Petitioner did not establish irreparable harm, and the District Court erred in making this finding.

⁶ The Union had an election on November 20, 2018 at a Climate Control location in Wisconsin. Mayfield, Bogardus, and Anderson had no responsibilities for Climate Control at the time of the election. (Tr. 239:19-240:25).

3. The District Court incorrectly balanced the potential harms and public interest.

Petitioner argues that the District Court correctly balanced the harms and public interest in favor of an injunction. To support this argument, Petitioner claims that Respondent “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.” Response, p. 41. However, Respondent laid off the employees in the bargaining unit on August 8, 2019 (Tr. 631:22-25), but Petitioner did not file an unfair labor practice Complaint until August 30, 2019, after the reorganization decision had been made. (District Court Docket, 1, Exhibit 4). The ALJ did not issue a decision until May 2020, approximately ten months after the reorganization, so Petitioner cannot argue that Respondent engaged in the reorganization despite an unfair labor practice charge and ALJ decision because the reorganization was complete at that point. As explained above, Petitioner made the decision to reorganize based on financial reasons, and therefore, having to again reorganize the Franksville location imposes significant harm on Respondent and its business.

Further, the unprecedented Covid-19 pandemic has changed nearly every aspect of life and business for people and businesses across the country. The District Court did not consider the effects of the Covid-19 pandemic, even though the District Court entered the Order on August 7, 2020, months into the pandemic. The

pandemic has caused significant harm to Respondent and many businesses across the country. The District Court should have considered the potential harms to Respondent in light of the current economic climate, and therefore, the District Court incorrectly balanced the potential harms and public interest.

4. The District Court erred in prohibiting all violations of the Act.

Finally, Petitioner argues that “the district court was well within its discretion to require Sunbelt from violating the Act in ‘any other manner.’” Response, p. 43. In support of its argument, Petitioner cites *Nat’l Labor Relations Bd. v. Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983), and *Frankl v. HTH Corp. (Frankl II)*, 693 F.3d 1051 (9th Cir. 2012). In *Cutting*, the NLRB ruled that the employer violated the NLRA and ordered the employer to, among other things, “cease and desist from ‘in any other manner’ interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under [the NLRA].” 701 F.2d at 669. On appeal, the Seventh Circuit ruled that the “‘any other manner’ language is unnecessarily broad.” *Id.* at 670. Specifically, the Court wrote, “The conduct found in violation of the Act was not so egregious or widespread to justify such an order.” *Id.*

In *Frankl II*, the NLRB issued a broad cease and desist order after the employer engaged in unfair labor practices. 693 F.3d at 1061. Specifically, the District Court granted a 10(j) injunction requiring the employer to cease and desist from specific conduct, and the employer violated the injunction by engaging in the

same unlawful conduct. *Id.* at 1056. Because the employer engaged in repeated, similar violations of the NLRA, the NLRB issued a broad cease and desist order. *Id.* at 1061. The Ninth Circuit affirmed the NLRB's order and wrote, "Such an order is appropriate 'when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.'" *Id.* at 1061.

Here, to the extent Respondent violated the NLRA, which Respondent denies, any violation "was not so egregious or widespread" to justify the District Court's overbroad order prohibiting any violation of the NLRA. *See Cutting*, 701 F.2d at 669. Unlike in *Frankl II*, the 10(j) injunction at issue in this case is the first injunction in the dispute between Respondent and the Union, and the underlying administrative case is the first dispute between Respondent and the Union. Therefore, the District Court erred in issuing a broad cease and desist order, and this Court should modify the order.

C. CONCLUSION

As set forth herein and in Respondent's Opening Brief, the District Court erred in granting Petitioner's motion for injunction because the District Court based its Order on faulty legal premises and clearly erroneous factual findings, and the Court improperly applied the factors for injunctive relief. Therefore, this Court should reverse the District Court's Order.

If this Court does not reverse the District Court's Order in its entirety, this Court should, at a minimum, strike the overbroad language generally enjoining Respondent from violating the NLRA.

Dated: November 18, 2020

Respectfully submitted,

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Dated: November 18, 2020

By: s/ Patricia J. Hill
Attorney

