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Sunbelt Rentals, Inc. *and* International Union of Operating Engineers Local 139, AFL–CIO. Cases 18–CA–236643, 18–CA–238989, and 18–CA–247528

March 29, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On May 13, 2020, Administrative Law Judge Michael A. Rosas issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

The Respondent owns and operates facilities throughout the United States at which it rents and sells construction equipment. This case involves numerous allegations that the Respondent committed unfair labor practices at its Franksville, Wisconsin facility in 2018 and 2019, including while negotiating for an initial collective-bargaining agreement with the Charging Party Union. As discussed below, we agree with most of the judge's conclusions and supporting findings. We also agree with the judge's imposition of special remedies for the Respondent's pattern of serious misconduct.

Background

The relevant facts, fully set forth in the judge's decision, are as follows. The Union filed a petition to represent a bargaining unit of drivers and mechanics at the Franksville facility on February 12, 2018. The unit employees transported and maintained the Respondent's large rental equipment. Between February 12 and the March 6 election, district manager Robert Bogardus III warned employees several times that if the Union won the election, the Respondent would close the Franksville facility.[5] A majority of unit employees voted for the Union, and the Board issued a certification of representative on March 13, 2018. Several days later, the Respondent discharged Franksville manager Katie Torgerson in part due to "the union vote."

Following the election, the Union sought to bargain with the Respondent for an initial collective-bargaining agreement. The Respondent's bargaining team included regional vice president Jayson Mayfield, district manager Bogardus, and new Franksville manager Bryan Anderson. On March 29, 2018, the Union proposed several potential bargaining dates in April, but the Respondent declined to meet until May 22, after which it met with the Union

[1] On August 7, 2020, the Federal District Court for the Eastern District of Wisconsin issued a preliminary injunction under Sec. 10(j) of the National Labor Relations Act, enjoining the Respondent from refusing to bargain in good faith with the Union, refusing to meet at reasonable times for bargaining, refusing to bargain about wages, making unilateral changes to employees' terms and conditions of employment, and discriminating against employees by transferring bargaining unit work and laying off unit members. *Hadsall v. Sunbelt Rentals, Inc.*, 2020 WL 4569177 (E.D. Wis. Aug. 7, 2020). Pending our disposition of these allegations, the court ordered the Respondent, inter alia, to bargain in good faith and restore the transferred unit work and positions. The court subsequently denied the Respondent's motion to stay the injunction pending appeal to the United States Court of Appeals for the Seventh Circuit. *Hadsall v. Sunbelt Rentals, Inc.*, 2020 WL 5259066 (E.D. Wis. Sept. 3, 2020).

[2] In their answering briefs, the General Counsel and the Charging Party argue that pursuant to Sec. 102.46(a) of the Board's Rules and Regulations, the Board should disregard several of the Respondent's arguments that were not included in its list of exceptions. We decline to do so because the Respondent sufficiently briefed these arguments, and there was no apparent prejudice to the other parties. See, e.g., *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1016 fn. 1 (1979) (declining to strike exceptions where opposing party "filed an answering brief and seemed to be fully apprised of the issues raised" and therefore suffered no prejudice), enfd. 615 F.2d 1100 (5th Cir. 1980).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of allegations that the Respondent's reorganization of the Franksville facility and accompanying layoffs violated Sec. 8(a)(4) or that Franksville manager Bryan Anderson's statement to an employee that the employee's "[union representative] buddies are outside" violated Sec. 8(a)(1).

[4] Consistent with our notice and invitation to file briefs issued March 1, 2021, we sever and retain for further consideration the issue of whether the Respondent unlawfully prepared two employee witnesses to testify at the unfair labor practice hearing by not fully complying with all the safeguards required under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). We shall modify the judge's conclusions of law and recommended Order to delete references to this severed issue and to conform to the judge's findings as modified herein, to the amended remedy, and to the Board's standard remedial language. We shall also modify the Order in accordance with our recent decisions in *Danbury Ambulance Service*, 369 NLRB No. 68 (2020), and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021). We shall substitute a new notice to conform to the Order as modified.

[5] The complaint made no allegation regarding these statements.

approximately once per month through July 2019.[6] The Union repeatedly requested additional meetings, but the Respondent refused these requests. At times, the Respondent also canceled scheduled meetings or delayed them because its representatives were unavailable. The parties' meetings, each generally lasting less than 4 hours, frequently included multiple lengthy caucuses requested by the Respondent, during which union representatives at times observed the Respondent's representatives engaging in activities unrelated to the negotiations. The parties ultimately met to bargain 13 times over a 15-month period.

Despite the infrequency of bargaining sessions and the brevity of actual negotiations, the parties made progress at their September, October, and December 2018 meetings. Negotiations came to a standstill in 2019, however, as the Respondent rejected most the Union's proposals and refused to make counterproposals. At the parties' two February 2019 meetings (there was no January meeting), the Respondent rebuffed the Union's requests to bargain over wages, stating that it was unwilling to negotiate economic terms at that time. The Respondent also rejected the Union's request for dues checkoff. It stood firm on these positions at both the March and April meetings, although it did propose small increases in its premium pay rate. The Respondent also consistently refused to make counterproposals to the Union's health and pension proposals and continued to engage in a pattern of delay.

At the end of February, the Union filed an unfair labor practice charge alleging that the Respondent was engaging in surface bargaining. On March 21, employee Mariano Rivera filed a decertification petition, which was posted in the Franksville facility. Franksville manager Anderson soon asked a unit employee to let him know if another employee—an open union supporter—told him anything about the petition. The petition was blocked by the pending unfair labor practice charge and withdrawn. Promptly thereafter, on March 27, district manager Bogardus asked the Respondent's attorney if she "would be available to discuss a planning session for approaches to shedding ourselves of this pariah called [the Union]." In April, Anderson repeated his question about the decertification petition to the same employee, and service manager Christopher Pender told several employees that it would be futile to support the Union because "the [U]nion was never going to get in and it was never going to happen."

At the parties' June 5 meeting, the Respondent again rejected the Union's dues checkoff, pension, and health insurance proposals. Further, it made its long-awaited wage proposal, which was to freeze wages at their current level during the first year of a collective-bargaining agreement, with wage reopeners in the second and third years. The session ended with the Respondent alleging that the Union's list of tentative agreements and remaining open issues was inaccurate but refusing to identify the errors.

The June 5 meeting was the last substantive bargaining session between the parties. At the July meeting the negotiations quickly turned adversarial, and the Respondent was away from the bargaining table for almost the entire hour-long session. At their final meeting on August 8, the Respondent announced that it had decided to convert Franksville into a will-call facility that would only rent small tools for customer pickup, and that it would reallocate Franksville's large equipment inventory to other facilities. The Respondent further informed the Union that these operational changes meant that the services of the two remaining unit employees were no longer needed and they would be laid off.[7] However, in the months following the layoffs, the Respondent continued to rent and transport large equipment out of the Franksville facility.

Analysis

I. THE 8(A)(1) ALLEGATIONS

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by threatening employees that it would be futile to support the Union. The judge based this finding on employee Jamie Smith's credible testimony that, in April 2019, he overheard service manager Pender tell several employees that it would be futile to support the Union because "the [U]nion was never going to get in and it was never going to happen." We find no merit in the Respondent's exceptions to this finding.[8] The judge's

[6] All dates hereinafter are in 2019 unless otherwise noted.

We affirm the judge's denial of the Respondent's motion to strike portions of the prehearing affidavit of union organizer and bargaining team member Michael Ervin regarding what transpired at bargaining meetings, and to strike related portions of Ervin's testimony. Ervin's prehearing affidavit was not placed into evidence. Rather, the Respondent's motion was based on the fact that Ervin consulted the notes of another member of the bargaining team in preparing his affidavit, and the affidavit was used at the hearing to refresh Ervin's recollection. Because Ervin attended these meetings and had personal knowledge of what happened at them, the judge properly denied the motion. See, e.g., 3 C. Mueller & L. Kirkpatrick, Federal Evidence § 6:6 (4th ed. 2020) (recognizing that testimony may "rest[] in part on information gleaned from outside sources"); *M.B.A.F.B. Federal Credit Union v. Cumis Insurance Society, Inc.*, 681 F.2d 930, 932 (4th Cir. 1982) (stating that "[e]vidence is inadmissible . . . only if . . . the witness could not have actually perceived or observed that which he testifies to").

[7] The Respondent previously had discharged three other unit employees, and decertification-petitioner Rivera had recently transferred to another location.

[8] That the complaint alleged the unlawful threat was made in December 2018 or January 2019 instead of April 2019 is inconsequential. See, e.g., *Williams Enterprises*, 301 NLRB 167, 168 (1991) (5-month date discrepancy between complaint and judge's finding immaterial because "the issue . . . was the same regardless of when the violation occurred"

misstatement that the threat occurred in March 2018 and was made to (rather than near) Smith does not affect the analysis. Moreover, Smith's testimony downplaying the severity of the threat is immaterial because the violation is based on objective rather than subjective coerciveness. See, e.g., *Network Dynamics Cabling*, 351 NLRB 1423, 1427 (2007).

We also agree that the Respondent violated Section 8(a)(1) by twice interrogating an employee about other employees' union activities related to the decertification petition. In addition to the facts found by the judge, we note that employee Ramon Gutierrez testified that Franksville manager Anderson instructed him in March 2019 that "if . . . anybody tells [Gutierrez] anything, especially [coworker Romanowski, a suspected union supporter], to let [Anderson] know."

II. ALLEGATIONS REGARDING THE RESPONDENT'S MARCH 2018-JULY 2019 COURSE OF BARGAINING

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by failing to meet at reasonable times for negotiations. In so doing, we emphasize that the Respondent attended only 13 bargaining sessions over 15 months, despite the Union's repeated but fruitless requests for additional meetings. In addition, the Respondent canceled scheduled meetings without proper reasons for doing so. The Respondent's exceptions overstate the extent, impact, and legitimacy of its negotiators' purported scheduling conflicts (and the Union's failures), and they do not address the Respondent's numerous other instances of dilatory behavior. See, e.g., *Lancaster Nissan*, 344 NLRB 225, 227-228 (2005) (rejecting employer's excuses that its representatives were often busy or unavailable where employer met with union only 12 times during initial certification year, canceled several meetings, and "turned a deaf ear" to union's repeated requests for additional meetings), enfd. 233 Fed.Appx. 100 (3d Cir. 2007); *Rhodes St. Clair Buick*, 242 NLRB 1320, 1323 (1979) (minor lateness of union representatives did not excuse employer's dilatory behavior because no evidence that union sought to inhibit bargaining), enfd. 622 F.2d 585 (4th Cir. 1980).

Further, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over wages from February to June 2019. The judge correctly found that the Respondent's 4-month refusal to submit a wage counterproposal—despite its previous willingness to discuss other economic subjects, such as health insurance and retirement plans—reflected an unlawful intent to stall negotiations.[9] See, e.g., *Viking Connectors Co.*, 297 NLRB 95, 104–106 (1989) (3-month delay in wage proposal unlawful due to unsupported justification that showed intent to delay bargaining beyond certification year). *Wyman Gordon Pennsylvania, LLC*,[10] in which the Board dismissed an allegation that the employer unlawfully insisted on resolving noneconomic subjects of bargaining before discussing economic ones, is distinguishable. There, the delay in discussing economic subjects was of shorter duration, the parties continued to make progress on noneconomic subjects in the meantime, and the parties had agreed to a ground rule that they would discuss noneconomic subjects before economic subjects. Although the Union here proposed such a ground rule at the outset of negotiations, the Respondent did not agree to it and thus could not rely on it to justify its stance.

We also adopt the judge's finding that the Respondent engaged in surface bargaining. We first note that not all of the Respondent's bargaining conduct demonstrated bad faith. Indeed, the judge found that, despite the Respondent's dilatory behavior, the parties made progress from September to December 2018. However, this hopeful trend was short-lived. Evidence of the Respondent's surface bargaining includes not only its elimination of the bargaining unit (discussed below) but also its refusal to bargain over wages and dues checkoff,[11] its failure to meet more frequently despite the Union's repeated requests for additional meetings, and its unwillingness to either confirm tentative agreements or identify potential inaccuracies at the June 5, 2019 meeting.[12] In addition, district manager Bogardus's warnings that the Respondent would

and the allegation was fully litigated), enfd. in relevant part 956 F.2d 1226 (D.C. Cir. 1992).

[9] We do not adopt the judge's finding that the Respondent also unlawfully failed to bargain over health insurance and retirement plans during the same period because the General Counsel did not so allege.

[10] 368 NLRB No. 150, slip op. at 4 (2019).

[11] We agree with the judge that the Respondent's unexplained opposition to dues checkoff was additional evidence of surface bargaining under the circumstances because it reflected an intent to frustrate agreement. See, e.g., *CJC Holdings*, 320 NLRB 1041, 1047 (1996) (opposition to checkoff showed intent to frustrate agreement in conjunction with other bargaining conduct). However, we disavow the judge's apparent suggestion that the refusal was per se unlawful due to the Respondent's acceptance of checkoff in collective-bargaining agreements with unions outside Wisconsin. See, e.g., *Tritac Corp.*, 286 NLRB 522, 523 (1987) (past agreement to checkoff does not obligate employer to agree to it in future).

[12] Because the Respondent had ample time to review the Union's summary of tentative agreements, its refusal to address them was probative of an intent to avoid reaching an overall agreement and, hence, bad-faith bargaining. See, e.g., *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 8 (2018) (unexplained repudiation of tentative agreement showed lack of seriousness about reaching agreement and bad faith). We do not rely, however, on the judge's citations to *Schuylkill Metals Corporation*, 218 NLRB 317, 317 fn. 2 (1975), where there were no exceptions to the judge's unfair labor practice findings, or *South Carolina Baptist Ministries*, 310 NLRB 156, 156 (1993), in which the employer explicitly admitted that it intended to frustrate agreement.

close the Franksville facility and discharge unit employees if the Union won the election and his solicitation of "approaches to shedding ourselves of this pariah called [the Union]" after the March 2019 decertification petition was blocked further bolster our finding that the Respondent was merely going through the motions of collective bargaining and had no real intention of reaching agreement.[13]

III. THE AUGUST 2019 ELIMINATION OF THE BARGAINING UNIT

We affirm the judge's findings that the Respondent's August 2019 reorganization of the Franksville facility and the accompanying layoff of employees Kyle McKellips and Allan Romanowski, the two remaining unit employees, violated Section 8(a)(3) and (1). Specifically, we agree with the judge that the General Counsel presented a strong prima facie case under *Wright Line*[14] by establishing that employees' choice of union representation was a motivating factor in the Respondent's decisions to reorganize the Franksville operation and to lay off its two remaining unit employees.[15] In addition, the General Counsel's case was further strengthened by the fact that the Respondent's purported reorganization of Franksville did not eliminate bargaining-unit work, which consisted of maintaining and transporting large equipment. Franksville was not converted into an operation that dealt exclusively with small equipment that customers could pick up themselves. Large equipment continued to be rented out of that facility, and that equipment continued to be transported and maintained by the Respondent.

The judge also correctly found that the Respondent failed to meet its *Wright Line* defense burden. The Respondent argues that the reorganization (such as it was) and layoffs resulted from a decline in revenue stemming from union activity but were also part of a preexisting plan to better serve the needs of its customers. However, the judge did not credit the Respondent's testimony about either justification, and we see no reason to overturn those findings. As evidence of the alleged revenue decline, the Respondent relies on exhibits purportedly showing Franksville's estimated financial losses and premature customer equipment returns stemming from union activity, but it does not explain the basis for these estimates, which is not apparent from the face of the documents. The Respondent also does not explain why it singled out the two Franksville unit employees[16] for layoff despite alleged decreases in revenue stemming from union activity at multiple other facilities.

We reject the Respondent's claim that the key financial consideration underlying the reorganization and layoffs was the variance between the Respondent's budget and its actual revenue for May through July 2019. The Respondent's Consolidated Income Statement for 2019 shows that after a drop in revenue in May, Franksville's revenue was significantly higher in June and July 2019—the last full months before the reorganization—than it had been during the same months in 2018. The document further shows that the Franksville facility's revenue declined precipitously in August and September 2019, *after* the reorganization. The Respondent does not explain why, with

[13] Contrary to the judge, however, Members Kaplan and Ring do not rely on Anderson's ministerial assistance with decertification—explaining the process and entering his name, position, and a date and time for the election on the petition—as evidence of bad-faith bargaining because there was no showing that it affected negotiations. See, e.g., *Latino Express, Inc.*, 360 NLRB 911, 922 (2014) (finding bad-faith bargaining but without relying on fact that employer allowed employees to solicit signatures for decertification petition in the workplace).

In Chairman McFerran's view, bad-faith bargaining is established even without relying on Anderson's involvement with the decertification petition. But contrary to her colleagues, she would find that this evidence, viewed in totality with the Respondent's other conduct, supports a finding of bad-faith bargaining. See, e.g., *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (Board examines the totality of a party's conduct, both at and away from the table, in assessing a bad-faith bargaining allegation).

As the judge found, Anderson posted copies of the decertification petition around the Respondent's facility, informed an employee that the petition had been posted, and then solicited the employee to report any conversations regarding the petition to him. In these circumstances, Chairman McFerran would find that Anderson provided more than ministerial assistance to the decertification effort, see, e.g. *Central Washington Hospital*, 279 NLRB 60, 64 (1986), enfd. 815 F.2d 1493 (9th Cir. 1987) (table decision), and *Placke Toyota, Inc*., 215 NLRB 395 (1974), and that Anderson's conduct supports a finding of bad-faith bargaining. See *Wahoo Packing Co*., 161 NLRB 174, 179 (1966) (respondent employer's involvement in decertification effort had "foreseeable effect of obstructing the bargaining process").

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[15] In agreeing with the judge's animus finding, however, Members Kaplan and Ring do not rely on the Respondent's discharge of Franksville manager Torgerson following the election; territory human resources manager Vicky Gibson's comment in response to the Union's organizational efforts that "FYI—this is our first in Wisconsin"; and Anderson's ministerial assistance with decertification.

Contrary to her colleagues, Chairman McFerran would find that Anderson's assistance with the decertification effort provides additional (although not necessary) support for the judge's animus finding, see supra fn. 13, as does the Respondent's discharge of manager Torgerson. Torgerson was the manager of the Franksville facility and the record establishes that the Respondent had been angry with her about the Union's presence at the facility. About a week after the election, the Respondent discharged her and acknowledged that the discharge was based, in part, on "the union vote." In Chairman McFerran's view, the Respondent's action towards Torgerson demonstrates its animus towards the employees' union activity. Cf. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 402 (1982), rev. denied 711 F.2d 383 (D.C. Cir. 1983); and *Talladega Cotton Factory, Inc.*, 106 NLRB 295, 297 (1953), enfd. 213 F.2d 309 (5th Cir. 1954).

[16] The judge at one point in his analysis inadvertently referred to the layoff of three unit employees instead of two.

increased revenues in June and July, its inaccurate budget forecast necessitated the layoff of the two employees. The Respondent also offered no evidence showing that it normally relies on such limited data when making business decisions.[17] In sum, the Respondent failed to sustain its burden of showing that it would have reorganized Franksville and permanently laid off McKellips and Romanowski even in the absence of its employees' union activity.

Finally, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over its decision to eliminate the bargaining unit, a mandatory subject of bargaining. The judge correctly rejected the Respondent's claim that the Union failed to request bargaining over the decision and thus waived its right to do so. The record shows that regional vice president Mayfield informed territory human resources manager Gibson on or before August 5, 2019, that the Respondent would reorganize the Franksville facility and lay off the remaining unit employees. On August 5, Gibson prepared letters (dated August 7) informing McKellips and Romanowski that they were laid off effective August 8, and she asked regional human resources manager Rebel Blake Strohmeyer to prepare severance agreements for the employees. On August 7, Mayfield informed the Union's financial secretary, Stephen Buffalo, that the Respondent would, at the next day's meeting, "bargain[] *the impact* for [sic] a reorganization at [Franksville]" (emphasis added). Thus, by the time the Respondent gave the Union notice of the impending reorganization, it had already decided to carry it out and was willing to bargain only over the effects of the decision. As the judge found, the Respondent presented the Union with a fait accompli, unlawfully foreclosing any opportunity for the Union to bargain over the decision itself. See, e.g., *Defiance Hospital*, 330 NLRB 492, 493 (2000) (finding fait accompli where employer notified union of change and added "that they should contact [the employer's representative] . . . if they had any objections or questions").

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 4(d).

Substitute the following for Conclusion of Law 6(c):

"(c) Engaging in overall surface bargaining by (1) refusing to meet at reasonable times for negotiations; (2) refusing to negotiate wages and dues checkoff; (3) engaging in delay tactics; and (4) refusing to confirm tentative agreements."

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith, we shall order the Respondent to meet with the Union on request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract.[18]

We agree with the judge's imposition of a 12-month extension of the certification year pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962). As discussed, the Respondent consistently sought to obstruct and delay negotiations from the Union's March 2018 certification to the Respondent's August 2019 reorganization and permanent layoff of the two remaining unit employees. Although the parties seemed to make progress in negotiations during three meetings in September, October, and December 2018, the Respondent's actions ultimately made clear that it was merely going through the motions of bargaining with no intention of reaching an agreement. Under these circumstances, the Respondent effectively denied the Union its full opportunity to bargain during the entirety of the certification year. See *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed.Appx. 331 (D.C. Cir. 2005). The Union is therefore entitled to a 12-month extension of the certification year from the time that the Respondent begins to bargain in good faith. See *Burrows Paper Corp.*, 332 NLRB 82, 82 fn. 3 (2000).

We also agree with the judge that requiring the Respondent to meet and bargain with the Union on a regularly scheduled basis would aid in ensuring that the

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[17] See, e.g., *Ishikawa Gasket America, Inc. v. NLRB*, 354 F.3d 534, 539–540 (6th Cir. 2004) (rejecting financial justification for bonus change because employer "was less than forthcoming about its financial situation and what little financial information [it] presented actually showed an improvement in productivity and profitability"); *Classic Sofa, Inc.*, 346 NLRB 219, 221–222 (2006) (financial justification for layoffs insufficient because employer's documents showed monthly increase in orders at that time and did not otherwise "explain the specific economic necessity"); *Eddyleon Chocolate Co.*, 301 NLRB 887, 890–891 (1991) (financial justification insufficient because employer's document showed seasonal high in monthly sales at time of layoffs).

[18] Because the Respondent did not except to the judge's recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). In any event, we are ordering a 12-month extension of the certification year. Since the reasonable period during which an affirmative bargaining order insulates a union's majority status from challenge cannot exceed 12 months, *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002), that remedy does not independently affect the rights of employees who may oppose continued union representation.

Respondent fulfills its obligation to bargain in good faith. See, e.g., *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011) (ordering employer to comply with bargaining schedule to remedy its unlawful conduct), enfd. 540 Fed.Appx. 484 (6th Cir. 2013). We find the judge's proposed schedule, requiring the Respondent to bargain with the Union on request for a minimum of 24 hours per month for at least 6 hours per bargaining session, or on an alternative schedule to which the Union agrees, to be appropriate here. See, e.g., *UPS Supply Chain Solutions, Inc.*, 366 NLRB No. 111, slip op. at 4 (2018). We shall also require the Respondent to submit written bargaining progress reports every 30 days to the compliance officer for Region 18 and to serve copies on the Union. See id.

Having found that the Respondent violated Section 8(a)(3), (5), and (1) by making operational changes at its Franksville facility and laying off unit employees Kyle McKellips and Allan Romanowski, we shall order the Respondent to restore the status quo by rescinding those changes and offering McKellips and Romanowski full reinstatement to their former jobs, or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.[19] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate McKellips and Romanowski for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, we shall order the Respondent to compensate McKellips and Romanowski for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In addition, we shall order the Respondent to file with the Regional Director for Region 18 a copy of McKellips' and Romanowski's corresponding W-2 form(s) reflecting the backpay awards.

The Respondent shall also be required to expunge from its files any and all references to the unlawful layoffs and to notify McKellips and Romanowski in writing that this has been done and that the layoffs will not be used against them in any way.

Based on the egregiousness of the Respondent's unfair labor practices and its evident disdain for employees' Section 7 rights, we agree with the judge that a broad order requiring the Respondent to cease and desist "in any other manner" from interfering with, restraining, or coercing its employees in the exercise of those rights is warranted. See *Hickmott Foods*, 242 NLRB 1357 (1979).

For the same reason, we agree with the judge's recommendation of a public reading of the remedial notice to employees. This is an "'effective but moderate way to let in a warming wind of information and, more important, reassurance' to the bargaining unit employees that their rights under the Act will not be violated in the future." *International Shipping Agency, Inc.*, 369 NLRB No. 79, slip op. at 8 (2020) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)). We shall accordingly order the Respondent to hold a meeting or meetings during working hours at its Franksville, Wisconsin facility, scheduled to ensure the widest possible attendance of employees, at which the remedial notice is to be read to employees by a high-ranking manager in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of management and, if the Union so desires, a union representative. We also agree with the judge's recommendation to allow a union representative to make an audio-visual recording of the notice reading. See, e.g., *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018), affd. in relevant part 803 Fed.Appx. 876 (6th Cir. 2020). The Respondent's unlawful elimination of the bargaining unit may leave the unit without its full complement of employees at the time of the notice reading; the recording would therefore aid the Union in informing subsequently hired unit employees of the Respondent's misconduct. It would also provide continuing assurance to employees that they have a right to engage in union activity without fear of retaliation.

[19] We leave to the compliance stage of this proceeding (1) whether rescission of the operational changes would be unduly burdensome for the Respondent, based on evidence not available prior to the unfair labor practice hearing, and (2) the effect of severance agreements signed by McKellips and Romanowski on their right to reinstatement and backpay.

ORDER

The National Labor Relations Board orders that the Respondent, Sunbelt Rentals, Inc., Franksville, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that selecting a union representative would be futile.

(b) Coercively questioning employees about their union sympathies.

(c) Failing and refusing to meet with the Union at reasonable times for bargaining.

(d) Refusing to bargain about employee wages until all noneconomic subjects of bargaining are resolved.

(e) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(f) Reorganizing operations at its Franksville facility and laying off employees because of their support for and activities on behalf of the Union.

(g) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union in good faith as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time mechanics, drivers, and foremen employed by the Employer at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.

Such bargaining sessions shall be held for a minimum of 24 hours per month for at least 6 hours per bargaining session or, in the alternative, on another schedule to which the Union agrees. The Respondent will submit written bargaining progress reports every 30 days to the compliance officer for Region 18, serving copies thereof on the Union. The certification year shall extend 12 months from the date the Respondent begins to bargain in good faith.

(b) Restore the status quo ante by returning to the Franksville facility all work previously performed by bargaining unit employees before the reorganization of the facility.

(c) Within 14 days from the date of this Order, offer Kyle McKellips and Allan Romanowski full reinstatement to their former jobs or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Kyle McKellips and Allan Romanowski whole for any loss of earnings and other benefits suffered as a result of their unlawful layoffs, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Kyle McKellips and Allan Romanowski for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(f) File with the Regional Director for Region 18 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay awards.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Kyle McKellips and Allan Romanowski, and within 3 days thereafter, notify McKellips and Romanowski that this has been done and that the unlawful layoffs will not be used against them in any way.

(h) Post at its Franksville, Wisconsin facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 29, 2018.

(i) Hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the "Notice to Employees" will be read to unit employees by a high-ranking manager in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of

management and, if the Union so desires, a union representative.[20] The Respondent shall allow a union representative to attend and make an audio-visual recording of each meeting.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 29, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT coercively question you about your union sympathies.

WE WILL NOT fail and refuse to meet with the International Union of Operating Engineers Local 139, AFL–CIO (the Union) at reasonable times for bargaining.

WE WILL NOT refuse to bargain about employee wages until all noneconomic subjects of bargaining are resolved.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT reorganize operations at our Franksville facility and lay you off because of your support for and activities on behalf of the Union.

WE WILL NOT change the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union in good faith as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time mechanics, drivers, and foremen employed by the Employer at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.

Such bargaining sessions shall be held for a minimum of 24 hours per month for at least 6 hours per bargaining session or, in the alternative, on another schedule to which the Union agrees, and WE WILL submit written bargaining progress reports every 30 days to the compliance officer for Region 18, serving copies thereof on the Union. The certification year shall extend 12 months from the date we begin to bargain in good faith.

WE WILL restore the status quo ante by returning to the Franksville facility all work previously performed by our bargaining unit employees before our reorganization of the facility.

[20] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted and read within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted or read until a substantial complement of employees have returned to work. Any delay in the physical posting of the paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of this Order, offer Kyle McKellips and Allan Romanowski full reinstatement to their former jobs or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kyle McKellips and Allan Romanowski whole for any loss of earnings and other benefits resulting from their unlawful layoffs, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

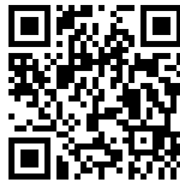
WE WILL compensate Kyle McKellips and Allan Romanowski for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 18 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay awards.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Kyle McKellips and Allan Romanowski, and WE WILL, within 3 days thereafter, notify McKellips and Romanowski that this has been done and that the unlawful layoffs will not be used against them in any way.

SUNBELT RENTALS, INC.

The Board's decision can be found at www.nlrb.gov/case/18-CA-236643 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Tyler J. Wiese, Esq., for the General Counsel.
Patricia J. Hill, Esq. (Smith, Gambrell & Russell, LLP), of Jacksonville, Florida, for the Respondent.
Patrick N. Ryan, Esq. (Baum, Sigman, Auerbach & Neuman, Ltd.), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on December 16–18, 2019, and February 18–19, 2020. Based on charges filed by The International Union of Operating Engineers Local 139, AFL–CIO (the Charging Party or Union). The amended complaint alleges that Sunbelt Rentals, Inc. (the Company): (1) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] by failing and refusing to bargain collectively and in good faith with the Union as the exclusive bargaining representatives of its Franksville, Wisconsin facility's bargaining unit employees over a 16-month period in 2018–2019: (2) violated Section 8(a)(1) of the Act by engaging in various coercive actions intended to undermine employee support for the Union during the aforementioned period; (3) violated Section 8(a)(3) and (4) of the Act on August 8, 2019,[2] by permanently laying off employees Kyle McKellips and Allan Romanowski, eliminating the bargaining unit representing mechanics and drivers represented by the Union at its Franksville facility through the transfer of their work to non-union facilities owned by the Company, and assigning their work non-unit employees; and (4) violated Section 8(a)(1) by coercively interrogating employees in connection with their testimony in this case. The Company denies the allegations and asserts that the decision to lay off the employees and eliminate the bargaining unit was premised solely on legitimate business considerations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a North Carolina corporation engaged in the business of renting and selling construction equipment, has a facility in Franksville, Wisconsin, where it annually purchases and receives goods valued in excess of $50,000 from points outside the State of Wisconsin. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company's operations includes facilities throughout the United States that rent, sell and service construction equipment to homeowners and customers in the construction industry through retail outlets, which are referred to as profit centers (PC).

Each PC employs salespeople, mechanics who repair and maintain equipment, and drivers who deliver rented equipment. The PCs are part of the General Tool (GT) Division, which is divided into regions. Region 9 covers North Dakota, South Dakota, Iowa, Minnesota, Wisconsin, Illinois, and Michigan. GT

[1] 29 U.S.C. §§ 142–159.

[2] All dates are in 2019 unless otherwise indicated.

operations in Wisconsin are divided into geographic regions covered by six PCs. The Franksville PC, also referred to as PC 776, is located in Racine County in southeastern Wisconsin. Walk-in customers have traditionally accounted for more than 80 percent of the Franksville PC's business.

Each PC is managed by a PC Manager. During the relevant time period, the Franksville PCMs were Katie Torgerson, Bryan Anderson, and Robert Rivera. They reported to Robert Bogardus III, the Wisconsin District Manager. Bogardus reported to Jayson Mayfield, the Regional Vice President for Region 9.

Each PC also had a service manager. Christopher Pender was service manager at the Franksville PC from July 2, 2018, until November 11, 2019. Prior to August 2019, as the shop supervisor, his duties included processing and cleaning returned equipment, purchasing and ordering parts, assigning job duties on a daily basis, dealing with warranty repairs, outside vendors, and training and assisting mechanics service and repair equipment. He supervised shop mechanics Mariano Rivera and Allan Romanowski, road mechanic Ryan McKellips and drivers Jamie Smith and Troy Schuls.

Gary Stamm, an Equipment Rental Specialist, supervised the Franksville PC's equipment deliveries by McKellips, Romanowski, Mariano Rivera, and outside sales representatives Tyler Sadowske and Ryan Marifke. Prior to August 2019, Stamm, as well as Anderson, assisted the mechanics on occasion by washing, hauling and delivering equipment.[3]

Prior to May 1, 2018, the Franksville PC also used contractors to repair certain equipment that was beyond the skill set of its mechanics or deliver and equipment. Moreover, outside trucking companies were hired whenever any of the aforementioned employees were not available to deliver equipment.[4] After May 2018, the Franksville PC's expenditures for outside hauling services increased from approximately $75,000 to $100,000 annually to $15,000 to $20,000 per month.[5]

Rebel Blake Strohmeyer is the Regional Human Resources Manager for Region 9. She reports to Vicky Gibson, the Territory Human Resources Manager.

B. The Company's Relationship with the Union

The Union, headquartered in Pewaukee, Wisconsin, represents members throughout Wisconsin. Organizer Michael Ervin coordinated the organizing and negotiations at the Franksville PC. On February 12, 2018, Ervin and another Union representative visited that facility, met with Torgerson and delivered a copy of a representation petition covering a bargaining unit consisting of the drivers and mechanics at the facility.[6]

After the union representatives left, Torgerson called Bogardus. Bogardus told Torgerson that he would get back to her after discussing the matter with Mayfield and the Human Resources department. Torgerson also emailed the petition to Bogardus. Bogardus emailed it to Mayfield shortly thereafter, stating, "[t]hought you had better see this prior to my doing anything. Jason, this is not the HR item I messaged you about this morning." Gibson and Strohmeyer were copied on the email. Gibson replied a few hours later about the potential formation of a bargaining unit at the Franksville PC: "FYI—this is our first in Wisconsin."[7]

After February 12, 2018, Torgerson spoke with Bogardus on a daily basis. He routinely asked her whether the organizing activity was causing a disruption, specifically, whether employees were congregating for that purpose or doing their jobs.[8] Within a week thereafter, Bogardus began visiting the facility almost daily. His frequent presence at the Franksville PC was in stark contrast to the periodic nature of his past visits to that store. While there, Bogardus angrily and loudly warned Torgerson and employees on more than five occasions that the Company would close the store if the Union organizing campaign succeeded. Within 2 or 3 weeks thereafter and just before the representation election, Torgerson asked Bogardus if she was going to be fired. He said that the Union was 'not helping [her] cause."[9]

On February 23, 2018, Bogardus emailed Hill, Mayfield and Black that Torgerson "called to share that current rumor out of the shop is that there are five for the union and two for us. I'm a little suspect of that but thought it better to give a heads up than to be surprised."[10]

On February 26, 2018, Bogardus updated the same group that "the Racine event is beginning to spill over" and that a driver noted that competitors were paying higher hourly wages. He also noted that, "in Racine it is the drivers, Richter and [Jamie] Smith, that are driving the organizing initiative."[11] Later that afternoon, Bogardus reported that Stamm informed him that the union organizers were "pushing their benefits package, pension and health care and better wages as the promises to the bargaining unit as what they will deliver. As for me I am taking this as

[3] The Union never complained during negotiations that Stamm, Pender or Anderson took away work hours from bargaining unit members. (Tr. 848, 1027, 1065–1067, 1097, 1157–1159, 1167–1168).

[4] The Union also did not complain during negotiations about the use of outside haulers to perform bargaining unit work. (Tr. 995, 1067, 1133).

[5] The increased use of trucking companies likely increased due to Smith's unavailability for overtime deliveries and then his termination on July 1. (Tr. 756–757, 1067, 1087.)

[6] GC Exh. 2.

[7] GC Exh. 56.

[8] Bogardus had a selective memory throughout much of his testimony and was not credible as to the disputed issues. In this instance, his denial that he was unaware as to how Torgerson got the information and or followed up with her about employee support for the Union was inconsistent with his emails documenting his proactive approach to determine and respond to such activity. (Tr. 867–869.)

[9] This finding is based on Torgerson's credible and unrefuted testimony. (Tr. 803–806.)

[10] GC Exh. 61.

[11] Bogardus denied interrogating or otherwise instructing Torgerson or any other any employee to inform him about the union activities or sympathies of other employees, insisting that "[t]he guys voluntarily told me. I did not ask." When asked about the source of his information, he vaguely referred to "others within the organization" or drivers at other facilities throughout Wisconsin. In response to Hill's leading question, he then denied instructing employees on any occasions to report employees' union activities. Given his acknowledged aversity to unionization at the Franksville PC, I find that those conversations were initiated by Bogardus or resulted from his previous requests for information about employees' union activities at all Wisconsin PCs. (GC Exh. 62; Tr. 873–874, 914–915.)

a failure to communicate on my part that the team we have worked with since coming to Wisconsin a year ago will believe union propaganda purveyors over us."[12]

On March 4, 2018, 2 days before the representation election, Bogardus conducted a mandatory meeting for Franksville PC employees in the breakroom. A free breakfast was provided. During the approximate 15-minute long meeting, Bogardus expressed his negative view of unions and discussed the ramifications of the election. He told the employees that he had handled unions before and was going to protect them from the Union because it was just interested in collecting dues. He concluded with a warning that if the Union won he would close the Franksville PC and terminate its employees.[13]

At the representation election on March 6, 2018, a majority of the eligible employees voted in favor of union representation. On March 13, 2018, the Regional Director certified the Union as the exclusive bargaining representative of the following bargaining unit of Company employees within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time mechanics, drivers, and foremen, employed by the Employer at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.[14]

On March 9, 2018, Bogardus updated the same group on information shared with him about the Union activities of several employees.[15] Based on that information, Bogardus "had a problem with" the fact that employees were discussing the organizing campaign during work time and using Company-issued cellular telephones.[16] Bogardus also reported later that day that Union supporters at the Franksville PC were also soliciting employees in other Wisconsin PCs:

> The drivers from Racine, Smith and Schuls, have "called a number of our drivers in other PC's in the district informing them that by bringing the union in they can expect: $36 to $38 per hour two year vesting into the retirement program of the union cheaper and better healthcare better control over whether they have to work overtime, additional people, i.e. yard associates where there are currently none we have also been informed the fine fellows from 139 are telling the members of the Racine bargaining unit there will be an agreement in place within 90 days or 150 will strike the Chicago area PC's. Pat [Hill], the best I can tell from the driver being approached in Green Bay is that the fine fellows in Racine are using their personal phones but calling our drivers on the Sunbelt phones during work hours.

A short while later, Bogardus reported that he was working with the Company's GPS and cellular telephone sections to monitor union activity at the Franksville PC and all Upper Midwest drivers. He noted that his GPS contact would "keep the request quiet and get us what we need" and his cellular telephone section contact provided similar assistance when the Union attempted to organize another facility the previous year.

Later that night, Mayfield, realizing the potential ramifications of union certification at the Franksville PC, directed Bogardus to engage with employees at all of the Wisconsin PCs:

> I ask that you spend time engaging the employees at this PC, starting Monday, as well as setting-up a benefits show at each of the PC's in the District over the next several weeks. It is important that everyone understands the full benefits package we offer, and more importantly we care. [17]

Bogardus's outreach started with Franksville PC management. It was around this time that Pender remarked to Smith that the Union was never going get in.[18]

Bogardus' outreach resulted in at least one report of union activity from another PC. On May 14, 2018, the Green Bay PC's manager emailed Bogardus that there had been "union talk" between one of her drivers and a PC 776 driver. She was "embarrassed" and "apologize[d] for the debacle," and would investigate before I call [the PC manager or district manager] on this issue again." After Bogardus asked for the details, the Green Bay PC manager reported:

> My driver came and said (to 776 driver) hey must be nice to be union and have a yard guy loading your truck. He said yeah, you are the only store with a yard guy. My yard guy Bret got the equipment to the truck and told the driver he would be better off loading it himself because Bret is newer. The way it was presented to me was the driver told my guy to load because he was union.

Shortly thereafter, Bogardus forwarded that information to Strohmeyer: "FYI. Guess I'll have to press for more details when

[12] GC Exh. 63.

[13] This finding is based on the credible and spontaneous testimony of former mechanic Ramon Gutierrez. Gutierrez, terminated on June 10, 2019 for a rules violation, had no grudge towards Company management: "They were good people. It's just they don't like the union and for the record, I still like Sunbelt. It's a good company. It's just the new management that came in after Katie, they weren't there to manage us. They were there to regulate the union." (Tr. 778–779, 790–791.)

[14] GC Exh. 2.

[15] GC Exh. 64.

[16] Bogardus denied that he sought to make himself and other PC managers "more available and approachable . . . because of the union organizing campaign at Franksville." However, given his adversity to the organizing effort, his vague explanation "that we needed to be closer to our teams" was not credible. Moreover, he conceded that the closer attention was spurred by the organizing activity: "I wouldn't say that it didn't have anything to do with it. It's just something that we needed to make sure we were making ourselves available as possible . . . [And that was triggered by the union vote at Franksville?] . . . I'd say in part, yes, sir." (Tr. 877–881.)

[17] GC Exh. 65.

[18] Smith's testimony was very credible, spontaneous and devoid of any indications of bias towards a company that terminated him on July 1, 2019, after he failed to take a safety quiz. (Tr. 759–760, 1258.) Pender's terse denial in response to leading questions that he made any of the alleged coercive statements did not credibly refute those allegations. (Tr. 1154–1155.)

conversing with my [PC managers]."[19]

C. Changes to the Franksville PC after Union Certification

Also within a week after the Union's certification as the labor representative of its employees, Mayfield and Bogardus met to discuss changes to the management and operation of the Franksville PC. Bogardus, who had been "ready to close the store" since the Union organizers "showed up," proposed to terminate the bargaining unit employees at that facility.[20]

The Company's next step was to terminate Torgerson as the Franksville PC's manager. Torgerson was not immediately informed of the decision but learned of it after making an approved offer of employment for a mechanic's position. That applicant had called her after receiving a telephone call from Strohmeyer informing him that the job offer had been rescinded. Torgerson called Strohmeyer and Bogardus for an explanation. Strohmeyer explained that the offer was rescinded because Mayfield did not approve the hire. Bogardus told her that he misunderstood Mayfield to say "yes" when he actually said "no." He also said that he would come and explain it to her because of changes planned for the store.

At the subsequent meeting with Bogardus and Strohmeyer on March 27, 2018, Torgerson was dismissed. Bogardus based the discharge on inventory shortages "as well as the union vote." The next day, Bogardus notified Hill of Torgerson's termination and informed her that he would serve as the Franksville PC's acting manager "for the foreseeable future."[21]

In addition to Torgerson's discharge, employees also felt Bogardus' wrath over the representation election. Within the several weeks after the election, Bogardus called Gutierrez into a meeting. Pender was also present. Bogardus showed Gutierrez a written discipline that he was to be issued. However, he pulled it back, showed him pictures of machines and said Gutierrez would not be disciplined. Bogardus referred to his action as a "freebee" and asked Gutierrez why he wanted to be in the Union. Gutierrez replied that he wanted a pension.[22]

In June 2018, Bogardus also implemented operational changes after he installed Anderson as the Franksville PC manager. Bogardus instructed him, "based on what was going on with the negotiations and the perception of where we were," to "pull down" and start transferring large equipment to other Wisconsin PCs.[23]

D. The Bargaining Sessions

On March 29, 2018, the Union requested that the Company commence bargaining and proposed the following dates: April 9, 16, 17, and 19, 2018.[24] On April 3, 2018, Hill replied to Ervin that the Company was "busy with the end of the fiscal year's activities and is not available on the dates that you proposed. However, [the Company] is available on May 22, 2018. Please let me know at your earliest convenience if May 22, 2018 works with your calendar."[25]

Once negotiations began, the Union's bargaining team usually consisted of Ervin,[26] Business Agent Marsolek, District A Manager Greg West, and Financial Secretary Stephen Buffalo. Ervin and West served as the primary spokespeople for the Union and took notes.[27] The Company's negotiating team consisted of labor counsel Patricia Hill, Mayfield,[28] Bogardus and Anderson.[29] Hill served as the Company's primary negotiator. Mayfield was the Company's primary decision maker but delegated authority to Bogardus when absent. Company proposals were drafted and presented by Hill.

All of the parties' bargaining sessions took place at the Franksville PC. Nearly every negotiation session started with a safety moment, which is required at any Company meetings attended by three or more employees. The Union never objected to the safety moments.

1. Bargaining Session 1: May 22, 2018

The first bargaining session started at 8 a.m. on May 22, 2018. At the outset, Ervin proposed "Negotiating Committee Ground Rules." They included proposals to set the next meeting date at the beginning of each meeting, limit caucus breaks to approximately 20 minutes, have negotiating sessions last between two and three hours, have the parties "decide all language proposals before discussing wages," preclude the introduction of new issues after the second session unless mutually agreed upon, and make all agreements tentative until a final agreement was reached.[30] Hill initially noted that the proposed ground rules contained the wrong name of the employer. She then rejected the proposal on the ground that every negotiation was different.

[19] GC Exh, 67.

[20] Mayfield did not deny Bogardus' version of their of this discussion: "Given what we were seeing" [about the Union coming in," Mayfield and Bogardus "had that conversation a week or so after the election." (Tr. 719–720.)

[21] Torgerson, whose credible version of these events was not disputed, conceded that the Franksville PC also experienced inventory shortages the year before. (Tr. 801–808, 812–816; GC Exh. 66.)

[22] Gutierrez' credible and detailed testimony regarding this incident was undisputed. (Tr. 779–780.)

[23] The assertion that the "pull down" was the result of Atwell's plan was not credible, first, because no evidence of such a plan was offered in evidence. Additionally, Anderson conceded that Bogardus was motivated to make the move by "the negotiations and where we were at the time." In fact, at one point, Mayfield told Anderson to stop transferring the large equipment. (Tr. 923, 1030–1031, 1038, 1081.)

[24] GC Exh. 3.

[25] GC Exh. 4.

[26] The Company's April 3, 2020 motion to strike portions of Ervin's prehearing affidavit is denied. It is Ervin's testimony, as refreshed, corroborated and otherwise unrefuted, that was received into the record, not his affidavit. Although sources used to refresh recollection are usually presented in the form of the witness' prior statement, they can come in virtually any form, including records kept by others or even random documents.

[27] The general accuracy of the Union's bargaining notes is undisputed. (Tr. 29–41, 55–56, 287–288, 297, 949–951; GC Exh. 5(a) at 1-5, 6(a), 15.)

[28] Over the previous 2 years, Mayfield negotiated over 60 contracts with Operating Engineers, Locals 18, 324, 150, and 139, including new contracts in Findlay, Ohio, with Local 18 and Kalamazoo, Michigan with Local 324.

[29] Anderson vaguely testified that the Union was often unprepared for negotiations and its negotiators' notes did not match or they forgot their notebooks. That testimony was not corroborated by credible evidence. (Tr. 1044–1045).

[30] GC Exh. 5(a), 15.

Hill also rejected the Union's proposal to meet at a neutral location.[31] As for scheduling, Hill said that the Company's negotiators were too busy to meet again before June 26, 2018.

The Union next tendered its initial noneconomic proposals that Ervin and Marsolek modeled after Company contracts with labor organizations in Michigan.[32] Hill said that the Company needed time to go through those proposals and tendered its own versions. With respect to caucusing, Hill suggested that the Union negotiators convene in their vehicles since there was no additional space at the facility. Buffalo responded that the parties should meet at neutral locations in the future. Hill replied that the Franksville PC was satisfactory and the Company would only agree to meet there. The Company negotiators did, however, agree to caucus in a nearby office and left the Union negotiators to caucus in the negotiating room.

The union representatives then requested that the parties schedule future bargaining sessions for either the week of June 11 or 18, 2018. Hill replied that the Company's negotiators were too busy to meet again until June 26, 2018. The Union agreed to that date.

The Company then took several caucuses to review the Union's proposal and prepare a counterproposal. After about an hour, Hill presented the Company's initial proposal consisting of noneconomic items, including rules relating to investigations and the employee handbook.[33] She then then told the Union negotiators that it would take some time to review the Union's proposal and suggested that the parties conclude negotiations for the day. The Union agreed and negotiations ended at about 9:30 a.m. The total amount of meeting time was about 90 minutes.

2. Bargaining Session 2: June 26, 2018

The June 26, 2018 session started at 10 a.m. Hill started by requesting that the Company present a safety moment. Anderson then proceeded to discuss the driving hazards presented by wandering deer—a problem that arises in the fall. While the presentation, which lasted 5 minutes, was completely unrelated to bargaining, the Union did not object.

Buffalo then asked Hill to reconsider the Union's request to meet at neutral locations. Hill reiterated that the Company would not agree to meet anywhere else. Ervin then asked to schedule consecutive weeks of bargaining and back to back days since Hill was traveling from Florida. Hill replied that the Company's representatives were too busy to meet at such a pace. She proposed to schedule meetings for July 30 and August 30, 2018. The Union accepted.

After discussion of the procedural issues, the Company verbally presented noneconomic proposals. The Union, however, insisted on them in writing. After a caucus called by the Union, the Company's negotiators took a long caucus to enable them to put their proposals in writing. When they returned, Hill presented a set of unnumbered items, including pay periods, management rights and bulletin boards.[34] The parties spent the remainder of the session going back and forth on these items. Bargaining concluded at 1:30 p.m.[35]

On July 26, 2018, Hill cancelled the July 30, 2018 session because the Company's negotiating team would be attending the funeral of a relative of another Wisconsin PC employee. Ultimately, however, no one from the negotiation team attended the funeral or visitation.[36]

3. Bargaining Session 3: August 8, 2018

The parties subsequently agreed to meet again on August 8, 2018. That session began at 8 a.m. All of the usual participants were present, except for Ervin, who was replaced by Business Manager Terrance McGowan. After the Company's safety moment presentation, the parties confirmed previously reached tentative agreements. They then discussed the Union's written proposals for paid time off (PTO) and Family Medical Leave Act (FMLA) issues.[37]

After further discussions, the Union caucused at 10:25 a.m. in order to consider the Company's position regarding its proposals. The Union drafted modified proposals by 10:55 a.m. and asked the Company to return to the table. The Company representatives, however, said they were busy and bargaining did not resume until 11:13 a.m.

At that point, the parties addressed the FMLA and PTO issues. That discussion led to negotiations regarding the Company's disciplinary policy. Towards the conclusion of the session, the parties tentatively agreed to PTO language and a broad management rights provision that gave the Company the sole and exclusive right to:

> . . . hire, promote, demote, layoff, assign, transfer, suspend, discharge and discipline employees for just cause; select and determine the number of its employees, including the number assigned to any particular work or classification, increase or decrease the number of employees; direct and schedule the workforce and all operations; determine the scope of work of the operation; determine and schedule hours of operation; determine the job classifications and assign work in accordance with management's needs; determine and schedule when overtime shall be worked; install or remove equipment; determine the methods, procedures, materials and operations to be utilize or to discontinue their performance by employees; determine the

[31] Since the Company wanted the Union's proposals in writing, it insisted on holding negotiations at the Franksville PC where it had access to a computer and printer. In contrast, the Union' headquarters was more than 30 miles away. On the other hand, Anderson was often diverted to store situations that arose. (Tr. 370, 919.)

[32] The Company alleges delay attributable to the Union's use of the Company's contracts with Michigan and Illinois locals as templates for its initial noneconomic proposals. (Tr. 30, 167.) However, the assertion that the comprehensive proposal was counterproductive or wasted time lacked credence since it otherwise tracked the terms that the Company entered into with other locals for similar work.

[33] The documents were received in evidence with the understanding that handwritten notes were subsequently added by Ervin while the parties were caucusing. (GC Exh. 7(a).)

[34] GC Exh. 7(b).

[35] GC Exh. 5(b).

[36] Bogardus' explanation—the need to manage PC 789 that day because all of its employees went to attend the funeral—is undisputed. (GC Exh. 8, 26; Tr. 720–723, 729–731.)

[37] GC Exh. 6(b).

> work duties of employees; promulgate, post and enforce reasonable rules and regulations governing the conduct of acts of employees during working hours; require duties other than those normally assigned to be performed; select supervisory employees; train and cross-train employees; discontinue or reorganize or combine any department or operation with any consequent reduction or other change in the workforce; determine reasonable work pace, work performance levels and standards of performance and production of the employees and in all respects carry out the ordinary and customary functions of management, all without hindrance or interference by the Union except as specifically altered or modified by the express terms of this Agreement.[38]

Otherwise, the Company presented no written proposals during this session. The parties agreed to meet again on August 30, 2018, and the meeting concluded around noon.[39]

4. Bargaining Session 4: August 30, 2018

The August 30, 2018 session started at 8 a.m. After the Company's safety moment, the Union renewed its request that the parties meet more than once per month and proposed an early September date for the next session. The Company negotiators, however, were too busy to meet that soon. Instead, Hill proposed, and the parties agreed, to meet again on September 27 and October 23, 2018.

Hill verbally presented the Company's proposal relating to grievance procedures, but West insisted that the Union submit its proposal in writing. The Company negotiators then caucused at 8:32 a.m. for that purpose. They returned at 10:12 a.m. with a written proposal.[40] Bargaining briefly resumed until the Company declared another caucus at 10:25 a.m. The Company returned to the bargaining table at 12:10 p.m. without any further written proposals. The parties met for about 20 additional minutes and negotiations ended at 12:30 pm.[41]

5. Bargaining Session 5: September 27, 2018

The September 27, 2018 session was supposed to start at 8:00 a.m. but Hill said that Mayfield and they needed to wait for him.[42] The Company finally agreed to start at 8:40 a.m. when Mayfield did not appear. After the Company's safety moment presentation, Hill submitted the Company's proposal.[43] The parties made significant progress in negotiations and the Company caucused from 9:50 a.m. to 11:07 a.m. After discussing their differences on several items and tentatively agreeing to others, the session concluded at 11:45 a.m.[44]

6. Bargaining Session 6: October 23, 2018

The October 23, 2018 session, scheduled to start at 8:00 a.m., was also delayed after Hill said that Mayfield would be late. At 8:18 a.m., Mayfield still had not appeared and Hill agreed to start the session. After the Company's safety moment presentation, Ervin handed out a revised summary of open issues.[45] At 8:21 a.m., the Company declared a caucus. At 8:48 a.m., Ervin told the Company it was ready to resume negotiations. A short while later, Ervin and West observed Bogardus and Anderson speaking on their cellphones. The Company finally returned to the table at 9:37 a.m. with Hill explaining that the Franksville PC was short-staffed that day and Mayfield just arrived.

The parties spent the remainder of the morning session discussing various noneconomic items and exchanging new proposals.[46] The Company called a caucus from 10:12 a.m. to 10:59 a.m. The parties then reconvened and negotiated until 11:09 a.m., when the Union caucused to review several Company proposals. When the Union returned at 11:25 a.m., it tentatively agreed to several Company proposals.

Before the parties concluded negotiations at 11:36 a.m., the Union asked to schedule future bargaining sessions. The Union negotiators explained that they were frustrated by the Company's "blanket discussions" and the length of the Company's caucuses.[47]

7. Bargaining Session 7: December 10, 2018

The next bargaining session was scheduled for November 13, 2018. On November 8, 2018, however, Bogardus emailed Hill that "[w]e have a number of things that have come up in the past few days that have pushed our fleet planning for next year back further than we had planned. We have to get this complete by the end of next week. We need to postpone the meeting for next week until after Thanksgiving due to the increased activity."[48] Hill notified Ervin of the need to reschedule the November 13 meeting to December 10, 2018. In the email discussion that followed, Ervin tried to get Hill to agree to sessions on December 10 and 18, 2018. However, Hill agreed only to meet again on December 10, 2018 because Bogardus and Mayfield both refused to meet more than once per month.[49]

The December 10, 2018 session started at 8 a.m. After the Company's safety moment presentation, Ervin requested again that the Company agree to meet more frequently and proposed that the next session be scheduled for early January 2019. Mayfield and Bogardus, however, were unavailable most of that month and the Union agreed to the Company's proposed meeting dates for January 28 and February 21.

After the procedural issues were resolved, the Union presented a written proposal for dues check-off[50] and verbally proposed pension and health insurance coverages.[51] The Company flatly rejected these proposals and the Union asked the Company for a comprehensive counterproposal. The Company declined to do that and, instead, provided an updated proposal addressing

[38] R. Exh. 7 at 3.

[39] GC Exh. 5(c).

[40] GC Exh. 7(c).

[41] GC Exh. 5(d).

[42] Contrary to what Hill told the Union's negotiators that morning, Mayfield conceded that he told her prior to the meeting that he would be unable to attend. (Tr. 59–76, 314, 1018.)

[43] GC Exh. 7(d).

[44] GC Exh. 5(e).

[45] GC Exh. 6(d).

[46] GC Exh. 6(c), 7(e).

[47] GC Exh. 5(f).

[48] GC Exh. 40.

[49] GC Exh. 9, 70–71.

[50] GC Exh. 6(e).

[51] Commenting on these proposals in an email to Hill on December 30, 2018, Bogardus referred to the proposal from "NGU 139," which meant "No Good Union." (GC Exh. 72: Tr. 891.)

other items, including premium pay, boot allowances and 401(k) provisions.[52]

The Union called a caucus from 8:49 a.m. until 9:59 a.m. The parties resumed negotiations and made progress on a number of items. The Company called a caucus at 10:46 a.m. After 12:30 p.m., the Company still had not returned. Ervin went to the Company negotiators, who were still caucusing, and told them that the Union negotiators were leaving.[53]

On January 7, Ervin reiterated the Union's December 10, 2018 request for a comprehensive counterproposal. On January 16, Hill sent Ervin the Company's proposed draft collective-bargaining agreement (CBA) noting the tentatively agreed to items, as well as the open items. The articles did not, however, match those in the Union's May 22, 2018 proposal. Nor was there a table of contents because Hill insisted that it be the last item completed.[54]

8. Bargaining Session 8: February 8, 2019

On January 17, Hill notified Ervin that the January 28 session would have to be rescheduled due to Bogardus' involvement in a court proceeding scheduled for that day. The parties eventually rescheduled the bargaining session to February 8.[55]

The February 8 bargaining session was scheduled to start at the usual time, 8 a.m., but did not start until 9:34 a.m. due to Mayfield's late arrival. While waiting, the Union representatives complained that the room was cold and the Company provided a portable heater. After the Company opened the session with its usual safety moment presentation, the Union presented its first wage proposal.[56] However, Hill replied that the Company was not going to get into economics. The Union then proposed again its health, pension and dues check-off proposals.

At 9:40 a.m., the Company caucused. At 10:25 a.m., its team had yet not returned to the table and Ervin asked them to reconvene. At that point, Ervin and West observed several Company negotiators socializing with a vendor. Bargaining finally resumed at 10:32 a.m. When the Company returned, the Union sought to schedule additional sessions on consecutive weeks. However, the Company only agreed to meet again on February 21 and March 21. The Union then requested counterproposals but the Company insisted on discussing its previously emailed comprehensive proposal.[57] After noting the confusion over the varying formats of the proposed articles in the parties' draft proposals, Ervin agreed to work with the Company's version.

After further negotiations, the Company declared a caucus at 11:09 a.m. During that caucus saw Bogardus on his computer for several minutes. When the Company returned at 12:21 p.m., West requested that the Company counter the Union's comprehensive wage proposal. Hill stated that the parties were not yet at that point and declined to go into any economic provisions. Ervin then reinforced that the Union put everything on the table. Since there was no further movement on the Company's part, the Union suggested and the Company agreed to end to the session at 12:50 p.m.[58]

In an effort to move negotiations forward, on February 19, Ervin asked Hill for a copy of the Company's proposals before the February 21 meeting. Hill replied that she "could not get the updated CBA done."[59]

9. Bargaining Session 9: February 21, 2019

After the Company opened with its safety moment presentation, Hill provided the Company's written dues counterproposal to have employees pay "dues, fees and assessments directly to the Union.[60] McGowan commented that the Company and other locals had dues checkoff agreements with employers in Michigan and Illinois.[61] Hill replied that the Company would not to that. The Union then caucused at 8:53 a.m. to review the proposal. At 9:05 a.m., the bargaining resumed. The parties proceeded to disagree over which items had been tentatively agreed to and Hill expressed confusion as to which version they were working with. Ervin reminded her that the Union agreed to base negotiations on the Company's version of the proposals. At 9:17 a.m., the Company took a caucus.

The Company was still caucusing at 11:16 a.m. when the Union negotiators decided to break for lunch. When they returned at 12:40 p.m., the Company negotiators were not at the table. Bargaining resumed shortly thereafter but the Company took a caucus at 12:56 p.m. after Ervin requested the Company's wage counterproposal. When the session reconvened at 1:35 p.m., the parties negotiated over the Company's proposals. At 1:58 p.m., the Union countered the proposals and renewed its request for a wage proposal from the Company. At 1:59 p.m., the Company caucused. At that point, the Union asked to schedule the next session before March 21. Hill declined because she was too busy to meet before then. When Hill returned to the table at 2:29 p.m., she reiterated that she would not respond to the Union's wage proposals and ended the session because Mayfield had to leave. The Union objected.

At that point, frustrated by the Company's positions on scheduling and its conduct at the bargaining table, the Union decided to seek Board intervention. On February 26, the Union filed unfair labor practice charges alleging:

> Since on or about August 29, 2019, the employer has violated Sections 8(a)(1) and (5) of the Act by engaging in surface bargaining or otherwise bargaining in bad faith, by, inter alia, canceling bargaining sessions, refusing to schedule more than one session a month (9 sessions in 12 months), being unprepared

[52] GC Exh. 7(f).

[53] GC Exh. 5(g).

[54] GC Exh. 7(g).

[55] Hill's actions regarding rescheduling consistently demonstrated the Company's intention to drag out negotiations. In this case, she learned of the scheduling conflict on January 10, 2019 but waited a week before informing the Union. Then on January 23, Bogardus informed her that he no longer had a conflict on January 28. Hill did not share that development with the Union. (GC Exh. 10, 53, 73.)

[56] GC Exh, 6(f).

[57] GC Exh. 7(g).

[58] GC Exh. 5(h).

[59] GC Exh. 11.

[60] Mayfield testified that the Company processes its payroll internally. (Tr. 1019; GC Exh. 7(h).).

[61] The Company asserts that McGowan delayed one or two unspecified sessions by claiming that the Union could help the Company acquire business with Foxconn, a large project in Wisconsin. According to Bogardus, the Company was not interested in such a business opportunity. (Tr. 920–921; 972–973).

for bargaining, refusing to meet at a location other than the Franksville shop, failing to provide adequate heat in the bargaining room or operational restrooms, showing up late for scheduled bargaining sessions, taking extended caucuses (due to lack of preparation and/or discussion of personal matters), suggesting that the Union bargaining team caucus in their vehicles, allowing management bargaining team members to perform work in the shop when they should have been bargaining, and refusing to provide counter-proposals on key economic terms, including health insurance and wages.[62]

10. Bargaining Session 10: March 21, 2019

The March 21 session began as scheduled at 8:30 a.m. Ervin did not attend this session. The Union opened discussions by accusing the Company of stalling tactics, insisting on a wage counterproposal and reiterating that its health and pension proposals were still on the table. The Company denied the stalling allegations, conceded that the Company did not yet have a wage proposal, and would not agree to changes to its existing 401k investment and health insurance benefit plans. At 9:09 a.m., the Company caucused and returned at 10:25 a.m.

After bargaining resumed, the Union attempted again to negotiate over wages. The Company only countered with a premium pay formula that included a 1.25 hourly wage multiplier that it created exclusively for the Franksville PC. The Union again requested that the Company discuss the Union's wage rate proposal. The Company, however, insisted that it would not discuss economics. The Union briefly caucused and returned at 10:52 a.m. to present a comprehensive economic proposal. At 11 a.m., the Company caucused and returned just before the parties agreed to break for lunch from 11:45 a.m. to 12:50 p.m. At that point, the Company announced that upon returning from lunch it would only be able to bargain until 2 p.m. because Mayfield had to leave by then.

When bargaining resumed at 1:02 p.m., the parties to schedule the next session for April 30. The Company then proposed a revised proposal relating, once again, to wage rate formulas, but not actual wage rates. The Union caucused at 1:18 p.m. During this caucus, West observed Anderson and Bogardus working the retail counter at the facility. West asked the Company's negotiators to reconvene at 1:45 p.m., but Hill told West they were delayed because Bogardus was busy working the retail counter. When the Company returned to the table, there was just enough time for the Union to present an updated verbal counterproposal relating to overtime and holiday pay. Shortly thereafter, the Company concluded the session at 2 p.m.[63]

E. Management's Involvement in the Decertification Campaign

As the bargaining dragged on in to 2019, the Company initiated a campaign to undermine and eliminate the bargaining unit. On March 21, with Anderson's assistance, Mariano Rivera filed a petition to decertify the Union as the exclusive collective-bargaining representative of the Company's employees. Mariano Rivera delivered the petition to Anderson on March 22. Anderson posted copies in the break room and by the time clock and shop door leading to the store.[64] In accordance with the petition, a representation hearing was scheduled for April 1.[65] However, due to the pending unfair labor practice charges, the Regional Director blocked the decertification election until the charges were investigated.[66] After Hill informed the rest of the Company's bargaining team of that development on March 27, Bogardus replied by asking,"[i]f nothing changes between now and Monday when would you be available to discuss a planning session for approaches to shedding ourselves of this pariah called 139?"[67]

The Company's plan to shed itself of the Union accelerated. On March 28, Anderson updated the team on his efforts to surveil union activities. In response to Mayfield's inquiry as to whether employees attended a Union meeting, he replied: "It is my understanding that there was a lot of people there from the 139, as well their attorney, along with our bargaining members. I am still fishing for more information. I found this out at 5:15 last night."[68]

In late March, Anderson approached Gutierrez at his work area told him and vaguely mentioned that "the paper was up on the wall and by the doors in the breakroom." Gutierrez did not know what Anderson was referring to until he saw the decertification petition on the wall. Anderson followed up again in early April by approaching Gutierrez again in his work area. Gutierrez had previously discussed the decertification effort from Mariano Rivera, who told him that he needed three votes to get a decertification vote. Anderson then told Gutierrez that if anybody talked to him about anything related to the petition, especially Romanowski, that he should report it to him because he was not going to put up with it, "zero tolerance." Gutierrez responded jokingly that if Romanowski told him anything about it, he would he "would sock him," and he and Anderson laughed. Shortly thereafter, Anderson told Gutierrez as he returned from lunch that "his buddies are outside." Gutierrez, a California native, denied that he had any "buddies" in Wisconsin. Anderson replied that he was referring to the Union representatives outside the shop. Gutierrez reiterated that they were not "buddies" and the conversation ended.[69]

On April 1, in the course of discussing the Union's annoyance about a long closed door meeting that Pender had with

[62] GC Exh. 1(a).

[63] GC Exh. 5(j).

[64] R. Exh. 39.

[65] Anderson did not dispute Mariano Rivera's testimony that he explained the decertification process, helped Rivera fill out the form, including his name and position, and the date and time for the decertification election. (GC Exh. 38; Tr. 106, 1186, 1195–1196.)

[66] The petition was subsequently withdrawn by the Company.

[67] GC Exh. 78.

[68] GC Exh. 79.

[69] I credit Gutierrez' detailed testimony over Anderson's general denial he discussed the decertification with Gutierrez, including asking whether his name was on the decertification petition or if his signature was forged on the decertification petition. (Tr. 771–778, 1059–1063.) Gutierrez, terminated on June 10 over a safety violation, was a very credible witness, conceding that employees were worn down by the bargaining process: "We were tired of having to go through the [bargaining] process. It was taking forever." (Tr. 765, 770–777, 895; GC Exh. 80 at 3–4.)

McKellips in his office earlier that day, Black told the negotiating team, “I really want to go after the union.” I worry about the fear and intimidation tactics they may use.”[70] On April 3, Bogardus reinforced the negotiating team’s aversion to the Union and its tactics based on information received from Robert Rivera:

> Dan Marsolek, Local 139 goon, followed one of our outside haulers yesterday from the Racine store to the FedEx distribution facility near the airport. Marsolek followed the truck into the facility and informed the FedEx personnel that if they continued to use Sunbelt there would be a picket set up by Local 139. The FedEx personnel on site relayed the above information to Lyons Electric, one of FedEx's primary electric contractors, who shared this information with Tito this morning.[71]

Union suspicions about Pender’s comments to employees were confirmed around that time when Smith overheard him telling employees in this office 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.”[72]

On April 3, the Union filed a charge alleging unlawful assistance with the decertification petition and various coercive statements by Company supervisors:

> Since on or about April 1, 2019, the employer has violated Sections 8(a)(l), (3) and (4) of the Act by interrogating bargaining unit employees regarding the decertification petition filed on or about March 21, 2019 (Case l 9-RD-23821) l, and to otherwise discourage bargaining unit employees from exercising their rights under the Act. The Employer, through its supervisors and other agents, has sought to coerce bargaining unit employees into retracting statements given to the Region in relation to the decertification petition and interrogated bargaining unit employees regarding their support for Local 139, all of which is done to interfere with, restrain or coerce bargaining unit employees in the exercise of their Section 7 rights to support and be represented by Local 139.
>
> The Employer has further violated the Act by, since October 5, 2018, interfering with, restraining and coercing bargaining unit employees from exercising their Section 7 rights and to discourage support for Local 139 through interrogation, threats and/or statements made by the Employer's shop supervisor to multiple bargaining unit employees, including statements that: the Union is not going to happen and will not be allowed into the shop.

F. Bargaining After Efforts to Decertify the Union

1. Bargaining Session 11: April 30, 2019

The April 30 negotiations were scheduled to start at 8:30 a.m. but did not begin until 9:04 a.m. because Mayfield arrived late. After the Company gave its safety moment presentation, the Union again tendered its wage, health, pension, and dues checkoff proposals. West requested counterproposals but the Company declined. McGowan said the Company was not bargaining in good faith but Hill disagreed. McGowan did not know why they would not agree to dues check-off even though they agreed to it elsewhere. At that point, the Company’s team left the table.

The Company’s team was gone from 9:15 to 9:30 a.m.. When they returned, the Union proposed a lower wage rate and reduced the proposed pension contribution from four dollars to two dollars an hour. The Company representatives then left to caucus at 9:33 a.m. When they returned at 10:28 a.m., they proposed increasing premium pay from $1.35 to $1.40 but again omitted any wage rate proposal and rejected any dues checkoff procedure. The Union then caucused at 10:33 a.m.

When bargaining resumed at 10:43 a.m., the Union changed its proposal for overtime pay after 8 hours to 10 hours per day and withdrew its training fund proposal. After presenting these proposals, Ervin proposed to meet again the following week but Hill said the Company negotiators were too busy to meet again until June 5. The Union reluctantly agreed. The Company then caucused at 10:48 a.m.

When the Company representatives returned at 11:09 a.m. they proposed increasing premium pay from $1.35 to $1.40 per hour, but limiting overtime pay only after an employee exceeded 40 hours per week. The Company still refused to propose any basic wage rates, again rejected a dues checkoff, and refused to modify its current pension and health benefits.

At 11:11 a.m., the Company representatives left to caucus. When the Company returned to the table at 11:20 a.m., the Union presented an updated counterproposal. At 11:27 a.m., the Union proposed to caucus during the lunch break. The Company declined and ended the session at that point because Mayfield had a lot of telephone calls to make.[73]

2. Bargaining Session 12: June 5, 2019

The June 5 session started on time at 12 p.m. The Company opened with a proposal to limit daily overtime to employee shifts exceeding 18 hours. West then asked Hill about the Company’s overtime policies at its Illinois facilities. Hill declined, noting that its Illinois facilities were not relevant to the negotiations. Hill then rejected the Union’s dues checkoff, pension and health insurance proposals before verbally offering a proposed wage rate. She proposed to freeze wage rates in the first year with a reopener in the second and third years. When the Union asked for the basis of that proposal, Hill replied that it was due to an “economic downturn.” She then stated that the next meeting would be on July 9 and declared a caucus at 12:09 pm, after only 9 minutes of bargaining.

When bargaining resumed at 12:38 p.m., the Union tendered a comprehensive sign-off proposal which indicated the items that had been tentatively agreed to and those that were still open.[74] Ervin asked the Company negotiators to compare the draft page

[70] GC Exh. 80.
[71] GC Exh. 81.
[72] I credited Smith’s credible and detailed testimony over Pender’s vague, global denial that he made the comments to several unidentified mechanics during early spring of 2019. (Tr. 758-60, 1154-55.)
[73] GC Exh. 5(k).
[74] GC Exh. 6(g).

by page to the Company's January 2019 draft. Hill initially declined but relented after Ervin insisted that bargaining would not progress. The Company then took a caucus at 12:43 p.m.

When bargaining resumed at 1:10 p.m., Hill questioned the accuracy of the table of contents in the sign-off proposal. At the Union's insistence, the parties reviewed the accuracy of the listed articles. The Union took a caucus at 1:16 p.m.

When bargaining resumed at 1:21 p.m., the partied discussed again the accuracy of the table of contents. At 1:27 p.m., Mayfield called another caucus. When the Company returned at 1:47 p.m., Hill asserted that the table of contents omitted articles that were agreed to by the parties and that the article numbers were inaccurate. West requested that Hill identify the missing articles in writing but Hill declined. Before concluding negotiations at 2:23 p.m., the parties finally agreed to a CBA table of contents. Hill requested and agreed to email Hill a Word pdf version of the Union's proposed CBA, including the agreed upon table of contents, prior to the next session on July 9.[75]

3. Bargaining Session 13: July 9, 2019

The July 9 session started on time at 9:00 a.m. with a Company safety moment presentation. Mayfield had not yet arrived. Hill then requested a copy of the sign-off document that the Union handed the Company on June 5. Ervin did not send the document prior to this session as promised because West told him not to forward proposals prior to bargaining sessions. He did, however, send it to Hill later that afternoon.[76]

The negotiations then turned adversarial after the Union brought up the termination of Jamie Smith, a unit employee and member of the Union's negotiating team. At 9:12 a.m., the Company negotiators left the table. At 9:37 a.m., Mayfield arrived but bargaining did not resume until 10:09 a.m. When they reconvened, however, the parties concluded the session and scheduled the next one for August 8.[77]

On July 16, the Union filed charges that since on or about June 10 the Company violated Sections 8(a)(3), (4), (5), and (1) for its retaliatory discharges of Smith and Gutierrez because they engaged in union activities and filed charges, and without providing the Union with notice and affording it an opportunity to bargain over their discharges.

G. The Company's Decision to Reorganize the Franksville PC

On or before August 5, Mayfield decided to pull the plug on the unionization of the Franksville PC's workforce. Without documenting his rationale for the move, Mayfield informed Gibson that the Franksville PC would be reorganized into a "will-call" store that carried only small equipment for pick up by customers. Accordingly, the remaining unit employees would be laid off since the store would no longer need mechanics and drivers.

At the time Mayfield made the decision to reorganize the Franksville PC, that store's total revenue had been increasing over the corresponding period in 2018. In the ordinary course, Mayfield reviewed and relied upon total revenue information reflected in the Consolidated Income Statement Information for each facility. That financial data for fiscal year 2019[78] for the Franksville PC showed a decrease in total revenue in May 2019 of $86,767 from the same period in May. However, June (+$21,084) and July (+$52,782) revealed a trend of increased revenue over the same periods in 2018 that Mayfield would have been aware of at the time he made the decision to reorganize the Franksville PC on August 5.[79]

H. The Elimination of the Bargaining Unit

On August 5, Gibson emailed Strohmeyer copies of letters for review. She noted the need for "severance agreements for all 3 to provide at time of layoff."[80] On August 7, Mayfield informed Buffalo that the Company would "be using the scheduled negotiating session on August 8, 2019 for bargaining the impact for a reorganization at Profit Center 776."[81]

1. Effects Bargaining on August 8, 2019

The August 8 session started once again with a safety moment and the Union raising its concern that Mariano Rivera threatened to shoot Union representatives. The Company said it was unaware of the threats but would refer the matter to its Human Resources department. After expressing those concerns, the Union asked for the Company's response to its proposed sign-off document. Hill then referred the Union to Mayfield's August 7 letter.

After the Union requested written notice of the layoffs and an explanation, Hill deferred to Mayfield. He explained that the shop was being converted to a will-call location and was not closing. It would service customer pick-ups of only small tools and no deliveries. Mayfield did not, however, know when the transition would be complete. As such, the Company no longer needed the services of the two remaining bargaining union mechanics, Romanowski and McKellips. Mariano Rivera previously transferred to another facility and Schuls had been terminated in May 2019 after driving a Company vehicle with a suspended license.

After the Union took a brief caucus, the Union did not challenge the decision to reorganize and eliminate the bargaining unit but focused on the effects of the layoffs. Buffalo requested

[75] GC Exh. 5(l), 12; R. Exh. 8, 40.

[76] Ervin's testimony that he forgot to email the requested documents was not credible since he conceded that he deliberately failed to send them at West's instruction. Nevertheless, the Company negotiators confirmed that it accurately reflected the tentative agreements. (GC Exhs. 6(g), 13 and 58; Tr. 122–125, 163, 926–927.)

[77] GC Exh. 5(m).

[78] The Company's fiscal year runs from May 1 to April 30. Mayfield testified that the budget for FY 2020 would have been created in February or March. (Tr. 673.)

[79] Mayfield's testimony that the layoffs were due to a 31 percent decrease in business caused by bannering activity was discredited by the financial data contained in the Company's Consolidated Income Statement. That document, which Mayfield conceded reviewing prior to August 5, was the only business record produced documenting the financial condition of the Franksville PC. (GC Exh. 30; Tr. 633–634, 668–673, 989–991, 1015.) Moreover, I did not credit the self-serving charts generated for the General Counsel during the investigation allegedly showing losses caused by the bannering activities. (R. Exh. 9; GC Exh. 28–29.) The only underlying documents provided in support of the charts amount to approximately two percent of the alleged losses of the Franksville PC. (Tr. 702, 710.)

[80] GC Exh. 31

[81] GC Exh. 17.

information relating to the Company's staffing numbers for its other facilities in Wisconsin and Northern Illinois. He also requested information relating to severance pay owed the laid-off employees for accrued vacation time and paid time off. Ervin asked if the laid-off employees could be transferred to available positions at other Company facilities that he saw online. Mayfield replied that they did not have the skills to be transferred to another shop. Hill then told the Union that the employees would be laid off later that day. The Union then asked to schedule the next session for the week of August 19. The Company asked to meet again on August 16 and the Union agreed. The session ended at 9:56 a.m.[82]

2. The Employee Layoffs

After the August 8 session, the Company informed Romanowski about the reorganization and terminated him.[83] McKellips was not in that day but was informed by Anderson, Bogardus and Strohmeyer during his next workday on August 10. Both employees were told that their services were no longer needed because the facility would only be renting small tools for customer pick-ups and would not deliver equipment. They were also informed that they were eligible for rehire and free to apply for any openings that they believed they were qualified for. After being told that he would be eligible for rehire, McKellips said he was willing to transfer to another store. However, he was informed that he would have to go through the standard procedure of applying for openings elsewhere.

3. Further Effects Bargaining: August 16, 2019

After several hours of negotiations on August 16, the parties agreed on a severance package based on the employees years of service, accrued vacation leave and paid time off:

(1) Hiring preference for comparable positions at any Sunbelt profit center for the next 2 years;

(2) Severance pay in an amount equal to 2 years wages at their most recent rate of pay (52 weeks x 40 hours x hourly rate);

(3) Company paid health insurance for 2 years from the date of layoff;

(4) Employer paid 401(k) contributions equal to the amount of all 401(k) contributions made by or on behalf of each employee for the past 2 years; and

(5) Confirmation that the employees may, at their discretion, leave their 401(k) accounts open with Sunbelt, roll them over to another 401(k) or IRA, or take a distribution consistent with the plan documents.[84]

Romanowski and McKellips each signed an "Individual Release Agreement" for severance payment in exchange for releases and waivers from liability for any claims, including discrimination on the basis of "any union activities in violation of local, state or federal laws, constitutions, regulations, ordinances or executive orders," as well as any violations of the Act.[85]

4. The Franksville PC's Operations After the Reorganization

After the Franksville PC's two remaining bargaining unit members were terminated, the Company continued to operate as an equipment rental facility. Most equipment weighing more than 10,000 pounds was transferred from the Franksville PC to other Wisconsin PCs. Of the equipment and machinery that continued to be available at the Franksville PC, only a backhoe loader and rough terrain forklift weighed in excess of 10,000 pounds. The backhoe had been purchased and awaited pick up by a customer. The forklift, however, had been rented from and returned to the Franksville PC.[86]

In any event, the Franksville PC continued to carry some large equipment, including large front loaders, excavators, boom lifts, backhoes, skid loaders and forklifts.[87] It also continued to make the rental of large equipment at the Franksville PC available on its website.[88] Much of that equipment, however, was too large and/or heavy to be picked up by homeowners.[89]

Moreover, the Franksville PC did not eliminate its other operations after the reorganization. Periodic monitoring by the Union and interaction with the remaining employees at the facility established that business as usual continued after the reorganization and was still ongoing as of November. Specifically, during the period of time between August 19 and November, employees at the facility continued to perform the maintenance work in and outside the shop on various pieces of equipment, machinery and vehicles, including trucks, lifts, steer loaders, woodchippers, compressors, tillers and utility vehicles.[90] The repair of certain equipment, such as hydraulic hoses and cylinders, were contracted out to another company before and after the reorganization. However, since the bargaining unit mechanics had been eliminated, Pender, the service manager, was required to perform a significant amount of the maintenance work, which included work on new equipment brought into the shop after the reorganization. While Pender previously helped to wash equipment and trained the mechanics, his new workload resulted in him working significantly longer hours. Indeed, the increased workload took a toll on Pender because he could not get all of the work done within his customary 8 or 10 hour day. As a result, he transferred to a mechanic's position at the Waukesha PC in December.[91]

[82] GC Exh. 5(n).

[83] GC Exh. 32.

[84] GC Exh. 5(o), 18.

[85] GC Exh. 19–20.

[86] I credit the detailed and unrefuted testimony of the Company's witnesses regarding the weight of the machinery, as well as the explanation that they were either being transferred to other facilities or awaited pickup by customers. (Tr. 992–994, 1101, 1104–1015, 1127; GC Exh. 25 at 25, 29; R. Exh. 6.)

[87] This finding is based on the credible testimony and photographic evidence of large equipment taken and observed by Ervin on August 19, and Marsolek on October 24 and 28, and November 14. (GC Exh. 16; GC Exh. 21 at 7–12; GC Exh. 25 at 25–32, 34–45; Tr. 536–544.)

[88] Ervin credibly testified that he searched the Company's website in early December and it indicated that large equipment similar to that also available at the Waukesha PC was still available to rent at the Franksville PC. (Tr. 141–44; GC Exh. 22.)

[89] Marsolek credibly testified that, based on his years of experience as a crane loader, that the large equipment was too large and heavy for a typical homeowner to pick up and drop off, further evidencing the PC's need to continue providing deliveries. (Tr. 509–510, 536–537.)

[90] This finding is based on the undisputed testimony of Marsolek and McKellips. (GC Exh. 25 at 1–4, 6, 14, 16–20, 24, 26–28, 33–35; Tr. 520–41, 825–837.)

[91] I credited the detailed testimony of McKellips that Pender told him that he was "stressed out" by the amount of maintenance work he had to

Second, after the reorganization and still continuing as of most recently as November 14, 2019, the Company continued hauling small and large equipment and towing operations at the Franksville PC on some occasions—all work that had been performed by bargaining unit driver Jamie Smith before he was terminated.[92] The vehicles used included trucks, pickup trucks, semi-trucks, trailers, a backhoe loader and a rough terrain forklift.[93]

As a result of the changes, the upward trend that the Company had seen in total revenue in June and July 2019 suddenly reversed to a decrease of $66,808 in total revenue in August 2019 versus August 2018 and a massive decrease of $257,360 in total revenue in September 2019 in comparison to September 2018.[94] That significant loss of total monthly revenue after the reorganization indicated that the shift to carrying mostly smaller equipment at the Franksville PC certainly did not generate greater profit for that facility.[95]

5. The Questioning of Employees Regarding Their Testimony

In preparation for the hearing, Hill met with Pender and Mariano Rivera at their respective workplaces on February 10, 2020 in preparation for their testimony in this hearing. While preparing Mariano Rivera for his testimony, Hill told him that he did not have to speak with her and was entitled to hire an attorney to represent him, which he declined. She did not, however, tell Rivera that his answers to her questions would not affect his job. With regard to Pender, he was informed by Hill as to the purpose of her questioning and told that his answers would not affect his job. She did not, however, inform him that his participation was voluntary.[96]

LEGAL ANALYSIS

I. THE BARGAINING ALLEGATIONS

A. The Company's Position on Scheduling Meetings

Section 8(d) of the Act defines the scope of collective bargaining under the Act. The first provision of this section is the "mutual obligation of the employer and the representative of the employees to *meet at reasonable times*." The Board examines the "totality of the circumstances" in determining whether a party has refused to meet at reasonable times and is "not limited to an examination of the number of bargaining sessions held." *Garden Ridge Management, Inc.,* 347 NLRB 131, 132 (2006). In considering a refusal-to-meet allegation, 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 failures to meet. See *People Care, Inc.*, 327 NLRB 814, 825–826 (1999); *Calex Corp.*, 322 NLRB 977, 977–978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998); *Bryant & Stratton Business Institute,* 321 NLRB 1007, 1042 (1996).

Notwithstanding the Union's repeated requests to meet more frequently, the Company agreed to only 13 bargaining sessions during the 15 month period between May 2018 and July 2019. The Board has generally held that meeting only once a month is unreasonable. See *Garden Ridge Management, Inc.,* 347 NLRB at 132 (20 bargaining sessions over 11 months violated Act); *Calex Corp.,* 322 NLRB at 977 (same for 20 sessions over 15 months).

The Company compounded the impact of the delays by cancelling bargaining sessions on multiple occasions, several of which were not justified. Its cancellation of the July session allegedly occurred because of a funeral for a manager at another PC but, contrary to Hill's representations, none of the bargaining team members attended that event. The November session was cancelled due to vague "fleet issues." Finally, Bogardus asked Hill several weeks before the January session to reschedule it because it conflicted with an adoption proceeding that he had to attend. However, she waited a week before telling the Union of that conflict and informed the Union 11 days before the January session. Hill then learned 5 days later that the adoption proceeding had been rescheduled but never told the Union.

The Company's explanation for spreading out bargaining sessions was either that Hill had to travel to the sessions from Florida and the rest of its bargaining team was otherwise busy with operational responsibilities. That defense was legally insufficient. As explained by the Board in *Bryant and Stratton Business Institute,* 321 NLRB at 1042, the excuse that the employer "had a business to run" is not legally sufficient. See also *J. H. Rutter- Rex, Inc*., 86 NLRB 470 (1949) (insufficient justification for refusing to meet at reasonable times due to respondent's counsel being a "busy and successful lawyer).

In conclusion, the Company's refusal to bargain in good faith by failing to make its bargaining team available on more frequent occasions violated Section 8(a)(5) and (1).

B. The Company's Conditioned Bargaining Over Wages

Section 8(d) of the Act further defines the duty to bargain, as it relates to subjects of bargaining, as requiring the parties to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." As a logical extension of this principle, the Board has held that a party generally violates the Act when it refuses to bargain over certain mandatory

perform and left to return to a mechanic position at another PC. He also told McKellips that he was being replaced by one or two workers. In response to Hill's leading question as to whether he transferred due to increased hours, Pender avoided a direct response and attributed the move to his commute and family. His less than credible characterization of the increased work as "a little bit" became evident when he was asked to elaborate: "Not a ton more, but there was an extra bit of work. I lost four mechanics." (Tr. 826–833, 844–848, 1167–1168.)

[92] It is not disputed that Anderson delivered and washed equipment, and Pender serviced equipment , along with their other duties while at the Franksville PC. (Tr. 848, 1065–1067).

[93] This finding is based on several credible sources: Ervin's videotapes of hauling activities on August 9 and 25; Marsolek's testimony and photographic evidence of vehicles and equipment observed on 10 occasions; and the testimony of Smith and McKellips. (Tr.138–139, 141, 524–534, 539–544, 761–763, 824–825; GC Exh. 21 at 1–3, 5–6; GC Exh. 23–24; GC Exh. 25 at 5, 7–10, 12–13, 15, 21–23, 30–32, 36–45.)

[94] GC Exh. 30.

[95] Neither Bogardus nor Mayfield addressed the significance of the June and July increases in total rental revenue. (Tr. 937–938, 1029–1030.)

[96] This finding is based on the testimony of Pender and Rivera. (Tr. 1161–1165, 1187, 1190–1191.)

subjects, or (as in this case) delays bargaining over mandatory subjects until the parties reach agreement on other subjects. *John Wanamaker Philadelphia,* 279 NLRB 1034, 1034–1035 (1986) (unlawful for employer to refuse "to discuss economic matters until noneconomic matters were resolved"); *Adrian Daily Telegram*, 214 NLRB 1103, 1110–1112 (1974) (same).

The Company refused to accept any ground rules for bargaining at the first session. It then proposed verbally that the parties bargain over the noneconomic issues before tackling the economic terms. The Union submitted its initial wage, health insurance and pension proposals at the February 8 session. Despite the Union's repeated requests, the Company continued a pattern of frustrating the negotiations over the noneconomic issues, which continued after the February 8 session. It refused to discuss these proposals at that session or the next three that followed and it was not until June 5, after the Region had already announced its merit determination in this matter, that it tendered a wage counterproposal. Cf. *Wyman Gordon Pennsylvania, LLC,* 368 NLRB No. 150, slip op. at 4 (2019) (employer's 1-month long refusal to bargain over economics until noneconomic issues were resolved did not violate the Act where parties agreed to negotiate and made progress on noneconomic items pursuant to ground rules).

Under the circumstances, the Company's 4-month long refusal to bargain over wage, health insurance and pension terms violated Section 8(a)(5) and (1) of the Act.

C. The Company Repeatedly Engaged in Surface Bargaining

In determining whether an employer engaged in surface bargaining, one must examine the totality of the employer's conduct to determine if it attempted to frustrate or avoid any agreement. *Joy Silk Mills, Inc. v. NLRB,* 185 F.2d 732, 742 (D.C. Cir. 1950). The Board will find a refusal to bargain in good faith if it determines that the employer is merely "going through the motions" of bargaining. *Unbelievable, Inc. dba Frontier Hotel & Casino,* 318 NLRB 857, 876 (1995). The following are the guidelines that the Board has used to determine whether a party is refusing to bargain in good faith:

> Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith … other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to by- pass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, 271 NLRB 1600 (1985).

As previously noted, the Company's intentions were laid bare even before bargaining began as Mayfield and Bogardus discussed closing the Franksville PC facility after the Union arrived. As bargaining proceeded, the Company began to deplete the Franksville PC's inventory by transferring most of its large equipment to other PCs. Around the same time, the Company helped a unit employee fill out the decertification petition. When that approach failed, the Company eliminated the bargaining unit.

Given the foregoing background, it is no surprise that the bargaining process that the Company begrudgingly endured was beset by a host of bad faith practices. Its refusal to meet more frequently than once a month and its delay tactics ensured that the process would drag out long enough to enable it to undertake alternative measures to rid itself of the bargaining unit. A stark example of bad faith was the session on September 27, 2018 when Hill delayed the session for 40 minutes while supposedly waiting for Mayfield, who frequently arrived late. Mayfield previously informed Hill, however, that he would not attend that day, a fact that she never disclosed to the Union. See *Regency Service Carts*, 345 NLRB 671, 672–673 (2005) (unlawful for employer to refuse to meet less than once per month, cancel numerous sessions, routinely show up late and end sessions early over union objection).

The Company's stalling tactics were also obvious. Throughout many of the sessions they hindered the progress of negotiations by taking prolonged and unproductive caucuses. On August 30, 2018, for example, the session lasted from 8:00 a.m. to 12:30 p.m. During that time, the Company's negotiators took two caucuses lasting more than 90 minutes. The second time, they returned to the table without any new written proposals. On February 21, 2019, they caucused from 9:15 a.m. until about 1:00 p.m. and again returned without any new proposals. At the October 23, 2018, February 8 and March 21 sessions, the Company's negotiators used chunks of their caucus break to perform work or speak with customers. Such conduct was clearly calculated to impede the progress of negotiations. *Michigan State Employees Assn.,* 364 NLRB No. 65, slip op. at 2, 37–38 (2016) (finding employer's caucus conduct "fits . . . the pattern of an employer bargaining without an intent to reach an agreement."); *Radisson Plaza Minneapolis,* 307 NLRB 94, 96 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993).

The Company's negotiators unlawfully refusal to discuss the Union's wage, health insurance and pension proposals for over 4 months. See *United Technologies Corp.,* 296 NLRB 571, 571–72 (1989) (employer's failure to submit wage proposal as evidence of surface bargaining). The Board has repeatedly noted that a refusal to consider or respond to a union's proposal, without explanation, constitutes strong evidence of surface bargaining. *John Ascuaga's Nuggett*, 298 NLRB 524, 547 (1990), enfd. in pertinent part sub nom., *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992) (refusal to explain objections to union proposals supported finding that the employer "was not engaged in a bona fide effort to bargain collectively").

The Company's negotiators also refused to consider, without explanation, the Union's dues checkoff proposals. That unyielding posture was clearly unlawful in light of the Company's agreement to dues checkoff provisions in contracts with locals outside of Wisconsin. *CJC Holdings,* 320 NLRB 1041, 1042 n.2, 1046–47 (unexplained and firm intransigence on the topics of dues checkoff is particularly indicative of surface bargaining); *Queen Mary Restaurants Corp.,* 219 NLRB 776, 777 (1975) (dues checkoffs at other locations).

The parties arrived at numerous tentative agreements over the course of bargaining. However, the Company's rejection of the Union's requests to submit written proposals muddled negotiations at a critical point on June 5 when the Union parties

attempted to confirm the tentative agreements reached. At that session, the Union tendered a written sign-off document but the Company refused to sign-off on that document as well as any tentative agreements reached. The Company then rejected the Union's request to identify the inaccuracies in the table of contents. This bad faith approach stymied the bargaining process and brought the progress reached up to that point to a screeching halt.[97] See *Schuylkill Metals Corp.*, 218 NLRB 317, 338 (1975) (refusal to confirm agreements in writing revealed a "predetermination not to reach agreement on any basis with the union."); *Bethea Baptist Home,* 310 NLRB 156, 156 (1993) (relying on employer's refusal to put alleged tentative agreements in writing in finding overall surface bargaining).

II. THE 8(A)(1) VIOLATIONS

A. Anderson's Interrogation of Unit Employees

In determining whether the questioning of an employee about union or other protected activity constitutes an unlawful interrogation, the Board considers the totality of the circumstances, including whether the employee is an open and active union supporter, whether there is a history of employer antiunion hostility or discrimination, the nature of the information sought, the position of the questioner in the company hierarchy, and the place and method of interrogation. See *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The Company's union animus was prevalent from the moment that Bogardus was informed that Union representatives visited the Franksville PC in February 2018 and was evident at the bargaining table prior to the filing of the decertification petition. Anderson, the Franksville PC's manager, initially questioned Gutierrez about the decertification petition in late March. Gutierrez did not know what he was referring to but Anderson still asked Gutierrez to let him know if anyone spoke to him about it.

The Board has held that questioning an employee regarding their knowledge of a decertification petition can violate the Act. *Ernst Home Centers, Inc.*, 308 NLRB 848, 855 (1992), particularly when the individual is a high-ranking manager and initiates the conversation. In this case, Anderson initiated the conversation and was the Franksville PC's manager. He followed up the question about the decertification petition by requesting that Gutierrez report the activities of other employees back to him. *Liquitane Corp.,* 298 NLRB 292, 293 fn. 4 (1990) (unlawful for supervisor to request employee to report union activities of other employees). Anderson violated Section 8(a)(1) again in similar fashion in April when he approached Gutierrez and requested that he inform Anderson about any statements by an employees, especially Romanowski, relating to the decertification petition.

Anderson did not, however, violate Section 8(a)(1) by alluding to the Union representatives outside the shop as Gutierrez' buddies as he returned to his work area from lunch. He reacted to Anderson's remark by stating that they were not his buddies since he was from California and had none in Wisconsin. Accordingly, Anderson's comment was not inherently coercive since it was not posed as a question. See *Advanced Masonry Associates*, LLC, 366 NLRB No. 57, fn. 3 (2018) (supervisor's inquiry not unlawful where reasonable person would not have been intimidated by the question); *NLRB v. Champion Labs., Inc.*, 99 F.3d 223, 227 (7th Cir. 1996) (applicable factors in determining whether inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, number of employees involved, the setting, authority of the supervisor, the question, and whether the employer otherwise showed hostility to the union). Cf. *Park N' Fly,* 349 NLRB 132, 133 (2007) (supervisor told employee that another named employee reported that the employee spoke with a "union guy").

B. Pender's Statement of Futility

Pender, a supervisor at the time, unlawfully threatened futility of union representation in the spring of 2019 when he told mechanics in his office that "the union was never going to get in and it was never going to happen." See *Soltech, Inc.*, 306 NLRB 269, 272 (1992) (employer's statement that union "was not coming in" or "would not be a union company" or "would not have a union in the plant"); *New England Health Care Employees Union, District 1199, SEIU*, 351 NLRB 1306, 1309 (2007) (employer's threats that he would spend as much money and do whatever was necessary to keep the union out); *Gravure Packaging*, 321 NLRB 1296, 1299 (1996), enfd. mem. sub nom. *Graphic Packaging Corp.*, 116 F.3d 941 (D.C. Cir. 1997) (threat that employer "would do everything in his power to keep the union out).

C. The Johnny's Poultry Allegations

In preparing Mariano Rivera for his testimony, Hill provided certain assurances but did not tell him that his testimony would not affect his job. In preparing Pender to testify, Hill also provided certain assurances but did not tell inform him that his participation was voluntary.

While employee interrogations regarding their protected concerted activities are prohibited by Section 8(a)(1), the Board also recognizes that an employer also needs to prepare it legal defenses. This balancing act of these rights requires that an employer wishing to interrogate an employee give the employee the following assurances: (1) communicate to the employee the purpose of the questioning; (2) obtain the employee's participation on a voluntary basis; and (3) assure the employee that no reprisals will take place. Moreover, the questioning must not inquire into union matters outside the scope of the legitimate purpose for which the questioning is taking place, elicit information concerning an employee's subjective state of mind or otherwise interfere with the statutory rights of employees. *Johnnie's Poultry Co.,* 146 NLRB 770, 774-75 (1964).

The Company's failure to provide all of these assurances to Mariano Rivera and Pender violated the Section 8(a)(1) of the Act. See *Tschiggfrie Properties, LTD*, 365 NLRB No. 34, slip

[97] The Company argues that the Union contributed to the delay when Ervin failed to email Hill the Word version of the CBA with the tentatively agreed to items prior to the July 9 session. Ervin agreed to do so on June 5 but West told him that he did not send draft CBAs out prior to sessions. Nevertheless, the Company's argument that the omission delayed bargaining is baseless since she left the June 5 session with a hardcopy of the draft with the tentatively agreed to items noted.

op. at 1 (2017) (employer violated the Act by failing to state that participation was voluntary in one instance, and failed to provide assurances against retaliation in another instance), enforcement denied, 896 F.3d 880 (8th Cir. 2018).

III. THE ELIMINATION OF THE BARGAINING UNIT

A. The Company's Reorganization

Section 8(a)(3) makes it an unfair labor practice to "discriminate in regarding to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(4) of the Act makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony." To prove a violation of Sections 8(a)(1), (3) and (4) and (1) of the Act, the General Counsel bears an initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the Respondent's adverse employment action at issue. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019) (initial burden requires evidence of animus to support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action); *Nichols Aluminum LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015) (the "discriminatory animus toward [the employee's] 'protected conduct was a substantial or motivating factor in' [the employer's] decision to discharge him"). Moreover, such "[p]roof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Once there is a showing of discriminatory motivation by proving the employee's pro-union activity, the employer's knowledge of the pro-union activity and animus against the employee's protected conduct, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004).

There is abundant evidence in this case of unlawful motivation. Company was well aware of the fact that bargaining unit employees were engaged in union activity and made its animus very clear based on the statements of its manager and supervisors: Bogardus' various threats and plans to close the Franksville PC; his termination of Torgerson after the Union won the election; Anderson's assistance in efforts to decertify the Union and his interrogation of an employee in connection therewith; Pender's remarks to unit employees of union futility; Anderson's depletion of the Franksville PC's inventory during bargaining; and the Company persistent bad faith conduct during bargaining.

The Company's demonstrated animus conclusively establishes that it discriminatorily eliminated only unit employees at the Franksville PC—even though there were losses at the other Wisconsin PCs allegedly attributable to union activity—and continued the same operations after the reorganization. Indeed, the Company's larger concern was the potential spread of unionization to its other Wisconsin PCs. As Gibson noted in her email warning to Mayfield and Bogardus: "FYI—this is our first in Wisconsin." See *RAV Truck & Trailer Repairs, Inc*., 369 NLRB No. 36 fn. 2 (2020) (employer's unlawful partial closure of its business "was motivated by a purpose of chilling the protected union activity of its remaining employees . . . and . . . the Respondent would reasonably have foreseen that this closure would have a chilling effect).

In this case, where the General Counsel made out a strong prima facie case under Wright Line, the burden shifted to the Company to show that it would have terminated these employees even in the absence of their union activity. An employer cannot carry its Wright Line burden simply by showing that it had a legitimate reason for the action, but must demonstrate that the action would have taken place absent the protected conduct. *Centre Property Mgmt.,* 277 NLRB 1376 (1985); *Route Betrand Dupont Inc*., 271 NLRB 443 (1984).

The Company failed to meet such a burden. Its alleged 31 percent decrease attributable to bannering was not corroborated by the only Company business record offered – the consolidated income statement for the Franksville PC. That document actually showed an increase in total rental revenue in June and July, a financial improvement accomplished with a reduced staff of mechanics and drivers. Moreover, the Company failed to demonstrate how its alleged losses would be remedied by the elimination of the three bargaining unit employees at the Franksville PC, especially when it also claimed that the union activity also adversely affected the other Wisconsin PCs. Under the circumstances, the Company's elimination of the bargaining unit violated Section 8(a)(3) and (1).

With respect to the Section 8(a)(4) charge, it is alleged that the initial charges filed on February 26, 2019 and updated charges filed on April 3, 2019, motivated the Company to continue to engage in the aforementioned bad faith bargaining and coercive behavior before deciding to eliminate the bargaining unit on August 5, 2019. The 8(a)(4) allegations fail, however, for the very reasons that sustain the 8(a)(3) allegations—the Company's determination to eliminate the bargaining unit and the related coercive actions were evident long before the first charges were filed. Accordingly, the 8(a)(4) allegations are dismissed.

Finally, the Company's elimination of the bargaining unit also violated Section 8(a)(5) because it failed to provide notice beforehand and afford it an opportunity to bargain in good faith before taking that action. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667, (1981), the Supreme Court, recognizing the needs of an employer for the "unencumbered decision-making" in its business, held that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." In cases where the employer decides to "shut down part of its business purely for economic reasons" would outweigh the "incremental benefit that might be gained through the union's participation in making that decision."

As previously concluded, the Company's the decision to eliminate the bargaining unit was not motivated by a legitimate business purpose, but rather, unlawful animus. That alone precluded it from avoiding its duty to bargain under *First National*

Maintenance Corp. v. NLRB, 452 U.S. at 687-88. *Central Transport, Inc.*, 306 NLRB 166, 167 (1992), enfd. in part, 997 F.2d 1180 (7th Cir. 1993) (employers were not exempt from obligation to bargain where decision was based on antiunion animus); *Strawsine Mfg. Co*., 280 NLRB 553 (1986) (same).

The Company also failed to meets its obligation to bargain before laying off the unit employees. See *Pan American Grain Co.,* 351 NLRB 1412, 1413 (2007) (layoffs based on "economic" reasons triggered duty to bargain), enfd. 558 F.3d 22 (1st Cir. 2009); *Davis Electric Wallingford Corp.,* 318 NLRB 375, 375–76 (1995) (employer owed a duty to union to notify it beforehand where it was certified as bargaining representative about 6 weeks prior to the mass layoff of unit employees). Operational changes which result in the replacement of union employees with non-union employees doing the same work are mandatory subjects of bargaining. *Pan American Grain Co.,* 351 NLRB at 1413; *Power, Inc.,* 311 NLRB 599, 599 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994); *Torrington Industries,* 307 NLRB 809, 811 (1992). Similarly, changes which involve the replacement of some equipment, resulting in the layoff of employees, also trigger an obligation to bargain. *Geiger Ready-Mix Co.,* 315 NLRB 1021, 1022–23 (1994) (movement of trucks), enfd. in rel. part*,* 87 F.3d 1363 (D.C. Cir. 1996); *Winchell Co.,* 315 NLRB 526, 526 n.2 (1994) (addition of computers replacing some unit work), *enforced,* 74 F.3d 1227 (3d Cir. 1995); *Power, Inc.,* 311 NLRB at 599 (sale of drilling equipment).

The Company argues that the Union never requested to bargain over layoffs, a mandatory subject of bargaining. That obligation on the part of the Union, however, was never triggered since the Company's notification of that decision on August 7, 2019, was presented as a final decision. It did offer to bargain over the effects or impact of that decision and reinforced its final decision by informing the Union on August 8, 2019 that the bargaining unit employees would be laid off that day. *Davis Electric,* 318 NLRB at 376 (union's duty to request to bargain over a proposed change does not apply where the employer presents its decision as a fait accompli).

CONCLUSIONS OF LAW

1. Sunbelt Rentals, Inc. (the Respondent) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Engineers Local 139, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive bargaining representative in the following appropriate unit:

> All full-time and regular part-time mechanics, drivers, and foremen employed by the Respondent at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Threating employees that it would be futile for them to select the Union as their bargaining representative.

(b) Instructing employees to report on the Union activities of other employees.

(c) Interrogating employees about their Union sympathies and activities.

(d) Interrogating employees without providing assurances under *Johnie's Poultry Co.*, 14146 NLRB 770, 74–75 (1964), enforcement denied 344 F.2d 617 (8th Cir. 1965).

5. The Respondent violated Section 8(a)(3) and 8(1) of the Act by taking the following adverse action because its employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities:

(a) Permanently laying off its employees Kyle McKellips and Allan Romanowski, thereby eliminating the bargaining unit at Franksville.

(b) Transferring the work of the bargaining unit from its Franksville facility to non-union facilities owned by Respondent.

(c) Assigning the bargaining unit work to individuals employed at the Franksville facility who are not in the bargaining unit.

6. Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing to meet at reasonable times and locations for bargaining.

(b) Insisting that all non-economic items be resolved before bargaining over wages.

(c) Engaging in overall surface bargaining by: (1) refusing to meet more than once per month for bargaining; (2) refusing to negotiate over wages, health insurance and pension benefits, and dues check off; (3) engaging in dilatory and delay tactics; and (4) refusing to submit proposals in writing.

(d) Eliminating the bargaining unit at its Franksville PC without providing the Union notice and an opportunity to bargain over its decision.

7. The unfair labor practices described above affect commerce within the meaning of Section 2(2), 2(6), and 2(7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Board has held that the standard remedy for the unlawful elimination of a bargaining unit is to "require the employer to restore the operation in question and to reinstate all discriminatorily terminated employees." See *We Can, Inc.,* 315 NLRB 170, 174 (1994) (characterizing restoration of work as the "usual practice" where "an employer has curtailed operations and discharged employees for unlawful reasons."); *RAV Truck & Trailer Repairs, Inc.,* 369 NLRB No. 36 at 1, fn. 3 (order requiring an employer to restore its operations and reinstate employees).

The Company's violations also warrant an affirmative bargaining schedule, requiring the parties to meet on a regular basis and the Company to submit progress reports to the Region every 30 days. The Board has held that such an order is appropriate in circumstances "where the Respondent has engaged in a series of dilatory tactics in contravention of its duty to bargain in good faith." See *UPS Supply Chain Solutions*, *Inc.,* 366 NLRB No. 111, slip op. at 2–4 (2018) (surface bargaining violations

rendered appropriate a bargaining schedule requiring the parties to meet for at least 24 hours per month, and at least 6 hours per session; *Camelot Terrace,* 357 NLRB 1934, 1941, 2004–05 (2011) (ordering bargaining schedule where employer limited number of sessions, cancelled other sessions, shortened sessions that it did attend, and refused to bargain economics); *All Seasons Climate Control, Inc.,* 357 NLRB 718, 718 fn. 2 (2011) (ordering bargaining based, in part, on employer's encouragement of decertification petition), enfd. 540 F. App'x 484 (6th Cir. 2013).

Furthermore, the circumstances require that the Company be required to read the attached notice aloud to employees at the Franksville PC and post a copy of the notice at all of its Wisconsin PCs. See *North Memorial Health Care,* 364 NLRB No. 61, slip op. at 1 (2016), enfd. in part, 860 F.3d 639 (8th Cir. 2017) (notice reading is appropriate where high-level managers have been involved in a pervasive, public pattern of unfair labor practices); *Nob Hill General Stores, Inc.*, 368 NLRB No. 63, slip op. 1, n.2 (2019) (notice should be posted at any facility where "affected employees perform work"); *Planned Building Services, Inc.,* 347 NLRB 670, 677 (2006) (multi-facility postings warranted where employers engaged in a "clear pattern or practice of unlawful conduct").

The Company's bad faith conduct and dilatory tactics also warrant issuance of a broad cease and desist order. See *Hickmott Foods, Inc.,* 242 NLRB 1357, 1357 (1979) (broad order warranted where respondent's "egregious or widespread misconduct" demonstrated "a general disregard for the employees' fundamental statutory rights."); *Allied Medical Transport, Inc.,* 360 NLRB 1264, 1269 fn. 9 (2014), enfd. 805 F.3d 1000 (11th Cir. 2015) (broad cease and desist appropriate based on independent violations of Section 8(a)(1) and termination of union supporters shortly after union certification),

Finally, the Company's persistent bad faith during 15 months of bargaining warrants a full 12-month extension of the certification year. *Mar-Jac Poultry Co.,* 136 NLRB 785, 786–87 (1962) (extension of the certification year is warranted where employer commits unfair labor practices during the initial certification year).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[98]

ORDER

The Respondent, Sunbelt Rentals, Inc., Franksville, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that forming a union is futile.

(b) Instructing employees to report the union activities of their fellow employees.

(c) Interrogating employees regarding their union and concerted activities.

(d) Interrogating employees without providing assurances under *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enforcement denied, 344 F.2d 617 (8th Cir. 1965).

(e) Permanently laying off employees, transferring work, and eliminating bargaining units because employees choose to engage in union activities.

(f) Permanently laying off employees, transferring work, and eliminating bargaining units because employees participate in Board investigative processes.

(g) Refusing to meet at reasonable times and locations for collective-bargaining negotiations.

(h) Conditioning bargaining over wages on the resolution of all other non-economic issues.

(i) Refusing to bargain in good faith with the Union.

(j) Unilaterally and without the consent of the Union eliminating the bargaining unit at the Franksville facility or otherwise changing terms and conditions of employment for bargaining unit employees employed at Franksville.

(k) In any other manner interfering with, restraining, or coercing Respondent's employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kyle McKellips and Alan Romanowski full reinstatement to their former jobs without prejudice to their seniority or any other privileges previously enjoyed.

(b) Within 14 days from the date of this Order, make Kyle McKellips and Alan Romanowski whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(c) Compensate Kyle McKellips and Allan Romanowski for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful permanent lay-offs of Kyle McKellips and Allan Romanowski, and within 3 days thereafter, notify McKellips and Romanowski in writing that this has been done and that the layoffs will not be used against them in any way.

(e) Within 14 days from the date of this Order, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the following Unit with respect to wages, hours, and other terms and conditions of employment:

> All full-time and regular part-time mechanics, drivers, and foremen employed by the Respondent at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.

(f) The Union's certification is extended 12 months from the date that Respondent begins to comply with this Order.

(g) Within 14 days from the date of this Order, on request of the Union, bargain in good faith with the Union on a schedule providing for good-faith bargaining for not less than 24 hours per month and 6 hours per bargaining session, or on another schedule

[98] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to which Respondent and the Union have mutually agreed to, until they reach a complete collective-bargaining agreement or good-faith impasse in bargaining.

(h) Prepare written bargaining progress reports every 30 days and submit them to the Regional Director and the Union to provide the Union with an opportunity to reply.

(i) Within 14 days from the date of this Order, restore the bargaining unit work to the status quo that existed on August 5, 2019, including transferring back unit work to the Franksville facility, restoring bargaining unit positions, and assigning bargaining unit work to unit employees.

(j) Within 14 days after service by the Region, post at its facilities in Franksville, Waukesha, Madison, Green Bay, Wausau, and Fond du Lac, Wisconsin copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since March 13, 2018.

(k) Within 14 days after service by the Region, convene meetings at its Franksville, Wisconsin facility during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to employees, supervisors, and managers by Regional Vice President Jason Mayfield (or his successor) in the presence of a Board Agent if the Region so desires, or, at the Respondent's option, by a Board agent in the presence of Mayfield. The Respondent shall allow a representative of the Union to attend and video record each such meeting.

Dated, Washington, D.C. May 13, 2020

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to interfere with, restrain, or coerce you in the exercise of the above rights granted by Section 7 of the Act.

WE WILL NOT tell you that the Union will not get into our facilities, that the Union was never going to happen, or otherwise communicate to you that it is futile to support a union.

WE WILL NOT instruct you to report the union activities of your coworkers to us.

WE WILL NOT question you about your union activities or the union activities of others.

WE WILL NOT question you in preparation for hearings before the National Labor Relations Board without providing appropriate assurances, including that your participation is voluntary and will not be met with retaliation.

WE WILL NOT permanently lay employees off or otherwise retaliate against you for engaging in union activity.

WE WILL NOT outsource or transfer work in retaliation for employees' union activities and participation in proceedings before the National Labor Relations Board or because the Union filed charges on your behalf.

WE WILL NOT eliminate the positions of union-represented employees because of their support for the union and participation in proceedings before the National Labor Relations Board or because the Union filed charges on your behalf.

WE WILL NOT assign work to employees who are not represented by the Union from bargaining unit employees because those employees are represented by a union.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive representative of employees in the following appropriate unit (Franksville Bargaining Unit):

> All full-time and regular part-time mechanics, drivers, and foremen employed by the Respondent at profit center 776 in Franksville, Wisconsin, excluding all other employees, clerical staff, salespeople, managers, guards, and supervisors, as defined in the Act.

WE WILL NOT refuse to meet regularly with the Union for collective bargaining negotiations.

WE WILL NOT refuse to discuss wages before all other noneconomic issues are resolved.

WE WILL NOT engage in negotiations without trying, in good faith, to reach an agreement with the Union.

WE WILL NOT transfer bargaining unit work done by drivers and mechanics at the Franksville facility without providing the Union with notice and an opportunity to bargain about the decision.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed under Section 7 of the Act.

WE WILL make Kyle McKellips and Allan Romanowski whole for any loss of wages and other benefits as a result of their permanent layoffs.

WE WILL, within 14 days from the date of the Board's Order, offer Kyle McKellips and Allan Romanowski full reinstatement to their former jobs without loss of seniority or any other rights or privileges previously enjoyed.

WE WILL compensate Kyle McKellips and Allan Romanowski for the adverse tax consequences, if any, of receiving a lump-

sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's order, remove from our files any references to the unlawful permanent layoffs of Kyle McKellips and Allan Romanowski, and within 3 days thereafter, WE WILL notify each of them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's order, restore the bargaining unit work that was unlawfully outsourced from the Franksville facility, as it existed on August 5, 2019.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the Franksville Bargaining Unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

WE WILL, on request of the Union, bargain in good faith for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees.

WE WILL submit progress reports regarding the negotiations to the compliance officer for Region 18 every 30 days and serve copies of those reports on the Union.

WE WILL hold a meeting or meetings during working at the Franksville facility and have this notice read to you and your fellow employees by Regional Vice President Jason Mayfield, in the presence of a Board agent and an agent of the Union, if the region or the Union so desires, or by a Board agent in the presence of a Regional Vice President Jason Mayfield and, if the Union so desires, of an agent of the Union.

SUNBELT RENTALS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-236643 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.