

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

SPURLINO MATERIALS, LLC, or in the alternative,
SPURLINO MATERIALS OF INDIANAPOLIS, LLC,
or in the alternative, SPURLINO MATERIALS, LLC and
SPURLINO MATERIALS OF INDIANAPOLIS, LLC,
a single integrated employer

and

Case 25-CA-31565

COAL, ICE, BUILDING MATERIAL,
SUPPLY DRIVERS, RIGGERS, HEAVY HAULERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 716, a/w INTERNATIONAL
BROTHERHOOD OF CHAUFFEURS, TEAMSTERS,
WAREHOUSEMEN AND HELPERS OF AMERICA

GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE
THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully Submitted by,

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THE ADMINISTRATIVE LAW JUDGE'S DECISION

Comes now the Counsel for the Acting General Counsel and respectfully submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision. This Answering Brief specifically addresses each of Respondent's Exceptions numbered 1 through 27. Counsel for the Acting General Counsel hereby requests that said exceptions be denied and that the Administrative Law Judge's decision in respect to these exceptions be affirmed. In support of this position, Counsel for the Acting General Counsel offers the following:

I. STATEMENT OF THE CASE

Based upon charges filed by the Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, Local Union No. 716, a/w International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America, herein the Union, the Regional Director for Region 25 issued a Complaint. The Complaint alleged that Spurlino Materials, LLC unlawfully refused to reinstate 14 unfair labor practice strikers after they made an unconditional offer to return to work. Respondent filed an answer alleging that Spurlino Materials, LLC was not the employer of the employees at issue. Counsel for the Acting General Counsel filed a Motion to Strike, Motion in Limine, and Motion for Partial Judgment on the Pleadings requesting that the Answer be struck to the extent that it denied that Spurlino Materials, LLC is not the employer of the employees at issue, and that Spurlino Materials, LLC be found to be the employer of the employees at issue based upon collateral estoppel. Administrative Law Judge Jeffery D. Wedekind denied the Motion. The Complaint was amended prior to hearing to define Respondent as Spurlino Materials, LLC, and in the alternative Spurlino Materials of Indianapolis, LLC, and in the alternative Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC, a single integrated enterprise. A hearing was held regarding the above-captioned case before Administrative Law Judge Jeffrey D. Wedekind January 11, 12, and 13, and February 3, 2011. At hearing the caption of the case was amended to read: Spurlino Materials, LLC, or in the alternative Spurlino Materials of Indianapolis, LLC, or in the alternative Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC, a single integrated employer. Counsel for the Acting General Counsel also renewed the motion to have Respondent collaterally estopped from denying that Spurlino Materials, LLC was the employer of the employees

at issue, which was denied by the Administrative Law Judge.¹ On March 15, 2011, Judge Wedekind issued his decision regarding the instant case. Judge Wedekind found that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, by failing to reinstate the unfair labor practice strikers, who had engaged in a lawful strike, upon their unconditional offer to return to work. Judge Wedekind also found that Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC constitute a single integrated employer.

II. PREFATORY FACTS

A. Introduction

Respondent admits that Spurlino Materials of Indianapolis, LLC (“SMI”) is an employer of the employees at issue in this case within the meaning of the Section 2(2) of the Act, but denies the employer status of Spurlino Materials, LLC (“SM”). Regardless of which entity is found to be the Respondent, the crux of this case is that Respondent is continuing its attempt to rid itself of the Union. Throughout the more than five years since the Union was certified as the bargaining representative there have been significant unremedied unfair labor practice charges against Respondent pending before the Board and/or the Federal Courts. Indeed at the end of March 2010,² Respondent had again shown its unwillingness to resolve its unremedied unfair labor practices by filing its brief to the Seventh Circuit in the pending appeal of the Board’s finding that Respondent had engaged in unfair labor practices. It is from this atmosphere that the employees, at the strike vote meeting, questioned why they had to comply with the law but Respondent did

¹ General Counsel has filed a limited exception with regards to this issue.

not. With this in mind and the concern that Respondent could turn its unfair labor practices upon them, the employees voted to engage in an unfair labor practice strike in support of discharged employee Gary Stevenson. They hoped that their Union brothers would do the same for them if the need arose. Ultimately, Respondent refused to reinstate the strikers after they made an unconditional offer to return to work from their lawful unfair labor practice strike.

B. History of Unfair Labor Practices

Respondent has a history of unfair labor practices starting with coercive statements during the Union organizing campaign beginning in late 2005 and unilateral changes immediately after the Union won the January 13, 2006 election as the employees' bargaining representative (Jt. Exh. 1; TR 90-91, 696-697). While these cases were still pending before the Board,³ Respondent committed extensive unfair labor practices in the fall/winter of 2006/2007 including unilateral changes to how work was assigned, subcontracting unit work, and discharging Union activist Gary Stevenson. The Regional Director obtained Section 10(j) injunctive relief regarding some of these unfair labor practices, including the discrimination in work assignments based upon employees' Union activity, but injunctive relief was not sought regarding employee Stevenson's discharge. Lineback v. Spurlino Materials, LLC, 546 F.3d 491, 499 (7th Cir. 2008). On March 31, 2009, the two-member Board issued a decision finding that Respondent violated the Act by, *inter alia*, discriminatorily assigning work, subcontracting work, and discharging Gary Stevenson. See Spurlino Materials, LLC, 353 NLRB 1198, 1211

² All dates contained herein are in 2010 unless otherwise noted.

(March 31, 2009).⁴ Respondent appealed the Board’s decision to the Seventh Circuit and settlement negotiations continued until about the end of March 2010 when Respondent filed its brief with the Court. Oral arguments were heard by the Seventh Circuit Court on January 11, 2011, and that case is still pending.

C. Bargaining History

In the over four and a half years since the Union was certified as the bargaining representative of Respondent’s employees the parties have not reached a collective bargaining agreement (TR 21). The parties have only been able to reach a required site specific Project Labor Agreement. The Project Labor Agreement (“PLA”) covers only the work performed by Respondent at the Lucas Oil Stadium and Indianapolis Convention Center Expansion jobsites in Indianapolis, Indiana. The parties were required to sign the PLA in order for Respondent to be eligible to perform work at those jobsites. Both parties signed the agreement by February 2006 and some limited work under the PLA agreement continued through the fall of 2010 (Jt. Exh. 2 and 3, TR 620-21, TR 190).

The PLA contains a broad no-strike/no-lockout clause, Article 12.1, that in pertinent part states:

“During the life of this Agreement, the Unions and Council (Central Indiana Building and Construction Trades Council) agree they will not collectively or individually incite, organize, coordinate, lead, recognize, engage in, participate in, encourage, or condone any strike,

³ These unfair labor practices involved unilateral changes to employees’ terms and conditions of work, including changes to their vacation benefits.

⁴ This Board order was subsequently adopted by a three-member Board on August 9, 2010. See Spurlino Materials, LLC, 355 NLRB No. 77 (Aug. 9, 2010).

work slowdown, withholding of services, work stoppage, sympathy strike, economic or unfair labor practice strike, refusal to work, walkout, handbilling, picketing, including informational picketing, or other interference with work at the Project Site”

(Jt. Exh. 2). This no-strike clause is limited to work covered by the PLA in Article 2:

Scope of the Agreement, Subsection 2.3, which states:

“The provisions of this Agreement shall control construction of this Project and take precedence over and supersede provisions of all the Unions’ collective bargaining agreements, national, area or local, which conflict with the terms of this Agreement. However, the national, area and local collective bargaining agreements will govern all issues that are not addressed in this Agreement.”

(Jt. Exh. 2). It is undisputed that Respondent did not apply the PLA to the work that it performed for its numerous other customers (TR 21, 620-21). Also, Respondent has been required by a District Court 10(j) injunction affirmed by the 7th Circuit and thereafter by a Board Order to maintain the employees’ current terms and conditions of employment for work not covered by the PLA, while it negotiates with the Union towards a collective bargaining agreement.⁵ Lineback v. Spurlino Materials, 546 F.3d 491 (7th Cir. 2008); Spurlino Materials, LLC, 353 NLRB No. 125 (March 31, 2009). The parties’ legal representatives met and discussed the status of negotiations and the unfair labor practice charges in April and Respondent was supposed to respond to some open issues (TR 89-90). No party has offered dates to resume contract negotiations, and neither party has

⁵ Based upon Spurlino’s testimony and his statement in his April 8, 2009 letter to employees that they “implemented higher wages against the union’s desires,” Respondent also unilaterally changed the employees’ wages during this period when the parties had not reached a collective bargaining agreement (GC Exh. 11, TR 661-2). The fact that the Union did not choose to file a charge over this issue does not lessen the arguable unlawful nature of this conduct.

filed a bad faith bargaining charge (TR 88-89). Thus, there is no contract provision prohibiting employees from engaging in a strike regarding non-PLA work.

III. THE ADMINISTRATIVE LAW JUDGE WAS CORRECT IN FINDING THAT SM AND SMI CONSTITUTE A SINGLE INTEGRATED EMPLOYER

The Administrative Law Judge's finding that SM and SMI are single integrated employers should be sustained (JD 2, 10-15).⁶ Respondent admits that SMI is the employer of the employees at issue in the current charge before the Board, but denies the employer status of SM (GC Exh. 2, responding to GC Exh. 1(q)). In spite of its claim that SM is not an employer of the unit of employees at issue in this case, Respondent has on more than one occasion admitted and been found to be the employer of this same unit of employees by the Board, the United States District Court for the Southern District of Indiana, and the United States Court of Appeals for the Seventh Circuit. See Lineback v. Spurlino Materials, LLC, 546 F.3d 491 (7th Cir. 2008); Spurlino Materials, LLC, 353 NLRB No. 125 (March 31, 2009). General Counsel's motion requesting that Respondent be collaterally estopped from disputing the status of SM as the employer was denied by order prior to hearing and a renewed request during the hearing was also denied (TR 8; GC Exh. 1(l) and attached exhibits).⁷ Therefore, evidence sufficient to prove that SM and SMI constitute a single integrated employer of the employees at issue was presented at hearing.

⁶ Respondent contentions in its exceptions numbered 1, 7, 8, 9, 10, 11 that the Administrative Law Judge's findings with regard to the single-employer status of SM and SMI should be denied for the reasons discussed herein.

⁷ The Administrative Law Judge's refusal to collaterally estop Respondent from disputing the status of SM as the employer of the employees at issue in this matter is addressed in General Counsel's Limited Cross-Exceptions.

The Board finds single integrated employer status where there is an interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. Radio Union Local 1264 v. Broadcast Service, 380 U.S. 255 (1965); Wisconsin Education Assn., 292 NLRB 702, 711 (1992). The Board has also noted that:

In finding that a single-employer relationship exists, not one of these factors is controlling, and the presence of all four factors is not necessary. The single-employer relationship has also been characterized as an absence of an “arm's length relationship found among unintegrated companies.” Operating Engineers Local 627 v. NLRB, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *affd.* on this issue sub nom. South Prairie Construction Co. v. Operating Engineers Local 267, 425 U.S. 800 (1976). Ultimately, in finding that a single-employer relationship exists, all the circumstances present in each case must be considered.

Northern District of Connecticut Iron Workers Local 15, 306 NLRB 309, 310-311 (1992). In the instant case, the Administrative Law Judge found sufficient evidence of interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control between SM and SMI to establish that they are a single integrated employer (JD 2, 10-15). The following discussion shows that the Administrative Law Judge was correct in finding strong evidence for each element to establish a single-employer relationship. (JD 10-15).

A. The Administrative Law Judge Was Correct In Finding Common Ownership Or Financial Control Of SM And SMI

The Administrative Law Judge correctly found that there is common ownership and financial control of these two entities (JD 10). SM is an Ohio limited liability company that started operating ready-mix concrete batch plants at various locations in the State of Ohio in 2000, including in Middletown, Dayton, Harrison, Marrow, and

Cincinnati (GC Exh. 7; TR 368). James Spurlino (“Spurlino”), who is now the sole owner of SM, has always been the majority owner and sole manager of SM (TR 365, 367). Spurlino became the sole owner of SM after purchasing the minority ownership interests of Norman and Mary Rita Weissman and Southside Development in 2008, and the minority ownership interests of Brent and Glenn Fraley in 2009 (TR 367).

In November 2005, Spurlino became interested in competing in the Indianapolis, Indiana ready-mix market (TR 453). Because it is impossible to transport ready-mix materials over the 100 mile distance between SM’s operations in Ohio and Indianapolis, it was necessary to acquire facilities in the Indianapolis area (TR 463, 656). Prior to November 2005, Spurlino organized SMI, an Ohio limited liability company, which later purchased the assets of American Concrete, including its Indianapolis and Noblesville, Indiana facilities, herein together called the Indianapolis area facilities⁸ (TR 563-64, 642). Spurlino has also always been the 52% majority owner and sole manager of SMI⁹ (TR 382-83, 464). Spurlino’s father, Cyrus Spurlino, holds another 24% interest in SMI and a company owned by a longtime friend of Spurlino owns the remaining 24% interest in SMI (GC Exh 45, pg. 30; TR 382-83, 464-65). Although Cyrus Spurlino does not have an ownership interest in SM, his trust fund loaned SM \$3,330,000 in 2008 that in part paid off a line of credit debt that SM had with Fifth Third Bank (TR 771).

⁸ A third plant in Linden, Indiana was purchased from American Concrete in 2005 and sold in 2009 (TR 369). A fourth SMI facility located in Northern Kentucky operated for about a year and a half in 2007 and 2008. The employees for that facility reported directly to Spurlino (TR 369, 439).

⁹ Limited liability companies do not have a board of directors, but are managed by the terms of their operating agreements. Spurlino is named as the sole manager in each of SM and SMI’s operating agreements (GC Exh. 43 and 45, TR 365).

As the sole manager of SM and SMI, Spurlino determines both entity's strategic direction, operating procedures, and capital expenditures (TR 370, 643-44, 685). Spurlino sets up and manages lines of credit and bank accounts for the two entities (TR 429). Spurlino developed the accounting department that performs all of the accounting for both entities GC Exh. 37, TR 401-03). Through the accounting department Spurlino authorizes financial transactions between to the two entities and all the expenditures for both entities (GC Exhs. 37, 38 and TR 351, 400-03, 513-14, 781). Based upon the record evidence, the Administrative Law Judge's finding of common ownership and financial control should be sustained.

B. The Administrative Law Judge Was Correct in Finding Common Management between SM and SMI

The Administrative Law Judge's finding that SM and SMI have common management should be sustained (JD 10-11). In addition to Spurlino being the sole manager of both SM and SMI at the executive level, there has been interchange of managers at the operations level between the two entities. Prior to the start of SMI, Gary Matney, who was familiar with the Indianapolis ready-mix market, was hired by SM at Spurlino's direction to assist with the opening of SMI (TR 397, 453). After SMI started operating, SM's Operations Manager, Jeff Davidson ("Davidson"), worked back and forth between SM and SMI for a few months before Spurlino permanently assigned him to SMI (TR 54). Davidson obtained the position of Operations Manager at SMI without having to complete any application process (TR 278-79). Although George Gaskin, a former supervisor for the predecessor company American Concrete, was hired as an

operations supervisor at SMI without ever working for SM, he has always been subordinate to Gary Matney and Davidson (TR 57).

In addition, SM Sales Manager Jeff Raussen also is involved with day-to-day management of both SM and SMI. In a deposition unrelated to the instant case, SM Controller Rick Bumgardener (“Bumgardener”) testified that Raussen manages both the sales employees of SM and SMI and that his wages are included in the administrative expenses allocated to both entities (TR 758-62). After a recess in the hearing and after being prepared to testify about this matter, Bumgardener attempted to downplay his knowledge of Raussen’s responsibilities. Spurlino also attempted to downplay Raussen’s role with regard to supervising SMI’s sales employees by stating that he “provides some sales support services” to the SMI sales people (TR 784). Even when Spurlino was asked by Respondent’s Counsel what these services entailed, they sounded very much like managerial types of responsibilities: “training, planning, mentoring, strategic kind of thinking” and accompanying SMI sales people on sales calls (TR 784-85).

As the sole manager of these two limited liability companies, Spurlino makes the major decisions affecting the terms and conditions of employment for both entities including the opening or closing of facilities, the purchase or sale of assets, the expansion or contraction of the workforce, discharging of employees, wage rates, employee benefits, etc. (TR 67-9, 283, 284, 369-70, 660-01, 684-87). In addition, both companies have used the same labor management firm to develop employee policies, employment documents, and screen employee applicants (TR 373-75, 381, GC Exh. 42). Notably, the principle owners of this labor management firm were also minority owners in SM until sometime in late 2008 (TR 367, 468). Although both SM and SMI have operations

managers that deal directly with the individual employees on a day-to-day basis, they both report to Spurlino who maintains the ultimate control over the employees' terms and conditions of employment.

Common management should be found in this case because the Board has held that "common management may be found where the separate managerial hierarchies take close instruction from a common owner." Lebanite Corporation and/or R.E. Service Company, 346 NLRB 748 (2006). See also, Masland Industries, 311 NLRB 184, 186 (1993). In Lebanite, each entity had the same president/owner and separate operations managers that dealt with day-to-day operations. Yet it was noted that the operations managers had limited authority in crucial areas such as expenditures which remained in the control of the president/owner. Similarly, in the instant case, the operations managers deal with day-to-day operations at the SM and SMI facilities, but Spurlino maintains control of numerous managerial functions such as: 1) determining strategic direction, operating procedures, and company values; 2) making decisions about capital expenditures/purchases and property leases; 3) establishing banking and credit accounts for both entities; 4) executing agreements between the entities and signing such agreements for both entities; 5) directing both entities accounting procedures; 6) authorizing cash advances and payments between the two entities; and 7) authorizing the payments of invoices for both entities (TR 370, 429, 513-514, 643-44, 684, 781). Furthermore, the operations managers need Spurlino's approval before they carry out many of the managerial functions that they do perform such as hiring, firing, and granting a wage increase (TR 283-84, 690-91).

Accordingly, the Administrative Law Judge's finding of common management between SM and SMI should be sustained (JD 10-11).

C. The Administrative Law Judge Was Correct In Finding Significant Interrelation Of Operations Between SM And SMI

The Administrative Law Judge's finding of significant interrelation of operations between SM and SMI should be sustained (JD 11-14). There is significant interrelation of operations between SM and SMI which is evident in their common business purpose, the manner in which they hold themselves out to the public and their employees, their interchange of employees and equipment, and their less than arms length financial transactions.

1. SM and SMI Have a Common Business Purpose and Hold Themselves Out to the Public and Their Employees as One Entity

The Administrative Law Judge's finding that SM and SMI have a common business purpose and hold themselves out to the public as one entity should be sustained. (JD 11-12). SM and SMI both supply ready-mix concrete materials to customers engaged in commercial and residential construction (TR 563, 565). Although SM and SMI serve different geographical areas, this is a product of the fact that ready-mix concrete can be transported only about 30 minutes from its place of origin rather than the fact that these are two separately operated entities (TR 463). In fact, Respondent has continually held itself out to the public and its employees as one entity. Respondent maintains one website which states that "Spurlino Materials is a full-service construction materials supplier servicing the metropolitan markets of Indianapolis, Cincinnati, Dayton and Northern Kentucky." The website gives contact information for Spurlino Materials

Indiana and Ohio order departments (GC 7; TR 352). The companies with which SMI deals on a regular basis are directed to send their invoices and payments to SM's Middletown, Ohio facility (TR 325-26). Both entities use the same letterhead and business cards (GC Exh. 21 and 22). Even the employer name on the Assent Agreement to the Project Labor Agreement is simply listed as Spurlino Materials (Jt. Exh. 3). All of the concrete mixer and tanker trucks and at least some of the maintenance trucks used by both entities have the Spurlino Materials logo without identifying if they belong to SM or SMI (TR 300, 322). SMI pays no fees to SM for the use of the Spurlino Materials "brand name" on its trucks, letterhead, business cards, etc. (TR 476).

SM and SMI also hold themselves out to the employees as one entity. The application forms, employee action forms and other documents that the employees receive simply state Spurlino Materials on the top (GC Exh. 11, 15, 17, and 18). The application that Davidson completed for SM, which only contains the title of Spurlino Materials, is still used by both entities (TR 279). Furthermore, Davidson retained the same 401(k) benefit plan and life insurance policy at SMI that he had acquired at SM (TR 412). These same benefit plans are still offered to both SM and SMI non-bargaining unit employees (TR 287-88).

The fact that these two companies were held out to the employees as one entity is evident in Spurlino's April 8, 2009, letter to "All Indianapolis Employees." That letter repeatedly refers to SM and SMI as one company. For example, the letter states:

All the employees at our other operations have enjoyed their work lives and shared in bonuses and profit-sharing. In fact, many of our employees living in Ohio, Indiana, and Kentucky have earned "Loyalty" bonuses of \$10,000 upon reaching 5 years employment with us. This is because they worked hard and helped make the company successful and profitable. . . . Every other employee (including me) of all Spurlino Materials companies

has taken a 5% decrease in pay and had their 401(k) match suspended. Everyone else pitches in, works together, and makes sure we all have jobs as we get through the toughest economic time of our lives. That is how companies survive and how we can, by working together. (GC Exh. 11).

This view of SM and SMI being one entity can even be found in the testimony of Respondent's witnesses. For example, Davidson stated he believed that the rear loader discharge trucks used by SMI had "come from another job we had finished up with" (emphasis added—referring to a job performed by SM or Bison Concrete, the Spurlino Materials mobile division). (TR 299-300). Another example is when Spurlino explained his role in directing operations managers at the two entities, Spurlino stated that "if they need assistance or needed to reaffirm, you know, some of our operating procedures or the values of the way we do business, and certainly continue to emphasize and make sure they understand what is important for our company to be successful." Inherent in Spurlino's statement is that there is one way that all Spurlino Materials companies do business. Furthermore, in testifying both Davidson and Bumgartener referred to SM and SMI as "divisions" of one company (TR 63, 525).

Accordingly, the Administrative Law Judge's finding that SM and SMI have a common business purpose and hold themselves out to the public as one entity should be upheld (JD 11-12).

2. There is Significant Interchange of Employees and Equipment Between SM and SMI

The Administrative Law Judge correctly found that SM and SMI interchange employees and equipment in a manner that evidences that they are one entity (JD 12). The two companies routinely interchange employees. Davidson testified that SMI had a practice of using SM concrete truck drivers when it did not have enough drivers (TR 66).

For example, Davidson had arranged with SM Operations Manager Lou Reiker to have six to eight SM drivers work at SMI on August 3, 2010, before learning the SMI drivers were going on strike (TR 63). Upon learning of the strike, Davidson made arrangements with Lou Reiker to use SM drivers through out the remainder of the strike and the week and a half following the strike (TR 65, 74). SMI used SM employee Brett Delong to perform maintenance and clean-up work when SMI first started operating (TR 320).¹⁰ SMI uses SM's maintenance mechanic Brent Shelton for approximately four weeks per year and had him drive an SMI mixer truck during the strike (TR 320-21, 322-23).

SM also used SMI employees. Employee Blackston Poindexter testified that he and three other SMI employees drove the mixer trucks they operate for SMI to SM in the summer of 2010 to perform concrete delivery work for SMI (TR 255-56). Davidson stated that he and Lou Reiker "do this commonly" and that SMI employees have turned in time cards to Lou Reiker and SM employees have turned in time cards to him depending on where they are working when time cards are due (TR 294). Similarly, if SM or SMI needed additional help with tanker truck deliveries of raw materials to their concrete batch plants, they utilized each other's drivers and tanker trucks (TR 296-99). Davidson admitted that in the one month that employee Jason Mahaney held the tanker truck position before he went out on strike, he had assigned Mahaney to perform tanker truck work for SM at least a couple of times (TR 296-97). SMI's tanker truck drivers

¹⁰ Although Davidson denied that SMI used SM employees to train SMI employees to operate rear loader mixer trucks for the PLA work, Davidson testified in the prior unfair labor practice hearing that SM employee Brett Delong did that training and driving tests. See Spurlino Materials, LLC, 353 NLRB 1198, 1211 (March 31, 2009).

prior to Mahaney had also been assigned to make deliveries to SM, and SM's tanker truck drivers had made deliveries to SMI.

SM and SMI also interchange equipment other than the tanker and mixer trucks that the employees drive from one facility to another including the rear loader mixer trucks and the portable batch plant used at the PLA jobsite (TR 299-301). With the exception of the lease of a tanker truck from SM to SMI, the interchange of equipment also occurs without contracts, invoices, or charge (TR 421). Significantly, this one lease agreement is signed by Spurlino for both SM and SMI (GC Exh. 38).

Clearly, interchange of employees and equipment was common between SM and SMI, but because of Respondent's lack of record keeping it is impossible to accurately determine how frequently this interchange occurred (TR 305-06). This interchange likely occurs more often than Respondent's witnesses would directly admit. For example, when testifying on direct about the interchange of tanker truck drivers, Spurlino first testified that this was a "regular event." After somewhat leading questions by Respondent's Counsel, he contradicted himself and said that it happened "occasionally." (TR 650). This interchange is made without contracts, invoices, or even time card records of where the employees perform the work (TR 63, 74-75). Davidson stated that when he completed the Excel spread sheet with employees' time records he called Bumgardener and orally informed him if some of his employees' hours were for the performance of work for SMI (TR 304). Although Spurlino claims that SM and SMI charge each other the market rate for the use of their employees and equipment, Bumgardener testified that he only expensed the employee's hourly wage for such interchange of employees and equipment between SM and SMI (TR 441, 487, 500).

Based thereon, the Administrative Law Judge was correct in finding that the evidence of employee and equipment interchange between SM and SMI supports a finding of single employer and that finding should be sustained (JD 12).

3. Less Than Arms Length Financial Interactions

The Administrative Law Judge was correct in finding that SM and SMI do not deal with each other through arms length transactions (JD 12-14). From the beginning of SMI, the companies have comingled funds under the common control of Spurlino. For example, SM paid the salaries of Gary Matney and Davidson prior to and during the initial start-up of SMI in November 2005 (GC Exh. 19; TR 54, 454). Five years later Davidson still uses the SM credit card that he received from SM prior to being transferred to SMI to make purchases for SMI (TR 538). Throughout the existence of SMI, SM has paid bills for it, advanced money to it, and even deposited checks from SM's customers into SMI's account (GC Exh. 19; TR 397-99, 484-86, 491-93, 501). All of these financial advances have been done without any loan agreement, any term for repayment, and no interest being paid (TR 448). The fact that separate bank accounts are maintained for these entities means little when SM and SMI comingle their funds in such a manner.

In order to facilitate these financial transactions between SM and SMI, Spurlino setup a system where SM's accounting department performs all of the financial transactions for SM, SMI, and two other related-party entities in which he is at least the majority owner (GC Exh. 37; TR 401-04). This accounting department is headed by an SM employee, Controller Rick Bumgardener ("Bumgardener") (TR 480-81). Spurlino, as the majority owner and manager of each of these entities, entered into an

Administrative Services Agreement (“ASA”) that charges the various entities for financial, administrative/human relations, and other services provided by SM based upon each entity’s percentage of the total sales of all the entities (GC Exh. 37; TR 401). These ASA charges include the salaries, benefits, facilities, equipment, and overhead for the accounting department employees, Spurlino’s salary, at least a portion of SM Sales Manager Jeff Raussen’s salary, and advertising expenses¹¹ (TR 489-91, 760, 763).

Spurlino stated that he authorized this agreement based upon his belief that it was a “fair” way of handling these transactions (TR 404). There is no evidence that Spurlino tried in anyway to calculate whether this procedure accurately reflects the expense of the work actually performed for those entities. Spurlino claimed that SM charged market rate for the services that SM performed for SMI, yet Bumgardener testified that he did not build any type of profit margin into the ASA charges (TR 411, 421, 490-91).

There are several instances in the accounting records where the accounts between the related-party entities were “netted or balanced out” (GC Exh. 19; TR). Two examples of this “netting out” reduced the amount owed to SM by SMI on its accounts payable ledger by more than \$900,000 on February 29, 2008, and \$500,000 on July 31, 2008 (GC Exh. 19). Why SM would be owed money by one of these other entities that would result in such large reductions to its accounts payable to SMI through this “netting out” practice is unclear in the record. Bumgardener testified that he could not recall what caused him to make such substantial reclassifications to the account, and there were no

¹¹ The evidence is unclear as to all the actual expenses attributed to the ASA charges. Bumgardener stated that he did the calculations and initially listed some expenses included in that calculation, but only included other expenses such as for advertising and a portion of Sales Manager Jeff Raussen’s salary after specifically being questioned about those issues.

records underlying these transactions. Bumgardener testified the information he used was “just his mind” (TR 483). Nor did he maintain any records of these transactions other than other electronic entries made by him that were also not supported by other documentation (TR 484). SMI and SM did not sell any products or provide any services to each other with the exception of the ASA services that SM provided SMI, and those services did not constitute such large sums of money to account for the \$500,000 or \$900,000 reclassifications (TR 653, 655). There is inconsistent testimony between Spurlino and Bumgardener as to whether SMI has ever advanced money to or paid the bills of SM (TR 778, 788). Regardless of whether there were debts owed to SMI from the other related-party entities, or if accounts receivable were somehow removed by unsound accounting practices, the result is the same. SM and SMI do not deal with each other through arms length financial transactions.

As a result of these transactions, at the end of 2010, SMI owed SM over \$1.4 million dollars (GC Exh 19, TR 396, 414, 772). In addition, SMI owed approximately \$4 million on its \$4.1 million line of credit with PNC Bank (TR 385, 387-88, 771-72). The PNC Bank line of credit is secured by all of SMI’s assets, tangible and intangible (TR 387-88). Any amount over \$25,000 in the SMI account is swept into the line of credit account to pay it down. SM has on numerous occasions made cash advances to SMI that far exceed that \$25,000 amount (GC Exh. 19). Therefore, it is likely that those funds are used to at least temporarily pay down SMI’s line of credit and/or the finance fees for the line of credit (TR 709-12, 775).

Furthermore, Spurlino disingenuously testified that SMI is treated like any other customer of SM and is afforded a line of credit (TR 421). Yet, he admitted that SM did

not 1) pay bills such as Verizon Wireless bills, 2) pay employee benefit payments, or 3) make cash advances to its other customers, but it does pay such bills, and make such payments and cash advances for SMI (TR 425-26, 473). Spurlino also testified that SM charged finance or interest on outstanding balances to “other outside unrelated party customers that unfortunately do not pay their bills very quickly.” SM has never charged SMI finance or interest charges on its outstanding balance (TR 448-49).

Through their accounting arrangement the companies commonly comingle money including making cash advances to one another, depositing checks made out to one company in the other’s bank account, and by paying bills of one company through the other’s account. These types of interactions evidences a less than arms length relationship between SM and SMI. See, e.g., Emsing’s Supermarket, Inc., 284 NLRB 302, 304 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989) (“[the] facts, taken as a whole, clearly reveal not only a financial interdependency between [the two supermarkets], but also a propensity on the part of [the owners] to operate the two stores in such a manner that the exigencies of one would be met by the other. This method of operating shows less than an ‘arms length relationship’”). Based thereon, the Administrative Law Judge’s finding that there is substantial evidence that the interactions between SM and SMI are not entirely at arm length should be sustained (JD 12-15).

D. The Administrative Law Judge Was Correct In Finding Common Control Of Labor Relations

The Administrative Law Judge correctly found that Spurlino maintains common control of labor relations for SM and SMI (JD 14-15). Respondent claims that former Operations Manager Gary Matney and Operations Manager Jeff Davidson maintained

control of the labor relations and human resources for SMI. To the contrary, the evidence shows that Spurlino maintained control of labor relations throughout the bargaining process. Respondent's first lead negotiator at the bargaining sessions was one of the principles of the Weissman Group, Mary Rita Weissman ("Weissman"), who was also a minority owner of SM at the time. (TR 468). Spurlino informed the employees that he (emphasis added) had replaced Weissman with Jim Hanson as the company's lead negotiator in his April 8, 2009 letter to the employees (GC Exh. 11). Davidson was only the lead negotiator for SMI for a brief period of time between Weissman and Jim Hanson (TR 579-80). Regardless of who has represented Respondent at the bargaining table it is clear that Spurlino has final control over contract negotiations as is evident by his decision to replace the Company's bargaining representative at the table and written communications to employees stating that it would be Jim Spurlino who would sign any agreed to contract (R Exh. 11, p. 2).

The record evidence contradicts Davidson's testimony that he, Operations Supervisor George Gaskin, and prior to her layoff in 2008, office employee Angie Johnson performed all of the human relations functions for SMI (TR 282). The Weissman Group has performed several human resources functions for both SM and SMI. The Weissman Group developed employee policies, handbooks, and employee action forms that were used at SM and SMI (TR 373-74). Weissman was also involved in discipline, discharge and wage rate decisions for SM and SMI employees (TR 686-87). The Weissman Group performed applicant recruiting and screening services, reference checks, and driving record reviews for both SM and SMI at least until sometime in early 2010 (TR 306-308, 374). Davidson admitted that he had no knowledge about how

payroll was performed beyond his submission of time records to Bumgardener (TR 285). Although Davidson may have distributed employee employment and benefit enrollment forms, he played no role in the development of those forms, benefits, or policies (TR 289). Davidson admitted that he had never discharged an employee from SMI or hired an employee at SMI without consulting with Spurlino or legal counsel at the direction of Spurlino (TR 283-84). In addition, Davidson admitted that even letters issued to the employees under his name were co-authored with Spurlino (R Exh. 10 and 11; TR 605, 747).

Despite Davidson's testimony that he did not make these decisions alone, Spurlino refused to answer Counsel for Acting General Counsel's questions regarding who actually made the final decisions on these types of issues. Spurlino admitted that he set the initial wages, hours, and terms and conditions of employment for both SM and SMI (TR 660-61). When asked about changes to employees' terms and conditions of employment at SM and SMI, Spurlino testified that these types of decisions were group decisions between him, the operations manager of the facility, and Mary Rita Weissman. When pressed on cross examination, Spurlino refused to admit that he or anyone else had the final say on such issues (TR 686-90). Similarly, although he admitted that he had made the initial decisions concerning employee benefit plans, he would not admit that SM Operations Manager Lou Reiker did not have the authority to change such plans for SM employees without his approval (TR 690-91). Spurlino would only directly admit that he made final decisions with regard to capital expenditures for SM and SMI such as the purchase or sale of new or existing facilities (TR 689). Due to the contradictions between Davidson's and Spurlino's testimony and between Bumgardener's and

Spurlino's testimony discussed above and Spurlino's evasive, ambiguous and self-serving answers to questions on cross-examination, Spurlino's testimony should not be found credible.

Based upon the credible evidence, the Administrative Law Judge's finding on common control of labor relations should be sustained (JD 15).

E. The Administrative Law Judge Was Correct In Concluding That SM And SMI Constitute A Single Integrated Employer

The Administrative Law Judge's finding that SM and SMI are a single integrated employer should be sustained (JD 2, 15). Respondent claims that because these two entities do not operate out of the same facilities and serve different markets and customers, they cannot be single integrated employers. This case is similar to Essex Valley Visiting Nurses Association and New Community Corporation and New Community Health Care, Inc., 352 NLRB 427 (2008) where the Board affirmed the administrative law judge's finding that the two separately operated companies with separate facilities performing health care services constituted a single integrated employer. There the companies served various individuals in the need of health care services within the Newark, New Jersey area. The services provided were identical but for different patients at different facilities. The Board found that they were single integrated employers even though they worked out of separate facilities, because of the lack of arm's length transactions, the comingling of funds, common ownership, common management, and interchange of employees. Id.

The record evidence shows that SM and SMI have a significant amount of interrelation of operations. They hold themselves out to the public and the employees as

one entity, engage in a significant amount of exchange of employees and equipment, and deal with each other financially without the use of arm's length transactions. Thus, the Administrative Law Judge's finding of sufficient evidence to support a finding of single integrated employer should be sustained (JD 2, 10-15).

IV. The Administrative Law Judge's Credibility And Factual Findings With Regard To The Testimony Should Be Sustained

The preponderance of the relevant evidence supports the Administrative Law Judge's finding that the credible evidence establishes that the employees engaged in an unfair labor practice strike (JD 2, 16-22).¹² The Board has repeatedly held that it will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces it that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). In this case, the record clearly supports the Administrative Law Judge's findings.

A. The Administrative Law Judge's Credibility and Factual Findings Concerning The Strike Vote Should Be Sustained

The Administrative Law Judge correctly found that the credible relevant evidence supports a finding that the employees authorized an unfair labor practice strike to demand the reinstatement of Gary Stevenson (JD 16-18). Local Union President Jim Cahill ("Cahill") received several calls from employees during the spring of 2010 inquiring about the status of the outstanding unfair labor practice charges and contract negotiations

¹² Respondent incorrectly contends in its exceptions 2, 3, 4, 5, 6, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 that the preponderance of the relevant evidence does not support the Administrative Law Judge's credibility and factual findings with regard to the unfair labor practice strike.

(TR 147). In response to these calls, and as a result of the suspension of 7th Circuit mediation discussions involving Respondent's violations of the Act which had been found by the Board including Respondent's unlawful discharge of Gary Stevenson, the Union called an employee meeting with its legal representatives present to explain the status of the charges and negotiations and to discuss options (TR 147-48, 168). One option was to see if employees would support an unfair labor practice strike concerning the discharge of Gary Stevenson since it appeared unlikely that Respondent was going to comply with the Board Order to reinstate Stevenson (TR 149, 99-100, 168-69). Cahill brought to the meeting professionally printed generic unfair labor practice picket signs which he wanted the attorneys to review. Employees may have seen the signs as they entered or exited, but the signs were not explicitly displayed to the employees (TR 166-68). The Union meeting occurred on May 13 with about 13 of the 19 unit employees present (TR 97, 148, 251). Local 716 President, Jim Cahill, introduced the Union's attorneys Geoffrey Lohman and Neil Gath (TR 98, 148, 205). Lohman discussed in detail the status of the unfair labor practices and the Union's attempts to remedy them through the Board processes. Lohman explained that Respondent had appealed the Board's decision to the 7th Circuit and had recently filed its brief with that court which likely meant that any resolution of those charges through the legal system would be some time away (TR 99-100).

Lohman also responded to employee questions. Among other things, employees wanted to know what their next step should be (TR 100, 149). Lohman discussed the possibility of striking, the differences between economic and unfair labor practice strikes, and the importance of doing everything by the law to preserve their jobs (TR 100, 149-

150, 205-06). Employees questioned Lohman as to why they had to continue doing things by the book/law when Respondent was not, and employees were told that they needed to protect themselves (TR 149, 209). Cahill then explained that the Union was recommending that employees go on an unfair labor practice strike for the purpose of getting Gary Stevenson back to work (TR 170, 205, 251). Stevenson was one of three lead employee organizers during the organizing campaign and was a bargaining committee member at the time of his discharge (TR 100, 243, 571). Before taking a vote on the issue, President Cahill reiterated that they were voting on whether or not to go on an unfair labor practice strike (TR 102, 208). A strike vote was conducted by employees marking paper ballots that simply read yes or no. The vote was unanimous for going on strike (TR 102, 151-52, 208).

Lohman, Cahill, and employee witness Terry Mooney testified that the status of contract negotiations was brought up by a couple of employees as commonly occurred at any Union meeting (TR 101, 149, 207). The issue of contract negotiations was not the focus of the meeting and certainly not the focus of the strike vote. There is no evidence that any discussion of seeking an economic goal through a strike ever occurred during the meeting. All of these witnesses testified that there was significant discussion about the unfair labor practices, including the discharge of Gary Stevenson, which became the issue over which the unfair labor practice strike vote was taken (TR 99-102, 148-151, 205-208, 251). The employees were explicitly told that the strike vote was concerning going on an unfair labor practice strike concerning Respondent's failure to reinstate Gary Stevenson (TR 102, 151, 205, 251).

Two of the employee witnesses testified that they supported the strike vote to get Stevenson his job back because they hoped that the others would do the same for them if the need arose. Employee Blackston Poindexter testified that he voted for the strike, “because it wasn’t only about Gary Stevenson to me, it was unfair that they were not allowing him to come to work over something that was handed to him, that they knew they shouldn’t have, but it was also about sticking together in my opinion, if it was me in that situation, I would hope that all the drivers would have my back and there was drivers there that didn’t know Gary and—you know—they stood behind because they felt the same way—you know—if it was them, in that situation, they would hope that we had their back, too.” (TR 252-53). Similarly employee Jeff Ipock expressed his support for the unfair labor practice strike as a vote for union brotherhood by stating, “I was concerned about going on strike, but I wasn’t concerned about going on strike for Gary Stevenson. I would have hoped that if I was in his position, the guys would have done the same thing for me. I had no qualms about going on strike for that reason” (TR 739). When questioned about why the employees had waited so long to show their support for their Union brother, both Poindexter and Ipock stated that they understood that the Union was handling this through the legal system. The strike vote was the first time that the Union had requested such action by the employees to support their attempts to get Respondent to comply with the law (TR 263, 740). Terry Mooney’s statement about why he supported the strike may explain why it occurred when it did. Terry Mooney stated he voted for the strike, “because it’s been going on for five years. We won several things through the courts and Spurlino never follows through on what we won and just over the

years you just getting tired of it, you're trying to do what's the best for you and for the other people that you work for" (TR 208-09).

Cahill told the employees that he would call the strike when the timing was right (i.e. when Respondent had enough work to make the strike effective) (TR 151, 209). On May 19, having learned about the strike vote, Respondent distributed anti-strike propaganda to the employees (R.Exh. 10). Because the element of surprise was gone and work was slow due to rain and lack of contracts, the Union postponed calling the strike (TR 152).

Based upon the record, the Administrative Law Judge's findings of fact with regard to the strike vote meeting should be sustained.

B. The Administrative Law Judge's Credibility and Factual Findings Concerning Respondent's Anti-Strike Meeting Should Be Sustained

The Administrative Law Judge's finding that any lack of discussion of unfair labor practices at the anti-strike meeting was a result of Respondent's control over the meeting should be sustained. In response to "rumors" concerning a strike, Respondent held an employee meeting with the bargaining unit employees. Davidson read a pre-prepared script developed by him and Spurlino and distributed it to the employees. This script only discussed economic strikes (R Exh. 10). After reading the script Davidson allowed a question and answer period. Davidson testified that all of the employees' questions involved contract negotiations and economic issues (TR 601). Davidson testified that the meeting, held in a thirty-foot by forty-foot room with employees numbering in the high teens, became unruly with employees talking over each other (TR 616, 626). Davidson claimed that Salesman Nathan Dexter recorded all the outstanding

questions so that he could respond to them later. Davidson and Spurlino prepared a question and answer sheet to address issues he felt he did not adequately address in the meeting. One of the issues he responded to in the question and answer sheet concerned prior unfair labor practices (R Exh. 11, pg. 2; TR 615). Thus, the Administrative Law Judge's finding that the content of the meeting was dictated by Respondent's pre-prepared letter to the employees should be sustained.¹³

C. The Administrative Law Judge's Credibility and Factual Findings Concerning The Unfair Labor Practice Strike Should Be Sustained

The Administrative Law Judge's findings that the employees' actions while on strike supports the finding that the strike was an unfair labor practice strike should be upheld. In addition, the Administrative Law Judges credibility findings with regard to the testimony of Davidson and Mooney should be upheld.

On August 2 Union President Cahill was contacted by employee Matt Bales and told that Respondent was starting a big new project the next day. Cahill arranged to meet Matt Bales at the facility the next morning to call the strike. They did not inform the other employees ahead of time, because the news of the earlier strike vote had been leaked to Respondent and they wanted the element of surprise (TR 151-52). On August 3

¹³ Employee Terry Mooney also testified that employees questioned Davidson about three employees who had been discharged, including Gary Stevenson. Mooney testified that Davidson gave reasons for the discharge of two of the employees, but never stated a reason for the discharge of Gary Stevenson (TR 244-45). The Administrative Law Judge found that Mooney's memory may have been faulty about at which meeting these questions occurred but did not discredit that they actually transpired. These comments by Davidson had to have occurred after April 6, 2010, because that was the date of the accident for which Eversole was discharged (GC Exh. 15, TR 109, 118). Therefore the employees' expressed concerns about employees' discharges, including Stevenson's, relatively close in time to the decision to strike.

Cahill provided Matt Bales with a letter stating in pertinent part that the employees were going out on an unfair labor practice strike protesting the discharge of Gary Stevenson. The letter also stated that in order to not be in violation of the PLA the employees would be available to perform only that work (Jt. Exh. 5; TR 153). Employees Matt Bales, Sam Sutherland, and Terry Mooney took the letter into Respondent Supervisor George Gaskin (TR 153, 210). The employees explained that they were making themselves available only for PLA work. Terry Mooney told George Gaskin that all Respondent had to do was call them on their cell phones, and they would come from the picket line to perform the PLA work (TR 210). George Gaskin told them that Respondent had one PLA load to run that day and would call them if they needed them.¹⁴ (TR 210). At least one striker reported for work at the beginning of the shift and informed management that the strikers were present on the picket line and available to perform PLA work. No striker was called to perform any PLA work during the strike.¹⁵ (TR 66-67).

After delivering the strike letter to George Gaskin, the employees waited in the parking lot for further instruction from management before actually engaging in picketing activities. Davidson arrived after a few minutes (TR 584). Davidson went into the facility for several minutes then came back and addressed the employees in the parking lot. Davidson told employees that they would be treated as economic strikers and would be replaced if they did not report to work. Davidson also told employees that they

¹⁴ Over the last four years, bargaining unit drivers periodically performed PLA work during the regular course of their shifts as assigned. For example, a driver may deliver a load of concrete to some customer other than the PLA, then to the PLA jobsite, and then to a third customer in the same shift (TR 590-91).

¹⁵ The Union did file a grievance concerning the failure to assign strikers PLA work during the strike in order to preserve any rights they may have under the PLA (TR 104). The grievance has been held in abeyance by the parties (TR 105).

needed to report to work or leave the property. Davidson claims that employee Jeff Ipock stated that all they wanted was to get negotiations started (TR 584-588). Ipock denies that he made this statement and testified that he told Davidson that if they would just put Stevenson back to work this would all be over (TR 728-730). Davidson incredibly testified that he would not have told the employees that the strike was an economic strike, because at the time he did not know that there were two types of strikes-- economic and unfair labor practice (TR 746). Davidson testified on direct that he had co-authored and read to employees the May 19, 2010, memo to employees regarding strike information which discusses economic strikes (R Exh. 10, TR 747). Davidson also testified that Ipock stated during August 3, 2010 conversation at the start of the strike that “Spurlino Materials couldn’t replace them, or him permanently if they were on an Unfair Labor Practice strike” (TR 587-88). Davidson clearly knew the difference between these two types of strikes and the consequences of them at the time the conversation took place, which was apparent by Davidson’s facial expression, including becoming extremely reddened in the face and scalp, when the inconsistencies of his statements were pointed out to him (TR 746). Davidson should therefore not be found to be a credible witness. On the other hand, Jeff Ipock credibly testified that he had been aware of the different types of strikes prior to the events underlying this case and that he had not stated that the strike was to get negotiations started and get a contract (TR 730, 735-36, 739). Knowing the difference between the two types of strikes, it makes no sense that Ipock would have defended his rights in an unfair labor practice strike and then turned around and stated that it had nothing to do with the unfair labor practice.

The employees picketed outside the facility and at jobsites, other than the PLA jobsite, when Respondent was present using printed and two hand-written picket signs all of which stated as follows: “Teamsters—Employees of Spurlino Materials of Indianapolis, LLP on Unfair Labor Practice Strike for the Illegal Termination of Gary Stevenson—Local 716.” (GC Exh. 4, TR 153-54, 213).¹⁶ These picket signs had been prepared after the strike vote and in anticipation of the strike (TR 165-67). The strike apparently caused Respondent to relinquish its new big job to another contractor. A few days after the strike commenced, the strikers noticed that Respondent’s business had slowed substantially (TR 159). During the strike Respondent made no attempts to settle the outstanding unfair labor practices (TR 159).

The Union made an unconditional offer for the employees to return to work on August 12, but Respondent refused to return the employees to work. Employee Terry Mooney readily admitted that in response to not being returned to work, he had written a letter to the International Brotherhood of Teamsters (R Exh. 14). Throughout this letter Mooney discusses the ongoing battle with Respondent over unfair labor practices and negotiations. Mooney specifically states in the letter that they “went on strike for unfair labor practices for the firing of Gary Stevenson and other issues that we won with the National Labor Board” (R Exh. 14, pg.2). Apparently the International Brotherhood of Teamsters had also received an e-mail from Mooney’s wife’s e-mail account which Mooney denied having any knowledge about (R Exh. 15, 217). Through fairly rigorous

¹⁶ Davidson denied being able to read the picket signs which he testified were about 2 feet by 2 ½ feet. The wording on the signs was in large block letters and the words “UNFAIR LABOR PRACTICE STRIKE” in bold letters that spanned the full width of the sign (GC Exh. 4). Therefore, any implication that the Union was attempting to conceal the purpose of the strike should not be found to have merit.

cross-examination Mooney candidly testified that he has never sent an e-mail and was unaware that his wife had sent such an e-mail but that she could have (TR 218). The e-mail was a shortened version of what Mooney stated in his letter. There is simply no reason for Mooney to be dishonest about sending the e-mail or having knowledge of the e-mail, after readily admitting he had sent the letter containing the same statements. Hence, the Administrative Law Judge's finding that Mooney's credibility was not damaged by his testimony concerning the e-mail should be sustained (JD 22-23).

Based upon the record, the Administrative Law Judge's findings of fact and credibility findings should be sustained, because the preponderance of the evidence supports the Administrative Law Judge's credibility and factual findings (JD 2, 16-23).

V. The Administrative Law Judge Correctly Found That Respondent Violated Section 8(a)(1) And (3) Of The Act By Refusing To Reinstat The Protected Unfair Labor Practice Strikers

The Administrative Law Judge's finding that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the unfair labor practice strikers should be sustained (JD 2, 15-25). The Administrative Law Judge correctly found that the credible evidence establishes that the employees engaged in an unfair labor practice strike, that the employees' conduct constituted a protected strike not an illegal partial strike, and that Respondent's refusal to reinstate the strikers after their unconditional offer to return to work violated Section 8(a)(1) and (3) of the Act. (JD 12, 29-37).

A. The Administrative Law Judge Correctly Concluded That The Employees Had Engaged In An Unfair Labor Practice Strike

As the Administrative Law Judge correctly found, the strike was motivated at least in part by Respondent's unfair labor practices (JD 16-19).¹⁷ The evidence shows that it was the suspension of settlement efforts by Respondent involving Gary Stevenson's discharge that motivated the Union's decision to hold a strike vote. Thus, the Union held the strike vote only after Respondent's suspension of such settlement efforts through the 7th Circuit mediation services (TR 92, 97-99, 146, 148-49, 205). Stevenson's discharge was also discussed at the strike vote meeting, there were unfair labor practice picket signs at the meeting, and at least two employees viewed the vote as an expression of employee support for discharged Union leader Stevenson and for each other in the face of Respondent's unfair labor practices (TR 97-100, 130, 149-150, 165-168, 252-53, 739). Local Union President Jim Cahill repeatedly emphasized that the purpose of the strike vote was to determine if the employees wanted to engage in an unfair labor practice strike over the unlawful discharge of Gary Stevenson with the goal of getting Respondent to reinstate Stevenson (TR 173, 174, 205, 251). As such, there is a strong causal connection between the Respondent's unlawful discharge of Stevenson and the August 3 strike.¹⁸

The Administrative Law Judge correctly found that the mere length of time between Stevenson's discharge in 2007 and the August 3 strike did not prevent the

¹⁷ Respondent incorrectly contends in its Exceptions numbered 2, 3, 4, 5, 6, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 25 that the strike was not an unfair labor practice strike.

¹⁸ See NLRB v. Midwestern Personnel Service, Inc., 322 F.3d 969, 979 (7th Cir. 2003) (causal connection between employer's unfair labor practices and strike established in part by employees' discussion of employer's unlawful conduct at strike vote meeting).

employees from engaging in an unfair labor practice strike.¹⁹ As the facts reveal, the Union’s decision to strike on May 13 came shortly after the Respondent established that it had no intention of reinstating Stevenson absent an order by the Seventh Circuit, rather than after the parties’ last bargaining session in August 2009 (TR 92, 97-101, 146, 148-49). Indeed, the Respondent’s unlawful discharge of Stevenson remains unremedied and continues to be an important issue to the employees.²⁰

The Administrative Law Judge correctly found that alleged “economic” statements by strikers on the picket line do not prevent a finding that the strike was an unfair labor practice strike. It is well-established, including in the Seventh Circuit, that an “unfair labor practices strike does not lose its character as such if economic motives contribute to its cause, however; it remains an unfair labor practices strike so long as the

¹⁹ See Northern Wire Corp. v. NLRB, 887 F.2d 1313, 1321 (7th Cir. 1989)(finding the employer’s unlawful conduct was viewed “rather seriously by the employees as ‘on-going incidents’” which caused, at least in part, the decision to strike and distinguishing NLRB v. Colonial Haven Nursing Home, 542 F.2d 691 (7th Cir. 1976)(where several of the unfair labor practices occurred after the vote to strike and the ones that occurred before the vote were minor 8(a)(1) statements neither of which were found to contribute to the cause of the strike.)

²⁰ See NLRB v. Midwestern Personnel Service, Inc., 322 F.3d at 979 (employer’s unfair labor practices not “dead issues” by the time of the unfair labor practice strike seven months later); Lapham-Hickey Steel Corp. v. NLRB, 904 F.2d 1180, 1187 (7th Cir. 1990) (employer’s unfair labor practices continued to be viewed “rather seriously” by employees 7.5 months after employer’s unlawful conduct when strike commenced), citing Burns Motor Freight, 250 NLRB 276, 277-78 (1980) (ALJ concluded, affirmed by the Board, that strike was unfair labor practice strike—even where union waited for more favorable weather conditions to strike— where unfair labor practices remained unremedied and were of a continuing nature likely to “provoke greater resentment the longer endured”).

employees are motivated in part by unfair labor practices.”²¹ Respondent claim that some strikers may have referenced an economic motive on the picket line is irrelevant, given the evidence that the strike was motivated in large part by the Respondent’s unlawful conduct and failure to reinstate Stevenson.²²

Respondent also contends that Terry Mooney’s letter to the International Brotherhood of Teamsters evidences an economic purpose for the strike. Although there are references to on-going contract issues and Mooney’s desires to see negotiations start again, there are repeated references to unfair labor practices and the fact that they employees had made the decision to go on an unfair labor practice strike. Again, the bulk of the evidence shows that the employees were motivated in large part by Respondent’s unlawful conduct. Thus, the Administrative Law Judge correctly found that Mooney’s letter supports a finding that the strike was motivated at least in part by an unfair labor practice (JD 22-23).

Respondent specifically contends that employee Matt Bales, former employee Ron Eversole, and Gary Stevenson should have been called to testify by General Counsel. Gary Stevenson and Ron Eversole had been discharged prior to the strike vote

²¹ NLRB v. Midwestern Personnel Service, Inc., 322 F.3d at 977 (citing cases). See also Lapham-Hickey Steel Corp. v. NLRB, 904 F.2d at 1187 (“[i]f substantial evidence on the record as a whole supports the inference that the unfair labor practices committed by [the employer] were contributing causes of the strike, we must uphold the Board’s finding and order”) (citation omitted); R & H Coal Co., Inc., 309 NLRB 28, 28 (1992), enf. mem. 16 F.3d 410 (4th Cir. 1994) (“we find that a contributing cause of the strike against the Respondent was its commission of unfair labor practices”).

²² See e.g. Stella Doro Biscuit Company, Inc., 355 NLRB No 158, slip op. 47 (Aug. 27, 2010) (“The “correct test” is whether the strike is “caused in whole or in part” by an unfair labor practice; whether the strike “was at least in part the direct result of the employer’s unfair labor practices”; and whether the employer’s unlawful conduct “played a part in the decision to strike”)(quoting In Re Boydston Electric, Inc., 331 NLRB 1450, 1452 (2000).

meeting and did not participate in the actual vote to strike. Therefore, they were not employees who actually contributed to the decision to go on strike or participated in the strike.²³ Although Matt Bales did participate in the strike vote and the strike, so did eight other employees. In finding that a strike constitutes an unfair labor practice strike, the Board has not held that all employees involved in a strike must testify about their motivation for the strike. If Respondent believed that the testimony of Bales, Eversole, Stephenson, or any of its other employees was critical to the determination of this case, it was equally in a position to call them as witnesses as General Counsel.

Respondent contends that the facts in this case mirror those in Pirelli Cable, 141 F.3d 503 (4th Cir. 1998) in which the Circuit Court overruled the Board's finding that the employees engaged in an unfair labor practice strike. The facts in the instant case are clearly distinguishable. In Pirelli the parties were engaged in heated contract negotiations. In the instant case contract negotiations had been at a stand still for a year. In Pirelli the unfair labor practice over which the employees were striking were relatively minor Section 8(a)(1) coercive statements about employees' right to strike. In this case, Respondent has a long history of significant unfair labor practices including the discharge of an active employee Union representative in a small unit of employees. Id. Clearly, the case at hand is distinguishable from Pirelli.

Thus, the Administrative Law Judge was correct in finding that the employee's August 3 strike was an unfair labor practice strike to protest the Respondent's discharge

²³ Although Gary Stevenson did participate in the picketing of Respondent during the strike, it is disingenuous for Respondent to consider Stevenson a striker whose subjective reasons for going on strike would be relevant in these matters when it has never reinstated him.

of Stevenson in 2007 (JD 2, 16, 23).²⁴ As such, the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) of the Act on August 11 when it refused to immediately reinstate the strikers to their former, or substantially equivalent positions should be upheld (JD 2, 25).²⁵

B. The Administrative Law Judge Correctly Found That The Strike Was a Lawful Strike

The Administrative Law Judge correctly found that the employees' strike conduct did not constitute an illegal partial strike (JD 2, 23-25).²⁶ Respondent contends that the strike was an unlawful partial strike because the employees made themselves available to perform the PLA work and filed a grievance claiming the PLA work at the same time that they were striking their non-PLA work. The no-strike clause in the PLA is not a waiver of the employees' right to strike non-PLA work (Jt. Exh. 2). In these circumstances, the Union's offer to perform PLA work and its grievance when Respondent failed to assign

²⁴ See, e.g., R & H Coal Co., Inc., 309 NLRB at 28 (strike 13 months after employer's unlawful conduct was unfair labor practice strike where employer's unlawful conduct remained unremedied, strike notice referenced unfair labor practices, and picket signs referred to employer's unfair labor practices).

²⁵ The Board has held that unfair labor practice strikers are entitled to reinstatement within 5 days of their unconditional offer to return to work. Drug Package Co., 228 NLRB 108, 113-114 (1977).

²⁶ Respondent incorrectly contends in its Exceptions numbered 22, 23, 24, and 25 that the strikers' participated in an illegal partial strike.

such work to unit employees fails to establish that the Union engaged in an unlawful partial strike.²⁷

The partial strike doctrine prohibits striking employees from setting their own terms and conditions of employment by unilaterally deciding to strike some work while performing other work.²⁸ Here, however, the Union's position with respect to the PLA work was not unilateral but, rather, was an effort to abide by and enforce the bilateral PLA. In that agreement the Respondent agreed to assign, and bargaining unit employees agreed to perform, work covered under the agreement. The PLA also contains promises by Respondent to refrain from locking employees out and by the Union to not strike that work. The Union, consistent with its obligation, told the Respondent from the outset that

²⁷ Davidson testified that it would have caused Respondent economic hardship to allow the strikers to perform the PLA work because another employee would have to be paid to sit and wait for the striker to take the load and return (TR 593). This claim is erroneous based upon the facts. Davidson admitted that there were PLA loads the first day of the strike and that the Indianapolis facility had thirty mixer trucks (TR 567, 620-21). With the five SMI employees that reported to work on the first day of the strike and the approximately ten SM employees that performed SMI work that day, there were less than thirty employees operating mixer trucks (TR 62, 583). Davidson also testified that he had scheduled all of SMI's seventeen mixer drivers and six to eight drivers from SM to haul the large number of loads needed for the Noblesville project to be performed during the strike (TR 62, 581-82). Respondent was not only in a position to use one of the strikers to perform the PLA work in the unmanned mixer trucks, it would have been economically beneficial to Respondent to have done so. Therefore, at least on the first day of the strike and possibly additional days until Respondent lost the Noblesville job, it would have economically benefitted by using the strikers to perform the PLA work. Thus, Respondent's decision to not use strikers to perform any PLA work during the strike must have been motivated by concerns other than economics (TR 621-22).

²⁸ Compare, e.g., Highlands Medical Center, 278 NLRB 1097, 1097 (1986), quoting Valley City Furniture Company, 110 NLRB 1589, 1594-95 (1954), enfd. per curiam 230 F.2d 947 (6th Cir. 1956) (refusal to work overtime found unprotected) (permitting employees to refuse to work on the terms prescribed by their employer while remaining in their jobs would "allow employees 'to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment.'"). See also Audubon Health Care Center, 268 NLRB 135, 136-37 (1983) (nurses' refusal to cover sections left unstaffed by an absent colleague constituted an unprotected partial strike).

it was not striking PLA work. Respondent violated its obligation under the PLA and effectively locked the unit employees out by refusing to assign them PLA deliveries during the strike.²⁹ The Union's PLA grievance was merely an attempt to confirm its compliance with the PLA and hold Respondent to its respective no-lockout promise.³⁰ Thus, unlike in a partial strike situation, the employees here were not trying to unilaterally determine their own conditions of employment. Rather, they were attempting to protect and abide by their existing terms and conditions of employment consistent with the PLA.

In asserting that the strikers' actions constituted an unlawful partial strike, Respondent relies upon cases where the striking employees actually performed some work while refusing to perform other work in an attempt to control their terms and conditions of employment. See Audubon Health Care, 268 NLRB 135 (1983); NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946). In this case, the strikers never performed any work nor were they compensated for any work. The Administrative Law Judge correctly noted that the Board has not found a partial strike when employees have received no compensation and performed no work even if the employees offered to do so. See NLRB v. Deaton Truck Line, 389 F.2d 163, 168–169 (5th Cir. 1968) (rejecting company's partial-strike argument where the owner-drivers' pay was predicated on the loads they carried, they collected no pay for the relevant period, and they therefore made "only an uncompensated offer . . . to work on other terms"). See also Virginia Stage Lines v. NLRB., 441 F.2d 499, 503 fn. 5 (4th Cir. 1971), cert. denied 92 S.Ct. 105 (1971)

²⁹ As discussed above, the facts do not support a claim that assignment of PLA work would have been a financial or logistical burden on Respondent.

(finding company's partial-strike analogy "particularly vulnerable" where the drivers were called to work only when their names reached the top of the list, and voluntarily relinquished that position, performed no work, and dropped to the bottom of the list without pay when they were assigned to the struck charters) (ALJ Dec. 24). As discussed above, the employees were not controlling their terms and conditions of employment, they were complying with the agreed upon terms of the PLA agreement.

Finally, the U.S. Supreme Court and the Board have repeatedly held that the waiver of employees' right to strike will not be lightly inferred. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) and cases cited therein. Accordingly, no waiver of the employees' right to strike the non-PLA work should be found in this case. It is not equitable to determine that the Union had waived all of the employees' right to strike by entering the PLA agreement, when that agreement by its terms is limited to the PLA work. Furthermore, the employees received nothing in exchange for any waiver of the right to strike the non-PLA work which forms a large percentage of the employees' actual work. For example, the employees have not reaped the benefit of a no-lockout clause, wage increase, or a grievance procedure with regard to non-PLA work in exchange for their waiver of the right to strike that work.

Based upon the foregoing, the Administrative Law Judge's finding that the employees' strike conduct did not constitute an unlawful partial strike, and therefore, the strike was a lawful strike should be sustained.

³⁰ Furthermore, the Union has taken no further action on its grievance since an initial meeting on August 19 (TR 106).

C. The Administrative Law Judge Correctly Found that Respondent's Refusal To Reinstatement The Unfair Labor Practice Strikers Upon Their Unconditional Offer To Return To Work Was A Violation Of Section 8(a)(1) And (3) Of The Act

The Administrative Law Judge correctly found that the Union made an unconditional offer to return to work on the behalf of the striking employees and that Respondent unlawfully refused to reinstate them (JD 2, 16, 25).³¹ On August 11 Cahill hand delivered to Davidson a written unconditional offer for the employees to return to work on August 12 (Jt. Exh. 6, TR 158). On August 11 Respondent replied by a faxed letter from its attorney Jim Hanson, which Cahill received on August 12, stating that Spurlino considered the strike an unlawful partial strike and if not an unlawful partial strike, an economic strike. The August 11 letter informed the Union that the strikers had been replaced and were being placed on a preferential recall list (Jt. Exh. 7, TR 158).

As a result of the strike, the majority of the bargaining unit drivers were replaced.³² Between August 4 and 11, Respondent admittedly hired 16 employees whom Respondent contends were offered full-time permanent employment and started work orientation and training on their hire dates (TR 66). As a result, 12 of the 19 bargaining unit employees are being treated as replaced economic strikers and have not been allowed to return to work, but have been "... placed on a preferential hiring list and will be

³¹ Respondent incorrectly contends in its Exceptions numbers 25, 26, and 27 that the Administrative Law Judge erred in ordering Respondent to remedy its unfair labor practice of failing to reinstate the unfair labor practice strikers.

³² Two new probationary concrete truck drivers, as well as the two batch men, did not go out on strike (TR 211). A couple days into the strike another driver Robert Rummel crossed the picket line (TR 72). Concrete truck driver Wayne Thomerson, was on medical leave during the strike, and was returned to work after he was released by his doctor (TR 73). A seventh employee was on vacation during the entire strike and was allowed to return to work at the end of his vacation. (TR 583). At the time of the hearing in the instant case, Respondent's other 12 drivers listed in the complaint had not been returned to work (TR 72-73).

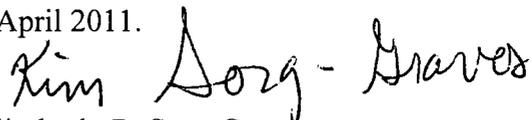
offered reinstatement on the basis of their seniority whenever a vacancy occurs.” (Jt. Exh. 7).

Respondent admits that it refused to reinstate the strikers in response to their unconditional offer to return to work. Respondent also admits that this refusal was not due to lack of work. Because the employees engaged in a lawful unfair labor practice strike, Respondent’s refusal to reinstate the strikers upon their unconditional offer to return to work constitutes a violation of Section 8(a)(1) and (3) of the Act. See Stella Doro Biscuit Company, Inc., 355 NLRB Nol 158, slip op. 49 (Aug. 27, 2010); In Re Boydston Electric, Inc., 331 NLRB 1450, 1453 (2000). Therefore, the Administrative Law Judge’s finding that Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate the strikers after their unconditional offer to return to work should be sustained.

VI. CONCLUSION

For the foregoing reasons and based on the record as a whole, General Counsel respectfully requests that Respondent’s Exceptions 1 through 27 be denied in their entirety.

Signed at Indianapolis this 26th day of April 2011.



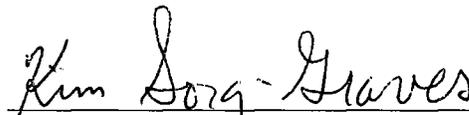
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE was filed with the Division of Judges electronically and was electronically served upon the following parties on this 26TH day of April 2011:

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