UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPURLINO MATERIALS, LLC, SPURLINO MATERIALS
OF INDIANAPOLIS, LLC, or in the alternative,
SPURLINO MATERIALS, LLC, AND
SPURLINO MATERIALS OF INDIANAPOLIS, LLC,
as a single, integrated enterprise,

Respondents,

and Case No. 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,

Charging Party.

RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS

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Respondent, Spurlino Materials, LLC ("SM"), or Spurlino Materials of Indianapolis, LLC ("SMI"), or in the alternative SM and SMI as a single, integrated enterprise, by counsel and pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board (the "Board"), respectfully submits this reply to Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge ("GC's Answering Brief") and to the Charging Party's Response in Opposition to Exceptions of Respondent ("Local 716's Brief").

I.

ARGUMENT

A.

The Bargaining Unit Drivers Engaged In An Illegal Partial Strike

In its Exceptions Brief, SMI demonstrated the bargaining unit drivers engaged in an illegal partial strike when they refused to perform concrete deliveries not associated with the Convention Center Project, but remained willing to perform deliveries for the Convention Center Project itself. The General Counsel and Local 716 submit multiple arguments that the ALJ's finding to the contrary should be upheld. Each of these arguments is without merit.

The General Counsel and Local 716 chiefly argue that the bargaining unit employees engaged in a lawful strike because the employees did not actually perform Convention Center Project work. However, the drivers were engaged in an unprotected partial strike the moment they informed SMI they were on strike for non-Convention Center Project work but were not on strike for Convention Center Project work. *Tr*. at 233-34, 253, 260; *Joint Ex. 5*. Indeed, Local 716 filed a grievance for the striking drivers seeking to be paid as if they had performed the

Convention Center Project work. *GC Ex. 5*.[1] Therefore, at that moment, they were subject to discharge and permanent replacement. *Audubon Health Care Ctr.*, 268 NLRB 135 (1983).

The fact the drivers did not actually perform work is irrelevant, particularly given that the drivers demanded to be allowed to perform Convention Center Project work. The ALJ's reliance on *Virginia Stage Lines v. NLRB*, 441 F.2d 499 (4th Cir. 1971), and *NLRB v. Deaton Truck Line*, 389 F.2d 163 (5th Cir. 1968), ignores the fact that SMI had a right to protect its operations against the immediate threat of a partial strike. *See Exceptions Br.* at 17-18. Because it is clear an employer may discharge any employee who engages in a partial strike, the employer should be permitted to enforce that right as soon as the employee notifies the employer that the employee is engaging in a strike of some but not all work.

Instead of acknowledging the reason partial strikes are unprotected under the Act, the arguments of General Counsel and Local 716 sidestep settled law on a technicality, consequences notwithstanding. Bringing their technicality to fruition, however, punishes employers for proactively protecting the workplace. What is more, if the position of General Counsel and Local 716 becomes law, employers would be encouraged to trap employees by offering work and then discharging those employees for accepting and starting to perform the work. Such a result could not have been intended by Congress, the Courts, or the Board.

General Counsel and Local 716 nevertheless argue that the partial strike in the present case should be allowed because it did not stand to have actual adverse consequences to SMI. To the contrary, the record demonstrates that due to the dispatch procedures and sporadic nature of

[1] Local 716's argument that the filing of the grievance has no bearing on whether the strike was a partial or complete strike is simply incorrect. In filing the grievance, Local 716 explicitly asserted that SMI was required to dispatch the strikers on Convention Center Project deliveries, and it seeks payment to the drivers as if they did in fact perform the work. In other words, Local 716 explicitly stated its position that SMI was required to permit the bargaining unit drivers to engage in a partial strike. It cannot now argue the grievance has no bearing on the strikers' attempts to engage in an illegal partial strike.

Convention Center Project runs, SMI would have suffered greatly by permitting the drivers to perform some but not all of their regular work. *Tr*. at 591-93, 628, 681-82. Nevertheless, SMI need not demonstrate actual harm to its operations in order to permanently replace partial strikers. In *Care Center of Kansas City d/b/a Swope Ridge Geriatric Center*, 350 NLRB No. 9, 66 (2007), a decision upon which Local 716 specifically relies in its brief, *see Local 716's Br.* at 10, the ALJ's decision (which was adopted by the Board) found the union engaged in a partial strike even though "[t]he record also show[ed] that the Respondent was well prepared for the strikes and that there was no disruption" in the Respondent's operations.

The remaining cases upon which Local 716 relies are inapposite. In *Coastal Insulation Corp.*, 354 NLRB No. 70, at *37 (2009), the Board concluded that a meeting by insulation installers before their regularly scheduled work was not a partial strike because, unlike in this case, the installers had no intention of striking to demand changes in terms and conditions of employment; they were simply meeting. Similarly, in *Luce & Sons, Inc.*, 32-CA-21415 (Div. Judges, Jan. 28, 2005), the employees had no intention of performing only part of their duties, where here, the strikers intended, in fact demanded, to perform some but not all of their duties.

Importantly, the Convention Center Project work was not voluntary. This case is therefore different than *St. Barnabas Hosp.*, 334 NLRB 1000, 1000 (2001), and *KNTV, Inc.*, 319 NLRB 447, 451-52 (1995), where the Board concluded the employees did not engage in a partial strike because the work at issue in those cases was completely voluntary. Finally, although the employees performed some of their work in *Care Ctr. of Kansas City d/b/a/ Swope Ridge Geriatric Ctr.*, 350 NLRB 64, 68 (2007), *Chep* USA, 345 NLRB 808, 808 (2005), *Centr. Illinois Public Serv.*, 326 NLRB 928 (1998), and *Highlands Medical Ctr.*, 278 NLRB 1097, 1097 (1986), none of those decisions identified that as a prerequisite. Indeed, in *Care Ctr. of Kansas*

City, 350 NLRB at 66, the Board explicitly noted that, just like in the present case, there was no actual effect on the employer's operations.

Finally, the General Counsel and Local 716 argue that the policy against the waiver of the right to strike supports the ALJ's Decision. Simply put, the contractual waiver of the right to strike is not at issue in this case. Unlike in *Mastro Plastics Corp v. NLRB*, SMI is not attempting to enforce the terms of a no-strike clause. 350 U.S. 270, 284 (1956) (holding employer could not enforce a no-strike clause on the employees' unfair labor practice strike). In other words, SMI does not assert that the bargaining unit employees were prohibited from engaging in any strike during the contractual period. *Cf. id.*

To the contrary, SMI merely objects to the fact Local 716 and the employees struck some work assignments and not others, thereby demanding that SMI alter the way it dispatches loads. Importantly, neither the General Counsel nor Local 716 have cited a single case where the union was permitted to engage in a strike of some but not all work due to a no-strike clause in a separate site-specific agreement. Local 716 was required to either engage in a complete strike or not strike at all. It could not, however, engage in a partial strike, regardless of the reason it believed it was entitled to perform only certain work. *Audubon*, 268 NLRB at 135, 137. The Board should therefore find merit to Respondent's exceptions and hold that the drivers' strike was an unprotected, illegal partial strike.

B.

The ALJ Erred By Finding The Bargaining Unit Drivers
Engaged In An Unfair Labor Practice Strike

In its Exceptions Brief, SMI demonstrated the ALJ's Decision erred by failing to find that the true motive of the August 2010 strike was to force SMI to negotiate a collective bargaining agreement. Specifically, SMI demonstrated that, much like the union leadership in *Pirelli Cable*

Corp. v. NLRB, 141 F.3d 503, 519 (4th Cir. 1998), Cahill orchestrated a scheme pursuant to which the employees would strike SMI, thereby forcing SMI into contract negotiations, but protecting the members' reinstatement rights by labeling the strike a ULP strike.

The General Counsel's attempt to distinguish *Pirelli* should be rejected. First, the General Counsel argues that this case is different than *Pirelli* because "contract negotiations had been at a stand still for a year." *GC's Ans. Br.* at 38. Regardless of the time between formal contract negotiations, the evidence unmistakably shows that, when the strike vote occurred, the drivers were concerned about Local 716's inability to finalize a labor agreement with SMI. During the strike vote meeting, the drivers expressed their frustration for not having a contract after years of negotiating, and how they had not received a wage increase. *Tr*. at 187, 206-07, 231-32, 251, 264-65. Moreover, as far as the drivers knew, SMI backed out on a contract in 2009, would not return Cahill's telephone calls, and failed to deliver a written proposal in the Spring of 2010. *Tr*. at 185, 237, 239, 245-46, 266-70, 601, 602-04. What is more, multiple drivers stated their economic motive the day of the strike or afterward. *Tr*. at 261, 586-88. As in *Pirelli*, the economic nature of the parties' dispute was front and center when union officials orchestrated their scheme to engage in an economic strike under the veil of a ULP strike.

Second, the General Counsel claims *Pirelli* is distinguishable due to the severity of the alleged ULP in this case (Stevenson's suspension and discharge) as opposed to what the General Counsel describes as "relatively minor Section 8(a)(1) coercive statements about employees right to strike." *GC's Ans. Br.* at 38. However, this difference is immaterial given the substantial time gap between Stevenson's suspension (August 2006) and discharge (February 2007) and the strike (August 2010). Pursuant to well-settled law, this gap in time provides clear and convincing evidence that no causal connection existed between the strike and any alleged ULPs. *See, e.g.*,

Paramount Liquor Co., 307 NLRB 676, 682, 687, n. 19 (1992).[2]

The cases cited by the General Counsel for the proposition that the strike was something other than an economic strike do not support the ALJ's decision. In *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1321 (7th Cir. 1989), the court, in analyzing whether the strike was an unfair labor strike, in fact noted that "all the incidents actually occurred shortly before the strike." Similarly, the court's decision in *NLRB v. Midwestern Personnel Service, Inc.*, 322 F.3d 969, 979 (7th Cir. 2003), focused on the short time period between the strike vote and the strike itself, not the substantial three to four-year period between the strike and purported non-economic reason for the strike at issue here. Finally, unlike here, where it is undisputed SMI has bargained in good faith, the alleged ULP at issue in *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1187 (7th Cir. 1990), and *Burns Motor Freight*, 250 NLRB 276, 277-78 (1980), was the employer's failure to bargain in good faith, making it difficult to distinguish between the employees' economic and non-economic motives for striking.

The General Counsel and Local 716 are therefore left with only the self-serving statements of Local 716 and the incredible testimony of Mooney, Poindexter, and Ipock. As to Local 716's statements, including the comments of Cahill and Local 716's attorney during the strike-vote meeting and the August 3 letter, the ALJ erred when it credited these self-serving statements as evidence of the bargaining unit members strike motive. *Pirelli*, 141 F.3d at 518.

The controversial nature of Cahill's motives in calling the strike vote meeting make the General Counsel's failure to call Matt Bales as a witness all the more troubling. Bales was the union leader among the drivers who played an extensive role in the organization of the strike and

[2] Consequently, *Dorsey Trailers*, 327 NLRB 835, 856 (1999), is distinguishable because the employer committed several ULPs just before the strike vote meeting and the strike itself.

in providing information to the individual strikers. Therefore, Local 716's argument that Bales "could have offered no more as a witness than Mooney, Poindexter, and Ipock" is simply not correct. Moreover, cases in which the ALJ or Board have drawn an adverse inference contain no requirement for the *respondent* to call the General Counsel's most pertinent witness to the stand. *Austal USA* , 356 NLRB No. 65, at *57 (Dec. 30, 2010); *In re Roberts*, 333 NLRB 987, 1000 (2001). Therefore, the ALJ erred in failing to draw an inference that Bales would have testified unfavorably to Local 716.

The General Counsel cites *Midwestern Pers. Serv. Inc.*, 322 F.3d at 979, for the proposition that there is a causal connection between the drivers' decision to strike and Stevenson's discharge because actual bargaining unit employees spoke up during the strike vote meeting. However, the court specifically noted in *Midwest Pers. Serv.* that the respondent did not dispute that bargaining unit employees complained about ULPs during the strike vote meeting. *Id.* Here, SMI vehemently opposes Local 716's position that the strikers were motivated by Stevenson's discharge during the strike vote meeting. Rather, as was the case in *Pirelli*, the employees merely followed Local 716's lead after being upset over the progress of contract negotiations. Moreover, although Local 716 cites *Exec. Mgmt Serv., Inc.*, 355 NLRB No. 33 (2010), for the proposition that "substantial weight *should* be given to the strikers' characterization of their motives," *GC's Ans. Br.* at 15 (emphasis added), the Board actually stated: "[w]hile substantial weight *may* be given to the strikers' characterization of their motives, the Board must be wary of self-serving rhetoric which is inconsistent with the factual context of the strike." *Exec. Mgmt. Serv.*, 355 NLRB at *16. Indeed, "the factual context of the strike and the ULPs must be examined regardless of the strikers' testimony." *Id.*

As to Poindexter, Mooney, and Ipock, the ALJ failed to recognize that nothing regarding

the origin of the strike came from these or any other drivers. As such, the ALJ's Decision ignores the fact that the drivers were simply following Local 716's lead. Indeed, the General Counsel admits that, even though the strikers had knowledge of Stevenson's suspension and discharge, the strikers did not strike sooner because "the strike vote was the first time that the Union had requested such action by the employees." *GC's Ans. Br.* at 28. This statement supports the fact that it was Local 716 who made all of the decisions, and the bargaining unit employees simply did whatever was asked of them. As *Pirelli* makes clear, it makes perfect sense for an employee disgruntled with the status of contract negotiations to vote for a ULP strike after being thoroughly educated by savvy union officers about the protections that accompany a ULP strike as opposed to an economic strike. *Pirelli*, 141 F.3d at 519.

Finally, the General Counsel claims the record evidence demonstrates the employees "expressed concerns" about Stevenson's discharge "relatively close in time to the decision to strike" because Mooney testified that the employees questioned Davidson about Ron Eversole during the May 19 meeting with Davidson, and the accident giving rise to Eversole's discharge occurred April 6, 2010. *GC's Ans. Br.* at 30 n.13. This argument should be summarily rejected, because the General Counsel inappropriately attempts to challenge the ALJ's explicit finding that Stevenson's discharge was not discussed at the May 19 meeting without filing a formal exception to the finding. *NLRB's Rules & Regs.*, § 102.46(b)(2) ("Any exception to a . . . finding . . . which is not specifically urged shall be deemed to have been waived."); *see Decision* at 6 n.11.[3]

In the end, the drivers' strike should be seen for what it was – an attempt to get SMI back

[3] Moreover, Mooney's testimony should not be credited due to his "faulty memory." *Decision* at 23 n.40. Significantly, the General Counsel did not produce a single witness to testify that he or she actually made these comments either during the strike vote meeting or the May 19 meeting with Davidson.

to the bargaining table, wrapped in a shield designed to protect the drivers' jobs. To the extent the ALJ's Decision on this point is allowed to stand, virtually every strike that is called will be labeled by the union and determined by the Board to be an unfair labor practice strike, so long as an unremedied unfair labor practice charge lurks somewhere in the past. This use of unfair labor practices as a shield has never been sanctioned by the Board.

C.

<u>The Single-Employer Analysis Does Not Apply</u>

As demonstrated in SMI's Exceptions Brief, the ALJ's application of the single-employer analysis to SM and SMI amounts to "reverse alter ego doctrine," which was expressly rejected by the court in *S. California Painters & Allied Trade Dist. Council No. 36 v. Rodin & Co. Inc.*, 558 F.3d 1028, 1033 (9th Cir. 2009). Importantly, the General Counsel and Local 716 fail to acknowledge this authority. As in *Rodin & Co.*, here SM, a non-union company, existed before SMI was subsequently created. *Id.* Simply put, the alter ego doctrine "does not apply in 'reverse' where a non-union employer creates a union company because the non-union employer has no collective bargaining obligations to avoid." *Id*. The ALJ erred by finding SM and SMI were a single, integrated entity. *Id.*

Even if the single-employer analysis did apply to SM and SMI, the ALJ erred in the application of those factors. The General Counsel claims the case at hand is similar to *Lebanite Corp. and/or R.E. Serv. Co.*, 346 NLRB 748(2008). There, the owner of the companies was closely involved with the day-to-day operations of each entity. Here, Spurlino was not involved in the day-to-day control of either company. *Tr*. at 643-45. *Cf. Essex Valley Visiting Nurses Assoc. & New Cmty. Corp. & New Cmty. Health Care, Inc.*, 352 NLRB 427, 441 (2008) (also cited by the General Counsel) (finding single, integrated employer where "there was significant

overlap in the directors and managerial personnel of all three named entities."). Moreover, unlike in *Masland Industries, Inc.*, 311 NLRB 184, 186 (1993), here there are no common managers or supervisors of daily business operations between the two entities, and the managers who work for SMI do not also work for SM. *Tr*. at 645-46. Finally, *Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), upon which the General Counsel relies in support of its argument that SM and SMI's dealings were not at arms length, is incompatible with the facts of this case. There, one business "sold" equipment to the other business that had no market value for the benefit of the business's accounting books. Here, SMI demonstrated the ALJ's suggestion that SM and SMI's dealings with each other are not at arms-length is without merit. *See Exceptions Br*. at 45.

The ALJ erred by finding SM and SMI were a single employer for purposes of the Act.

II.

CONCLUSION

For the reasons discussed above and in SMI's Exceptions Brief, the Amended Complaint should be dismissed because the strikers engaged in an illegal partial strike and are not entitled to reinstatement or, at best, engaged in an economic strike, which would only entitle them to be placed on a preferential hiring list. Moreover, SM and SMI are not single employers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on May 10, 2011 and served the same day by first-class, U.S. mail, upon the following:

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