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.

EXCEPTIONS BRIEF OF RESPONDENT

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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 of the Rules and Regulations of the National Labor Relations Board (the "Board"), respectfully submits this Exceptions Brief.

I.

STATEMENT OF THE CASE

On August 13, 2010, Teamsters Local Union No. 716 ("Local 716") filed an unfair labor practice ("ULP") charge (the "Charge") against SMI, alleging SMI "refused to reinstate bargaining unit members who have made an unconditional offer to return to work following the conclusion of an unfair labor practice strike." SMI opposed the Charge, asserting that reinstatement was not proper because the drivers engaged in an illegal, partial strike, or, at best, an economic strike in which permanent replacements were hired. Region 25 of the Board disagreed with SMI and issued the Complaint and Notice of Hearing ("Complaint") on November 5, 2010. The Complaint inexplicably identified SM as the respondent. On November 12, 2010, SM filed its Answer to the Complaint, denying the Complaint's substantive allegations and additionally denying that SM was the correct respondent.

On December 3, 2010, Counsel for General Counsel filed a Motion to Strike, Motion in Limine, and Motion for Partial Judgment on the Pleadings (the "Motion to Strike"), seeking to preclude SM from denying that it was the proper Respondent. On December 21, 2010, SM filed its Response, and, on January 3, 2011, Administrative Law Judge, Jeffrey D. Wedekind (the "ALJ"), denied the Motion to Strike. Counsel for General Counsel, however, was permitted to file an Amended Complaint alleging that SM and SMI constituted a single employer.

On January 5, 2011, Counsel for General Counsel filed the First Amended Complaint (the "Amended Complaint"), again naming SM as the sole Respondent, but alleging SM and SMI comprised a single employer. On January 10, 2011, SM filed its Answer to the Amended Complaint, again denying the substantive allegations and also denying that it and SMI could be considered a single employer. A hearing was conducted on January 11-14 and February 3, 2011. During the hearing, Counsel for General Counsel amended the caption of the case to include both SM and SMI in the alternative. *Tr*. at 39-40. The ALJ noted that the January 5, 2011, Answer to the Amended Complaint sufficiently covered the amended caption. *Tr*. at 42.

On March 10, 2011, the parties filed post-hearing briefs, and, on March 15, 2011, the ALJ issued his Decision, finding in favor of Local 716 on all material allegations. Respondent now files this Brief in Support of Exceptions showing the ALJ erred and that the Amended Complaint should have been dismissed.

II.

STATEMENT OF FACTS

In the Decision, the ALJ made factual findings, many of which were in error. The following facts are stated bearing in mind the appropriate standard of review to be engaged by the Board. Specifically, the Board has consistently held that "in all cases which come before us for decision we based our findings as to the facts upon a *de novo* review of the entire record," and not the ALJ's findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950). Only the ALJ'S credibility determinations are given weight by the Board. *Id.*

A.

Introduction/Operations

SMI is an Indiana concrete company that has operated in Indianapolis, Indiana and the metropolitan area immediately surrounding Indianapolis since November, 2005. *Tr.* at 642. In conducting operations, SMI dispatches employee drivers to customer sites to deliver loads of ready mix concrete. *Tr.* at 565-67. In January, 2006, Local 716 became the certified bargaining representative of the drivers employed by SMI. *Joint Ex. 1*. The parties have been bargaining for an initial collective bargaining agreement since Spring, 2006, but the parties have yet to reach an agreement.

SMI takes orders from customers in several ways. Some customers, particularly on larger jobs, notify SMI of a general, upcoming need for concrete deliveries. The customer will then notify SMI a day or two in advance that the job is starting, and the customer will identify the amount of concrete to be delivered and the amount of spacing needed between deliveries. Despite the planning, however, many deliveries are accelerated or delayed due to jobsite issues. In addition to pre-planned deliveries, many customers will call the evening before deliveries are needed or even the day of a delivery to order concrete. *See Tr*. at 631-39.

SMI's dispatch procedures account for customer needs by the use of a telephone call-in system. Each afternoon, SMI Operations Manager Jeff Davidson ("Davidson") and Operations Supervisor George Gaskin ("Gaskin") analyze the scheduled concrete needs for the following day and plug the information into a computer system that determines the number of drivers needed and the start times. *Tr.* at 634-35, 639. Davidson and Gaskin use that information to schedule drivers by seniority. *Tr.* at 631-32. The drivers are then able to phone the call-in

system for their start-time for the following morning, *Tr.* at 630-31, unless, like most drivers, they obtain their start-times before leaving for the day. *Tr.* at 631.

Although the first load of the day for each driver is pre-planned and scheduled by seniority, every load thereafter is determined on a first in, first dispatched out basis. *Tr.* at 589-91, 631-32.[1] Specifically, once all scheduled drivers are dispatched on their first run of the day, the first driver to return from his delivery receives the next available dispatch, regardless of seniority. *Tr*. at 632. The dispatch system is akin to an air traffic control system in that the best plans are laid out well in advance, but the shifting customer needs throughout each day have an affect on other deliveries and schedules. *Tr*. at 681-82. As such, the first in, first dispatched out system is the only system found suitable at SMI.

B.

Contract Negotiations

In the years following certification of Local 716 as the bargaining representative of the drivers, several contract proposals were exchanged between the parties. In March 2009, SMI made what turned out to be the last written proposal by either party. *Tr.* at 268, 569-70; *R. Exs. 13 and 18*. In that proposal, SMI offered a wage increase, but Local 716 President, James Cahill ("Cahill"), never told employees that SMI had done so. *Tr*. at 185. Rather, he assumed Matt Bales ("Bales") and Ron Eversole ("Eversole"), both of whom were bargaining unit drivers and members of the bargaining committee present at all negotiation sessions, informed the employees. *Tr*. at 185-86. The drivers voted to ratify the contract, but Cahill told the drivers that when he gave it to SMI, SMI took back what they had agreed to and refused to sign the contract.

[1] Drivers do not get to choose the jobs to which they are assigned. *Tr*. at 590.

Tr. at 237, 245-46. Thereafter, the parties continued to negotiate, but Cahill told the drivers that SMI did not return his calls. *Tr*. at 239.

On April 9, 2009, SMI delivered a letter to drivers, addressing the status of negotiations. *GC Ex. 11*; *Tr*. at 572-73. The letter indicated that negotiations since former President, Gary Green ("Green"), retired were disappointing, but that SMI continued to await a written counter-proposal from Local 716. *Id*. In August, 2009, the parties met for extensive negotiations, and the parties agreed to all terms except a signing bonus for drivers. *Tr*. at 595-96. Cahill reacted to SMI's refusal to agree to the signing bonus with hostility. *Tr*. at 596.

In Spring 2010, Local 716, including Cahill and Green, explained to the drivers that SMI would be delivering a contract proposal to Local 716's union hall. *Tr*. at 266-67. The drivers therefore gathered at the union hall to wait for the written proposal, to go over it, and to settle for it. *Tr*. at 266-68. The written proposal, however, never arrived. *Tr*. at 266-68. Local 716 told the drivers that SMI decided not to make a written offer. *Tr*. at 268-69.[2] Drivers, including Blackston Poindexter ("Poindexter"), were upset that SMI did not make a written offer. *Tr*. at 270.

C.

The Strike Vote Meeting

On May 13, 2010, Local 716 held a strike vote meeting. The idea to go out on strike came from Cahill and Local 716's attorneys. *Tr*. at 228, 263. The drivers were merely following the lead of Cahill and Local 716's attorneys. *Tr*. at 229. Cahill told Bales, the union leader among drivers, to notify the drivers when the meeting was going to take place and that the

[2] Cahill protested Poindexter's version of these events, but Cahill, himself, admitted that in Spring 2010, the drivers were under the impression that SMI was supposed to get something to Local 716 but never did so. *Tr*. at 555-56.

meeting was for a strike vote.[3] *Tr*. at 164, 204, 220. Bales let the bargaining unit drivers know about the meeting, including its strike vote purpose, a couple days in advance.[4] *Tr*. at 204, 220.

Cahill had picket signs professionally printed in advance of the meeting, and he brought the signs to the strike vote meeting. *Tr*. at 165-66. The signs indicated that SMI was unfair. *Id*. The signs were placed on the table/platform next to where Cahill and Local 716's attorneys addressed the drivers. *Id*. Cahill also had strike vote ballots with him. *Tr*. at 168.

According to Cahill, there would have been no reason to go on strike if SMI had reinstated former bargaining unit employee Gary Stevenson ("Stevenson"), who had been discharged over three years before the meeting. *Tr*. at 119, 170, 185, 263, 581. Stevenson began his employment as a driver for SMI on or about November 14, 2005, at the time SMI purchased the assets of Stevenson's former employer, American Concrete. Stevenson had been discharged because SMI errantly provided information to Stevenson, among others, with his paycheck that included the social security numbers of all of the drivers. When SMI asked Stevenson to return the information because it included the social security numbers of other employees, Stevenson indicated he had destroyed it. After further questioning, Stevenson removed the information

[3] Cahill testified that the meeting was merely a "general meeting" called because bargaining unit drivers had been asking Cahill about the unfair labor practice cases against SMI. However, despite Cahill's testimony that approximately "half a dozen" drivers called him, *Tr*. at 162, no driver testified that he called Cahill or raised any concern whatsoever with Cahill regarding the pending UPS cases. Moreover, Local 716's attorney testified that he was unaware of any employee calling in or otherwise calling a meeting to discuss the reinstatement of Stevenson. *Tr*. at 125. Indeed, according to Cahill, Bales, Eversole and Stevenson would have benefited from a resolution to the prior charges, but none of the three individuals testified at the hearing at all, let alone to indicate they were concerned with resolution of the prior unfair labor practice cases. *Tr*. at 162. Moreover, Bales, the union leader among the drivers, played no part in the hearing, and Cahill testified that the strike had nothing to do with Bales' lack of remedy with respect to the prior ULP cases in the months just prior to the strike vote in May, 2010. Cahill's hearsay testimony cannot be used to prove the truth of why Cahill called the meeting in which the vote took place. *Tr*. at 163. Cahill also stated that SMI's decision to call off negotiations with Local 716 regarding settling the case involving Stevenson's discharge was the motivating factor in calling the strike vote, but SMI had never considered the reinstatement of Stevenson to be a part of the negotiations. *Tr*. at 120-21, 193.

[4] Interestingly, neither the General Counsel nor Local 716 called Bales as a witness to corroborate their version to the events.

from his pocket and surrendered it. Stevenson was suspended pending further investigation, and he was discharged on February 22, 2007. *Tr*. at 170, 581.

Despite Local 716's disagreement with the discharge of Stevenson, Local 716 never called a meeting with the drivers to talk about taking a ULP strike vote to protest the discharge or to demand or request Stevenson's reinstatement until May, 2010. *Tr*. at 170, 180, 193, 581. Even then, Local 716 did not call the strike for another three months. *Tr*. at 171. Local 716, until the August 3, 2010 strike, never made a request that Stevenson be reinstated. *Tr*. at 581. Cahill expressly admitted he had never demanded reinstatement. *Tr*. at 179-80. Furthermore, neither Stevenson nor his discharge were ever addressed in negotiations between SMI and Local 716 over the past four years. *Tr*. at 596.

Cahill and Local 716's attorneys opened the May 13 meeting by explaining *they* were calling the drivers out on a ULP strike. *Tr*. at 205, 263. Cahill called it a ULP strike in order to protect the drivers' jobs, and Local 716's attorneys "stressed that we weren't on no economical strike." *Tr*. at 252. Cahill told the drivers that if the strike was a strike to get a contract, the drivers' reinstatement rights would be affected, but that if the strike were labeled a ULP strike, the drivers could not be replaced. *Tr*. at 169-70, 265. Cahill stated as much because part of his job is to protect the drivers' jobs. *Tr*. at 170.

Neither Cahill nor Local 716's attorneys brought up contract negotiations in the meeting. *Tr*. at 186-87. Instead, the drivers asked whether this move would help them get a contract with SMI, as they were concerned about getting a contract and were willing to do whatever it took to get a contract. *Tr*. at 122, 187, 264-65. For example, bargaining unit driver Terry Mooney indicated, "We all talked about the contracts and stuff that we haven't been getting." *Tr*. at 206, 231-32. Drivers were frustrated that there was no contract after five years. *Tr*. at 232. Mooney

continued, "we always talk about when they're going to start negotiating on contracts, will it ever get done, are they talking – you know – and that nature – you know – about vacations and pay raises and all that good stuff." *Tr*. at 207. Local 716 attorney, Geoffrey Lohman ("Lohman"), explained to the drivers that a strike would make it easier to get a contract.[5] *Tr*. at 114-15. The drivers voted unanimously to strike.[6] Local 716, however, held off on calling the strike because concrete pouring jobs were slow and because SMI heard rumors that a strike would be called. *Tr*. at 152.

On May 19, 2010, Davidson held a meeting for employees because he, Gaskin, and others had heard that employees were talking about contract issues, monetary issues, and vacation pay and rumors of a strike by the bargaining unit drivers. *Tr*. at 234, 598, 615. In preparation for the meeting, Davidson created a handout for drivers. *Tr*. at 599; *R. Ex*. 10. Topics discussed at the meeting included a contract, wages, vacation pay, and negotiations. *Tr*. at 234-35, 601. The drivers were concerned about why SMI, in their opinion, had not been negotiating with Local 716. *Tr*. at 601. Bales, in particular, was upset about what he had been told by Local 716 about negotiations as opposed to what SMI was telling him, and he was upset about drivers not getting enough hours of work. *Tr*. at 602-03.[7] Bales indicated he had been

[5] Lohman never explained how a ULP strike would make it easier to get a contract.

[6] Poindexter testified that he voted for the strike because he wanted to have Stevenson's back and he hoped that other drivers would do the same if Poindexter had been in that position. *Tr*. at 252-53. Poindexter admitted, however, that neither he nor Local 716 voted to strike when Stevenson lost his job in February, 2007, over three years prior to the strike vote in May, 2010, when the ALJ decided the ULP charge involving Stevenson in December, 2007, or when the Board originally issued its decision affirming the ALJ's decision in March, 2009. *Tr*. at 263-64. Moreover, at the time of the strike vote, Poindexter was concerned about reaching a contract with SMI, the fact that he had not had a wage increase in a long, long time, and receiving additional benefits. *Tr*. at 264. In fact, Poindexter was interested in doing whatever it took to get SMI to agree to a contract with Local 716. *Tr*. at 265.

[7] Bales did not testify on behalf of Local 716, despite his significant involvement in calling the strike vote and notifying drivers of the strike. As the chief union activist at SMI, his testimony must have contradicted the testimony of Cahill and the other bargaining unit employees.

informed that SMI was supposed to be in contact with Local 716 and had failed to return several phone calls by Local 716 for negotiation meetings. *Tr*. at 604.

During the meeting, Davidson also answered several questions by drivers, all of which related to contract negotiations. *Tr*. at 601. In response to questions by drivers, Davidson also indicated that, if a strike occurred, SMI would hire permanent replacement employees. *Tr*. at 244. Even though the employees had already voted in favor of a purported ULP strike, and despite Cahill's and Local 716's attorney's explicit advice regarding the importance of labeling the strike a ULP strike instead of an economic strike, none of the employees at the meeting responded to Davidson's suggestion that they could be permanently replaced if they went on strike. *Tr*. at 626.

The employees' questions eventually became too voluminous to answer at the meeting, prompting Davidson to take down the questions and answer them in a follow-up letter to drivers. *Tr*. at 605; *R. Ex. 11*. Davidson addressed all of the drivers' questions, all of which centered on economic concerns, either during the meeting or via the follow-up letter. *Tr*. at 626.

D.

The Strike

On August 3, 2010, SMI received a letter from Local 716 indicating the bargaining unit workers would be engaged in a "strike," beginning that day, for the ULP Local 716 claims SMI committed when it discharged Stevenson. *Joint Ex. 5*. The August 3 letter was the first time Local 716 requested that SMI remedy the claimed ULP associated with Stevenson's discharge. *Joint Ex. 5*.

In the August 3 letter, Local 716 instructed SMI that the strikers were willing to perform work on the Indianapolis Stadium and Convention Center under the Project Labor Agreement for

Work Stabilization for Stadium and Convention Center Expansion Construction (the "Convention Center Project"), but that the drivers were otherwise not willing to perform all other work.[8] *Joint. Ex. 5*; *Tr*. at 179, 253. The drivers were therefore picking and choosing between which jobs they were willing to perform.[9] *Tr*. at 234. Cahill and Bales told the drivers as they came in for work that they were on strike, and they refused to work even though their start times had already passed. *Tr*. at 250, 728-29, 733-34. The only job on which they were willing to work, the Convention Center Project, did not have any runs in the morning. *Tr*. at 589, 593; *R. Ex. 12*. Rather, all drivers had been scheduled either for the large, Noblesville job or smaller, non-PLA jobs. *Tr*. at 588-89; *R. Ex. 12*.

After Local 716 delivered the August 3 letter to Gaskin at the facility, Gaskin telephoned Davidson, who was on his way to the facility, to notify him of the letter. *Tr*. at 210, 583-84. When Davidson arrived at the facility, drivers were gathered, but they were not working. All of them, however, were scheduled to work. *Tr*. at 582-83. Davidson first went to the office to speak with Gaskin. Davidson thereafter stepped outside the office and spoke with a group of drivers, including Jason Mahaney, Mooney, Bob Rummell, Jeffrey Ipock ("Ipock") and Sam Sutherland. *Tr*. at 211-12. Davidson asked them whether they were going to work and indicated that if they were striking, they would be permanently replaced because SMI had an obligation to continue serving its customers and because SMI considered the strike to be an economic strike. *Tr*. at 212, 247-48, 585, 586-88, 729-30.

[8] Mooney and Poindexter testified that they were willing to perform work on the Convention Center Project, but that they were not willing to perform any other work. *Tr*. at 233-34, 259-60.

[9] The Convention Center Project paid a wage approximately $5.00 per hour higher than SMI's other work, along with increased benefits and overtime pay. *Tr*. at 663-64.

Although Local 716 cast the strike as a ULP strike, the drivers' statements indicated they were striking for economic reasons. *Tr*. at 586-88. In response to Davidson's comment to the strikers that they would be permanently replaced because SMI considered the strike to be an economic strike, Ipock indicated to Davidson that the strikers could not be permanently replaced if it was a ULP strike. *Tr*. at 586-88. However, Ipock then told Davidson that "you know this does not have anything to do with Gary Stevenson. All we want is to get negotiations started." *Tr*. at 586-88; *R. Ex. 19*.[10] Ipock was not concerned about going on strike for Stevenson, as Stevenson had been off for four years and Ipock would have gone on strike much earlier. *Tr*. at 738. Poindexter, while picketing at the Calumet jobsite, told SMI sales representative Nathan Dexter that SMI was "messing with my livelihood and taking away from my family." *Tr*. at 261.[11]

The strike was called on August 3 in order to have the greatest impact on SMI. According to Cahill, the goal of the strike was to get Stevenson reinstated. *Tr*. at 174. As such, when Bales called Cahill early that morning to let him know that SMI was set to start a large, non-PLA job in Noblesville, Cahill called the strike. *Tr*. at 177-78, 222. Cahill told the drivers that they could picket the plant and some jobs in order to "put the pressure on [SMI] to get to the negotiation table." *R. Ex. 14*; *Tr*. at 222-23. At the time of the strike, it had been several years since the drivers had received a wage increase. *Tr*. at 174-75. The drivers were simply following Cahill's lead. Indeed, during the strike, Mahaney sent a text message to Davidson, which read: "Really sorry for letting you down with the way things went the day of the strike! I

[10] Ipock denied making the statement, but he admitted he was not a good friend of Stevenson and was not concerned about Stevenson. *Tr*. at 736-38. Moreover, the General Counsel did not call Mahaney, Rummell, or Sutherland to testify, even though, as noted by the ALJ, these strikers would have overheard what Ipock said to Davidson.

[11] Drivers carried picket signs, but the signs could not be read clearly. *Tr.* at 608-10.

had no clue that it was gonna happen or when! Nothing was told to any of us until I arrived that morning!" *R. Ex. 16*; *Tr*. at 611-12.

In response to the drivers' offer to perform partial work, SMI declined to dispatch any of the strikers for Convention Center Project work because it would have been "pretty impossible" for Davidson to attempt to schedule striking drivers only for loads for the Convention Center Project. *Tr*. at 591. Specifically, SMI's dispatch system, described above, changes minute-by-minute throughout the day, based on how customers perform, drivers perform, and whether the facility has a plant problem. *Tr*. at 593.[12] Moreover, SMI simply cannot pay a partially-striking driver to stand by, waiting for a truck to return in the middle of the day so the partially-striking driver could get in the truck, make a Convention Center Project delivery, and return the truck to the facility to the driver who had been operating the truck up to that point on non-Convention Center Project deliveries. *Tr*. at 593. Quite simply, it would create a hardship on SMI. *Tr*. at 593.

Therefore, as an immediate response to the strike, Davidson called SM and asked whether SM could supply additional drivers as emergency, temporary replacements for the striking drivers. Tr. at 65. SMI had previously planned to continue operations in the event of a strike through the use of SM drivers on a temporary basis. *Tr*. at 62-63. Indeed, SMI has a history of occasionally using SM drivers as overflow help. Tr. at 66. In all, SMI used approximately 16 SM drivers during the strike and for approximately a week and a half after the

[12] Jim Spurlino ("Spurlino"), an owner of SMI, testified consistently with Davidson, analogizing the schedule to an air traffic control system in which the schedule can be set up perfectly, but once the first set of runs actually take off, everything changes. *Tr*. at 681-82. Weather delays, delays in getting unloaded, customer delays, customer accelerations, and accidents on the highway all contribute to the need for significant adjustment throughout the day. *Tr*. at 682.

strike for purposes of training permanent replacement employees hired during the strike. *Tr*. at 66, 74-75.

SMI did not view the strike as a ULP strike. SMI viewed the strike to have been either an illegal partial strike unprotected by the National Labor Relations Act (the "Act") or, at best, an economic strike. *Joint Ex.* 7. In an effort to carry on and protect its business, SMI ultimately staffed its workforce with those who crossed the picket line and with permanent replacement workers to meet SMI's obligations to its customers. At the time replacements were hired, SMI expressly told the workers they were being hired as permanent replacements. *Tr*. at 612.

After a few days, SMI's customer took the job away from SMI and contracted with another concrete company to finish the job. On August 11, 2010, SMI received a letter from Local 716 in which Local 716 indicated the strikers were making an unconditional offer to return to work as of August 12, 2010. *Joint Ex. 6.* The offer was made because Local 716 believed it had achieved its goal of causing SMI to lose a major project. *R. Ex. 14*; *Tr*. at 213, 224.

That same day, SMI promptly responded to the strikers' unconditional offer to return to work with a letter, advising Local 716 that the strike was an illegal partial strike and that no jobs were available because SMI had already filled all positions with those who had already crossed the picked line and with permanent replacements. *Joint Ex. 7.* SMI further informed Local 716 that it would place the strikers on a preferential hiring list and offer them reinstatement on the basis of their seniority whenever a vacancy occurs. *Id.* SMI never contacted Local 716 to discuss or offer reinstatement to Stevenson. *Tr*. at 192-93.

Recognizing that Cahill misled him, Mooney sent a letter to the International Brotherhood of Teamsters (the "IBT") after the strike ended, explaining that Cahill was not

properly representing the drivers. *R. Ex. 14*.[13] Mooney was concerned that it had been five years and the drivers still did not have a contract. *Tr*. at 220-21. Mooney wanted to get a contract and a raise. *Tr*. at 221.

Approximately two weeks after the strike ended, Local 716 held another meeting to discuss continued picketing against SMI's customers to let SMI and the customers know that issues remained. *Tr*. at 257-58. The decision "fell through" because "a lot of people were trying to find jobs, didn't have no work, money situations – you know – as far as gas getting to the jobs and then to do it, and so it kind of didn't take place." *Tr*. at 258.

E.

The Distinctiveness of SMI and SM

SMI was formed in 2005 when James Spurlino, the majority owner of SM, decided to enter the Indianapolis and surrounding area ready mix concrete market. *Tr*. at 643. Spurlino formed the entity as an Ohio LLC, registered with the Indiana Secretary of State, and purchased the assets of American Concrete Co. *See R. Ex. 4-5.*

The relationship between SMI and SM can be reduced to that of debtor-creditor. *Tr*. at 653-54. Otherwise, there is no relationship between the entities, as they maintain separate addresses, phone numbers, fax numbers, receptionists, tax identification numbers, tax return filings, insurance policies, licensing, financial statements, bank accounts, payroll accounts, unemployment accounts, and benefits for employees, including 401(k) accounts. *Tr*. at 656-660. The two entities also offer separate and distinct services, as SM does not subcontract any of its work to SMI. *Tr*. at 655. Occasionally SMI will rent equipment and drivers from SM, but it

[13] The IBT also received an e-mail from either Mooney or his wife. *See R. Ex. 15*. Although Mooney claimed he does not know how to use e-mail, *Tr.* at 218, the letter (which Mooney admits sending) and the e-mail (which Mooney denies sending), each contain the exact same misspelling of the word "advice." *See R. Ex. 14 and 15*.

does so through an arms-length, written agreement, and it also rents equipment and drivers from companies other than SM. *Tr*. at 651; *GC Ex. 38*.[14] SM has never guaranteed any debts for SMI, and the two entities have never shared the same lines of credit. *Tr*. at 652-53. The two entities have their own sales staff and they purchase their raw material from different vendors. *Tr*. at 645-46, 647, 649. SMI creates monthly profit and loss statements whereas SM only does so on an annual basis. *Tr*. at 677-78.

The only common owner between SM and SMI is Spurlino. *Tr*. at 644. Otherwise, there are no common owners between the two entities. *Id*. Neither entity has a board of directors. *Tr*. at 645. Each entity has established a distinct Operating Agreement. *GC Ex. 43, 45*.

There are no common managers of daily business operations between the two entities. *Tr*. at 645. For example, Spurlino testified that those managers who work for SMI do not also work for SM. *Tr*. at 645. Further, there is no common supervision of daily operations between the two entities. *Tr*. at 646. Because the two entities are managed separately and distinctly, it is no surprise that the way the employees are dispatched differs completely, *Tr*. at 665-66, the drivers hours are scheduled by different individuals, *Tr*. at 670, the raw materials are purchased from different vendors, *Tr*. at 649, and the job duties that drivers are responsible for completing differ greatly between the two entities, *Tr*. at 671-72. Finally, the managers who are instrumental in SM's operations had no involvement in the negotiations of SMI and Local 716. *Tr*. at 669.

SM and SMI each have their own human resources teams: Lou Reiker and Allan Roell comprise the human resources personnel for SM, and Davidson is responsible for human

[14] SMI sometimes uses SM drivers for overflow work on a temporary basis, and when this occurs, SMI is charged by SM for the driver rental cost, including a premium. *Tr*. at 432-36. SMI also rents drivers and equipment from third parties. *Tr*. at 651.

resources functions for SMI. *Tr*. at 668. These individuals are independently responsible for the hiring, firing and scheduling of each separate entity. *Tr*. at 670. Neither entity has an ability to control hiring, firing, supervision or discipline of the other entity's employees. *Tr*. at 680. No day-to-day direction is provided from one company to the other company's employees. *Tr*. at 680.[15]

III.

STATEMENT OF THE ISSUES

1. Should the Board find merit to exceptions 22 through 27 because the ALJ erred in finding that Local 716 and the bargaining unit employees did not engage in an illegal partial strike?

2. Should the Board find merit to exceptions 2 through 6 because the ALJ ignored the overwhelming evidence of an economic motivation for the drivers' strike in favor of self-serving statements by Local 716's president and attorney?

3. Should the Board find merit to exceptions 1, 7 through 11, 26 and 27 because the ALJ erred in finding SM and SMI are a single, integrated employer?

IV.

ARGUMENT

A.

Refusing Immediate Reinstatement to Strikers was Proper Because the Strikers Engaged in an Illegal Partial Strike

The ALJ erred when he concluded the strikers did not engage in an illegal partial strike. When the strikers refused to perform *only* work not associated with the Convention Center

[15] SM provides limited administrative services to SMI, but those services are governed by a written agreement, and SMI pays for those administrative services. *GC Ex. 37*.

Project, the strikers engaged in an illegal partial strike unprotected by the Act and thus forfeited any right to reinstatement at the conclusion of the partial strike. As such, SMI properly refused to immediately reinstate the strikers upon their unconditional offer to return to work.

1.

Partial Strikes are not Protected Activity Under the Act

Although the Act protects some concerted activity, "not all work stoppages are federally protected concerted activities." *Vencare Ancillary Servs., Inc. v. NLRB* 352 F.3d 318, 322 (6th Cir. 2003). To constitute a protected strike or work stoppage, "employees must withhold *all* their services from the employer. They cannot pick and choose the work they will do or when they will do it." *Audobun Health Care Ctr.*, 268 NLRB 135, 137 (1983) (emphasis supplied). A "selective refusal to perform some, but not all . . . lawfully assigned tasks . . . constitutes a partial strike, an activity that is not protected" by the Act. *Airo Die Casting, Inc.*, 354 NLRB No. 8, 2009 WL 1311471 at *36 n.42 (Apr. 29, 2009) (citing *United Paperworkers Int'l Union Local 5*, 294 NLRB 1168, 1170-1171 fn. 14 (1989)).[16]

Toleration of such partial strikes "would be to allow employees to do what [the Board] would not allow any employer to do, that is to unilaterally determine conditions of employment." *Highlands*, 278 NLRB at 1097 (citation omitted). The rule against partial strikes is informed by

[16] *See also Audubon*, 268 NLRB at 136 (finding nurses engaged in illegal partial strike when nurses refused to perform job functions generally required of nurses in one area of hospital but performed job functions in other areas of the hospital); *Elec. Data Sys. Corp.*, 331 NLRB 343, 344 (2000) (indicating it is "well established that a partial refusal to work, in contrast to a complete work stoppage, is unprotected activity"); *Highlands Hosp. Corp., Inc.*, 278 NLRB 1097, 1097 (1986) (finding guards engaged in illegal partial strike when guards refused to perform duties within scope of employment, including the transport of individuals through a picket line and the removal of litter left by strikers, but continued to perform other job-related duties); *Yale Univ.*, 330 NLRB 246, (1999) (finding teaching fellows engaged in illegal partial strike when teaching fellows withheld submission of grades but continued to perform other functions within scope of employment, including meeting with students, writing letters of evaluation, and preparing for classes).

a "notion of economic fair play." *Nat'l Steel & Shipbuilding Co.*, 324 NLRB 499, 509 (1997). As such, the Board

> has consistently reasoned that, unlike a protected "unequivocal" strike done to further some work-related protest, such quasi-strike activities [including partial strikes or intermittent work stoppages] should be regarded as beyond [the Act's] protections because they involve at their essence an attempt by employees to reap the economic benefits of strike action without their being simultaneously willing to assume the status of strikers with its consequent loss of pay and risk of being replaced.

Id. (citations omitted), *see also Hoover Co. v. NLRB*, 191 F.2d 380, 389 (6th Cir. 1951) (noting an employee cannot "collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business."); *Vencare*, 352 F.3d at 322 (indicating employees "may not strike and retain the benefits of working at the same time").

Consequently, an employer may lawfully discharge employees who engage in an unlawful partial strike, and those employees would not be entitled to reinstatement upon making an unconditional offer to return to work. *NLRB v. Montgomery Ward & Co.*, 157 F.2d 496, 498 (8th Cir. 1946) (upholding discharge of typists employed in folder billing department who refused to process some orders but processed other orders); *see also Vencare*, 352 F.3d at 322 (upholding discharge of rehabilitation care employees who refused to see patients but remained on premises and completed paperwork).[17]

2.

The Bargaining Unit Drivers Engaged in an Illegal Partial Strike

On August 3, 2010, the bargaining unit drivers in this case engaged in an illegal partial strike when they refused to perform deliveries for construction projects not associated with the

[17] Like the courts in *Vencare* and *Montgomery Ward*, countless authorities have likewise upheld the discharge of workers who engaged in unlawful partial strikes. *See, e.g.*, *Hoover Co.*, 191 F.2d at 389; *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 604-05 (1st Cir. 1979); *Elec. Data Sys. Corp.*, 331 NLRB at 344; *Audubon*, 268 NLRB at 136; *Highlands*, 278 NLRB at 1097.

Convention Center Project, but remained willing to perform deliveries for the Convention Center Project itself. To engage in a protected strike, the strikers, like the workers in the cases described above, were required to withhold *all* of their services from SMI, including making deliveries for the Convention Center Project. *Audubon*, 268 NLRB at 137. The strikers simply are not entitled to "pick and choose the work they will do or when they will do it." *Id.* Yet, that is *exactly* what the striking drivers admit they have done. *Tr*. at 234. This partial refusal to work, in contrast to a complete work stoppage, mirrors the illegal activity undertaken by the workers in *Audubon*, *Highlands*, and *Yale University* because the strikers here likewise sought to engage in a strike *and* retain the benefits of working *at the same time*, which constitutes unprotected activity.

Contrary to the ALJ's finding, the no-strike clause[18] contained in the PLA for the Convention Center Project makes no difference to the illegal, partial nature of the strike.[19] Partial strikes are illegal because they are attempts by employees "to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters." *Audubon*, 268 NLRB at 137. More directly, they "usurp [an employer's] prerogative to assign work" with the expectation that the partially striking employees will still be paid for the work they are willing to perform. *Id.* The Board has never gauged the reason for the strikers' willingness to perform only a portion of their work. The Board has instead simply held any partial strike to be illegal because it usurps an employer's prerogatives to assign work. As such, the strikers may not, as they attempted to do here, escape the restrictions imposed on the Convention Center Project through engaging in an illegal partial strike.

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[18] *Joint Ex. 2, Article 12.*

[19] *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956); *see also United Bhd. of Carpenters & Joiners of Am., AFL-CIO, Local 1780*, 296 NLRB 412, 419 (1989).

The absurdity of allowing employees to set their own assignments is on display here. It would have been "pretty impossible" for Davidson to attempt to schedule striking drivers only for loads for the Convention Center Project. *Tr*. at 591. Specifically, in the ready mix delivery industry, only the initial loads can be preplanned because many variables alter the runs assigned to and made by drivers. *Tr*. at 592. Jobsite problems or customers holding or otherwise delaying drivers prevent SMI from planning a pre-determined schedule for the day. *Tr*. at 592-93. In other words, SMI is at the mercy of its customers' needs, and it cannot dictate to the customer when concrete is to be delivered. *Tr*. at 628. As such, SMI's dispatch system changes minute-by-minute throughout the day, based on how customers perform, drivers perform, whether the facility has a plant problem, weather delays, traffic problems and other issues. *Tr*. at 593, 681-82. Moreover, SMI simply cannot pay a non-striking driver to stand by, waiting for his truck, which is now being operated by a partially-striking driver who is performing a Convention Center Project delivery, to return in the middle of the day so the non-striking driver could get back in the truck to make the deliveries the partially-striking driver is unwilling to perform. *Tr*. at 593. Quite simply, it would create a hardship on SMI, both operationally and financially, having to pay two drivers to do what would ordinarily require only one driver. *Tr*. at 593.

The Decision's only attempt to distinguish *Audubon* and the other cases cited by Respondent claims that, in those cases, the bargaining unit employees continued to unilaterally perform some duties "without the employer's agreement or sanction." *Decision* at 23. *Audubon*, however, stands for no such thing. Rather, the employer in *Audubon* wanted and expressly ordered the bargaining unit employees to perform their duties, and when the employees refused, the employer phoned the police and discharged the employees. 268 NLRB at 136. Quite simply,

there is no hint in *Audubon* that a partial strike only occurs when employees perform work against the wishes of the employer.

Citing *Virginia Stage Lines v. NLRB*, 441 F.2d 499, 503 n.5 (4th Cir. 1971), and *NLRB v. Deaton Truck* Line, 389 F.2d 13, 168-69 (5th Cir. 1968), the ALJ incorrectly found the strikers did not engage in an illegal partial strike because the strikers did not actually perform any work and, therefore, did not actually affect SMI's operations. *Decision* at 24. But the drivers made it clear at the beginning of the strike that they were refusing to perform non-Convention Center Project work and yet were willing to perform Convention Center Project work. *Tr.* at 233-34, 253, 260; Joint Ex. 5. Drivers were at that moment engaging in an unprotected partial strike and were therefore subject to lawful discharge. *Audubon*, 268 NLRB at 135. Moreover, 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*. The striking drivers are claiming that, despite their refusal to perform one type of work for SMI, they are entitled to be paid for other work SMI performed. That is an illegal partial strike, and the drivers lose their protection under the Act. *Audubon*, 268 NLRB at 135.

This fallacy aside, the cases on which the ALJ relied are inapposite. In *Virginia Stage Lines v. NLRB*, 441 F.2d 499 (4th Cir. 1971), the Court analyzed whether drivers should be permitted to refuse to cross picket lines, an activity the Board has staunchly protected. *See Virginia Stage Lines, Inc.*, 182 NLRB 717, 720 (1970) (recognizing that "the Board has repeatedly held that employees who respect a picket line of striking employees are thereby engaging in a protected concerted activity"). And, if the ALJ's reading of *NLRB v. Deaton Truck Line*, 389 F.2d 163 (5th Cir. 1968), is followed, it would encourage employers to dispatch drivers according to the drivers' professed limitations and then discharge the drivers for

accepting the dispatch. This bazaar result could not have been what Congress, the Board, or the 5th Circuit intended.[20]

When the strikers refused to perform *all* of the work assigned to them by SMI and chose only to perform work associated with the Convention Center Project, SMI did not give work to the strikers because it would disrupt business operations. Although, as noted by the ALJ, the underlying rationale of the prohibition on partial strikes is that the employer has the right to know whether or not his employees are striking, the Act surely would not punish an employer who, when informed of the employees intent to engage in a partial strike, proactively enforces its right to protect its operations by hiring and training permanent replacements.

The bargaining unit drivers in this case engaged in an attempt to "reap the economic benefits of strike action without their being simultaneously willing to assume the status of strikers." *Nat'l Steel & Shipbuilding Co.*, 324 NLRB at 509. Because the Act does not protect this activity, SMI was well within its rights to refuse to immediately reinstate the strikers upon their unconditional offer to return to work. *Montgomery Ward & Co.*, 157 F.2d at 498. On this basis alone, the Amended Complaint should be dismissed.

B.

The Strikers Did Not Engage in a ULP Strike

Even if the strike could somehow escape the label of an illegal, partial strike, the ALJ erred in finding the strike was a ULP strike. To the contrary, the strike was the culmination of

[20] The Decision also expresses misgivings about forcing the bargaining unit to choose between engaging in unprotected activity by striking the Convention Center Project (thereby engaging in a complete strike of SMI) or to engage in unprotected activity by refusing to strike the Convention Center Project (thereby engaging in a partial strike). *Decision* at 24. Local 716, however, carefully orchestrated the strike in this case, timing it to begin at the onset of an important job that would cripple SMI. Local 716 could just have easily used such careful timing to strike when there were no Convention Center Project runs. Moreover, Local 716 voluntarily entered into the PLA, and it could very well have counted the cost of doing so when deciding whether to enter into the contract.

employee frustration at what they thought was SMI's refusal to bargain for a contract. In order to get SMI back to the bargaining table, Cahill called for a strike. He then carefully labeled it a ULP strike in an attempt to preserve recall rights. Cahill's attempt to use the strike as a shield should not be rewarded.

It is well settled that strike activity is a sword, designed to place pressure on an employer. *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 519 (4th Cir. 1998). The goal of such pressure could be to force the employer to agree to economic demands or it could involve forcing the employer to remedy ULPs committed by the employer. *Id.* The use of a strike, however, "is not a shield to protect [strikers'] jobs from the potential legitimate consequences of an economic strike." *Id.* In order to prevail on the Amended Complaint, the General Counsel must therefore prove that the bargaining unit members genuinely reacted to a ULP with a strike. *Id.* at 517-18. *See also Typoservice Corp.*, 203 NLRB 1180 (1973) (rejecting the charging party's contention that a strike was a ULP strike because the conduct purportedly covering the strike occurred over one month prior to the strike).

For the wrongful conduct of an employer to "invest a strike with the label of a ULP strike, the conduct must be shown by substantial evidence to have had a *causal connection* with the strike." *Winn-Dixie Stores, Inc. v. NLRB*, 448 F.2d 8, 11 (4th Cir. 1971) (denying enforcement in part when finding substantial evidence did not support a decision that a strike against an employer was caused in part by the employer's ULP) (emphasis added).[21] To

[21] This holds true even if the employer's previous wrongful conduct was held to be an unfair labor practice. *Filler Prods., Inc. v. NLRB*, 376 F.2d 369, 379 (4th Cir. 1967); s*ee also Exec. Mgmt. Servs., Inc.*, 355 NLRB No. 33, 2010 WL 1903993 at *13, *16 (2010) (indicating unlawful labor practice must be shown to have a causal connection with the strike by credible evidence; also indicating the General Counsel must "prove that the employer's unfair labor practices were causally related to either the employees' decision to strike or remain on strike to establish their status as unfair labor practice strikers and holding employer did not violate the Act when it refused to reinstate strikers on unconditional offer to return to work when substantial evidence did not support finding of causal connection).

determine whether the necessary causal connection exists, the Board often considers, among other *ad hoc* factors, whether (1) evidence of non-economic motives consists of self-serving statements made by union representatives and (2) there exists a gap in time between the commission of a ULP and the strike. *U.S. Servs. Indus., Inc.*, 315 NLRB 285, 290 (1994); *Paramount Liquor Co.*, 307 NLRB 676, 682, n.19 (1992); *Typoservice Corp.*, 203 NLRB at 1180; *California Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1102 (9th Cir. 1998); *Pirelli Cable*, 141 F.3d at 519; *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 705 (7th Cir. 1976); *Winn-Dixie*, 448 F.2d at 12; *Filler Prods.*, 376 F.2d at 379.

When applying these factors to the circumstances here, it is apparent no causal connection exists between the strike and the alleged ULP. The ALJ's Decision – which is supported by only the self-serving statements in Local 716's August 3 letter and incredible testimony of Cahill, Poindexter, Mooney, and Ipock – is not supported by credible evidence that demonstrates the bargaining unit employees engaged in a strike to protest Stevenson's discharge. Rather, the credible evidence in the record demonstrates that the true purpose of the strike was to put economic pressure on SMI to force it into contract negotiations. The strikers were therefore not entitled to immediate reinstatement upon their unconditional offer to return to work, because an employer like SMI "may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements." *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926, 930 (7th Cir. 1982) (citing *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)); *see also Post Tension of Nevada, Inc.*, 353 NLRB No. 87, 2009 WL 241717 at * 3 (2007); *Winn-Dixie*, 448 F.2d at 12.[22]

[22] Under well-settled Board law, employers may lawfully refuse to reinstate economic strikers if the employer has hired permanent replacements. *Service Workers' Int'l Union v. NLRB*, 544 F.3d 841, 850 (7th Cir. 2008). A replacement is permanent, in turn, if there is a mutual understanding between the employer and the replacements that employment is considered permanent (although still at-will) and not jeopardized by an end to the strike. *Id.* at 852-53 (rejecting the union's attempt to label replacements as temporary). Here, SMI hired replacement employees
Continued

1.

Local 716's Self-Serving Statements do not Negate the Economic Nature of the Strike

The ALJ cites the fact Local 716 has consistently cast the partial work stoppage initiated on August 3, 2010, as an "unfair labor practice strike" as proof the employees decided to engage in a strike, at least in part, to protect Stevenson's discharge. The ALJ erred in relying upon Local 716's self-serving statements, which do not provide probative evidence in this case.

Generally, no weight is to be given self-serving references to a strike as a ULP strike when no credible evidence supports such a contention. *Filler Prods.*, 376 F.2d at 379 (holding self-serving statements warrant no finding of fact by the Board). Thus, in *Pirelli Cable*, the court rejected the import of self-serving statements when union officials told the members prior to their strike vote that the strike would be considered a ULP strike. *Pirelli Cable*, 141 F.3d at 518. The court noted it "must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context" when "examining the union's characterization of the purpose of the strike." *Id.* Self-serving statements are particularly suspect when union representatives fail to mention to the employer the concerns related to the purported ULP at any time prior to the strike. *Winn-Dixie*, 448 F.2d at 11. As such, when the "only evidence indicating that the strike was in protest of unfair labor practices" consists of self-serving statements, a court will hold the testimony to be incredible. *Id.* at 12.

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as permanent replacements whose employment would not end when and if the strike ended. *Tr*. at 612. As such, the replacements underwent training once hired and began actual concrete deliveries as soon as their skills allowed. *Tr*. at 62, 69, 74. Neither Counsel for General Counsel nor Local 716 has challenged whether SMI hired permanent replacements. Rather, the sole basis for which Counsel for General Counsel and Local 716 have claimed that the partial strikers are entitled to reinstatement is limited to the argument as to the nature of the strike as an unfair labor practice strike.

Here, the ALJ chiefly relied upon Local 716's self-serving statements in support of the ALJ's conclusion that the employees engaged in an ULP strike. Specifically, the ALJ placed great emphasis on the fact that Local 716 claims it called the May 2010 strike meeting to vote for a ULP strike; the Union's attorney explained the differences between a ULP and an economic strike; the union recommended to the employees that the strike be a ULP strike; the employees voted for a ULP strike; the August 3 letter and the employees' picket signs stated the employees were engage in a ULP strike; and the Union did not make any economic demands on the company during the strike. *Decision* at 16. But these facts are perfectly consistent with what would occur where, as in *Pirelli Cable*, a union makes a strategic decision to mask its economic strike as an unfair labor strike.

In *Pirelli Cable*, the union and employer were engaged in heated contract negotiations. During those negotiations, the employer sent a Q&A letter to the bargaining unit, in which it explained the consequences of engaging in an economic strike, namely, permanent replacement. The Union officials filed a ULP charge, claiming the Q&A letter was coercive. Then, the union officials called a strike meeting, during which they recommended the bargaining unit vote for a strike. The union officials carefully instructed the bargaining unit regarding the importance of labeling the strike an ULP strike to protect job security and that the ULP charge they had filed would shield the members from the consequences of an economic strike. The court reversed the Board for finding a causal connection between the ULP charge and the strike. According to the court, the Board failed to make the reasonable inference that the union made a strategic decision to file an ULP charge to shield the members from the consequences of an economic strike.

As in *Pirelli*, the evidence here indicates Cahill made a strategic decision to represent that the strike was for the alleged ULP related to Stevenson's discharge because it had the potential

of shielding union members from the consequences of an economic strike. Prior to its receipt of the August 3 letter, SMI received no communications in the last four years from Local 716 or the bargaining unit members related to pressing concerns about Stevenson's stale claims. Specifically, Cahill, at no time during his presidency, demanded the reinstatement of Stevenson. *Tr*. at 179-80. And, to Cahill's knowledge, no such demand had been made prior to Cahill becoming president. *Tr*. at 180. Indeed, until May 2010, Local 716 never called a meeting to discuss Stevenson's discharge or to going out on strike due to the discharge. *Tr*. at 170, 180, 193, 581.

Nevertheless, as the union officials in *Pirelli*, Cahill chose Stevenson's discharge as the shield with which he would attempt to protect his constituents' jobs by calling a strike under the auspices of an ULP charge. Importantly, it was Cahill's decision to call the strike and assemble for a strike vote meeting. *Tr*. at 228, 263. Despite Cahill's testimony that approximately "half a dozen" drivers called him, *Tr*. at 162, no driver testified that he called Cahill or raised any concern whatsoever with Cahill regarding the pending ULP cases. Moreover, Local 716's attorney testified that he was unaware of any employee calling in or otherwise calling a meeting to discuss the reinstatement of Stevenson. *Tr.* at 125. Indeed, according to Cahill, Bales, Eversole and Stevenson would have benefited from a resolution to the prior charges, but none of the three individuals testified at the hearing at all, let alone to indicate they were concerned with resolution of the prior ULP cases. *Tr.* at 162. Moreover, Bales, the union leader among the current drivers, played no part in the January 11-14, 2011 hearing, and Cahill testified that the strike had nothing to do with Bales' lack of remedy with respect to the prior ULP cases. *Tr.* at 163. Cahill also stated that SMI's decision to call off negotiations with Local 716 regarding settling the case involving Stevenson's discharge was the motivating factor in calling the strike

vote, *but* SMI had never considered the reinstatement of Stevenson to be a part of the negotiations. *Tr*. at 120-21, 193.

Similar to the union officials in *Pirelli*, Cahill and Local 716's attorneys opened the May 13 meeting by explaining they were calling the drivers out on an ULP strike. *Tr*. at 205. Cahill called it an ULP strike in order to protect the drivers' jobs, and Local 716's attorneys "stressed that we weren't on no economical strike." *Tr*. at 252. Cahill told the drivers that, if the strike was a strike to get a contract, the drivers' reinstatement rights would be affected, but that if the strike were labeled a ULP strike, the drivers could not be replaced. *Tr*. at 169-70, 265. Cahill stated as much because part of his job is to protect the drivers' jobs. *Tr*. at 170. Local 716's attorney carefully explained the differences between a ULP strike and an economic strike, particularly with respect to reinstatement rights.

As in *Pirelli*, 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 drivers simply followed Cahill's lead when Cahill told them they were going on strike. They did so because the only thing the drivers knew at the time was that five years had gone by without a contract, SMI was not negotiating, and a strike was the only way to get SMI back to the bargaining table.[23] Cahill, however, also told the drivers that they could not overtly claim that the strike was called in order to get a contract because their reinstatement rights would be adversely affected if they ended the strike without a

[23] There is no allegation in this case that SMI has refused to negotiate with Local 716. At the time of the strike, only a wage rate, dispatch procedure, and signing bonus separated the parties. *Tr*. at 88-89, 135, 238-39.

contract. *Tr*. at 169-70, 265. However, "[a] strategic decision by savvy Union officials does not lead to any inference regarding the motivation of the Union membership.[24]

Despite Cahill's attempt to provide a shield for the bargaining unit drivers, the drivers expressed their actual motivation during the meeting when they asked whether this move would help them get a contract with SMI. *Tr*. at 187, 251. For example, Mooney indicated that "we all talked about the contracts and stuff that we haven't been getting." *Tr*. at 206, 231-32. Mooney and the other drivers were frustrated that there was no contract after five years. *Tr*. at 232. Mooney continued, "We always talk about when they're going to start negotiating on contracts, will it ever get done, are they talking – you know – and that nature – you know – about vacations and pay raises and all that good stuff. *Tr*. at 207.[25]

The self-serving nature of Cahill's actions becomes crystal clear when his interactions with bargaining unit drivers are examined. As far as the drivers knew, SMI backed out on a contract that had already been ratified in 2009, SMI would not return Cahill's telephone calls attempting to set up negotiation sessions, and SMI failed to deliver a written proposal in the Spring of 2010, despite the fact that the bargaining unit drivers were gathered at the union hall and were set to ratify the proposal even without seeing it. *Tr*. at 185, 237, 239, 245-46, 266-69, 601. The drivers were plainly upset that, according to Cahill, SMI had failed repeatedly to

[24] The ALJ's reliance on *Dorsey Trailers*, 327 NLRB 835, 856 (1999) is misplaced. Unlike here, where the underlying alleged ULP occurred nearly four years before the strike, in *Dorsey Trailers*, the employer committed several ULPs just before the strike vote meeting and the strike itself. Therefore, the administrative law judge understandably concluded there was sufficient evidence that the bargaining unit in that case engaged in a ULP strike.

[25] Poindexter testified that he voted for the strike because he wanted to have Stevenson's back and he hoped that other drivers would do the same if Poindexter had been in that position. *Tr*. at 252-53. Poindexter admitted, however, that neither he nor Local 716 voted to strike when Stevenson lost his job over three years prior to the vote in February, 2007, when the ALJ decided the ULP charge involving Stephenson in December, 2007, or when the Board originally issued its decision affirming the ALJ's decision in March, 2009. *Tr*. at 263-64. Moreover, at the time of the strike vote, Poindexter was concerned about reaching a contract with SMI, the fact that he had not had a wage increase in a long, long time, and receiving additional benefits. *Tr*. at 264. In fact, Poindexter admitted he was interested in doing whatever it took to get SMI to agree to a contract with Local 716. *Tr*. at 265.

participate in negotiations. For example, Poindexter was upset that SMI failed to make a written contract offer in the Spring of 2010 when he understood from Local 716 that SMI had promised to do so only a short time earlier. *Tr*. at 270. Moreover, when SMI explained to the drivers in its May 19 meeting that it had been trying to negotiate without any cooperation from Local 716, Bales became upset because he had been told the opposite by Local 716. *Tr*. at 602-04. Cahill's misrepresentations to his own members expose his true intent: (1) incite anti-employer sentiment within Local 716's membership so the membership will vote to strike and (2) convince the membership that the strike is for Stevenson's discharge, so he could later claim the employees are entitled to reinstatement.

Further confirmation of the economic nature of the strike comes from the statements of strikers, themselves. On the day the strike started, Ipock made an unsolicited remark, expressly telling Davidson that the strike had nothing to do with Stevenson. Instead, the strike was called just to get contract negotiations re-started. *Tr*. at 586-88. Ipock denied making the statement, but his denial is incredible because he admitted he was not a good friend of Stevenson, that he was not concerned about Stevenson, and that he would have gone on strike much earlier if he had been concerned about Stevenson. Tr. at 738. Similarly, during the strike Poindexter told an SMI employee who had crossed the picket line that the employee was "messing with my livelihood." *Tr*. at 261.

The ALJ failed to find that either of these statements indicated the employees intended to engage in an economic strike. First, the ALJ found that Ipock did not make his statement to Davidson, concluding Davidson's testimony about the conversation not credible. The ALJ incorrectly reasoned that "it makes no sense that Ipock" would have told Davidson that the strike had nothing to do with Stevenson right after Ipock stated he was engaged in a protected ULP

strike. However, it makes perfect sense for a striker to regurgitate to SMI the boilerplate response Local 716 taught the members to state if confronted by management, but then, when given the opportunity to persuade the employer to engage in contract negotiations (the ultimate goal of the strike), to inform management that the strike could end if the company would enter into contract negotiations. Moreover, the ALJ's second reason for rejecting Davidson's version of the events, namely that Davidson's testimony was not credible, was also in error. The fact Davidson may have some inconsistencies in what and when he knew about the differences between ULP and economic strikes has little to do with whether he accurately testified about hearing Ipock's statement, which Davidson contemporaneously memorialized in written notes. Thus, the ALJ erred in not crediting Davidson's testimony that Ipock stated the strike had nothing to do with Stevenson's August, 2006 suspension and February, 2007 discharge.

The ALJ's swift dismissal of Poindexter's statement is equally troublesome. In making the statement to the SMI employee who had crossed the picket line, Poindexter was not simply referring to the general hardship faced by strikers. Rather, the evidence demonstrates Poindexter was concerned with the status of contract negotiations. Indeed, Poindexter was upset that SMI failed to make a written contract offer in the Spring of 2010 when he understood from Local 716 that SMI had promised to do so only a short time earlier. *Tr*. at 270.

Finally, the end of the strike exposes the economic nature of the strike. Local 716's August 11, 2010 offer to return to work was made because Local 716 had accomplished its goal of causing SMI to lose a major project. *R. Ex. 14; Tr.* at 213. If the strike had really been about remedying the discharge of Stevenson, it would not have ended without Stevenson's reinstatement, which did not occur. And, even then, Local 716 would not have admitted it accomplished its goal.

Because the only evidence indicating a causal connection between the partial work stoppage initiated on August 3, 2010, and Stevenson's discharge consists of self-serving statements, no weight should be given to this contention and, therefore, the case should be dismissed. *Winn-Dixie*, 448 F.2d at 11; *Filler Prods.*, 376 F.2d at 379.

2.

The Extreme Time Gap Between Stevenson's Discharge and the Strike Exposes the Strike's Economic Nature

The ALJ also incorrectly dismissed the importance of the time gap between Stevenson's discharge and the strike. Both the Board and courts widely recognize that a gap in time as little as two weeks between employer activity that allegedly violates the Act and the members' strike is evidence that a strike is economic in nature and negates the existence of a causal connection between the strike and a ULP. *Paramount Liquor Co.*, 307 NLRB at 682, 687, n. 19 (holding that a gap of two months between the commission of ULPs and the onset of a strike is evidence that the strike is economic in nature); *California Acrylic*, 150 F.3d at 1102 (emphasizing strike occurred two weeks after unlawful surveillance when finding court was not "bottomed in part upon unfair labor practices"); *Colonial Haven*, 542 F.2d at 705 (emphasizing strike occurred many days after the ULP was committed when finding substantial evidence did not support causal connection between strike and ULP). Thus, in support of its conclusion that the bargaining unit engaged in an economic strike, the *Pirelli Cable* court noted the two-week gap between the alleged ULP activity and the strike. *Pirelli Cable*, 141 F.3d at 519. The court firmly held that "no reasonable person could have concluded the membership of the union was motivated to vindicate" the employer's unlawful conduct. *Id.*

Here, the purported non-economic motivation for the partial work stoppage occurred in August of 2006 with Stevenson's suspension and eventual discharge in February of 2007. The

"strike" did not occur until nearly *four years later*, in August of 2010. Even then, the strike was called without prior notification to the bargaining unit workers, as bargaining unit workers came to work on August 3, 2010, intending to work. *R. Ex. 16.* And, prior to the initiation of the partial work stoppage, Local 716 had directed *no communications* to SMI seeking to remedy the suspension and discharge of Stevenson under threat of a strike. *Tr.* at 170, 179-80, 193, 581. Pursuant to well-settled law, the three to four-year gap between the commission of the alleged ULP and the onset of the "strike" provides clear and convincing evidence that no causal connection existed between the strike and any alleged ULPs.

The ALJ nevertheless credited Local 716's claim that the time gap can be explained by a March, 2010 court of appeals filing that, according to Local 716, signaled the end of negotiations to settle the prior ULP cases, including Stevenson's discharge. Local 716, however, has never even asserted those negotiations touched on Stevenson at all. Indeed, just the opposite is true, as Local 716 has not in the years since Stevenson's discharge demanded reinstatement. *Tr.* at 170, 179-80, 193, 581. What is more, Local 716 waited nearly two months after that brief was filed in order to even call a strike vote, and it waited another three months in order to initiate the strike. As shown above, these timeframes negate any claim that the strike was motivated by ULPs.[26]

Moreover, the ALJ erred by finding that the time gap between the parties' last negotiation session in August 2009 and the strike suggests the employees were not motivated by the Respondents' failure to agree to their contract demands is in error. The ALJ ignored credible evidence that the status of contract negotiations were at the forefront of the employees' concerns

[26] Although a few cases indicate a time gap is not dispositive, those cases typically involve ongoing conduct. *See R&H Coal Co.,* 309 NLRB 28 (1992) (holding that an employer's unlawful refusal to bargain was the motivation behind the strike, particularly considering that nothing in the record suggested an economic motive); *Burns Motor Freight, inc.*, 250 NLRB 276 (1980) (same). In the present case, there is no similar allegation of a continuing violation, yet there is ample evidence of an economic motivation.

when they voted to strike, including Cahill's representations that SMI backed out on a contract that had already been ratified in 2009, SMI would not return Cahill's telephone calls attempting to set up negotiation sessions, and SMI failed to deliver a written proposal in the Spring of 2010, despite the fact that the bargaining unit drivers were gathered at the union hall and were set to ratify the proposal even without seeing it. *Tr*. at 185, 237, 239, 245-46, 266-69, 601. Indeed, Cahill admitted that, in the Spring of 2010, the drivers were under the impression that SMI was supposed to get something to Local 716, but never did so. *Tr*. at 555-56. Moreover, several drivers voiced concern about the status of contract negotiations at the strike vote meeting and the May 19 meeting with Davidson. The drivers were plainly upset that, according to Cahill, SMI had failed repeatedly to participate in negotiations. For example, Poindexter was upset that SMI failed to make a written contract offer in the Spring of 2010 when he understood from Local 716 that SMI had promised to do so only a short time earlier. *Tr*. at 270.

In brushing off SMI's arguments, the ALJ simply indicated it was "equally as likely" that the strike was motivated by economic concerns as ULP concerns. *Decision* at 18. Given the fact that General Counsel bears the burden of proving the strike was motivated at least in part by ULPs, *Ryan Iron Works, Inc.*, 332 NLRB 506 (2000), the ALJ erred in holding that General Counsel met his burden.

The whole conduct of Local 716 and the strikers, including the failure to strike in response to the alleged ULP shortly after it occurred in an effort to remedy it, makes it clear that the strike occurred solely for economic reasons. The strike is therefore, at best, an economic strike and bore no causal connection to the alleged ULP that occurred several years prior. SMI therefore had no duty to reinstate strikers upon their unconditional offer to return to work and

may further refuse to reinstate those strikers due to their illegal partial strike activities. *Giddings & Lewis*, 675 F.2d at 931.

C.

Local 716 and Its Witnesses Lack Credibility

Questions of credibility exist on the part of Local 716 and associated individuals due to the failure to call key witnesses, the existence of inconsistent testimony, and the presence of self-serving statements. One of these issues alone could raise evidentiary concerns, but all three issues are present and signal that Local 716's claim regarding the nature of the strike lacks credibility.

1.

Self-Serving Testimony Provides Little Value

Local 716 has provided self-serving testimony in order to categorize the work stoppage as an ULP strike. The labeling of the strike as a ULP strike is clearly in the bargaining unit drivers' interest, thereby decreasing its probative value. The ALJ nevertheless ignored SMI's showing of credibility problems. As shown below, the ALJ erred in doing so.

When an individual testifies in his or her own interest, the Board gives the testimony less weight due to its self-serving nature. *Austal USA, LLC and Sheet Metal Workers Int'l Association Union, Local 441*, 356 NLRB No. 65, 2010 WL 5462282 at *57 (Dec. 30, 2010) (testimony that new rule had been established just before supervisor discharged employee was self-serving, as it created ability to absolve supervisor for improper discharge); *Contractor Serv., Inc.*, 351 NLRB 33 (2007) (describing testimony of an employee who claimed he was willing to travel as self-serving and unusable); *Sunrise Senior Living, Inc. and United Food & Commercial Workers Union Local 880, AFL-CIO and Rosie Howard*, 344 NLRB 1246, 1251 (2005)

(testimony by supervisor and other managers that meetings inquiring about union participation were voluntary was incredible and self-serving in face of employee testimony that employees were in fear of termination and considered meetings mandatory).

The Board has found that testimony presented in one's own interest can be questioned as self-serving. *See, e.g.*, *Electric Hose & Rubber Co.*, 267 NLRB 488 (1983) (finding an employee's testimony as to why he received discipline to be self-serving). Here, Local 716 president Cahill had the idea to go out on strike, he ordered preprinted ULP picket signs based on Stevenson's discharge, he called a strike vote, and he told employees he had to label it a ULP strike over the discharge of Stevenson because striking over a contract would not protect the drivers' jobs. *Tr*. at 169-70, 204-05, 220, 228-29, 263, 265.

Nothing regarding the origin of the strike came from the drivers, who at that time were only concerned with getting to the negotiating table and getting a contract with SMI. Rather, it was Cahill's idea and plan to strike in response to his members' inquiries about the contract, but to put the spin on the strike as a ULP strike in order to prevent SMI from hiring permanent replacements. The few drivers who testified simply had no choice but to repeat Stevenson's name at Cahill's bidding, despite the fact each admitted he was concerned about getting SMI to the bargaining table for a contract. Their testimony, however, does not prove the type of strike involved, but rather exists as an example of incredible, self-serving testimony designed simply to save their jobs. The Board has disregarded such testimony in previous decisions, and the same result should follow here.

2.

Testimony Should be Questioned When it Conflicts with Prior Written Accounts

The ALJ additionally ignored SMI's showing that the inconsistencies between Mooney's writings and his subsequent testimony raise credibility issues. The Board regularly questions testimony that conflicts with writings created prior to the labor proceedings at issue. *PPG Aerospace Industries, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO*, 353 NLRB No. 23, 2008 WL 4492576 at *3 (Sept. 30, 2008); *Al & John, Inc., d/b/a Glen Rock Ham and Noel Echavarria Gonzalez*, 352 NLRB 516, 521 (2008). Mooney's attempt to deflect his contemporaneous writings should be rejected here.

In *PPG*, the Board questioned the credibility of a witness' testimony regarding antiunion statements made by a supervisor. *PPG* at *3. The employee claimed the supervisor made such statements, but, in a written incident report created immediately after the confrontation, the employee made no mention of the statements, giving rise to a question of the employee's later testimony. *Id*. In *Al & John*, a supervisor testified that an employee was terminated due to the use of loud words and the act of walking out of a meeting. 352 NLRB at 521. However, in a written statement issued at the time of termination, the supervisor cited poor productivity as the reason for discharge, with no mention of the meeting confrontation. *Id*. The administrative law judge found that "the use of shifting reasons . . . inevitably casts doubt on the truthfulness of the asserted reasons." *Id*.

In the wake of the strike, Mooney wrote a letter to the IBT complaining to the union that he had been misled as to the wisdom of striking. Mooney was upset and expressed his disappointment with the guidance offered by his union leaders. *See R. Ex. 14-15*. Specifically,

Mooney's letter to the IBT showed that Cahill's purpose in calling the strike was to "put the pressure on Spurlino Materials to go to the negotiations table." *R. Ex. 14* at 2. Mooney went on, stating the strike ended because "we all agree we did all we could on hurting Spurlino with the jobs. Even though we still couldn't get Spurlino to the negotiation table." *Id.* at 3-4.

Mooney's writing, drafted in the weeks that followed the end of the strike, provides the motivation of the drivers for the strike – to get SMI to the bargaining table. At the hearing, however, Mooney wanted to distance himself from the writing's stated goal of getting SMI to the table. *Tr*. at 225-28. Indeed, he has an incentive to do so because the letter severely damages his ability to claim he should be reinstated immediately rather than be placed on a preferential hiring list. Mooney nevertheless admitted that going on strike and calling it a ULP strike was not his idea but was instead the idea of Cahill and Local 716's lawyers, that Mooney was concerned with vacations and pay raises, and that he hoped to get SMI back to the negotiations table. *Tr*. at 227-28.

As in *PPG* and *Al & John*, Mooney made a written statement in which one account was given, followed by testimony attempting to soften and explain away the prior statement. His attempts to minimize or clarify his written statement should be seen as incredible due to inconsistency and an effort to offer the court testimony more favorable to his cause.

3.

Failure to Call a Key Witness Damages Credibility

Finally, Local 716 has failed to call at least one key witness, raising suspicion as to why that witness was not involved in the proceedings. Local 716 described Bales as a union organizer and a lead employee negotiator. He informed the individual employees within Local 716 of both the commencement of the strike at issue and its eventual conclusion. Bales played

an extensive role in the organization of the strike and in providing information to the individual strikers. Yet, Bales was noticeably absent from the hearing, and the ALJ failed to address Bales failure to testify in the Decision. Therefore, the ALJ erred in not drawing an inference that Bales would have testified unfavorably to Local 716.

Failing to call a witness with knowledge of a labor situation has led ALJs and the Board to question the veracity of the provided testimony; if a party fails to provide the testimony of a witness with obvious knowledge, the conclusion is that the party is taking evasive action. *Austal USA*, 356 NLRB No. 65 at *57 (Dec. 30, 2010); *In re Roberts*, 333 NLRB 987, 1000 (2001); *DePalma Printing Co.*, 196 NLRB 656, 660, n.4 (1972). In *Austal*, one supervisor, O'Dell, claimed he was following the company's new policy of terminating employees immediately for sleeping on the job. *Austal* at *57. He stated that his supervisor, Perciavalle, had verbally informed him of the new policy just prior to the termination of an employee complaining of a ULP, but Perciavalle was never produced as a witness to verify this account. *Id*. The ALJ, affirmed by the Board, found O'Dell's testimony incredible and a "pretextual creation" due to the failure to produce Perciavalle, a key witness who clearly could have corroborated O'Dell's testimony but was quizzically not called to do so.

Similarly in *Roberts*, an individual, Martin, testified to a lack of knowledge of a questionnaire. *Roberts*, 333 NLRB at 1000. He was, however, alternately labeled on the questionnaire as the individual with the most knowledge of the information contained within it. *Id*. The two individuals involved in labeling him as such were not called to testify, and the ALJ found that this permitted him to draw an adverse inference that neither witness would support Martin's claim. *Id*. Furthermore, the Board found in *DePalma* that a failure to support the reasons for an employee's discharge by calling the immediate supervisors who had the best

knowledge of the quality of the employee's work cast doubt on the veracity of the reasons actually provided by the employer. *DePalma,* 196 NLRB at 660, n.4.

Bales could have provided valuable information as to the content of his conversations with the bargaining unit drivers, the details surrounding the strike vote, whether he notified drivers of the strike vote in advance, and his motivation for going on strike. Bales could have also explained the disconnect between Cahill's statement that the strike was to protest Stevenson's discharge without regard to Bales even though Bales was also deemed by the Board to have been the victim of ULPs. Finally, Bales could have explained why he became upset when he learned after the strike vote meeting SMI had been attempting to negotiate with Local 716, contrary to what he had been told by Cahill. His absence raises questions because, like in *Austal*, *Roberts*, and *DePalma*, he was directly involved, but has not been called. His absence should raise an adverse inference or, at the least, should cast doubt on the veracity of the information provided by Local 716 in Bales' absence.

D.

No Single Employer Relationship Exists in This Case

The ALJ concluded that SMI and SM are a single, integrated employer. As more fully shown below, the ALJ erred when he made this decision.

1.

The ALJ Improperly Applied a "Reverse" Single Employer Analysis

Typical single employer cases involve a "double breasted" entity – one in which a union company forms a new, non-union company in order to provide the same services to the same customers without the presence of the union. A sampling of other cases applying the single employer analysis involve specific instances of either overt acts on the part of one of the entities

in question or a jurisdictional issue. Because no such overt act or jurisdictional question is at issue in this case, the single employer allegation should be dismissed.

A single employer analysis has been applied for purposes of determining whether an entity was an employer or a political subdivision for purposes of jurisdiction under the Act (*Research Foundation of the City University of New York*, 337 NLRB 965 (2002)); for purposes of determining whether an entity participated in discrimination in laying off union employees when work was shifted from a union company to the non-union company (*Burgess Const.*, 227 NLRB 765 (1997)); for purposes of determining which entity was the appropriate employer for purposes of the Board determining whether it could assume jurisdiction over an entity (*Radio and Television Broadcast Technicians Local Union 1764 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965)); for purposes of the Board's attempts to apply the terms of a collective bargaining agreement to a related entity that otherwise would not be subject to the collective bargaining agreement (*Mercy Hospital of Buffalo*, 336 NLRB 1282 (2001) (*infra*)); or otherwise for purposes of determining whether an entity failed to bargain in good faith over the effects of a decision to close a subsidiary's facility (*Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 20-21 (1st Cir. 1983)).

In the current situation, no precipitating event like those described above is present. SM has not made any overt act which should subject it to a single employer analysis. Indeed, if a similar analysis applied to this situation at all, it would be analogous to a "reverse alter-ego doctrine" analysis because SM, a non-union company, existed well before SMI was established in 2005. The General Counsel's theory of liability does not fit, and therefore SM should have been dismissed as a respondent.

In *Southern California Painters & Allied Trade District Council No. 36 v. Rodin & Co. Inc.*, the court held that in situations like the present one where a non-union company first exists and then a union company is subsequently created – a so-called reverse alter-ego doctrine situation – the alter-ego employer doctrine does not apply. 558 F.3d 1028, 1033 (9th Cir. 2009). Specifically, the court held that 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 court went on to say, "We decline to recognize a 'reverse' alter ego doctrine. The alter ego doctrine was never intended to coerce a non-union company into becoming a union company by requiring its compliance with a collective bargaining agreement it never signed, with a union its employees never authorized to represent them." *Id.*

Based on the lack of a jurisdictional issue or an overt act on the part of SM, and based also on the court's holding in *Southern California Painters*, the ALJ erred by not dismissing SM from the case because SMI, the acknowledged employer of the involved drivers and the entity against which Local 716 filed the Charge, is the proper respondent, and neither SMI nor SM was formed for the purpose of avoiding collective bargaining obligations.

2.

SMI and SM are Distinct Enterprises

Even if the single employer doctrine applied in this case, no single employer finding is possible because SMI and SM are entirely separate in all material respects. Indeed, the Board recognized SMI as the employer in its Certification of Representative, and Local 716 filed the Charge against SMI. *Joint Ex. 1; GC Ex. 1(a).* The drivers, themselves, understand SMI is the

correct entity. *Tr*. at 259, 727. The Amended Complaint, as it relates to SM, should therefore be dismissed.

In determining whether entities constitute a single employer under the Act, four factors are applied: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *Research Found. of City Univ. of New York* ("CUNY"), 337 NLRB 965, 970 (2002) (citation omitted). No single factor is deemed controlling, and all four factors need not be present to find single employer status. *Id.* The factors of common control over labor relations, common management and interrelation of operations are "more critical" than the factor of common ownership or financial control. *Centr. Penn. Reg. Council of Carpenters*, 337 NLRB 1030, 1036 (2002). Indeed, the Board has clearly stated that "the most critical factor is centralized control over labor relations." *Research Found. of CUNY*, 337 NLRB at 970. Further, common ownership alone does not establish a single-employer relationship. *Id*. Rather, "single-employer status is marked by the absence of an arm's-length relationship between two or more unintegrated entities." *Centr. Penn. Reg. Council of Carpenters*, 337 NLRB at 1036.

In applying this four factor test, the Board in *Research Found. of CUNY* reversed the Regional Director's determination that the Employer and CUNY were a single employer for purposes of the Act. 337 NLRB at 970-71. In reversing the decision, the Board found that none of the four factors as discussed above was present between the Employer's and CUNY's relationship. Specifically, the Board found no common ownership when neither entity was "owned" by any shareholders and the Employer was created by private individuals and not by CUNY, a public university. *Id*. at 970. The Board likewise did not find common management between the two entities, despite the fact that the Employer's board of directors included several

CUNY-affiliated individuals. Notably, none of the Employer's board of directors included any of CUNY's board of trustees.

Most importantly, the Board determined that the labor relations policies and practices were independently administered by its director of human resources and CUNY had no involvement, as no one at CUNY's management was responsible for the Employer's labor relations decisions, including hiring, firing, discipline, or assignment and direction. *Id.* at 971. Finally, the Board found that the two entities' daily operations were not substantially integrated because they had separate computer and payroll operations, different benefit plans and workers' compensation plans, filed separate tax returns and did not interchange any employees between the two entities. *Id.*

Similarly, in *Centr. Penn. Reg. Council of Carpenters*, the administrative law judge ("ALJ") found that a single employer relationship did not exist based on the absence of evidence on the record.[27] 337 NLRB at 1036. The ALJ noted that there was no evidence that either entity controlled the labor relations of another entity. By way of example, the ALJ specifically indicated that it might expect to find evidence that the workers of each entity worked interchangeably or that there were management personnel common to the entities that could affect the other entity's labor relations. The only evidence present in the record – that a certain individual was the "boss of all entities" and he used another individual as his secretary" – was not enough to establish the control required to show a single employer relationship. *Id.*

As demonstrated below, the ALJ incorrectly applied the four-factor test when he concluded SMI and SM are a single, integrated employer. To the contrary, the correct

[27] The Board ultimately determined that the issue of whether a single employer relationship existed was not necessary, and therefore it neither affirmed nor rejected the ALJ's finding on the single employer issue.

application of four-factor test as in the Board cases above renders but one conclusion: SMI and SM are distinct entities and are therefore not a single employer for purposes of the Act.

a. Interrelation of operations between the entities. The ALJ incorrectly concluded that this factor favored finding SM and SMI are a single, integrated employer. Simply put, the ALJ failed to recognize that the relationship between SMI and SM is fundamentally that of debtor-creditor. *Tr*. at 653-54. Otherwise, there is no relationship between the entities, as they maintain separate addresses, phone numbers, fax numbers, receptionists, tax identification numbers, tax return filings, insurance policies, licensing, financial statements, bank accounts, payroll accounts, unemployment accounts, and benefits for employees, including 401(k) accounts. *Tr*. at 656-660. The two entities also provide their services in completely separate and distinct markets, and SM does not subcontract any of its work to SMI. *Tr*. at 655.

The ALJ's suggestion that SM and SMI's dealings with each other are not at arms-length is without merit. Although, SMI will occasionally rent equipment and drivers from SM, it also rents equipment and drivers from companies other than SM. *Tr*. at 432-36, 651. SM has never guaranteed any debts for SMI, and the two entities have never shared the same lines of credit. *Tr*. at 652-53. Although SMI would sometimes use SM employees to perform work for SMI, the ALJ failed to credit the testimony of Spurlino that SM typically charged other companies, including SMI, the employee's regular wage plus a 30 percent premium to cover the cost of the employee's benefits and SM's overhead and profit. *Tr*. at 411, 436, 441-42, 673-74. Further, the two entities have their own sales staff and operate in different geographic markets, and they purchase their raw material from different vendors. *Tr*. at 645-46, 647, 649. SMI creates monthly profit and loss statements whereas SM only does so on an annual basis. *Tr*. at 677-78.

b. Common ownership. The only common owner between SM and SMI is Spurlino. *Tr*. at 644. Otherwise, there are no common owners between the two entities. *Id.* Neither entity has a board of directors. *Tr.* at 645. Further, as detailed above, common ownership alone is insufficient to establish a single-employer relationship. *Mercy Hospital, supra.* Indeed, in *Mercy Hospital*, the Board reversed the ALJ's finding of single employer status, despite the fact that the respondent in that case owned 50% of Southtowns Catholic MRI, Inc., a satellite facility and related entity of Mercy Hospital. The Board did so based, in part, on the outcome in *Western Union Corp.*, 224 NLRB 274, 276 (1976).

In *Western Union*, the only one of the four single-employer status factors present was common ownership. *Id.* The ALJ concluded that Western Union exercised management control based on the common ownership facts. Two "top officials" of Western Union also served as "chairman of the boards of the four new subsidiaries," and further that the "new subsidiaries' respective boards of directors are elected by Western Union directors." *Id.* The Board, however, did not focus only on the common ownership and instead focused on the actual day-to-day control of the subsidiaries. Specifically, in addition to the fact that each subsidiary had its own board of directors and corporate officers, the "day-to-day management responsibilities and decisions are handled at a level far below the two [Western Union] officials serving as the subsidiaries' board chairmen." *Id. See Also Cimato Bros., Inc.*, 352 NLRB 797 (2008) (finding that common ownership is insufficient to establish single employer status).

Just as the Board did not find single employer status in *Western Union* with only the common ownership factor being present, such should be the case here. Although Spurlino has an ownership interest in both SM and SMI, Spurlino does not handle the day-to-day management responsibilities and decisions at SMI. Rather, the record is clear that Davidson is responsible for

management for SMI, including decisions involving drivers' hours and human resource duties, and Reiker and Roell handle these duties for SM. *Tr*. at 645, 668, 670. Moreover, Spurlino specifically testified that there are no common managers of daily business operations between the two companies. *Tr*. at 645, 646. Likewise, neither company provides any daily direction to the other company's employees, and neither company has control over the hiring, firing, supervision or discipline over the other company. *Tr*. at 680.

In short, the Board has stressed that common ownership "is not determinative" without a showing of common control of management and labor relations policies. Here, the independent nature of management and labor relations militates toward dismissal of the single employer allegation.

c. Common management. The ALJ's finding that Spurlino is intimately involved in the management of both SM and SMI and that therefore SM and SMI have common management is, just like in *Western Union*, incorrect and not supported by substantial evidence. The focus on the common management determination is the day-to-day control of operations. *Climato Bros.*, 352 NLRB at 798**.** Here the ALJ ignored the evidence of day-to-day management and instead focused only on Spurlino, who is *not* involved in the day-to-day control of either company. *Tr.* at 643-45. In fact, there are no common managers of daily business operations between the two entities. *Tr.* at 645. For example, Spurlino testified that those managers who work for SMI do not also work for SM. *Tr.* at 645. Further, there is no common supervision of daily operations between the two entities. *Tr*. at 646.

Davidson has management responsibilities only over SMI and not SM. *Tr*. at 80. Davidson is in charge of all plant facility maintenance, truck maintenance, raw material orders, managing employees, and some administrative duties. Tr. at 567. Davidson is also in charge of

hiring, disciplining, and otherwise managing employees. Tr. at 568. Moreover, Gaskin has supervisory responsibilities only over SMI, he came to SMI from SMI's predecessor, and he has never worked for SM. *Tr*. at 79-80.

Because the two entities are managed separately and distinctly, it is no surprise that the way the employees are dispatched differs completely, *Tr*. at 665-66, the drivers hours are scheduled by different individuals, *Tr.* at 670, the raw materials are purchased from different vendors, *Tr*. at 649, and the job duties that drivers are responsible for completing differ greatly between the two entities, *Tr*. at 671-72. Further, SM and SMI do not compete with each other, and the companies operate in completely different geographic territories. *Tr.* at 463. Finally, the managers who are instrumental in SM's operations had no involvement in the negotiations of SMI and Local 716. *Tr*. at 669.

d. Control of labor relations. Finally, in the same way, the ALJ erred when the ALJ concluded that Spurlino had centralized control of SM's and SMI's labor relations. The Board has continued to reject the notion that common ownership is indicative of centralized control of labor relations. *See Climato Bros.*, 352 NLRB at 797; *Western Union*, 224 NLRB at 276. Importantly, the labor relations of SM and SMI are entirely distinct and separate. Davidson has been the representative for SMI in collective bargaining agreement negotiations, no SM representative has ever participated in negotiations, and Davidson participated in some negotiations even without the assistance of counsel. *Tr*. at 569, 579-80, 613. SM and SMI each have their own human resources teams: Reiker and Roell comprise the human resources personnel for SM and Davidson is responsible for human resources functions for SMI. *Tr.* at 668. Much like the human resources personnel in *Research Foundation of City University of New York*, these individuals are independently responsible for the hiring, firing and scheduling of

each separate entity. *Tr.* at 79-80, 670. Neither entity has an ability to control hiring, firing, supervision or discipline of the other entity's employees. *Tr.* at 680. Such facts in *Research Foundation of City University of New York* were the basis for the Board determining that there was no control over labor relations among the entities, and such is the case here. The fact Spurlino may be involved in some high-level decision-making does not negate the fact that Davidson is the one who is control of SMI's labor relations. In short, SM and SMI cannot be treated as a single employer because no day-to-day direction is provided by one company to the other company's employees. *Tr.* at 680.

V.

CONCLUSION

Based on the above, 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 April 12, 2011 and served the same day upon the following:

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