UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPURLINO MATERIALS, LLC or in the alternative
SPURLINO MATERIALS OF INDIANAPOLIS, LLC
or in the alternative, BOTH AS A SINGLE
INTEGRATED EMPLOYER,

Respondent,

Case 25-CA-31565

and

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.

CHARGING PARTY'S RESPONSE IN OPPOSITION TO
EXCEPTIONS OF RESPONDENT

I. INTRODUCTION

The Charging Party, Coal, Ice, Building Materials, Supply Drivers, Riggers, Heavy Haulers, Warehousemen, and Helpers, Local Union No. 716 a/w the International Brotherhood of Teamsters ("the Union" or "Local 716") filed this unfair labor practice charge on August 13, 2010 (GC 1(a)). The Charge protested the failure of the Employer, Spurlino Materials, to reinstate bargaining unit members who made an unconditional offer to return to work on August 12, 2010 following an unfair labor practice strike (*Id.*). The General Counsel issued a Complaint on November 5, 2010 and subsequently filed an Amended Complaint on January 5, 2011 (GC Ex. 1(c) & 1(q)). Both Complaints allege that the Employer violated Section 8(a)(1) and (3) of

the Act by refusing to reinstate the unfair labor practice strikers to their former positions of employment.

On March 15, 2011, Judge Wedekind issued his decision and order, finding that Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC are a single employer (referred to hereinafter as "Spurlino")[1] and that Spurlino violated Sections 8(a)(1) and (3) by refusing to reinstate twelve (12) employees who had engaged in an unfair labor practice strike. Judge Wedekind's decision is correct. Local 716 respectfully requests that the Board adopt his decision and order in its entirety, and that it deny Spurlino's exceptions. Spurlino's exceptions are without merit for several reasons.

1. The employees did not engage in a partial strike. It is undisputed that from the time the strike began on August 3 through the Union's unconditional offer to return to work effective August 12, no striking employee performed any work for Spurlino. Local 716 did offer to make the drivers available to perform work on the Convention Center project because Spurlino and the Union were signatory to a project labor agreement (PLA) containing a no-strike clause only for that job site. Despite the Union's offer, Spurlino never called the striking drivers to work for that project. The ALJ correctly concluded that the partial strike doctrine was inapplicable here because the employees were not attempting "'to set their own terms and conditions of employment in defiance of their employer's authority by engaging in a partial strike." (Decision at 24). Rather, the employees acted to avoid engaging in an illegal strike contrary to the limited no-strike clause in the PLA, they clearly notified Spurlino that they were

[1] Local 716 agrees with the ALJ's finding and conclusion of single-employer status, but does not separately address Spurlino's exceptions on this point. Local 716 supports the position taken by the General Counsel below and believes the ALJ correctly decided this issue.

on strike, and did not impede Spurlino's operations in any way.

2. The employees engaged in an unfair labor practice strike. The ALJ credited the testimony of employee witnesses Mooney and Poindexter that they were motivated to strike by the unremedied unfair labor practice involving the discharge of Union supporter Gary Stevenson. (Decision at 16-18). Spurlino has not shown that these credibility findings should be rejected. Furthermore, the ALJ found that all other evidence revealed that the employees and Local 716 were engaged in an unfair labor practice strike relating to Stevenson, including that the bargaining unit employees unanimously voted to engage in a ULP strike, that the employees were informed at a pre-strike meeting of the differences between an economic and unfair labor practice strike, that Local 716's strike letter informed of a ULP strike, that the employees' picket signs referred to being on a ULP strike protesting Stevenson's discharge, and that the Union never made economic demands on Spurlino during the strike. (Decision at 16).

3. The passage of time between the illegal discharge of Stevenson and the ULP strike does not control. The last bargaining session between the Union and Spurlino prior to August 2010 ULP strike was almost a year earlier, in August 2009. The most recent event in the relationship was the late March/early April of 2010 breakdown of negotiations between the parties at the Seventh Circuit involving the unremedied Board decision relating to the discharge of Stevenson and other unfair labor practices. It was the breakdown of these discussions that led to the employee strike meeting in May of 2010 and the unfair labor practice strike.

II. STATEMENT OF FACTS

Following a NLRB election, Local 716 was certified as the exclusive bargaining representative of the full and regular part-time drivers and plant operators/batch men of Spurlino

on January 23, 2006 (Joint Ex. 1). Over the past five years, Spurlino and Local 716 have been unsuccessfully engaged in bargaining for their first labor agreement (Tr. 88). The last formal bargaining session between the parties was in August 2009 (Tr. 87-88). Since February 2006, the Company and Local 716 have been party to a Project Labor Agreement covering work on the Lucas Oil and Indiana Convention Center Project (Joint Ex. 2 & 3). The PLA contained a no-strike clause prohibiting strikes and picketing involving the Stadium/Convention Center project site (Joint Ex. 2 at 26).

Spurlino has committed numerous unfair labor practices in an effort to undermine the Union's support within the bargaining unit. See Spurlino Materials, LLC, 355 NLRB No. 77 (August 9, 2010). While the unfair labor practices were pending before the Board, the Regional Director obtained Section 10(j) relief regarding some of these unfair labor practices. See Lineback v. Spurlino Materials, LLC, 546 F.3d 491 (7th Cir. 2008). This prior injunction ceased to be in effect after the Board issued its Decision and Order on the underlying unfair labor practice charges.

In its Decision and Order, the Board found that Spurlino had illegally terminated a Union activist, Gary Stevenson, in February 2007.[2] The Board ordered that Spurlino reinstate Gary Stevenson with full back pay and other benefits. Spurlino refused to comply with the Board's Decision. Indeed, the Company never offered reinstatement to Gary Stevenson (Tr. 193). The Board subsequently filed a Petition to Enforce the NLRB Decision with the United States Court

[2] The Board initially issued a decision in this case on March 31, 2009. The case was remanded to the Board following the Supreme Court's decision in New Process Steel, L.P. v. NLRB, ___U.S.___, 130 S. Ct. 2635 (2010). The Board re-adopted its initial decision on August 9, 2010. Spurlino Materials, LLC, 355 NLRB No. 77 (2010).

of Appeals for the Seventh Circuit. Since Stevenson was not encompassed in the prior Section 10(j) relief, he has not been permitted to work at Spurlino Materials following his unlawful discharge.

The Seventh Circuit initially referred this matter to mediation under the auspices of Court staff. The Seventh Circuit mediation discussions ended in late March or early April 2010 without a negotiated resolution of the case (Tr. 92). The Company has not taken any steps to remedy the unfair labor practices in the Board Order. Consequently, Gary Stevenson has never been allowed to resume his prior employment.

On May 13, 2010, Local 716 held a meeting of Spurlino employees at the Union hall. Union president James Cahill began the meeting by thanking the approximately thirteen Spurlino employees for attending (Tr. 98). Union attorney Neil E. Gath then briefly spoke to the members (*Id*.) The next speaker was another Local 716 attorney, Geoffrey S. Lohman. Mr. Lohman spoke at length regarding the failed status of settlement discussions in the Seventh Circuit mediation process in regards to the unfair labor practices (Tr. 91). He explained that the NLRB unfair labor practice case would now be briefed on its merits before the Court of Appeals with a significant delay in any decision (Tr. 100). Mr. Lohman also discussed possible courses of action available to the bargaining unit members including a possible strike (*Id*.) Mr. Lohman described the differences between an unfair labor practice strike and an economic strike (Tr. 100-01). He explained that the purpose of an unfair labor practice strike was to remedy existing unfair labor practices while an economic strike sought financial concessions from an employer. Mr. Lohman noted that the National Labor Relations Act allowed an employer to permanently replace economic strikers, but that unfair labor practice strikers were entitled to their former positions

after unconditionally ending the job action (Tr. 101).

Spurlino employees posed numerous questions at the meeting (Tr. 101-02). Members were concerned regarding the status of negotiations, the Company's failure to comply with the Board's Order and its general refusal to follow applicable rules (*Id*.) Union President James Cahill, Business Agent Steve Jones, and Lohman sought to answer these questions (Tr. 102).

Following this discussion, Cahill asked the Spurlino employees what future course of action they wanted to pursue. The Spurlino employees decided to vote on whether to go on an unfair labor practice strike against Spurlino Materials (Tr. 102). A secret ballot vote was taken which indicated that the bargaining unit members unanimously decided to go on the unfair labor practice strike (*Id*.) Cahill concluded the meeting by telling the assembled members that a decision would be made in the future as to when they would commence this unfair labor practice strike (*Id*.).

The Company quickly learned that the bargaining unit employees had met to discuss a strike. Within six days of the Union meeting, on May 19, 2010, Jeff Davidson and George Gaskin held a meeting with Spurlino Materials employees (Tr. 598-99). The Company required employees to attend this meeting (Tr. 599). Jeff Davidson conducted the meeting. He read a memorandum entitled "strike information" to the assembled employees. This memorandum stated that Local 716 and the Company last met in August 2009 and discussed the Company's right to permanently replace economic strikers (Tr. 599-600; Respondent Ex. 10). Davidson later distributed a second memorandum to the employees on May 23, 2010 which discussed negotiations and a possible strike (Respondent Ex. 11).

The Union delayed its decision to commence the unfair labor practice strike a number of months due to rainy weather and lack of significant work by Spurlino (Tr. 152). In a letter which was hand-delivered on August 3, 2010, the Union informed the Company that the employees would be engaging in an unfair labor practice strike starting at 12:00 a.m. on that day (Joint Ex. 5). The Cahill letter further stated that the employees would be on strike until Spurlino Materials "remedies the unfair labor practice it committed in discharging Gary Stevenson" (*Id*.).

On that morning, Cahill brought this letter to the Spurlino facility on Kentucky Avenue and gave it to the Union Steward Matt Bales (Tr. 153). Mr. Bales and two other bargaining unit members, Terry Mooney and Samuel Southerland, delivered this letter to Operations Supervisor, George Gaskin (Tr. 210-11). The Operations Manager, Jeff Davidson, arrived at the facility shortly thereafter (Tr. 211). The employees told Spurlino officials that they would honor the no-strike clause in the Project Labor Agreement by accepting assignments to the Stadium/Convention Center project (210-12). Jeff Davidson told the Spurlino employees that they were engaged in an economic strike, and if they were unwilling to work, that they should leave the property (Tr. 734-35).

The Spurlino employees then began informing the public of their unfair labor practice strike through picketing at the Company. All of the picket signs read as follows:

Teamsters
Employees of Spurlino Materials
of Indianapolis, LLP
on
Unfair Labor Practice Strike
for the Illegal Termination of Gary Stevenson
Local 716

(GC Ex. 4).

Approximately a week later, on August 11, 2010, Cahill hand delivered another letter to the Company announcing that the Union and its members were prepared to end their unfair labor practice strike (Joint Ex. 6). This Local 716 letter made an unconditional offer for all employees to return to work at Spurlino on August 12, 2010 (*Id*.). On that same day, Company attorney James Hanson responded to Mr. Cahill on behalf of Spurlino Materials (Joint Ex. 7). Hanson stated that Spurlino viewed the strike "to have been either an illegal partial strike unprotected by the National Labor Relations Act or, at best, an economic strike" (*Id*.). Hanson concluded by indicating that no jobs were available for the strikers and that they would be offered reinstatement on basis of seniority when vacancies occur (*Id*.).

All three bargaining unit employees who testified at the hearing refuted the Company's contention that the workers had been on an economic strike. Terry Mooney stated that the first goal of the job action was "to get Gary Stevenson his job back" (Tr. 205). Blackston Poindexter explained that the strike vote was about "sticking together", and if he had been in Gary Stevenson's situation, "I would hope that the drivers would have my back" (Tr. 252-53). Jeffery Ipock unequivocally stated that "the union went on an unfair labor practice strike" (Tr. 728). On that day, Mr. Ipock told Operations Manager Jeff Davidson that "if you just put Gary Stevenson back to work, this would be all over" (Tr. 730). Jeff Ipock explained that he did not have any concerns over deciding to strike on behalf of Gary Stevenson (Tr. 739). He stated "I would have hoped that if I was in his position, the guys would have done the same thing for me. I had no qualms about going on strike for that reason" (*Id*.).

Spurlino never offered work to any of the twelve (12) employees who were on the unfair labor practice strike as of August 11, 2010 (Tr. 70).[3]

III. ARGUMENT

A. The employees did not engage in an illegal partial strike.

The ALJ correctly concluded that the striking employees did not engage in an unlawful partial strike as a result of the Union's offer to permit employees to work on the Stadium/Convention Center Project during the term of the strike. (Decision at 23-25). Spurlino's argument as to a partial strike has always been sophistry, in which Spurlino seeks entirely to deny its employees their elemental right to strike pursuant to Sections 7 and 13 of the Act. Spurlino's argument is that even though the Union and Spurlino entered into a project labor agreement containing a no-strike clause applicable only to a single job site, Local 716 waived the right to strike for every job, under the theory that honoring the PLA necessarily made a strike as to other projects a partial strike. Spurlino's argument is contrary to clear, long-established precedent.

Compelling language is necessary to imply a waiver of the right to engage in an unfair labor practice strike. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 284 (1956). When interpreting a no-strike clause, the U.S. Supreme Court has held that it will not infer the waiver of a statutory right absent explicit language to that effect. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). The Supreme Court states that such a "waiver must be clear and

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[3] As a result of the ALJ decision, Spurlino offered to reinstate the striking employees, and 11 of 12 have returned to their employment. Spurlino and Region 25 entered into a consent agreement in the Section 10(j) proceedings providing for their reinstatement. Lineback v. Spurlino Materials, 1:10-cv-01647-WTL-MJD (April 25, 2011) (Dkt. Entry 39).

unmistakable." Id. Any such waiver must be "explicitly stated" in the collective bargaining agreement. Equitable Gas Co., 303 NLRB 925, 929 (1991). The narrow no-strike clause in the PLA, which is limited only to the Stadium/Convention Center project site, does not represent such a broad waiver of the rights of the Union and the employees (Joint Ex. 2 at 26).

Moreover, Local 716's offering to continue to provide workers for the PLA project, in accordance with the limited no-strike clause, was not a "partial strike" under Board precedent. Board decisions hold that a partial strike is a concerted effort by employees, while remaining at work, to bring economic pressure on their employer, as by refusing to work overtime, engaging in a slowdown or accepting some tasks and refusing to perform others. Coastal Insulation Corp., 354 NLRB No. 70, n. 82 (2009). The point of the partial strike doctrine is to prohibit employees from engaging in activity where they "continue working on their own terms," rather than on the terms of the employer. Care Center of Kansas City d/b/a Swope Ridge Geriatric Center, 350 NLRB No. 9, 66 (2007). In other words, the partial strike doctrine developed as a response to the need to prohibit employees from unilaterally determining their conditions of employment. Chep USA, 345 NLRB No. 50 (2005); St. Barnabas Hosp., 334 NLRB No. 125 (2001) (the vice of a partial strike is that the Union seeks to bring about a condition that is neither strike nor work, and that in effect, the Union is attempting to dictate the terms and conditions of employment); Central Illinois Public Service Co., 326 NLRB No. 80 (1998) (same).

A partial strike is one that involves employees "performing only part of their job functions while accepting their pay and avoiding the risks and disadvantages of a complete strike action." Luce & Son, Inc., 32-CA-21415 (Div. Judges, Jan. 28, 2005) (citing Vic Koenig Chevrolet, 263 NLRB 646, 650 (1982)). Partial strikes occur where the employees refuse to

perform a portion of their duties, while performing others and continuing to accept the benefits of employment. See, e.g., KNTV, Inc., 319 NLRB No. 66 (1995); Highlands Medical Center, 278 NLRB No. 160 (1986).

The cases Spurlino cites in support of its argument all involve circumstances in which the employees actually remained at work and performed a portion of their duties while refusing others, thereby disrupting the employer's operations while the employees continued to obtain their wages and benefits from employment. See, e.g., Audobon Health Care Center, 268 NLRB No. 14 (1983) (nurses worked in some sections but refused to work in others). That simply did not occur here. The Spurlino employees did not remain at work, but instead only made themselves available to work on the Convention Center project so as to not run afoul of the PLA.[4]

The employees engaged in a complete work stoppage. It is undisputed that the unfair labor practice strikers never performed work for Spurlino since the strike began, including on the Convention Center Project. They made themselves available to work, as they were required to do, and Spurlino never put them to work. Spurlino told the employees not to report to work and they complied. Thus, there is nothing to support the allegation of a partial strike. The unfair labor practice strikers never performed partial work.

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[4] Contrary to Spurlino's argument, the Union's filing of a grievance over the Company's refusal to use the bargaining unit drivers for PLA work has no bearing. (GC 5). Local 716 filed the grievance to confirm its willingness to make workers available for Convention Center work in compliance with the no-strike clause in the PLA. After an initial meeting between legal counsel, the Union has done nothing to further process the grievance (Tr. 106). The Union's filing of the grievance was in no way inconsistent with the partial strike doctrine. The bargaining unit employees have not engaged in any slowdown and have not attempted to dictate the terms of their work to Spurlino. Indeed, Spurlino has never paid the unfair labor strikers for any work performed during the term of the strike.

Indeed, as the ALJ observed, had the Spurlino employees not reported to work, Spurlino would have undoubtedly contended that the employees had engaged in an illegal strike contrary to the no-strike clause. (Decision at 24). Thus, Spurlino's sophistry. Spurlino does not seek to vindicate the partial strike doctrine; rather, it seeks only advantage vis-a-vis its relation with the employees and the Union that represents them.

Spurlino further complains that it could not have possibly assigned work on the Convention Center Project to the striking employees had it honored the PLA. (Spurlino Brief at 20). This particular argument is pointless given that Spurlino made no effort to honor the PLA. The fact remains that the employees offered to make themselves available to work the Convention Center Project, which they were required to do, and Spurlino chose not to use their labor. Its reasons for so choosing are irrelevant; the employees and Local 716 complied with their obligations under the PLA simply by offering to work.

Spurlino also suggests that the Union could have orchestrated its strike in a manner that avoided a strike when there were Convention Center runs. (Spurlino Brief at 22, n.20). Of course, as Spurlino repeatedly emphasizes, it and its customers control the timing and location of runs, not the Union. The Union had no way of knowing when such runs might occur. Furthermore, Spurlino and Local 716 have been parties to this particular PLA since early 2006. (Jt. Ex. 2 and 3); Spurlino Materials, LLC, 355 NLRB No. 77 (August 9, 2010) (Spurlino attempting to use the same PLA as a defense to the ULP charges involved in the earlier Board decision that included Stevenson's discharge). Under Spurlino's view of the partial strike doctrine, Local 716 has been barred from engaging in any form of strike for over 4 years, since shortly after this bargaining unit was organized, because of the inclusion of that single job-site

specific no-strike clause. Perhaps nothing more clearly underscores how far afield from the true purpose of the partial strike doctrine Spurlino asks the Board to stray. The ALJ correctly rejected these arguments.

B. The strike was motivated by Spurlino's unfair labor practice relating to the discharge of Union supporter Gary Stevenson.

The ALJ correctly determined that Spurlino's employees were motivated to strike by the unfair labor practice Spurlino committed in discharging Union supporter Gary Stevenson. "A work stoppage is considered to be an unfair labor practice strike if it is motivated, at least in part, by an employer's unfair labor practices." Dorsey Trailers, Inc., 327 NLRB 835, 855 (1999) (citing C-Line Express, 292 NLRB 638 (1989)). "As long as the unfair labor practice has 'anything to do with' causing the strike, it will be considered an unfair labor practice strike." Child Development Council of Northeastern Pennsylvania, 316 NLRB 1145, n.5, (quoting NLRB v. Cast Optics Corp., 458 F.2d 398, 407 (3rd Cir. 1972)).

1. Bargaining unit employees and the Union clearly expressed their intent to engage in an unfair labor practice strike.

At all times, the Union and bargaining unit members demonstrated that the purpose of their labor action was to remedy the unfair labor practice involving Gary Stevenson. At the May 13, 2010 meeting, the employees discussed the Company's unfair labor practices, including the termination of Stevenson. At that meeting, the employees voted on the specific issue of whether to engage in an unfair labor practice strike. The Spurlino bargaining unit members voted unanimously in favor of this job action. When commencing the unfair labor practice strike, Local 716 informed Spurlino that the employees were going on an unfair labor practice strike protesting the illegal termination of Gary Stevenson (Joint Ex. 5). The message on the Union

picket signs confirmed that the bargaining unit members were engaged in an unfair labor practice strike over the unlawful discharge of Stevenson (GC 4).

Spurlino claims that the true purpose of the strike was based upon economic concerns of the employees rather than to remedy the Stevenson discharge. Spurlino recites a litany of claims that it contends supports this contention, all of which were carefully considered by the ALJ and rejected. (Decision at 16-23). The unlawful conduct by Spurlino must only be a factor, rather than the sole or predominant cause, in the employees' decision to strike. C-Line Express, 292 NLRB 638 (1989). If the unfair labor practice had "anything to do with" causing the strike, the job action will be considered to be an unfair labor practice strike. Dorsey Trailers, Inc., 327 NLRB at 855.

Spurlino suggests that the ULP strike was orchestrated by the Union in order to mask solely economic motivations. The ALJ rejected this contention, crediting the testimony of unit employees Terry Mooney and Blackston Poindexter indicating that they were motivated to strike in order to help Gary Stevenson. Terry Mooney stated that they employees decided to go on an unfair labor practice strike for Gary Stevenson (Tr. 205).[5] He explained that their first goal was to obtain Gary Stevenson's job for him (Tr. 215). Blackston Poindexter described the strike decision as a vote for Stevenson and to stick together (Tr. 252-53). Similarly, Jeff Ipock testified

[5] The September 8, 2010 letter from Terry Mooney to President James Hoffa of the International Brotherhood of Teamsters confirms that the discharge of Gary Stevenson was a motivating factor behind the unfair labor practice strike (Respondent Ex. 14). Mr. Mooney repeatedly refers to Spurlino Materials' unfair labor practices, the illegal termination of Gary Stevenson, and that they went on strike for unfair labor practices (*Id*. at 1-3). His frustration with the Union's inability to negotiate a first labor agreement, coupled with his hope that the strike would bring Spurlino Materials back to the bargaining table, does not indicate that the August 2010 strike was motivated solely by economic issues. In fact, Mooney states that the Company's depiction of the job action as an economic strike is "untrue" (*Id*. at 4).

that this was an unfair labor practice strike to assist Gary Stevenson. (Tr. 739). This testimony from the bargaining unit employees confirms that the August job action was motivated by the Company's illegal termination of Gary Stevenson and thus represented an unfair labor practice strike, and the ALJ correctly gave substantial weight to it. See Dorsey Trailers, 327 NLRB at 855-56; Executive Management Services, Inc., 355 NLRB No. 33 (2010) (substantial weight should be given to the strikers' characterization of their motives).

Spurlino's effort to attack the credibility of these witnesses fails. Spurlino has cited no record evidence demonstrating that these individuals were motivated solely by economic concerns. Local 716 and Spurlino had last engaged in contract negotiations in August of 2009, almost a year prior to the onset of the strike. If these employees had been motivated to strike solely for economic reasons they would have agitated to do so long before the May 2010 strike vote. This is far different from the case of Pirelli Cable Corp. v. NLRB, 141 F.3d 503 (4th Cir. 1998), cited by Spurlino. (Spurlino Brief at 26). In that case, employees struck within days of the Company's presentation of its last, best and final offer, and the individuals who testified that the strike was motivated by the employer's unfair labor practices were solely union officials. Here, the Spurlino employees, who had no connection to the Union other than being within the bargaining unit, testified that they were motivated to strike by the termination of Stevenson and Spurlino's persistent refusal to remedy it. And, there was no breakdown in contract negotiations suggesting that a ULP strike was a cover for true economic motives.

Spurlino repeats some testimony by Blackston Poindexter that it claims indicates the employees had a meeting with the Union in the spring of 2010 about a written contract proposal. (Spurlino Brief at 30-31; Tr. 266-68). Poindexter was simply confused about the timing of this

meeting, which actually occurred in 2008 or early 2009, which was made clear when he testified that Gary Green was still President of Local 716 at the time of the meeting. (Tr. 267). Green left his position with the Union in March of 2009. (Tr. 548). No other employee or Union official testified about such a meeting in 2010, and given that there had been no contract negotiations since August of 2009, it is plain that Poindexter was simply confused about the date, which the ALJ recognized. (Decision at 18-19).

Also as noted by the ALJ, Spurlino's contention that Local 716 and the employees never previously expressed concern regarding the reinstatement of Stevenson is without merit. (Decision at 19). Local 716 repeatedly demanded the reinstatement of Stevenson through its lengthy efforts before the NLRB. The Union filed an unfair labor practice charge alleging that the termination violated the Act. The Union participated in the Board proceedings to obtain his reinstatement. The Union intervened in the Board's action to enforce its order of reinstatement at the Seventh Circuit. The Union participated in settlement negotiations over the Board order during the Seventh Circuit mediation.[6] Given all of this, suggesting that Local 716 never communicated its desire that Stevenson be reinstated before the strike is simply incorrect.

Likewise, the fact that the strike ended without Stevenson being reinstated and made whole says nothing about the intent behind the strike, contrary to Spurlino's argument. (Spurlino Brief at 31). Strikes do not always succeed. The Union and the employees sought to force a remedy for Stevenson's unfair discharge, a goal that was clearly communicated by the Union and

[6] Spurlino's suggestion that Stevenson's reinstatement was not a topic at the Seventh Circuit mediation is spurious. (Spurlino Brief at 27-28). Of course, those discussions are confidential and cannot be used in this proceeding by any party, including Spurlino. However, it is undisputed and public record that the Board's decision before the Seventh Circuit included an order for Stevenson's reinstatement.

its employees. (Jt. Ex. 5; Tr. 215). Of course, if the goal had been to force Spurlino into additional contract negotiations or to obtain a contract, as Spurlino claims, that goal was not reached either. Thus, Spurlino's argument that the end of the strike is reflective of intent makes no sense.

The fact that drivers also had concerns about the lack of a contract after four years changes nothing. The drivers were concerned about a large number of issues, including Spurlino's failure to comply with Board orders and their general course of action demonstrating disdain for employee rights. The fact remains that if Spurlino's unfair labor practice had "anything to do with" causing the strike, the job action will be considered to be an unfair labor practice strike. Dorsey Trailers, Inc., 327 NLRB at 855.

Spurlino attacks the credibility of all of the Union's witnesses, claiming that they all should be discredited because they are self-interested. The ALJ properly considered any issues of self-interest in making his credibility findings. (Decision at 2, n.4). Moreover, the entire idea that the testimony of Mooney, Poindexter and Ipock regarding their motivations was self-serving is contrary to the evidence. The May 13 meeting with employees centered around Spurlino's unfair labor practices and the Stevenson discharge in particular. This is an undisputed fact. The employees unanimously voted to go on an unfair labor practice strike after hearing from Cahill and Local 716's attorney regarding the status of the pending Board charges at the Seventh Circuit. This is an undisputed fact. The employees made this choice, and they easily could have chosen otherwise regardless of any recommendation by Local 716. If the employees had wanted to engage in an economic strike they could have done that, as Local 716's attorney fully explained the different strike options to them at the meeting.

Spurlino also argues that the General Counsel or the Union should have called steward Matt Bales as a witness, and the failure to do so suggests Bales would have testified in an unfavorable manner. First, if Spurlino believed Bales would have testified negatively it could have called him as a witness itself. Second, Bales could have offered no more as a witness than Mooney, Poindexter, and Ipock. All of these individuals were at the May strike vote meeting and heard the same message. All of these individuals voted to strike. All of these individuals engaged in the strike. All of these individuals sat through mandatory employee meetings conducted by Spurlino. Spurlino presents nothing more than speculation on this point, speculation it could have remedied by simply calling Bales as a witness if it actually believed Bales would have testified in a manner negative to the employees.

2. The time gap between Stevenson's discharge and the strike does not help Spurlino under the facts of this case.

Spurlino seeks to place controlling weight on the fact that the strike was initiated years after Stevenson was unlawfully discharged. However, temporal proximity is only one factor among many that must be considered in determining whether a strike was motivated by an employer's unfair labor practices. The entire factual context of the strike must be considered, of which temporary proximity is only one such factor, a relatively minor one at that. Executive Management Services, Inc., 355 NLRB No. 33 (2010); Quickway Transportation, Inc., 354 NLRB No. 80 (2009). Among the factors appropriately considered are the picket line language and the discussions with employees at the strike vote meeting. Also relevant are the reasons that a union leader uses to recommend or initiate a strike. Quickway Transportation, supra. Indeed, temporal proximity alone will not suffice to demonstrate a causal relationship between an unfair

labor practice and a strike. Hendrick Mfg. Co., 287 NLRB No. 33 (1987); Deister Concentrator Co., 253 NLRB No. 40 (1980).

Spurlino's contention regarding the timing also overlooks the fact that the breakdown of the Seventh Circuit mediation process motivated the Spurlino employees to act. The failure of this mediation process was the catalyst for the May 13 meeting. While the Seventh Circuit mediation was continuing, a possibility had existed that Stevenson could have been soon reinstated in accordance with the Board Order. The Union and the employees had given the Board and Courts an opportunity to favorably resolve the Stevenson case and the other unfair labor practices. The unsuccessful conclusion of the settlement negotiations showed the bargaining unit employees that Spurlino was still refusing to follow the rules (Tr. 209). The Spurlino employees thus decided to engage in an unfair labor practice strike to remedy the illegal discharge of a Union activist (Tr. 205, 730, 739).

In Dorsey Trailers, Inc., the employer had first engaged in unfair labor practices in February. Even though the union had decided to delay any walkout until that June, the Board found that the employees had engaged in an unfair labor practice strike. 327 NLRB at 855. The Board noted that the union had "decided that the time had come to strike" and had discussed the underlying unfair labor practices at an employee meeting. Id. The Board further dismissed the argument that the union somehow orchestrated and manipulated events to have the job action declared an unfair labor practice strike. The Board aptly observed that it was the employer, rather than the union, which had committed the underlying violations of the Act. 327 NLRB at 856. The Board further stated that it failed "to see how the union can be blamed for having had sufficient foresight and being intuitive enough to advise its members against walking out to

protest something other than unfair labor practices." Id.

Spurlino Materials has made similar contentions in the case at bar in an effort to challenge whether the employees and Union had the requisite motivation to engage in an unfair labor practice strike. As with the employer in Dorsey Trailers, Spurlino Materials overlooks the fact that its illegal termination of Gary Stevenson caused the bargaining unit employees to commence their unfair labor practice strike.

Spurlino likewise overlooks the fact that there had also been a substantial gap in time between any contract negotiations. The most recent event in the history between these parties was the breakdown in the Seventh Circuit mediation, not any breakdown in negotiations between the parties. The time lapse simply does not help Spurlino.

IV. CONCLUSION

The Charging Party respectfully requests that the Board deny Spurlino's exceptions and that it adopt the ALJ's opinion and order in its entirety.

Respectfully submitted,

/s/ Geoffrey S. Lohman
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served, via e-mail and first class mail, postage prepaid, upon:

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on this 26th day of April, 2011.

/s/ Geoffrey S. Lohman
Geoffrey S. Lohman

p/2013gl