

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

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

and

Case 25-CA-31565

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

GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF LIMITED EXCEPTIONS

Comes now Counsel for General Counsel and respectfully submits to the Board this Brief  
in Support of Limited Exceptions to the Administrative Law Judge's Decision.<sup>1</sup>

I. STATEMENT OF THE CASE

Based upon charges filed by the Coal, Ice, Building Material, Supply Drivers, Riggers,  
Heavy Haulers, Warehousemen and Helpers, Local Union No. 716, a/w International  
Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America, herein the

---

<sup>1</sup> If the Board does not affirm the Administrative Law Judge's finding that Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC are a single integrated employer and thus the employer of the bargaining unit employees, the Board is requested to find that Spurlino Materials, LLC is the employer of the bargaining unit employees in the instant case through the arguments raised in these limited exceptions.

Union, the Regional Director for Region 25 issued a Complaint. The Complaint alleged that Spurlino Materials, LLC (“SM”) unlawfully refused to reinstate 14<sup>2</sup> unfair labor practice strikers after they made an unconditional offer to return to work. Respondent filed an answer alleging that Spurlino Materials, LLC was not the employer of the employees at issue. Counsel for the Acting General Counsel filed a Motion to Strike, Motion in Limine, and Motion for Partial Judgment on the Pleadings requesting that the Answer be struck to the extent that it denied that Spurlino Materials, LLC is not the employer of the employees at issue, and that Spurlino Materials, LLC be found to be the employer of the employees at issue based upon collateral estoppel. Administrative Law Judge Jeffery D. Wedekind denied the Motion. The Complaint was amended prior to hearing to define Respondent as Spurlino Materials, LLC, and in the alternative Spurlino Materials of Indianapolis, LLC, and in the alternative Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC, a singer integrated enterprise. In its Answer to the Amended Complaint, Respondent admitted that Spurlino Materials of Indianapolis, LLC (“SMI”) is a employer of the employees at issue but continued to deny that Spurlino Materials, LLC (“SM”) is an employer of said employees.

A hearing was held regarding the above-captioned case before Administrative Law Judge Jeffrey D. Wedekind on January 11, 12, and 13, and February 3, 2011. At hearing the caption of the case was amended to read: Spurlino Materials, LLC, or in the alternative Spurlino Materials of Indianapolis, LLC, or in the alternative Spurlino Materials, LLC and Spurlino Materials of Indianapolis, LLC, a singer integrated employer. Counsel for the Acting General Counsel

---

<sup>2</sup> Prior to the date of the hearing, two of the employees listed in the Complaint, Robert Rummel and Wayne Thomerson, returned to work. Therefore the Administrative Law Judge’s recommended order pertains to only the 12 remaining employees listed in the Complaint.

renewed its motion to have Respondent collaterally estopped from denying that Spurlino Materials, LLC was the employer of the employees at issue. The motion was again denied.

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

## II. ARGUMENT

The Administrative Law Judge erred in his decision to deny General Counsel's motion to collaterally estop Respondent from denying that SM is an employer of the employees at issue in this case within the meaning of the Act. Contrary to Respondent's denials of the employer status of SM in its answers to the Complaint and the Amendment to the Complaint in this case, it has previously admitted and been found to be the employer of the employees at issue within the meaning of Section 2(2) of the Act as alleged in paragraph 2 of the Complaint and the Amendment to the Complaint (GC Exh. 1(c), 1(e), 1(q) and 2). On March 21, 2007, Region 25 issued an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing in Cases 25-CA-30053 et. al. alleging that Spurlino Materials, LLC was the employer within the meaning of Section 2(2) of the Act of the employees at the same facilities engaged in the same type of work alleged in the Complaint in the instant case (GC Exh. 1(l), Exhibit Q). Respondent, in its February 13, 2007, Answer of Spurlino Materials, LLC, to Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing, admitted to that it operates the Indiana

facilities at issue in the instant case, that it met statutory commerce requirements and is an employer within the meaning of the Act (GC Exh. 1(I), Exhibit D). In Lineback v. Spurlino Materials, LLC, No. 07-3925, 1-3 (7 th Cir. Oct. 8, 2008), the Seventh Circuit found that Spurlino Materials, LLC was the employer of the employees at the Indianapolis area ready mix plants at issue in the instant case (GC Exh. 1(I), Exhibit E). In Spurlino Materials, LLC, 355 NLRB No. 77 (Aug. 9, 2010)(adopting Spurlino Materials, LLC, 353 NLRB No. 125 (March 31, 2009)), the Board found that Spurlino Materials, LLC is the employer of the employees at the Indiana facilities at issue in the instant case (GC Exh. 1(I), Exhibit F). Respondent petitioned the Seventh Circuit Court of Appeals for review of the Board's decision in Spurlino Materials, LLC, 353 NLRB No. 125 (March 31, 2009). Respondent submitted its brief in support of its petition on March 30, 2010, which on page 6 states:

Spurlino Materials [referring to Spurlino Materials, LLC] is engaged in the production and sale of ready-mix concrete. (ALJ Tr. 34, 163.) The Company has been in business in Indianapolis, Indiana area since November 2005, when it acquired the assets of American Concrete Company. (ALJ Tr. 35-36, 162-63.) Spurlino Materials hired most of the mixer drivers who had previously worked for American Concrete. (ALJ Tr. 37). Spurlino Materials maintains three Indianapolis area plants: Indianapolis, Indiana ("Kentucky Avenue Plant" or "South Plant"); Linden, Indiana ("Linden Plant")<sup>3</sup>; and Noblesville, Indiana ("Noblesville Plant" or "North Plant"). (ALJ Tr. 34-35.) The Company's Indiana business office is located at its Kentucky Avenue Plant. (ALJ Tr. 35, 164).

(GC Exh. 1(I), Exhibit G).

Respondent does not contend nor has it presented any evidence that the corporate structure between SM and related business entity SMI has changed in any way since the prior Board case against SM was litigated, but Respondent is now contending that SM is not the employer of the same employee unit that was at issue in the earlier litigation.

Under the doctrine of collateral estoppel, Respondent should be precluded from asserting that Spurlino Materials, LLC is not the employer within the meaning of Section 2(2) with regard

to the employees at issue in this matter and should have been precluded from eliciting and presenting any evidence to support such an assertion.

The Board has held that:

under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Big D Service Co.*, 293 NLRB 322, 323 (1989) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fa. 5 (1979); *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1015-1016 (6th Cir. 1983)). An issue is "necessarily determined" if its adjudication was necessary to support the judgment entered in the prior proceeding. *Marlene Industries*, 712 F.2d at 10 15.... An issue need not be actively litigated at trial in order to be actually litigated for purposes of collaterally estopping a party from relitigating that issue. Otherwise, admissions in answers, failure to contest material facts in summary judgment dispositions, and stipulations or failures to present evidence at trial would have no issue preclusion consequences. See *Abbott Bank v. Armstrong*, 44 F.3d 665 (8th Cir. 1995) (issue of whether bank was creditor held "actually litigated" in prior case, where creditor status had not been judicially resolved but, rather, was "inherent" and necessary to judgment in case and was admitted in answer).

Allied Mechanical Services, Inc., 356 NLRB No. I (Oct. 14, 2010)(incorporating

Allied Mechanical Services, Inc., 352 NLRB 662, 664-665 (2008). The issue as to whether

Spurlino Materials, LLC is the employer of the employees at issue in this matter has been

"actually litigated" for the purposes of collateral estoppel. The Board and the Seventh Circuit

"necessarily determined" that Spurlino Materials, LLC is the employer within the meaning of the

Act in their decisions cited above. Respondent has admitted to its employer status in its answers

to pleadings, evidence presented at hearing, and by its failure to contest the findings by the Board

and the Seventh Circuit as to its employer status.

The Administrative Law Judge distinguishes Allied Mechanical from this case, because the relevant issue had been denied in the respondent's answer in the prior proceeding placing it

---

<sup>3</sup> The Linden, Indiana plant has since been

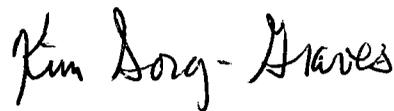
squarely at issue. Instead, the Administrative Law Judge relies upon the Board's statement in Harvey's Resort, 271 NLRB 306 (1984), that "if a matter is not actually litigated in the first proceeding, that is, if the answer to a complaint fails to put the matter in issue, then collateral estoppel is inapplicable because the issue is in reality being litigated for the first time in the second proceeding." Id. In Harvey Resort the respondent attempted to rely upon earlier litigation finding that specific individuals in the job classification of floormen were statutory supervisors. The earlier decisions in the Harvey Resort line of cases did not specifically address the supervisory issue but necessarily found that the individuals to be supervisors because they were found to have violated the Act as alleged in the complaint. In Harvey Resort the Board went on to state that "even if all the requirements for collateral estoppel were not met in this case, we would nonetheless find that the Respondent's reliance on the earlier case is justified in view of the striking similarities between the two cases. The Board noted that the cases involved the same parties, related allegations, and the same individuals. Furthermore there was no contention that there had been any change to the floormen's duties/job description in the intervening time. Id. Similarly in the instant case, the same parties are involved, the unfair labor practice strike at issue in this case arose out of the unfair labor practices in the prior case, and Respondent makes no claim that the relationship between SM and SMI have changed in any manner during the intervening time. Therefore, Respondent should be collaterally estopped from denying that SM is an employer of the employees at issue within the meaning of the Act even if all the components of collateral estoppel are not present.

Based upon the foregoing, the Administrative Law Judge erred in failing to collaterally estop Respondent from denying that SM is the employer within the meaning of Section 2(2) of the Act of the employees at the facilities involved in the instant case.

### III. CONCLUSION

For the reasons stated above and based on the record as a whole, the Board is requested to grant the General Counsel's limited exception to the Judge's decision.

SIGNED at Indianapolis, Indiana this 26<sup>th</sup> day of April 2011.



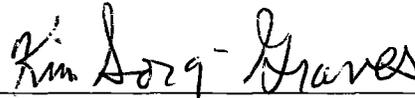
Kimberly R. Sorg-Graves  
Counsel for General Counsel  
National Labor Relations Board - Region Twenty-Five  
Minton-Capehart Building, Room 238  
575 North Pennsylvania Street  
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS was filed with the Division of Judges electronically and was electronically served upon the following parties on this 26<sup>TH</sup> day of April 2011:

James H. Hanson, Attorney  
Jack Finklea, Attorney  
Scopelitis, Garvin, Light, Hanson & Feary, P.C.  
10 W. Market Street, Suite 1500  
Indianapolis, IN 46204-2968  
[jhanson@scopelitis.com](mailto:jhanson@scopelitis.com)  
[jfinklea@scopelitis.com](mailto:jfinklea@scopelitis.com)

Geoffrey S. Lohman, Attorney  
Neil E. Gath, Attorney  
International Brotherhood of Teamsters  
429 E. Vermont Street, Suite 200  
Indianapolis, IN 46202  
[glohman@fdgtlaborlaw.com](mailto:glohman@fdgtlaborlaw.com)  
[ngath@fdgtlaborlaw.com](mailto:ngath@fdgtlaborlaw.com)



---

Kimberly R. Sorg-Graves  
Counsel for the General Counsel