

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**STERLING TOWING AND RECOVERY, LLC**

**and**

**Case 16-CA-177429**

**ANDREW WORLEY**

**and**

**Case 16-CA-177438**

**KEVIN HODGES**

**and**

**Case16-CA-177446**

**CLARENCE MACK**

**ORDER DENYING MOTION**

The Respondent's Motion for Summary Judgment is denied. The Respondent has failed to establish that there are no genuine issues of material fact warranting a hearing and that it is entitled to judgment as a matter of law.<sup>1</sup>

---

<sup>1</sup> Member Miscimarra agrees with the denial of the Respondent's motion as stated in the Board's Order, but he notes that the Respondent raises an argument (indicating that its gross revenues are insufficient to support Board jurisdiction) which could be grounds for granting a motion for summary judgment, particularly since the General Counsel has not filed any timely response to Respondent's motion. As Member Miscimarra stated in *L'Hoist North America of Tennessee, Inc.*, 362 NLRB No. 110, slip op. at 3 (2015) (concurring), "in response to a motion for summary judgment, I believe that the General Counsel at least must explain in reasonably concrete terms why a hearing is required. Under the standard that governs summary judgment determinations, this will normally require the General Counsel to identify material facts that are genuinely in dispute." See also *Leukemia & Lymphoma Society*, 363 NLRB No. 124, slip op. at 2 (2016) (Member Miscimarra, dissenting). In the instant case, however, Member Miscimarra agrees with the denial of summary judgment because the facts supporting Respondent's motion are set forth only in a supporting brief, unaccompanied by an affidavit or sworn statement, which makes it appropriate for Respondent's arguments to be addressed in a hearing, based on record evidence, which will permit the judge to address and resolve any genuine issues of material fact that exist regarding the existence or absence of Board jurisdiction, and the judge can likewise determine, in the first instance, the extent to which the hearing should also proceed on the merits. *Charter Communications*, Case 07-CA-140170 (Order issued 4/26/16) (Member Miscimarra concurring with the denial of the respondent's motion for summary judgment despite the "conclusory argument" made by the GC because "scrutiny of the parties' pleadings reveal[ed] that genuine issues of material fact exist....").

Dated, Washington, D.C., January 18, 2017

MARK GASTON PEARCE, CHAIRMAN

PHILIP A. MISCIMARRA, MEMBER

LAUREN McFERRAN, MEMBER