

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

THE GULFPORT STEVEDORING
ASSOCIATION-INTERNATIONAL
LONGSHOREMEN’S ASSOCIATION
CONTAINER ROYALTY PLAN

And

Case 15-CA-096939

TOMMY EVANS, an Individual

INTERNATIONAL LONGSHOREMEN’S
ASSOCIATION LOCAL 1303

And

Case 15-CB-096934

TOMMY EVANS, an Individual

MOTION TO DISMISS FOR LACK OF JURISDICTION

COMES NOW, Respondent, the Gulfport Stevedoring Association-International Longshoremen’s Association Container Royalty Plan, by and through its undersigned counsel, Deutsch, Kerrigan & Stiles, L.L.P., and moves to dismiss the General Counsel’s First Amended Order and Complaint for lack of jurisdiction for the reasons set forth below:

I. FACTUAL BACKGROUND

a. The GSA-ILA Container Royalty Plan

The Gulfport Stevedoring Association-International Longshoremen’s Association Container Royalty Plan (hereinafter “Plan”) is an independent 501(c)(9) Trust entity established by agreement between the ILA Local 1303 (hereinafter “Union”) and the existing port employers, SSA and Ports America (hereinafter “Employers”) under a collective bargaining

agreement (hereinafter “CBA”) for the purposes of administering container royalty benefits to eligible participants.¹

Participants are hired by the Employer signatories to the CBA to perform work at the Port of Gulfport. The Employer signatories’ contribution derived from revenues which are paid to the Plan pursuant to a formula set forth in the CBA. The CBA states that if an employee works seven hundred (700) or more hours they are entitled to receive “container royalties.” In simplistic terms, these monies are calculated based on the tonnage worked, divided by the number of employees, divided by the divisible dollar amount. Monies are only contributed by the Employer signatories to the Plan for “covered employees.”² If an employee does not work 700 or more hours for that calendar year he/she is not eligible to receive the annual Container Royalty Payment.

The Trust established by the CBA is administered by a Board of Trustees (hereinafter “Trustees”). The Trustees are made up of individuals nominated by each Employer representative (i.e. SSA and Ports America) and a matching number of individuals nominated by the union. A plan administrator is hired by the Plan as contract labor for ensuring Plan compliance with applicable laws and regulations. The Plan itself employs two individuals, the two Container Inspector/Dispatchers (hereinafter “CI/D”). None of the Plan employees are required to be union members. The Plan is not a signatory to the CBA.

¹ See Victor Walsh Affidavit, May 12, 2003, attached hereto as Exhibit 1 (hereinafter “Walsh Affidavit”). The allegations contained in Paragraphs 2-7 of the Amended Complaint are specifically denied. Walsh’s affidavit provides the context of the Plan’s general denial and support of this Amended Motion to Dismiss. The Container Royalty Plan is only charged with administering container royalty benefits. The Plan is not responsible for administering pension, health insurance, life insurance, vacation or other benefits to participants who are employed by Employers who are signatory to the CBA. *Id.*

² It is important to note that unlike a typical union employee, the CI/D is not considered a “participant” or “covered employee.” Thus, the amount of hours worked by the CI/D does not create any duty under the CBA for the Employer to contribute monies to the container royalty trust. This fact is critical because it reflects that the CI/D is not and cannot be a position governed by the CBA’s “covered employee” requirements.

Although the CBA directs the establishment of a Trust, there is nothing in the CBA which provides or sets forth any guidelines regarding how the Plan will operate, including but not limited to the hiring and/or termination of Plan employees. All Plan employees are “at-will” employees.³ Each Plan employee serves at the leisure of the Board of Trustees who have independent fiduciary duties to the 501(c)(9) Trust. All hiring decisions are made by the Trustees as independent fiduciaries of the Plan and are governed by the best interests of the Plan.⁴ Further, the Trustees determine the terms and conditions of employment for the CI/D. Finally, the CI/D is compensated directly by the Plan, which further distinguishes the CI/D from a CBA controlled union position.⁵

b. Tommy Kirk Evans Factual Background

On or about April 8, 1974, the Claimant, Tommy Kirk Evans (hereinafter “T. Evans”), was hired by the GSA-ILA Container Royalty Plan to fill the position of CI/D. Upon information and belief, T. Evans was and still is an active member of the ILA Local 1303. The genesis of this Complaint arises from the unanimous vote of the Trustees to terminate T. Evans from his position as CI/D due to increasingly poor job performance, effective January 5, 2013. Upon information and belief, at no time was T. Evans ever removed from his position within the

³ See generally *Empire gas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971, 974 (Miss. 1992) (citing *Perry v. Sears Roebuck and Co.*, 508 So. 2d 1086, 1088 (Miss.1987); *Butler v. Smith & Tharpe*, 35 Miss. 457, 464 (1858)). Therefore, “either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.” *Id.* (citing *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 875 (Miss.1981)).

⁴ Although the Board of Trustees is comprised in part by two union nominees, those individuals are required by law to act only in the capacity as fiduciary to the Plan. See 29 U.S.C. § 1104(a)(1); See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572, 580 (11th Cir. 1987)(a fiduciary acts solely in the interest of the participants and beneficiaries under the ERISA plan). Thus, no union involvement or pressure is permitted in their role as Trustee. It is said that the even if a trustee is nominated by the Employers or the Union they leave their “hats at the door.”

⁵ The CI/D position was created by the Board of Trustees in 1974 to be an administrative position within the Plan. There is no local Union contribution for attachment to the position. All monies paid to the CI/D position come out of the administrative cost fund line item which is set aside by the Employer shipping lines. The CI/D position was created at the request of the Board of Trustees and confirmed by the Southern District Court as a “checks and balances” for container royalty contributions. The CI/D position is NOT eligible for the annual container royalty payments because the CI/D is not a “covered employee” under the Plan like a typical union member.

Union. Upon further information and belief, T. Evans remains eligible for any open Union position due to his seniority.

c. The Plan Does Not Affect Commerce

The Plan affirmatively denies the following allegations contained in Sections 2-7, 10-14 of the First Amended Order and Complaint, more specifically as follows:⁶

2(a)-(b). It is denied that the Plan administers anything other than container royalty trust funds provided by the Employer signatories. The Plan does not provide services or engage in any activity regarding pensions, life insurance, health benefits or vacation benefits. The Plan is a custodian of monies deposited by the signatory Employers. The Plan funds are then held in trust until paid out annually to qualified plan participants. *See* Walsh Affidavit at ¶ 8-; *see also* Commerce Questionnaire.

(c)-(e). It is denied that the Plan provides services in any regard let alone those valued in excess of \$50,000 annually to enterprises within or outside of the State of Mississippi. Pursuant to its tax exempt status as a 501(c)(9) Trust, the Plan is **prohibited** from engaging in any form of commerce or commercial activity. *See* Walsh Affidavit at ¶¶ 10-16; *see also* Commerce Questionnaire. It is denied that the Plan annually purchases or receives goods or services valued in excess of \$50,000 at its Gulfport, Mississippi facility from points directly outside the State of Mississippi. *See* Walsh Affidavit at ¶ 14; *see also* Commerce Questionnaire. The Plan does not possess “facilities” of any type and thus cannot purchase or receive goods of any value. The Plan incurs only the necessary business expenses for it to comply with the federal auditing requirements in order to retain its 501(c)(9) trust status. *See* Walsh Affidavit at ¶ 9; *see also*

⁶ The Plan incorporates by reference its Answer to the First Amended Complaint/Order for its more detailed list of denials therein. Upon information and belief, certain sections of the Amended Complaint/Order pertain to unnamed parties and/or the ILA Local 1303. However, in an abundance of caution the same are denied and strict proof is demanded thereof.

Commerce Questionnaire. The Plan has been audited every year since its inception and found to be in compliance and NOT participating in commerce or any commercial related activity. *See* Walsh Affidavit at ¶¶ 15-16 (including audit records from the past five years).⁷

(f)-(g). It is denied that the Plan lends money to the Welfare Plan or the Vacation Plan which is administered by the separate and distinct legal entity, the GSC-ILA.

3(a)-(d). The Plan lacks standing to respond to allegations set forth against the unnamed “Respond Ports” as the Plan is a separate and distinct entity with no direct relationship aside from receiving container royalty funds for administration. Whether the Respondent Ports engage in commerce is irrelevant for purposes of this Motion as Ports America is neither a named party to this action nor responsible for administering the container royalty funds which is the sole duty of the Plan.

4(a)-(d). The Plan lacks standing to respond to allegations set forth against the unnamed “Respond Stevedoring” as the Plan is a separate and distinct entity with no direct relationship aside from receiving container royalty funds for administration. Whether the Respondent Stevedoring engage in commerce is irrelevant for purposes of this Motion as SSA is neither a named party to this action nor responsible for administering the container royalty funds which is the sole duty of the Plan.

5(a)-(d). The Plan lacks standing to respond to allegations set forth against the unnamed “Welfare Plan” as it is a separate and distinct legal entity (GSC-ILA) with no direct relationship to the Plan (GSA-ILA). The Welfare Plan did not employ T. Evans and is not responsible for any oversight or responsibility over the container royalty funds. What the Welfare Plan does or does not do is irrelevant for purposes of this Motion as the Welfare Plan is neither a named party to this action nor is it responsible for administering the container royalty funds which is the

⁷ *See* fn. 9, *infra*.

sole duty of the Plan.

6(a)-(d). The Plan lacks standing to respond to allegations set forth against the unnamed “Vacation Plan” as it is a separate and distinct legal entity (GSC-ILA) with no direct relationship to the Plan (GSA-ILA). The Vacation Plan did not employ T. Evans and is not responsible for any oversight or responsibility over the container royalty funds. What the Vacation Plan does or does not do is irrelevant for purposes of this Motion as the Vacation Plan is neither a named party to this action nor responsible for administering the container royalty funds which is the sole duty of the Plan.

It is specifically denied as alleged in Paragraph 7 of the First Amended Order and Complaint, that the Plan is an employer engaged in commerce within the meaning of Section 2(2), (6) or (7) of the Act, and the Respondent Plan demands strict proof thereof. In the event of an adverse ruling on this subject motion to dismiss for lack of jurisdiction, the Plan expressly reserves the right to file an amended answer more fully setting forth the facts discussed herein and raising any and all affirmative defenses available under law.

II. LEGAL ARGUMENT

The National Labor Relations Act (hereinafter “Act”) grants the National Labor Relations Board (hereinafter “Board”) jurisdiction over cases involving alleged unfair labor practices by employers who affect interstate commerce. *See* 29 U.S.C. §§ 159(c), 160(a). Here, the Board lacks jurisdiction over the Plan on two separate grounds.

First, the Plan does not engage in commerce or any commercial activity sufficient to affect interstate commerce. Second, the CI/D position is a non-union position which has been addressed by the U.S. District Court for the Southern District of Mississippi as permissibly receiving monies paid directly by the signatory Employers. The Board has failed to present any evidence, case law or

testimony aside from *ipse dixit* statements that the Plan engages in commerce of any type. The Board has further failed to present any evidence, precedent or testimony that the Plan is a signatory to a CBA or that CI/D is a union position and not an “at-will” position as defined by Mississippi law.

Independently or combined, both grounds stand for the clear position that the Board lacks jurisdiction over the matter *sub judice* and the same should be dismissed.

a. The GSA-ILA Container Royalty Plan Does Not Affect Commerce Under the Act’s Statutory Jurisdictional Standards or the Discretionary Jurisdictional Standards set by the Board.

According to the Act, an employer’s activities “affect commerce” if it is “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.” 29 U.S.C. § 152(7). The Board lacks statutory jurisdiction over employers whose effect on interstate commerce is *de minimis*. *NLRB v. Marsden*, 701 F.2d 238, 241 (2d Cir.1983). Furthermore, under the Board’s discretionary jurisdictional standards, codified in 29 C.F.R. § 102.204(d)(1)(ii), the Board should decline jurisdiction over non-retail employers whose goods or services provided outside of the state are not valued at more than \$50,000, and who do not purchase goods or services from outside of the state in excess of \$50,000. Moreover, in bringing a Complaint, it is the burden of the Regional Director who brings the Complaint to allege sufficient facts supporting a finding of jurisdiction. *See Colquest Energy, Inc. v. United Mine Workers of America, AFL-CIO*, 1992 WL 1465810 (May 20, 1992) (The burden of proof regarding jurisdiction, as with all other elements of a prima facie case, is on the General Counsel); *Qualicare-Walsh*, 269 N.L.R.B. 746 (1984). The Board’s attempt to impute jurisdiction through its reference to separate and distinct legal unnamed parties (Ports America,

SSA etc.,) reflects its own failure to prove jurisdiction over the GSA-ILA Container Royalty Plan.

The Plan does not and cannot by its own status as a 501(c)(9) tax exempt entity engage in commerce in any way. *See* 26 C.F.R. § 1.501(c)(9)-1 *et seq.* As discussed above, the Plan has received successful audit findings each year since its inception reflecting that it has *not* engaged in any commercial activity. *See* Walsh Affidavit, ¶¶ 15-16. As stated above, the Plan exists for the exclusive purpose of administering container royalty monies to qualified participants who work for the employer signatories to the CBA.⁸ The Plan does not buy or sell goods or services or conduct intra/interstate commerce.⁹ Its lone function is to hold funds in trust for annual payments to qualified participants.¹⁰ Thus, the Plan has at most a *de minimis* effect on interstate commerce. Even if the Board finds that the Plan exceeds the *de minimis* threshold, it certainly does not meet the Board’s jurisdictional standards under the \$50,000 “inflow-outflow” guidelines for non-retail employers described above and set forth in 29 C.F.R. § 102.204(d)(1)(ii). *See* Walsh Affidavit. As such, the Board lacks jurisdiction over the Plan in the matter *sub judice*.

b. The GSA-ILA Container Royalty Plan is Not an Employer under the Act.

Assuming *arguendo* that the Board could present sufficient credible evidence establishing that the Plan “affects commerce,” this matter should still be dismissed on a second set of grounds.¹¹ Although the Plan has ties to the Union in that it is responsible for administering

⁸ At no time was the Plan ever advised or requested to complete a Commerce Questionnaire, NLRB Form 5081. Nonetheless, that questionnaire has been completed and is attached hereto. Form 5081 along with the Victor Walsh affidavit make clear that the plan does not and cannot engage in commercial activity of any type.

⁹ *See* Walsh Affidavit at ¶ 10-14.

¹⁰ *See* Walsh Affidavit at ¶ 8.

¹¹ The Plan would note however, that any such finding would be contrary to the exhaustive yearly audits accepted and confirmed by the Internal Revenue Service as required by 26 C.F.R. 1.501(c)(9)-1 *et seq.* *See* IRS Correspondence, Aug. 25, 1958; IRS Correspondence, July 22, 1960; IRS Correspondence, Aug. 12, 1974; IRS Correspondence, Mar. 9, 1979; IRS Correspondence, Feb. 26, 1980; IRS Correspondence, Jan. 15, 2013, attached

monies provided by the signatory Employers for the benefit of qualified participants, the Plan itself is not a union, does not participate in the union and moreover does not require union membership for its employees. Thus, T. Evans cannot be an “employee” covered by the Act.

The Act defines “employee” to include any individual whose work has ceased as a consequence of an unfair labor practice. 29 U.S.C. §§ 152(2), (3). The regulations state that an employee does not include any person who is employed by any other person who is not an employer as defined by the Act. 29 U.S.C. §152(3); *see also* 29 C.F.R. § 104.201.

The Plan is not a signatory to the CBA.¹² It is further undisputed that the CI/D is a non-union position. *See* Walsh Affidavit, ¶ 6. The fact that T. Evans happened to be a union member does not make the CI/D job a CBA-defined union position.¹³

Courts have uniformly ruled that employees covered by a CBA may only be terminated for cause, whereas non-Union employees may be terminated for any reason. *See, e.g. Pub. Serv. Co. of N.M. & Int’l B’hood of Elec. Workers Local Union No. 611, AFL-CIO, 2012 WL 2393077* (NLRB Div. of Judges, San Francisco, June 22, 2012). In Mississippi, a non-union employee who is not under a contract for labor is an “at-will” employee who may be terminated for any reason.¹⁴

The Trustees are charged with acting in the best interests of the Plan. Here, the Trustees unanimously determined that T. Evans was not satisfactorily fulfilling the position of CI/D.

hereto as Composite Exhibit 2; *see also* Walsh Affidavit. Second, pursuant to an Order dated July 1, 2003, Judge Walter Gex of the United States District Court for the Southern District of Mississippi authorized the Plan to facilitate a Seniority Board for the purpose of ensuring that the correct amount of hours were calculated for the Container Royalty check. The Order further stated that the expenses for the Seniority Board were to be borne by the Plan. *See* Order, July 1, 2003, attached hereto as Exhibit 3.

¹² *See* Walsh Affidavit, ¶¶ 4-5.

¹³ Each Trustee and the plan administrator confirmed that the CI/D position could be filled by any individual regardless of union membership during their respective NLRB affidavits.

¹⁴ *See Bain*, 599 So. 2d at 974 (citing *Perry*, 508 So. 2d at 1088); *Butler*, 35 Miss. at 464. Therefore, “either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.” *Id.* (citing *Kelly*, 397 So. 2d at 875).

Because T. Evans was employed “at-will,” the Trustees were well within their rights in discharging him for poor performance. There is nothing in the Act which gives the Board discretion to question the termination decisions of non-union employers over their non-union employees.

It is well established that Mississippi is an employment at-will state. *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26 (Miss. 2003). Thus, T. Evans could be terminated from his position as CI/D for any reason, or no reason at all. *Id.* (citing *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 606 (Miss.1993)). The Plan was well within its right in terminating Evans for his increasingly poor performance as attested to by each Trustee and the Plan Administrator in the NLRB affidavits.

Furthermore, there are no grounds for holding that the Plan’s activities are “integrated” with the business of the Employers or the Union so as to create a “single employer” or “integrated enterprise” scenario. The Board considers four criteria in determining whether two entities are a single employer or integrated enterprise: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. *Radio Union v. Broadcast Service*, 380 U.S. 255, 256 (1965). Thus, where two employers, one of which would not otherwise be subject to Board jurisdiction, do not have interrelated operations, management, workforces or finances, one of which would not otherwise be subject to Board jurisdiction, there is no single employer/integrated enterprise and the Board should decline jurisdiction. *See Milo Express Inc.*, 212 N.L.R.B. 313 (1974) (the Board ruled that two trucking companies owned by the same persons were not an integrated enterprise because, with the exception for common ownership, the two trucking companies had separate equipment, management, payrolls and bookkeepers, and operated almost entirely independently

of one another). In the matter *sub judice*, the common link is even more casual, the Plan has a board of trustees who are each recommended by parties to a separate CBA.

Here, the Plan is not a signatory to the CBA between the Employers and the Union, and Plan employees are not required to belong to the Union. The two Container Inspector/Dispatchers (CI/Ds) are paid directly by the Plan. The Plan does not share workforces, facilities, expenses or duties with the Employers or the Union. The Plan employees' wages are paid directly by the Plan. Finally, the Plan operates independently of the Employers and the Union. Even when decisions are made by the Trustees regarding the Plan, the Trustees are acting in their independent fiduciary capacity to the Trust and not as representatives of the Employers or the Union. These facts together demonstrate that the Plan, Union and Employers are not interrelated from an operational, managerial or financial perspective, and thus there can be no finding of single employer or integrated enterprise status.

The Plan neither qualifies as a covered "employer" or "affects commerce" as defined by the Act or under the jurisdictional standards adopted by the Board, and the Board thus lacks jurisdiction.

III. CONCLUSION

The Gulfport Stevedoring Association-International Longshoremen's Association Container Royalty Plan respectfully requests that the Complaint against it be dismissed on grounds of lack of jurisdiction. In the alternative, the Plan requests leave to file an amended answer and/or affidavit which more fully sets forth the facts contained herein and presents any and all affirmative defenses permitted under law. The Plan further requests a preliminary hearing on this issue due to the costs and expenses necessary to prepare for a protracted trial on the merits with multiple witnesses which cost will be born entirely by the plan participants out of

the container royalty fund. The Plan further prays for any other such relief as this Agency may see appropriate to award under the circumstances set forth herein.

RESPECTFULLY SUBMITTED, this the 1st day of July, 2013.

THE GULFPORT STEVEDORING
ASSOCIATION-INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION
CONTAINER ROYALTY PLAN,
Respondent,

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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing Motion, via electronic filing, via United States Postal Service Postage Prepaid, via e-mail and/or facsimile to:

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SO CERTIFIED this the 1st day of July, 2013.

s/Stephen W. Dummer

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