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

THE GULFPORT STEVEDORING ASSOCIATION-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION CONTAINER ROYALTY PLAN	*	
and	*	**Cases 15-CA-096939**
TOMMY EVANS, an Individual	*	
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1303	*	
and	*	**15-CB-096934**
TOMMY EVANS, an Individual	*	

<u>GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE</u>

/s/Caitlin E. Bergo

Caitlin E. Bergo
Counsel for the General Counsel
National Labor Relations Board
Region 15
600 S. Maestri Place, 7th Floor
New Orleans, Louisiana 70130
Caitlin.Bergo@nlrb.gov
(504) 589-3111

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NOW COMES Counsel for the General Counsel (General Counsel), through undersigned counsel, who files this Memorandum in Support of its Exceptions to the Decision of the Administrative Law Judge (ALJ) in the matter noted above.

I. Introduction and Statement of the Case

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), the General Counsel submits this Brief in Support of Exceptions to the Decision of the ALJ.

On January 24, 2013, Tommy Evans filed the charges in 15-CA-096939 and 15-CB-096934 with Region 15 of the Board alleging Gulfport Stevedoring Association-International Longshoremen's Association Container Royalty Plan (Respondent Plan) and International Longshoremen's Association Local 1303 (Respondent Union) engaged in unfair labor practices

in violation of Sections 8(a)(1) and (3) and 8(b)(2) of the Act. The First Amended and Second Amended charges in Case No. 15-CB-096934 were filed on March 25, 2013, and April 8, 2013, respectively. The First Amended charge in Case No. 15-CA-096939 was filed on April 24, 2013.

On April 26, 2013, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (CCNOH) issued. On April 30, 2013, an Amendment to the CCNOH issued (Amended CCNOH). On May 10, 2013, Respondent Union filed its Answer to the Amended CCNOH. On May 14, 2013, Respondent Plan filed its Answer to the Amended CCNOH.

On May 30, 2013, a First Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (First Amended CCNOH) issued. On June 12, 2013, Respondent Union filed its Answer to the First Amended CCNOH. Thereafter, on June 14, 2013, Respondent Plan filed its Answer to the First Amended CCNOH.

On July 16, 2013, Respondent Plan filed a Motion to Postpone Hearing. On July 17, 2013, the Division of Judges issued an Order Granting Respondent's Motion to Postpone Hearing. On July 19, 2013, an Order Setting Hearing Date issued rescheduling the hearing for September 9, 2013.

On August 22, 2013, a Second Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Second Amended CCNOH) issued. On September 3, 2013, Respondent Union and Respondent Plan filed their Answers to the Second Amended CCNOH.

From September 9 through 12, 2013, a hearing on the matter was held before ALJ Michael A. Marcionese in New Orleans, Louisiana. ALJ Marcionese issued a decision (ALJD) on February 27, 2014, dismissing the complaint and transferring the case to the Board.

In his decision, ALJ Marcionese erroneously discredited the testimony of Glen Evans and Tommy Evans that Tommy Evans openly supported and campaigned for his son Glen Evans when his son ran for Union President against Donald Evans in 2012. ALJD at 8, 44-46. In addition, ALJ Marcionese credited Donald Evans' self-serving testimony that he had no knowledge that his brother Tommy Evans campaigned or otherwise supported Glen Evans' candidacy for president. ALJD at 9, 2-4. ALJ Marcionese further mistakenly found that each trustee voted to terminate Tommy Evans based on his job performance after the trustees discussed his job performance at a December 11, 2012, meeting. The ALJD is difficult to untangle, but the record demonstrates several prejudicial errors in the decision. Its ruling, inter alia, excluding Respondent's position statement[1] is erroneous and not supported by established Board precedent. Moreover its rationale for discrediting Tommy Evans and Glen Evans is flawed because it is based in large part on a refusal to accept Respondent's position statement into the record, unfounded assumptions, inaccurate recall of the evidence presented at hearing, and distortions of the record evidence.

The ALJD failed to consider relevant and material testimony and evidence, and arbitrarily rejected evidence, including Respondent Plan's position statement. The General Counsel respectfully requests the Board reverse the decisions of the ALJ and conclude Respondents violated the Act as alleged in the First Amended CCNOH.

[1] During the trial, Counsel for the General Counsel offered Respondent Plan's February 26, 2013, position statement into evidence. It was rejected by ALJ Marcionese and placed into the rejected exhibit file as GCX-36.

II. Statement of Facts[2]

A. The International Longshoremen's Association Local 1303

Respondent Union is a labor organization within the meaning of the Act engaged in collective bargaining on behalf of and representation of employees working as longshoremen at the Port of Gulfport (Port) located in Gulfport, Mississippi. Respondent Union is charged with operating a Hiring Center at the Port which refers workers to unload vessels at the Port pursuant to the collective bargaining agreement between Respondent Union and the Gulfport Stevedoring Association (GSA), and other collective bargaining agreements covering the employment of longshoremen through Respondent Union's Hiring Center. Tr. at 452, 2-18. GCX-3. GCX-26. GCX-27.

B. The Gulfport Stevedoring Association

GSA is a multi-employer association that is a party to the collective bargaining agreement with Respondent Union. GSA is comprised of two employer stevedoring companies, Ports America and SSA (Port Employers). Tr. at 56, 18-25; ALJD at 2, 32-35. The stevedoring companies are the entities that load and unload cargo from merchant vessels at the Port. They contract with ship owners to handle the cargo, and they hire longshoremen through Respondent Union in accordance with the collective bargaining agreement to perform the actual loading and unloading of goods. ALJD at 2, 32-35.

C. The Gulfport Stevedoring Association- International Longshoremen's Association Container Royalty Plan

[2] Reference to the Exhibits of the General Counsel, Respondent Plan, and Respondent Union and Joint Exhibits will be designated as "GCX", "RUX", "RPX", and "JX" respectively, with the appropriate number or numbers for those exhibits. Reference to the transcript and the ALJD in this matter will be designated as "Tr." and "ALJD" respectively. An Arabic numeral(s) after "Tr." or "ALJD" is a spot cite to a particular page of the transcript or the ALJD; and an Arabic numeral(s) following a page spot cite references specific lines of the page cited, e.g. Tr. at 15 13-16 is transcript at page 15, lines 13-16.

1) History and Purpose of Respondent Plan

Respondent Plan is an employee benefit plan created in 1974 that collects royalty money from signatory employers and distributes part of the money annually to employees who work 700 hours during the previous plan year in accordance with the terms of the collective bargaining agreement between Respondent Union and GSA. RPX-1; JX-1. The main function of Respondent Plan is to enforce the terms of the collective bargaining agreement by providing supplemental cash benefits to longshoremen who work pursuant to the collective bargaining agreement. RPX-1, 2; ALJD at 2, 30-38; ALJD at 3, 1-14.

2) Board of Trustees

Respondent Plan is governed by a four-member Board of Trustees (Trustees) with two members representing the GSA employers and two members representing Respondent Union. Tr. at 58, 2-5; Tr. at 748, 1-17; ALJD at 3, 16-22. At the time of Tommy Evans' discharge, the Trustees were Greg Schruff (Schruff), representing SSA, Kendall Lamb (Lamb), representing Ports America, and Union President Donald Evans and Union Vice-President Darius Johnson, representing Respondent Union. Tr. at 58, 2-5; Tr. at 748, 1-17. Union President Donald Evans was the Chairman of the Board of Trustees at the time of his brother Tommy Evans' discharge. Tr. at 156, 24-25.

Donald Evans has been President of Respondent Union and a Trustee of Respondent Plan since 1989. Tr. at 450, 17; ALJD at 3, 20-22. Darius Johnson has only been a Trustee since 2011. Glen Evans served as the second Union Trustee until he was removed as Trustee in 2011 by his uncle Donald Evans due to a falling out between Glen Evans and Donald Evans over divorce papers. Tr. at 354-361. ALJ Marcionese mistakenly found that Glen Evans was removed

from his elected position as Union Vice President due to a falling out between Glen Evans and Donald Evans over divorce papers. ALJD at 6, 28-33. (Exception No.6).

3) Services Provided by Respondent Plan

The record demonstrates Respondent Plan provides services to Respondent Union, GSA, Port Employers, DuPont, and other fringe benefit plans by operating the Hiring Center on behalf of Respondent Union and GSA; collecting and keeping in trust the Container Royalty contributions made by the Port Employers; investing the contributions, annually distributing the contributions to the qualifying longshoremen; distributing excess funds to the other fringe benefit plans in accordance with the applicable collective bargaining agreements; dispatching longshoremen to load and unload vessels for GSA and the Port Employers, and dispatching longshoremen to unload the DuPont merchant vessels. ALJD at 3, 1-14; Tr. at 610, 9-16.

In order to fulfill Respondent Plan's function of operating Respondent Union's Hiring Center, Respondent Plan employs two Container Inspector-Dispatchers (CI-D) who are responsible for dispatching longshoremen to unload vessels belonging to the Port Employers and DuPont in accordance with the applicable collective bargaining agreements. ALJD at 3, 26-33; GCX-3, 15.

At least once a week, each of the Port Employers has ships that make deliveries to the Port, which are unloaded by the longshoremen dispatched to work by the CI-Ds through Respondent Union's Hiring Center. Tr. at 167, 1-3. RPX-18(a). In addition, DuPont also unloads it barges at the Port using longshoremen dispatched by the CI-Ds to work through Respondent Union's Hiring Center.[3]

[3] See Cuevas notes attached to RP 18(a) and 19 and GC Post-trial Attachments 1, 2, 3, and 4 attached hereto.

4) Container Inspector-Dispatcher (CI-D)

In 1974, the Container Inspector-Dispatcher (CI-D) position was established by Respondent Plan for operations at the Port. On April 8, 1974, Tommy Evans was hired by Respondent Plan as the first CI-D[4]. JX-4. CI-Ds employed by Respondent Plan are tasked with 1) answering calls from stevedoring company supervisors requesting labor for container ships and/or DuPont barges; 2) recording voice messages announcing what ships and/or barges are arriving, and at what time; 3) announcing the gang assigned to work the unload, and 4) attending the shape-ups for each ship and/or barge in order to fill vacancies in the assigned gangs. If additional longshoremen are needed to fill the gangs, the CI-Ds are supposed to refer the most senior longshoreman present for the shape-up who also has the skills to work with the gang. ALJD at 3, 26-35. The CI-Ds also perform dispatching and container inspector duties. Container inspecting consists of checking the ships manifests, calculating the amount to be paid in container royalty based on those manifests, and comparing that number with the amount actually contributed by the Port Employer.

The two CI-Ds do not have a formal division of duties. Tr. at 478-479, 17-25, 1-9. Although Respondent Plan introduced documents purporting to be the CI-Ds official job descriptions, Tommy Evans credibly testified that he was never given the document. Respondent's own witness Cuevas testified at trial that he had only recently seen the document. RPX-10; Tr. at 476, 3-19. Tr. at 587, 21-24.

The CI-Ds receive minimal supervision from Respondent Plan. For example, in 2012, when CI-D Cuevas needed to go on vacation, he did not contact a Trustee or Respondent Plan's administrator, Victor Walsh; Cuevas instead contacted Union Vice President Glen Evans to get

[4] A second CI-D position was eventually added.

authorization. Tr. at 597, 9-25. Similarly, the Trustees are rarely if ever present to observe the CI-Ds' work performance. Tr. at 81, 10-25; ALJD at 6, 11-12.

In order to facilitate the task of operating Respondent Union's Hiring Center, Respondent Plan pays to establish and maintain a telephone answering system for Respondent Union. After the CI-D records the "call out" on the telephone answering system, the longshoremen call the telephone answering system and listen to the CI-D's message to find out what time a ship and/or barge is arriving, so they know what time to report to the Union Hall for a shape-up.

5) Seniority Board

Because vacancies to fill gangs at the shape-ups are based in large part upon a longshoremen's seniority, the seniority date of the longshoremen is very important to the operation of Respondent Union's Hiring Center. If a longshoreman believes he was not properly referred by a CI-D in accordance with his seniority, he can file a complaint with the GSA-ILA Seniority Board (Seniority Board). GCX-39; ALJD at 3, 29-39. All of Respondent Plan's Trustees serve as members of the Seniority Board. ALJD at 3, 38-39.

The Seniority Board reviews the longshoreman's complaints and resolves all issues regarding seniority in accordance with the collective bargaining agreement between Respondent Union and GSA. ALJD at 3, 35-39.

6) September 2012 Election of Union Officers

Respondent Union holds elections for officers every three years. The most recent election for officers took place on September 22, 2012. In the September 2012 Union election, Union

Vice-President Glen Evans, son of Tommy Evans, ran for Union President against his uncle Donald Evans. Glen Evans and Donald Evans were the only candidates for President.[5]

Glen Evans produced and distributed campaign material supporting his candidacy, which called into question the leadership of the decades long presidency of his uncle, Donald Evans. GCX-9. Tommy Evans openly supported his son Glen Evans' candidacy for Union President by talking to longshoreman about his son's candidacy and asking them to support Glen Evans for Union President against Donald Evans. Tr. at 483, 5-23; GCX-36.

Donald Evans won the election and was re-elected Union President over Glen Evans by a vote of 124-106. GCX-37.

7) Tommy Evans as Container Inspector-Dispatcher

Tommy Evans worked from 1964 until 1974 as a longshoreman through Respondent Union. In 1974, he was hired by Respondent Plan as its first CI-D. Huey Cuevas (Cuevas) was hired in 2005 and is still employed as a CI-D. Tr. at 586, 4-9.

Tommy Evans was not given a job description for the CI-D position when he began in 1974. He learned the duties and requirements of his position by word of mouth from officers in Respondent Union and at least one training session observing CI-Ds working in New Orleans, Louisiana. Tr. at 476-477, 3-25, 1-16.

In late 2010, CI-D Tommy Evans decided to retire because he was frustrated with Cuevas not performing his share of the CI-D duties. Tr. at 506, 19-21. In addition, in 2011 Tommy Evans was frustrated because Cuevas, "was drawing a check and not coming to work." Tr. at 506, 19-21. Tommy Evans was upset because he saw Cuevas at the casino while Cuevas was out on medical leave from his CI-D position. Tr. at 509, 4-14. However, in 2011 Union President

[5] Although the elections are in September, the terms for Union officers begin the January following the election and last for three calendar years.

Donald Evans asked his brother Tommy Evans not to retire, and Tommy Evans did not finish the paperwork necessary to retire. Tr. at 496, 1-10. (Exceptions No. 1-3).

In June 2011, Union President Donald Evans told his brother Tommy Evans that Respondent Union was getting a new insurance program called "MILA." Donald Evans told his brother that he should wait to retire until after the new "MILA" insurance program was enacted because of the better benefits he would receive under that program. After being persuaded by Donald Evans not to retire, Tommy Evans repaid the Social Security checks and continued to work as a CI-D. Tr. at 498, 1-3. On September 30, 2011, Tommy Evans became eligible for the benefits under MILA which became effective January 1, 2012. Tr. at 273, 1-8. In his decision, ALJ Marcionese mistakenly found that Respondent Plan selected Tommy Evans' discharge date as January 5, 2013, to ensure Tommy Evans would be eligible to receive the new health benefits under MILA. ALJD at 7, 29-31 and footnote 9. (Exceptions No. 11 and No. 14).

Although there were complaints in 2011 and 2012 against Tommy Evans regarding his failure to dispatch longshoremen in accordance with seniority, Respondent Union and Respondent Plan did not produce any documentary evidence at trial indicating the Seniority Board upheld a single complaint against Tommy Evans. In the post-trial brief to ALJ Marcionese, the General Counsel asked ALJ Marcionese to take an adverse inference and find that no complaints against Tommy Evans were upheld by the Seniority Board based on Respondent's failure to produce documents showing that the Seniority Board upheld a single complaint filed against Tommy Evans.

Moreover, neither the Seniority Board members, nor the two longshoremen who testified that they believed Tommy Evans failed to dispatch them in accordance with their seniority, claimed any complaint against Tommy Evans was found by the Seniority Board to have merit.

Nevertheless, despite the lack of evidence showing that the complaints were valid, the ALJ, in an apparent attempt to show that Tommy Evans was not doing his job, cited the two longshoremen's testimony in his decision as a mark on Tommy Evans' job performance. ALJD at 7, 42-43. (Exception No. 20).

After September 30, 2011, Tommy Evans decided to continue working and not retire, even though he was eligible for the MILA benefits. Similarly, Donald Evans did not ask Tommy Evans to retire after Tommy Evans became eligible for the benefits under MILA in September 2011.

In 2012, Respondent Union moved into a new Union Hall, and there was construction related to getting the new Union Hall completed. Tommy Evans suffers from Lupus. Tr. at 518, 1-2: Tr. at 664, 19-21. Unfortunately, the byproducts of construction work aggravated Tommy Evans' Lupus symptoms; as a result Tommy started performing his dispatcher work outside of the Union Hall. Tr. at 518, 1-7; at 542, 1-22.

8) Termination of Tommy Evans

Sometime after the November 16, 2012, Union President Donald Evans asked Tommy Evans if he was going to retire. Tommy Evans stated that he was not ready to retire and that he would wait until after the next union election, implying that he would wait to see if Glen Evans runs and is elected President before deciding to retire. Tr. at 489, 5-10; Tr. at 467, 15-21.

On December 11, 2012, during a special meeting called by Union President Donald Evans solely for the purpose of terminating Tommy Evans, the Trustees voted to terminate Tommy Evans from his CI-D position, effective January 5, 2013. Tr. at 467, 11-21; GCX-15. (Exception No. 12).

On December 12, 2012, Plan Administrator Vic Walsh issued a letter to Tommy Evans in which he cited "performance issues" as the reason for his termination. JX-6. Tommy Evans was never given more information by Respondent Plan or Respondent Union about what was meant by "performance issues" as written in the termination letter. Tr. at 488, 3-11.

It was odd that the Trustees voted to terminate Tommy Evans in December 2012 for performance issues when at the November 16, 2012, meeting the Trustees voted to give Tommy Evans a bonus for his work performance. GCX-2; Tr. at 83, 13-19. Although he was employed by Respondent Plan for more than 30 years, prior to his termination Tommy Evans never received any complaints from any of Respondent Plan's Board of Trustees and/or the Administrator regarding any alleged performance issues. Tr. at 481, 22-25; Tr. at 482, 1-2; Tr. at 488, 3-14; ALJD at 8, 9-13. Similarly, although Donald Evans in his capacity as Union President recommended Tommy Evans' termination, Tommy Evans was never warned or given an opportunity by a representative of Respondent Union to improve his performance. GCX-15; Tr. at 488, 3-14; ALJD at 8, 9-13. Furthermore, Tommy Evans never received any written discipline or negative performance reviews during his more than 30 years as a CI-D. Tr. at 482, 3-8; ALJD at 8, 12-13. Most importantly, while asserting that its Trustees had many concerns about Tommy Evans' work performance over a two-year period,[6] Respondent Plan did not produce at trial any written communications – emails, Board minutes, correspondence, phone texts, etc. - between the Trustees, the Union, and/or the Administrator regarding CI-D Tommy Evans' alleged poor work performance.

Although it is apparent the sole purpose of the December 11, 2012, meeting, was to vote on terminating Tommy Evans' employment as a CI-D for Respondent Plan, none of the Board

[6] It should be noted that this two year period includes the more than six months CI-D Cuevas was out of work due to illness.

Members, except Union President Donald Evans, knew in advance of the meeting that the purpose of the meeting was to vote on Tommy Evans' discharge. Yet, prior to the December 11, 2012, vote to terminate Tommy Evans, Union President Donald Evans offered Tommy Evans' CI-D position to newly elected Union Secretary/Treasurer Chris Johnson. Further, before the December 11, 2012, meeting, Johnson, who was a supporter of Donald Evans during the September 2012 Union election, had already informed Union President Donald Evans that he would accept the not-yet-vacant CI-D position with Respondent Plan. Tr. at 468, 1-6.

At the time Chris Johnson was offered the not-yet-vacant CI-D position, he had not performed any of the CI-Ds' duties, and had only worked a maximum 17 hours during the preceding three years as a longshoreman.[7] GCX-33. Amazingly, it appears the only experience required of the person selected by Union President Donald Evans to replace Tommy Evans was that he was the newly elected Union Secretary/Treasurer who ran on the slate of candidates headed by Union President Donald Evans. Tr. at 306, 1-3; Tr. at 154, 12-16; GCX-33; GCX-37.

III. Analysis[8]

A. Position Statement Was Erroneously Excluded (Exception Nos. 7-10 and 22-25)

1) Position Statement Supports Tommy Evans and Glen Evans' Testimony

During the investigation of the underlying charge, Respondent Plan submitted to the Region a position statement. GCX -36. When the General Counsel offered the position statement into evidence, the ALJ sustained Respondents' objections and placed it in the rejected exhibit file. The ALJ then found there was no objective evidence supporting Tommy and Glen Evans' testimony at trial that Tommy Evans openly supported his son Glen Evans in his candidacy for Union President against Donald Evans. ALJD at 6, 34-37; ALJD at 8, 44-46.

[7] According to the shape-ups provided by Respondent Plan, Johnson only worked one day – July 3, 2012 – during the period October 2011 to December 2012. RPX-18a.

[8] Each subsection of the Analysis Section relates generally to Exception Nos. 26-33.

Because the ALJ found there was no objective evidence supporting Tommy and Glen Evans' testimony, he concluded that Donald Evans "…credibly testified that he had had no knowledge that [Tommy Evans] campaigned or otherwise supported his son's candidacy for president." ALJD at 9, 1-4. However, Respondent Plan's position statement contains an admission which corroborates Tommy and Glen Evans' testimony and contradicts Donald Evans' testimony that he was not aware Tommy Evans supported his son for Union President. In the position statement dated February 26, 2013, Respondent Plan's states:

> "Upon information and belief, during the time of T. Evans' termination, the union was in the midst of its election of officers. The Union President position was then held by T. Evans' brother, Donald Evans. T. Evans' son, Glen Evans, ran against Donald Evans for the position of President. Upon information and belief, T. Evans publicly supported Glen Evans." GCX-36 at page 4.

The ALJ's ruling is inconsistent with settled Board law, and the instructions contained the Board's Bench Book, which considers position statements to be admissions. See *Division of Judges Bench Book*, §13-215 (August, 2010). ALJ Marcionese erred in his ruling because he ignored the admission against interest contained in the position statement. The position statement was submitted by Respondent Plan during the investigation of its conduct. In that context, a position statement is viewed as an admission of a party opponent; the ALJ's decision to exclude the document represents clear error which substantially affected the outcome of this case. *Steve Aloi Ford*, 179 NLRB 229, fn. 2 (1969), *Evergreen America Corp.*, 348 NLRB 178, 187 (2006), enfd. 531 F.3d 321 (4th Cir. 2008); *Bond* Press, 254 NLRB 1227, 1231-1232 (1981).

Respondent Plan's position statement is admissible as substantive evidence just as its Answer is admissible as an admission. *Local 342-50, United Food & Commercial Workers Union, AFL-CIO*, 339 NLRB 148, 154 (2003); *Hogan Masonry, Inc.*, 314 NLRB

332, 338 fn. 1 (1994). See also *Pratt & Whitney Aircraft*, 310 NLRB 1126, 1130 fn. 1 (1993) ("an admission against interest may be used as evidence as well as to impeach and thus includes assertions made in position statements of counsel.") Certainly, Respondent Plan's admission that Tommy Evans openly supported his son against Donald Evans should have been considered, particularly since the admission supported Tommy and Glen Evans' testimony that Union President Donald Evans knew Tommy Evans supported his son's candidacy for Union President, testimony ALJ Marcionese mistakenly determined was not supported by any other evidence.

2) Position Statement Supports Finding that Respondent Plan's Stated Reasons for Terminating Tommy Evans were Pretextual

Respondent Plan is governed by its Board of Trustees. ALJD at 3, 16. During the trial, all of Respondent Plan's Trustees self-servingly testified that there were complaints about Tommy Evans' work performance about which each of them was personally aware. However, in its position statement, when explaining why Respondent Plan elected to terminate Tommy Evans, Respondent Plan stated:

> "Upon information and belief, Local 1303 received multiple complaints related to the job performance of T. Evans during the last half of 2012. It is expected that the Local 1303 will provide supporting documents of these complaints. The GSC/GSA Plans however, do not have knowledge of the substance or access to those complaints." GCX-36, at page 4.

Obviously, the Trustees' testimony at trial that they were personally aware of substantial problems with Tommy Evans' job performance is contradicted by Respondent Plan's position statement. By not considering this more credible, yet contradictory, evidence in the position statement, the ALJ discounted that Respondent Plan was shifting its recounting of reasons for its conduct. Because the ALJ failed to find that Respondent Plan was shifting defenses, he failed to

find that the more credible reason for Respondent Plan's termination of Tommy Evans was because Tommy Evans told his brother Donald Evans that he would not retire until after the next union election, presumably in which Glen Evans would again run against Donald Evans. It is reasonable to conclude that Donald Evans did not want Tommy Evans in the influential CI-D position for the 3 years prior to the next Union election campaigning against him and for his son Glen Evans because the CI-D position gave him frequent access to campaign on behalf of his son to the longshoremen expected to vote in the election. The Board cited has cited inconsistencies between respondent's written statements of position to the regional office and its witnesses' statements at the hearing to find respondent put forth shifting reasons for its conduct and inferred its real reason was unlawful. *Black Entertainment Television*, 324 NLRB 1161 (1997).

B. The Trustees did not Discuss Tommy Evans Performance Issues (Exception Nos. 12, 13, and 15).

If Donald Evans, in his capacity as Union President, had not called the December 11, 2012, for the sole purpose of terminating Tommy Evans, the Trustees would not have acted to terminate Tommy Evans. In order to justify the meeting and to show that Tommy Evans' termination was not the Trustees merely rubber stamping Union President Donald Evans' request to terminate the son of his political rival, the ALJ found the Trustees discussed Tommy Evans' performance issues before deciding to terminate him. ALJD at 7, 25-30. However, the ALJ's finding is not supported by the record in this matter.

First, if the Trustees had discussed CI-D Tommy Evans' performance problems at the December 11, 2012, meeting, Respondent Plan would have articulated those issues in its February 26, 2013, position statement to the Region. Yet, as noted above, in its February 26, 2013, position statement Respondent Plan admitted it had no knowledge of the performance

issues that lead to CI-D Tommy Evans' termination. It is also established by the record that counsel for Respondent Plan, the four Trustees, and the Plan Administrator were all present at the December 11, 2012, meeting. Therefore, if Tommy Evans' performance issues were discussed at the meeting, Respondent Plan would have been able to articulate those performance issues in its position statement.

Second, the Trustees' testimony at trial directly contradicts the ALJ's finding that the Trustees discussed CI-D Tommy Evans' performance problems before voting to terminate him at the December 11, 2012, meeting. Trustee Greg Schruff could not remember what was discussed at the meeting. Tr. at 109, 4-7. He further testified that he did not remember receiving any complaints about Tommy Evans' performance, and he never talked to Tommy Evans about his performance in the CI-D position. Tr. at 108, 14-20. Trustee and Union Vice President Darius Johnson testified that he did not remember Donald Evans stating any reasons why Tommy Evans should be terminated, and he did not remember Union President Donald Evans during the meeting discussing any performance issues he had with Tommy Evans. In fact, Johnson does not even remember an executive session being called during the December 11, 2012, meeting. Tr. at 305, 13-22; RUX 1. Trustee Kendall Lamb testified that the discussion at the meeting related to replacing CI-D Tommy Evans with Chris Johnson, and the legality of the decision under at-will employment law. Lamb did not testify that specific performance reasons for terminating Tommy Evans were discussed at the meeting by him or any other Trustee. Tr. at 753, 14-24; Tr. at 754, 1-6. Even Union President Donald Evans, who called the Board of Trustees meeting to terminate his brother, could not specifically remember at trial what, if any, performance issues were discussed at the December 11, 2012, meeting. Tr. at 683, 2-11.

Based on the above, it is apparent that on December 11, 2012, the Trustees merely rubber stamped Union President Donald Evans' request to terminate CI-D Tommy Evans and did not discuss the alleged performance problems of Tommy Evans.

C. Respondent Plan did not Immediately Terminate Tommy Evans (Exception Nos. 11 and 14).

Despite Respondent Plan's assertions that Tommy Evans was an underperforming employee whose performance was so poor that it was necessary for Respondent Union to arrange a special meeting to terminate him, Respondent Plan did not explain why Tommy Evans' termination was not immediate, but was made effective January 5, 2013. In an attempt to justify the delay, the ALJ found that Respondent Plan did not effectuate Tommy Evans' termination until January 5, 2013, because it was waiting for him to be eligible for an improved health insurance plan. ALJD at 7, fn 9. ALJ Marcionese's finding is factually inaccurate, as the record clearly indicates that because Tommy Evans worked through September 30, 2011, he became eligible for Respondent Union's new insurance plan, known as "MILA" on January 1, 2012. Tr. at 273, 1-8.

Instead, the ALJ should have concluded that this delay in terminating Tommy Evans was evidence that Respondents' assertion it made the decision for "performance reasons" was merely pretextual. Respondent Plan had no reason to wait until January 5, 2013, to effect his termination, and Respondent Plan, if it was truly unhappy with Tommy Evans' performance, could have used this time period to give a 30-year employee a written warning and/or suspension regarding his performance before terminating him after failing to correct any performance issues.

D. Trustees' Purported Reasons for Voting to Terminate Tommy Evans are not Supported by Evidence (Exception Nos. 10, 13, 15, and 22).

The ALJ should have found Respondent Plan's purported reasons for terminating Tommy Evans to be pretextual and a cover for the unlawful motivation behind his termination. Respondent Plan's Trustees proffered reasons for voting to terminate Tommy Evans were not credible and are not supported by the record evidence. As noted above, in its February 26, 2013, position statement Respondent Plan admitted it was not aware of any claimed complaints about Tommy Evans' job performance.

Trustee and Union Vice President Darius Johnson testified he voted to terminate CI-D Tommy Evans because of an incident in April 2012, when Tommy Evans either did not show up or was late for a shape-up. RUX-1. It strains credibility that Union VP Johnson thought CI-D Tommy Evans' alleged April 2012 conduct was a terminable offense, but he could not recall the date it occurred, he did not document the incident, nor did he report the conduct to his fellow Trustees. There were at least two Trustee meetings after Tommy Evans' allegedly terminable conduct in April 2012 during which he could have raised these issues, in June and November 2012, but the record fails to show that he did. Instead, at the November 16, 2012, Board meeting, Johnson voted along with the three other trustees to give CI-D Tommy Evans a bonus. Johnson's testimony that he knew of a terminable offense committed by CI-D Evans in April 2012, gave CI-D Evans a bonus in November 2012, and then voted to terminate CI-D Evans in December 2012, because of the April 2012, offense is incredible.

Trustee Kendall Lamb testified he voted to terminate CI-D Tommy Evans because his supervisors on unspecified dates had trouble getting in touch with Tommy Evans and he considered the dispatcher work important. Tr. at 755, 2-12. He testified that his Ports America supervisors, Tim Lancaster and Jesse Parker, told him they had problems getting in touch with CI-D Tommy Evans. Tr. at 750, 2-16. Neither Lancaster nor Parker testified at trial. Respondent

Plan did not provide any reason why it could not call as witnesses the supervisors it contended had problems with Tommy Evans. As in the case of Trustee Johnson, Trustee Lamb in the November 16, 2012, meeting voted to give Tommy Evans a bonus despite the putative complaints of the missing supervisors. Based on Respondent Plan's failure to call such important witnesses, the ALJ should have taken an adverse inference that the supervisors, if called at trial, would not have supported Lamb's testimony.

Trustee Greg Schruff testified he voted to terminate Tommy Evans because "over the years" his SSA supervisors had a difficult time getting in touch with him to perform dispatcher duties. Tr. at 110, 6-11. Schruff's unnamed SSA supervisors did not testify at trial. Despite these alleged complaints from his supervisors, Schruff voted to give Tommy Evans a bonus in November 2012. Schruff could not indicate what years the unidentified supervisor made the claimed complaints with any precision. Significantly, he could not recall if he heard of any complaints about CI-D Tommy Evans between the November 2012 meeting during which he voted to give CI-D Evans a bonus and the December 2012 meeting at which he voted to terminate CI-D Evans. Tr. at 101, 7-22. General Counsel respectfully asserts that ALJ Marcionese should have taken an adverse inference about Respondents' failure to call the SSA supervisors to testify and found that unnamed SSA supervisors, if called to testify at trial, would not have supported Schruff's testimony.

Donald Evans, Chairman of the Board of Trustees and President of Respondent Union, admitted that he called the December 11, 2012, meeting in his capacity as Union President to terminate his brother CI-D Tommy Evans. GCX-15. Union President Donald Evans claimed he voted to terminate CI-D Tommy Evans because Trustee Kendall Lamb told him that Lamb would no longer sign any more paychecks for Tommy Evans. Tr. at 657, 5-17; GCX-15. Neither

Union President Evans nor Kendall Lamb were able to provide any objective evidence to substantiate that such a self-serving discussion ever occurred. Moreover, Union President Donald Evans and Trustee Lamb never told the other Trustees during the December 11, 2012, meeting that the Union called the special meeting to terminate CI-D Tommy Evans about Trustee Lamb's threat not to pay him. On the other hand, the evidence indicates Lamb voted and signed the check for Tommy Evans to get a bonus in late November 2012. The fact that Donald Evans called the meeting in his capacity as Union President, and not as Trustee, and had already hired Tommy Evans' replacement clearly supports a finding that his stated reasons at trial for terminating Tommy Evans were pretextual.

E. Tommy Evans Performed A Substantial Amount of Dispatching Work (Exception Nos. 1-3, 5, 19, and 20).

Respondent Plan's claim that it terminated Tommy Evans because of his poor performance, mainly his failure to conduct shape-ups, is false and pretextual. In support of its position, Respondent Plan introduced RPX- 18a and RPX- 19 to show that CI-D Cuevas performed more shape-ups than CI-D Tommy Evans in 2011 and 2012. However, Cuevas' notes and RPX-18a and RPX-19 show that Cuevas' summaries and his testimony were false.

1) RPX- 19

RPX-19 contains a summary, the completed shape-ups, and CI-D Cuevas' notes for 2011. The shape-up forms are essentially a list of men dispatched on a certain date for a particular ship. CI-D Cuevas testified that in 2011 he completed a shape-up form whenever he did a shape-up. He also testified he worked from January 1, 2011, until he started sick leave on or about February 16, 2011. There were a total of 20 shape-ups during the January 1, 2011, through February 16, 2011, period; however, Respondent Plan did not introduce any shape-up forms for that period. CI-D Tommy Evans testified that he did not document when he conducted shape-ups

because he was familiar with the process and written records were not required. Based on Respondent's inability to produce any shape-up forms completed by CI-D Cuevas during the period in question, it is reasonable to conclude that CI-D Tommy Evans performed all of the shape-ups for that period.

The evidence shows that two or three containers ships arrived at the Port each week. Cuevas testified he did not return to work until October 4, 2011. From February 16, 2011 to October 4, 2011, is approximately 32 weeks. At a minimum of two ships per week, CI-D Tommy Evans was responsible for 64 shape-ups, and if during this period there were three container ships per week, CI-D Evans was responsible for a total of 96 shape-ups at the Port during this 32 week period.

RPX-19's summary indicates there were only 19 shape-ups from October 4, 2011 to December 28, 2011, and CI- D Tommy Evans was involved in 14 of the shape-ups, Glen Evans in one, and CI-D Cuevas in all 19. However, CI-D Cuevas' summary for the period is incorrect. CI-D Cuevas's notes show that in addition to the 19 shape-ups listed on his summary, CI-D Cuevas made tape recordings for 35 additional call-outs for container ships and barges during this period. See GC Post-trial Attachment 4. Due to the lack of shape-up forms completed by CI-D Cuevas, the only reasonable conclusion is that Tommy Evans was responsible for the additional 35 shape-ups.

The record shows CI-D Cuevas only participated in 19 shape-ups during the periods he worked in 2011, while during the same period Tommy Evans participated in 20 + 8 +14 +35 shape-ups during this same period for at total of 77. Additionally, if you add the shape-ups CI-D Tommy Evans performed while CI-D Cuevas was out of work, CI-D Tommy Evans conducted 77+96 for a total of 173 shape-ups during 2011. Therefore, Respondent Plan's efforts to

demonstrate CI-D Evans was a poor performer in 2011, based on him not conducting shape-ups, is not supported by the evidence.

2) RPX-18a

RPX- 18a contains a summary, completed shape-up forms, and CI-D Cuevas' notes for 2012. According to CI-D Cuevas in 2012 he completed a shape-up form whenever he did a shape-up. The summary for RPX-18a claims CI-D Cuevas completed 121 shape-ups in 2012, while Tommy Evans completed 5. However, CI-D Cuevas' 121 shape-ups included the 18 shape-ups he completed after Tommy Evans was terminated. Therefore, CI-D Cuevas, he at most completed only 103 shape-ups in 2012, before Tommy Evans' discharge. CI-D Cuevas claims, without any supporting evidence, that he conducted the five shape-ups he marked as performed by Glen Evans. However, Glen Evans credibly testified that he would not have completed the shape-up form if CI-D Cuevas was present because that would have been CI-D Cuevas' job. Tr. at 790, 1-9. Therefore, before Tommy Evans' termination, CI-D Cuevas should only get credit for at most 98 shape-ups in 2012.

Again, CI-D Cuevas' notes do not support his testimony and his summary for RPX- 18a. GC Post-Trial Attachment 2 is a computation of all tape recordings for callouts made by CI-D Cuevas where there is not a corresponding shape-up form or summary listing. Attachment 2 is based on CI-D Cuevas' notes in RPX-18a. Based on Attachment 2, in addition to what is listed on the summary listing, there were an additional 53 tape recordings and shape-ups for container ships in 2012, before Tommy Evans' discharge on December 11, 2012. The only reasonable conclusion is that Tommy Evans, and not CI-D Cuevas, conducted the 53 shape-ups. This is supported by a complaint filed by Hebert Williams against Tommy Evans. GCX-39.

In 2012, Hebert Williams filed a complaint against Tommy Evans stating that Tommy Evans failed to properly refer him on November 24, 2012. CI-D Cuevas testified that he was

aware of the complaint. But, as part of RPX- 18(a), Cuevas did not reflect in his summary listing of RPX- 18a that CI-D Tommy Evans conducted a shape-up on November 24, 2012, nor did Cuevas produce a corresponding shape-up form for November 24, 2012. However, Cuevas' notes indicate that he made a tape recording for a shape-up on November 24, 2012, and Williams testified that the shape-up was on November 24, 2012. See GC Post-Trial Attachment 2, No. 52. Although Cuevas' note says "11/2512 SAT," November 24, 2012 was a Saturday. The complaint filed by Williams states the shape-up was at 1:00 p.m., and CI-D Cuevas' note states the shape-up was for 1:00 p.m.

Respondent Plan cannot reasonably claim that because Williams made one complaint about Tommy Evans that he was doing a bad job. Instead, the complaint shows Respondent Plan's records of who performed dispatch work are inaccurate. All complaints about CI-Ds not properly referring longshoremen are submitted to the Seniority Board for review. Respondents did not introduce a copy of the Seniority Board's decision regarding Williams' complaint. If the Seniority Board had determined that Tommy Evans did not properly refer Williams, Respondents would have introduced the decision into the record. The ALJ should have made an adverse inference that Respondents failure to introduce the Seniority Board's decision means any written document would indicate that the Seniority Board determined that Tommy Evans acted properly in not referring Williams.

The fact that CI-D Cuevas' summary for RPX- 18a is not accurate should further call his credibility into question. CI-D Cuevas testified that during the summer of 2012, while he was on vacation he made a tape recording for a Saturday shape-up. However, the summary listing does not indicate one Saturday during the summer of 2012 when Tommy Evans or Glen Evans conducted a shape-up alone or with each other. Yet, CI-D Cuevas' notes show several

Saturdays in May, June, July, August, and September 2012, where a tape recording was made for a Saturday shape-up that is not reflected on the summary listing created by CI-D Cuevas. See GC Post-trial Brief Attachment 2. The only reasonable conclusion is that Tommy Evans conducted the shape-up on the Saturdays not reflected on CI-D Cuevas' summary listing. Notably, none of CI-D Cuevas' notes indicate that he made tape recording on a Saturday while he was on vacation or that he had to make a tape recording because no one could get in touch with Tommy Evans. RPX-18a

Moreover, as noted above, the CI-Ds also made tape-recordings for DuPont barges and conducted the shape-ups for the barges. GC Post-Trial Attachment 1 is a computation of the tape recordings made for barges in 2012 that were not included on the summary listing and where there is not a corresponding shape-up form. There are 57 barge shape-ups listed. CI-D Cuevas testified he prepared shape-up forms for all shape-ups he participated in, the only reasonable conclusion is that Tommy Evans was responsible for the shape-ups for the additional 57 barge call-outs.

Based on the above, before his discharge, Tommy Evans conducted 5+ 53+57 shape-ups for a total of 117 shape-ups in 2012, while CI-D Cuevas arguably only participated in 98, or 103 if he is credited with the five conducted by Glen Evans.

Therefore, Respondent Plan's assertion that Tommy Evans only performed 5 shape-ups in 2012 (RPX-18a) and was not conducting shape-ups in 2011(RPX-19) is not supported by Respondent Plan's exhibits. Thus, the evidence clearly shows that Respondent Plan's claimed reason for discharging Tommy Evans is a poorly executed fabrication.

Although the evidence shows that CI-D Cuevas testified falsely regarding Tommy Evans' dispatching work, the ALJ failed to find that Tommy Evans performed dispatch work far more

than asserted by Respondent. ALJD at 8, 22-24. (Exception Nos. 4 and 5). Likewise, Respondent Plan's assertion that Tommy Evans only conducted shape-ups in 2012 is contradicted by its own witness, Garland Taylor. Taylor testified that Tommy Evans failed to dispatch him 10-14 times in 2012. Tr. at 737, 19-20. Although Taylor's testimony, the same as Williams' testimony, shows that CI-D Cuevas presented false testimony regarding the number of times Tommy Evans dispatched longshoremen in 2012, it does not support a finding that Tommy Evans did a bad job of dispatching longshoremen. As in the case of Williams, Taylor's complaints are not supported by the evidence. Specifically, none of his complaints have been upheld by the Seniority Board, and Respondents failed to produce any evidence showing that the longshoremen dispatched by Tommy Evans were junior to Taylor on the days Taylor claims Tommy Evans failed to dispatch him properly.

F. Tommy Evans did not need to go inside Union Hall to Dispatch (Exception Nos. 4 and 5).

ALJ Marcionese, in attempt to show that CI-D Evans was not dispatching in 2012, credited Gloria Pittman's testimony that Tommy Evans had stopped coming into the new Union Hall in April 2012. ALJD at 6, 23-27. Yet, he did not credit Pittman's testimony that a dispatcher could perform the dispatch work without going inside the dispatch office located in the Union Hall. Tr. at 729, 11-13; 736, 12-18. Because of his lupus, Tommy Evans admitted that he stopped going inside the new Union Hall to dispatch and instead was dispatching outside the Union Hall. According to GC Post-trial Attachments 1 and 2, Tommy Evans participated in 74 dispatches from April 2012 until December 11, 2012. Likewise, Williams' and Taylor's testimony support the finding that he dispatched longshoremen from outside the Union Hall after April 2012. Therefore, his not going into the new Union Hall did not prevent him from dispatching longshoremen. By failing to recognize that Tommy Evans could and had dispatched

longshoremen outside the Union Hall, ALJ Marcionese failed to consider that Respondent Plan's exhibits asserting that he had only dispatched 5 times in 2012 were false and strong evidence of its unlawful motivation.

G. A dispute in 2010 does not negate a father's support for his son (Exception No. 25)

The ALJ erred in finding that a dispute Tommy Evans had with his son in 2010 caused Tommy Evans not to support his son for Union President in September 2012. ALJD at 9, 14-18.

Tommy Evans and Glen Evans had a dispute outside the Union Hall in 2010 relating to the referral of Garland Taylor for work as a longshoreman. Tr. at 394, 14-24. Taylor had previously been a longshoreman assigned to a gang before Hurricane Katrina. When he returned to the port, Henry Spears, a foreman, requested Taylor to be in his gang. Tr. at 394, 20-22. Union Vice President Glen Evans made the decision at the time to return Taylor to Spears' gang. CI-D Tommy Evans did not believe that Taylor should be put on a gang because he had spent a substantial amount of time away from longshoremen work while other longshoremen had stayed working during the "lean" times after Hurricane Katrina. Tr. at 513, 10-21. Glen Evans told his father that his decision was final and that Taylor would remain on the gang. Tr. at 395, 17-21.

The ALJ should have found the above-described disagreement between Tommy and Glen Evans was minor in nature and remote in time, and it therefore did not affect Tommy's support for his son Glen in the September 2012 Union election. Respondent Plan attempted to exaggerate the extent of this disagreement and to make it appear closer in time to Tommy Evans' termination. However, the record evidence shows that the argument took place more than a year before the Union election. The severity of such an argument between parent and child should not be judged by the subjective assessment of outside witnesses. Tommy and Glen Evans, who know their own relationship with each other better than anyone, both admitted the argument took place

and corroborated each other that this argument or any other disagreements between them were not severe enough that Tommy Evans would not support his son, Glen Evans, for Union President. And as previously noted, Respondent Plan's position statement corroborates Tommy Evans' and Glen Evans' testimony that Tommy Evans openly supported Glen Evans for Union President. GCX-36.

H. If there were any performance issues relating to CI-D Evans, Respondent Plan was aware of them for years before it terminated him.

If Respondent Plan's witnesses are credited, Respondent Plan engaged in an extensive pattern of condoning Tommy Evans' performance at the CI-D position. Respondent Plan was aware of any and all performance issues cited at hearing for many months, if not years, yet it did not decide to terminate him until shortly after the September 2012 election. In determining "whether an employer has condoned certain misconduct, the Board does not look for any 'magic words' suggesting that the employer has forgiven the employee." *White Oak Coal Co.*, 295 NLRB 567, 570 (1989). Under well-established Board precedent, the "doctrine of condonation" applies where there is clear and convincing evidence the employer has agreed to forgive the misconduct, to 'wipe the slate clean,' and to resume or continue the employment relationship as though no misconduct occurred." *United Parcel Service*, 301 NLRB 1142, 1143 (1991).

In that the ALJ mistakenly found that Tommy Evans had performance issues, he should have also should found that Respondent Plan condoned the manner in which Tommy Evans performed his job by ignoring any alleged performance problems for many years. According to Respondent Plan's witnesses, Respondent Plan was aware of any and all performance problems presented at trial for years and had condoned any performance failings by refraining from taking any action against Tommy Evans over more than 30 years. The Administrator testified that early on in

Tommy Evans employment he had problems with Tommy Evans' work performance. Tr. at 155, 5-14. Again in 1992, the Plan Administrator allegedly reported complaints about Tommy Evans' performance to Donald Evans who was a Trustee and Union President. Tr. at 155, 14-23. The Plan Administrator's complaints did not result in any written discipline or counseling for CI-D Evans.

Union President and Trustee Donald Evans claims he was aware of problems with his brother Tommy Evans' performance in the CI-D position for years. Donald Evans testified he covered for his brother's poor performance for years before the September 2012 Union election. Tr. at 655, 21-24; at 656, 1-6. Therefore, the evidence indicates that Union President Donald Evans only decided to stop "covering" for his brother's alleged performance problems after CI-D Tommy Evans advised him that he was not going to retire until after the next Union election. Based on CI-D Tommy Evans' support of his son's candidacy in 2012, it was reasonable for Union President Evans to believe CI-D Tommy Evans would support his son in a second run against him for Union President.

I. Union President Donald Evans Effectuated Tommy Evans' Termination (Exception No. 12)

In his decision, ALJ Marcionese acknowledged that Union President Donald Evans called the special December 11, 2012, meeting of Trustees to discharge Tommy Evans. ALJD at 7, 22-23. However, ALJ Marcionese erred in failing to find that Donald Evans was acting as Union President when he called the special meeting of the Trustees.

In its position statement to the Region, Respondent Plan included an affidavit from Donald Evans. GCX 15[9]; GCX 36. In the affidavit, Donald Evans specifically states:

[9] GCX-15 was excluded in the original transcript. In his decision, ALJ Marcionese admitted it into evidence. ALJD at 2, footnote 2. It is attached here in as GCX-15.

> "The Local 1303 recommended to the Board of Trustees for the GSC/GSA Plans that Tommy Kirk Evans be terminated due to complaints Local 1303 was receiving regarding performance issues in the position of Container Inspector/Dispatcher." GCX-15

Based on GCX-15, Donald Evans called the meeting because of complaints Respondent Union had regarding Tommy Evans job performance, not because of complaints he received from CI-D Cuevas, Administrator Walsh, Trustee Lamb or any of the other Trustees. Amazingly, the record shows the only complaint Respondent Union received against Tommy Evans after Donald Evans and the other Trustees voted to give CI-D Tommy Evans a bonus on November 16, 2012, was the complaint[10] filed by Williams asserting that Tommy Evans did not dispatch him to work. As previously noted, Williams' complaint was not upheld by the Seniority Board.

Based on the above, the only reasonable explanation for Respondent Union recommending the discharge of Tommy Evans is because Tommy Evans openly supported Glen Evans against Donald Evans in the September 2012 Union election. In terminating Tommy Evans, the Board of Trustees merely rubber stamped a decision that Donald Evans had already made in his capacity as Union President. Donald Evans knew the other Trustees would go along with his recommendation, which allowed him to offer the CI-D position to Chris Johnson prior to the December 11, 2012, meeting. By recommending and effectuating the termination of CI-D Tommy Evans based on unlawful motivation, Respondent Union violated the Act. *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382 fn. 2 (1984) (There is a presumption of unlawfulness when a union causes an employee's discharge). Respondent Plan by acceding

[10] Although Garland Taylor testified that he made complaints to Vice President Glen Evans about Tommy Evans. Taylor never made any complaints to Donald Evans. In addition, by the time of the November 16, 2012, vote to give Tommy Evans a bonus, Glen Evans was no longer Vice President. Therefore, it is reasonable to assume that if Taylor made any complaints to Glen Evans they were before November 16, 2012. And as previously noted, none of Taylor's alleged complaints in 2012 were upheld by the Seniority Board.

to the demands of Respondent Union to discharge Tommy Evans because of internal union activity, violated Section 8(a)(3) of the Act. *USF Red Star, Inc*., 330 NLRB 53, 65 (1999).

J. Respondent Plan's failure to consider Glen Evans for the CI-D position shows its merely acceded to Respondent Union (Exception No. 21)

Respondent Plan was motivated by CI-D Tommy Evans' support of Glen Evans during the September 2012 Union election in its decision to terminate CI-D Tommy Evans. The Board has established, "…that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of animus is not required." *Tubular Corp. of America*, 337 NLRB 99 (2001).

Here, Union President Donald Evans and the other Trustees failure to even consider Glen Evans for Tommy Evans' CI-D position is further evidence of the false and pretextual nature of Respondents' proffered reasons for terminating Tommy Evans. Although the ALJ only acknowledged that Glen Evans performed dispatch work when Tommy Evans was not available, the evidence indicates that Glen Evans performed dispatch work when CI-D Tommy Evans and CI-D Cuevas were both not available. ALJD at. 8, 1-4; Tr. at 783-791. Moreover, based on Respondents' own evidence, Glen Evans had years of experience performing the dispatch work, and he was the only person with such experience. Respondent Plan's Board of Trustees did not consider Glen Evans when seeking a candidate to replace CI-D Tommy Evans. Tr. at 171, 8-15. Rather, Union President Donald Evans selected and offered the still occupied CI-D position to Chris Johnson, a man with no experience with the CI-D duties.

K. Respondent Plan's Lack of Documentary Evidence shows it merely acceded to Respondent Union

Respondent's failure to provide documentary support for a termination based on performance issues has been construed by the Board to be evidence the asserted performance issues are a pretextual reason for termination. See *Northeast Lincoln Mercury*, 292 NLRB 857, 860 (1989). In this case, Respondents did not provide any documentation that Respondent Plan's Trustees, Administrator, or Respondent Union were unhappy and/or dissatisfied with Tommy Evans' more than 30 years of job performance.

Moreover, the evidence does not support Respondent Plan's claim that Tommy Evans' performance had reached new lows in the months leading up to its decision to terminate him. During the November 6, 2012, meeting of the Trustees, there was no discussion of Tommy Evans' job allegedly increasingly poor job performance when the Trustees voted to give him a bonus. Tr. at 89, 6-8. In fact, Trustee Greg Schruff specifically testified that he was not aware of any change in CI-D Tommy Evans' performance in the CI-D position between the November 6, 2012, meeting where the trustees voted unanimously to pay him a bonus and the December 11, 2012, meeting where they voted unanimously to terminate him. Tr. at 101, 7-25.

L. Testimony of Ports America foremen Larry Donald Holloway and Gary Thomas shows that Respondent Plan merely acceded to Respondent Union. (Exceptions 16-18).

In attempt to show that foremen complained about Tommy Evans dispatching duties, Respondent Plan called Ports America foremen and Larry Holloway and Gary Thomas as witnesses in its case-in-chief. Although they were both foremen for Chiquita ships, and their gangs were dispatched on the same day for Chiquita ships, Holloway and Thomas contradicted each other at trial. Tr. at 706, 18-19; Tr. at 715, 18-24; Tr. at 716, 1-4; RXP 18a. For example, Holloway testified that he did not have any problems with Tommy Evans dispatching men to his gang. Tr. at 709, 23-24; Tr. at 710, 1-3. Whereas, Thomas testified that he had problems with

Tommy Evans dispatching men to work, and had to dispatch men on several occasions because Tommy Evans was not present for the shape-up. Tr. at 698, 1-2. Because they were foremen for the same ship and worked the same day of the week, if Thomas had problems with Tommy Evans' dispatching, Holloway would have had the same problems[11]. Notably, the ALJ recognized at trial that if Thomas had any complaints regarding Tommy Evans' dispatching, there was no evidence presented at trial that Thomas communicated his complaints to the Trustees or that the Trustees had knowledge of Thomas' testimony at the time they decided to terminate Tommy Evans. Tr. at 703, 20-24.

Despite Holloway's testimony, the ALJ's recognition that Thomas' alleged complaints about Tommy Evans were not known by the Trustees, and the fact that the two foremen were not employed by SSA, the ALJ mistakenly found that "a supervisor from each of the employer members of GSA testified regarding the difficulties each had contacting the Charging Party to tell him a ship was needed and that workers needed to be assigned." ALJD at 7, 37-40. The ALJ's fact findings regarding the foremen were in error. The ALJ's failure to properly recognize the facts regarding the foreman unfortunately lead to his failure to recognize that their testimony contradicted each other and that without documents showing Thomas dispatched longshoremen or corroborating witnesses supporting Thomas' testimony that he dispatched longshoremen, Thomas' testimony was not reliable and should not have been given any credit.

Notably, Thomas testified that he only dispatched longshoremen when CI-D Cuevas was also not present to dispatch longshoremen. Tr. at 697, 8-11. According to CI-D Cuevas, the only time he was not available to perform dispatch work was when he was out sick in 2011. If Thomas had problems with Tommy Evans' failure to dispatch longshoremen, it was in 2011 and

[11] RPX-18a contains the shape-ups for 2012. Wherever there is a shape-up for Chiquita, Holloway and Thomas are listed as the gang foremen.

not 2012. Therefore, Respondent Plan's assertions that Tommy Evans job performance deteriorated in 2012, is not supported by its witnesses. Tr. at 701, 17-19.

M. Respondent Plan's disparate treatment of Tommy Evans shows it merely acceded to Respondent Union. (Exceptions 1-3)

It is undisputed that Tommy Evans suffered with Lupus. Tommy Evans credibly testified that he did not go into the new Union Hall because the construction related to it aggravated his Lupus. Nonetheless, Tommy Evans continued to work. It is also undisputed that in February 2011, CI-D Cuevas had heart surgery and did not do any dispatching from March 1, 2011, through September 30, 2011. Tommy Evans' uncontradicted testimony is that in June 2011 Cuveas was observed out-and-about town at the casino and purchasing lottery tickets. Tr. at 509, 4-14. Yet, Cuevas was not disciplined for failing to dispatch during this seven month period.

In an attempt to show that Cuevas continued to work after his heart surgery until October 2011, the ALJ found that CI-D Cuevas continued to do inspection reports during the period March 2011 through September 2011. ALJD at 6, 17-18. Although the inspection reports are under the direct control of Respondent Plan, it did not produce one inspection report to show that CI-D Cuevas performed inspection reports during the months of March through September 2011. Therefore, any testimony that CI-D Cuevas performed inspection reports during this 7-month period is not supported by the evidence and is purely self-serving. In addition to not doing any inspection reports, Respondent Plan did not offer any reasonable explanation as to why CI-D Cuevas could not and did not perform dispatch work during the period March through September 2011, or at least since June 2011 when he was observed out-and-about town at the casino and buying lottery tickets. Notably, Respondent Plan did not introduce any medical documentation showing that Cuevas was excused from work for a 7-month period.

As previously noted, supposedly Respondent Plan knew for years that Tommy Evans was not performing all the duties of the CI-D. And as admitted in Foreman Thomas' testimony, Tommy Evans' work performance in 2011 was the same as 2012. Tr. at 701, 17-19. However, when CI-D Cuevas was sick and not able to perform all his duties, he was allowed to miss 7 months of work with pay. Whereas, when Tommy Evans Lupus was aggravated by construction at the union hall, he still made efforts to perform the work he has always performed, he was allegedly terminated for poor work performance. Respondent Plan's failure to treat an employee with 30 plus years on the job the same as an employee with less than 10 years shows that there was an unlawful motivation behind Tommy Evans' termination.

IV. Conclusion

General Counsel respectfully suggests ALJ Marcionese based his findings, and the dismissal of the First Amended CCNOH on key factual errors rather than a studied examination of the record evidence and relevant case law. The Board has remanded proceedings to the ALJ under similar circumstances. See *Comaco Lorain Manufacturing Plant*, 353 NLRB 605, fn. 3 (2008). However, because here the ALJ relied on factors other than demeanor to discredit all of Tommy Evans' and Glen Evans' testimony regarding Tommy open support for Glen Evans, it is unnecessary to remand the case to the ALJ. Rather, it is appropriate for the Board to review the record de novo, and make its findings as revealed by the preponderance of the evidence. Here, the preponderance of the evidence establishes that Respondent Union's President, Donald Evans, called a special December 11, 2012, Trustee Meeting to terminate Tommy Evans because of Tommy Evans' refusal to retire and his support of Glen Evans candidacy for Union President. The undisputed evidence, is had Donald Evans not called the special meeting on December 11, 2012, for the sole purpose of discharging Tommy Evans, the meeting would not have occurred,

and Tommy Evans would not have been terminated. During the meeting, the other Trustees merely acquiesced to Donald Evans' recommendation to discharge Tommy Evans and to select the individual Donald Evans had already hired to replace Tommy Evans. Accordingly, the Board should find merit to the General Counsel's exceptions, reverse the findings of the ALJ and enter an appropriate order.

Dated at New Orleans, Louisiana this 17th day of April 2014.

/s/Caitlin E. Bergo

Caitlin E. Bergo
Counsel for the General Counsel
National Labor Relations Board
Region 15
600 S. Maestri Place, 7th Floor
New Orleans, Louisiana 70130
Caitlin.Bergo@nlrb.gov
(504) 589-3111

	Call-outs received for Barges for which Respondent Plan has Failed to Provide a Corresponding Shape-up Record from 1/1/2012-12/11/12. The date below represents the shape-up date, but the call to the CI-D was normally made the day before.	Exhibit Number	Bates Number
1	1/10/12 Tuesday 8:00 am. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men, cancelled at 6:30 a.m.	RP-18a	122
2	1/12/12 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	123
3	1/13/12 Friday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	123
4	1/14/13 Saturday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	123
5	1/18/12 Wednesay 8:00 a.m. for SSA on the Dupont Ore Barge HL Hunt	RP-18a	123
6	1/20/12 Friday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	124
7	2/16/12 Thursday 5:00 p.m. for SSA on the Dupont Ore Ship Archie Schields with 2 Extra Men	RP-18a	128
8	2/17/12 Thursday 12:00 Midnight for SSA on the Dupont Ore Ship Joe Halloway	RP-18a	129
9	2/17/12 Friday 6:00 p.m. for SSA on the Dupont Ore Ship CW Pruitt with 2 Extra Men	RP-18a	129
10	2/18/12 Friday 12:00 Midnight for SSA on the Dupont Ore Ship JL Skinner	RP-18a	129
11	2/18/12 Saturday 6:00 p.m. for SSA on the Dupont Ore Ship Houston Fairley	RP-18a	129
12	2/19/12 Saturday 12:00 Midnight for SSA on the Dupont Ore Ship Archie Shields	RP-18a	129
13	2/19/12 Sunday 7:00 a.m. for SSA on the Dupont Ore Ship Joe Holloway with 2 Extra Men	RP-18a	129
14	2/19/12 Sunday 6:00 p.m. for SSA on the Dupont Ore Ship AE Howell with 2 Extra Men	RP-18a	129
15	2/20/12 Monday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	130
16	2/22/12 Wednesday 7:00 a.m. for SSA on Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	130
17	2/23/12 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	131
18	2/24/12 Friday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	131
19	3/26/12 Monday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	135
20	3/27/12 Tuesday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	136
21	5/4/12 Friday 5:00 p.m. for SSA on the Dupont Ore Ship CW Pruitt	RP-18a	141
22	5/5/12 Friday 12:00 Midnight for SSA on the Dupont Ore Ship JL Skinner with 2 Extra Men	RP-18a	141
23	5/5/12 Saturday 7:00 a.m. for SSA on the Dupont Ore Ship Houston Fairley with 2 Extra Men	RP-18a	141
24	5/5/12 Saturday 6:00 p.m. for SSA on the Dupont Ore Ship Archie Shields	RP-18a	141
25	5/6/12 Saturday 12:00 Midnight for SSA on the Dupont Ore Ship Joe Holloway with 2 Extra Men	RP-18a	141
26	5/6/12 Sunday 7:00 a.m. for SSA on the Dupont Ore Ship AE Howell with 2 Extra Men	RP-18a	141
27	5/8/12 Tuesday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	141
28	5/31/12 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	145
29	6/12/12 [read '6-12-19'] Tuesday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	146
30	6/14/12 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	147

	Call-outs received for Barges for which Respondent Plan has Failed to Provide a Corresponding Shape-up Record from 1/1/2012-12/11/12. The date below represents the shape-up date, but the call to the CI-D was normally made the day before.	Exhibit Number	Bates Number
31	6/15/12 Friday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	147
32	6/22/12 Friday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	148
33	7/5/12 Thursday 6:00 p.m. for SSA on the Dupont Ore Ship Archie Schields with 2 Extra Men	RP-18a	150
34	7/6/2012 Thursday 12:00 Midnight for SSA on the Dupont Ore Ship Joe Holloway	RP-18a	150
35	7/6/12 Friday 7:00 a.m. for SSA on the Dupont Ore Ship AE Howell with 2 Extra Men	RP-18a	150
36	7/9/12 Monday 8:00 a.m. for SSA on the Dupont Ore Ship gang CW Pruitt	RP-18a	151
37	7/10/12 Tuesday 6:00 p.m. for SSA on the Dupont Ore Ship gang Joe Holloway	RP-18a	151
38	7/11/12 Wednesday 7:00 a.m. for SSA on the Dupont Ore Ship gang CW Pruitt with 2 Extra Men	RP-18a	151
39	7/17/12 Tuesday 7:00 a.m. for Ports America on Dupont Ore Barge JL Hunt	RP-18a	152
40	8/14/12 Tuesday 1:00 p.m. for SSA on Dupont Ore Ship gang JL Skinner	RP-18a	154
41	8/15/12 Wednesday 8:00 a.m. for SSA on the Dupont Ore Ship gang Joe Holloway with 2 Extra Men	RP-18a	154
42	8/16/12 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	154
43	8/17/12 Friday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	154
44	8/20/12 Monday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	154
45	8/21/12 Tuesday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	155
46	8/23/12 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-18a	155
47	9/27/12 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	160
48	10/1/12 Monday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-18a	161
49	10/1/12 Monday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt *double entry*	RP-18a	162
50	10/25/12 Thursday 10:00 a.m. for SSA on the Dupont Ore Ship gang AE Howell	RP-18a	165
51	10/25/12 Thursday 6:00 p.m. for SSA on the Dupont Ore Barge gang CW Pruitt	RP-18a	165
52	10/26/12 Thursday 12:00 Midnight for SSA on the Dupont Ore Ship gang JL Skinner	RP-18a	165
53	10/26/12 Friday 7:00 a.m. for SSA on the Dupont Ore Ship gang Houston Fairley	RP-18a	165
54	10/26/12 Friday 6:00 p.m. for SSA on the Dupont Ore Ship gang Archie Schields with 2 Extra Men	RP-18a	165
55	11/28/12 Wednesday 6:00 p.m. for SSA on the Dupont Ore Ship AE Howell with 2 Extra Men	RP-18a	169
56	11/29/12 Wednesday 12:00 Midnight for SSA on the Dupont Ore Ship CW Pruitt with 2 Extra Men	RP-18a	169
57	11/29/2012 Thursday 7:00 a.m. for SSA on the Dupont Ore Ship JL Skinner with 2 Extra Men	RP-18a	169

	Call-outs received for Container Ships for which Respondent Plan has Failed to Provide a Corresponding Shape-up Record from 1/1/2012-12/11/12. The date below represents the shape-up date, but the call to the CI-D was normally made the day before.	Exhibit Number	Bates Number
1	1/2/12 Monday 1:00 a.m. for Ports America on Dole Cont Ship 2 gangs with 5 drivers each	RP-18a	121
2	1/3/12 Tuesday 8:00 a.m. for Ports America on Crowley Cont Ship 1 gang JW Beavers	RP-18a	121
3	1/10/12 Tuesday 8:00 a.m. for Ports America on Crowley Cont Ship 2 gangs JW Beavers and Henry Spears	RP-18a	122
4	1/28/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	125
5	2/7/12 Tuesday 2:00 p.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	127
6	2/21/12 Tuesday 7:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	130
7	2/25/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	131
8	2/28/12 Tuesday 1:00 p.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	131
9	3/10/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	133
10	3/13/12 Tuesday 8:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	134
11	3/17/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	134
12	3/21/12 Wednesday 7:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	135
13	3/31/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	136
14	4/3/12 Tuesday 1:00 p.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	137
15	4/7/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	137
16	4/10/12 Tuesday 1:00 p.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	138
17	4/14/12 Saturday 10:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	138
18	4/17/12 Tuesday 10:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	139
19	4/18/12 Wednesday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs with 4 drivers each	RP-18a	139
20	4/21/12 Saturday 1:00 p.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	139
21	4/24/12 Tuesday 1:00 p.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	140
22	5/5/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	141
23	5/8/12 Tuesday 10:00 a.m. for Ports America on Crowleys Cont Ship JW Beavers	RP-18a	142
27	5/15/12 Tuesday 7:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	142
28	5/19/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	143
29	5/22/12 Tuesday 5:00 p.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	143
30	5/26/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	144
31	5/29/12 Tuesday 1:00 p.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	144
32	6/2/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	145
33	6/5/12 Tuesday 8:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	145

	Call-outs received for Container Ships for which Respondent Plan has Failed to Provide a Corresponding Shape-up Record from 1/1/2012-12/11/12. The date below represents the shape-up date, but the call to the CI-D was normally made the day before.	Exhibit Number	Bates Number
34	6/9/12 Saturday 11:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	146
35	6/12/12 Tuesday 9:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	147
36	6/16/12 Saturday 8:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	147
37	6/19/12 Tuesday 8:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	148
38	6/23/12 Saturday 9:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	148
39	6/26/12 Tuesday 1:00 p.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	149
40	7/14/12 Saturday 9:00 p.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	152
41	8/4/12 Saturday 3:00 p.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	153
42	8/11/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	153
43	8/25/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	155
44	9/15/12 Saturday 9:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	158
45	9/20/12 Thursday 3:00 p.m. for Ports America on Crowleys Cont Ship 2 gangs with 4 drivers each	RP-18a	159
46	9/22/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	159
47	10/13/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	163
48	10/20/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	164
49	11/3/12 Saturday 1:00 p.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	166
50	11/17/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-18a	167
51	11/17/12 Saturday 6:00 p.m. for Ports America on Crowleys Cont Ship 1 gang Henry Spears	RP-18a	167
52	11/24/12 [read: 11/25/12] Sat 1:00 pm for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-18a	168
53	11/28/12 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs with 4 drivers each	RP-18a	169
54		RP-18a	
55		RP-18a	
56		RP-18a	
57		RP-18a	

	Call-outs by Huey Cuveas from 8/26/11 - 9/27/11 received for Container Ships and Barges. The date below represents the shape-up date, but the call to the CI-D was normally made the day before.	Exhibit Number	Bates Number
1	8/27/11 Saturday 7:00 a.m. for Ports America on Crowleys Container Ship 2 gangs	RP-19	9356
2	9/19/11 Monday 6:00 p.m. for SSA on the Dupont Ore Ship 1 gang Houston Fairley	RP-19	9356
3	9/20/11 Monday 12:00 Midnight for SSA on the Dupont Ore Ship 1 gang Archie Schields	RP-19	9356
4	9/20/11 Tuesday 7:00 a.m. for SSA on the Dupont Ore Ship 1 gang Joe Holloway with 2 Extra Men	RP-19	9356
5	9/20/11 Tuesday 7:00 a.m. for Ports America on Crowleys Cont Ship 1 gang	RP-19	9356
6	9/21/11 Wednesday 7:00 a.m. for Ports America on Chiquita Cont Ship 1 gang with 4 drivers	RP-19	9356
7	9/21/11 Wednesday 8:00 a.m. for Ports America on Chiquita Cont Ship 1 gang with 4 drivers	RP-19	9356
8	9/27/11 Tuesday 1:00 p.m. for Ports America on Crowley Cont Ship 2 gangs JW Beavers & Henry Spears	RP-19	9357

	Call-outs by Huey Cuveas from 10/4/11 - 12/31/11 received for Container Ships and Barges. The date below represents the shape-up date, but the call to the CI-D was normally made the day before.	Exhibit Number	Bates Number
1	10/8/11 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-19	26152
2	10/10/11 Monday 1:00 a.m. for Ports America on Dole Cont Ship 2 gangs with 5 drivers each	RP-19	26152
3	10/11/11 Tuesday 7:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-19	26151
4	10/15/11 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-19	26151
5	10/16/11 Sunday 8:00 p.m. for Ports America on Dole Cont Ship 2 gangs with 5 Drivers each	RP-19	26151
6	10/18/11 Tuesday 11:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-19	26150
7	10/22/11 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-19	26149
8	10/23/11 Sunday 8:00 p.m. for Ports America on Dole Cont Ship 2 gangs with 5 drivers each	RP-19	26149
9	10/25/11 Tuesday 8:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-19	26149
10	10/26/11 Wednesday 7:00 a.m. for Ports America on Chiquita Cont Ship 1 gang with 4 drivers	RP-19	26149
11	10/26/11 Wednesday 8:00 a.m. for Ports America on Chiquita Cont Ship 1 gang with 4 drivers	RP-19	26149
12	10/26/11 Eurius Lima Voy 1142 Men needed Gary 1 Larry 6	RP-19	26149
13	10/31/11 Monday 8:00 a.m. for Ports America on Dole Cont Ship 2 gangs with 5 drivers each	RP-19	26149
14	11/1/11 Tuesday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-19	26148
15	11/1/1 Voy Men needed Beavers_____ Spears_____	RP-19	26148
16	11/1/11 Tuesday 8:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-19	26148
17	11/2/11 Wednesday 7:00 a.m. for Ports America on Chiquita Cont Ship 2 gangs with 4 drivers each	RP-19	26148
18	11/3/11 Thursday 8:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-19	26148
19	11/4/11 Friday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-19	26148
20	11/5/11 Saturday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-19	26148
21	11/5/11 Saturday 7:00 a.m. for Ports America on Crowleys Cont Ship 2 gangs JW Beavers & Henry Spears	RP-19	26148
22	11/7/11 Monday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-19	26147
23	11/7/11 Monday 1:00 a.m. for Ports of America on Dole Cont Shile 2 gangs with 5 drivers each	RP-19	26147
24	11/8/11 Tuesday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-19	26147
25	11/8/11 Tuesday 8:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-19	26147
26	11/9/11 Wednesday 7:00 a.m. for SSA on the Dupont Ore barge JL Hunt	RP-19	26147
27	11/9/11 Wednesday 7:00 a.m. for Ports America on Chiquita Cont Ship 2 gangs with 4 drivers each	RP-19	26147
28	11/10/11 Thursday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt	RP-19	26147
29	11/11/11 Friday 8:00 a.m. for SSA on the Dupont Ore barge JL Hunt	RP-19	26146
30	11/12/11 Saturday For orders on Crowleys Cont Ship for Saturday please call back by 10:00 a.m.	RP-19	26146

	Call-outs by Huey Cuveas from 10/4/11 - 12/31/11 received for Container Ships and Barges. The date below represents the shape-up date, but the call to the CI-D was normally made the day before.	Exhibit Number	Bates Number
31	11/13/11 Sunday 8:00 p.m. for Ports America on Dole Cont Ship 2 gangs with 5 drivers each	RP-19	26146
32	11/14/11 Monday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-19	26146
33	11/15/11 Tuesday 7:00 a.m. for SSA on the Dupont Ore Barge JL Hunt with 2 Extra Men	RP-19	26146
34	11/15/11 Tuesday 8:00 a.m. for Ports America on Crowleys Cont Ship 1 gang JW Beavers	RP-19	26146
35	11/16/11 [read: '11-15-11] Wednesday 7:00 a.m. for Ports America on Chiquita Cont Ship 2 gangs with 4 drivers	RP-19	26146

* *

AFFIDAVIT OF DONALD EVANS

STATE OF MISSISSIPPI
COUNTY OF HARRISON

COMES NOW your affiant, DONALD EVANS, who being first duly sworn, deposes and says:

1. I am the President of the International Longshoremen's Association, Local 1303.

2. I am not an infant, incompetent, or ineligible to be engaged in military service.

3. As President of Local 1303, I am intimately familiar with the terms and conditions of the Collective Bargaining Agreement ("CBA") governing the International Longshoremen's Association Local 1303 and the Gulfport Stevedoring Association, Inc., as well as the parties thereto.

4. The Gulfport Stevedoring Association-International Longshoremen's Association (G.S.A.-I.L.A.) Container Royalty Plan, Gulfport Stevedoring Companies-International Longshoremen's Association (G.S.C.-I.L.A.) Welfare Plan, Gulfport Stevedoring Companies-International Longshoremen's Association (G.S.C.-I.L.A.) Vacation Plan, Gulfport Stevedoring Companies-International Longshoremen's Association (G.S.C.-I.L.A.) (herein collectively referred to as the GSA/GSC Plans) are not signatories to the CBA.

5. The collective bargaining agreement and the terms of the CBA do not govern the employment relationship between the GSA/GSC Plans or the individuals who are employed in the position commonly known as the Container Inspector/Dispatcher position.

6. The position of Container Inspector / Dispatcher is and has always been a non-union position.

7. The Gulfport Stevedoring Companies-International Longshoremen's Association Container Royalty Plan (GSA-ILA Plans) at one time employed union member Tommy Kirk Evans in the position of Container Inspector/ Dispatcher. Tommy Kirk Evans worked as one of the Container Inspector/Dispatchers until January 2013. The Local 1303 recommended to the Board of Trustees for the GSC/GSA Plans that Tommy Kirk

EXHIBIT
C

Evans he terminated due to complaints Local 1303 was receiving regarding performance issues in the position of Container Inspector/Dispatcher.

8. As of January 2013 two local union members, C.A. Johnson and H.L. Cuevas, occupy the Container Inspector/Dispatcher positions.

I declare under penalty of perjury that the foregoing is true and correct, further, affiant sayeth not.

DONALD EVANS

Subscribed to and sworn before me this 26th day of February, 2013.

NOTARY PUBLIC

My Commission Expires: Sept 8, 2014

STATE OF MISSISSIPPI
NOTARY PUBLIC
ID # 53702
BONNIE SHUBERT
Commission Expires
Sept. 8, 2014
HANCOCK COUNTY

GCX-15

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

THE GULFPORT STEVEDORING ASSOCIATION-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION CONTAINER ROYALTY PLAN	*	
and	*	**Cases 15-CA-096939**
TOMMY EVANS, an Individual	*	
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1303	*	
and	*	**15-CB-096934**
TOMMY EVANS, an Individual	*	

AFFIDAVIT OF SERVICE OF: <u>GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE</u>.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on April 17, 2014, I **E-FILED** the above-entitled document with the National Labor Relations Board and served by **E-MAIL ,** as noted below, the following persons, addressed to them at the following e-mail addresses:

Stephen W. Dummer, Esq.
Dummer and Lowery, PLLC
PO Box 1423
Gulfport, MS 39502
228.284.1818 (Ext.102)
228.284.1855 fax
sdummer@dl-pllc.com

Kevin Mason
Robein, Urann, Spencer, Picard, and Cangemi APLC
2540 Severn Ave, Suite 400
Metairie, LA 70002
504.885.9994
504.885.9969
kmason@ruspclaw.com

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