

**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

**GULFPORT STEVEDORING ASSOCIATION-  
INTERNATIONAL LONGSHOREMAN'S ASSOCIATION CONTAINER ROYALTY  
PLAN BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

/s/ Stephen W. Dummer

Stephen W. Dummer (Miss. Bar No. 102341)

Warren H. Dedeaux (Miss. Bar No. 104662)

**DUMMER & LOWERY, PLLC**

322 Courthouse Road

Gulfport, MS 39507

Telephone: (228) 284-1818

sdummer@dl-pll.com

wdedeaux@dl-pll.com

**Counsel for the**

**GSA-ILA Container Royalty Plan**

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COMES NOW, the Gulfport Stevedoring Association-International Longshoremen’s Association Container Royalty Plan (hereinafter “the Plan”) by and through its undersigned counsel, Dummer & Lowery, PLLC, and submits its Brief in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge (ALJ) in the above referenced matter.

**I. INTRODUCTION**

This case was presented to Administrative Law Judge Michael Marcionese upon the General Counsel’s Complaint, First Amended Consolidated Complaint and Second Amended Consolidated Complaint (collectively hereinafter “Complaint”), following a hearing before Judge Marcionese on September 9-12, 2013. In its Complaint as amended, the General Counsel alleged that Respondent Plan discriminated against Claimant, Tommy Kirk Evans (hereinafter “T. Evans”), by terminating him for supporting his son Glen Evans in his campaign for Union

President against the sitting president and Tommy Evans' brother, Donald Evans, in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (hereinafter "Act").

On February 27, 2014, Judge Michael A. Marcionese, after having heard all the evidence, observed the demeanor of the witnesses and having read the briefs of the parties entered his decision finding that Respondent Plan was subject to the jurisdiction of the National Labor Relations Board. ALJD at 4-5. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (hereinafter "the Board") the Container Royalty Plan respectfully submits that the ALJ erred in his finding that the Board has jurisdiction over the Plan.<sup>1</sup>

## II. BACKGROUND FACTS <sup>2</sup>

The Plan is an independent 501(c)(9) tax-exempt trust first established and certified by the Department of Revenue in 1979. *See* RPX-3. The Plan administers container royalty benefits to eligible participants under a trust agreement. *See* RPX-1. The genesis of the Container Royalty Plan is an agreement between the Local 1303 and existing port employers, currently SSA Marine, Inc. a/k/a SSA Gulf, Inc. ("SSA") and Ports America, Inc. ("Ports America") (SSA and Ports America hereinafter collectively "Port Employers") and their respective collective bargaining agreement (hereinafter "CBA"). *See* GCX-3. The Plan is not responsible for administering pension, health insurance, life insurance, vacation or other benefits to participants who are employed by the Port Employers.

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<sup>1</sup> The plan has contemporaneously filed its Opposition to the General Counsel's Brief in Support of its Exceptions to the ALJD finding that the Plan did not wrongfully terminate the charging party Tommy Evans (hereinafter "T. Evans"). These facts and arguments are incorporated by reference as if set forth fully herein.

<sup>2</sup> Reference to the Exhibits of the General Counsel, Respondent Plan, Respondent Union and Joint Exhibits will be designated as GCX, RPX, RUX 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 "T.R." and "ALJD" respectively. An Arabic numeral(s) after "T.R." 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. T.R. 15 at 13-16 is transcript page 15 at lines 13-16.

Participants are hired by the Port Employers to perform work at the Port of Gulfport. The Port Employers' contributions derive from revenues, which are paid to the Container Royalty Plan pursuant to a formula set forth in the CBA. The CBA explains that if an employee works seven hundred (700) or more hours they are entitled to receive "container royalties." *See* RPX-1, p. 2. 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 Port Employer signatories for "covered employees."<sup>3</sup> If an employee does not work 700 or more hours for that calendar year he/she is not eligible for an annual Container Royalty Payment. (T.R. 235).

The Container Royalty Plan Trust, established by the CBA, is administered by the Trustees comprised of two representatives nominated by the Port Employers (*i.e.* SSA and Ports America) and an equal number of representatives nominated by the Union.<sup>4</sup> An administrator is hired by the Plan as contract labor to ensure compliance with applicable laws and regulations. The Plan itself employs only two individuals called Container Inspector/Dispatchers (hereinafter "CI/D"). T. Evans has served as one of the two CI/Ds since the creation of the position in 1974. The Plan is not a signatory to the CBA and thus the CI/D position is not governed by the CBA; it is furthermore not required that CI/Ds be members of the Union.

Although the CBA directs the establishment of a trust, there is nothing in the CBA which sets forth guidelines regarding how the Container Royalty Plan will operate, including but not limited to the hiring and/or termination of employees. All employees of the Plan are "at-will"

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<sup>3</sup> 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 Plan. 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.

<sup>4</sup> *See* Record of Exceptions, No. 7 (The respondent union does not necessarily appoint two trustees; the number will always be equal to the number of trustees placed in by the employers).

employees under the terms of their respective employment agreements and serve at the leisure of the Trustees.<sup>5</sup> Furthermore, the Trustees determine the terms and conditions of employment for the CI/Ds. Finally, the CI/Ds are compensated directly by the Plan which further distinguishes the CI/D position from a CBA-controlled Union position.<sup>6</sup>

### III. STANDARDS OF REVIEW

It is well established by the Board that on matters not founded upon a determination of credibility, a *de novo* review of the entire record is appropriate. *Valley Steel Prods., Co. v. Shopmen's Local 536*, 111 NLRB 1338 (1955). A Trial Examiner (now ALJ) is instructed to make a credibility determination by evaluating “demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.”<sup>7</sup> The General Counsel always carries the burden to make a *prima facie* proving jurisdiction. *Constr. & Gen. Laborers Local 1177*, 269 NLRB 746, 746 (1984). The jurisdictional burden never shifts to the Respondent. *Id.* A review of the totality of the facts reflects that ALJ's decision on jurisdiction should be overturned.

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<sup>5</sup> See generally *Empire Gas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971, 974 (Miss. 1992) (citing *Perry v. Sears Roebuck & 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.” *Empire gas, Inc. of Kosciusko*, 599 So. 2d at 974 (citing *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 875 (Miss.1981)).

<sup>6</sup> The CI/D position was created by the Trustees in 1974 to be an administrative position within Respondent Plan. During the period in question, there was no local Union contribution for attachment to the position. All monies paid to the CI/D position come out of the administrative cost line item which is set aside by the Respondent Plan from monies received. The CI/D position was created at the request of the Trustees, and later confirmed by the U.S. District Court for the Southern District of Mississippi, as a “checks and balances” for container royalty contributions. See RPX-6. The CI/D position is not eligible for the annual container royalty payments because the CI/D is not a “covered employee” under the CBA.

<sup>7</sup> *In re Double D. Const. Group, Inc. v. Int'l Assoc. of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 272*, 339 NLRB 303, 305 (2003) (citing *Daikichi Corp. d/b/a Daikichi Sushi and Mohammad Based*, 335 NLRB 622, 623 (2001)).

#### IV. LAW AND ARGUMENT

##### A. *The GSA-ILA Container Royalty Plan is Unique and Should Not Be Subject to the Board's Jurisdiction*<sup>8</sup>

The Act gives the Board a broad range of jurisdiction over matters protected by the Act. *NLRB v. Marsden*, 701 F.2d 238, 240 (2d Cir. 1982). While broad in scope, Congress did not intend that the Board's jurisdiction be *carte blanche*. Congress clearly provided boundaries establishing that the Board did not have statutory jurisdiction over employers whose effect on interstate commerce is only *de minimis*. *Id.* at 241.<sup>9</sup> 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). Furthermore, under the Board's discretionary jurisdictional standards, codified in 29 C.F.R. Section 104.204(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. That inflow or outflow of money must have at least an impact on commerce that is more than *de minimis*. *Marsden*, 701 F.2d at 241.

The Board has used the above standards to exercise jurisdiction over trusts set up by employers for the purpose of providing services to the employees. *See Roofing, Metal & Heating Assoc's, Inc.*, 304 NLRB 155, 156 (1991). However, the cases are limited in scope to the range of services provided by the trusts. *Chain Serv. Rest., Luncheonette & Soda Fountain*

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<sup>8</sup> See Record of Exceptions, Nos. 1-7, 9-10.

<sup>9</sup> *Marsden* gives some indication that where an organization's level of services does not exceed the \$50,000 jurisdiction requirement, jurisdiction may be imputed under certain circumstances. The Board imputed jurisdiction in *Marsden* solely because the employer was a municipality exempt from the Board's jurisdiction. Thus, such an imputation of jurisdiction should be limited to cases where the employer is an exempt municipality.

*Emps., Local 11, AFL-CIO*, 132 NLRB 960, 961 (1961) (stating that the purpose of the trust was to purchase insurance for the employees, and the trust actually purchased more the \$2,000,000 in policies annually from out-of-state carriers); *Southeastern Reg'l ILGWU Health & Welfare Fund*, 146 NLRB 790, 791-92 (1964) (stating that the purpose of the trust was to provide health, hospitalization and recreational benefits to the employees, and the trust actually operated a mobile health unit); *Joint Indus. Bd. of the Elec. Indus. and Pension Comm.*, 238 NLRB 1398, 1406 (1978) (stating the purpose of the trust was to provide dental, medical and optical care for the employees and their families); *Welfare, Pension & Vacation Funds*, 256 NLRB 1145, 1148 (1981) (stating that the purpose of the trust was to administer vacation, pension, and welfare funds to the employees); and *Iron Workers Local 15*, 278 NLRB 914 (1986) (stating that the purpose of the committee was to establish and operate training programs on behalf of the employer). The Board's jurisdiction does not reach all organizations everywhere simply because they are affiliated with a collective-bargaining agreement or its members. *See Marsden*, 701 F.2d at 241. Each organization must be analyzed individually to see if the Board may impute jurisdiction due a trust's association with an exempt organization or whether the trust's impact on commerce is more than *de minimis*. *See Id.*

It is always the burden of the General Counsel who brings the Complaint to prove sufficient facts supporting a finding of jurisdiction. *See Colquest Energy, Inc. v. United Mine Workers of America, AFL-CIO*, 1992 WL 1465810 (NLRB Div. of Judges May 20, 1992) ("The burden of proof regarding jurisdiction, as with all other elements of a *prima facie* case, is on the General Counsel"); *Roy Spa, LLC & Int'l Bd. of Teamsters Local 2*, 19-CA-83329, 2013 WL 3294091 (NLRB Div. of Judges June 28, 2013) ("it is the General Counsel's burden to establish facts which show that a respondent meets the Board's jurisdictional standards."). This burden

never shifts to the Respondent. The Plan respectfully states that the ALJ erred in his decision and should have declined jurisdiction over the Plan due of its *de minimis* effect at best on commerce and the fact that the Plan provides no direct service to either the signatory employers or the Union.

1. *The General Counsel Failed to Present Evidence That the Plan Provides a Service that Directly or Indirectly Affects Commerce Under the Inflow-Outflow Standard*<sup>10</sup>

In this case, the Plan does not provide a service as required under the jurisdictional standards. The ALJ found, however, that the Plan was no different from entities in other cases over which the Board has established jurisdiction. ALJD at 4, 26-27. The Plan respectfully asserts that the ALJ erred because the Plan is unique from the entities referenced in the ALJD because in those cases the entities did provide a "service." The Plan here does not provide service except to its beneficiaries.

For example, the present case is clearly distinguishable from *Joint Industrial Board* because the Board in that case based its decision to exercise jurisdiction on the fact that the Commission received payments over the \$50,000 requirement from the employers. *Joint Indus. Bd. of the Elec. Indus. and Pension Comm.*, 238 NLRB at 1406. More importantly, the ALJ also relied on the fact that the commission used funds to purchase more than \$50,000 in interstate goods and materials required to provide tangible services to the employees, such as medical and dental clinics. In this case, the Plan is similar to the commission in *Joint Industrial Board* in that the Plan does receive payments from the employers in excess of the \$50,000 requirement. (T.R. 139). However, the Plan in the matter *sub judice* does not use the funds to purchase *any* interstate goods, especially not more than \$50,000 in interstate goods. RPX-4. Furthermore, the Plan here does not provide any tangible services to the employees. It merely provides

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<sup>10</sup> See Record of Exceptions, Nos. 1-2, 10.

supplemental income payments to its beneficiaries who lost fulltime employment due to containerization. (T.R. 235).

The ALJ in this case also relied on cases where the respondent entities provided intangible services to the employees. ALJD 4, 14-19. However, the entities in those cases are also clearly distinguishable from the Plan in this case. For example, the trust in *Welfare, Pension and Vacation Funds* provided services such as pension, welfare and vacation benefits in excess of the \$50,000 requirement. *Welfare, Pension & Vacation Funds*, 256 NLRB at 1148. The Plan in this case does *not* dispute that the benefits provided by a trust in the aforementioned case could constitute a service under the jurisdictional requirements. However, the Container Royalty Plan does not provide pension, welfare or vacation benefits (T.R. 235-36). Neither the ALJ nor the General Counsel have cited any cases where the Board has found an entity similar to the Container Royalty Plan to provide a “service” under the jurisdictional requirements. As such, this is a case of first impression.

In this case, the Plan neither provides services or goods nor receives any services or goods from the Union or the signatory employers. (T.R. 235). The General Counsel argued that the act of deducting Union dues from disbursements and submitting dues in a process known as a "check-off" constitutes a service to the Union. This argument is counter-intuitive. The check-off service, which is similar to an elective withholding, is offered to the participating Container Royalty Plan members who choose to have their dues deducted. (T.R. 684) If a member does not sign a check-off authorization, the member’s dues are not deducted and he/she receives the full amount of the disbursement. Thus, if checking-off dues is a service, which is expressly denied, it is a *de minimis* service to the Container Royalty Plan participants, not to the Union.

Furthermore, the General Counsel put on no evidence to refute the Plan's position that it neither provides services or goods nor receives services or goods "valued" in excess of \$50,000. (T.R. 228-229); *compare* 29 C.F.R. § 104.204 (d)(1)(ii). The only potential "service" at issue is the depositing of container royalty contributions by the Port Employers and Shipping Partners into the trust, which funds are then disbursed annually to the qualifying Plan participants. (T.R. 235). This activity however, is for the benefit of the Container Royalty Plan **participants**, not the Port Employers or Respondent Union, and thus cannot constitute a service to an employer engaged in commerce.<sup>11</sup> (T.R. 235). Furthermore, the mere fact that an amount of aggregated disbursements to Plan participants in a given year exceeds \$50,000, does not establish that this amount is the *value* of the service. (T.R. 236). To meet its burden of proof, the General Counsel needed to put on evidence that the "value" of these services was in excess of \$50,000. The General Counsel however, put on no evidence to refute the testimony of Walsh, the administrator of the Plan, that the services provided by the Plan to the participants amounts to writing one check per year. (T.R. 236).<sup>12</sup> As Walsh explained, the "value" of writing one check, per participant per year, would not have a fair market value in excess of \$50,000. (T.R. 236). This evidence remained unrefuted and was not addressed by the ALJ. The value for a one time transfer of funds per year would be *de minimis* at best.

Finally, the General Counsel argued that the Plan provided a service to the Union by facilitating the shape-up process designated by the CI/D Job Description. The General Counsel,

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<sup>11</sup> See Record of Exceptions, Nos. 3 & 9.

<sup>12</sup> The General Counsel attempted to illustrate the Container Royalty Plan's use of a remote answering system and one time transfers to the GSC-ILA Welfare Plan as justification to support jurisdiction from out of state revenues. First, the expense for the phone system was approved by Judge Walter Gex and reviewed by the Department of Labor. See RPX-5, RPX-6. Second, the phone expense does not exceed the \$5,000 yearly threshold for out of state services. (T.R. 219) (indicating that the services were local and not out of state). Moreover, the phone system is a benefit provided to the Container Royalty Plan participants and not a service sold on the open market. Third, the transfers to the GSC-ILA Welfare Plan were not loans or revenue and thus do not apply to 29 C.F.R. Section 104.204(d). (T.R. 239).

however, failed to put on any evidence that this activity by the CI/Ds, which is for the benefit of the Container Royalty Plan participants, constituted a "service" to the Union. If the Plan ceased to function tomorrow, the CI/Ds' dispatching work, when required could be easily accommodated by the foremen at no cost and interstate commerce would not be affected. The ALJ found, despite no evidence being presented by the General Counsel, that the Plan provided a service to the signatory employers. ALJD 4, 34-35. While not stated or explained by the ALJ what "service" is provided to the employers, the ALJ lists several functions (collecting royalty payments, investing funds, using funds to pay administrative costs) as support for his finding. The Plan respectfully suggests that the ALJ's reliance on these unsupported factors is in error and should be overruled.

2. *The Plan Does Not Engage in Any Activity Considered to Be Interstate Commerce*

The ALJ also rejected as not relevant the Plan's proof that it is a tax-exempt 501(c)(9) trust.<sup>13</sup> ALJD at 5, fn. 7. However, a key factor that distinguishes the Plan in this case from the entities established in the cited cases is that it is treated differently under the tax code. Unlike all of the entities from the precedent cases, the Plan in this case operates as a tax-exempt 501(c)(9) trust. Because the Plan is certified under IRS rules it is prohibited from engaging in any form of commerce or commercial activity. (T.R. 141, 208, 231-233, 241) (wherein Walsh testifies: "Q. If you were providing a service or generating revenue, would you be able to maintain your tax-exempt status. A. No, sir."); *compare* 26 C.F.R. § 1.501(a)-1 *et seq.* The Plan respectfully submits that the ALJ's rejection of this fact and its weight was in error.

The Container Royalty Plan is required to prove to the IRS each year that it is not involved or engaged in commerce to retain its tax-exempt trust status. (T.R. 233); *see* RPX-3. The GSA-ILA Container Royalty Plan has received compliance certification from its

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<sup>13</sup> *See* Record of Exceptions, No. 5.

independent auditors and the IRS each year since its inception, as exemplified by the IRS Form 990s introduced at trial. (T.R. 233-34); *see* RPX-2, RPX-7. Additionally, the Plan does not possess “facilities” of any type and does not purchase or receive goods of any value. (T.R. 236). 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.

The Plan’s 501(c)(9) status clearly distinguishes it from all other entities in the precedent cases. (T.R. 232). For example, the signatory employers in this case even have established separate trust plans through the Gulfport Stevedoring Company–International Longshoremen’s Association (hereinafter “GSC-ILA”) to provide intangible service benefits similar to the trust in *Welfare, Pension and Vacation Funds*. However, even these trusts do not share the 501(c)(9) status with the Container Royalty Plan because the IRS considers those to be engaged in commerce. The Plan is clearly unique and distinguishable from the entities in all of the precedent cases. The Plan respectfully submits that the ALJ erred in finding that the Plan provides a service to the signatory employers or that any benefit therein was more *de minimis* and thus insufficient to satisfy the Board’s jurisdictional standards for indirect flow. *See e.g., Chain Serv. Restr.*, 132 NLRB at 960.

Furthermore, the collection of container royalty monies for later distribution is not analogous to a bank as suggested by the ALJ.<sup>14</sup> ALJD at 4, 39-41. The Plan’s tax-exempt 501(c)(9) status also distinguishes it from the line of cases dealing with financial institutions. First, the Plan does not invest the funds within the common meaning of the word. The Plan holds some of the monies in short-term interest bearing accounts until they are distributed in November of each year. (T.R. 48). Because of the limited amount of time the Plan holds the funds it is precluded by both the tax code but also the practicality of annual distributions from

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<sup>14</sup> *See* Record of Exceptions No. 4.

“investing” the monies its holds in trust for the qualified plan participants. Any administrative costs incurred to run the trust are for the benefit of the plan participants and not the signatory employers or union. (T.R. 235). If the signatory employers or union gain any advantage from this indirect benefit it is *de minimis* at best. Regardless, the General Counsel failed to put on any evidence of this fact or that this advantage had any associated value sufficient to satisfy the Board’s jurisdictional standards. The Plan respectfully asserts that the ALJ’s analogy of the Plan being like a bank was error.

Finally, the ALJ found that the plan distributed money to other trust funds, and the General Counsel argued that Plan was subject to its jurisdiction by virtue of these transfers to the GSC-ILA.<sup>15</sup> The GSC-ILA Welfare Plan however, is a distinct and separate individual legal entity. It has its own separate board meetings, minutes, operating rules and procedures, audits and independent tax returns. (T.R. 238). There is no intermingling of funds between GSC-ILA and the Container Royalty Plan. (T.R. 238). While the Plan does have the ability to transfer money to the GSC-ILA, the GSC-ILA trustees independently decide how to allocate those funds. Monies transferred from one entity to the other do not function as a loan as they are applied without condition. (T.R. 239). Aside from sharing some of the same individual trustees, there are no interconnections between the two entities. (T.R. 239). This tangential connection is akin to the way in which the Container Royalty Plan receives money from the shipping companies or stevedoring companies of the Port of Gulfport, in which the conveyor of the funds maintains no control over how the funds are spent, utilized, held or paid.

Whether the General Counsel’s arguments, as adopted by the ALJ, are reviewed *in toto* or individually, the Plan respectfully submits that the ALJ erred in his finding that the Board had jurisdiction over the Container Royalty Plan as required by 29 C.F.R. Section 104.204. The Plan

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<sup>15</sup> See Record of Exceptions No. 6.

respectfully suggests that the *Marsden* decision reflects that the Board lacks jurisdiction over employers whose effect on interstate commerce is only *de minimis*. *Marsden*, 701 F.2d at 241. Any purported “service” to the signatory employers or Union is likewise minimal, indirect and not sufficient to satisfy the Board’s jurisdictional standards.

### 3. *Multi-Employer Jurisdictional Standards Do Not Apply to the Plan*

While the ALJ did not specifically address the General Counsel’s argument for jurisdiction based on the concept of a multi-employer association, the ALJ cited the case law provided by the General Counsel. *See* ALJD at 4, 14-19. In an abundance of caution, the Plan responds to the General Counsel’s argument despite the omission of any analysis on this point in the ALJD. At trial and in the closing briefs, the General Counsel argued that it relied upon the Board’s decision in *Town House Restaurant*, 203 NLRB 134 (1973) to support its jurisdictional position over the GSA–ILA, and by extension, the Container Royalty Plan. (T.R. 39).<sup>16</sup>

*Town House Restaurant* involved a restaurant that was deemed subject to Board jurisdiction based on the fact that it belonged to a multi-employer association and had engaged in group bargaining with other members of the association who were deemed to be engaged in commerce under the Act. The *Town House* decision has no bearing on the present case, as the Plan is a trust and not a multi-employer association, nor is it a member of the multi-employer association. In testimony elicited by the General Counsel, Greg Schruff, one of the Trustees, explained that the Container Royalty Plan was not affiliated with the multi-employer association known as the GSA–ILA (T.R. 56-57). Moreover, the Plan never engaged in any type of negotiation or bargaining with any members of the GSA–ILA. Thus, *Town House Restaurant* has no relevance to the facts of this case and should be disregarded.

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<sup>16</sup> The ALJD does not reference *Town House Restaurant* but includes the sister cases presented by the General Counsel for the same issue. As such, *Town House Restaurant* is included herein in the abundance of caution.

4. *The Affect of the Plan's Activity on Interstate Commerce Should Be Considered de minimis in Order to Avoid Carte Blanche Jurisdiction*

The General Counsel had the sole duty to prove jurisdiction and it failed in that regard. *See e.g., Roy Spa, LLC*, 2013 WL 3294091. The Plan respectfully states that the ALJ's adoption of an analogy excused the General Counsel's failure to meet its burden of proving jurisdiction. Because this issue does not include a determination based on credibility, the Plan respectfully requests this Board review this issue *de novo* and hold that the General Counsel has failed in its burden and find that the Container Royalty Plan is not subject to Board's jurisdiction. 29 U.S.C. § 152(7); 29 C.F.R. § 104.204(d)(1)(ii); *Marsden*, 701 F.2d at 241. A finding contrary to this will have the effect of rendering 29 U.S.C. Section 152(7) moot.

## V. CONCLUSION

The Board's jurisdictional reach is certainly broad in scope under the Act. However, its jurisdiction, as set forth in *Marsden*, is not without limit. The Board must draw the line of jurisdictional power at some point, or it exceeds the permissible scope of 29 U.S.C. Section 152(7). The Plan in this case is the proper point to draw such a line. The Plan does not provide services to any organizations, i.e., municipalities, which are exempt from the Board's jurisdiction. Therefore, the Board should not impute whatever jurisdiction it may have over the other employers in this case to the Container Royalty Plan. The Plan's effect on interstate commerce is *de minimis* at best. For these reasons, and to avoid an unintended carte blanche extension of jurisdictional power, the Board should not exercise jurisdiction over the Container Royalty Plan in this case. The Gulfport Stevedoring Association–International Longshoremen's Association Container Royalty Plan respectfully requests that the Board overrule the ALJ's findings on jurisdiction.

**RESPECTFULLY SUBMITTED**, this the 9<sup>th</sup> day of May, 2014.

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

**DUMMER & LOWRY, PLLC**

BY: /s/ Stephen W. Dummer  
STEPHEN W. DUMMER (Miss. Bar No. 102341)  
WARREN H. DEDEAUX (Miss. Bar No. 104662)

**DUMMER & LOWERY, PLLC**

322 Courthouse Road  
Gulfport, MS 39507  
Telephone: (228) 284-1818  
sdummer@dl-llc.com  
wdedeaux@dl-llc.com

**CERTIFICATE OF SERVICE**

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

**Respondent Union:**

Louis L. Robein  
Kevin R. Mason-Smith  
2540 Severn Ave.  
Suite 400  
Metairie, LA 70002  
Via email: kmason@ruspclaw.com

**General Counsel:**

M. Kathleen McKinney  
Kevin McClue  
Caitlin E. Bergo  
NLRB – Region 15  
600 South Maestri Pl., 7th Floor  
New Orleans, LA 70130-3413  
Via email: Caitlin.bergo@nlrb.gov

**Administrative Law Judge:**

National Labor Relations Board  
Division of Judges  
401 West Peachtree St. N.W., Suite 1708  
Atlanta, GA 30308-3510

SO CERTIFIED this the 9<sup>th</sup> day of May, 2014.

*/s/ Stephen W. Dummer*

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STEPHEN W. DUMMER

**DUMMER & LOWERY, PLLC**

322 Courthouse Road  
Gulfport, MS 39507  
Telephone: (228) 284-1818  
sdummer@dl-pll.com  
wdedeaux@dl-pll.com