

**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

T. EVANS, an Individual

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION LOCAL 1303

And

Case 15-CB-096934

T. EVANS, an Individual

**GULFPORT STEVEDORING ASSOCIATION-INTERNATIONAL
LONGSHOREMAN'S ASSOCIATION CONTAINER ROYALTY PLAN BRIEF IN
SUPPORT OF ITS OPPOSITION TO THE GENERAL COUNSEL'S 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-pllc.com
wdedeaux@dl-pllc.com
**Counsel for Respondent, GSA-ILA
Container Royalty Plan**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND FACTS 2

A. *The GSA-ILA Container Royalty Plan* 2

B. *Tommy K. Evans* 4

III. STANDARDS OF REVIEW 8

IV. LAW AND ARGUMENT..... 9

A. *Legal Standards for Claims under Section 8(a)(1) and 8(a)(3) of the Act* 9

B. *The Plan Did Not Have The Burden to Prove That Evans Had Performance Issues*10

 1. Position Statement was Properly Excluded or Not Material13

 2. The Plan Trustees Discussed Tommy Evan’s Performance Issues and Unanimously Voted for his Termination as Supported by Credible Evidence17

 3. The Plan’s Effective Termination Date was to Provide Additional Assistance Because of Donald Evan’s Continuing Efforts to aid his Brother31

 4. T. Evans Essentially Abandoned his Employment as CID32

 5. Container Inspector-Dispatchers Cannot Effectively Complete Their Duties Standing Beside Their Vehicle And Refusing To Enter The Workplace.....37

 6. General Counsel Misinterprets ALJ’s findings on Credibility.....38

 7. Inability to Terminate is Not Condonation when a Majority Vote is Required for Action39

 8. Donald Evans’ Affidavit Does Not Demonstrate that He or the Union Effectuated the Termination of T. Evans42

 9. The Container Royalty Plan acted in Accordance with its Independent Fiduciary Duties and Did Not Accede to a Union Request44

CONCLUSION.....48

TABLE OF AUTHORITIES

Cases

Advocate South Suburban Hospital v. NLRB, 468 F. 3d 1038, 1046 (7th Cir. 2006).....43

Ampersand Publishing and Graphic Communications Conference,
2010 NLRB Lexis 134 (2010).....44, 45

Black Entertainment Television, 324 NLRB 1161 (1997)16, 17

Boilermakers Local 40 v. Whitt, 266 NLRB 432 (1983)46

Bond Press, 254 NLRB 1227 (1981)16, 17

Butler v. Smith & Tharpe, 35 Miss. 457 (1858) 4

Camaco Lorain Manufacturing Plant, 353 NLRB 605 (2008).....46

Civic Center of Sports, 206 NLRB 428 (1973)22

Daikichi Corp. d/b/a Daikichi Sushi and Mohammad Based, 335 NLRB 622 (2001) 8

Deak v. Masters, Mates and Pilots Pension Plan, 821 F.2d 572 (11th Cir. 1987)4, 21

Electrical Workers, IUE, Local 601 (Westinghouse Electrical Corp.),
180 NLRB 1062 (1970)22

Empire Gas, Inc. of Kosciusko v. Bain, 599 So. 2d 971 (Miss. 1992) 4

Evergreen America Corp., 348 NLRB 17816, 17

Fluor Daniel, Inc., 304 NLRB 970 (1991).....12

*Gelita, USA, Inc. v. United Food and Commercial Workers International Union
Local 1142*, 352 NLRB 404 (2008).....12, 50

Grant Prideco, 337 N.L.R.B. 99 (2001)18

Hirst v. Inverness Hotel Corp., 544 F.3d 221 (3d Cir. 2008)38

Hogan Masonry, Inc., 314 NLRB 332 (1994).....16

Hormel v. Helvering, 312 U.S. 552 (1941)33, 38

Huber v. Taylor 469 F.3d 67 (3d Cir. 2006)33, 38

<i>In re Double D. Const. Group, Inc., v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 272</i> , 339 NLRB 303 (2003).....	8
<i>Kelly v. Mississippi Valley Gas Co.</i> , 397 So. 2d 874 (Miss.1981).....	4
<i>Lumbee Farms Coop., Inc. and Industrial Union Department, AFL-CIO</i> , 285 N.L.R.B. 497 (1987)	33
<i>Mitroff v. Xomox Corp.</i> , 797 F.2d 271 (6th Cir. 1986).....	38
<i>Mt. Healthy City School District Board of Education v. Doyle</i> , 429 U.S. 274 (1977)	10
<i>NLRB v. Amax Coal Co.</i> , 453 U.S. 322 (1981)	4
<i>NLRB v. Colonial Press</i> , 509 F.2d 850 (8th Cir. 1975).....	41
<i>NLRB v. CWI of Maryland, Inc.</i> , 127 F.3d 319 (4th Cir. 1997).....	26
<i>NLRB v. Fibers Int’l Corp.</i> , 439 F.2d 1311 (1st Cir. 1971).....	12
<i>NLRB v MaGahey</i> , 233 F.2d 406 (5th Cir. 1956).....	11
<i>NLRB v. Wright Line</i> , 662 F.2d 899 (1st Cir. 1981) 455 U.S. 989 (1982).....	7, 15, 15, 17, 23
<i>Northeast Lincoln Mercury, Inc., v. Borda</i> , 292 NLRB 857 (1989)	7
<i>Operating Engineers Local 478 v. Gigliotti</i> , 271 NLRB 1382 (1984).....	46
<i>Perry v. Sears Roebuck and Co.</i> , 508 So. 2d 1086 (Miss.1987).....	4
<i>Pratt & Whitney Aircraft</i> , 310 NLRB 1126 (1993).....	16, 17
<i>Redway Carriers, Inc. and Fraternal Association of Special Haulers</i> , 274 NLRB 1359 (1985)	43, 44
<i>Rockwell Auto./Dodge</i> , 330 NLRB 547 (2000).....	2
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966)	12
<i>Southeastern of Dallas Optical Co., Inc.</i> , 153 NLRB 33 (1965)	22
<i>Speas v. Merchants’ Bank & Trust Co.</i> , 125 S.E. 398 (1924).....	12
<i>Standard Dry Wall Products, Inc., v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 872</i> , 91 NLRB 544 (1950)	8, 43, 47

<i>Steve Aloi Ford</i> , 179 NLRB 229 (1969).....	16, 17
<i>Trailways, Inc. & International Union of Operating Engineers, Local 714, AFL-CIO</i> , 237 NLRB 79 (NLRB 1978).....	21
<i>Union Tribune Co. v. NLRB</i> , 1 F.3d 486 (7th Cir. 1993).....	12
<i>United Food & Commercial Workers Union, AFL-CIO</i> , 339 NLRB 148 (2003)	16, 17
<i>United Parcel Serv., Inc., v. Nick</i> , 301 NLRB 1142 (1991).....	41
<i>United States v. Glenn</i> , 312 F.3d 58 (2d Cir. 2002)	38
<i>Valley Steel Prods., Co., v. Shopmen’s Local 536</i> , 111 NLRB 1338 (1955)	8
<i>White Oak Coal Co., v. United Mine Workers of Am.</i> , 295 NLRB 567 (1989)	40, 41

Statutes

29 U.S.C. § 158	9, 11, 18
29 U.S.C. § 1104	4

Other Authorities

BRYAN A. GARNER ED., BLACK'S LAW DICTIONARY (7th ed. 1999).....	14, 40, 46
DIVISION OF JUDGES BENCH BOOK (August, 2010)	16
NLRB BENCH BOOK (2010)	43
WIGMORE ON EVIDENCE (3d ed. 1940).....	12

Rules

FED. R. EV. 701	38
FED. R. EV. 702.....	38
FED. R. EV. 801	14
FED. R. EV. 805.....	14

**GULFPORT STEVEDORING ASSOCIATION– INTERNATIONAL
LONGSHOREMAN'S ASSOCIATION CONTAINER ROYALTY PLAN
BRIEF IN SUPPORT ITS OPPOSITION TO THE GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

COMES NOW, Respondent, the Gulfport Stevedoring Association-International Longshoremen's Association Container Royalty Plan (hereinafter "Container Royalty Plan" or "the Plan"), by and through its counsel, Dummer & Lowery, PLLC, and submits its Brief in Support of its Opposition to the General Counsel's Exceptions to the Decision of the Administrative Law Judge (ALJ) in the above referenced matter. As set forth below, the General Counsel's exceptions are without merit and should be denied.

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 the Plan discriminated against the 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 T. Evans' brother, Donald Evans, in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (hereinafter "Act"). 29 U.S.C. §§ 158(a)(1)-(3). Additionally, the General Counsel claimed that the Respondent, International Longshoreman's Association Local 1303 (hereinafter "Local 1303" or "Respondent Union") had caused the Plan to discriminate against T. Evans in violation of Section 8(b)(2) of the Act.

On February 27, 2014, Judge 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 the Plan did not violate either Section 8(a)(1) or 8(a)(3) of the Act. The Judge

further explained that the General Council had failed to meet its burden that the Plan wrongfully terminated T. Evans. In closing the Judge wrote, “...in the absence of a prima facia case, it is unnecessary to determine whether the Charging Party would have been terminated in the absence of any protected activity under the *Wright Line* analysis...[however] [e]ven if the evidence was sufficient to support a prima facia case, I would find on the evidence here that the Respondents met their burden of showing that the Charging Party would have been terminated for the reasons asserted by their witnesses.” Decision - Statement of the Case, Feb. 27, 2014, p. 9-10 (hereinafter “ALJD”) (citing *Rockwell Auto./Dodge*, 330 NLRB 547 (2000)).

On April 17, 2014, the General Counsel filed its exceptions to the ALJD and the Plan responds with the following analysis in support of the ALJ’s findings as it pertains to the merits of the case.¹ The Plan supports the ALJ’s findings that the General Counsel failed to meet its burden of proving that the Respondent Plan’s act of terminating T. Evans constituted a violation of Section 8(a)(1) or 8(a)(3) of the Act.

II. BACKGROUND FACTS ²

A. *The GSA-ILA Container Royalty Plan*

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,

¹ The Plan has contemporaneously filed its Cross-Exceptions to the ALJ’s findings regarding jurisdiction which are incorporated by reference herein.

² 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.

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.

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.”³ 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. An administrator is hired by the Container Royalty Plan as contract labor to ensure compliance with applicable laws and regulations. The Plan 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

³ 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 (or shipping companies) 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.

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.

All employees of the Plan are “at-will” employees under the terms of their respective employment agreements and serve at the leisure of the Trustees.⁴ All employment decisions are made by the Trustees as independent fiduciaries based on the best interests of the Plan.⁵ The CI/Ds are compensated directly by the Plan, further distinguishing the CI/D position from a CBA-controlled Union position.⁶

B. T. Evans

On or about April 8, 1974, the Charging Party (hereinafter T. Evans) was hired by the Container Royalty Plan in the new position of CI/D. T. Evans was offered the position by his father, Wilson Evans, who was then President of Local 1303 in 1974. Originally, the CI/D position was focused primarily on dispatching workers into gangs to unload cargo from ships arriving at the Port of Gulfport. *See* RPX-10. Around the early 1990s, with the increasing use of containerization, the Trustees determined that additional cargo inspection duties should be delegated to the CI/Ds.⁷ T. Evans, however, refused to comply with many of the new duties.

⁴ *See generally Empire Gas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971, 974 (Miss. 1992) (citing *Perry v. Sears Roebuck and Co.*, 508 So. 2d 1086, 1088 (Miss.1987); *Butler v. Smith & Tharpe*, 35 Miss. 457, 464 (1858)). Therefore, “either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.” *Id.* (citing *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 875 (Miss.1981)).

⁵ Although the Trustees are comprised of two Union nominees and two Port Employer nominees, those individuals are required by law to act only in the capacity as fiduciary to the Container Royalty Plan. *See* 29 U.S.C. § 1104(a)(1); *see NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572, 580 (11th Cir. 1987) (a fiduciary acts solely in the interest of the participants and beneficiaries under the ERISA plan). Thus, no union involvement or pressure is permitted in their role as Trustee. It is said that the even if a trustee is nominated by the Employers or the Union they leave their “hats at the door.”

⁶ The CI/D position was created by the Trustees in 1974 to be an administrative position within the Plan. During the period in question, there was no local Union contribution for the position. All monies paid to the CI/D position come out of the administrative cost line item which is set aside by the 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.

⁷ In order to compel better performance from the CI/Ds, the Trustees adopted a more comprehensive job description. (T.R. 264); *see also* GCX-19.

Despite remembering traveling to New Orleans for job training for the duties set forth in the new job description, T. Evans claims that he never received the written job description. (T.R. 492-494); *see also* RPX-2.

When disciplinary action was proposed by Victor Walsh (“Walsh”) for his refusal to comply with the new duties, Donald Evans (hereinafter “Donald”) intervened and cautioned Walsh against taking such action stating to him “[a]s long as you get what you need, you need to keep your mouth shut.” (T.R. 265-66). As a result of the refusal to perform his duties, the other CI/D was forced to perform T. Evans’ duties in addition to his own. The two Trustees representing the Port Employers found their authority constrained because they could not take action to remove or discipline T. Evans without a majority vote, which necessitated at least one Union representative’s vote.

T. Evans maintained his mediocre performance for many years, largely refusing to do any of the container inspector work and performing only some of his dispatching duties. However, in 2011 T. Evans’ performance became even worse. T. Evans made it known that he resented that the other CI/D Huey Cuevas was, from his perspective, allowed to perform dispatching duties from home during a period of time in 2011. Cuevas was on approved medical leave for several months in 2011 following open heart surgery during which time Cuevas was either in the hospital or recovering at home. (T.R. 598). Cuevas testified that despite his medical condition, and medication that prevented him from driving, he continued to prepare and submit all of the container inspector reports that T. Evans should have been completing in his absence. *See* RPX-12, 12a. Nevertheless, T. Evans’ growing resentment manifested itself into open hostility reflected by his refusal to answer calls to place work orders and his refusal to show up or record shape-ups during Cuevas’ absence. (T.R. 598-600); *see* RPX-19.

Towards the middle of 2011, T. Evans decided he wanted to retire.⁸ Donald however, convinced his brother to delay retirement so he could obtain better pension benefits and access to the Managed International Longshoremen's Association Health Care Trust (MILA) to sustain improved coverage until T. Evans reached the age of eligibility for Medicare. (T.R. 664). Aware of his brother's declining work performance and health issues, Donald testified that he "strung" the Trustees along so he "wouldn't have to vote to fire [T. Evans]." (T.R. 664). Donald stated:

Tommy's my brother, you know. I don't – you know, he didn't have much longer to go, you know as far as retirement. What I was saying is that I knew we were in the process of trying to get MILA or get in with MILA. I knew he was sick. He had lupus. I knew that if we got – if he had retired at the time that he was talking about retiring, he would only have had a \$50,000 hospital policy, which we provided for our pensioners . . . That's why I, you know, just made sure that he stayed on until that happened.

(T.R. at 664-65). Donald testified that his brother promised him that he would retire after the vesting of his pension, healthcare benefits and Medicare eligibility at the end of the 2012. *Id*,

Based on Donald's request, T. Evans elected not to retire and continue working. (T.R. 498). Towards the end of 2011 however, problems arose when T. Evans was involved in a physical altercation with his son, Glen Evans over T. Evans' refusal to assign work to Garland Taylor, despite Taylor's seniority and availability. (T.R. 663, 740-741, 394-395). In early 2012, T. Evans got into another physical altercation with his son, necessitating Donald intervening to break up the dispute. (T.R. 730-732). Following the 2012 argument, T. Evans stopped coming into the Union Hall *except* to pick up his paycheck. Similarly, T. Evans stopped participating in the recording/dispatching aspect of his job. *See* RPX-18; *see also* (T.R. 619) (specifically, Huey Cuevas' testimony that: "Glen Evans told me he wanted to apologize to me that I wasn't getting

⁸ (T.R. 498) ("Q. But for your brother talking to you and asking you to come back to work, you'd be retired today. Right? A. Definitely so.")

much help, and he said that he and his dad had had a discussion about it[.]”). The evidence presented at trial reflected that the Plan had only documentary records that T. Evans participated in five (5) shape-ups for the entire 2012 calendar year. *See* RPX-18a.⁹

T. Evans’ refusal to answer his phone, complete the container inspector reports or participate in the shape-ups in 2012 created sufficient tension that one of the Trustees, Kendall Lamb, confronted Donald and stated that he would no longer sign T. Evans’ paycheck. (T.R. 657, 752). Donald, facing growing pressure from the foremen, Trustees and laborers as a result of his brother’s refusal to work decided he could no longer protect his brother. (T.R. 667-69). When Donald realized his brother was not going to retire at the end of 2012 as promised, he came to the realization that he could no longer protect him. Confident that his brother was now eligible for the highest possible categories of pension, social security, Medicare and health care, Donald made the difficult decision of permitting the termination of his brother.

On December 11, 2012, the Trustees met to discuss T. Evans’ employment status. After forty-five minutes of discussion about his substandard performance and workplace conduct, the Trustees unanimously voted to terminate the T. Evans effective January 5, 2013.¹⁰ Donald made it clear to the other Trustees that he did not want anything negative or disparaging written about

⁹ T. Evans acknowledged during trial that his name, initials or handwriting only appeared on five (5) shape-up reports for entire calendar year of 2012. (T.R. 525, 537-38). Neither T. Evans nor the General Counsel provided any documentary evidence to the contrary. Moreover, T. Evans admitted that he did not have any documentation to support his attendance. The CI/D job description, however, requires CI/Ds to fill out daily records of their attendance. *See* RPX-10. The Port of Gulfport has approximately 120 shape-ups per year. This truancy was confirmed by co-worker Huey Cuevas. (T.R. 617-18). The General Counsel failed to present any credible evidence to refute this fact. As discussed *infra*, it is the General Counsel’s duty to present this evidence, not to require the Respondent to “prove a negative.” *Northeast Lincoln Mercury, Inc., v. Borda*, 292 NLRB 857, 860 (1989).

¹⁰ January 5, 2013, was selected as the effective date to permit T. Evans to retain employment through the holidays as an additional attempt by Donald to assist his brother. To qualify for the MILA core plan, a member must have worked more than 700 hours between October 1 to September 30 in any plan year. The Charging Party was asked by Donald to continue working from October 1, 2010, to September 30, 2011, so he would qualify for coverage from January 1, 2012, to December 31, 2012. This extension of better coverage under MILA carried T. Evans to his sixty-fifth birth date and thus qualified him for Medicare. Once T. Evans turned sixty-five he no longer needed Plan coverage or MILA coverage. The ALJ however, found that this date was tied to the Charging Party’s qualification for MILA. ALJD at 7, fn. 9. The ALJ erred on this point but the error is neither material nor relevant for purposes of this analysis. *See* Plan Record Exception No. 11.

his brother in the meeting minutes or the termination letter. Each Trustee testified to his own specific reasons for voting to terminate T. Evans. Each however, unequivocally rejected the notion that the 2012 election played any part in their decision. (T.R. 116-17, 306-10, 670-74, 752-755). The ALJ credited the Trustees testimony. ALJD at 7.

III. STANDARDS OF REVIEW

In reviewing a credibility determination, the Board has explained:

...it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.

Standard Dry Wall Products, Inc., v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 872, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951) (hereinafter "Standard Dry Wall"). Stated another way, the Board may not disturb an ALJ's credibility findings except "in the most unusual of circumstances." *Poly-America, Inc., v. NLRB*, 260 F.3d 465, 480 (5th Cir. 2001).

The Board shall not overrule a Trial Examiner's resolution as to credibility because the Board acknowledges that the ALJ has "had the advantage of observing the witnesses while they testified..." *Id.* at 545. An 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."¹¹ On matters not founded upon a determination of credibility however, the Board may base its findings upon a *de novo* review of the entire record. *Id.*; *Valley Steel Prods., Co., v. Shopmen's Local 536*, 111 NLRB 1338 (1955).

¹¹ *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

The General Counsel always bears the burden to make a *prima facie* showing to support its charge. Only “if” the General Counsel meets its primary burden does the “ball pass” to the Respondent to demonstrate its affirmative defense(s). *See e.g. Borda*, 292 NLRB at 860. In the matter *sub judice*, the ALJ not only found that the General Counsel failed to meet its *prima facie* burden but also ruled that even if the General Counsel’s burden had been met, that the Plan had put on sufficient evidence to defeat the allegations that the Plan had violated Sections 8(a)(1) and 8(a)(3) of the Act. ALJD at 9-10, fn. 10. The General Counsel’s exceptions are nothing more than disagreements with the ALJ’s rulings on credibility as will be discussed below.

A. *Legal Standards for Claims under Section 8(a)(1) and 8(a)(3) of the Act*

Section 8(a)(1) of the Act forbids an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this Title.” 29 U.S.C. § 158(a)(1). The Board has generally interpreted this section to prohibit interference by an employer with an employee’s rights to organize, form, join, or assist a labor organization, to bargain collectively, or to engage in other concerted activities. In consequence, whenever a violation of Section 8(a)(2), (3), (4), or (5) is committed a “derivative” violation of Section 8(a)(1) is also found. For purposes of this brief the Plan will focus primarily on the alleged violation of Section 8(a)(3) of the Act.

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees “in regard to hire or tenure of employment or any term or condition of employment” for the purpose of encouraging or discouraging membership in a labor organization. 29 U.S.C. § 158(a)(3). In general, this section makes it illegal for an employer to discriminate because of an employee’s union-related or otherwise protected activities. Discrimination within the meaning of the Act has included such action as refusing to hire, discharging, demoting, assigning to a less desirable shift or job, or withholding benefits. It is exclusively the General Counsel’s burden to prove that T. Evans was terminated in violation of the Act.

B. *The Plan Did Not Have The Burden to Prove That Evans Had Performance Issues*¹²

To establish a violation of Section 8(a)(3) of the Act, the General Counsel must prove by a preponderance of the evidence that the employee's employment conditions were adversely affected by his or her engaging in protected activities. *Wright Line and Bernard R. Lamoureux*, 251 NLRB 1083 (1980), *cert. denied*, 455 U.S. 989 (1982). To sustain its *prima facie* burden, the General Counsel is required to prove all four prongs of the *Wright Line* analysis which are:

- (1) the discharged employee was engaged in union or protected activities or the employer believed them to have been so engaged;
- (2) the employer knew about those union or protected activities;
- (3) the employee's protected activity or union affiliation was a substantial or motivating factor in the employer's decision to terminate; and
- (4) there was a causal relationship between the employer's animus and the employee's termination.

Id. The General Counsel must show that the employee's engagement in the protected activities caused, or was a "motivating factor" in the Employer's decision regarding the employment. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

Only if the General Counsel meets its burden, does the burden pass to the employer to prove good cause for taking the action against the employee. *Id.* The generally accepted premise when there is no showing of a Section (8)(a)(3) violation is that a business is free to make their own business decisions. *Wright Line*, 251 NLRB at 1084. "Management can discharge for good cause, or bad cause, or no cause at all. It has . . . complete freedom with but

¹² The Plan incorporates by reference its exception numbers 8, 11, 12. The ALJ held that "longshoremen seeking work at the Port call a dispatch number and listen to a voice message to find out if they will be working." ALJD 3, 32-33. In practice, the longshoremen seeking work call into the number to see if there are any possible openings which may "permit" them to work, subject to their seniority. (T.R. 596). Additionally, the ALJ held "there is no dispute that the performance concerns cited by the Trustees and these witnesses had occurred for a number of years yet there is no evidence that the Charging Party was ever warned, counsel or otherwise informed that the Respondent Plan was unhappy with his performance." ALJD at 8, 9-12. The Plan put on testimony by Walsh and four trustees to support its position regarding performance concerns. However, the Plan was not permitted to create any written record over the years as it was not its common practice and would have been prevented by Wilson Evans and later Donald Evans in their position as Chairman of the Board of Trustees. *See e.g.*, (T.R. 656-57).

one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.” *Id.* (citing *NLRB v MaGahey*, 233 F.2d 406, 413 (5th Cir. 1956)).

In this case, the General Counsel failed to meet its burden of proof required under *Wright Line*. ALJD at 9, 31-44. All four trustees testified that they had no knowledge of any public involvement by T. Evans in his son’s campaign. As a matter of fact, the only evidence presented by the General Counsel demonstrates that T. Evans was at relational odds with his son.

Multiple witnesses, including Donald Evans, testified that they knew about the altercations between T. Evans and his son. Therefore, it is extremely plausible that Donald would presume that T. Evans was not helping with his son’s campaign. As the ALJ ruled, the General Counsel failed to present sufficient evidence to indicate that Donald or the other trustees were acting on any knowledge that T. Evans engaged in activity protected under the Act. This fact is further supported by T. Evan’s own pre-hearing affidavit.¹³ The ALJ specifically credited the Plan’s witnesses over T. Evans on this issue. ALJD at 9, 1-18.

Because the General Counsel failed to meet its initial burden under *Wright Line*, the Plan never assumed a burden to have to justify the termination. Thus, any attempt to “disprove” that T. Evans had performance issues in unnecessary albeit readily reflected in the record.

Furthermore, General Counsel failed to introduce any evidence of *adequate* performance at trial.

Assuming *arguendo* that the General Counsel had established a *prima facie* claim, the burden would have shifted to the Plan to produce credible evidence that it would have taken the

¹³ (T.R. 500-501)(“I did not actively campaign on behalf of my son Glen Evans. I did not pass out flyers or petitions.”); *see also* (T.R. 741, 743-44, 783).

same action against T. Evans even in the absence of the protected conduct.¹⁴ The Plan would need only to establish that it had a legitimate reason to take the challenged action against T. Evans, and the burden would shift back to the General Counsel to show that the proffered reasons for termination were pretextual.¹⁵ The employer's reasons may only be rejected as pretextual if the explanation is false, implausible, or unsupported by the record as a whole.¹⁶

Therefore, the General Counsel was required to prove to the ALJ by a preponderance of evidence that the dominant, overriding reason the Plan terminated T. Evans was retaliation in response to his known public support of his son in the 2012 election. *See NLRB v. Fibers Int'l Corp.*, 439 F.2d 1311, 1315 (1st Cir. 1971). The ALJ ruled that the General Counsel failed in its *prima facie* burden. However, the ALJ went even further and held that even if the General Counsel had met its burden that the Plan presented credible evidence and testimony that the termination would have been taken in the absence of the protected conduct. ALJD at 9-10. The following will respond to each of the General Counsel's individual arguments from its Brief in Support of Exceptions.¹⁷

¹⁴ *Id.* at 904. Thus the employer in a Section 8(a)(3) case has "no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel." *Wright Line*, 662 F.2d at 905; *Gelita, USA, Inc. v. United Food and Comm'l Workers Int'l Union Local 1142*, 352 NLRB 404, 414 (2008). Professor Wigmore explained the distinction as follows:

[a] *prima facie* case ... need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof[.]

WIGMORE ON EVIDENCE, § 2487 at 282 (3d ed. 1940) (quoting *Speas v. Merchants' Bank & Trust Co.*, 125 S.E. 398 (1924)).

¹⁵ The intent of the burden-shifting paradigm is to prevent a Union employee from being immunized from bad conduct by simply engaging in protected activity. The *Wright Line* court explained that any other result would place an employee in a "better position than he would have held if he had not done so, and his employer's freedom to apply legitimate performance standards would be impaired by the activist's favored position." *Wright Line*, 662 F.2d at 904 (citing *Doyle*, 429 U.S. 274 at 285-87).

¹⁶ *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490-492 (7th Cir. 1993); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

¹⁷ Each Section label may not mirror the label provided by the General Counsel. However, the Plan has attempted to identify the subject matter for ease of reference. Additionally, the Plan has attempted to combine arguments which rely on similar facts or authorities in the interest of brevity.

1. Position Statement was Properly Excluded or Not Material¹⁸

The General Counsel argues that the Plan's position statement was improperly excluded from evidence. GC Brief at 13. This argument is without merit. As a foundation, the General Counsel failed to prove by a preponderance of the evidence that the T. Evans was engaged in a protected activity. ALJD at 8-9. T. Evan's own testimony was also discredited on this point. At trial T. Evans attempted to revise his position to reflect that he handed out campaign materials. (T.R. 500-501). No corroborating evidence however, was presented by the General Counsel and T. Evans' self-serving statements were rejected by the ALJ.

The General Counsel argues that the Plan's position statement dated February 26, 2013, should have been admitted into evidence and used to support T. Evan's position. GC Brief at 13.

The position paper reads in part:

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.

...

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 (GSA-ILA CRP Correspondence, Feb. 26, 2014) (emphasis added). The General Counsel argues that the statement contains an admissions by the Plan that 1) it "knew" that T. Evans openly campaigned for his son Glen Evans, and 2) because the Local 1303 had access to and held information about complaints against T. Evans the Plan Trustees could not testify to the same. These issues will be addressed individually herein.

¹⁸ This section encompasses the General Counsel's exceptions 7-10 and 22-25.

i. Qualified Assumption of Counsel Not Sufficient to Impeach Credibility of Trustees

The General Counsel attempts to distort the letter's intent and purpose. This position paper should not be held as an admission of the Plan's "knowledge" that T. Evans publically "campaigned" for his son. T. Evans testified under oath that no one affiliated with the Plan or the Union knew of his campaigning on behalf of his son. (T.R. 502). A determination of whether the Plan had knowledge that T. Evans supported his son is contested and speaks to the ultimate issue of credibility.¹⁹

The fact that the undersigned counsel implied, before any discovery had commenced, that a father would likely support his son does not constitute an "admission" when viewed under the Federal Rules of Evidence. FED. R. EV. 801. This is especially true considering the prefacing phrase "upon information and belief" which was purposely added to the letter because no formal discovery had been conducted and the undersigned was basing its statements on secondhand information which it believed to be true at the time.²⁰ FED. R. EV. 801; *contra* FED. R. EV. 805.

The prefacing statement "upon information and belief" identifies this comment as hearsay within hearsay under Rule 805 of the Federal Rules of Evidence. FED. R. EV. 805 (hearsay within hearsay may only be included if each part of the "combined statements conforms with an exception to the hearsay rule provided in these rules."). The General Counsel has provided no authority to suggest that the statement is admissible under the Federal Rules of Evidence. This argument is rather an attempt by General Counsel to rehabilitate its own witness

¹⁹ Counsel for the Union asked T. Evans, "Q: "Do you have any evidence that anyone, including your brother, knew that you went to those homes [to campaign]. A: No." (T.R. 502). On February 1, 2013, T. Evans executed an Affidavit wherein he stated, "I did not actively campaign on behalf of my son, Glen Evans." (T.R. 501-02) (emphasis added). Thus, according to his own Affidavit, T. Evans was not involved in distributing petitions or flyers in support of his son's candidacy for Union President. (T.R. 501-02).

²⁰ In legal parlance, the phrase "**information and belief**" identifies a statement that is made, not from firsthand knowledge, but "based on secondhand information that the declarant believes is true." BRYAN A. GARNER ED., BLACK'S LAW DICTIONARY 783 (7th ed. 1999).

(T. Evans) after the ALJ found T. Evans lacked credibility when impeached with his own affidavit. ALJD at 8, 42-44.

ii. Imputed Knowledge from Union Not Sufficient as to Trustees

The General Counsel also suggests that the ALJ committed error by refusing the letter from the undersigned counsel as an admission of imputed knowledge of complaints by union members against T. Evans. GC Brief at 15. The General Counsel's position should also be rejected because this section of the letter includes the same qualifying language "[u]pon information and belief" and further explains that "...The GSC/GSA Plans however, do not have knowledge of the substance or access to those complaints." GCX-36. The General Counsel attempts to impeach the Trustees' trial testimony wherein each explained the problems they had with T. Evans.

Contrary to the General Counsel's argument, these statements are not in conflict but rather support the Plan's statement that in February 2013 the Trustees' were not all privy to the various complaints which had been filed. The term "complaint" as used in the letter refers to seniority complaints [both verbal and written] as compared to verbal "complaints" that the Trustees had received from their respective supervisors.²¹ The General Counsel's attempt to imply inconsistency is simply red herring.

iii. Failure to Admit Position Statement is Not Material

The Plan respectfully suggests that even if the Board ruled that the ALJ committed error in not admitting GCX-36, that error is not material. This error, if any, did not affect the outcome of the case or the ALJ's ability to judge the credibility of the witnesses. Moreover, at trial the General Counsel only sought to introduce the position statement in support of whether the CID

²¹ The term "complaint" as a matter of legal parlance can have many meanings. As used in the February 26, 2013, correspondence it was used to reflect verbal and/or written seniority complaints that had been given to the union representative trustee(s).

position was “supervisory.” The ALJ inquired and the General Counsel conceded that no one was placing that at issue. The General Counsel then stated, “Well, again, Your Honor, if they put on the record that they’re not asserting that that (sic) position is a supervisory position, we don’t have any objections.” (T.R. at 448, 22-24). The General Counsel waived this argument when it agreed with the ALJ to put the entire position paper into the rejected exhibits file. (T.R. at 449, 13-17). The General Counsel’s failure to preserve its objection or to identify that the letter included other purported admissions relevant to: 1) if T. Evan’s publically supported his son, or 2) that that the Trustees did not have knowledge or access to “complaints” (used in the specific rather than the general sense) should be a bar to its requested relief.²²

iv. The Authority Relied Upon by General Counsel is Distinguishable

The General Counsel relies upon several distinguishable cases in support of its position.²³ Each of the cited cases refers to a material change in a party’s position from a prior written position. None of the case cited by the General Counsel includes facts analogous to those found in the matter *sub judice*.²⁴ Despite the distinguishable nature of each of the General Counsel’s

²² The General Counsel failed to raise this issue in its Post-Trial Brief, Joint Motion to Correct the Record or its option to file a Motion to Correct the Record. Thus, the General Counsel has waived this argument. *Hicks v. Midwest Transit, Inc.*, 500 F.3d 647, 652 (7th Cir. 2007).

²³ *Evergreen America Corp.*, 348 NLRB 178, 187 (2006), *enfd.* 531 F.3d 321 (4th Cir. 2008); *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); *Black Entertainment Television*, 324 NLRB 1161 (1997) (hereinafter *BET*); *Pratt & Whitney Aircraft*, 310 NLRB 1126, 1130 fn. 1 (1993); *Bond Press*, 254 NLRB 1227, 1231-1232 (1981); *Steve Aloï Ford*, 179 NLRB 229, fn. 2 (1969); *see also* DIVISION OF JUDGES BENCH BOOK, § 13-215 (August, 2010).

²⁴ In *Evergreen*, the employer submitted three separate position papers in connection with disparate charges. Later however, the employer attempted to assert a privilege to prevent prior statements being entered into the record as admissions contradicted at trial. *Evergreen America Corp.*, 348 NLRB at 186-87. None of the cited cases by the General Counsel include facts analogous to those found in the matter *sub judice*. *Evergreen* is distinguishable from the matter *sub judice* because the ALJ stated that if the Plain admitted something material like jurisdiction he would accept the correspondence. (T.R. at 448-49, 18-21).

In *Local 342-50*, the union admitted in a formal answer that certain individuals were agents of the company and then later disclaimed their ability to bind the company. *United Food & Commercial Workers Union, AFL-CIO*, 339 NLRB at 154. In *Bond Press*, the Respondent drastically shifted its position that the collective bargaining contract was controlling and denied seniority layoffs and then later argued the agreement had expired and the employer was no longer under an obligation to observe seniority rules. *Bond Press*, 254 NLRB at 1231-1232. In *BET*, the employer initially asserted that it laid off multiple employees due to reduced production and/or poor performance

cited cases, each makes the point that a position paper is only relevant and admissible as to credibility “if” the paper reflects that a party “vacillates in offering a rational and consistent account of its actions...” *Bond Press*, 254 NLRB at 1232.²⁵

In the matter *sub judice*, the Plan has uniformly and consistently taken the position that T. Evans was terminated due to his performance issues and not because of any purported protected activity under the Act. The ALJ credited the Plan’s witnesses against the self serving statements of T. Evans and Glen Evans in all regards. The General Counsel also failed to preserve these issues on appeal. The General Counsel’s attempt to cloud the findings as to credibility by asserting that a qualified position statement is superior to trial testimony is without merit.

2. The Plan Trustees Discussed Tommy Evan’s Performance Issues and Unanimously Voted for his Termination as Supported by Credible Evidence²⁶

The General Counsel next argues that the Plan did not put on sufficient evidence that T. Evans was terminated for performance related issues. This suggestion is without merit. As discussed *supra*, the General Counsel would have had to prove by a preponderance of the evidence that at least three of the four trustees (a majority) voted to terminate the T. Evans for

but later claimed that these individuals were “found wanting pursuant to Production Manager David Faulks ‘skills matrix.’” *BET*, 324 NLRB at 1161. Each of those cases are factually distinguishable from the matter *sub judice*.

In *Steve Aloi Ford*, a dealership initially took the position that it laid off workers attempting to unionize for economic reasons (while hiring new employees for the jobs) but then later asserted that the employees were terminated for not having an inspectors license, then for failing a test, and then later still for belligerency. *Steve Aloi Ford*, 179 NLRB at 230. In *Pratt & Whitney*, the employer provided prior position statements asserting progress during negotiations for rate increases however, at trial its testimony was “riddled with contraction” as to the exact position it took during the negotiations. *Pratt & Whitney*, 310 NLRB at 1126 fn. 1.

²⁵ In *Hogan Masonry*, the Board ruled in a very short opinion that the employer’s stated reason for termination were not supported by the record. *Hogan Masonry, Inc.*, 314 NLRB at 338 fn. 1. *Hogan Masonry* contains little to no factual development and no analysis that a prior attorney statement existed or was sought to be entered into the record. The Plan assumes *Hogan Masonry* was inadvertently included in the General Counsel’s brief.

²⁶ The Plan incorporates the General Counsel’s arguments under its heading “D. Trustee’s Purported Reasons for Voting to Terminate T. Evans are not Supported by Evidence” and “L. Testimony of Ports America foreman Larry Donald Holloway and Gary Thomas shows that Respondent Plan merely acceded to Respondent Union (Exceptions 16-18).” All three of these sections are incorporated into the Plan’s response here as the analysis deals with the same general facts, testimony and authority.

purposes which violation of Sections 8(a)(1) or 8(a)(3) of the Act.²⁷ The Plan respectfully submits that the General Counsel has failed to show that even one of the Trustees voted to terminate with animus or for an unlawful reason.²⁸ The following will set forth the relevant testimonies which the ALJ credited in his decision.²⁹

The Plan presented credible, consistent and unchallenged evidence through its four Trustees that each voted to terminate the T. Evans based on their own individual experiences and knowledge of his increasingly poor performance. Each Trustee testified under oath that their decision to terminate T. Evans was in no way influenced by the election or T. Evans' alleged support for his son. The Plan's other witnesses credibly testified as to T. Evans' increasingly poor work and conduct.

i. *Greg Schruff - Trustee*

Greg Schruff, Manager of SSA Gulfport and one of the Plan's Trustees, explained that CI/Ds are hired based upon the Trustees' own recommendations. Schruff further explained that the Union representatives have historically recommended candidates for the CI/D position because the Union representatives had closer relationships with the workers and were in the best position to make an informed recommendation. (T.R. 77). Thus, it was expected that the Union

²⁷ See generally, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983) (in which the Supreme Court held that to make out a prima facie case under *Wright Line*, the General Counsel must prove by a preponderance of the evidence, *i.e.* that it is more likely than not, that the employer had a discriminatory intent that was a substantial or motivating factor in the discharge); *aff'd in Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994).

²⁸ General Counsel argues that T. Evans met his burden because animus may be inferred from circumstantial evidence rather than having to be supported by direct evidence. *Grant Prideco*, 337 N.L.R.B. 99, 99 (2001). Although the facts may have supported such an inference in *Prideco*, the facts in this case do not support such an inference. In *Prideco*, the facts demonstrated that none of the supervisors had ever had a problem with the claimant's performance, which created a reasonable inference of animus. However, the facts in this case clearly demonstrate that a number of supervisors had consistent problems with T. Evans' performance for many years, and the only reason that he was kept on was because Donald had always tried to protect his brother. Thus, no reasonable inference can be made in this case. See also *NLRB v. E-Systems, Inc.*, 642 F.2d 118, 120 (5th Cir. 1981); *Forsyth Elec. Co.*, 332 NLRB 801, 818 (2000).

²⁹ For the sake of brevity, the Plan incorporates by reference its Post Trial Closing Brief, for a more thorough recitation of applicable factors presented at trial.

representatives would begin considering potential replacements once the performance issues with T. Evans rose to a level that termination became necessary.

Schruff testified that he personally attempted to contact T. Evans several times, but was unable to reach him and did not ever get a response. (T.R. 111). Schruff explained that the situation grew more dire during the last six months of 2012 when he had problems getting in touch with T. Evans “[t]wo, three, four times.” and “if we needed to try to communicate with him, I would say the majority of the time, we could not get him.” (T.R. 112). Schruff explained that his supervisors, Mickey Pebbles and Steve Puccio complained to him about not being able to get in touch with T. Evans for their respective duties. (T.R. 129).

Schruff, a friend of Glen Evans since 1996, acknowledged the difficulty he experienced in voting to terminate his friend’s father, but nevertheless explained that he was compelled to support the termination “because of the performance issues that we had had in the past.” (T.R. 118). Schruff explained that his termination vote arose from “[n]ot being able to reach [T. Evans] to call a tape. I had specifically tried to communicate with him on those time-frames with no avail[.]” (T.R. 116-17). Schruff further testified that there was no mention or discussion of the election at all at the meeting by any of the Trustees. (T.R. 117).

ii. Darius Johnson - Trustee

Darius Johnson, one of the two Trustees representing the Union, testified that during the meeting on December 11, 2012, he voted to terminate T. Evans because of performance related concerns. Johnson explained, “I witnessed several times Tommy Kirk being absent as far as shapeups. It’s time for men to go to work.” (T.R. 306). Johnson stated that in T. Evans’ absence, many of the foremen had to fill their own gangs. (T.R. 306). Johnson testified that T. Evans would show up late for shape-ups, arriving five to ten minutes before the shift started

while the other CI/D would arrive an hour prior to the start time. (T.R. 307). Johnson stated that T. Evans' habitual late arrival caused complications in the shape-up process. (T.R. 308).

Johnson also discussed his hesitation in confronting T. Evans personally about his poor performance. Johnson explained that T. Evans' seniority within the Union and his familial relationship with the Union President made any disciplinary action problematic. (T.R. 309).

Johnson's friendship with the Glen Evans also complicated the decision to terminate T. Evans.

The following exchange occurred during the trial:

Q. Did you vote to terminate T. Kirk because of the election or him supporting his son?

A. No.

Q. Do you know Glen Evans?

A. Yes.

Q. Is he a friend?

A. Yes.

Q. And you still voted to terminate his dad?

A. Yes.

(T.R. 311). Johnson testified that during the December meeting, none of the Trustees discussed the election or suggested that the T. Evans should be terminated based on his alleged support of Glen Evans. (T.R. 310).

*iii. Donald Evans - Trustee*³⁰

Donald Evans, President of Local 1303 and Chairman of the Board of Trustees, explained that in his thirty years as a Trustee, he had never seen a written record of any complaint or disciplinary session for *any* CI/Ds. (T.R. 655). Donald acknowledged that with his brother,

³⁰ Donald Evans executed an affidavit on February 26, 2013, prepared by counsel for the Plan. In that affidavit, counsel incorrectly ascribed the recommendation to terminate T. Evans made by Donald Evans individually to Local 1303. Pursuant to *Amax Coal*, Donald Evans was acting as an individual fiduciary and not as a direct representative of Local 1303. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572, 580 (11th Cir. 1987) (a fiduciary acts solely in the interest of the participants and beneficiaries under the ERISA plan). This issue was discussed at trial and Donald testified that he did not draft that affidavit and as such it incorrectly describes his recommendation as being on behalf of Local 1303 rather than as an independent Trustee. As the Board has acknowledged in prior decisions, a witness's affidavit prepared by his attorney that contains inconsistent statements with those made at the hearing is not proper impeachment evidence or dispositive on the issue of credibility where the affidavit was not drafted by the witness or closely scrutinized by him prior to signing. *See Trailways, Inc. & Int'l Union of Operating Eng'rs, Local 714, AFL-CIO*, 237 NLRB 79, p. 4 (1978).

“from time to time we get complaints about him. I’ve always tried to, you know, cover it up or make up for whatever mistake he made.” (T.R. 656). Donald indicated that he talked with his brother over the years about complaints being made against him and requested he do better.

(T.R. 656). When discussing his brother’s performance, Donald testified:

Q. Over the years leading up to 2012, did you see, I guess, his performance getting better, staying the same, or getting worse?

A. Well, it’s bad to say, but it deteriorated over the – you know, over time. It really did.

Q. Focusing on 2011-2012, what would you say about his performance?

A. Well Tommy, you know, has always, you know, did basically, you know, what he wanted to do, and like I say, he went from doing something to nothing.

Q. When did you see that he was doing nothing in your words?

A. It had to be around 2012.

Q. Was there a point in 2012 where Kendall Lamb approached you about your brother’s performance?

A. Yes, he did.

Q. What did he tell you?

A. I don’t remember the full conversation, but the part that is most vivid in my eye was the part that, you know, he wasn’t going to continue to sign his check.

Q. What did that mean, he was no longer going to sign his check?

A. Well, he was just saying from the standpoint of he was disappointed or displeased with what was going on with the container dispatcher, and that if things didn’t improve, you know, he wouldn’t sign any checks for him anymore.

(T.R. 656-57).³¹ Donald explained that if a Trustee refused to sign a payroll check that it would cause internal problems among the Trustees. (T.R. 658).

Donald described an incident in 2012 where Huey Cuevas, the other CI-D, told him that T. Evans had not been into the dispatcher’s office to work since earlier that year. (T.R. 658-59).

This caused Donald to begin taking notice of his brother’s increasing truancy, worsening performance and internalizing the growing number of complaints he had been receiving in 2012.

³¹ The General Counsel attempted to impeach Donald on this point by referencing the pre-hearing affidavit because it did not mention the conversation with Kendall Lamb. However, It is well settled law that the failure of an investigator or Board agent to develop through affidavit the full range of testimony, which may later be adduced from the affiant as a trial witness, does not indicate a lack of credibility or aid impeachment. *See Southeastern of Dallas Optical Co., Inc.*, 153 NLRB 33, 38 (1965); *Civic Center of Sports*, 206 NLRB 428, 431 (1973). Witnesses are frequently called upon to testify concerning matters they were not questioned about during the investigation process and often they recall for the first time on the stand matters previously forgotten. *See Electrical Workers, IUE, Local 601 (Westinghouse Elec. Corp)*, 180 NLRB 1062, 1066 (1970).

Donald explained that his brother had not been terminated earlier because the vote would have resulted in a deadlock between the Trustees, and prevented his removal without one of the Union representative Trustee's consent. (T.R. 674).³²

Donald also made it clear that he tried to keep his brother on the job long enough for him to obtain the highest available pension and eligibility for MILA/Medicare. (T.R. 664-65). Donald explained:

It was my understanding that [Tommy] was going to retire once we got MILA, once we got the MILA program started. Once we got the MILA program started, I knew if he stayed on until January 1, he would have MILA until he got 66 years old or 65 – over 65 years old. At that point, once MILA – we found out that MILA did not cover pensioners, I knew that he would have an opportunity to get with the Social Security program.

(T.R. 665). Donald further explained that despite his brother's promise to retire, when he asked at the end of 2012, he refused. Donald stated that after learning of his brother's refusal to retire, he told him "well, Tommy, you know, I'm not going to sign any more checks for you." (T.R. 667-68).

The General Counsel argued that the timing of T. Evans' termination was suspect because the Plan awarded yearly bonuses to the two CI/Ds in November 2012. This issue was resolved by Donald Evans and Victor Walsh who explained that CI/D bonuses are **not** merit-based but rather are loosely tied as an equivalent dollar amount to the container royalty bonus paid to qualified Container Royalty Plan participants. Donald explained, "[I] wanted to make sure that he got his vacation bonuses and everything out of the way, and that – the other reason for calling it for that time frame is the fact that he would have his insurance." (T.R. 669).

Donald testified that if he had wanted to punish T. for supporting Glen Evans in the election he

³² Donald explained that the two Union representatives historically vote together just as the two Port Employer representatives vote together. (T.R. 674).

could have voted to suspend his 2012 bonus. (T.R. 668). The fact that T. Evans' was paid a bonus in November 2012 is consistent with the testimony that Donald was still protecting his brother until the end of 2012. Moreover, these facts demonstrate a lack of any animus on the part of Donald or the other three Trustees.

Donald explained, however, that if he did not take action to remove his brother by the end of the year he believed that the Union members would begin filing complaints with the Department of Labor because he was continuing to employ a family member who was not performing his job duties. (T.R. 676). As he stated, "that was my biggest concern. And by him being my brother, I know that the wrath of the Department of Labor would probably come down on me, more so than the other trustees." (T.R. 676).

Donald succinctly stated his reason he voted to terminate his brother was, "Because he wasn't doing his job."³³ (T.R. 669). The following exchange took place during the hearing:

Q. Did it matter to you that his son had ran against you in the election?

A. No, it didn't.

Q. Did it matter to you that he supported his son in the election?

A. No, it didn't.

Q. Was he going to be terminated, regardless of that election?

A. Yes, he was.

(T.R. 669). When asked why he told Walsh to list the reason for T. Evans' termination in the meeting minutes as simply, "for performance issues," Donald explained,

A. You know, it's bad enough to terminate him, but why would you want to put all the other negative things about it in writing? That's the way I looked at it.

Q. Is that because he's your brother ?

A. Well, yes.

³³ Donald Evans further stated, "Because I knew the – it had come time, you know, for him to – the other trustees were basically fed up, you know, with him. I knew how Kendall had felt, and I really didn't want anybody else to do that." (T.R. 673).

(T.R. 670-71). The General Counsel failed to present any evidence to refute Donald's recitation of the facts or his justification for the termination. The ALJ credited Donald's testimony. ALJD at 9.

iv. Kendall Lamb - Trustee

Kendall Lamb, Manager for Ports America Gulfport, has served as a Trustee since 2007. (T.R. 748). Lamb explained that T. Evans had performed to a satisfactory level "until around 2010 when we were having a hard time getting in touch with T. Evans to order labor for dispatch purposes, to provide services to our customers which we are a service provider." (T.R. 749). Lamb explained that after 2010 and into 2012 he was not able to get in contact with T. Evans while he was supposed to be on shift performing his duties. (T.R. 749). Lamb stated that his site manager, Tim Lancaster, and another Ports America employee, Jesse Parker complained to him that they were having problems getting in touch with T. Evans to assign laborers. (T.R. 750). Lamb explained that he complained to Donald in 2010 regarding the problems with T. Evans' poor attendance, after which his attendance and availability improved for a short time before regressing back to unacceptable levels. (T.R. 751).

Lamb testified however, that in 2012 the situation grew worse: "Well, at one point, I mentioned to Mr. Evans, to Mr. Donald Evans, that, you know, we were having a hard time justifying paying the salary if we weren't able to get in touch with the gentleman to perform the function that he was hired." (T.R. 752). Lamb explained that he told Donald that he would not sign any further checks for T. Evans if he wasn't working. (T.R. 752). Lamb explained that the December 11th meeting was convened for the purpose of discussing the dismissal of T. Evans.

Lamb testified:

Mr. [T.] Evans had been given the opportunity to continue to come perform his job, had not done so, and it was our understanding that he was an at-will

employee, and that we were going to move forward to take care of the issues at hand, and have someone that could order labor so that we could properly service our service accounts.

(T.R. 753-54). Lamb then explained his own personal motivation for voting to terminate T.

Evans from the position of CI/D:

Because when we need to order labor, we need someone to do their job and order labor. We can't wait for our service – for our customers to not be serviced. Quite frankly, two thirds of our customers are perishable cargos, and time is of the essence. When they hit the dock, the cargo has to come off and get – make its way to the market. Its perishable green fruit, and we don't have the means to put together labor ourselves. The dispatcher has to put that information on the tape.

(T.R. 755). Lamb made it clear that the T. Evans' failure to put work orders on the tape or be available by phone in 2012 forced him into action.

Lamb testified that the election had nothing to do with his decision to vote to terminate T.

Evans. The following exchange took place at trial:

Q. Did any of the trustees raise the point that they wanted to terminate Tommy because of his son Glen running against Donald?

A. Absolutely not.

Q. Would that have been a factor for your consideration?

A. Absolutely not.

Q. Why not?

A. Ports America works with ILA in multiple ports on the Eastern seaboard and the Gulf of Mexico. We deal with different administrations within the ILA continuously and have a proven track record that we will deal with any of their officers, whomever is elected by themselves. We don't have any skin in that game. We'll work with whichever managers that their members elect.

Q. Would it have mattered to you if Glen had won?

A. Absolutely not.

Q. If – would you still have voted to terminate Tommy if Glen had won?

A. If he – absolutely.

(T.R. 754-755). Lamb explained that employers cannot take sides in elections because they have to be ready to work with whomever wins an election. Lamb presented credible and unrefuted testimony that his decision to terminate T. Evans had no connection to the election.

The General Counsel questioned Lamb as to why he would terminate an employee without giving them prior written warnings. Lamb explained that he had never had an employee just stop coming to work like T. Evans had, but if he did, he would feel justified in terminating that employee without a written warning. (T.R. 761-62).

Lamb's testimony makes it clear that providing written notice or having a counseling session with T. Evans prior to making the decision to terminate him in 2012 was neither necessary nor practical. Moreover, it is established law that an employer is not required "to have finely tuned notice procedures in order to justify firing someone for excessive absenteeism; unexcused absences are usually obvious to the employee." *NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319, 333 (4th Cir. 1997). The failure to provide prior warnings or notice before terminating an employee for repeated failures to report to work is typically not worthy indicia of pretext by an employer. *Id.* The ALJ credited Lamb's testimony and rejected the notation of pretext or unlawful motive. ALJD at 7, 1-4.

v. *Vic Walsh - Plan Administrator*

Vic Walsh, who has served as the chief administrator for the Plan since 1981, was the official most familiar with the supervision of the CI/Ds and performance issues. Walsh testified that after the CI/D job description was revised to include container inspection duties in the early 1990s, T. Evans refused to perform the new duties, including the completion of container inspection reports. (T.R. 155). Walsh stated that he approached Donald about his brother's performance issues but was rebuffed.

Donald Evans told Walsh that he would take care of the problem and not to worry about it. (T.R. 156). Walsh further stated that the other CI/D at the time, Harold Oliver, turned in his completed inspection reports on a regular basis. (T.R. 156, 267). On the other hand, to the best of Walsh's recollection in over thirty years, T. Evans only provided inspection reports on two

occasions. (T.R. 264). Walsh provided unrefuted testimony that he received numerous complaints from the Trustees and the other CI/Ds over the years regarding the T. Evan's failure and/or refusal to perform inspection and dispatching duties. (T.R. 266–269). Walsh also testified that T. Evans' performance grew even worse in 2012. (T.R. 269-70).

Walsh explained that Donald did not want negative comments about his brother written into the December 11th minutes or the termination letter. (T.R. 163). Donald instructed Walsh at the meeting to only list the reason for his brother's termination as "performance issues" to avoid creating a record of his poor conduct. (T.R. 162-63). Specifically, when asked to recite the reasons given by Donald at the meeting as to why he was recommended T. Evans' termination, Walsh stated:

[Donald] said that [Tommy] was not even coming into the hall to do the dispatch anymore. He'd been doing dispatch fairly decently for a long time, but of late, he had refused to come in and even do the dispatch work. The only time he walked in the hall was to pick up a check.

(T.R. 164). On December 12, 2012, Walsh sent a termination letter to T. Evans, listing an effective date of termination as January 5, 2013. The delay between the December 11, 2012, and the actual termination date was due to the Trustees' vote to give T. Evans as much notice as possible. (T.R. 221).

vi. Huey Cuevas - Contain Inspector Dispatcher

Huey Cuevas has served as a CI/D since Harold Oliver retired in 2005. As part of his duties, Cuevas kept detailed log books of all work orders, call outs, cargo shipments and reports. *See e.g.*, RPX-18, 18a, 19, 12, 12a. As part of the CI/D dispatching duties, Cuevas reports to work one hour before the scheduled starting time for each shift to receive and organize the worker's seniority cards so that the shape-up can occur promptly at the scheduled time. (T.R. 596). Additionally, Cuevas explained that the most important duty of a CI/Ds is **being available**

by phone to receive work orders 24 hours per day from the stevedore companies and make an audio recording of the unloading time, the number of men needed, and other aspects of the job (a process called “setting the tape”). (T.R. 597).

In February 2011, Cuevas took medical leave to undergo open heart surgery. (T.R. 598). Cuevas remained on leave until October 2011 while recovering from the operation. However, even while he was hospitalized and in recovery, Cuevas received multiple phone calls from multiple representatives of the stevedore companies complaining that they were unable to get in touch with the T. Evans. (T.R. 598-600). Cuevas also testified to receiving similar calls from the stevedore companies while he was on vacation at various times, regarding their inability to get in touch with T. Evans to place work orders and set the tape. (T.R. 600).

As part of his inspection duties, Cuevas maintained detailed log books for each container shipment that came into the Port of Gulfport, listing the vessel’s identifying information, the type of cargo, and most importantly, the CI/Ds who were on duty when the shape-up occurred for that vessel. RPX-18a. Cuevas testified that he has never witnessed T. Evans performing his inspecting duties or completing inspection reports. (T.R. 594). Furthermore, the Plan’s only documentary evidence presented, and which the General Counsel was unable to refute, reflected that during 2012 T. Evans appears to have only been present and participating in a total of five (5) shape-ups, out of approximately 121. RPX 18-a. This ratio equates to roughly four percent (4%) attendance rate for T. Evans in calendar year 2012. (T.R. 627-28).³⁴ Despite acknowledging a worthy rebuttal by the General Counsel, the ALJ credited the Plan’s witnesses and evidence on this issue. ALJD at 8, 21-34.

³⁴ The General Counsel’s Brief attempts to call into question the veracity of the data or that the exhibits incorrectly reflect the amount of times T. Evans appeared for work. The Plan addressed these issues in Section IV(4), *infra*.

vii. *Herb Williams - Laborer*

Herb Williams testified that he filed several complaints against T. Evans' for his conduct as a CI/D, one of which he provided directly to T. Evans and which was seemingly never turned into management. *See* RPX-23; (T.R. 723). Williams explained that despite working on the dock for 25 years, T. Evans routinely passed him over for work. In contrast, Williams explained that he was consistently assigned to work by Huey Cuevas and other CI/Ds. (T.R. 722). Williams stated that the complaints he had given to either Cuevas or Gloria Pittman were eventually heard by the seniority board in his favor, but the complaint he had given to T. Evans was never brought up again. Williams' testimony was unrefuted by the General Counsel and deemed credible by the ALJ. ALJD at 7, 42-43.

viii. *Garland Taylor - Laborer*

Garland Taylor testified that T. Evans passed him over for work between 10 and 15 times between 2011 and 2012. (T.R. 739). Taylor explained, "That was just him. If he had a problem with you, he might not say nothing to you, but if he had a problem with you, he'd take it out that way, where it hurt you the most." (T.R. 740). Taylor also testified that in 2012, a heated argument occurred between Glen Evans and his father about passing him over for another job. Taylor testified that:

It was one Saturday, we was going out on Crowley, and I come to get a job, and at that time, Glen Evans was the vice president, and Tommy Kirk was the dispatcher, but they had a heated argument because Tommy Kirk didn't want to give me no job and Glen did.

(T.R. 741). Despite Glen and T. Evans denying that any such argument occurred, Taylor stated, “I mean, it was toe to toe, face to face, whatever was said. . . .” (T.R. 741). The ALJ specifically credits the Plan’s witnesses on this issue. ALJD at 7, 5-11.³⁵

Taylor explained that between 2011 and 2012, T. Evans’ performance as dispatcher got even worse as he began failing to appropriately dispatch men: “He wasn’t doing the cards right. He wasn’t getting the men that’s supposed to have got a job, he wasn’t getting those men a job. He was getting who he wanted to have a job at that time.” (T.R. 783). Taylor also acknowledged that the men were starting to go to Donald and make more complaints about his brother in 2012. (T.R. 743-44). Taylor’s testimony was unrefuted by the General Counsel and deemed credible by the ALJ. ALJD at 7, 42-43.

ix. Gloria Pittman - ILA Local 1303 Employee

Gloria Pittman, a receptionist and secretary for the Local 1303 for 46 years testified that she has been “as close as family” to the Evanses throughout her entire term of employment. After the CI/Ds moved to the new union hall in 2012, she testified that she never saw T. Evans enter the building during dispatching hours. (T.R. 729). Pittman stated that from her workstation, she was five to ten feet away from the area where T. Evans should have been working, however, she never saw him enter the building. (T.R. 730).

Pittman testified that following the altercation between Glen Evans and T. Evans, that Glen stormed out of the room and told her:

[Tommy’s] just sitting up there, telling all those damn lies . . . but he’s lucky, because when I take over, I’m not putting up with the shit; I’m not going to put up with him. I’m going to get rid of him He might fool you all, but he don’t fool

³⁵ The altercation in late 2011 is in addition to the altercation in early 2012 wherein the Plan’s witnesses related that the T. Evans stopped coming to work or going into the Union Hall. Tommy and Glen Evans both attempted to claim that the altercations did not occur or that they were merely “civil discussions.” T. Evans’ attempt to describe the altercation as a “civil discussion” is directly refuted by multiple witnesses. (T.R. 711-13).

me It's a damn shame, the way he works that poor white man [Huey Cuevas] to death, while he sit his ass at home and get drunk.

(T.R. 731). Following the public altercation, Pittman explained that she did not see T. Evans back in the Union hall. (T.R. 734). Pittman's unchallenged testimony coincides with the shape-up logs prepared by Cuevas, on which T. Evans' name seemingly appears for the last time on January 25, 2012. *See* RPX-18a. Pittman testified she had never heard before or after that T. Evans was terminated because he supported his son in the election against Donald Evans. (T.R. 734-735). Pittman's testimony is compelling, unrefuted and supports the Plan's position. Further, Pittman's recitation of the facts is highly credible by virtue of the fact that she has no vested interest in the outcome of the litigation. Pittman's testimony was also deemed credible by the ALJ. ALJD at 7, 5-11.

When all of these testimonies are viewed together along with the accepted evidence, and the ALJ's crediting of the same in contrast to the self-serving testimonies of Tommy and Glen Evans, the General Counsel's argument as to sufficiency must be rejected as without merit.

3. The Plan's Effective Termination Date was to Provide Additional Assistance Because of Donald Evan's Continuing Efforts to aid his Brother³⁶

The General Counsel next argues that the Plan's delay in terminating T. Evans immediately implies pretext. The General Counsel's argument fails to account for several common sense factors that are at issue. First, the decision to delay the effective termination date was to permit T. Evans to retain employment through Christmas and New Years. Second, the delay was also designed to provide additional time for T. Evans to make additional arrangements, if needed, for his return to the union labor pool. Additionally, because T. Evans

³⁶ The General Counsel identifies exceptions 11 and 14 to this issue.

was effectively “not working” by that point anyway, delaying his effective termination date had little impact on the day to day operations of the CIDs.³⁷

4. T. Evans Essentially Abandoned his Employment as CID

The General Counsel argues that T. Evans performed a substantial amount of work in its attempt to refute the Plan’s voluminous records reflecting that following 2011 T. Evans 1) only called in the tape ten (10%) percent of the time, 2) completed none of the required container inspector reports, and 3) participated in approximately five (5) of the shapeups which were reported for 2012.

The General Counsel spends a considerable amount of time attempting to show that T. Evans may have worked “others days” by providing new Post-Trial exhibits. The General Counsel’s attempt to put on new evidence is untimely and should be restricted because it is well established that an appellate court should not give consideration to evidence that were not raised in the lower court proceedings. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). When a party attempts to raise such evidence on appeal, “the waiver doctrine is ‘essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues’” *Huber v. Taylor* 469 F.3d 67, 75 (3d Cir. 2006) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). The Board has explained that where an exceptions brief refers to, attaches or refers to evidence outside the official transcript, the Board should grant the other party’s motion to strike the attached evidence.³⁸ *Lumbee Farms Coop., Inc. and Indus. Union Dep’t, AFL-CIO*, 285 N.L.R.B. 497, fn 2 (1987).

³⁷ If the ALJ erred on this point, as suggested by the General Counsel, the error is neither material nor relevant for purposes of this analysis because Donald’s intent in asking his brother not to retire was to ensure that he had sufficient “coverage” in the event of a health issue. (T.R. 664). This position is consistent and unrefuted by the evidence at trial. The ALJ’s error of precision, if any, was neither material nor sufficient to call into question the acknowledged “intent” and the ALJ’s general findings on credibility.

³⁸ Pursuant to *Lumbee Farms*, the Respondent Plan herein moves to strike the Post-Trial Exhibits of the General Counsel (attachments 1-4). *See infra* Section IV(4)(ii).

i. *The Burden Never Shifted to the Plan to Prove that T. Evans had Performance Issues*

For the sake of brevity, the Plan incorporates by reference all arguments set forth in Section IV(2) herein. However, because the General Counsel failed to meet its initial burden under the *Wright Line* test, the Plan never assumed a burden to prove that termination actually took place due to performance issues. Thus, any evidence presented Post-Trial to attack the Plan's accepted evidence is irrelevant and should be stricken.

ii. *General Counsel Cannot Attach the Post-Trial Demonstrative Evidence*

The General Counsel's next argument should also fail because it attempts to interject evidence that is not in the record. As such, the Plan moves to strike the Post-Trial Attachments 1, 2, 3, and 4 because T. Evans failed to introduce the same at trial.

This motion to strike should be granted because to permit the same would be unduly prejudicial to the Plan because it did not have the opportunity to cross-examine or challenge the reliability of the purported evidence at trial. Moreover, the Plan did not have the opportunity then or now to present rebuttal evidence or testimony. The General Counsel's attempt to circumvent the rules of evidence by attaching this evidence for the first time in its appeal brief should be rejected.

iii. *Post-Trial Exhibits do not Support the General Counsel's Position when weighed against the totality of evidence.*

However, assuming *arguendo*, that the General Counsel's Post-Trial Brief attachments are accepted by the Board over the Plan's objections, the attachments have no effect on the outcome because they speak to the weight of the evidence and the ALJ's determination of credibility. Huey Cuevas credibly testified that he prepared the summaries by revisiting the source material in RPX-18 and 19. He then noted the individual's name as "present" if he: 1)

saw them there, 2) saw their hand writing on supporting documents, or 3) saw their name/initials on any of the forms. (T.R. 610). Cuevas further testified that if he was not present at the shapeup, and presumably no one else created the report, he would *not* have that information on the summary. *Id.* at 614-616. To suggest that Mr. Cuevas' testimony was "false" or anything less than credible is specious and the ALJ correctly credited the Plan's witnesses. ALJD at 9, 21-25.

The most telling aspect in the General Counsel's argument is its failure to acknowledge that T. Evans, as part of his job was to keep *written records* of all shape-ups, reports and activities. This record keeping requirement is absolute especially for all shape-ups due to the possible ramifications of an error. Despite these facts, T. Evans provided no such evidence to the Plan or at trial. (T.R. 264, 492-94; *see also* GCX-19, RPX-2, RPX-10).

The purpose of requiring a written record for every "shapeup" to create a record is in the event a complaint is filed for a seniority violation. If a complaint is filed, the Seniority Board must review the record to determine who was present at the shapeup, who was selected, and who was passed over. Without this record the Seniority Board would be forced to base its decision on a "he said-she said" set of facts. When confronted with this duty T. Evans attempts to pass all responsibility for his CID duties to Huey Cuevas whom he calls the "assistant CID" despite admitting that no one except him has ever made that determination.³⁹

T. Evans agreed at trial that RPX-18 consisted of the entire year's worth of records, for the CID shapeups for 2012.⁴⁰ T. Evans conceded that no other records existed to support his

³⁹ (T.R. 523-24) ("Q: Mr. Evans, who told you that Huey Cuevas was the assistant CID? A: No one. Q: No one. Does your check say primary CID on it, or was your job title primary CID? ...Q: Do you have any that say Huey Cuevas, Assistant? A: No, I don't.").

⁴⁰ (T.R. 540) ("Q: Would you agree with me that constitutes an entire year's worth of shape-ups then? A: Okay.").

argument of attendance.⁴¹ T. Evans' inconsistent testimony calls into question his credibility as well as his performance as a CID. Despite Evans' duty to make a record of shapeups he participated in he admits that no documents exist other than those held by Mr. Walsh's office (T.R. 557; *see* RPX 18 & RPX 19). T. Evans' acknowledgment that he did not document any of his shapeups in 2011 or 2012 would be sufficient grounds for his termination considering the importance of this duty alone. No doubt, T. Evans' slipshod approach to his job is yet another reason the Seniority Board received multiple complaints about this work in 2011 and 2012.

The General Counsel attempts to discredit the Plan's evidence and Cuevas by asserting that T. Evans attended more shape-ups than are reflected in the 2011 and 2012 summaries. Cuevas testified that in preparing the summaries he would note attendance if he saw a CI-D on duty. However, Cuevas also explained that he did not go out looking for T. Evans if he did not see him in the hall or assisting in the shape-up. The General Counsel attempts to overcome T. Evans' own failure to put on proof of his attendance by implying that other shape-ups were not listed on the summary. The Plan acknowledges that it is possible that other shape-ups may have occurred which are not identified in the summaries. However, the Plan put on the credible testimony evidence of Larry Holleman and Gary Thomas, who testified that when Huey Cuevas did not attend the shape-ups they frequently had to shape up their own gangs.⁴²

For the General Counsel to suggest that if the summary did not reflect a shape-up then T. Evans "must have been there" runs contrary to common sense and the record. Workers and

⁴¹ (T.R. 554) (Q: Did you return any property to Mr. Walsh or any trustee for the Container Royalty after you were terminated? A: No. Q: Why? A: *Because I didn't have any.*); *contra* (T.R. 555) ("Q: Did you write an email or a letter to Ms. Bergo at the National Labor Relations Board where you stated: I have about a couple hundred pounds of paperwork that I can bring to you? A: Yes.").

⁴² (T.R. 697) ("Q: When Tommy Kirk didn't show up, how did the gangs get filled? A: If we don't have a dispatcher, we'll do it. We'll hire our own men sometimes."); (T.R. 710) ("Q: Have you ever had to shape up men yourself? A: Once or twice. Q: Was [Evans] the dispatcher that was supposed to be there when you had to shape up those men? A: Yes --").

foremen each testified that foreman frequently had to fill their own gangs because T. Evans would not show up or showed up so late that the gangs had already been filled. The General Counsel's position is equally contradicted by Cuevas' testimony that while on vacation he would frequently get calls and complaints from the signatory employers and the union that T. Evans was not answering his phone or showing up for work. (T.R. 600). The General Counsel's assumption fails to account for the fact that 1) not all ships have shape-ups (because their gangs are full), and 2) some ships are cancelled or moved to later dates.

Finally, despite having the summaries RPX 18a and RPX 19, days in advance before the trial, the General Counsel now presents for the first time new exhibit thereby precluding the Plan from presenting rebuttal testimony to address its errors.⁴³ Even assuming Attachments 1-4 are considered, it does not overcome the fact that T. Evans barely performed any of his stated duties

⁴³ The fact that the General Counsel is trying to prove T. Evans' attendance by inferring a negative (because T. Evans did not fill out the required paperwork for his job) speaks volumes as to T. Evans' work performance. This fact also illustrates why the ALJ did not credit his testimony. The Attachments contain multiple errors. For example, Attachment 2 line 52, reflects an incorrect date of the shapeup because the shipper called back and changed the delivery date to November 25, 2012, which moved the actual work date to Sunday, November 26, 2012, listed on the summary. *See* GSA Plans 000168-000169; *see also* RPX-18a p3. Next, DuPont/Ore Barges (Attachments 3-4), would never had been part of a shapeup because the foremen, James Beavers and Henry Spears, only have gangs of ten to twelve men and have alternates in place to fill openings. Both Beavers and Spears have historically filled their own gangs by contacting each other rather than going through dispatch. As such, none of the barges implied by the General Counsel could have been filled by T. Evans. Moreover, James Beavers and Henry Spears each deny that T. Evans ever assisted with a shapeup for their gangs in 2011 to 2012. Next, (Attachment 4) line 35, is incorrect as Cuevas' log sheet reflects carry over date between record books. *See* RPX-18a, Bates Number 26145-26146. Additionally, on other dates not listed on the summary, it is more likely that Glen Evans, rather than T. Evans, fulfilled the dispatch duties. (T.R. 621) ("Q: Do you know how many times [Glen] helped out in 2012? A: Quite a bit, I would assume, even from what I was told by the longshoremen that he was there when I wasn't."). As such, even assuming *arguendo*, that T. Evans may have shown up to work on dates not noted on the summary, he nevertheless failed to produce any such proof or could he testify as to any particular date he worked. Finally, the more accurate number of ships "worked" could be found in RPX-12a.

in 2012.⁴⁴ The ALJD acknowledges this point in his credibility findings and noted that T. Evans undermined his own credibility at trial. ALJD at 8, 24-25.

5. Container Inspector-Dispatchers Cannot Effectively Complete Their Duties Standing Beside Their Vehicle And Refusing To Enter The Workplace.

The General Counsel next attacks the ALJD suggesting that the reason T. Evans did not come to work for much of 2011 and nearly all of 2012 was because of Lupus. GC Brief at 26. The General Counsel thereafter alleges that T. Evans did not really “need” to go into the CI-D office to perform shape-ups and dispatching. *Id.* The General Counsel’s position is as specious as it is unsupported by the facts. As clever as this argument may be, the record does not contain any evidence (i.e., doctor’s orders and/or doctor’s excuses) that T. Evans’ Lupus prevented T. Evans from performing his duties.

i. The Record Does Not Contain Any Permissible Evidence that Lupus Kept T. Evans From Entering the Union Hall and is Therefore Waived On Appeal

Unless a witness is testifying as an expert under the requirements of Rule 702 of the Rules of Evidence, any opinion or inference must be rationally based on the first hand perception of the witness and not based on scientific, technical, or other specialized knowledge.⁴⁵ The purpose of Rule 701(c) is to eliminate the risk that the reliability requirements Rule 702 would be evaded. Moreover, an appellate court does not ordinarily give consideration to evidence that was not raised in the lower court proceedings. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). When a party attempts to raise such evidence on appeal, “the waiver doctrine is ‘essential in

⁴⁴ Additionally, on those dates where T. Evans may have worked (and not fill out his paperwork), his dispatching apparently resulted in multiple complaints being filed for violations of the seniority rules. *See e.g.*, (T.R. 663, 740-741, 394-395). Herb Williams credibly testified that he filed several complaints regarding T. Evans’ conduct as a CI/D, one of which he provided directly to T. Evans and which was conveniently never turned into management. *See* RPX-23; (T.R. 723). For the General Counsel to take the position of “oh well, at least he showed up” speaks volumes about what type of employee T. Evans and credits the ALJ’s ultimate ruling.

⁴⁵ FED. R. EV. 701; *United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002). *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 226 (3d Cir. 2008) (citing *Mitroff v. Xomox Corp.*, 797 F.2d 271, 276 (6th Cir. 1986)).

order that parties may have the opportunity to offer all the evidence they believe relevant to the issues” *Huber v. Taylor*, 469 F.3d 67, 75 (3d Cir. 2006) (citing *Hormel v. Helvering*, 312 U.S. at 556). T. Evans is now for the first time arguing medical causation for his absence from work. This argument requires specialized knowledge under Rule 702. However, the Board should not give any consideration to this irrelevant claim because it was neither raised at trial nor properly supported by a tendered medical expert. The Plan had no opportunity to cross-examine this allegation at trial and would be prejudiced if the Board simply accepted the General Counsel’s *ipse dixit* argument.

This argument is therefore an issue of credibility, and the record contains no evidence that Lupus prevented T. Evans from entering the union hall or performing any of his duties. The ALJ found that T. Evans’ attitude change was the result of the other CID, Huey Cuevas, missing time due to illness.⁴⁶ This notion that Lupus prevented T. Evans from coming to work is simply a red herring and should be rejected as without merit.

6. **General Counsel Misinterprets ALJ’s findings on Credibility**

The General Counsel argues that the ALJ erred because he found that T. Evans did not support his son in the campaign because of several altercations. GC Brief at 27 (citing ALJD at 9, 14-18). The General Counsel’s argument is unconvincing. A plain reading of the ALJD does not suggest that the ALJ found that T. Evans did not support his son because of *only* the altercations. Rather, the ALJ’s decision states that T. Evans’ support was not “expressed in some tangible fashion that would be of concern to Donald Evans.” ALJD at 9, 9-10. The ALJ discredited Tommy and Glen Evans due to their attempts to minimize the fights as mere

⁴⁶ The fact that T. Evans could harbor such animosity for his fellow CID recovering from heart surgery is a telling footnote to his mindset in 2011 and 2012. T. Evans’ refusal help out his co-worker in need who was recovering from a life threatening medical condition speaks volumes. Instead of working harder to help out, T. Evans was “put off” that he had to work at all while Cuevas was in the hospital or convalescing (despite the fact that Cuevas continued to do his job from the hospital and home during this period). This is clearly reflected in RPX-12(a) which includes inspector reports created and turned in by Cuevas while recovering from his surgery.

“disagreements” when the multiple eye witnesses testified that the two nearly came to blows. (T.R. 711-13, 741).

The fact that Glen Evans admitted that he and his father did not speak for a long period of time following the fights in 2011-2012 further suggests that T. Evans likely did not publically campaign for his son. T. Evans admitted as much at trial when discussing his affidavit given to the General Counsel on February 1, 2013. (T.R. 500-501)(“I did not actively campaign on behalf of my son Glen Evans. I did not pass out flyers or petitions.”). The General Counsel attempts to minimize the effect of the inconsistency but fails to appreciate the volume of other evidence presented at trial which supports the ALJ’s findings. (T.R. 741, 743-44, 783).

7. Inability to Terminate is Not Condonation when a Majority Vote is Required for Action

The General Counsel argues that Plan’s failure to discipline or terminate T. Evans for prior poor work amounts to condonation of the performance. This argument is misplaced due to, 1) the General Counsel’s failure to raise the issue at trial, 2) the unique facts of this case, and 3) because the Plan is comprised of a Board of Trustees where no action can be taken without a majority vote. Each of these reasons, whether in aggregate or individually, reflect that the ALJ considered the matter, based his decision on the credibility of the evidence and rejected the General Counsel’s arguments.

Initially, as set forth in Section IV(2), the Plan acknowledges that T. Evans had always been a sub-standard employee due to his refusal to do comply with certain tasks over the years. Moreover, it is acknowledged that originally, T. Evans’ father Wilson Evans, serving as Chairman of the Trustees, protected him. It is equally acknowledged that later Donald Evans, serving as Chairman of Trustees, protected his brother. The application of condonation however, is inappropriate under these facts.

The term condonation is defined by Black's Law Dictionary as a "[v]ictims implied forgiveness of an offense, esp. by treating the offender as if there had been no offense." BRYAN A. GARNER, BLACK'S LAW DICTIONARY 315 (8th ed. 2004). The Board has explained that condonation applies "when there is clear and convincing evidence that 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 had occurred." *White Oak Coal Co., v. United Mine Workers of Am.*, 295 NLRB 567, 570 (1989) (employer rehired striking union members after they had engaged in serious misconduct on a picket line). In *White Oak* the Board cautioned that "condonation is not to be lightly inferred." *Id.* (citing *NLRB v. Colonial Press*, 509 F.2d 850 (8th Cir. 1975))(emphasis added; see also *United Parcel Serv., Inc., v. Nick*, 301 NLRB 1142, 1143 (1991) (UPS driver later terminated after he was told to go home if he did not feel it was safe to drive his route in bad weather). None of these cases cited by the General Counsel are applicable to the set of facts in this case.

In the matter *sub judice*, it has never been the Plan's position that it "forgave" T. Evans for his lack of results or refusal to complete work. Donald testified that he would tell the other trustees (and Walsh) that he would take care of it, suggesting that he would discipline his brother. Donald testified that he was personally covering up for his brother's poor work performance in the past. (T.R. 656). Walsh credibly testified that the employer trustees never forgave or accepted T. Evans' poor performance. However, as Walsh testified, because Donald was protecting his brother the employer trustees could not bring the matter to a vote because 1) Donald was Chairman and the only one who can call a meeting, and 2) that Donald would vote against the motion if raised insuring its defeat. As such, the Plan (speaking through its Trustees) was prohibited from action (i.e. termination) due to the voting structure and protection by Donald

Evans. (T.R. 256-66) Thus, the Plan's inability to terminate T. Evans cannot be said to be "forgiveness" or treatment that "no offense occurred." Thus, the doctrine would not apply. *See e.g., White Oak*, 295 NLRB at 570.

Next, assuming *arguendo*, the doctrine of condonation would not apply to "all behavior" but only that behavior previously permitted. The Plan acknowledges that T. Evans had not been a productive employee in the past. This had created a fair amount of friction between the union and employer trustees. However, up until 2010 (when Tommy attempted to retire) he had at least regularly assisted with the shape-up process and "calling in the tape."⁴⁷ As such, any prior tolerance of him not doing the container inspector reports cannot be deemed condonation of "other" future bad conduct no matter the significance or magnitude.

Once T. Evans' behavior grew to include a patent refusal to answer his phone (the most important of all CID duties), call in the tape or regularly participate in shape-ups; Kendall Lamb, risking a clash with the union, confronted Donald and stated that he would no longer sign T. Evans' paychecks. (T.R. 657, 752). The magnitude of Lamb's challenge cannot be understated as it could have had far reaching ramifications for Lamb's own employer. Fortunately, due to the pressure coming from multiple sources, Donald had already begun fearing that the other Union members would begin filing complaints with the Department of Labor because he was continuing to employ a family member who was not working. (T.R. 676) (Evans stating, "that was my biggest concern. And by him being my brother, I know that the wrath of the Department of Labor would probably come down on me, more so than the other trustees.").

Once these factors were brought to bear and Donald was satisfied that his brother would be taken care of because he had reached the age to qualify for Medicare, had received his yearly

⁴⁷ (T.R. 598-600, 619) (Evans' growing resentment manifested itself into his open refusal to answer calls from the shipping companies, Cuevas or foremen to place work orders as well as his frequent refusal to show up for shape-ups in a timely manner or at all during Cuevas' absence.).

bonus and would be paid through the holidays, he called the meeting to discuss whether the Plan should terminate T. Evans. Upon discovering the long list of complaints the trustees unanimously voted to terminate T. Evans. (T.R. 116-17, 306-10, 670-74, 752-755).

The General Counsel's argument must be rejected when the facts are weighed against the "clear and convincing" standard necessary to apply the doctrine of condonation. The ALJ credited the Plan and correctly rejected the General Counsel's argument for condonation.

8. Donald Evans' Affidavit Does Not Demonstrate that He or the Union Effectuated the Termination of T. Evans

The General Counsel next argues that the ALJ did not give sufficient weight to an affidavit signed by Donald during the early phases of the charge. In that affidavit, prepared by Plan counsel, Donald stated that, "The Local 1303 recommended to the Board of Trustees for the GSC/GSA Plans that Tommy Kirk be terminated due to complaints Local 1303 was receiving regarding performance issues in the position of Container Inspector/Dispatcher." GCX-15. The General Counsel asks this Board to reject the ALJ's credibility rulings by forcing a negative inference through the imprecise drafting of the preliminary affidavit prepared by the undersigned counsel. The General Counsel's request should be declined.

Generally, affidavits are allowed to impeach a witness when testimony *differs* from the prior affidavit. NLRB BENCH BOOK, § 13-206. The witness however, must be given the opportunity to explain or deny the statement, and the witness should be credited "where the discrepancies are easily explained." *Id.* at § 13-706 (quoting *Advocate South Suburban Hosp. v. NLRB*, 468 F. 3d 1038, 1046 (7th Cir. 2006)).

An affidavit introduced for the purpose of impeachment should always be weighed carefully in the context in which affidavit was made. *Redway Carriers, Inc. and Fraternal Ass'n of Special Haulers*, 274 NLRB 1359, 1371 (1985). An affidavit that was signed in an

investigatory or preliminary stage of a case may not be due much consideration because “a preliminary investigation, whether impartial or not, is not a substitute for or duplicate of a full evidentiary hearing.” *Id.* “For example, when a witness testifies to facts which are not contained in his investigatory affidavit, a finding of contradictory evidence, i.e., impeachment by omission, ordinarily is not warranted unless the context of the affidavit indicates a probability that the facts would have been included in the narrative if they were true.” *Ampersand Publ’g and Graphic Commc’n Conference*, 2010 NLRB Lexis 134, 50 (2010) (citing *Redway Carriers, Inc.*, 274 NLRB at 1371). Statements given in preliminary affidavits tend to carry little weight because they have a high probability of meaning two different things to two different parties. *Id.*

In the present case, the facts asserted in the affidavit are not inclusive of all the facts of the case. The primary purpose of the affidavit (when drafted) was to establish the fact that the CID position was not a union position. Donald signed the affidavit on February 26, 2013, during the preliminary phases of the charge investigation. The initial charges were later amended on March 25, 2013. Thus, the affidavit was drafted by the undersigned counsel and signed by Donald Evans as an initial response to the original charges.⁴⁸

Donald also explained that he did not remember seeing the affidavit or its contents. (T.R. 466). When asked about the affidavit Donald credibly explained that he did not remember making that statement and that he called the meeting *not* as a representative of the union but as the Chairman of the Board of Trustees for the Plan.⁴⁹

⁴⁸ The undersigned explained at trial that the affidavit was drafted by counsel and that it “may not be the exact verbiage that Mr. Evans would make.” (T.R. at 466, 19-21).

⁴⁹ (T.R. 464, 466) (“Q: Mr. Evans, I’ve shown you what is marked GC-15. Do you recognize this document? A: I really don’t. . . . Q: At this time do you have any recollection of having made that statement? THE WITNESS: No, I don’t.”); *compare* (T.R. 464) (“Q: Mr. Evans, at the December 11, 2012 meeting, ILA Local 1303 recommended T. Evans be terminated. Correct? A: The local didn’t do it, no, Local 1303 didn’t do that.”).

In fact, there is clear evidence in the record that an employer trustee [Lamb] was the driving force, and not Donald to terminate T. Evans.⁵⁰ Therefore, the scope of the affidavit does not speak to whether Donald or the Union effectuated the termination. “[D]ue consideration must be given for the fact that in the present case certain words or phrases meant one thing to one witness and a different thing to another.” *Ampersand Publishing*, 2010 NLRB Lexis at 50.

Because the purpose of the affidavit does not speak to the “how or why of Donald Evans’ recommendation” or what “hat” he was wearing when he called the meeting, the testimony of the hearing should be given greater weight. *Id.* The context of the affidavit was limited to the nature of the CID position in response to the initial charge. The issue of Donald Evans, as President of Local 1303, wrongfully effectuating the termination did not come up until after the affidavit was signed.⁵¹ The affidavit should not be “back dated” to show motive at a time before the issue arose. Regardless, the ALJ received the affidavit and credited Donald’s explanation about which “hat” he was wearing when he called the meeting. ALJD at 9, 39-41

9. The Container Royalty Plan acted in Accordance with its Independent Fiduciary Duties and Did Not Accede to a Union Request⁵²

The General Counsel, in five separate sub-sections, argues in general that certain facts suggest that the Plan merely acceded to the Union’s request to terminate T. Evans. Each of these implications are without merit.

⁵⁰ General Counsel stated “Donald Evans knew the other trustees would go along with his recommendation. . . .” GC Brief at 30. General Counsel is inferring that Donald was the driving force of the termination. However, Donald knew the other trustees would vote in favor of termination, not because he was the driving force, but because they had been pushing for the termination for some time.

⁵¹ T. Evans didn’t charge Donald or the Union for wrongful effectuation until the March 25, 2013, amended complaint, which was one month after the affidavit was signed.

⁵² The Plan incorporates by reference the General Counsel’s arguments set forth in headings: ““J. Respondent Plan’s Failure to consider Glen Evans for the CI-D position shows it merely acceded to Respondent Union (Exception No. 21),” “K. Respondent Plan’s Lack of Documentary Evidence shows it merely acceded to Respondent Union,” “L. Testimony of Ports America foreman Larry Donald Holloway and Gary Thomas shows that Respondent Plan merely acceded to Respondent Union (Exceptions 16-18),” and “M. Respondent Plan’s disparate treatment of T. Evans shows it merely acceded to Respondent Union. (Exceptions 1-3).” All of these sections are incorporated into the Plan’s responses in Section 8 because they are based upon the same general facts, testimony and authorities.

The doctrine of accession, as proposed by the General Counsel, is simply that the Plan was asked by the “Union” to take an action and it consented or agreed to the same. *See e.g.*, BRYAN A. GARNER, BLACK’S LAW DICTIONARY 11-12 (8th ed. 2004). The General Counsel relies upon several cases⁵³ without analysis to suggest that Donald’s action of calling the meeting as Chairman of the Board of Trustees constitutes a “Union request.”⁵⁴ The Board has explained that:

. . .when a union causes the discharge of an employee or prevents him from being hired, there is a *rebuttable presumption* that the union acted unlawfully because by such conduct a union demonstrates its power to affect the employee’s livelihood in so dramatic a way as to encourage union membership among the employees.

Operating Eng’rs Local 478 v. Gigliotti, 271 NLRB 1382, fn. 2 (1984) (*citing Boilermakers Local 40 v. Whitt*, 266 NLRB 432 (1983)) (emphasis added). The Board went on to explain that in the event a *prima facie* case is made the inference can be overcome by the “labor organization in showing that its action was necessary to the effective performance of its functions of representing its constituency.” *Id.* at 1384. The Board instructs that one must look to the totality of the conduct to show “that it is requesting such action and notwithstanding the fact that it did not make an express unequivocal demand for such action.” *Id.* Each of these factors must be then weighed against the Board’s standard of review that it will not “overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all relevant evidence convinces [the Board] that [the ALJ’s rulings] are incorrect.” *Standard Dry Wall*, 91 NLRB 544.

⁵³ The General Counsel cites, but provides no analysis, from *Camaco Lorain* which is a bench decision wherein the decision was less than two pages and contained no credibility determinations. *See* GC Brief at 35; *contra Camaco Lorain Mfg. Plant*, 353 NLRB 605 (2008) Because the matter *sub judice* does not include a bench decision and the facts have no similarity to those in *Camaco*, it should be distinguished.

⁵⁴ In particular the General Counsel relies heavily upon a statement contained in a pre-complaint affidavit prepared by the undersigned counsel (GSX-15) wherein the language suggests that the Local 1303 called the meeting rather than using the more precise *statement* is Donald Evans as Chairman and the Representative Trustee of Local 1303. This attempt to create an issue, where none exists, is addressed in Section H and is incorporated by reference.

Initially, the “Union” did not request T. Evans’ termination. Tommy’s brother Donald, who is Chairman of the Board of Trustees, called the meeting and brought the issue to the table. However, Donald’s action was predicated upon Kendall Lamb, telling Donald months before that if something was not done about T. Evans he would no longer be able to approve his paychecks.⁵⁵

The General Counsel next argues that the Plan’s failure to consider Glen Evans for the CID position reflects Union accession. This suggestion is not only irrelevant but equally without merit. The Trustees may nominate whomever they desire for the position. (T.R. 77) Chris Johnson was nominated by the Union Trustees because he had worked as a clerk, had even more hours than T. Evans at the time of his selection and all Trustees thought he would be a good fit for the CID position. (T.R. 170-71). Walsh testified that he had independently investigated Glen Evan’s work record and had brought it to the meeting should the same be requested. *Id.* However, due to several complaints being filed for shape-ups where Glen Evans purportedly placed his friends over more senior workers, he was not nominated for the position. Regardless, the General Counsel’s argument that accession applies because Glen Evans was not hired is untimely, irrelevant and not in line with the alleged doctrine. The General Counsel failed at trial and to put on any proof that Chris Johnson was not qualified for the CID position. As such, the General Counsel should be estopped from raising the issue here.

The General Counsel next asserts that the Plan’s lack of documentary evidence shows it merely acceded to the union’s request. The General Counsel again fails to acknowledge that it alone bears the burden of production and proof. Nevertheless, the General Counsel conveniently

⁵⁵ (T.R. 656-58) (Evans stating “I don’t remember the full conversation, but the part that is most vivid in my eye was the part that, you know, he wasn’t going to continue to sign his check.”); *compare* (T.R. 752) (Lamb stating, “Well, at one point, I mentioned to Mr. Evans, to Mr. Donald Evans, that, you know, we were having a hard time justifying paying the salary if we weren’t able to get in touch with the gentleman to perform the function that he was hired.”).

fails to tell the Board that the Plan produced over 35,000 pages of production in this case. Yet T. Evans openly testified that he had *no* documentation to support his work as a CID. (T.R. 264, 492-94). The Trustees credibly testified that the CID position is not a collective bargaining position and is thus not subject to the same recording requirements for disciplinary action. (T.R. 665). Even so, both Walsh and Donald Evans testified that Donald would not permit any written record of the discipline of his brother.⁵⁶

The General Counsel next attempts to imply a contraction between the testimonies of Larry Holloway and Gary Thomas. Had the General Counsel carefully read *all* of the testimony rather than cherry picking select parts it would have omitted this argument from its brief.⁵⁷ Thomas is one of the rotating foreman on Chiquita's container ships and does that job when a Chiquita Container ship is in Port. When no Chiquita container ship is in Port, then Thomas also works as a gang member on Dole ships. When neither ship is in Port, Thomas works in the warehouse. If not all the gangs are needed on the Chiquita ship at the same time, gangs are rotated so that all the gangs work approximately the same number of hours. This is done because the pay for working a ship is substantially higher than the pay for working in the warehouse

Apparently the General Counsel failed to understand that more than one Chiquita ship can come in per week and further that Ports America rotates its foreman for ships. Ports America may at time have more than one gang working on the ship. *See e.g.*, RPX-18(a), GSA Plans 000124 (“ . . . 1-25-12 Wednesday Morning 10:00 for Ports America on Chiquita Cont Ship 1 gang with 4 drivers, Wednesday Morning 11:00 for Ports America on Chiquita Cont Ship 1 gang with 4 drivers.”). Thomas' testimony was credited that due to T. Evans' tardiness and/or

⁵⁶ (T.R. 665, 265-66). Nevertheless, this argument is more fully developed in Section IV(B)(2) herein and is incorporated by reference to avoid needless duplication.

⁵⁷ (T.R. 694) (Thomas works in the warehouse and as a foreman for Ports America. Thomas acts as a foreman for any ships that are not already assigned to other foreman because his primary job is in the warehouse); *compare* (T.R. 716).

truancy he often had to shape up his own gangs. (T.R. 696-97). Holloway also credibly testified that he has had to shape up his own gang once or twice when T. Evans was supposed to be the Dispatcher. (T.R. 710). Despite the General Counsel's attempt to imply a contradiction where none exists, its argument does not support accession.⁵⁸

Finally, the General Counsel argues that disparate treatment reflects accession. Notably, the General Counsel again relies on no legal support for its position and fails to acknowledge that it alone bears the burden of proof in this case. The core complaint raised by the General Counsel appears to be that while Huey Cuevas was out for heart surgery (and yet was still doing all the paperwork because T. Evans refused to help) and light duty thereafter, that he should have been punished by the Plan for "not working."

The General Counsel then takes the unbelievable position that because T. Evans claimed he saw Cuevas, a married adult male with grown children, "out around town" while he was convalescing, that this should have resulted in his termination. The argument presumably follows that by not terminating Cuevas, who was doing nearly all the work despite recovering from heart surgery, that T. Evans should not have been terminated for refusing to come to work on a regular basis for nearly ten months. The General Counsel's argument is without merit.

CONCLUSION

The Gulfport Stevedoring Association - International Longshoremen's Association Container Royalty Plan respectfully submits that it has shown that the General Counsel failed to meet its *prima facie* burden of proof. In the alternative, the Plan has sufficiently proven that it

⁵⁸ The Plan acknowledges that the ALJD indicates that a supervisor from each of the employer members testified when in fact Holloway and Thomas both work for Ports America. However, the employer trustees (Schuff and Lamb) each credibly identified their respective supervisors and talked about the complaints they had received about T. Evans. (T.R. 129, 750). Moreover, the Plan put on the testimony of laborers Herbert Williams and Garland Taylor as additional support that T. Evans failed to attend shape ups, exhibited tardiness and/or failed to follow seniority rules. (T.R. 722-23, 783). As such, any lack of precision in the ALJ's ruling is not material when viewed against the weight of the evidence.

possessed legitimate cause to terminate T. Evans and that he would have been terminated regardless of whether he supported his son in the 2012 Union election. *See Wright Line*, 662 F.2d at 905; *Gelita*, 352 NLRB at 414.

T. Evans a substandard employee, simply became hostile and began to refuse to work at all after a dispute in the first part of 2012. For the entire 2012 calendar year, T. Evans participated in less than five (5%) percent of the recorded shape-ups. Furthermore, by T. Evans' own admission he only recorded the announcement tape about ten (10%) percent of the time and he did not complete *any* container inspector reports for the entire year of 2012.

Based on these facts, when viewed individually or in *toto*, the Plan respectfully submits that the ALJ properly weighed the evidence and found General Counsel's evidence lacked credibility. The General Counsel failed to prove that the Plan's stated reasons for terminating T. Evans were pretextual, false or implausible. The Plan further submits that the ALJD properly rejected the General Counsel's unsupported assertions that the Plan exhibited animus towards the T. Evans.

For the foregoing reasons, the Plan respectfully requests that the Board 1) grant the Plan's motion to strike the improperly attached Post-Trial Exhibits, 2) accept the ALJ's rulings that the Plan did not violate Section 8(a)(1) and 8(a)(3) of the Act, and 3) reject the General Counsel's exceptions in full.

RESPECTFULLY SUBMITTED, this the 9th 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 9th day of May, 2014.

/s/ Stephen W. Dummer

STEPHEN W. DUMMER

DUMMER & LOWERY, PLLC

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