

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

\*\*\*\*\*

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

**and \***

**Cases 15-CA-096939**

**TOMMY EVANS, an Individual \***

**INTERNATIONAL LONGSHOREMEN’S \*  
ASSOCIATION LOCAL 1303 \***

**and \***

**15-CB-096934**

**TOMMY EVANS, an Individual \***

\*\*\*\*\*

**COUNSEL FOR THE GENERAL COUNSEL’S REPLY BRIEF TO RESPONDENT  
UNION’S ANSWERING BRIEF TO COUNSEL FOR GENERAL COUNSEL’S  
EXCEPTIONS**

**COMES NOW** Counsel for the General Counsel, (General Counsel) in the above-styled matter and files this brief with the National Labor Relations Board (Board).

**I. Statement of the Case<sup>1</sup>**

In his February 27, 2014 Decision, ALJ Michael A. Marcionese (ALJ) made a number of incorrect findings of fact and conclusions. On April 17, 2014, General Counsel filed its Exceptions to the Decision of the Administrative Law Judge (Exceptions). The International Longshoremen’s Association Local 1303 (Respondent Union) filed its Answering Brief to Counsel for General Counsel’s Exceptions (Answering Brief) on May 9, 2014. As explained in

---

<sup>1</sup> Reference to Exhibits of the General Counsel, Respondent Union, and Respondent Plan will be designated as “GCX”, “RUX”, and “RPX,” respectively with the appropriate number for those exhibits. Reference to the transcript and the ALJD will be designated as “Tr.” and “ALJD,” respectively. References to Respondent Union’s Answering Brief to General Counsel’s Exceptions will be designated as “UBX” followed by the page number.

detail below, in its Answering Brief Respondent Union misstates and manipulates the facts of the case, argues facts not admitted into the record, and generally attempts to support its case by making arguments directly contradictory to each other and unsupported by record evidence.

**II. The ALJ erred in refusing to admit Respondent Plan's position statement.**

The Gulfport Stevedoring Association-International Longshoremen's Association Container Royalty Plan's (Respondent Plan) position statement submitted during the investigation of the charges in this case should have been admitted by the ALJ at hearing and considered by the ALJ in making his decision. Respondent Union argues in its Answering Brief that the position statement should not be admitted and considered by the Board. The Board has repeatedly held that position statements submitted during the course of investigation are admissible as admissions at trial. *Steve Aloï Ford*, 179 NLRB 229, fn. 2 (1969), *Evergreen America Corp.*, 348 NLRB 178, 187 (2006), *enfd.* 531 F.3d 321 (4th Cir. 2008); *Bond Press*, 254 NLRB 1227, 1231-1232 (1981).

In its position statement, Respondent Plan admitted to knowledge of CI-D Tommy Evans' (Tommy Evans) protected activity of supporting his son, Glen Evans, in Glen's campaign against Union President Donald Evans. In its position statement, Respondent Plan admitted it did not know why Donald Evans, as the Union President, requested Respondent Plan terminate his brother Tommy Evans, even though, Donald Evans was the Chairman of Respondent Plan's Board of Trustees. The ALJ erred in excluding the position statement and failing to consider Respondent Plan's admission regarding its knowledge of Tommy Evans' campaign activities on behalf of Glen Evans, and Respondent Plan's shifting defense at trial when it claimed that the main reason Union President Donald Evans initiated the meeting to discharge his brother Tommy Evans was because Trustee, Kendall Lamb (Trustee Lamb),

allegedly stated that he would not sign anymore checks for Tommy Evans, a claim that was not made in the position statement.

**III. The December 11, 2012, Board Minutes show Donald Evans as the force behind the termination of Tommy Evans.**

In its Answering Brief, Respondent Union asserts that the December 11, 2012, “Board Minutes reflect that the topic of the union campaign and election never came up in the discussion to terminate Tommy Evans’ employment.” UBX at 13; GCX 2. The December 11, 2012 Board Minutes also do not reflect the following:

- 1) That Trustee Lamb ever told any Trustee of Respondent Plan that he would not sign any more checks for Tommy Evans after December 2012.
- 2) That Trustee Lamb discussed any problems he allegedly had with Tommy Evans’ work performance with Respondent Union, Donald Evans, and/or Respondent Plan’s other Trustees at any time before or during the meeting.
- 3) That the supervisors<sup>2</sup> Trustee Lamb specifically named at trial ever discussed any problems they allegedly had with Tommy Evans’ work performance with Trustee Lamb at any time before and/or at the meeting.
- 4) That Trustee Darius Johnson discussed any problems he allegedly had with Tommy Evans’ work performance with Respondent Union, Donald Evans, and/or Respondent Plan’s other Trustees at any time before and/or at the meeting.

---

<sup>2</sup> Ports America’s Foremen Larry Holloway and Gary Thomas testified at the hearing, but no evidence was introduced at trial, that they were considered to be Ports America supervisors under the Act. Moreover, during the trial, Trustee Lamb did not name Holloway and Thomas as individuals that complained to him about problems with Tommy Evans. Furthermore, none of the Ports America supervisors specifically named by Trustee Lamb were called to testify regarding any alleged issues they were having with Tommy Evans. According to Trustee Lamb and the record evidence, Trustee Lamb’s only knowledge of Tommy Evans’ allegedly poor work performance was through the Ports America supervisors he named at trial. No evidence was introduced at trial indicating that any Trustee of Respondent Plan was aware of the matters testified to by Holloway and Thomas prior to the December 11, 2012, decision to terminate Tommy Evans.

- 5) That Trustee Greg Schruff discussed any problems he allegedly had with Tommy Evans' work performance with Respondent Union, Donald Evans, and/or Respondent Plan's other Trustees at any time before and/or at the meeting.
- 6) That Plan Administrator Victor Walsh discussed any problems he allegedly had with Tommy Evans's work performance with Respondent Union, Donald Evans, and/or Respondent Plan's other Trustees at any time before and/or at the meeting.
- 7) That prior to agreeing to hire a newly elected union official to replace Tommy Evans the Trustees discussed Christopher Johnson's ability to perform the CI-D job, especially considering Johnson worked no more than 18 hours in 2012, and the last time he worked was in July 2012.<sup>3</sup>

The December 11, 2012 Board Minutes reflect that Union President Donald Evans not only called the special meeting to terminate Tommy Evans, he made the motion to terminate Tommy Evans after turning over his Chairmanship. If all the Trustees were so keen on terminating Tommy Evans because of his alleged extreme poor work performance, there would have not been any need for Donald Evans to relinquish his Chairmanship in order for the motion to be made at the meeting. The fact that Donald Evans had to relinquish his Chairmanship in order for the Trustees to hear a motion to terminate Tommy Evans shows the other Trustees did not believe that Tommy Evans was performing badly and had no issues with his work performance. This is supported by the fact that the reason given for the termination in the Board Minutes was "due to job performance issues with Mr. [Tommy] Evans." GCX 2.

The December 11, 2012 Board Minutes clearly reflect that only Donald Evans had issues with Tommy Evans' job performance. If the other Trustees had any issues with Tommy Evans'

---

<sup>3</sup> According to the shape-ups provided by Respondent Plan, Johnson only worked one day – July 3, 2012 – from October 2011 to December 2012. RPX 18; RPX 18(a); RPX 19.

job performance they would have discussed those issues at the December 11, 2012 Board meeting, and the Board Minutes would reflect the problems. However, the Board Minutes are completely silent as to the alleged issues the other three (3) Trustees allegedly had with Tommy Evans' work performance.

Based on the above and the record as a whole, the ALJ erred in finding Trustee Lamb, Trustee Johnson, and Trustee Schruoff discussed the issues they allegedly had with Tommy Evans' work performance at the December 11, 2012 meeting.

**IV. Trustee Lamb's statement about refusing to sign Tommy Evans' checks is not supported by the evidence.**

Supposedly, Trustee Lamb's statement that he was not going to sign any more of Tommy Evans' checks was the great catalyst for Union President Donald Evans' decision to terminate Tommy Evans. However, Trustee Lamb's testimony was self-serving and not supported by any evidence presented at trial.

First, neither Donald Evans nor Trustee Lamb could testify within any certainty as to when Lamb supposedly made this momentous statement to Donald Evans. Surprisingly, their testimony could not provide a date, day of the week, and/or month as to when the statement was made. They did not even testify about where this life-changing statement was allegedly made.

Second, Trustee Lamb admittedly did not have any direct contact with Tommy Evans before he voted to terminate Tommy Evans. Trustee Lamb's claimed disgust with Tommy Evans' job performance was allegedly based on conversations Trustees Lamb had with the mysterious Ports America's supervisors. However, Trustee Lamb's testimony lacked the normal context. Specifically, he did not state the dates, day of the week, and/or month he had the alleged conversations with supervisors concerning Tommy Evans. In addition, none of the alleged supervisors – Tim Lancaster and Jesse Parker - testified at trial to confirm that they had problems

with Tommy Evans' job performance and/or that they reported these alleged problems to Trustee Lamb. Tr. at 750, 9-13.

Third, none of CI-D Huey Cuevas' notes indicate that any of the Ports America supervisors called him complaining about Tommy Evans. RPX 18(a); RPX 19. This is especially important consider Trustee Lamb's testimony that his supervisors were to only call one CI-D, and if that person was not available, the supervisors would then call the other CI-D. Tr. at 751, 1-8. Obviously, when Cuevas returned from sick leave in 2011, he was the primary CI-D called to make the tape and the Ports America supervisors would only call Tommy Evans when they could not get in touch with Cuevas.

Fourth, Trustee Lamb, an experienced Ports America manager for several years, had no documents – notes, emails, text messages – indicating his discussions with the Plan Administrator, Donald Evans, the other Trustees, or his supervisors regarding Tommy Evans alleged poor work performance and failure to be available to make the dispatch tape. If Tommy Evans was truly the designated first contact CI-D and was failing to be available for the more than the 120 call-outs listed in RPX 18(a), you think there would have been at least one email or text message discussing the problems contacting Tommy Evans, especially considering Trustee Lamb's testimony that the CI-D placing a tape message was of the utmost importance to Ports America.

Fifth, the December 11, 2012 Board Minutes do not reflect that Trustee Lamb had a problem with Tommy Evans' work performance and/or that Trustee Lamb discussed the alleged issues with Tommy Evans and/or the other three (3) Trustees before and/or at the December 11, 2012 meeting.

Sixth, Respondent Plan's position statement clearly shows that Trustee Lamb's alleged statement to Donald Evans never happened. In its position statement when explaining why Respondent Plan elected to terminate Tommy Evans, Respondent Plan stated:

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

The testimony of Trustee Donald Evans and Trustee Lamb at trial that Trustee Lamb told Donald Evans that he would not sign any more checks for Tommy Evans' poor work performance completely contradicts the Respondent Plan's position statement. If Trustee Lamb actually made his complaint to Trustee and Chairman Donald Evans, Respondent Plan would have had “knowledge of the substance or access to those complaints.” By failing to consider the evidence in the position statement, the ALJ failed to find that Respondent Plan was shifting reasons for its conduct and then inferred that the real reason for its conduct. Since the ALJ failed to find that Respondent Plan was shifting defenses, he then failed to infer that the real reason for Respondent Plan's conduct was because Tommy Evans openly supported Glen Evans in his candidacy for Union President. For example, in *Black Entertainment Television*, the Board cited inconsistencies between respondent's written statements of position to the regional office and its witnesses' statements at the hearing to find respondent put forth shifting reasons for its conduct and inferred its real reason was unlawful. 324 NLRB 1161 (1997).

**V. Tommy Evans suffers with Lupus.**

In its Answering Brief, Respondent Union acknowledges that “while it is undisputed that Tommy has Lupus, no medical evidence was provided to establish that due to his Lupus, Tommy could not perform his work duties.” Respondent Union’s position is disingenuous, especially considering its and Respondent Plan’s position regarding CI-D Huey Cuevas. Respondent Plan argued that Huey Cuevas’ medical condition was the reason he was out of work from late February 2011 to the end of September 2011; however, it did not provide any medical expert, supporting documentation, or any evidence other than the testimony of witnesses to show that his condition even existed or that he needed seven (7) months to recover from his alleged medical condition.

**VI. Tommy Evans performed his dispatcher work from outside the Union Hall.**

Respondent Union asserts that Tommy Evans did not perform his duties as dispatcher. However, the record is clear that Tommy Evans could and did properly perform dispatcher work outside the Union Hall. The Union Hall is available to dispatchers and contains a dispatcher office, but it is not required that the CI-D perform the dispatcher work from inside the hall. Tr. at 164, 12-18. Respondent Plan’s witness, Plan Administrator Victor Walsh, testified that a dispatcher could perform his duties “on a pickup truck,” which is precisely what Tommy Evans did. Tr. at 164, 19-23.

Similarly, other witnesses supported a finding that Tommy Evans performed dispatch work outside the Union Hall from his pickup truck. Gloria Pittman testified that she never saw Tommy Evans enter the building during dispatching hours after Respondent Union moved into the new Union Hall in 2012. However, Herbert Williams testified that Tommy Evans failed to dispatch him on November 24, 2012. GCX 39; RPX 23. If Tommy Evans was not in the Union

Hall when he dispatched Herbert Williams, he must have been in his pickup truck. Therefore, based on the testimony of Herbert Williams, the ALJ erred in finding that Tommy Evans' failure to go into the Union Hall prevented him from dispatching workers.

**VII. Respondent Plan acquiesced to Respondent Union's decision to terminate Tommy Evans.**

The undisputed evidence is that if Union President Donald Evans had not called the special meeting to terminate Tommy Evans, the meeting would not have happened. In addition, if Donald Evans had not relinquished his Chairmanship and then made the motion to terminate Tommy Evans, the Trustees would not ever have voted on the matter.

The Union violated the Act when its President, Donald Evans, effected the termination of his brother Tommy Evans in retaliation for his protected activity. Donald Evans was the decision maker, and as acknowledged by Respondent Plan, he strung the Trustees along until he was ready to terminate Tommy Evans. ABX at 6. Board precedent states 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..." *Operating Eng'rs Local 478 v. Giglotti*, 271 NLRB 1382 fn. 2 (1984) (citing *Boilermakers Local 40 v. Whitt*, 266 NLRB 432 (1983)). The ALJ erred when he failed to recognize the affidavit prepared by Respondent Plan's attorney and signed by Donald Evans showed that Respondent Union caused Respondent Plan to terminate Tommy Evans. GCX 15. Because of this failure, the ALJ erred in failing to apply Board law as announced in *Operating Eng'rs Local 478* in rendering his Decision.

**VIII. Conclusion**

General Counsel respectfully submits, for the reasons detailed above, the Board should reverse the Decision of the ALJ and find that Respondent Union unlawfully caused Respondent Plan to terminate Tommy Evans in violation of Section 8(b)(2) of the Act .

Dated at New Orleans, Louisiana this 22<sup>nd</sup> day of May 2014.

\_\_\_\_\_/s/\_\_\_\_\_  
Caitlin E. Bergo  
Counsel for the General Counsel  
National Labor Relations Board  
Region 15  
F. Edward Hebert Federal Building  
600 South Maestri Place, 7<sup>th</sup> Floor  
New Orleans, Louisiana 70130