



on May 9, 2014. As explained in detail below, in its Answering Brief Respondent Plan 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.**

Respondent Plan's Position Statement submitted during the investigation of the charges in this case should have been admitted by the ALJ at hearing. Respondent Plan argues in its Answering Brief that its Position Statement should not be admitted because it is not material and used the phrase, "upon information and belief" which Respondent Plan seems to think allows it to retract the parts of the position statement it now deems unfavorable to his case. ABX at 14. 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 and that it did not know why Union President Donald Evans requested Respondent Plan terminate Tommy Evans after over thirty years. The ALJ erred in excluding the position statement and failing to consider Respondent Plan's admission that it knew of Tommy Evans' campaign activities on behalf of Glen Evans, his son. Respondent Plan's shifting defenses are also evident in the position statement.

Respondent Plan's argument that it submitted the position statement in response to an allegation unrelated to the allegations litigated at hearing does not negate the damning

admissions and is patently false. The original charge in Case No. 15-CA-096939 filed against Respondent Plan on January 24, 2013, alleges as follows:

On or about January 5, 2013, the Employer discriminated against employee Tommy Evans by terminating him in order to discourage union activities or membership.

**III. Huey Cuevas was not performing dispatch work and/or container inspector reports from home while on sick leave.**

Respondent Plan's assertion that CI-D Huey Cuevas (Cuevas) was, "allowed to perform dispatching duties from home," after he had his heart surgery is unsupported by any record evidence. ABX at 5. The "dispatching duties" related to the CI-D position involves referring men in order of seniority. Respondent Plan's claim that Cuevas performed dispatcher work at home contradicts its argument that dispatching work requires the dispatcher to be physically present in the dispatcher office, an argument it attempted to use against Tommy Evans.

Similarly, Respondent Plan's assertion that RPX 12, and 12a support a finding that Cuevas prepared container inspector reports while he was on sick leave in 2011 is not supported by the record. ABX at 5. Cuevas did not work from late February 2011 through the end September 2011. The documents in RPX 12 and 12a do not indicate that Cuevas performed container inspector reports during this period. Therefore, the ALJ erred in finding that RPX 12 and 12a showed that Cuevas prepared container inspector reports from home during the period covering late February 2011 through the end of September 2011.

**IV. Tommy Evans suffers with lupus.**

Respondent Plan incorrectly argues in its Answering Brief that no "admissible evidence" was introduced regarding Tommy Evans' lupus diagnosis and its affect on the methods he used to perform his job as dispatcher. ABX at 37. Contrary to Respondent Plan's specious assertions, cumulative evidence was introduced on the record of Tommy Evans' lupus, some by Respondent

Plan's own witnesses. Specifically, Tommy Evans testified that he performed dispatch work outside the Union Hall because the dust from construction in the hall aggravated his lupus symptoms. Tr. at 518, 1-7. ABX at 37. Glen Evans confirmed that his father had lupus. Tr. at 518, 1-7. Tr. at 381, 1. More importantly, Union President Donald Evans testified that part of the reason he asked his brother not to retire in 2011 was because Tommy Evans would receive better health insurance related to his lupus if he waited for the MILA program to go into effect. Tr. at 664, 5-14.

Respondent Plan's assertion that a medical expert would be required to allow evidence of Tommy Evans' condition to be admitted is disingenuous, especially considering its position regarding Cuevas. Respondent Plan argued that 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 months to recover from his alleged medical condition.

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

Respondent Plan repeatedly argues that Tommy Evans could not perform his duties as dispatcher outside the Union Hall. 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 while inside the hall. Tr. at 164, 12-18. Respondent Plan's own witness, Plan Administrator Victor Walsh, admitted that a dispatcher could perform his duties "on a pickup truck," which is precisely what Tommy Evans did. Tr. at 164, 19-23.

Similarly, Respondent other witnesses support a finding that Tommy Evans performed dispatch work outside the Union Hall from his pickup truck. According to Respondent Plan's Answering Brief, Gloria Pittman never saw Tommy Evans enter the building during dispatching hours after Respondent Union moved into the new Union Hall in 2012. ABX at 30. However, Respondent Plan witness Herbert Williams testified that Tommy Evans failed to dispatch him on November 24, 2012. ABX 29; GCX 39; RPX 23. If Tommy Evans was not in the Union Hall when he allegedly failed to dispatch Herbert Williams, he must have been in his pickup truck. Therefore, based on the testimony of Respondent Plan's witnesses, the ALJ erred in finding that Tommy Evans' not going inside the Union Hall prevented him from dispatching workers.

**VI. No alleged complaints against Tommy Evans were upheld by the Seniority Board**

Respondent Plan argues in its Answering Brief that the "Seniority Board received multiple complaints," regarding Tommy Evans in 2011 and 2012; yet, it failed to put any evidence, documents and/or testimony from the Seniority Board members, into the record to show that the Seniority Board upheld any of these alleged complaints. Such evidence, if it exists, was certainly accessible to Respondent Plan, because its four Trustees who testified at trial are the same four members of the Seniority Board.

In particular, the evidence shows that Herbert Williams submitted his complaint regarding Tommy Evans failure to dispatch him on November 24, 2012, to Cuevas.<sup>2</sup> GCX 39. Although Cuevas was called by Respondent Plan in its case-in-chief, Cuevas did not deny receiving the complaint from Herbert Williams. Respondent Plan did not produce any documents at trial showing that Herbert Williams' alleged complaint was upheld by the Seniority Board. Although all the members of the Seniority Board were called by Respondent Plan in its

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<sup>2</sup> RPX 23 and GCX 39 are basically the same complaint by Herbert Williams about Tommy Evans alleging failing to refer him on November 24, 2012. Respondent Plan's attempts to treat them as separate complaints clearly demonstrate Respondent Plan's attempts to manipulate the facts of the case.

case in chief, none of them testified the Seniority Board upheld a complaint by Herbert Williams against Tommy Evans. Therefore, the ALJ erred in finding that Herbert Williams' complaint showed that Tommy Evans was not properly performing his duties as a dispatcher. In fact, the lack of evidence that the Seniority Board substantiated Herbert Williams' alleged complaint shows that the members of the Seniority Board believed Tommy Evans performed his dispatching duties correctly.

Respondent Plan argues in its Answering Brief that Tommy Evans passed over Garland Taylor 10 to 15 times between 2011 and 2012. ABX at 29. Taylor is a "casual employee". However, Respondent Plan's recitations of the facts are completely false. Garland Taylor testified as follows:

Question: All right. Has he ever passed you over for a position?

Answer: Yes. Many times.

Question: How many is many?

Answer: Ten to 15 maybe.

Question: And was this happening in 2012?

Answer: Yes. Before that too. Tr. at 739, 17-22.

Garland Taylor's testimony is that Tommy Evans passed him over 10 to 15 times in 2012 and on other occasions in 2011. The 10 to 15 times in 2012 are relevant because Cuevas testified that Tommy Evans only conducted five (5) shape-ups in 2012. Therefore, Garland Taylor's testimony contradicts Cuevas's testimony regarding the amount of dispatching Tommy Evans performed in 2012.

Although Garland Taylor testified that Tommy Evans failed to properly dispatch him, his claims were baseless, as evidenced by Respondent Plan's failure to introduce evidence into the

record that the Seniority Board, the entity responsible for investigating any alleged dispatching complaints, found that Charging Party Tommy Evans ever passed over Garland Taylor. There was no evidence introduced at trial showing the dates Garland Taylor was passed over for dispatch and/or the names of the casuals who were referred before Garland Taylor and were junior to Garland Taylor.

Furthermore, Respondent Plan asserts that Tommy Evans conducted only five (5) dispatches in 2012, and that when Tommy Evans did work in 2012, he worked with Cuevas. RPX 18a. However, Cuevas did not testify that Tommy Evans refused to dispatch Garland Taylor on any of the five (5) days. In fact, the only day out of the five days listed on RPX 18a that Garland Taylor's gang worked was January 17, 2012. RPX 18a, GSA Plans 000006. On that particular day, Huey Cuevas' wrote on the shape up "DNW," which stands for "Did Not Work." RPX 18a, GSA Plans 000006. On the other four days, the shape-ups indicate that no "Casuals" worked on those days. RPX 18a. GSA Plans 000001, 000003, 000007, and 000011. Because Cuevas did not work Garland Taylor on January 17, 2012, and no casuals were dispatched on the other four days, Tommy Evans could not have passed over Garland Taylor for a junior employee on any of the days listed on RPX 18a. Therefore, either the summary attached to RPX 18a is inaccurate or Garland Taylor testified falsely at trial regarding Tommy Evans failing to dispatch him 10 to 15 times in 2012. The ALJ erred in crediting Garland Taylor's testimony that Tommy Evans failed to properly dispatch him while at the same time crediting Cuevas' testimony that Tommy Evans only performed five (5) dispatches in 2012.

**VII. Respondent Plan's delay in terminating Tommy Evans supports a finding that its performance reasons given for termination are pretextual.**

Respondent Plan argues for the first time in its Answering Brief that it delayed in

terminating Tommy Evans from December 11, 2012, to January 5, 2013, out of some consideration for Tommy Evans' pension, holiday plans or potential return to the workforce as a longshoreman. ABX at 31. Respondent Plan's argument is not supported by any record evidence. The delay undermines Respondent Plan's argument that Tommy Evans' performance had become so poor that they had to have a special meeting to terminate him without first giving him any discipline related to his poor work performance. If Respondent Plan was sincere in its concern regarding Tommy Evans' performance issues, it could have given him a warning and allowed him to improve his performance during the three week period after the December 11 meeting but before the effective termination date. The ALJ's attempt to justify the delay by misapplying the facts of the case is evidence that the ALJ did not believe Respondent Plan had a legitimate reason for delaying its termination of Tommy Evans, an allegedly extremely poor performer.

**VIII. Glen Evans performed dispatcher work and should have been considered for the vacant CI-D position.**

Respondent Plan references facts not in evidence when it asserts Glen Evans was not considered for the CI-D position because "several complaints were filed for shape-ups" performed by Glen Evans. Respondent Plan did not provide any records of any dispatching complaints regarding Glen Evans. If such complaints existed, Respondent Plan did not present any evidence, documents and/or testimony, that any of the complaints were upheld by the Seniority Board. Yet, instead of considering Glen Evans for the position, Respondent Plan admits it merely went along with Respondent Union's suggestion; even though, the individual Respondent Union recommend had worked, at most, 17 hours in 2012. Amazingly, Respondent Plan argues that Tommy Evans was terminated because he was not doing his job and then turns

around and hires an individual who worked no more than 17 hours in 2012, and had not worked for several months prior to December 11, 2012.

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

Respondent Plan's argument that it did not merely accede to the Union's request to terminate Tommy Evans is contrary to the facts and record evidence. 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. ABX at 40-43.

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. As cited in Respondent Plan's Answering Brief, the applicable Board standard is, "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 counsel and signed by Donald Evans showed that Respondent Union caused Respondent Plan to terminate Tommy Evans. GCX 15.

Respondent Plan contradictorily tries to minimize the influence and control of Union President Donald Evans on its decision to fire Tommy Evans and hire his replacement while also arguing that the Trustees were beholden to Donald Evans when he "protected" his brother prior to deciding to terminate him. According to Respondent Plan, Union President Donald Evans, "would not permit any record of discipline of his brother." ABX at 47. Likewise, Respondent Plan freely admits that it blindly accepted Respondent Union's recommendation for Tommy

Evans replacement without discussion. Respondent Plan cannot have it both ways. It cannot say that the Trustees act as fiduciaries when performing their duties and at the same time admit that the Trustees would not initiate any action or bring up for discussion at Trustee Board meetings regarding Tommy Evans' work performance without Donald Evans' permission. The evidence overwhelmingly supports a finding that Donald Evans made the decision to terminate Tommy Evans in his capacity as Union President, and the other Trustees, merely went along with the Union's recommendation.

**X. General Counsel's Post-Trial Exhibits Should be Considered by the Board.**

The Board should consider General Counsel's Post-Trial Exhibits despite Respondent Plan's unsupported argument in its Answering Brief that General Counsel's Post-Trial Exhibits should not be considered by the Board. The Post-Trial Exhibits are merely analyses, in chart form, of Respondent Plan's voluminous and confusing exhibits introduced at trial. RPX 18; RPX 18a; RPX 19. They were also included as attachments to the General Counsel's Post-Trial Brief to the ALJ that was served on Respondents prior to the ALJ rendering his Decision.

**XI. Conclusion**

General Counsel respectfully submits, for the reasons detailed above, the Board should reverse the decision and order of the ALJ and find that Respondent Plan terminated Tommy Evans in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

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

\_\_\_\_\_/s/\_\_\_\_\_  
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