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The Gulfport Stevedoring Association—International Longshoremen’s Association Container Royalty Plan and Tommy Evans.

International Longshoremen’s Association Local 1303 and Tommy Evans. Cases 15–CA–096939 and 15–CB–096934

September 25, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 27, 2014, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent Gulfport Stevedoring Association—International Longshoremen’s Association Container Royalty Plan (the Plan) filed cross-exceptions, a supporting brief, and an answering brief, and the General Counsel filed a reply brief. The Respondent International Longshoremen’s Association Local 1303 (the Union) filed an answering brief to the General Counsel’s exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order.

¹ The General Counsel has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Plan cross-exceptions only to the judge’s finding that it met the Board’s jurisdictional requirements. For the reasons discussed in the judge’s decision, we affirm the judge’s conclusion that the Plan is an employer engaged in commerce under Sec. 2(2), (6), and (7) of the Act and, accordingly, that the Board has jurisdiction over the Plan.

Consistent with the General Counsel’s exception, we find that Glen Evans was removed in 2011 from his position as Plan trustee, not from his position as vice president of the Union. The judge’s error does not affect our analysis or conclusions.

We reject the General Counsel’s argument that the judge committed reversible error by not admitting the Plan’s February 26, 2013 position statement into evidence. We find that the General Counsel failed to preserve this objection. At trial, the General Counsel offered the statement into evidence only for the purpose of showing that the container inspector-dispatcher position, which Charging Party Tommy Evans held, was not supervisory, and subsequently, the parties stipulated that

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 25, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

The Respondent Gulfport Stevedoring Association—International Longshoremen’s Association Container Royalty Plan (the Plan) discharged employee Tommy Evans on December 11, 2012, effective January 5, 2013. The General Counsel contends that the Respondent Union violated Section 8(b)(2) of the Act by causing the Plan to discharge Tommy Evans in violation of Section 8(a)(3) because he supported his son’s unsuccessful campaign for Union president against the incumbent, Donald Evans, who is Tommy Evans’ brother and a Plan trustee. Applying *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted), the judge found that Respondents Plan and Union acted lawfully and dismissed the complaint.

I join my colleagues in adopting the judge’s dismissal of the complaint allegations involving the Plan. With respect to the Respondent Union, the Board has applied

it was non-supervisory. Furthermore, counsel for the General Counsel stated at trial that the position statement was not being offered for any other purpose. By contending for the first time on exception that the position statement is relevant for another purpose—that it purportedly contained admissions—the General Counsel seeks to assert a claim that he failed to preserve. See e.g., *Hicks v. Midwest Transit, Inc.*, 500 F.3d 647, 652 (7th Cir. 2007).

Finally, we reject the General Counsel’s argument that the Plan’s trustees condoned the Charging Party’s poor performance and terminated him because of his protected activity. Even assuming arguendo that the Respondents had knowledge of the Charging Party’s protected activity, the condonation doctrine does not apply here. *General Electric Co.*, 292 NLRB 843, 844 (1989) (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 the employment relationship as though no misconduct had occurred). Here, as the judge found, the trustees never demonstrated a willingness to “wipe the slate clean” with the Charging Party. Rather, as the judge found, the Charging Party’s work performance declined in 2011, and he stopped performing his essential job duties in 2012, which led to his January 5, 2013 discharge.

both the analytical framework set forth in *Wright Line*¹ and the duty-of-fair-representation framework² in determining whether a union has violated Section 8(b)(2) by causing or attempting to cause the discharge of an employee in violation of Section 8(a)(3). See *Good Samaritan Medical Center*, 361 NLRB No. 145, slip op. at 2 (2014). The judge, however, only analyzed the 8(b)(2) violation under *Wright Line*. I adopt that analysis, and find, for the reasons that follow, the Union also did not violate Section 8(b)(2) under the duty-of-fair-representation standard.

Under the duty-of-fair-representation standard, whenever a labor organization causes the discharge of an employee, there is a rebuttable presumption that it acted unlawfully because by such conduct it demonstrates its power to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees. *Acklin Stamping*, supra, 351 NLRB at 1263; *Graphic Communications Local 1-M (Bang Printing)*, supra, 337 NLRB at 673. One way in which a union may rebut that presumption is by showing that it acted pursuant to a valid union-security clause. *Operating Engineers Local 18 (Ohio Contractors Assn.)*, supra, 204 NLRB at 681. The other is by showing that its actions were "done in good faith, based on rational considerations, and were linked in some way to its need effectively to represent its constituency as a whole." *Operative Plasterers & Cement Masons, Local No. 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981).

Assuming for the purpose of this analysis that the Union caused Tommy Evans' discharge,³ I find that the Union rebutted the presumption that it acted unlawfully. As

more fully set forth in the judge's decision, Tommy Evans' longstanding failure to perform the dispatching and inspection duties of his position adversely affected both union members and signatory employers. Replacing Tommy Evans with someone who would perform those duties would prevent those adverse effects. Therefore, causing Tommy Evans' discharge was "done in good faith, based on rational considerations," and it was "linked . . . to [the Union's] need effectively to represent its constituency as a whole." *Operative Plasterers & Cement Masons, Local No. 299 (Wyoming Contractors Assn.)*, supra; see *Acklin Stamping*, supra (union lawfully sought discharge of employee based on reasonable concerns his presence on jobsite endangered coworkers because he was unqualified). Thus, the Union acted lawfully regardless of whether this case is analyzed under *Wright Line* or the duty-of-fair-representation standard. I therefore concur in the dismissal of the complaint.

Dated, Washington, D.C. September 25, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

Caitlin E. Bergo, Esq., Matthew J. Dougherty, Esq., and Kevin McClue, Esq., for the General Counsel.

Stephen W. Dummer, Esq., and Matthew M. McCluer, Esq., for the Respondent Container Royalty Plan.

Kevin Mason-Smith, Esq., and Louis L. Robein, Esq., for the Respondent Union.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New Orleans, Louisiana, on September 9 through 12, 2013. Tommy Evans, an Individual, filed the charge in Case 15-CA-096939 on January 24, 2013, and amended it on April 24, 2013. Evans filed the charge in Case 15-CB-096934 on January 24, 2013, and amended it on March 25, 2013, and April 8, 2013. On August 22, 2013, the General Counsel issued a second amended consolidated complaint alleging that Respondent, Gulfport Stevedoring Association-International Longshoremen's Association Container Royalty Plan (Respondent Employer or Plan) violated Section 8(a)(1) and (3) of the Act by discharging Evans December 15, 2012, at the request of Respondent International Longshoremen's Association Local 1303 (Respondent Union). The second amended consolidated complaint further alleged that the Respondent Union violated Section 8(b)(2) of the Act by attempting to

¹ See *Security, Police and Fire Professionals of America (SPFPA) Local 444 (Security Support Services)*, 360 NLRB No. 57, slip op. at 6-7 (2014); *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004); *Freight Drivers, Local 287 (Container Corp. of America)*, 257 NLRB 1255, 1258-1259 & fn. 18 (1981).

² See *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), enf. denied on other grounds 555 F.2d 552 (6th Cir. 1977) (per curiam); *Acklin Stamping Co.*, 351 NLRB 1263, 1263 (2007); *Graphic Communications Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002); *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382, 1382 fn. 2 (1984).

³ The judge did not resolve the issue of whether the Union caused Tommy Evans' discharge because he found no unlawful motivation in any event. With regard to this issue, Tommy Evans was employed as a container inspector-dispatcher (CID), the Plan's employer trustees generally testified that they left the selection of CIDs to the Union, Tommy Evans was discharged at Donald Evans' request, and Donald Evans offered the CID position held by Tommy Evans to Union secretary-treasurer Chris Johnson without any prior authorization from the Plan or the other trustees even before the Plan trustees voted to discharge Tommy Evans. I need not determine whether this evidence is sufficient to establish union causation because even assuming it is, I would find no violation under either the *Wright Line* or the duty-of-fair-representation standard.

cause and causing the discharge of Evans.¹

On September 3, 2013, the Respondent Plan and the Respondent Union filed their answers to the complaint. In addition to denying the unfair labor practice allegations of the complaint, both Respondents denied that the Respondent Plan was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent Plan asserted a number of affirmative defenses, including that Evans was discharged for cause and would have been discharged even absent any protected activity.

In response to the complaints that issued in this case, the Respondent Plan also filed directly with the Board a motion to dismiss for lack of jurisdiction. By Order dated September 9, 2013, the Board denied the Motion to Dismiss. On September 5, 2013, shortly before the hearing was scheduled to open, the Respondent Plan filed a Motion to Bifurcate Hearing, seeking to have the jurisdictional issue decided in a preliminary hearing before a hearing on the substantive allegations in the complaint. I denied this motion when the hearing opened on September 9, 2013.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent Plan, and the Respondent Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent Container Royalty Plan (Plan) is a jointly administered tax exempt 501(c) (9) trust fund established in 1974 through a collective-bargaining agreement between the Respondent Union and the Gulfport Stevedoring Association (GSA). GSA is a multiemployer association consisting of two stevedoring companies, Stevedoring Services of America, Inc. (SSA) and Ports America, Inc. (Ports) that hire longshoremen to load and unload cargo at the Port of Gulfport, Mississippi. The Plan was one of several such plans created at ports throughout the United States in the 1970s to deal with the loss of work resulting from the shift to containerization of cargo.³ Under the terms of the collective-bargaining agreement between Respondent Union and the employers, including GSA, the Plan collects royalty payments from signatory employers to distribute annually as supplemental cash benefits to longshoremen who work 700 or more hours at the port during the plan year. Shipping companies that utilize the services of the employers' longshoremen, such as Dole Food Company and Dole Fresh Fruit Company (Dole), Chiquita Brands International Ltd. (Chiquita), and Crowley Maritime (Crowley), make royal-

ty payments to the Plan based on the tonnage of containers. The evidence establishes that, for the 2011–2012 plan year, the last one before the events at issue here, the Plan collected \$1,430,096.92 from the employers.⁴ Of this amount, \$761,709.64 was distributed to the 131 longshoremen who met the 700 hour qualification criteria.⁵ The Plan uses some of the money collected to fund its administrative expenses, including the compensation for its administrator, Victor Walsh, who is a contractor not an employee, and the wages and benefits of its only two employees, the container inspection-dispatchers. The remainder of the money is distributed to other trust funds established under the collective-bargaining agreement, such as the welfare fund, vacation fund and pension.

The Respondent Plan is governed by a four-member board of trustees. Each employer member of the GSA appoints one trustee and the Respondent Union appoints two trustees. In 2012, Greg Schruff was the trustee appointed by SSA, Kendall Lamb was the trustee appointed by Ports America and the Respondent Union's president and vice president, Donald Evans and Darius Johnson, respectively, were the union trustees. Donald Evans is the Charging Party's brother and has been president of the Respondent Union and a trustee of the Respondent Plan since 1989. Under law and the trust documents, the trustees are required to act as fiduciaries for the benefit of the plan and its participants rather than in the interest of the parties who appointed them. See, e.g., *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

In addition to the collection and distribution of container royalty money, the Respondent Plan is also responsible for dispatching longshoremen to work at the Port of Gulfport. The two container inspector-dispatchers perform this function. They receive calls from the signatory employers requesting labor when a ship is coming in. The container inspector-dispatcher then records a voice message on an answering machine announcing that a ship is coming in, the date and time of arrival, the gangs selected to work the ship and the reporting time. Longshoremen seeking work at the port call a dispatch number and listen to this voice message to find out if they will be working. The container inspector-dispatcher is also required to be present for the shape-up in the event there are any vacancies on the gangs selected to work. If so, the container inspector-dispatcher will fill the vacancies by seniority. Any complaints about selection or nonselection can be brought by a longshoreman to a Seniority Board, also established under the collective-bargaining agreement, which hears these disputes. The four trustees of the Respondent Plan serve as the four members of the Seniority Board. The Respondent Plan pays for the maintenance and operation of the telephone answering system on which the voice messages regarding work are left and for the expenses of the Seniority Board out of the royalty payments collected from employers.⁶ There is no dispute that, until some-

¹ The second amended consolidated complaint supersedes the original consolidated complaint that issued on April 26, 2013, and a first amended consolidated complaint that issued on May 30, 2013.

² On November 6, 2013, the parties filed a joint motion to correct the record to show that GC Exh. 15 was admitted into evidence and that Respondent Plan Exhs. 18(a) and (19) were received at p. 616 of the transcript. The motion is hereby granted and the record will be corrected accordingly.

³ See *NLRB v. International Longshoremen's Assn., AFL-CIO*, 447 U.S. 490, 494 (1980), in which the Supreme Court found that such plans were lawful under the Act.

⁴ The plan year ends on September 30.

⁵ This is the gross amount of distribution before taxes and other withholdings.

⁶ Records of the Respondent Plan show that the cost of the telephone answering system is about \$360/month. The Respondent utilizes a local telecommunications company to provide this service.

time in 2011, the Respondent Union paid 25 percent of the container inspector-dispatchers' salary to assist the plan in carrying out the dispatch function.

The parties stipulated at the hearing that SSA, Ports, Dole, Chiquita and Crowley are all employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act. As noted above, both the Respondents have denied that the Respondent Plan is an employer engaged in commerce within the meaning of the Act.

There are no reported cases in which the Board has addressed the issue here, i.e. whether a longshoremen's container royalty plan is an employer engaged in commerce within the meaning of the Act. The General Counsel has cited a number of cases in which the Board has found that other types of Taft-Hartley fringe benefit funds are employers subject to the Board's jurisdiction. See, e.g., *Roofing, Metal & Heating Associates, Inc.*, 304 NLRB 155, 156 (1991); *Iron Workers Local 15*, 278 NLRB 914 (1986); *Welfare, Pension & Vacation Funds Local 2*, 256 NLRB 1145 fn. 1 and 1156 (1981); *Joint Industry Board of the Electrical Industry & Pension Committee*, 238 NLRB 1398, 1405 (1978); *Garment Workers Health & Welfare Fund*, 146 NLRB 790, 791-793 (1964); *Chain Service Restaurant Employees Local 11*, 132 NLRB 960, 961-963 (1961). The rationale of those decisions is that the payments or contributions made by the employers to the various funds pursuant to collective-bargaining agreements with the respective union are essentially the payment for services "subcontracted" to the fund to carry out the employers' contractual obligations to its employees. In this context, the receipt of such contributions would represent an indirect inflow which would satisfy the Board's jurisdictional standards if the employer making the contribution were itself directly engaged in interstate commerce. *Chain Service Restaurant Employees Local 11*, supra. I agree with the General Counsel that the analogy is appropriate to the Respondent Plan.

There can be no question, and the parties in fact stipulated, that the stevedoring companies and the shippers that contribute royalty payments to the fund are directly engaged in interstate commerce. Although the Respondent Plan attempted to distinguish itself from the funds involved in the cases cited above by claiming it engaged in no commercial activity, such as the purchase of insurance policies or annuities or the provision of health care services, it cannot escape the fact that the Respondent Plan does perform a service for the signatory employers. The Respondent Plan admits that it collects the royalty payments that are required under the collective-bargaining agreement and that it annually distributes supplemental cash benefits to qualified employees performing work under the collective-bargaining agreement. If the Respondent Plan did not exist, the employers would still have to provide these supplemental payments to the employees. The Respondent Plan invests the funds collected during the year so that the money can earn interest for the benefit of the Plan's participants. In this way, it functions much like a bank. The Respondent Plan also uses part of the money collected to pay its administrative costs, to maintain the contractual dispatch system, and to fund other contractual fringe benefit funds established pursuant to the collective-

bargaining agreement. I see the role of the Respondent Plan as no different than the health and welfare and pension funds over which the Board has historically asserted jurisdiction. Because the record established that the Respondent Plan, during the most recent plan year, collected almost \$1.5 million in royalty payments from Dole, Chiquita, Crowley, and other employers who are directly engaged in commerce, I find that the Respondent Plan is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁷

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent Union violated Section 8(b) (2) of the Act by attempting to cause, and in fact causing, the Respondent Plan to discharge the Charging Party in violation of Section 8(a)(3) and (1) of the Act because the Charging Party supported his son, Glen Evans, in his election campaign for president of the Union, in opposition to the candidacy of the incumbent president, Donald Evans. The complaint further alleges that by acquiescing to the Respondent Union's demands, the Respondent Plan violated Section 8(a)(3) and (1) of the Act. As with any case that turns on motivation, the Wright Line test applies to the issue here. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This test requires the General Counsel to prove, by a preponderance of the evidence, that the employee engaged in activity protected by the Act, that the employer (and union in this case) were aware of the employee's protected activity and that the employer and/or union was motivated by animus against the protected activity in taking adverse action against the employee. If the General Counsel meets this burden, the burden shifts to the employer and/or union to show, again by a preponderance of the evidence, that the same action would have been taken against the employee even in the absence of protected activity. Id. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997).

At the time of his termination, the Charging Party was one of two container inspector-dispatchers ("CID") employed by the Respondent Plan. The CID position was created in 1974, shortly after the Respondent Plan was established. The Charging Party was the first CID hired, on April 8, 1974. He previously worked as a longshoreman at the port for about 10 years. He was offered the job by his father, Wilson Evans, who was the Respondent Union's president and a trustee of the Respondent Plan in 1974. The Charging Party held the CID position for almost 40 years before his termination. He was the only CID for the first few years until the trustees hired Harold Oliver. Oliver was the other CID until his retirement in 2005, when he was replaced by Huey Cuevas. Cuevas was still employed as a CID at the time of the hearing. The Charging Party, Oliver and

⁷ In asserting that the Board lacked jurisdiction, the Respondent Plan relied heavily on the fact it is a tax-exempt trust prohibited from engaging in commercial activities, and that it employs no employees covered by the collective-bargaining agreement. These factors are not determinative under Board precedent cited above and have little bearing on the issue of jurisdiction.

Cuevas are all members of the Respondent Union.⁸ They are not represented by the Union and are not part of the bargaining unit covered by the collective-bargaining agreement. However, they do receive the health and welfare, pension, and vacation benefits set forth in that agreement and continue to accrue seniority while working as CIDs.

In the beginning, the two CIDs, including the Charging Party, only performed the dispatch duties described above. In the early 1990s, with increasing containerization at the port of Gulfport, the Charging Party and Oliver were assigned additional inspection duties and were sent to New Orleans for training. The inspection duties involved checking the ships' manifests, calculating the amount to be paid in container royalty based on what the manifests showed was the volume of container cargo, and comparing that number with the amount actually contributed by the particular employer. If there were any discrepancies, the CID contacted the employer in an attempt to correct the discrepancy. Although forms were created to report the results of these inspections, Charging Party testified that he seldom completed the paperwork. In fact, he admitted that he did not do any inspection reports in 2012. Although the CIDs report to the Respondent Plan's administrator, Victor Walsh, they are not closely supervised and perform most of their work independently.

The Charging Party testified that he decided to retire in 2011 because he was becoming resentful with what he perceived as Cuevas not doing his job. There is no dispute that Cuevas was on medical leave after open heart surgery for several months in 2011 and was not showing up to dispatch at the shape-ups. He was, however, still doing inspection reports while working from home. The Charging Party started the paperwork to collect social security and actually collected a couple checks before his brother, the Respondent Union's president, talked him out of it. There is no dispute that Donald Evans encouraged the Charging Party to continue working until a new, more favorable insurance plan went into effect in 2012. The Charging Party continued working through 2012 although the testimony of many witnesses is that he performed less and less of the work. In fact, several witnesses, including Gloria Pittman, the Respondent Union's receptionist/secretary for 46 years, testified that the Charging Party stopped coming into the Union hall after they moved to a new building in April 2012.

The Respondent Union held its regular election of officers on September 22, 2012. The elections are customarily held in September, every three years, with the newly elected officers taking office the following January. The Charging Party's son, Glen Evans, was the Respondent Union's vice president until he was removed from office by his uncle, the Respondent Union's president, in June 2011 after a falling out over divorce papers. Glen Evans ran for president in the 2012 election against his uncle Donald. He lost the election by 18 votes out of 230 cast. The Charging Party testified at the hearing that he supported his son's candidacy and campaigned for him by

handing out flyers and talking to pensioners and other senior members of the union, asking them to vote for his son. Glen Evans also testified at the hearing, as a witness for the General Counsel, and corroborated his father's testimony. The testimony of these witnesses was contradicted by an affidavit the Charging Party signed on February 1, 2013, during the investigation of these charges. In that affidavit, the Charging Party stated that he did not actively campaign for his son. The Charging Party provided no credible explanation for this glaring inconsistency when he testified at the hearing.

The Charging Party did admit, on cross-examination, that he did not know whether his brother, the Respondent Union's president, or any other of the Respondent Plan's trustees knew he had "campaigned" for his son. According to the Charging Party, his conversations with pensioners took place at their homes. He did not know whether any of them said anything to Donald Evans about these visits. The Respondent Plan's trustees all testified at the hearing that they were unaware of any campaign activity engaged in by the Charging Party. The General Counsel offered no evidence to contradict this testimony. Donald Evans also testified that he was aware of at least one incident in early 2012 when the Charging Party and his son had a verbal altercation at the union hall. The dispute was so intense that Donald Evans had to intervene to break it up. Gloria Pittman, the secretary, corroborated Donald Evans' testimony in this regard. There was also testimony from several witnesses about an earlier confrontation between the Charging Party and his son over the Charging Party's failure to dispatch longshoreman Garland Taylor. The Charging Party and Glen Evans did not dispute that they had "disagreements" on these two occasions. Instead they tried to minimize the seriousness and volume of the exchange.

In November, the trustees of the Respondent's Plan voted to give the two CIDs, including the Charging Party, a bonus that was equivalent to the supplemental cash payments that eligible longshoremen receive from the Plan around the same time each year. There is no dispute that this is done annually because the CIDs, who are not participants in the Plan and not covered by the collective-bargaining agreement, are not eligible to receive a royalty check. Around the same time, Donald Evans asked his brother if he was now going to retire, since the new health plan was in effect. The Charging Party told Donald Evans that he had decided to continue working until the next election in three years.

On December 11, at Donald Evans' request, the Respondent Plan's trustees held a special meeting at which Donald Evans' recommendation to terminate the Charging Party was discussed. Each of the four trustees testified regarding this meeting. All but Donald Evans were unaware of the purpose of the meeting until they got there. Each trustee testified that they voted to terminate the Charging Party after a discussion of his performance issues. Although each trustee gave his own reason for being unsatisfied with the Charging Party's performance, they all testified that the internal union election and any role the Charging Party may have had in it was not discussed or considered. The trustees then directed Administrator Walsh to send a letter to the Charging Party informing him of his termination, to

⁸ The Respondent Union is somewhat of a family business with several generations of the Evans family holding office through the years. As noted previously, the Charging Party's brother is the current president.

be effective January 5, 2013.⁹ At the request of Donald Evans, Walsh was told to cite “performance issues” generally as the reason for the termination rather than to detail any specific reasons for the termination. Donald Evans testified that he made this recommendation to spare his brother any embarrassment.

The Respondents called a number of witnesses, including the four trustees, to testify regarding the Charging Party’s performance issues. In addition to the trustees, a supervisor from each of the employer members of GSA testified regarding the difficulties each had contacting the Charging Party to tell him a ship was needed and that workers needed to be assigned. The Charging Party’s colleague, CID Cuevas, testified regarding the Charging Party’s failure to perform dispatch duties and inspection reports which resulted in Cuevas shouldering more than a fair share of the work. Two longshoremen in the bargaining unit testified about complaints each had regarding the Charging Party’s dispatch performance. There was testimony on cross-examination from Glen Evans, the Charging Party’s son, in which he acknowledged that his father did not always appear at shape-ups and that he had been called upon to perform dispatch duties for his father during the time he was vice president of the Respondent Union. In fact, Glen Evans sought his father’s job after he was terminated by speaking to one of the employer trustees, Schruoff. Glen Evans cited his experience performing dispatch duties in his father’s absence as a basis for his qualification for the CID position.

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, counseled, or otherwise informed that the Respondent Plan was not happy with his performance. Nor did the Charging Party receive any specific warning before the December 11 trustees meeting that he was about to be terminated. Donald Evans testified that, in the past, when other trustees or the administrator, Walsh, had complained about his brother, he advised them he would take care of it. Donald Evans testified that, shortly before the December 11 meeting, fellow trustee Kendall Lamb told him that he would no longer sign any checks for the Charging Party because of problems his employer was having communicating with the Charging Party. Lamb corroborated Donald Evans regarding this conversation. Walsh also corroborated Evans testimony that he asked Walsh not to take any action against his brother when concerns were raised.

In her brief, counsel for the General Counsel reviewed the documentary evidence and made a strong showing that the Charging Party performed his dispatch functions far more often than the Respondent’s witnesses claimed. However, her efforts in this regard were undermined by the testimony of the Charging Party. As noted above, the Charging Party conceded that his attitude toward the job changed in 2011 during Cuevas’ absence, around the time he initially decide to retire. The Charging Party admitted on cross-examination that he did not record the tape announcing work assignments 90 percent of the time and that he did not prepare any container inspection reports in

⁹ This date was chosen to ensure that the Charging Party would be eligible to receive the new and improved health benefits.

2012. These are the two primary duties of a CID. It appears from the Charging Party’s own testimony that about the only part of his job that he performed was showing up at the shape-up and dispatching men, as needed. Even in this regard, there is no dispute that his choices of whom to dispatch were sometimes questioned, even by his own son.

As noted above, resolution of this case turns on application of the Wright Line test to the facts and evidence. Two key elements of the General Counsel’s burden under that test is proof of protected activity and knowledge of that activity by the employer (and union in this case). The credible evidence in this case is not sufficient to meet the General Counsel’s burden as to these two elements. As noted, the testimony of the Charging Party and his son regarding the Charging Party’s activities during his son’s election campaign are contradicted by his prior sworn testimony in the February 2013 affidavit. The affidavit was given closer in time to the events and at a time when no complaint had yet issued. The Charging Party’s statement is thus more reliable than his testimony at the hearing when he had a vital interest in exaggerating his campaign activity in order to get a remedy for his termination. The absence of any objective evidence to support his testimony, and the lack of corroborating testimony from a disinterested witness, convinces me that the testimony is unreliable.

As to the element of knowledge, Donald Evans, who made the recommendation to terminate the Charging Party, credibly testified that he had no knowledge that the Charging Party campaigned or otherwise supported his son’s candidacy for president. The General Counsel, in the brief, acknowledges this flaw in the case by arguing that it should be inferred that Donald Evans knew of the Charging Party’s support for Glen Evan’s in the election because Glen Evans was the Charging Party’s son. This argument does not hold up for two reasons. The mere fact that the Charging Party “supported” his son would not be enough to meet the first element unless there was evidence that the Charging Party’s support was expressed in some tangible fashion that would be of concern to Donald Evans. Without such evidence, the Charging Party’s “support” amounted to one vote against him. Second, the assumption that the Charging Party supported his son’s election as president is contradicted by other evidence, known to Donald Evans, that the Charging Party and his son did not always agree on union issues. I credit the testimony of the Respondent’s witnesses over that of the Charging Party and Glen Evans as to the two altercations between them, one of which had to do with how the Charging Party was dispatching the men. Glen Evans even acknowledged in his testimony that there was a period of time in 2011–2012 when he and his father “did not talk.”

The record is also devoid of any direct evidence of animus toward the Charging Party over the exercise of any protected activity. The General Counsel essentially acknowledges this weakness by emphasizing the circumstantial evidence that might suggest the existence of the requisite animus. The circumstantial evidence cited, such as timing (within three months of the union election); the claim of pretext; the fact that Donald Evans offered the Charging Party’s position to Chris Johnson, the Respondent Union’s newly-elected secretary-treasurer, before the trustees’ meeting at which the Charging Party was

terminated; and the selection of this individual, with no dispatch experience, over the Charging Party's son, Glen, who had substantial experience performing the dispatch duties in his father's absence, is not sufficient to establish a prima facie case of animus or unlawful motivation in the absence of evidence of protected activity and knowledge.

Based on the above, having considered all the evidence, I find that the General Counsel has not established, by a preponderance of the evidence, that the Charging Party was terminated by the Respondent Plan because he engaged in any protected activity under the Act, and in particular because he supported or campaigned for his son in the September 2012 intraunion election. See *Ronin Shipbuilding, Inc.*, 330 NLRB 464 (2000). Because I have found no unlawful motivation in the decision to discharge the Charging Party, it is unnecessary to determine whether the Respondent Union caused, or attempted to cause, his discharge. Even assuming the Respondent Union, through the recommendation of its trustee, Donald Evans, caused the Charging Party's termination, the evidence is insufficient to establish any unlawful motivation behind this recommendation, for the reasons stated above. Finally, in the absence of a prima facie 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.¹⁰

¹⁰ Even if the evidence was sufficient to support a prima facie 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. See *Rockwell Automotive/Dodge*, 330 NLRB 547 (2000).

CONCLUSIONS OF LAW

1. The Respondent Gulfport Stevedoring Association–International Longshoremen's Association Container Royalty Plan is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent International Longshoremen's Association Local 1303 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent Plan did not violate Section 8(a) (3) and (1) of the Act by discharging Tommy Evans on December 15, 2012.

4. The Respondent Union did not violate Section 8(b)(2) of the Act by causing, or attempting to cause, the Respondent Plan to discharge Tommy Evans for discriminatory reasons in violation of Section 8(a)(3) of the Act.

5. The Respondents did not individually or collectively violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 27, 2014

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.