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

and *

Case Nos. 15-CB-096934
15-CA-096939

TOMMY EVANS, an Individual *

INTERNATIONAL LONGSHOREMEN’S *
ASSOCIATION LOCAL 1303 *

and *

TOMMY EVANS, an Individual *

**MOTION TO DISMISS APPLICATION FOR AN AWARD OF ATTORNEY’S FEES
AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

**Caitlin E. Bergo
Counsel for the General Counsel
National Labor Relations Board
Region 15
600 S. Maestri Place 7th Floor
New Orleans, LA 70130**

TABLE OF CONTENTS

I.	Procedural History	1
II.	Summary of Pertinent Facts	4
	a. The International Longshoremen’s Association Local 1303.....	4
	b. The Seniority Board.....	5
	c. The Gulfport Stevedoring Association	5
	d. The Gulfport Stevedoring Association-International Longshoremen’s Association Container Royalty Plan (Respondent Plan).....	6
	i. Respondent Plan’s History and Purpose.....	6
	ii. Board of Trustees.....	7
	iii. Contributors to the Plan.....	7
	iv. Funds Contributed to Respondent Plan.....	8
	v. Services Provided by Respondent Plan	9
	vi. Container Inspector-Dispatcher (CI-D).....	9
	e. Tommy Kirk Evans as Container Inspector-Dispatcher.....	11
	i. September 2012 Election of Union Officers.....	12
	ii. Termination of Tommy Kirk Evans.....	13
	iii. Trustees’ Purported Reasons at Trial for Voting to Terminate T.K. Evans.....	16
III.	Respondent Plan’s Factual Background in its Application Contains Numerous Inaccuracies and Misstatements of the Record.....	18
	a. T.K. Evans did not have a physical altercation with his son Glen Evans.....	18
	b. T.K. Evans performed the substantial amount of dispatching work.....	18
	c. Despite revisions to Respondent’s summaries, they were still inaccurate.....	20
	i. RP-19.....	20
	ii. RP-18a.....	21
	d. T.K. Evans performed his dispatcher work without going into the Union Hall....	24
	e. Donald Evans did not wait to terminate his brother in order for him to qualify for better health benefits.....	24
	f. Respondent Plan’s Trustees did not have a lengthy discussion regarding T.K. Evans substandard performance before deciding to terminate him.....	25
	g. The Local Union via Donald Evans made the decision to terminate T.K. Evans, and the Board of Trustees rubber-stamped his recommendation.....	27
IV.	Respondent Plan’s Application Should be Dismissed Because the General Counsel’s Position was Substantially Justified Overall, and at Each Step of the Proceedings.....	28
	a. The General Counsel was substantially justified in issuance of the Complaint and proceeding to trial before the Administrative Law Judge.....	29
	b. The General Counsel was substantially justified in its filings with the Board after the Decision of the Administrative Law Judge.....	31

V.	Respondent’s Application is Deficient Because it Provides Insufficient Evidence to Show Respondent is Eligible for Fees.	34
	a. Respondent Plan has failed to provide financial information regarding its affiliate Respondent Union.....	35
	b. Respondent Plan has failed to provide financial information regarding its affiliated Benefit Plans.....	36
VI.	Respondent’s Conduct Led to Protracted Litigation, and Therefore its Application for Fees Should be Denied in Full.....	38
VII.	Respondent Plan’s Application Seeks Fees and Expenses That Are Not Compensable and/or That are Unreasonable and/or Excessive.....	43
VIII.	Conclusion.....	45

TABLE OF AUTHORITIES

CASES

Acklin Stamping Co., 351 NLRB 1263, (2007).....31, 32
Advance Development Corp., 277 NLRB 1086, 1087 (1985).....29
Alpha-Omega Electric, 312 NLRB 292, 293 (1993).....29
Barrett's Contemporary & Scandinavian Interiors, 272 NLRB 527 (1984).....29
Blaylock Electric, 319 NLRB 928, 929 (1995).....28
Bouley, Inc. 308 NLRB 653, 654 (1992).....29
Brandeis School, 287 NLRB 836, 838-839 (1987).....44
Carmel Furniture Corp., 277 NLRB 105, 1106 (1985).....29
Commissioner, INS v. Jean, 496 U.S. 154, 161-162 (1990)..... 28
David Allen Co., 335 NLRB 783, 784-785 (2001).....29
Euoplast, Ltd., 311 NLRB 1089 (1993), *affd.* 33 F.3d 16 (7th Cir. 1994).....32
In re Glesby Wholesale, Inc., 340 NLRB 1059.....28
Graphic Communications Local 1-M (Bang Printing), 337 NLRB 662, 673 (2002).....32
Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).....43, 44
Jansen Distributing Co., 291 NLRB 801 at fn. 2 (1988).....29
Noel Produce, 273 NLRB 769, 769 (1984).....35
Operating Engineers Local 478 (Stone & Webster), 271 NLRB 1382, 1382 fn.2 (1984).....32
Pierce v. Underwood, 487 U.S. 552, 565 (1988)28
Quality C.A.T.V., Inc., 302 NLRB 449, 449-450 (1992).....29
State of Louisiana v. Lee, 853 F.2d 1219, 1223 (5th Cir.1988).....34
Teamsters Local Union No. 741, 321 NLRB 886, 889 (1996).....35
Temp Tech Indus., Inc. v. NLRB, 756 F.2d 586, 590 (7th Cir.1985).....29
USF Red Star, Inc. 330 NLRB 53, 65 (1999).....32
York Products, 289 NLRB 1414 (1988).....33

 THE GULFPORT STEVEDORING *
 ASSOCIATION-INTERNATIONAL *
 LONGSHOREMEN’S ASSOCIATION *
 CONTAINER ROYALTY PLAN *
 *
 and *
 *
 TOMMY EVANS, an Individual *
 *
 INTERNATIONAL LONGSHOREMEN’S *
 ASSOCIATION LOCAL 1303 *
 *
 and *
 *
 TOMMY EVANS, an Individual *
 *

Case Nos. 15-CB-096934
 15-CA-096939

General Counsel’s Motion to Dismiss Respondent Plan’s Application for an Award of Attorney’s Fees and Expenses under the Equal Access to Justice Act

Now comes, Caitlin Bergo, Counsel for the General Counsel (General Counsel), and moves, pursuant to Section 102.150 of the National Labor Relations Board’s Rules and Regulations (Rules) for dismissal, in its entirety, of the Application for Attorney’s Fees and Costs (Application) of The Gulfport Stevedoring Association- International Longshoremen’s Association Container Royalty Plan (Respondent Plan) for attorney’s fees and costs under the Equal Access to Justice Act (EAJA) 5 U.S.C. Section 504 et seq., because the General Counsel was substantially justified – reasonable in fact and law – in the underlying matter as a whole.

I. Procedural History

On January 24, 2013, Tommy Kirk Evans (T.K. or Tommy Evans) filed charges in cases 15-CA-096939 and 15-CB- 096934 with Region 15 of the National Labor Relations Board (Board) alleging Respondent Plan and the International Longshoremen’s Association Local

1303 (Respondent Union) engaged in unfair labor practices in violation of Sections 8(a)(1), 8(a)(3) and 8(b)(2) of the National Labor Relations Act (the Act), respectively, when after over thirty years of employment, they terminated employee T.K. Evans because of his protected activity. The First Amended and Second Amended charges in Case No. 15-CB-096934 were filed on March 25, 2013, and April 8, 2013, respectively. On April 24, 2013, the First Amended charge in Case No. 15-CA-096939 was filed.

On April 26, 2013, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (CCNOH) issued with a hearing date of July 23, 2013. On April 30, 2013, an Amendment to the CCNOH issued. On May 10, 2013, Respondent Union filed its Answer to the CCNOH. On May 13, 2013, Respondent Plan filed its Request for Preliminary Hearing or Continuance.

On May 14, 2013, Respondent Plan filed its Answer to the CCNOH along with its Motion to Dismiss for Lack of Jurisdiction with NLRB Region 15.

On May 30, 2013, a First Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (First Amended CCNOH) issued. On June 12, 2013, Respondent Union filed its Answer. Thereafter, on June 14, 2013, Respondent Plan filed its Answer.

On June 25, 2013, Region 15's Regional Director issued an Order Denying Request for Preliminary Hearing or Continuance. On July 1, 2013, Respondent Plan filed a Motion to Dismiss for Lack of Jurisdiction, a Motion to Continue Hearing, and a Request for Preliminary Hearing for Amended Motion to Dismiss. On July 5, 2013, the Division of Judges issued an Order Denying Respondent's Motion to Continue Hearing.

On July 9, 2013, Respondent Plan was notified that its Motion to Dismiss for Lack of Jurisdiction was untimely filed.

On July 16, 2013, Respondent Plan filed a Motion to Postpone Hearing. On July 17, 2013, General Counsel filed its Opposition to the Motion to Postpone Hearing. On July 17, 2013, the Division of Judges issued an Order Granting Respondent's Motion to Postpone Hearing. On July 19, 2013, an Order Setting Hearing Date issued rescheduling the hearing to September 9, 2013.

On July 22, 2013, Respondent Plan refiled its Motion to Dismiss for Lack of Subject Matter Jurisdiction. On July 26, 2013, General Counsel filed its Opposition to the Motion to Dismiss.

On August 2, 2013, Respondent Plan filed its Reply Brief to Memorandum in Opposition to Motion to Dismiss. On August 12, 2013, Counsel filed its Response to Reply Brief to Opposition to Motion to Dismiss.

On August 22, 2013, a Second Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Second Amended CCNOH) issued. On September 3, 2013, Respondent Union and Respondent Plan each filed their Answers.

On September 5, 2013, Respondent Plan filed its Motion to Bifurcate Proceedings.

On September 9, 2013, the Board denied Respondent Plan's Motion to Dismiss for Lack of Jurisdiction and request for a preliminary hearing. A hearing in this matter took place on September 9 through September 12, 2013, in New Orleans, Louisiana before Administrative Law Judge Michael A. Marcionese (ALJ). At the hearing, the ALJ denied Respondent Plan's Motion to Bifurcate Proceedings. Tr. at 12, 3-5.

On February 27, 2014, the ALJ issued his decision (ALJD) in the above proceeding, and on the same date, the proceeding was transferred to and continued before the Board. On April 17, 2014, General Counsel filed its Exceptions to the Decision of the Administrative Law Judge and

Brief in Support of Exceptions (Exceptions). On May 9, 2014, Respondent Plan filed its Cross-Exceptions, and Respondent Union filed its Answering Brief to Exceptions on the same date. On May 22, 2014, the General Counsel filed its Answering Brief to the Plan's Cross-Exceptions, its Reply Brief to Respondent Plan's Answer to Exceptions, and its Reply Brief to the Union's Answer to Exceptions. On June 5, 2014, Respondent Plan filed its Answering Brief to General Counsel's Reply Brief to Cross-Exceptions. On September 25, 2015, the Board issued its Decision and Order (Board Decision) affirming the rulings of ALJ Marcionese.

On October 22, 2015, Respondent Plan filed its Application for Attorney's Fees and Costs under the Equal Access to Justice Act (Application).

II. Summary of Pertinent Facts

a. The International Longshoremen's Association Local 1303

Respondent Union is a labor organization within the meaning of the Act engaged in collective bargaining on behalf of, and representation of, employees working as longshoremen at the Port of Gulfport (Port). Respondent Union is charged with dispatching longshoremen to unload vessels at the Port pursuant to the collective bargaining agreement between Respondent Union and the Gulfport Stevedoring Association (GSA), and other collective bargaining agreements covering the employment of longshoremen through Respondent Union's Hiring Center (Hiring Center).¹ Tr. at 452, 2-18. GC -3. GC-26. GC-27.

¹ References to the Exhibits of the General Counsel, Respondent Plan and Respondent Union will be designated as "GC- #", "RP- #" and "RU- #," respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as "Tr. at." References to the Decision of the Administrative Law Judge are designated as "ALJD at ." References to Exhibits attached to this Motion to Dismiss are designated as "MOT - #." An Arabic numeral(s) after "Tr. at" and "ALJD at" is a reference to a specific page of the transcript or ALJD, and Arabic numerals following page citations reference specific lines of the page cited. References to the Board Decision will be designated as BDO, with the appropriate page number.

b. The Seniority Board

Respondent Union's Seniority Board (Seniority Board) consists of four trustees, the same trustees on the Board of Respondent Plan, who are tasked with deciding disputes arising regarding referrals, and the proper application of Respondent Union's seniority rules regarding order of referral. The seniority date of an individual longshoreman is very important to the operation of Respondent Union's Hiring Center because vacancies in gangs at the shape-ups are filled based in large part upon a longshoreman's seniority. If a longshoreman believes he was not properly referred by a CI-D in accordance with his seniority, he can file a complaint with Respondent Union's Seniority Board (Seniority Board). GC-39. The Seniority Board reviews the longshoreman's complaints and resolves all issues regarding seniority in accordance with the collective bargaining agreement between Respondent Union and GSA. Although complaints were filed against CI-Ds in 2011 and 2012, neither Respondent Union nor Respondent Plan produced any documentary evidence at trial indicating the Seniority Board ever upheld a complaint against CI-D T.K. Evans.

The Seniority Board is inextricably integrated with the operations of Respondent Plan. Respondent Plan pays all expenses related to the functioning of Respondent Union's Seniority Board, and as described above, the same four individuals who make up the members of Respondent Plan's Board of Trustees serve as the four members of Respondent Union's Seniority Board.

c. The Gulfport Stevedoring Association (GSA)

The GSA is a multi-employer association that is a party to a collective bargaining agreement with Respondent Union. GSA is comprised of two stevedoring companies, Ports America, Inc. (Ports America) and SSA Marine, Inc. a/k/a SSA Gulf, Inc. (SSA). Tr. at 56, 18-

25. The stevedoring companies are the entities that load and unload cargo from merchant vessels at the Port. They contract with ship-owners to handle the cargo, and they hire longshoremen through the Hiring Center in accordance with the collective bargaining agreement to perform the actual loading and unloading of goods from the merchant vessels.

d. The Gulfport Stevedoring Association- International Longshoremen's Association Container Royalty Plan²

i. Respondent Plan's History and Purpose

The Gulfport Stevedoring Association-International Longshoremen's Association Container Royalty Plan (Respondent Plan) is a 501(c)(9) tax exempt trust fund established in 1974 by a collective bargaining agreement between Respondent Union and the GSA. ALJD at 2, 30 . Respondent Plan collects royalty money from signatory employers and distributes part of the money annually to employees who work 700 hours in the previous plan year in accordance with the terms of the collective bargaining agreement between Respondent Union and GSA. RP-1; JE-1.

The main function of Respondent Plan is to enforce the terms of the collective bargaining agreement by operating the Hiring Center on behalf of Respondent Union and provide supplemental cash benefits to longshoremen who work pursuant to the collective bargaining agreement between Respondent Union and GSA. RP-1, 2. Respondent Plan is also affiliated with the other fringe benefit plans established by the collective bargaining agreement between Respondent Union and GSA, specifically the Vacation, Health and Welfare, and Pension Funds, (Benefit Plans) and it sometimes transfers money to the Benefit Plans to ensure the funds are able make their required payments to and/or on behalf of the longshoremen. ALJD at 3, 13-14.

² Respondent Plan is one of a few container royalty plans in the United States and was created during the boom of containerization in the 1970s in order to offset some of the losses experienced by longshoremen due to a reduction in work hours resulting from containerization.

Respondent Plan's affiliation with the other fringe benefit plans is further demonstrated by its Application. In its Application, on page 6, Respondent Plan refers to the other fringe benefit plans as its affiliated plans.³

Shipping companies that utilize the Port make royalty payments to Respondent Plan based on the tonnage of containers. The shipping companies include international corporations such as Dole Food Company and Dole Fresh Fruit Company (Dole), Chiquita Brands International Ltd. (Chiquita) and Crowley Maritime (Crowley). ALJD at 3, 1-6.

ii. Board of Trustees

Respondent Plan's four person Board of Trustees (Trustees) is the decision making body at the helm of the organization. The Trustees include one representative from each of the two stevedoring companies who comprise GSA, Ports America and SSA, and two representatives from Respondent Union. RP-1, 3. The Trustees during the relevant time period were Greg Schruff (Schruff), representing SSA, Kendall Lamb (Lamb), representing Ports America, and Union President Donald Evans and Vice-President Darius Johnson, representing Respondent Union. Union President Donald Evans was also the Chairman of Respondent Plan's Board of Trustees during the relevant time period. Tr. at 58, 2-5; at 748, 1-17. Victor Walsh is the Administrator of Respondent Plan, and he reports directly to the Trustees. The members of Respondent Plan's Board of Trustees are also the Board of Trustees for Respondent Union's Vacation, Health and Welfare, and Pension Plans.

³ After the issuing of the Complaint in this matter, the General Counsel issued subpoenas to the other fringe benefit plans to show that the Board had jurisdiction over Respondent Plan. In its Application, Respondent Plan seeks reimbursement for the Motion to Revoke the Subpoena Duces Tecum it filed on behalf of the other fringe benefit plans. As noted later herein, Respondent Plan did not prevail in its Motion but reached an agreement with the General Counsel that it would stipulate at trial that Ports America and SSA were covered employers under the Act. Application, Exhibit D. Once Respondent Plan stipulated as agreed, General Counsel did not enforce subpoenas against the other fringe benefit plans, SSA, or Ports America. Tr. at 14, 10-14.

iii. Contributors to the Plan

The contributors to Respondent Plan are the companies whose container ships are unloaded by the longshoremen dispatched through the Hiring Center. At all relevant times, the three companies contributing royalty payments to Respondent Plan were Dole, Chiquita, and Crowley (Port Employers, collectively). Tr. at 57, 6-10; GC-26-27. In addition, Dupont also unloads its barges at the Port using longshoremen dispatched to work through Respondent Union's Hiring Center. Respondent Plan and Respondent Union stipulated to the Board's statutory jurisdiction over the Port Employers individually and to its jurisdiction over the two stevedoring companies (SSA and Ports America) that together comprise GSA. GC-34; GC-35; TR. at 14, 10-14; at 298, 18-25, at 300, 1-25.

iv. Funds Contributed to Respondent Plan

The Port Employers contribute \$3 per ton of cargo assessed royalty into the fund. The money is used to make a supplemental wage payment to qualifying longshoremen at the end of the plan year, to pay the administrative expenses of Respondent Plan, and to distribute monies to the other GSA fringe benefit plans. Tr. at 59-60, 1-25, 1-15.

In 2012, 131 longshoremen qualified for a container royalty check from Respondent Plan, and each eligible longshoreman received a check in the amount of \$2,989.68, after deductions for FICA, Federal Withholding, State Withholding, and Respondent Union's Dues Check-off. GC-30.⁴ Although, Respondent Plan does not have a written contract with Respondent Union for the deduction of Union dues from container royalty checks, on the day the checks are issued to

⁴ The total amount of funds issued to longshoremen in 2012 was \$694,990.55. GC-30.

the longshoremen they sign a dues check off form and are handed their container royalty check with the union dues already deducted from their checks.⁵ Tr. at 684-685, 18-24, 1-3.

v. Services Provided by Respondent Plan

Respondent Plan provides services to Respondent Union, GSA, Port Employers, DuPont, and other fringe benefit plans by operating the Hiring Center on behalf of Respondent Union and GSA, collecting and keeping in trust the Container Royalty contributions made by the Port Employers, investing the contributions, annually distributing the contributions to the qualifying longshoremen, distributing excess funds to the other fringe benefit plans, dispatching longshoremen to load and unload vessels for GSA and the Port Employers, and dispatching longshoremen to unload the DuPont merchant vessels. ALJD at 3, 1-14. Tr. at 610, 9-16.

In order to fulfill Respondent Plan's function of operating Respondent Union's Hiring Center, Respondent Plan employs two Container Inspector-Dispatchers (CI-D) who are responsible for dispatching longshoremen to unload vessels belonging to the Port Employers and Dupont⁶. ALJD at 3, 26-33. GC-3, 15.

vi. Container Inspector-Dispatcher (CI-D)

In 1974, the CI-D position was established by Respondent Plan. On April 8, 1974, T.K. Evans was hired by Respondent Plan as the first CI-D. JE-4. Prior to 2011, Respondent Union paid 25% of the CI-D salary to assist Respondent Plan in covering cost related to the dispatching work the CI-Ds performed because the dispatching of longshoremen is the responsibility of

⁵ Although it was not alleged in this proceeding as a violation, the deducting of union dues from an employee's paycheck before the employee signs the dues checkoff form and then having the employee signed the dues checkoff form before receiving the check, leads employees to believe that dues checkoff authorization method of fulfilling financial obligations to their union is compulsory and a violation of the Act. *See e.g. Rochester Manufacturing Co.*, 323 NLRB 260 (1977).

⁶ Although Dupont does not make container royalty payments to Respondent Plan, the CI-Ds are charged with dispatching longshoremen to Dupont on behalf of Respondent Union.

Respondent Union under the effective collective bargaining agreements. Tr. 207, at 2-16.

Although Respondent Union stopped paying a portion of the CI-Ds' wages in 2011, the CI-Ds perform the same job functions related to the operation of Respondent Union's Hiring Center that they performed prior to 2011. Tr. at 206, 20-25; at 207, 1-25.

Even though, Respondent Plan and Respondent Union asserted at trial that the CI-Ds were not bargaining unit employees, Respondent Union specifically negotiated for and included in its collective bargaining agreement with GSA, provisions which allowed the CI-Ds to accrue seniority hours within the longshoremen's bargaining unit while they are employed by Respondent Plan. Tr. at 482, 20-22; GC -3. In addition, although there is no contract between Respondent Plan and the fringe benefit funds and/or Respondent Union, the CI-Ds also receive the same vacation, welfare, and pension benefits through the Benefit Plans as Respondent Union's longshoremen. Tr. at 482, 6-19. Notably, the GSA-ILA Pension Plan and Trust (Pension Plan) defines an employee eligible to receive pension funds as, "any individual employed by an employer for whom contributions are to be made pursuant to a collective bargaining agreement." RP-1.

CI-Ds employed by Respondent Plan are tasked with, (1) answering a call from a stevedoring company's supervisor requesting labor for a container ship and/or Dupont barge, (2) recording a voice message announcing what ship and/or barge is coming in, and at what time, (3) announcing the gang to work the unload, and (4) attending the shape-ups for each ship and/or barge in order to fill vacancies in the assigned gangs. If additional longshoremen are needed to fill the gangs, the CI-Ds dispatch the most senior longshoreman present for the shape-up who also has the skills to work with the gang.

In order to facilitate the tasks associated with operating the Hiring Center, Respondent Plan paid for the establishment and maintenance of a telephone answering system. Prior to 2012, the system was located at Respondent Union's Hiring Center, but in 2012 the old system was replaced and it is now managed and maintained remotely by Respondent Plan. After the CI-D records the "call out" on the telephone answering system, the longshoremen call the telephone answering system and listen to the CI-D's message to find out what time a ship and/or barge is arriving, so they know what time to report to the Union Hall for a shape-up.

e. Tommy Kirk Evans as Container Inspector-Dispatcher

T.K Evans worked for most of his life at the Port of Gulfport, as a CI-D for Respondent Plan, and as a member of Respondent Union, until he was terminated. T.K. Evans worked from 1964 to 1974 as a longshoreman and was a member of Respondent Union. In 1974, he was hired by Respondent Plan as the first and only CI-D. A few years later, a second CI-D position was created. Huey Cuevas (Cuevas) was hired in 2005 as a CI-D, Cuevas was still employed in the position at the time of hearing. Tr. at 586, 4-9.

T.K. Evans received minimal training and instructions on how to perform the CI-D job, and he was not given a job description for the CI-D position when he began in 1974. Although Respondent Plan introduced documents purporting to be the CI-Ds official job descriptions, T.K. Evans testified that he was never given the document purporting to represent the CI-Ds' job descriptions. Huey Cuevas, the other CI-D at the time of T.K. Evans' termination, testified at trial that he had just recently seen the document. RP-10; Tr. at 476, 3-19. Tr.at 587, 21-24. T.K. Evans had experience dispatching from his time working through the Hiring Center, and he learned more about dispatching and its duties and requirements by talking to officers in Respondent Union. For the Container Inspector part of his job, T.K. Evans attended at least one

training session observing CI-Ds working in New Orleans, Louisiana in about 1992 or 1993. Tr. at 476-477, 3-25, 1-16.

The CI-Ds work under a very loose supervisory structure. For example, in 2012, when CI-D Cuevas needed to go on vacation, he did not notify a member of Respondent Plan's Board of Trustees or the Administrator; Cuevas instead notified Union Vice President Glen Evans. Tr. at 597, 9-25. Respondent Plan's Trustees are rarely if ever present to observe the CI-Ds' work performance. Tr. at 81, 10-25.

In late 2010, T.K. Evans testified that he decided to retire because he was frustrated with Cuevas not performing his CI-D duties. Tr. at 506, 19-21. He applied for Social Security, and in 2011, he received two Social Security payments, but he did not finish the paperwork necessary to retire. Tr. at 496, 1-10. In June 2011, Union President Donald Evans told his brother T.K. Evans that he should wait to retire until after the new "MILA" insurance program was enacted because of the better benefits he would receive under that program. After being persuaded by Donald Evans not to retire, T.K. Evans repaid the Social Security checks and continued to work as a CI-D until his termination. Tr. at 498, 1-3. On January 1, 2012, T.K. Evans became eligible for the benefits under MILA. Tr. at 273, 1-8.

i. September 2012 Election of Union Officers

Respondent Union holds elections for officers every three years. In the September 2012 Union election, Union Vice-President Glen Evans, son of CI-D T.K. Evans, ran for Union President against his uncle Donald Evans. Glen Evans and Donald Evans were the only candidates for Union President.⁷

⁷ Although the elections are in September, the terms for Union officers begin the January following the election and last for three calendar years.

Glen Evans produced and distributed campaign material supporting his candidacy, which called into question the leadership of Union President Donald Evans. GC-9. CI-D T.K. Evans supported his son Glen's candidacy for Union President by talking to longshoremen about his candidacy and asking them to support Glen Evans for Union President against incumbent Donald Evans. Tr. at 483, 5-23. In the position statement Respondent Plan submitted to the Board during the unfair labor practice investigation, Respondent Plan acknowledged it was aware of T.K. Evans' support of his son Glen Evans' campaign for Union President. GC RJT-36; MOT-1. Donald Evans won the election and was re-elected Union President over Glen Evans by a vote of 124-106. GC-37.

Sometime in late November 2012 or early December 2012, after the September 2012 Union election, Union President Donald Evans asked T.K. Evans if he was going to retire. In response, T.K. Evans told Donald Evans that he was not ready to retire and that he would wait for the next Union election. Tr. at 489, 5-10; Tr. at 467, 15-21.

ii. Termination of Tommy Kirk Evans

On December 11, 2012, Respondent Plan's Board of Trustees voted to terminate T.K. Evans from the CI-D position, effective January 5, 2013. The December 11, 2012 meeting of Respondent Plan's Board of Trustees was not a regularly scheduled meeting. Instead, it was special meeting called by Union President Donald Evans with the sole purpose of terminating T.K. Evans from the CI-D position. On December 12, 2012, Plan Administrator Vic Walsh issued a letter to T.K. Evans in which he cited "performance issues" as the reason for his termination. JE-6. T.K. Evans was never given more information from Respondent Plan or Respondent Union about what was meant by "performance issues" as written in the termination letter. Tr. at 488, 3-11.

Although the sole purpose of the December 11, 2012, meeting, was to vote on terminating T.K. Evans' employment as a CI-D with Respondent Plan, none of the Board Members, except newly reelected Union President Donald Evans who called the special meeting, knew the purpose in advance of the meeting. Tellingly, Donald Evans, prior to December 11, 2012, had already offered T.K. Evans' position as CI-D to newly elected Union Secretary/Treasurer Chris Johnson. Johnson, who was a supporter of Donald Evans during the September 2012 Union election, had already informed Donald Evans that he would accept the not-yet-vacant CI-D position when the Board of Trustees met on December 11, 2012. Tr. at 468, 1-6.

Although Respondent Plan asserts that at the December 11, 2012 meeting it decided to terminate T.K. Evans for years of performance issues, in November 2012, Respondent Plan's Board of Trustees voted to give T.K. Evans a bonus for his work performance, without raising any concerns about T.K. Evans' job performance GC-2; Tr. at 83, 13-19. In addition, although he was employed by Respondent Plan for more than 30 years, T.K. Evans never received any complaints from any of Respondent Plan's Board of Trustees or Administrator regarding his alleged performance issues before his termination. Tr. at 481-482, 22-25, 1-2. Similarly, although Respondent Union recommended his termination, T.K. Evans was never told by a representative of Respondent Union that he needed to improve his performance. GC-15; Tr. at 488, 3-14. Respondent Plan never issued any written discipline or negative performance reviews to T.K. Evans for the duration of his over 30 years of employment. Tr. at 482, 3-8.

While asserting at trial that its Board of Trustees had many concerns about T.K. Evans' work performance over a two-year period, Respondent Plan did not produce at trial any written communications – emails, Board minutes, correspondence, phone texts, etc. - between any

member of the Board of Trustees and/or the Administrator showing an expression of concern regarding T.K. Evans job performance. In fact, the ALJ found there was no evidence T.K. Evans was, “ever warned, counseled, or otherwise informed,” that there were problems with his performance. ALJD at 8, 9-12.

Moreover, despite Respondent Plan’s assertions at trial that T.K. Evans was a perpetually underperforming employee whose performance was so poor that had to be terminated at a special session, Respondent Plan did not offer any explanation as to why on December 11, 2012, they made the termination effective January 5, 2013. In an attempt to justify the delay, the ALJ found that Respondent Plan did not effectuate T.K. Evans’ termination until January 5, 2013, because it was waiting for him to be eligible for an improved health insurance plan. ALJD at 7, fn 9. However, the record clearly indicates that because T.K. Evans worked through September 30, 2011, he became eligible for Respondent Union’s new insurance plan, known as “MILA” on January 1, 2012, a whole year before his last day on the job. Tr. at 273, 1-8.

At the same meeting where it decided to terminate T.K. Evans, Respondent Plan replaced him with the newly elected Union Secretary/Treasurer, Chris Johnson, who ran on the same slate of candidates headed by Union President Donald Evans. Tr. at 306, 1-3. Tr. 154, 12-16. GC-33. GC-37. At the time of his hire, Chris Johnson had not performed any of the CIDs’ duties and had only worked at maximum 17 hours during the preceding three years as a longshoreman.⁸ GC-33.

⁸ According to the shape-ups provided by Respondent Plan, Johnson only worked one day – July 3, 2012 – from October 2011 to December 2012. It is highly unlikely Johnson worked 17 hours on July 3, 2012. RP 18(a) and RP 19.

**iii. Trustees' Purported Reasons at trial for Voting to Terminate
Tommy Kirk Evans**

During the investigation of the instant charges, Respondent Plan submitted a position statement to Region 15 dated February 26, 2013. In its position statement Respondent Plan specifically stated that it was not aware of the complaints regarding T.K. Evans' job performance. Specifically, Respondent Plan stated as follows:

“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.”
GC RJT-36, MOT-1, at page 4.

However, at trial Respondent Plan struck a different tone.

Darius Johnson testified that he voted to terminate T.K. Evans because of one incident in April 2012, where T. K. Evans either did not show up or was late for a shape-up. RUX-1. Although he thought T. K. Evans' conduct was a terminable offense, he could not state the date it occurred nor did he report the conduct to his fellow trustees. Johnson had at least two Board of Trustee meetings in which he could have raised these issues, in June and November 2012, but the record indicates that he did not. At the November 16, 2012, Board meeting, Johnson voted along with the three other trustees to provide T.K. Evans with a bonus, without raising any concerns about T.K. Evans' job performance.

Trustee Kendall Lamb testified that he voted to terminate T.K. Evans because important it is important that the work of dispatcher be properly done. Tr. at 755, 2-12. Although Lamb admitted he did not have personal experience with CI-D T. K. Evans being unavailable for work, he testified that his Ports America supervisors, specifically Tim Lancaster and Jesse Parker, had told him they had problems getting in touch with T. K. Evans. Tr. at 750, 2-16. Notably, neither Lancaster nor Parker was called as witnesses by Respondent Plan or Respondent Union to

corroborate Lamb's claim. As in the case of Trustee Johnson, Trustee Lamb in the November 16, 2012 meeting voted to give CI-D T. K. Evans a bonus, without raising any concerns about T.K. Evans' job performance.

Trustee Greg Schruff testified that he voted to terminate CI-D T. K. Evans because "over the years" his unnamed SSA supervisors had a difficult time getting in touch with CI-D T.K. Evans to perform dispatcher duties. Tr. at 110, 6-11. Again, none of these unnamed supervisors testified at trial. Despite these alleged complaints from his supervisors, Schruff voted to give CI-D T.K. Evans a bonus in November 2012. Schruff could not state when these complaints with any precision, and he could not recall whether he heard any complaints about CI-D T. K. Evans between the November 2012 meeting in which he voted to give T.K. Evans a bonus and the December 2012 meeting at which he voted to terminate him. Tr. at 101, 7-22.

Donald Evans, Chairman of Respondent Plan's Board of Trustees and President of Respondent Union, testified that he called the meeting in his capacity as Union President, and not as a Trustee. Donald Evans admitted he called the December 11, 2012 meeting specifically to terminate his brother, CI-D T.K. Evans. He testified he voted to terminate T. K. Evans based on fellow Trustee of Respondent Plan Kendall Lamb telling him that he would no longer sign any more paychecks for T.K. Evans. Tr. at 657, 5-17; GC-15. However, Evans could not recall when the conversation with Lamb occurred and could not explain why he called the special meeting as the Union President and not as the Chairman of Respondent Plan's Board of Trustees. A more reasonable explanation is that, after voting to give his brother T.K. Evans a bonus in November 2012, Donald Evans asked T.K. Evans if he would retire. When T.K. Evans told Donald Evans he would not retire, but would wait for the next union election, Donald Evans made the decision to terminate him. Tr. at 489, 5-10; Tr. at 467, 15-21. Application Exhibit C. As noted in General

Counsel's Exceptions No. 32 and No. 33 and its Supporting Brief, the testimony and order of events support an inference that Donald Evans recommended terminating T.K. Evans after he told him he would not retire until the next Union election because he was concerned about T.K. Evans continuing support for his son Glen Evans as an opposition candidate after surviving the close September 2012 election.

III. Respondent Plan's Factual Background in its Application Contains Numerous Inaccuracies and Misstatements of the Record.

In its summary of the facts in its Application, Respondent Plan, distorts the evidence produced during the investigation and at hearing in support of its arguments. However, the record supports the facts as summarized above, and Respondent Plan's distortions summarized below should be held against it in considering its application for fees under EAJA.

a. T.K. Evans did not have a physical altercation with his son Glen Evans.

On page 3 of its Application, Respondent Plan states that CI-D T.K. Evans got into two physical altercations with his son, Union Presidential Candidate Glen Evans, an assertion that is patently untrue. While Respondent Plan seeks to inflate the facts to suit its own argument, the record contains no evidence of a physical altercation between son Glen Evans and father T.K. Evans.

Glen Evans admitted to a disagreement with his father T.K. Evans regarding the hiring of longshoremen Garland Taylor, and he credibly dated the disagreement to 2010, based on his notes. Tr. at 394-396. Union President Donald Evans referred to the disagreement as an argument only. Tr. at 663, 15-19.

b. T.K. Evans Performed the Substantial Amount of Dispatching Work.

Respondent Plan’s assertion in its Application at pages 3-4, and at trial, that it terminated T.K. Evans because of failure to conduct shape-ups is pretextual and not supported by the record at trial, including Respondent’s own evidence. Respondent Plan introduced summaries, RP-18a and 19, at trial, purportedly to show that CI-D Cuevas performed more shape-ups than CI-D T.K. Evans in 2011 and 2012. Although Cuevas testified at trial that he prepared the summaries marked as RP 18(a) and 19, Respondent Plan, as part of its Application, submitted requests for reimbursement of attorney fees which demonstrate that someone else besides Cuevas prepared the summaries.

With its Application, Respondent Plan submitted a breakdown of its attorney fees (Application, Exhibit E-2) showing the date of the activity, the person who performed the activity (timekeeper) and number of hours to perform the activity. According to Respondent Plan, “SWD” stands for attorney Stephen W. Dummer and “cn” stands for paralegal Colleen Nunez.

The following entries are in Application, Exhibit E-2:

Date	Timekeeper		Hours
6/20/13	cn	Conference with attorney to discuss what have found in documents and what other information I need to find to create chart reflecting work done by whom	0.50
6/26/13	cn	Revisions to chart created with shape up dates and who worked after meeting with Mr. Cuevas and going over documents with him	0.90
8/5/2013	SWD	Review and editing of Rule 1006 summary of shapeups for T Evans attendance	0.70
8/9/2013	cn	Revisions to shape up charts in preparation for hearing and using as exhibits – have to redo 2011 chart to conform with rest	1.30

8/12/2013	cn	Revisions to shape up three charts created as exhibit for hearing	0.50
8/12/2013	cn	Working on an in-globo exhibit for 2011, cannot locate any notes for 9-11 to 12-11, send message to client requesting same	0.70
8/14/2013	cn	Preparation of additional documents received from Huey for 2011 shape ups so can produce	0.60
8/14/2013	cn	Check 2011 shape up chart with supporting documents we have, make revisions to same for an in-globo exhibit at hearing	0.60

Based on the above, it is apparent that Cuevas' testimony at trial asserting that he prepared the summaries relied upon by Respondent Plan to show that CI-D T.K. Evans did not perform his job was false and misleading. Tr. at 606 – 609.

c. Despite Revisions to Summaries, They Were Still Inaccurate.

i. RP-19

RP-19 contains the summary, shape-ups, and CI-D Cuevas' notes regarding work he performed in 2011. According to CI-D Cuevas, he completed a shape-up form whenever he did a shape-up. He also testified he worked from January 1, 2011, until he started sick leave on or about February 16, 2011. However, Respondent Plan did not introduce any shape-up forms for that period. CI-D T.K. Evans testified that he did not make written records of when he conducted shape-ups because he was familiar with the process and written records were not required. The only reasonable conclusion is that CI-D T. K. Evans, not CI-D Cuevas, performed the shape-ups from January 1, 2011, until February 16, 2011 of that period for a total of 20 shape-ups.

The evidence indicates that two or three containers ship arrived at the Port at least once a week. According to Cuevas' testimony, he did not return from sick leave until October 4, 2011. From February 6, 2011 to October 4, 2011, is approximately 32 weeks. At a minimum, CI-D T.K. Evans conducted 64 shape-ups, assuming there were only two container ships per week, and 96 shape-ups if there were three container ships a week unloading at the Port.

RP-19's summary also indicates there were 19 shape-ups from October 4, 2011 to December 28, 2011, and that CI-D T.K. Evans was involved in 14 of the shape-ups, Glen Evans in one, and CI-D Cuevas in all 19. But CI-D Cuevas' summary for this period is incorrect. CI-D Cuevas's notes indicate that in addition to the 19 shape-ups listed on the summary, CI-D Cuevas made tape recordings for 35 other call-outs for container ships and barges during this period. See MOT-2. The only reasonable conclusion is that CI-D T.K. Evans, not CI-D Cuevas, conducted the additional 35 shape-ups, otherwise Cuevas would have produced his shape-up records for that period.

Respondent Plan's records show that CI-D Cuevas only participated in 19 shape-ups during the periods he worked in 2011, while CI-D T.K. Evans participated in 20 + 8 + 14 + 35 shape-ups during this same period for a total of 77. If you count the shape-ups CI-D T.K. Evans performed while CI-D Cuevas was out of work, CI-D T.K. Evans conducted 77+96 for a total of 173 shape-ups. Therefore, Respondent Plan's assertion that T.K. Evans was not conducting shape-ups, and that CI-D Cuevas performed more shape-ups than T.K. Evans in 2011, is not supported by the evidence.

ii. RP-18a

RP-18a contains the summary, shape-ups, and CI-D Cuevas' notes for 2012. According to CI-D Cuevas he completed a shape-up form whenever he did a shape-up. The summary for RP-18a indicates CI-D Cuevas completed 121 shape-ups in 2012, while CI-D T.K. Evans completed 5. The 121 shape-ups include the 18 shape-ups Cuevas completed after T.K. Evans was notified of his discharge. Therefore, according to CI-D Cuevas, he actually only completed 103 shape-ups in 2012, before T.K. Evans was discharged. Based on Glen Evans completing shape-up forms, CI-D Cuevas concluded that five of the 103 shape-ups in 2012 are shape-ups

that Glen Evans supposedly conducted with CI-D Cuevas. However, Glen Evans credibly testified that he would not have filled out the shape-up form if CI-D Cuevas was present because that would have been CI-D Cuevas' job. Tr. at 790, 1-9. Therefore, CI-D Cuevas should only get credit for 98 shape-ups in 2012, before CI-D T.K. Evans' was notified on December 11, 2012, that he was being discharged.

Similar to RP-19, Cuevas' notes do not support his testimony and his summary for RP 18a. GC Post-Trial Attachment 2, attached to this Motion as part of Exhibit 2, is a computation of all tape recordings made by CI-D Cuevas where there is not a corresponding shape-up form or summary listing. Attachment 2 is based on CI-D Cuevas' notes in RP-18a. Based on Attachment 2, in addition to what is listed on the summary listing, there were an additional 53 tape recordings and shape-ups for container ships in 2012, before T.K. Evans' discharge on December 11, 2012. The only reasonable conclusion is that CI-D T.K. Evans, and not CI-D Cuevas, conducted the 53 shape-ups.

The incomplete nature of the evidence provided by Respondent Plan of work done by CI-D T.K. Evans is supported by a complaint filed by longshoreman Hebert Williams against Respondent Plan's CI-D T.K. Evans. GC-39. In 2012, Hebert Williams filed a complaint with Respondent Union's Seniority Board against T.K. Evans stating that T.K. Evans failed to properly refer him on November 24, 2012. CI-D Cuevas testified that he was aware of the complaint. However, as part of RP-18(a), Cuevas did not reflect in his summary listing of RP-18a that T. K. Evans conducted a shape-up on November 24, 2012, nor did Cuevas produce a shape-up form for November 24, 2012, showing that Cuevas worked that day. The failure of RP-18a to show that CI-D T.K. Evans worked clearly demonstrates that RP-18(a) is flawed and does not reflect the actual work he performed.

Although longshoreman Williams made a complaint against CI-D T.K. Evans, Respondent Plan cannot reasonably claim that because of Williams' complaint, it should be inferred that T.K. Evans was actually doing a bad job. All complaints about CI-Ds not properly referring longshoremen are submitted to the Seniority Board for review. Respondent Union's Seniority Board is entirely made up of Respondent Plan's Board of Trustees. Respondent Plan did not introduce a copy of the Seniority Board's decision regarding Williams' complaint. If the Seniority Board had determined that CI-D T.K. Evans did not properly refer Williams for work, Respondent Plan would have introduced the decision into the record to support its claim of CI-D T.K. Evans' poor performance.

The fact that CI-D Cuevas' summary for RP 18a is not accurate is also supported by CI-D Cuevas' testimony that during the summer of 2012, he went on vacation and while he was on vacation he made a tape recording for a Saturday shape-up. However, the summary listing does not indicate any Saturday during the summer of 2012, when T.K. Evans or Glen Evans conducted a shape-up alone or with each other. Yet, CI-D Cuevas' notes show several Saturdays in May, June, July, August, and September 2012, where a tape recording was made for a Saturday shape-up that is not reflected on the summary listing. See MOT-2. The only reasonable conclusion is that CI-D T. K. Evans conducted the shape-up on the Saturday CI-D Cuevas was out of town and the other Saturdays not reflected on the summary listing.

Moreover, as noted above, the CI-Ds also made tape-recordings for DuPont barges and conducted the shape-ups for those barges. GC Post-Trial Attachment 1, attached as part of MOT- 2, is a computation of the tape recordings made for barges in 2012, that were not included on the summary listing and where there is not a corresponding shape-up form. There are 57 barge shape-ups not listed. Because CI-D Cuevas prepared shape-up forms for the barge shape-

ups he participated in, the only reasonable conclusion is that CI-D T. K. Evans conducted the shape-ups for the additional 57 barge call-outs.

Based on the above, before his discharge, T. K. Evans conducted 5+53+57 shape-ups for a total of 115 shape-ups in 2012, while CI-D Cuevas only participated in 98, or 103 if you give him credit for the five conducted by Glen Evans.

Therefore, Respondent Plan's assertion at trial that T. K. Evans only performed 5 shape-ups in 2012 (RP-18a) and did not conduct shape-ups in 2011 (RP-19a) is not supported by Respondent Plan's exhibits.

d. CI-D T.K. Evans performed his dispatcher duties without going into the Union Hall.

Respondent Plan attempted to use evidence relating to CI-D T.K. Evans not going into the Hiring Center to support its argument that he was not performing his job duties, but the record indicates T.K. Evans was not required to go inside the Hall to perform his job duties and indeed did perform them from outside the Hiring Center. Record testimony reflects that the type of work required for dispatching, specifically putting seniority cards in order and then referring workers to fill gangs based on seniority and the number of positions available, could be done without entering the Hiring Center.

Plan Administrator Victor Walsh testified the dispatch work was done outside in a "covered pavilion" prior to Hurricane Katrina, and so clearly the dispatch work does not need to be done in an office. Tr. at 254. T.K. Evans testified that he would frequently perform shape-up and hire the men while outside of the hall; they would give them their seniority cards, he would put them in seniority order, and refer them in order of seniority to available positions; he might only go inside the Hiring Center office if there was a dispute about who should be referred to work. Tr. at 576-577.

e. Donald Evans did not wait to terminate his brother T.K. Evans so he would qualify for better health benefits.

Respondent Plan asserts its Chairman of the Board Donald Evans and the other Trustees postponed deciding to discharge T.K. Evans until December 11, 2012, and elected not to make his discharge effective in 2013 so that T.K. Evans could qualify for Respondent Union's MILA insurance plan. Tr. at 663-665; ALJD at 7 fn. 9. However, these assertions are not supported by the evidence. Respondent Plan's Administrator Victor Walsh undisputed testimony is that T.K. Evans worked through September 30, 2011; as a result, he was eligible for benefits under MILA as of January 1, 2012, more than a year before his termination date. Tr. at 273, 1-8. Respondent Plan also filed an Exception to the ALJ's finding that the January 5, 2013, effective date of termination was done to ensure T.K. Evans was eligible for new and improved health benefits. Respondent Plan Cross-Exception No. 11.

f. Respondent Plan's Trustees did not have a lengthy discussion regarding T.K. Evans substandard performance before deciding to terminate him.

Respondent Plan asserts in its Application that the Trustees voted to terminate T.K. Evans after "forty-five minutes of discussion about his substandard performance and workplace conduct." However, the evidence in the record does not support Respondent Plan's contention that the Trustees did anything more than rubber stamp its Chairman Donald Evans' request that the Board of Trustees terminate his brother T.K. Evans. Respondent Plan's assertions that its Trustees engaged in substantive discussion of T.K. Evans' performance is not supported by the record evidence. For example, the minutes from the December 11, 2013 Board of Trustees meeting do not contain evidence regarding the length of the meeting or provide any evidence that the discussion of T.K. Evans lasted more than a few minutes. RP-17.

Moreover, the Trustees' testimony at trial do not support a finding that the Trustees engaged in a forty-five minute discussion regarding T.K. Evans. Trustee Greg Schruff could not remember what was discussed at the meeting. Tr. at 109, 4-7. He further testified that he did not remember receiving any complaints about T.K. Evans' performance, and he never talked to T.K. Evans about his performance in the CI-D position. Tr. at 108, 14-20. Trustee Darius Johnson testified that he did not remember Donald Evans stating any reasons why T.K. Evans should be terminated, and he did not remember Donald Evans discussing any performance issues he had with T.K. Evans. In fact, Johnson does not even remember an executive session being called specifically to discuss terminating T.K. Evans during the December 11, 2012 meeting. Tr. at 305, 13-22; RUX 1. Trustee Kendall Lamb testified that the discussion at the meeting related to replacing T.K. Evans with Chris Johnson, and the legality of the decision under at-will employment law, but Lamb did not testify that specific performance reasons for terminating T.K. Evans were proffered at this meeting by him or any other trustee. Tr. at 753, 14-24; Tr. at 754, 1-6. Even Respondent Plan's Chairman and Union President Donald Evans, who called the special Board of Trustees meeting to terminate his brother, could not specifically remember at trial what, if any, performance issues were discussed at the December 11, 2012, meeting. Tr. at 683, 2-11.

Lastly, Respondent Plan's position statement does not support a finding that the Trustee had a lengthy discussion before voting to discharge T.K. Evans. GC RJT-36. MOT-1. As noted above, Respondent Plan stated in its position statement that it did not have knowledge of the substance or access to those complaints against T.K. Evans. Interestingly, the attorney who prepared Respondent Plan's position statement is the same attorney who attended the December 11, 2012 executive session as Respondent Plan's attorney. Therefore, if T.K. Evans had job performance issues, Respondent Plan's Trustees and its attorney would have been

aware of them and would have specifically included them in Respondent Plan's position statement.

- g. The Local Union via Union President Donald Evans made the decision to terminate T.K. Evans, and the Board of Trustees rubber-stamped its Chairman's recommendation.**

Respondent Plan asserts in its Application that newly reelected Union President and Chairman Trustee Donald Evans merely "permitted" the termination of T.K. Evans, his political rival's father and supporter, but the record evidence indicates Donald Evans, as Union President, made the decision to discharge T.K. Evans after the September 2012 Union election and called a special session of the Board of Trustees in order for them to ratify his decision. This is supported by the position statement (GC RJT-36, MOT-1) and the notarized statement Respondent Plan (GC-15) submitted to the Board during the unfair labor practice investigation. In its position statement, Respondent Plan admitted that it knew CI-D T.K. Evans publicly supported Glen Evans in his candidacy for the position of Union President when he ran against the Chairman of Respondent Plan's Board of Trustees, Donald Evans, in the September 2012 election. GC RJT-36. MOT-1. Moreover, in his notarized statement, Donald Evans stated the following:

"The Local 1303 recommended to the Board of Trustees for the GSC/GSA Plans that Tommy Kirk Evans be terminated due to complaints Local 1303 was receiving regarding performance issues in the position of Container Inspector/Dispatcher." GC- 15

Based on GC-15, Union President Donald Evans called the special meeting because of complaints Respondent Union received regarding CI-D T.K. Evans' job performance, not because of complaints he received from CI-D Cuevas, Administrator Walsh, Trustee Lamb or any of the other Trustees.

Amazingly, the record shows the only complaint Respondent Union received against T.K.

Evans after Donald Evans and the other Trustees voted to give T.K. Evans a bonus on November 16, 2012, was the complaint filed by Williams asserting that T.K. Evans did not dispatch him to work. As previously noted, Williams' complaint was not upheld by the Seniority Board, whose members were Respondent Plan's Trustees. Likewise, there is no evidence of any other complaint against CI-D T.K. Evans, if any other existed, being upheld by the Seniority Board.

Based on the above, the facts indicated that Respondent Union, via its President Donald Evans, caused the discharge of T.K. Evans because T.K. Evans openly supported Glen Evans for Union President against Donald Evans in the September 2012 Union election. By effectuating the termination of T.K. Evans based on unlawful motivation, Respondent Union violated the Act. *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382 fn. 2 (1984) (There is a presumption of unlawfulness when a union causes an employee's discharge). Ergo, Respondent Plan by acceding to the demands of Respondent Union to discharge T.K. Evans because of internal union activity, it violated Section 8(a)(3) of the Act. *USF Red Star, Inc.*, 330 NLRB 53, 65 (1999).

IV. Respondent Plan's Application Should be Dismissed Because the General Counsel's Position was Substantially Justified Overall, and at Each Step of the Proceedings.

Respondent Plan's Application should be dismissed because the General Counsel was overall substantially justified in its issuance of the Complaint and Notice of Hearing, its pursuit of the case to trial before the ALJ, and in its filings with the Board. EAJA, as applied through Section 102.143 of the Board's Rules and Regulations, provides that the prevailing party in litigation with the Board is not entitled to an award of attorney's fees and expenses incurred in

the litigation if the government’s position was “substantially justified.” *Blaylock Electric*, 319 NLRB 928, 929 (1995). To determine whether the government’s position at a particular stage of litigation is substantially justified, the case should be treated as an, “inclusive whole, rather than as itemized line-items.” *In re Glesby Wholesale, Inc.*, 340 NLRB 1059, quoting *Commissioner, INS v. Jean*, 496 U.S. 154, 161-162 (1990).

Although EAJA does not define the term “substantially justified,” the Supreme Court has explained the standard as “justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Supreme Court held in *Pierce* that the government’s failure to prevail at trial cannot be determinative on its own, finding, “[A] position can be substantially justified even though it is not correct ...” *Pierce*, 487 U.S. at 566 n. 2. The Board adopted the Supreme Court’s language in *Pierce* in *Jansen Distributing Co.*, 291 NLRB 801 at fn. 2 (1988). The “substantially justified” standard does not require the General Counsel to establish that its position and decision to litigate was based on a significant probability of prevailing at trial. *Carmel Furniture Corp.*, 277 NLRB 105, 1106 (1985). Accordingly, the mere fact the General Counsel lost a particular stage of litigation, does not mean the General Counsel’s position lacked substantial justification for the purposes of EAJA relief. *Alpha-Omega Electric*, 312 NLRB 292, 293 (1993).

a. The General Counsel was substantially justified in issuance of the Complaint and proceeding to trial before the Administrative Law Judge.

Based on the facts as summarized above, including credibility determinations necessitating a determination by the ALJ, and Respondent’s position during the investigation as stated in GC RJT-36, the General Counsel was substantially justified in issuing the Complaint and Notice of Hearing and proceeding to trial before the Administrative Law Judge.

Where the investigative stage of the unfair labor practice proceeding involves a credibility determination, and if credited the evidence would constitute a prima facie case, the General Counsel is compelled to bring the credibility determination before the administrative law judge, and therefore its position in doing so is substantially justified. *See Barrett's Contemporary & Scandinavian Interiors*, 272 NLRB 527 (1984); *David Allen Co.*, 335 NLRB 783, 784-785 (2001); *see also Bouley, Inc.* 308 NLRB 653, 654 (1992); *Advance Development Corp.*, 277 NLRB 1086, 1087 (1985); *Temp Tech Indus., Inc. v. NLRB*, 756 F.2d 586, 590 (7th Cir.1985). Likewise, where the evidence gives rise to more than one reasonable inference, the General Counsel is substantially justified in issuing a complaint so that the issues in the case can be resolved during evidentiary hearing. *See Quality C.A.T.V., Inc.*, 302 NLRB 449, 449-450 (1992).

As noted above, Respondent Plan admitted in its position statement submitted during the unfair labor practice investigation that (1) it was aware of T.K. Evans' activity in support of his son Glen Evans' candidacy for Union President, against Respondent Plan's Chairman of the Board, Union President Donald Evans, (2) that the local union caused T.K. Evans' discharge, (3) that Respondent Plan was not aware of any complaints against T.K. Evans as noted in its position statement, GC RJT-36, (4) that Respondent Plan's Trustees unanimously voted to give T.K. Evans a bonus at the November 2012 regularly scheduled Board meeting and not single Trustee raised a complaint or concern about T.K. Evans job performance, that the attorney who prepared Respondent Plan's position statement was the same attorney who attended the December 11, 2012 executive session so that he would have noted T.K. Evans' performance issues in the position statement if they were discussed at the executive session, (5) that the attorney who prepared Respondent Plan's position statement was the same attorney who attended the December 11, 2012 executive session and he would have noted T.K. Evans' performance issues

in the position statement if they were discussed at the executive session, (6) that none of the Trustees, except Donald Evans, knew the purpose of the December 11, 2012 special meeting until they arrived for the meeting, and (7) that prior to the December 11, 2012 meeting Donald Evans offered Johnson T.K. Evans' job, which Johnson accepted.

Taking into account all of the above, the General Counsel was substantially justify in believing there was sufficient evidence for an ALJ to find that (1) T.K. Evans engaged in activities protected by the Act, (2) Respondent Union, via Union President Donald Evans, was aware of these activities, (3) Respondent Plan, as reflected in its position statement, was aware of T.K. Evans' activities, (4) the Respondent Union caused Respondent Plan to discharge T.K. Evans because T.K. Evans supporting his son's candidacy for Union President against incumbent Union President and Respondent Plan Chairman Donald Evans, which are activities protected by the Act, (5) Respondent Plan was unable to produce documentary evidence of any counseling of T.K. Evans about his putative poor performance prior to terminating his 30 year career, and (6) Respondent Plan merely acquiesced to the interests and demands of Respondent Union to discharge T.K. Evans based on his activities protected by the Act but adverse to the interests of incumbent Union President and Respondent Plan Chairman Donald Evans. *See Acklin Stamping Co.*, 351 NLRB 1263, (2007) (Whenever a union causes the discharge of an employee, there is a rebuttal presumption that the union acted unlawfully.)

b. The General Counsel was substantially justified in its filings with the Board after the Decision of the Administrative Law Judge.

The General Counsel was substantially justified in the filing of exceptions to the ALJD because in it the ALJ failed to find facts, made inferences from the facts on which a reasonable person could have differed, and/or misstated the facts as asserted in the General Counsel's

Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions.⁹

In particular, the General Counsel excepted to the ALJ's failure to find that Donald Evans, as Union President, and Respondent Plan's Chairman, caused the termination of T.K. Evans when he called the December 2012 special meeting of Respondent Plan's Board of Trustees during which he requested T.K. Evans' discharge. As noted in Board Member Philip A. Miscimarra's concurring opinion, the ALJ "...only analyzed the 8(b)(2) violation under Wright Line." BDO at 2. Whereas, a proper evaluation of the evidence by the ALJ should have also included a review of the evidence under the Section 8(b)(1)(A) duty-of-fair-representation standard. Although Board Member Miscimarra concurred in dismissing the complaint, the General Counsel was substantially justified in filing Exceptions because the ALJ failed to find that Donald Evans, as Union President, caused the discharge of T.K. Evans; therefore, he failed to apply the duty-of-fair-representation standard announced in *Acklin Stamping Co.*, *supra* at 1263 and *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). Whereas, if the ALJ would have applied the duty-of-fair-representation standard and concluded that the Union had not met its burden, the ALJ would have found that Respondent Plan, by acceding to the demands of Respondent Union to discharge T.K. Evans because of internal union activity, would have violated Section 8(a)(3) of the Act. *USF Red Star, Inc.* 330 NLRB 53, 65 (1999).

Likewise, the General Counsel was also substantially justified in filing exceptions in order to pursue a reasonable argument that the ALJ should have drawn other inferences from the evidence in the record. *See Europlast, Ltd.*, 311 NLRB 1089 (1993), *affd.* 33 F.3d 16 (7th Cir.

⁹ General Counsel's Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions filed on April 17, 2014, are incorporated herein by reference.

1994)(finding NLRB was substantially justified in filing 13 exceptions to ALJ's opinion dismissing charges against employer where the judge had failed to make certain inferences which would have supported the General Counsel's position.)

In particular, Respondent Plan's claim that it terminated T. K. Evans because of his lack of performance, mainly his failure to conduct shape-ups, is false and pretextual. In support of its position, Respondent Plan introduced RPX 18a and 19 to show that CI-D Cuevas performed more shape-ups than T.K. Evans in 2011 and 2012. However, the notes Cuevas submitted along with the exhibits, as noted above, indicate that Cuevas' summaries and his testimony about the work he performed were not accurate.

Although the ALJ recognized that Cuevas testified falsely regarding T.K. Evans' dispatching work, the ALJ failed to infer from Cuevas' false testimony that Respondent Plan's claim T.K. Evans' dispatching performance was unsatisfactory was unlawfully motivated and when put forth as a pretextual reason for his termination. ALJD at 8, 22-24. Because the ALJ failed to infer that Respondent Plan was unlawfully motivated in its termination of T.K. Evans, the General Counsel was substantially justified in filing exceptions. *See York Products*, 289 NLRB 1414 (1988) (The assertion of false or pretextual reasons for a termination is strong evidence of unlawful motivation).

Additionally, the General Counsel was also substantially justified in filing exceptions in order to address the ALJ's mistaken finding of facts that were relevant to the case. In particular, despite Respondent Plan's assertions that T.K. Evans was a perpetually underperforming employee for many years, whose performance was so poor that had to be terminated at a special session, during the investigation and at the hearing, Respondent Union President and Respondent Plan's Chairman Donald Evans did not offer any explanation about why on December 11, 2012,

they made T.K. Evans' termination not effective until January 5, 2013. However, in an attempt to justify the delay, the ALJ found that Respondent Plan did not effectuate T.K. Evans' termination until January 5, 2013, because it was waiting for him to be eligible for an improved health insurance plan. ALJD at 7, fn 9. The ALJ's particular finding on this issue is factually inaccurate. The record clearly shows that because T.K. Evans worked through September 30, 2011, he became eligible for Respondent Union's new insurance plan, known as "MILA" on January 1, 2012, more than a year before his termination. Tr. at 273, 1-8.

Therefore, the General Counsel was substantially justified in pursuing exceptions that the ALJ should have concluded that the delay in terminating T. K. Evans was evidence that Respondents' assertion it made the decision for "performance reasons" was merely pretextual. Respondent Plan had no reason to wait until January 5, 2013, to effect T.K. Evans' termination. Moreover, the General Counsel was substantially justified in believing T.K. Evans' termination due to poor performance was pretextual based on the lack of any documentary evidence to support this assertion. Specifically, if it truly believed T.K. Evans was not performing up to par, Respondent Plan could have used the period between December 12, 2012 and January 5, 2013, to give a 30-year employee a written warning and/or suspension regarding his performance before terminating him. Because the ALJ misstated a crucial fact in order to justify Respondent's delayed termination of T.K. Evans, General Counsel was substantially justified in filing exceptions herein.

V. Respondent's Application is Deficient Because it Provides Insufficient Evidence to Show Respondent is Eligible for Fees.

Under EAJA, and the Board's Rules and Regulations applying it to cases with the NLRB, a prevailing party in litigation must meet financial requirements in order to qualify for an award

of fees. Under Section 102.143(c)(3) and (5) of the Board's Rules and Regulations, a respondent may only be eligible to an award of fees under Section 102.145 if it is a "private organization with a net worth of not more than \$7 million and not more than 500 employees." Respondent has the burden to prove by a preponderance of the evidence that it has limited financial resources and is therefore entitled to fees under the EAJA. *See State of Louisiana v. Lee*, 853 F.2d 1219, 1223 (5th Cir.1988). Under Section 102.147(b), an application shall include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). Section 102.147(f) requires the applicant attach a detailed exhibit showing the net worth of the applicant and any affiliates which provides, "full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part."

For the purposes of EAJA, an affiliate is defined as, "any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant indirectly owns or controls a majority of the voting shares or other interest." In *Noel Produce*, 273 NLRB 769, 769 (1984), the Board explained its intent that the net worth of an applicant and all its affiliates shall be aggregated in determining the applicant's eligibility for EAJA relief, stating, "Parties that meet the eligibility standard only because of technicalities of legal or corporate form, while having access to a large pool of resources from affiliated companies, do not fall within this group of intended beneficiaries." 273 NLRB at 769. Where affiliation is present, aggregation is appropriate where the entity is directly or indirectly controlled by another entity, and "it is the applicant's burden to show that control is lacking and that aggregation of net worth would therefore be inappropriate." *Teamsters Local Union No. 741*, 321 NLRB 886, 889 (1996).

a. Respondent Plan has failed to provide financial information regarding its affiliate Respondent Union.

Respondent Plan's net worth for the purposes of EAJA is calculated as the sum of the net worth of Respondent Plan and all of its affiliates. Section 102.143(g) of the Board's Rules and Regulations states for the purposes of EAJA relief, "the net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility." Respondent Plan has a duty to provide documents reflecting the net worth of its affiliates, and it has not done so.

As previously noted, under the collective bargaining agreement, Respondent Union is responsible for operating the hiring hall. GC 3; Tr. 134 at 1-4. However, Respondent Plan, via the CI-Ds operates the hiring hall for Respondent Union. Respondent Plan not only operates the hiring hall related to the Employer's obligated to make contributions to the container royalty payments, but also operated the hiring hall for dispatches to the DuPont merchant vessels. ALJD AT 3, 1-14. Tr. at 610, 9-16.

Up until 2011, Respondent Union paid 25% of the CI-Ds salary. Respondent Union only stopped paying part of the CI-Ds' salary after the labor department made inquiries about the set-up. Nonetheless, after the labor department inquiry, Respondent Union stopped paying part of the CI-Ds salary, but the duties and responsibilities of the CI-Ds did not change, including the dispatching duties that were not related to the container royalty dispatches.

Therefore, based on their job duties and the control exerted over them by each entity, the CI-Ds are joint employees of Respondent Union and Respondent Plan. Yet, Respondent Plan failed to properly address this affiliation in its Application for fees by not including the net worth

of Respondent Union when calculating whether its net worth exceeds the seven million cap for EAJA purposes, therefore, the Application is deficient and should be dismissed.

b. Respondent Plan has failed to provide financial information regarding its affiliated Benefit Plans.

As previously noted, under the collective bargaining agreement, employers have to make contributions to Respondent Plan and other benefit plans of Respondent Union, e.g. – the Vacation Plan, the Health and Welfare Plan, and the Pension Plan, collectively referred to as Benefit Plans. The evidence shows Respondent Plan’s Board of Trustees are also Trustees on the Boards of the all the Benefit Plans. Even though there is no provision in the collective bargaining agreement that permits or requires Respondent Plan to make payments to the Benefit Plans, and no evidence was presented during the investigation or during the hearing of an type of an agreement between Respondent Plan and the Benefit Plans, Respondent Plan takes some of its contributions and distributes them to the Benefit Plans. ALJD at 3, 10-14. In addition to general transfers of its contributions funds to the Benefit Plans, Respondent Plan makes specific contributions to the Benefit Funds on behalf of the CI-Ds; even though, there was no evidence of an agreement between Respondent Plan and the Benefit Funds and the collective bargaining agreement does not provide for Respondent Plan making contributions to the Benefit Plans on behalf of the CI-Ds.

During the investigation, Respondent Plan claimed that the Board lacked jurisdiction over Respondent Plan. General Counsel asserted that because of the facts above, regarding the relationship between Respondent Plan and the Benefit Plans, and the similarity between the operations of Respondent Plan and a traditional benefit plan, that since the Board has exercised jurisdiction over other similar benefit plans, the Board had jurisdiction over Respondent Plan.

(See ALJD at 4, 10-27 and 40-45). Nonetheless, Respondent Plan contested jurisdiction at every stage of litigation. And as Respondent Plan noted in its Application, General Counsel issued subpoena duces tecums to the Benefit Plans to show that the Board had jurisdiction over those Benefit Plans, and to show Respondent Plan's affiliation with those Benefit Plans based on its admitted contributions to those Benefit Plans. Notably, Respondent Plan filed petitions to revoke on behalf of those Benefit Plans and is seeking reimbursement of those attorney fees in its Application. As previously stated, General Counsel did not withdraw its subpoenas to the Benefit Plans because Respondent Plan filed petitions to revoke, but withdrew them because Respondent Plan agreed to other stipulations. ALJD at 4, 4-7. The ALJ noted during a pre-trial conference that the Board had found other benefit funds as employers subject to the Board's jurisdiction. Therefore, General Counsel believed that additional evidence would not be needed to show jurisdiction. ALJD at 4, 44-45. Nonetheless, it is amazing that Respondent Plan did not include the Benefit Plans in calculating its net worth for EAJA purposes, but is requesting reimbursement for attorneys for representing the Benefit Plans during the litigation of this matter.

Because Respondent Plan (1) uses part of its money to fund the Benefit Plans in general, (2) makes specific payments to the Benefit Plans on behalf of the CI-Ds, (3) its Trustees serve as Trustees for the Benefit Plans, (4) its attorney represented the Benefit Plans during the investigation and trial in this matter, and (5) seeks attorney fees for representing the Benefit Plans, the net worth of the Benefit Plans should be included in calculating Respondent Plan's net worth for EAJA purposes. Respondent Plan's failure to do so makes its Application deficient; therefore, it should be dismissed.

VI. Respondent's Conduct Led to Protracted Litigation, and Therefore its Application for Fees Should be Denied in Full.

Respondent Plan's numerous filings and arguments, at every stage of the investigation and of the litigation, contesting the jurisdiction of the Board substantially protracted the litigation and should prevent Respondent Plan from recouping fees under EAJA. In the 1985 Amendments to EAJA, Congress provided that, "fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings." Pub.L. 99-80, 99 Stat. 185, § 2(c)(2)(B), 28 U.S.C. § 2412(d)(2)(D). Section 102.144(b) of the Board's Rules and Regulations adopted this provision and states that an award for relief under EAJA will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award unjust.

Respondent Plan filed multiple pleadings related to its frivolous argument against jurisdiction at every stage of the proceedings. In all its Answers to the Complaints issued by the Region, Respondent Plan denied jurisdiction, which resulted in the issuance of Board subpoenas to various entities to prove jurisdiction, the filing of petitions to revoke by Respondent Plan, ALJ telephone conferences with Respondent Plan to discuss the jurisdiction, the production and review of numerous documents by Respondent Plan related to the jurisdictional issue, Motions to Dismiss for Lack of Jurisdiction filed by Respondent Plan, General Counsel's Opposition to the Motions to Dismiss for Lack of Jurisdiction, the preparation and the calling of witnesses at hearing by the General Counsel related to the jurisdiction issue, post-trial briefs to the ALJ related to the jurisdiction, Cross-Exceptions filed by Respondent Plan related to the jurisdiction issue, an Answer to Respondent Plan's Cross Exceptions filed by the General Counsel, and finally a decision by the Board.

In particular, Respondent Plan filed documents with the Regional Director on May 13 and May 14, 2013, requesting a preliminary hearing on issues of jurisdiction, which were denied by the Regional Director on June 25, 2013. On July 1, 2013, Respondent Plan filed another Motion to Dismiss for Lack of Jurisdiction with the Board, and on July 9, 2013, the Board notified Respondent Plan that its Motion to Dismiss for Lack of Jurisdiction was untimely filed.

On June 16, 2013, Respondent Plan filed a motion to postpone the hearing and despite General Counsel's opposition, on July 17, 2013, the Division of Judges issued an Order Granting Respondent's Motion to Postpone Hearing. Respondent Plan then took advantage of the new hearing date as an opportunity to refile its frivolous argument against jurisdiction. On July 22, 2013, Respondent Plan refiled its Motion to Dismiss for Lack of Subject Matter Jurisdiction. On July 26, 2013, General Counsel filed its Opposition to the Motion to Dismiss. On August 2, 2013, Respondent Plan filed its Reply Brief to Memorandum in Opposition to Motion to Dismiss.

On September 5, 2013, Respondent Plan filed its Motion to Dismiss for Lack of Jurisdiction and Motion to Bifurcate Proceedings, asserting its baseless argument against jurisdiction should be heard separately from the merits of the unfair labor practice case. On September 9, 2013, the Board denied Respondent Plan's Motion to Dismiss for Lack of Jurisdiction and request for a preliminary hearing.

Although the Board had already refused to grant its motion, Respondent Plan argued against jurisdiction again at trial before the Administrative Law Judge. Not only did Respondent Plan refuse to stipulate to the Board's jurisdiction over it as a statutory employer, Respondent Plan initially refused to stipulate to commerce information relating to national and multi-national companies including Dole and Chiquita. It was only when the General Counsel issued subpoenas

to Dole and Chiquita, and required them to complete commerce questionnaires, that Respondent Plan agreed to stipulate to the Board's jurisdiction over Dole and Chiquita. Tr. at 300-302.

Despite the ALJ's clear and concise ruling on the matter, and without providing any additional legal support for its position, Respondent Plan filed Cross-Exceptions disputing statutory jurisdiction and again brought the specious issue before the Board. In fact, ten out of twelve of Respondent Plan's Cross-Exceptions related to the issue of statutory jurisdiction.

Respondent contested jurisdiction throughout every stage of the proceedings despite knowing the following uncontested facts:

- 1) Its creation was for the sole purpose of issuing supplemental container royalty checks to longshoremen who worked pursuant to the applicable collective bargaining agreements.
- 2) Every year, Respondent Plan issues royalty checks to longshoremen who worked more than 700 hours at the dock in accordance with the applicable collective bargaining agreements.
- 3) Respondent Plan deducts union dues and remits it to Respondent Union from the royalty checks of the longshoremen; even though, it does not have an agreement with Respondent Union for deducting the union dues. Interestingly, Respondent Plan asserts the longshoremen are not its employees.
- 4) Respondent Plan obtains its funds directly from companies, Dole, Chiquita, and Crowley, all of which engage in interstate commerce, based solely on applicable collective bargaining agreements.
- 5) On a yearly basis, Respondent Plan collects more than \$1 million in royalty payments from these companies.

- 6) Although the collective bargaining agreement requires Respondent Union to operate the Hiring Hall, Respondent Plan's CI-Ds actually dispatch longshoremen from the Hiring Hall.
- 7) Although Respondent Union stopped paying 25% of Respondent Plan's CI-Ds' salary in 2011, the CI-Ds duty related to the operation of the Hiring Hall did not change.
- 8) Respondent Plan pays for the telephone system used to operate the Hiring Hall.
- 9) If a longshoreman has a complaint about not being properly referred to work, his complaint is made about a CI-D of Respondent Plan, and not against a representative of Respondent Union, and his complaint would be forwarded to the Seniority Board for final determination.
- 10) The Seniority Board expenses are paid by Respondent Plan, and its membership consists of Respondent Plan's Board of Trustees.
- 11) If the Board did not have jurisdiction over Respondent Plan, it would not have jurisdiction over the referral process through which longshoremen are dispatched to work at port employers, an area in which the Board clearly has jurisdiction.
- 12) T.K. Evans was allegedly terminated because he failed to properly make the tape recordings informing longshoremen when they had to work and failed to dispatch longshoremen to work.
- 13) The CI-Ds not only dispatch longshoremen to work for the employers obligated to make contributions to Respondent Plan under the terms of the applicable collective bargaining agreement, but also to Dupont merchant vessels, dispatch work that is the responsibility of Respondent Union under the collective bargaining agreement.
- 14) The applicable collective bargaining agreements established the other Benefit Plans.

- 15) When the other Benefit Plans were short of funds, Respondent Plan would fund the Benefit Plans.
- 16) Although Respondent Plan does not have any written agreements with the Benefit Plans, it makes contributions to the Benefit Plans on behalf of its CI-Ds.
- 17) Through all its claims related to the Board lacking jurisdiction, Respondent Union's President – Donald Evans - served as the Chairman for Respondent Plan's Board of Trustees.
- 18) Donald Evans, in his capacity as Union President, called the special meeting on December 11, 2012, for the purpose of terminating T.K. Evans.
- 19) Prior to the December 11, 2012 special meeting, Union President and Respondent Plan's Chairman Donald Evans offered T.K. Evans' job to another union official, who accepted the job before a vote was taken to discharge T.K. Evans.

Based on the above, it is apparent that Respondent Plan's arguments over jurisdiction were frivolous and meant solely to obstruct the litigation. Conduct by Respondent intended to unreasonably delay litigation would justify denying fees for that portion of the litigation. *See Commissioner, I.N.S., v. Jean*, 496 U.S. 154 (1990). From the billed hours submitted by Respondent Plan, it is impossible to separate and determine what time was billed for advancing Respondent Plan's baseless argument against jurisdiction and any of the other issues; therefore, its application for fees should be denied.

VII. Respondent Plan's Application Seeks Fees and Expenses That Are Not Compensable and/or That are Unreasonable and/or Excessive

Apart from the fact that the General Counsel was substantially justified in its litigation of the entire case, Respondent Plan's Application should be denied to the extent that it seeks fees

and expenses to which it is clearly not entitled as a matter of law, or which are, in these circumstances, unreasonable or excessive.

First, Respondent Plan is not entitled to recover fees and expenses on matters in which it was not the prevailing party. Any claims upon which Respondent Plan did not prevail and are “distinct in all respects” from claims upon which it did prevail “should be excluded in considering the amount of a reasonable fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). For example, Respondent Plan was not a prevailing party with respect to the jurisdiction issue and allegations related to Respondent Union. Based on the billed hours submitted by Respondent Plan, it is impossible to separate and determine the time that was billed for advancing Respondent Plan’s baseless argument against jurisdiction. Respondent Plan has requested attorney fees and costs for all the time it spent reviewing documents and responding to General Counsel’s subpoena duces tecum. It is important to note that a majority of the subpoena duces tecum and documents produced by Respondent Plan related to the issue of jurisdiction. Likewise, much of Respondent Plan’s trial preparation of its witnesses and time spent at trial related to the jurisdiction issue. In its Application, Respondent Plan has not specifically delineated the time spent and costs related to its frivolous claims that the Board lacked jurisdiction over Respondent Plan.

Second, compensable expenses must be identified, adequately documented, and incurred in connection with the issues on which Respondent Plan prevailed. *Brandeis School*, 287 NLRB 836, 838-839 (1987). Respondent Plan, however, did not adequately identify and document its attorney’s fees and expenses. Respondent Plan’s practice with respect to its attorneys billing records was to list everything Respondent Plan’s legal representatives did on a given date, and then to list the total number of hours the attorney, or another employee at the law firm, worked

on all of those items without separately listing the amount of time he spent on each item. Based on the records submitted, on many occasions, counsel for Respondent Plan performed some work that is compensable and other work that is not compensable. As a result, it cannot be determined from the records submitted by Respondent Plan how much time was spent on work that was noncompensable. It is the fee applicant's burden to maintain billing time records in a manner that will enable a reviewing court to evaluate hours expended on distinct claims, and when documentation is inadequate, the award must be reduced accordingly. *Hensley v. Eckerhart*, 461 U.S. at 433, 437. Here, Respondent Plan has not met his burden.

Third, Section 102.145(b) of the Board's Rules and Regulations provide maximum attorney fees of \$75 per hour. In spite of this restriction, Respondent Plan has applied for fees of between \$90 per hour to \$195 per hour. Respondent Plan's request for attorney fees in excess of the amount provided in the Board's rules must be denied. Pursuant to Section 102.146 of the Board's Rules, to obtain fees greater than \$75 per hour, Respondent Plan must petition the Board under Section 102.124 to increase the maximum rate for attorney fees.

Respondent has not filed any such petition or made any argument why the fees provided for in the Rules and Regulations are insufficient.

VIII. Conclusion

Based on the foregoing, Respondent Plan has failed to provide sufficient financial information to show that it qualifies for fees under EAJA. Even if Respondent Plan is found to qualify for fees, Respondent Plan engaged in conduct at each step of litigation which unduly protracted the proceedings. Additionally, for these reasons noted above, the General Counsel was substantially justified as a whole in litigating this matter, and the Application should be denied in its entirety.