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CONFIDENTIAL – CONTAINS SENSITIVE BUSINESS INFORMATION

M. Kathleen McKinney
National Labor Relations Board Regional Office
600 South Maestri Place, 7th Floor
New Orleans, LA 70130-3413

RE: ***NLRB Responses in Opposition***
Complainant: Tommy Evans
NLRB Case No.: 15-CA-096939
Date filed: January 24, 2013

RE: ***NLRB Responses in Opposition***
Complainant: Glen Evans
NLRB Case No.: 15-CA-096951
Date filed: January 24, 2013

Docket No. 15-CA-096939 15-CB-096934 OFFICIAL EXHIBIT NO. GC3 6
Disposition { Identified ✓ Received ___ Rejected ✓
In the matter of GULFPORT STEVEDORE LUB
Date 9-11-13 Witness ___ Reporter BW
No. Pgs. 5

Dear Ms. McKinney:

The Gulfport Stevedoring Companies-International Longshoremen's Association Welfare, Pension and Vacation Plans, and the Gulfport Stevedoring Association-International Longshoremen's Association Container Royalty Plan (collectively, "the GSC/GSA Plans") timely submits this response to two charges[1] filed on January 24, 2013, by Tommy Evans and Glen Evans, respectively, against the entity improperly identified as the GSC-ILA Plan.[2]

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[1] Tommy Evans and Glen Evens also filed charges against the International Longshoremen's Association, Local 1303 (Case No. 15-CB-096934 and Case No. 15-CB-096963, respectively). Upon information and belief, Local 1303 will file separate responses to these charges.

[2] T. Evans' employer is properly identified as: (1) the Gulfport Stevedoring Association-International Longshoremen's Association (G.S.A.-I.L.A.) Container Royalty Plan, which can provide funding in whole or in part to the Board of Trustees of the 2) Gulfport Stevedoring Companies-International Longshoremen's Association (G.S.C.-I.L.A.) Welfare Plan; (3) Gulfport Stevedoring Companies-International Longshoremen's Association (G.S.C.-I.L.A.) Vacation Plan; and (4) Gulfport Stevedoring Companies-International Longshoremen's Association (G.S.C.-I.L.A.) Pension Plan; hereinafter collectively referred to as the GSC/GSA Plans. While T. Evan's legal employer was the GSC/GSA Container Royalty Plan, all Plans are hereinafter combined for ease of discussion and reference as the "GSC/GSA Plans."

In doing so, the Plans reserve all rights to assert any and all available defenses, and/or to supplement all factual and legal content at a later date, including but not limited to in conjunction with any potential future litigation.[3]

I. SUMMARY OF THE CHARGES

On January 24, 2013, Tommy Kirk Evans (hereinafter T. Evans) filed a NLRB Charge (Case No. 15-CA-096939) alleging that on or about January 5, 2013, his employer, the GSC/GSA Plans, terminated him from his position as Container Inspector-Dispatcher, (hereinafter CI/D) in an effort to discourage union activities or membership.

On the same day, Glen Evans, who is the son of T. Evans, also filed a charge (Case No. 15-CA-096951) against the GSC/GSA Plans asserting that, as of January 5, 2013, the individual chosen to replace T. Evans as Container Inspector/Dispatcher was "an International Longshoremen's Association Local 1303 official" and was improperly employed in a supervisory position as a dispatcher.

II. SUMMARY OF THE RESPONSE OF THE GSC/GSA PLANS

Preliminarily, Glen Evans lacks standing to bring a charge against the GSC/GSA Plans because the GSC/GSA Plans do not "employ" Glen Evans as required to establish jurisdiction of the NLRB. *See* Section V(a) *infra.*

Second, both charges are based on the faulty assumption that the position in question -- Container Inspector/Dispatcher – is a union position governed by the local union's Collective Bargaining Agreement ("CBA"), which it is not. The GSC/GSA Plans which employed T. Evans in his capacity as CI/D are <u>not</u> signatories to the Local 1303's CBA. The GSC/GSA Plans are not therefore bound by any provisions relating to the hiring and/or firing of union employees. Consequently, the GSC/GSA Plans were at liberty to terminate T. Evans at-will, for any reason not prohibited under state or federal law.

Furthermore, the Board of Trustees for the GSC/GSA Plans were permitted to hire any replacement for the CI/D position without regard to limitations, including but not limited to those related to seniority or supervisory status that would have otherwise been imposed had the position been governed by the CBA.

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[3] The GSC/GSA Plans expressly represent that they will make available to the NLRB any member of the Board of Trustees to answer questions relative to their position with the GSC/GSA Plans as set forth herein. The GSC/GSA Plans respectfully provides the redacted bates numbered documents GSC/GSA 00001-000061 pursuant to the NLRB's request for production dated February 5, 2013. These documents have been redacted to protect confidential proprietary information. The GSC/GSA Plans request a list of deponents from the NLRB to ensure they are timely made available for an examination under oath. The GSC/GSA Plans reserve all objections as provided by the applicable rules of civil procedure.

III. BACKGROUND AND RELEVANT FACTS

The GSC-ILA Welfare, Pension and Vacation Plan and Trusts were established in 1958 between various employers and the Union for the purpose of providing retirement, health and vacation benefits to eligible longshoremen working in the Port of Gulfport who were covered under the local CBA.

The local CBA[4] provided for the establishment of the Pension, Welfare, Vacation and Container Royalty benefit plans, and authorized the payment of vacation, pension, welfare and container royalty benefits to eligible employees.[5] It further provided that the vacation, welfare, pension, and container royalty benefits were to be funded through contributions by the CBA's employer-signatories. The Employer contributions are based either on hours worked, or on the container tonnage transported by each employer, depending on the applicable plan.

The local CBA established a Board of Trustees to administer the Trust. That Board consists of two employer representatives, two labor representatives, counsel, and a plan administrator who is employed by the Board.[6] The GSC/GSA Plans have the common goal of insuring the longevity and fiscal stability of the members, pensioners and retirees pursuant to the provisions of the Plan documents.

The CI/D position was created in March of 1974 by the Board of Trustees for the Plans to effect the administration of the benefit plans as required under the CBA. The CI/D's job is to assist in ensuring compliance of the employer-signatories with their obligations under the local CBA so that the plan is properly funded and that the seniority system in the CBA is properly administered.[7] To ensure that result, the CI/D inspects and records the amount of tonnage being transported by the employer so that the employer's benefit contribution can be accurately determined. The CI/D also dispatches the proper individuals at the request of the gang foreman to replace regular gang members not at work for a particular shift. All documentation collected

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[4] Upon information and belief, the current governing CBA was established on September 24, 1991. That CBA has been amended several times with its most recent modification dated September 30, 2009, and a recent term of extension dating until September 30, 2012. Upon information and belief, both T. Evans and Glen Evans are members of Local 1303. The GSC/GSA Plans do not have a copy of that CBA because the GSC/GSA Plans are not signatories to the CBA. As such, the GSC/GSA Plans are unable to produce a copy of the complete CBA.

[5] In addition to vacation, pension and welfare benefits, union employees in covered employment positions who work more than 700 hours are eligible to receive "container royalty benefits." Each employee who worked 700 hours or more receives a divisible payment from the GSA-ILA Container Royalty Plan from its employer contribution.

[6] Pursuant to an Order dated July 1, 2003, Judge Walter Gex of the United States District Court for the Southern District of Mississippi authorized the Plan to facilitate a Seniority Board for the purpose of ensuring that the correct amount of hours were calculated for the Container Royalty check. The Order further stated that the expenses for the Seniority Board were to be borne by the Plan. *See* Order, July 1, 2003, attached hereto as Exhibit A.

[7] *See* Container/Assistant Container Inspector/Dispatcher Job Description, attached hereto as Exhibit B. It should be noted that the CI/D position was originally called the "GAI- Seniority Board Record Maintenance Clerk/Assistant Dispatcher/Container Investigator." *Id.* However, over time the title has become known as the CI/D. No assistant CI/D position has ever existed or been utilized. Therefore, the job duties and scope of employment identified in Exhibit B are the most accurate reflection of the duties and responsibilities of the CI/D with exception of increased technical responsibilities due to the advent and incorporation of computers in the work place.

by the CI/D position is then submitted to the plan administrator so that it can be categorized, reviewed and audited. Those data are then submitted to the employers and government agencies pursuant to applicable laws and regulations. The CI/D position is neither a union position nor is it governed by the local union's CBA.

On April 8, 1974, T. Evans was hired to fill the position of CI/D for the GSC/GSA Plans. Evans was at all relevant times paid directly by the GSC/GSA Plans as part of the administrative cost line item of the Plans from Employer contribution income to the Plans. Evans worked as the CI/D until January 2013.

Upon information and belief, Local 1303 received multiple complaints related to the job performance of T. Evans during the last half of 2012.[8] On December 11, 2012, the Board of Trustees governing the administration of the GSA-ILA Container Royalty Plan voted unanimously to terminate T. Evans from his position as CI/D. Because the position requires familiarity with the local union and the rules of seniority, the Board of Trustees relied upon the recommendation of the union in selecting a replacement for the CI/D position. The union recommended that the position be filled by C.A. Johnson.[9] However, the position remains a non-union at-will position *not* subject to the provisions of the local CBA.

Upon information and belief, during the time of T. Evans' termination, the union was in the midst of its election of officers. The Union President position was then held by T. Evans' brother, Donald Evans. T. Evans' son, Glen Evans, ran against Donald Evans for the position of President. Upon information and belief, T. Evans publicly supported Glen Evans. Glen Evans lost the election and Donald Evans remained as Union President of Local 1303. T. Evans has suggested through his complaint that he was terminated by the GSC/GSA Plans in retaliation for his support of his son Glen Evans to unseat his brother Donald Evans. Any familial discord however, is not relevant to these charges as a matter of law.

Following the termination of T. Evans from the CI/D position and selection of C.A. Johnson as one of the new CI/D positions, Glen Evans requested consideration for the position via email on December 17, 2012. The Board of Trustees, through its administrator Victor Walsh, responded to Glen Evans' request and explained that the position of CI/D had already been filled. Walsh also explained that the CI/D position is a non-union at-will position and as such, the Board of Trustees was not bound by the provisions of the CBA as they relate to filling union positions.

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[8] 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.

[9] Upon information and belief, both C.A. Johnson and H.L. Cuevas, who fill the at-will plan position of CI/D are members with the Local 1303. Upon further information and belief, in the past due to increased volume, the Plans elected to create a second CI/D position to accommodate the increased workload.

IV. RESPONSES TO SPECIFIC QUESTIONS

1. Why was Tommy Evans terminated from his employment as a Container Inspector/Dispatcher on or about December 12, 2012.

T. Evans was an at-will employee of the GSC/GSA Plans. Pursuant to Mississippi law, at-will employees can be terminated for any grounds. In this instance, upon information and belief, T. Evans was terminated for job performance related issues. The Plan does not have access to the complaints which the employer and/or Local 1303 have in regards to T. Evans. However, both Employers and the Union trustees voted unanimously to terminate T. Evans from the CI/D position.

2. Who made the decision to terminate Tommy Evans from his position as Container Inspector/Dispatcher?

The Board of Trustees of the GSA-ILA Container Royalty Plan made the decision to terminate T. Evans from his at-will position as CI/D.

3. Who made the decision to hire the replacement for Tommy Evans in the Container Inspector/Dispatcher position?

The hiring decision was made by the Board of Trustees of the GSA-ILA Container Royalty Plan. The Union Trustees recommended C.A. Johnson fill the position of CI/D. This recommendation was accepted by all Trustees in a unanimous vote.

4. Who is currently employed by the Employer as a Container Inspector/ Dispatcher?

The at-will position is currently maintained by C.A. Johnson and H.L. Cuevas. Upon information and belief, both Johnson and Cuevas are members of the Local 1303 union.

5. What employees are eligible to be employed as Container Inspector/Dispatcher?

Any individual (union or non-union) who meets the qualifications for the position would be eligible. *See* Container/Assistant Container Inspector/Dispatcher Job Description, attached hereto as Exhibit B.

6. What employees applied or expressed interest in any way in the Container Inspector/Dispatcher position when it was available after Evans' termination?

The Board of Trustees accepted recommendations from the union trustees and selected a replacement candidate. As the position is at-will and non-union, it is not governed by the requirements of the collective bargaining agreement.

7. How was the new employee in the Container Inspector/Dispatcher position selected?

The union recommended Mr. C.A. Johnson and the Trustees unanimously approved the recommendation.

8. Was Glen Evans considered for the position of Container Inspector/ Dispatcher? Provide any and all evidence to support the decision not to hire Glen Evans as a Container Inspector/Dispatcher.

Glen Evans was not recommended by any party so he was not considered for the position.

9. Is the hiring of the Container Inspector/Dispatcher position governed by a collective bargaining agreement? (a) If so, please provide the relevant collective bargaining agreement. (b) If not, what are the hiring rules and procedures for this position.

There is no collective bargaining agreement which governs the hiring of the Container Inspector/Dispatcher. It is an at-will position within the GSC/GSA Plans not subject to the local CBA. The at-will position can be filled by any qualified union/non-union candidate.

10. What are the job duties and responsibilities of a Container Inspector/Dispatcher?

The job duties and responsibilities are outlined above in the factual background section of this correspondence. *See also* Container/Assistant Container Inspector/Dispatcher Job Description, attached hereto as Exhibit B. With the emergence of relative technologies, this position now requires additional familiarity with computers and electronic data management.

11. What is the Company's position on whether or not the Container Inspector/Dispatcher position is a supervisory position under Section 204(b) of the National Labor Relations Act? Please provide evidence in support of this position.

The NLRA is inapplicable. The NLRA defines "supervisor" as, "Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). The CI/D position is not supervisory in nature by virtue that it cannot hire, fire, suspend, transfer, lay off, recall, promote, discharge, assign, reward or discipline any employee. The CI/D position receives requests from gang foremen for temporary work requests. The CI/D then places a call to all union members to appear for work. The CI/D then utilizes the seniority list to fill those temporary vacancies. All other responsibilities are clerical in nature. *See* Container/Assistant Container Inspector/Dispatcher Job Description, attached hereto as Exhibit B.

12. Can an elected Union officer hold the position of Container Inspector/Dispatcher? Please explain why or why not.

In general, any individual (union or non-union) who meets the qualifications of the position may hold the position of CI/D. Whether an individual holds a union elected position would have no bearing on the qualifications to hold the CI/D position.

V. LEGAL ARGUMENT

A. Case No. 15-CA-096939: The NLRB Lacks Jurisdiction over Glen Evans' Charge Against the GSC/GSA Plans.

Glen Evans filed a charge against the GSC/GSA Plans (Case No. 15-CA-096951) in which he alleges that "since about January 5, 2013, the Employer has employed an International Longshoremen's Association Local 1303 official in a supervisory position as a dispatcher."

Setting aside the fact that the position of CI/D is a non-union position, Glen Evans lacks standing to bring a charge against the GSC/GSA Plans because the GSC/GSA Plans do not "employ" Glen Evans as required to establish jurisdiction of the NLRB. *See* Donald Evans Affidavit, February 25, 2013, attached hereto as Exhibit C (hereinafter D. Evans Affidavit).

An employer "is not subject to the Labor Board jurisdiction, except insofar as it is an employer of its own employees." *Connell v. U.S. Steel Corp.* 516 F.2d 401, 404 (5th Cir. 1975) (The true party defendant was the Pension Fund, and the plaintiff, Connell, was not an employee of the Fund, therefore the Fund could not be guilty of violating the NLRA as to Connell.)[10] Stated differently, to be an "employer" within the meaning of the NLRA, a person must be in an employer-employee relationship with the employees against whom he has allegedly committed an unfair labor practice. *Local 98, Detroit, Mich., of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, AFL-CIO v. Flamegas Detroit Corp.*, 52 Mich. App. 29, 217 N.W.2d 131. Because there is no employer-employee relationship between Glen Evans and the GSC/GSA Plans, he lacks standing to bring a charge against the Plans, and the NLRB has no jurisdiction over Case No. 15-CA-096939. *Id.*

Regardless, even if jurisdiction existed, Glen Evans' allegation that the GSC/GSA Plans "employed an International Longshoremen's Association Local 1303 official in a supervisory position as dispatcher," is without merit because the position is a non-union, non-supervisory position which is <u>not</u> governed by the CBA, as set forth below.

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[10] The GSC/GSA Plans are qualified exempt plans according to the U.S. Treasury Department and Internal Revenue Service. *See* IRS Correspondence, Aug. 25, 1958; IRS Correspondence, June 30, 1960; IRS Correspondence, Aug. 12, 1974; IRS Correspondence, Mar. 9, 1979; IRS Correspondence, Feb. 26, 1980; IRS Correspondence, Jan. 15, 2013, attached hereto as Composite Exhibit D.

B. Case No. 15-CA-096939: The GSC/GSA Plans are Non-Union Employees not Subject to the CBA; Tommy Evans' Employment was Terminable At-Will.

T. Evans acknowledges that the GSC/GSA Plans employed him in his capacity as CI/D. He alleges that the GSC/GSA Plans terminated him from his position as CI/D in an effort to discourage union activities or membership.

The GSC/GSA Plans are not, however, employer-signatories to Local 1303's CBA. Further, the employees of the GSC/GSA Plans, including but not limited to those filling the position of CI/D do not need to be union employees. Termination decisions relative to this non-union position are not governed by the CBA, but are instead governed by the general rule of at-will employment pursuant to the laws of the State of Mississippi.

Mississippi has long adhered to the common-law rule of terminability at will, wherein an employment relationship may be terminated at will by either party when the employment contract does not specify the duration or term of the employment. *Empiregas, Inc. of Kosciusko v. Bain*, 599 So.2d 971, 974 (Miss. 1992) (citing *Perry v. Sears Roebuck and Co.*, 508 So.2d 1086, 1088 (Miss.1987); *Butler v. Smith & Tharpe*, 35 Miss. 457, 464 (1858)). Therefore, "either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract." *Id.* (citing *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874, 875 (Miss.1981)).

Evans has asserted no basis or evidence upon which to support a finding that the GSC/GSA Plan is bound by the terms of the CBA. Although he was a union member, Evans was not covered under the CBA because he occupied a non-union position. *See* D. Evans Affidavit. Thus, T. Evans could be terminated by the GSC/GSA Plans for any reason or no reason at all. *See Palmer v. Transit Management Southeast Louisiana*, 2000 WL 41204, 6 (E.D. La. 2000) (finding that plaintiff was employed in a non-union position at the time of his termination, thus his employment was terminable at will.) In the matter *sub judice*, upon information and belief however, T. Evans was terminated from the CI/D position due to job performance issues.

Furthermore, T. Evans remains a member of the Local 1303, and upon information and belief, his seniority within the union allows him the ability to select any job available to the members of the International Longshoremen's Association, Local 1303. Respondent respectfully requests the above identified charges be dismissed, unless withdrawn.

VI. CONCLUSION

The GSC/GSA Plans are not employer-signatories to the local CBA. Further, the employees of the GSC/GSA Plans, including but not limited to those filling the position of Container Inspector/Dispatcher, are not required to be union employees. Hiring and termination decisions relative to this non-union position are not governed by the CBA, but are instead at the discretion of the employer. The GSC/GSA was within its rights in terminating Evans from this at-will position.

Moreover, the Board of Trustees of the GSC/GSA Plans was fully within its rights in choosing a replacement for T. Evans without regard to the provisions of the CBA, because the GSC/GSA Plans are non-signatories to the CBA, and the position is non-union. Respondent respectfully requests the above identified charges be dismissed, unless withdrawn.

With kind regards, I am

Sincerely yours,

DEUTSCH, KERRIGAN & STILES, L.L.P.

Stephen W. Dummer

SWD/bs
Enclosures
cc: Victor J. Walsh
GSC/GSA Boards of Trustees