

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

THE GULFPORT STEVEDORING ASSOCIATION-  
INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION CONTAINER ROYALTY PLAN

and

Case 15-CA-096939

TOMMY EVANS

INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION LOCAL 1303

and

Case 15-CB-096934

TOMMY EVANS

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

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

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

SUPPLEMENT DECISION AND ORDER

[Equal Access to Justice Act]

Eric M. Fine, Administrative Law Judge. This is a Supplement Decision and Order regarding an application for an award of allowable fees and expenses pursuant to the Equal Access to Justice Act (EAJA), Pub. L 96-481, 94 Stat. 2325 and Section 102.143 of the Rules and Regulations of the National Labor Relations Board (the Board) filed by The Gulfport Stevedoring Association-International Container Royalty Plan (Respondent Plan).

STATEMENT OF THE CASE

On September 25, 2015, the National Labor Relations Board issued a Decision and Order<sup>1</sup> in the above-entitled proceeding. Thereafter, on October 22, 2015, the Respondent Plan filed with the National Labor Relations Board in Washington, D.C., an Application for Attorney's Fees and Brief in Support under EAJA based on the unfair labor practice proceeding held before Administrative Law Judge Michael A. Marcionese.<sup>2</sup> On November 2, 2015, the Board

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<sup>1</sup> 363 NLRB No. 10.

<sup>2</sup> Respondent Plan also filed on October 22, 2015, a "Motion to Withhold Information from Public Disclosure."

issued an order referring the EAJA application to the Administrative Law Judge; and since judge Marcionese has retired the matter has been referred to the undersigned. On January 15, 2016, Counsel for the General Counsel filed a "Motion to Dismiss Application for an award of  
5 Attorney's Fees and Expenses under the Equal Access to Justice Act." On March 18, 2016, Respondent Plan filed a "Response to General Counsel's Motion to Dismiss the Application for Attorney's Fees and Cost" as well a "Petition for Increased Attorney's Fees."

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A. *The Underlying Decision*

Judge Marcionese found in his decision, as affirmed by the Board, that Respondent Plan is under the Board's jurisdiction as a statutory employer. The judge then went on to dismiss the underlying complaint allegations against Respondent Plan and Respondent Local 1303 (Local 1303 or the Union) finding that Tommy Evans was not discharged in violation of Section of  
15 8(a)(3) of the Act; and that Local 1303 did not cause Respondent Plan to discharge him in violation of Section 8(b)(2) of the Act.<sup>3</sup>

The judge found: Tommy Evans, at the time of his termination, was one of two container inspector-dispatchers (CIDs) employed by Respondent Plan. The position was created in 1974 and Tommy Evans, hired in 1974, was the first CID hired. Tommy Evans held the position  
20 almost 40 years until the time of his termination effective January 5, 2013. Harold Oliver was hired as a CID a few years after Tommy Evans, at which time there were two CIDs. Oliver was replaced, upon his retirement, by CID Huey Cuevas in 2005. The judge noted that although the CID's are members of Local 1303, they are not part of the bargaining unit represented by Local  
25 1303. While not part of the bargaining unit, the judge noted they received the health and welfare, pension and vacation benefits provided for by the CBA for the bargaining unit, and they continued to accrue bargaining unit seniority while working as CID's. The record reveals that for a number of years, until 2010, the CIDs were paid for their dispatch work by Local 1303 for 25 percent of their wages, and the remainder of their wages was paid by Respondent Plan for  
30 container verification for purposes of employer contributions to Respondent Plan.

It was noted that, in the beginning the CIDs only performed dispatch duties, but in the early 1990's due to containerization, the CIDs were assigned additional inspection duties, involving checking the ships' manifests, calculating the amount to be paid in container royalty by  
35 employers based on what the manifests showed in terms of volume of container cargo, and comparing that number with the amount contributed by the employer. If there were discrepancies the CID contacted the employer to try and resolve the matter. The judge noted that Tommy Evans testified he seldom completed the paperwork for these inspections, and that he did not do any inspection reports in 2012.  
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The judge stated that Tommy Evans decided to retire in 2011, because he was resentful in what he perceived to be Cuevas not doing his job. The judge noted Cuevas was on medical leave in 2011 for several months, and was not showing up to dispatch longshoremen at the shape ups. Tommy Evans brother, Donald Evans, who was the longtime president of Local  
45 1303, and one of four trustees of Respondent Plan talked Tommy Evans out of retirement at that time, and to continue working until a more favorable health insurance plan went into effect in 2012. The judge found that Tommy Evans continued to work in 2012, although several

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<sup>3</sup> There are three individuals named Evans involved in this proceeding, Charging Party Tommy Evans, his brother Donald Evans, and Tommy Evans' son Glen Evans, as a result each will be referred to by their full name.

witnesses including long time receptionist Gloria Pittman testified Tommy Evans stopped coming into the union hall for dispatch purposes when the Union moved to a new hall in 2012.

5 Respondent Union held its election of officers on September 22, 2012. The elections were held every three years. During the election at issue, Tommy Evans son Glen Evans ran against long time Local 1303 President Donald Evans, and Glen Evans lost a close race by 18 votes out of 230 cast. Glen Evans was Local 1303's vice president at the time of the election, although as the Board noted on appeal, the judge had mistakenly stated in his decision that  
10 Glen Evans had been removed from that position by Donald Evans in June 2011. In fact, Glen Evans was removed as Respondent Plan trustee in 2011, not as Local 1303 vice-president. A distinction worth mentioning here because as Local 1303 vice president Glen Evans performed dispatch duties when the CIDs did not post.

15 The judge noted that Tommy Evans, as corroborated by Glen Evans, testified that he campaigned for Glen Evans, by handing out flyers and talking to pensioners. The judge stated this testimony contradicted that contained in Tommy Evans' pre-hearing affidavit wherein Tommy Evans testified that he did not actively campaign for his son. It was noted that Tommy Evans testified he did not know if his brother knew of his campaign activity, and the judge stated the Respondent Plan's trustees all testified at the hearing that they were unaware of any  
20 campaign activity engaged in by Tommy Evans.

The judge cited one disagreement between Glen Evans and Tommy Evans in early 2012, which Donald Evans had to break up, as well as testimony by other witnesses of another earlier confrontation between Tommy and Glen Evans. It was noted that in November 2012, the  
25 trustees voted during a trustee meeting to give CIDs Tommy Evans and Cuevas the annual container bonus that was tendered to eligible bargaining unit employees. The judge found that around the same time Donald Evans asked Tommy Evans if he was going to retire, and Tommy Evans replied that he decided to continue working until the next election which would take place in 3 years.

30 The judge found that on December 11, 2012, at Donald Evans request, Respondent Plan trustees held a special meeting at which Donald Evans' recommendation to terminate Tommy Evans was discussed and voted on unanimously to terminate by the four trustees. The trustees denied that the union election had anything to do with the decision. The judge found  
35 the trustees directed the Plan Administrator Walsh to send Tommy Evans a termination letter and at Donald Evans' request not to detail his brother's viewed performance issues. The termination letter, dated December 12, 2012, was limited to the only explanation to Tommy Evans was that he was being terminated for "performance issues" with the effective date of the termination listed as January 5, 2013. The judge found the January 5, 2013 date was selected  
40 to ensure that Tommy Evans would be eligible to receive the new and improved health benefits.

The judge cited a number of witnesses who testified concerning performance issues of Tommy Evans in support of his decision to dismiss the complaint. Yet, the judge also stated:

45 There is no dispute that the performance concerns cited by the trustees and these witnesses had occurred for a number of years yet there is no evidence that the Charging Party was ever warned, counseled, or otherwise informed that the Respondent Plan was not happy with his performance. Nor did the Charging Party receive any specific  
50 warning before the December 11 trustees meeting that he was about to be terminated.

The judge noted that in her brief the General Counsel reviewed the documentary evidence and made a strong showing that Tommy Evans performed his dispatch functions far more often than Respondent claimed. However, the judge noted that Tommy Evans conceded in his testimony that he did not record the tape announcing work assignments 90 percent of the time and he did not prepare any contain inspection reports in 2012, which the judge found to be primary functions of the CID.

The judge concluded using the *Wright Line* test that the General Counsel failed to meet two key elements of a prima facie case in terms of establishing Tommy Evans participation in protected concerted activities and knowledge of that participation by Respondent. The judge noted the testimony of Tommy Evans and Glen Evans on this point was contradicted by Tommy Evans pre-hearing affidavit, and based on circumstances he described the judge found the testimony in the affidavit to be more reliable than that of the witnesses at the hearing. The judge in dismissing the complaint found in the circumstances cited that the General Counsel's arguments of timing and pretext were not sufficient to establish a "prima facie case of animus or unlawful motivation in the absence of evidence of protected activity and knowledge."

### B. Analysis

#### 1. Legal Principles

*In Horizon Contract Glazing, Inc.* 353 NLRB 1094, 1094-1095 (2009), it was stated:

It is well established that the General Counsel's litigation position is substantially justified where it is possible to draw a set of inferences that would have supported the General Counsel's position. See *Meaden Screw Products Co.*, 336 NLRB 298, 302-303 (2001); *Euoplast, Ltd.*, 311 NLRB 1089 (1993), *affd.* 33 F.3d 16 (7th Cir. 1994).

Apart from evidence about the November 8, 2005 conversation, the General Counsel presented evidence of the Applicant's shifting defenses for refusing to recall Upchurch, as well as other circumstantial evidence that, if credited, might reasonably have established the animus element of the General Counsel's prima facie case. Although the judge failed to address this evidence, and the General Counsel did not except to his failure to do so, the evidence provides further support for finding that the General Counsel's litigation position was substantially justified. For it is also well established that "where the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and therefore to present evidence, which, if credited, would constitute a prima facie case, the General Counsel's case has a reasonable basis in fact and law and is substantially justified" (citations omitted). See *Golden Stevedoring Co.*, 343 NLRB 115, 116 (2004).

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Where credibility issues crucial to the outcome of the case cannot be resolved administratively on the basis of documentary or other objective evidence, the General Counsel is substantially justified in taking the case to trial before an administrative law judge. *Bouley, Inc.*, 308 NLRB 653, 654 (1992); *Advance Development Corp.*, 277 NLRB 1086, 1087 (1985).

In *Raleys & Indep. Drug Clerks Assn.*, 357 NLRB 880 (2011), it was stated:

Under *Pierce v. Underwood*, 487 U.S. 552, 563-566 (1988), an agency's position is "substantially justified" where the evidence is "what a reasonable mind might accept as adequate to support a conclusion"—i.e., where it has a reasonable basis in fact and law.

An agency's position is substantially justified when "reasonable people could differ" on whether the action should go forward. *Id.*; see also *Teamsters Local 741*, 321 NLRB 886, 889 (1996). The mere fact that the General Counsel lost or advanced a position contrary to prior precedent does not mean the litigation lacked substantial justification. *Alpha-Omega Electric*, 312 NLRB 292, 293 (1993).

As the EAJA judge also noted, the applicable standard is not intended to deter the General Counsel from bringing forward close questions of fact or new theories of law. *Meaden Screw Products, Co.*, 336 NLRB 298, 300 (2001). Finally, the clarity of the governing legal principles, or lack thereof, must be taken into account. *Abell Engineering & Mfg.*, 340 NLRB 133, 133-134 (2003).

## 2. The Witnesses' Testimony

At the time of Tommy Evans' termination, Respondent Plan had four trustees, two representing the Union and two representing the Gulfport Stevedoring Association (GSA). The two union trustees were Local 1303 President Donald Evans and Darius Johnson. The two GSA trustees were Gregg Schruff, the port manager for Stevedoring Services of America, Inc., (SSA) and Kendall Lamb employed by Ports America, Inc. (Ports).

Tommy Evans, hired as the first CID in 1974, testified he was not given a job description during the duration of his employment.<sup>4</sup> Tommy Evans testified that around 1992 or 1993, they sent CIDs Tommy Evans and Oliver for training on container checking procedures. He testified that, at that time, Tommy Evans and Oliver started doing paperwork relating to container volume for employer fund contributions; up until that time they were just dispatching longshoremen. Tommy Evans testified that a dispatcher's job is to separate the men's cards by seniority and call out according to seniority by the number of men needed by each foreman. Tommy Evans testified the dispatcher also sets up a recording that the longshoremen can phone into to learn of the next day's ship schedule. Tommy Evans testified it was Oliver who was the CID called by the shipping companies to call in to set up the recording. He testified the person that would place the call to the CID for the ship order for men was usually a shipping company supervisor.

Tommy Evans testified the other CID when Tommy Evans was terminated was Cuevas, who had replaced Oliver. Tommy Evans testified that when Cuevas came in he just assumed the duties that Oliver was doing until he retired. Tommy Evans testified if there was shape up scheduled for 6 a.m., he would report by about 5:15 a.m. Tommy Evans testified they determined which longshoreman to call out based on certain levels of seniority listed on the longshoremen's cards. He testified following Katrina there were generally only up to six longshoremen per call out, and that the call out would only take a few minutes.

Tommy Evans testified there were times when Cuevas was not present and Tommy Evans had to perform the dispatch work. He testified the CIDs were on call for dispatch work 24/7. He testified most times when Cuevas did not show it was because he was involved with youth football and baseball, and he enjoyed going to the races. Tommy Evans testified Cuevas would never show up for dispatching night callouts. Tommy Evans testified when Cuevas did not show up, Tommy Evans would dispatch the men out. Tommy Evans testified Cuevas was out for an extended period from September to at least November 2010.

Tommy Evans testified he had spoken with his brother Local 1303 President and Respondent Plan Trustee Donald Evans about retirement when Tommy Evans had turned 62.

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<sup>4</sup> This testimony was confirmed by Respondent witness and fellow CID Huey Cuevas.

5 He testified the discussion was in 2010. Tommy Evans testified that, he did not retire at that time, but that he did receive two Social Security pension checks, which he subsequently returned. Tommy Evans testified he was going to retire, and Donald Evans talked him out of it. Tommy Evans testified Donald Evans asked him to consider delaying retirement until such time as he was qualified for a new retiree medical plan known as the MILA plan.

10 Tommy Evans testified he really had not spoken with Donald Evans since 2010. Tommy Evans explained in 2010 when Donald Evans talked him out of retirement, Tommy Evans had quit because he refused to keep doing work for Cuevas in that he was drawing a check and not coming to work. Tommy Evans testified the problem Tommy Evans had with Donald Evans was that Donald was telling him that it was not his job to worry about Cuevas not coming to work. Tommy Evans testified that Donald Evans did not tell him that Cuevas was home recovering from open heart surgery. Tommy Evans testified his son Glen Evans told him about Cuevas condition. Tommy Evans testified that at the time Tommy Evans saw Cuevas at the casino. 15 Tommy Evans testified he complained to Donald about Cuevas being out. Cuevas testified his open heart surgery was actually in February 2011, and that as a consequence he was not doing dispatch work from February through October 2011.

20 Tommy Evans son Glen Evans was elected to be Local 1303 vice president in September 2009. Glen Evans testified he became a full trustee in Respondent Plan in 2010. Glen Evans testified he was removed as trustee on June 3, 2011, by Donald Evans.<sup>5</sup>

25 Glen Evans testified that in 2010 that he had a disagreement with his father Tommy because Tommy did not agree to reinstate Garland Taylor into a gang, although a foreman had requested Taylor's reinstatement. Glen Evans testified he granted the request as vice president of the Union. Glen Evans testified there was not an incident. Glen Evans testified his father's position was that Taylor had left after Katrina and found other work, and Tommy Evans favored giving the work to the men who remained. Glen Evans testified that any disagreement between himself and Tommy Evans was in 2010 because that was when Garland was reinstated in the gang. 30 Glen Evans reviewed his journal which he testified confirmed that this event occurred in 2010. Tommy Evans testified that after this incident he gave his son Glen Evans the cold shoulder.

35 Glen Evans testified he had another incident with Tommy Evans taking place either in the latter part of 2010 or up until June 2011 when Glen Evans was removed from the Respondent Plan's board of trustees. Glen Evans testified he did not have a physical altercation with Tommy Evans at the time. Glen Evans testified Donald Evans asked Tommy Evans when he came in why he had not called out the men yet. Tommy Evans asked Donald Evans where is Cuevas. Donald Evans said he is sick, you know he is sick. Glen Evans, who 40 was in the back, testified he came out and said you know Cuevas is sick. Donald told Glen to leave to go back in the back. Tommy Evans, pertaining to the incident, testified Glen Evans was saying Cuevas was sick. Tommy Evans testified he told Glen Evans that he did not know what he was talking about that Cuevas was not sick anymore. Tommy Evans testified men had told Tommy Evans that they had been seeing Cuevas at football games. Tommy Evans 45 testified when Glen was saying this, Donald Evans came in and sent Glen to the back. Tommy Evans testified the discussion was about Cuevas not showing up for work, and that he was complaining about Cuevas. Tommy Evans testified that during the discussion Donald Evans was talking about Cuevas being out sick.

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<sup>5</sup> Glen Evans testified he was removed due to a dispute with Donald Evans over Glen Evans divorce paperwork which Glen Evans removed from Donald Evans' desk.

5 Glen Evans testified while he was vice president he did not receive any complaints about either of the CID's performance. He testified he never talked to Schruff or Lamb, the two employer trustees for Respondent Plan, about his father's performance. However, Glen Evans then testified he had a conversation once with Schruff in that Schruff mentioned something about foremen not being able to get in touch with Tommy Evans. Glen Evans told Schruff if there was a problem Schruff should write a letter, but Schruff responded, "Nah." Glen Evans could not recall when this conversation occurred but testified he was a trustee for Respondent Plan at the time Schruff made the complaint. As set forth above, Glen Evans had been removed as trustee in June 2011. Glen Evans testified conversation with Schruff did not occur in 2012.

15 Glen Evans testified that, while he was vice president, he was present for the majority of the shape ups. He testified CID Cuevas took ill around the latter part of 2010 or early part of 2011, had bypass surgery and was gone for a year, at least, and when he returned, due to his health he could not attend certain call outs. Glen Evans testified that even when Cuevas was healthy he would travel with his baseball team and Cuevas would let Glen Evans know and they made sure the work got done. Glen Evans testified they looked out for each other, and they always had the ships go out on time. Glen Evans testified that if both Tommy Evans and Cuevas were missing Glen Evans would do the shape ups. Glen Evans testified that since he has been a longshoreman he has never heard of a ship leaving late because of problems with the dispatch.

25 Glen Evans ran against Donald Evans for Local 1303 president in September 2013. Glen Evans identified campaign literature that he had authored that depicted Donald Evans in a bad light showing 16 bulleted items criticizing Donald Evans, including describing some of the things Donald Evans purportedly agreed to in a negative fashion, and criticizing the way he conducted himself as union president such as card playing daily from "11-2:30 or later," and "Does not abandon card game and members have to discuss personal business at card table." Glen Evans testified he had about 100 copies of the literature made, and he passed it to different Local 1303 members. He described in his testimony that the distribution of the literature was fairly extensive.

35 Glen Evans testified he discussed his decision to run for president with his father Tommy Evans in 2012. He testified he told Tommy Evans that Glen Evans needed him to talk to some of the retirees to get some of them on Glen Evans' side. Glen Evans also testified that on the day of the election Tommy Evans walked around, and talked to men as they were going to vote. Glen Evans testified that day they had a picnic and Tommy Evans was walking around talking to the men, who being family members, making for an uncomfortable situation. Tommy Evans testified he campaigned for Glen Evans "a little" for union president. Tommy Evans testified a couple of retired longshoremen called and asked him to meet with them. He went to their homes. Tommy Evans testified he spoke to them in favor of Glen Evans. Tommy Evans testified he thought he passed out three or four flyers. However, Tommy Evans testified that he stated in his affidavit given on February 1, 2013, that "I did not actively campaign on behalf of my son, Glen Evans." When asked for an explanation of the discrepancy, he testified "I don't know. I just wasn't thinking at the time, I guess."

50 Glen Evans testified he lost the election for president by 18 votes. The certification of election results was dated September 22, 2013, with Donald Evans receiving 124 votes and Glen Evans receiving 106 votes. Glen Evans testified he had certain individuals running on his slate and Donald Evans' slate included Chris Johnson, and Darius Johnson. Glen Evans

5 testified he contested the election results arguing there were a lot of irregularities. Glen Evans testified he filed election objections with the local union, then with the district office, then with the international union. He testified he also filed with the Office of Labor-Management Standards to contest the election. He did not prevail on his election objections. Glen Evans testified he expressed an interest in the CID position immediately after he found out his dad was fired. However, he learned that Chris Johnson had already been selected.

10 Tommy Evans testified that in November 2012, Donald Evans told him he needed to retire that Donald Evans was not going to sign his dam check anymore. Tommy Evans testified he was trying to respond to ask him what was going on but Donald Evans left too quickly to give him a response. Tommy Evans found out about his termination when he received his termination letter dated December 12, 2012, effective January 5, 2015. The letter just states "performance issues" as cause for the termination. Tommy Evans testified he did not know what the performance issues were that were referenced in the letter. He testified no one is ever explained it to him. He testified he was never told that specific aspects of his job needed to be improved by anyone from the Union, or Respondent Plan.

20 Tommy Evans testified union president Donald Evans was present for the shape ups only about 1% of the time. Tommy Evans testified he never saw Lamb or Schruff at the shape ups. Tommy Evans testified that none of the Respondent Plan trustees ever told him about any performance problems he had at work. Tommy Evans testified he never received any written discipline as a CID. He never received any negative performance reviews. Tommy Evans testified he received a bonus equivalent to the container royalty check, and he received one each year he was employed as a CID. Tommy Evans received a bonus in November 2012 the month before his termination.

30 Tommy Evans testified he showed up about 98% of the time to work in 2012. He testified Donald Evans was not there because Tommy Evans dispatched the men before Donald Evans arrived at the union hall. Tommy Evans testified they were doing construction work in the new union hall which caused problems with his sinuses, and that as a result he only came into the new hall 50% of the time. He testified he did a lot of hiring for the shape up outside the union hall. When asked if he was really working in 2012 Tommy Evans testified, "Yes, I was working." Tommy Evans testified he did not do any reports for the container inspector position in 2012. Tommy Evans testified that after Donald Evans had previously talked him out of retiring that Donald did not subsequently complain to him that he was not coming to work and not doing his job.

40 Victor Walsh testified he has been the administrator of Respondent Plan since 1982 and he was an assistant administrator when it started in 1974. Walsh testified the CID is hired by Respondent Plan's Board of Trustees. Walsh testified the CID serves as a dispatcher of labor, and as a container inspector who checks tonnage shipped to verify the shippers are making the correct contribution to Respondent Plan. Walsh testified he is not the supervisor of the CIDs, he testified the Plan trustees are their supervisor. Walsh testified if he has a problem with the CID's performance he will bring it to the board of trustees. Walsh testified that he is not the one who observes the CID's performance pertaining to their dispatch work. He testified he observes their work pertaining to the container inspecting.

50 Walsh testified that in 1992 the CID position changed in terms of expanded container inspection duties. Walsh testified that one of the functions of the CID's is to provide shipping manifest reports. Walsh testified he received these reports from CID Cuevas, but over a span of a lot longer than a year he did not received any of these reports from Tommy Evans. Walsh

testified that over the 30+ years he has been an administrator he has received only about two of these reports from Tommy Evans. Walsh testified he tried to get Tommy Evans to do it and he would not. Walsh testified he told Donald Evans in 1992 that Tommy Evans was not doing it. Walsh testified that Donald Evans told him that he would see if he could get him to do it. Walsh testified that Donald Evans said, "as long as you get what you need, you need to keep your mouth shut." Walsh testified he did keep his mouth shut. He testified he was getting what he needed from CID Oliver and later from Cuevas, and the last report he received from Tommy Evans was around 1992. Walsh testified in the past few years there have not been any incidents where he talked to Tommy Evans about his performance.

Walsh also testified he did not recall receiving any complaints about Tommy Evans dispatching duties. However, he then testified they Cuevas told him that he was not happy with it and Walsh told Tommy Evans he had to do the job. Walsh testified he did not receive any complaints from the trustees concerning Tommy Evans unavailability on the phone until the last couple years. Walsh testified that in the summer of 2012 Lamb complained about it to Walsh, stating he and his people could not get ahold of Tommy Evans. Walsh testified he told Lamb to talk to Donald Evans. Walsh testified he did not report the complaint to anyone. Thus, Walsh's testimony was inconsistent concerning complaints about Tommy Evans performance at first stating he did not recall any incidents where he talked to Tommy Evans about a performance issue then saying there was an instance when he did.

Walsh testified that beginning in 2010 going into 2011 Respondent Plan began trying to get under MILA welfare plan. Walsh testified the MILA Plan was better for the plan participants than the then existing self-funded plan which only had a maximum annual payout of \$125,000. He testified MILA has an unlimited maximum. Walsh testified that he is familiar with Tommy Evans' health condition and that the MILA plan is better for Tommy Evans. Walsh testified that Donald Evans came to him and was concerned that Tommy Evans needed to have higher limit coverage. Donald Evans asked him if MILA would be better for Tommy Evans and Walsh said yes. Walsh testified that Tommy Evans had to work through September 30, 2011 to be qualified for better MILA benefits as of January 1, 2012.

Donald Evans gave somewhat confused and inconsistent testimony concerning health insurance benefits for Tommy Evans. Donald Evans testified in terms of Tommy Evans performance getting worse over the years the reason the trustees did not terminate him earlier was that Donald Evans found out that Tommy Evans was planning on retiring. Donald Evans testified he strung Lamb along on that basis in that Donald Evans probably would not have voted to fire him. Donald Evans testified he wanted to keep Tommy Evans working because Tommy Evans was his brother, he did not have much longer to go as far as retirement and they were trying to get a MILA insurance program started. Donald Evans testified he knew Tommy Evans had developed lupus and the insurance program they had for pensioners at the time was only \$50,000 for hospitalization. Donald Evans testified he knew that MILA was an unlimited plan where you have enough coverage until you reach 65 to get on Medicare. Donald Evans testified they were getting MILA in 2012. Donald Evans testified, "Once we got the MILA program started, I knew if he stayed on until January 1, he would have MILA until he got 66 years old or 65 – over 65 years old. At that point, one MILA – we found out that MILA did not cover pensioners, I knew that he would have an opportunity to get with the Social Security program." He testified Tommy Evans was born in 1948. However, according to this explanation unless Tommy Evans was born on or before January 5, 1948, since the effective date of his termination was January 5, 2013, Tommy Evans would not have been 65 at the time he was discharged. Moreover, in Donald Evans March 13, 2013 affidavit attached to Respondent's "Application for Attorney's Fees," Donald Evans gave another version stating he told Tommy

Evans "if he waited to retire, he might have better health care benefits under the new plan. The new insurance was effective January or February 2012." The discussion concerning Tommy Evans turning 65 was not even mentioned in the affidavit, which concurred more with Walsh's explanation. Moreover, while the judge found Respondent benevolently postponed Tommy Evans' discharge date until January 5, 2013, a more logical explanation was the January 5, 2013 date was selected because that was the date the new union officers from the September 2012 election took office. Thus, January 5, 2013, was the date that Chris Johnson who Donald Evans handpicked as a replacement CID for Tommy Evans also took union office. Chris Johnson ran on Donald Evans undercard slate of candidates. Therefore, a more logical explanation of the January 5, 2013 termination date was it coincided with Donald Evans goals from the 2012 election, and that was to get his supporters in favorable positions with the bargaining unit, including the CID function of dispatcher which determined which employees worked and did not work.

The minutes for Respondent Board of trustees meeting held on November 6, 2012, reflect there was a motion made by union trustee Johnson and approved unanimously to pay the CIDs Tommy Evans and Cuevas a bonus equal to the container royalty benefits paid to qualifying longshoremen. Schruff testified that at this meeting there was no discussion of Tommy Evans's performance. There was also no discussion of firing or disciplining Tommy Evans at the meeting. The parties stipulated that Tommy Evans did not appear in any of the minutes of the Board's prior meetings.

Walsh testified that he attended the December 11, 2012, plan trustee meeting where the decision was made to terminate Tommy Evans. He testified he learned of the meeting from Donald Evans who is chairman of the board of trustees. Walsh testified that Donald Evans said he was going to call the meeting to talk about Tommy Evans. Walsh testified during the December 11 meeting Donald Evans made the motion seconded by union trustee Darius Johnson to replace Tommy Evans with Chris Johnson for performance issues. There was to be a termination letter to Tommy Evans and Walsh had to write it and was told to only state the reason was "performance issues." He testified Donald Evans did not want his brother Tommy Evans long history of nonperformance cited in the letter. Walsh testified he did not know Tommy Evans was going to be fired before it was determined at the December 11 meeting, so Walsh did not give Tommy Evans a prior warning.

Walsh testified that, during the meeting December 11 meeting, Donald Evans said he wanted to recommend that the trustees terminate Tommy Evans. He testified the reason Donald gave was that he was not doing his job. Walsh testified Donald said that Tommy was not even coming into the hall to do the dispatch anymore. Walsh testified then both the employer trustees said their people had trouble contacting Tommy Evans. Walsh testified there was a discussion by the attorneys about the legal ramifications as to whether they could terminate Tommy Evans. Walsh testified the trustees did not discuss any other candidate other than Chris Johnson to replace Tommy Evans. He testified they voted unanimously to terminate Tommy Evans and replace him with Chris Johnson. Walsh testified Donald Evans and Darius Johnson made the motion to terminate and replace, which was passed unanimously. Walsh testified that after the vote he was directed by the trustees to write Tommy Evans a letter and notify him of that decision. Walsh testified concerning the December 11, 2012 meeting, in response to a question from Respondent Plan's counsel, that there was no discussion at the meeting about an attempt to retaliate against Tommy Evans for Glen Evans running. Walsh testified that as a result of the meeting the Board approved a set of minutes, which Walsh prepared. Walsh wrote the termination of Tommy Evans was for performance issues. Walsh

testified he did not write down the complaints the trustees explained during this executive session because Donald Evans wanted to protect his brother.

5 Donald Evans testified he called Walsh to schedule a special meeting of the board of trustees of Respondent Plan in order to terminate Tommy Evans. Donald Evans at first testified that at the December 11, 2012, meeting, Local 1303 recommended Tommy Evans be terminated and replaced with Chris Johnson. He then testified the local did not do that. Donald Evans testified he did not recall giving a notarized statement on February 26, 2013. However, it was read into the record that the document states "The Gulfport Stevedoring Association, 10 International Longshoremen's Association Container Royalty Plan, the GSA-ILA plans at one time employed union member Tommy Kirk Evans, in the position of container inspector/dispatcher. Tommy Evans worked as one of the container inspectors until January 2013. The Local 1303 recommended to the Board of Trustees for GSC/GSA plans that Tommy Kirk Evans will be terminated due to complaints Local 1303 was receiving regarding 15 performance issues in the position of container inspector/dispatcher." Donald Evans testified he had no recollection of making the statement but that it contained his signature. Donald Evans testified at the trial that at the December 11, 2012 meeting, Donald Evans recommended that Chris Johnson be hired into the position of CID to replace Tommy Evans. Donald Evans testified he knew that Johnson would take the position because he asked him before the 20 meeting.

Donald Evans testified he called the December meeting for the purpose of terminating Tommy Evans. Donald Evans testified that at the meeting that the reason he voted for terminating his brother was because he was not doing his job. When asked by Respondent 25 Plan's counsel, Donald Evans testified it did not matter to him Tommy Evans his son ran against Donald Evans in the election. Then the following exchange occurred under the questioning of Respondent Plan's Counsel Dummer:

30 Q Did it matter to you that he supported his son in the election?  
A No, it didn't.

On February 26, 2013, the same date of Donald Evans notarized statement, Respondent Plan counsel Dummer submitted a position statement to the Region containing the following 35 statement:

40 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.

45 Donald Evans testified that during the December 11 meeting, everyone at the meeting had an opinion and said something but Donald Evans did not want a lot of negative things in writing in the termination letter. However, Donald Evans' pre-hearing affidavit given to the Region on March 13, 2013, states pertaining to the meeting:

50 I'm not sure if I called or initiated the meeting in December 2012. At the meeting, I recommended that the trustees vote to terminate Tommy Evans. I do not remember exactly what was said at the meeting. I do not remember if I gave the reasons listed above are not. I don't remember what the company representative said at the meeting. I assumed they all had experience with Tommy not putting calls on the tape or not being

responsive to phone calls but I cannot say for sure whether they brought this up in the meeting or not.<sup>6</sup>

5       Schruff testified he learned of the December 11, 2012 meeting by receiving a call from  
Walsh. Walsh told Schruff they would be discussing Tommy Evans. Schruff testified the first  
time he heard they were considering terminating Tommy Evans was at the meeting. Schruff  
testified that, during the December 11 meeting, Donald Evans suggested terminating Tommy  
Evans. Donald Evans also suggested Chris Johnson as a replacement. Schruff testified this  
10       was the first time he heard Chris Johnson being recommended by Donald Evans. Donald  
Evans told the trustees that Chris Johnson would be able to do the CID job. Schruff testified  
there was no further evaluation of Johnson's qualifications for the job. Schruff testified that he  
was aware that Chris Johnson had just been elected to be secretary-treasurer of the Union.

15       Schruff testified he did not remember exactly what was stated at the December 11  
meeting concerning the decision to terminate Tommy Evans. Schruff later testified that during  
the December 11, meeting, "I don't remember the exact things that were said, but there was—  
the other management trustee had had several complaints or had indicated his problems—"  
concerning Tommy Evans performance. Schruff testified he voted to terminate Tommy Evans  
because of performance issues they have had. He testified the trustees also unanimously voted  
20       to hire Chris Johnson as Tommy Evans replacement. Schruff testified he never talked to  
Tommy Evans about his performance as a CID. He testified he did not recall any union  
members who complained to him about Tommy Evans performance as a CID. Schruff later  
testified concerning the December 11 meeting, that management trustee Lamb indicated  
performance issues of his supervision or someone not being able to reach to get labor  
25       pertaining to the dispatch functions of the CIDs. Schruff testified this was similar to complaints  
from Schruff's supervisors about not being able to reach Tommy Evans to call a tape which was  
used to schedule labor. In response to questions from Respondent Plan's Counsel Dummer,  
Schruff testified there was no discussion about the election during the December 11 meeting.  
He testified no trustee indicated they wanted to terminate Tommy Evans because of the  
30       election. Schruff testified he voted to terminate Tommy Evans because of past performance  
issues.

35       Schruff stated in his pre-hearing NLRB affidavit of March 13, 2013, attached to  
Respondent Plan's application for attorneys' fees as follows concerning the December 11,  
meeting:

40       I don't know if I said anything specifically in the meeting about my superintendents  
having trouble getting in touch with Tommy, but that was the reason why I voted to  
terminate Tommy. I remember Tommy's performance was brought up by other trustees,  
but I do not remember specifically what problems with his performance were brought up.  
I do not remember which trustee made the recommendation to terminate Tommy. I  
remember the other management trustee, Kendall Lamb, had problems with his  
performance as well. The President of the ILA, Donald Evans, also agreed to vote to  
45       terminate Tommy. After discussing Tommy's performance problems, we discussed what  
would be required to terminate Tommy with the Plan's attorneys.

Lamb testified he attended the December 2012 meeting. Lamb testified the discussion  
was that Tommy Evans had been given the opportunity to continue to come perform his job, had

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<sup>6</sup> Donald Evans March 13, 2013 affidavit was attached to Respondent's application with the Board for attorney's fees.

not done so, and it was our understanding he was an at will employee, and that they were going to move forward to have someone there who could order labor so that they could properly service our accounts. Lamb testified the trustees did not raise the point that they wanted to terminate Tommy Evans because his son Glen was running against Donald Evans. Lamb testified it was not a factor in his decision. He testified his reason for voting to terminate Tommy Evans was they needed to order labor. He testified they needed someone to do their job and order labor.

Darius Johnson testified on September 10, 2013, that he is a trustee for Respondent Plan, and he assumed the position 2 years ago. Johnson testified Donald Evans nominated him for the position. Johnson was vice president of the Union at the time he testified, and he was elected to that position on September 22, 2012, but he did not assume the position of Local 1303 vice president until January 5, 2013.<sup>7</sup> Johnson testified Chris Johnson was elected secretary treasurer for the Union in the September 22, 2012 election. Glen Evans testified that both Darius Johnson and Chris Johnson ran on Donald Evans slate of candidates.

Johnson initially testified on 611(c) exam that, prior to the December 11, 2012 meeting, he did not know why the meeting was called. Johnson could not recall who brought up the termination of Tommy Evans at the meeting, except to say that Johnson did not recommend it. Johnson testified he did not remember Donald Evans giving any reasons why Tommy Evans should be terminated. He testified he did not recall Donald Evans discussing any performance issues he had with Tommy Evans during the meeting. He testified he never told the other trustees about performance problems he had personally witnessed with Tommy Evans. Johnson testified that, during the meeting, Donald Evans recommended Chris Johnson replace Tommy Evans. He testified he did not recall Donald Evans giving any reasons why Chris Johnson would be a good replacement. However, when later questioned by Respondent Plan's counsel, Johnson's testimony changed. He now testified that during the meeting he voiced concerns he had with Tommy Evans performance. He testified in April he had witnessed several times that Tommy Evans was absent for shape ups, or showed up late. Johnson testified that it was more than once or twice that he saw that Tommy Evans was absent and other people had to do his job for him. Johnson testified he never said anything to Tommy Evans about his being absent. Johnson also testified that during the December 11 meeting, other trustees complained about Tommy Evans performance. Johnson testified another reason that was raised wanting to terminate Tommy Evans was they were having problems communicating with him. Johnson testified he thought it was said that they could never get in touch with him. Johnson testified the stevedores have to get in touch with the CID for the CID to make the work order recording. Johnson testified he voted to terminate Tommy Evans because he witnessed at the union hall Tommy Evans not showing up or being late. Johnson denied voting to terminate him because of the election or because he supported his son Glen Evans. Johnson testified that, during the meeting, no one suggested the need to terminate Tommy Evans as a result of the election.

Johnson gave a third version of what was discussed at the December 11, 2012 meeting, in his affidavit given on March 7, 2013:

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<sup>7</sup> Darius Johnson's pre-hearing affidavit, dated March 7, 2013, entered into evidence by Respondent Union reveals that while he was elected as vice-president in September 2012, Johnson did not assume the position until January 5, 2013. Moreover, Glen Evans testified he did not vacate the position of vice-president until January 2013, and that he returned to a prior employer on January 5, 2013. While the record also refers to Chris Johnson, Darius Johnson was the only Johnson to testify and he will be referred to as Johnson herein.

5 One of the trustees, I am not sure which one, said they had an issue with not being able to get in touch with Tommy when they needed him. I do not remember Donald Evans saying any reasons why Tommy Evans should be terminated. I do not remember Donald Evans discussing any performance issues he had with Tommy Evans. I do not remember anything else that was discussed as a reason for terminating Tommy Evans. I voted to terminate Tommy Evans because of what I had witnessed with him not being present when he should have been at the shape-ups around April 2012. I did not tell the trustees about what I observed in April 2012 because I felt it wasn't necessary. I am not aware of any problems Tommy Evans had working with the other CI/D Huey Cuevas.

15 Schruff testified, at the hearing, over the years his supervision always had a very difficult time in getting contact with Tommy Evans to put a call out for labor. Schruff testified that Steven Puccio and Mickey Pebbles had complained to him about Tommy Evans performance as a CID. He testified he did not know the specific dates of the complaints but at different points throughout the year when we would need to communicate with Mr. Evans it was always very difficult. Schruff testified when he received the complaints he reported them to either Union President Donald Evans and/or Union Vice President Glen Evans. Schruff testified Glen Evans was the vice president of the Union and a Respondent Plan trustee at the time of the complaints. Schruff testified he tried to contact Tommy Evans personally. Schruff testified he was not able to reach him and did not receive a response back. Schruff testified that during the last six months of 2012 he had problems getting a hold of Tommy Evans multiple times, two, three, four times. Schruff testified that in 2011 if they needed to get a hold of Tommy Evans the majority of time they could not get him. Schruff testified these problems got worse between 2012 and 2011. Schruff testified he did not recall if there was any discussion in 2012 between himself and Lamb regarding problems they were having with Tommy Evans.

30 As set forth above, Glen Evans testimony contradicted that of Schruff in that Glen Evans testified he only received one complaint from Schruff about Tommy Evans performance. He agreed with Schruff that complaint was made when Glen Evans was still a trustee for Respondent Plan which would mean the complaint had to have occurred prior to June 2011 when Glen Evans was removed as trustee. Moreover, Glen Evans told Schruff to document the complaint in writing but Schruff refused undermining how seriously Schruff considered the matter. Moreover, until Donald Evans initiated the December 11, 2012 meeting to terminate Tommy Evans none of the trustees thought it necessary to bring Tommy Evans performance issues up at any of the prior trustee meetings, something that likely would have been done if there was a serious concern by the employers about his performance.<sup>8</sup> It should also be said, that since there were two CID's any time there was a claimed complaint about not being able to reach Tommy Evans implicit in that would be an inability to reach Cuevas who also had the responsibility to set up the recordings for labor orders.<sup>9</sup> Even during the period in 2011 when Cuevas was recovering from his illness he was still working from home reviewing records and issuing container manifests. Therefore, he had the ability to answer the phone and make phone calls. Plus, the gravamen of the complaint of employer trustees supposedly was the inability to reach Tommy Evans in 2012 when Cuevas had returned to dispatch duties. Here again, implicit in their complaints was an inability to reach either CID, but this was taken out on Tommy Evans after his son had the temerity to run for office against fellow trustee Donald Evans.

<sup>8</sup> Donald Evans did not mention any complaints to him by Schruff about Tommy Evans in his March 13, 2013 pre-hearing affidavit.

<sup>9</sup> Tommy Evans testified that setting up the tape for call out had primarily been a function by CID Oliver, and it was assumed by Cuevas when he was hired to replace Oliver in 2005.

Lamb testified he thought Tommy Evans performed his duties well as the CID until around 2010 when they were having a hard time getting in touch with Tommy Evans to order labor for dispatch purposes. Then Lamb testified it was not him personally that was having difficulty it was his supervision at Ports America naming Tim Lancaster and Jesse Parker who called in labor orders. Lamb testified these two individuals reported problems they were having contacting Tommy Evans to Lamb. Lamb testified they did not contact the other CID as he was doing the accounting for the containers. He was not dispatching labor. Lamb testified around 2010, Tommy Evans was the CID on duty unless otherwise notified. When asked if there were any disciplinary action against Tommy Evans, Lamb testified as we do with most laborers they sent word to Tommy Evans that he needs to come to work and he would come back and he would work.<sup>10</sup> Tommy Evans would show up for some time, and then they would have the same issue again on several occasions. When asked if this was getting better or worse, Lamb then testified "2010 to 2012." As set forth above, Cuevas testified he was out with illness from February 2011 to October 2011. So Lamb's time period is off here. Moreover, there is no contention that Cuevas had any problems taking phone calls, or calling in to set the tape even during this time period. Finally, Cuevas testified he returned to dispatching in November 2011, so Lamb's contention that problems reaching Tommy Evans continued in 2012 is somewhat undercut by the fact that the employer's had the option of contacting Cuevas. There was also a credibility issue here as Tommy Evans testified that neither Kraft or Lamb ever complained to him about his performance.

When asked what happened in 2012, Lamb testified that at one point Lamb mentioned to Donald Evans that they were having a hard time justifying paying Tommy Evans' salary if they were not able to get in touch with him. Lamb testified he stated to Donald Evans that he was contemplating not signing Tommy Evans checks. However, Respondent attached Lamb's prehearing affidavit given to the Region on March 13, 2013 to Respondent Plan's Motion for Attorney's Fees. In the affidavit Lamb made no mention of this conversation with Donald Evans. Rather, in the affidavit, Lamb testified as follows:

I had a few brief discussions with Glen Evans where I told him that Tommy needed to answer his phone during the months toward the end of 2012 when we had problems with Tommy not answering the phone. I do not remember the exact dates or circumstance of these conversations. I may have discussed this with the Union President Donald Evans at some point in 2012, but I do not remember when.

Thus, Lamb not only omitted this critical discussion from his affidavit given much closer to the event, but the affidavit undercuts the contention that the conversation ever took place in that he could not even recall discussing Tommy Evans' performance with Donald Evans. While

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<sup>10</sup> Yet, the General Counsel entered into evidence warnings that Schruff and Lamb had issued to longshoremen, but none were issued to Tommy Evans. While technically not covered by the CBA, the CIDs received their benefits under the CBA, and maintained their longshoremen seniority under the CBA for time worked as CID's. Moreover, any claim that the trustees viewed the CIDs as at-will employees and therefore they did not need to document performance problems is undermined by the fact that they needed the plan attorneys in attendance for legal advice at the December 11, 2012, meeting to inform them that Tommy Evans was an at-will employee. An inference could be drawn that the real concern and need for counsel to attend the December 11 meeting was discharging Tommy Evans so close in time to the union election. As set forth above, Cuevas, as per his testimony, was performing dispatch work in 2010, at the end of 2011, and all the way through 2012.

the General Counsel failed to alert the judge to this prior inconsistent statement at trial, the affidavit was in the General Counsel's possession when the Agency proceeded to complaint further justifying bringing the matter to trial. As both Donald Evans and Lamb omitted this alleged discussion from their pre-hearing affidavits. Donald Evans omission of the conversation from his affidavit was in fact pointed out to the judge at the trial as set forth below.

Donald Evans testified that Tommy Evans performance deteriorated over time. Concerning the years 2011 to 2012, Donald Evans testified that Tommy Evans has always done basically "what he wanted to do" and "he went from doing something to nothing." Donald Evans testified Tommy Evans was doing nothing around 2012. Like Lamb, Donald Evans testified there was a point in 2012 when Lamb approached him about Tommy Evans. Donald Evans testified Lamb said he was not going to continue to sign Tommy Evans' check. Donald Evans testified Lamb was saying he was disappointed or displeased with what was going on with the container dispatcher and if things did not improve he would not sign checks for him anymore. However, Donald Evans provided an affidavit to the Region on March 13, 2013, a copy of which Respondent attached to Application for Attorney's Fees. Donald Evans when questioned at the trial testified that he did not recall mentioning this conversation with Lamb in the affidavit. A review of the affidavit attached to Respondent's application for attorneys in fact reveals it was not mentioned. The failure of either Lamb or Donald Evans to mention such a conversation in their affidavits, and Lamb's further statement that he may not have talked to Donald Evans about Tommy Evans' performance at all in 2012 would lead to the reasonable conclusion that no such conversation actually took place and that there was no precipitating event leading to Tommy Evans discharge other than his son running a spirited and close campaign against Donald Evans for president. Then after Glen Evans lost, Tommy Evans informed Donald Evans that he wanted to continue working until the next election thereby tying his retirement decision to elections past and future.

Donald Evans testified he was involved in an argument between Tommy Evans and Glen Evans. Donald Evans testified Glen Evans was complaining about Tommy Evans not coming to work on time and one day Donald Evans confronted Tommy Evans about it. Donald Evans testified at that point Glen Evans came into the office and took the argument over. He testified Glen and Tommy Evans started arguing, and Donald Evans had to get between them to stop them and he made Glen go back into the office where he came from. Donald Evans testified this was a heated argument. He testified there was yelling, and using profanity. Donald Evans testified it got to the point where he got up from behind his desk to separate them. Donald Evans testified that he did not recall what he told Tommy Evans when Glen Evans left the room but, "like I always tell him, you know, you need to tighten up and, you know, do a little bit better. And I think he left." Tommy Evans and Glen Evans testimony were both a lot more specific to the incident, each testifying it occurred in 2011. Moreover, both testified that the precipitating point leading to the discussion was Cuevas not showing up for work that day. Tommy Evans testified he argued to Glen that Cuevas was malingering.

Donald Evans has been president of Local 1303 since 1989. Donald Evans became a trustee for Respondent Plan in the 1980s. Donald Evans testified from time to time they received complaints about Tommy Evans. Donald Evans testified, "I've always tried to, you know, cover it up or makeup for whatever mistake he made." Donald Evans testified when he received these complaints he has addressed them with Tommy Evans from time to time and asked him to improve his performance. Donald Evans explained that he did not take a stricter role concerning the complaints he received about Tommy Evans because, "I did what I thought I had to do in order to make things work in the Port, you know."

Donald Evans testified that, between September 30 and December 2012, prior to Tommy Evans termination, Donald Evans asked Tommy Evans about his plans to retire, and Tommy Evans said he would not retire but he would wait until the next election. Donald Evans testified that, at one point after the September 2012 election, Donald Evans told Tommy Evans he would not sign any more checks for him. Donald Evans testified he protected his brother as much as he could. He testified when he was finished protecting him he recommended he be terminated to the board of trustees.

Donald Evans testified that after Tommy Evans came out of Social Security retirement and went back to work that he was not doing his job. He then testified "he did his job pretty much, you know, at times but at one point, I was – I got to the point where I was afraid that some of the members were probably going to go to the Department of Labor and saying that we were signing checks for somebody who was not doing anything. That was my biggest concern. And by him being my brother, I know that the wrath of the Department of Labor would probably come down on me, more so than the other trustees." Here again, according to Donald Evans his brother was not doing his job for two years. Yet, Glen Evans who was present for most of the dispatch testified the CIDs with Glen Evans' support backed each other up and to his knowledge the ships went out on time. Even according to Donald Evans' testimony Tommy Evans' behavior had been going on a long time and knowingly allowed by Donald Evans. Given the circumstances here, in which Donald Evans out of the blue precipitated the discharge meeting with no warning to the other trustees, and handpicked a replacement in advance of the meeting who happened to run on Donald Evans slate of officers, the General Counsel was substantially justified in contending that Tommy Evans was motivated by Glen Evans running for office against Donald Evans and Respondent Plan's belief that Tommy Evans supported his son in that effort. In this regard, the campaign, the election, Tommy Evans' son running in strong opposition to Donald Evans, and Tommy Evans statement close in time to his termination to Donald Evans that he would maintain his CID until the next union election established a strong nexus between the timing of Tommy Evans' discharge and that union election. It could also be logically inferred by the General Counsel that the internal union election and Donald Evans' belief of Tommy Evans support for Glen Evans, his son, was the reason Donald Evans precipitously had Tommy Evans removed from his CID position since the position was highly visible to union members who voted in the election as they were dependent for the CIDs for their work opportunities.

Respondent Plan called other witnesses in addition to its administrator and plan trustees. Cuevas testified he had worked as a CID for Respondent Plan since October 1, 2005. Cuevas testified that dispatchers are on call 24 hours a day, seven days a week. They receive work orders from the stevedore companies to notify the employees of when the vessels are scheduled to arrive, and the CID then calls in to set up a digital recording the longshoremen can call to learn when to report. He testified the CID in their dispatcher function also needs to be at the hall or dispatch office by one hour prior to the vessel going to work. The dispatcher receives the union cards of anyone that is applying for a job that day. Cuevas testified that 30 minutes prior to that vessel going to work the dispatcher calls out the highest qualified seniority man. Cuevas testified the most important part of the dispatcher position is being available by phone to take the work orders from the stevedore companies. Cuevas testified that there were times that neither one of the CID's were available. Cuevas testified when he was going on vacation he let the other CID know and if he could not get in touch with him he would let Glen Evans know.

Cuevas testified he had open heart surgery in February 2011. Cuevas testified he kept dispatch records but he did not have dispatch records from February 16, 2011 to October 3, 2011 because he did not dispatch, during that time, due to illness. Cuevas testified while he

was out he received complaints about not being able to get in touch with Tommy Evans from the stevedore companies. He named Jesse Parker, Jr., Danny Chapin, Mickey Pebbles and another man named Steven (Puccio) as individuals who said they were having trouble getting in touch with Tommy. Cuevas testified he told them if they could not get in touch with Tommy Evans to get in touch with Glen Evans. There is no claim that Cuevas reported any of these contacts to any of Respondent Plans trustees, and according to Cuevas these contacts were all made in 2011.

Cuevas, at the request of Respondent Plan's counsel, prepared a summary for the trial from his records as to who the dispatcher was on duty each day. Cuevas identified the shape up summary as being from Cuevas' records for 2011 and 2012. As set forth above, Cuevas did not have dispatch records from February 16 to October 3, 2011. Cuevas testified there was a period in 2012 where Tommy Evans stopped showing up for dispatching. Cuevas testified they were still in the old hall for some period of time in February 2012 and Tommy Evans stopped coming to the office to dispatch there. Cuevas testified they moved into the new office around the end of April or May and Tommy Evans never came in to dispatch there. He testified Tommy Evans would be outside but he did not come in the office so Cuevas had to dispatch.

Cuevas testified he had a discussion around June or July 2012 with Donald Evans concerning Tommy Evans attendance. He testified they hired up one day before lunch around 10 or 11 o'clock, and after dispatching, Donald Evans asked him if Tommy Evans had helped him dispatch that day. Cuevas said no and that he had not seen Tommy Evans in the dispatch office since February when they were in the old hall. Cuevas testified Donald Evans said he would look into it. When asked if any of the trustees ever spoke to him about problems he was having with Tommy Evans, Cuevas testified just one time. He testified Schruff called him when Cuevas was in Florida on vacation and Schruff stated he was unable to get in touch with Tommy Evans and he needed the recording put on to get labor for his vessel. Cuevas testified he was in Florida for four days around July or early August 2012. This was the only incident in 2012, where Cuevas reported a discussion with a trustee about the inability to contact Tommy Evans, and it occurred at least 4 months before a decision was made to discharge Tommy Evans.

Cuevas, in response to leading questions, testified Tommy Evans attendance was better in 2011 and worsened in 2012. Cuevas testified from a review of his summary that for plan year 2012 Tommy Evans helped him five times during the shape ups. Cuevas testified during that period he did shape ups 121 times. Cuevas testified that Glen Evans helped him out quite often after Tommy Evans stop showing up on these reports. Cuevas testified Glen Evans was always helping him out. However, in the General Counsel's post-hearing brief and brief in support of exceptions the General Counsel relied on Cuevas' testimony and the records he submitted to contend that Cuevas, during the period he worked in 2011, participated in 19 shape ups in 2011, while Tommy Evans conducted 173 shape ups in 2011. Based on a similar analysis for Cuevas records in 2012, it was posited that Cuevas participated in 98 to 103 shape ups before Tommy Evans was terminated, and that while Cuevas testified Tommy Evans only participated in five shape ups, the records show Tommy Evans conducted at least 117 shape ups in 2012.

Gary Thomas works for Ports America in the warehouse as a foreman. Thomas testified the ships he works for are Chiquita. He testified he carried a gang once a week and the ships come in on a Wednesday. Thomas testified there were days when Tommy Evans did not show up as a CID. Thomas testified if they do not have a dispatcher, the foremen will hire their own gangs. Thomas testified that if Tommy Evans did not arrive at work either Cuevas or Thomas or the other foreman would fill the gangs themselves. Thomas testified if Cuevas was there he will

do it. When asked how many times that Thomas or the other foreman had to do the shape up because Tommy Evans was not there since 2011, Thomas replied "Well, I know several times I done it." Thomas testified that Glen Evans was also there to do the dispatching. Thomas also testified that Tommy Evans arrived late. Thomas testified that if Tommy Evans came late "we  
5 were already gone, we already got the guys and were gone." Thomas did not know whether the board of trustees knew that Tommy Evans arrived late. Thomas testified that Tommy Evans job performance got worse over time. Thomas explained that Tommy Evans stopped going in the dispatch. However, Thomas also testified that from 2011 to 2012 Tommy Evans job  
10 performance stayed the same. After Thomas testified, the judge stated on the record that this testimony is not helpful because there is no evidence that the trustees had knowledge of this individual's testimony at the time they made the decision to terminate Tommy Evans. Larry Holloway testified he is a foreman and crane operator for Ports America. Holloway testified he carries a gang one time a week for Chiquita. He testified the ship comes in mostly on  
15 Wednesdays. Holloway testified he has not had any problems with Tommy Evans dispatching men to him. Holloway testified that he has had to shape up men himself once or twice. He testified he could not state whether Tommy Evans or Cuevas was supposed to be the dispatcher at those times.

Holloway testified there was a verbal disagreement between Glen Evans and Tommy  
20 Evans a year or two back. He testified the disagreement happened outside the old hall. Holloway testified the disagreement was that Glen wanted to send Garland Taylor to work and Tommy Evans said that he could not go ahead of other fellows. Holloway testified he would characterize the argument as a heated discussion. He testified they were raising their voices. When asked if it was becoming almost physical, Holloway testified "Oh, I don't know about that."  
25 When asked if it appeared the argument was escalating, Holloway testified "Oh, I don't know."

Herbert Williams, Jr. Williams works for Ports America as a dockworker and he has been in that position since 1983. He testified that Tommy Evans is their dispatcher. He testified that  
30 Tommy Evans did not hire him fairly. Williams testified that a couple of times there had been people hired over him and their seniority is under him. Williams testified he is filed two or three complaints about Tommy Evans not picking him. The record contains three complaints filed by Williams containing allegations that Tommy Evans failed to dispatch him properly, one was filed on November 1, 2011, one was filed on November 27, 2012, and one was filed on December 2,  
35 2012. Williams testified that he did not know if Donald Evans or any other officers of the union intervened on his behalf. He testified on September 12, 2013, that the situation has not been corrected and that he was still not working. Williams testified he has a casual seniority card which means he has the lowest type of seniority.

Garland Taylor is a forklift operator and has been in that position since 1994. At the time  
40 of the hearing he had a casual seniority card. Taylor testified that Tommy Evans did not want to give Taylor a job. Taylor testified that Tommy Evans passed over him 10 to 15 times for a position in 2012 and before that. Taylor testified he complained to then vice president Glen Evans about Tommy Evans passing him over. He testified he did not complain to anyone else, and he never approached Donald Evans about it. Taylor testified he witnessed a heated  
45 conversation between Tommy and Glen Evans. Taylor testified they argued because Tommy Evans did not want to give Taylor a job and Glen did. Taylor testified "I mean, it was toe to toe, face-to-face, whatever was said." Taylor did not file a formal complaint about being passed over by Tommy Evans.

Gloria Pittman works as a secretary for Local 1303, and had been in that position for  
50 many years. She testified she will interact with dispatchers if they are hiring during Local 1303's

office hours which are 8 a.m. to 4 p.m. She testified if gangs are going to work between those hours she gets a chance to see the dispatchers but if they are going to work at 7:00 a.m. or midnight, she would never see the dispatchers. Pittman testified that from the hours she was there she did not have occasion to see Tommy Evans during the day very often. However, 5 Pittman testified when the Union was in the old dispatch office Tommy Evans would just stand outside the building talking to the men and very seldom come into the office. When asked if Tommy Evans was working the cards, calling names out or was he just talking Pittman testified "No. I didn't see any of that." She testified that when they moved into the new building "I never really saw Tommy in our new building." However, Pittman testified when she saw Tommy 10 Evans outside of the hall for shape up, he could have been doing the dispatching work outside in that it was possible to dispatch the men without going into the dispatcher's office.

### 3. The General Counsel's Position was Substantially Justified.

15 As set forth above, Tommy Evans was a hired as a CID in 1974. Respondent Plan Administrator Walsh testified that in 1992, the CID position changed requiring record keeping pertaining to shipping manifests. Walsh testified Tommy Evans refused to file these reports and that in 1992, Walsh told Donald Evans about this refusal. Donald Evans told Walsh he would see if it could get Tommy Evans to do it, but as long as Walsh got what he needed that Walsh 20 should "keep his mouth shut." Walsh testified he only received one or two of these reports from Tommy Evans, and the last being around 1993. Donald Evans confirmed that a discussion with Walsh pertaining to this matter did take place. Thus, a different inference could have reasonably been drawn, than the one drawn by the judge who cited Tommy Evans admission that he did not do these reports in 2012 as justifying his discharge in that Walsh and Donald 25 Evans were aware that Tommy Evans was not doing these reports since 1992, and Donald Evans reaction was for Walsh to keep him mouth shut about it. Moreover, there was no contention that the failure of Tommy Evans to do these reports was mentioned or considered by the trustees at the December 11, 2012 special meeting called by Donald Evans when they voted to terminate Tommy Evans.

30 The judge also discredited the testimony of Tommy and Glens Evans that Tommy Evans campaigned on behalf of his son for the office of union president against Donald Evans. The judge noted that this testimony contradicted a statement in Tommy Evans pre-hearing affidavit that he did not campaign for Glen Evans. The judge also found that Respondent Plan trustees 35 all testified that they were "unaware of any campaign activity engaged in by the Charging Party." However, to my reading of the record the trustees were never asked that question, nor specifically denied knowledge of Tommy Evans' campaign activity. Rather, as the judge also found each of the trustees testified that the internal union election and any role Tommy Evans may have had in it was not discussed or considered at the meeting December 11, 2012 40 meeting. The judge also found that, Donald Evans credibly testified that "he had no knowledge that the Charging Party campaigned or otherwise supported his son's candidacy for president." In my reading of the record, I did not find that Donald Evans was directly asked and denied knowledge that Tommy Evans campaigned for his son. In fact, the question posited to Donald Evans by Respondent Plan's counsel seems to suggest that Donald Evans was aware of, or 45 believed that Tommy Evans campaigned on behalf of Glen Evans. In this regard, the question by Respondent Plan Counsel Dummer went as follows:

Q Did it matter to you that he supported his son in the election?

A No, it didn't.

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The meaning of this exchange takes on all the more significance because on February 26, 2013, Dummer had submitted a position statement to the Region containing the following statement:

5           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.

10           In this regard, Walsh testified that counsel for Respondent Plan attended the December 11 trustees meeting where it was voted to terminate Tommy Evans. As the General Counsel pointed out on appeal to the Board, this admission could be construed as substantive evidence of the knowledge of Respondent Plan officials of Tommy Evans campaign activity. See, 15 *Pressroom Cleaners*, 361 NLRB No. 57 (2014); *Black Entertainment Television*, 324 NLRB 1161 (1997); *Evergreen America Corp.*, 348 NLRB 178, 187 (2006), *enfd.* 531 F.3d 321 (4<sup>th</sup> Cir. 2008); *Bond Press*, 254 NLRB 1227, 1231-1232 (1981); and *Steve Aloï Ford*, 179 NLRB 229 fn. 2 (1969). If admitted into evidence the position statement containing counsel's admission could 20 have persuaded the judge to have credited the testimony of Tommy and Glen Evans concerning those activities, or at a minimum warranted a finding that Respondent's officials believed he engaged in those activities. However, the position statement was excluded by the judge at trial, and placed in the rejected exhibit file.

25           The Board on appeal refused the General Counsel's argument that the position statement should be admitted into evidence. This is because, at trial when the General Counsel offered the position statement, a statement was made limiting the purpose for which it was being tendered, which did not include the above referenced admission concerning Tommy Evans' campaign activities and Respondent Plan's knowledge thereof. Nevertheless, the 30 position statement was in the Regional office file at the time complaint issued and when the case went to trial. In the undersigned's view, given all of the other evidence, the admission contained in the position statement warranted taking the matter to trial, notwithstanding the prior statement in Tommy Evans' affidavit. Moreover, despite the error by counsel for the General Counsel in limiting the purpose of the position statement before the judge, I find that the General Counsel was substantially justified in placing the matter of the exclusion of the position 35 statement before the Board, as the admission contained in the position statement went to the heart of an important credibility finding by the judge question, as well as to the judge's failure to find the General Counsel had established a prima facie case. Since, it is province of the Board to protect employees against being discriminatorily discharged it could have been concluded on appeal that an important trial error by General Counsel should not serve as a shield against an 40 unfair labor practice finding. As an alternative the issue could have been to remanded to the judge to eliminate any due process concerns, rather than have an employee possibly lose the Act's protection due to an error of the General Counsel during the heat of a trial. I am not questioning the Board's decision to reject the General Counsel's argument here. Rather, I am finding that the General Counsel was justified in bringing the matter to the Board. Regardless, I 45 have concluded that since the position statement was in the Region's files, as set forth above, the admission therein clearly demonstrates that the issuance of complaint and bringing the matter to trial was substantially justified, regardless of any error at trial concerning its admission to evidence. In this regard, the record was preserved to the extent the position statement was placed in the rejected exhibit file for reconsideration of its admission by reviewing authorities.

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As noted by the Board, the judge found in error that Glen Evans was removed as vice-president of the Union in June 2011. The Board corrected this finding in that Glen Evans was not removed as vice-president at that time, but rather was removed from his position as plan trustee in June 2011. Glen Evans was vice-president from September 2009 until January 5, 2013, serving his full term in that office. This error could have been considered as significant in that Glen Evans served as a backup to the CIDs in terms of their dispatching duties for a period of 3 years while serving as vice-president. Cuevas' testimony revealed that he reported to Glen Evans in terms of his taking time off, and that Glen Evans diligently reported to the shape ups. Yet, after he ran for office against Donald Evans he was not even considered by the trustees at the December 11 meeting to replace Tommy Evans as CID. Rather, Chris Johnson, who ran on Donald Evans slate, was contacted about the CID position and agreed to accept it prior to the December 11, meeting even before the trustees had voted to terminate Tommy Evans. A reasonable argument could be made that Donald Evans decisions and recommendations were tied to who was for and who was against him in the September 22 election.

Along these lines, the judge found that the trustees voted to terminate Tommy Evans during the December 11, 2012 meeting, effective January 5, 2013, and that the January 5 effective date was selected to ensure that the Charging Party would be eligible to receive the new health insurance benefits. This finding by the judge could certainly be challenged by the General Counsel. First, there was no testimony of any witness that the termination date and the reasons therefore was discussed or voted on by the trustees at the December 11 meeting. Moreover, the testimony of Respondent's witnesses concerning Tommy Evans' eligibility for the new health insurance was all over the lot. Walsh, the plan administrator, who by his position in terms of the availability of the insurance was in the best position to know testified that he discussed the matter with Donald Evans. Walsh testified that Tommy Evans had to work through September 30, 2011 to be qualified for the MILA benefits as of January 1, 2012, a full year earlier than Tommy Evans was discharged. However, Donald Evans gave a different explanation at trial stating in a somewhat confused fashion that they were receiving MILA in 2012, and that if Tommy Evans stayed on until January 1, he would have MILA until Tommy Evans was 65, as at that point MILA did not cover pensioners as they would have an opportunity to switch to the Social Security program presumingly Medicare. Yet, in his pre-hearing affidavit attached to Respondent's Motion for Attorney's fees, given in March 2013, Donald Evans testified, along the lines of Walsh's testimony at the trial, that the new insurance was effective January or February 2012. Thus, according to Walsh, who drafted the termination letter, Tommy Evans termination date of January 5, 2013 had nothing to do with his receipt of the new health insurance as he was eligible for it a year earlier. Rather, the record revealed that Donald Evans' slate of officers, including Chris Johnson, took office on January 5, 2013, and Tommy Evans termination date of January 5, 2013, was selected because it coincided with day the new Union officers, including Donald Evans handpicked replacement CID, took union office. This could have been reasonably considered to be another factor relating to timing of Tommy's Evans removal and replacement as CID related to the September 2012 union election, rather than any performance issues of Tommy Evans.

The judge stated that, in addition to the trustees, a supervisor from each of the employer members of GSA testified regarding the difficulties they had contacting the Tommy Evans to tell him a ship was coming in and that workers needed to be assigned. However, my review of the record does not bare this finding out. Aside from the trustees, the only supervisors who testified were Thomas and Holloway and they worked for the same employer Ports America working for Chiquita ships. Both testified they primarily attended Wednesday shape ups. Neither complained about not being able to reach Tommy Evans to phone in call outs as stated by the judge. Their testimony was also somewhat contradictory between the two in that Thomas

testified there were many days Tommy Evans did not show up, or came late. He testified if Tommy Evans was not there Cuevas would do the shape up or the foreman would do it. Thomas testified he had to do the shape up several times since 2011. Oh the other hand, Holloway, testified he had not had any problems with Tommy Evans dispatching the men to him. 5 Strange to say, neither of these two witnesses testified they ever reported any problems concerning Tommy Evans to the trustees or to anyone for that matter. Their names were not mentioned by the trustees as persons who complained about Tommy Evans performance, and there is nothing on the record to warrant a finding that their opinions or complaints were known to the trustees on December 11, 2012, when they decided to terminate Tommy Evans. While 10 Thomas attributed his having to call an unnamed number of shape ups due to Tommy Evans absence, there was no showing that the failure to man any particular shape up by a CID should not have been attributed to Cuevas rather than Tommy Evans, or that both were not equally at fault. Moreover, although their testimony was apparently cited by the judge in his opinion, it could be reasonably argued that it played no role and was irrelevant to the decision to discharge 15 Tommy Evans, as the judge stated with respect to Thomas' testimony at the trial. Rather, a reasonable inference could be Respondent Plan's need to call them as witnesses highlights the fact that trustees conducted no independent investigation at the time they summarily discharged a 40 year employee. Moreover, Holloway testified he had no problems with Tommy Evans work, which serves to undercut the trustees' unsubstantiated claims that Tommy Evans did not 20 work in 2012.

The same could be said of the summaries prepared by Cuevas at the request of Respondent Plan's attorneys for the trial. In this regard, there is no claim that trustees requested Cuevas opinion, or asked him to provide them with records to review before they 25 discharged Tommy Evans. The meaning of the analysis of Cuevas records and his overall credibility was disputed by General Counsel in their brief to the judge, and on appeal to the Board. In fact the judge found, "In her brief, counsel for the General Counsel reviewed the documentary evidence and made a strong showing that the Charging Party performed his dispatch functions far more often than the Respondent's witnesses claimed." It could have been 30 concluded that the most significant part of Cuevas testimony was that none of this information was requested or provided to the trustees before they perfunctorily decided to terminate Tommy Evans. It serves to highlight the fact that no investigation was made in their haste to show him out the door. In fact, Donald Evans called the meeting and had pre-selected Tommy Evans replacement while the trustees were not even told what the meeting was about before they 35 arrived.

The judge also noted that Lamb corroborated the testimony of Donald Evans shortly before the December 11 meeting that Lamb told Donald Evans that Lamb would no longer sign Tommy Evans checks because of problems his employers were having reaching Tommy Evans. 40 The timing of this conversation Lamb and Donald Evans purportedly had so close in time to the decision to terminate Tommy Evans would make it fairly significant. Yet, while Donald Evans testified about the conversation at the trial in September 2013, he made no mention of it in his affidavit given to the Region on March 13, 2013, which was given much closer to the event in question. While not privy to the judge at the hearing, Lamb's affidavit given on the same date 45 also makes no mention of the conversation. In fact, Lamb, whose affidavit was proffered by Respondent Plan in its application for fees, testified in his affidavit concerning Tommy Evans not answering his phone that, "I may have discussed this with the Union President Donald Evans at some point in 2012, but I do not remember when." Clearly, if Lamb had a conversation where he told Donald Evans close in time to the discharge determination meeting in December 2012, 50 that he would no longer sign Tommy Evans checks he would have had an affirmative memory of that conversation in March 2013 as opposed to ginning up a recollection of it 6 months later at

the trial in September 2013. While the General Counsel failed to point this discrepancy in Lamb's affidavit to the judge at trial, the omission in Donald Evans' affidavit was made clear to the judge at the trial. Moreover, both affidavits affirmatively demonstrate that Respondent Plan's witnesses never made known what was purportedly a significant conversation to the  
5 Region prior to the issuance of complaint, which at a minimum serves to validate the Region's decision making in issuing the complaint and taking the case to trial.

The judge also stated that two employees in the bargaining unit testified about complaints they had with Tommy Evans dispatch performance, and the judge stated "there is no  
10 dispute that his choices of whom to dispatch were sometimes questioned even by his own son." However, a somewhat different conclusion could have been reasonably drawn from the evidence pertaining to these findings by the judge. The record contains three written complaints filed by Williams over Tommy Evans not selecting him for dispatch. They are dated November  
15 1, 2011, November 27, 2012, and December 2, 2012. Williams testified he never directly addressed his concerns with Donald Evans. He testified he did not know if Donald Evans or any other officer of the union intervened on his behalf. The complaints should have worked their way to the Seniority Board, which was composed of Respondent Plan's four trustees. Williams testified that as of September 12, 2013 the situation had not been corrected. Respondent Plan put in no evidence that the Seniority Board, (Respondent Plan's trustees) had  
20 considered the complaints, or found them to be valid. Williams testified he has a casual seniority card which means he had the lowest category of seniority. Similarly, Taylor testified he never complained to Donald Evans about his hiring dispute with Tommy Evans, and he never filed a formal complaint over it. While there was testimony that Glen Evans agreed with Taylor and got into an argument with Tommy Evans over it, there was no formal complaint lodged and  
25 no evidence on this record that Tommy Evans position was incorrect with respect to either individual. With respect to Williams the opposite is true because he filed formal complaints a substantial time period prior to the unfair labor practice trial and the Seniority Board composed of Respondent Plan trustees failed to act on them. What perhaps is most important, none of the trustees cited Williams or Taylor's complaints as a reason for Tommy Evans discharge, nor was  
30 there any evidence that they were raised or considered by the trustees at the December 11, meeting. This attempt by Respondent Plan to pile on after the fact matters that not considered by the trustees would reasonably support a finding of shifting defenses and support a reasonable conclusion that the discharge was pretextual in nature.

The judge also mentioned Glen Evans applying for the CID position after he learned that  
35 his father Tommy Evans was discharged. The judge drew an inference that Glen Evans applying for the position somehow reflected that he approved the discharge. However, Glen Evans' full time position as vice-president was coming to an end. So, in fact, he needed a job. He was neither consulted nor given the reasons for Tommy Evans' termination. This in itself  
40 would serve to support a conclusion that the decision about who occupied the CID position was election based. In this regard, Glen Evans had served as vice-president for three years and his position included serving as a backup for shape ups to the CIDs and in fact serving as a quasi-supervisor to them in that he attended a good portion of the shape ups, was aware of their work pertaining to them, but was not consulted about the discharge. The failure to consult Glen  
45 Evans concerning Tommy Evans work goes to support the perfunctory nature of the termination decision.<sup>11</sup> Glen Evans applying for a job that was being vacated when he was the most

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<sup>11</sup> In fact, Plan Trustee Schruff testified Schruff did not know who Tommy Evans' direct supervisor was, except to state it was not Schruff. Schruff testified that while the CIDs are employed by Respondent Plan they report to someone at the Union. Along these lines, Plan Administrator Walsh testified he had little firsthand knowledge of the performance of the CID's in

5 experienced person to assume that position when he was in need of a job under these  
circumstances would not serve to support a conclusion that he supported the discharge  
decision. Moreover, even if it could be read to support such a conclusion, he applied for the job  
after the termination decision had been made so his application had no impact on the trustees'  
10 decision to discharge Tommy Evans. Rather, if they wanted the opinion of the union official who  
most closely worked with the CIDs as to whether Tommy Evans was performing his job, the  
trustees could have asked him before they decided to discharge Tommy Evans. The failure to  
do so further serves to support a finding that the decision to discharge Tommy Evans related to  
the September 2012 union election, and the perfunctory nature of the decision making process  
would support a conclusion that reasons advanced for the decision were pretextual.

15 The record established that Tommy Evans was hired as the first CID for Respondent  
Plan in 1974, at which point he was largely performing dispatch functions. In 1992, the  
functions of the CID changed and they were required to keep records pertaining to shipping  
manifests. At that time there were two CID's, Tommy Evans and Oliver. After keeping these  
records for a short period of time, Plan Administrator Walsh testified that Tommy Evans ceased  
20 doing the reports and they were left to be done by CID Oliver. Walsh testified he complained to  
Donald Evans Local 1303 president, Respondent Plan trustee, and Tommy Evans' brother  
about Tommy Evans failure to do the reports in 1992, and Donald Evans told Walsh that he  
would try to get Tommy Evans to do the reports, but as long as Walsh was getting what he  
needed that Walsh should keep his mouth shut. Walsh testified that since 1992, Tommy Evans  
did not do these reports and that it fell on Oliver to complete them. Cuevas replaced Oliver as  
the second CID in 2005, and Tommy Evans testified that Cuevas assumed the functions that  
25 Oliver was performing. Thus, the judge relying on Tommy Evans not filing these reports in 2012  
as justifying the discharge can also be called into question, as Respondent Plan's officials  
testified they were aware he had not been filing these reports since 1992. Moreover, the failure  
to file these reports was not discussed at the December 11, 2012, or raised by Respondent's  
witnesses as a reason for the discharge.

30 Glen Evans was elected vice-president of Local 1303 in September 2009 and he served  
in that position until January 5, 2013. Glen Evans also served as one of the two union trustees  
to Respondent Plan until he was removed from that position by Donald Evans in June 2011,  
over a dispute about Glen Evans' divorce papers. Glen Evans testified that while he was vice  
president he was present for the majority of the shape ups concerning the dispatching of  
35 longshoremen. He testified CID Cuevas took ill around the latter part of 2010 or early part of  
2011, had bypass surgery was gone for a year, at least, and when he returned he due to his  
health he could not attend certain call outs. Glen Evans testified that even when Cuevas was  
healthy he would travel with his baseball team and Cuevas would let Glen Evans know and they  
made sure the work got done. Glen Evans testified they looked out for each other, and they  
40 always had the ships go out on time. Glen Evans testified that only if both Tommy Evans and  
Cuevas were missing Glen Evans would do the shape ups. Cuevas testified that due to illness  
he ceased doing shape ups between February and October 2011, but for most of this period he  
completed container reports pertaining to the shippers while he worked at home and  
recuperated from his February surgery and illness.

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their dispatching duties. Schruff testified if there were problems with a CID's job performance  
someone at the Union would be the one to provide them with any discipline. Schruff testified  
that he did not reprimand Tommy Evans personally. Schruff testified the CID's are hired  
through the trustees under the Respondent Plan but they are they are recommended for hire by  
the Union as a courtesy because the Union trustees know the people.

Glen Evans testified while he was vice president he did not receive any complaints about either of the CID's performance. He testified he never talked to Schruff or Lamb, the two employer trustees for Respondent Plan, about his father's performance. However, Glen Evans then corrected this testimony stating he had a conversation once with Schruff where Schruff mentioned something about foremen not being able to get in touch with Tommy Evans. Glen Evans told Schruff if there was a problem Schruff should write a letter, but Schruff responded, "Nah." Glen Evans testified he was a trustee for Respondent Plan at the time Schruff made the complaint. As set forth above, Glen Evans had been removed as trustee in June 2011. Glen Evans testified the conversation with Schruff did not occur in 2012. Thus, Glen Evans testified he only received one complaint from the employer trustees and he estimated it occurred in 2011, concerning Tommy Evans, and at the time Schruff refused to act upon the complaint, although Glen Evans suggested that he do so.

Tommy Evans testified he spoke Donald Evans about retirement when Tommy Evans had turned 62. He testified the discussion was in 2010. Tommy Evans testified that, he did not retire at that time, but that he did receive two Social Security pension checks, which he subsequently returned. Tommy Evans testified he was going to retire, and Donald Evans talked him out of it in that Donald Evans asked him to consider delaying retirement until such time as he was fully qualified for a new retiree medical plan known as the MILA. Tommy Evans explained in 2010 when Donald Evans talked him out of retirement, Tommy Evans had quit because he refused to keep doing work for Cuevas in that he was drawing a check and not coming to work. Tommy Evans testified Donald Evans was telling him that it was not his job to worry about Cuevas not coming to work. Tommy Evans testified that Donald Evans did not tell him that Cuevas was home recovering from open heart surgery. Tommy Evans testified his son Glen Evans told him. Tommy Evans testified that at the time he thought Cuevas was malingering because he saw Cuevas at the casino. Tommy Evans testified he complained to Donald Evans about Cuevas being out. Cuevas testified he had open heart surgery in February 2011, and that as a consequence he was not doing dispatch work from February through October 2011. It is likely that while Tommy Evans placed these events in 2010 that they occurred sometime in 2011 during Cuevas recuperation period.

Glen Evans testified he had an argument with Tommy Evans taking place either in the latter part of 2010 or up until June 2011 when Glen Evans was removed from the Respondent Plan's board of trustees. Glen Evans testified he did not have a physical altercation with Tommy Evans at the time. Glen Evans testified Donald Evans asked Tommy Evans when he came in why he had not called out the men yet. Tommy Evans asked Donald Evans where is Cuevas. Donald Evans said he is sick, you know he is sick. Glen Evans, who was in the back, testified he came out and said you know Cuevas is sick. Donald told Glen to leave to go back in the back. Similarly, Tommy Evans, pertaining to the incident, testified Glen Evans was saying Cuevas was sick. Tommy Evans testified he told Glen Evans that he did not know what he was talking about that Cuevas was not sick anymore. Tommy Evans testified the men had told Tommy Evans that they had been seeing Cuevas at football games. Tommy Evans testified when Glen was saying this, Donald Evans came in and sent Glen to the back. Tommy Evans testified the discussion was about Cuevas not showing up for work, and that he was complaining about Cuevas. Tommy Evans testified that during the discussion Donald Evans was talking about Cuevas being out sick. Donald Evans testimony provided a different slant to the same event. He did not mention Cuevas not showing for work had any part in the discussion. Rather, he testified the conversation centered around Tommy Evans not showing up for work on time. Donald Evans described the discussion between Tommy and Glen to be more heated than they described it, and stated he had to separate the two. A reasonable argument could be made that the conversation took place in 2011 during the time period Glen

Evans testified since that was the time Cuevas testified he was missing the shape ups due to health reasons.

5 Glen Evans ran a somewhat bitter campaign attempting to unseat his uncle Donald  
Evans as Local 1303 president in 2012. Glen Evans identified campaign literature that he had  
authored and distributed that depicted Donald Evans in a bad light showing 16 bulleted items  
criticizing Donald Evans, including describing some of the things Donald Evans purportedly  
agreed to in a negative fashion, and criticizing the way he conducted himself as union president  
10 such as card playing daily from “11-2:30 or later,” and “Does not abandon card game and  
members have to discuss personal business at card table.” Both Glen Evans and Tommy  
Evans testified that Tommy Evans campaigned on behalf of his son by advocating Glen Evans  
to retirees at Glen Evans’ request. Glen Evans also testified that Tommy Evans spoke on his  
behalf to family members at a picnic on the day of the election. As the judge noted, this  
15 testimony contradicted that which was contained in a pre-hearing affidavit given by Tommy  
Evans stating he did not campaign.

Regardless of any contradiction between Tommy Evans’ affidavit and his testimony at  
the hearing, prior to the issuance of complaint, on February 26, 2013, Respondent Plan counsel  
Dummer had submitted a position statement to the Region containing the following statement:

20 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  
25 Glen Evans.

Thus, the Region had a reasonable basis to conclude, notwithstanding any statements in his  
affidavit to the contrary, that Tommy Evans did campaign on behalf of Glen Evans, and once  
more Respondent Plan officials were aware that he did so. This conclusion was further  
30 supported by Walsh’ testimony at trial wherein he testified that Respondent Plan’s attorneys  
attended the December 11, 2012 meeting wherein the trustees voted to discharge Tommy  
Evans. While counsel for the General Counsel erred at trial in terms of her description as to the  
purpose of the position statement being offered into evidence at the trial, its submission to the  
Region certainly provided a sound basis to support proceeding to trial, as well as appealing its  
35 admission into evidence to the Board since it went to the heart of critical credibility findings by  
the judge and well as to his determination that there was no prima facie case of an unfair labor  
practice.

40 Glen Evans lost a close election held on September 22, 2012, by 18 votes out of the 230  
that voted. Glen Evans testified Donald Evans’ successful slate for the election included Chris  
Johnson, and Darius Johnson. Glen Evans testified he filed election objections with the local  
union, then with the district office, then with the international union. He testified he also filed  
with the Office of Labor-Management Standards to contest the election. He did not prevail on  
his election objections. Thus, Glen Evans continued his campaign to unseat Donald Evans from  
45 the presidency beyond the election date which could have only exacerbated any tensions  
created by his campaign.

On November 6, 2012, at a board of trustees meeting, the trustees voted to give both  
CID’s the annual container bonus, annually accorded longshoremen who worked over 700  
50 hours that year. There was no discussion of any performance problems by the trustees during  
that meeting pertaining to Tommy Evans, or at any prior board of trustees meetings.

Respondent's witnesses testified the awarding the CID's these bonuses was a routine act, and had nothing to do with their actual performance. On the other hand, a reasonable inference could be drawn that if they truly had problems or concerns about Tommy Evans performance they would have raised those concerns at that or prior trustees meetings, particularly when the argument was being made that Tommy Evans performed no work for a year.

Tommy Evans testified that in November 2012, Donald Evans told Tommy Evans to come into the office, and Donald Evans told him he needed to retire that Donald Evans was not going to sign his dam check anymore. Tommy Evans testified he was trying to respond to ask him what was going on but Donald Evans left too quickly to give him a response. Similarly, Donald Evans testified he asked Tommy Evans about his plans to retire, and Tommy Evans stated he would not retire until the next election. Donald Evans confirmed that he told Tommy Evans that he would not sign any more checks for him.

Donald Evans testified he called Walsh to schedule a special meeting of the board of trustees of Respondent Plan in order to terminate Tommy Evans. Donald Evans at first testified that at the December 11, 2012 meeting, Local 1303 recommended Tommy Evans be terminated and replaced with Chris Johnson, and then he disavowed that the Union made such a recommendation. However, Donald Evans through counsel had provided the Region with an affidavit given on February 26, 2013 taken by Respondent Plan's counsel. In it Donald Evans stated, "The Gulfport Stevedoring Association, International Longshoremen's Association Container Royalty Plan, the GSA-ILA plans at one time employed union member Tommy Kirk Evans, in the position of container inspector/dispatcher. Tommy Evans worked as one of the container inspectors until January 2013. The Local 1303 recommended to the Board of Trustees for GSC/GSA plans that Tommy Kirk Evans will be terminated due to complaints Local 1303 was receiving regarding performance issues in the position of container inspector/dispatcher." Donald Evans testified at the trial that at the December 11, 2012 meeting, Donald Evans recommended that Chris Johnson be hired into the position of CID to replace Tommy Evans. Donald Evans testified he knew that Johnson would take the position because he asked him before the meeting.

Thus, the Region had in its files at the time it issued complaint and proceeded to trial evidence that Tommy Evans campaigned on behalf of his son, and through Dummer's admission, Respondent Plan had knowledge that he did so. The Region had evidence of timing, in that after the election, Donald Evans questioned his brother's retirement plans, and when Tommy Evans told Donald Evans that he would not retire until the next election, Donald Evans told him that he would stop paying his checks. Donald Evans then precipitously arranged a trustees meeting to discuss the termination of Tommy Evans through his contact with Walsh. Donald Evans also handpicked Tommy Evans successor, Chris Johnson who had successfully run for office with the Union on Donald Evans' ticket. The other Union trustee Darius Johnson ran for vice president of the Union on Donald Evans' ticket. It was clearly to Donald Evans advantage to replace Tommy Evans whose son ran against him, because the CID position was a high visibility position among the longshoremen in that CID selected them for dispatch. Thus, the trustees did not consider Glen Evans, at the December 11 meeting for the CID position. Glen Evans ran against Donald Evans and lost, although Glen Evans had direct experience performing and supervising the CID dispatch functions. Rather, the trustees decided to discharge Glen Evans' father who recently told Donald Evans he would not retire until the next election, impliedly stating he was supporting his son. While the decision to discharge Tommy Evans was voted on December 11, 2013, the discharge was not effective until January 5, 2013, the date when Chris Johnson along with the other officers on Donald Evans slate took office in

their new elected positions. Thus, the Region had evidence of timing and knowledge pertaining to Tommy Evans discharge.<sup>12</sup>

5 In an effort to rebut what could have been found to be the Region's prima facie case, Respondent Plan put on the testimony of witnesses who were not consulted about the discharge decision, i.e., Thomas and Holloway; and complaints by casual employees over their dispatch which were not mentioned by the trustees as reasons for the discharge, or with respect to Williams even acted upon by the Seniority Board which was composed of Respondent Plans trustees. Respondent Plan also put into evidence an after the fact summary prepared by Cuevas, who himself was not consulted about the discharge nor his records reviewed prior to the discharge. Moreover, Cuevas had been repeatedly accused of malingering to Donald Evans with no investigation about it shown. Thus, Respondent's true case was only built on the self-serving declarations of the Respondent Plan trustees and the plan administrator. It has been long held as set forth in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (9th Cir. 15 1966), "it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book." Here, the testimony of the trustees, as set forth above, was internally inconsistent, inconsistent between witnesses, and undercut by omissions from or contradictions with statements in their pretrial affidavits. They claimed long standing problems with Tommy Evans performance, but failed to document anything or even to discuss it at prior trustee meetings. In fact, in 1992 when Walsh reported a failure of Tommy Evans to complete certain reports to Donald Evans, Walsh was told to keep his mouth shut by Donald Evans. While there was testimony that minutes were sparse as to reasons for discharging Tommy Evans pertaining to the December 11, 2012 meeting and the December 12, 2012 discharge letter lacked specificity in only citing "performance issues" as a means of protecting Tommy Evans, another inference from these self-serving declarations could be drawn. That is the minutes were sparse and the discharge letter was limited because there was only minimal substantive discussion of the reason for discharge. In this regard, union trustee Johnson stated in his March 7, 2013 affidavit, submitted into evidence by the Union, 25 about the December 11, meeting:

35 One of the trustees, I am not sure which one, said they had an issue with not being able to get in touch with Tommy when they needed him. I do not remember Donald Evans saying any reasons why Tommy Evans should be terminated. I do not remember Donald Evans discussing any performance issues he had with Tommy Evans. I do not remember anything else that was discussed as a reason for terminating Tommy Evans.

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<sup>12</sup> The Board has also long held it is unlawful to discriminate against an employee for the union activities of their relative. See, *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126, slip op. at 28 fn. 68 (2015), and the cases cited therein. Donald Evans son's election activities were clearly known to Respondent Plan trustees. While this theory of the case was not articulated in the complaint it was fully litigated, as Respondent Plan's counsel repeatedly asked the trustees if they voted to terminate Tommy Evans because of the election, and because Glen Evans ran for office. See, *Marshall Durban Poultry Co.*, 310 NLRB 68 fn. 1 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994), and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977), where violations were found for matters not specifically alleged in the complaint but that were fully litigated.

It could have been reasonably concluded that Johnson's recollection given so close in time to the event was not faulty. Rather, he could not remember the discussion because not much was said. Rather, Donald Evans recommended the discharge and a handpicked replacement who had run on his election slate and the trustees concurred with minimal discussion. The timing of Tommy Evans' discharge was timed to when Chris Johnson, who ran for office with Donald Evans, took office on January 5, 2013. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. See, *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988); *W. W. Grainger, Inc. v. NLRB*, 582 F.2d 1118 (7th Cir. 1978); *Kidde, Inc.*, 284 NLRB 78 (1987); *Firestone Textile Co.*, 203 NLRB 89, 95 (1973). Here, Respondent offered testimony about events not considered by the trustees at the trial warranting a conclusion of shifting positions and pretext. Respondent also failed to contact Tommy Evans, a close to 40 year employee, and give him a chance to defend himself, or directly raise any concerns with him. Glen Evans, who was then a union officer and who worked closely with the CIDs was not consulted about Tommy Evans' performance, nor was he considered to replace Tommy Evans. Here, through the trustees' testimony, Respondent did not cite any incidents involving Tommy Evans past the summer of 2012. Yet, the decision to discharge him was not made until December 11, 2012, and the only intervening event was the September 22, 2012 election. In this regard, the judge found:

There is no dispute that the performance concerns cited by the trustees and these witnesses had occurred for a number of years yet there is no evidence that the Charging Party was ever warned, counseled, or otherwise informed that the Respondent Plan was not happy with his performance. Nor did the Charging Party receive any specific warning before the December 11 trustees meeting that he was about to be terminated.

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In her brief, counsel for the General Counsel reviewed the documentary evidence and made a strong showing that the Charging Party performed his dispatch functions far more often than Respondent's witnesses claimed.

It should also be noted that the General Counsel rested their case in chief during the third day of a four day trial. Respondent Plan made a motion of directed verdict only on the issue of its position that the Board lacked jurisdiction over Respondent Plan. Respondent Plan did not move for a directed verdict on the underlying merits of the discharge, although Respondent Plan was aware of the inconsistency in Tommy Evans testimony at the trial to that contained in his pre-hearing affidavit pertaining to his election activities at the time the General Counsel rested. This failure by Respondent Plan could certainly be considered as a concession that the General Counsel was substantially justified in taking this case to litigation. In any event, I have concluded that the General Counsel was substantially justified in issuing complaint, trying the case, and appealing the judge's decision to the Board. In this regard, upon careful review, with different inferences drawn a violation of the Act that Tommy Evans was discriminatorily discharged could have been found and for that reason I recommend that Respondent's application for attorney's fees be dismissed.

4. Respondent Plan's litigation over whether the Board has Jurisdiction over Respondent Plan unduly and unreasonably protracted this litigation.

In addition to the General Counsel's argument that its litigation position was substantially justified at every stage of the hearing, the General Counsel argues in its motion to dismiss

Respondent Plan's EAJA application that Respondent Plan should be denied attorneys' fees because its "frivolous argument against jurisdiction at every stage of the proceedings" unduly or unreasonably protracted the litigation. By contrast in its initial filing for attorneys' fees Respondent Plan contends it should be allowed increased fees "to reflect the skill level and expertise of the Plan's attorneys which were required to defend this complicated action brought by the General Counsel."

By Motion dated July 1, 2013, Respondent Plan moved to dismiss the first amended complaint arguing lack of jurisdiction over the Respondent Plan by the Board. By letter dated July 9, 2013, the Board's Associate Executive Secretary issued a letter denying Respondent's Plan's motion to dismiss as being untimely filed, stating it had to be filed under the Board's Rules and Regulations no later than 28 days prior to the hearing date. Since the hearing was scheduled for July 23, 2013, the motion to be timely filed had to be filed by June 25, 2013, and it was not filed until July 1, 2013. By letter dated July 10, 2013, Respondent Plan filed a request with the Executive Secretary's office to reconsider the denial of the Motion to Dismiss.

On July 16, 2013, Respondent Plan filed a motion to postpone the hearing then scheduled for June 23, 2016, due to medical complications pertaining to one of the Respondent Plan trustees who had been subpoenaed as a witness, and for whom it was represented testimony was critical to each party. Over counsel for the General Counsel's opposition the hearing was postponed on July 17, 2013, and rescheduled to September 9, 2013.

On July 22, 2013, Respondent Plan filed a "Motion to Dismiss for Lack of Subject Matter Jurisdiction" stating the hearing had been postponed to September 9, 2013, therefore its motion is timely under the Board's Rules and Regulations. On July 26, 2013 counsel for the General Counsel filed an opposition to the motion dismiss detailing the motions that Respondent plan had filed until that date. In its motion to dismiss, the General Counsel described Respondent Plan's operations and stated that annually, the Respondent Plan provides services in excess of \$50,000 to employers by checking the tonnage of containers being transported through the Port of Gulfport to verify the amount of contributions to Respondent Plan from those employers; receiving contributions; and issuing Container Royalty checks to ILA workers. It was also noted that Respondent Union is a labor's organization within the meaning of the Act and annually Respondent Plan provide services in excess of \$50,000 to Respondent Union by deducting dues from the container royalty checks and forwarding the dues to the Union. It was noted that the evidence for calendar years 2011 and 2012 Respondent Plan deducted union dues from the container royalty checks of over 100 ILA workers per year paying dues to Respondent Union in excess of \$91,000 each year. The cases cited in the General Counsel's motion to dismiss where in large part relied upon by the judge and the Board in finding that the Board had jurisdiction over Respondent Plan. Thus, Respondent Plan was privy to this line of cases early on in these proceedings. On August 2, 2013, Respondent Plan filed a reply brief in opposition to the General Counsel's filing. On September 5, 2013, Respondent Plan's counsel filed a motion to bifurcate proceedings into separate hearings on the issue of whether the Board may exercise jurisdiction over Respondent Plan, and if so, whether Respondent Plan committed an unfair labor practice as claimed pertaining to Tommy Evans.

By order dated September 9, 2013, the Board denied Respondent Plan's motion to dismiss for lack of jurisdiction. It was stated that Respondent has failed to establish that it is entitled to judgment as a matter of law. It was noted that the denial was without prejudice to the Respondent Plan's right to renew its jurisdictional arguments and any request to bifurcate the hearing to the Administrative Law Judge and to raise the jurisdictional issue before the Board on any exceptions that may be filed to the judge's decision. The trial opened on September 9,

2013, wherein the judge denied Respondent's motion to bifurcate the hearing and declined to litigate Respondent Plan's motion to dismiss on jurisdiction in a separate, but prior, proceeding to underlying unfair labor practice allegation.

5           Pertaining to jurisdiction over the Respondent Plan, the consolidated complaint issued  
on August 22, 2013, alleged the Respondent Plan has been engaged as an administrator of  
employee fringe benefits with an office and place of business in Gulfport Mississippi. It asserts  
the Respondent Plan provides services in the form of administering contain royalty benefits to  
10 employees employed by Gulfport Stevedoring Association, Inc., (GSA), Ports America, Inc.  
(Ports), Stevedoring Services of America, Inc. (SSA), Crowley Maritime (Crowley), Dole Food  
Company, Inc. and Dole Fresh Fruit Co. (Dole) and Fresh North America, L.L.C. and Chiquita  
Brands International, Inc. (Chiquita) who are signatories to a collective bargaining agreement  
with International Longshoremen's Local 1303 (Respondent Union or Local 1303). It is alleged  
15 that Respondent Plan annually provides services valued in excess of \$50,000 each to GSA,  
Ports, SSA, Crowley, Dole and Chiquita. It is alleged that Respondent Plan purchased and  
received at its Gulfport, Mississippi facility goods valued in excess of \$5000 from points directly  
outside the state of Mississippi. It is alleged that the Respondent Plan annually provides  
services in the form of transferring funds from Respondent Plan to the G.S.C.-I.L.A. Welfare  
Plan (Welfare Plan) in excess of \$50,000 to pay the expenses of the Welfare Plan; and that  
20 Respondent Plan annually provided services in the same amount to each of the G.S.C.-I.L.A.  
Vacation Plan (Vacation Plan); and the G.S.C.-I.L.A. Pension Plan (Pension Plan) to pay the  
expenses of those plans.

25           The complaint alleges that GSA is an organization engaged in providing stevedoring  
services. It is asserted that GSA has been composed of various employers engaged in the sale  
of goods or materials and whose purpose is to represent its employer members in negotiating  
and administering collective-bargaining agreements with various labor organizations including  
Local 1303. It is alleged that the following employers are members of GSA and have authorized  
30 GSA to represent them in negotiating and administering collective-bargaining agreements with  
Local 1303: Ports, SSA, Crowley, Dole, and Chiquita. The complaint alleges that Ports  
purchases goods and materials valued in excess of \$50,000 directly from points outside of  
Mississippi, sells and ships goods and materials valued in excess of \$50,000 directly to points  
outside Mississippi, derives gross revenues in excess of \$50,000 for the transportation of freight  
35 in interstate commerce under arrangements with and as an agent for various common carriers  
which operate between various states of the United States, and derives gross revenues in  
excess of \$500,000. The complaint repeats the allegations pertaining to Ports for SSA,  
Crowley, Dole and Chiquita.

40           The complaint alleges that the Welfare Plan provides services of administering welfare  
benefits to employees employed by GSA, Ports, SSA, Crowley, Dole, and Chiquita based on  
collective bargaining agreements between Local 1303 and the named employers. It is alleged  
that the Welfare Plan provides services valued in excess of \$50,000 annually to each of the  
named employers, as well as to the Local 1303 union. Similar allegations are made in the  
45 complaint with respect to the Vacation Plan, and the Pension Plan.

50           The complaint alleges that all the named entities including Respondent Plan are each  
employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.  
Respondent Plan denied every single commerce allege in the consolidated complaint, including  
the allegation that the Local 1303 is a labor organization under the Act, and denied the status of  
Respondent Plan's four trustees as agents of Respondent Plan although the evidence  
established without dispute that it was their decision to discharge the Charging Party.

Respondent Plan also denied the agency status of Respondent Plan's administrator although he authored the letter informing the Charging Party of his discharge. Respondent Plan also denied that Donald Evans, president of Local 1303 and one of Respondent Plan's trustees was an Agent of Local 1303.

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The trial began on September 9, 2013, as set forth above. While Respondent Plan denied in its answer to the complaint that the Board has jurisdiction over Ports and SSA, when pressed with a subpoena request from the General Counsel, Respondent Plan counsel Dummer stated on the record "we have never changed our position. We have always stipulated to the jurisdiction as it pertains to the SSA as well as Ports America. However, we lack standing to stipulate on behalf of anyone else who's outside our purview." It should be noted, one of the Respondent Plan's trustees was employed by Ports and the other by SSA. Thus, Respondent Plan had clear access to whether those large employers met the Board's jurisdictional requirement but still denied knowledge of such in its answer. Moreover, when it finally admitted commerce information and jurisdiction pertaining to Ports and SSA, Respondent Plan was still not willing to stipulate to the jurisdictional status of Dole, Chiquita, and Crowley. With respect to Respondent Plan's refusal to admit jurisdictional status of Dole and Chiquita, the judge was to state, "I don't want to, you know, tell anybody what to do, but there's going to be enough issues and testimony in this case that we shouldn't be spinning our wheels and trying to establish that a company like Chiquita Brand and Dole Fruit are engaged in interstate commerce, ... They're well-known brand names. You know, they sell products throughout the United States and the world. I mean, are we really going to have to have people come in and testify that these are companies engaged in interstate commerce?" "I don't want to have us get in a situation where we're having witnesses from Dole and Chiquita come in and explain the company's business and their revenue, and where they shipped their products, when this is something that is not really going to be much in dispute. Okay?"

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As set forth above, Respondent Plan denied Ports and SSA's commerce information as alleged in the complaint until the first day of the hearing, although Respondent Plan Trustee Schruff testified on that date that he is the Port Manager for SSA. Similarly, Lamb testified he was the general manager of the fruit division of Ports America, and was the other employer trustee for Respondent Plan. Thus, Respondent Plan had easy access to determine the jurisdiction of these two employers when it responded to the complaint rather than making the General Counsel press the matter through subpoenas to be resolved at the hearing. Moreover, as to employers Dole, Crowley, and Chiquita who were alleged as employers under the Act in the complaint, the Respondent Plan received tonnage reports on a monthly basis that they delivered to the port at issue, in that one of Respondent Plan's functions was to keep track of those tonnage reports to determine the royalties that each of the named employers owed to Respondent Plan. Moreover, any legitimate doubt that Respondent's counsel had over these employer's meeting the Board's jurisdictional requirements could have been resolved by simple phone call by Respondent's counsel to these employers since Respondent Plan's representative was working with them in calculating what they brought into Gulfport. However, that call was never made. Rather, the General Counsel was required to subpoena Dole and Chiquita to procure commerce information before Respondent Plan would stipulate to their status at the second day of the hearing, at which point Respondent Plan's counsel followed up with phone calls to those entities which could have easily be made before filing its answer to the complaint.

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In case, there is an impulse to conclude this behavior which the undersigned would view as obstructionist, was merely coincidental, as set forth above Respondent Plan denied that Local 1303 was a labor organization, although two of the officials of that Union were plan

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trustees, including Donald Evans. Moreover, Respondent Plan was distributing monies to members of that Union, and collecting dues on behalf of some of those members from funds received pursuant to the CBA from which the Respondent Plan was created. Respondent Plan was also providing dispatchers to refer members of Local 1303 for work. Respondent Plan was

5 Respondent Plan, in its answer, in addition to denying the four plan trustees were its agents within the meaning of Section 2(13) of the Act, also denied that Victor Walsh, Respondent's Plan's Administrator, was an agent of Respondent Plan, although Respondent Plan designated Walsh as Respondent's Plan's representative for sequestration purposes under the judge's  
10 sequestration order. Thus, it is likely that the size of any subpoenas issued by the General Counsel were impacted by nature of the contumacious answer to the complaint that Respondent Plan provided, and the breath of those subpoenas were likely in large part of Respondent Plan's own making. In *M.M. Santulli Mail Services*, 281 NLRB 1288 fn. 1 (1986),  
15 the Board noted that counsel for the respondent in its answer to the complaint denied knowledge or information sufficient to form a belief concerning the truth or falsity of the complaint allegation that the union is a labor organization within the meaning of Sec. 2(5) of the Act. The Board cited actions taking by the respondent in support of its denial at the hearing and noted that the judge has recommended the Board take action against counsel for the  
20 respondent, pursuant to its Rules and Regulations, Sec. 102.21, which states that an attorney may be subject to disciplinary action where he has willfully violated the rule that statements contained in an answer to a complaint be made in good faith and not be interposed as an attempt to delay case proceedings. In so recommending, the judge concluded that counsel for the respondent could not have entertained a good-faith doubt about the status of the union, the certified collective-bargaining representative of the respondent's employees. The Board stated:

25 We have carefully considered the judge's recommendation in light of the record and agree that counsel for Respondent appears to have acted contrary to the strictures of Sec. 102.21 of the Board's Rules and Regulations. As our attention has not been called  
30 to other instances where counsel for the Respondent has engaged in similarly inappropriate conduct, in the circumstances of this case the Board will limit its disciplinary action to expressing our strong disapproval of such conduct and cautioning counsel for the Respondent against similar conduct in future appearances before the Board.

35 See also *Graham-Windham Services*, 312 NLRB 1199 fn. 2 (1993); and *Worldwide Detective Bureau*, 296 NLRB 148 fn. 2 (1989). Here, Respondent denied multiple allegations of the complaint such agency of its officials, labor organization status of the Union, and commerce allegations of large employers for which its trustees were either high level officials, or for which it regularly dealt with and in fact received tonnage reports showing large amounts of interstate  
40 discourse. Respondent Plan's counsels answer to the complaint and recalcitrance at trial could only be seen as an attempt to obstruct and delay this proceeding for which they are certainly not entitled to attorneys' fees let alone increased attorneys' fees based on an argument of expertise.

45 On the second day of the hearing the following exchange occurred during questioning by Respondent Plan's counsel of Plan Administrator Walsh pertaining to the operation of the dispatching function of Respondent Plan:

50 Q Does that remote answering machine system provide a service to the ILA 1303?  
A I guess you could say it, but really it's to the people, so that they can come to get work.

Q. Does it provide a service to the stevedoring companies?

A. Again, you could say it, but really it's to the people so we can get them to work.

Q. So would you say that this is an indirect benefit at best?

A. At best—

5 JUDGE MARCIONESE: Well, I mean, that's — he is your witness. It is somewhat leading an argumentative as well, so I'll sustain an objection.

MR. DUMMER: Withdrawn, Your Honor.

JUDGE MARCIONESE: I mean, it is a benefit. You can't say the union and the employer don't benefit from having a dispatch system.

10 MR. DUMMER: The question was a service, Your Honor.

JUDGE MARCIONESE: All right. Well, it's a service. I mean, who would be doing it if they didn't do it? It is a service. They're doing something for someone else, so—and to say that the union and the employer aren't receiving a service through the operation is to meet illogical or doesn't make— is nonsense. So go ahead. You can continue.

15 When the General Counsel rested the their case in chief on the third day of the hearing, following exchange occurred:

20 Mr. Dummer: Your Honor, we would like to make a brief motion for a directed verdict on the jurisdictional issue.

JUDGE MARCIONESE: All right. Well, I'm going to deny that because, obviously, I have to interpret everything in the light most favorably for the General Counsel, and I can't say at this point that under no circumstance could jurisdiction be established over the Respondent Plan. I mean, clearly they may not be selling goods and receiving goods, but they are obviously performing a service. I mean, the dispatching of workers, the collection of funds and their disbursement are obviously a service they're performing for other entities. They're performing a service for the employers who employ the longshoremen and they're performing a service for the union that dispatches the longshoremen.

30 And it's clear that the people that they're performing services for are engaged in interstate commerce, whether you are talking about Dole, Chiquita, Crowley, Ports America or SS A, those are all clearly engaged in interstate commerce by their very nature because they're loading and unloading ships that are carrying cargo from other states to the state of Mississippi and from other countries to the state of Mississippi. So the only question is are those services sufficient in volume to bring the Plan under the Board's jurisdiction. And also, under the whole purposes and policies of the Act, would a labor dispute at the Plan have an impact on interstate commerce, and it seems to me that it would because if the Plan had a labor dispute and the CIDS were not able to dispatch the men, there would be an impact on interstate commerce.

40 Now, I haven't made a final judgment yet, but that's why I'm denying your directed verdict. Okay?

45 Thus, at one point the judge labeled Respondent Plan's argument pertaining to lack of jurisdiction over Respondent Plan by the Board as nonsensical. Viewed on top of its obstructionist answer and tactics at trial which in like cases has drawn warnings of sanctions for future conduct by the Board, I reject Respondent Plan's argument for enhanced attorneys' fees due to an averred expertise, and I agree with General Counsel that no fees should be available for Respondent's assertion of lack of jurisdiction for the obstructionist way in which the argument was mounted, and the frivolous nature in which the judge found it to be grounded. I also find this undercuts any claims for attorneys' fees in general as contended by the General Counsel.

## 5. Additional contentions of the parties

5 The General Counsel contends Respondent is not entitled to an EAJA award because it  
 failed to file financial information pertaining to affiliate plans created by the same CBA as well as  
 its failure to file financial statements for the Union. The record showed there were four plans in  
 all including Respondent Plan created by the CBA. The other plans were the Health and  
 Welfare Plan, the Vacation Plan, and the Pension Plan. All plans, including Respondent have  
 10 the same plan administrator and the same trustees. Respondent Plan decides how much of the  
 container royalty funds it collects on an annual basis go to each of the other plans. The General  
 Counsel also argues that Respondent Plan and the Union are joint employers of the CIDs and  
 therefore financial records of the Union needed to be provided to demonstrate Respondent Plan  
 meets EAJA requirements as an eligible employer. Here, it is asserted that the Respondent  
 15 Plan was performing dispatch functions designated to the Union by the CBA. In fact, the record  
 showed that the Union paid 25 percent of the CID's wages until 2010. The testimony reveals  
 that the CIDs were reporting to Glen Evans, the then vice president of the Union, and Schruoff  
 testified the Union supervised the CIDs. In fact, the record shows the trustees decided to  
 20 discharge Tommy Evans based on the recommendation of the Union trustees, and allowed  
 Union President Donald Evans to select his replacement with very little discussion about either  
 decision. Schruoff testified the trustees deferred to the Union on such matters because they  
 knew the personnel the best. Respondent Plan's counsel also at one point during the hearing  
 argued attorney-client privilege citing an alleged joint defense pact between Respondent Plan  
 and the Union. However, since I have recommended dismissing the EAJA application on its  
 25 merits because I have found the General Counsel was substantially justified in litigating this  
 matter I do not need to resolve these issues. Similarly, Respondent Plan argues that certain of  
 its submissions should be kept under seal for confidentiality purposes. Since I have dismissed  
 the underlying EAJA application, I do not find it necessary that these items be disclosed to the  
 public. Should the Board disagree with my decision, these issues can be ruled upon at that  
 30 time, if necessary.

On these findings of fact and conclusions of law, and, on the entire record, I issue the  
 following recommended<sup>13</sup>

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<sup>13</sup> As set forth above, the General Counsel's answer to the EAJA application also disputes the amount of the fees and expenses sought by Respondent. I do not reach this issue because, since the General Counsel's case was substantially justified, no fees and expenses are awarded.

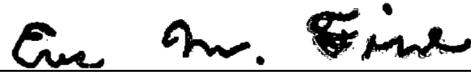
ORDER

The EAJA application for fees and expenses filed by Respondent Plan is denied.<sup>14</sup>

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Dated, Washington, D.C. December 9, 2016

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Eric M. Fine  
Administrative Law Judge

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<sup>14</sup> If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.