A. L. Barge Lines, Inc. Mechling *and* Local 47, Great Lakes and Rivers District, Masters, Mates and Pilots and Marine Officers Association, Local 54, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract. Case 13–CA–9894

June 15, 1972

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

On February 7, 1972, Trial Examiner Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Trial Examiner. This case was tried at Chicago, Illinois, on November 15 and 16, 1971. The charge was filed on June 10, 1970, (and amended September 17, 1971) by Local 47, Great Lakes and Rivers District, Masters, Mates and Pilots, herein called MMP Local 47, against the Respondent, A. L. Mechling Barge Lines, Inc., herein called the Company. The complaint was issued on September 14, 1971, and amended at the trial.

The party to the contract, Marine Officers Association, Local 54, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called MOA, has been representing all the personnel on the Company's river towboats—the masters and chief engineers in one bargaining unit and the other crew members in a separate unit. The primary issues are (a) whether the masters and chiefs are supervisors and, if they are, (b) whether the Company interfered with the administration of MOA by permitting the masters and chiefs to vote in a MOA election for union officers and by thereafter recognizing the MOA as the bargaining representative of the nonsupervisory employees, in violation of Section 8(a)(2) and (1) of the National Labor Relations Act.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the excellent briefs filed by the General Counsel, Company, MMP Local 47, and MOA, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation with its principal place of business in Joliet, Illinois, is engaged in providing towboat and barge inland waterway transportation services between Chicago and New Orleans. It annually provides services valued in excess of $100,000 to out-of-State businesses which are engaged in interstate commerce. The Company admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that MOA is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Prior decisions

This is one of several cases in which the Board has been called on to apply the *Nassau* doctrine, *Nassau and Suffolk Contractors' Association Inc*, 118 NLRB 174, in the towboat transportation industry.

In *G & H Towing Co.*, 168 NLRB 589, 590 and 596–597, the Board adopted Trial Examiner Weil's finding that the towboat employer violated Section 8(a)(2) and (1) by dealing with a union negotiating committee which included a towboat captain and other admitted supervisors. There the union, IBU (Inland Boatmen's Union, affiliated with the SIU, AFL–CIO) had for many years represented all the towboat personnel in a single bargaining unit. (This unit, including the supervisors, had been certified by the Board prior to 1947.) I note, however, that in rejecting the employer's various defenses, Weil found that there were not separate negotiations for the supervisors and concluded:

> Finally, the argument that supervisors, since they are covered by the contract, should have a voice in its negotiation, might have appeal if there were any reason why supervisors must be covered by the contract, but there is none. The law envisages the contrary situation and *there is no inherent disability in the concept of a separate contract for supervisors.* [168 NLRB at 597, emphasis supplied.]

[1] The Company's motion to correct the transcript, dated January 7, 1972, and its motion to amend its answer to admit that MOA is a labor organization are granted

In a later case, *Mon River Towing,* 173 NLRB 1452, 1453–55 enfd. 421 F.2d 1 (C.A. 3, 1969), the Board found that the employer violated Section 8(a)(2) and (1) by negotiating with a union committee which included a river towboat captain. Again, the captains were included in the same contract with the other towboat personnel, and again in the Trial Examiner's Decision (issued on January 12, 1968, prior to the time MOA began representing the masters and chief engineers in the present case) there was a finding that there were not separate negotiations for the supervisors. (173 NLRB at 1455.) Thereafter the Third Circuit, enforcing the Board's Order and applying the *Nassau* doctrine, ruled (421 F.2d at 7) that, if negotiation on the captains' behalf was essential for their protection, "nothing prevents Mon River from negotiating a separate contract with them."

In the present case, as discussed later, the Company and MOA did negotiate a separate agreement for the masters and chief engineers. None of the masters or chiefs participated in the negotiation or ratification of the agreement covering the remaining towboat personnel. The complaint, however, alleges that the Company violated Section 8(a)(2) and (1) by permitting these alleged supervisors to vote in a MOA election for union officers.

2. Patterns of bargaining in the industry

There has been considerable litigation concerning appropriate bargaining units for towboat personnel. The towboat crews are small, yet they perform many of the same functions as the marine officers and employees aboard large Great Lakes and deep sea ships.

As indicated by the above-cited cases—as by *Material Service Division, General Dynamics Corp*, 144 NLRB 906, 909, fn. 3, involving an overall unit represented by MOA—various unions have bargained for all towboat crew members in single bargaining units, despite the differences in skills and responsibilities, and despite the admitted or alleged supervisory status of some members of the crews. It is argued that inasmuch as they live and work closely together as a team on the small vessels, performing interdependent duties, they share common interests which can best be served without fragmentation of the bargaining unit. Although the towboat captains (or masters) and certain other members of the crew have from time to time been found to be supervisors, some employers continue to argue to the contrary—as in the present case. In *Mon River,* 173 NLRB at 1454, fn. 14, where the employer contended "that the boat captains are in effect only 'leadmen,' with authority to direct other employees in routine, nondiscretionary matters," it argued, "The operation of a small fleet of barges on the local rivers is a far cry from the sailing vessel on the high seas for many months, or military ships. Furthermore, one must consider that this is the age of instant communications, changing the amount of on-board supervision required even on ocean vessels, to say nothing of river barges." Similarly, in the present case, the Company contends that all the towboat personnel are nonsupervisory and argues that "Major decisions . . . are made by shore-based, high ranking management personnel, who maintain virtually constant radio contact with all vessels," and that the discretion and independent judgment exercised by the masters and chief engineers "are no more than would ordinarily be expected of experienced and highly skilled employees, and are insufficient to confer supervisory status on them." In a fairly recent case, a finding was made that the entire towboat crew was nonsupervisory. MOA Local President David Carlton credibly testified that the NLRB Regional Director in New Orleans ruled the towboat master, pilot, and chief engineer at Pearl River Towing Company to be nonsupervisors and that, later in negotiations, the company president stated that "he made all the decisions in that company." (The Board's records show that in *Pearl River Towing Co.;* 15–RC–4023, the Regional Director issued an unpublished direction of election on December 20, 1968, finding a unit of "all employees including captains, mates, deckhands, and the port engineer" to be appropriate. There were 13 eligible voters.) Carlton also credibly testified, on cross-examination, that on some of the smaller towboats, he has seen the master serve "as a tankerman and pumped the barges off whenever he got to his destination. He was a common laborer hooking up hoses and running pumps to discharge cargo."

On the other hand, some unions contend that various members of the towboat crews are "officers" with supervisory authority, and insist that they must be represented separately. Faced with these and differing employer contentions in river towboat cases, the Board has examined the amount of actual authority which different employers have vested in the higher-ranked towboat personnel and has ruled on a case-by-case basis. In the above-cited *Mon River Towing* case, 173 NLRB 1452, 1454–55, enfd. 421 F.2d 1 (C.A. 3, 1969), THE Board and the Court rejected the employer's contention that the river towboat *captains* were mere leadmen, and found that they were supervisors. In the recent case, *Sioux City and New Orleans Barge Lines,* 193 NLRB No. 55 (TXD, sec. III, B), the agreed unit in a stipulated consent election excluded river towboat *pilots* (along with captains and engineers), but included *mates* (along with deckhands, oilers, and cooks). The unions involved were NMU, MOA, and IBU. A union not involved in that case, MMP Local 47 (the Charging Party herein), purports to limit its membership to *supervisory* masters, mates, and pilots, and seeks to represent them separately. It (and presumably other MMP locals) follows the practice of *negotiating*—and including in its bargaining agreements—contract language agreeing that all towboat *masters, mates,* and *pilots* are vested with certain supervisory authority. In *Local 28, International Organization of Masters, Mates and Pilots, AFL–CIO (Ingram Barge Co.),* 136 NLRB 1175, 1195–1205, enfd. 321 F.2d 376 (C.A.D.C., 1963), the Board—upon the testimony of witnesses from four or five river towboat employers which had MMP Local 28 agreements containing such contract language (see 136 NLRB at 1193)—found that both *mates* and *pilots* were supervisory. Recently, in *A L. Mechling Barge Lines,* 192 NLRB No. 166, the Board found that on the present Company's river towboats, the *pilots* and also the *mates* (which the Company calls "head deckhands" and "watchmen") are nonsupervisors and are properly included in a bargaining unit with other towboat employees. (In so finding, the Board considered detailed

evidence of the status of the Company's pilots and mates in 1970—11 years after the representation hearing in the *Ingram Barge* case, which involved pilots and mates represented by a different union, at different employers, under different collective—bargaining agreements. The MOA agreement covering the Company's pilots and mates (and other employees) did not assign them any supervisory authority.) Concerning towboat engineroom personnel at different employers, the Board found *chief engineers* to be nonsupervisors in the above-cited *Material Service* case, 144 NLRB at 912, and in *Graham Transportation Co.*, 124 NLRB 960, 962, but found not only chief engineers but also *assistant engineers* to be supervisors in *Midwest Towing Co.*, 151 NLRB 658, and *Mississippi Valley Barge Line Co.*, 151 NLRB 676, enfd. *sub nom District 2, Marine Engineers Beneficial Assn., AFL–CIO* v *N L R.B.*, 353 F.2d 904 (C.A.D.C., 1965).

Thus, there have been several patterns of bargaining for towboat personnel. There have been single bargaining units, consisting of all crew members. Sometimes the "marine engineers" and "deck officers" have been represented in two separate units. In other instances, there have been one unit for the employees (e.g., oilers, deckhands, cooks, and maids or messmen), and a separate unit for the supervisory "officers" (masters and chief engineers, and sometimes also the pilots, or pilots and mates, and/or assistant engineers). Because of differences in sizes of the towboat crews and the differences in management—some employers vesting more authority than others in on-vessel personnel—the question of whether particular towboat masters, pilots, mates, chief engineers, and assistant engineers are supervisors depends upon their actual status at their particular employer.

3. Prior processing of representation case

Before discussing the merits of the present complaint case, I note the contentions made by MMP Local 47 in its brief that "This complaint proceeding is tainted with irremediable prejudicial error resulting from the Board's unlawful and improper determination in, and processing of, the related representation case."

The representation proceeding, Case 13–RC–12165, was begun on April 30, 1970, when MEBA (District 2, Marine Engineers Beneficial Association, later joined by IBU) filed a petition seeking a unit of all nonsupervisory employees, including pilots, head deckhands, and watchmen. MMP Local 47 intervened at the representation hearing held on June 1 and 2, 1970, for the purpose of protesting the inclusion of pilots, head deckhands, and watchmen (contending that they were supervisors). Shortly thereafter, on June 10, 1970, MMP Local 47 filed the original charge herein, alleging that the Company was violating Section 8(a)(2) by dealing with MOA as exclusive bargaining agent of supervisory "marine officers, namely, pilots, head deckhands and watchmen" in the same unit with towboat employees. Thereafter, exercising his discretion, the General Counsel withheld the complaint herein until after the Board issued its decision and direction of election in the representation case, 192 NLRB No. 166, dated August 27, 1971. The election is now being held in abeyance, pending the outcome of the present complaint proceeding.

Without citing any apposite authority, MMP Local 47 contends in its brief that the Board "flouted its own recognition of the statutory independence of the General Counsel" and was "usurping the General Counsel's unfettered initial discretion," by its "unprecedented, and arbitrary and capricious" failure to permit the charge in this complaint case to block the Board's decision in the representation case. MMP Local 47 argues that the Board's "unfortunate and imprudent" decision in the representation case, prejudging the matter and deciding that the pilots, head deckhands, and watchmen were not supervisors, "directly influenced and controlled" the scope of the General Counsel's complaint, and that the Board, in effect, was "instructing" the General Counsel not to allege in the complaint that the pilots, head deckhands, and watchmen are supervisors. The contention obviously lacks merit. There was no impinging on the statutory independence of the General Counsel; it was the General Counsel who, in the exercise of his own discretion, deferred issuance of the complaint in the present case until after the Board had ruled in the representation case.

MMP Local 47 further contends that the Board was in error in deciding that the pilots, head deckhands, and watchmen were not supervisors. However, that issue is still before the Board in the representation case, upon MMP Local 47's motion for rehearing and reconsideration by the Board *en banc* and request for oral argument.

B. *Alleged Interference with Administration of MOA*

1. History of bargaining

For about 10 years before 1965, all of the Company's towboat personnel were included in a single bargaining unit and were represented by MEU (Maritime Employees Union), an independent union. In 1965, the MEU masters and chiefs union was formed to represent the masters and chief engineers in a separate unit. MEU continued to represent the remaining members of the towboat crews.

In 1968, MOA defeated MEU in a stipulated consent election and was certified on April 18, 1968, for a unit of all towboat personnel, excluding masters, relief masters, chief engineers, and relief chief engineers. Negotiations began in June 1968 and concluded in March 1969, when the Company and MOA signed an agreement covering the so-called employee unit for the term, January 1, 1969, through June 30, 1970.

Meanwhile, in November 1968, a majority of the masters and chiefs voted for MOA in a private election and MOA began representing them in a separate unit. The Company and MOA reached an agreement, covering the masters, relief masters, chief engineers, and relief chief engineers, and expiring on June 30, 1970.

As previously mentioned, a petition was filed in the employee unit on April 30, 1970. An election (now held in abeyance) was directed by the Board on August 27, 1971, in an appropriate unit of "All employees including pilots, assistant engineers, head deckhands, relief head deckhands, watchmen, deckhands, oilers, cooks, maids, and

messmen, but excluding all other employees including captains, relief captains, chief engineers, relief engineers, shore-based engineers, office clerical employees, guards and supervisors as defined in the Act." MEBA and IBU jointly, NMU, and MOA are to be on the ballot.

2. Supervisory status of masters and chiefs

The Company's river towboat crews consist of 11 to 13 persons. The regular and relief crews alternate about every 25 days. When on board, the crew is divided into two watches. There are five or six persons on the forward watch (6 a.m. to noon, and 6 p.m. to midnight). The master is then on duty with the head deckhand and two deckhands, and the chief engineer works alone in the engineroom, or with an oiler on about half the boats. On the afterwatch (the remaining two 6-hour periods of the day), there are five persons on duty: the pilot and three deck employees (the watchman and two deckhands), and the assistant engineers working alone in the engineroom. The cook, and sometimes a maid or messman, is on duty around meal times.

In the above-mentioned representation case, 192 NLRB No. 166, the Board found that the Company's pilots, head deckhands, watchmen, and assistant engineers were nonsupervisors, but did not rule on the supervisory status of the masters and chief engineers.

The master, or captain, is in overall charge of the towboat and the transportation of the barges in its tow as it proceeds along the waterway. He steers the towboat on the forward watch and consults with, and gives instructions to, the pilot who does the steering on the afterwatch. He gives directions to the head deckhand and the two deckhands on his watch and decides on which watches the deckhands are to work. He is in regular contact by radio with the shore, but has on-vessel responsibility for the discipline and proper performance of all the crew outside the engineroom. He authorizes crew members to leave the towboat and has the authority to hire a crewman in an emergency. He may put a crewman off the boat for cause and the Company's usual practice is to discharge any person who has twice been put off a boat. He makes recommendations concerning promotions, demotions, transfers, and discharges. He handles certain clerical work, orders supplies over the radio, and sees that the towboat is kept in good physical shape. He is on call when off watch.

The chief engineer is in charge of the engineroom, and is responsible for keeping all mechanical equipment and systems on board the towboat in good condition. He makes repairs and performs preventive maintenance on the forward watch, and gives directions to the assistant engineer who performs similar work on the afterwatch. On about half of the Company's towboats, he is assisted on the forward watch by an oiler, whose work he directs. He is authorized to assign overtime work to the assistant engineer and oiler, to grant them time off, and to put either of them off the boat for cause. He evaluates their work and recommends their promotion, demotion, transfer, and discharge. He also makes recommendations concerning the promotion of a deckhand to oiler. He is in regular contact by radio with the port engineer, who has overall charge of all engineers and who schedules the major overhauls.

The General Counsel and MMP Local 47 contend that both the masters and the chief engineers are supervisors. The Company disputes this, contending that "Major decisions, such as those involving hiring and firing of employees; destination of the vessels; type and amount of barges to be picked up and let off, and scheduling of major overhauls are made by shore-based, high ranking management personnel, who maintain virtually constant radio contact with all vessels. The discretion and independent judgment exercised by the employees in the four disputed classifications are no more than would ordinarily be expected of experienced and highly skilled employees, and are insufficient to confer supervisory status on them." MOA contends that "The duties and authorities of the masters, relief masters, chief engineers and relief chief engineers, coupled with the continual close contact of the vessel with shore based personnel of higher managerial authority" are such that these "persons are, at most, low-level, intermediate supervisors who meet the statutory indicia of supervisors on a very low basis, if at all."

While the responsibilities of the masters and chiefs are great (the larger towboats being valued between $3 million and $4 million), the supervisory part of their duties are limited by the close supervision exercised by shore-based management personnel. Nonetheless, after considering all the evidence, including the evidence in the preceding representation case (introduced into evidence by MMP Local 47), I find that the masters and chiefs (and their reliefs) do in fact responsibly direct employees working under them and effectively recommend promotions, demotions, transfers, and discharges. I therefore find that although they are lower level supervisors, the masters, relief masters, chief engineers, and relief chief engineers do possess and exercise sufficient supervisory authority, requiring the use of independent judgment, to be supervisors within the meaning of the Act.

3. Common interests

Between December 1969 and June 1970 (the time covered by the complaint), the Company operated from five to six river towboats, the number varying from month to month. As a result, some of the towboat personnel went from one bargaining unit to the other, working at times under the masters and chiefs agreement and at other times under the employee agreement. For example, engineers Griffin and Lovekamp would work about half the time as chief engineers (in the supervisors unit) and the other half of the time as assistant engineers (in the employee unit). In past years, when business was slack, a master has stepped down to pilot, and "if things got tight enough, he'd go down to head deckhand." Masters (and relief masters) have frequently earned seniority in the employee bargaining unit as deckhand, head deckhand or watchman, and pilot. Chief engineers have often earned seniority in the employee classifications of oiler and assistant engineer.

On board the towboat, the crew works as a team, performing interdependent duties. Particularly when making up or dropping off tow, going through locks, or coping with bad weather or such emergencies as accidents, running aground, and engine failure, it is important that every member of the crew, from deckhand up, have much

experience to be able to assist in the joint effort and to assure safety for the boat and crew. There is "joint yelling and screaming and hollering" back and forth between the wheelhouse and the deck.

The master and the pilot may discuss the proper placement of the barges in the tow, or they and other members of the crew, at watch changing time, "will all get together and thrash it out." There is a lounge chair in the wheelhouse on most of the boats and various members of the crew go there to sit and talk with the master or pilot. If a deckhand has a grievance, he may discuss it with another deckhand or mention it to someone in the wheelhouse or engineroom before taking it to a union official. Crew members are required to sign a crew separation report when they are relieved by the relief crew. The book is countersigned, in their presence, by the master or chief engineer (persons in the supervisors unit) or by the pilot or assistant engineer (persons in the employee unit).

In the small quarters aboard the towboat, two crew members usually sleep in a room. Usually the master (in the supervisors unit) and the pilot (in the employee unit) have private rooms. On about half the towboats, the chief engineer (a supervisor) has a private room; on the others, he shares a room with the assistant engineer (an employee). The assistant engineer sometimes has a private room. There is only one cook, and sometimes a maid or messman, on board to serve all the members of the crew.

Thus, on these river towboats, there is not the same sharp demarcation between "officers" and "crew" as there is aboard large ships There is more contact, association, consultation, interplay, and interchange of duties between the supervisors and nonsupervisors. Some crew members go from one bargaining unit to the other as the volume of business fluctuates. All towboat personnel work, eat, and sleep in confined areas and work closely together as a team, performing interdependent duties.

4. Supervisors' intraunion activity

In December 1969, when the Company was recognizing MOA as the bargaining representative of the supervisory masters and chief engineers in one unit and the nonsupervisory members of the crews in a separate bargaining unit, MOA held its election for union officers. A total of 15 or 16 of the Company's masters and chief engineers—apparently without any actual knowledge by higher supervision—cast mail ballots in the election. (MOA had a membership of about 750 persons, about one-sixth of whom were masters and chief engineers at different towboat employers. About 98 MOA members worked for the Company.) Following the election, the Company continued to recognize and deal with MOA as the representative of the supervisors and nonsupervisors in the two bargaining units.

MOA negotiated separately for the supervisors and employees. MOA's officials (none of whom worked for the Company) represented the Union in both sets of negotiations. When bargaining for the masters and chiefs, the MOA officials were assisted by a committee selected by the masters and chief engineers. And when bargaining for the employee unit, the MOA officials were assisted by an employee committee, consisting of employees in different employee classifications. None of the Company's masters and chiefs participated in the selection of the employee bargaining committee, or in the negotiation or ratification of the collective-bargaining agreement covering the towboat employees.

The evidence does not reveal any other intraunion activity on the part of the Company's masters and chief engineers.

On board the towboats, neither the masters nor chief engineers represented the Company in the handling of grievances. The individual MOA members took their grievances directly to a MOA official, who processed them—at the first level of the contractual grievance procedure—with the Company's director of operating personnel.

Thus, the evidence shows only that masters and chief engineers voted in a union election at the same time the Company recognized MOA as the representative of the towboat crews in separate bargaining units of supervisors and employees.

5. Concluding findings

In *Nassau and Suffolk Contractors' Association,* 118 NLRB 174, 183–184, the Board established different rules for lower level supervisors (master mechanics), who were in the bargaining unit, and "company executives and high-ranking supervisors," who were outside the bargaining unit. It ruled that an employer would not be liable for lower level supervisors voting in union elections unless it could be shown that the employer "encouraged, authorized, or ratified" the intraunion activity or "acted in such manner as to lead employees to believe" that the bargaining unit supervisors were acting for and on behalf of management. On the other hand, it ruled that "company executives and high-ranking supervisors" could not lawfully "participate in elections to determine who is to administer the affairs of the union." The Board also ruled that the employer could not lawfully permit either the lower level or high level supervisors to serve on the union's negotiating committee. (118 NLRB at 187.)

Here, the General Counsel, joined by MMP Local 47, contends that under the *Nassau* doctrine, it is a violation of Section 8(a)(2) and (1) for supervisors (towboat masters and chief engineers), "*not part of the rank-and-file unit,* to vote along with the rank-and-file employees in an election for union officials." To the contrary, the Company and of the rank-and-file unit, to vote along with the rank employees MOA contend that inasmuch as the masters and chief engineers are, at most, lower level supervisors with interests which are "virtually identical" or "closely related" to the interests of those in the employee bargaining unit, their intraunion conduct should be judged by the rule applicable to lower level bargaining unit supervisors, rather than the rule applicable to company "executives and high-ranking supervisors." MOA further argues that "the facts of the present case do not give rise to a situation creating the substantive evils as contemplated by Section 8(a)(1) and (2) of the Act," and that its representation of the masters and chiefs "in a different and separate unit from the statutory employees is helpful to the insulation of the statutory employees from interference" with their Section 7 rights.

It is clear that, if the *Nassau* rule applying to lower level bargaining unit supervisors is applicable here, there would be no violation of the Act for the masters and chief engineers voting in the union election and for the Company thereafter continuing to recognize and deal with MOA. The reason is that there is no showing that the Company was even aware that the masters and chiefs were voting or that the Company did anything to indicate that they were acting on its behalf.

The General Counsel contends that the *Nassau* rule concerning lower level supervisors is inapplicable because the masters and chief engineers are outside the employee bargaining unit. The General Counsel is thus contending, in effect, that MOA's representation of the masters and chiefs in a separate bargaining unit automatically places them under the *Nassau* rule applying to "company executives and high-ranking supervisors." Like the Trial Examiner in *Banner Yarn Dyeing Corp*, 139 NLRB 1018, the General Counsel has fallen into error by distinguishing the *Nassau* rule concerning lower level supervisors from the rule concerning "company executives and high-ranking supervisors," solely on the basis of whether the supervisors are in or outside the employee bargaining unit. In *Banner Yarn,* the Trial Examiner erroneously concluded (139 NLRB at 1024–25) that *Anchorage Businessmen's Assn.,* 124 NLRB 662, 666–67—where the Board found a violation for bargaining unit supervisors voting in union elections—was inconsistent with the Nassau rule *permitting* bargaining unit supervisors to vote in union elections—absent proof of employer responsibility. (In so concluding, the Trial Examiner relied on *Geilich Tanning Co.,* 128 NLRB 501, and other cases discussed below.) The Board (139 NLRB at 1019, fn. 1) rejected the Trial Examiner's conclusion that the Board's decisions in *Anchorage* and *Nassau* were inconsistent and specifically approved the correlation of those two Decisions in *National Gypsum Co.,* 139 NLRB 916, 920–921. By so ruling, the Board made it clear that it found a violation in *Anchorage,* despite the fact that the supervisors were in the employee bargaining unit, because they were "higher level supervisors having 'managerial functions' "—that is, they came under the *Nassau* rule for "company executives and high-ranking supervisors," not under the rule for lower level bargaining unit supervisors. Therefore, inclusion in or exclusion from the employee bargaining unit is not controlling when determining whether an employer is to be held liable for supervisors voting in union elections. The more important basis for the determination is whether the supervisors are lower level supervisors—as in *Beach Electric Co*, 174 NLRB 210, and *Allied Chemical Corp.,* 175 NLRB 974, 978—or whether the supervisors are owners, executives, high-ranking supervisors, or management representatives; *Anchorage, supra,* 124 NLRB 662, 666–667, enfd. 289 F.2d 619 (C.A. 9, 1961), involving supervisors with managerial functions; *Detroit Assn of Plumbing Contractors,* 126 NLRB 1381, 1383, fn. 6, enfd. in part 287 F.2d 354 (C.A.D.C., 1961), involving job and field superintendents as well as general and job foremen, and 132 NLRB 658, involving a "high-ranking supervisor"; *Bottfield-Refractories Co*, 127 NLRB 188, 189–192, enfd. 292 F.2d 627 (C.A. 3, 1961), involving officers, owners, and management representatives; and *Employing Bricklayers' Assn of Delaware Valley,* 134 NLRB 1535, involving the executive secretary of the employer association.

The basic reasons for this distinction between lower level supervisors and management is particularly applicable here. Voting by management in union elections "is plainly a form of interference with the administration of a labor organization," and, in a closely divided vote, could result in placing management "in a position to select the union officials who are to deal with them in their separate capacity as employer agents." *Nassau,* 118 NLRB at 184. But the Company's masters and chief engineers do not represent management either in negotiations or in the grievance procedure. They are lower level supervisors, sharing common interests with the other members of the towboat crews, as found above

This is not a situation where supervisors "organize employees into one union in a context of unfair labor practices and hostility to another union." *Nassau,* 118 NLRB at 182. The masters and chiefs voted in a private election for representation by MOA several months after a large majority of the towboat employees voted in the 1968 Board election for MOA in preference to an independent or company union which had been representing them. Instead, the charge herein arose in the context of the 1970 election campaign, and was filed by a competing union, MMP Local 47, which purports to restrict its membership to supervisors and which challenges the qualification of MOA to represent both supervisors and employees. The real dispute is between MMP Local 47, which believes that a supervisors' union can best serve the interests of towboat supervisors, and MOA which believes that the interests of both towboat supervisors and employees can best be served by a single union. Such a dispute would ordinarily be resolved by the employees themselves, when they express their choice in the Board election.

The General Counsel argues that, even if MOA represents the supervisory masters and chief engineers in a separate bargaining unit, the statutory rights of the towboat employees could be adversely affected by the masters and chiefs voting in elections for union officers. Ignoring the low level of these supervisors and their common interests with the employees, the General Counsel theorizes that a union official could not "isolate his decisions from the natural influence of the membership electorate," that occasions could arise "where the interest of the rank and file employee may be in direct opposition to the interest of" the masters and chiefs, that the "mere power of the supervisors to vote may effect what that officer will do," and that therefore the Company could, through its supervisors' votes, exert "undue influence upon the statutory employees' right of full representation." In reality, the General Counsel is arguing against the basic policy determination in *Nassau,* permitting lower level supervisors to vote in union elections unless there is proof of employer responsibility.

Moreover, the Board has already applied the *Nassau* rule concerning lower level bargaining unit supervisors to a supervisory towboat captain's voting in contract ratification elections. *Mon River Towing, supra,* 173 NLRB 1452, 1455–56. The employer was not held responsible, in the

absence of evidence that it encouraged, authorized, or ratified the captain's voting, or acted in such a manner as to lead employees reasonably to believe that the captain was acting for and on behalf of management. It would certainly appear that if this *Nassau* rule applies to a towboat captain who is in the employee bargaining unit and who votes with the employees on contract ratification, it should apply here, where the masters and chief engineers are in a separate bargaining unit, and have no voice in the negotiation or ratification of the collective-bargaining agreement covering the employees. I agree with MOA that its representation of the masters and chiefs in a separate unit "is helpful to the insulation of the statutory employees from interference."

While the Board in *Mon River* found the employer not liable for the towboat captain voting in union elections, it found the employer liable for the Captain's service on the union negotiating committee—finding employer acquiescence to be unlawful interference with the administration of the union. Upon enforcement, though, the court strongly suggested that there would have been no unlawful interference if the towboat captain had been in a separate supervisors unit and if the union negotiating committee on which he served had engaged only in bargaining for a separate contract covering the supervisors (as in the present case). The court held, *Mon River Towing* v *N.L.R.B.*, 421 F.2d 1, 7 (C.A. 3, 1969):

> [I]f negotiations on their own behalf is essential to adequately protect the captains, *nothing prevents Mon River from negotiating a separate contract with them.* There seems to be no reason, therefore, to overlook the possibility of even small detriment to the effective representation of employee interests inherent in having a supervisor participate as a member of the union negotiating committee. [Emphasis supplied.]

Here, the Company and MOA have followed this suggestion (first made in *G & H Towing Co., supra,* 168 NLRB at 596–597) that the towboat supervisors be placed in a separate bargaining unit. Applying the *Nassau* rule concerning lower level supervisors to these masters and chief engineers, I find that the Company was not responsible for their voting in the election for union officers and that the Company did not violate the Act by continuing thereafter to recognize and deal with MOA as the representative of the towboat employees. I therefore grant the company motion to dismiss the complaint.

Conclusions of Law

1. The Company's towboat masters, relief masters, chief engineers, and relief chief engineers are supervisors within the meaning of the Act.
2. Under the *Nassau* doctrine, the Company did not violate Section 8(a)(2) or (1) of the Act by permitting these lower level supervisors to vote in an election for union officers and by thereafter recognizing and dealing with MOA as the representative of the towboat supervisors and employees in separate bargaining units.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

The complaint is dismissed in its entirety.