American Commercial Barge Line Company *and* Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO

Hines American Line *and* Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO. Cases 26–CA–18659 and 26–CA–18664

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS COWEN AND BARTLETT

On September 27, 1999, Administrative Law Judge Lawrence W. Cullen issued the attached decision finding, among other things, that the pilots at issue were not supervisors and that the Respondent violated Section 8(a)(3) and (1) by terminating them for participating in a strike. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions. On June 28, 2001, the National Labor Relations Board issued an order remanding the proceeding to the judge for further consideration in light of *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001); and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000).[1]

On August 16, 2001, the judge issued the attached supplemental decision on remand finding that the pilots were supervisors and that, therefore, the Respondent did not violate the Act by terminating them for participating in a strike. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the Charging Party's exceptions.

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

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as supplemented below, and to adopt the recommended Order set forth in the judge's supplemental decision.

For the following reasons, we agree with the judge's supplemental decision that the Respondent's pilots David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins were supervisors at the time they were discharged.

Section 2(3) of the Act defines "employee," and specifically excludes from that term "any individual employed as a supervisor[.]" Under Section 2(11),

> [t]he term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board has held that the possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner. See, e.g., *Health Care & Retirement Corp.*, 328 NLRB 1056 (1999); and *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). As stated by the United States Court of Appeals for the 11th Circuit, which considered the question of supervisory status of docking pilots in *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1263 (11th Cir. 1999):

> The statutory definition lists the functions of a supervisor in the disjunctive, so Cooper only needs to prove that docking pilots fulfill one of these functions in order to succeed in its claim that the pilots are supervisors. See *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 496 (5th Cir. 1980). As the Supreme Court has noted, three questions must be answered in the affirmative for an employee to be deemed a supervisor under section 2(11): "First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the

[1] We find that the Respondent's motion for reconsideration of the Board's Order remanding the proceeding to the judge is moot.

[2] All of the parties rely, to some extent, on the testimony of witnesses who were not credited by the judge. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent implies that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decisions and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] No exceptions were filed to the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Relief Captain John Bomer.

> exercise of that authority require 'the use of independent judgment?' Third, does the employee hold the authority in the 'interest of the employer'?" *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573–74, 114 S.Ct. 1778, 1780, 128 L.Ed.2d 586 (1994)[.]

We find, consistent with the judge's supplemental decision, that the pilots have authority to responsibly direct the towboat crew in their work and to assign work. They use independent judgment in exercising that authority, and they do so in the interest of the employer.

The judge credited the testimony of pilots Whitehurst, Blaine, Dunaway, Hudgins, and Scoggins. According to credited testimony of one or more of the pilots, the pilot and captain rotate 6-hour shifts. The pilot is on duty for two 6-hour shifts each day for 30 days. The pilot is the highest ranking official when the captain is off duty. The pilot is confined to the wheelhouse during his shift.[4] The pilot communicates by radio with the lead deckhand or calls him to the wheelhouse. When coming upon a lock or in connection with tow work, the pilot tells the lead deckhand what he expects to be done and the lead deckhand conveys that to the deckhands. The deckhands are supposed to do what the pilot tells them—whether directly or through the lead deckhand. The pilot seldom, if ever, wakes the captain.

The pilot has the authority to post a lookout any time he feels it is appropriate to do so. The pilot determines how many lookouts to post and when and where to post them. Although Coast Guard rules govern the posting of lookouts in bad weather, limited visibility, and very congested areas, the pilot uses his judgment to determine whether and when those conditions are met. Coast Guard rules also provide that a lookout can be posted at anytime deemed necessary by the wheelhouse navigator (in this case the captain or the pilot on watch).

The pilot may rectify a staff shortage by waking the call watch man when he determines that an extra set of hands is necessary. This can be during, for example, tow work periods, locking procedures, and tow breakup. The pilot has the discretion to use the call watch man even if that incurs overtime. The pilot can change the priority of the crew's work and instruct the crew to stop work on one assignment in order to perform a navigation assignment.[5]

In sum, the pilots assign and responsibly direct the lookouts and have the discretion to wake the call watch man. The pilots make navigation decisions based on their evaluation of nonroutine factors including the river condition, problems with the boat, a "green" (inexperienced) man on crew, the type of cargo, whether barges are full or empty, and weather and traffic conditions. The pilots do not check with others before ordering that action be taken. Indeed, when the pilot is on watch, he is the sole wheelhouse official responsible for the safety of the vessel, crew, and cargo. If a crew member does something wrong during the pilot's watch, such as causing the tow to break loose, the pilot is held responsible. The consequences of an error in the pilot's judgment can be catastrophic, including a collision causing loss of life or a chemical spill. See *Sun Refining & Marketing Co.*, 301 NLRB 642, 649 (1991) (the size, complexity, and cargo carried by a supertanker was a factor in determining that the disputed licensed officers working aboard the supertanker exercised responsible direction).

Based on the foregoing, we find that the record establishes that the pilots responsibly direct and assign the work of the crew in the navigation of the towboat and that such direction and assignment involve the exercise of independent judgment.[6] We reject the General Counsel's reliance on cases such as *McAllister Bros. Inc.*, 278 NLRB 601 (1986), enfd. 819 F.2d 439 (4th Cir. 1987), which found that pilots or other similar officers did not exercise independent judgment because, inter alia, their authority to direct employees was based on their greater technical expertise and experience rather than supervisory authority.[7] In *Kentucky River*, the U.S. Supreme Court rejected such a rationale as inconsistent with the

[4] Captains are similarly confined to the wheelhouse when navigating the vessel on their watch.

[5] If the pilot receives last-minute notice of a barge that needs to be picked up during his watch, the pilot uses his own judgment to determine where to place the barge in the configuration of the tow. The judgmental factors he uses to make that decision include the kind of cargo, where the barge is going to be dropped off, the kind of barge, and how much time there is to get the barge wired into the tow. On many routes, the pilot must navigate the tow through locks. All locks are not the same. Some locks are 1200 feet long; some are 600 feet. If a tow with 15 barges needs to go through a 600-foot lock, it is too long to make it through at once. Rather, the tow must be broken up so that nine barges go in first while the other six are tied off until the crew is able to go back and get them through the lock. Although the pilot goes through the same locks on various trips, going through those locks can vary based on a different current, the tow configuration, the wind, and the time of day.

The pilot also has the authority to stop the vessel anytime he is unable to move the vessel or determines that it is unsafe to move the vessel. The pilot uses his discretion and judgment to evaluate whether to stop based on factors such as weather, traffic, the size of the tow, the cargo, a blockage in the river, the way the boat is operating, the river stage, and the flow of the current. Although Coast Guard rules provide for stopping the vessel in limited visibility, the pilot uses his own judgment to decide whether and when that condition exists.

[6] That the pilots' directions to the deckhands were routed through the lead deckhand does not diminish their responsible direction inasmuch as the directions remain the pilots'.

[7] Similarly, in *A.L. Mechling Barge Lines*, 192 NLRB 1118 (1971), relied on by the General Counsel, the Board found the pilots were cast more in the role of leadmen and did not responsibly direct employees.

Act. The Court noted that the statutory term "independent judgment" was ambiguous with respect to the degree of discretion required for supervisory status and, thus, that it falls within the Board's discretion to determine, within reason, what scope of discretion qualifies. The Court found, however, that the Board's interpretation of "independent judgment" to exclude individuals who directed less-skilled employees based on professional judgment, technical judgment, or judgment based on greater experience contradicted the text of the Act.[8] The Court questioned "[w]hat supervisory judgment worth exercising . . . does not rest on 'professional or technical skill or experience?'" *Kentucky River*, 532 U.S. at 717 (citation omitted).

Consistent with *Kentucky River* and, as noted above, we find that the scope of discretion exercised by the pilots to direct and assign the crew involves independent judgment. Accordingly, we conclude that the pilots responsibly direct and assign employees in the interest of the Respondent—two primary indicia of supervisory authority.

Having found that the pilots possess two primary indicia of supervisory authority, we note that the pilots also possess many secondary indicia of supervisory authority. The pilots are paid by salary whereas the deck crew is paid by the day. The pilots also have better benefits, such as a paid vacation, and occupy better quarters.

As noted by the judge, the Board has previously found that pilots and mates who perform virtually the same duties as the pilots here are supervisors. *Bernhardt Bros. Tugboat Service*, 142 NLRB 851, 854 (1963), enfd. 328 F.2d 757 (7th Cir. 1964) (pilots found to be supervisors where they decide when and where to place a lookout, determine who to assign as a lookout, give orders to the crew in connection with the tow, the lookout, and the amount of power needed, and are responsible for the tow); *Organization of Masters, Local 28 (Ingram Barge Co.)*, 136 NLRB 1175, 1203 (1962), enfd. 321 F.2d 376 (D.C. Cir. 1963) (mates are supervisors where they issue orders to deckhands during locking and docking operations which require obedience for the protection of person and property).

Accordingly, we agree with the judge's conclusion that the pilots were supervisors within the meaning of Section 2(11) of the Act. We further agree that, as the pilots were supervisors, their participation in the strike was not protected by the Act. Therefore, the Respondent did not violate Section 8(a)(3) and (1) by discharging them for participating in the strike.[9] *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), enfd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

[8] The General Counsel's reliance on *Chevron Shipping Co.*, 317 NLRB 379 (1995), is also misplaced. The Court in *Kentucky River* accepted the Board's holding in *Chevron Shipping* that the disputed officers were not supervisors because their use of independent judgment and discretion was circumscribed by the master's standing orders and the Operating Regulations, which required the watch officer to contact a superior officer whenever anything unusual occurs or when problems occur. As explained above, the judgment of the pilots in the instant case is not similarly circumscribed.

ORDER

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

Rosalind Thomas, Esq., for the General Counsel.
David W. Miller, Esq. and *Cynthia K. Springer, Esq. (Baker & Daniels)* for the Respondent.
Samuel Morris, Esq. (Allen, Godwin, Morris, Laurenzi & Bloomfield), for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on September 1, 2, and 3, 1999 in Memphis, Tennessee. The complaint as amended at the hearing is based on a second amended charge filed in Case 26–CA–18659 and a third amended charge filed in Case 26–CA–18664 by Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Association of Masters, Mates and Pilots, ILA, AFL–CIO (the Charging Party or the Union) and alleges that American Commercial Barge Line Company (the Respondent or ACBL) and Hines American Line (the Respondent or Hines) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The complaint is joined by Respondent's answer thereto wherein it denies the commission of any violations of the Act and asserts certain affirmative defenses thereto.

On the entire record, including my observation of the testimony of the witnesses, and exhibits submitted and after review of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondents ACBL and Hines admit and I find that at all times material herein during the 12-month period ending October 31, 1998, Respondents ACBL and Hines have been a corporation with an office and place of business in Jeffersonville, Indiana where they have been engaged in the business of providing towboat and barge inland waterway transportation services and that Respondent Hines has operated as a division of Respondent ACBL, with an office and place of business in Jeffersonville, Indiana where it has been engaged in

[9] In view of this decision, we need not address the remaining arguments raised by the Respondent as to why it did not violate Sec. 8(a)(3) and (1) of the Act. Further, to the extent that the Respondent seeks sanctions for what it asserts was misconduct by Board agents, we find no such misconduct and we deny the Respondent's request.

the business of providing towboat and barge inland waterway transportation services. The complaint further alleges, Respondents admit and I find that at all times material herein Respondents have each in the conduct of their business, received goods valued in excess of $50,000 directly from points outside the state of Indiana. The complaint further alleges Respondents admit and I find that during the 12-month period ending October 31, 1998, Respondents ACBL and Hines in conducting their individual business operations have each derived gross revenues in excess of $50,000 for the transportation of freight in interstate commerce under arrangements with and as agents for various common carriers, each of which operates between various states of the United States and have functioned as an essential link in the transportation of freight in interstate commerce and have been a single employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent denies and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND

The Union is a labor organization of inland waterway Tugboat Pilots and Captains formed to address issues of safety, working conditions and pay and other terms and conditions of employment. The employees in this case initially learned of Pilots Agree in the fall and winter of 1997, through radio and contact with other pilots and captains and by postings on the Web as they traveled along the inland waterways in the course of their duties as river captains and pilots. The President of the Union, Richard Mathis, testified that in September of 1997, he posted a letter on the internet inviting captains and pilots of tugboats operating on the inland waterways to join Pilots Agree. This group later affiliated in February 1998, with the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO. On March 27, 1998, Mathis directed a letter to numerous towing companies including Respondents asking them to meet with Pilots Agree at a Hotel conference room in Memphis, Tennessee, to discuss recognition and wages and terms and conditions of employment of the pilots and captains. Respondent ACBL responded by letter and it declined to meet with Pilots Agree. This was the only response received by Pilots Agree. No towing company appeared at the proposed meeting in Memphis in response to the letter request of Pilots Agree. Pilots Agree called for a work stoppage of the pilots and captains throughout the industry for April 3, 1998. A number of pilots and captains responded to the request by ceasing work at midnight of April 4, 1998, and in some cases pulling the towboats and barges they were operating to shore and refusing to proceed further. Respondents' employees engaged in this work stoppage including the six alleged discriminatees, pilots David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins and relief captain John Bomer. Respondents terminated Whitehurst on April 15, 1998, Blaine on May 12, 1998, Dunaway on October 22, 1998, Hudgins on October 22, 1998, Scoggins on July 19, 1998, and Relief Captain Bomer on October 21, 1998. Respondent conceded at the hearing that each of these employees had been terminated because of their engagement in the strike. At issue in this case is whether the terminations of those employees violated Section 8(a)(3) and (1) of the Act. Central to this inquiry is whether the employees were employees under the Act so as to be entitled to the protection of the Act as employees and whether they were engaged in protected concerted activities under the Act.

The Respondent contends that each of these pilots was a supervisor and thus their work stoppage was not protected by the Act. It further contends that captains are supervisors under the Act, assuming arguendo that pilots are not supervisors and that the activity of these employees was not protected because Pilots Agree admits captains who Respondent contends are supervisors to membership and that the strike activity was thus unprotected. Respondent further contends that the strike by its employees who were on its boats at the time of the strike constituted mutiny and constituted serious misconduct so as to make their discharges lawful.

A. Status of the Pilots and Relief Captain

I find that pilots David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins and Dayton Scoggins were at all times material herein employees within the meaning of Section 2(3) of the Act. I find that relief captain John Bomer was a supervisor within the meaning of Section 2(11) of the Act. Respondent has asserted as an affirmative defense that the pilots and relief captain were supervisors within the meaning of Section 2(11) of the Act so as to exclude them from the protection accorded employees under Section 7 of the Act to engage in concerted activities concerning wages, hours, and other terms and conditions of employment. The burden is on the Respondent to demonstrate that its employees should be excluded from the protection of the Act as supervisors. The issue of supervisory status is to be decided on a case by case basis. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982); *Hicks Oil & Hickgas*, 293 NLRB 84, 91 (1989); *Purolater Products*, 270 NLRB 694 (1984).

The crew of a towboat is comprised of a captain (or relief captain) and a pilot who alternate their duties in 6-hour shifts to steer the boat, an engineer and his assistant who maintain the engine and operating parts, a mate or lead deckhand who directs the work of the deck crew who maintain the barges as they are tied together in groups of several barges which are pushed by the towboat. The deckhands also perform cleaning duties and chip off old paint from the surface of the towboat and paint it. There is also a cook who prepares the meals. While on watch the captain or pilot remain in the wheelhouse to steer the boat. The pilot reports to the captain as does the mate or lead deckhand, the engineer, and the cook. The mate or lead deckhand directs the work of the deckhands. While on his watch the pilot calls by radio to the mate or lead deckhand to inform him of upcoming bridges, locks and other structures or conditions of the river that may require lookouts at the head of the barges or otherwise to ensure safe navigation. The pilots also call to the mate or lead deckhand if they observe that there is a problem with the securement of the barges being towed or

if they observe the deckhands are not working. At the start of each shift the captain and the mate or lead deckhand discuss the configuration of the tow (the arrangement of the barges) and other clean up and maintenance work to be performed by the deckhands. If a serious problem arises, the pilot may wake the captain for handling at his discretion. All of the pilots who testified at this hearing testified that they wake up the captain if there is any serious discipline required at the moment. The captain evaluates the employees and these evaluations are turned over to land based management who review the evaluations for determination as to whether to take corrective action for adverse evaluations such as transferring the employee to another boat for additional observation, or such as counseling, suspending, or discharging employees.

At the hearing the pilots replied in the negative to virtually all of the questions propounded by the General Counsel concerning whether they had authority to and/or performed the factors set out in Section 2(11) of the Act which define a supervisor. They testified they do not have the authority to hire, transfer, suspend, layoff, recall, promote, reward, discharge, adjust grievances, or discipline employees and have never done so in the performance of their work. Pilots Whitehurst, Blaine, Dunaway, Hudgins, and Scoggins all testified they did not make work assignments or direct employees in the performance of their work. Rather they call to the mate or lead deckhand for lookout and other duties connected with going through locks in the river and if they observe any problems with the tow. The mate then is expected to handle this and direct the work of the deck crew. If the mate does not respond or correct a problem, the pilot will report this to the captain at the change of watch. Only in case of a serious problem will he wake the captain up. I credit their testimony.

In addition to his other duties the captain has several administrative duties and is the sole person in charge of the boat's allotted budget and the purchase of food. The captain does not have the authority to discharge an employee but may put him off the boat in a case of a serious infraction such as the employee being intoxicated or the employee engaging in fighting. All disciplinary problems are reported to land based management who decide and administer the appropriate discipline. The captain has the authority to promote or demote mates or leadmen while on ship at his discretion which directly affects their rate of pay. The pilot does not have this authority.

B. Analysis

I find the evidence overwhelmingly supports the conclusion that the pilots alleged as discriminatees in this case were employees within the meaning of Section 2(3) of the Act at all times material herein. Respondent has failed to meet its burden to establish that they were supervisors. The evidence presented by Respondent did not rebut the testimony of the discriminatees concerning their duties and responsibilities. In the case of relief captain John Bomer, I find the Respondent presented ample evidence of supervisory authority and duties performed by captains and relief captains to support the conclusion that they are supervisors within the meaning of Section 2(11) of the Act. Although Bomer was subpoenaed by the General Counsel, he did not appear at the hearing. The evidence presented by the Respondent of the supervisory status of its captains and relief captains is thus unrebutted. I thus conclude Bomer was a supervisor and that his engagement in the work stoppage was not protected by the Act. *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995), enf. denied 106 F.3d 484 (2d Cir. 1997). See *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), Re: supervisors. See also *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), wherein the Board held that the complexity of dispatchers responsibilities and the adverse consequences that might flow from dispatchers' misjudgments in their own work does not necessarily make their judgments supervisory.

C. The Strike

On April 3, 1997, pursuant to a call for a strike by Pilots Agree at midnight, tugboat captains and pilots of various companies including some of Respondent's captains and pilots participated in the strike. Whitehurst, Blaine, and Dunaway were not on board at the time of the call for the strike but later refused to board a boat during the strike. Relief Captain Bomer and Pilots Hudgins and Scoggins were on boats at the time of the strike and pulled the boats over to await relief. There is no contention by Respondent that this created a danger or hazard. In each case when the employees subsequently attempted to return to work, they were discharged by Respondent.

In addition to its assertion that the tugboat pilots were supervisors, Respondent also contends that the captains were supervisors and contends that the action of the pilots in striking for recognition of a union which represented Respondent's supervisors was an act Respondent could not be legally compelled to undertake. Consequently Respondent concludes that the strike activity was unprotected, citing *Rapid Armored Truck Corp.*, 281 NLRB 371 (1986). However, I find this contention has no merit in view of my finding that Respondent has not carried its burden of proving its assertion that its pilots were supervisors. Furthermore as discussed by General Counsel and Charging Party in their briefs *Rapid Armored* involved a disqualification of certification of a bargaining unit under Section 9(b)(3) which prohibits the certification of a unit of guards and nonguards. See *Sierra Vista Hospital*, 241 NLRB 631 (1979), wherein the Board held that the inclusion of supervisors did not disqualify a labor organization from representing nonsupervisors. As in this instance there has been no recognition of the Union or bargaining, there is no showing of a conflict of interest such as to disqualify the labor organization.

D. Analysis of the Strike

This was an economic strike for recognition of Pilots Agree and to persuade Respondents to engage in bargaining for improvements in wages, hours and other terms and conditions of employment. The rights of employees to engage in a lawful work stoppage or strike to promote these purposes are protected by Section 7 of the Act.

In addition Respondent contends that the strike was for recognition of a minority union and therefore unprotected. The factual matters regarding this argument were stipulated by the parties as set out in Joint Exhibit 6 as follows:

E. Stipulation

The Parties hereto, ACBL/HINES (the Employer), Pilots Agree / MMP (the Union), and the General Counsel, hereby agree for the purposes of the hearing in the matter of NLRB Cases 26–CA–18659 and 26–CA–18664, as follows

> (1) Effective June 30, 1998, ACBL Co. was merged into ACBLLLC. Effective July 1, 1998, ACBL ceased using the name Hines American Line. Prior to July 1, 1998, Hines was a division of ACBL.
>
> (2) At no time relevant to this case did the Union represent a majority of Hines or ACBL pilots and/or captains.
>
> (3) At all times relevant hereto, MMP has been a party to contracts, some of which included provisions by their terms for hiring hall administration, and provisions for industry advancement funds.
>
> (4) The Union engaged in a work stoppage against Hines/ACBL, as well as other employers, that began on April 4, 1998.

Respondent also contends that the strike constituted mutiny. Respondent acknowledges that the work stoppage did not create a danger or a hazard. No reports of the work stoppage were made to the U.S. Coast Guard or any other governmental agency. While an employee can be permanently replaced for honoring a picket line or otherwise engaging in an economic strike, he or she may not lawfully be discharged for doing so. *NLRB v. International Van Lines*, 409 U.S. 48, 52–53 (1972); *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165 (1999).

I find no merit to Respondents' argument that the strike was unprotected because its purpose was to obtain recognition of a minority union of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO. At the time of the strike in April 1997, the employees were seeking improvements in wages and hours and other terms and conditions of employment. These are protected rights under Section 7 of the Act. Assuming arguendo that they also sought recognition of Pilots Agree, this did not serve to render the strike unprotected. *Mine Workers Dist. 50 v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956); *NLRB v. Drivers Local 639 (Curtis Bros.)* 45 LRRM 2975 (1960).

Respondents' contention that the strike constituted mutiny and was thus unprotected is without merit. As set out above, three of the pilots were not on boats at the time of the strike but refused to board boats when subsequently ordered to do so. With respect to the Relief Captain and the two pilots who were on boats at the time of the strike, there was no proof of any action taken by them except to inform the Respondent of their intention to support the strike and pull their boats to a landing and await relief. Respondent's Vice President conceded at the hearing that there is no contention that their actions in pulling the boats over to a landing created a danger or hazard. Nor has any misconduct on their part been established by the Respondent. I find *Southern SS Co. v. NLRB*, 316 U.S. 31 (1942), and 18 U.S.C. 2192 cited by Respondent does not apply to the facts of this case as that case involved engagement by crew members in conduct violative of a criminal mutiny statute whereas the instant case involved merely a work stoppage as found protected in *Pantex Towing Corp.*, 258 NLRB 837, 842 (1981).

I find that General Counsel has established a prima facie case that the alleged discriminatees were discharged in retaliation for their engagement in concerted activities by participating in the strike, which was protected activity under Section 7 of the Act. I find Respondent has failed to rebut the prima facie case with respect to the pilots by the preponderance of the evidence. I find that Respondent has rebutted the prima facie case with respect to Captain Bomer. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), affirmed in *NLRB v. Transporation Management Corp.*, 462 U.S. 393 (1983).

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Pilots Agree is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by terminating its employees David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins.
4. Respondent did not violate the Act by its termination of Captain John Bomer.
5. The above unfair labor practices in connection with the business engaged in by Respondent as set out above have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies and purposes of the Act including the posting of an appropriate notice.

It is recommended that Respondent offer immediate reinstatement to David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins to their former positions or to substantially equivalent ones if their former positions no longer exist, and that it make them whole for all loss of pay and benefits sustained as a result of the discrimination against them, with backpay and benefits to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest shall be computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 USC, Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, American Commercial Barge and Hines American Line, a single employer, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Discharging its employees because of their engagement in union activities.

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

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, offer reinstatement to David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary, any employees in that position.

(b) Make David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision, with interest.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discrimination against David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins and within 3 days thereafter notify them that this has been done and that the discriminatory action will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix[2]." Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

As to any violations not specifically found, the complaint is dismissed.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection

To choose not to engage in any of these concerted activities

WE WILL NOT discharge our employees because of their engagement in union activities.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights previously enjoyed and will make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful action taken against David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins, and Dayton Scoggins and notify them within 3 days thereafter in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

AMERICAN COMMERCIAL BARGE LINE COMPANY AND HINES AMERICAN LINE

Rosalind Eddins, Esq., for the General Counsel.
David W. Miller, Esq. and *Cynthia K. Springer, Esq.* for the Respondent.
Samuel Morris, Esq., for the Charging Party.

SUPPLEMENTAL DECISION ON REMAND

LAWRENCE W. CULLEN, Administrative Law Judge. I issued my original decision in this case on September 27, 1999. In my decision I found that Respondents American Commercial Barge Line Company (ACBL) and Hines American Line (Hines) are in the business of providing towboat and barge inland waterway services and that Respondent Hines has operated as a division of Respondent ACBL and they are a single employer within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act. I also found the Union is a labor organization of inland waterway Tugboat Pilots and Captains formed to address issues of safety, working conditions and pay and other terms

and conditions of employment, within the meaning of Section 2(5) of the Act.

The Union called for a work stoppage of pilots and captains in the industry for April 3, 1998. A number of pilots and captains responded to the Union's call by ceasing work at midnight on April 4, 1998, and in some cases pulling the towboats and barges to shore and refusing to proceed further. Certain of Respondents' employees engaged in this work stoppage including the six alleged discriminatees, pilots David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins and Dayton Scoggins, and relief captain John Bomer. Respondent terminated all six employees and conceded at the hearing that each of these employees had been terminated because of their engagement in the strike. Respondent's vice president conceded at the hearing that there is no contention that certain of the discriminatees' actions in pulling the boats over to a landing created a danger or hazard. I also found that no misconduct on the discriminatees' part had been established by the Respondent. The issue in this case is whether the terminations of these employees violated Section 8(a)(3) and (1) of the Act. Central to this inquiry is whether the pilots and relief captain were employees under the Act so as to be entitled to the protection of the Act as employees and whether they were engaged in protected concerted activities under the Act. Respondent contended at the hearing that the pilots and the relief captain were supervisors and thus their work stoppage was not protected by the Act.

I found that the pilots were, at all times material herein, employees within the meaning of Section 2(3) of the Act. I found that relief captain John Bomer was a supervisor within the meaning of Section 2(11) of the Act. I found the burden was on the Respondent to demonstrate that its employees should be excluded from the protection of the Act as supervisors.

The factual findings in my decision are as follows:

> The crew of a towboat is comprised of a captain (or relief captain) and a pilot who alternate their duties in six hour shifts to steer the boat, an engineer and his assistant who maintain the engine and operating parts, a mate or lead deckhand who directs the work of the deck crew who maintain the barges as they are tied together in groups of several barges which are pushed by the towboat. The deckhands also perform cleaning duties and chip off old paint from the surface of the towboat and paint it. There is also a cook who prepares the meals. While on watch, the captain or pilot remain in the wheelhouse to steer the boat. The pilot reports to the captain as does the mate or lead deckhand, the engineer, and the cook. The mate or lead deckhand directs the work of the deckhands. While on his watch the pilot calls by radio to the mate or lead deckhand to inform him of upcoming bridges, locks and other structures or conditions of the river that may require lookouts at the head of the barges or otherwise to ensure safe navigation. The pilots also call to the mate or lead deckhand if they observe that there is a problem with the securement of the barges being towed or if they observe the deckhands are not working. At the start of each shift the captain and the mate or lead deckhand discuss the configuration of the tow (the arrangement of the barges) and other cleanup and maintenance work to be performed by the deckhands. If a serious problem arises, the pilot may wake the captain for handling at his discretion. All of the pilots who testified at this hearing testified that they wake up the captain if there is any serious discipline required at the moment. The captain evaluates the employees and these evaluations are turned over to land based management who review the evaluations for determination as to whether to take corrective action for adverse evaluations such as transferring the employee to another boat for additional observation, or such as counseling, suspending, or discharging employees.
>
> At the hearing the pilots replied in the negative to virtually all of the questions propounded by the General Counsel concerning whether they had authority to and/or performed the factors set out in Section 2(11) of the Act which define a supervisor. They testified they do not have the authority to hire, transfer, suspend, layoff, recall, promote, reward, discharge, adjust grievances, or discipline employees and have never done so in the performance of their work. Pilots Whitehurst, Blaine, Dunaway, Hudgins, and Scoggins all testified they did not make work assignments or direct employees in the performance of their work. Rather they call to the mate or lead deckhand for lookout and other duties connected with going through locks in the river and if they observe any problems with the tow. The mate then is expected to handle this and direct the work of the deck crew. If the mate does not respond or correct a problem, the pilot will report this to the captain at the change of watch. Only in case of a serious problem will he wake up the captain. I credit their testimony.
>
> In addition to his other duties the captain has several administrative duties and is the sole person in charge of the boat's allotted budget and the purchase of food. The captain does not have the authority to discharge an employee but may put him off the boat in a case of a serious infraction such as the employee being intoxicated or the employee engaging in fighting. All disciplinary problems are reported to land based management who decide and administer the appropriate discipline. The captain has the authority to promote or demote mates or leadmen while on ship at his discretion which directly affects their rate of pay. The pilot does not have this authority.

Based on the foregoing facts I concluded that the evidence overwhelmingly supported the conclusion that the pilots alleged as discriminatees in this case were employees within the meaning of Section 2(3) of the Act at all times material herein and that Respondent had failed to support its burden to establish that they were supervisors. I further found that the evidence presented by Respondent had not rebutted the testimony of the discriminatees concerning their duties and responsibilities. I also found, however, that Respondent had presented ample evidence of supervisory authority and duties performed by captains and relief captains to support the conclusion that they were supervisors within the meaning of Section 2(11) of the Act. Although Bomer was subpoenaed by the General Counsel,

he did not appear at the hearing. I thus found that the evidence presented by the Respondent of the supervisory status of its captains and relief captains was unrebutted and concluded that Bomer was a supervisor and that his engagement in the work stoppage was unprotected.

I found that this had been an economic strike for recognition of Pilots Agree and that the pilots' engagement in the strike was protected, that the General Counsel had established a prima facie case that the pilots were discharged in retaliation for their engagement in concerted activities by participating in the strike, which was protected activity under Section 7 of the Act. I found Respondent had failed to rebut the prima facie case with respect to the pilots by the preponderance of the evidence and had violated Section 8(a)(3) and (1) of the Act by terminating the pilots. I found that Respondent had not violated the Act by its termination of relief captain John Bomer. The Respondent has excepted to my findings regarding the status of the pilots.

Subsequent to my decision in this case, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001). Two Circuit Courts in *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001), and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2001), issued decisions denying enforcement of the Board's decisions concerning the status of individuals similar to the pilots in this case. On June 28, 2001, the Board remanded this case to me for review in light of these three decisions and the issuance of a supplemental decision. I was also directed to address the issue of whether the record should be reopened to take additional evidence on the issue of whether the pilots "assign" and "responsibly direct" employees and on the scope or degree of "independent judgment" used in the exercise of such authority.

On July 10, 2001, I issued a Notice and Invitation to File Briefs with me on July 30, 2001, addressing the issues and matters setout by the Board's Order Remanding. On July 30, the General Counsel and Respondent filed their briefs. I subsequently received the Charging Party's brief which had been sent to an incorrect address. All briefs have been considered. With respect to whether the current record contains sufficient evidence for me to address the issues raised by the Board's Order, the General Counsel contends that the two days of testimony and substantial documentation in the record concerning the authority and job duties of the pilots is sufficient to address whether the pilots "assign" and "responsibly direct" employees and the degree of "independent judgment" exercised under such authority. The General Counsel thus contends that the reopening of the record is not warranted as the current state of the record is sufficient for the administrative law judge to issue a supplemental decision addressing the issues raised by the Board's Order. Respondent asserts in its brief that on July 17, 2001, it filed a Motion and Memorandum Requesting Reconsideration of the Board's Order Remanding Proceeding to the Administrative Law Judge. It asserts that the Motion remains pending before the Board and that the filing of the instant brief should not be considered a waiver of that motion. In its brief, Respondent asserts that since the administrative law judge (ALJ) found ACBL's pilots performed none of the 12 indicia of supervisory status, "it is not necessary nor legally appropriate, for the ALJ to consider whether the pilots exercise independent judgment." Respondent also asserts in brief that "The NLRB did not invite, and ACBL strongly opposes, any effort by the ALJ to revisit his Decision on any issue beyond the questions of 'independent judgment.'" Respondent asserts that it "is satisfied to have the NLRB correct those errors already raised in ACBL's exceptions."

After a review of the General Counsel's and Respondent's position and the record as a whole, I find the record contains sufficient evidence for the undersigned to address the issues raised by the Board's Order.

Section 2(3) of the National Labor Relations Act excludes supervisors from the protection of the Act. 29 USA §152(3). Section 2(11) of the NLRA defines supervisor as:

> Any individual having *authority, in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, or discipline other employees, *or responsibly to direct them*, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment*. [Emphasis added.]

Section 2(11) requires an affirmative answer to three questions, if an employee is to be deemed a supervisor. *NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994). (1) Does the employee have authority to engage in one of the 12 activities listed in Section 2(11); (2) Does the exercise of that authority require the use of independent judgment; and (3) Does the employee hold their authority in the interest of the employer? For the reasons hereinafter setout in this decision, I find that each of the above questions should be answered in the affirmative.

With respect to the Supreme Court's ruling in *Kentucky River*, the Court upheld the Board's rule that the burden of proving Section 2(11) supervisory status rests on the party asserting it. As I found in my decision that the burden of proving Section 2(11) supervisory status of the pilots rested on the Respondent, this ruling is consistent with the Supreme Court's ruling in *Kentucky River*. In *Kentucky River*, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s definition of the term "supervisor." The Court rejected the Board's interpretation that i.e. registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary or professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. The Court found the Board's interpretation of "independent judgment" to be inconsistent with the Act. However, the Court recognized that the Board has discretion to determine what scope or degree of "independent judgment" meets the statutory threshold. The Court also left open the question of the interpretation of the 2(11) definition of supervisors and the 2(12) definition of professionals and the question of the interpretation of the 2(11) supervisory function of "responsible direction" noting the possibility of distinguishing employees who direct other employees from those who direct them in specific tasks.

In her brief, the General Counsel contends that the finding in my decision regarding the status of the pilots withstands the scrutiny of the recent court decisions and should not be reversed. General Counsel notes that the Court, in *Kentucky River*, "conceded that the discretion to determine, within reason, what scope of discretion qualifies for supervisory status" rests with the Board. General Counsel contends that it is thus "within the discretion of the Board to determine whether the judgment associated with any enumerated 2(11) authority satisfies the statutory threshold to such a degree that it constitutes independent judgment." General Counsel contends that "Accordingly the Court accepted the Board's analysis and decision in *Chevron Shipping Co.*, 317 NLRB 739 (1995), that the individuals at issue were not supervisors." General Counsel contends, "Moreover, the Court left open the question of the possibility of interpreting the Section 2(11) supervisory function of 'responsible direction' by distinguishing employees who direct the manner of other's performance of discrete tasks from employees who direct other employees."

General Counsel notes: "In the instant matter the Administrative Law Judge determined that the evidence credibly established that the Respondent's pilots did not engage in any of the supervisory functions as set forth in Section 2(11) of the Act. General Counsel contends "the record (sic) reflects that the pilot's exercise of judgment in connection with the nominally supervisory functions of assigning or directing the work of others falls well below the statutory threshold required by the Act to constitute independent judgment." General Counsel notes that "for the most part the work of the deckhands require little or no guidance from the pilots, since the mate directly supervises them and the pilots' interactions are with the mates and not other deck crew. The mate is expected to handle problems and to direct the work of the deck crew." General Counsel contends that the pilots direction in this case is no different from that given by the employees in *Chevron*, where the Board found this direction was not supervisory in nature but the relationship of a "more experienced employee over one who is less skilled." She also cites *A. L. Mechling Barge Lines*, 192 NLRB 1118, 1119 (1971).

General Counsel argues also that the Circuit Court decisions cited in the Board's Remand Order do not support a reversal of the finding that the pilots are employees and not statutory supervisors. In *Empress*, supra the Court found "that the recommendations of the individuals at issue concerning hiring and firing carried great weight." The individuals in that case "played significant roles . . . evaluating employees for salary hikes and assigning and directing work." In *Empress*, the vessels involved were passenger ships with approximately 150 to 200 employees on board and the only supervisor was a shore based official. In the instant case, it is undisputed that the Respondent's captains who are on board at all times are statutory supervisors and the crew consists of less than ten individuals. In *Empress*, the direction and assignment of work by its pilots was not routine. I find *Empress* is not controlling in the instant case before me as the magnitude of the responsibility by virtue of the size of the ship and the large number of crew members and passengers and the low ratio of supervisors to non-supervisory employees in *Empress* is significantly different from the situation in the instant case.

General Counsel also contends that the decision in *Brusco*, supra does not warrant a reversal as the decision in the instant case was not inconsistent with prior Board precedent. In *Brusco*, the Court denied enforcement of the Board's order and remanded the case to the Board for an explanation of its decision as it found the Board had not adequately explained or distinguished its finding from prior Board precedent, , *International Organization of Masters, Local 28*, 136 NLRB 1175 (1962), enfd., 321 F.2d 376 (D.C. Cir. 1963); and *Bernhardt Bros. Tugboat Service*, 142 NLRB 851, enfd., 328 F.2d 757 (7th Cir. 1963). General Counsel notes that *Brusco*, involved the issue of the supervisory status of the mates as opposed to the pilots involved in this case. The Board in Brusco found that the mates were not supervisors. In *Chevron*, supra and *Mechling*, supra, the Board found similarly situated individuals to be employees. General Counsel notes that the earlier Board decisions were made when "pilots and mates were perceived by both management and crew personnel as officers" and "The term officer had a precise meaning in the industry, as one with authority to issue orders. Refusal to comply with said orders resulted in discipline. Evidence in more recent cases fails to establish such. Moreover, those decisions placed undue weight on the potential danger involved in the operation of a complex piece of machinery." General Counsel also notes that "later decisions suggest that the Board has become cognizant of the erosion of the traditional authority of wheelhouse personnel, particularly pilots," citing the recent case of *Cooper/T. Smith Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999) where the Board determined that the operation of complex machinery was insufficient to confer supervisory status upon an individual.

In my decision, I credited the testimony of the pilots who testified that they did not have the authority and/or perform the factors set out in Section 2(11) of the Act which define a supervisor. They testified they do not have the authority to hire, transfer, suspend, layoff, recall, promote, reward, discharge, adjust grievances, or discipline employees and have never done so in the performance of their work. Pilots Whitehurst, Blaine, Dunaway, Hudgins and Scoggins all testified they did not make work assignments or direct employees in the performance of their work but rather call to the mate or lead deckhand for lookout and other duties connected with going through locks in the river and if they observe any problems with the tow. The mate handles this and directs the work of the deck crew. In *Bernhardt Bros. Tugboat Service*, 142 NLRB 851 (1963) cited in *Brusco*, the trial examiner with Board approval concluded that the tugboat pilots involved in that case had the authority to direct crew members other than routinely. Relying on credited testimony, he cited the pilots responsibility at 854 "on watch, relying upon his own experience and judgment, decides if the weather is bad enough to require a lookout against shifting navigational hazards, and if so when and where to place the lookout and which crew member should be so assigned." The trial examiner concluded at 854 that the pilots had "authority responsibly to direct the crew members on their watch and that the exercise of such authority is not merely routine, but on the contrary requires the use of independent skill and judgment."

The trial examiner thus concluded that the pilots were supervisors within the meaning of the Act. Similarly in *Local 28* the ALJ with Board approval found pilots were supervisors for the same reasons.

In *Brusco*, the D.C. Circuit Court of Appeals denied enforcement and remanded the case to the Board. In its decision the D.C. Circuit remanded for the Board "to explain why its decision in this case is not inconsistent with *Local 28* and *Bernhardt Brothers* or alternatively, to justify its apparent departures." The Board has directed me to reconsider my decision in view of *Kentucky River*, *Brusco* and Empress. In my initial decision in this case I found that testimony of the pilots' assignment of work was merely a direction to the mate or lead deckhand who carried out the order. However, in the earlier *Bernhardt* and *Local 28* decision, on similar facts, the trial examiners concluded and the Board adopted their conclusions that based on the safety hazards and requirement that pilots make decisions under loosely constrained conditions, the pilots did indeed exercise direction over significant matters requiring the use of independent judgment. My review of *Bernhardt and Local 28* convince me that although I credited the pilots who testified at the hearing that they did not assign work to the crew but merely called to the mate or lead deckhand who directed the work of the crew, it is obvious that the pilots do more than this in the direction of the operation of the boat and barges as they are navigated through the inland waterways. The Orders of the pilot must be followed if the navigation of the tugboat and the tow are to be successful. It is implicit in the direction of the operation of the tugboat and barges that the pilots in the instant case perform the same duties as those in the *Bernhardt and Local 28* cases. I thus modify my credibility resolution with respect to the assignment of work and find that the pilots in the instant case direct the work of the crew and do so with the exercise of significant independent judgment under conditions that are loosely constrained by Respondent. I find that the pilots have authority in the interest of the employer to assign work to the crew and to responsibly direct them and that such authority is not of a routine or clerical nature but requires the use of independent judgment. Since the Board has directed me to analyze this case as viewed in light of the above cited precedents, I am constrained to reconsider my conclusion that the pilots were not supervisors. In so doing and in reliance on the precedent of *Bernhardt* and *Local 28*. I find the pilots were supervisory employees at the time they engaged in the work stoppage which was not protected insofar as it affected them. I accordingly find that the Respondent did not violate the Act by the discharge of the five pilots as well as by the discharge of Captain Bomer.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.
2. Pilots Agree is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein, pilots David Whitehurst, Charles Blaine, Thomas Dunaway, Bradford Hudgins and Dayton Scoggins were supervisors under Section 2(11) of the Act as was Relief Captain John Bommer.
4. As supervisors their engagement in the economic strike was unprotected and Respondent did not violate the Act by its termination of them for their engagement in the strike.

ORDER

The complaint is dismissed in its entirety.