

American River Transportation Co. and International Organization of Masters, Mates and Pilots, ILA, AFL-CIO. Case 14-CA-25753

August 18, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On March 1, 2001, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge issued his decision before the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).² The judge found that prior to May 1999 the Respondent's towboat pilots were not supervisors within the meaning of Section 2(11) of the Act because, inter alia, the pilots did not have the supervisory authority to independently assign work and responsibly direct the crew. He also found that the Respondent violated Section 8(a)(1) of the Act by making statements to employees implying that pilots were assigned supervisory duties after May 1999 to discourage their union or protected concerted activity. He further found that the post-May 1999 assignment of supervisory duties to the pilots violated Section 8(a)(1) and (3) of the Act.

We reverse the judge's findings and shall dismiss the complaint in its entirety. As more fully discussed below, the record shows that the pilots were, at all relevant times, statutory supervisors based on their authority to responsibly direct and assign employees.³ We therefore

¹ The Respondent has excepted to some of the judge's credibility findings. 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In that decision, the Supreme Court rejected the Board's interpretation of the phrase "independent judgment," which appears in Sec. 2(11)'s definition of the term "supervisor."

³ The Respondent additionally argues that its pilots have supervisory status based on their authority to effectively recommend hiring; effectively recommend promotion; effectively recommend layoff and recall from layoff; reward employees; discipline, and effectively recommend

find that the Respondent's challenged treatment of its supervisor pilots did not violate the Act.

Relevant Facts

The Respondent uses towboats to push strings of barges carrying freight along the Mississippi and Illinois Rivers. The barges are about 200 feet long and the entire tow may extend over 1000 feet. Each of the Respondent's 30 towboats operates with a crew of 9-10 individuals, 24 hours a day, 7 days a week, for most of the year. The captain, the chief engineer, a watchman, and a deckhand generally work the "forward watch" consisting of two shifts from 6 a.m. to noon and 6 p.m. to midnight. The mate, the pilot, a deckhand, and the assistant engineer/oiler/deckineer generally work the "after watch" consisting of two shifts from noon to 6 p.m. and midnight to 6 a.m. The cook and a call watchman work either shift whenever needed. The members of the deck crew are assigned to the vessels by crew dispatchers, and to a particular watch by the captain or the mate. The captain is in complete command of all phases of the vessel operation at all times, regardless of shift. If the captain is off the boat for any reason, the pilot is expected to stand in for the captain as the person in charge of the entire boat, and pilots have done so. The pilot is the highest ranking official when the captain is off duty.

The pilot is responsible for the safe transport of the vessels, cargo, and the crew during his watch. Like the captain, the pilot navigates the boat and tow from the wheelhouse. As the boat and the tow move along the river, the crew performs a variety of tasks connected with dropping off barges from the tow, adding new barges to the tow, and helping the vessel maneuver locks and bridges—all under the pilot's control. During the locking process, the pilot will frequently rely on a crew member to serve as a "lookout." The lookout stands on the tow or boat, and conveys information to the pilot about distances and speed as the lock is approached and entered. The pilot often will require crew members to attach a line to a stationary fitting in the lock and then use the line to pull the tow or boat towards the lock's wall. In some situations, the pilot has the crew attach an "assist" tugboat to the front of the tow to help direct the tow into the lock. The pilot also often relies on the crew for a lookout or an assist tug to help him safely maneuver the vessel through bridges that span the river.

When the crew is working on the tow, the pilot generally uses a radio to transmit, through the mate, his directives to the deck crew. For instance, when coming upon

discipline of, employees. In view of our resolution of the case, we find it unnecessary to pass on these additional arguments and the judge's corresponding findings pertaining to them.

a lock or in connection with tow work, the pilot tells the mate what he expects to be done, and the mate conveys that to the rest of the deck crew and oversees the work of the crew. The pilot can also order the crew members to perform tasks such as repairing lights, cleaning windows, fixing depth finders, or other maintenance tasks. The deck crew is supposed to do what the pilot says—whether directly or through the mate. As part of his authority to require a crew member to perform tasks that affect the navigation of the vessel or tow, the pilot may also 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 for the safety of the boat, tow, and crew.

Navigation is a complex and skilled undertaking that requires the pilot to take into account such factors as time of day, weather, speed and direction of the wind, depth and width of the river channel, speed of the current, size and configuration of the tow, barge draft, capabilities and reliability of the vessel and its electronic equipment, the maneuverability of the vessel and tow, the presence or absence of depth finders and other aides to navigation, the number of vessels in the area, and the direction the vessel is traveling. The navigational decisions that the pilot makes determine what tasks the mate and deck crew need to perform. For instance, 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. The pilot's authority to direct the crew becomes even more critical in the pilot's handling of emergency situations arising on the after watch.

During his work shifts, the pilot is the contact person for communications to the boat from land-based management, fleeting operations, and other boats. The pilot reports to both the captain of the boat and the port captain. The pilot receives officer's benefits, has better sleeping quarters than the deck crew, and is the second highest paid person on the boat. The pilot must also undergo an extensive 3½-year training program. He is required to have a Coast Guard license to operate uninspected towing vessels, and he must follow the many Coast Guard regulations or else risk losing his license and his pilot's job.

The Respondent's towboat pilots have never been represented by a union for purposes of collective bargaining. In 1997, a labor organization known as "Pilots Agree" began a campaign to organize captains and pilots working for several river barge companies, including the Respondent. In April 1998, Pilots Agree initiated a strike against those employers. Roughly one third of the captains and two thirds of the pilots employed by the Re-

spondent at that time participated in the strike. The Respondent discharged the striking captains, but it reinstated the striking pilots after the strike ended.

In September 1998, Masters, Mates and Pilots Union filed a petition seeking to represent a unit composed of the Respondent's towboat pilots. The Regional Director issued a decision and direction of election rejecting the Respondent's contention that the pilots were supervisors. A Board panel majority denied the Respondent request for review of the Regional Director's decision.⁴ The election was subsequently held, the Union failed to obtain a majority of the valid votes counted, and the Board issued a certification of results on February 26, 1999. However, the Union's efforts to organize the pilots continued.

Beginning in May 1999, the Respondent conducted training sessions for its pilots. John David Cook, the Respondent's vice president of operations, spoke at these training sessions, including the one held on June 8, 1999. Cook told the pilots that the Respondent had been forced to make changes in the past to respond to factors such as drought and flood. He stated that the Respondent would be changing again in response to what it had learned during the 1998 Pilots Agree strike. Cook explained that prior to the strike the pilots had been seen as persons with virtually no "say-so" in the management of the boat. Cook said that the Respondent was now giving pilots more "say-so" in management. Cook concluded by stating "[r]est assured," "we will survive Pilots Agree of '98." At these training sessions, the Respondent informed pilots that new duties were being assigned to them and that these new duties would be effective September 1999. In this connection, the Respondent issued a new written pilot job description in May 1999, which included both some old and new duties for the pilots. Later, the job description was supplemented by the Respondent's distribution of a written "additional responsibilities" memorandum for pilots in September 1999. Both before and after May 1999, the pilots' responsibility to make navigational decisions existed, and they exercised their authority to assign and direct a crew member in the performance of tasks involving the navigation of the vessel and tow, as described above.

Parties' Contentions

The Respondent argues, contrary to the judge's decision, that its pilots possessed supervisory authority and duties prior to May 1999. It contends, *inter alia*, that its pilots were authorized to assign or responsibly direct work and exercise independent judgment in making work

⁴ In his partial dissent, former Member Hurtgen indicated that he would have granted review as to the pilots' supervisory status.

assignments and directing the crew. The Respondent asserts that the Supreme Court's decision in *Kentucky River*, supra, supports finding supervisory status for the pilots. The Respondent also argues that Cook's June remarks are protected by Section 8(c) of the Act and that any modification, formalization, and assignment of its pilots' supervisory duties in May and September 1999 were lawful.

The General Counsel, in agreement with the judge's decision, argues that the Respondent did not meet its burden of proving supervisory status for the pilots. The General Counsel contends, inter alia, that the Respondent did not historically treat its pilots as supervisors; it never informed its pilots that they had supervisory authority; and the pilots possessed none of the Section 2(11) indicia of supervisory status. The General Counsel maintains that the Supreme Court's *Kentucky River* decision does not require any factual or legal findings different than those made by the judge, and that the judge's findings of violations should be upheld.

Discussion

Section 2(11) of the Act defines "supervisor" as:

[A]ny individual having the 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.

Pursuant to this definition, employees are statutory supervisors if they hold the authority to engage in any of the supervisory functions specified in Section 2(11), their exercise of such authority requires the use of independent judgment, and their authority is held in the interest of the employer. The possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status. The burden of proving supervisory authority is on the party asserting it.⁵

We find that at all times relevant the Respondents' pilots have been supervisors within the meaning of Section 2(11). They 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. Our finding that the Respondents' pilots are statutory supervisors based on their authority to responsibly direct and assign employees is consistent with the approach taken by the Board in several similar post-*Kentucky River* pilots

cases. In those cases, the Board found that the pilots at issue used independent judgment in exercising their authority to responsibly direct the towboat crew in their work and to assign work to the crew. See *Ingram Barge Co.*, 336 NLRB 1259 (2001); *Alter Barge Line, Inc.*, 336 NLRB 1266 (2001); and *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002). For instance, in *American Commercial Barge Line Co.*, id. at 1072, the Board considered that, "[c]onsistent with *Kentucky River*, . . . the scope of discretion exercised by the pilots to direct and assign the crew involves independent judgment."⁶

Here, the Respondent's pilots have the authority to make assignments and reassignments of the crew and order the crew to perform particular tasks such as standing lookout, repairing lights, cleaning windows, and fixing depth finders. During the course of navigation, the pilots use independent judgment to determine that the assignment of certain tasks to the crew is necessary for the safe passage of the boat and tow.⁷ The pilots do not check with others before ordering that action be taken.⁸ That the pilots' instructions and orders often are routed through the mate does not diminish the pilots' responsible direction inasmuch as the instructions and orders remain those of the pilots.⁹ The pilots are in charge of the after watch and serve as the sole wheelhouse official responsible for the safety of the vessel, crew, and cargo. They have authority over the crew during emergencies. Finally, the pilots also possess the following secondary indicia of supervisory authority; higher pay, better benefits, and better sleeping quarters.

Our finding of supervisory status for the Respondent's pilots means that the complaint allegations involving them must be dismissed. An employer may lawfully modify, formalize, or add to the authorities and duties of its supervisors, and it may take action against its supervisors for their participation in union activity. Similarly, the Respondent may make statements to supervisors which might violate Section 8(a)(1) if made to employees. Accordingly, Cook's statements at the June training session did not violate Section 8(a)(1) of the Act and the

⁶ Our recent adoption of the judge's supplemental decision in *Marquette Transportation/Bluegrass Marine*, 346 NLRB No. 54 (2006), lends further support for the result reached here because the responsibilities, authorities, and duties of the Respondent's pilots are strikingly similar to those possessed by the *Marquette* supervisor pilots.

⁷ See *Alter Barge Line, Inc.*, supra, at 1271 (supervisor pilots must judge how best to apply the skills of the crew).

⁸ That the pilots' orders are based on their extensive training, experience, and skill as navigators is not inconsistent with their exercise of independent judgment in directing and assigning work of the crew. See *American Commercial Barge Line Co.*, supra, at 1071–1072.

⁹ See id. at 1071.

⁵ *Kentucky River*, 532 U.S. at 711–713.

Respondent's distribution of the job description and the "additional responsibilities" memorandum to the pilots and the corresponding assignment of purported new duties to the pilots did not violate Section 8(a)(1) and (3) of the Act.

ORDER

The complaint is dismissed.

MEMBER WALSH, concurring in the result.

I concur in the result reached by my colleagues, but not in their rationale. In particular, I do not agree that the majority's analysis of the pilots' alleged authority to assign and to responsibly direct other employees, or of the pilots' alleged exercise of independent judgment, is necessarily the proper way to harmonize the result in this case with the concerns expressed by the Supreme Court in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Nonetheless, I concur in the result based solely on the fact that I acknowledge that the material facts concerning the supervisory status of the Respondent's pilots cannot be meaningfully distinguished from those in current Board precedent involving the same pilot classification in which supervisory status was found. See *Marquette Transportation/Bluegrass Marine*, 346 NLRB No. 54 (2006), and cases cited therein. By citing those cases, however, I do not necessarily agree that they were properly decided.

Paula B. Givens, Esq., for the General Counsel.

Scott V. Rozmus, Esq., *Jerry McInnis, Esq.*, and *Darren M. Mungerson, Esq. (Jenner & Block)*, of Chicago Illinois, for the Respondent.

John M. Singleton, Esq., of Linthicum Heights, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in St. Louis, Missouri, over the course of 10 days in May, July, and September 2000. The initial charge was filed by the International Organization of Masters, Mates & Pilots, AFL-CIO (the Union), on September 20, 1999, against American River Transportation Company (the Respondent or ARTCO). The Union filed an amended charge on December 27, 1999, and the complaint was issued on December 30, 1999.

The Respondent is in the business of transporting freight by river barge. On September 24, 1998, the Union filed a petition with the Board asking to be certified as the bargaining representative of the Respondent's pilots. The Respondent argued that the petition should be dismissed and contended that pilots were statutory supervisors under Section 2(11), and therefore not "employees" who had the right to bargain collectively. On November 20, 1998, the Director of Region 14 issued a decision directing that an election be held, and rejecting the Respondent's contention that pilots were supervisors. The Re-

spondent asked that the Board review this decision, but the Board denied that request on January 21, 1999. A representation election was held, and on February 26, 1999, results were certified showing the union had failed to garner a majority of the valid ballots cast.

Subsequent to the election, the Respondent called its pilots together for a series of meetings and issued certain training and administrative documents to them. The complaint alleges that in the course of these activities the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily assigning supervisory duties to pilots and by making statements to pilots implying that the Respondent had assigned the supervisory duties to discourage union support and membership. The Respondent filed an answer denying the essential allegations of the complaint. The Respondent re-asserted its contention that pilots have always been statutory supervisors within the meaning of Section 2(11)—a contention which, if accepted, would mean that the pilots did not have rights under the Act that could have been violated by the assignment to them of supervisory duties or the statements by the Respondent regarding such assignment.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation with its principal office in Decatur, Illinois, is engaged in the interstate transportation of freight by river barge. During the 12-month period ending November 30, 1999, the Respondent derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Missouri directly to points outside the State of Missouri. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Prior representation case decision

On January 21, 1999, in a prior proceeding, the Board upheld a decision by the Director of Region 14 that the Respondent's pilots and pilots-in-training (pilots B/steersman) constituted a unit appropriate for purposes of collective bargaining. (GC Exh. 2C.) The decision upheld by the Board explicitly rejected the Respondent's contention that pilots were statutory supervisors under Section 2(11) of the Act. (GC Exh. 2B.) The decision noted that it is the towboat captain, not the pilot, who is responsible for deciding which crew members will work on which shifts, recommending promotion of watchmen and mates, and recommending promotion (with the mate) of deckhands. The decision found that the Respondent's pilots did not have authority to perform those activities, nor did they have the

¹ The Charging Party Union did not file a brief.

authority to transfer, suspend, lay off, recall, promote, assign, or reward members of the crew. The decision observes that although the navigator of the vessel—regardless of whether it is the pilot or the captain—communicates directions to the deck crew during certain procedures, “[i]n practice the navigator and the crew are faced with performing all of these procedures on a regular basis, and that crew members generally need little to no direction.” The decision indicates the directions given to crew by the Respondent’s pilots are “routine in nature” and do not “require the use of independent judgment.” The Regional Director acknowledged that pilots use considerable experience and skill in navigating the boats and tows, but cited Board precedent that when a skilled worker directs his helpers, such direction is not sufficient to make the skilled worker a supervisor. The decision concluded that the “duties and responsibilities of pilots do not reflect the degree of responsible direction or effective recommendation necessary to confer supervisory stat[us] within the meaning of Section 2(11) of the Act.” In addition to rejecting the argument that the pilots were supervisors, the decision rejected the Respondent’s argument that the Union was not a bona fide labor organization, and accepted the Respondent’s argument that pilots in training (pilots B or steersmen) shared a community of interest with the pilots and should be included in the unit with the pilots.²

2. The Respondent’s towboat operation

The Respondent operates approximately 30 river towboats, also known as “line boats,” on the Mississippi River and the Illinois River.³ The towboats push groups of from 15 to 48 river barges—called “tows”—which carry grain, grain products, salt, coal, steel, fertilizer, vegetable oils, beverage alcohol, denatured alcohol, and caustic soda. The Respondent transports freight primarily for the Archer Daniels Midland Company (ADM), although approximately 30 percent of the freight is not ADM-related.⁴ The barges themselves are quite large—between 195 and 200 feet long—and the entire tow may be over 1000 feet in length.

The Respondent’s towboats operate 24 hours a day, 7 days a week, and upwards of 350 days a year. Typically, a crew

boards for a 30-day period or “trip” and then is relieved by another crew which boards for the next 30-day period. The towboats operating on the “upper” Mississippi (north of St. Louis) and the Illinois River have crews of 10—the captain (also known as the “master” of the vessel), the watchman, the chief engineer, the mate, the pilot, two deckhands, an assistant engineer/oiler/deckineer, a call watchman, and a cook. Each day is divided into four shifts of 6 hours each. The shifts from 6 a.m. to noon, and from 6 p.m. to midnight are known as the “forward watch.” The captain, the chief engineer, a watchman, and one deckhand, generally work on the forward watch. The shifts from noon to 6 p.m. and from midnight to 6 a.m., are known as the “after watch” or “aft watch.” The mate, the pilot, one deckhand, and the assistant engineer/oiler/deckineer generally work on the after watch. The call watchman works when an additional deckhand is needed, regardless of shift, but he or she is not permitted to work more than 12 hours during a 24-hour period. The captain and the mate decide whether to wake the call watchman. (Tr. 83, 85, 416, 556–557, 1726–1727.)⁵ The cook works based on when meals are prepared and served. On the lower Mississippi (south of St. Louis) the towboats have a crew of nine persons. The crew members and the shifts worked are the same as on the upper Mississippi, except that there is no assistant engineer/oiler/deckineer. The captain is in complete command of all phases of vessel operation at all times, regardless of shift. (GC Exh. 76, p. 2.)

The Respondent’s towboats have five decks and vary in size and horsepower, but one consistent feature is that the uppermost deck of the boat is the “wheelhouse.” The wheelhouse has windows all the way around and contains navigational controls and the displays for navigational equipment such as depth finders.⁶ The wheelhouse also contains a facsimile (FAX) machine, telephones, and a radio. These are used for communicating with the land-based component of the Respondent’s operation and with other vessels. The captain navigates the boat from the wheelhouse on the forward watch, and the pilot navigates from the wheelhouse on the after watch. During their shifts, the chief engineer and the assistant engineer are usually in the engine room, and the deck crew (which includes the mate, watchman, and deckhands) works on the tow and at various places around the vessel. The members of the deck crew are assigned to the vessels by crew dispatchers, and to a particular watch by the captain or the mate.

As the vessel and tow move along the river, the crew performs a variety of types of tasks. One type is called “tow work,” which means dropping off barges from the tow, and adding new barges to the tow. The barges in a tow are held together by a system of cables, called “wires,” that are wrapped around stationary fittings on the barges. Tow work generally takes place in staging areas on the river, known as “fleets.” The configuration of the barges in the tow must sometimes be

² Despite the prior decision, affirmed by the Board, in the Representation case, the Respondent is entitled to relitigate the issue of the supervisory status of pilots in this unfair labor practice case alleging violations of Sec.8(a)(1) and (3). *Brusco Tug & Barge Co.*, 330 NLRB 1188, 1189 (2000). However, the Board may give the prior decision a “certain persuasive relevance” or a “kind of administrative comity” in this unfair labor practice case, “subject to the reconsideration and to any additional evidence adduced in the unfair labor practice case.” *Id.*

³ The Respondent also has operations in South America, which are not relevant here.

⁴ Although the precise relationship between the Respondent and ADM is not clear from the record, documentary evidence indicates that the Respondent’s president reports to ADM’s vice president of transportation. GC Exh. 80(i). It is also plain that ADM controls the labor relations activities of the Respondent. Robert Creviston, manager of labor relations for ADM, testified that he was the one responsible for coordinating the response to the unionizing campaign affecting the Respondent and that he was the one who made the decision to terminate the Respondent’s striking captains.

⁵ The pilot is involved to the extent of giving the mate sufficient advance notice that certain types of work is coming up so that the mate can, if he chooses, wake the call watchman in time to perform the work.

⁶ Depth finders are apparently also referred to by a variety of other names, including “fathometers,” “transducers,” and “sounders.”

altered to accommodate the addition or removal of barges, or because of navigational factors. The individual barges themselves must be checked from time to time to determine if they are taking on water or otherwise compromised. The integrity of the tow's overall structure must also be maintained, sometimes by tightening the wires holding the barges together in order to create a more secure tow. Another kind of work involves attaching the boat itself to the tow. This is accomplished using a variety of types of wires and other equipment and is referred to as "facing up."

As it progresses on the river, the vessel encounters obstacles such as locks and bridges. During the locking process the captain or pilot will frequently rely on a crew member to serve as a "lookout" who stands on the tow or boat, and conveys information to the pilot or captain about distances and speed as the lock is approached and entered.⁷ Crew members are also often required to "catch a pin" to help the tow and boat enter the lock safely. "Catching a pin" means attaching a line to a stationary fitting in the lock and then using the line to pull the tow or boat towards the lock's wall. In some cases an "assist tug"—a boat that attaches to the front of the tow—is used to help direct the tow into the lock. The crew must also safely maneuver through bridges that span the river. Here, too, the captain or pilot may rely on a lookout or an assist tug.

The deck crew typically performs a variety of maintenance duties on the boat. Among these are scraping and painting surfaces, repairing aides to navigation such as depth finders, replacing or checking the running lights on the boat or tow, sweeping and mopping, and making the beds and cleaning the rooms of the captain, the chief engineer, and the pilot.

Royce Wilken is the Respondent's president. John David Cook is the Respondent's vice president of operations and reports directly to Wilken. Raymond Hopkins and Bruce Hussell are the Respondent's two port captains and report directly to Cook, as do the Respondent's port engineers, and various other managers. The Respondent's towboat captains report to Hopkins and Hussell. Towboat pilots report to both the towboat captains and the port captains. (Tr. 51, Tr. 1303.) The record is clear that the mate and watchman are the ones primarily responsible for directing and overseeing the work of the deck crew. Whether, and to what extent, the pilot also has been involved in directing the deck crew is a central issue in this case.

3. The strike and union election

The Respondent's towboat pilots have never been represented by a union for purposes of collective bargaining. On April 3, 1998, towboat captains and pilots for a number of river barge companies, including the Respondent, initiated a strike. The strike was called by a labor organization known as "Pilots Agree." At the time of the strike the Respondent had approximately 60 captains, 20 of whom participated in the strike. The Respondent had approximately 56 or 57 pilots, and approximately 36 (25 full-time and 11 fill-in, "trip," pilots) partici-

⁷ The wheelhouse is a superior vantage point for many purposes, but does not always provide the captain or pilot with an adequate view to navigate at close quarters, particularly with respect to the tow, portions of which may be over 1000 feet from the vessel.

pated in the strike. The strike had a severe and deleterious effect on the Respondent's operations on the Mississippi and Illinois rivers. Sixty to seventy percent or more of its boats ceased operating for a time and the Company was not fully operational again until the fall of 1998 at the earliest.

On the day the strike began, the Respondent sent an e-mail message to captains informing them that they were supervisors, had no protected right to strike, and would be terminated unless their ships were underway by 6 p.m. The Respondent terminated 20 captains who defied this warning. The captains are indisputably in overall charge aboard the Respondent's towboats, and the Board's Associate General Counsel, Division of Advice, issued a memorandum opining that the Respondent's captains were statutory supervisors who had authority to discharge, discipline, and effectively recommend promotion. 29 NLRB Advice Memorandum Reporter, Par. 35033 (GC Br., Exh. A).

Unlike the striking captains, striking pilots were not terminated or threatened with termination. Rather, the Respondent sent pilots a letter which acknowledged that employees had a protected right to strike, and which invited them to return to work. Robert Creviston, the ADM labor relations department official who made the decision to terminate the captains, testified that his intent in doing so was to "cut[] off the head of the snake." (Tr. 955.) Regarding the decision to terminate captains, but not pilots, Creviston explained, "[Y]ou don't kill the snake by cutting it in the middle; you kill the snake by cutting the head off." Id.

It is not clear from the record precisely when the strike ended, however, it appears to have been sometime prior to September 24, 1998, when the Union⁸ filed a petition with the Board asking to be certified as the bargaining representative of a unit composed of "[a]ll full-time and regular part-time wheelhouse pilots, operating vessels of the [Respondent] on the inland waterways." The Respondent argued that the petition should be dismissed, and contended, contrary to the implication of its letter to pilots during the strike, that pilots were statutory supervisors under Section 2(11) who were precluded from bargaining collectively with the Respondent. The Regional Director rejected this argument, and the Board issued an order denying the Respondent's subsequent request for review and stating that the request "raise[d] no substantial issues warranting review."

A representation election was held and, on February 26, 1999,⁹ the results of the election were certified. The certified

⁸ By this time, Pilots Agree had affiliated with the Union.

⁹ During the trial, the Respondent objected to a line of questioning by the General Counsel regarding the Respondent's tactics and themes in opposing the Union during the organizational campaign, and I reserved ruling on the objection subject to briefing. See, e.g., Tr. 134-138. Specifically, the Respondent objected that Sec. 8(c), 29 U.S.C. Sec. 158(c), precluded testimony regarding the Respondent's pre-election appeal that the pilots "give us a year" to improve before deciding to support the Union. In its brief, the Respondent broadens its argument and contends that "the General Counsel may *not* use evidence of Cook's expressing any views, argument, or opinion at the pilots meetings that did not contain any threats of reprisal or force of promise of benefits." R. Br. at 65. The Respondent's extremely broad reading

results showed that 28 ballots were cast in favor of the Union and 36 against the Union, and that there were 8 challenged ballots.

After the election, the Union continued in its efforts to organize the Respondent's pilots. The Union sent newsletters to pilots, generally on a monthly basis, counting down the time until another representation election could be held, and reminding pilots of promises the Respondent had allegedly failed to keep. One would expect that such activity would not escape the Respondent's notice and indeed, the Respondent was aware that there was continued union activity.¹⁰

4. Pilots Meetings and Job Description

Approximately 3 months after the Union lost the election, the Respondent began a series of 2-day "leadership" training meetings for its pilots.¹¹ The meetings were held in Decatur,

of Sec. 8(c) has previously been rejected by the Board, which has held that such statements, while not themselves violations of the Act, may be evidence of antiunion animus or motivation, *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Lampi, L.L.C.*, 327 NLRB 222 (1998); *GenCorp*, 294 NLRB 717 fn. 1 (1989), citing *General Battery Corp.*, 241 NLRB 1166, 1169 (1979). I am, of course, bound by the Board precedent on this issue. At any rate, I find that the evidence regarding the Respondent's use of the "give us a year" slogan was not probative regarding any issue in this case given Creviston's undisputed testimony, corroborated by documentary evidence, that he routinely used the same slogan to respond to other unionizing campaigns. Therefore, I afford the testimony regarding the "give us a year" slogan no weight in making my decision. I reject the Respondent's broader argument, raised for the first time in its brief, that I may not rely on evidence of any of Cook's expressions of views, arguments, or opinions. The Respondent itself called Cook and questioned him extensively about his statements during the talk. Moreover, the Respondent did not raise objections at trial to most of the testimony regarding Cook's presentation and the Respondent's brief does not specify what portions of such testimony the Respondent now maintains I must disallow. The Respondent waived any objection to testimony or other evidence along these lines to which no objection was lodged at trial. Moreover, as noted above, the Board has held that such statements may be considered as evidence of animus.

¹⁰ Royce Wilken, the Respondent's president since March 1999, testified that prior to May 1999 he had been informed by the labor relations department that there was still union activity "out there." Tr. 665-666.

¹¹ Wilken testified that the planning that led to the pilots meetings began in early 1997 when he and Hopkins "recogniz[ed] that we needed to . . . provide our people with the skills to manage our vessels." Tr. 1292-1293. However, Wilken did not state what caused him and Hopkins to "recognize" this, and did not even claim that he had decided at that point to provide pilots with training or new duties. Hopkins testified about discussions in 1997 or 1998 regarding leadership meetings for captains, but did not state that new duties for pilots were contemplated at that time. Tr. 1411-115. Moreover, at the mates meetings in March 1999, the mates were provided with documents stating that mates managed the deck crew under the direction of the captain. No current or future role for pilots in this was mentioned. I conclude that the testimony by Wilken and Hopkins is not credible evidence that in 1997 or 1998 the Respondent was already considering new duties for pilots.

The first documentary evidence that gives any indication that the Respondent might be considering training on a management role for pilots is a proposed meeting agenda for *captains* meetings from Sep-

Illinois, on May 18 to 19, May 25 to 26, June 8 to 9, and July 20 to 21. Each pilot attended only one of the 2-day sessions. This was the first time the Respondent brought pilots together in this fashion for training, although in the past the Respondent had held training meetings for captains at regular intervals, as well as for mates. Port captain Hussell sent pilots an e-mail message on May 13, 1999, which informed them about the meetings and explained that the Respondent would be "introduc[ing] some new expectations of ARTCO pilots." (GC Exh. 17.) The message stated that while the Respondent would "introduce some changes at the meetings, the change w[ould] take place at a later date after all meetings [we]re completed." Id.

The pilots meetings were attended not only by the pilots, but also by Wilken, Cook, Hopkins, Hussell, and other officials. At the beginning of each meeting Cook gave an introductory presentation in which he explained the purposes of the meeting. The General Counsel alleges that remarks that Cook made during this presentation on June 8, 1999, violated Section 8(a)(1) by "impl[y]ing to employees that Respondent assigned them supervisory duties in order to discourage their support for and/or membership in the Union."

The witness accounts of precisely what Cook said differ substantially, even among those witnesses who testified for the same side about the same meeting. Based on credible testimony, and on Cook's own notes regarding what he said at the meeting, (R Exh. 15), I find that Cook covered a number of subjects at the June 8 meeting. First Cook welcomed the pilots and informed them that this was the first series of pilots meeting that the Respondent had conducted in 25 years. Cook then recounted that the Respondent had been required to make changes in the past to respond to factors such as government regulations, economics, river conditions, the drought of 1988, and the flood of 1993. He mentioned the 1998 strike by Pilots Agree, and stated that the Respondent would now be changing again. The Respondent had "learned a lot" of things from the strike, Cook explained, and one of the most important was that pilots were a valuable resource that ARTCO had never fully utilized. Cook stated that in the past the pilot had been seen as *a person that drives the boat with virtually no say-so in the management of the boat*. He stated that pilots were officers of the boat, that they earned over 90 percent of what captains earned, and that it was from the pilots' ranks that new captains were drawn. Cook then said, "And all of this is why you are here today and tomorrow. We are changing again. ARTCO is going to give you the pilot more 'say-so' in managing your boat." Cook told employees that the strike had really hurt the Respondent and that he did not want that ever to happen again. Cook's talk concluded with the statement "[r]est assured," "we will survive Pilots Agree of '98." Cook also stated

tember 1998 (after the strike, and just days before the representation petition was filed by the Union), which states that the captains were to be trained on the "role and expectations of Captains/Pilots as Managers." R. Exh. 26. However, even that document does not state that pilots would attend meetings or what the pilots' role in management was to be. The first document indicating that pilots meetings involving new duties were planned is the e-mail notice to pilots dated May 13, 1999 (after the strike, representation petition, and Board decision that pilots were not supervisors). GC Exh. 17.

that he felt that ARTCO did not need a union as long as there were good communications between the boats and the land side management. (Tr. 869–870).¹²

Prior to the pilots meetings, the Respondent had never issued a written job description for the pilot position. Around the time the pilots meetings began, the Respondent issued a document entitled “ARTCO Pilot Job Description,” which was dated May 20, 1999. (GC Exh. 22). By all accounts, some of the duties listed in this document were new for pilots and some were not; however, the accounts differ substantially regarding how many of the duties, especially how many of the supervisory-type duties, were new. Among the pilot duties outlined in the job

¹² Witnesses for the General Counsel testified that Cook made additional, harsher statements. For, example, Lavon R. Church, who attended the June 8–9 pilots meeting, testified that Cook’s final statement during his introductory remarks was “gentlemen, make no mistake about it, there will be no more Pilots Agree at ARTCO.” Church’s account regarding this statement was contradicted by a pilot, and several management officials who were present at the meeting and who testified on behalf of the Respondent. Tom Mason, a witnesses who attended the May 25–26 pilots meeting, testified that Cook said that the only reason for the meeting was because of Pilots Agree. Mason testified that he asked Cook what effect making pilots supervisors would have on Pilots’ Agree, since supervisors cannot be in a union, and, according to Mason, Cook responded that the Respondent had taken a hard hit during the strike and did not want that to ever happen again. This account was substantially corroborated by Tony Reames, a pilot who was also present at the meeting. However, the account was contradicted by Sammy Hutton, another pilot who attended the meeting, as well as by various management officials who were present. Larry Long, a probationary captain, who attended the July 20–21 pilots meeting as a pilot, testified that Cook’s remarks included the statement “we’re making the pilots supervisors; there will be no union at ARTCO.” John Phelps, a pilot who attended the same meeting, testified that Cook said that “ARTCO is not union,” “has never been union,” and will “never be union, and warned that the Respondent would “do anything in [its] power to prevent it from happening.” These reports by Long and Phelps were contradicted by a number of witnesses who attended the meeting, including two of the Respondent’s pilots and various management officials. The question is close, but I find that the General Counsel has not established that Cook made the additional, harsher, statements. As I discuss below, I generally found Church, Mason, Reames, and Long to be credible witnesses, especially with respect to testimony regarding their duties as pilots, and believe that they were testifying to the best of their ability regarding the statements made by Cook at the meetings. However, unlike the pilots’ statements regarding the nature of their own duties—a subject to which pilots have ongoing, intensive, and intimate exposure—their recollections regarding the precise wording of remarks they once heard Cook make at a meeting over a year earlier are susceptible to memory lapses and unconscious distortion. Based on the testimony of all the witnesses, as well as on Cook’s own notes regarding his remarks, I find that the General Counsel has not established that Cook made the additional statements, although I have found the testimony of the pilots who testified for the General Counsel reliable in most other respects. See *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) (A trier of fact is not required to accept the entirety of a witness’ testimony, but may believe some and not all of what a witness says.), enforcement granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Containers, Inc.*, 325 NLRB 17 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness’ testimony).

description are: responsibility “for the safety of the crew as well as the vessel and all other equipment while on watch”; responsibility to “know[,] follow and enforce all policies, procedures, safety rules, and practices of ARTCO to all crew members on his watch;” responsibility to “assist the Captain in accomplishing all duties in overseeing personnel and delegating duties in accordance with existing conditions and circumstances;” responsibility to “supervise[] the deck crew serving on his watch and [be] accountable to the Captain for their assigned task[s];” responsibility to “know and follow the four step disciplinary process;” responsibility to “use the Employee Behavioral Evaluation Form for discipline and the recognition of good work performance, of the deck crew on his watch;” responsibility to “recommend any crew member for promotion;” responsibility to “receive and execute orders and instructions from ARTCO Barge Dispatchers regarding pickup, movement and delivery of barges and cargoes during operations to the assigned vessel and to report progress toward completion of the assignment;” responsibility to “verify barge drafts and ensure that the deck crew checks, pumps or repair[s] leaks to either the wing tanks or the cargo box of any barge in tow requiring attention;” and, responsibility to “ensure that all tows are properly built or made up and that the vessel is properly connected to the tow.”

Subsequent to the pilots meetings, the Respondent also provided the pilots with a separate document, this one entitled “The ARTCO Pilot’s *Added* Responsibilities, Effective 09 Sept. 99.” (GC Exh. 23) (Emphasis added). This document states:

The full time ARTCO pilot (wheelman on the aft watch) as second-in-command of the vessel and as a company supervisor/manager has the following additional responsibilities: 1. in command of the aft watch; A. to supervise the aft watch deck crew; B. to supervise the entire aft watch crew in accordance with company policies and safety rules; C. to recommend crew members on his watch for promotion, demotion, or probation by completing and signing the appropriate company forms; D. to evaluate the aft watch deck crew utilizing the appropriate company form; E. to discipline as necessary, up to and including termination, the aft watch crew utilizing the appropriate company form; 2. to make a written recommendation to the personnel department for employee hiring; 3. to be familiar with the memo book and capable of updating the same; 4. take overall command of the vessel in the absence of the master (i.e., masters illness or absence).

The General Counsel alleges that the Respondent published the May 20, 1999 job description which assigned new duties effective in September of 1999, and the “additional responsibilities” memorandum in order to discourage employees from engaging in concerted and union activities.

5. The pilot and the pilot’s duties prior to the alleged unfair labor practices

a. The pilot

One of the central questions in this case is whether the Respondent’s pilots already had supervisory functions at the time

of the alleged unfair labor practices that began in May 1999. The record is clear that pilots have always been extremely important persons aboard the Respondent's towboats. The pilot navigates the boat and tow 12 hours out of each day and a mistake on his or her part can endanger not only valuable cargo and equipment, but also the safety of the crew and other persons on the river. On the after watch, the pilot is also the contact person for communications to the boat from land-based management, fleeting operations, and other boats. The pilot's status is recognized in numerous ways. Pilots are the second highest paid persons on the Respondent's boats, after the captain. The pilots receive "officers' benefits," along with the captain, the mate, the chief engineer, the assistant engineer, and various land-based personnel. The pilots have desirable sleeping quarters on the vessel.

Pilots must undergo extensive training consistent with the high level of responsibility associated with their duties. An individual, usually a mate, who wishes to become a pilot must first find a captain who is willing to teach him to be a pilot. Then, for a year and a half, the prospective pilot, known as a "pilot B," shadows the captain, who endeavors to teach the pilot B everything necessary to function as a pilot, and evaluates the progress of the pilot B on a regular basis. (See GC Exh. 50). The entire training program for pilots generally takes 3-1/2 years. Each of the Respondent's pilots is required to have a Coast Guard license to operate uninspected towing vessels (OUTV license), an endorsement showing that the pilot can use radar for navigation, and a restricted radiotelephone operator's permit.

While it is clear that pilots have always been extremely important persons on the Respondent's towboats, being extremely important is not the same as having supervisory functions. The testimony regarding whether the pilots had such supervisory functions was contradictory. The General Counsel's witnesses testified that the pilots' duties had essentially been limited to driving the boat and conveying information to the mate, crew members, land-based management, and other boats. The testimony of the Respondent's witnesses was that far from being confined to these duties, pilots had long possessed a panoply of supervisory responsibilities, which included, making recommendations about hiring and promotion, dispensing discipline, evaluating crew member performance, and responsibly directing the work of the mate and deck crew. I have no doubt that witnesses on both sides made efforts to portray the pilots' duties in the light most favorable to their side. For reasons discussed below, I generally found the General Counsel's witnesses more credible on these subjects based on their demeanor, the plausibility of their testimony in light of the totality of the evidence, and other factors. Moreover, the documentary evidence in the case painted a clear and quite consistent picture and tips the scale further in favor of the accounts of the General Counsel's witnesses. Such documentary evidence is particularly helpful where, as here, the testimonial evidence piles contradiction on disagreement on contradiction. Unlike testimony, pre-existing documentary evidence cannot easily be shaped or shaded to suit the purposes of subsequent litigation. See *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (in an atmosphere "untainted by live controversies

over the statutory status of any particular group of employees, management's statements conferring responsibilities and allocating duties are likely to be more reliable than similar statements made in the context of union conflict when directives are often addressed as much to the Board as they are to the company's personnel"), cert. denied 494 U.S. 1039 (1972). Here, preexisting documents, which were used, and in most instances created, by the Respondent itself, contain so much to indicate pilots did not possess supervisory responsibilities, that in order to conclude that pilots *were* supervisors one would almost have to believe that the Respondent was intentionally keeping pilots' supervisory powers a secret from towboat personnel, including the pilots themselves.

b. Documentary evidence regarding pilots' status and functions

The Respondent has described its operations and procedures in a number of different documents. Most significantly, the Respondent maintains a collection of memoranda entitled the "American River Transportation Company Line Boat Memo Book" (the bible by crew members and the memo book), which contains approximately 123 memoranda or entries. (GC Exh. 46). The Respondent has also issued various other memoranda, training materials, and communications to its line boat personnel.

In February and March 1999, prior to the pilots meetings, the Respondent held a series of meetings for mates at which it distributed written training materials. The documents distributed by the Respondent directly contradict its claim here that the pilot supervises the mate and deck crew. For example, the Respondent distributed an "ARTCO Leadership" flow chart to mates that excluded pilots entirely. (GC Exh. 80(i)). The chart indicates that the deck crew and the watchmen report to the *mates*, and that the mates report to the *captains*, and the captains reports to the port captains, and so on all the way up to the CEO of ADM. No role at all is indicated for pilots in this leadership scheme.

At the same mates meetings the Respondent distributed a document entitled "Expectations of the Mate." (GC Exh. 80(J)). This document states that the mate is the manager of the deck crew and that "*as manager of the deck department, [the mates] report to the Captain.*" Id. (Emphasis Added.) The document continues that: "if you cannot solve a problem yourself, ask the Captain for advice and assistance. Utilize other resources, such as Crew Dispatch, when necessary. Always keep the Captain informed so there are no surprises." Id. The document informs the mates that as managers of the deck crew, they are responsible for "assigning watches and work, directing work as it is being performed, training new deckhands, creating and maintaining a safe work environment, giving reprimands and implementing corrective discipline, and evaluating employees for the purpose of recommending promotions." Id. The document states that mates and watchmen perform various functions under the direction of the captain, but *never once* informs them that any activity is performed under the direction of the pilot. For example, the document states that the mate is to: "create a safety culture for the crew" "*under the direction of the Captain*"; "comply with the confined space entry program *as implemented by the Captain*"; "administer the hazard communi-

cation program *under the Captain's direction*"; "administer the respiratory protection program *under the Captain's direction*"; and "prepare and lead a weekly safety meeting *under the Captain's direction*." Id. (Emphasis added.)

It is wholly implausible that if pilots were, as alleged by the Respondent, the supervisors of the mates and deck crews the Respondent would simply fail to inform mates about the pilots' supervisory role during these meeting dedicated to "leadership." These documents are powerful evidence that the mate is the manager of the deck crew and performs those managerial duties under the direction of the captain, not the pilot.

The Respondent's written communications to captains convey the same message—i.e., that the captains, not the pilots, supervise the mates and oversee the mates' direction of the deckhands. An "all boats" memorandum dated October 2, 1998, states that "[e]ach Captain needs to meet with their Mate each day and discuss what is being done on the vessel and to help the Mate manage his time well in the next 24 hours." (GC Exh. 77.) Similarly, the memo book states that in order "to coordinate daily activity and projects on the boat," "[t]he Captain needs to meet with his mate each day," "[d]iscuss what is scheduled on the vessel for the next 24 hours," and "[a]id the mate prioritizing his time." (GC Exh. 8, GC Exh. 46.) There is no mention in this document of the pilot having meetings with the mate, nor is there any mention of the mate conferring with the pilot regarding work to be done over the next 24 hours. It is highly unlikely that pilots would not be included in this process if they were, as the Respondent contends, the supervisor of the deck crew. Moreover, while the above-discussed documents explicitly provide that the captain and the mate supervise the deck crew, Management Officials Wilken and Hopkins conceded that, prior to May of 1999, no document was given to pilots or mates informing either of the pilots' supposed supervisory function. (Tr. 714, Tr. 764, Tr. 1560.) Indeed, neither Wilken nor Hopkins is aware of the pilots' supervisory authority ever being mentioned to mates. (Tr. 715–716, Tr. 760, Tr. 1561.)

The same theme—that the captain and the mate, not the pilot, supervise the deck crew—is repeated in a training manual that the Respondent gives to all new deckhands. (GC Exh. 5; Tr. 624.)¹³ The section of this manual entitled "chain of command" states: "The Captain on your boat is the man in full charge. He gives orders to the Deck Supervisor, the Mate or Head Deckhand of the deck department. You will look to him for orders and instructions about your work." The Respondent even communicated this information to guests on its towboats. A document entitled "Information For Our Towboat Guests" states that "the Master on board (Captain) is in *complete command of all phases of vessel operation at all times*." (GC Exh. 76, p. 2) (Emphasis in original.) The materials also inform the guests that if "larger problems occur, feel free to ask the Cap-

tain and we're sure he will accomplish anything necessary to make your tenure onboard as comfortable as possible."¹⁴

When, in documents issued prior to May 1999, the Respondent discussed some of the specific types of supervisory functions that the Respondent now claims pilots possessed (e.g., evaluating performance, enforcing safety and other rules, overseeing the work of the deck crew) a role is consistently acknowledged for captains and sometimes mates or chief engineers, but not for pilots. For example, during the relevant period, the memo book provided that captains, mates, and chief engineers would fill out employee evaluations, but it gave no such authority to pilots. (GC Exh. 46 at Sec. 3.019; see also GC Exh. 6, GC Exh. 30, GC Exh. 31.) It was not until September of 1999, after the pilots meetings, that the Respondent modified its employee evaluation forms to permit pilots to sign them. (GC Exh. 25.)

The Respondent contends that, prior to the 1999 pilots meetings, the pilots issued verbal discipline, but its witnesses have conceded that this discipline was not reduced to writing or included in the recipient's personnel records. The Respondent's memorandum describing its disciplinary system, however, explicitly states that there are four types of discipline—verbal warning, written warning, probation, and discharge—and that even in case of the verbal warning a written record of the discipline must be placed in the employee's personnel file. (GC Exh. 61, p. 3.) The Respondent's pre-5/99 discipline form indicates that "verbal discipline" is to be recorded even when such discipline is for "information only." (GC Exh. 32.) These documents show that the Respondent's sanctioned forms of discipline did not include the type of *unrecorded* verbal discipline that it now claims its pilots were authorized to issue. I do not doubt that the Respondent's pilots have on occasion chastised crew members who they believed were performing poorly, however, the Respondent's own records indicate that when pilots did so they were not issuing discipline recognized or sanctioned by the Respondent.

Documentary evidence regarding the promotion of new, or "green," deckhands to experienced deckhand entitled to "experienced" pay, also indicates that the pilots were not part of this process. For example, an experienced deckhand evaluation checkoff form in the record shows that it was completed by mates, not by the pilot. (GC Exh. 33f.) Indeed, the Respondent's witness Hopkins conceded that it was the mate or the captain who filled out the written evaluations relevant to the

¹³ The deckhand's manual was not created by the Respondent, however, the Respondent does issue it to new deckhands and requires them to sign a statement that they have received a copy for their "use and reading." GC Exh. 29.

¹⁴ The Respondent points out that the document advises guests not to go onto the tow without the captain's or pilot's permission, and argues that this indicates that the pilots are supervisory employees. I disagree that any such inference is appropriate. First the portion relied on by the Respondent describes a relationship between pilots and nonemployee guests, and therefore is not relevant to the question of whether the pilots supervise the Respondent's employees. This is especially true given the prior statement in the same memo that the captain is "in complete command of all phases of the vessel operation at all times." In addition, the captain and the pilot are the persons easiest to contact about entry to the tow since the captain or pilot can always be found in the wheelhouse on their respective shifts, whereas the mate, watchman, and deckhands may be almost anywhere on the boat or tow.

promotion of deckhands to experienced status. (Tr. 1581–1582.)

The Respondent contends that prior to May 1999 its pilots enforced safety rules and other policies and procedures, but this claim is belied by its own documents. A memorandum, dated November 25, 1996, regarding safety awards, directs “mates” and “captains” to “constantly *enforce* all ARTCO safety rules and policies.” (GC Exh. 62) (Emphasis added.) The same memorandum does not direct pilots to enforce safety rules and policies, but rather states that the “Pilot, Chief, Asst./Oiler/Deckineer, Watchman, Cook, Deckhands” must “[c]omply with” and “[e]ncourage . . . shipmates to comply with all ARTCO safety rules and polices.” *Id.* (Emphasis added). In another memorandum, this one dated September 25, 1990, the Respondent states that it is “the duty of the Master . . . to see that [safety rules] are enforced,” and the duty of the other crew members to know and follow safety rules. (GC Exh. 63.) Here, again, the pilot is not given responsibility to enforce the safety rules. Similarly, the memo book contains an entry dated December 6, 1995, stating that injuries of deck crew members should be investigated by the mate because he is “their front-line supervisor” and that “it is the responsibility of the Captain to ensure that there is a thorough investigation.” (GC Exh. 46, Memo 4.018 (12/6/95).) A separate entry in the memo book, this one dated October 4, 1998, directs that all acts of violence be reported to the captain or the Respondent’s St. Louis operations office, but does not require that pilots be informed of such transgressions, regardless of which watch they occur on. (GC Exh. 46, Memo 6.011 (10/4/98).) A section in the memo book states that captains must be trained in the administration of regulations every year, but does not require pilots to undergo the training in administration. (GC Exh. 46, Memo 6.010 (12/25/97).)

The memo book also contains many entries that give authority to the captain and the mates, or even the watchmen, to oversee the crew and the work of the crew, but do not give this authority to the pilot. For example, crew members may disembark only with the permission of the captain, and must inform the captain if they will need to be excused for a court date, regardless of which watch the crew member works on or is boarding during. (GC Exh. 46 memo 6.006 (6/5/92) and memo 6.007(6/14/90).) When a crew member is injured, regardless of watch, the memo book provides that it is the captain who decides whether the person can continue working in a modified duty capacity or whether the person must disembark. *Id.* Memo 6.009 (12/2/96). If the captain determines that the person must disembark, it is also “the captain” who “should make sure for the person’s financial situation” regardless of watch. *Id.* Memo 6.008 (11/3/93). Another section of the memo book gives the captain, mate, and watchmen all responsibilities regarding the pumping of compromised wing tanks, but does not give the pilot any responsibilities, regardless of watch. *Id.* Memo 1.007 (9/29/98). A memorandum, this one dated July 19, 1995, and directed to “all captains/mates/watchmen,” informs the captains, mates, and watchmen that they are responsible for barge maintenance and inspection, and for the documentation of the same. (GC Exh. 56 (7/19/95).) The memorandum provides that the required forms “must be signed by the

mate/watchman on duty,” and that the captain must also sign them, without regard to whether it is the captain or the pilot who is on duty.

Documents regarding the requisition and distribution of supplies give responsibilities to captains, mates, and chief engineers, but not to the pilots. For example, the memo book contains an entry that gives the captain responsibility for requisitions and states that in the captain’s absence the chief engineer will sign the requisition forms. (GC 46, memorandum 3.010 (9/30/98).) A memorandum, dated October 9, 1996, states that the responsibility for the distribution of safety gloves is “in the hands of the Mates . . . but the overall responsibility still lies with the Captain as it does for everything on Board.” (GC Exh. 54 (10/9/96).)

Documents created by the Respondent at the time of the strike also indicate that it considered pilots to be non-supervisory employees, and did not, as it now contends, always view its pilots as supervisors. During the strike the Respondent sent letters to pilots, over the signature of then-President Craig Fischer (and apparently drafted largely by Creviston), which read in relevant part:

Pilots have asked about the procedures to be followed should they desire to return from the strike. We recognize that employees have the protected right to take concerted action by not returning to their jobs during an economic strike. Any pilot who wishes to return to work is welcome to request to do so and, upon receiving an assignment, to return to whichever line boat the pilot may be assigned to by the Company. . . . Those pilots who remain on strike will not earn wages or benefits from ARTCO for the duration of the strike and remain subject to being permanently replaced.

(GC Exh. 39, p. 2.) Captains, on the other hand, received a written communication stating that they were “ARTCO supervisor[s]” and as such had “NO PROTECTED RIGHT TO STRIKE under the National Labor Relations Act” and would be terminated if they participated in the strike. (GC Exh. 35a.)

The Respondent points to documents which it claims support its litigation position that line boat pilots have always been supervisors. The Respondent notes in particular a memorandum, dated August 1, 1990 (R. Exh. 8a), which while not addressed to pilots (Tr. 1680–1681), states that “you [the captain,] and the other officers of your boat are management personnel and as such, you are to counsel” problem employees, and complete a counseling form. The Respondent argues that this memorandum applies to pilots since they receive its “officers’ benefits.” However, the evidence showed that officers’ benefits are provided to a number of employees who are not officers, (Tr. 1440), including, apparently, assistant engineers and office personnel. (Tr. 1319, Tr. 1777.) Thus, the fact that pilots receive “officers’ benefits” does not mean that they are officers, or that the August 1 memo applied to them. Moreover, even Management Official Hopkins conceded that being an officer does not equate with any particular authorities. (Tr. 1438.) Management Official Cook stated that he was not aware of a pilot ever completing one of the counseling forms that the memorandum says “officers” are required to complete.

The Respondent also notes that the payroll code “101” signifies “ARTCO SUPV”—presumably standing for “ARTCO supervisor”—and that personnel records show that pilots were designated “101.” (R. Br. at 58–59.) However, the evidence shows that the “101” payroll code is also applied to the assistant engineer position, (R. Exh. 25), even though assistant engineers are, according to the Respondent, not supervisors. Moreover, I consider documentation regarding titles much less significant than the documentation regarding the actual authorities, duties, and responsibilities of the crew members. As discussed above, the latter type of documentation reveals that the Respondent repeatedly excluded pilots from the group of persons exercising supervisory responsibilities. The Board has affirmed the view that it is an individual’s actual powers, duties and responsibilities that determine whether he or she is a supervisor, not the individual’s title. *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000); *Chevron U.S.A.*, 309 NLRB 59, 61 (1992) (“[j]ob titles are unimportant”); *Walla Walla Union Bulletin v. NLRB*, 631 F.2d 609, 612–613 (9th Cir. 1980) (“[T]he specific job title of the employees is not controlling.”)

In summary, while the Respondent maintains an extensive collection of organizational and procedural memoranda and documents, and while many of these clearly give supervisory authorities to captains, without meaningful exception, show that pilots are not possessed of such authority. The documents from the period prior to May 1999 create a very consistent and clear picture: the mate directs the work of the deck crew and performs this function under the captain’s oversight and direction; the pilot does not supervise the deck crew or anyone else aboard the boat and tow. The supposedly contrary documentary evidence relied on by the Respondent is at best stray drops of spray from a current of evidence that is flowing powerfully in another direction.

c. *Credibility of testimonial evidence regarding pilots’ status and functions*

In general, I found the testimony of the General Counsel’s witnesses more credible than that of the Respondent’s witnesses regarding the status and functions of pilots. In particular, I found the testimony of Lavon R. “Rod” Church (pilot with Respondent), Tony Reames (pilot with Respondent), Thomas Mason (pilot with Respondent), and Jeremiah L. Long Jr. (former Respondent pilot, recently promoted to probationary captain at time of testimony) very credible on the subject of the functions of the Respondent’s pilots. I base this on the demeanor of each of these witnesses on the stand. Generally, these witnesses appeared to testify in a forthright and cooperative manner. What the Respondent attempts to characterize as instances of self-contradiction or evasiveness during their testimony are, by and large, more accurately seen as disagreements over semantics, and do not alter my impression that these witnesses testified truthfully regarding those matters.¹⁵ In addition,

¹⁵ These witnesses testified that as pilots they lacked certain responsibilities or powers, and that the Respondent had never informed them that they did have these responsibilities or powers. On cross-examination, Respondent’s counsel elicited testimony that the Respondent had never explicitly told them that pilots did *not* have these responsibilities or powers, and that they therefore could not “be sure” that

I based my conclusion regarding credibility on the plausibility of the testimony of Church, Reames, Mason, and Long in light of the totality of the evidence.¹⁶

The Respondent forwards myriad arguments regarding the credibility of the General Counsel’s witnesses, only a few of which warrant discussion. The Respondent argues repeatedly in its brief that Long cannot be credited because he gave the “ridiculous” and “outlandish” testimony that he had never used a lookout on the upper Mississippi River. (R. Br. at 35; 74; 85; 93 fn.19.) Long has 10 years of experience with the Respondent as a pilot, and at the time he testified had recently been promoted to probationary captain. Moreover, although Long had previously been a pilot and a member of Pilots Agree, he did not participate in the strike. With respect to the matter of Long’s testimony about the use of lookouts, I did not while observing him at trial, and do not now after carefully reviewing the trial transcript, understand Long’s testimony in the way counsel for the Respondent suggests that I should. Long did not state that he had never needed lookout assistance, but rather that when he needed such assistance he had relied on the mate to stand lookout for him, and that he had never directed or designated a deckhand to be a lookout. (See Tr. 589–590, Tr. 605–608.) The record does not, in my view, establish that this statement by Long is untrue, much less that it is, as Respondent contends, so ridiculous or outlandish as to warrant discrediting all of Long’s testimony.¹⁷

The Respondent also asserts that Long should not be believed because he stated that the captain is not “in command”

they lacked them. I do not consider it particularly telling that the Respondent did not enumerate to pilots all the duties that they did not possess. As a general matter, new personnel are told what their job *is*, not what it *is not*, and are told what their duties *are*, not what their duties *are not*. See *Chevron U.S.A.*, 309 NLRB at 62 (“the evidence must ‘fairly’ show . . . ‘that the alleged supervisor knew of his authority to exercise’ the supervisory power”) (quoting *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 969 (4th Cir. 1980)).

¹⁶ My credibility findings with respect to these witnesses are made independently of the fact that they were working for the Respondent at the time they testified. I nevertheless note that these findings are consistent with the Board’s view that the testimony of a current employee that is adverse to his employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false.” *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977); see also *Flexsteel Industries*, 316 NLRB 745 (1995), *enfd.* 83 F.3d 419 (5th Cir. 1996).

¹⁷ The Respondent also claims that Long was “identifi[ed] by other witnesses as an individual with a reputation for falsity.” R. Br. at 93 fn. 19. However, the claim that witnesses testified to this is itself of questionable veracity since the portions of the record relied on by the Respondent include the testimony of only one such witness, port captain Bruce Hussell. Moreover, Hussell’s testimony made clear that he did not have a basis for testifying about Long’s general “reputation” in the community, but rather was simply stating his own personal view that Long had not been honest with him. Indeed, while Hussell claimed that port captain Hopkins, a management witness, was aware of Long’s supposed reputation for dishonesty, Hopkins himself denied this and stated that he was not aware of Long having a reputation for dishonesty. Similarly, management witness Ernest Mathes, Jr., who described himself as “100% ADM man,” stated that Long had no reputation for dishonesty.

of the after watch, a view that was contrary to the testimony of other witnesses for the General Counsel. (R. Br. at 35, 85.) However, Respondent itself has issued a document that corroborates Long's view that the captain is in command of the after watch. In that document the Respondent emphatically states that the "(Captain) is in *complete command of all phases of vessel operation at all times.*" (GC Exh. 76, p. 2 (emphasis original).) Therefore, I do not believe that Long's statement that the captain, not the pilot, is in command of the vessel on the after watch is incredible, or even necessarily inaccurate.

On the other hand, a number of the Respondent's most important witnesses had very real credibility problems. Port captain Hopkins claimed that pilots had an array of supervisory responsibilities prior to May 1999 that were not documented in any way. I am unwilling to take Hopkins' "word" regarding these undocumented matters since he revealed himself to be a facile historian. Indeed, some of Hopkins testimony regarding significant matters was so utterly impeached that I hesitate to credit his statements regarding any disputed matter, and in general have given his testimony very little weight.

Hopkins was forced to admit on more than one occasion that as far as he knew no pilot had ever exercised a supervisory function he claimed pilots had, (Tr. 1581-1583), and when Hopkins did claim knowledge about the specifics of a pilot's exercise of supervisory functions his testimony was shown in some cases to be simply false. For example, in an effort to substantiate the contention that pilots effectively recommended hiring, Hopkins testified that pilot Ray Standridge recommended that Hopkins hire Charlie Marshall and Bill Upchurch as pilots. Hopkins testified that he had conversations with Standridge about Marshall's and Upchurch's respective candidacies and Hopkins even went so far as to recount some details of those conversations. Hopkins said that he remembered seeing a note he had written to himself stating that Standridge recommended Marshall and Upchurch. The problem with this testimony is that both Marshall and Upchurch were hired *before* Standridge. This rendered it impossible that Standridge, when an ARTCO pilot, recommended that Marshall and Upchurch be hired, and also highly improbable that Hopkins had had the conversations with Standridge that he claimed to have had or wrote himself the note that he claims to have written.

Hopkins' trial testimony was at that point interrupted for over a month because of a medical emergency suffered by one of the participants in the trial. When Hopkins resumed the witness stand he became yet more entangled. He indicated that he became aware of the employment connections between Standridge, Marshall, and Upchurch during an effort to revive his memory about instances where pilots had effectively recommended hiring. He explained that when he testified previously he merely got the parties "backwards" and that it was Marshall and Upchurch who had recommended Standridge, not the other way around. This account was itself impeached by documentary evidence that both Marshall and Upchurch were captains—and therefore recognized supervisors—at the time that Standridge was hired. Thus, there would have been no reason for Hopkins to make note of, or plan to testify about, their supposed recommendations of Standridge as preparation

for this proceeding about the supervisory functions of *pilots*. Furthermore, a number of the other specific examples that Hopkins gave of pilots recommending hiring were not mentioned by him when he testified on the same subject in the prior hearing regarding the status of the Respondent's pilots, even though that hearing was held much closer in time to the alleged events.

Hopkins' testimony was even contradicted regarding an important matter by another management witness. Hopkins claimed that when Dragon recommended Gary for a position as a pilot they discussed that Gary had good "leadership qualities"—a claim that, if true, would lend some support to the Respondent's claim that it viewed pilots as supervisors. (Tr. 1327-1328.) However, Dragon, a management witness, stated that he had "no knowledge" of Gary's leadership qualities, that "leadership wasn't a concern" in the hiring of pilots at that time, and that the Respondent was simply "looking for people to be able to run boats up and down the river." (Tr. 1743-1744.) Because Hopkins testimony was at odds with the documentary evidence and the other testimony, and because he exhibited, to an unusual degree, an ability to recollect events—even *details* of events—that certainly did not occur, I conclude that his testimony should be given very little weight regarding disputed matters.

I did not find Wilken to be a very credible witness regarding the duties of mates based on his demeanor and testimony which was evasive on cross-examination. Wilken gave the distinct impression on multiple occasions that he was relying on feigned confusion and convenient memory lapses to avoid giving testimony unfavorable to the Respondent. He also was prone to changing his testimony mid-stream. For example, he first testified that after the union lost the election he was aware that there was still "union activity out there" prior to May 1999 (and, therefore, before the start of the alleged unfair labor practices), Tr. 665-666, but then he reversed himself and asserted that he was not aware of this activity until "June-ish" of 1999, Tr. 666-668 (and, therefore, after the start of the alleged unfair labor practices). Wilken claimed that pilots had actually exercised various supervisory functions prior to May of 1999, but when asked to recount specific instances of such exercises he was often unable to do so. Most notably, Wilken testified that it was "not uncommon" for a pilot to recommend either suspension or termination of a crew member (Tr. 781), but he was unable to recount a single instance where a pilot had done so. Id. Even Hopkins stated that it was false to say that it was not uncommon for a pilot to recommend suspension or termination, and that he was not aware of a single instance when a pilot recommended suspension or termination. (Tr. 1578-1579.)

I also found Respondent's witness Randy Lee Johnsen (captain and former pilot with the Respondent) very lacking in credibility based on his demeanor which was difficult, hostile and unusually uncooperative on cross-examination. At times his testimony left no doubt in my mind that he was shading his account liberally to favor the Respondent's position. For example, during cross-examination regarding the pilot's role in tow work he repeatedly evaded questioning, then denied that "most of the time" the captain, not the pilot, decided which barges would be dropped from the tow if the tow orders did not

specify. (Tr. 1022.) When subsequently pressed for a specific percentage of the time when the captain decided which barges would be dropped, Johnsen said that the captain decided “probably ninety percent” of the time. (Tr. 1023.) Johnsen’s refusal to admit that “ninety percent of the time,” was “most of the time” is representative of his uncooperative and evasive stance during cross-examination. Another example relates to his testimony that, as a pilot, he once called a fire drill. (Tr. 1708-1709.) The General Counsel asked Johnsen if the captain had actually told him to have the fire drill on the pilot’s watch. At first Johnsen refused to directly answer. When the General Counsel asked whether the captain had told Johnsen to hold the fire drill on the pilot’s watch, Johnsen responded that the captain “just discussed having a drill that day.” Tr. 1709. When the General Counsel asked if it was not true that he had previously testified that the captain told him to have the drill on the pilot’s watch, Johnsen answered equivocally again, stating “Yeah, we talked about having a drill.” Id. The General Counsel asked again whether Johnsen “recalled testifying that the captain said that the drill was going to be on the pilots’ watch?” Id. At this point, Johnsen finally conceded that he “believe[d]” that the captain had told him to have the drill on the pilot’s watch. Id.

Johnsen’s exaggerated claims about his authority as a pilot were even contradicted by the Respondent’s own witness, George Bergman, a mate who had worked with Johnsen when Johnsen was a pilot. Johnsen testified unequivocally that when he was an ARTCO pilot he had made the decision that the call watchman was needed *every* time the call watchman was awakened for tow work on the after watch. (Tr. 1023.) However, Bergman testified that in some cases he, as the mate working with Johnsen, had decided whether the call watchman was required (Tr. 1727), and that in other situations the call watchmen always had to get up, without direction from Johnsen or anyone else (Tr. 1726). Similarly, Johnsen claimed that as a pilot he sometimes made the decision to use an inexperienced deckhand to serve as a lookout in order to give the deckhand experience. (Tr. 976-977.) However, Bergman said that it was generally up to the mate to decide who would serve as lookout (Tr. 1723), and that he would have told Johnsen that a deckhand was not ready for the task if he had believed that to be the case (Tr. 1720). When pressed, Johnsen conceded that while he claimed it was his decision to decide to use an inexperienced deckhand, he would always defer to the mate’s conclusion that an inexperienced was not ready for the job. (Tr. 1044-1045.)

I also found Steve Wolfe (captain and former pilot with the Respondent) a less than credible witness based on his demeanor, testimony, and the totality of the evidence. Wolfe appeared highly suggestible during questioning by counsel for the Respondent, changing or retracting his testimony on more than one occasion when counsel expressed some doubt about his answer. (See Tr. 1125, ll. 3-11) (Wolfe reverses testimony regarding whether the pilot issues instructions to the crew during the process of stopping the boat in foul weather); (Tr. 1125 l. 25, to Tr. 1126 l. 8) (Wolfe reverses testimony about the pilot’s authority to start the vessel running again when the captain has stopped it). In one instance Wolfe inadvertently revealed that as a pilot he had merely “asked” the mate to per-

form a certain task, but then palpably strained on the witness stand to re-cast the request as an order. He stated that “when the mate told me that . . . the tow was ready to depart, I *asked* him to go and prepare for departure by *ordering* him to throw off all the shore cables.” (Tr. 1094.) (Emphasis added.) In another case he made the patently false claim that the mate could not tell the deck crew to take a break without asking the pilot, but he then was forced to retreat from that claim and admit that the mate could, and did, give the crew breaks without clearing it with the pilot. (Tr. 1165-1167.) Indeed, Wolfe had to concede, in stark contrast to his original testimony, that *most* of the time it was the *mate* that gave the deck crew a break. Id.

Port Captain Hussell, who began working with the Respondent in July 1998, was also a less than credible witness based on his demeanor, evasiveness and other factors. He seemed eager to exaggerate or deny facts in order to support the Respondent’s position. For example, Hussell stated that the Respondent’s pilots had the authority to terminate a deckhand (Tr. 1907), a claim that has not been made by the Respondent and which was denied even by management witness Hopkins (Tr. 1601). When pressed Hussell himself conceded that he had no reason to believe that pilots knew of their supposed authority to terminate. (Tr. 1909-1910.) Hussell also exaggerated the role of the Respondent’s pilots in recommending the hiring of new pilots. Hussell claimed that after pilot Benny Ainsworth recommended Church, Church was hired as a regular pilot, and that he had not been hired first as a fill-in, or “trip” pilot. However, the Respondent’s records show that Church was, in fact, hired first as a trip pilot. (Tr. 1844-1845; R. Exh. 35.) Hussell also evidenced an eagerness to deny established facts that would harm the Respondent’s position. To cite just one example, he denied that at the pilots meetings Cook had stated that the pilot was seen in the past as someone who just drove the boat with virtually no say-so in management. Tr. 1854. However, management witness Cook admitted that he had made this statement in his presentations at the meetings, Tr. 894-895, and this is corroborated by the outline for his presentations. (R. Exh. 15.) I might be disposed to consider this an innocent memory lapse on Hussell’s part if Hussell had attended only one pilots meeting. However, Hussell attended all four pilots meetings, and therefore would have heard this statement by Cook repeatedly. (Tr. 1829.) Given that, I believe that Hussell’s denial was an intentional deception. I found Hussell’s testimony lacking in credibility and have given it virtually no weight regarding disputed matters. See also, *supra*, footnote 17.

d. Pilot’s duties prior to May 1999

Although much about a pilot’s authorities, responsibilities, and duties prior to May 1999 are in dispute, some facts about pilot’s work during that period are clear. First, the pilot navigated the vessel and tow during the two, 6-hour, after watch shifts each day. Navigation is a complex and skilled undertaking that requires the pilot to take into account such factors as time of day, weather, speed and direction of the wind, depth and width of the river channel, speed of the current, size and configuration of the tow, barge draft, capabilities and reliability of the vessel and its electronic equipment, the maneuverability

of the vessel and tow, the presence or absence of depth finders and other aides to navigation, the number of vessels in the area, and the direction the vessel is traveling. The pilot also had responsibility for communicating with the Respondent's land-based management, and the personnel of approaching boats and fleeting operations. This was accomplished by means of the FAX machine, telephones, and radio in the wheelhouse. Among the communications that the pilot routinely received from land-based management were tow orders (barge dispatches) which stated that certain barges, or a certain number of barges, were to be removed from, or added to, the tow. The pilot also received information such as whether there was a delay at the fleeting operation (for example because fleeting personnel were on break), or whether the crew of a passing vessel had noticed that one of the pilot's running lights had blown out. In addition, the pilot performed certain record keeping functions, such as completing the daily log and incident reports regarding any accidents¹⁸ on the after watch. In the unlikely event that a captain became incapacitated or had to leave the vessel, it would have been the pilot's responsibility to serve as acting captain on an interim basis until a new captain was assigned to the vessel, but the pilot's pay and his job title for purposes of the Respondent's personnel records, would not change. In such instances the chief engineer, not the pilot acting as captain, would perform some or all of the captain's requisition duties.

During the relevant timeframe, the Respondent's pilots helped the Respondent to recruit new pilots by referring candidates with whom they were familiar professionally and sometimes personally. The Respondent was especially interested in referrals from pilots during the strike, and the period following it, since the Respondent's decision to terminate all 20 striking captains had left it desperately short of wheelhouse personnel. After such a referral was made, the port captain would interview the candidate, either in person or by telephone, and would determine whether the candidate had the necessary license, certification, and other qualifications to work as a pilot with the Respondent. Generally the individual would also submit an application naming three persons as references. The final decision about whether someone would be hired as a pilot was made by the port captain, who would not hire the candidate until he confirmed that the prospective pilot operated the type of boats used by the Respondent, pushed the size of tows used by the Respondent, and worked on the rivers where the Respondent operated. The recommendations of pilots were given some weight regarding the abilities of prospective pilots with whom they were familiar. The Respondent also would give weight to recommendations of experienced deckhands who referred prospective deckhands. (Tr. 1874.) Applicants referred to the Respondent by pilots were not always hired. (Tr. 323.) There was no credible evidence that the Respondent's pilots ever recommended pilot candidates about whom they did

¹⁸ Pilots merely reported the circumstances of the accidents. They did not recommend personnel action regarding any crew members who caused the accidents. The pilots were not held personally accountable for, or disciplined because of, the errors of other crew members involved in the accident.

not have personal knowledge, that they reviewed the applications of candidates unknown to them, or that they were asked to review competing applications and make a recommendation about who should be hired.

The Respondent's pilots did not prepare evaluations or pre-evaluation reports for crew members, nor did they participate in any official or systematic way in crew member evaluation. When a captain or other official did not have sufficient experience with a crew member to assess his or her performance or to determine suitability for promotion, but a pilot did have such experience, the official would sometimes informally ask the pilot to relate factual information about the crew member's performance. The pilot was not asked to submit any type of formal evaluation.

Prior to May of 1999, the Respondent's pilots did not have authority to issue written discipline to any employee, nor did they have the authority to create "information only" reports regarding verbal discipline. Pilots would occasionally chastise crew members who they believed had failed to perform their jobs properly, however, this was not one of the forms of discipline recognized or sanctioned by the Respondent. Such displays of displeasure by pilots were not recorded in the crew member's personnel file and no personnel action resulted from them. When the layoff of a mate was being contemplated, Cook might ask the pilot who worked with the mate for factual information about how the mate was performing, but Cook would not even tell the pilot that the mate was being considered for layoff, and would not ask for the pilot's opinion about whether the mate should be laid off. (Tr. 888-890.) The final decision regarding the layoff of the mate was made by Cook. *Id.*¹⁹ Mates could discipline deckhands, and when they did their action was reviewed by the captain, even if the deckhand worked on the same watch as the pilot.

During the period prior to May 1999, the Respondent never informed its pilots in writing or verbally that pilots had the authority to reward employees. However, some pilots would occasionally take it upon themselves to invite a hard working crew member to the wheelhouse for coffee, or allow such a crew member to steer the vessel briefly. These opportunities to steer were viewed as a "nice ego trip" (Tr. 1338), but there was no credible evidence that they assisted the individual to obtain a promotion or a raise or any other personnel benefit. Indeed, it appears likely that the Respondent did not even know when a pilot allowed a crew member to steer. (Tr. 1165.)²⁰ If the pilot

¹⁹ In one instance, pilot Jasper Bryant called Cook to tell him that he believed a mistake had been made when the Respondent laid off mate Rick Fisk. Tr. 881-882. Cook checked with the captain of the vessel to which Fisk had been assigned, and the captain agreed that a mistake had been made. *Id.* Fisk was recalled from lay off. Cook stated that this was the only case he was aware of in which the Respondent had acted on a pilot's recommendation that an individual be recalled from layoff, Tr. 882-884. In that case, the Respondent did not solicit Bryant's recommendation, did not take the recommendation in writing, and did not recall Fisk until after a captain opined that Fisk should not have been laid off.

²⁰ In an effort to portray these brief steering opportunities as a significant reward, the Respondent states that steering "is among the most prestigious experiences for any river employee" and that allowing

knew of no pressing work, and believed that the deck crew deserved a break, the pilot might suggest to the mate that it was a good time for the deck crew to take a break. (Tr. 420–421, Tr. 562). However, it was up to the mate to decide whether the crew actually took the break. *Id.* The Respondent did not tell pilots that they had the authority to give employees breaks. (Tr. 97–100, Tr. 328 ff.)

During much of pilots' two daily shifts they were unable to observe the work of the deck crew from their vantage, and they spent very little time communicating with the mates or the deckhands about work-related matters. On some shifts a pilot might not communicate with the mate about work at all, and generally a pilot spent something on the order of 3 percent of his or her time during each shift communicating with the mate and deck crew about work. The pilot was, and is, able to communicate with the mate using a radio, but prior to May 1999 the rest of the deck crew on the after watch did not have radios. If a crew member was in certain rooms on the vessel, the pilot could communicate with him or her by using an intercom system. When the crew members were working on the tow it was sometimes impossible for the pilot to directly communicate with them at all. In general, the pilot's work-related communications to the deck crew were made to the mate, using the radio. The mate would then make any necessary communications to the rest of the deck crew.

As suggested by the above, the mates, not the pilots, had the primary responsibility for overseeing the work of the deck crew. The mates were responsible for assigning watches and work, directing work as it was being performed, training new deckhands, creating and maintaining a safe work environment, giving reprimands and implementing corrective discipline, and evaluating employees for the purpose of recommending promotions. (GC Exh. 80 (J).) In some cases, a list of deckhand duties was created by the mate and posted on the boat. The mates performed their duties regarding the work of the deck crew under the direction of the captains. *Id.*

Although the mate managed the deck crew, and did so under the direction of the captain, the pilot would also communicate information and sometimes directions to the mate and deck crew. When the pilot informed the mate that something needed to be done, it would be the mate who then decided which member of the deck crew would perform any necessary task. For example, when a pilot was told by the crew of a passing boat that one of the running lights on the vessel or tow had blown, the pilot would inform the mate that one of the lights needed to be replaced, and the mate would replace the bulb or assign someone to do so. When the pilot's instrument displays indicated that a necessary depth finder was not functioning, the pilot would inform the mate that the depth finder required repair. The pilot also would inform the mate if the windows of the wheelhouse need to be cleaned in order to allow the pilot to see well enough to navigate safely. Similarly, if the pilot knew that the vessel was being painted, the pilot would inform the mate when the painting of the wheelhouse could proceed (and

the wheelhouse view be partially obstructed) without compromising the pilot's ability safely to navigate the vessel. However, if the mate believed that other tasks were more important than painting the wheelhouse at that time, he was not required to accept the pilot's invitation. The pilot would also relay tow orders to the mate when the pilot received these from land based management. When the vessel was approaching a fleet for tow work, the pilot would inform the mate so that the mate could ready the crew. Similarly, if fleet personnel informed the pilot that there would be a delay before tow work could begin due to a crew change in the fleeting operation or another factor, the pilot would inform the mate of the expected delay.

Depending on the personality of the particular pilot, these communications might be cast as the mere conveyance of information, or as a request, or as a directive. Regardless of what type of language the pilot used, he or she had no authority from the Respondent to compel the mate or deck crew to perform a task, and no authority from the Respondent to discipline any crew member who failed to perform a task. If the mate and deck crew refused to take action that the pilot believed was necessary, the pilot's recourse would be to complain to the captain or, perhaps, another supervisory/management official. At any rate, as one would expect, the mate and deck crew generally performed tasks that the pilot said were necessary for the navigation of the vessel. However, the same would be true when a deckhand serving as a lookout told the pilot that he needed to slow down as he approached an obstacle such as a lock or a bridge. The pilot would be expected to comply with such direction based on the deckhand's superior information or vantage even though the deckhand had no authority to compel or discipline the pilot.

The navigational decisions that the pilot makes based on his experience, training, and expertise sometimes dictated certain aspects of how the mate and deck crew performed their duties. For example, based on how a pilot decided to approach a lock or bridge and other navigational factors, the pilot would tell the mate that he needed someone to serve as a lookout at a specific location on the tow. Based on the same or similar types of factors, the pilot would direct the mate and deck crew to "catch" a particular pin on the lock. In certain instances, variables affecting navigation, such as the weather, would cause a pilot to pull the boat over and hold position, and the pilot would inform the mate that he or she was doing this, which side he or she was pulling over to, and whether the vessel needed be tied off to shore. Under certain conditions a pilot would decide that, in the interests of safe navigation, it was necessary to reconfigure the barges in the tow, or to run the vessel's engines at above the usual RPM level, and the pilot would inform the crew of this. Here again, regardless of whether pilots cast the communications to the crew as the conveyance of information, a request, or a directive, the pilot had no authority to compel the deck crew to perform any task, nor did the pilots have authority to issue discipline for noncompliance. However, as expected, the crew generally responded to the pilots' concerns regarding safe navigation of the vessel and tow.

During the relevant timeframe, the Respondent directed its pilots to "encourage" shipmates to comply with the Company's safety rules and policies. (GC Exh. 62.) However, cooks,

someone to steer "assists employees in obtaining promotion to the wheelhouse." R. Br. at 14 and 44. However, the record does not support either proposition.

deckhands, and oilers were also directed to do this. *Id.* As more than one witness credibly testified, a mate, or even a deckhand, could “tell” a captain to comply with established safety rules. (Tr. 281, Tr. 522.) Similarly, if a mate violated the Respondent’s policy of protecting tank barges (also known as “chemical” barges) against damage by positioning them in the interior of the tow, the pilot could “tell” the mate that he needed to comply with that policy. However, the Respondent gave the power to *enforce* safety rules exclusively to the captain and the mate. (GC Exh. 62.) Thus, if the captain refused to comply when the deckhand advised him to wear a life vest, or if the mate refused when the pilot told him to comply with the Respondent’s policy regarding tank barges, neither the deckhand nor the pilot would be empowered to compel compliance or issue discipline.²¹ In the case of the pilot, his recourse would be to tell the captain about the mate’s refusal to comply with the Respondent’s policy. (Tr. 234, Tr. 273, Tr. 469.)

In emergency situations, the captain retains the pre-eminent status as master of the vessel, even if the emergency occurs on the after watch. A memorandum issued by the Respondent in 1995, directs that the “captain be contacted immediately” in the case of an emergency involving a barge. (GC Exh. 56.) (July 19, 1995).²² The memorandum does not state that the pilot must be contacted, even if the emergency occurs on the after watch. Certain emergencies that may occur on the after watch may require action before the captain can be informed. An example of this is a barge break away, where a barge comes loose from the tow. In these situations the pilot is expected to provide some direction to the crew. Such emergencies may not occur at all during a particular pilots’ tenure, and do so, at most, rarely. Moreover, an emergency creates a special situation where personnel who do not usually give directions may do so. For example, the Respondent’s written policy explicitly provides that during an emergency a deckhand will “instruct [crewmembers] to report to the galley” and make sure that the crew members show up in the reporting area. (GC Exh. 9.) To the extent that a pilot directs the crew during a barge breakaway, he does so based on his experience and training as a navigator and his superior vantage point and access to information. In these situations, the crew members will be doing the same types of activities (catching lines, wiring barges to the tow), and using the same types of techniques and equipment that they use routinely.

6. New duties given to pilots effective September 1999

At the pilots meetings beginning in May 1999, the Respondent informed pilots that new duties were being assigned to them and that these new duties would be effective in September

1999. A job description detailing their duties—some old and some new—was distributed to the pilots at these meetings. (GC Exh. 22.) Subsequent to the pilots meetings, the Respondent distributed a document entitled “The ARTCO Pilot’s Added Responsibilities, Effective 09 Sept. 99” (GC Exh. 23), which also listed a number of new duties.

If find that the new pilots’ duties stated in these documents included: to enforce all of the Respondent’s policies, procedures, safety rules, and practices on the after watch; to assist the captain in overseeing personnel and delegating duties; to supervise the deck crew serving on the after watch and be accountable to the captain for the deck crew’s assigned duties; to know and follow the four-step disciplinary process; to use the employee behavioral evaluation form for discipline and recognition of good work performance of the deck crew; to recommend crew members for promotion; to recommend crew members on the after watch for promotion, demotion, or probation by completing and signing the appropriate company forms; to ensure that the deck crew checks, pumps, or repairs leaks to either the wing tanks or the cargo box of any barge in tow requiring attention; to ensure that the tow was properly built and attached to the tow; to sign the daily vessel log for the watch; to supervise the entire crew serving on the after watch in accordance with company policies and safety rules; to evaluate the deck crew serving on the after watch using the appropriate company form; to discipline as necessary, up to and including termination, the crew serving on the after watch and using the appropriate company form; to make a written recommendation to the personnel department for employee hiring; and to update the memo book.

Although these documents purported to give the pilots multiple new duties, no duties were taken away from the captains or mates who were already performing many of these functions. In September 1999, following the pilots meetings, pilots were required, for the first time ever, to complete a number of written employee evaluations. (GC Exh. 24.) The Respondent allowed the pilots 5 days to complete the evaluations and in many cases the pilots responded that they had insufficient or very little experience with the crew members they were asked to evaluate. (GC Exh. 78(c) and (f)-(m).) At the time of the trial (May to September 2000), pilots testified credibly that they had not been asked to complete any additional written evaluations after the spate required of them following the pilots meetings. The pilots had not been called on to perform a number of the new duties at all.

B. The Complaint Allegations

The complaint alleges that the Respondent interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act at the pilots meeting on June 8, 1999, when its agent, Cook, implied to employees that the Respondent had assigned them supervisory duties in order to discourage their support for and/or membership in the Union. The complaint, as amended, further alleges that the Respondent discriminated in regard to the hire or tenure or conditions of employment of its employees in violation of Section 8(a)(1) and (3) of the Act, when it published an ARTCO pilot job description which assigned supervisory duties to its pilots effective about Septem-

²¹ The communication of standard safety rules dictated by established procedure (such as the Respondent’s procedure with respect to chemical barges) lacks the type of independent judgment contemplated by 2(11). See *First Western Bldg. Services*, 309 NLRB 591, 601 (1992).

²² This memorandum regarding barge maintenance is directed to captains, mates, and watchmen. GC Exh. 56. Although a pilot might inform the mate if he observes a potential problem with a barge, barge maintenance is the duty of the mates and watchmen under the direction of the captain.

ber of 1999,²³ and assigned additional supervisory duties to its pilots effective September 9, 1999, because its employees had engaged in union and concerted activities, and with the purpose of discouraging such activities.

Analysis and Discussion

I. STATUS OF TOWBOAT PILOTS

A. *Supervisory Status Under the Act*

Section 7 of the Act provides that “employees” have the right, inter alia, to form, join, or assist labor organizations, and to engage in concerted activity for the purpose of collective bargaining. Section 7, 29 U.S.C. Sec. 157. The Act’s definition of “employee” excludes from coverage “any individual employed as a supervisor,” Section 2(3), 29 U.S.C. Sec. 152(3), and thus the Act does not extend the rights described in Section 7 to “supervisors.” Section 2(11) of the Act defines “supervisor” as follows:

The 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.

Section 2(11), 29 U.S.C. Sec. 152(11). The supervisory authorities are listed in the disjunctive, meaning that if an individual possesses even one of the authorities listed in the manner described by Section 2(11), that individual is a “supervisor” who does not have the rights provided to “employees” by Section 7. However, Section 2(11) also contains the conjunctive requirement that the power be exercised with “independent judgment,” not in a “routine” or “clerical fashion.” *Chevron U.S.A.*, 309 NLRB at 61.

The Respondent argues that at the time of the conduct alleged to be unlawful in this case, its pilots had long been “supervisors,” who exercised not just one, but many, of the supervisory functions described in Section 2(11). According to the Respondent, its pilots had the authority to: effectively recommend hiring; effectively recommend promotion; effectively recommend layoff and recall from layoff; reward employees; discipline, and effectively recommend discipline of, employees; assign work; and responsibly direct the crew. In this case, the alleged unfair labor practices alleged involve rights that the Act grants to employees, but not supervisors. Therefore, if the Respondent is correct in its assertion that its pilots were already supervisors at the time of the alleged unfair labor practices, the complaint would have to be dismissed even if the Respondent engaged in the conduct alleged. For this reason, I will turn first

to the question of whether the Respondent’s pilots were already supervisors prior to May 1999.

B. *Pilots and Supervisory Activities Listed in Section 2(11)*

The U.S. Supreme Court has stated that an individual may not be deemed a supervisor under Section 2(11) unless the following questions are answered in the affirmative: “First, does the employee have the authority to engage in 1 of the 12 listed activities? Second, does the 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, 573–574 (1994) (internal citations omitted); see also *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). The party asserting supervisory status, in this case the Respondent, bears the burden of proving that these requirements are met. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999); *Chevron U.S.A.*, 309 NLRB at 62; *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992); *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982), *enfd.* 703 F.2d 577 (9th Cir. 1983). The Board has stated that caution should be exercised before finding supervisory status since supervisors are excluded from the protections of Section 7 of the Act. *King Broadcasting Co.*, 329 NLRB 378, 381 (1999). “In light of this, the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights.” *Beverly Enterprises-Massachusetts, Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); see also *Chevron U.S.A.*, 309 NLRB at 62; *Williamson Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (6th Cir. 1987); *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981), *cert denied* 455 U.S. 1017. For the reasons discussed below, I conclude that the Respondent has failed to meet its burden of establishing that pilots had any of the listed authorities under the terms required by Section 2(11).

1. Effectively recommend hiring

I reject the Respondent’s contention that, prior to May 1999, its pilots “effectively recommended hiring.” It is not unusual for companies to consider word-of-mouth referrals from its experienced work force as a way of recruiting new employees. See *NLRB v. Adco Electric, Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993) (“recommend[ing] someone for hire . . . is nothing more than what [the employer] would expect from experienced employees”). The Respondent in this case considered such referrals from its experienced work force, including, at a minimum, its captains, pilots, and deckhands. An emphasis was placed on this form of recruitment for captains and pilots during the period following the strike, when the Respondent was desperately in need of wheelhouse personnel. When current pilots referred pilot candidates, such referrals were given some weight since the current pilots were familiar with the abilities of other pilots who they encountered on the river and knew the skills required to work as a pilot for the Respondent.

Something more than an employer’s accepting referrals from its work force, and placing some reliance them, is necessary to constitute a supervisory recommendation. Otherwise an employer’s generalized use of word-of-mouth referrals could confer supervisory status on its entire work force. Indeed, in the

²³ The complaint originally stated that “[o]n about May 20, 1999, Respondent assigned supervisory duties to its pilots.” Complaint par. 6A. At trial I granted the General Counsel’s request to amend the complaint to clarify that the allegation was that the Respondent published the new duties in a job description on about May 20, but that these duties were not effective until about September of 1999.

instant case, even the Respondent's deckhands, who the Respondent admits are nonsupervisory, could refer other deckhands, and their referrals would be given some weight by the Company. The Board has indicated that whether referring applicants constitutes "effectively recommending hiring" for purposes of Section 2(11) depends on the *amount* of weight that the employer gives to the referral. In *F.A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997), the Board upheld a decision that crew foremen who "inform the general foreman when they learn of individuals who are interested in being hired, and at times . . . recommend an applicant's hire" are not supervisors even though these recommendations had "some influence on the general foreman's hiring decisions," since "the extent" of such influence was "not known." See also *Empress Casino Joliet Corp.*, 204 F.3d 719, 721 (7th Cir. 2000) (critical question is the weight that is given to the alleged supervisor's recommendation to hire or fire). The standard that the Board has applied to determine whether recommendations for personnel action are given enough weight to render them supervisory is that such recommendations are "insufficient to satisfy the statutory standard for supervisors *unless . . . management is prepared to implement the recommendation without an independent investigation of the relevant circumstances.*" *Chevron U.S.A.*, 309 NLRB at 65 (emphasis added); see also *Spetonbush/Red Star Co.*, 319 NLRB 988 (1995), *enf. denied* 106 F.3d 484 (2d Cir. 1997) (the Board recognizes that an employer's claim that a person has authority to effectively recommend a personnel action is undercut where the evidence shows that the employer routinely conducts an independent investigation before making a decision).

In the instant case, candidates referred by current pilots were never hired until after the port captain interviewed the candidate and determined that the candidate had the required license and certifications and was able to operate the types of boats used by the Respondent, push the size of tows that the Respondent used, and navigate on the rivers where the Respondent operated. The Respondent also required candidates referred by pilots to complete applications on which they were directed to list three persons familiar with their capabilities or training. Even during the period when the Respondent was in desperate need of wheelhouse personnel, the port captains continued to perform independent investigations prior to retaining pilot candidates who had been referred to it by current pilots. Since the port captains routinely performed independent investigations into the qualifications of candidates who were referred for employment by current pilots, these referrals do not rise to the level of "effective recommendations" to hire for purposes of Section 2(11), under the standards stated in *Bartlett*, *Chevron U.S.A.*, and *Spetonbush*.²⁴

²⁴ The Respondent cites *Thriftaway Supermarket*, 276 NLRB 1450 (1985), *enf. d.* 808 F.2d 835 (4th Cir. 1986), as support for its contention that pilots effectively recommended hiring. In *Thriftaway* the Board stated, in dicta, that an individual was a supervisor based on "numerous instances" of his "disciplining, assigning, and responsibly directing employees, and effectively recommending their hire and discharge, in the interests of the Respondent." *Id.* Regarding hiring, the Board noted that the individual had referred two candidates and told the company's president that they were good workers, and that the company had hired

Moreover, an individual's influence on hiring decisions is not supervisory in nature unless that influence is based on "delegated authority to participate in the hiring process," and not merely on the employer's respect for the judgment of the individual making the recommendation. *Plumbers Local 195*, 237 NLRB 1099, 1102 (1978). The facts present in this case lead me to conclude that whatever weight was given to referrals made by pilots was based on the Respondent's trust in the pilot's expertise and judgment, not on delegated authority to participate in the hiring process. The Respondent did not ask its pilots to evaluate applications or to submit evaluations in any systematic way as one would expect if such activities were part of pilots' job duties. Rather, pilots' involvement was limited to referring candidates about whom they had personal knowledge. Furthermore, there was no evidence that any pilots were ever informed that they were not performing their duties because they did not refer candidates, or because their referrals were of insufficient number or quality. Based on the evidence in this case, I conclude that while some pilots referred prospective employees, doing so was not one of their job duties and did not involve the exercise of delegated authority to participate in the hiring process.

Under the circumstances present in this case, I conclude that pilots were doing no more than what experienced employees at all levels do in many companies—referring acquaintances to their employer for possible hire. To elevate this type of referral to a supervisory activity would likely transform the entire line boat crew in supervisors, and contravene the admonitions in *King Broadcasting* and *Beverly Enterprises*, that supervisory status not be construed broadly. I find that the Respondent has failed to show that pilots effectively recommended hiring.

2. Effectively recommend promotion

"An employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will affect employees' job status." *Chevron U.S.A.*, 309 NLRB at 61; see also *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989) (factual accounts that do not include any recommendation are not supervisory); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995) (individuals do not possess supervisory authority with respect to hiring, firing, evaluating, promoting, or granting wage increases, or with respect to recommending these actions, when the individuals' involvement is limited to a reporting function); see also *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1046–1047 (8th Cir. 1998) (individuals did not exercise power to "promote" where "[t]heir evaluatory function was . . . primarily a reporting function"). Prior to May of 1999, the Respondent's captains sometimes asked pilots to verbally convey their observations regard-

both candidates. In *Thriftaway*, unlike the instant case, there was no mention of the employer performing any independent investigation or evaluation of the employees who had been referred before hiring them. Under the Board's subsequent rulings in *Bartlett*, *Spetonbush*, and *Chevron U.S.A.*, the fact that the Respondent in this case always performed an independent investigation into the qualifications of the candidates referred by its pilots is very significant and warrants a different result that was reached in *Thriftaway*.

ing the performance of crew members, especially inexperienced deckhands on the after watch who were being considered for promotion to experienced status. Such reports were helpful because the pilot, not the captain, stood watch on that shift. However, the decision to promote deckhands to experienced status was made by the personnel department based on forms that were completed by the captain or the mate, not by the pilot. Similarly, captains, mates, and chief engineers, but not pilots, had the authority to complete the evaluation forms for employees. In the case of mates who wished to be promoted to pilot, such promotion was only possible if a *captain* decided that the mate was ready and offered to train the mate through the steersman program. A mate could not gain access to the steersman program by convincing a current pilot to agree to train him or her. The port captain made the final decision about whether a mate would become a pilot.

Under these circumstances, I conclude that the Respondent has failed to show that the pilots' participation in the promotion process went beyond a "reporting function." Therefore, this participation was not supervisory in nature pursuant to the decisions in *Chevron USA*, *Ohio Masonic Home*, and *Chevron Shipping*.

3. Effectively recommend layoff and recall from layoff

I also conclude that the Respondent has not shown that pilots had the authority to recommend layoff and recall from layoff. Pilots were not advised that they had the authority to recommend layoff, and generally were under the impression that they did not have this authority. *Chevron U.S.A.*, 309 NLRB at 62 ("the evidence must 'fairly' show . . . 'that the alleged supervisor knew of his authority to exercise' the supervisory power"). Nevertheless, the Respondent's witness, Operations Manager Cook, testified that when he was considering laying off an employee he would sometimes solicit factual information from a pilot who worked with the employee. Cook conceded, however, that during these conversations he would not advise the pilot that the information sought related to a potential lay off, and would not ask the pilot's opinion. Cook explained that he "did not want to put the pressure" on "the pilot, to let them know what was going [on], that this person was being considered for permanent layoff." (Tr. 890.) This suggests that Cook was actively trying to insulate the pilots from the supervisory component of the process. The Respondent's attempt to characterize this as "effectively recommending layoff" is frivolous. The pilots were not asked to make any recommendation at all regarding layoff, much less an effective one. Indeed, the pilots did not even know that their conversations with Cook had anything to do with a possible layoff. Rather, the Respondent was simply soliciting factual reports from pilots about other crew members. Pursuant to Board precedent, see, e.g., *Chevron U.S.A.*, supra, and *Ohio Masonic Home*, supra, this type of reporting activity is not supervisory. See *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1411 (9th Cir. 1985) (prudent employers seek advice of foremen in evaluating employees; this does not elevate foreman to supervisor status).

The Respondent also contends that pilots recommended recall from layoff. It cites a single case in which a pilot, Jasper Bryant, complained to Cook that a mistake had been made in

laying off mate Rick Fisk because Fisk "was a good man and everybody got along with him, he kept the boat good and clean, towed good and tight." After Bryant made this statement, Cook talked the captain on the vessel about Fisk. The captain's opinion was consistent with Bryant's, and Fisk was recalled. Bryant did not exercise supervisory authority in this instance. First, the Respondent, even under the account of its own witness, was unwilling to accept the pilot's recommendation without further investigation. It was not until the captain on the vessel, a statutory supervisor, made the same recommendation as Bryant that the Respondent recalled Fisk. Thus the Respondent has not shown that it ever accepted a *pilot's* recommendation to recall someone from layoff without further investigation as is required pursuant to create supervisory status under the Board precedent discussed above. See, e.g., *Spetonbush*, supra, and *Chevron U.S.A.*, supra.

Moreover, the Respondent has not shown that, to the extent that the pilot's opinion influenced the decision, such influence was based on any authority delegated to the pilot to participate in a personnel decision rather than on the Respondent's respect for the pilot's judgment. Indeed the evidence that was presented indicated that the pilot's influence was based on the latter. Bryant's input was volunteered by him, not sought by the Respondent. There is no evidence of pilots recommending recall in any systematic or written way or of pilots participating in recall decisions regarding employees about whom they did not have first-hand knowledge. The action by Bryant, even assuming it could somehow be construed to be of a supervisory character, was an isolated incident. Other pilots testified credibly that they had never been informed that they had the authority to recommend recall from layoff, that they did not believe they had such authority, and that they had never, in fact, recommended that anyone be recalled from layoff. *Chevron USA*, 309 NLRB supra, at 61 ("isolated and infrequent incidents of supervision do not elevate a rank-and-file employee to a supervisor level"). I conclude that the Respondent has failed to show that pilots effectively recommended recall.

4. Reward

The Respondent contends that its pilots had the authority to reward crew members. However, multiple pilots testified credibly that they never rewarded crew members, and that the Respondent never told them that they had the authority to do so. See *Chevron U.S.A.*, 309 NLRB at 62 (alleged supervisors must know their supposed supervisory authority). What the Respondent apparently means by its claim that pilots rewarded crew members is that certain pilots sometimes invited crew members to have coffee with them in the wheelhouse, or permitted a crew member to steer the vessel briefly. The Respondent's effort to elevate these friendly gestures into expressions of supervisory authority is frivolous. The Respondent's pilots would also sometimes inform mates that it was a good time for the crew to take a break. However, these instances were generally limited to cases where the pilot had information that tow work or other activity was not imminent, or had been delayed. Even when the pilot conveyed such information it was up to the *mate* to decide whether the crew would be "rewarded" with a break at that time, or whether there was maintenance or other

work that required them to continue working. Under these circumstances the pilot's role was essentially limited to reporting on upcoming work, and therefore was not supervisory. *Beverly Enterprise v. NLRB*, 148 F.3d at 1046–1047 (individuals did not have power to “reward” where “[t]heir evaluatory function was . . . primarily a reporting function”). The Board has held that allowing employees to take breaks during periods when their assistance is not needed is a routine, nonsupervisory act. *Greenspan, D.D.S., P.C.*, 318 NLRB 70, 75–76 (1995) (dentists exercise routine, nonsupervisory, authority when they allow dental assistants to take breaks during the performance of procedures for which the assistants are not needed), *enfd.* 101 F.3d 107 (2d Cir. 1996), cert. denied 519 U.S. 817 (1996).

Even if one were to conclude that these actions by pilots constituted “rewards,” the Respondent's argument still fails because it has not made the necessary showing that the rewards were dispensed with any authority held in the interest of the employer, as is required by the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. at 573–574. Indeed, the evidence indicated that the Respondent did not even know when pilots rewarded employees by allowing them to steer or suggesting a break, and the pilots' actions did not change the recipients' personnel status in any way.

5. Discipline

Pilots did not have authority to discipline, or effectively recommend discipline of, crew members during the relevant timeframe. I do not doubt that pilots would occasionally scold crew members who they believed had failed to perform properly, but these episodes did not result in any personnel action and, in fact, were not even recorded. The Board has held that it is not discipline for purposes of Section 2(11) when an individual merely discusses an employee's shortcomings or mistakes with him. *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998). The ability to give oral reprimands that do not automatically affect job status or tenure does not constitute supervisory authority. *Ohio Masonic Home*, 295 NLRB at 394.

Moreover, as noted above, in order for a responsibility to qualify as supervisory for purposes of Section 2(11), that responsibility must involve authority *held in the interest of the employer*. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. at 573–574. In the instant case, the Respondent's own written description of its disciplinary process shows that any undocumented scoldings given by pilots were not considered discipline by the Respondent. The Respondent was not even made aware of these incidents of alleged discipline by pilots in any official way, and there was no credible evidence of any personnel action ever being taken based on such an incident. The credible evidence was that pilots were not told that they had authority to discipline prior to the pilots meetings in May 1999. Indeed, pilots did not even have the authority—possessed by captains, the mates, and chief engineers—to complete employee evaluations. The Respondent's effort to characterize scolding remarks by its pilots as an exercise of supervisory authority under Section 2(11) is without merit.

6. Effectively recommend discipline

When an adverse personnel action against an employer was being contemplated by the Respondent, a pilot who worked

with the crew member would sometimes be asked to report on the crew member's work. However, the evidence did not indicate that pilots were told about the personnel action that was being contemplated or that their opinions were requested. During the relevant, pre-5/99, timeframe pilots were without authority to complete the written employee evaluations that were used by captains, mates, and chief engineers to comment on the performance of employees. Since the information requested from pilots amounted to, at best, a report of factual information, it did not constitute an effective recommendation regarding discipline. See *Chevron USA*, 309 NLRB supra at 61; *Ohio Masonic Home*, 295 NLRB at 393–394.

7. Assign employees

The pilot did not assign other employees prior to May of 1999. The members of the deck crew were assigned to the vessels by crew dispatchers, and to a particular watch by the captain or the mate. The Respondent contends that pilots assigned employees because they had the authority to wake the call watchman and require him or her to work. However, I credit the testimony of multiple witnesses that it was the mate and the captain, not the pilot, who had the responsibility to decide if the call watchman would be awakened. (Tr. 83, 85, 234, 416, 556–557, 589, 1726–1727.)²⁵ The pilot's responsibility was limited to giving the mate sufficient advance notice that tow work was coming up so that the mate could, if he or she chose, wake the call watchman in time to perform the tow work.

The Respondent also asserts that pilots “assign employees” by ordering crew members to perform tasks such as standing lockout, repairing lights, cleaning windows, and fixing depth finders. The credible evidence in this case showed, however, that the pilot did not assign employees to these tasks. Rather the pilot informed the mate that the work was necessary, and the mate selected the member of the deck crew who would perform the task. The pilot was not called upon to take into account the skill, experience, or fatigue level of the individual selected by the mate. “[F]or an assignment of function to involve independent judgment, the putative supervisor must select employees to perform specific tasks on the basis of a judgment about the individual employee's skills.” *Cooper/T. Smith Inc. v. NLRB*, 177 F.3d 1259, 1265 (11th Cir. 1999).

Even if one assumes, contrary to my own conclusion, that that pilots did direct particular deckhands to perform the tasks enumerated by the Respondent, pilots would still not “assign employees” as required by Section 2(11). The members of the deck crew are assigned to the vessels by crew dispatchers and to a particular watch by the captain or the mate. The tasks cited by the Respondent are within a deckhand's already-assigned routine duties. Under these circumstances, the pilot could not reasonably be seen as “assigning” employees.

8. Responsibly direct work

Prior to May of 1999, the Respondent's mates oversaw the work of the deck crew under the direction of the captain of the

²⁵ For the reasons given in the credibility discussion above, I do not credit Captain Johnsen's testimony that the pilot decides whether the call watchman will be awakened on the after watch.

vessel. The deckhands and watchmen reported to the mate, who in turn reported to the captain. The mate was responsible for selecting the particular member of the deck crew who would perform a task on the after watch, and the mate and the captain worked together to prioritize the deck crew's work. That being said, it is clear that in the course of navigating the vessel the captain would make determinations that certain work by the crew was necessary. For example, the pilot would determine: that the wheelhouse windows needed to be cleaned so that he or she could see clearly enough to navigate; that a broken depth finder needed to be repaired or replaced to permit safe navigation; that the boat needed to be tied off due to weather conditions; that he or she needed someone to stand lookout when negotiating a bridge or other obstacle; that he or she needed a particular pin to be caught when entering a lock; that the tow configuration needed to be altered to allow safe navigation. The pilot would also sometimes determine that wheelhouse maintenance, such as painting, needed to be delayed so as not to interfere with his or her ability to see or hear well enough to navigate safely. The pilot also conveyed information to the deck crew based on his or her superior vantage and access to communications from land-based management, passing vessels, fleeting operations, and navigational instruments. For example, a pilot would relay tow orders received from land-based management and communications from passing crews that one of the vessel's running lights was out. The pilot generally communicated with the mate, who in turn decided who on the deck crew would perform any necessary work. On occasion the pilot would determine that safe navigation required that the engines of the vessel run at above their normal RPM level (an "engine overload"), and this information would be communicated to engine room personnel. Depending on the personality of the pilot, his or her communications could be cast either as the conveyance of information, a request for help, or a directive. Regardless of how the particular pilot cast the communication, he had no authority to compel the action or to discipline nonperformance or poor performance.

I conclude the Respondent's pilots did not possess the type of supervisory judgment required to "responsibly direct" within the meaning of Section 2(11). In many of the instances that the Respondent is attempting to characterize as responsible direction the pilot was really only conveying information from off-vessel sources or his navigational equipment. In other instances it is true that the pilot was making complex decisions that sometimes resulted in directions being issued to crew members. However, these decisions were based on the pilots' extensive training, experience, and skill as navigators—in other words, on their status as expert/experienced employees—not on the possession of management prerogative, and the directions only required employees to perform their routine duties. The Board recently discussed this distinction in *Mississippi Power & Light*:

A professional, technical, expert or experienced employee is often required, as part of the employee's own job, to make detailed and complex decisions. The judgment required in making those decisions does not, however, "transform" that employee into a supervisor. And, the mere communication of that information to other em-

ployees does not mean that the alleged supervisor uses supervisory judgment in assigning and directing others, especially when such assignments and direction flow from professional or technical training and do not independently affect the terms and conditions of employment of anyone.

328 NLRB 965, 970 (1999); see also *Providence Hospital*, 320 NLRB 717, 728 (1996) (where nurse uses substantial professional judgment to create treatment plan, but the resulting directions that the nurse gives to staff are wholly routine, the nurse does not exercise supervisory independent judgment), *enfd. sub nom. Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997); see also *Westinghouse Electric Corp.*, 424 F.2d 1151, 1156 (7th Cir. 1970) (engineers who "give directions" as "necessary incidents of their technical know-how" do not responsibly direct), *cert. denied* 400 U.S. 831 (1970). The pilots' decisions in response to river conditions, and at locks, bridges, during tow work, and while facing up are all decisions made based on navigational standards and expertise, and are not decisions based on management concerns such as business norms and profit maximizing objectives. Under such circumstances the issues of divided loyalties that Section 2(11) addresses, are not raised. *NLRB v. GranCare*, 170 F.3d 662, 666–667 (7th Cir. 1999) (*en banc*).

The legislative history of Section 2(11) indicates that "responsible direction" was meant to refer to the authority of an individual who "determines under general orders what job shall be undertaken next and who shall do it" and "gives instruction for its proper performance." *Mississippi Power & Light Co.*, 328 NLRB at 12 (dissenting opinion of Members Hurtgen and Brame) (quoting Congressional Record, Senate, March 7, 1947 (remarks of Senator Flanders)). Prior to May 1999, the Respondent's pilots bore little if any resemblance to that description of a supervisory employee. It was up to the mate, not the pilot, to determine which member of the deck crew would perform a particular task, even if the pilot was the one who determined that the action was necessary. "[F]or an assignment function to involve independent judgment, the putative supervisor must select employees to perform specific tasks on the basis of a judgment about the individual employee's skills" and the Respondent's pilots did not do that. *Cooper/T. Smith*, 177 F.3d at 1265.²⁶

²⁶ The Respondent cites *Bernhardt Bros. Tugboat Service*, 142 NLRB 851 (1963), *enfd.* 328 F.2d 757 (7th Cir. 1964), in support of its contention that its pilots responsibly directed crew members. In that case, a trial examiner found that an employer's pilots did have the authority to responsibly direct for purposes of Sec. 2(11). The Board adopted the trial examiner's decision, but it is not clear how much consideration it gave to the question of the supervisory status of pilots since its decision did not discuss this issue and noted that exceptions were not filed to the trial examiner's dismissal of certain allegations, and that such findings were "adopted *pro forma*." *Id.* at 851 fn. 1. In any case, the facts found in *Bernhardt Bros.*, while in many respects similar to those present here, differ in the significant respect that the pilots decided which crew member would be assigned to a task. *Id.* at 854. As noted above, in the instant case the Respondent's pilots were not involved in selecting which crew member would perform a task. This distinction is significant, as discussed in *Cooper/T. Smith*, 177 F.3d at 1265, and the legislative history of Sec. 2(11). Moreover, the

In addition, the pilot did not “give instruction in [the task’s] proper performance.” Indeed, from his duty station in the wheelhouse, the pilot often could neither converse with the crew member about the tasks nor observe the crew member’s performance. When the pilot did communicate with the crew, these communications almost always fell into one of two, sometimes overlapping categories. The first category consisted of communications of information that the pilot had because of his special vantage and access to off-vessel communications. The pilot would tell the mate, for example, how many barges the tow order said would be picked up or dropped off, that a depth finder was not working, that a light had blown, that a barge appeared to be compromised, or that tow work was imminent or delayed. The Board has held that the conveyance of information from management does not show independent judgment for purposes of Section 2(11), see *Fleming Co.*, 330 NLRB 277 (1999) (role as conduit of management information is insufficient evidence of independent judgment within meaning of Sec. 2(11)); *Mayfield Produce Co.*, 290 NLRB 1083, 1084 (1988) (role as conduit for relaying instructions and policies of management insufficient to render individual a supervisor, but can be sufficient to render him or her an agent). Similarly, communications do not involve independent judgment for purposes of Sec. 2(11) when they are the mere conveyance of information regarding problems that the pilot gathers from passing vessels, navigational instruments, or his own superior vantage point in the wheelhouse. See *Exxon Pipeline Co v. NLRB*, 596 F.2d 704, 706 (5th Cir. 1979) (individual does not responsibly direct when he “does little more than notify the field that a certain problem has occurred and requests assistance in remedying it”). The second category consisted of the communication by pilots of their needs ancillary to navigation of the vessel—for example, that a particular pin be caught so that he or she could steer safely into the lock, that a crew member serve as look out, or that the deck crew tie off the tow when the vessel and tow were pulled over due to weather conditions. These communications are of the same character as those involved in *A.L. Mechling Barge Lines*, 192 NLRB 1118, 1119 fn.7 (1971). There the Board held that instructions such as “untie that line,” “catch a line,” “get down there,” “get that barge over in line,” or “get that boat” did not “reflect the degree of responsible direction” necessary to confer supervisory status under Section 2(11), and the same conclusion is warranted here. See also *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967) (“Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.”).

The Respondent’s pilots were also excluded from the management procedure for deciding “what job shall be undertaken next.” *Mississippi Power & Light Co.*, 328 NLRB at 12; see also *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (indi-

decision in *Bernhardt Bros.*, was issued almost 40 years ago, and its continued viability is called into question by the recent decision in *Mississippi Power & Light Co.*, where the Board recognized a distinction between supervisory employees whose direction “share[s] management’s power,” and those nonsupervisory employees whose direction is based on “superior training, experience, or skill.” 328 NLRB 965, 970.

viduals do not assign or direct within the meaning of Section 2(11) when they do not have any role in planning and controlling their departments’ operation). The Respondent’s operating procedures required the captain and the mate to meet daily to prioritize all work on the vessel, but the pilots were not included in these meetings. At most, the pilot would have inconsequential involvement in scheduling a tiny proportion of the deck crew’s work—for example, telling the mate when it was, or was not, a good time to perform wheelhouse maintenance (e.g., scraping and painting) based on navigational concerns such as whether the stretch of river and weather conditions permitted the pilot to steer safely even with his or her view partially obstructed. Certainly, if the pilot told the mate that, in the interests of safe navigation, it was urgent that the wheelhouse windows be cleaned or that an aid to navigation be repaired, one would expect that the mate would set a high priority on those tasks, but there was no evidence that this was so because of any supervisory authority possessed by pilots, rather than because of the mate’s understandable desire to cooperate with the pilot in order to avoid accidents or mishaps. The Respondent’s training materials stated that it was the mate who would be responsible for “directing work as it is being performed.” Individuals are not supervisory even though they make an independent judgment that a problem must be corrected immediately and request assistance from employees in remedying it, where the individual has no further authority to direct personnel in the performance of their remedial duties. See *Exxon Pipeline Co. v. NLRB*, 596 F.2d at 706.²⁷

Because the Respondent has not shown that its pilots determined what job would be undertaken next or who would do it, or that pilots gave significant instruction on proper performance, I conclude that the pilots did not have the authority to “responsibly direct.”

Even if one were to conclude that the Respondent’s pilots directed employees on behalf of the employer in non-routine tasks, those pilots would still not be statutory supervisors because such direction was not “responsible” within the meaning of Section 2(11). Pilots were not held accountable in any meaningful way for the performance and work product of the crew. The Respondent did not prove a single instance when any pilot had been warned, counseled, suspended, or disciplined in any way because of the mistake or poor performance of one of the crew members he or she allegedly supervised.²⁸

²⁷ One pilot who testified for the General Counsel said that he could “insist” that work necessary for safe navigation (e.g., the cleaning of windows, repair of an aid to navigation) be performed by the deck crew. Tr. 461–467. In the unlikely even that the deck crew refused to perform a task that was necessary to safe navigation, one would expect that the pilot would “insist” in no uncertain terms that the task be done. However, it is one thing to insist, and another to have the authority to compel such actions. Certainly one would expect that if a deckhand standing lookout observed a small boat in the path of the tow, he would “insist” that the pilot take action to avoid a collision, but this would not mean that the deckhand was the pilot’s supervisor or had authority to compel the pilot to follow directions. The Respondent has not shown that, prior to May 1999, the pilot had authority or power from the Respondent to compel any crew member to do anything.

²⁸ Pilots did complete incident reports on any accidents that occurred during the after watch. This reporting function does not show that the

At least five United States Courts of Appeals have indicated that an individual does not responsibly direct employees unless he or she is held responsible in the sense of being fully accountable or answerable for the performance and work product of the employees he or she directs. *Schnurmacher Nursing Home*, 214 F.3d 260, 267 (2d Cir. 2000); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d at 1265–1266 (11th Cir.); *Spetonbush/Red Star Cos. v. NLRB*, 106 F.3d at 490 (2d Cir.); *Northeast Utilities Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994), cert. denied, 514 U.S. 1015 (1995); *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1383 (9th Cir. 1976); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545, 549 (9th Cir. 1960); *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), cert. denied 338 U.S. 899 (1949). The Board has not expressly stated whether it adheres to this definition of the word “responsibly” in Section 2(11), but it has approved at least one decision by an administrative law judge that relied on it, see *Asheville Steel Co.*, 202 NLRB 146, 147 fn. 11 (1973), enfd. 487 F.2d 1398 (4th Cir. 1973). In my view, it is reasonable that the inquiry into whether an individual “responsibly” directs work should focus on whether the alleged supervisor is held responsible for the performance and work product of the employees he directs. In this case, pilots are not only not held fully accountable for the performance and work product of crew, but they are not held accountable at all in any meaningful sense. This buttresses the conclusion that pilots did not “responsibly” direct within the meaning of Section 2(11).²⁹

pilot was held responsible for the performance of the crew during the accident, but only that he or she was held responsible for making the report regarding the accident. The Respondent contends that the pilot was held responsible insofar as he or she could lose his or her Coast Guard license in the event of an accident, or in the event that a crew member failed to comply with Coast Guard regulations. There was no evidence, credible or otherwise, that a pilot had ever lost his or her license because of an accident that was caused by a crew member’s mistake, or because of a crew member’s violation of Coast Guard regulations. Even if this had happened, it would only indicate that the Coast Guard considered the pilot responsible, not that the Respondent considered the pilot responsible, or that the pilot actually was responsible under the Respondent’s policies and procedures.

²⁹ Another possible test of whether an alleged supervisor “responsibly” directs employees is to ask if the alleged supervisor has been “charged,” with doing so. *Mississippi Power & Light*, 328 NLRB No. 965, 979 fn. 23 (1999) (dissenting opinion of Members Hurtgen and Brame). The result is the same under that test. The Respondent’s own documents show that it charged the mate with managing the deck crew under the direction of the captain. The pilot was not charged with directing or management of the deck crew or mate. Cook, the vice-president of the Respondent’s operations, admitted that he had told pilots that prior to May of 1999, they were viewed as a “person that drives the boat with virtually no say-so in the management of the boat.” Moreover, the credible testimony of pilots was that, prior to May of 1999, the Respondent had never told them that they managed the crew on their watch or that they had the authority to direct or oversee work. Indeed pilots were generally unable to observe the work of the deckhands, and were sometimes unable to communicate with them.

The Respondent contends that the pilot’s direction is responsible because he is “in command” of the “inherently dangerous” line boat operations during the after watch. This argument fails both factually and legally. The Respondent’s captains are “in complete command of all phases of vessel operation at all times.” GC Exh. 76, p. 2 (emphasis in

The Respondent argues that pilots are statutory supervisors because they are expected to direct the crew during emergencies and because they assume the captain’s duties in the event that the captain is incapacitated or absent. These incidents occur on a very isolated and infrequent basis and are insufficient to confer supervisory status. *Chevron USA*, 309 NLRB at 61 (“isolated and infrequent incidents of supervision do not elevate a rank-and-file employee to a supervisor level”). Recently, the Board stated that the “appropriate test for determining the status of employees who substitute for supervisors is ‘whether they spend a regular and substantial portion of their working time performing supervisory tasks.’” *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000). In *Hexacomb Corp.*, 313 NLRB 983, 984 (1994), the Board held that an employee who substituted for a supervisor 8 to 10 percent of the time was still not himself a supervisor because he assumed the supervisor’s duties on too sporadic a basis. See also *McDonnell Douglas Corp. v. NLRB*, 655 F.2d at 937 (where airplane pilot exercised supervisory authority over crew five percent of the time, such authority was too infrequent to render him a supervisor). The record here does not indicate that anywhere near eight percent of a pilot’s time was spent acting as captain.³⁰ Pilots’ substitution for captains was sporadic and clearly did not occupy a “regular and substantial portion of their working time.” Such substitution does not confer supervisory status.

Regarding the pilot’s actions during emergencies, these incidents are not only sporadic, but, by their nature, create special circumstances where personnel at various levels may give directions to others and expect them to comply. See *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1076 (1985) (an employee does not become a supervisor because he or she gives common sense direction in response to an isolated emergency

original). Even if pilots did exercise some limited sort of “command” function, it is not clear that this would implicate any of the supervisory functions listed in Section 2(11). In addition, the Board has rejected the argument that the danger inherent in an operation establishes that individuals are supervisors. See *Mississippi Power and Light Co.*, 328 NLRB 965, 969 (1999) *Chevron Shipping Co.*, 317 NLRB at 382. A number of United States Courts of Appeals have also rejected the idea that the inherent danger of an activity renders persons involved in it supervisors. In *Cooper/T. Smith*, the Eleventh Circuit recognized that docking pilots directed others in work that was complex and potentially dangerous, but held that this did not elevate the pilots to supervisory status. 177 F.3d at 1266. In *McDonnell Douglas Corp. v. NLRB*, the Ninth Circuit held that an airplane pilot who exercised “the authority needed to insure the safety of the airplane, passengers, and crew,” was not a supervisor since such authority stemmed from his “professional expertise,” and was “an intrinsic part of any pilot’s job.” 655 F.2d at 937; see also *Providence Hospital*, 320 NLRB 717, 725–726 (1996) (when a nurse directs others in matters of life and death, the nurse exercises professional, not supervisory judgment), enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997).

³⁰ In one instance a pilot assumed a captain’s duties for a somewhat lengthy period of time, but this was when the vessel was not underway. The evidence did not show that other pilots had acted as captains with any frequency at all, nor did it show that any pilot had assumed a captain’s duties for an extended period of time on a vessel that was underway.

situation). For example, if a deckhand standing lookout on the forward watch were to observe a small boat immediately in the path of the tow one would expect the deckhand to tell the captain to avoid the craft, and for the captain to endeavor to do so. Indeed, the Respondent's own written policies provide that a deckhand tells other crew members where to gather during an emergency. (GC Exh. 9.) Furthermore, during emergencies, like other times when the pilot communicates with crew, the pilot is not exercising the supervisory responsibilities of the Respondent, but rather is acting in accordance with the expertise as a navigator. In *Empress Casino Joliet Corporation v. NLRB*, 204 F.3d at 722, the Seventh Circuit observed that "[w]hen a ship's captain orders the helmsman to steer the ship to starboard in order to avoid an iceberg, he is exercising professional judgment rather than shouldering one of the supervisory responsibilities of the ship owner's managers," even when such "exercise of professional judgment" has "an irreducible supervisory component." *Id.* When, in emergency situations, a pilot instructs others about what needs to be done, this does not render the pilot a supervisor even though the pilot used his or her judgment as an experienced navigator in deciding what instructions to give.

9. Secondary indicia of supervisory status

The Respondent contends that pilots should be considered supervisors because they receive officer's benefits and are the second highest paid person on the vessel after the captain.

Some decisions have discussed "secondary indicia" of supervisory status, see, e.g., *Laser Tool, Inc.*, 320 NLRB 105, 108 (1995), however, such indicia cannot establish supervisory status unless the disputed employee possesses at least one of the types of authority listed in Section 2(11), see *GRB Entertainment, Inc.*, 331 NLRB 320 (2000), *Carlisle Engineered Products*; *supra*, *Chrome Deposit Corp.*, 323 NLRB 961 fn. 9 (1997), *Bay Area-Los Angeles Express*, 275 NLRB at 1080, quoting *Memphis Furniture Mfg. Co.*, 232 NLRB 1018, 1020 (1977), *enfd.* 616 F.2d 964 (6th Cir. 1980). Since the Respondent has failed to meet its burden of showing that pilots possessed any of the types of authority specified in Section 2(11), the argument based on secondary indicia fails. At any rate, the Respondent's contention that officer's benefits and pay level correlate directly with supervisory status is undermined by the evidence that assistant engineers, who management witnesses conceded were not supervisors, received officer's benefits, Tr. 1319, and higher pay than the mate (GC Exh. 59), even though management witnesses agree that the mate is a supervisor. See *Chevron Shipping Co.*, 317 NLRB 379 (second and third mates aboard oil tanker are not supervisors even though they are officers); see also *Bay Area-Los Angeles Express*, 275 NLRB at 1080 (fact that senior employee receives greater compensation than other employees is not inconsistent with non-supervisory status).

The most telling of the secondary indicia in this case is the improbable supervisory ratio that would result from acceptance of the Respondent's contentions. According to management witness Hopkins, five members of the line boat crew are supervisors—the captain, the pilot, the mate, the watchman, and the

chief engineer. (Tr.1433–1435.)³¹ This would leave, as supervised employees, only four crew members on the lower Mississippi River, and five crew members on the upper Mississippi River. In other words, acceptance of the Respondent's view would result in a supervisory ratio of five supervisors to every four or five non-supervisory employees. In *NLRB v. Grancare, Inc.*, the Seventh Circuit, sitting en banc, observed that under the employer's theory the supervisory ratio would be 59 supervisors to 90 nonsupervisors and remarked that "[s]uch a highly improbable ratio of bosses to drones 'raises a warning flag.'" 170 F.3d at 667; see also *Northcrest Nursing Home*, 313 NLRB 491, 498–499 (1993) (discussing that significance has been given to supervisory ratio, but stating that it is not dispositive of supervisory status). In the instant case, the ratio of supervisors to non-supervisors that would result from acceptance of the Respondent's view is even higher and even more unrealistic than in *Grancare*, and raises an even brighter warning flag.

Conclusion

For the reasons discussed above, I reject the Respondent's contention that its pilots were already statutory supervisors at the time of the alleged unfair labor practices. The Respondent has failed to show that its pilots exercised a single one of the supervisory authorities listed in Section 2(11) prior to May 1999. The Respondent's argument is contradicted not only by the evidence regarding pilots' duties, but also by its own prior statement in a letter to striking pilots which indicated that it viewed pilots as employees who had the right to engage in concerted activity, and by Cook's statement that pilots had been viewed as having "virtually no say-so in management."

II. ALLEGEDLY UNLAWFUL STATEMENTS OF COOK ON JUNE 8, 1999

The General Counsel alleges that remarks made by the Respondent's vice president of operations, Dave Cook, at the pilots meeting on June 8, 1999, violated Section 8(a)(1) because they implied that the new supervisory duties were being assigned to discourage union and protected activity. The test for such a violation is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). At the time of the pilots meetings the Respondent was aware that the union organizing campaign was ongoing. During his June 8 talk to pilots, Cook stated that the Respondent had been forced to make changes in the past to respond to factors such as drought and flood. He stated that the Respondent would be changing again in response to what it had learned during the Pilots Agree Strike of 1998. Prior to the strike, Cook explained, the pilots had been seen as persons with virtually no "say-so" in the management of the boat. Now the Respondent, Cook said, was giving pilots more "say-so" in management.³² Cook con-

³¹ Wilken stated that the captain, pilot, mate, and chief engineer were supervisors, but excluded the watchman from the group.

³² The General Counsel alleges that Cook also said "gentleman, make no mistake about it, there will be no more Pilots Agree at ARTCO," however, for reasons discussed in the statement of facts, I

cluded by stating “[r]est assured,” “we will survive Pilots Agree of ‘98.”

I conclude that these remarks by Cook tended to interfere with the free exercise of the pilots’ rights under the Act, in violation of Section 8(a)(1). The Respondent essentially stated that the Company was assigning management duties to employees in reaction to concerted activity, i.e., the strike. Moreover, since supervisory employees do not have the right under the Act to engage in concerted activities, the implication of these statements was clear. The Respondent was telling the pilots that any further organizational activity would be futile because the Company was making pilots supervisors. An employer violates Section 8(a)(1) when it acts to discourage organizational activity by stating that such activities will be futile. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991); *Uniroyal Technician Corp.*, 324 NLRB 429, 432 (1997), *enfd.* 151 F.3d 666 (7th Cir. 1998).

III. ALLEGEDLY UNLAWFUL ASSIGNMENT OF SUPERVISORY DUTIES

In May 1999, the Respondent issued a job description that assigned new supervisory duties to its pilots, and in September 1999 the Respondents issued a document to pilots entitled “The ARTCO Pilot’s Added Responsibilities, Effective 09 Sept. 99,” which also listed a number of new supervisory duties.³³ The General Counsel alleges that these actions violated Section 8(a)(1) and (3) of the Act because the Respondent acted in response to the pilots’ union and concerted activities, and with the purpose of discouraging such activities. The Board has held that the assignment of supervisory functions violates Section 8(a)(3) if it is done to discourage support for the union and to avoid the possibility of a representation election. *Matson Terminals*, 321 NLRB 879 (1996), *enfd.* 114 F.3d 300 (D.C. Cir. 1997).

In *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent’s actions were motivated, at least in part, by antiunion considerations. The General Counsel meets this burden by showing that: (1) the employees engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity to-

wards the union or union activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, 330 NLRB 1105.

The Respondent in this case was aware that many of its pilots had participated in a strike in 1998 that hobbled the Company for many months. In addition, the Respondent was aware that the Union was engaged in a campaign to organize its pilots and that this campaign was continuing at the time of the alleged unfair labor practices. The General Counsel has shown that the Respondent’s pilots engaged in union and other protected activity, and that the Employer knew of such activities.

The evidence also shows that the Employer harbored animosity towards the union activity. I believe Cook’s statement to pilots that the Respondent was changing the pilots duties as a result of what the Company had “learned” during the strike, is evidence enough of this. The Respondent’s anti-union animus is seen again in the testimony of Creviston, the labor relations manager who had responsibility for the Company’s response to the organizing campaign. Creviston compared Pilots Agree and its concerted activity to a “snake” that he had tried to “kill” by “cutting the head off.” These remarks drip with animosity towards Pilots Agree.

Timing is an important factor in assessing motivation in cases alleging discrimination based on union or protected activity. See, e.g., *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994). The Respondent had historically viewed its pilots as nonsupervisory personnel with “virtually no say-so in management.” As late as the strike of 1998, the Respondent sent pilots a letter recognizing that they were nonsupervisory employees with Section 7 rights. Then, in response to the election petition filed on September 24, 1998, the Respondent for the first time contended that its pilots were not employees, but statutory supervisors. This contention was rejected by the Regional Director, and the Board upheld that decision on January 21, 1999. The Union lost the representation election, but the Respondent knew that the organizing effort was continuing. On May 13, 1999—less than 4 months after the Board ruled that the pilots’ existing duties were nonsupervisory—port captain Hussell sent an e-mail message to pilots stating that the Respondent would be holding meetings for pilots at which the assignment of new duties would be discussed. This was the first credible evidence that the Respondent was intending to assign new duties to pilots. See, *infra* footnote 11. There was no credible evidence that the Respondent had even contemplated such a change before the Board ruled that their existing duties were nonsupervisory. This smacks of an effort by the Respondent to negate the Board’s decision by giving pilots, at least on paper, new authorities that would render them supervisors and preclude further organizational efforts.

The view that the assignment of the new functions was designed to thwart the organizational effort, not for any legitimate business purpose, is further supported by the Respondent’s conduct after those duties were assigned. The credible testi-

conclude that the General Counsel did meet its burden of proving that this remark had been made.

³³ The witnesses for the General Counsel and the Respondent disagree about how many of the responsibilities assigned to pilots in the May 1999 pilot’s job description, and the September 1999 statement of “Pilot’s Added Responsibilities,” were “new,” but by all accounts some the responsibilities had not been possessed by pilots previously. As indicated by the preceding discussion of pilots’ status prior to May 1999, I have concluded that the pilots did not previously possess any of the supervisory authorities mentioned in the job description or “Added Responsibilities” memorandum.

mony showed that the Respondent had not called upon pilots to exercise many of the new duties it gave them on paper.³⁴ Moreover, captains and mates had long been exercising a number of these duties and continued to do so without any change to accommodate the pilots' supposed new role in management. Immediately after the pilots meetings, the Respondent required pilots to complete evaluations of deck crew members. Pilots testified credibly that since that round of evaluations, they had not been called upon to complete evaluations ever again. The mates continued to complete their own deck crew evaluations, which were reviewed by the captains, as they had been prior to the assignment of new duties to the pilots. This evidence supports the view that the assignment of new duties to the pilots was a sham. See *New York Univ. Med. Ctr. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998) (Theoretical or paper power does not a supervisor make.), *Beverly Enters.—Mass., Inc. v. NLRB*, 165 F.3d at 963 (“[A]bsent exercise, there must be other affirmative indications of authority. Statements by management purporting to confer authority do not alone suffice.”), *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976) “[T]he mere . . . giving of ‘paper authority’ which is not exercised does not make an employee a supervisor.”

The statements of Cook and Creviston, the timing of the Respondent's assignment of the new duties, the failure of the Respondent to call upon pilots to exercise their new supervisory authorities in a meaningful way, and the record as a whole persuade me that the Respondent's decision to assign the new duties was motivated, at least in part, by antiunion considerations.³⁵ Therefore, the burden shifts to the Respondent to demonstrate that it would have taken the same action absent the unlawful motive.

The Respondent contends that it had legitimate reasons for assigning supervisory duties to pilots, and that these reasons would have caused it to take the same action even absent any antiunion motive. Specifically, the Respondent says it needed: to have a management representative on the vessel at all times; to provide management training to pilots; and to obtain “responsible carrier” certification. None of these alleged motives for the assignment of supervisory functions to pilots withstands scrutiny.

Regarding the contention that the Respondent needed to have a management representative on the vessel at all times, the

evidence showed that the Respondent did have such a representative—the captain. According to its own written statement the captain is in *complete command of all phases of vessel operation at all times.*” (GC Exh. 76, p. 2) (Emphasis in original.) Moreover, the Respondent's contention that the training was motivated by a need to have a management representative on the vessel at all times is contrary to its claim that it already considered pilots to be supervisors and managers.

It is not unreasonable that the Respondent would want to provide training in its policies and procedures to pilots, especially to the many new pilots who it hired after the strike. However, this motive would only explain the Respondent's desire to provide training in *existing* duties. It is no explanation at all for the Respondent's decision to assign a host of new supervisory duties to its pilots. Similarly, although the issuance of a job description for pilots may have been required in order to obtain responsible carrier program certification,³⁶ that would not necessitate the assignment of new supervisory authorities to pilots. The Respondent could have met any requirement that a job description be issued by creating one that reflected the pilots' actual and existing duties. The desire for responsible carrier program certification in no way explains the Respondent's decision to issue a job description that purported to assign numerous new supervisory functions to pilots.³⁷

The Respondent argues that under the Board's decision in *Bridgeport & Port Jefferson Steamboat*, 313 NLRB 542 (1993), an employer is permitted to assign supervisory duties to employees with the intent of making them statutory supervisors, even where the employer knows the action will deprive the employees of Section 7 rights. In that case, the Board held that it was not a violation to assign supervisory duties to the captains of its vessels, even though the Board had previously

³⁶ The responsible carrier program was established by the American Waterways Operators, an industry group, as a code of practice for member companies.

³⁷ I found Wilken's testimony that the assignment of supervisory functions was motivated by a desire to comply with the requirements of the responsible carrier program to be lacking in credibility for the same reasons, discussed above, that I found his testimony generally lacking in credibility. Moreover, I believe that the totality of the evidence makes his statements about motive implausible. The Respondent states that the program requires that pilots be trained in supervisory skills. However, the provision cited, indicates that supervisory skills training is for the “master,” not the pilot. GC Exh. 48 at p. V-2. Moreover, the document is dated “1/00,” which is *after* the Respondent assigned the supervisory duties to pilots. Even if pilots required some supervisory training to prepare them to serve as acting captains on rare occasions, that would not explain why the Respondent decided to issue documents making the supervisory authorities a permanent part of the pilots' job at times when the pilots were not substituting for the captain. Lastly, the timing of the Respondent's action does not support the claim that it was motivated by the responsible carrier program. That program was implemented in December 1994, GC Exh. 48 at p. I-1. One would expect that if that program was the reason for the assignment of new supervisory duties to pilots, then the Respondent would have assigned the duties closer in time to when the program was implemented. The fact that the Respondent waited over 4 years—until after the strike and the Board's decision in the representation case—before assigning the new supervisory duties undermines the Respondent's claim that its action was motivated by the responsible carrier program.

³⁴ The Respondent's pilots did exercise some new duties that were not supervisory in nature, e.g., signing the daily log for the after watch.

³⁵ The Respondent argues that one cannot reasonably conclude that it had antiunion animus because it hired known union sympathizers as wheelhouse personnel after the strike. I disagree. To refuse to hire these individuals because of their protected activity would have been a violation of Sec. 8(a)(3) of the Act. Although it is commendable that the Respondent did not choose to violate the Act in this respect, the fact that an employer does not violate the Act in every way possible does not prove that it complied in all others. Moreover, after the strike the Respondent was desperately short of wheelhouse personnel and this could explain the Respondent's decision to hire pilots it might otherwise consider undesirable. This is particularly true since the strike had affected other towboat operations who would presumably be competing for the same experienced wheelhouse personnel. Both Hopkins and Dragon testified to the Respondent's unusual need for new wheelhouse personnel following the strike.

held that captains were not statutory supervisors. However, the Board explicitly stated that the reason that the assignment of new supervisory duties was lawful was that the employer's action was "not a sham aimed at undermining the Union but a sincere effort to provide onsite supervision of its vessels through the performance of supervisory duties by its captains." 313 NLRB at 544. Indeed in *Bridgeport* there was credible evidence including written directives and memoranda, showing that the employer was having serious problems with the operation of its vessels due to a complete lack of on-board supervision. The evidence showed that the *Bridgeport's* recognition of these problems, and its desire to remedy them, pre-dated the Board's ruling that the *Bridgeport's* captains were non-supervisory employees. The evidence also showed that *Bridgeport* had not merely assigned the new supervisory tasks, but "required the captains to perform" them. *Id.*

The facts of the instant case stand in stark contrast to those in *Bridgeport*, and, as noted above, show that the Respondent's assignment of supervisory functions to pilots was "a sham aimed at undermining the Union" and therefore a violation of the Act, consistent with the Board's decision in *Matson Terminals*, 321 NLRB 879. In the instant case, unlike *Bridgeport*, there is no credible evidence that the Respondent contemplated assigning supervisory duties to pilots prior to the strike and the organizing campaign. On *Bridgeport's* vessels there had been a true supervisory vacuum in which no one on board, not even the captains, had been considered supervisors. There was no such vacuum on the Respondent's boats here. The Respondent's captains were recognized supervisors who the Respondent stated were "in complete command of all phases of vessel operation at all times." (GC Exh. 76 at p. 2.) Moreover, according to the testimony of the Respondent's witness, the mate, the watchman and the chief engineer also had supervisory authority. Lastly, the evidence in this case indicates that, unlike the disputed employees in *Bridgeport*, the pilots in this case were not called upon to exercise their new supervisory duties in a meaningful way.

I conclude that, as the General Counsel alleges, the Respondent assigned the new supervisory duties to pilots because of their protected and union activity and in an effort to preclude such activity in the future. Therefore such assignment violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. American River Transportation Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Organization of Masters, Mates & Pilots, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By making statements to employees implying that it had assigned supervisory duties to them in order to discourage union or protected activity, the Respondent interfered with its employee's Section 7 rights in violation of Section 8(a)(1).

4. By publishing the ARTCO pilot job description in May 1999 that assigned supervisory duties to its pilots, and the subsequent document in September 1999 that assigned additional supervisory duties to pilots, and by putatively assigning supervisory duties to pilots, all because of the pilots' union and protected activity and in order to discourage such activity by pilots in the future, the Respondent discriminated in regard to hire, tenure, and conditions of employment of its employees in violation of Section 8(a)(1) and (3) of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend to the Board that it be required to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I will recommend to the Board that the Respondent be ordered to cease and desist from assigning supervisory duties to statutory employees because of their union or protected activities, or to discourage such activities.

I will recommend that the Respondent be required to withdraw the job description for pilots published in May 1999, and rescind any orders or instructions it has issued implementing that description. In addition, I will recommend that the Respondent be required to withdraw the memorandum, entitled "The ARTCO Pilot's Added Responsibilities, Effective 09 Sept. 99," and to rescind any orders or instructions that it has issued implementing that document.

[Recommended Order omitted from publication.]