

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BRUSCO TUG AND BARGE CO.

and

Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS, PACIFIC
MARITIME REGION, AFL-CIO

**PETITIONER’S OPPOSITION TO EMPLOYER’S REQUEST FOR REVIEW
OF REGIONAL DIRECTOR’S SECOND SUPPLEMENTAL DECISION**

The International Organization of Masters, Mates, & Pilots, ILA, AFL-CIO, hereinafter referred to as the Petitioner or the Union, files this Petitioner’s Opposition to Employer’s Request for Review of Regional Director’s Second Supplemental Decision. For the reasons set forth below, the Employer’s Request for Review should be denied.

I. BACKGROUND

This case comes before the Board once more on the Employer’s Request for Review of the Regional Director’s Second Supplemental Decision on Remand finding that the Employer’s mates are employees within the meaning of the Act. Since the Petition was filed in 1999, on three (3) separate occasions, two (2) different Regional Directors have found that the Employer’s *mates are employees* and *NOT* supervisors, as argued by the Employer.

In the first decision in this case, then Regional Director for Region 19 Paul Eggert, in a pre-*Kentucky River* legal landscape, found that the Employer’s mates were

employees within the meaning of the Act. (D&DE Nov. 26, 1999). The Board denied the Employer's Request for Review of that decision on December 29, 1999.

In the second decision in this case, on remand from the United States Court of Appeal for the D.C. Circuit on a test of certification case, and on remand by the Board to the Region for further processing, and after holding a second supplemental hearing in the case, then Regional Director for Region 19 Paul Eggert, in a post-*Kentucky River* pre-*Oakwood* legal landscape, again found that the Employer's mates were employees within the meaning of the Act. (Supplemental Decision on Remand, July 7, 2002). The Board granted the Employer's Request for Review of that decision on October 18, 2002, and the case was held in abeyance pending Board action on post-*Kentucky River* reformulation of the analytical framework defining supervisors under the Act.

In the third decision in this case, upon a second remand by the Board for consideration after *Oakwood*, Regional Director for Region 19 Richard L. Ahearn, in a post-*Oakwood* legal landscape, once more found that the Employer's mates were employees within the meaning of the Act and not supervisors as argued by the Employer.

The Employer requests review of the Regional Director's Second Supplemental Decision on Remand alleging that (1) the Regional Director has departed from precedent; and (2) the Regional Director's fact findings are "clearly erroneous."¹ As fully set forth below, the Employer has failed to make even a colorable showing on either of those two

¹ Employer's Request for Review (hereinafter Er. RR) at 1. The actual formulation of the standard, as set forth in the Board's rules and Regulations, Section 102.67 is:

"(c)(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party."

arguments and, accordingly, review must be denied.

II. ISSUES

A. Whether the Regional Director's decision that the Employer's mates are employees within the meaning of the Act is supported by sufficient record evidence so that it is not "clearly erroneous."

B. Whether the Regional Director departed from officially reported Board precedent in concluding that the Employer's mates are employees within the meaning of the Act.

III. PRELIMINARY PROCEDURAL ARGUMENTS

In its Request for Review, the Employer raises two preliminary procedural arguments. First, the Employer argues that the Regional Director denied it the opportunity to introduce new evidence in the matter. (Er. RR at 19). Second, the Employer argues that the United States Court of Appeals for the D.C. Circuit made specific findings that the Employer's mates "responsibly directed deckhands and others," and that, under the doctrine of the law of the case, the Regional Director was not at liberty to make a different finding. (Er. RR at 20). As fully discussed below, both of these arguments are utterly without merit and should be rejected.

A. The Employer Was Provided Sufficient Opportunity to Request the Reopening of the Record and It Declined to Do So.

The Employer acknowledges that on October 25, 2006, the Regional Director "issued a Show Cause Order to demonstrate why the record should be reopened or supplemental briefing be allowed." (Er. RR at 3). The Employer further admits that it responded to the Show Cause Order by stating:

While Employer believes the present record adequately reflects the “held accountable” aspect of this issue, should there be any ambiguity, then we would be prepared to supplement the record, by affidavit or live testimony.

(Er. RR at 3). The Employer thus acknowledges that it communicated to the Regional Director its belief that the record was adequate for its purpose. The Employer, however, makes the remarkable argument that the statement cited above somehow bound the Regional Director – a neutral decision-maker in this case – to evaluate the record as it stood at the time, and give the Employer advice as to whether the Employer had made a sufficient case. The Employer astoundingly contends:

The Employer advised that it did not think that an additional hearing was necessary, unless the Regional Director thought there to be any uncertainty whether mates were “accountable.” The Regional Director proceeded to deny a hearing, while at the same time concluding that mates were not “accountable.” For this reason alone the Decision should be remanded to supplement the record.

(Er. RR at 19). This is the equivalent of telling a judge “Your Honor, I think I am prepared to rest my case, unless you think I cannot win on this record, in which case, I will continue to submit evidence.” It is the job of the advocate, not the neutral decision-maker, to determine tactically and practically whether he/she has sufficient evidence in the record to prove his/her case before resting. There is certainly no provision in the Board’s Rules and Regulations requiring the Regional Director to provide an advisory opinion to a party as to whether it has sufficiently made its case before closing the record. The Regional Director properly issued an Order to Show Cause why the record should be reopened, the Employer made the tactical decision not to request the reopening of the record, and instead “advised that it did not think that an additional hearing was necessary.” (Er. RR at 19). The Employer is simply now trying to take yet another bite

out of this thoroughly eaten apple. There was no error by the Regional Director in accepting the Employer's representation that it thought that the evidence in the record was sufficient.

For the foregoing reasons, the Regional Director acted appropriately in declining to reopen the record. Accordingly, the Board should uphold the Regional Director's ruling and deny the Employer's request for remand.

B. The United States Court of Appeals for the D.C. Circuit Did Not Make Specific Findings that the Employer's Mates "Responsibly Directed Deckhands and Others," and the Doctrine of the Law of the Case Has No Application to the Present Matter

The Employer contends that the Regional Director "*may* have ignored the law of the case doctrine" in finding that the mates were statutory employees. (Er. RR 19) (emphasis added). In support of this argument, the Employer mischaracterizes the decision of the Court of Appeals in this case asserting that the Court "found that Mates responsibly directed deckhands and others, and did not remand for re-determination of that issue." (Er. RR 20). The Employer then accuses the Regional Director of "appear[ing] to have ignored this mandate." (Er. RR at 20). Not surprisingly, the Employer did not provide any pinpoint cite to the Court's decision where the Court allegedly found that mates "responsibly directed deckhands and others." There is none; the Court never made such finding. Indeed, the words "responsibly" and "direct" do not appear together anywhere in the Court's decision, other than in the Court's quotation of Section 2(11) of the Act. At best, the Court noted that the hearing officer had found that the mates "directed" crewmen. Direction alone, of course, does not make an individual a supervisor. This has been the law since before *Kentucky River* and before *Oakwood*.

It is well settled that for a Court's decision to become the "law of the case" as to a particular issue, the Court must have affirmatively decided that issue, either explicitly or by necessary implication. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (citing *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir. 1990)). Issues that "merely could have been decided do not become law of the case." *Women's Equity Action League*, 906 F.2d at 751 n.14 (citing *Bouchet v. National Urban League*, 730 F.2d 799, 806 (D.C. Cir. 1984)). Because more than "direction" is needed to make someone a supervisor, finding that mates "directed" crewmen did not decide the supervisory issue; the Court did not pass judgment on whether that direction was "responsible" or whether it was done using "independent judgment." The Court's decision, thus, cannot be the "law of the case" as to those matters.

More importantly, even if the Court had in fact decided that mates "responsibly directed" crewmen, the law of the case doctrine would still not apply to the present matter. It has been widely recognized by the courts that the law of the case doctrine does not apply where: (1) the first decision was clearly erroneous (*Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999); *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005)); (2) an intervening change in the law occurred (*Kimberlin*, 199 F.3d at 500; *Women's Equity Action League*, 906 F.2d at 751 n.14 ("Law of the case' cannot be substituted for the law of the land")) (quoting Vestal, Law of the Case: Single Suit Preclusion, 1967 Utah L. Rev. 1, 12); *Ingle*, 408 F.3d at 594); (3) the evidence on remand was substantially different (*Ingle*, 408 F.3d at 594); (4) other changed circumstances exist (*Ingle*, 408 F.3d

at 594); or (5) a manifest injustice would otherwise result (*Kimberlin*, 199 F.3d at 500; *Ingle*, 408 F.3d at 594).² In the present case, virtually all of these elements are present.

First, since the D.C. Circuit decision issued, the Supreme Court of the United States issued the case of *Kentucky River*, which substantially changed the law as to supervisory determinations under the Act. The Court was in fact mindful of the potential and impending change in law when it expressly noted in its decision:

The Board's approach to the direction issue on remand will doubtless be affected by the Supreme Court's forthcoming decision in *NLRB v. Kentucky River Community Care, Inc.*, No. 99-1815 (argued Feb. 21, 2001). . . . The Supreme Court [in *Kentucky River*] granted certiorari to consider the viability of the Board's expert employee approach . . . precisely the theory the hearing officer relied on in finding that Brusco's mates' direction of crewmen involved no independent judgment.

Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001). Since then, and as a direct result of *Kentucky River*, the Board issued its decision in *Oakwood* changing the analytical framework for determination of supervisory status under the Act. Thus, significant intervening changes in law have occurred since the D.C. Circuit issued its decision in this matter.

Second, the record in the present matter is substantially different than it was at the time the Court issued its decision. Since the D.C. Circuit issued its decision in this matter, a second hearing on remand was held, and additional evidence was introduced by both parties on the issue of the alleged supervisory status of mates. Thus, the evidence on remand is substantially different than that considered by the Court in its first decision.

Finally, the Court's decision in this case was clearly erroneous to the degree that it applied an analytical framework that was found by the Supreme Court to be

² The law of the case doctrine, moreover, is "prudential" and not jurisdictional as to absolutely preclude the Court from hearing the case. *Crocker*, 49 F.3d at 739-40; *Women's Equity Action League*, 906 F.2d at 751

inappropriate, and manifest injustice would result if the mates are denied their bargaining rights based on a decision made on obsolete law and incomplete facts.

Finally, it must be noted that the Employer never argued or advanced this argument of the law of the case when the case was first remanded to the Regional Director nor when it filed its request for review of that Supplemental Decision on Remand. Now, one trip further to the Region for a Second Supplemental Decision, is too late for the Employer to be raising this argument. Thus, even if there was any validity to the Employer's claim, it waived that argument – at best – or it should be barred on laches.

For the foregoing reasons, the Employer's argument is without merit, and the Request for Review should be denied.

IV. FACTS³

1. The First Hearing

The Employer provides towing and barge services out of several ports located on the west coast of the United States. (Tr. 17). It transports a variety of cargo, including chip, log, sand, rock, and target sleds for the United States Navy. (Tr. 22-23). The Employer has approximately thirty-four tugboats, twenty-five of which operate from its homeport in Cathlamet, Washington. (Tr. 28-29). Only the mates who work on the twenty-five tugs based on Cathlamet, Washington are involved in this proceeding.

The Employer has two types of tugs, inland and offshore. (Tr. 31). Inland tugs are generally smaller than offshore tugs and have less tolerance for rough seas. (Tr. 31). Inland tugs are manned by a master and a deckhand, and perform primarily day jobs on the Columbia River of up to 12 hours per day. (Tr. 43). Offshore tugs operate along the

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Pacific Coast on hitches of 30 days. (Tr. 46). Offshore tugs are manned by a captain, mate, engineer and one or two deckhands. (Tr. 42). While at sea, the crew in an offshore tug work on six-hour shifts, with the captain and a deckhand alternating shifts with the mate and the other crewman. (Tr. 42). The captain or mate on duty steers the vessel. (Tr. 104-05, 124-25).

David Seaberg, the Employer's port captain in Cathlamet, Washington, testified at the representation hearing for the Employer. (Tr. 149-50). According to Seaberg, he interviews all job candidates for crew positions, and he is ultimately responsible for hiring and promoting them. (Tr. 182-84). Seaberg is also responsible for making up the crews and for assigning crews to vessels, including captains. (Tr. 150-52, 182-84). Seaberg noted that captains have the power to veto particular individuals from joining his crew. (Tr. 182-83). Seaberg also noted that crew assignments are generally permanent in nature unless personality conflicts develop. (Tr. 169, 182-83). Finally, Seaberg noted that he follows the recommendation of captains regarding the promotion of his crewmembers. (Tr. 155-56). Indeed, Seaberg testified that the captain probably have "more ultimate involvement" in the promotion of crewmen than Seaberg himself does. (Tr. 155-56).

The captain is the highest authority in the boat. (Tr. 104). He is responsible for all the navigation and safety of the vessel, and for making sure that the crew fulfills their responsibilities. (Tr. 104-05). Everything in the vessel, right down to what groceries and supplies are purchased, is controlled by the captain. (Tr. 104). The captain ensures that company policy, rules, and regulations are followed, that the vessel is fully equipped with

³ The record transcript of the first hearing (November 2, 1999) will be cited as "(Tr. [page number])"; the record transcript for the second hearing (November 14, 2001) will be cited as "(2 Tr. [page number])."

groceries and supplies, that the vessel is sea-worthy and compliant with all regulations, and that the crew is familiar with their duties and capable of carrying them out. (Tr. 104-06, 137-38; Resp. App. at 476-79). During a voyage, the captain monitors weather conditions, and he has the authority to bring the vessel to port if the weather conditions are unsafe. (Tr. 104, 106-07). On the offshore and 24-hour vessels – the only ones with mates – the captain decides which crewmembers work on each watch and he monitors their performance on a daily basis. (Tr. 125, 138-39). The captain may put a crewmember off the ship for disciplinary reasons. (Tr. 126).

The mate takes control of the navigation of the vessel when the captain is off-shift. During his shift, the mate has similar responsibilities as to the safety and navigation of the vessel as the captain does. (Tr. 105, 124-25). While some mates may feel comfortable navigating the vessel in dangerous conditions, other mates wake the captain up for advice. (Tr. 140).

Tying a barge to a tug or landing a barge is a task that involves the entire crew. (Tr. 122-23, 143-44). The captain takes control of the vessel and the mate moves to the deck to aid the operation from that position. (Tr. 122-23, 143-44). The mate, in that capacity, often serves as the “eyes” of the captain who may not be able to see the operation from the wheelhouse. (Tr. 143-44). In some instances, the captain sends the mate and a deckhand out of the tug and onto the barge itself to work from that location. (Tr. 123-24). During the operation, the mate coordinates the work at the deck and gives instructions to the deckhands to that end. (Tr. 143-44). The captain, however, remains in control of the operation and even tells the deckhands specifically what lines to put in place. (Tr. 122-24). The entire operation is routine in nature; everyone knows what to

do. (Tr. 135-36, 143-44). Indeed, the Employer intentionally makes the operation routine to increase safety during its execution. (Tr. 135-36).⁴

The tugs are equipped with an array of electronic systems to help the crew stay in touch with their superiors. The tugs have cellular telephones and fax machines that are used to maintain communication with the Employer's office and the ports at all times. (Tr. 113-14, 125, 133, 135, 138). The tugs are also equipped with electronic navigational systems that are used to chart the course of the voyage. (Tr. 105). The crew is also equipped with hand-held radios that are used to communicate with each other when they not in sight of one another. (Tr. 122).

2. The Second Hearing

The Employer is in the business of towing cargo along the west coast of the United States, such as general freight, logs, and chips. (2 Tr. 35-36). The ocean-going tugs, the one at issue in this proceeding, tow barges anywhere from Alaska to Mexico. (2 Tr. 36). The crews in ocean-going tugs typically work on 30-days-on-30-days-off rotations, although some crewmembers work longer rotations. (2 Tr. 37). Each vessel has a captain or master with a Coast Guard issued master's license, a mate with at least a mate's license, an engineer, and one or two able-bodied seamen or ordinary seamen. (2 Tr. 47-48). The vessels generally tow one barge at the time. (2 Tr. 89).

⁴Captain Shawn Sarff testified for the Employer at the first representation hearing. Captain Sarff noted with regards to the docking or tying up of the barges:

Q. The docking or tying up of the barge is something you've done in the past year how many times?

A. All my life as an adult.

Q. It gets a little routine after a while?

A. Yes.

Q. So although you make certain independent judgments on your job, many of them tend to be routine things that you've gone through again and again and again. Is that correct?

A. Yes. We try to make them routine. It's safer if it's routine. Everybody knows what they're doing if it's routine.

(Tr. 135-36).

The vessels are equipped with VHF handheld radios that are used by the crew to communicate with each other during operations. (2 Tr. 51). The captain or master communicates via radio with the person on the barge during landings. (2 Tr. 51). In this regard, the industry has changed significantly over the years. (2 Tr. 51). In the past, crewmen had to rely on hand signals to communicate with each other during operations. (2 Tr. 51). Now, however, with the radios crewmen are able to communicate with each other even if they are not in sight of one another. The vessels also are equipped with computers, fax machines, and cellular telephones, which are used by the master to communicate with the port captain or the Employer's management. (2 Tr. 51-52).⁵ As a result, the captain of the vessel seeks the advice and permission of management and the port captain to do certain things more now than they had done in the past. (2 Tr. 52).⁶

On any given 30-day period, a tug would do an average of four roundtrips. (2 Tr. 61). There may be fewer trips during the winter. (2 Tr. 61). A few crews with the shortest routes would do at most eight to ten trips in a thirty-day period. (2 Tr. 62). On each trip, the crew would perform the hook up and release of the barge twice – once on each end. (2 Tr. 62-63). During the hook up and release of the barge, the captain, the mate, and the deckhand each have radios to keep in contact with each other. (2 Tr. 63). The engineer is generally in the wheelhouse with the captain. (2 Tr. 63). Sometimes, radio communication is not necessary because the crew is close enough to communicate verbally. (2 Tr. 63). During the hookup and release of the barge, the captain is in charge,

⁵ In Captain Nordstrom's words: "[I]f you'd have told me ten years ago that I was going to be running a boat with a fax machine, and a cell phone, and a computer, you know, I'd have laughed it off. You know, we have all that equipment now." (2 Tr. 51).

⁶ In Captain Nordstrom's words: "Where before you might have been – weren't sure what they [management] wanted to do and you weren't in communication with them, so you had to make that decision yourself. And now it's a lot easier to get a hold of them to make sure what you're doing is what they wanted to have done." (2 Tr. 52).

and he often goes up to the “Texas deck” above the wheelhouse where he can control the winch and the vessel. (2 Tr. 63-64). From that vantage point, he can visually oversee the hookup and release operations. (2 Tr. 64-65). The hookup and release of a barge take on average thirty to forty minutes. (2 Tr. 82). Because the operation is performed approximately twice in a thirty day trip, the operation encompasses approximately 1.1 percent of each crewmember’s work time. (2 Tr. 105-107).

Richard Nordstrom testified at the second hearing on behalf of the Employer. Nordstrom has worked as a master for the Employer for approximately six and one half years. (2 Tr. 8). As a master, Nordstrom is in charge of the overall operation of his vessel, such as trip planning, laying out a course, voyage time, inspecting the vessel for safety, and directing the crew “into what their jobs are.” (2 Tr. 8-9).

According to Nordstrom, Masters are required to have master’s licenses that equal or exceed the tonnage of the vessel they command. (2 Tr. 11-12). Mates are required to hold mate’s licenses that equal or exceed the tonnage of the vessel they command, although some of them also hold master’s licenses. (2 Tr. 12). Some deckhands and engineers also possess master’s licenses. (2 Tr. 35). Thus, the fact that an individual is the “master” of the vessel does not mean that the individual has more training, ability, or skills than the rest of the crew. (2 Tr. 35). It only means that the individual assigned to work as a master has certain responsibilities assigned to him/her and he/she is “in charge.” (2 Tr. 35). Indeed, there are instances in which a deckhand may have more experience than the mate, the engineer, or the captain, and the deckhand may make suggestions that the master will follow. (2 Tr. 41-42). Depending on the level of experience of any particular crewmember, the master will listen to the crewman and let

him do what he wants to do. (2 Tr. 46). The master, however, is ultimately in charge of the entire operation and he/she is held responsible for all decisions made in the vessel. (2 Tr. 43). The mate, therefore, checks with the master “on a lot of things,” such as how he wants the lines laid. (2 Tr. 43).

New Coast Guard regulations – STCW – require all mariners to take and pass certain courses, such as firefighting. (2 Tr. 33-34).

The main function of the captain is to run and direct the whole crew to accomplish the task of moving the freight from one point to another. (2 Tr. 44-45). In addition, the captain is in charge of navigating the vessel during his watch. (2 Tr. 45). The captain also gives out orders to the crew regarding maintenance of the ship. (2 Tr. 48). The main function of the mate is to navigate the vessel during his watch. (2 Tr. 45, 75).⁷ The principal function of the engineer is to make sure that the mechanical components of the vessel are functioning properly. (2 Tr. 45). The principal function of the deckhand is to perform maintenance on the vessel, such as painting, cleaning, etc. (2 Tr. 48). The captain has a duty roaster that tells the deckhand what maintenance functions to perform and how frequently to perform them. (2 Tr. 72-73, 83-84). The deckhand also cooks for the crew. (2 Tr. 73). The deckhand’s other major responsibility is to participate in hooking and unhooking the tug to the barge. (2 Tr. 48).

The amount of time a particular crew spends together working as a unit significantly affects the amount of direction that the crew necessitates to performing their functions. (2 Tr. 55-56). This is so because of the very routine nature of what they do. (2 Tr. 56). In fact, Captain Nordstrom testified that the most important factor affecting

how much direction a crew may need is how much time they have actually worked together. (2 Tr. 56). According to Captain Nordstrom, his crew knows how he wants things done. (2 Tr. 76). Captain Nordstrom further testified that he has tried to maintain the same crew over the years so that everyone understands each other's routines. (2 Tr. 39). Nordstrom has worked with the same engineer for close to five years, the mate for three years, and the deckhand for two years. (2 Tr. 39). Over the course of the past three years, these individuals have worked together to hook and unhook a barge "a couple of hundred times." (2 Tr. 40). Every member of the crew knows that they are supposed to do and there is very little direction given. (2 Tr. 42).

If there are problems with the engine during a voyage while the mate is on his/her watch, the mate can wake the engineer up to address the problem. (2 Tr. 79-82). If the problem needs urgent attention, the engineer would address it immediately, taking whatever time was needed to fix it, and he would be paid overtime. (2 Tr. 80-82). If the problem is not urgent and it can wait until his/her watch, the engineer would go back to sleep. (2 Tr. 81). The captain and the mate typically defer to the engineer on the issue of whether the problem needs to be fixed immediately and how long it would take to get it fixed because the engineer is more qualified in that field than the master or the mate. (2 Tr. 81-82, 108-109).

The tugs operate on six-hours shift rotations. (2 Tr. 9). The captain does one six-hour watch, and the mate does a six-hour watch. (2 Tr. 9). If there is an emergency or something unusual takes place during the mate's watch, the mate is required to wake the master up so that the master may assess the situation. (2 Tr. 12-13). Thus, for example,

⁷ The Employer requires the mates to make regular entries in the vessel log regarding position, weather, etc. Some captains, such as Captain Nordstrom, have more specific requirements for his mates; Captain

if the mate encounters a rough bar crossing that he might think would be severe or very bad, the master would be awoken to decide whether to proceed. (2 Tr. 14). On cases of emergency or in unusual situations, other crewmembers may also be awoken. (2 Tr. 13).

In case of an emergency, such as a fire, the master takes control of the vessel while the mate directs the crew on the deck to fight the fire. (2 Tr. 15). However, the ship has a “station bill” that sets forth what each crewmember is supposed to do in the firefighting or emergency operation and the mates simply “see to it that they’re doing it.” (2 Tr. 15, 102-103).

When landing a barge on port, the master decides how the vessel will make the approach to port and whether the barge will be towed or hipped up. (2 Tr. 18). During landing operations, the entire crew would be up and working. (2 Tr. 18-24). The master would remain in control of the vessel (2 Tr. 19).

If the vessel is performing a hip-up approach, the tug will move to the side of the barge to secure the barge to the tug and push it, as a single unit, to the dock. The lines for tie up would be selected and lay out ahead of time. (2 Tr. 18). The tug would move alongside the barge and a crewmember, generally a deckhand, would hop onto the barge. (2 Tr. 19). The mate and the engineer would then pass the lines to the crewman and the tug would be secured tightly alongside the barge. (2 Tr. 19). The mate would then jump onto the barge, where he would have better visibility of the tug-barge unit, and he would give directions to the master to the dock. (2 Tr. 19). In some vessels, however, at the discretion of the master, the master is the one who jumps onto the barge and serves as the eyes of the mate, who remains in the bridge navigating the vessel to the dock. (2 Tr. 49). The function of the person on the barge at that time is to act as the eyes of the person

Nordstrom requires his mate to make entries in the log at least every two hours. (2 Tr. 85).

piloting the vessel because the barge would block the view of that person on one side. (2 Tr. 49). The function of the person on the barge is much the same as the function of a person on a road who gives directions to aid a driver back up a truck or a car. (2 Tr. 56).

If the vessel is performing a tow wire landing, there would generally be an assist boat involved. (2 Tr. 19). The assist boat will take the mate and a deckhand and bring them to the barge. (2 Tr. 19). The master and the engineer remain aboard the tug. (2 Tr. 19). From the barge, the mate then would call directions via radio to the master and the assist boat. (2 Tr. 19). The “directions” given by the mate generally are to speed up or slow down and general information on how close the vessels are to the dock, how is the approach looking, and whether the vessels should push or back away. (2 Tr. 19).

The barges are tied up to the dock using a set of standard lines well recognized in the industry. Spring lines generally run from mid ship to the direction of the front or back of the vessel. (2 Tr. 22). Spring lines are generally the first ones to be tied up from the vessel to the dock because they help “flatten” the vessel and direct it to the dock. (2 Tr. 22). At least two spring lines are generally used in the tie up operation. (2 Tr. 22). Once spring lines are in place, offshore lines are used. (2 Tr. 22). Offshore lines run on 90-degree angles to each end of the barge to hold it in flush and flat to the dock. (2 Tr. 22). Occasionally, if there is very little tide, a breast line may also be used, which is very short (three or four feet long). (2 Tr. 22).⁸

During a voyage, the length of the towline may be increased or decreased depending on factors such as weather conditions, depth of the water, geographical

⁸ The testimony of Captain Nordstrom regarding the different types of lines and their use in the docking operation shows that each type of line has a specific purpose in the docking operation and that they are used in a specific sequence. Nordstrom testified that the mates direct the deckhand in the tie up operation by telling them which line to use first. (2 Tr. 23). However, such direction is only illusory as Nordstrom

location of the vessel, etc. (2 Tr. 24-25). The mate, during his watch, may decide to increase or decrease the length of the towline. (2 Tr. 24-25). The mate and the deckhand then go to the winch where the mate operates the controls and the deckhand watches for the fair lead to make sure that the line is being spooled appropriately. (2 Tr. 90-92). If there is a problem with the spooling, the deckhand would tell the mate to stop and pay it back so that it may be spooled again. (2 Tr. 91). Before the mate goes on watch, based on weather forecast, the crew may anticipate needing to increase or decrease the length of the tow line and thus the captain may discuss the matter with the mate before going off his/her watch. (2 Tr. 92-93).⁹

When the vessel is preparing to take a barge underway, the entire crew works to establish the tow. (2 Tr. 27). The work of establishing the tow is performed following a pre-established “plan of attack.” (2 Tr. 28). The master takes up position at the controls of the winch or the “Texas deck.” (2 Tr. 27, 64). The deckhand takes position on the barge and the mate and engineer take position on the deck of the tug. (2 Tr. 27, 64-65). The deckhand, from the barge, passes the lines to the tug and the mate and engineer on the deck pull the barge’s bridles aboard the tug and hook it up to the tug lines. (2 Tr. 27). The crew, including the master, does not communicate by radio during this operation, as they are generally close enough to be able to simply talk back and forth to each other. (2 Tr. 28). Each member of the crew has its own responsibilities and jobs “laid out” during that operation and each do what they need to do to get the job done. (2 Tr. 28). The mate may give some direction to the others, such as pass one line first, or slack one of the

himself admitted that spring lines are generally used first “because the rest of them aren’t going to do you a heck of a lot of good.” (2 Tr. 23).

⁹ Captain Nordstrom originally testified during direct examination that the mate would instruct the deckhand to shorten or lengthen the towline and that the deckhand would carry out that instruction. (2 Tr.

lines. (2 Tr. 28, 66-67). But the crew follows the captain's plan of attack and they have a "pretty good idea of what we want to do." (2 Tr. 29, 66-67). The procedure is generally the same all the time, and the captain determines what procedure is followed on his vessel. (2 Tr. 67). For example, Captain Nordstrom testified that he always follows the order spring line, stern, and bow, whereas other captains may do spring line, bow and stern. (2 Tr. 67). The job of establishing the tow (or hooking up the barge) is performed by the crew time and time again. (2 Tr. 38-39). It is purposely kept very routine to increase the safety of the operation. (2 Tr. 39). When the sea is rough or the barge is heavy, a surge gear may be used to more safely secure the barge. (2 Tr. 56-57). The decision of whether to use the surge gear belongs to the captain. (2 Tr. 57). However, other crewmen may suggest to the captain that he should use the surge gear. (2 Tr. 57).

Captain Nordstrom testified that at the beginning of a 30-day hitch, he would gather his crew and communicate to them how things were going to be done on that voyage. (2 Tr. 42). He would laid out a "plan of attack" before they ever get started. (2 Tr. 42). If there is anything unusual expected of the trip, the crew would be advised at the beginning of the voyage. (2 Tr. 42). If anyone has any problems, such as a back injury, the master would be advised at the beginning of the voyage and the master would make whatever adjustments are required. (2 Tr. 42-43). Additionally, whenever the vessel is about to make an approach or maneuvers, the captain discusses the plan to be followed with the crew so that the crew knows what procedure the captains wants the crew to follow. (2 Tr. 67-68). The captain is the one who decides what procedure will be followed. (2 Tr. 68).

25). On further examination by the Hearing Officer, however, Captain Nordstrom testified that the process required the participation of both the mate and the deckhand, as described supra in text.

In case of low visibility, a crewman may be posted as a watch to keep an eye out on things. While the mate, in theory, has the authority to post a watch during his shift, Captain Nordstrom testified that the master generally would have been awakened in a situation in which a watch would be needed. (2 Tr. 30-31). Unlike large vessels, however, the deckhands are not posted on the vessel's bow because the wheelhouse is only 20 feet from the bow and the captain relies on the instruments and radarscope to navigate the vessel. (2 Tr. 74-75).

Aside from the functions of hookup and release of the barges, the daily duties of the deck crew is set forth in the captain's duty roaster. (2 Tr. 107-108).

James Richard Barton testified at the second hearing for the Employer. (2 Tr. 111-199). His testimony is confusing and highly unreliable. His testimony covered periods of time in which he worked on part of the Employer's operation that are outside of the petitioned-for bargaining unit and that are part of units covered by other collective-bargaining representatives. His testimony also covered work done as a pilot in a "fish run" that is covered by a federal government contract that apparently has been part of the Employer's operation only during the summer of 2001. (2 Tr. 145-148, 218-220). The witness had problems distinguishing what parts of his testimony corresponded to work pertinent to the petitioned-for bargaining unit. (See, e.g., 2 Tr. 158). According to Barton, every single member of the crew directs one another. (2 Tr. 152-53, 188-89). In fact, according to Barton, the mate has the authority to direct even the master. (2 Tr. 152-53). Barton sat at the hearing through most of Captain Nordstrom testimony; Barton testified that he fully agreed with Nordstrom's testimony. (2 Tr. 155-156).

Mark James Guinn testified at the second hearing on behalf of the Employer. Most of Guinn's testimony was devoted to trying to explain away the clear language of Petitioner Exhibits 1 and 2. (2 Tr. 200-213). Contrary to every other witness, Guinn testified that the process of making and breaking a tow is not always an "all-hands-on-deck" operation. (2 Tr. 209). Coincidentally, the only two examples Guinn could give of mates that were able to do "solo" operations for making or breaking a tow were James Barton and Joe Bromley, both of whom testified at the hearing. (2 Tr. 209). Neither Barton nor Bromley testified that they performed "solo" operations in making or breaking a tow.

Mark McKinley testified at the second hearing for the Union. McKinley worked for the Employer as a mate/relief captain from November 1997 to February 2001. (2 Tr. 221). McKinley worked as a mate for Captain Strickland for the first two years of his employment with the Employer. (2 Tr. 222). McKinley's work with Strickland was on a sea-going tug with a crew of five: captain/master, mate, engineer and two deckhands. (2 Tr. 237).

McKinley testified that he had been present for Nordstrom's testimony and that in his opinion, most of Nordstrom's testimony was "real accurate." (2 Tr. 239).

The captain is in charge of the operations of making up a barge and landing a barge. (2 Tr. 223-224). Before arriving to a dock, the captain gathers the crew and explains to the crew how he wants the operation to be performed, and he gives direction to the crew to that end. (2 Tr. 223-224). If a crewmember has more experience with a particular port or dock, he would provide input. (2 Tr. 224).

According to McKinley, the more experienced deckhand and the engineer would teach the newer deckhands how to perform the duties on the duty roster. (2 Tr. 223). A more experienced deckhand would also give direction to the “green” deckhand during the operations, such as telling him how to do the job, or ordering him to do something. (2 Tr. 224). “Everybody in the boat helps everybody else on the boat.” (2 Tr. 224).

The deckhands inspect the vessel’s engine room as part of their duties. (2 Tr. 225). If there were problems in the engine room, a deckhand would wake the engineer up to alert him of the problem without first having to obtain permission from the captain or the mate. (2 Tr. 224-225).

The engineer has more contact with the deckhands than a mate does. (2 Tr. 243). Accordingly, he gives more directives to the deckhands than the mate does. (2 Tr. 243). The engineer is in charge of the engine room and teaches the deckhands how to take care of it. (2 Tr. 243).

During the landing operation of log barges, the mate would be posted at one end of the barge and a deckhand would be posted at the other end. (2 Tr. 225). The deckhand and the mate would be in contact with the captain and the assist vessel via radios and would give direction to the captain and the assist vessel concerning the position of the barge vis-à-vis the dock. (2 Tr. 225-226). The mate and the deckhand on the barge would be out of sight of each other because the pile of logs between them would obstruct their view. (2 Tr. 225-226). The mate and the deckhand on the barge would perform the same function; they would convey information concerning the distance from their end of the barge to the dock and would instruct the captain and the assist vessel to move forward

or to pull away in order to correctly position the barge. (2 Tr. 226, 238).¹⁰ The captain, who stays in control of the tug, remains in command of the operation and conveys orders via radio to the crewmen in the barge and to the assist boat. (2 Tr. 226). Whoever is closest to the dock generally throws the first line – it may be the deckhand on the stern, the deckhand on the bow, or the crewman on the vessel. (2 Tr. 239). On McKinley’s words, “generally you want to catch the dock. Then you have something to work with. And it doesn’t matter if it’s the back of the barge, the front of the barge.” (2 Tr. 239).

The captain is required to sign the logbook approving any overtime taken by the crew. (2 Tr. 227).

Like Nordstrom, McKinley testified that once a crew has been to a docking facility once or twice, everybody on the vessel knows what to do, and they just go out and do it; there is “very little direction given by anybody.” (2 Tr. 239).

Joseph Bromley testified as a rebuttal witness for the Employer. (2 Tr. 243-264). Most of his testimony concerning the duties of mates was based on his experience on vessels that are not covered by the petition in this matter, and that are, in fact, crewed or partly crewed, by employees represented by labor organizations and covered by collective-bargaining agreements. (2 Tr. 251-264). Moreover, large portions of his testimony were based on his experiences in three-men-crews, which are not only outside the petitioned-for unit, but are, in fact, not even analogous to the crews under consideration in this proceeding. (2 Tr. 259).

Bromley testified that he had worked as a deckhand under Captain Strickland while McKinley was a mate. (2 Tr. 245). While Bromley purported to disagree with

¹⁰ Similar to Nordstrom, McKinley referred to the directions given by a crewman, such as a deckhand, to the captain during the landing operation as “directives.” (2 Tr. 242).

McKinley's testimony, he testified, just as McKinley and Nordstrom did, that once the crew has been to a particular dock before, everyone knows what to do in the landing operation. (2 Tr. 246). Bromley noted:

Basically, just everything everybody has stated, the same routine, but, you know, when you start a job like that and you know, especially if you're going to the same spot, you already know exactly what's going to happen. You know, you know, what side you're going to hip up. [The Captain] let's you know. Everybody pretty much knows. (2 Tr. 246).

Like McKinley, Bromley testified that in approaching the dock, the main goal is to get any line in first so that you have "something to work against." (2 Tr. 247). That first line will come from the end that gets to the dock first. (2 Tr. 246). Also like McKinley, Bromley testified that the captain gives instructions to the crew about the landing procedure prior to making the approach to the dock. (2 Tr. 246). Finally, much like the other witnesses, Bromley testified that once on the barge, the mate gives direction to the captain as to how much power to apply and what direction to go in landing the barge. (2 Tr. 246). As all other witnesses testified, the mate in that position serves as the "eyes" of the captain. (2 Tr. 246).

V. ARGUMENT

A. **The Regional Director's decision that the Employer's mates are employees within the meaning of the Act is supported by sufficient record evidence so that it is not "clearly erroneous."**

As shown in the "Facts" section herein, there is substantial record evidence supporting the Regional Director's decision that the Employer's mates are employees within the meaning of the Act. In its Request for Review, the Employer argues that the Regional Director "deployed all the right words from *Oakwood* but has *gerrymandered* the fact findings to circumvent its holding." (Er. RR at 21). This argument is nothing

more than a disgruntled complaint by the Employer that the Regional Director should have weighed the evidence differently than he did so as to arrive at the conclusion desired by the Employer. In other words, the Employer contends that the Regional Director should have given more weight to the evidence that supported the Employer's position than to the evidence that supported the Union's position. This is not, however, the appropriate standard for granting review under the Board's Rules and Regulations. The standard is "clearly erroneous." To meet that standard, the Employer must show that the Regional Director's findings are implausible in light of the totality of the record. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (discussing the meaning of "clearly erroneous."). The record in this matter fully supports the Regional Director's decision.

Moreover, even if the Employer could show that some evidence in the record support its position, that alone would not be sufficient to meet the "clearly erroneous" standard. It is axiomatic that in any case there will be at least some evidence supporting the competing positions of the parties. The job of the Regional Director is to review the totality of the evidence – also weighing the competing evidence – and make a decision based on the totality of the record. While there may be some evidence supporting each party's position, the Regional Director must determine which position is better supported by the record. As the Supreme Court has noted, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. Thus, to meet the "clearly erroneous" standard, the Employer must show more than just the existence of evidence supporting its position. The

Employer must establish that the Regional Director’s decision is untenable on the totality of the record. The Employer here has failed to meet that burden.

B. The Regional Director Did Not Depart from Officially Reported Board Precedent In Concluding that the Employer’s Mates Are Employees Within the Meaning of the Act.

The Regional Director did not depart from officially reported Board precedent in concluding that the Employer’s mates are employees within the meaning of the Act. To the contrary, as shown below, the Regional Director – as instructed by the Board on remand – applied *Oakwood* to the facts of the case and determined that the mates were not supervisors.

1. The Effect of *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006) on Supervisory Status Determinations.

In *Oakwood*, the Board interpreted the terms “assign,” “responsibly to direct,” and “independent judgment” in Section 2(11) of the Act in light of the Supreme Court’s decision in *Kentucky River*. With regards to the criteria of “assign,” the Board construed the term “to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, slip op. at 4. The Board further noted that “the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function” but that “choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” *Id.*

With regards to the term “responsibly to direct,” the Board adopted the definition propounded by the United States Court of Appeals for the Fifth Circuit in *NLRB v.*

KDFW-TV, Inc., 790 F.2d 1273 (5th Cir. 1986):

To be responsible is to be answerable for the discharge of a duty or obligation . . . In determining whether “direction” in any particular case is responsible, the focus is on whether the alleged supervisor is “held fully accountable and responsible for the performance and work product of the employees” he directs. . . . Thus in *NLRB v. Adam [&] Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department.

Oakwood, slip op. at 6-7. The Board concluded that

for direction to be “responsible,” the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.

Id., slip op. at 7. The Board further explained the burden of proof for this criteria stating that “to establish accountability for purposes of responsibly direction, it must be shown that the employer delegate to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.*

With regards to the criteria of “independent judgment,” the Board held that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.*, slip op. at 8.

The Board noted that actions that are of a “merely routine or clerical nature” do not fall under the definition of “independent judgment.” *Id.* The Board explained:

If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment made is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.

Id., at 8-9.

2. *Oakwood Had No Significant Impact In the Present Case on Remand Because the Regional Director in His First Supplemental Decision on Remand Essentially Applied the Standards Adopted by the Board in Oakwood.*

On the first remand to the Regional Director of this matter, the Union filed a brief in which, citing *NLRB v. KDFW-TV*, 790 F.2d 1273, 1278 (5th Cir. 1986), *Mississippi Power & Light*, 328 NLRB No. 146 (1999), and *Empress Casino Joliet Corp.*, 204 F.3d 719, 722 (7th Cir. 2000), among other cases, the Union argued that the Board should re-define “assign” and “responsible to direct” in a manner almost identical to the one adopted by the Board in *Oakwood*. Indeed, the Board in *Oakwood* adopted wholesale the definition of “responsibly to direct” propounded by the Fifth Circuit in *NLRB v. KDFW-TV*, one of the principal cases relied upon by the Union in that brief. The Regional Director in his Supplemental Decision on Remand adopted in large part the analysis proposed by the Union in its brief. Thus, as shown below, the *Oakwood* analysis has been essentially already applied to the facts of this case twice by two different Regional Directors in concluding that the mates are not supervisors.

3. Burden of Proof Remains on the Employer to Establish Supervisory Status.

In *Kentucky River*, the Supreme Court upheld the Board's well settled principle that the party asserting supervisory status has the burden of proving that such status exists. *Kentucky River*, 532 U.S. at 711-12. In *Oakwood*, the Board again reiterated its adherence to that principle. *Oakwood*, slip op. at 9. A party asserting that supervisory status exist, must prove by a preponderance of the credible evidence that the status exist. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of facts "to believe that the existence of a fact is more probable than its non-existence before [finding] in favor of the party who has the burden" to make the proof. *In re Winship*, 397 U.S. 358, 371-72 (1970). Any lack of evidence in the record must be construed against the party asserting supervisory status. *See Willamette Industries, Inc.*, 336 NLRB 743 (2001). "Whenever the evidence is in conflict or otherwise inconclusive on a particular indicia," the Board "will find that supervisory status has not been established." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

In the present case, the Employer has alleged that the mates are supervisors under the Act. Accordingly, the Employer has the burden of establishing by a preponderance of the evidence that the mates possess any of the supervisory indicia delineated in Section 2(11) of the Act. As fully discussed below, the Employer has failed to make such proof. Accordingly, the Board must find that the mates are not supervisors under the Act.¹¹

4. The Employer Failed to Prove that Mates Are Supervisors Under the Act.
- (a) The Employer Has Not Met Its Burden of Showing that Mates Responsibly Direct Crewmembers Using Independent Judgment.¹²

Thorough analysis of the record evidence compels a conclusion that the Employer did not meet its burden of proving that Mates are supervisors under Section 2(11) of the Act. The specific evidence in the record concerning direction of employees by the mates rests on testimony that the mates direct other crewmen during barge tie-ups or landings. The evidence in that regard, however, is insufficient to show that the mates “responsibly” direct the work of others, or that they do so exercising “independent judgment” within the meaning of the Act. The record reflects that tying a barge to a tug or landing a barge is a task that involves the entire crew. The captain takes control of the vessel, generally from the “Texas deck” and the mate moves to the deck to aid the operation from that position. The mate, in that capacity, often serves as the “eyes” of the captain who may not be able to see the approach to the dock from his vantage point. The crew remains in contact with each other, including the captain, at all times via hand-held radios. In some instances, the captain sends the mate and a deckhand out of the tug and onto the barge itself to work from that location. During that operation, the mate and the deckhand perform the same functions; that is, to give direction to the captain, and often an assist vessel, regarding whether to move forward or to back up. The captain remains in control of the operation

¹¹ In its Request for Review, the Employer repeatedly accuses the Regional Director of demeaning the work of the mates by finding them to be employees, rather than supervisors. Contrary to the Employer, the Union believes that there is nothing demeaning about being an employee.

¹² Much has been said on the record regarding whether the mates exercise judgment in deciding to slow down or speed up the vessel or performing other solitary functions during their shifts. The use of “independent judgment” under the Act, however, is significant to a determination of supervisory status only when it relates to the performance of one of the supervisory indicia of Section 2(11). Thus, the mate might exercise all the independent judgment in the world in calling the base for a weather report; as long as there is no supervisory indicia involved in the process, the fact is irrelevant.

and even tells the deckhands specifically what lines to put in place. Indeed, the testimony of almost every witness (both Employer and Petitioner) clearly reflects that the captains would typically meet with the crew prior to the performance of such operations to establish the “plan of attack” and to let them know how he wanted things done.

Every witness (both Employer and Petitioner) also testified that the making and releasing or landing of the tow were very routine operations; everyone knows what to do and very little direction needs to be given to the crew. Indeed, the Employer’s witnesses in both hearings specifically testified that the Employer intentionally makes the operations routine to increase safety during their execution.

There is some testimony that the mates give some direction in case of emergency, such as in case of fire. However, the witnesses also acknowledge that under Coast Guard regulation the vessel has a “station bill” that details what function each crewmember must perform in case of an emergency, such as where they need to be stationed, what equipment they need to bring with them, and what work they will perform. Thus, direction which is dictated by an established plan – absent more – is insufficient to establish “independent judgment.” *Oakwood*, slip op. at 8-9.¹³

There is also some testimony that the mate might tell a deckhand during the hook up operation to pass a line or another to him. The testimony at best reflects that the crew, including the mate, participate in the process and that the mate communicates to another employee “I am ready for line A, pass it to me.” This is no different than a groundman signaling to a crane operator to lower the cable to the ground so that the groundman may hook the load to the cable. It is part of a group effort in which different tasks are

performed in a sequence and one employee lets the other ones know that he is ready for the next step. This is clearly routine work under *Oakwood*. Slip op. at 8-9. Indeed, there is evidence in the record that the engineer gives similar direction to the deckhand, that the deckhand gives similar direction to the mate and the captain, and that the mate gives similar direction to the captain. Thus, if the direction involved in this case by the mate were to be considered “responsible direction” under the Act, virtually all four or five crewmen in the vessel would be supervisors and there would be no employees.

On the other hand, the record shows that the captain of the vessel is ultimately held responsible for all decisions made in the vessel. He has the power to affect the terms and conditions of employment of all crewmember, including the power to veto crew assignments to his vessel. The captain’s direction to other crewmembers goes beyond direction given with regards to the manner of the crew’s performance of discrete tasks; it is the type of general direction that involves managerial prerogatives. *Oakwood*, slip op. at 5-7.

The record also shows that the making and releasing of a barge may be approximately 1 per cent of the work done by the crew. The other 99 per cent of the time, the crew is involved in navigating the vessel and giving maintenance to it. Indeed, the testimony reflects that aside from the making and releasing of a barge or the landing of a barge, the remaining duties of the deckhands is set by the captain in the duty roster.¹⁴

¹³ There is no evidence on the Record suggesting that Mates have discretion to “determine when an emergency exist” or to deviate from the emergency plan established pursuant to Coast Guard regulation. *Cf. Oakwood*, slip op. at 9.

¹⁴ Thus, even assuming that the Employer met its burden of establishing that the direction given by the Mates to the crew during the process of landing a barge was “responsible direction” using “independent judgment” within the meaning of the Act, the Employer failed to establish that such direction occurs more

The above-stated facts clearly show that the “direction” given by the mates to the crew is simply routine, not the kind that would encompass management prerogatives, and not the type that can be said to be “responsible” as the term is used in the Act. Indeed, the “direction” given by the mates to the crew is no different than the direction given by the engineer or the deckhand to other members of the crew.

Finally, a finding that mates are supervisors would result on a silly 1:1 ratio of supervisor to supervisees (or perhaps a 4:0 ratio of supervisors to supervisees).

For the foregoing reasons, the Employer has failed to meet its burden of proving that the mates are supervisors under the Act.

(b) The Employer Has Not Met Its Burden of Showing that Mates “Assign” Within the Meaning of the Act.¹⁵

There is no evidence in the Record that the Mates “assign” other employees as that term was defined in *Oakwood*. Slip op. at 4-5. The record reflects that other than the making and releasing of the barge or the landing of the barge (which constitutes some 1 per cent of the work done by the crew) the remaining functions of the deckhands are established by the Captain in his duty roster. With regards to the landing of the barge or the making and releasing of the barge, the record further reflects that the Captain meets with the crew prior to the operation and tells the crew how he wants the work done. The work is done the same way over and over and over, and everyone knows what they are supposed to do. The Captain assigns the Mate and a deckhand to go to the barge to help him with the landing, or, in some instances, the Captain decides to go to the barge

than 1% of the time worked by the Mate, thus falling short of the 10-15% discussed in *Oakwood*. Slip op. at 9.

¹⁵ Ironically, if there is any “law of the case” applicable to this case is that the Employer waived the issue of whether mates “assign” within the meaning of the Act, thus precluding the Employer from arguing that issue now. In its decision, the D.C. Circuit clearly found that the Employer failed to properly raise the issue before the Board, and treated the issue as waived. *Brusco Tug & Barge Co.*, 247 F.3d at 279.

himself and assigns the Mate to the wheelhouse. There is some testimony that in low visibility the Mate has the authority to post a lookout to help him see better, but there is no evidence that this has ever been done, as the witness – Captain Nordstrom – testified that in case of low visibility he would have likely been awakened by the Mate in any event.

There is also evidence that in case the Mate needs to shorten or lengthen the towline during his shift, he brings the deckhand with him to the winch to perform the operation. The testimony clearly reflects, however, that the operation is a two-man job, and thus, the only two men on the shift perform it. Thus, in reality, there is no judgment made by the Mate with regards to assigning the work to the deckhand; the Mate simply calls the only other crewman on the shift to take his established position in the two-man job. *See Oakwood*, slip op. at 4, 8-9. The testimony further reflects that both crewmen have a set job in that operation; the Mate operates the winch, and the deckhand watches for the lead line.

For the foregoing reasons, the Employer has failed to meet its burden of proving that the Mates are supervisors under the Act.

(c) The Regional Director Properly Considered *Ingram* and *Bernhardt Bros.* Cases as Not Controlling In the Present Matter.

The Regional Director properly considered and distinguished the cases of *Local 28, International Organization of Masters, Mates & Pilots, AFL-CIO*, 136 NLRB 1175 (*Ingram Tug and Barge*) (1962) and *Bernhardt Bros. Tugboat Service, Inc.*, 142 NLRB 851 (1963). The Director properly found that on the facts on the record in this case, those two cases are distinguishable. Moreover, the continued validity of those cases for determination of supervisory status is questionable, inasmuch as the Board has substantially changed the analytical framework for supervisory determinations since

Certificate of Service

The undersigned counsel for the Petitioner certifies that on this 17th day of January of 2007, a copy of the foregoing Petitioner's Opposition to Employer's Request for Review of Regional Director's Second Supplemental Decision has been served via next-day mail on the following parties at the addresses shown below:

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