

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

**COOK INLET TUG & BARGE, INC.**

Employer,

and

**INLANDBOATMEN'S UNION  
OF THE PACIFIC,**

Petitioner.

**Case No. 19-RC-106498**

**PETITIONER INLANDBOATMEN'S UNION OF THE PACIFIC'S  
OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL  
DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. FACTUAL BACKGROUND..... 2

    A. Cook Inlet’s Business and Operations ..... 2

    B. Cook Inlet’s Organizational Structure ..... 2

    C. Captains Merely Exercise Routine Authority to Direct Deckhands in their Day-to-Day Duties. .... 4

III. ANALYSIS..... 6

    A. The Regional Director’s finding that captains do not possess indicia of supervisory authority is consistent with officially reported precedent and amply supported by the record..... 7

        1. Hire ..... 9

        2. Promote..... 11

        3. Discharge ..... 13

        4. Assign ..... 17

        5. Discipline ..... 20

        6. Responsible Direction..... 22

        7. Adjust Grievances ..... 24

        8. Secondary Indicia of Supervisory Status ..... 25

        9. Responsible Carrier Program and Coast Guard Regulations ..... 26

    B. The Regional Director applied the correct legal standard in assessing whether captains possess indicia of supervisory status. .... 27

    C. The Hearing Officer did not prejudice the Employer or otherwise comprise the integrity of the proceedings by showing IBU his collection of historical union memorabilia. .... 30

IV. CONCLUSION..... 32

**TABLE OF AUTHORITIES**

**Federal Cases**

*NLRB v. Chicago Metallic Corp.*,  
794 F.2d 527 (9th Cir. 1986) ..... 9

*Empress Casino Joliet Corp. v. N.L.R.B.*,  
204 F.3d 719 (7th Cir. 2000) ..... 9, 25, 26, 29

*Laborers Local 341 v. NLRB*,  
564 F.2d 834 (9th Cir. 1977) ..... 27

*NLRB v. Kentucky River Community Care*,  
532 U.S. 706 (2001)..... 7

*NLRB v. Prime Energy Ltd. P'ship*,  
224 F.3d 206 ..... 9, 10

**NLRB Cases**

*Arlington Masonry Supply, Inc.*,  
339 NLRB 817 (2003) ..... 27

*Brusco Tug and Barge, Inc. (Masters, Mates & Pilots)*,  
359 NLRB No. 43 (2012) ..... passim

*Chevron Shipping Co. (MEBA No. 1-Pacific Coast Dist.)*,  
317 NLRB 379 (1995) ..... 8, 14, 19

*Chevron U.S.A.*,  
309 NLRB 59 (1992) ..... 28

*Chicago Metallic Corp.*,  
273 NLRB 1677 (1985) ..... 9

*Chrome Deposit Corp.*,  
323 NLRB 961 n.9 (1997) ..... 26

*DirecTV*,  
357 NLRB No. 149 (2011) ..... 21

*F.A. Bartlett Tree Expert Co.*,  
325 NLRB 243 (1997) ..... 9, 29

*Franklin Hospital Medical Center*,  
337 NLRB 826 (2002) ..... 18, 20

*Golden Crest*,  
348 NLRB at 731 ..... 22

<i>Grace Industries, LLC,</i> 358 NLRB No. 62 n.24 (2012) .....	32
<i>Great Lakes Towing Co.,</i> 168 NLRB 695 (1967) .....	28
<i>Health Resources Lakeview, Inc.,</i> 331 NLRB No. 81 (2000) .....	13
<i>In Re Training Sch. at Vineland,</i> 332 NLRB 1412 n.3 (2000) .....	26
<i>Majestic Star Casino, LLC (American Maritime Officers),</i> 335 NLRB 407 (2001) .....	7
<i>Marian Manor for the Aged &amp; Infirm, Inc.,</i> 333 NLRB 1084 (2001) .....	31
<i>McAllister Brothers Inc. (Seafarers Int'l Union),</i> 278 NLRB 601 (1986) .....	19, 24
<i>Oakwood Healthcare,</i> 348 NLRB at 689 .....	17, 22
<i>Sheraton Universal Hotel,</i> 350 NLRB 1114 (2007) .....	21
<i>Southern Illinois Sand Co.,</i> 137 NLRB 1490 (1962) .....	24
<i>Tree-Free Fiber Co.,</i> 328 NLRB 389 (1999) .....	28
<i>Volair Contractors, Inc.,</i> 341 NLRB 673 (2004) .....	28

**Statutes**

29 U.S.C. § 152(11) .....	7, 9
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**Rules**

29 C.F.R. § 102.67(c).....	6
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## I. INTRODUCTION

Petitioner Inlandboatmen' Union of the Pacific ("IBU" or "Union") initiated this action to request that the Board find appropriate and order an election in a bargaining unit consisting of all deckhands and captains employed by Cook Inlet Tug & Barge, Inc. ("Cook Inlet" or "Employer") in Anchorage and Seward, Alaska. The petitioned-for unit excludes all guards, clericals, statutory supervisors, and confidential employees. The primary issue before the Regional Director was whether Cook Inlet captains are statutory supervisors and therefore excluded from the petitioned-for unit. Based on the record evidence presented at the hearing, the Regional Director found that Cook Inlet failed to meet its burden of establishing that captains are supervisors as defined by § 2(11) of the Act and further directed an election in the following Unit:

All full-time and regular part-time captains and deckhands, including mates and captains in training, employed by the Employer at or out of its Anchorage and Seward, Alaska locations; excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

(Decision at 41.) The Regional Director's decision was issued on July 19, 2013 and on August 2, 2013, the Employer requested the Board's review of the Regional Director's decision.

The Union opposes the Employer's request on the ground that the Employer has failed to meet its burden of showing that compelling reasons exist to review the Regional Director's decision. Cook Inlet contends that the Regional Director's decision departs from Board precedent and is clearly erroneous as to substantial factual issues. However, this argument misconstrues the relevant case law and ignores the painstakingly careful and detailed analysis conducted by the Regional Director in his 43-page decision. Contrary to the Employer's contention, the Regional Director's decision is consistent with Board precedent and amply supported by the record. Cook Inlet further contends that the Hearing Officer prejudiced the

Employer by displaying bias toward the Union after the hearing. This argument fails as there is no evidence of bias on the part of the Hearing Officer, nor is there any suggestion that such bias affected the Regional Director's decision. For these reasons, IBU respectfully requests that the Board deny Cook Inlet's request for review.

## **II. FACTUAL BACKGROUND**

### **A. Cook Inlet's Business and Operations**

Foss Marine Holdings ("Foss") purchased Cook Inlet in January 2011. (TR 13:10-23.) Previously, Cook Inlet was a family owned business. (TR 13:25-14:5.) Cook Inlet currently owns several vessels: four tug boats, two barges, and two crew passenger boats. (TR 14:6-18; 15:17-19.) Cook Inlet typically provides ship assist and project services. (TR 15:2-4, 10-13.) Ship assist services consist of at least 50% of Cook Inlet's summer work and virtually all of its winter work. (TR 63:3-8, 71:12-14.) Ship assist jobs typically involve assisting ships, barges, and other vessels safely maneuver in and out of the Anchorage Harbor, primarily using the company's tug boats; Cook Inlet does not perform long haul towing. (TR 17:21-18:4.) The standard manning for a ship assist job is one captain and one deckhand. (TR 19:9-13.) The testimony concerning project services merely consists of descriptions of construction support work and, aside from identifying that the crew for project services "could be different," does not provide much more detail as to the typical manning. (TR 19:17-18.) The operational region for project services covers the Kenai, Kodiak, Homer, Seward, Whittier, and Valdez areas -- all within Cook Inlet. (TR 17:7-20; Employer Ex. 1.)<sup>1</sup>

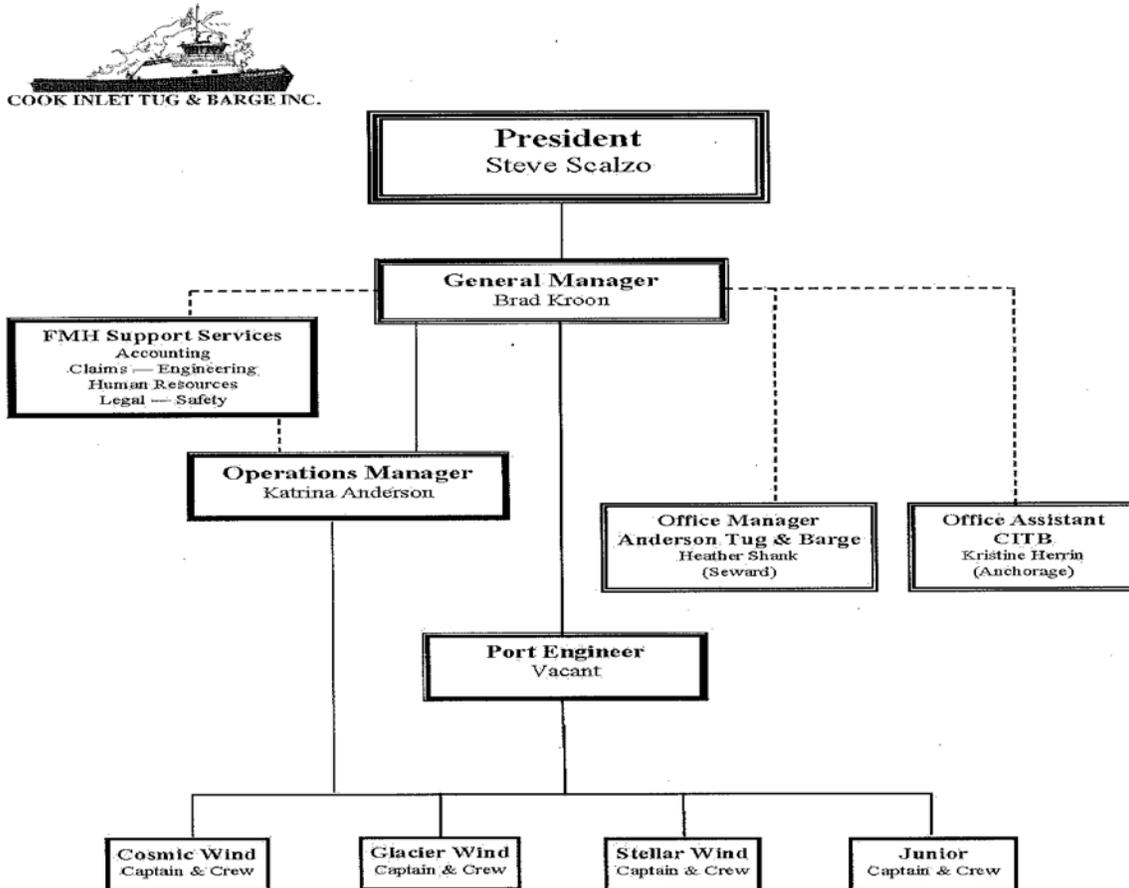
### **B. Cook Inlet's Organizational Structure**

Cook Inlet is a small company, with six (6) captains and at least as many deckhands as

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<sup>1</sup> Exhibit citations refer to the Employer's hearing exhibits.

well as a President, General Manager, Operations Manager, and Office Assistant (TR 32:6-35:23, 66:1-4, 170:18-171:5; Employer Ex. 2, at 6.) Cook Inlet’s employee manual describes the organization of the company as follows:



(Employer Ex. 2, at 6.) Pertinent to the instant matter, captains report to the General Manager, who reports to the President. (TR 32:6-21.) Captains also obtain, for the most part, their assignments from the Operations Manager, who is sometimes referred to as the Operations Dispatch Manager. (TR 35:4-23.) The General Manager’s duties consist of business development, customer relations, budgets, and managing the activities of Cook Inlet’s vessels. (TR 166:25-167:9.) The Operations Manager’s duties include “dispatch, crewing issues, payroll, organizing vendors, dealing with invoicing, making sure . . . vendors are paid appropriately,

[and] communicating with the crews.” (TR 168:11-14.) The Office Assistant position is currently unfilled, but its duties include general clerical support. (TR 169:21-170:1.) Captains operate Cook Inlet’s vessels, with, as described in detail below, the assistance of deckhands. (See *supra*.)

**C. Captains Merely Exercise Routine Authority to Direct Deckhands in their Day-to-Day Duties.<sup>2</sup>**

The evidence before the Board demonstrates that, while captains do direct deckhands in their day-to-day duties, the captains are constrained by detailed employer and Coast Guard guidelines in their execution of these duties and are given their assignments from managerial staff. In particular, the record evidence establishes that captains’ actual duties include:

- (1) day-to-day management of, typically, one deckhand and one vessel; (TR 23:9, 37:6-8, 39:19-22, 62:1-16, 83:10-25, 103:14-18, 107:24-108:8, 114:10-116:2)
- (2) maintenance of safe operations of the vessel; (TR 23:12, 36:14-15, 61:11-16, 105:12-24)
- (3) mentorship of deckhands; and (TR 37:10-12)
- (4) vessel maintenance. (TR 52:10-11, 53:10-13, 109:25-110:9)

As the only captain to testify explained, his responsibilities involve, “the safe operation of the vessel, the safety of [his] crew, and the tasks given to [him] from dispatch.” (TR 99:20-22; *see also* TR 67:15-18 [Captains obtain their assignments from the dispatcher].)

Captains are also subject to strict and specific guidelines covering their day-to-day operations of Cook Inlet vessels. In particular, Cook Inlet has a Responsible Carrier Program

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<sup>2</sup> The Employer has presented testimony of three individuals: (1) the President of Cook Inlet, Steve Scalzo, who never served as a captain for Cook Inlet; (2) the General Manager of Cook Inlet, Brad Kroon; and (3) a current captain of Cook Inlet, Daniel Butts. While Mr. Kroon did serve as captain for a few months following Foss’ acquisition of Cook Inlet, he nonetheless maintained his General Manger duties throughout this brief tenure as a captain. (TR 165:11-19.) Thus, Mr. Butts, as the only regularly employed captain, is the most qualified witness to testify on the nature of the work of a captain for Cook Inlet.

(“RCP”), which provides detailed procedures and policies to captains and deckhands (TR 24:22-25:2; Employer Ex. 2, at 13-225.) Furthermore, captains are subject to specific Coast Guard and Rule of the Road regulations and legal requirements, which dictate their operation of a vessel. (TR 50:6-51:10, 101:22-102:1, 108:14-109:4, 111:23-25, 145:17-146:1, 225:6-8; Employer Ex. 3.) In fact, the primary examples provided by the Employer’s witnesses of a captain’s discretion concern his response to an emergency situation in which he applies Coast Guard regulations. (TR 41:21-42:14, 200:11-201:1, 223:9-17.)

Moreover, the Employer has not put forth any specific evidence of any of the following incidents, which could suggest supervisory status, since Foss’ acquisition of Cook Inlet:

- (1) A captain being disciplined for the conduct of a deckhand on his vessel; (See TR 148:4-9; 212:16-18)
- (2) A captain hiring a deckhand; (TR 125:1-5, 132:6-18)
- (3) A captain terminating a deckhand; (TR 133:11-13)
- (4) A captain disciplining a deckhand, aside from providing instruction on how to perform his duties; (See TR 137:23-138:14; 141:3-4.)
- (5) A captain setting the pay of a deckhand; (TR 141:11-20)
- (6) A captain promoting a deckhand; (TR 141:21-145:70)
- (7) A captain raising the pay of any employee; and (TR 130:23-131:1)
- (8) A captain doing more than advising on a fellow captain’s work performance and informing the fellow captain that management has decided to issue a verbal warning or to terminate him. (TR 183:1-14; 221:3-6.)

None of these actions have ever been done by a captain since Foss acquired Cook Inlet. The testimony indicating that captains may at times come together as a group to review each other’s

job performance falls far short of the type of managerial authority required of statutory supervisors. (*See, e.g.*, TR 182:9-183:20.) Rather, it tends to indicate collective action of a kind protected as concerted activity under Section 7 of the Act.

Further, the RCP clearly sets forth that only the General Manager can make employment offers and assign new hires to a Cook Inlet vessel or floating position between the vessels. (Employer Ex. 2, at 231-32.) Additionally, the RCP only allows a dispatcher, general manager, port captain, or senior captain<sup>3</sup> – none of whom are part of the requested unit -- to interview applicants for job applicants. (*Id.*) In light of the undisputed testimony that the RCP governs in all cases, with the only exception being matters pertaining to safety and Coast Guard regulations, the evidence provided by the Employer concerning the role of captains in hiring, must be understood to include merely a referral capacity and, at most, minimal input as to the Coast Guard’s “basic criteria” for applicants.<sup>4</sup> (TR 88:3-20, 132:6-18, 55:16-18-57:11, 127:10-24, 132:6-18, 156:3-9, 226:10-25.)

### III. ANALYSIS

Pursuant to section 102.67(c) of the Board’s Rules and Regulations, a request for review of the Regional Director’s decision will only be granted “where compelling reasons exist” for doing so. 29 C.F.R. § 102.67(c). A compelling reason exists only if the request for review is based on one or more of the following grounds:

- (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

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<sup>3</sup> Currently, no employee serves as a port captain for Cook Inlet and no evidence has been presented of any employees serving as “senior” captains. (TR 166:10-21)

<sup>4</sup> Further, the only evidence in the record of a captain having any input in the preparation of the RCP was that Mr. Butts suggested a revision to one part of a safety protocol. (TR 156:10-158:16) Such is a far cry from the Employer’s contention that the captains create the RCP. (Request for Review 13:18-16:4.)

- erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
  - (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

*Id.* § 102.67(c)(1)-(4).

Cook Inlet asserts that the Board should grant its request for review because: (1) the Regional Director applied an erroneous standard in evaluating the evidence; (2) the Regional Director disregarded uncontroverted evidence establishing supervisory indicia and discounted uncontroverted oral testimony despite making no findings that the witnesses were not credible; and (3) the Hearing Office demonstrated bias by initiating ex parte contact with the Union team following the hearing. For the reasons set forth below, these arguments lack merit and do not constitute “compelling reasons” for revisiting the Regional Director’s decision.

**A. The Regional Director’s finding that captains do not possess indicia of supervisory authority is consistent with officially reported precedent and amply supported by the record.**

As the party asserting Section 2(11) supervisory status, Cook Inlet bears the burden of proving the alleged supervisory status of captains. *Brusco Tug and Barge, Inc. (Masters, Mates & Pilots)*, 359 NLRB No. 43, \*4 (2012); *Majestic Star Casino, LLC (American Maritime Officers)*, 335 NLRB 407, 408 (2001), *citing NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Section 2(11) defines a “supervisor” as:

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

29 U.S.C. § 152(11).

To establish that the captains are supervisors, Cook Inlet would have to prove that: (1) captains have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) captains “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; **and** (3) the captains exercise such authority “in the interest of the employer.” *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, at \*4. “T[o] exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at \*5 (internal quotations omitted). Of critical importance here, “[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.* (internal quotations omitted) (“[T]he authority to assign must be exercised using independent judgment, and judgment is not considered independent if it is dictated or controlled by detailed instructions.”); *see also Chevron Shipping Co. (MEBA No. 1-Pacific Coast Dist.)*, 317 NLRB 379, 381-82 (1995) (“[A]lthough the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by . . . Operating Regulations. . . . Further, the duties of the crewmembers, both licensed and unlicensed, are delineated in great detail in the Regulations; thus, the officers and crew generally know what functions they are responsible for performing and how to accomplish such tasks.”)

“The Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status. Supervisory status is not proven where the record evidence is in conflict or otherwise inconclusive. Mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority.” *Id.* at 5 (internal quotations and modifications omitted). Moreover, the Board has a

duty “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), *aff’d. in relevant part*, 794 F.2d 527 (9th Cir. 1986)

Applying these standards to the case at bar, the Regional Director correctly concluded that Cook Inlet failed to meet its burden of establishing supervisory status.

### **1. Hire**

An individual has supervisory authority with respect to hiring if he/she has the authority to hire or “the authority ‘effectively to recommend such action.’” *Empress Casino Joliet Corp. v. N.L.R.B.*, 204 F.3d 719, 721 (7th Cir. 2000) (quoting 29 U.S.C. § 152(11)). In determining whether referring applicants for hire constitutes effective recommendation of hiring, “[w]hat is critical is the *weight* of the [individual’s] recommendation in the final decision.” *Id.* (emphasis in original); *see NLRB v. Prime Energy Ltd. P’ship*, 224 F.3d 206, 212 (finding individual was supervisor where, *inter alia*, the manager testified that his hiring decision was based 90 percent on individual’s recommendation); *F.A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997) (upholding 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”).

Cook Inlet contends that the Regional Director unfairly deemphasized testimony showing that captains have the authority to effectively hire. However, an examination of the Regional Director’s decision and the record before him makes clear that he considered all the evidence and found that “the weight given to captains’ referrals and the degree of review of captains’ hiring recommendations was contradictory and inconclusive.” (Decision at p. 29.) This finding is

amply supported by the record. For example, the employer's policies and some of the testimony showed the existence of a formal hiring process whereas other testimony indicated that the employer does not follow any formal hiring procedure. (TR 80:2-12, 171:24-172:4; Employer Ex. 2, at 231-32.) Additionally, while Mr. Scalzo and Mr. Butts both testified that captains make final hiring determinations, Mr. Scalzo and Mr. Kroon later acknowledged that the final decision is subject to management's review and approval. (TR 37:8-9, 46:13-19, 80:2-13, 172:25-173:3.) Cook Inlet did not put forth any evidence regarding the possible grounds for the manager's objections. Meanwhile Mr. Kroon testified in conclusory fashion that various people had been hired by captains over the years, but he did not provide the details about the process followed by the Employer when they were hired. (TR 172:9-13, 173:24-177:2.) And to further conflate matters, the written hiring policy suggests that captains do not have any express responsibility in hiring. (See Exh. 2, at 231-32 (making no mention of captains under the hiring "responsibility" section.)) The only mention of captains in the Employer's hiring policy states that Port Captains or Senior Captains<sup>5</sup> may conduct interviews and subsequently discuss their evaluation of the candidate with the General Manager. (*Id.* at 232.) According to Mr. Butts' testimony, however, these meetings were not truly interviews but rather informational meetings for the prospective hire. (TR 128:2-4.) Since the evidence was in conflict or otherwise inconclusive, the Regional Director correctly found that the Employer failed to establish supervisory status based on the authority to hire or to effectively recommend hiring. See *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, at \*5.

Moreover, contrary to Cook Inlet's contention, Mr. Kroon did not offer clear testimony

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<sup>5</sup> As discussed above, no employee currently serves as "Port Captain" and the Employer has not presented any evidence on whether any employees in the unit are "Senior Captains" or any evidence on the duties and responsibilities of "Senior Captains."

regarding management's role in the hiring process. As explained by the Regional Director in his decision:

When asked if he accepted [Captain] May's recommendation that Murphy be hired, or if he did any independent vetting of Murphy, Kroon responded, "Yes and no. I mean most of the time, we take recommendations, but we're still under the authority of the Coast Guard and those entities so we have to do our due diligence to make sure that all their documentation is in place."

(Decision at 10 (quoting TR 172:25-173:3).) This testimony fails to establish the extent of Mr. May's influence on the ultimate hiring decision. Specifically, it is unclear when and under what circumstances management does not "take" the captain's recommendation, what is involved in the due diligence process of "mak[ing] sure that all their documentation is in place," whether management does any other independent vetting of an applicant in addition to this due diligence function, and whether captains play any role in performing this due diligence. Mr. Kroon's vague and ambiguous testimony hardly constitutes the type of detailed and specific evidence necessary to establish supervisory liability. See *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, at \*5.

## **2. Promote**

Cook Inlet asserts that the Regional Director improperly held that the Employer failed to establish that captains possess the authority to promote employees or to effectively recommend the same. Specifically, it claims that the Regional Director ignored clear and un rebutted testimony regarding the captain's ability to elevate a deckhand to "mate" status. This argument assumes a fact not established by the record—namely, that obtaining "mate" status constitutes a promotion. As explained in the Regional Director's decision, Cook Inlet did not proffer any evidence showing that it maintains a job description or formal job classification for the position, nor did it offer any written policies, payroll records, employee rosters, or other documents

recognizing “mate” as a distinct job classification.<sup>6</sup> Further, Mr. Butts’ testimony suggests that the mate classification is just an informal designation used by captains to refer to deckhands whom captains have decided to mentor and train on captain work. (TR 142:11-23, 145:1-2.) When asked if becoming a mate was a promotion, Mr. Butts testified: “It’s more of a captain in training. You’re grooming someone from a deckhand’s position to get into the captain’s chair eventually.” (TR 142:15-19.) Mr. Butts also testified that he did not know whether being selected by a captain as mate entailed change in job title or a raise. (TR 144:14-17, 145:3-4) Although Mr. Kroon testified that mates have a higher pay range than regular deckhands (TR 185:1-2.), the record did not establish whether any changes to a deckhand’s job tenure, status, or pay is actually linked to their selection by captains for training.

And even assuming *arguendo* that becoming a “mate” constitutes a promotion, the Regional Director correctly found that the Employer failed to establish that captains exercise independent judgment in selecting deckhands to serve as mates as required under § 2(11). “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.” *Brusco Tug and Barge, Inc.* 359 NLRB No. 43, at \*5 (internal quotations omitted). Here, the Employer did not provide any specific evidence showing how a deckhand is selected to serve as “mate.” The only evidence in the record regarding this selection process is Mr. Butts’ testimony that deckhands are brought up to mate

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<sup>6</sup> The Employer contends that the captains’ promotion of deckhands to “mate” status is consistent with the Company’s expectation as set forth in the handbook. However, the handbook merely states: “We are intent on developing employees who can grow and take on additional responsibilities as the company grows. Our personnel management practices are directed at fostering individual initiative and creativity and providing our employees with the opportunity to broaden their supervisory and management responsibilities.” (Employer Ex. 4, at 6.) This generic statement in no way suggests that captains possessed the authority to promote deckhands.

status “[i]f they’re performing their tasks and they have the proper certification.” (TR 141:24 – 142:2.) This testimony fails to demonstrate independent judgment, and in fact suggests that the selection is the type of routine and perfunctory task that the Board has found insufficient to establish supervisory authority. *Health Resources Lakeview, Inc.*, 331 NLRB No. 81, at \*1 (2000). Further, the Employer’s argument regarding captains’ discretion misconstrues the appropriate legal test. Even assuming the record clearly established that the selection of a mate is left to the captains’ discretion—which it does not—this still would not be sufficient absent a showing that the exercise of that discretion is not dictated or controlled by detailed instructions. Based upon this record, the Regional Director properly found the independent judgment requirement unsatisfied.

### **3. Discharge**

Cook Inlet claims that the Regional Director erred by disregarding evidence that captains have the authority to discharge and that management takes captains’ recommendations for discharges. With respect to the captains’ own authority to discharge, Cook Inlet relies on Mr. Scalzo’s testimony that the captain “has the right to hire and fire [the crew]” and that they may do so without conferring with management “if they think it’s absolutely necessary and the circumstances warrant it.” (TR 37:4-9, 45:13-23.) However, as pointed out in the Regional Director’s decision, Mr. Scalzo later explained that captains usually consulted with the general manager before discharging an employee “unless it’s immediate and/or a succession of issues that have cause[d] it.” (TR 86:19-87:6.) When asked about circumstances in which a captain may terminate an employee without consulting a manager, Mr. Butts testified that it could be done where there is insubordination, fighting, sabotage, and problems with drugs and alcohol. (TR 135:22-136:7.) However, the authority to discharge an employee for such egregious

conduct requires no independent judgment. *See Chevron Shipping Co.*, 317 NLRB 379, 381 (1995) (“The Board has consistently found that the authority . . . to order intoxicated or insubordinate employees to leave the workplace does not constitute the statutory authority to discipline employees, as such violations are so egregious and obvious that little independent judgment is needed.”). Therefore, the Regional Director did not err in finding this testimony insufficient to establish supervisory authority.

Cook Inlet further contends that the Regional Director improperly discounted Mr. Kroon’s testimony regarding the discharge of Captain Daniel Wright. (Request for Review at 21 (citing Decision at 14).) However, the record demonstrates that Mr. Kroon’s testimony was inconsistent and ambiguous about who made the determination to discharge Mr. Wright. Mr. Kroon initially testified that he himself concluded that Mr. Wright should be terminated after the incident precipitating his discharge. (TR 178:4-5.) However, he later provided the following testimony about discussions regarding whether to discharge Mr. Wright before the end of the season:

Q: Okay, and did you want to terminate him before the end of the season?

A: I did. I did. And . . . .

Q: And did your captains want him terminated before the end of the season?

A: Yes, they did. We had . . . .

Q: But did they decide to terminate him before the end of the season?

A: Well, we had lots of discussions about that. And, unfortunately, because of the demand for captains and the inability to find licensed personnel in the midst of the season, it was discussed with the captains that, yes, we could terminate him. However, the workload, because we didn’t have somebody to fill that role full-time, would fall on them. And it was discussed and decided that we would keep him for another month until the end of the season and . . . .

Q: So who made that decision?

A: The captains.

Q: So you left it to them to determine whether he was going to be terminated now or terminated later?

A: Well, we were just trying to decide whether we would terminate him at that time or whether we'd let him ride [to] the end of the season. He'd already been there a couple months. He had about a month left, if I remember correctly at that meeting, to be – to meet the obligations of our contract to the end of that year for providing that service to Fire Island.

Q: And they decided to let him stay?

A: Yes.

Q: And you went along with that decision?

A: Regretfully so.

Q: Because after that decision . . . .

A: Because of the incident, yeah.

Q: . . . . he ran under the bridge?

A: Correct. Well, he did some poor judgment after the investigation that caused the incident. But more importantly so, it was his judgment after the fact that we were in the -- that he sent personnel down below decks at the point of contact with the dock that really cemented my believe in his termination.

(TR: 179:1 – 180:13.) Cook Inlet attempts to focus exclusively on Mr. Kroon's responses to leading questions from Employer's counsel. (*See* Request for Review at 21.) However, the broader context of Mr. Kroon's testimony supports the Regional Director's finding that the captains had complained about Mr. Wright prior to the accident and that Mr. Kroon regrettably rejected the captains' call to discharge him earlier. In short, the Regional Director did not err in finding that Mr. Kroon's testimony failed to establish action on the part of the captains rising to the level of independent judgment required under § 2(11).

The Employer also claims that the Regional Director improperly disregarded Mr. Scalzo's testimony that Shawn Van Deusen had been terminated following captains' recommendations without any independent investigation by management. However, Mr. Kroon provided more specific testimony regarding Mr. Van Deusen's termination. And unlike Mr. Scalzo's account of what happened, Mr. Kroon's testimony did not make clear that the captains were the ones responsible for the termination decision. Mr. Kroon gave the following account when asked about the circumstances surrounding Mr. Van Deusen's discharge:

A: . . . . And it had a real negative impact on morale. So there was a lot of discussions about his performance.

Q: A lot of discussions with who?

A: With the captains and even with the crew. The crew were disgruntled as wells [sic], because they were out working hard. And so they would complain to the alternate captains.

Q: Okay. But the crew wasn't making the decision?

A: No.

Q: Who was making the decision?

A: The other captains.

Q: And they made the decision based upon the complaints and their observations?

A: Yes.

Q: Okay. And did you accept their recommendation to terminate?

A: Yeah. It was – yes. And . . . .

(TR 182:8-24.) Mr. Kroon further testified that he asked Captain Mark Theriault to inform Mr. Van Deusen of his discharge because Mr. Kroon was scheduled to be on vacation and could not delay in implementing the discharge. (TR 182:25 – 183:14.) According to Mr. Kroon, he told

Mr. Theriault that he could give Mr. Van Deusen the option to quit instead of being discharged. (TR 189:5-10.) Mr. Theriault subsequently emailed Mr. Kroon to report that he had given Mr. Van Deusen the news and that Mr. Van Deusen requested to have a meeting describing the reasons for the discharge. (Employer Ex. 5.) Based on this record, the Regional Director did not clearly err in finding that it was Mr. Kroon, and not the captains, who conducted the investigation into whether Mr. Van Deusen's conduct warranted discharge. (Decision at 32.)

Accordingly, the Regional Director properly concluded that the Employer failed to establish supervisory status based on authority to discharge or to effectively recommend the same.

#### **4. Assign**

The Board has defined "assignment" as "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 an overtime period; or giving significant overall duties to an employee." *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, at \*5 (citing *Oakwood Healthcare*, 348 NLRB at 689). Importantly, the Board distinguishes between "the designation of significant overall duties to an employee," an assignment of independent judgment, and "the ad hoc instruction that [an] employee perform a discrete task," an assignment of a routine, non-supervisory nature. *Id.* (internal quotations and modifications omitted). Applying this standard to similar facts, the Board held that mates' instructions concerning towing and docking did not constitute assignments. *Id.* The Board explained that, "[d]irecting the deckhand, during these procedures, where to stand, on which side of the vessel to place the lines, what lines to release and in which order, and which tools to use exemplify ad hoc assignments that do not rise to the level of supervision." *Id.*

The Board has further held that "[p]roof of independent judgment in the assignment of

employees entails the submission of concrete evidence showing how assignment decisions are made.” *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002). Thus, the “assignment of tasks in accordance with an Employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require sufficient exercise of independent judgment to satisfy the statutory definition.” *Id.*

Here, the testimony makes clear that the instructions provided by captains to their crew are precisely the type of “ad hoc instructions” that the Board has found insufficient to establish supervisory status. Mr. Scalvo testified that the captain directs orders on how to tie up the barge, how to untie the barge, how to assist in loading the cargo, how they’re going to go on in the tide, how he wants the barge aligned, and how to operate the ramp on the barge. (TR 39:18-40:16.)

Mr. Butts described the captains’ directions as follows:

I need to direct the crew. If we’re towing something and we got shallow water, I have to direct them to bring in the winch and have so much tow wire out. I have to direct them to make sure all the hatches are closed. If we’re doing a certain towing job, I need to direct them to, hey, have this on standby in case we need it. Be in the engine room, because this has been happening with one of the engines.

(TR 113:10-16.) Mr. Butts further testified that he sets work schedules based on the work that they have been assigned to and upon his determination of the proper amount of rest everyone needs to perform their main duties safely. (TR 123:14-19.) As recognized in the Regional Director’s decision, the Employer did not offer any evidence establishing that captains exercise independent judgment in determining who will perform what tasks when captains and their deckhands are completing maintenance work when their vessels are not underway. (Decision at 35.) Based on this record, the Regional Director did not err in finding that the captains’ assignment of deckhands to perform particular discrete tasks did not rise to the level of supervisory authority.

The Employer argues that it established supervisory authority to assign by submitting evidence showing that captains exercise control over the vessel and are responsible for the vessel's safe operations. According to the Employer, captains exercise judgment depending on the maintenance needs of the ship, changing weather conditions, and emergency situations. Even assuming this is supported by the record, however, the Board has expressly determined that duties and responsibilities, including having the "charge of the safety of the ship, crew, and cargo," "responsibl[ity] for posting a proper lookout," the "abl[ity] to call additional unlicensed crew," and the authority to "suspend all work on deck in situations involving bad or potentially dangerous weather" and to "determine[] how to respond to navigational hazards and . . . order the vessel to change course," do not constitute the exercise of independent judgment for purposes of determining supervisory status. *Chevron Shipping Co. (MEBA No. 1-Pacific Coast Dist.)*, 317 NLRB 379, 379 (1995). The Board has also held that a tugboat captain whose duties included "plan[ning] the operation," "observ[ing] conditions while the boat . . . was proceeding to an assignment," "maintain[ing] radio contact with the mate," "coordinat[ing] the operation," and "giv[ing] such directions as were necessary to carry out the operation" did not exercise supervisory authority to remove him from the protections of the Act. *McAllister Brothers Inc. (Seafarers Int'l Union)*, 278 NLRB 601, 610 (1986). Rather, under these facts, "[t]he captain was nominally in charge of the tugboat . . . ." *Id.* Therefore, contrary to the Employer's contention, a captain's responsibility for the overall safety of the ship or the decisions he must make in extreme climate conditions are not sufficient to establish supervisory status.

Cook Inlet also claims that the Regional Director erred in finding that when a captain is in the wheelhouse navigating, it requires little independent judgment for him to determine that his deckhand should be assigned to complete any task outside the wheelhouse. According to the

Employer, this “oversimplification” is unsupported by the evidence. However, the Employer does not dispute that the standard manning for a ship assist job is one captain and one deckhand, nor does the Employer dispute that the captain is generally in the wheelhouse navigating when the vessel is underway. (TR 19:9-13, 110:6-7.) The Employer also does not—and cannot—point to any “concrete evidence showing how assignment decisions are made” when the captain is navigating in the wheelhouse. *Franklin Hospital*, 337 NLRB at 830. In short, the Regional Director’s conclusion is supported by the record and the Employer has not identified any evidence to the contrary.

Lastly, the Employer’s argument that the Regional Director placed undue emphasis on the ratio of supervisors to employees completely lacks merit. The cases cited by the Employer stand for the proposition that the ratio of supervisors to employees, in and of itself, is not the proper test for determining supervisory status. However, the Regional Director did not rely on this ratio itself as a determinative factor. Rather, he relied on the fact that captains generally work with only one deckhand on a vessel for purposes of assessing Mr. Butts’ testimony that he plays to his deckhands’ strengths in deciding who will perform which tasks. (*See* Decision at 35.) It goes without saying that the degree of judgment necessary to assign tasks between two people is qualitatively different from that required to assign tasks amongst five or six people. Moreover, nothing in the Regional Director’s extensive discussion suggests that he placed undue emphasis on this one factor.

## **5. Discipline**

The Board has held that when an individual has the authority to initiate the disciplinary process, even when discipline must be reviewed or approved by a supervisor before issuance, the individual has the authority to exercise independent judgment in effectively recommending

discipline. *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007). However, even where an individual merely initiates the disciplinary process, the Board will decline to find that the individual is a supervisor if the party asserting supervisory status fails to introduce evidence of the extent and nature of the review process undertaken in determining whether discipline should actually issue. *DirectTV*, 357 NLRB No. 149, at \*3-4 (2011).

The only argument advanced by the Employer regarding the authority to discipline pertains to a November 2011 verbal warning delivered by Captain Mark Theriault to Mr. Van Deusen. The Employer asserts that the Regional Director erred in finding that this warning did not demonstrate supervisory authority to discipline. When questioned about this warning, Kroon testified as follows:

Q: And did Mark talk to you before making the verbal warning?

A: Yes. Mark was pretty upset, because he was the one that staged all equipment for putting up the ice wire so he was pretty upset that Shawn hadn't done that last step.

Q: And did you authorize him to make the verbal warning?

A: Yeah, we discussed it. Yeah.

Q: Yes, you authorized?

A: We discussed it and felt it was appropriate.

(TR 220:24 – 221:6.) Based on this testimony, the Regional Director did not clearly err in finding that Mr. Theriault (Mark) did not exercise independent judgment by effectively recommending discipline. Indeed, the record is ambiguous as to whether Mr. Theriault recommended discipline at all. It merely shows that Mr. Theriault brought the incident to Mr. Kroon's attention and, after discussion, Mr. Kroon authorized the issuance of a verbal warning. Because the burden was on the Employer to introduce evidence of the extent and nature of the

review process in determining whether discipline should issue, the absence of testimony regarding who recommended the verbal warning counts against the Employer.

## **6. Responsible Direction**

The Board has held that if an individual decides “what job shall be undertaken next or who shall do it,” he or she is a supervisor provided that such direction is both (1) “responsible,” meaning he or she will be held accountable for the task’s performance, and (2) requires the exercise of independent judgment. *Brusco Tug and Barge*, 359 NLRB No. 43, at \*7 (citing *Oakwood Healthcare*, 348 NLRB at 691-92).

To establish accountability for purposes of responsible direction, “it must be shown not only that the employer ‘delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary’ but that ‘there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.’” *Id.* (citing *Golden Crest*, 348 NLRB at 731). In *Brusco Tug and Barge, Inc.*, the Board found that “conclusory assertions” about mates’ accountability for deckhands’ work, such as testimony to the effect that they were “ultimately responsible” or that mates are “accountable . . . under federal law for the actions of their crew” were too conclusory to establish supervisory status. *Id.* at \*8. The Board explained that the party asserting supervisory status had failed to “delineate . . . for what or how the mates are actually held accountable.” *Id.*

Similarly, here the record is replete with nothing but conclusory assertions of accountability. (*See, e.g.*, TR 23:5-25 (“[T]he captain is responsible for everything on the vessel . . . . We hold him accountable for that work.”); 57:23-24 (“Well he is totally accountable for anything that happens on the vessel.”); 100:5-101:24 (“That’s the essence of being a captain is you’re responsible for everything that happens onboard.”).) As explained by the Regional

Director, while “all of the Employer’s witnesses stated that captains could be held accountable for deckhands’ errors,” they did not “specify what types of errors by deckhands would result in what levels of discipline for their captains.” (Decision at 38.) The Employer also did not provide any concrete examples of instances in which a deckhand’s performance led to adverse consequences for his or her captain. According to the Employer, the Regional Director’s “focus on minor details [] unfairly undercuts the plain meaning of the testimony.” (Request for Review at 25.) However, Board precedent makes clear that the Employer must do more than offer purely conclusory evidence. *See Brusco Tug and Barge*, 359 NLRB No. 43, at \*8. Accordingly, the Regional Director did not err in finding the Employer’s conclusory testimony insufficient to meet the accountability prong.

As to the second prong, in order to establish that directing employees requires the exercise of independent judgment, a party must show that the direction is more than a routine or clerical “ad hoc instruction that the employee perform a discrete task.” *Id.* Cook Inlet contends that the Regional Director erred in concluding that the captains’ technical expertise precludes a finding of supervisory status here. However, the Regional Director made no such conclusion. To the contrary, he expressly held that the captains’ directions to deckhands did not require technical expertise. He explained: “While operating vessels in the conditions of Cook Inlet undoubtedly requires technical expertise, the Employer did not introduce evidence establishing that the directions given to deckhands are anything more than routine *ad hoc* instruction.” (Decision at 39.) Therefore, contrary to the Employer’s assertion, the Regional Director in no way relied on the captains’ technical expertise in his determination that the Employer failed to meet its burden here. Rather, if anything, the Regional Director may have considered, as one of many factors, the captain’s greater experience, which would not be in error. Board authority

makes clear that *ad hoc* instructions by an employee with greater experience (here captains) to employees with lesser experience (here deckhands) do not transform the more experienced employees into statutory supervisors. *McAllister Brothers Inc.*, 278 NLRB at 614 (“To the extent that captains did and still do exercise control over other crewmembers ‘the type of direction involved is not that of the supervisor but that exercised by the more experienced employee over one who is less skilled.’”) (quoting *Southern Illinois Sand Co.*, 137 NLRB 1490, 1492 (1962)).

## **7. Adjust Grievances**

Cook Inlet asserts that the Regional Director erred in concluding that the evidence was insufficient to establish that captains possessed supervisory authority to adjust grievances. To support this argument, the Employer cites Mr. Butts’ testimony that if there is a conflict between deckhands or a complaint by a deckhand about a problem with the vessel, he has the authority to resolve those issues in certain cases. (TR 162:3-17.) However, the Employer failed to submit evidence showing how the exercise of such authority would require independent judgment. For example, it is unclear whether this authority is of a routine nature or whether the captain’s response in these situations is dictated or controlled by detailed instructions. *See Brusco Tug Barg, Inc.*, 359 NLRB No. 43, at \*5. Therefore, the Regional Director did not err in finding Mr. Butts’ testimony insufficient to establish that captains possess supervisory authority to adjust grievances.

Cook Inlet also relies on evidence showing that captains are responsible for reporting discrimination or harassment. Specifically, the Employer’s employee handbook provides: “Vessel Captains . . . who know or receive reports or complaints of offending behavior must promptly notify the Company President so that appropriate action can be taken. Any vessel captain . . . who witnesses an act of harassment or who receives a complaint of harassment and

fails to take appropriate action is also subject to discipline.” (Employer Ex. 4, at 16.) The Regional Director correctly observed that the handbook does not state that captains have anything more than a reporting role. And when asked whether captains have any investigatory role upon becoming aware of discriminatory conduct, Mr. Kroon testified “they can.” (TR 225:23-25.) Mr. Kroon further testified that no captain has ever done so. (TR 226:1-2.) The Employer’s assertion that captains have authority to and were specifically directed to handle harassment complaints is simply not established in the record. Moreover, the Employer has not cited any law to support a finding of supervisory status based solely on the authority to report, as opposed to address, a grievance. Accordingly, the Regional Director did not err in finding the Employer’s showing insufficient to establish supervisory authority to adjust grievances.

#### **8. Secondary Indicia of Supervisory Status**

The Board may use non-statutory indicia, including the ratio of supervisors to employees, differences in terms and conditions of employment, attendance at management meetings, and the presence of other supervisors on-site, as background evidence in resolving supervisory issues. *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000). While the Regional Director did recognize that the Employer’s secondary indicia concerning the lack of a supervisor on a vessel, rates of pay, and captains’ meetings do weigh somewhat in favor of finding supervisory status, the Regional Director emphasized other secondary indicia, namely the ratio of supervisors to employees, militates against a finding of supervisory status. As the Regional Director explained, “[I]f captains are found to be supervisors, the ratio of supervisors to employees on a vessel would be one to one, and the overall ratio of supervisors to employees in the Employers’ operations would be approximately one and a half to one.” (Decision at 40.) The Regional Director further explained that the lack of a supervisor on a vessel is “undercut by the

fact that captains and deckhands have means of communicating with management from the vessels.” (Id.) Finally, the Regional Director properly noted that “nothing in the statutory definition of ‘supervisor’ suggests that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor.” (Id.) Moreover, regardless of the persuasiveness of the Employer’s secondary indicia arguments, an Employer cannot meet its burden on secondary indicia arguments alone. Rather, the Employer must present sufficient evidence to establish that captains possess any of the primary indicia set forth in § 2(11). This analysis is consistent with established Board precedent. *See In Re Training Sch. at Vineland*, 332 NLRB 1412, 1412 n.3 (2000) (declining to consider secondary indicia because “we believe that we are constrained by the statute *not* to find an employee to be a supervisor *unless* it has been established that at least one of those [statutory] indicia is present”); *Chrome Deposit Corp.*, 323 NLRB 961, 963 n.9 (1997) (“it is well settled that secondary indicia are not dispositive in the absence of evidence indicating the existence of any one of the primary indicia of such status”). Therefore, the Regional Director did not err in this determination.

#### **9. Responsible Carrier Program and Coast Guard Regulations**

Cook Inlet argues that the Regional Director improperly put significant weight on the existence of the RCP and Coast Guard Regulations to support his conclusion that captains exercise insufficient independent judgment. According to Cook Inlet, this effectively punishes the Employer for having established guidelines for performance and constitutes “an untenable and undesirable position.”

This argument fails for several reasons. First, there is no indication in the Regional Director’s decision that he gave any undue weight to the Employer’s policies and regulations. While his decision takes this evidence into consideration, the Regional Director does not rely

exclusively on the mere presence of these materials as dispositive on any particular issue. Second, the Board has expressly held that “[a] judgment is not independent if it is dictated or controlled by detailed instructions,” including those “set forth in company policies or rules.” *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, at \*5. Therefore, ignoring the materials set forth in the Employer’s policies and regulations would be inconsistent with Board law. And third, the Employer’s argument that this constitutes an “undesirable position” does not constitute the type of compelling reason necessary to warrant review of the Regional Director’s decision and is nonsensical. If an employer, like here, chooses to impose specific, detailed duties on its employees for its chosen business and regulatory reasons and, in so doing, shields itself from liability and risk by eliminating or restricting the exercise of independent judgment of its employees, then that employer simply elected to deprive its employees of supervisory authority. Such a conclusion is not undesirable, it is to be expected. The more control the Cook Inlet exercises on its captains, through its guidelines, policies, and other mechanisms, the less independent judgment those captains can exercise.

**B. The Regional Director applied the correct legal standard in assessing whether captains possess indicia of supervisory status.**

Cook Inlet claims that the Regional Director applied the wrong legal standard by considering the frequency with which supervisory authority is exercised instead of finding the mere existence of such authority sufficient. It is well-established that it is the existence of supervisory authority, not the frequency of its exercise, that determines whether an individual is a supervisor. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003). However, it is equally well-established that the frequency with which supervisory authority is exercised may be relevant to the determination of whether such authority exists at all. *See Laborers Local 341 v. NLRB*, 564 F.2d 834, 847 (9th Cir. 1977) (“failure to exercise [supervisory powers] may show

the authority does not exist”); *Chevron U.S.A.*, 309 NLRB 59, 61 (1992) (“isolated and infrequent incidents of supervision do not elevate a rank-and-file employee to a supervisory level”); *Great Lakes Towing Co.*, 168 NLRB 695, 700 (1967) (“while the statute merely requires the individual to possess the right to exercise such [supervisory] authority, the total absence of its exercise . . . may negative its existence”); *Tree-Free Fiber Co.*, 328 NLRB 389, 392 (1999) (“the frequency of exercise of the authority is relevant to a determination of whether in fact the authority has been delegated to him by management [at all]”); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004) (“The Board has declined to find individuals to be supervisors based on alleged authority that they were never notified that they possessed and where its exercise was sporadic and infrequent.”). Therefore, it is simply not the case that any consideration of frequency constitutes legal error, as the Employer suggests.

Moreover, the Employer’s argument completely misconstrues the Regional Director’s decision. According to the Employer, the Regional Director improperly rejected evidence of supervisory authority as insufficient based on improper considerations of frequency. However, the examples identified by Cook Inlet wherein the Regional Director allegedly rejected competent and sufficient evidence simply do not support the Employer’s argument.

First, the Employer cites to sections of the Regional Director’s decision in which he observes that the Employer failed to show the frequency or regularity with which the captains’ recommendations for hire or discharge are followed. (Decision at 9, 30, 33.) However, this consideration is highly relevant in determining whether an individual possesses the authority to “effectively” recommend the hiring or firing of an individual within the meaning of § 2(11). As discussed above, whether an individual has the authority to effectively recommend such action depends primarily on the *weight* of the individual’s recommendation on the final decision. *See*

*Empress Casino Joliet Corp*, 204 F.3d at 721; *F.A. Bartlett Tree Expert Co.*, 325 NLRB at 245.

The mere authority to make a recommendation, standing alone, is insufficient to establish supervisory authority. Since the frequency with which the captains' recommendations are followed is probative of the *weight* given to such recommendations, the Regional Director's consideration of this factor was proper and consistent with Board precedent.

Second, Cook Inlet claims that the Regional Director laid undue emphasis on "frequency" evidence when he wrote: "Captain Butts testified that captains may veto changes to deckhands' normal schedules if they need a person with particular capabilities to be onboard for a particular job, but he testified that captains *do not often* veto schedule changes." (Decision at 18 (emphasis added).) This statement does not appear in the analysis section of the Regional Director's decision, but rather in his detailed summary of the record evidence at the beginning of the decision. Contrary to the Employer's suggestion, this statement merely constitutes an accurate description of Mr. Butts' testimony. When asked how often he vetoed schedule changes, Mr. Butts responded "not very often." (TR 154:1-3.) It was neither improper, let alone legal error, for the Regional Director to note this fact in his decision. What is more, there is no indication that the Regional Director relied on the captain's authority (or lack thereof) to veto schedule changes in his analysis regarding assignment powers. In short, the Regional Director's passing reference to this fact does not constitute a compelling reason to review his decision.

Third, the Employer cites to the Regional Director's statement that: "Butts offered no details regarding the regularity and/or frequency with which a captain may bring on another deckhand without management approval." (Decision at 11.) This statement, like the one discussed above, appears in the background factual summary and does not come up in the Regional Director's analysis of the captains' authority to promote deckhands. Moreover, as

discussed above, the frequency with which this purported authority was exercised may be considered for purposes of determining whether the authority existed at all. Therefore, even if the Regional Director had in fact considered this factor, it would not constitute error.

Lastly, the Employer asserts that the Regional Director improperly considered the absence of evidence regarding the exercise of supervisory authority when he wrote: “Although there was testimony that captains may discipline or discharge deckhands if they refuse to perform a task as directed, the Employer did not provide any concrete examples or documentary evidence of instances where that had happened.” (*Id.* at 29.) However, the Regional Director’s consideration of the lack of specific details is consistent with Board standards. *See Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, at \*5 (“Mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority.”). Furthermore, it was proper for the Regional Director to consider whether the asserted supervisory authority had ever been exercised. (*See discussion supra.*)

For these reasons, the Regional Director did not apply an erroneous legal standard in evaluating the Employer’s evidence regarding indicia of supervisory authority.

**C. The Hearing Officer did not prejudice the Employer or otherwise compromise the integrity of the proceedings by showing IBU his collection of historical union memorabilia.**

Cook Inlet contends that the Hearing Officer violated the Administrative Procedure Act, the Code of Judicial Ethics, and the NLRB’s Rules and Regulations when he invited the IBU parties into his office to view his collection of historical union memorabilia. According to the Employer, this conduct “calls the integrity of the entire proceeding into question.” (Request for Review at 30.) However, an examination of the facts make clear that the Hearing Officer did not engage in any improper ex parte communications or otherwise prejudice the Employer through

this conduct.

As set forth in the accompanying declaration of counsel for IBU, during some breaks on the first day of the hearing, the Hearing Officer asked if the IBU parties were interested in historical ILWU memorabilia. He explained that he was a collector of such items and offered to show the IBU parties his collection. No efforts were made to conceal this invitation from the Employer, and Employer representatives and/or counsel were likely present when the invitation was made. After the second day of the hearing ended early, the IBU parties took the Hearing Officer up on his invitation to view his collection. At no point during this time did the Hearing Officer or any of the IBU parties discuss any matters remotely related to the proceedings. Rather, the Hearing Officer simply showed the IBU parties several pieces of his collection, including both ILWU and other union memorabilia. No one from the Employer ever asked anyone from IBU about this meeting.

The Employer's argument that this meeting somehow compromised the integrity of the entire proceedings fails for several reasons. First, as a preliminary matter, the Employer has waived its right to make this argument by not raising it in its post-hearing brief to the Regional Director. Second, there was absolutely no improper communication relating to the merits of this action during the meeting. The IBU did not reap any unfair advantage by attending, nor did the Employer suffer any prejudice by not attending. Third, the Employer has not identified nor even alleged any conduct on the part of the Hearing Officer *during* the hearing that reflects bias. Fourth, any purported bias on the part of the Hearing Officer did not prejudice the Employer, particularly since the Employer's request for review does not rest on any claim of error as to any evidentiary matters ruled upon by the Hearing Officer. Moreover, the Regional Director's decision does not rest on any credibility determinations by the Hearing Officer. *See Marian*

*Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001) (“a preelection hearing is investigatory in nature and credibility resolutions are not made”); *Grace Industries, LLC*, 358 NLRB No. 62, at \*7 n.24 (2012) (same).

Accordingly, the IBU’s meeting with the Hearing Officer does not constitute grounds for reviewing the Regional Director’s decision.

#### **IV. CONCLUSION**

For the foregoing reasons, the IBU respectfully requests that the Board deny the Employer’s request for review of the Regional Director’s Decision and Direction of Election.

Respectfully submitted this 9th day of August.

**LEONARD CARDER, LLP**

A handwritten signature in blue ink, appearing to read 'Emily M. Maglio' and 'Amy Endo', is written over a horizontal line.

Emily M. Maglio, Esq.

Amy Endo, Esq.

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1 **PROOF OF SERVICE**

2 I am employed in the County of San Francisco, State of California. I am over the age of  
3 18 years old and not a party to the within action; my business address is 1188 Franklin Street,  
4 Suite 201, San Francisco, CA, 94109.

5 On **August 9, 2013**, I served a true and accurate copy of the foregoing document(s):

- 6 **1. PETITIONER INLANDBOATMEN’S UNION OF THE PACIFIC’S**  
7 **OPPOSITION TO EMPLOYER’S REQUEST FOR REVIEW OF THE**  
8 **REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**
- 9 **2. DECLARATION OF EMILY MAGLIO IN SUPPORT OF IBU’S OPPOSITION**  
10 **TO EMPLOYER’S REQUEST FOR REVIEW**

11 on all interested parties in this action as follows:

12 **Ronald J. Knox**  
13 **Garvey, Schubert & Barer**  
14 Second & Seneca Building  
15 1191 Second Ave., 18<sup>th</sup> Floor  
16 Seattle, WA 98101-2939  
17 rknox@gsblaw.com

18  **BY E-MAIL:** I caused the documents to be sent to the person at the electronic  
19 notification address(es) listed above. I did not receive, within a reasonable time after the  
20 transmission, any electronic message or other indication that the transmission was  
21 unsuccessful.

22 **Regional Director Ronald K. Hooks**  
23 **National Labor Relations Board, Region 19**  
24 915 2nd Avenue, Room 2948  
25 Seattle, WA 98174-1078

26  **BY MAIL:** I enclosed the document(s) above in a sealed envelope or package addressed  
27 to the persons at the addresses above. Following ordinary business practices, the  
28 envelope was sealed with postage fully prepaid and placed for collection and mailing on  
this date, and would, in the ordinary course of business, be deposited with the United  
States Postal Service on this date at San Francisco, CA.

I declare under the penalty of perjury under the laws of the State of California that the  
above is true and correct.

Executed on **August 9, 2013** at San Francisco, California.

  
\_\_\_\_\_  
Leslie Rose