

**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
BRIEF IN SUPPORT OF THE REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION**

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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 tugboat 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 tugboat 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 tugboat 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. On January 23, 2014, the Board granted the Employer's request for review solely with respect to the issue of whether the tugboat captains are statutory supervisors based on their authority to assign and direct.

The Regional Director correctly found that Cook Inlet failed to meet its burden of showing that the tugboat captains possess the authority to make assignments or responsibly direct employees. This finding is consistent with Board precedent and amply supported by the record. Accordingly, IBU respectfully requests that the Board affirm the Regional Director's decision.

II. FACTUAL BACKGROUND

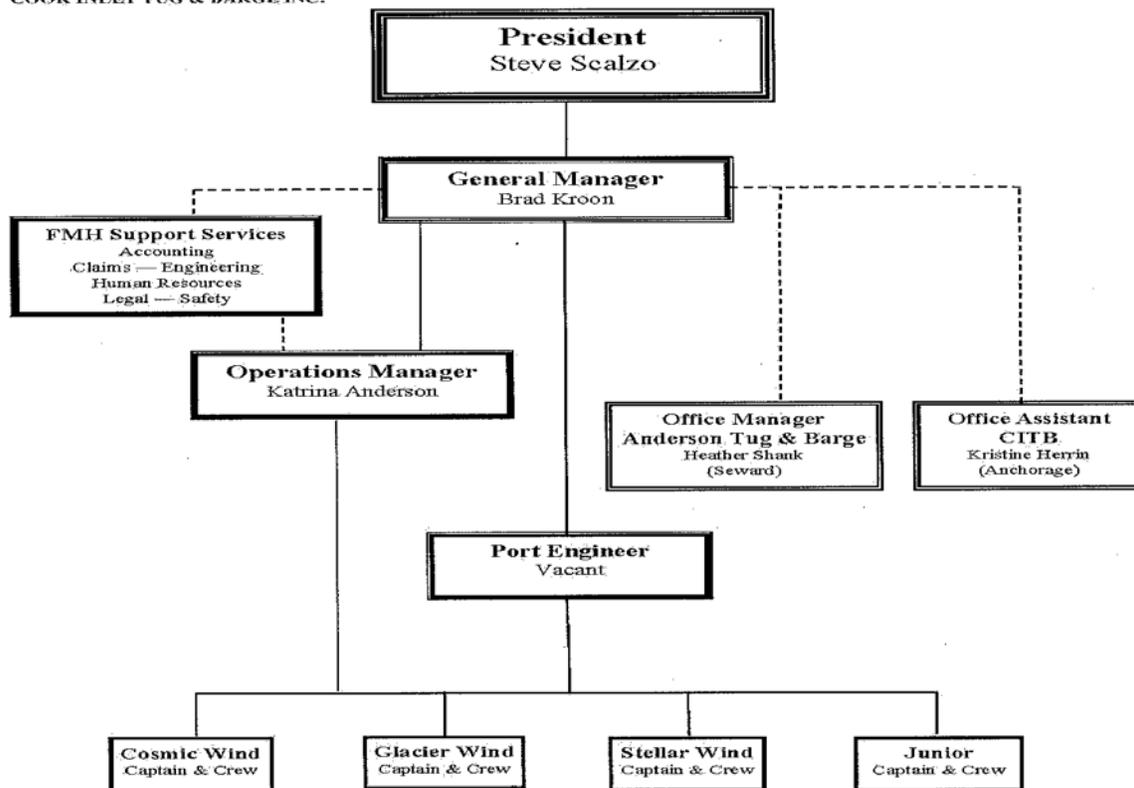
A. Cook Inlet's Business and Operations

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 tugboats, 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 tugboats; Cook Inlet does not perform long haul towing. (TR 17:21-18:4.) The standard manning for a ship assist job is one tugboat 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.)¹

B. Cook Inlet's Organizational Structure

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

¹ Exhibit citations refer to the Employer's hearing exhibits.



(Employer Ex. 2, at 6.) Pertinent to the instant matter, tugboat captains report to the General Manager, who reports to the President. (TR 32:6-21.) Tugboat 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.) Tugboat captains operate Cook Inlet’s vessels, with, as described in detail below, the assistance of

deckhands. (See *supra*.)

C. Tugboat Captains Maintain Safe Operations of the Vessel and Provide Deckhands Routine Ad Hoc Instructions To Perform Discrete Tasks.²

The evidence before the Board demonstrates that, while tugboat captains do instruct deckhands in their day-to-day duties, the tugboat captains are constrained by detailed employer and Coast Guard guidelines in the execution of these duties and are given their assignments from managerial staff. As the only tugboat 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 [Tugboat captains obtain their assignments from the dispatcher].)

Tugboat 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 (“RCP”), which provides detailed procedures and policies to tugboat captains and deckhands. (TR 24:22-25:2; Employer Ex. 2, at 13-225.) Furthermore, tugboat 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 tugboat captain’s discretion concern his response to an emergency situation in which he applied Coast Guard regulations. (TR 41:21-42:14, 200:11-201:1, 223:9-17.)

The RCP also sets forth that only the General Manager can assign new hires to a Cook

² The Employer 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 tugboat captain of Cook Inlet, Daniel Butts. While Mr. Kroon did serve as tugboat 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 tugboat captain, is the most qualified witness to testify on the nature of the work of a tugboat captain for Cook Inlet.

Inlet vessel or floating position between the vessels. (Employer Ex. 2, at 231-32.) And, while tugboat captains do instruct deckhands in their day-to-day performance of discreet tasks, there is no specific evidence in the record showing that tugboat captains are disciplined for the conduct of a deckhand on his vessel. (*See* TR 148:4-9; 212:16-18.)

III. ANALYSIS

As the party asserting Section 2(11) supervisory status, Cook Inlet bears the burden of proving the alleged supervisory status of tugboat 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 tugboat captains are supervisors, Cook Inlet would have to prove that: (1) tugboat captains have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) tugboat captains “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; **and** (3) tugboat captains exercise such authority “in the interest of the employer.” *Brusco Tug and Barge*, 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 conclusory 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 that its tugboat captains are statutory supervisors.

A. Assignment

Cook Inlet argues that the tugboat captains have supervisory status based on their

authority to make assignments. 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*, 359 NLRB No. 43, at *5 (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006)). Importantly, the Board distinguishes between “the designation of significant overall duties to an employee,” which is an assignment of independent judgment, and “the ad hoc instruction that [an] employee perform a discrete task,” which is an assignment of a routine, non-supervisory nature. *Id.* (internal quotations and modifications omitted). Additionally, “[c]hoosing the order in which an employee will perform ‘discrete tasks within the supervisory assignments’ does not demonstrate the authority to assign under Section 2(11).” *Id.*

As stated above, “the authority to assign must be exercised using independent judgment, and judgment is not considered independent if it is dictated or controlled by detailed instructions.” *Id.* Moreover, “the assignment authority must rise above the level of ‘routine or clerical’ in order to constitute independent judgment.” *Id.* (citing *Alternate Concepts*, 358 NLRB No. 38, slip op. at 3 (2012); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), cited with approval in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 714 (2001)).

Here, the Employer argues that the tugboat captains’ assignment authority consists of: (1) assigning duties based on the needs of the ship in changing circumstances, such as extreme climate conditions or emergencies; (2) assigning deckhands based on their strengths and workload; and (3) responsibility for the safe operations of the vessel. The Employer has not shown that the tugboat captains are statutory supervisors based on this purported authority.

1. Assigning Duties Based on Needs of the Vessel

Cook Inlet asserts that tugboat captains exercise supervisory authority by assigning crew

members to specific duties based on the needs of the ship in changing circumstances. However, a similar argument was considered and rejected by the Board in *Brusco Tug and Barge*, 359 NLRB No. 43, at *5. In that case, the Board held that mates' instructions concerning towing and docking did not constitute assignments under section 2(11). *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 further held that “the mate’s instructing the deckhand to go to the winch, watch to make sure the line is spooling properly, start up the winch or the hydraulics, run or redirect the fair lead, or lubricate the lines are discrete tasks within the overall process, and do not demonstrate supervisory assignment.” *Id.* at *6.

Similarly, the testimony in the instant case makes clear that the instructions provided by tugboat captains to their crew are precisely the type of “ad hoc instructions” to “perform a discrete task” that the Board has found insufficient to establish supervisory status. Mr. Scalvo testified that the tugboat 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 tugboat 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.) These instructions do not involve the appointment of employees to a particular department or time slot, or giving an employee significant overall duties. *See Brusco Tug and*

Barge, 359 NLRB No. 43, at *5. Moreover, as recognized in the Regional Director’s decision, the Employer did not offer any evidence establishing that tugboat captains exercise independent judgment in determining who will perform what tasks when tugboat captains and their deckhands are completing maintenance work when their vessels are not underway. (Decision at 35.)

2. Assigning Deckhands Based On Their Strengths and Workload

Cook Inlet relies on Mr. Butts’ testimony to assert that tugboat captains may choose which of several deckhands to perform certain tasks based on the crew members’ strengths and upon a determination of the proper amount of rest everyone needs to perform their main duties safely. However, the Employer failed to meet its burden of showing that tugboat captains used independent judgment in selecting deckhands to perform specific overall duties. The Board has made clear 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). Here, the Employer did not present any evidence of tugboat captains actually making assignment decisions based on skill or capacity, but rather merely offered hypothetical situations as to when a tugboat captain might select one deckhand over another based on their relative strength. (*See* TR: 113:21-24.) The Board has found such testimony insufficient to establish the use of independent judgment in assigning duties to crew members. *See Brusco Tug and Barge*, 359 NLRB No. 43, at *7. Moreover, “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.” *Franklin Hospital*, 37 NLRB at 830.

Cook Inlet also claims that the Regional Director erred in finding that when a tugboat 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 tugboat captain and one deckhand, nor does the Employer dispute that the tugboat captain is generally in the wheelhouse navigating when the tugboat 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 tugboat 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.

Additionally, 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 alone to determine supervisory status. Rather, he relied on the fact that tugboat 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—one of whom must stay in the wheelhouse—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.

Cook Inlet also claims that the Regional Director applied the wrong legal standard by

considering the frequency with which tugboat captains veto schedule changes when he stated: “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 argument fails for several reasons. First, 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. Second, there is no indication that the Regional Director relied on the tugboat captain’s authority (or lack thereof) to veto schedule changes in his analysis regarding assignment powers. Third, it is 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.

3. Responsibility For The Safe Operations of the Vessel

The Employer’s arguments that tugboat captains exercise control over the vessel and are responsible for its safe operation also fail to establish supervisory status for several reasons. First, there is no specific evidence of how tugboat captains exercise this “unmitigated control” beyond the ad hoc instructions to perform discrete tasks as discussed above. And, even assuming this were supported by the record, 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.

B. 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) (emphasis added).

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 727, 731 (2006)). In *Brusco Tug and Barge*, 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 witnesses did not provide a single concrete example of an instance in which a deckhand's performance led to adverse consequences for his or her tugboat captain. While witnesses are not expected to testify as to the consequences for every breach of conduct by a deckhand, the conclusory assertion that captains are accountable is simply not sufficient. Additionally, the Employer's reliance on evidence regarding repercussions for the failure to adequately maintain a vessel has no bearing on whether tugboat captains are accountable for their deckhands' actions. Indeed, according to the RCP, deckhands are also responsible for the general maintenance of vessels. (Employer Exhibit 2, at pp. 5, 236.)

Moreover, neither the RCP nor the employee manual provides that tugboat captains may be held accountable for the deckhands' performance. (Employer Exhibits 2 & 4.) 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 "purely conclusory evidence is not sufficient to establish supervisory status." *See Brusco Tug and Barge*, 359 NLRB No. 43, at *8. Accordingly, the Employer's failure to offer nothing more than "conclusory assertions of the [tugboat captains'] accountability for the deckhands' work" constitutes an independently sufficient reason to reject Cook Inlet's claim of supervisory status based on responsible direction. *Id.*

Cook Inlet also failed to satisfy the second prong of the responsible direction analysis. 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.* As discussed above, the evidence in the record amply

supports the Regional Director's determination that tugboat captains merely provide deckhands with routine ad hoc instructions to perform discrete tasks and that these instructions generally do not require independent judgment, particularly given that each tugboat captain is generally assigned one deckhand.

The Employer contends that the Regional Director erred in concluding that the tugboat 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 tugboat 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 did not rely on the tugboat 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 tugboat 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 tugboat 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)). While the Regional Director may have considered the tugboat captains' greater experience, he did not hold that this greater experience precluded a finding of supervisory status, but rather appropriately

evaluated this evidence consistent with Board precedent.

C. The RCP and Coast Guard Regulations

Cook Inlet also argues that the Regional Director improperly put significant weight on the existence of the RCP and Coast Guard Regulations to support his conclusion that tugboat 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*, 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 reversal 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 Cook Inlet exercises over its tugboat captains, through its guidelines, policies, and other mechanisms, the less

independent judgment those tugboat captains can exercise.

Further, contrary to the Employer's suggestion, the evidence in the record does not establish that captains created the RCP themselves. The only evidence of a captain having any actual input in the preparation of the RCP is Mr. Butts' testimony that he suggested a revision to one part of a safety protocol. (TR 156:10-158:16) There is no evidence in the record that tugboat captains had any role in drafting or any substantial role in revising the RCP. This is a far cry from the Employer's contention that the captains create the RCP. (Request for Review 13:18-16:4.).

D. Secondary Indicia

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 properly found that consideration of secondary indicia did not support a finding of supervisory status here.

IV. CONCLUSION

For the foregoing reasons, the IBU respectfully requests that the Board hold that Cook Inlet has not met burden of proving that tugboat captains are statutory supervisors based on their authority to assign and direct and, on this basis, affirm the Regional Director’s Decision and Direction of Election.

Respectfully submitted this 6th day of February.

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