

**Belcher Towing Company and Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO and District 2, Marine Engineers Beneficial Associations—Associated Maritime Officers, AFL-CIO and John A. Hill.** Cases 12-CA-6971, 12-CA-7070, 12-CA-7177, 12-CA-7125, and 12-CA-7176

September 27, 1978

### DECISION AND ORDER

On June 23, 1977, Administrative Law Judge Maurice S. Bush issued the attached Decision in this proceeding. Thereafter, Respondent and General Counsel filed exceptions and briefs in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions of the Administrative Law Judge, and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) of the Act by its discriminatory discharge of employees John George and John Hill for their union activities. We also agree with him that Respondent committed multiple violations of Section 8(a)(1) of the Act beginning in August 1975 and continuing through January 1976 by warning an employee that anyone caught signing union pledge cards would be discharged, by instructing its captains to keep employees under surveillance through the use of time logs and reports to management, by interrogating employees about their union activities and the union activities of other employees, by threatening an employee that he would not have a good future with the Company if he continued to hand out union pledge cards, by warning an employee to quit "talking union" or the Company would fire him, by informing an employee that the Company had terminated another employee for union activity, by requesting that the employees report any contacts they had with the unions "by telephone, mail, in person, or by invitation to [union] meetings" after creation of a coercive atmosphere by Respondent, and by soliciting employee grievances with an implied promise to remedy those grievances if the employees bypassed the unions. We further agree that Respondent maintained and enforced an unlawful

"no-solicitation" rule, that it routinely and discriminatorily denied access of union representatives to its vessels, and that it required that its captains engage in unfair labor practices against its employees, and discriminate against them based on their union activities.

We disagree, however, with the Administrative Law Judge's conclusion that Respondent's discharge of Captain Frank Mosso did not violate Section 8(a)(1) of the Act. Thus, while we accept the Administrative Law Judge's definition of the "ultimate issue" here as being the "essentially legal issue of whether Mosso as an admitted supervisor had immunity from discharge under the Act for disobeying the Company's rule requiring all of its captains in their capacities as supervisor to report to management *any union activities* that came to their attention . . . generally referred to as the 'no-solicitation' rule," we conclude that he erred in reasoning that Respondent had the right to discharge Mosso for not enforcing its unlawful no-solicitation rule absent a "prior definitive and final finding that Respondent's no-solicitation rule was in fact an unfair labor practice."

As found by the Administrative Law Judge, Mosso's testimony "clearly indicates that Mosso knew he was not allowed to have union representatives aboard his boat." We also adopt his finding that "Respondent fired Captain Mosso because of his failure as a supervisor to report to management the presence of a union delegate aboard his vessel in disobedience of the duty imposed on him by Respondent's order, under its . . . no-solicitation rule as explained to Mosso in person by Vice-president Morris." Thus, in essence the record shows that Mosso was terminated for his failure to effectuate as ordered the Company's anti-union policies as set forth in its no-solicitation rule. Vice President Morris told Mosso that he was fired because Mosso had a union delegate aboard his boat and did not inform Morris. When Mosso asked Port Captain Barr why he was being terminated, Barr responded that Mosso's discharge was due to information that there was a lot of union activity on Mosso's boat. When Mosso later telephoned Vice President Morris for an explanation of why he was being terminated, Morris replied that "in order to work for Belcher, Mosso would have to inform Morris of *any and all union activities* aboard these vessels." Morris also indicated he would consider rehiring Mosso *if* he would agree to abide with the company rule requiring all captains to report any union activity aboard their vessels. Moreover, on the very day of Mosso's termination, Vice President Morris sent a letter to *all* of the Company's captains which contained the following orders: "You are expected *and required* to report *all* conversations you have regarding the Union. *You may not* permit any union officials on board and you

<sup>1</sup> In adopting the Administrative Law Judge's finding that handbilling does not constitute a viable alternative to direct access to Respondent's crewmembers, we disavow any reliance on the cost of printing to the unions of such handbills.

<sup>2</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

must report any attempt by union officials to go on board.”

Usually, a supervisor may be lawfully discharged for any reason, including prounion activities. However, an exception to this principle is that a supervisor cannot be lawfully discharged for declining to commit an unfair labor practice.<sup>3</sup> Thus, in *N.L.R.B. v. Lowe*, 406 F.2d 1033, 1035 (C.A. 6, 1968), the court of appeals sustained the Board’s finding that *one of the reasons* Supervisor Goudy had been discharged was his “failure or refusal to oppose the Union in the manner and to the extent desired by the general manager,” and, accordingly, enforced the Board’s order for Goudy’s reinstatement. Similarly, in *N.L.R.B. v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (C.A. 5, 1954), enfg. 106 NLRB 295 (1953), the court sustained the Board’s findings that certain supervisors had been terminated for their failure to sufficiently thwart union organizational efforts and enforced the Board’s order for their reinstatement.

We find that the same setting is present here, and that Captain Mosso was fired precisely because he failed to comply sufficiently with Respondent’s illegal demands, and because he failed to enforce Respondent’s invalid no-solicitation rule prohibiting access and discussion for union purposes. Respondent’s violations of the Act are extensive here and it cannot be gainsaid that Respondent unlawfully required its captains to commit unfair labor practices. When Captain Mosso did not entirely fall in line with Respondent’s required enforcement of its unlawful no-solicitation rule and surveillance of employees, he was fired.<sup>4</sup> Against this backdrop, we conclude that Respondent’s discharge of Captain Mosso and the obvious

and necessary effects of this action on employees (particularly those under Mosso’s supervision), violate Section 8(a)(1) of the Act. We shall therefore order reinstatement with backpay for Captain Mosso.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Belcher Towing Company, Coral Gables, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Reletter paragraph 1(h) as paragraph 1(i) and insert the following as paragraph 1(h):

“(h) Discharging or otherwise disciplining any supervisor because said supervisor failed or refused to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.”

2. Substitute the following for paragraph 2(a) and renumber footnote 37 of the Order as footnote 38:

“(a) Offer John W. George, John A. Hill, and Frank Mosso immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each whole for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he would normally have earned from the date of his discharge to the date of such offer of reinstatement, less his net earnings during said period, said backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>37</sup>”

<sup>37</sup> See, generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).”

3. Substitute the attached notice for that of the Administrative Law Judge.

MEMBERS PENELLO and MURPHY, dissenting in part:

The holding of the majority in this case has the effect of abrogating the supervisory obligation of loyalty owed to an employer and disrupting the employer-supervisor relationship, contrary to the intent of Congress. For, here our colleagues are stretching the Act to find a violation by the Employer’s discharge of a supervisor who failed to fulfill his legitimate obligation arising out of his supervisory status.

evidence of any request that Gray spy upon, and report, employee union activity.” At the most, he was only reproached for not reporting information “that he had *innocently acquire*” [emphasis supplied. See 175 NLRB at 313]. But it is a long voyage from the facts in *Mallory* to the situation here.

<sup>3</sup> *J. D. Lowe, d/b/a Thermo-Rite Manufacturing Company*, 157 NLRB 310 (1966), enfd. 406 F.2d 1033 (C.A. 6, 1969).

<sup>4</sup> As the Administrative Law Judge noted: “Thus in essence the record shows that Mosso was terminated for his failure to effectuate as ordered the Company’s antiunion policies as set forth in its ‘no-solicitation’ rule.” We agree. We, together with our dissenting colleagues, also agree that Respondent’s no-solicitation rule is unlawful, that Respondent required its captains to engage in unfair labor practices, and that it discriminatorily denied union representatives access to its vessels. In this context, we cannot accept our dissenting colleagues’ contention that Mosso was fired by Respondent solely for failing to supply Respondent, “as lawfully directed,” with information which he had “legitimately obtained.” Thus, *P. R. Mallory Co., Inc.*, 175 NLRB 308 (1969), and *Western Sample Book and Printing Co., Inc.*, 209 NLRB 384 (1974), on which our colleagues rely, are in our view inapposite here. In *Western Sample*, the Board, in agreement with the Administrative Law Judge, found that respondent did *not* direct its supervisors to engage in illegal acts. The Board also found that respondent’s no-solicitation rule in that case was in fact a lawful one. Not so here, where the rule is unlawful, and Respondent has required its supervisors to enforce it and to engage in surveillance of employees. In *P. R. Mallory*, the Board affirmed the Trial Examiner, who distinguished the case on its facts from *Talladega Cotton, supra*. He correctly noted (at 313), “it is well settled that a supervisor may not be discharged for refusing to combat employee union activity or for refusing otherwise to engage in unfair labor practices, and had Respondent asked [Supervisor] Gray to engage in surveillance of union activity and to report the results of such surveillance, and discharged him for refusing to do so, such discharge would have been unlawful.” In *Mallory*, the only information which Supervisor Gray had was based on one employee’s voluntary disclosure that he intended to help the union organize. But there was “no

Thus, contrary to our colleagues, we find that Captain Frank Mosso, an admitted supervisor, was not discharged for refusing to enforce Respondent's invalid no-solicitation rule prohibiting access to union representatives aboard Respondent's vessels. Rather we find that his discharge was caused by his refusing to supply Respondent, as lawfully directed, with information he had legitimately obtained in the course of performing his supervisory duties, and that, consequently, his dismissal was not unlawful.

Briefly the facts are as follows: Captain Mosso was hired by Respondent on July 24, 1975. Some 6 weeks after his arrival, Respondent's vice president, Morris, told Mosso that he was required to report information to the Company "that he [Mosso] might legally come by in the performance of his duties." On October 6, 1975, Mosso was on shore making a telephone call when Wayland Burgess, a representative of the United Marine Division, Local 333, boarded Mosso's boat. When Mosso went back to the vessel he intercepted Burgess and asked him who he was. They introduced themselves to one another and for about 10 minutes carried on a conversation aboard the vessel. Mosso then told Burgess "for crying out loud, come on, get out of here before you get the crew in trouble." Thereafter, Burgess and Mosso left the boat. Mosso did not report the foregoing incident to management.

On October 10, 1975, at 6 a.m., Mosso was discharged by Port Captain Robert L. Barr acting on instructions from Morris. Mosso asked why he was being discharged. Barr told Mosso to talk to Morris and that Morris would give him "more information on it." Mosso pressed Barr for an answer with the plea "it might make it a little bit easier for me if you tell me what's going on?" Barr responded in effect that Mosso's discharge was due to information that there was a lot of union activity going on at Mosso's boat as well as generally all around the Company. Mosso then left the boat and flew to Miami where he took a taxi to his home. At noon that same day, Mosso telephoned Morris for an explanation as to why he was terminated. Morris told Mosso that "I am firing you because you had a union delegate aboard your boat and you did not inform me."

In their conversation Mosso sought to justify his failure to report the union delegate aboard his boat on the ground that "it was against my principles to inform and that anyway, I had believed it was against the Constitution and the laws to inform on the men who were trying to get a union to protect them." Morris replied that "in order to work for Belcher" Mosso "would have to inform him [Morris] of any and all union activities aboard these vessels." The conversation ended with an indication from Morris that he would consider rehiring Mosso if he would

agree to abide with the company rule requiring all of its supervising captains to report to management any union activity aboard their vessels that came to their attention.

The same day, but *after* Mosso's early morning termination, Vice President Morris sent a letter to all of the Company's captains which contained the following orders:

You are expected *and required* to report *all* conversations you have regarding the union. You may not permit any union officials on board.

General Counsel urges that Respondent discharged Mosso for refusing to violate the Act. In order for General Counsel to prevail, it must be established that Mosso was discharged for a failure or refusal to engage in *illegal activities*.<sup>5</sup> Since there is no real question but that Mosso was discharged for his failure to report the presence of a union organizer on board his ship,<sup>6</sup> the sole question before us is whether Respondent was requiring him to engage in an unlawful act.

Certainly, in general there is nothing improper in an employer's requiring its supervisors to disclose information, even that pertaining to union activity, which they lawfully acquire in the normal course of their supervisory duties.<sup>7</sup> Indeed the Board has so held in *Western Sample Book and Printing Co., Inc.*,<sup>8</sup> and *P. R. Mallory Co., supra*.<sup>9</sup> In *Western Sample* the Board upheld the discharge of three supervisors<sup>10</sup> because they failed to reveal to their superior substantial information which had come to their attention concerning the union and the union activities of the employees whom they supervised, thereby failing to assist the Employer's antiunion campaign. Similarly, in *P. R. Mallory* the Board adopted the conclusion of the Administrative Law Judge that, even if the discharge of the supervisor (Gray) had been for his refusal to disclose what he innocently learned about employee union activity, such discharge would not be attributable to his refusal to violate the Act and therefore was not unlawful.<sup>11</sup>

<sup>5</sup> See, e.g., *P. R. Mallory Co., Inc.*, 175 NLRB 308, 313 (1969).

<sup>6</sup> Barr's statement at the time of the discharge raises a possible issue, not whether Mosso was refusing to obey an unlawful order, but whether Mosso was discharged as part of an attempt to retaliate against employees because of their union activities. However, General Counsel does not so contend and the Administrative Law Judge concludes, in our opinion correctly, that it is essentially undisputed that Mosso was discharged for his failure to report to management the presence of a union representative aboard his ship.

<sup>7</sup> In fact, since supervisory knowledge is routinely imputed to employers by the Board and reviewing courts, the prudent employer might well institute such a requirement as a precautionary or protective measure, as its failure to do so could result in adverse legal consequences for it.

<sup>8</sup> 209 NLRB 384 (1974).

<sup>9</sup> 175 NLRB at 313.

<sup>10</sup> *Miraula, Stogsdill, and Campos*. See 209 NLRB at 386-390.

<sup>11</sup> See also *Florida Builders, Incorporated*, 111 NLRB 786, 787 (1955), where the Board held it was not a violation of Sec. 8(a)(1) for an employer merely to instruct supervisors to ascertain information concerning the union activities of its employees.

We conclude that the holdings of the Board in *Western Sample* and *P. R. Mallory Co.* are dispositive of the issues concerning Mosso's discharge. Here, nothing in the instructions Respondent gave to Mosso suggests that he was to engage in illegal activities such as the surveillance of employee union or protected concerted activity, or that the information to be reported would be used for unlawful purposes. To the contrary, the instruction to Mosso was limited to reporting only information he "might legally come by in the performance of his duties." And that instruction does not assume illegal meaning merely because it appears to have been Respondent's way of telling Mosso to report to it all union activity aboard his assigned vessels, as inferred and found by the Administrative Law Judge. For under the aforesaid cases it is clear that the subject matter of the information sought does not determine the legality of the order or request to the supervisor. Rather the propriety of the order or request is to be determined by its own terms. Consequently, where, as here, Mosso was required only to report on union activity which lawfully came to his attention, no illegality attaches to the requirement he failed to heed.<sup>12</sup>

Nor do the circumstances surrounding Mosso's discharge indicate that Respondent was unhappy with him for refusing to do anything unlawful. Mosso had observed a stranger board his boat and consequently had sought him out to ascertain his identity and purpose (as master of the boat he was duty-bound to do no less). Thus, having lawfully come by this information, Mosso had every right to pass it on to his superiors and they in turn had every right to require him to do just that, and to discipline him for failing to do so. Accordingly, we perceive no basis for the majority's finding that he was discharged for refusing to engage in unlawful conduct.

Our colleagues' position, however, gives no indication of being aware of the actual circumstances surrounding Mosso's discharge or the precedent governing it, as the following point-by-point examination of their position reveals. Instead they appear to rely mostly on unwarranted suppositions drawn from a misconstruction of the relevant facts.

1. The majority has mistakenly combined the instruction to Mosso to report information lawfully ob-

tained by him—in this case the presence of a union representative on board his boat—with Respondent's unlawful "no-solicitation" rule prohibiting access to its vessels of union officials,<sup>13</sup> and his mistakenly concluded based thereon that Mosso received an instruction requiring him to engage in unlawful conduct. However, the instruction to Mosso was quite separate from the no-solicitation (i.e., no-access) aspects of Respondent's rules and bears only a tangential relationship to it. Furthermore, the majority offers no explanation as to how a rule merely requiring supervisors to report an event is rendered unlawful by its coexistence with an invalid rule requiring them to try to prevent such event from occurring.

The assertions by the majority that Mosso failed to enforce the no-solicitation rule and was discharged therefor are factually inaccurate. He enforced the rule (however belatedly) when he ordered the union agent from the boat; in any event, as previously noted, he was not dismissed from Respondent's employment for that reason. If our colleagues are suggesting thereby that the failure to supply information is part of a failure to enforce the no-access rule because the information acquired may be used for that purpose or another unlawful aim, their suggestion must fall of its own weight. Any information innocently acquired has the potential for improper use. But the mere existence of this possibility does not render the acquisition and reporting of the information improper, nor entitle a supervisor to disobey an order to disclose information so acquired.

To hold as our colleagues do leads to a strange result indeed. As noted, above, information obtained by supervisors is routinely ascribed to an employer.<sup>14</sup> This is done on the basis that supervisors are agents of the employer and the knowledge of the agent is attributable to the superior. The Board has imputed supervisory knowledge to employers on numerous occasions and presumably will continue to do so in the future. Yet, the majority view has the effect of precluding an employer from compelling supervisors to disclose the information any time the information *might* be used for illegal activities. Thus, they would attribute the knowledge to the employer but prevent it from compelling supervisors from disclosing it.

<sup>12</sup> In his findings under the section of his Decision entitled "Section 6(i) of the Complaint," the Administrative Law Judge found that virtually the same instruction (report any information they had on the union activities of their crewmembers) made to some of Respondent's captains at a meeting in September 1975 was insufficient, by itself, to establish that the captains were asked to keep their crewmembers under surveillance (surveillance being the key to whether a violation existed). Rather, the Administrative Law Judge found that the instruction merely required the captains to report to management any information they happened by chance to run across of union activities on the part of crewmembers. (The record does not reveal whether Mosso was present at this meeting.) General Counsel did not except to these findings.

<sup>13</sup> The Administrative Law Judge appears to have made the same error in analyzing the issues relating to Mosso's discharge (see for example fn. 19 of his Decision, in particular the phrase "which is generally referred to as the 'no solicitation' rule by the parties"). The facts clearly establish that the "no solicitation" rule was the no-access rule against union agents. Thus, the majority's, the Administrative Law Judge's, and the parties' imprecision in describing that rule in overly broad or loose terms so as to lump with it the reporting requirement as well, cannot substitute for evidence or provide a basis for a finding which does not comport with the facts.

<sup>14</sup> See, for example, *Red Line Transfer & Storage Company, Inc.*, 204 NLRB 116 (1973); *Uneco, Inc.*, 175 NLRB 567, 570 (1969), enf. 433 F.2d 974 (C.A. 8, 1970); *N.L.R.B. v. Eclipse Lumber Co., Inc.*, 199 F.2d 684 (C.A. 9, 1952), enf. 95 NLRB 464 (1951).

Such a nonsensical result is legally untenable as well as logically unsound.

Notwithstanding the illogic of its approach and the absence of factual support, the majority concludes that Respondent was instructing Mosso to engage in unlawful surveillance when it directed Mosso to report to it information which he legally acquired. The obvious fallacy with the reasoning behind that conclusion is that, as we have pointed out, no instruction to engage in surveillance of employee union activity was ever given to Mosso.<sup>15</sup>

The majority attempts to infer a direction of illegal surveillance from Morris' commenting to Mosso—after the latter's dismissal—that as a condition of working again for Respondent “Mosso would have to inform him of any and all union activities.” Aside from ignoring the *ex post facto* nature of Morris' comments and the absence therein of an express instruction to Mosso to gather such information by illegal means, the majority brushes by the fact that Morris made the statement in response to Mosso's volunteering to Morris that he would refuse on principle to report the presence of a union delegate aboard his vessel or inform on the employees' union activity. In so stating, Mosso did not distinguish between a situation where he merely would be required to report his knowledge of union activity innocently learned as here, or a situation where he would be obligated to obtain such information illegally, and then pass it on to management.<sup>16</sup> Morris' answering statement, therefore, was directed at Mosso's refusal to supply any and all information; and any sinister implication which, however unlikely, could arguably be misread into Morris' remarks was removed when Morris added that he simply wanted Mosso to obey Respondent's rule requiring him to report any union activity which might come to his attention. Thus, even assuming that by some convoluted process of reasoning the statement of Morris was susceptible of being interpreted to include a veiled instruction to engage in illicit surveillance, it was clarified in terms which the Administrative Law Judge found in another instance made virtually the same instruction permissible, and which

<sup>15</sup> At the risk of belaboring the point, Mosso was simply instructed to disclose lawfully acquired knowledge of the presence of union representatives aboard his boat. By any stretch of the imagination, no matter how febrile, such an instruction, for reasons already explicated, does not constitute an order to engage in unlawful surveillance.

The instructions to other captains to engage in such surveillance came after Mosso's discharge. Clearly, those instructions cannot relate back to taint the legal propriety of the lawful instructions to Mosso.

<sup>16</sup> The majority, noting this, appears to be suggesting that Mosso would have been discharged in any event because he would have refused to engage in unlawful surveillance when at a later time such an instruction was given to Respondent's captains. The relevance of that observation eludes us. A discharge for legitimate reasons does not become unlawful because Respondent might have discharged the individual for unlawful reasons at another time.

the Board has found lawful in cases like *Western Sample, supra*, and *P. R. Mallory Co., supra*.<sup>17</sup>

Accordingly, for all the reasons set forth above, we conclude that Mosso was discharged solely for his failure to comply with Respondent's lawful instruction to him and would therefore find that his discharge did not violate the Act.<sup>18</sup>

<sup>17</sup> Our colleagues claim that these cases are inapposite by pointing out that in *Western Sample* the respondent did not direct its supervisors to engage in illegal acts and in *P. R. Mallory* the supervisor was only reproached for not reporting information “that he had innocently acquired.” But these very points, which they claim distinguish this case from the two cited cases, are precisely the ones which make these cases controlling of Mosso's discharge! Thus, as we have repeatedly said, the facts show that Mosso was *not* instructed to do anything illegal but was merely told to report the presence of union activity on board his vessel. How does that instruction differ in kind from the instruction in *P. R. Mallory*? How does his failure to report the visit of a union representative to his ship constitute enforcement of an unlawful no-access rule (which he eventually enforced)? Thus, Mosso's situation parallels those in the cited cases, and it is our colleagues who, as we have shown previously, miscomprehend the facts in this case and as a result find themselves at sea.

<sup>18</sup> In all other respects we concur with our colleagues' disposition of the issues in this case.

## APPENDIX

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

WE WILL NOT discharge employees for engaging in union activities.

WE WILL NOT, subject to reasonable rules and regulations, refuse to allow nonemployee union organizers to have access on our vessels to our employees during their free time for the purpose of soliciting their support or for consulting, advising, meeting, or assisting our employees in regard to their rights to self-organization.

WE WILL NOT discharge any supervisor for failing or refusing to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7.

WE WILL NOT threaten employees with discharge if they engage in union activity.

WE WILL NOT instruct captains to report the names of employees who pass out union cards, talk about unionism, and spread union literature.

WE WILL NOT interrogate employees about their union activities or the union activities of other employees.

WE WILL NOT interrogate employees about contracts by union representatives.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in the National Labor Relations Act.

WE WILL offer John A. Hill, John W. George, and Frank Mosso immediate, full, and unconditional reinstatement to their former positions or, if such no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and WE WILL make them whole for any loss of earnings they may have suffered by reason of their unlawful discharge, plus interest.

All of our employees are free to become, remain, or refrain from becoming or remaining members of District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO, or any other labor organization.

## BELCHER TOWING COMPANY

### DECISION

#### STATEMENT OF THE CASE AND ISSUES

MAURICE S. BUSH, Administrative Law Judge: Respondent Belcher Towing Company is a tugboat operator over the waterways and the surrounding waters of Florida for the delivery of fuel oil to various power plants at numerous points within that State and for the bunkering or delivery of fuel oil to ships. It operates 15 tug-towboats and 19 barges and employs tugboat crews totalling approximately 100 men, exclusive of captains and mates who are admittedly supervisors under the Act.

Starting in the autumn of 1975, the Company, a successful veteran of prior union organizational drives, became the target of new organizational drives by three separate marine unions which the Company vigorously opposed.<sup>1</sup>

During these latest organizational campaigns, the Company, under its admitted "no-solicitation" rule, denied access to their vessels to nonemployee union representatives for the purpose of consulting, advising, meeting, and/or assisting the vessel's crewmembers in the exercise of their Section 7 rights, including the selection of a bargaining representative.

The principal issue under the complaint is whether the Company's no-solicitation rule, barring nonemployee Union representatives from boarding the Company's vessels for the above-stated purposes, is in violation of Section 8(a)(1) of the Act.

As Respondent concedes that under the Board's Decisions in *Sioux City and New Orleans Barge Lines, Inc.*, 193 NLRB 382 (1971), enforcement denied 472 F.2d 753 (C.A. 8, 1973), and *Sabine Towing & Transportation Co., Inc.*, 205 NLRB 423 (1973), labor organizations are entitled to access to crewmembers aboard company vessels during their free time for soliciting union support where there is otherwise no reasonable alternative on-the-ground methods of access to such employees, Respondent's principal defense of its no-solicitation rule is that under the special and different fac-

<sup>1</sup> The company in a letter addressed to its captain-supervisors, dated October 10, 1975, and marked "Confidential," stated: "From time to time various unions have made efforts to get employees to sign union cards. They have never been particularly successful and we intend to keep it that way."

tual circumstances of the instant case, the Unions here involved did and do have reasonable access to its crewmember employees at times and places other than when they are at work aboard the Company's vessels. General Counsel disputes that defense.

In addition there are six related issues as to whether Respondent under the aforementioned Board decisions is also in violation of Section 8(a)(1) of the Act by its refusal to allow certain union representatives to board various of its vessels "for the purpose of consulting, advising, meeting/or assisting the vessel's crewmembers in the exercise of their Section 7 rights, including selection of a bargaining representative."

The pleadings further place in issue multiple alleged violations of Section 8(a)(1) by Respondent throughout the union organizational campaigns here involved, by the following alleged misconduct, to wit, (1) a warning by Captain Leon Bell to employees that anyone caught signing union pledge cards would be discharged, (2) instructions by top executives to all captains to report the names of employees who were passing out union cards, talking union and passing out union literature, (3) interrogations by Captain Leon Bell of various employees about the union activities of other employees, (4) an interrogation by Captain Leon Bell of an employee about his union sympathies, (5) a threat by Captain Leon Bell to an employee that he did not have a good future with the Company if he continued to hand out union pledge cards, (6) a warning by Captain Robert Ritter to an employee to quit talking union or the Company would fire him or make it so uncomfortable for him that he would quit, (7) a threat by Vice President Morris to employees that if the Union came in, he could not guarantee the same benefits they were then receiving, (8) a threat by Captain Leon Bell to an employee that he would never get a chance to obtain a captain's license if the Union came in, (9) informing an employee through Captain Mark T. Flockhart that the Company had terminated an employee for union activity, (10) informing employees by letter of January 16, 1976, of the Company's aforementioned no-solicitation rule aboard its vessels, (11) interrogating employees by the same letter about contacts by union representatives and soliciting information about these activities, (12) telling employees in the same letter not to be talked into signing a union card, but requesting they inform their supervisors of such attempts.

Finally, the case raises issues under the Act as to whether Respondent discriminatorily transferred Chief Engineer John A. Hill from one tugboat to another and then terminated him, and also whether it discriminatorily terminated Captain Frank Mosso and ordinary seaman John William George.

The consolidated and amended complaint herein was issued on April 26, 1976, pursuant to charges filed<sup>2</sup> and duly served upon Respondent. Numerous amendments to the complaint were allowed at the hearing as set forth in G.C.

<sup>2</sup> The charge in Case 12-CA-6971 was filed on October 14, 1975; the charge in Case 12-CA-7070 was filed on January 12, 1976; the charge in Case 12-CA-7125 was filed on February 19, 1976; the charge in Case 12-CA-7176 was filed on April 2, 1976; and the charge in Case 12-CA-7177 was filed on April 2, 1975.

Exh. 8, a copy of which is heretofore attached as Appendix A. [Omitted from publication.] Respondent's answer to the consolidated amended complaint denies the commission of any unfair labor practices.

The case was heard at Coral Gables, Florida, on June 22, 23, 24, 25, 29, 30; July 1, 2, 27, 28, 29, 30, and August 2, 3, and 4, 1976.

The briefs of the parties filed on November 26, 1977, totaling 338 pages, have been carefully reviewed and considered.

For reasons hereinafter indicated, Respondent will be found in violation of the Act as alleged in the amended consolidated complaint, as further amended at the hearing, except as hereinafter noted.

Upon the entire record<sup>3</sup> in the case and from my observation of the witnesses, I make the following:

## FINDINGS OF FACT

### I. JURISDICTIONAL FINDINGS

Respondent Belcher Towing Company, a Florida corporation and a wholly owned subsidiary of Belcher Oil Company, is engaged in the transportation of petroleum products along intracoastal and other navigable waterways in and around the State of Florida. Both Respondent Belcher Towing Company and Belcher Oil Company, the parent corporation, have their principal office and place of business at the same location in Miami, Florida. During the past 12 months, the parent oil company purchased and received petroleum products valued in excess of \$100,000 directly from points outside the State of Florida. Respondent Belcher Towing Company functions as a link in the transportation of passengers and freight in interstate commerce and commerce between the United States and foreign nations, for which services it receives in excess of \$50,000 per year. Belcher Towing Company provides services valued in excess of \$50,000 annually to private companies over whom the Board would assert jurisdiction. In addition Belcher Towing Company provides services in the Miami Harbor to ships engaged in interstate commerce and also to the United States Navy. Based on the above admitted facts, I find and conclude that Respondent Belcher Towing Company is an employer engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE INVOLVED LABOR ORGANIZATIONS

As admitted in the pleadings I find and conclude that each of the three unions named below are labor organizations within the meaning of Section 2(5) of the Act, to wit, (1) Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, (2) District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO, and (3) Inland Boatmen's Union.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background Facts—Number of Respondent's Vessels and Employees, the Company's Home Ports and its Loading and Unloading Locations

The paramount issue in the case is whether the marine Unions here involved should be given "access" to Respondent's seamen employees aboard the Company's vessels for purposes of explaining to them in their free time their Section 7 rights for want of any reasonable alternative means of access to such employees on land, or whether in fact such reasonable alternative means of access by the Unions to Respondent's employees off its vessels are available for the purposes of soliciting their union support. The physical facts with reference to this issue are set forth below.

Respondent operates 15 tug and/or towboats which are used to pull or push 19 oil barges on the waterways of the State of Florida, exclusive of Pensacola. The Company employs approximately 100 ordinary seamen on its vessels. Each boat is manned by three to five employees, including a supervisory captain and sometimes a supervisory mate.

The Company's boats operate out of four "home ports" or locations in Florida from which the boats start and return. The largest of these home ports is Respondent's facility at Miami Beach, near the southern tip of the east coast of Florida, which also functions as the administrative port for the Company's entire operation. The Miami facility berths nine boats and an unspecified number of barges.

The remaining home ports are Port Canaveral, 200 miles north of Miami on the east coast of Florida; Port Manatee in south Tampa Bay on the west coast of Florida, some 250 miles from the Miami home port; and Tice just north of Fort Myers on the west coast of Florida. Each of these home ports berths two boats and two or more barges.

In addition to the above-described home ports, the Company's boats are frequently in other ports for the purpose of either loading their barges or unloading the oil at customer's facilities.

The Miami Beach home port boats loads their barges at either the tank farm at Fisher Island about a half mile away from the "home port" or the tank farm at Port Everglades, near Fort Lauderdale, which is some 30 miles north of Miami Beach home port.

With respect to deliveries, Respondent's Miami Beach boats make deliveries of oil to power plants located as far north as Fort Pierce, about 80 miles north of Fort Lauderdale and as far south as Key West, about 160 miles south of Fort Lauderdale. Some of the points of deliveries have tight security; others have loose or no security as far as allowing persons to approach the docks where the boats or barges are tied.

The Port Canaveral home port boats load their barges from storage tanks at the port and deliver the oil to two power plants within about a 15-mile radius from the home port and to a third power plant, some 80 miles away. Access to the docks of these power plants is either available, or, if not, the lack of access is due to security measures taken by the power companies.

The Port Manatee home port boats apparently load from storage tanks at the Company's facilities at its port and

<sup>3</sup> Errors in the transcript have been noted and corrected.

deliver the oil to a power plant, its only customer, at Crystal River some 110 miles north of the home port.

The Tice home port boats loads their barges from its tank farm at the nearby Boca Grande oil terminal and makes delivery of fuel and diesel oil to only one customer, a power plant, at the home port of Tice.

From the above evidentiary findings and the record as a whole I find that Respondent's boats and the personnel thereon are generally more accessible to visitations from visitors and union representatives while the boats are docked at their home ports than at their points of deliveries because departure times of the boats from the home ports are generally as scheduled whereas delivery times are only generally predictable as to hours of arrival due to weather conditions. I also find that Respondent's boats at the home ports are generally more accessible to visitations than at the docks of delivery points which for security reasons are sometimes less accessible.

*B. Text of Respondent's Admitted No-Solicitation Rule Denying Access to Nonemployee Union Representatives to their Vessels*

Respondent by its brief admits that it has a promulgated no access rule which denies access to its boats to nonemployee union representatives<sup>4</sup> but contends that the rule is "permitted under the Act."

The text of Respondent's no-solicitation rule as set forth on January 28, 1972, under "INSTRUCTION NO. 1" reads as follows:

BELCHER TOWING COMPANY

INSTRUCTION NO. 1

Page 1 of 1 Page

January 28, 1972

TO:

TUG CAPTAINS

DISPATCH SUPERINTENDENT

SUPERINTENDENT, MARINE WAYS

MANAGER, BELCHER TOWING COMPANY OF BOCA GRANDE

SUBJECT: Visitors on Board Tugs and Barges Owned by Belcher Oil Company and Belcher Towing Company

1) For reasons of safety, efficiency and insurance considerations, it is the policy of Belcher Oil Company and Belcher Towing Company to hold to a minimum the number of visitors boarding company tugs and barges.

2) Male visitors will normally be persons who have bona-fide business on board and have been invited on board or authorized to come on board by the Tug's Captain or appropriate persons indicated in the last paragraph herein.

3) Lady visitors will be received on board company-owned tugs and barges only during authorized open-

house functions or when prior approval has been obtained from appropriate persons indicated in the last paragraph herein.

4) Visitors may not remain on board overnight without prior approval.

5) Persons who may authorize overnight visitors, lady visitors or exceptions to this policy are:

a) an officer of Belcher Oil Company;

b) the Manager or Dispatch Superintendent of Belcher Towing Company; or

c) the Assistant Terminals Manager.

/s/ L. C. Morris

L. C. Morris

More than 3 years after the promulgation of its no-solicitation rule, the Company on October 10, 1975, addressed a letter to its Captains, marked "CONFIDENTIAL." In the letter the Company stated that, "The purpose of this letter is to explain your [the captains'] role in accomplishing our Company objective of remaining non-union."

The company letter then goes on to issue the following instruction to its Captains:

You may *not* permit any union officials on board and you *must* report any attempt by union officials to go on board.

The foregoing deals only with the text of Respondent's no-solicitation rule of July 28, 1972, as further explained and emphasized in the Company's letter of October 10, 1975, to its Captains. The determination of the validity of Respondent's no-solicitation rule is deferred to a later section of this Decision.

*C. Respondent's Alleged Refusals To Allow Union Representatives To Board Company Boats for the Purpose of Talking to Crewmembers About Their Section 7 Rights*

The complaint, as amended, alleges six different occasions between October and December 1975, when union representatives were allegedly denied access to Respondent's vessels for the purpose of talking to crewmembers about what their respective Unions had to offer to them. (See par. 6(b)-(g), inclusive.)

The first of these occasions occurred on October 6, 1975, when Wayland Burgess, regional representative of Local 333, one of the Charging Parties herein, went aboard a company vessel called the "Admiral Leffler," then under the command of Mark T. Flockhart, better known as Tom Flockhart, as his vessel was being tied to a dock at Port Everglades, near Fort Lauderdale. Burgess stepped aboard before Captain Flockhart knew he was there and upon contacting Flockhart, Burgess introduced himself and told him he would like to talk to his crewmen. Flockhart, according to his own testimony, told Burgess that ". . . over and above company viewpoint, that I had no use for him and to get to hell off my boat which he did." Flockhart's reference to "company viewpoint" was a reference to Respondent's no-solicitation rule to the Company's vessels as applied to union representatives as heretofore described. Although Flockhart's testimony shows that he was in part irritated by

<sup>4</sup> For the admission, see caption, Resp. br., p. 4.

Burgess' presence on the boat while it was still in the process of being tied to the dock, his testimony shows and I find that he would have refused to let Burgess talk to his crewmen aboard his vessel under any circumstances.

About a week later on October 15, the same union agent, Wayland Burgess, attempted to get permission to speak to the crewmembers of another Respondent's boats, not identified in the record by name, which was also docked at Port Everglades. The captain of the boat was Charles E. Flockhart, the brother of the aforementioned Captain Tom Flockhart. Burgess was accompanied by discharged Captain Frank Mosso, a staunch union adherent who had been discharged by Respondent only 5 days earlier and whose discharge as an alleged discriminatee under the complaint will be dealt with in a subsequent section of this Decision. Upon arrival by car the two men were met by Captain Charles Flockhart, Flockhart greeted his former colleague Captain Mosso who in turn introduced him to union agent Burgess. Burgess asked Captain Flockhart for permission to speak to his crewmen and Flockhart replied, "Not on my boat." Flockhart at the trial admitted that he "denied him [Burgess] access to the vessel." Thereafter, while the three men were still engaged in conversation, Flockhart polled his crew members who were having breakfast if any of them wanted to talk to the union man and was met by silence. A later section herein will show that Respondent's crewmen are keenly aware of Respondent's well known hostility to union representation and were generally fearful of showing any interest in being represented by a union.

The complaint next alleges unsuccessful efforts in November 1975 by representative Dick Avery of the Inland Boatmen's Union<sup>5</sup> to speak to crewmembers on board three of the Respondent's vessels because of the refusals of the captains of such boats to let him talk to their crew members.

At the hearing Respondent withdrew its original denials under its answer to its alleged refusal to allow union representative Avery access to certain of its vessels as set forth in paragraphs 6(d), (e), and (f) of the amended complaint and entered into open admissions on the record of the allegations of these paragraphs with some modifications but substantially as pleaded in the amended complaint. Counsel for General Counsel relies on these admissions in lieu of testimony from union agent Avery who was not called as a witness because he could not be located.

Notwithstanding its admissions, Respondent called as witnesses the captains who had refused Avery access to their vessels to show what it deems mitigating circumstances for their refusals.

Despite its admissions that the captains of the three boats here involved refused union agent Avery access to their boats, Respondent contends that the refusals were not legally unlawful.

While thus reserving its right to contend that the following admitted acts are permitted under the Act, Respondent now admits engaging in such acts:

*Par. 6(d):* On or about November 8, 1975, at Cape Canaveral, Florida, by Captain Jones refusing Dick Avery, Representative, Inland Boatmen's Union, permission to remain on the tugboat "Virginia Bee" for the purpose of consulting, advising, meeting and/or assisting the employees aboard the vessel in the exercise of their Section 7 rights, including selection of a bargaining representative.

*Par. 6(e):* On or about November 8, 1975, at Cape Canaveral, Florida, by Captain Russel refusing Dick Avery, Representative, Inland Boatmen's Union, permission to board "Mamie Belcher" for the purpose of consulting, advising, meeting and/or assisting the vessel's crew members in the exercise of their Section 7 rights, including selection of a bargaining representative.

*Par. 6(f):* On or about November 11, 1975, at a location presently unknown, by Captain Miller requiring Dick Avery, Representative, Inland Boatmen's Union, to leave the "H. W. Orr," because he was engaged in union activities among the vessel's crew members during their non-working time.

With reference to paragraph 6(d) as quoted above, the only witness called to testify thereon was Captain Jones who testified on behalf of the Company. Captain Jones under direct examination readily admitted that he told union agent Avery on November 8, 1975, at Port Canaveral when he spotted him walking on the barge towards the boat, "that he couldn't talk to the crew on the boat" about his Union and that, "he would have to go ashore." Avery readily acceded to Captain Jones' refusal with the statement, "Captain, I don't want to cause you any trouble" and turned around and left the barge to continue talking briefly with the Captain on the dock where he handed him a union flyer. Captain Jones' testimony indicates that he refused Avery access to his boat pursuant to "a company order in '72 that states there will be nobody aboard without company official approval." (The text of the Company's 1972 no-solicitation rule is set forth in an earlier section of this Decision.) At the time Avery sought access to the boat's crewmembers aboard the vessel, the three-man crew was engaged in various work duties, but there is nothing in Captain Jones' testimony to indicate that he would have allowed Avery to speak to his crewmembers aboard the boat even if they were on free time in view of the Company's 1972 standing order of no-solicitation.

With reference to Respondent's admissions of paragraph 6(e) of the complaint as quoted above, the only witness to testify thereon was Captain Russel who testified on behalf of the Company. Captain Russel under direct examination readily affirmed Respondent's admissions under its pleadings that on November 8, 1975, while his boat the "Mamie Belcher" was tied to a dock at Cape Canaveral he refused Union Agent Avery's requested permission to board the boat "to talk to the crew members about organizing a union." This refusal took place on the barge when Captain Russel spotted Business Agent Avery walking across the tugboat's barge, contrary to U.S. Coast Guard Safety Regulations, towards the boat and while each of the three-man crew of the boat was performing his varying work duties. However, Captain Russel's testimony shows that he would

<sup>5</sup> A circular by Inland Boatmen's Union addressed to all crewmembers of Belcher Towing Company shows that Inland is affiliated with "Seafarers International Union of North America—AFL-CIO—Atlantic, Gulf, Lake and Inland Waters District," with headquarters in Brooklyn, New York. The local office of Inland Boatmen's Union is in Dania, Florida. (Resp. Exh. 21.)

not have allowed Avery to talk to his crew aboard the boat even if Avery could have reached the boat without crossing the barge and even if the crew was on free time because of the Company's heretofore described no-solicitation rule.

With reference to Respondent's admissions to paragraph 6(f) of the complaint as quoted above, the only witness to testify thereon was Captain Miller who likewise testified on behalf of the Company. Captain Miller under direct examination substantially affirmed Respondent's admissions under its pleadings that on November 11, 1975, while his boat, the "Jerry Laler," was docked at Port Everglades (near Fort Everglades) after loading, and while his crew, including himself, had gone to bed, Captain Miller was awakened by union agent Avery who had entered the vessel from the dock.

As related by Captain Miller, Avery told Miller that he would like to talk to him about his Union, and that Miller refused to talk to him about that subject. Asked by Avery whether he declined because of company policy, Captain Miller replied, "Right now that's my policy." However, Captain Miller's testimony shows that on prior occasions he had declined to allow visitors aboard his boat because, "It is against the regulations." From that testimony I infer and find that Captain Miller would have denied union agent Avery permission to talk to his crewmembers aboard the boat about the Union even if they were on free time and not asleep because of the Company's aforementioned no-solicitation rule.<sup>6</sup>

The final incident with reference to the enforcement of Respondent's no-solicitation rule took place on some date in December 1975, at Port Everglades, which as shown is in the vicinity of Fort Lauderdale. At that time Respondent's tugboat, the "W. H. Orr," was tied to a dock at Port Everglades while its captain, Kramp, and his crewmembers were awaiting a truck to come up with oil, presumably for use in operating the tugboat. At that juncture, union representative Gordon Spencer of Charging Party District 2,<sup>7</sup> was at the dock near the "W. H. Orr" where he met and talked to Captain Kramp. Their composite testimony shows that during the course of their conversation Captain Kramp acknowledged that he had orders not to let any union agents on his vessel and that Spencer acknowledged that he was aware of the order and did not press the issue, but instead contented himself by passing out union literature to one or two of the crewmembers on the dock.

#### Conclusion

From the above virtually undisputed instances of Respondent's refusals to allow union representatives aboard its vessels to speak to Respondent's crewmembers about their Section 7 rights, I find and conclude that Respondent has at all times here pertinent strictly enforced its above-described no-solicitation rule, but it is again noted that the determination of whether the rule is in violation of Section

8(a)(1) of the Act is deferred to a subsequent section of this Decision.

#### D. Thirteen Other Alleged 8(a)(1) Violations

Thirteen additional allegations of violations of Section 8(a)(1) of the Act are alleged in paragraphs 6(h) through 6(t) of the amended complaint. Each is denied by Respondent's answer to the amended complaint.

A *seriatim* consideration of each of these allegations follows below.

#### Section 6(h) of the Complaint

The above-noted subparagraph of the complaint reads: "On numerous occasions during the period August 1975 through January 1976, the exact number of occasions and dates being presently unknown, on board the tugboat 'Mary Belcher' and at dockside, by Captain Leon Bell warning employees that anyone caught signing union pledge cards would be discharged."

#### Findings

Robert Tyler has been employed by Respondent as a marine engineer on a number of its tugboats since the spring of 1974. He worked in that capacity on the tugboat "Mary Belcher" for an extended period of time under Captain Leon Bell. The composite testimony of Tyler and Captain Bell shows that between August 1975 and January 1976 there were a number of occasions in which they engaged in conversations on the subject of unions. Tyler testified that in several such conversations he had with Captain Bell, the Captain told him that, "If the Company found out that anybody signed a pledge card and the Company had ways of finding out these things, that they would be discharged," not on the ground of their union activity but under some pretext.

Captain Bell in his testimony did not directly deny that he had made the above statement to Tyler, but merely testified in response to a question put to him by counsel for Respondent that during the alleged 6-month period he did not "tell any employees, any employee that anyone caught signing union cards would be discharged."

#### Conclusions

Based upon Tyler's superior demeanor evidence I fully credit his testimony that Captain Bell in several conversations told him that if the Company discovered that an employee had signed a union authorization card, the Company would find some pretext or other for discharging that employee for reasons other than his union activity. I further credit Tyler's testimony because it was not directly denied by Captain Bell and is not responsive to Tyler's testimony. I find and conclude that Respondent through the statement made by its agent Captain Bell to its employee Tyler engaged in a self-evident and patent violation of Section 8(a)(1) of the Act.

<sup>6</sup>Under Captain Miller's testimony, the boat, erroneously named as "H. W. Orr" in par. 6(f) of the complaint, as amended, is corrected to "Jerry Laler," and the location of the "Jerry Laler" shown as "presently unknown" in par. 6(f) is identified as Port Everglades.

<sup>7</sup>Spencer's position was more than that of an ordinary union business agent; he was executive vice president of District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO.

## Section 6(i) of the Complaint

The above-noted subparagraph of the complaint reads: "On a day in September, October, or November, 1975, the exact date being presently unknown, at a Company meeting of Captains (at the company offices), by Vice President Morris and Captain Barr instructing the Captains to report the names of employees who were passing out union cards, talking union and spreading union literature."

## Findings

Preliminary to any evidentiary findings of fact on the above allegation, I find and conclude that in substance the allegation charges that at a company-called meeting of its captains, the Respondent ordered its captains to keep its rank-and-file crewmembers *under surveillance* with respect to such union activities as, "passing out union cards, talking union and spreading union literature," although the word "surveillance" is not as such specifically mentioned in the allegation.<sup>8</sup>

The record is undisputed that Respondent called meetings of its captains in the late fall and winter of 1975-76 for the purpose of organizing a counterattack against the drives of the three unions here involved to organize Respondent's tugboat employees. The evidence shows that at least two such meetings were held in order not to cause a simultaneous total shutdown of Respondent's tugboat operations.

These company meetings of its captains were designed to augment the Company's letter of October 10, 1975, addressed "TO ALL CAPTAINS" which frankly stated that the purpose of the letter was to explain to their captains their "vital role in accomplishing our company objective of remaining non-union."

The instructions the captains received at these meetings are reflected in the testimony given on behalf of General Counsel by Captain Ritter and testimony given on behalf of Respondent by Captains James Russel, Leon Bell, Herman Miller,<sup>9</sup> Port Captain Robert L. Barr, and by L. C. Morris, assistant vice president of the parent Company, Belcher Oil Company, in charge of its marine operations, whom the record shows is in effect Respondent's general manager.

General Counsel's witness, Captain Ritter, had a period of employment with Respondent for a little over 3 years when he was terminated in late December 1975, for reasons that were never told him by Respondent. His fully credited testimony shows that he attended two company-called meetings of Respondent's captains.

The first such meeting took place in about September 1975 at Port Captain Barr's office in South Miami, at which there were only five captains present, including Ritter. The meeting was conducted by Respondent's trial counsel herein, John M. Capron, who told the captains that union pledge cards had been found on the galley table of one of the company tugboats. Ritter's testimony further shows that Capron on behalf of Respondent instructed the cap-

tains present at the meeting that the Company wanted each of them to report any information they had on the union activities of any of their crewmembers. As Captain Ritter's testimony with respect to that first meeting fails to show that the captains were asked to keep their crewmembers under surveillance for their union activities but merely shows that the captains were only instructed to report to management any information they happened by chance to run across of union activities on the part of crewmembers, I find and conclude without further consideration that Respondent through its agent Capron did not engage in any conduct in violation of Section 8(a)(1) of the Act at the meeting of its captains.<sup>10</sup>

The second meeting of Respondent's captains attended by Ritter took place in a conference room at Respondent's headquarters in South Miami, not long after the Company had sent its aforementioned letter of October 10, 1975, to all of its captains in which it sought as aforementioned their cooperation as supervisors to do all they could to accomplish the "Company objective of remaining non-union." (G.C. Exh. 3.) The meeting was attended by 12 of Respondent's captains.

The captains were addressed by *de facto* General Manager Morris and by Captain Barr who has supervision over all of Respondent's captains and is known as the port captain. Barr and Morris spoke to the captains about the union activities going on to organize the Company's marine employees, more particularly the nonsupervisory crewmembers of Respondent's vessels.

Captain Ritter's credited testimony shows that Morris and Barr closely questioned the captains on whether they had any information on the union activities going on among their crewmembers and instructed them that it was their duty as supervisors to pass on to management whatever information they had of such union activities.

Ritter's credited testimony further shows that all the captains at the meeting "were asked to find out as much as we could" about the union activities of their crewmembers and to also find out "who was behind it," and to report such information to Mr. Morris or Port Captain Barr.

Ritter also credibly testified that in December 1975, a month or more after he attended the above-described second captains' meeting, he was personally instructed by Port Captain Barr to keep a separate time log "on what the crew was doing and who they were seeing."<sup>11</sup> The new logs were in addition to the standard or official running logs all captains had to keep on the operations of their boats. Respondent's Exhibits 24 and 26 are samples of the new logs required to be kept by the captains on their crew members; they bear the caption, "Log of Crew Activity When Tug is Moored."

In general the testimony of Respondent's aforementioned captains and that of Mr. Morris, in charge of Respondent's operations, corroborate Captain Ritter's above-described testimony with respect the instructions the captains received from management to watch for and report the union activities of their crewmembers and with respect to the in-

<sup>8</sup> Counsel for the various parties appear to take the same view of the allegation. See G.C. br., p. 23; Resp. br., p. 129; and brief of counsel for Charging Party 2, p. 41.

<sup>9</sup> All of the above-named captains have been heretofore mentioned in connection with other allegations of the complaint.

<sup>10</sup> The above findings are based on Captain Ritter's testimony under redirect examination.

<sup>11</sup> All the other captains received the new log forms at a meeting in December which Captain Ritter was unable to attend because of illness.

structions captains received to keep logs on the hour-to-hour activities of their crewmembers when their boats are moored. To the extent that the testimony of any of Respondent's witnesses is in conflict with that of Captain Ritter as set forth above, I do not credit such testimony because the demeanor evidence of such witnesses was not convincing.

Captain Charles Flockhart, testifying for Respondent, admitted that at a meeting of Respondent's captains sometime in the fall of 1975, management ordered the captains to report the names of any crewmembers who in any way engaged them in a conversation about unions.

The composite testimony of General Manager Morris, Port Captain Barr and Captain Miller, also testifying for Respondent, shows that at a captains' meeting held in December 1975, attended by 20 captains and chaired by Mr. Morris and Mr. Capron. Respondent's trial counsel, the captains were instructed to report all things spoken to them by their crewmembers in relation to union activities so that the Company could constantly assess its legal position. Their composite testimony, together with that of Captain James Russel, also shows that at the same meeting Mr. Morris passed out new logs they were ordered to keep for the first time on "Crew Activity When Tug is Moored." This was the same log that Port Captain Barr ordered Captain Ritter to keep on his crewmembers as he had not been at the meeting at which the logs had been passed out. General Manager Morris testified that the new logs were designed to show that even when the Company's various tugs were moored, the crewmembers were too tied up with work duties to have any free time to listen to union agents about what their unions could offer them. From the record as a whole I find that this contention of no free time is unsubstantiated.

In Respondent's aforementioned antiunion letter of October 10, 1975, to all of its captains, the captains were instructed that they must not interrogate any employees about their union feelings because such interrogations are unlawful, but they were also told that as captains they could provoke a crewmember into showing his feelings either for or against unions by telling them, "I sure hope the Union doesn't get in." In the event they got a response to such provocative remarks, the captains were instructed to promptly report the crewmember's response to management. The letter is emphatic in its instructions that Respondent's captains "are expected and required to report all conversation you have regarding the union." The composite testimony of Respondent's aforementioned witnesses show that these instructions under the Company's letter of October 10, 1975, were reiterated at one or more of the company-called captains' meetings after the letter was issued. Thus the composite testimony of Respondent's witnesses substantiate that part of the aforementioned allegation of paragraph 6(i) of the complaint which states that at a meeting of Respondent's captains, the captains were instructed "to report the names of employees who . . . were talking union. . . ."

#### Discussion and Conclusions

It is again noted that the allegation of the complaint here under consideration (par. 6(i) as quoted above) alleges that at company-called meetings of its captains, they were in-

structed to keep their rank-and-file crewmembers *under surveillance* with respect to such union activities as, "passing out union cards, talking union and spreading union literature," although the word "surveillance" is not specifically mentioned in the allegation.

In summary I find and conclude both directly and by inference from the above evidentiary findings that Respondent ordered its captains at company-called meetings to keep their nonsupervisory crewmember under constant surveillance by time logs and otherwise with respect to "who were passing out union cards, talking union and spreading union literature," substantially as alleged in the complaint.

In conclusion I find that this conduct by Respondent is in clear violation of Section 8(a)(1) of the Act.

#### Section 6(j) of Complaint

The above-noted subparagraph of the complaint reads: "On or about October 18, 1975, on board 'Mary Belcher,' by Captain Leon Bell interrogating employees about the union activities of another employee."

#### Findings

The Captain Bell referred to in the above allegation is the same Captain Bell who was found above under an earlier allegation to have unlawfully told Robert Tyler who serves as an engineer on Captain Bell's boat, the "Mary Belcher," the following, "If the Company found out that anybody signed a pledge card and the Company had ways of finding out these things, that they would be discharged," under some pretext or another.

John W. George,<sup>12</sup> a highly articulate young man, worked as an ordinary seaman on the "Mary Belcher" under Captain Bell at all times here material.

The composite testimony of Captain Bell and George shows that they had a conversation on October 18, 1975, in the presence of a cook deckhand, Broward Albury, in the wheelhouse of the "Mary Belcher" on the subject of unions. George's credited testimony shows that Captain Bell during that conversation asked George and Albury individually in a roundabout way if they knew that the boat's engineer, Robert Tyler, was handing out union pledge cards. Both George and Albury told Captain Bell that they did not know. George characterized Captain Bell's question concerning engineer Tyler as follows, "He didn't want it to seem like a direct question but it was." I credit George's characterization of Captain Bell's question.

Albury, testifying for the Company, at first stated that he could not recall the conversation in question but then under a leading question by the Company's counsel he denied that such a conversation had even taken place. In view of the fact that even Captain Bell recalled the conversation about unions he had with George aboard the wheelhouse, I discredit Albury's testimony that he could not recall the conversation and his denial that the conversation actually took

<sup>12</sup> Mr. George was terminated subsequent to the incident here under discussion. The complaint under another paragraph alleges that he was discriminatorily discharged. The matter of his alleged discriminatory termination will be determined in a later section of this Decision.

place. Also, based on Albury's unconvincing demeanor as he testified and his seeming willingness to change his testimony to suit what he believed Respondent's trial counsel wanted, I do not credit anything in Albury's testimony that conflicts in any way with George's testimony that on the date in question Captain Bell questioned both him and George on whether they had any knowledge on whether engineer Tyler was passing out union pledge cards.

Captain Bell testified that he recalled the conversation he had in the pilothouse of the "Mary Belcher" on the date in question with George on the subject of unions which Respondent concedes was initiated by Captain Bell.<sup>13</sup> He did not directly deny that he had asked George if he had any knowledge on whether engineer Tyler was passing union pledge cards but merely denied that he had asked "John George any questions about union activity." Based both on Captain Bell's unconvincing demeanor and the fact that he did not specifically and directly deny that he had asked George if engineer Tyler was passing out union pledge cards, I do not credit Captain Bell's testimony insofar as it conflicts in any way with George's testimony that Bell did ask him and Albury whether Tyler was passing out union cards.

#### Conclusions

Based on the above credibility determinations, I find and conclude the Respondent to be in violation of Section 8(a)(1) of the Act by reason of the interrogations by its agent, Captain Leon Bell, of employees John W. George and Broward Albury about the union activities of employee Robert Tyler, substantially as alleged in paragraph 6(j) the amended complaint.

#### Paragraph 6(k) of the Complaint

The above-noted paragraph of the complaint reads: "On or about October 18 or 19, 1975, on board the tugboat 'Mary Belcher' in Miami Harbor, by Captain Leon Bell interrogating an employee about his union sympathies."

#### Findings

In the prior allegation under paragraph 6(j) of the complaint, it was found that Captain Bell on October 18, 1975, had interrogated seamen John W. George and Broward Albury on whether engineer Robert Tyler was passing out union authorization cards.

The issue here under paragraph 6(k) of the complaint, as amended, is whether on or about the same date Captain Bell had himself directly interrogated engineer Tyler about his union sympathies.

The record shows that at the time of the alleged interrogation Captain Bell and Tyler were well acquainted with each other as Tyler had worked for more than a year as an

engineer on the tugboat "Mary Belcher" under Captain Bell's supervision.

The combined testimony of Tyler and Captain Bell shows that Bell on the late evening of October 18, 1975, on the deck of the "Mary Belcher" initiated a conversation with Tyler on the subject of his union activities. Tyler's credited testimony shows that Captain Bell told him that the Company, "had the idea that I [Tyler] was working for the Union, and [that] he [Bell] liked me and I was a good engineer, and he didn't want to see me get into trouble, and if possible, I should do something to prove to the Company that I didn't have Union sympathies."

Captain Bell in his testimony flatly denied that he had directly questioned Tyler on whether he was distributing union authorization cards but readily admitted that he had voluntarily and deliberately told Tyler that he "thought" Tyler was distributing such cards.

#### Discussion and Conclusions

Although the evidence shows that Captain Bell pursuant to both written and oral instructions from the Company did refrain from directly and expressly questioning Tyler on whether he was distributing union authorization cards, the record leaves no doubt that Captain Bell indirectly questioned him on that subject by accusing him of being under suspicion of passing out union cards. The accusation was clearly intended as an indirect interrogation into Tyler's union activities which put the onus on Tyler to answer or evade the question.

Accordingly, based on the consolidated testimony of Tyler and Captain Bell, I find and conclude that Respondent through its agent Captain Bell did unlawfully interrogate employee Robert Tyler about his union sympathies in violation of Section 8(a)(1), substantially as alleged in paragraph 6(k) of the complaint.

#### Paragraph 6(l) of the Complaint

The above-noted paragraph of the complaint reads: "On or about the latter part of November or early December 1975, the exact date being presently unknown, on board the tugboat 'Mary Belcher' in Miami Harbor, by Captain Leon Bell interrogating an employee about the union activities of another employee."

#### Findings

The record under the above allegation of the complaint identifies John W. George as the "employee" Captain Bell allegedly interrogated concerning the union activities of another "employee" identified by the record as John Hill. This was not the first time George had been put through such an interrogation about the union activities of another employee. Under an earlier determination herein (see above for discussion of par. 6(j) of the complaint), it was determined that Captain Bell had earlier unlawfully interrogated George on the union activities of Captain Bell's engineer, Robert Tyler. It will be recalled that John George worked as an ordinary seaman on Captain Bell's tugboat, the "Mary Belcher."

<sup>13</sup> This concession is made at p. 144 of Respondent's brief where it is stated: "Captain Bell, following the instructions he received from the Company, was initiating a conversation with his own personal opinion and was reminding Mr. George that the Company had good benefits without the union."

At the time here involved in late 1975, John Hill worked as a relief engineer under Captain Bell on the "Mary Belcher." On the day here involved a heated discussion on the subject of unions took place aboard the "Mary Belcher" between Captain Bell and John Hill, with Captain Bell expressing antiunion sentiments and Hill expressing pronoun sentiments.

Finding that the argument over unions with Captain Bell was getting too tense, Hill quietly walked away.

George's credited testimony shows that after Hill had walked away, Captain Bell turned to George and asked him, ". . . if John Hill had a hard-on for the company, if he was pushing the union?" Under cross-examination, Captain Bell admitted that there had been an incident in the galley in which he "probably" did ask George if Hill had a "hard-on" for the company.

#### Discussion and Conclusions

As Captain Bell virtually admitted that he asked George if Hill had a "hard-on" or dislike for the Company because of Hill's expressed interest in union representation, I find based on that admission and George's more convincing demeanor that Captain Bell did in fact interrogate George about relief engineer Hill's union activities in violation of Section 8(a)(1) of the Act, substantially as alleged in the complaint.

#### Paragraph 6(m) of the Complaint

The above-noted paragraph of the complaint reads: "On or about December 5, 1975, on board the tugboat 'Mary Belcher' in Miami Harbor, by Captain Bell threatening an employee that he didn't have a good future with Respondent if he continued handing out union pledge cards and interrogating that employee regarding the union activities of another employee."

#### Findings

The credited composite testimony of the same John W. George and the same Captain Bell<sup>14</sup> shows that George on December 5, 1975, while aboard the "Mary Belcher" in Miami Harbor, gave a union authorization card to the heretofore mentioned deckhand Broward Albury, pursuant to Albury's request, which he looked at but did not sign. Captain Bell admits that Albury brought the card to him and showed it to him. It is also undisputed that later that afternoon, Captain Bell summoned George to the wheelhouse where, in the presence of the Captain's 17-year-old son Robert Allen Bell, Captain Bell told George that he knew that George was passing out union pledge cards.

George's credited testimony shows that in the conference he had with Captain Bell at the wheelhouse, the captain told him in a roundabout way that he would not have a good future with Belcher. ". . . if you keep on handing out

union pledge cards." Although Captain Bell admits that at the same conference he told George that the Company "had well enough benefits without the Union," he denies that he told George that the would not have a good future with Belcher if he persisted in passing out union cards. Based on Captain Bell's unconvincing demeanor and his heretofore found unreliability as a witness in many other incidents, I do not credit Bell's denial that he threatened George with the loss of his job unless he quit his union activities.

George's credited testimony also shows that at the same conference Captain Bell told him, "that if [engineer] John Hill was handing out union cards, it wouldn't be good for him as far as Belcher went" by which I find that Captain Bell indicated to George that the Company would find some pretext for terminating Hill if it believed he was engaging in union activity.

All of the above-described remarks by Captain Bell to George were made in the presence of Captain Bell's aforementioned son, Robert Allen Bell, who was not called by Respondent as a witness.

#### Discussion and Conclusions

The credibility issues having been disposed of as shown above, the only remaining issue is whether the above-quoted remark made by Captain Bell in the wheelhouse of the "Mary Belcher" to George about relief engineer Hill constitutes "interrogation" as alleged in the above-quoted paragraph of the complaint. Respondent states its defense as follows: "Regardless of whose testimony is credited in this instance, there is no interrogation, much less unlawful interrogation, involved in the conversation. Even Mr. George testified that there was not any more than a declaratory statement made to him [by Captain Bell about Hill]. No response was required or requested, and none was given. By definition there was no interpretation."

While it is true that Captain Bell did not directly and expressly ask or question John George about John Hill's union activities, I find that the record leaves no doubt that Captain Bell's flat declarative statement to George that "if John Hill was handing out union cards, it wouldn't be good for him," was an indirect way of questioning George about Hill's union activity by the very provocative nature of his statement to George. I find that Captain Bell in using this indirect mode of interrogating an employee, was following company instructions not to directly question employees about their union activities and that of other employees but was also following an instruction under which a captain is not only permitted but ordered to make provocative statements designed to bring forth employee sentiments about union representation. (See G.C. Exh. 3, for company instructions "To all Captains.") I find that ploy unlawful.

Based on the above findings, I find and conclude that Captain Bell on board the "Mary Belcher" by threatening John W. George that he did not have a good future with Respondent if he continued handing out union pledge cards and by interrogating George in regard the union activities of engineer John Hill, violated Section 8(a)(1) of the Act, substantially as alleged in the complaint.

<sup>14</sup> Captain Bell was not called as a witness for Respondent; such testimony as Captain Bell gave on the issue under discussion was adduced through his cross-examination by counsel for District 2, one of the Charging Party Unions.

### Paragraph 6(n) of the Complaint

The above-noted paragraph of the complaint as amended at the hearing reads: "On or about December 5, 1975, the exact date being presently unknown, while riding in an automobile in South Florida, by Captain Robert Ritter telling an employee to quit talking union or the Company would fire him or make it so uncomfortable for him that he would quit."

### Findings

The record shows that the unnamed employee in the above allegation is the same John Hill referred to in other incidents dealt with above. Hill had a period of employment with Respondent as a marine engineer from early September 1975 to his termination on February 18, 1976, which is challenged by the complaint as being discriminatory.<sup>15</sup>

During his period of employment with Respondent, Hill served as marine engineer on eight of its vessels, but worked mostly on the tugboat "Jeanettee" under Captain Robert Ritter who was heretofore referred to under a preceding allegation. A strong friendship developed between Hill, a young man of 26, and Captain Ritter. As previously shown Captain Ritter worked for Respondent from August 1972 to December 25, 1975, when he was terminated without any explanation for his discharge, but his termination is not at issue in this proceeding.

Hill's undisputed and credited testimony shows that on a payday when both he and Captain Ritter were off boat, Hill was driving his friend Captain Ritter home when the Captain "warned" him that, "... the Company was becoming very agitated with the people that were talking union on the boats and that if I [Hill] kept it up I would probably be fired or placed in a circumstance where I would be fired."

Under further questioning Hill credibly elaborated about the circumstances that prompted Captain Ritter's warning as follows: "... Captain Ritter seemed pretty upset. We were personal friends as well as crewmates, and he didn't want to see me lose my job or get in any more trouble, so he asked me to cool it. He asked me not to talk around the men, not to talk on the boat or else I'd be placed in that circumstance [of losing his job]. Because I was placing him, he advised me, in a very bad circumstance as my Captain for not reporting me."

Captain Ritter creditably corroborated Hill's testimony as follows: "... it had gotten back to me that Mr. Hill was engaged ... in union activities. And I told him that I was doing this for his own benefit. I didn't want to see him get in trouble. And is said, 'You keep on doing it and you might be putting yourself, in a position where the Company could make it very uncomfortable for you.'" As shown above Ritter's prophesy of Hill's discharge was fulfilled not long after the incident here described.

Respondent offered no testimony to rebut the testimony of General Counsel's witnesses but contends that the testimony of Hill and Captain Ritter about the warning Captain

Ritter gave Hill to drop his union activities aboard the "Jeanettee," should be discredited because Captain Ritter's testimony is in conflict with a statement he made in a pretrial affidavit, to wit, "I never told any employee that he had better quit engaging in union activity because he might be fired or the Company would make things uncomfortable for him."

Asked about this conflict, Captain Ritter testified that the statement in his pretrial affidavit did not in truth reflect what he had really meant to say, namely, that after the first company-called captains' meeting, he called his crewmembers together and told them that he, "... didn't want union literature on the boat, or if they were going to discuss it, I wasn't to be present and they could take it for what it was worth."

Based chiefly on Captain Ritter's wholly convincing demeanor and also the lack of any rebutting testimony, I credit Captain Ritter's explanation of the apparent conflict between his testimony and his pretrial affidavit and reaffirm my crediting of his original testimony herein that in late winter of 1975 he had warned Hill to give up his union activity aboard the "Jeanettee" or else face the chance of possible termination.

### Discussion and Conclusions

Anticipating the crediting as made above of the testimony of Hill and Captain Ritter that Ritter warned Hill to cease, in his own best interests, his union activities aboard the Company's vessels, Respondent's remaining contention is that Captain Ritter's warning to Hill should nevertheless not be held to be a violation of Section 8(a)(1) of the Act because of the close personal friendship between Captain Ritter and young Hill and because of the Captain's obvious and genuine concern for Hill's best interests and welfare.

While it is unquestionably true that Captain Ritter made his warning to Hill as his personal friend and without any coercive intent on his part, I find and conclude that the effect of the warning was nevertheless clearly coercive in that it was meant to induce Hill to cease his statutory right to engage in lawful union activity aboard Respondent's vessels. I accordingly find that Captain Ritter's warning to young Hill "to quit talking union or the Company would fire him or make it so uncomfortable for him that he would quit," was in violation of Section 8(a)(1) of the Act, substantially as alleged in the complaint.

### Paragraph 6(o) of the Complaint

The above-noted paragraph of the complaint reads: "On or about early December 1975, the exact date being presently unknown, at the Company offices on McArthur Causeway, Miami, Florida, by Vice President Morris threatening employees that if the Union came in, he couldn't guarantee the same benefits they were then receiving."

### Findings

The same above-mentioned John W. Hill testified in support of the above allegation. His credited testimony shows

<sup>15</sup> Hill's transfer from one tugboat to another and his eventual discharge a month later, both alleged to be discriminatory, will be dealt with in a subsequent section of this Decision.

that an employee meeting held at company headquarters on a payday in December 1975, Assistant Vice President Morris, in addressing the employees on the subject of company insurance benefits at a time the involved Unions were seeking to organize Respondent's employees, told them, "that if the Union did get in that he couldn't guarantee us that we would be receiving the same benefits that we were receiving under the Belcher Company, under the present employee benefits."

Vice President Morris was not called by Respondent to rebut Hill's testimony, but Respondent did call employees Steven Brown and Timothy Burr to rebut or defend against the above-quoted allegation of the complaint. Brown did not deny that Vice President Morris made the above-quoted remark to the assembled employees at the meeting in question as testified to by Hill.

Brown's credited recollection of Vice President Morris' remarks to the assembled employees was that he told them that, "... the Union might not be able to offer us as good an insurance coverage as we had depending on the bargaining the Union had to do with the Company." He creditably recalled that Morris told the employees that under collective bargaining the company insurance benefits "could-be better, or then again, could be worse."

Timothy Burr likewise did not deny that Vice President Morris made to the assembled employees the remark attributed to him by Hill as shown above. Burr's credited recollection of Vice President Morris' remark is that Morris, "... in explaining what would happen if the union were to be voted in, he stated that would simply open the benefits and anything else up for negotiation and that those benefits and salaries could go up or down."

#### Discussion and Conclusions

Counsel for Charging Party District 2 contends that the testimony of both employees Steven Brown and Timothy Burr should be discredited because as applicants for tow-boat operators' licenses from the U.S. Coast Guard the two employees were dependent upon the Company to certify their sea time as a prerequisite for a license and that for this reason there was a possibility, "... that they would be inclined to orient their testimony toward the Respondent's position in order to ingratiate themselves with their employer." I reject that requested inference as not being justified by the record. From the totally convincing demeanors of Brown and Burr, I fully credit their testimony as set forth above.

I renote the finding above that Hill's credited testimony shows that Vice President Morris told the assembled employees that he could not guarantee them that they would receive the same employee insurance benefits they were then receiving from the Company if the Union got in. Hill did not testify that Morris' said statement was all Morris said to the employees on the subject. Likewise Hill did not deny the credited testimony of Brown and Burr that Morris also told the assembled employees that in the event that any union got in, the ultimate insurance benefits the employees would receive, would depend upon the bargaining agreement the Company and the Union hammered out which could result in higher or lower insurance benefits than the

employees were then receiving without union representation.

Accordingly I find that Hill's testimony of what Vice President Morris told the assembled employees is out of context with the full tenor of Mr. Morris' remarks which was that he could not guarantee them their present insurance benefits if a union got in *because under a union contract* such benefits could be either higher or lower than their present benefits. I thus find that Hill's testimony that Morris told the employees that he could not guarantee the same benefits they were then receiving if the Union got in, standing alone as an isolated portion of Morris' entire remarks, cannot serve as a factual basis for a determination of whether Respondent, solely by reason of that isolated remark, is in violation of Section 8(a)(1) of the Act.

On the basis of the composite testimony of Hill, Brown, and Burrs on the entire remarks made by Vice President Morris, I find that Morris merely told the assembled employees that he could not guarantee them their present insurance benefits if the Union got in because whatever benefits they would receive would depend entirely upon the terms of the contract the Company and the Union negotiated under which their insurance benefits could be lower or higher than their current insurance benefits. It is thus clear that the remarks made by Morris taken as a whole, and not fragmented, show that he did not threaten the employees "that if a Union came in, he couldn't guarantee the same benefits they were then receiving," as alleged in the complaint.

In the light of the entire record, I find and conclude that there is a failure of proof that Vice President Morris, "threatened employees that if the Union came in, he could not guarantee the same benefits they were then receiving," as alleged in the allegation of the complaint here under consideration. Accordingly, I will recommend the dismissal of that allegation.

#### Paragraph 6(p) of the Complaint

The above-noted paragraph of the complaint, as amended, reads: "On or about December 17, 1975, at the Company dispatch office, by Captain Bell threatening an employee that he would never get a chance to obtain a captain's license if the Union came in."

#### Findings

The same above oft-mentioned John George testified in support of the above allegation. Subsequent to the incident here involved, George was terminated for alleged union activities, the lawfulness of which will be determined in a later section of this Decision.

The undisputed record shows that a three-way conversation took place at the Company's dispatch office in Miami on December 17, 1975, between dispatcher Richard Beasley, John George, and Captain Leon Bell. Dispatcher Beasley initiated the conversation by asking Captain Bell in the presence of John George if George "had any potential." The composite testimony of both George and Captain Bell shows that this was a reference to George's "potential" or chances of getting a captain's license to operate a tugboat

as it was well known that George was ambitious to become a captain. George's credited testimony shows that Captain Bell answered Beasley's question about George's "potential," substantially as follows, "Yes, but he won't get a chance to use it if the union gets in here." This was a reference to what Bell believed to be union policy that only those able-bodied seamen with the longest seniority should be considered eligible to take the captain's test, a requirement young George could not meet with his limited experience on a tugboat.

Or as stated by Captain Bell in his own words, what he "... was trying to tell John George was that if the union did succeed in getting into our company, that he wouldn't have the seniority and couldn't make the possible progression because I thought the union could bring in the people that would have more seniority."

#### Discussion and Conclusions

In summary the evidence shows that Captain Bell in the presence of John George told dispatcher Beasley that George, in view of his low seniority, would have little chance of obtaining a captain's license if a maritime union got in because of what Bell believed to be the policy of maritime unions to sponsor applicants with the longest seniority.

I find that this evidence is insufficient to prove that Captain Bell, "... threatened an employee [John George] that he would never get a chance to obtain a captain's license if the Union came in," as alleged under the paragraph of the complaint here under consideration, as I find nothing in the record to indicate either a direct or indirect threat by Captain Bell to George but only a protected opinion under the Act that George would stand little chance of a promotion to a captaincy if the Union got in because of George's low seniority as it was Captain Bell's belief that maritime unions would seek labor contracts which favored applicants with the longest seniority for tugboat captain's licenses.

Accordingly I find and conclude that there is a failure of proof that Captain Bell on or about December 17, 1975, at the company dispatch office threatened an employee, identified at the trial as John George, that he would never get a chance to obtain a captain's license if the Union came in, as alleged in the paragraph of the complaint here under consideration. I will, therefore, recommend the dismissal of that allegation.

#### Paragraph 6(q) of the Complaint

The above paragraph of the complaint reads: "On or about the third week in January 1976, the exact date being presently unknown, on board the tugboat 'Admiral Leffler,' By Mark T. Flockhart informing an employee that Respondent had terminated an employee for union activity."

#### Findings

The heretofore oft-mentioned John Hill testified in support of the above allegation. As aforementioned Hill worked as a relief engineer on a number of Respondent's tugboats, but spent most of his brief employment with Re-

spondent as the regular engineer on the "Jeanette" under Captain Ritter. Some time in January 1976 he was transferred to the tugboat "Admiral Leffler" under Captain Tom Flockhart and Mate Jack Guiton who has served under Captain Flockhart for 3 of the 4 years he has worked for Respondent. I find from the record as a whole that Guiton and Captain Flockhart are personal friends as well as being crewmates. Guiton, who is given to coarse and obscene speech, is shown by the record to be intensely loyal to and supportive of Captain Flockhart.

Captain Flockhart by his own admission has a fierce dislike of both cats and "union people." Under cross-examination, Captain Flockhart admitted that he was given to the practice of throwing cats overboard from his vessels because, "I like them [cats] just about as much as I like union people."

Engineer Hill testified that at the day and time thereof here in question he had just been transferred to the "Leffler" and that after he had put away his gear at a place in or adjacent to the galley he sat down at the galley table to have some coffee where he found Captain Flockhart and Guiton already engaged in a private conversation over their coffee in which Hill did not participate.

Hill further testified that as he was sitting at the table listening quietly to the conversation between Flockhart and Guiton he overheard them say "that they weren't really worried about the union because they had already run off one man" because of his union activity. Under cross-examination Hill did not swerve from his testimony that he had overheard Flockhart and Guiton say that, "they had run off the union man" and that he was certain about the accuracy of that phrase because he had written it down and was quoting it "verbatim." At first Hill ascribed that phrase to Captain Flockhart, but as he probed his memory on the witness stand he stated on his own initiative that he was not sure whether Flockhart or Guiton made the remark but he was certain that one or the other had and that both had expressed agreement that one of their crewmembers had been "run off" their vessel because of his union activities.

Guiton called Hill's testimony "a god dam black-ass lie." In this connection, it is noted that Hill is a white person, not a black man. Guiton further testified that Captain Flockhart never at any time, "not at a bar, not at his home, or any other place" engaged him in a conversation "about any union personnel being fired from under him."

Captain Flockhart also flatly denied having a conversation with anyone at any time about "terminating or running ... a union man off."

As will be shown in a subsequent section of this Decision, Hill was himself discharged for alleged union activity not long after the above-alleged incident.

#### Discussion and Conclusions

As conceded by the parties, the issue to be resolved here is primarily one of credibility. Based mainly on demeanor evidence I fully credit Hill's testimony that he overheard either Captain Flockhart or Mate Jack Guiton say, "that they weren't really worried about the union because they had already run off one man" because of his union activity. I find this to be an admission that Captain Flockhart and

Mate Guiton had caused the Company to fire a crewmember because of his union activities in violation of Section 8(a)(1) of the Act.

Because of their totally unconvincing demeanor evidence, I specifically discredit the denials of Captain Flockhart and Mate Guiton that they made the above statement in the presence of Hill at the galley table. In addition I do not credit Flockhart's denial of his admission that an employee with union sympathies was run off his boat because Flockhart's own testimony shows that he hates "union people" as bitterly as he hates cats which he throws overboard from his boat into the sea. I find that a supervisor with that kind of intense hatred for union people was capable of terminating a union sympathizing employee and in fact did so, as shown by Hill's credited testimony.

As shown above I have also primarily discredited Guiton's denial of Hill's testimony because of Guiton's unconvincing demeanor. In addition I discredit Guiton's denial because the very vituperativeness of his denial indicates that he was trying to cover up the truthfulness of Hill's testimony. I also further discredit Guiton's testimony that Captain Flockhart never at any time, "not at a bar, not at his home, or any other place" engaged him in a conversation "about any union personnel being fired from under him" because I find it difficult to believe that Captain Flockhart would hide from a man as close to him as Mate Guiton his part in supporting the Company's well publicized antiunion campaign through reporting to management the union activities of any of his crewmembers which could lead to the discharge of such employees. I find it incredible that Captain Flockhart would take such action against a crewmember without telling his friend Guiton, the man second in command of Flockhart's boat.

For the above-stated reasons, I find and conclude that one day in January 1976 on board the "Admiral Leffler," the commanding officers thereof, Captain Mark T. Flockhart, better known as Tom Flockhart, and his mate, Jack Guiton, informed crewmember John Hill that Respondent had terminated an employee for union activity in violation of Section 8(a)(1), substantially as alleged in the complaint.

#### Paragraph 6(r) of the Complaint

The above-noted paragraph of the complaint, as amended, reads: "On or about January 16, 1976, in a letter given to employees by Vice President Morris restraining employees by setting forth Respondent's no-solicitation rule as alleged in subparagraph (a) above."

#### Findings

In support of the above allegation, General Counsel relies exclusively on that part of Respondent's letter to all of its employees of January 16, 1976, which reads as follows:

The labor unions are still trying to come on board our tugs and barges. One union has filed a complaint with the National Labor Relations Board hoping to force our Company to let him on board. This is a long term nationwide effort and there are previous court cases on it. Normally, companies don't have to let union repre-

sentatives on their private property. . . . [See G.C. br., p. 12.]

Aside from the above evidence, no testimony was offered by either General Counsel or any of the other parties herein pertaining to the above allegation.

At the hearing counsel for General Counsel stated that the above-quoted paragraphs from Respondent's letter of January 16, 1976, sent to all of its employees, "is merely a *restatement of the no access rule* which we deem to be unlawful." (Emphasis supplied.) This representation is in full accord with the allegation of the complaint itself here under consideration as quoted above which forthrightly states that the restraint therein described is in accord with the restraint set forth by "Respondent's *no-solicitation rule* as alleged in subparagraph (a) above." (Emphasis supplied.) For convenience the related text of subparagraph (a) of paragraph 6 of the complaint is restated below:

(a) At all times material herein, by maintaining in effect and enforcing an invalid no-solicitation rule denying access to their vessels to non-employee union representatives, at all times for the purpose of discouraging organizing activities among its employees.

Since as shown in an earlier section of this Decision, Respondent's no-solicitation rule was inaugurated as long ago as 1972 (see G.C. Exh. 2), I find that the only thing new in the conceded restatement of the Company's no-solicitation rule in paragraph 6(r) of the complaint here under consideration is that the Company was still maintaining the rule some 4 years after its inauguration as evidenced by Respondent's letter of January 16, 1976, to all of its employees.

I find from the record that there is full agreement between all parties that Respondent has at all times here material maintained and enforced the no-solicitation rule set forth in subparagraphs of 6(a) and (r) of the complaint as amended. However, the parties differ completely on the validity or lawfulness of Respondent's no-solicitation rule. General Counsel and the Charging Parties contend that the rule is unlawful. Respondent, on the other hand, contends for a variety of reasons that the rule is lawful. Ruling on the lawfulness of Respondent's no-solicitation rule is again deferred to a later section of this Decision in order that still other facts bearing on the lawfulness of the rule are first determined and found.

#### Paragraph 6(s) of the Complaint

The above-noted paragraph of the complaint, as amended, reads: "On or about January 16, 1976, in a letter given to employees by Vice President Morris *interrogating employees* about contact by union representatives and *soliciting information* about these activities." (Emphasis supplied.)

#### Findings

In support of the above allegation, General Counsel by his brief relies only on that part of the Respondent's aforesaid letter to all of its employees of January 16, 1976, which reads as follows:

If you have been contacted by telephone, mail, in person, or invited to meetings, we would appreciate knowing about this. [See G.C. br., p. 12.]

Aside from the above evidence, no testimony was offered by either the General Counsel or any of the other parties herein pertaining to the above allegation.

Respondent admits that under its letter of January 16, 1976, it has sought to interrogate its employees on matters involving the employees' Section 7 rights, but contends that under the Board's ruling in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), it has the right to engage in such interrogations for the purpose of preparing its defense of its no-solicitation rule on its vessels which the complaint alleges to be unlawful.

Although General Counsel in his brief states the "offending sentence" in Respondent's letter of January 16, 1976, to be only the above sentence, to wit, "If you have been contacted by telephone, mail, in person, or invited to meetings, we would appreciate knowing about this," I find that that sentence alone is misleading because taken out of context. The full text in which the above "offending sentence" appears reads as follows, with emphasis supplied to the "offending sentence" to show its proper perspective to the full text:

The labor unions are still trying to come on board out tugs and barges. *One union has filed a complaint with the National Labor Relations Board hoping to force our Company to let them on board.*<sup>16</sup> This is a long term nationwide effort and there are previous court cases on it. Normally, companies don't have to let union representatives on their private property. A hearing before an Administrative Law Judge of the NLRB is scheduled for February 17. Our Company will show that visits by union representatives, insurance salesmen, bill collectors, tourists, etc., would be an imposition on your individual rights, a deterrent to operational safety and efficiency, and an invasion of the Company's private property rights. You can help your Company in this case if you want to. Your cooperation will be entirely voluntary with no rewards and no penalties attached. If you would like to help, tell your Captain, Port Captain, Supervisor, or call me. We may want you to talk with our attorney but we will do nothing without your permission. Here's how you can help.

First, we will prove that the unions have enough information to contact us when arriving or departing from work, at home by telephone or mail, and at meetings which have been held by unions. In those cases we are able to make individual decisions about whether to listen to a union representative. *If you have been contacted by telephone, mail, in person, or invited to meetings, we would appreciate knowing about this.*

#### Discussion and Conclusions

In summary Respondent's defense of its no-solicitation rule barring union agents from solicitations on its vessels is

<sup>16</sup> The second sentence in the first quoted paragraph above has also been underscored to more clearly show the nature of Respondent's defense under *Johnnie's Poultry, supra*.

that under *Johnnies Poultry, supra*, Respondent has the legal right to interrogate its employees for the purpose of developing facts to show that its employees can be conveniently contacted by union agents at their homes, by telephone, or by mail, while arriving or departing from work on the Company's vessels, and at union meetings and that accordingly Respondent's "no-solicitation" rule to its vessels does not deprive the employees of their right to be informed of their Section 7 rights by union representatives.

The briefs of General Counsel and counsel for the Charging Parties do not address themselves to the question of whether Respondent has the right as a defense and justification of its "no-solicitation" rule to interrogate its employees on their claimed alternative availability to union solicitation while not aboard Respondent's vessels under the defense doctrine of *Johnnies Poultry, supra*, although Respondent at the trial put opposing counsel on notice that it would raise that defense.

As shown by Respondent's brief, *Johnnies Poultry, supra*, will allow employer interrogation only if seven separate safeguards are observed to minimize coercive impact of the interrogation. One of these safeguards is that, "the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature," which Respondent lists as Safeguard No. 4.

As Respondent's unvarying hostility to union organization is manifest from the numerous unfair practices Respondent has engaged in violation of Section 8(a)(1) of the Act as set forth above, it is at once evident that Respondent has not met Safeguard No. 4 and is therefore not entitled to the privileged interrogation it seeks under *Johnnies Poultry, supra*.

I find that Respondent's contention that, "Any assertion that any questioning was done in the context of employer hostility . . ." is "foreclosed by the absence of any evidence or even an allegation that any employees were ever questioned" pursuant to Respondent's request, is without merit. Just as the threat of employer reprisals for union activity is a violation of Section 8(a)(1) of the Act without proof that the threat was carried out, I find that the mere request by Respondent to its employees to question them about contracts they have had with the unions "by telephone, mail, in person, or by invitations to [union] meetings" is inherently coercive in nature and therefore unlawful.

Finally, I find and conclude that essentially the effect of what Respondent is seeking to do under its letter of January 16, 1976, is to get its employees to function as informers on the union activities going on to organize the Company and that this clearly unlawful act is so destructive of the rights guaranteed by Section 7 of the Act as to cancel out the dubious defense value of any information Respondent could get from its employees of alternative access to them by the Unions other than aboard Respondent's vessels.

From consideration of the entire record, I find and conclude that Respondent by its letter to employees of January 16, 1976, sought to interrogate its employees about contacts by union representatives and sought to solicit information about these activities, in violation of Section 8(a)(1) of the Act, substantially as alleged in the complaint.

## Section 6(t) of the Complaint

The above-noted paragraph of the complaint, as amended, reads: "On January 16, 1976, in a letter given to employees by Vice President Morris telling employees not to be talked into signing a union card, but requesting they inform their supervisor of such attempts."

## Findings

In support of the above allegation, General Counsel by his brief relies only on that part of the same Respondent's letter of January 16, 1976, which reads as follows:

Don't be talked into signing a union card. If you have a problem take it to your Supervisor. He will not ask for part of your paycheck. [See. G.C. br.. p. 12-13.]

Aside from the above evidence, no testimony was offered by either the General Counsel or any of the other parties herein pertaining to the above allegation.

## Discussion and Conclusions

Respondent in its brief states that it "readily concedes that an employer's solicitation of its employees' grievances when accompanied with an express or implied promise that the grievances will be remedied constitutes interference with the employees' Section 7 rights, in violation of Section 8(a)(1) of the Act." However, Respondent denies that it made any express or implied promises in the above quotation from its letter of January 16, 1976.

On the contrary I find that Respondent's urgent plea to its employees, "Don't be talked into signing a union card. If you have a problem, take it to your Supervisor. He will not ask for part of your paycheck," is clearly an implied promise by Respondent to resolve employee grievances without the cost of union dues—if the employee with a grievance would only refrain from seeking union representation.

I find this implied promise to be a clear violation of Section 8(a)(1) of the Act, substantially as alleged in the complaint.

*E. The Alleged Discriminatory Discharges Including One Transfer Prior to Discharge*

1. The findings

(a) *Captain Frank Mosso*

Frank Mosso, with residence over the years chiefly in the State of New York, is a licensed tugboat operator who has been a seaman for some 22 years.

In or about early July 1975 Mosso was hired over the telephone from New York by Vice President Morris to become one of Respondent's licensed tugboat operators or captains as they are called. At the time of the hiring, Mosso and Morris had never met or seen each other. Mosso, a family man with five children, commenced work for Respondent on July 24, 1975, and was terminated on October 10, 1975. At the time of his discharge he was still in his 90-day probation period. During Mosso's brief employment

with the Company, he saw and talked to Vice President Morris in person only two or three times.

The record is undisputed that all of Respondent's tugboat operators, including Mosso, are supervisors within the meaning of the Act. In one of Mosso's pretrial affidavits he admitted the supervisory nature of his employment as a captain with Respondent as follows:

When I am aboard the vessel out of the docks, navigating, I make all decisions that have to be made, I am in complete charge of the vessel, I am responsible for the lives of the crewmen and the property of the company, in this case the vessel, therefore I admit I am a supervisor.

Captain Mosso in turn worked under the heretofore mentioned Port Captain Robert L. Barr who has supervision of all of Respondent's captains.

On October 10, 1975, at 6 o'clock in the morning, Port Captain Barr arrived at Key West from the company headquarters at South Miami and walked aboard Captain Mosso's tugboat, the "H. W. Orr," as it lay moored to a dock at Key West where the tug arrived only 3 hours earlier. Finding Mosso asleep in his bunk Barr awakened him and asked Mosso to accompany him to the boat's galley. There Barr, pursuant to instructions from Vice President Morris, notified Mosso of his termination in the following words, "Frank, I'm sorry I have to do this, but I've got to terminate your services." Mosso replied that he had been "kind of expecting it" and asked, "Would you tell me why?" Barr told Mosso to talk to Mr. Morris and that Morris would give him "more information on it." Mosso pressed Barr for an answer to his question with the plea, "It might make it a little bit easier for me if you tell me what's going on?" Barr responded in effect that Mosso's discharge was due to information that there was a lot of union activity going on at Mosso's boat as well as generally "all around" the Company.<sup>17</sup>

After the above conversation, Port Captain Barr assumed command of the "Orr" and brought it back to headquarters in South Miami and Captain Mosso flew to Miami and then went on by cab northward to his home at Boynton Beach where at noon that same day he telephoned Vice President Morris for an explanation as to why he was being terminated.

Morris gave Mosso three reasons for his discharge. He mentioned first that the discharge was due to Mosso knocking over a U. S. Coast Guard navigational marker with his vessel some 3 days prior to his discharge, which could cost the Company around \$1,600 to replace. Morris also told Mosso that he was being discharged because he had been complaining too much about his work assignments. But it was finally agreed between Morris and Mosso that the principal reason for his discharge was Mosso's failure to comply with a company directive that all captains must report to management all union activity aboard their vessels that came to their attention.

It is undisputed that Morris told Mosso that, "I am firing you because you had a union delegate aboard your boat

<sup>17</sup> The above findings are based on the credited composite testimony of Captain Mosso and Vice President Morris and the absence of any contradictory testimony by Port Captain Barr.

and you did not inform me." In his pretrial affidavit Mosso admits that Morris had told him "that I had been fired for allowing a union delegate aboard my vessel" and that Morris told him that he "had to inform him of anything that happened aboard that vessel."

It is thus essentially undisputed that Mosso was discharged for his failure to report to management the presence of a union delegate aboard his ship.<sup>18</sup>

In their conversation Mosso sought to justify his failure to report the union delegate aboard his boat on the ground that "it was against my principles to inform and that anyway, I had believed it was against the Constitution and the laws to inform on the men who were trying to get a union to protect them." Morris, according to Mosso's testimony, replied that, "... in order to work for Belcher," Mosso "... would have to inform him [Morris] of any and all union activities aboard these vessels." The conversation between the two men ended with the termination of Mosso left standing, but with an indication from Morris that he would consider rehiring Mosso if he would agree to abide with the company rule requiring all of its supervising-captains to report to management any union activity aboard their vessels that came to their attention.<sup>19</sup>

The details of Mosso's failure to notify Vice President Morris about the presence of a union delegate aboard his assigned vessel, the "H. W. Orr," are as follows. On October 6, 1975, at around noontime, Captain Mosso docked the "Orr" and its barge for refilling at Port Everglades. After the vessels were moored, Mosso left the boat to make telephone calls at a pay station to the Company's nearby office to report his position and also to his wife. Upon his return to the "Orr" he saw a stranger on the boat making his way to its living quarters. The stranger was Wayland Burgess who introduced himself as the union representative of Local 33 of the United Marine Division of the International Longshoremen's Association, AFL-CIO. Burgess, who appears to have been a delegate from the International rather than a mere representative of Local 333, did not testify herein, with respect to his meeting with Captain Mosso aboard the "Orr" on October 6, 1975, although Burgess did testify on other issues herein.

Although the details of the meeting of the two men are not as clear as could be, Captain Mosso's credited and undisputed testimony shows that he enthusiastically greeted

Burgess whom he had never met before, that he told Burgess that he [Mosso] had been a member of the same union, International Association, for 21 years, and that after some 8 or 10 minutes of conversation aboard the boat, Mosso told Burgess, "For crying out loud, come on, get out of here before you get the crew in trouble."

As Burgess wanted to continue the conversation and Mosso agreed, they left the boat, went up the street to a restaurant, and "had a cup of coffee." Over their coffee, Burgess asked Mosso to sign a union pledge card. Mosso, after first protesting that it was not necessary as he was still a member in good standing of the Union and that, "These people know," nonetheless readily signed a union authorization card upon Burgess' plea that it would be helpful to him "as a [new] delegate, to show the office that he had been around the men. . . ."

Thus, it is an undisputed and admitted fact that a friendly meeting of about a 10-minute duration did take place between Captain Mosso and Burgess aboard the "Orr" on about October 6, 1975, and it is also an undisputed and admitted fact that Captain Mosso failed to report the incident to Vice President Morris or anyone else in management.

Later that same day *after* Mosso's early morning termination, Vice President Morris sent a letter to all of the Company's captains which contained the following orders:

You are expected *and required* to report *all* conversations you have regarding the union. You may *not* permit any union officials on board and you *must* report any attempt by union officials to go on board. [G.C. Exh. 3.]

There is a conflict of testimony as to whether Captain Mosso, *prior* to his termination, had knowledge of the company rule barring access to its vessels to union representatives and the ancillary company order requiring all captains to report any attempts by union officials to board its vessels.

I fully credit Vice President Morris' testimony that at a chance meeting he had with Mosso some 6 weeks after his hiring in July 1975, he briefed Mosso in the office of Port Captain Barr on company policy of "requiring their loyalty to the Company as supervisors, and our company policy . . . toward reporting information to the Company that he [Mosso] might legally come by in the performance of his duties." I infer and find that Morris' reference to Mosso's duties "toward reporting information to the Company" was a reference to "information" about union activities aboard Mosso's assigned vessels.

Based primarily on Mosso's nonconvincing demeanor, I discredit his testimony that prior to his termination he had no knowledge of any company rule requiring him to report to management any union activity aboard his assigned vessels that came to his attention. I also discredit Mosso's denial of the rule because his own *aforenoted* remark to union delegate Burgess after Burgess had been visiting with him on the "Orr" for some 10 minutes, to wit, "For crying out loud, come on, get out of here before you get the crew in trouble," clearly indicates that Mosso knew he was not allowed to have union representatives aboard his boat.

In any event I find it immaterial whether or not Mosso had knowledge at the time of his termination of the com-

<sup>18</sup> Even if the record is deemed to show that Mosso was also in part discharged for damaging a navigational marker and for complaining too much about his work assignments, it is well established that such justifiable reasons for his discharge would not give Respondent immunity for his discharge under the Act, if as shown here he was at least in part terminated for his alleged protected union activity in not reporting to management the presence of a union delegate aboard his vessel.

<sup>19</sup> The above findings are based on the credited individual testimony of Mosso and Morris and also upon their composite testimony. It does not appear from the record or the briefs of the parties that there is any dispute that at least one of the factors that led to Mosso's termination was that he was fired for failure to report a union delegate aboard his vessel. As will be shown in the Discussion below, the ultimate issue here is the essentially legal issue of whether Mosso as an admitted supervisor had immunity from discharge under the Act for disobeying the Company's rule requiring all of its captains in their capacities as supervisors to report to management any union activities that came to their attention which is generally referred to as the "no-solicitation" rule by the parties.

pany rule requiring him as a captain and supervisor to report the presence of a union agent aboard his ship because in my opinion under established law Respondent had the right to discharge Mosso as a supervisor for an infraction of the rule whether or not he had prior knowledge of the rule in the absence of a prior definitive and final finding that Respondent's alleged unlawful "no-solicitation" rule was in fact an unfair labor practice which Respondent vigorously disputes. It is once again noted that the determination of the lawfulness of Respondent's no-solicitation rule is deferred to a later section herein in order that all other alleged violations of the Act which have a bearing on the lawfulness of Respondent's no-solicitation rule, are determined beforehand.

#### Discussion and Conclusions

The central fact and finding on the issue here involved is that Respondent fired Captain Mosso because of his failure as a supervisor to report to management the presence of a union delegate aboard his vessel in disobedience of the duty imposed on him by Respondent's order, under its heretofore described no-solicitation rule as explained to Mosso in person by Vice President Morris. Thus in essence the record shows that Mosso was terminated for his failure to effectuate as ordered the Company's antiunion policies as set forth in its no-solicitation rule.

It is well established that a supervisor may be lawfully discharged for any reason, including prounion activities, except under circumstances as noted in the paragraph below. *N.L.R.B. v. North Arkansas Electric Corporative, Inc.*, 446 F.2d 602 (C.A. 8, 1971); *National Industrial Contractors, Inc.*, 225 NLRB 672 (1976); *Dexter Foods, Inc., d/b/a/d Dexter IGA Foodliner*, 209 NLRB 369 (1974).

An exception to the above principle is that a supervisor cannot be lawfully discharged for declining to commit an unfair labor practice. This exception prevails only where the evidence shows that the discharge interferes with, restrains, and coerces the rights of ordinary employees in violation of Section 8(a)(1) of the Act. Thus, in *N.L.R.B. v. Lowe*, 406 F.2d 1033, 1035 (C.A. 6, 1969), the court sustained the Board's finding that one of the reasons Supervisor Goudy had been discharged was for his "failure or refusal to oppose the Union in the manner and to the extent desired by the general manager." and accordingly enforced the Board's order for Goudy's reinstatement. Similarly, in *N.L.R.B. v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (C.A. 5, 1954), the court sustained the Board's findings that certain supervisors had been terminated for their failure to thwart union organizational efforts and therefore enforced the Board's order for their reinstatement.

Both the *Lowe* and *Talladega* cases and other cases involving the same problem deal with situations of *unquestionable* unfair labor practices, such as for example, instructions by a general manager to a general foreman to discover which employees were carrying on union activities, in obvious interference with the rights guaranteed employees under Section 7 of the Act.

On the contrary, the present case involves an alleged but deeply contested unfair labor practice charged to Respondent by reason of its no-solicitation rule whose lawfulness

or unlawfulness can only be determined on the basis of massive evidence, pro and con.

Under these circumstances I find that Captain Mosso's discharge does not come within the protective exceptions set forth in the *Lowe* and *Talladega* cases, *supra*, but on the contrary falls within the general rule that a supervisor can be lawfully discharged for any reason.

#### Conclusion

I, therefore, find that Captain Mosso's discharge was not an unfair labor practice and accordingly recommend the dismissal of that part of the complaint which alleges that Mosso's discharge was an unfair labor practice.<sup>20</sup>

#### (b) *John W. George*

John W. George, a highly articulate young man of 27, was hired by Captain Barr as a deckhand or ordinary seaman on September 25, 1975, and was discharged by Captain Barr on December 24, 1975, only a day before his 90-day probation period would have been over.

George's credited testimony on his prior sea experience shows that he started to go to sea when he was 18 years old, that during his military service with the U. S. Army he operated patrol boats in Vietnam for a year, that he received several Army ratings of "excellent" for his Vietnam services, and that subsequent to his discharge he worked on several research ships and a few tugboats and was also employed as a yacht mate for 1 year and as a yacht captain for another year.

George's credited testimony further shows that Captain Barr told him at the time of his hiring that he had a "good future with Belcher," based on the sea experience shown on his employment application.

George worked under the aforementioned Captain Bell on the tugboat "Mary Belcher" during most of the nearly 90 days of his employment with Respondent. The record shows that it was well known to both Captain Bell and Port Captain Barr that George had a burning ambition to become a licensed tugboat operator or captain as the position is called as soon as possible.

<sup>20</sup> The record contains testimony by Vice President Morris that Captain Tom Flockhart telephoned him from Port Everglades on October 8, 1975, to inform him that after he had tied up at Port Everglades, his "new Captain . . . had a union man on his boat and that he came down the dock and brought him to my boat and says, 'I think we need a union in this company.'" (Captain Mosso testified that union delegate Burgess was on his boat the "Orr" on October 6, not the 8th.) Whatever the relevance of Morris' above-quoted testimony is to the issue of the lawfulness of Mosso's discharge, I credit Morris' testimony that Captain Flockhart did convey to him the above remarks about his "new" but unnamed captain, but as the source of those remarks was Flockhart, I discredit the veracity of the information Flockhart sought to convey to Morris because I have found Flockhart to be an unreliable witness both by his demeanor and by his evident tendency to incur favor with the Company by flaunting his avowed hatred of unions. As noted above, Captain Flockhart is the witness who tossed live cats overboard from his boats because he disliked cats as much as he disliked unions. I also discredit Flockhart's remarks to Morris about the "new" Captain bringing union agent Burgess aboard Flockhart's boat because in Flockhart's own testimony he stated that on October 8 union agent Burgess boarded Flockhart's boat *on his own*. There is no mention in Flockhart's testimony that Mosso brought Burgess to him. (See discussion above under par. 7(b) of the complaint.)

Captain Bell's testimony shows that he (Bell) was one of several of Respondent's captains designated by the Company to train rank-and-file tugboat employees to become mates and captains. Bell admits that deckhand George has the capabilities for becoming a captain.

Captain Bell, who the record shows took a strong liking for George, encouraged George in his ambition to become a captain by giving him the opportunity to navigate the "Mary Belcher" under Bell's supervision in his free time as often as possible, by allowing him on one occasion to dock the boat, by giving him the opportunity to make entries on his captain's logbook, and by providing him with study material that would help him pass the U. S. Coast Guard's tests for a tugboat operator.

From the record as a whole I find that George utilized as much of his free time as possible on the wheelhouse navigating the "Mary Belcher," mostly in the presence of and with the express or implied approval and encouragement of Captain Bell, but with a tendency to lag at the wheel until the last moment when the Mate and Albury were expecting help from George on the deck.

Although as shown below that there was some grumbling on the part of one of the seamen, Broward Albury, aboard the "Mary Belcher" that George was spending too much time at the wheelhouse at the expense of his job as a deckhand I credit George's testimony that he took to the wheel on his free time only after he had carried out all his own assigned duties as a deckhand.

George's credited and virtually undisputed testimony shows that in the nearly 90 days of employment he had with the Company he had never been reprimanded, either orally or in writing, on his work as a deckhand. George's undisputed testimony further shows that only 7 days prior to his discharge on December 24, 1975, Captain Bell told a company dispatcher in George's presence that he (George) would have a good future with Belcher if no union got in because of union insistence on seniority which George lacked as a qualification for becoming a captain. (See above discussion of par. 6(p) of the amended complaint.)

As shown in a previous section of this Decision, Captain Bell openly admits that he learned of George's union activity on December 5, 1975, some 19 days prior to his discharge. That was the date when seaman Broward Albury tricked George into giving him a union authorization card by feigning interest in union representation and then reported the incident to Bell. The above findings further show that on that same day Bell called George to the wheelhouse and told him that he knew that he was passing out union cards and that he would not have a good future with Belcher if he continued handing out union cards. (See discussion above under par. 6(m) of the amended complaint.)

Previous findings on other issues also show that Captain Bell is extremely zealous in his efforts to aid Respondent in the enforcement of its antiunion policy. Summarized these previous findings show the following. In the fall and winter of 1975 Captain Bell told his engineer Robert Tyler on a number of occasions that if the Company discovered that an employee had signed a union card, it would find some pretext for his discharge. On October 18, 1975, Captain Bell interrogated John George, here involved, and seaman Broward Albury, about the union activities of engineer

Robert Tyler. On the same date of October 18, Captain Bell directly interrogated engineer Robert Tyler about his union sympathies. In the late winter of 1975 Captain Bell interrogated the same John George about the union activities of Captain Bell's relief engineer, John A. Hill. (See subpars. (h), (j), (k), and (l) of par. 6 of the amended complaint.)

As heretofore shown Port Captain Barr discharged George on December 24, 1975, 1 day before his 90-day probationary period was over. Barr admits that he had knowledge of George's union activity through Captain Bell and other sources prior to George's termination, but denies that George was discharged for that reason.<sup>21</sup>

Port Captain Barr testified that he terminated George because of complaints from Captain Bell and crewmembers aboard the "Mary Belcher" that George was lazy and caused additional work to be thrown on other members of the crew. To support these reasons for George's discharge, Respondent relies on the testimony of Captain Bell and the aforementioned crewmember Broward Albury. But Captain Barr conceded that when he and George recently served together for an 18-hour shift with Albury on the same tugboat "Mary Belcher" George helped out a lot because Albury was incapacitated.

Captain Bell testified that he had received complaints from crewmembers about George and that he had reported these complaints to Port Captain Barr. The complaints were that George "was in the pilothouse a lot of the time and was not on deck when they needed his help"; that "he wasn't active in helping on deck"; and that "he liked to stand around and talk a lot." Under cross-examination, Captain Bell could name only a single source of these complaints about George, the aforementioned seaman-cook Broward Albury.

Broward Albury worked on the "Mary Belcher" from September through December 1975, roughly during the same period that George worked on the same boat. Albury had the reputation of being a complainer. As a cook-seaman, Albury spent about 4 or 5 hours each day performing his duties as a cook for the crew. Albury's chief complaint about his fellow worker, George, are perhaps best expressed in Albury's own words as follows: "Well, he [George] was messing around the pilothouse just about all the time instead of getting out, you know, getting to work, and being around the pilothouse until the last minute." Albury's testimony shows that after he made such a complaint about George to Captain Bell, the Captain, then "... kept him out of the pilothouse quite a bit." Another complaint voiced by Albury at the trial about George was that "... he was all the time talking about the union."

Albury also complained to Port Captain Barr about George's alleged laziness.<sup>22</sup>

<sup>21</sup> Resp. br., p. 113 reads: "Captain Barr candidly admitted that he had received reports that Mr. George was active in union organizational efforts. . . ."

<sup>22</sup> Pursuant to the motion of Charging Party District 2, the testimony of Albury as to the work performance of George aboard the "Mary Belcher" was stricken on the ground that Albury had no supervisory authority over George. At the time the motion to strike was made, there had been no prior testimony by company witnesses who had supervision over George over his work performance but as such testimony did come in later, the order striking Albury's testimony is vacated and his testimony is received in evidence as corroborative testimony.

These complaints about George's work performance to Port Captain Barr reached him at or about the same time (December 5, 1975) that he had received reports that George was passing out union pledge cards aboard the "Mary Belcher." As heretofore noted, Captain Barr discharged George some 3 weeks later on December 24, 1975.

#### Discussion and Conclusions

The record shows that Respondent's alleged disaffection with George's work performance began on December 4, 1975, only 3 weeks before his discharge, when the Company first discovered that George had been passing out union pledge cards to his fellow workers aboard the "Mary Belcher." It was only after December 4 that the Company began to find complaints about George's work performance although from the date of his employment in September through the date of his discharge on December 24, 1975, George had never been reprimanded in writing or orally on his job performance.

The chief and apparently only complaints about George's work performance came from his coworker, Broward Albury, who as heretofore shown tricked George on December 4, 1975, into giving him a union pledge card under a feigned interest and then immediately reported it to Captain Bell. As shown Albury complained to Captain Bell that George was spending too much time at the wheelhouse and consequently did not volunteer to help him and the boat's mate in their work "until the last minute." Captain Bell's testimony shows that Albury's complaints to him about George was that George "was in the pilothouse a lot of the time and was not on deck when they [the Mate and Albury] needed" his help.

It was on the alleged basis of these reports on George's work performance that Port Captain Barr fired George for being "lazy" and causing additional work to be thrown on other members of the crew.

I find and conclude that Respondent's reasons for George's termination are purely pretextual and that the real reason for his discharge was his union activity.

It is obvious that if George spent so much time on the pilothouse so as to not make himself available to help his coworkers "until the last moment," it was Captain Bell's fault and not George's because Bell as captain of the tugboat had command of all hands aboard and a word from Bell could have banned George altogether from the wheelhouse. Actually George in his ambition to become a captain spent as much of his free time as possible at the wheel of the boat with the full approval and sanction of Captain Bell because it was part of Bell's responsibilities and job to train promising young seamen like George to become licensed tugboat operators. It was only after seaman Albury complained to Captain Bell that he and the mate were not getting the help they wanted from George that Bell took George off the pilothouse "quite a bit."

I find that George's discharge was precipitated only by the discovery of his union activity in passing out a union card aboard the "Mary Belcher" at the very time the Company was using every means possible to stop the Charging Party Unions from organizing its employees as is revealed in the numerous unfair labor practices set forth in the prior sections of this Decision.

Although the evidence shows that Captain Bell was quite fond of young George, the record shows that Bell's first loyalty was to the Company. Prior findings show that Bell had told his engineer that any one caught signing union pledge cards would be fired and that he had engaged in a number of unlawful interrogations into the union activities of his crewmembers. On December 4, 1975, the very day Bell learned that George had passed a union card to coworker Albury, Captain Bell confronted George about the incident and warned him that he did not have a good future with the Company if he continued handing out union pledge cards.

Bell reported the incident to Port Captain Barr who as shown above discharged George soon thereafter on the day before his 90-day probation period would have been over.

#### Conclusion

Upon the entire record I find and conclude that Respondent discriminatorily discharged John W. George because of his union activity in violation of Section 8(a)(3) and will recommend his reinstatement with appropriate back pay.

#### (c) *Engineer John A. Hill—Background*

The complaint alleges that Engineer John A. Hill was first discriminatorily transferred from the company tugboat "Jeanettee" to the company tugboat "Admiral Leffler" and later discriminatorily discharged because of his union activities in violation of the Act.

Based on the composite testimony of Hill and Port Captain Barr, I find that Barr ordered the described transfer.

Hill, age 26, has had a period of employment with the Company as a marine engineer for a period of about 5 months. He was hired by Port Captain Barr on September 2, 1975, and discharged by Vice President Morris on February 18, 1976, for his refusal to obey an order of Captain Mark T. Flockhart, more commonly known as Tom Flockhart as heretofore shown, to wash the dinner dishes aboard the "Admiral Leffler" on which Hill served as its chief engineer.

At the time of his hiring, Port Captain Barr was deeply impressed with young Hill's marine experience as set forth in his application, particularly as a marine engineer. As his father was a captain in the U. S. Merchant Marine, Hill had the opportunity to sail throughout his high school years. After high school graduation, he attended the deep sea marine academy of Charing Party, Marine Engineers Beneficial Association, at Baltimore, Maryland. Subsequently he worked on some of the larger tugboats of the Gulf Coast Transit Company. Just prior to his employment with Respondent, he served as first assistant engineer and chief engineer on ships cruising the Caribbean and South America. Although the engineer's job he applied for with Respondent does not require a license, Hill has a U. S. Coast Guard Third license, "unlimited, steam and diesel, unlimited horsepower," resulting from a 40-hour examination.

At the time he was hired Captain Barr told Hill that he was not accustomed to dealing with engineers of his advanced training and experience as a marine engineer as most of the Company's tugboat's engineers were mere

aff'd. 242 F.2d 497 (C.A. 2, 1957). See also *Arlington Hotel Company, Inc.*, 127 NLRB 736 (1960); *Alabama Textile Products Corporation*, 164 NLRB 88 (1967).

#### Hill's Transfer to Captain Tom Flockhart's Boat and his Discharge 8 Days Later

Possessed of the knowledge that Hill was a union activist, Respondent by order of Port Captain transferred Engineer Hill on February 1, 1976, from Captain Ritter's tugboat "Jeanettee," operating out of the home port of Miami, to Captain Tom Flockhart's boat, the "Admiral Leffler," operating out of the home port of Port Manatee in or near Tampa, Florida. Port Manatee on the west coast of Florida is about 250 miles from the Miami home port and about 265 miles from Hill's home in the greater Miami area. Hill had one prior brief tour of duty on the "Leffler" about 2 weeks earlier as an observer engineer to familiarize himself with the boat's engines and other mechanical equipment under the tutelage of one of the boat's chief engineers, William Trump, who served under Captain Pate who alternates 10-day tours on the "Leffler" with Captain Flockhart, as crews generally work 10 days and are off 10 days.

At the time of Hill's temporary transfer to the "Admiral Leffler," his regular boat, the "Jeanettee," was tied up for at least 2 months for extensive repairs at the Miami home port and the "Leffler's" regular engineer, Jack Fisk, was off work due to a knee injury. Upon Hill's temporary transfer to the "Leffler," Port Captain Barr hired a new engineer to take Hill's place on the "Jeanettee." I infer and find that Captain Barr transferred Hill to the "Leffler" rather than the newly hired engineer because of Hill's prior familiarity with engine room of the "Leffler" from a prior tour on that tugboat. Because of the "Leffler's" advanced age and deteriorating condition, the work of an engineer on the "Leffler" is more trying and difficult than on Respondent's other and more recent tugboats.

#### Captain Tom Flockhart's Reputation

The record shows that Captain Tom Flockhart by his own admission has an open and fierce dislike of all unions which he puts in the same category as his dislike of cats which, as shown in prior findings, he is given to throwing overboard from his tugboats while at sea. Port Captain Barr's testimony shows that Respondent knew of Flockhart's strong antiunion views as of the time it transferred union adherent Hill from his regular assignment as chief engineer on the "Jeanettee," to an assignment as temporary chief engineer on the "Leffler" under Flockhart. Prior findings show that Hill while thus temporarily serving under Captain Flockhart on the "Leffler" overheard a conversation in the galley between Flockhart and Jackson Guiton, his mate, that "they weren't really worried about the union because they had already run off one man" because of his union activity.

Hill's credited testimony further shows that in a conversation he had with Captain Flockhart on a wheel watch on the "Leffler," he told Flockhart that he had attended Charging Party MEBA's Deep Sea Academy, that he held a book in MEBA's District 1, and that, "... they represent-

ed a fair way that sailors should be treated and they represented the best sort of protection for the sailors as far as benefits. . . ." I find that this gave Captain Flockhart firsthand knowledge that Hill was a union adherent. Hill's credited testimony shows that Flockhart replied to his pronoun views with the comment that "He didn't like unions, he never liked unions and he wouldn't have a union man working on his boat if the union came in."

In addition to having strong antiunion views, Captain Flockhart had the reputation of being extremely autocratic, harsh, and tongue lashing with his crews. Flockhart in his testimony admitted that his superior, Port Captain Barr, "... has crawled my ass a couple of times about being too hard of a master on my men. . . ." Hill's credited testimony shows that Flockhart once told him that, "... the more miserable he kept his crew, the harder they worked."

#### Incident of Engineer Hill's Discharge Over His Refusal To Wash Dishes

On February 10, 1976, Captain Flockhart's tugboat, the "Leffler," and its leased barge were tied to a dock at Crystal River on the west coast of Florida, some 130 miles north of the boat's home port, Port Manatee, in or near Tampa. The entire five-man crew except Engineer Hill but including Captain Flockhart and his mate Guiton, spent the day chipping and painting the barge, preparatory for its imminent return to its lessor. While the rest of the crew was working on the barge, Hill worked at his usual duties in the engine room and at making repairs of electrical damage to an open wire box caused by rough seas coming through one of the doors of the engine room. The damage included the replacement of about 30 feet of wire which had burned out. In addition he voluntarily assumed and performed a number of tasks beyond his normal duties of an engineer, which included washing down the entire boat, scrubbing the deck, washing the used noon dishes and cleaning up the galley where the men eat. After the evening meal, cooked by Captain Flockhart, was over, the crew returned to their work on the barge and later Flockhart from the barge sent an order to Hill through Mate Guiton to also wash the dinner dishes and clean up the galley.

Two hours later Captain Flockhart and Mate Guiton returned to the galley for some refreshments. Finding that the dishes had been stacked in the galley sink but not washed and that the galley had not been cleaned, Flockhart had Hill summoned from his bunk and asked why he had not squared away the galley as ordered.

Hill replied that he was an engineer, that it was his job to take care of the engine room and that it was not the job of an engineer to wash the galley's soiled dishes.

Flockhart's testimony shows that he thereupon "told John Hill either to wash the dishes or to get the hell off of my boat." Hill admits he was given these alternatives but testified they were in Flockhart's more colorful language, "You either wash the dishes or get your ass off my boat" which I credit over against Flockhart's phrasing because of Flockhart's evident flamboyancy of speech as it comes through his testimony herein.

In reply, Hill told Flockhart that he would be glad to leave Flockhart's boat if he would arrange for his transpor-

tation back to the Tampa airport in the near vicinity of the boat's Port Manatee home base. Upon Flockhart's arrangement of the transportation, Hill after a 6-hour wait for a car got to the Tampa airport in the middle of the morning and from there flew to Miami where he resides. It is admitted that Hill was discharged by Captain Flockhart when he ordered him off his tugboat.<sup>28</sup>

It is undisputed that the main function of Respondent's tugboat engineers is the maintenance of the tugboat's engine room as without the proper functioning of the engines and other equipment therein, a tugboat is not navigable. It is also the subsidiary duty of Respondent's tugboat engineers to assist with deck duties including the handling of lines and standing wheel watch when the engineer can be spared from the engine room. These duties were explained to and accepted by Hill when he was hired by Port Captain Barr. Barr also told Hill that it was his duty to follow the orders of the captains he worked under, but the record is barren of any evidence that Hill was told that in his employment as a marine engineer he would also be required or expected to wash galley dishes. The record shows that normally this is the duty of the boat's cook or cook-deckhand or seamen when the boat does not have a regular cook as was the situation on Captain Flockhart's tugboat "Admiral Leffler."

The credited testimony of Respondent's Engineer Robert Tyler, heretofore mentioned in other connections, shows that within his knowledge of the past 4 years, first as a mate and then as an engineer, that there has never been a requirement on any of Respondent's vessels he has served for an engineer to wash dishes. The credited testimony of Hill likewise shows that in his experience as an engineer with Respondent and with the other companies, engineers are not expected to wash dishes.

I infer and find from the record that Captain Flockhart is the only captain among the 15 or so captains employed by the Company who directs his engineers to wash dishes. Flockhart's own testimony shows that his regular engineer, Jack Fisk, will wash dishes only when ordered but that he "will bitch and moan about it for two weeks after."

As heretofore shown Hill's discharge by Captain Flockhart took place on February 10, 1976, on the eighth day of his tour as chief engineer on the tugboat "Leffler," as the boat lay moored to a dock at Crystal River, Florida. On the day of his return to Miami, Hill contacted Port Captain Barr in person at the company offices in Coral Gables and told him about the disagreement he had had with Flockhart and his consequent discharge for his refusal as the chief engineer of the "Leffler" to comply with Flockhart's order to wash the crew's dirty dishes.

After hearing Hill's story, Port Captain Barr told him "he didn't see any problem" and that the matter "would be straightened out" after Hill got back from Jacksonville from his then scheduled marriage there on February 14.

Upon his return to Miami on February 17 after his marriage, Hill again contacted Barr who reassured him that "everything was going to be all right." Once before in a dispute between Flockhart and Hill on Hill's earlier tour on the "Leffler," Barr had upheld Hill's position that as the

tugboat's engineer Flockhart could not require him to help clean up an oil spill on the barge.<sup>29</sup>

But somewhat later that same day Barr summoned Hill to be at the Company's offices early the next morning for a meeting because Vice President Morris, a retired United States Navy Commandant and former Navy engineer, wanted to speak to him. Flockhart was not at the meeting. At the meeting Barr was silent except for his remark that Hill had been only temporarily assigned to Flockhart's tugboat the "Leffler." Morris asked Hill what had happened between him and Flockhart. Hill repeated his story that Flockhart had ordered him "to wash the dishes in the galley" and that he had "refused to do this because it did not go along with my job description or with my occupation. I'm not a dishwasher, I'm an Engineer."

Morris told Hill that in the event a crewmember and a captain did not get along he sometimes transferred the complaining crewmember to another boat under another captain but in the present case he was "going to have to back up" Captain Flockhart's discharge of Hill for his refusal to wash the crew's dirty dishes although he realized that Hill had not had any trouble with the other captains he had worked under. Thus, in the words of Hill he was twice discharged, "Off the boat, Captain Flockhart discharged me. From the Company, Mr. Morris discharged me."<sup>30</sup>

<sup>29</sup> The above findings are based on Hill's credited and undisputed testimony.

<sup>30</sup> The above findings are based not only on Hill's fully credited testimony that Assistant Vice President Morris had upheld his discharge by Flockhart solely on the ground of his refusal to carry out Flockhart's order to wash the dirty galley dishes but also by Mr. Morris' own corroborating testimony to the same effect which shows that he told Hill in his exit conference that he should have carried out Flockhart's order to wash the dirty dishes and complained "about it afterwards rather than to walk off the job, that he could not walk off the job and remain on the payroll, and that I had no alternative but to support the captain and assume that Mr. Hill had, in fact, quit his job."

After Flockhart discharged Hill for not washing the dirty dishes, he sought in communications with Mr. Morris to further justify the discharge with accusations that Hill's "screw-ups" through negligence or incompetence had caused costly damage to various electrical equipment on the "Admiral Leffler," but Flockhart volunteered that he does not "normally fire a man for his 'screw ups'" and that he discharged Hill solely because of his refusal to obey his order to wash the boat's dirty dishes.

Morris' testimony likewise shows that while he mentioned these negligent accusations to Hill at his exit conference, he told Hill as heretofore shown that he was sustaining his discharge solely because he disobeyed Flockhart's order to wash the galley's dirty dishes.

Notwithstanding these admissions that Hill was discharged solely for his refusal to wash the dirty dishes, Respondent spent days at the trial herein in an endeavor to prove that Hill's alleged predischarge negligence had caused serious damage to the electrical equipment on the vessel.

But in its brief Respondent again admits that the immediate and sole cause for Hill's discharge at the time it took place was his failure to obey Flockhart's order to wash the dirty galley dishes and that Respondent's accusations of predischarge negligence against Hill are "irrelevant for various reasons." (See Resp. br. at pages 85, 86, and 92.)

In any event I find from the record as a whole that the damage to the equipment of the tugboat "Leffler" which Respondent seeks to attribute to Hill's negligence was brought on by the dangerously deteriorated condition of the tugboat due to its old age.

This is best brought out by Hill's credited and undisputed testimony, to wit: ". . . The Leffler is very old and a very dangerous boat, if you don't know what you are doing in the engine room. And you have to be right on top of the engine because the machinery is antiquated. It is very old. It is very gentle. That's why you have to be careful. You can't start the engine and go lay down. You have to keep an eye on the oil pressure, oil circulation and water temperature because you never know when something is going to go on that boat." (Emphasis supplied.)

<sup>28</sup> For admission, see Resp. br., p. 98-99.

Respondent's written "Policy Statement" on terminations states, "It is our policy to make every effort to avoid unwarranted discharges." The statement then sets forth company rules, violations of which "shall result in disciplinary action according to the frequency, seriousness and circumstances of the offense." The rule for "Discharge" reads: "A permanent separation for cause initiated by the Company i.e., dishonesty, violation of company rules, unreported accident, rough handling of equipment." Under the heading of "Transfers," the policy statement states that the company favors transfers where possible "instead of a release and thus mutually benefit both the employee and the Company."

As the only reason given by Vice President Morris to Hill for his discharge was his refusal to comply with Captain Flockhart's order to wash the boat's dirty dishes. I find that his discharge was not for violations of any of the Company's published rules governing terminations. I further find that Hill's discharge was in conflict with the Company's own policy to effectuate transfers where it would be to the mutual benefit of the involved employee and the Company, as the record shows that Hill got along well with all the captains he had worked under except Flockhart and as the record further shows that Hill is an exceptionally qualified marine engineer.

In illustration of employees who have been disciplined short of termination, Port Captain Barr under cross-examination mentioned the case of a captain who because of his boat's involvement in serious accidents was given a temporary reduction in rating and the case of a tankerman who was disciplined by a short layoff, rather than by discharge, for his negligence in causing an oil spill on a barge.

#### Discussion and Conclusions

It is noted that there are two issues to be decided with respect to employee John A. Hill. The first is whether he was discriminatorily transferred from his regularly assigned position as chief engineer on the tugboat "Jeanette" based in Miami on the east coast of Florida, to the same position on Captain Tom Flockhart's "Admiral Leffler" based at Port Manatee in Tampa on the west coast of Florida, some 250 miles from Miami where Hill resided.

Although the record and the findings above leave no doubt that management had knowledge of Hill's union sympathies and open union activities at the time of his transfer to Captain Flockhart's tugboat, other countervailing findings compel the conclusion that Hill's transfer was not discriminatorily motivated in violation of the Act as alleged in the complaint. The record and findings show that Respondent had legitimate and bona fide business reasons for Hill's temporary transfer to Flockhart's tugboat stem-

Furthermore, based primarily on demeanor evidence, I credit Hill's non-culpable explanations for the mishaps and damage to the tugboat's equipment and discredit the blame Captain Flockhart seeks to put on Hill for the mishaps. As admitted by Respondent in its brief much of the testimony with respect to the mishaps are "only inexact propositions" and "peripheral . . . based on brief and superficial observation." I also credit Hill's denial of Mate Guiton's accusation that he fell asleep on a watch on his first tour on the "Leffler."

Whether Respondent's discharge of Hill solely on the ground of his refusal to wash the boat's dirty dishes was a pretext for his termination because of his union activities will be determined below under Discussion and Conclusions.

ming from the fact, among others, as found above that at the time of his transfer, Hill's regularly assigned tugboat "Jeanette" was moored at Miami for a period of at least 2 months for extensive repairs which obviously necessitated Hill's transfer to another tugboat to obviate a layoff. The record further shows that Hill's transfer to Flockhart's boat was nothing unusual because he had worked on seven other company tugboats as a relief chief engineer since his hiring and because he was hired with the understanding that he would be used as a relief engineer on other company boats in addition to his regular assignment on the "Jeanette" under Captain Ritter. I also find the Captain Flockhart's discharge of Hill for his refusal to wash the galley's dirty dishes was not a pretext for firing Hill for his union activities because the record shows as found above that Flockhart was also given to ordering his regular assigned but then ailing chief engineer to wash the galley dishes from time to time despite his vigorous protests. I find that Flockhart's order to Chief Engineer Hill to wash the galley dishes was a personal idiosyncrasy unrelated to Hill's prouinion views as previously disclosed by Hill to Flockhart.

Finally, Port Captain Barr's indirect assurances to Hill, prior to his final discharge by Vice President Morris, that his discharge "would be straightened out" shortly after his then imminent scheduled marriage took place at Jacksonville, Florida, and his further assurance to Hill after his marriage that "everything was going to be all right," are further convincing proofs that Barr did not transfer Hill to Captain Flockhart's jurisdiction under an arrangement for Flockhart to find some pretext to fire Hill to cover up his discharge for his union activities aboard the company tugboats. As shown in the above findings, Barr, some 2 weeks before Hill's discharge, had bailed Hill out on his first tour with Flockhart from Flockhart's improper order to clean up an oil spill on the boat's barge. I infer from this prior behavior of Barr that if he had had final authority he would again have bailed Hill out and ordered his reinstatement.

For all of these reasons I find that there has been a failure of proof that Hill was discriminatorily transferred to the "Admiral Leffler" because of his union activities in violation of the Act and accordingly will recommend that the allegation of the complaint here under consideration be dismissed.

The second issue here under consideration is whether the real reason for Hill's discharge some 8 days after his transfer to the "Admiral Leffler" was his union activities. On this issue the record compels the conclusion that Vice President Morris upheld Captain Flockhart's discharge of Hill for his refusal to comply with Flockhart's order to wash the dirty galley dishes, not because he believed that reason to be a justifiable ground for dismissal, but because it served as a handy, readymade pretext for upholding Hill's discharge because of his open, undisguised and flagrant union activity aboard the Company's vessels. As shown by the findings above it was inevitable that Morris had knowledge of Hill's union activities at the time he upheld Hill's discharge.

The record shows that in sustaining Hill's discharge, Morris brushed aside certain factors which under normal circumstances would have assured Hill of reinstatement. These include Hill's superior training and experience as a marine engineer compared to that of most of Respondent's

other engineers, the fact that Hill had a good reputation as a superior engineer among a number of the captains he had served prior to his troubles with Captain Flockhart, the fact that in the marine trade the duties of an engineer do not include dishwashing as Vice President Morris undoubtedly must have known from his experience as a former U. S. Navy engineer and commander, the fact that Captain Flockhart has a reputation for harsh treatment of his crewmembers, the fact that Hill's refusal to wash the galley's dirty dishes did not endanger or harm the boat's crewmembers or the boat's equipment, and the fact that Respondent has meted out only suspension without pay or transfers to other jobs for other employees who committed real offenses compared to Hill's refusal in his capacity as a marine engineer to carry out an affronting order to wash dirty dishes. Under these facts I find it incredible that Respondent terminated Hill for his refusal to obey an order to wash dirty dishes that should never have been issued in the first place. As shown above, if the decision about Hill's discharge had been left to Port Captain Barr, he would have reversed Flockhart's discharge and reinstated Hill.

In summary I find that Hill was discharged because of his union activities and not because he declined to carry out an order to wash the galley's dirty dishes. Accordingly Hill's reinstatement with backpay will be recommended.

*F. Additional Facts Pertaining to Availability of Reasonable Alternative Methods of Access to Respondent's Employees Other than Aboard its Vessels*

Earlier sections herein show that Respondent has, and strictly enforces, a no-solicitation rule, barring access to nonemployee union representatives to its employees aboard its vessels for the purpose of soliciting their union support. As shown above, under the Board's holdings in *Sioux City and New Orleans Barge Lines, Inc.*, *supra*, and *Sabine Towing & Transportation Co.*, *supra*, no-solicitation rules are unlawful where labor organizations, seeking to organize seamen, have no other reasonable alternative means of contacting such seagoing employees other than aboard the employer's vessels.

Respondent's sole defense of its own strictly enforce no-solicitation rule is that the organizing Unions here involved do have such reasonable alternative means of contacting Respondent's seamen employees when off duty and not at sea because Respondent's operations are confined solely to the waterways of the single State of Florida and its seamen all live within Florida, whereas in the *Sioux City* case such reasonable off-the-boat "access" to the seamen employees was impossible because the employer in that case operated through a number of States and its employees resided in 15 different States and that, similarly, "access" in the *Sabine* case to the seamen employees was likewise impossible because in that case the employer operated in the vast adjoining sea areas of the Atlantic, the Gulf of Mexico, and the Caribbean, and its employees resided in eight different States.

Respondent's contention that the Unions here involved have reasonable alternative access to its seamen employees when ashore must be measured against the following facts. As heretofore shown, Respondent's tugboats and barges op-

erate out of four home ports or bases. Two of these, Miami and Port Canaveral, are on the east coast of Florida, separated south and north of each other by some 200 miles. The other two ports, Port Manatee, in or near Tampa, and Tice, just north of Fort Myers, are on the west coast of Florida, separated north and south of each other by approximately 120 miles. The distance between Miami on the east coast and Fort Myers on the west coast is about 140 miles. The distance from Port Manatee on the west coast and the home port of Miami on the east coast is approximately 250 miles.

In addition to these home ports, Respondent's boats are frequently in numerous other ports for the purpose of either loading their barges or unloading the oil at the customer's facilities covering about two-thirds of Florida. These other ports are shown in Appendix C.<sup>31</sup>

Some of Respondent's home ports and the other loading and unloading ports are restricted against visitations of nonemployees for security reasons. For example, the home port of Miami which also serves as Respondent's administrative port, has a terminal building inside a fence through which a person must pass to get to the docks. Although anyone can drive through the gates of the fence to the terminal building, a person cannot get to the dock where the company boats are moored without stating his business when he got to the tug office in the terminal building.

Crew changes take place at the home ports but in the case of Port Canaveral they may also take place at the ports where deliveries are made. In the latter case besides other difficulties of access, union agents would have the additional difficulty of timing their visits to crewmembers to coincide with the crew changes. Crew changes normally take place at noon, but due to weather conditions or other causes, crew changes could take place hours later or even the next day. As heretofore shown Respondent operates 15 boats and 19 oil barges and employs about 100 nonsupervisory seamen. The operating boats operate 24 hours a day. Only half of the 100 seamen work at any one time as each boat has two full crews, one relieving the other. The men work 15 days in each month but not consecutively and are off the remaining 15 days. They are approximately paid for working 12 hours a day and for being available for any emergency for the other 12 hours.

Although Respondent has schedules for departures and arrivals of its boats and tugs, Engineer Hill's credited testimony shows that in actual practice such schedules are irregular. This factor among others makes it difficult for union agents to time their offshore visits with seamen to coincide with boat departures and arrivals for purposes of soliciting union support.

Hill's credited testimony further shows that there is a high rate of turnover among Respondent's seamen employees which further complicates the matter of union access to the Company's employees while still in Respondent's employment.

The record contains documentary evidence showing the

<sup>31</sup> The locations and other related access data of Respondent's other numerous ports used for purposes of either loading barges or unloading the oil at customer facilities, as described in Respondent's briefs, are hereby adopted as findings of fact herein but placed separately in Appendix C [omitted from publication] hereto in order not to unduly interrupt the flow of the narration of this section of the Decision.

towns but not the street addresses of 98 of Respondent's rank-and-file seamen. Their residences are scattered among 40 different towns or municipalities. Of the 98 employees, 62 live on the east coast, 34 live on the west coast, and 2 live in mid-Florida. The terms "west coast" and "east coast" are here used in a loose sense in that many of the towns or municipalities are not strictly on the Gulf of Mexico coast or on the Atlantic coast; for convenience they are said to be on the west coast or east coast solely because they are closer to the west coast than the east coast or vice versa although the towns may be quite some distance interior to their coastlines. The greatest number of such 98 residences—31—are in Miami which covers a 34 square mile area and has a population of 334,859 and a metropolitan population of 4,267,792.<sup>32</sup> It is inferred and found in the absence of any proof to the contrary that these 31 residences are scattered throughout most of the 34 square mile area of Miami. Six of Respondent's 98 seamen reside in Tampa and 5 of the 98 reside in St. Petersburg, but the remaining 56 residences out of the total 98 residences are for the most part in 1 and not more than 3 of the remaining 56 towns located all over the east and west coasts of Florida.

As heretofore shown both Local 333 and District 2, competing unions, sought to organize Respondent's seamen at the times here pertinent through their respective agents, Wayland Burgess for Local 333, and Gordon Spencer for District 2. Burgess worked alone in organizing Respondent's seamen except for such assistance as he received from Captain Mosso after Mosso's discharge. Spencer, who is the executive vice president of District 2, had the part-time assistance of four or five other national officials from other parts of the country and the help of John Hill after his discharge, in his efforts to organize Respondents.

Due to the widespread dispersion of the homes of the seamen here involved throughout the greater part of Florida, as shown above, I find and conclude from the record as a whole that union home visitations to the seamen is not and has not been a feasible, practical, or viable alternative or substitute for direct access to Respondent's seamen aboard its vessels. Among the factors involved in this conclusion is the fact that a union agent could never know in advance whether the seamen he planned to visit would be home at the time of his visitation and the fact that such home visitations would obviously be very costly and incalculably time consuming.

Access to Respondent's seamen by the handbilling of union literature at the docks has also presented serious and difficult problems to the Unions here involved. Among these difficulties are (1) the high cost of printing union literature; (2) the frequent inability of union agents to be at the docks at the precise times the seamen are there because of delays in scheduled boat arrivals and departures due to inclement weather or other emergencies; (3) the wastage of handbilling on wrong persons because not all Belcher employees wear identifying company insignia on their clothing; and (4) the inability of union agents to even get to a goodly number of the docks because they bar nonemployees from access thereto for security reasons.

<sup>32</sup> The population figures and the square mileage of Miami are based upon official notice from public records.

These difficulties are more colorfully described in the credited testimony of union executive Gordon Spencer whose testimony shows that the union people who pass out union material at the docks used by Respondent have, ". . . no way of identifying . . . if a person is an employee in the marine end of it or if he's a truckdriver or if he's even employed by Belcher. So they try to hand it out to everybody involved that's going in and out of these various locations in the hope that they give it to the people they want to get it to. And this . . . costs a lot of money you know, we put preaddressed envelopes, stamped envelopes out most of the time, and you might have to put 500 to 700 of those things out to get ten [union pledge] cards back at one handbilling or something like that."

In summary I also find from the record as a whole that the handbilling here involved was not a viable alternative for direct access to Respondent's crewmembers aboard the vessels they serve.

The record shows that insofar as the union representatives were able to make contacts at or near the docks with Respondent's seamen, these contacts were also generally minimally effective. They were largely ineffective because the employees by common knowledge knew how hostile the Company was to union organization and therefore commonly refused to be seen in any serious conversations with union agents for fear that such conduct if observed and reported to management might arouse suspicion of union activity and thereby jeopardize their jobs.

This fear of retaliation by discharge is more graphically revealed in Spencer's credited and undisputed testimony as follows, "Because of the atmosphere . . . the average Belcher employee that our people have come in contact with, to put it very simply," is that they, "are scared to death," of being fired if the Respondent found out that they were engaged or interested in organizing the Company.

Captain Mosso likewise witnessed this fear of retaliation in Respondent's seamen during the brief period after his discharge he was assisting union agent Burgess in his efforts to organize Respondent's crewmen. Mosso's credited and undisputed testimony shows that he and Burgess, ". . . just could not contact employees. People I worked with refused to talk to me." Mosso's credited testimony also shows that when he was attempting to speak to a crewman at the Port Everglades dock, the crewman told him, ". . . to get lost, the Captain's watching me."

For the same reasons of fear the Unions were also unsuccessful in organizing union meetings because as the credited testimony of Spencer of District 2 shows, Respondent's crewmembers were "scared to death" to attend union meetings for fear that their presence at such union meetings would get back to the Company and cause their discharge. More explicitly, Spencer's credited and undisputed testimony shows that, ". . . the Belcher employees don't want to meet like that at [union meetings] because they are, without a question, frightened, somebody is going to go back and say who was at a meeting. So we don't even attempt to try and have meetings of that kind any more."

As a result of the above-combined adverse conditions, the two Unions, in their efforts to reach Respondent's crewmembers by alternative methods of contact other than aboard the Company's vessels from which they are barred

by Respondent's no-solicitation rule, have attained only scanty and comparatively insignificant results despite their best efforts to organize Respondent's seamen.

Thus, Business Agent Burgess of Local 333, notwithstanding his month-long intensive followup of the predecessor's campaign to organize Respondent's seamen and after driving hundreds of miles, was able to speak to only 8 or 10 employees face to face and to obtain only about 25 mailing addresses of the seamen and no more than about 20 union pledge cards out of the 100 seamen employed by Respondent. Finding these results too meager for the time and effort involved to merit continuance, he returned to his other jurisdictional organizational duties which extend from Norfolk, Virginia, to New Orleans, Louisiana.

Executive Vice President Spencer of District 2 likewise suffered the same difficulties in his efforts to reach Respondent's crewmembers by means of access other than by direct access to the seamen aboard the Company's vessels which Respondent prohibits under its no-solicitation rule. In the 4-month period between December 1975 when District 2's organizational campaign started and the latter part of April 1976 when the campaign was temporarily suspended pending the outcome of the instant unfair labor practice proceeding, Spencer and his assistants were able to speak to only about 20 employees face to face and to get the home addresses of only about 50 of Respondent's crewmembers and only some 25 union pledge cards out of the 100 employed by Respondent, notwithstanding diligent efforts but with some interruptions to permit Spencer and his assistants to perform their other jurisdictional duties.<sup>33</sup>

Although Respondent does not allow any nonemployee union representatives aboard its vessels under its no-solicitation rule for alleged reasons of safety, the published rule itself states that captains are authorized to allow male visitors aboard their boats "who have bona fide business on board" and that even lady visitors are allowed aboard the Company's boats during authorized open-house functions. (See rule as set forth in full above from G.C. Exh. 2.) The rule also permits overnight visitors when authorized by an appropriate officer or manager of the Respondent. The credited and undisputed testimony of several employee witnesses collectively show that the girlfriend of a shipping agent spent an afternoon aboard one of Respondent's boats while it was at sea, that Captain Bell's son spent a night as part of a 2-day visit aboard his father's seagoing boat, that the wives of crewmen occasionally came aboard the tugboats to visit their husbands, that the wife and 3-year-old son of a captain visited his boat, and that even "a lady of the evening" had visited one of the company boats.

Under the above-undisputed facts I find and conclude that Respondent's no-solicitation rule is on its face and in practice discriminatorily in violation of the Act inasmuch as it bars such visitors as nonemployee union agents from

access to its boats while at the same time it allows such access to other nonemployee visitors who have no connection with the boat's business.

The record shows that District 2 here involved does not seek access to the Belcher boats while their crews are at work. The record further shows that it seeks access only during crewmen's rest or break periods or when the crewmen are merely laying around and not working. I infer and find that this is also true with respect to Local 333 and Inland Boatmen's Union.

The combined and fully credited testimony of Vice President Morris, Captain Tom Flockhart, and discriminatee John George show that Respondent's crewmembers have considerable free time or break periods. I find that in these periods union representatives could speak to the crewmen without any interference or interruptions with their work duties. The record shows that this free time is principally spent in the boat's galley. In the words of Captain Flockhart, ". . . the galley is a recreation area. That is where the television set is located. That's where the card games go on. That's where B.S. sessions go on." As stated by Mr. Morris the company captains, ". . . realize the rights of a person [crewmember] to discuss the subject he wants to during mealtime and breaks." The record shows that generally speaking Respondent's crewmembers have a minimum of 4 hours of free time in any 24-hour period after allowance is made for sleep time. I do not credit the testimony herein that the free time of the crewmembers is too unpredictable for a general order herein allowing union agents aboard Respondent's vessels to tell its crewmen what their unions have to offer.

Under the heading of "Operational Burdens" Respondent in its brief also contends that an order, ". . . requiring Respondent to permit access to its boats by nonemployee union organizers would be a difficult, if not totally impossible, order with which to comply." Under this heading, Respondent points out that its tugs and the huge barges they pull or shove are frequently tied to a dock in a "configuration" in which only the barge is adjacent to the dock for direct access from the dock whereas the tug is hitched to the barge either at its side or at its rear and in either case is surrounded by the sea and thus cannot be reached from the dock except by walking across the barge which means of access in effect is prohibited by the U. S. Coast Guard to "visitors" unless the barge "is empty and gas freed." This prohibition appears from a letter dated December 18, 1975, from the U. S. Coast Guard to Respondent. The letter states that a U. S. Coast Guard regulation with respect to tank barges ". . . requires a warning sign to be posted while the vessel if moored or anchored unless it is empty and gas freed, which reads:

WARNING  
No open lights  
No smoking  
No visitors.

But with respect to the matter of permitting nonemployees aboard Respondent's tugboat, the letter states that this "rests solely with the company" and that the "U. S. Coast Guard takes no position in this matter." It hardly needs noting here that the matter of the legality of the Company's

<sup>33</sup> District 2's efforts to organize Respondent appear to have been started in December 1975 by Spencer when he attempted to board the "W. H. Orr" to talk to the crewmembers but was stopped by Captain Kramp under the prohibitions of the Company's no-solicitation rule. (See earlier findings on this above.) District 2's organizational efforts were suspended as far as the record shows, within days after the publication of its campaign letter of April 28, 1976, in which it stated, "We Have Just Begun to Fight." (See Resp. Exh. 12.)

no-solicitation rule as it relates to union visitations aboard company vessels is one of the principal issues herein.

Although the record shows that while the above-described configuration of tugs and barges at a dock is frequent, the record also shows that other configurations in which tugs are tied immediately adjacent to the docks are about equally frequent and are thus easily accessible to visitors from the dock.

Although the evidence shows that normally the Unions' principal and best alternative access to the crewmembers is at crew changes at the docks, I find and conclude under the factual circumstances of this case that the face-to-face contacts at the docks were in fact, as shown by the findings, largely ineffective because of general employee fear that any show of union interest as evidenced by observed conversations with union representatives could lead to discharge because of the Company's well known hostility to unions and its vigorous counter antiunion campaign. As shown in the above-detailed findings, Respondent's antiunion campaign overflowed into massive violations of Section 8(a)(1) of the Act and into the unlawful discharges of union activists Hill and George in violation of Section 8(a)(3) of the Act and also to the discharge of Captain Mosso for his open and flagrant union sympathies although for technical reasons Mosso's discharge is found not to be unlawful.

Aside from the obstacles to the face-to-face contacts experienced by union representatives with the crewmen due to their fears of company retaliation, the conclusion that the Unions here did not and do not have reasonable alternative means of meeting the Company's crewmen is based on the hard facts of geography. Respondent has some 17 ports or places of call, including its four home ports, and these are scattered up and down the east and west coast of Florida and over the greater part of that State. A significant fraction of these places of call are closed to visitation of nonemployees for security reasons. Moreover, the record shows that union agents would have difficulty in timing their visits to the docks of the various places of call to coincide with the arrival of Respondent's vessels and their crewmembers because the scheduled arrivals and departures are not infrequently subject to grievous delays due to bad weather or other unexpected emergencies.<sup>34</sup>

The serious difficulties the union agents had in their attempts to see and talk to the crewmen at Respondent's nearly 20 ports or places of call is even surpassed by the difficulties they encountered in trying to make home contacts with the crewmen. This is because the homes of at least 98 of the crewmen are scattered over 40 different towns or municipalities on both the east and west coasts of Florida. The distance between Homestead on the remote southeast coast of Florida where two of Respondent's crewmen live, and Merrit Island on the northeast coast of Florida where two other crewmen reside, is about 600 miles.

<sup>34</sup> This is indirectly admitted by Respondent in its brief as follows: "Although the crew change schedules are for the most part uniform with regard to each boat, the departure and arrival times are less predictable. The loading and unloading time, type and temperature of the oil, weather and material failure can all operate to alter the actual departure and arrival times of the boats. . . . For the most part its [departures and arrivals] are within the range of a few hours." (Resp. br. p. 24.)

Stretched between Homestead on the south and Merrit Island on the north, there are 15 other home towns where for the most part no more than two or three crewmembers reside. The distance between Cape Coral on the southeast coast of Florida where only one crewman lives and Inverness on the northwest coast of Florida where another crewmember resides, is approximately 500 miles. Stretched between Cape Coral on the south and Inverness on the north there are 19 towns where for the most part only one crewmember resides. Although 31 crewmembers live in Miami within 5 to 10 miles from Respondent's Miami port out of which they presumably work, the seeking out of these crewmen for home calls is obviously a formidable task.

But even if the involved Unions had the manpower to make home calls on Respondent's crewmembers, such an alternative means of access would not be of much help to District 2, for example, because all it could amass with diligent effort was the home addresses of only about half of the crewmembers and it had no assurance that these prospects would be home when visitations were made.

Thus, while the geographical facts with respect to alternative access are not as severe herein as in the *Sioux City* and *Sabine* cases, *supra*, I find and conclude that they were of sufficient magnitude to render the alternative access in the present case ineffectual as substitutes for direct access to the crewmembers aboard Respondent's vessels.

The possibility of face-to-face contact at union-called meetings as an alternative access is also foreclosed for the reasons as shown in the above findings, of employee fears that their presence at such meetings could become reported to Respondent and cause their discharge.

With these three major sources of face-to-face contacts, to wit, at the docks, at the homes of crewmen, and at union meetings foreclosed, the remaining sources of access by telephone, mail, or in taverns or gin mills, need little comment. Obviously, all of these points of access even when combined are not a realistic substitute for direct access aboard Respondent's vessels. As Union District 2 had the mailing addresses of only about 50 out of the 100 crewmen, its organizational campaign by mail was *a priori* destined for failure as an alternative means of access to Respondent's crewmen. Similarly, I find that the gin mills under the evidence of record were the poorest and virtually totally ineffective alternative access to Respondent's crewmembers. *Sabine, supra*.

In summary, I find and conclude that, aside from Respondent's tugboats, none of the other sources of communication constituted effective or practical substitutes for the personal and direct contact with trained full-time organizers aboard the boats.

Counsel for General Counsel and for District 2 do not ask for an order requiring Respondent to change the configurations of their vessels so that they uniformly permit lawful visitations of the vessels from the docks which Respondent contends would be costly; they request only that Respondent's no-solicitation rule be found to be unlawful.

## Discussion and Conclusions

The final issue for determination herein, the one that most concerns the parties, is the question of whether Re-

spondent's "no-solicitation" rule, barring access to nonemployee union representatives to its vessels, is lawful in view of the Board's previous holdings in *Sioux City and New Orleans Barge Lines, Inc.*, 193 NLRB 382 (1971), and *Sabine Towing & Transportation Co., Inc.*, 205 NLRB 423 (1973), that similar denials of access to the vessels of those companies were unlawful because of the lack of reasonable alternative access to the employees therein involved.

As heretofore shown, Respondent's sole defense to its admitted and strictly enforced "no-solicitation" rule as it relates to unions is that because its maritime operations and the homes of its crewmen are all contained within the single State of Florida, contrary to the heretofore described far more widespread geographical operations of the employers in the *Sioux City* and *Sabine* cases, the Unions here involved, unlike the unions in the *Sioux City* and *Sabine* cases, did have and do have reasonable alternative means of access to Respondent's crewmembers other than by actual access to them aboard the Company's vessels.

In the present case, however, disposition can be made of the lawfulness or unlawfulness of Respondent's "no-solicitation" rule independently of and without any determination of the issue of whether or not the involved Unions herein had or have reasonable alternative means of access to Respondent's crewmembers other than aboard its vessels. In that connection I find and conclude as previously stated and here reiterated that Respondent's no-solicitation rule is on its face independently discriminatory in violation of the Act. This is because while the Company expressly allows "Lady visitors . . . during authorized open-house functions" on its boats, it denies similar selective access to other visitors, such as the union representatives here involved. Respondent's no-solicitation rule is also discriminatory because in actual practice Respondent allows such random visitors aboard its boats as the girlfriend of a shipping agent, the son of a captain for an extended overnight visit, and even "a lady of the evening," all of whom have obviously no relationship to the boat's business while at the same time it denies access to its boats to union representatives.

Coming back now to the originally stated issue of whether the involved Unions had and have reasonable alternative access to Respondent's crewmembers other than on the Company's vessels, I find and conclude from the record as a whole that the Unions did not and do not have such alternative access to the crewmembers for the reasons summarized below.

Accordingly, I find Respondent's no-solicitation rule unlawful under the Act and will recommend an order requiring Respondent to give the Unions reasonable access to its vessels for the purposes of consulting, advising, meeting, and/or assisting the employees on each of its vessels in the exercise of their Section 7 rights, including the selection of a bargaining representative.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

#### CONCLUSIONS OF LAW

1. Respondent Belcher Towing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 333, United Marine Division, Inland Boatman's Union, and District 2, Marine Engineers Beneficial Association, are labor organizations within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging John W. George and John A. Hill, Respondent violated Section 8(a)(3) and (1) of the Act.

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

#### REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action of the type which is conventionally ordered in such cases as provided in the recommended Order below, which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act. Because of the character and scope of the unfair labor practices found, I shall recommend a broad cease and desist order.<sup>35</sup>

Upon the foregoing findings of fact and the entire record in this proceeding, I make the following recommended:

#### ORDER<sup>36</sup>

The Respondent, Belcher Towing Company, Coral Gables, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Continuing or giving effect to its policy or rule or otherwise barring nonemployee union organizers from access to employees on its vessels for the purpose of soliciting their support during their free time, or for the purpose of consulting, advising, assisting, or otherwise communicating with them during their free time in regard to their rights to self-organization; provided, however, that nothing herein contained shall be construed to prohibit Respondent from making and enforcing reasonable regulations with respect to visits to its vessels by such nonemployee union representatives.

(b) Threatening employees with loss of their jobs if they engage in union activity.

(c) Indirectly threatening employees with loss of their jobs for union activity by passing out word in their presence of employees who had been discharged for union activity.

(d) Causing supervisors to engage in surveillance of union activities of their employees and instructing them to report the names of employees who pass union cards, talk union, or spread union literature.

<sup>35</sup> *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426 (1941); *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4, 1941); *Consolidated Industries, Inc.*, 108 NLRB 60 (1954), and cases cited therein.

<sup>36</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Interrogating employees about their union activities or of the union activities of other employees.

(f) Promising, directly or indirectly, to resolve grievances without the assistance of union representatives.

(g) Discouraging membership in Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO; Inland Boatmen's Union; and District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO, or any other labor organization, by discharging employees or in any other manner discriminating against them in regard to their hire or tenure of employment.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer John W. George and John A. Hill immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each whole for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he would normally have earned from the date of his discharge to the date of such offer of reinstatement, less his net earnings during said period (*Crossett Lumber Company*, 8 NLRB 440), said backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest thereon at the rate of 6 percent per annum (*Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)).

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under this recommended Order.

(c) Post at its places of business in Florida and in the galleys of all of its vessels copies of the attached notice marked "Appendix."<sup>37</sup> Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by the Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that, as to all allegations of the complaint not specifically found to have been in violation of the Act, those allegations shall be dismissed.

<sup>37</sup> In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."