

UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

In the Matter of:

BUCHANAN MARINE, L.P.

Employer/Petitioner,

and

Case No. 29-UC-570

LOCAL 333, UNITED MARINE DIVISION,  
INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION, AFL-CIO,

Union

**REQUEST FOR REVIEW**

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Dated July 15, 2010

## **INTRODUCTION**

Buchanan Marine, L.P. (“Buchanan” or the “Employer”), by its attorneys, The Law Office of Craig L. Cohen, LLC, and in accordance with Section 102.67 of the Board’s Rules and Regulations, requests review of the Regional Director’s June 2, 2010 Decision and Order (“Decision”) finding the Employer’s tug boat captains are not supervisors within the meaning of the Act. This Request for Review is made for the following reasons: (1) the Decision of the Regional Director raises substantial questions of law or policy because of its departure from officially reported precedent and (2) many of the Regional Director’s findings regarding substantial issues are clearly erroneous and prejudicially affect the Employer’s rights.

## **NATURE OF THE CASE**

On February 25, 2010, Buchanan filed a Unit Clarification Petition (“Petition”) in Case No. 29-UC-570 seeking to clarify the recognized bargaining unit to exclude the job classification “captain” because captains employed by Buchanan are, and have always been, statutory supervisors within the meaning of Section 2(11) of the Act. The Union argued the captains were, and should remain, bargaining unit employees. A hearing before a hearing officer from Region 29 to consider the Petition and the issues raised therein was held on March 15 and 16, 2010.

The Regional Director concluded the Employer had not met its burden of proving that captains are supervisors as defined in Section 2(11) of the Act. Buchanan requests review of this finding.<sup>1</sup>

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<sup>1</sup> For ease of reference the Employer will refer to the page number(s) of the Decision as “Dec. at \_\_\_” and transcript pages from the Official Report of Proceedings in 29-UC-570 as “Tr. at \_\_\_”. Employer exhibits submitted into evidence during the hearing in Case No. 29-UC-570 shall be referred to as “Er Ex \_\_\_”. Union exhibits submitted into evidence during the hearing in Case No. 29-UC-570 shall be referred to as

## ARGUMENT

### I. A Substantial Question of Law and Policy Is Raised Because Of the Regional Director's Departure From Officially Reported Board Precedent

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

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

Pursuant to this definition, employees are statutory supervisors if they hold the authority to engage in any of the aforementioned functions, their exercise of such authority requires the use of independent judgment, and their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *American River Transportation Co.*, 347 NLRB 925 (2006). This section is to be read in the disjunctive. Any one of the indicia listed above found to exist with respect to the duties exercised by Buchanan's captains, is sufficient to find their supervisor status under the Act. See, *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). The burden of proving supervisory status rests on the party asserting it. *Kentucky River*, 532 U.S. at 711-713. Supervisory status may be established where the putative supervisor has the authority to either perform a supervisory function or to effectively recommend same. *Croft Metals, Inc.*, 348 NLRB 717 (2006).

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"U Ex \_\_\_\_". Exhibits jointly submitted by the Employer and the Union during the hearing in Case No. 29-UC-570 shall be referred to "J Ex \_\_\_\_". Employer Exhibit 2-10 pages, Exhibit 3-7 pages, Exhibit 4-3 pages, Exhibit 5-6 pages, Exhibit 8-1 page, Exhibit 10-3 pages, Exhibit 11-4 pages, Exhibit 12-9 pages, Exhibit 13-12 pages and Joint Exhibit 1-21 pages have all been submitted electronically with this Request for Review. Due to the size of Employer Ex 1, a 500-page operations manual, it is being sent by overnight mail to the attention of Associate Executive Secretary Henry S. Breiteneicher. I was also advised by the Associate Executive Secretary it was not necessary to reproduce and forward a copy of the Regional Director's Decision and Order or the transcript of the Official Report of Proceedings Before the National Labor Relations Board.

In light of the foregoing, Buchanan submits the Regional Director erred in departing from officially reported Board precedent in failing to find the captains at issue in this case are statutory supervisors. Specifically, of the twenty-eight cases cited by the Regional Director in his Decision, the overwhelming authority relied upon stems from precedent developed in the health care rather than the maritime industry.<sup>2</sup> To the extent the Decision even references those cases which have reviewed the supervisory status of captains (or pilots) in the maritime industry, it would appear the Regional Director has gone to great lengths to minimize or distinguish current Board precedent in this area, certainly with respect to the supervisory status of the captains in this case.

A. The Decision Fails to Adhere to the Precedent Set Forth in *American Transportation Co. Establishing the Criteria to Determine Supervisory Authority in the Maritime Industry*

While the Regional Director cites *NLRB v. Kentucky River Community Care* supra and *American Transportation Co.* supra for the general proposition upon which the Board will rely to determine supervisory status,<sup>3</sup> the Decision fails to adhere to the precedent set forth in this latter 2006 maritime case holding that pilots, a job classification subordinate to the position of captain, were statutory supervisors based upon criteria virtually indistinguishable from the facts present herein. Moreover, of the five “maritime” cases referenced by the Regional Director, it would appear the Decision places the greatest reliance on *Chevron, USA, Inc.*, 309 NLRB 59 (1992). This 1992 decision, while not overruled, is a departure from current Board precedent on the issue of the supervisory status of a pilot in the maritime industry.

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<sup>2</sup> Eighteen of the twenty-eight cases cited by the Regional Director in his Decision are health care related cases.

<sup>3</sup> Dec. at 18-19

In contrast, *American River Transportation* is only referenced twice in the Decision.<sup>4</sup> Indeed, the second reference appears in a footnote on page 33 wherein the Regional Director states “[t]hat the pilots’ orders are based on their extensive training, experience and skill as navigators is not inconsistent with their exercise of independent judgment in directing and assigning the work of the crew.” Contrary to the Regional Director’s ultimate finding, this observation would appear to support the evidence presented by Buchanan during the hearing that its captains’ are statutory supervisors.<sup>5</sup>

In *American River Transportation* the Board reversed the decision of the Administrative Law Judge and found the employer’s towboat pilots were statutory supervisors within the meaning of Section 2(11) of the Act based on their authority to responsibly direct and assign employees. “They use independent judgment in exercising that authority, and they do so in the interest of the employer.” *Id.* at 927. In that case, the supervisory status of the employer’s captains was neither challenged nor in dispute.

As noted above, the pilot classification in *American River Transportation* was subordinate in hierarchy to the captains’ position – the job classification at issue in this case. As in the instant case, the employer’s towboats operated 24 hours a day, seven days a week. While the members of the crew were assigned to a particular boat by the crew dispatcher, as in the present case, the captain has the authority to assign duties to the crew. (Tr. at 206, 230, 236) As in the present case, the captain is in complete command of all phases of the vessel operation at all times. (Er Ex 1, Tr. at 206, 237) The pilot, like

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<sup>4</sup> Dec. at 19 and 33

<sup>5</sup> Er Ex 1, the Employer’s Safety Management System, details the duties and responsibilities of all Buchanan employees while working on a Buchanan vessel. The qualifications necessary to be a captain include a U.S. Coast Guard license and a minimum of six years experience. Both captains who testified during the hearing had extensive training, experience and skill prior to becoming captains which exceed the Employer’s minimum requirements for such a position. Tr. at 179-180, 223-224.

the captain in this case, is responsible for the safe transport of the vessel, cargo and crew. Like the pilots in *American River Transportation*, Buchanan's captains instruct the deckhands regarding work which needs to be performed and have the authority to assign tasks to employees. (Tr. at 214, 218, 251). As in *American River Transportation* during the course of a voyage Buchanan's captains use independent judgment "to determine that the assignment of certain tasks to the crew is necessary for the safe passage of the boat and tow". Id. at 927, (Tr. at 236). Buchanan's captains do not check with anyone else before ordering such action to be taken. That the Employer's captains' instructions may be routed through the mate while the captain is not actually on watch does not diminish the captains' responsible direction of the crew inasmuch as the instructions remain those of the captain. (Tr. at 203, 211, 256); *American Commercial Barge Line Co.*, 337 NLRB 1070, 1071 (2002).

Examples of a captain's exercise of such authority evidenced through the testimony of the 2 Buchanan captains who were called by the Union to testify during the Unit Clarification hearing include directing a deckhand to take a pump out to a scow (barge) in tow, inspect it and pump it out if required (Tr. at 218), directing anyone of the crew to perform an initial safety inspection (Tr. at 231), directing a deckhand to ride a barge and act as a lookout if visibility is poor (Tr. at 236), assigning a lookout, including someone who is not already on watch when the captain determines it is necessary (Dec. at 7) and overseeing the work of the deckhands in making up a tow (Tr. at 264). Although the Decision states "the record evidence indicates that the crewmembers know what they are supposed to do" (Dec. at 7) none of this work is self-initiated by the deckhands absent assignment and direction from the captain.

Additional evidence regarding a captain's exercise of supervisory authority is clear from the October 29, 2005 warning issued by Captain Lo Piccolo to deckhand Frank Bonislowski for violating company policy, failure to follow instructions, insubordination and insolence because Mr. Bonislowski refused to follow the captain's instructions to "sound scow #208 at Bridgeport Blackrock".<sup>6</sup> (Er Ex 8 - first page). Further, the unrebutted testimony of Steve Mitchell, Buchanan's Sustainability and Business Development Manager, established that Captain Rod Bissen had the authority to responsibly assign and direct engineers to raise the tire fender surrounding the perimeter of the tug and would not put to sea until this work was completed to his satisfaction. (Tr. at 54).<sup>7</sup>

Other indicia relied upon by the Board in *American River Transportation* also present in the instant case includes the fact that the Employer's captains receive better benefits,<sup>8</sup> are the highest paid personnel on the boat. (see, J Ex 1,- page 7 - Wages) All the Employer's captains must be licensed by the Coast Guard to operate uninspected towing vessels (the vessels at issue in this proceeding) and must follow the many Coast Guard regulations or risk loss of license and employment. (See generally, Joint Ex 1, Er Ex 1, Sections A-H and Er Ex 13).

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<sup>6</sup> That Captain Lo Piccolo issued the warning in his supervisory capacity is further evidenced by his signing the document on the line stating "Supervisor Signature".

<sup>7</sup> The incident involving Captain Bissen is analyzed in greater detail in Section II. B. of this Request for Review.

<sup>8</sup> Captains are the only seamen eligible to participate in the Employer's Bonus Incentive Program. A captain who meets the incentive criteria is eligible to receive additional compensation of up to \$900 a month. (Tr. at 155) In this regard, the Regional Director's Decision also failed to consider this critical "secondary indicia" of supervisory authority. (See *infra* page 12)

The Board's finding that pilots in *American River Transportation* were statutory supervisors "was consistent with the approach taken by the Board in several post-Kentucky River pilot cases". Id. at 927. See, *Ingram Barge Co.*, 336 NLRB 1259 (2001); *Alter Barge Line, Inc.*, 336 NLRB 1266 (2001); *American Commercial Barge Line Co.*, supra; *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543 (2006). Based on the pilots' authority to responsibly direct and assign work to the towboat crew, the Board in *American River Transportation* found it unnecessary to examine any other Section 2(11) indicia of supervisory authority. To the extent other Board members did not concur with the rationale expressed by the majority in *American River Transportation*, nevertheless, all agreed in the result "because the material facts concerning the supervisory status of Respondents pilots cannot be meaningfully distinguished from those in current Board precedent involving the same pilot classification in which supervisory status was found." Id. at 928.

Certainly, where the Board has found without exception since 2006 that pilots, a position subordinate to that of captain, are statutory supervisors within the meaning of the Act, *a fortiori*, that rationale must be applied to the captains in the instant case. This is true because Buchanan's captains are senior in classification to pilots and the material facts relied upon by the Board in making this determination cannot be meaningfully distinguished from facts present herein.

B. The Regional Director Erred in Finding There was Insufficient Evidence to Establish Buchanan's Captains are Accountable for their Direction of Employees

Relying on health care rather than maritime case law, the Regional Director also determined the Employer's tug captains lacked supervisory authority because there was

insufficient evidence to establish the captains are “accountable” for their direction of employees aboard ship. (Dec. at 36). Buchanan respectfully submits this determination is also a departure from officially reported Board precedent in maritime industry cases which have considered this issue.

In *Oakwood Health Care* 348 NLRB 686, 692 and *Beverly Enterprises – Minnesota, Inc., d/b/a Golden Crest Healthcare Center*, 348 NLRB 727, 731, the Board, consistent with the *post-Kentucky River* line of cases, determined the phrase in Section 2(11) “responsibly to direct” includes the element of accountability. “The person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 692.

*Oakwood Health Care* finds support for this proposition in part, based on the maritime decision in *American Commercial Barge Line Co.*, *supra* at 1071.<sup>9</sup> In that case the Board determined accountability would be established “[i]f a crew member does something wrong during the pilot's watch, such as causing the tow to break loose, the pilot is held responsible. The consequences of an error in the pilot's judgment can be catastrophic, including a collision causing loss of life or a chemical spill.” *Id.* at 1071.

In an effort to focus on the specific details of the captains’ accountability in relation to their direction of employees aboard a Buchanan vessel, the Regional Director has disregarded the larger reality regarding the consequences of a captains’ error in judgment. As the Second Circuit noted in *Spentonbush/Red Star Co. v. NLRB*, 106 F3d 484, 489 (2d Cir. 1997) (internal quotations omitted)

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<sup>9</sup> See *Oakwood Health Care*, 348 NLRB at 690, fn. 37

Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey.

He must maintain proper order and discipline on board at all times. He shall be held responsible for any disorderly conduct or violation of the law or of rules covered in the manual, which might have been prevented by proper administration and supervision on his part. He shall not permit any alcoholic beverages, illegal drugs or other intoxicants on board his vessel at any time.

By law and Buchanan policy, the captain has overall accountability for everything that happens on his vessel including his crew and all operations. (Er Ex 1, *also see*, 46 CFR Section 10.104) Just because actual events which would lead to adverse consequences and in turn, establish “accountability” (which the Regional Director claims is lacking in the record) have failed to actually occur in connection with a captain’s assignment and direction of work to other Buchanan crewmembers, does not make the captain any less accountable or the potential consequences he faces any less real or severe. In this regard, and as the Decision correctly notes, accountability for the purposes of finding “responsible direction” may also be established through evidence of prospective consequences to the terms and conditions of employment of the putative supervisor. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); (Dec. at 35 fn. 60).

In the instant case, the Regional Director ignored the record evidence of the prospective adverse consequences the Employer’s captains would suffer in the event a crew member did something wrong. One example of such prospective adverse consequences would be the suspension of a captain’s license in the event a deckhand failing to properly secure a tow hawser line. (Dec. at 35, fn 60) This was the precise

example relied upon by the Board in *American Commercial Barge Line Co.* and the Second Circuit in *Spentonbush/Red Star Companies* supra. to establish the supervisory accountability of the pilot and captain, respectively, in those cases. In neither case however, was there record evidence such an incident actually occurred.<sup>10</sup> This notwithstanding, the Board and Second Circuit, both determined that the mariners' being subject to such prospective adverse consequences established their supervisory authority.

Further, whether the consequences of a deckhand error were imposed by law, or by the employer's rules and regulations, made no difference to the Board in finding accountability. *Id.* at 1071. This latter rationale was also adopted by the Second Circuit in *Spentonbush/Red Star Companies* in rejecting the Board's narrow distinction between responsibilities imposed on the captain either by law or by the company. *Id.* at 490.

Specific examples of a captain's accountability and the potential adverse consequences he faces in the event a crewmember fails to follow his directions include the following which are set forth in Buchanan's Safety Management System and the Code of Federal Regulations:<sup>11</sup>

- the captain's potential loss of license for a deckhands' failure to properly secure a tow line (Dec. at 35, Tr. at 58);
- the captain's potential loss of license in failing to properly implement and enforce Buchanan's Vessel Standard Operating Procedures (Er Ex 1 – Enclosure 3, Section A);
- the captain's potential loss of license in failing to ensure crew members follow Buchanan's garbage pollution procedures (Er Ex 1 – Enclosure 1, Section B);

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<sup>10</sup> *Spentonbush/Red Star Companies*, 106 F3d at 490, 491; *American Commercial Barge Co.*, 337 NLRB at 1071.

<sup>11</sup> In addition to Er Ex 1, Er Ex 13 also references the various sections of the United States Code of Federal Regulations establishing a captains' accountability and potential adverse consequences he may be subject to.

- the captain's potential loss of license in failing to ensure Buchanan's crew members follow Marine Sanitation Policy and Procedures (Er Ex 1 – Enclosure 2, Section B);
- the captain's potential loss of license in failing to ensure compliance with the Vessel Oil Transfer Policy and Procedure (Er Ex 1 – Enclosure 3, Section B);
- the captain's potential loss of license in failing to ensure the mate follows his directives and operates the vessel in a safe and prudent manner (Er Ex 1 – Enclosure 2, Section C);
- the captain's potential loss of license in failing to ensure the mate follows the captain's directives while navigating the vessel consistent with Buchanan's Bridge Transit Policy (Er Ex 1 – Enclosure 3, Section C);
- the captain's potential loss of license in failing to ensure the mate follows the captain's directives in making entries in the Deck Log (Er Ex 1 – Enclosure 7, Section C);
- the captain's potential loss of license in failing to appoint proper lookouts while on or off duty. With respect to the latter, a mate may not decrease (but may increase) the number of required lookouts (Er Ex 1 – Enclosure 8, Section C);
- the captain's independent authority to reduce the size and configuration of any tow to meet the requirements of sound navigational practices (Er Ex 1 – Enclosure 9, Section C);
- the captain's independent authority to determine appropriate operation requirements in the event of restricted visibility or heavy weather conditions (Er Ex 1 – Enclosure 11, Section C);
- the captain's potential disciplinary consequences in failing to ensure all crewmembers comply with Buchanan's safety procedures and regulation (Er Ex 1 – Section D and Enclosure 1, Section D);
- the captain's responsibility to conduct formal safety meeting with crewmembers at least once a week (Er Ex 1 – Enclosure 2, Section D);
- the independent authority to establish, post and maintain "Station Bills" (Er Ex 1 – Enclosure 2, Section E); and
- the captain's responsibility to conduct on board evaluation of all new hire personnel which assessment shall include the individual's seamanship,

safety, skills, motivation, cooperation and other aspects of the attitude (Er Ex 1 – Enclosure 1, Section H)

In addition to the above specific guidelines detailed in the Employer’s Safety Management System (Er Ex 1), the various forms the captain is required to execute evidence his overall accountability for each and every facet of operations, including his direction of employees while on the vessel.<sup>12</sup> As the foregoing examples demonstrate, the Regional Director’s focus on the absence of actual adverse consequences having impacted Buchanan’s captains rather than the potential adverse consequences they face as a result of the conduct of crewmembers under their supervision does not negate the captains’ accountability. To the contrary, the fact that no Buchanan captain has suffered any adverse consequences based upon the action (or inaction) of a crewmember is more illustrative of the manner in which Buchanan employees conduct themselves in adhering to the captain’s directives rather than any evidence of a lack of accountability.

Lastly, the Regional Director erred in failing to consider the potential adverse consequences, and in turn, accountability, a Buchanan captain is subject to in light of his participation in the Employer’s Bonus Incentive Program. (Er. Ex 10). In this regard, the Decision completely ignores this secondary indicia of supervisory status stating: “there is no evidence that the captains are evaluated on their crewmembers’ performance.” (Dec. at 33). To the contrary, the Bonus Incentive Program affords almost \$11,000 more per annum to each captain who meets the operational criteria set forth in the Program. There would appear no better measure of “accountability” than the additional compensation (or lack thereof) available to the captains based upon the performance of their crews.

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<sup>12</sup> These forms include the captain’s required signature on the Pre-Underway Checklist (Er Ex 2, 10-pages); on the Voyage Plan (Er Ex 3 7-pages and Er Ex 11, 4-pages); on the Oil Transfer Authorization (Er Ex 4, 3-pages) and on the Crewman Initial Safety Orientation Record (Er Ex 5, 6-pages).

Based upon the foregoing it is respectfully submitted the Regional Director erred in relying on health care, rather than maritime Board precedent in failing to find the Employer's captains are statutory supervisors within the meaning of the Act. The Regional Director also erred in failing to find Buchanan's captains were "accountable" for the purposes of establishing "responsible direction" as those terms have been construed by the Board in its maritime decisions to determine supervisory status under the Act. In this regard, the Regional Director departed from officially reported Board precedent established in such necessitating review and reversal.

II. The Regional Director's Decision on Substantial Factual Issues is Clearly Erroneous on the Record and Such Error Prejudicially Affects the Rights of the Employer in this Case

A. The Regional Director Erred in Failing to Find that Employees Were Not Hired Based Upon the Captains' Evaluations

Evidence that a putative supervisor has the authority to effectively recommend hiring is among the Section 2(11) criteria relied upon by the Board to establish supervisory status. In his Decision, the Regional Director concluded there was "insufficient evidence to prove the captains effectively recommended hiring." (Dec. at 23) In reaching this determination the Regional Director relied in large part on "copies of the evaluations of three trainees and there is testimony of Tug Personnel Manager Haab that the Employer relied heavily on captains' evaluations of the trainees in deciding on whether to hire them in a permanent position as a deckhand." (Dec. at 23) The Regional Director discounted this evidence finding it was "conclusionary" testimony lacking in "specific detail as to the action taken, if any, by the Employer in response to the trainee evaluations in evidence". (Dec. at 23)

On this point, the Regional Director would appear to have discounted the weight given this testimony alleged because this information was introduced in response to a leading question.<sup>13</sup> However, the Regional Director failed to consider this indistinguishable testimony on this precise issue elicited through the direct questioning by the Hearing Officer as follows:<sup>14</sup>

Hearing Officer Boerschinger: Did these trainees ever become permanent employees?

The Witness: Yes, oh, yes. They were deck hands, trainees that moved into the deck hand position, yes.

Hearing Officer Boerschinger: How would you make the determination whether or not a trainee could become a permanent employee?

The Witness: Well, as far as a permanent employee it's based on an opening and again if we had an opening and if we felt the person was more qualified than the union recommendations we would hire that person as a permanent employee, but being hired was strictly based on the Captain's evaluation of the employee at the time.

In addition, the Regional Director also claimed the record evidence contained "copies of the evaluations of [only] three trainees." (Dec. at 23) In fact, Er Ex 12 consists of 14 employee evaluations in total, including 4 (not 3) trainee evaluations; wherein each trainee was evaluated by a Buchanan captain and thereafter hired for a permanent position. (Tr. at 275)

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<sup>13</sup> Dec. at 23, fn. 46

<sup>14</sup> Tr. at 140-141

Mr. Haab was asked on direct examination: “[a]nd did those evaluations result, actually result in either trainees being retained by Buchanan or considering deck hands for promotion?” His response was “Absolutely.” (Tr. at 277)<sup>15</sup> Again, this is prejudicial and factually inconsistent, with the Regional Director finding that it was “unclear as to whether the evaluations ‘resulted’ in any of the individuals whose evaluations were part of Employer Ex. 12 being hired by the Employer or the process involved.” (Dec. at 24, fn. 47) since all of the above-mentioned trainees evaluated were included in Er Ex 12.

Perhaps the Regional Director characterized Mr. Haab’s answer as “unclear” because it came in response to a compound question “...did those evaluations result, actually result in *either* trainees being retained by Buchanan or considering deck hands for promotion?” (Dec. at 13, fn.27) Though Mr. Haab answered this affirmatively the Regional Director found it “unclear as to whether and when the three trainee evaluations ‘resulted’ in any individuals whose evaluations were part of Employer Ex. 12 being hired by the Employer or the process involved.” Buchanan submits that whether the evaluations by the captains’ resulted in those evaluated being promoted or hired, in either situation, effectively recommending hiring or promotion would be sufficient to establish the captains’ supervisory status.

With specific reference to Trainee Robert Stanton, Mr. Haab testified he moved from trainee to deckhand and remains employed by Buchanan. (Dec. at 24) In this regard, it would also appear the Regional Director erred in failing to consider the subsequent evaluation of Robert Stanton by Captain Timothy Pisculli and instead relied

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<sup>15</sup> Of the four trainees whose evaluations were placed into evidence, Jose Delgado (Er Ex 12-m and an unmarked evaluation dated December 13, 2004), Wade Cummings Er Ex 12-b and e), Steve Sandland (Er Ex 12-h, I and j) and Robert Stanton (Er Ex 12-g and f), each person was hired by Buchanan as a deckhand based upon the captains’ evaluation.

solely on the evaluation by Captain Lo Piccolo finding insufficient evidence that “the captain’s evaluation effectively recommended his [Trainee Stanton’s] ultimate hire into a permanent position.” (Dec. at 24) In this regard, Captain Pisculli’s subsequent evaluation stated Trainee Stanton possessed “very good” skills and had an “excellent” attitude. Er. Ex 12-g)

To the extent the Regional Director did not credit or gave less weight to the testimony of Captain Tom Cutten with respect to the issue of his being hired as a result of the recommendation of another Buchanan captain, John Brooks, this too was clearly erroneous and prejudicially affected the Employer’s rights in this case. Captain Cutten testified he was solicited by John Brooks for a position with Buchanan. No one else spoke to him, he did not solicit the job and thereafter he was offered employment. In the absence of any unrebutted evidence to the contrary, this is proof Tom Cutten was hired based upon the recommendations of Captain Brooks.

Again, it would appear the Regional Director has marginalized this testimony by asserting it came about “in response to a leading question.” (Dec. at 11) The mere fact that this testimony became part of the record through a leading question does not diminish the truthfulness or reliability of such evidence.

In Representation hearings, unlike Unfair Labor Practice hearings, the rules of evidence prevailing in courts of law and equity are not controlling. *NLRB R-Case Manual, Section 11216*. What is essential is developing an accurate and complete record; not necessarily the form or manner in which this information is derived. In *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058, 1070 (1999), the Board affirmed the Administrative Law Judge’s finding with respect to certain testimony introduced through

leading questions. “[D]espite minor flaws in testimony, I am convinced Tyson testified honestly, truthfully, and completely to the best of his ability and consequently find his testimony reliable.” “A truthful witness does not become untruthful merely because the witness has trouble with dates, days and even sequence of events.” *Jennie-O-Foods*, 301 NLRB 305, 336 (1991). Moreover, since Captain Cutten was called as witness in this case by the Union and as such, his testimony potentially adverse to the Employer’s interests, the accuracy and reliability of his testimony should not be discounted because it was elicited through a leading question.

As the foregoing demonstrates, the Regional Director made substantial factual errors with regard to the issue of the Employer’s reliance on the captains’ evaluations of trainees leading to their permanent employment. Buchanan submits these substantial errors of fact are clearly erroneous from a review of the record and have prejudiced the Employer on the issue of supervisory status of its captains. Had the Regional Director properly considered this evidence, the supervisory status of Buchanan’s captains would have also been established based upon their effectively recommended trainees for hire.<sup>16</sup>

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<sup>16</sup> The Regional Director also cites the case of *Chevron, U.S.A., Inc.*, 309 59 (1992) for the proposition that performance evaluations submitted by launch captains did not constitute effective recommendations inasmuch as upper management had a review process and ultimately it was a team effort that decided whether to promote, demote, reward or discipline a crew member. (Dec. at 24-25) By contrast, in the present case there is no evidence suggesting the Employer relied on anything other than the captains’ recommendations in making permanent hiring decisions of trainees. As Mr. Haab testified, “I’m not there. Captain’s on board, and I trust the captains recommendations, evaluations at that point.” (Tr. at 277)

B. The Regional Director Erred in Failing to Find that Crewmembers Under Captain Rod Bissen Supervision Were Directed to Perform Maintenance Work Captains Resulting in a Delayed Departure

The Regional Director also failed to consider the testimony of Stephen Mitchell, the Employer's Sustainability and Business Development Manager, on the issue of the captains' supervisory status in connection their effectively and independently directing crewmembers to perform certain work on the vessel. Mr. Mitchell testified that he observed Captain Rod Bissen exercise his authority to delay the sailing the Mr. T, directing the tires on the perimeter of the vessel – acting as fender protection – be raised and re-welded. (Tr. at 160-161) Mr. Mitchell testified: “ [t]he tires were hung, you know under the supervision of multi-engineers on the Mr. T and they both gave it the thumbs up, but Rod came on and said thumbs down, so yeah, he had the authority because he did it.” The vessel did not sail until the tires were adjusted to the height Captain Bissen directed. (Tr. at 161)

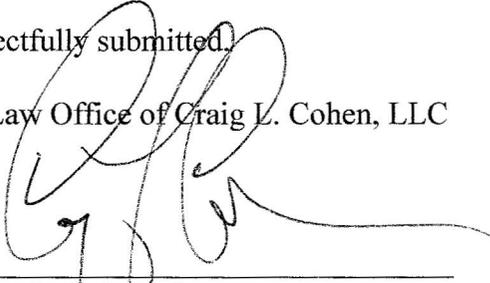
Contrary to Mr. Mitchell's testimony, the Regional Director ruled “there is no direct evidence that the crewmembers under Captain Bissen were involved in this maintenance work.” (Dec. at 36, fn. 62). The Regional Director's factual finding on this issue is erroneous and in direct conflict with the unrebutted testimony of Mr. Mitchell. The Regional Director's failure to consider this evidence is clearly erroneous from the record and prejudicially affects the rights of the Employer in this case because Captain Bissen's authority to assign and responsibly direct other employees to perform work would establish his supervisory authority under the Act. Accordingly, the Employer also seeks review and reversal of this portion of the Decision.

**CONCLUSION**

Based upon the foregoing discussion, argument, analysis and authority, Buchanan respectfully submits the Employer's captains are supervisors within the meaning of the Act. Consequently, it is respectfully requested that the Board grant this Request for Review and reverse the Regional Director's Decision and Order.

Respectfully submitted,

The Law Office of Craig L. Cohen, LLC

By: 

Craig L. Cohen  
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THE UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
OFFICE OF THE EXECUTIVE SECRETARY

-----X

BUCHANAN MARINE, L.P.  
Petitioner,

-and-

CASE NO. 29-UC-570

LOCAL 333, UNITED MARINE  
DIVISION, ILA, AFL-CIO  
Respondent,

-----X

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION OR REGULAR U.S.  
MAIL

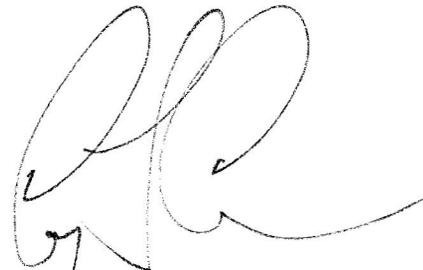
On July 15, 2010 the undersigned served and filed the Request For Review of the Decision and Order in the above-captioned action by serving same by electronically and/or by regular U.S. Mail upon:

Executive Secretary  
The National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570-0001

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Dated July 15, 2010



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Craig L. Cohen