

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:)
)
BUCHANAN MARINE, L.P.,)
)
Employer/Petitioner,) Case No. 29-UC-570
)
and)
)
LOCAL 333, UNITED MARINE)
DIVISION, ILA, AFL-CIO)
)
Union)
)

**UNION'S STATEMENT IN OPPOSITION TO
THE EMPLOYER'S REQUEST FOR REVIEW**

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INTRODUCTORY STATEMENT

Local 333, United Marine Division, ILA, AFL-CIO (“the Union” or “Local 333”) submits this statement in opposition to the Request for Review filed by Buchanan Marine, L.P. (“the Employer” or “Buchanan”), in which the Employer requests a review of the Regional Director’s dismissal of their Unit Clarification Petition. Contrary to the Employer’s position, the Regional Director’s decision that Buchanan’s tug boat captains are not supervisors under the Act is consistent with precedent and free of erroneous or prejudicial factual findings.

The Employer argues that the Decision departs from precedent because it relies on “healthcare case law” as opposed to “maritime case law.” However, there is no such distinction under the Act. The Decision correctly relies on *Kentucky River Community Care*, the seminal case regarding supervisory status, and other relevant cases arising within and outside the maritime industry. The Employer also argues that since most Board cases have held boat captains and pilots to be supervisors, therefore the tug boat captains in the present case must be supervisors. This is a mechanistic analysis that fails to consider the many differences between the present case and those in which the Board has found supervisory status.

ARGUMENT

A. The Regional Director’s Decision is Consistent With Board Precedent

The evidence is clear that tug boat captains at Buchanan are not invested with the same authority as most captains of maritime ships. The on-the-job authority they have is more like that of a “sea-going heavy equipment operator” than that of the captain of a military ship, oil tanker, or even a larger tow vessel. (*See* Tr. at 292.) They do not meet the test for supervisory status under 29 U.S.C. §

152 (11):

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

29 U.S.C. § 152 (11)

“Because the issue of supervisory status is heavily fact-dependent and job duties vary, per se rules designating certain classes of jobs as always or never supervisory are generally inappropriate.” *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001), citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). The burden of proof is borne by the party claiming that the employee is a supervisor. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

In deciding based on the facts of each case whether captains or pilots are supervisors, the Board analyzes whether the employee has the authority to direct the tugboat crew using “the exercise of significant independent judgment under conditions that are loosely constrained by [management].” *Marquette Transportation and Pilots Agree Association*, 364 NLRB 543, 556. Tugboat captains do not constitute supervisors if “boat personnel were experienced and qualified to perform jobs without constant supervision.” *Marquette Transportation*, 364 NLRB 543, 556 citing *McAllister Brothers Inc. and Seafarers International Union*, 278 NLRB 601, 613 (1986). A tugboat captain does not constitute a supervisor if “the captain was nominally in charge of the tugboat, although in practice he

had limited authority and little need to exercise control over the crew.” *McAllister Brothers*, 278 NRLB 601, 610. A final factor in gauging the individual authority of a captain is their burden of responsibility for the “safety of ships, their crews, the public, and the environment.” *Spentonbush/Red Star Companies v. Local 333, ILA*, 106 F.3d 484 (1997).

As the Regional Director’s decision makes clear, Buchanan’s tug boat captains have no authority whatsoever in the majority of the areas specified in the statutory definition of a supervisor. In the areas where they still retain limited authority, they operate under the tight constraint of a bevy of management directives. Contrary to the Employer’s position in the Request for Review, the use of independent judgment by their tug boat captains is limited to routine matters. In addition, tug boat captains work with experienced crews, in which many crew members have served as captains themselves, who require little direction. (Tr. at 143, 181.) Finally, their level of responsibility for the safety of the crew or public is modest: they are not shipping toxic waste or millions of gallons of fuel, as in other cases the Board has considered—they are transporting gravel.

B. The Regional Director’s Decision Correctly Finds that the Employer Did Not Meet It’s Burden of Proof in Establishing That Tug Boat Captain’s are Statutory Supervisors

During two days of hearings, the Employer failed to provide evidence of tug boat captains being held accountable for the job performance of other crew members or evaluated on their crew members’ performance. The Employer does not point to such evidence in its Request for Review, but instead argues that “prospective adverse consequences exist.” It is notable that the Employer finds little support for these “potential adverse consequences” in the hearing transcript, only making one citation to the transcript to support this argument. (*See* Request for Review at 10.) These hypothetical

consequences, of which the Employer could not provide any actual examples during the hearing, were given the appropriate weight by the Regional Director.

Similarly, the Regional Director's finding that the Employer's tug boat captains do not exercise sufficient independent judgment to meet the statutory standard is well-supported by the record and consistent with precedent. Work assignments are generally determined by the crew member's job: captain, mate, engineer, and deck hand. With only six crew members on board, all performing routine (though skilled) tasks that they are well-versed in, there is little need for direction. (*See* Tr. at 143, 181, 208, 327.) Where there might be room for discretion in the direction of work, Buchanan's Safety Management System Manual (hereinafter "SMS Manual") and the Management Rights Clause of the collective bargaining agreement severely restrict the captain's ability to exercise independent judgment.

The SMS Manual is a two-inch thick compendium of rules and regulations governing every aspect of the tug boat's operation. (Er. Ex. 6.) It "provides a mechanism for standardization" of captain's job duties and eliminates the exercise of independent judgment. It helps to "insure the same level of performance" among captains "to a much higher degree." (Tr. at 356, lines 1-3.) The detailed procedures in the SMS Manual provide the captains with "steps to follow, so that you can insure you get the same standard of performance every time." (Tr. at 361, lines 16-18.) This imposition of hundreds of pages of work guidelines severely restricts captains' authority and quashes their use of independent judgment to direct crew members.

The extensive Management Rights clause in the collective bargaining agreement was specifically designed to restrict captains' responsibilities and limit their authority. (Jt. Ex. 1 at 15; Tr. at 19, lines 20-23.) Al Vadnais, the Employer's former attorney, testified that the purpose in

negotiating this Management Rights clause was to restrict captain's responsibilities. (Tr. at 20, lines 13-17; *Compare* Jt. Ex. 1 at 4, Article 4.1 – the prior Management Rights Clause *with* Jt. Ex. 1 at 15, Articles 4.1 and 4.2 – the new, expanded Management Rights Clause.)¹⁾ Under this clause, only management--not tug boat captains-- has the right to assign work, to establish and change work schedules and assignments, to transfer or promote employees, to lay off employees, to make and enforce rules for the maintenance of discipline, and to suspend, demote, discharge or otherwise discipline employees for cause. (*See* Jt. Ex. 1 at 15.)

There is little need for captains to exercise significant independent judgment to direct the workforce due to the highly experienced tug boat crews at Buchanan. Crews are small and have known one another for years. Due to lay-offs, employees trained as ship captains are now working as mates, and even deck hands. (Tr. at 143, 181.) This is directly analogous to *McAllister Brothers Inc.*, where tug boat captains were held to not be supervisors.

“At least in part because of the contractual seniority system, coupled with layoffs and a declining workforce in recent years, most of the boat personnel, including deckhands, had worked for *McAllister* for many years and were experienced and well qualified to perform their jobs without on-the-spot supervision.” *McAllister Brothers Inc.*, 278 NLRB 601, 610. As in *McAllister Brothers Inc.*, captains at Buchanan have little need to direct a crew that is “experienced and qualified to perform jobs without constant supervision.” *Marquette Transportation*, 364 NLRB 543, 556 *citing* *McAllister Brothers Inc.*, 278 NLRB 601, 613.

A final consideration used in some cases to gauge the individual authority of a captain has

1. The Management Rights clause appearing on page 4 of the collective bargaining agreement is *not* the complete Management Rights Clause currently in effect; the current Management Rights Clause includes both Article 4.1, which appears on page 4 of Joint Exhibit 1, and Article 4.2, which appears on page 15 of

been their level of responsibility for the “safety of ships, their crews, the public, and the environment.” *Spentonbush/Red Star Companies v. Local 333, ILA*, 106 F.3d 484 (2d. Cir. 1997). In finding that a tug boat captain constituted a supervisor, the Court in *Spentonbush* stressed that “the effects that the mishandling of over four million gallons of gasoline might have upon the waterways and the surrounding areas would also be a disaster,” and that the captain’s responsibilities could therefore not be categorized as routine. The situation was analogized to that of the “possible atomic disaster” described in *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980).

The cargo pulled by Buchanan’s tug boats is much more benign than atomic waste or four million gallons of gasoline. Buchanan’s tug boats pull barges full of “rock aggregate”—in other words, gravel. The dire responsibility borne by the captains in *Spentonbush* and *Maine Yankee Atomic Power* is absent in the present case.

C. The Regional Director’s Findings of Fact are Accurate and Well-Supported by the Evidence

The Request for Review alleges that the Regional Director made clearly erroneous factual findings regarding captains’ recommendations for hiring and also an incident a management witness testified to in which a tug boat captain delayed the departure of a boat. The Regional Director’s findings in regards to both these issues are not erroneous.

The evidence established that tug boat captains are not involved whatsoever in the hiring of employees. (Tr. at 135, lines 18-20.) Furthermore, no one has been hired for the last two to four years. (See Tr. at 145.) While the Employer might consult captains for employee recommendations, they would also consult mates and engineers regarding recommendations. (Tr. at 144, lines 13-21.)

No convincing evidence was presented that tug boat captains' recommendations have been or would be followed. The Regional Director was correct in determining the weight to give testimony regarding hiring that was solicited through leading questioning. (*See* Decision and Order at 23-24.) His credibility findings regarding the weight to be given this conclusionary testimony should not be overruled. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 f.2d 362 (3d. Cir. 1951).

The Regional Director was also correct in finding that an incident in which Captain Rod Bissen ordered a three-hour delay of the departure of a tug boat did establish Section 2(11) authority over employees. The portions of the transcript cited here by the Employer are unclear, referring to a brief delay requested by the captain to adjust "tires hung under the supervision of multi-engineers." (*See* Tr. at 160-161.) Since all other testimony in the case established that there is only one engineer per tug boat, it remains unclear what persons the witness is referring to, or if they are even crew members, and there is no further explanation in the record as to what, if anything, was done to correct the situation, or who did it.

CONCLUSION

The tug boat captains at Buchanan, members of small six-person crews that tow barges loaded with gravel in and out of New York City, do not exercise "significant independent judgment under conditions that are loosely constrained by [management]," the test for supervisory status of tug boat captains that is articulated in *Marquette Transportation*. Through an expansive Management Rights clause and the imposition of a two-inch thick SMS manual full of rules and regulations,

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Union's Statement in Opposition to the Employer's Request for Review in Buchanan Marine, L.P. and Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, Case 29-UC-000570, was served today upon the following persons at the addresses below:

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Dated: July 23, 2010

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