

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG & BARGE, INC.

and

Cases 19-CA-026716
19-RC-013872

INTERNATIONAL ORGANIZATION
OF MASTERS, MATES, & PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

**MOTION FOR PARTIAL RECONSIDERATION AND MODIFICATION
OF DECISION AND ORDER**

Pursuant to § 102.48(d)(1) of the National Labor Relations Board's ("Board") Rules and Regulations, Counsel for the Acting General Counsel ("General Counsel") moves that the Board: (1) revisit its December 14, 2012, Decision and Order in the above-captioned matter, reported at 359 NLRB No. 43 (2012), inasmuch as the merits of Case 19-CA-026716 were not addressed; and (2) issue a Supplemental Decision and Order reinstating the earlier vacated Decision in Case 19-CA-026716, finding that Respondent violated the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et. seq.* In support of this Motion, General Counsel shows as follows:

1. On October 21, 1999, Charging Party International Organization of Masters, Mates, & Pilots, Pacific Maritime Region, AFL-CIO ("Union"), filed the Petition in Case 19-RC-013872 to represent employees of Brusco Tug & Barge, Inc. ("Respondent"). (Exhibit A).

2. On the same date, the Union filed the charge in Case 19-CA-026716, alleging that the Respondent violated § 8(a)(1) of the Act by threatening to discharge

employees classified as mates if they engaged in union activities. The charge was properly served on October 22, 1999. (Exhibit B).

3. On November 26, 1999, the Regional Director of Region 19 of the Board (the "Regional Director") issued a Decision and Direction of Election in Case 19-RC-013872. (Exhibit C).

4. On January 31, 2000, the Regional Director issued Complaint in Case 19-CA-026716, alleging that Respondent promulgated an unlawful rule threatening to discharge mates if they engaged in Union activities. (Exhibit D).

5. On February 10, 2000, the Respondent filed its Answer, in which it admitted to promulgating such a rule, and asserted an affirmative defense that mates are not employees within the meaning of the Act. (Exhibit E).

6. On April 11, 2000, upon a Motion for Summary Judgment, the Board issued its Decision and Order in Case 19-CA-026716. (Exhibit F).

7. On September 22, 2000, the Regional Director issued a Certification of Representative in Case 19-RC-013872, certifying the Union as the exclusive collective-bargaining representative of the following employees of Respondent (the "Unit"):

All mates, deckhands, and engineer deckhands employed by [Respondent] on vessels operated by [Respondent] out of its Longview/Cathlamet, Washington, home port; excluding all guards and supervisors as defined by the Act, including all captains, and all other employees.

(Exhibit G).

8. On May 2, 2001, upon a Petition for Review filed by Respondent and Cross-Application for Enforcement filed by the Board, the Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's Order in Case 19-CA-026716 and remanded the case to the Board. (Exhibit H).

9. Due to the related representation case issue, on October 24, 2001, the Board issued a Supplemental Decision and Order vacating its previous Decision and Order in Case 19-CA-026716, and remanded Case 19-RC-013872 to the Regional Director to reopen the record. (Exhibit I).

10. On January 7, 2002, the Regional Director issued his Supplemental Decision on Remand in Case 19-RC-013872. (Exhibit J).

11. On October 18, 2002, the Board granted Respondent's Request for Review of the Regional Director's Supplemental Decision on Remand in Case 19-RC-013872. (Exhibit K).

12. On September 30, 2006, the Board issued an Order again remanding Case 19-RC-013872 to the Regional Director; the remand was to address *Oakwood Healthcare Inc.*, 348 NLRB 686 (2006). (Exhibit L).

13. On December 21, 2006, the Regional Director issued his Second Supplemental Decision on Remand in Case 19-RC-013872. (Exhibit M).

14. After having granted Respondent's Request for Review on April 18, 2007, the Board issued its Decision and Order in Case 19-RC-013872 on December 14, 2012, affirming the Regional Director's Second Supplemental Decision, finding that Respondent's mates are not statutory supervisors within the meaning of the Act. That Decision and Order failed to address the merits of 19-CA-026716, despite the issues being intertwined. (Exhibit N).

15. On January 11, 2013, the Regional Director issued an Order Reaffirming the Certification of Representative. (Exhibit O).

16. In light of the Board's December 14, 2012, Decision and Order in Case 19-RC-013872, finding Respondent failed to meet its burden to establish that mates are statutory supervisors, and the fact that said finding is controlling in the unfair labor practice matter in 19-CA-026716, it is appropriate for the Board to reconsider and modify its December 14, 2012, Decision and Order to reinstate its previously vacated decision in Case 19-CA-026716.

WHEREFORE, the General Counsel respectfully requests that the Board reconsider and modify its December 14, 2012, Decision only to the extent necessary to reinstate the previously vacated Decision and Order in Case 19-CA-026716 finding that Respondent violated § 8(a)(1) of the Act by promulgating a rule threatening mates with discharge for engaging in Union activities.

Dated at Seattle, Washington, this 4th day of February, 2013.



M. Anastasia Hermsillo
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 19--RC--13872	Date Filed 10/21/99

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)
- RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- UD-WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- UC-UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) In unit not previously certified. In unit previously certified in Case No. _____
- AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____
Attach statement describing the specific amendment sought.

2. Name of Employer Brusco Tug and Barge	Employer Representative to contact Bo Brusco	Telephone Number 1-360-636-3341
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3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
548 - 14th Avenue, P. O. Box 1060
Longview, WA. 98632

4a. Type of Establishment (Factory, mme, wholesaler, etc.) Tug and Barge	4b. Identify principal product or service Towing
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5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.) Included: All employees employed in the Offshore Division, including Masters, Mates, Able Bodied Seamen, Ordinary Seamen, Engineers, and Cooks Excluded: Guards and Supervisors as defined in the Act	6a. Number of Employees in Unit: Present 30 Proposed (By UC/AC)
	6b. Is this petition supported by 30% or more of the employees in the unit? * <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No *Not applicable in RM/UC and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. Request for recognition as Bargaining Representative was made on (Date) October 20th, 1999 and Employer declined recognition on or about (Date) October 20th, 1999 (If no reply received, so state).

7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state) None	Affiliation None
Address and Telephone Number None	Date of Recognition or Certification None

9. Expiration Date of Current Contract, If any (Month, Day, Year) None	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day, and Year)
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11a. Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes No <input checked="" type="checkbox"/>	11b. If so, approximately how many employees are participating?
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11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Affiliation	Address	Date of Claim (Required only if Petition is filed by Employer)
None			

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

International Organization of Masters, Mates and Pilots, Pacific Maritime Region, AFL-CIO

By <u>Captain Michael R. Simonsen</u> (Signature of Representative or person filing petition)	Captain Michael R. Simonsen, Branch Agent (Title, if any)
--	--

Address 2333 - 3rd Avenue Seattle, WA. 98121-1711 (Street and Number, City, State, and ZIP Code)	1-206-441-1070 X12 (Telephone Number)
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WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Ex A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
19--CA--26716	10/21/99

INSTRUCTIONS

File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer BRUSCO TUG AND BARGE	b. Number of workers employed 30	
c. Address (street, city, state, ZIP code) 548 - 14TH Avenue, P. O. Box 1060 Longview, WA. 98632	d. Employer Representative Bo Brusco	e. Telephone No. 1-360-636-3341
f. Type of Establishment (factory, mine, wholesaler, etc.) Tug and Barge Service	g. Identify principal product or service Ocean Towing and Harbor Work	
h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.		
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)		
<p>On or about October 20th, 1999, the above named Employer, by Bo Brusco and its officers, agents, and representatives, threatened and coerced employees for exercising their Section 7 rights by threatening to terminate Masters and Mates and by notifying employees they may not join or participate in Union activities under threat of termination..</p>		
By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act		
3. Full name of party filing charge (if labor organization, give full name, including local name and number)		
International Organization of Masters, Mates and Pilots, Pacific Maritime Region		
4a. Address (street and number, city, state, and ZIP code)	4b. Telephone No.	
2333 - 3rd Avenue Seattle, WA. 98121-1711	1-206-441-1070	
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filed in when charge is filed by a labor organization)		
International Organization of Masters, Mates and Pilots		
6. DECLARATION		
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		
By <u>Michael R. Simonsen</u> (signature of representative or person making charge)	Captain Michael R. Simonsen	Branch Agent (title if any)
Address 2333 - 3rd Avenue Seattle, WA. 98121-1711	1-206-441-1070 X 12) (Telephone No.)	October 21, 1999 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Ex. B



United States Government
NATIONAL LABOR RELATIONS BOARD

Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174-1078

Telephone: (206) 220-6300
Facsimile: (206) 220-6305
Agency Web Site: www.nlrb.gov

October 22, 1999

Brusco Tug and Barge
Mr. Bo Brusco,
548 - 14th Avenue
P.O. Box 1060
Longview, WA 98632

Re: Brusco Tug and Barge
Case 19-CA-26716

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter. Also enclosed is a statement (Form NLRB-4541) briefly setting forth our investigation and voluntary adjustment procedures.

I would appreciate receiving from you promptly, a full and complete written account of the facts and a statement of your position with respect to the allegations of the charge. Also, please complete and return one copy of the enclosed questionnaire regarding commerce information (Form NLRB-5081). Please state the case name and number on all correspondence.

This case has been assigned to the Board agent shown below. When the Board agent solicits relevant evidence from you or your counsel, I request and strongly urge you or your counsel to promptly present to the Board agent any and all evidence relevant to the investigation. It is my view that a refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily. Full and complete cooperation includes, where relevant, timely providing all material witnesses under your control to a Board agent so that witnesses' statements can be reduced to affidavit form, and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation.

Please be advised that we cannot accept any limitations on the use of any evidence or position statements that are provided to the Agency. Thus any claim of confidentiality cannot be honored except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. In this regard, we are required by the Federal Records Act to keep copies of documents used in furtherance of our investigation for some period of years after a case closes. Further, we may be required by the Freedom of Information Act to disclose such records upon request, absent some applicable exemption such as those that protect confidential

financial information or personal privacy interests (e.g., Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4)). Accordingly, we will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the foregoing laws, regulations and policies.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event that you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance," Form NLRB-4701, and forward it promptly to this office. If you choose to have your agent receive exclusive service of certain documents and communications, you may utilize enclosed Form NLRB-4813 as described in the enclosed statement of procedures.

Please be advised that, under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member of the public.

Customer service standards concerning the processing of unfair labor practice cases have been published by the Agency and are available upon request from the Regional Office. Your cooperation in this matter is invited so that all facts of the case may be considered.

Sincerely,

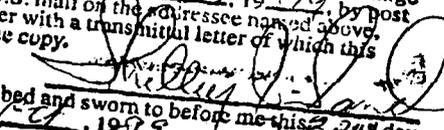

Paul Eggert
Regional Director

Enclosures

Case assigned to: Joan R. Abrevaya

Telephone No.: (206)220-6288

I certify that I served the above referred to charge on the 22 day of Oct, 1979, by post paid U.S. mail on the addressee named above, together with a transmittal letter of which this is a true copy.


Subscribed and sworn to before me this 22 day of Oct, 1979.


Designated Agent

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

BRUSCO TUG AND BARGE CO.

Employer

and

Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All mates, deckhands and engineer/deckhands employed by the Employer on vessels operated by the Employer out of its Longview/Cathlamet, Washington, home port;

Excluded: All guards and supervisors as defined by the Act, including all captains, and all other employees.

Ex. C

Facts

The Employer is engaged in the operation of tugboats on the west coast of the United States. Petitioner seeks a unit of captains,¹ mates, deckhand/engineers, and deckhands performing offshore to towing out of the Employer's Longview, Washington, port, excluding all guards and supervisors as defined in the Act and all other employees.² The Employer contends that captains and mates are statutory supervisors, and, further, that a unit limited to offshore is not appropriate. In addition, the Employer contends that if captains and mates are found not to be supervisors, the unit should include all of its unrepresented captains and mates. Currently, all of its engineers and deckhands who are not sought by this petition are already represented, in all but one case by other labor organizations.

The Employer operates a total of about 34 tug boats. The home port for approximately 25 tugs is Cathlamet, Washington, approximately 25 miles down the Columbia River from the Employer's corporate headquarters in Longview. In addition, three boats are home ported in Port Hueneme, California, three are in Sacramento, California, two in Stockton, California, and one in Grays Harbor, Washington. The Employer is signatory to a collective bargaining agreement with Seafarers International Union covering deckhands and engineers employed at Port Hueneme; with Inlandboatmen's Union covering the deckhands on the tug Mary Rose Brusco at Grays Harbor; and with Petitioner covering a unit of masters, mates, deckhand/engineers, and deckhands in San Francisco Bay, the Sacramento River, and the Stockton deep water channel. The San Francisco agreement specifically excludes "towing between offshore ports."

The Employer tows a variety of barges and commodities, including: chip barges from various locations in Canada, Alaska, and California, to the Columbia River and to Eureka, California; log barges equipped with cranes from Alaska and Canada and other points on the west coast of the United States, to Eureka, California, Coos Bay and Newport, Oregon, and the Columbia River; sand barges from Sozol, Mexico, to San Diego, California; a self-loading barge for hauling rocks on the Columbia River; target sleds for the U.S. Navy off Point Mugu in California; dump scows assisting dredging projects; and occasional tows of individual barges on the River or along the coast. In addition, the Employer's tugs assist ships in and out of Port Hueneme, California.

Two types of tug boat activity emanate from the Cathlamet home port: inland (Columbia River) and offshore (Pacific Ocean). Inland tugs operate on a daily basis, up to 12 hours per day. They tow or push barges between various points on the river, including about seven trips a year to Lewiston, Idaho, and back, a round trip of about seven days. Such a journey requires passage through locks. The master on a vessel passing through the locks must have personal knowledge of the individual locks, including the currents, size, approach, and exit. Inland boats are manned by a master and one deckhand.

Offshore tugs tow barges between various points along the Pacific coast, anywhere from Vancouver, British Columbia, to ports in Mexico. Offshore tugs are manned by a captain, mate, engineer, and deckhand; a few have two deckhands. A crew is on a boat for approximately 30 days, then has 30 days off. At sea, they are on duty in six-hour shifts, the captain and one deckhand or engineer on one shift; the mate and the other crewman on the next. The captain or mate on duty steers the vessel. The Employer makes an effort to have each 30-day trip begin and end in Cathlamet, but when that is not possible, crews are flown to and from another port.

¹ The term "captains" is synonymous with "masters."

² As amended by Petitioner at hearing.

Different types of tug boats are used offshore and on the River. Offshore boats all have a V-bow, are bigger and heavier, and are water-tight. Inland boats have less freeboard, less tolerance for rough water, and are not water-tight. Some inland boats have a V-bow, others have square bows with pushing "knees." Some have pilot houses elevated 30 or 40 feet.

Captains and Mates.

Captains and mates who work only in inside waters have an "uninspected vessel"³ towing license for inland waters of the United States, called an inland, or inside, license. There are two types of outside licenses for captains and mates who work offshore: an all-oceans license, which allows them to work anywhere; and near-coastal, which allows them to operate within 200 miles of the U.S. coast. The licenses are issued by the US Coast Guard.

Aboard a boat, the captain has authority to decide when to leave port; when, for weather reasons, to put into a port or to turn the boat around on the river;⁴ what course to follow; what groceries will be purchased, and whether to put a crewman off the boat for disciplinary reasons. On offshore boats, the captain decides which crew member will work which six-hour shift. When the mate is on duty, he has the same authority as the captain with respect to navigation and putting into port in bad weather. In the event that a crew member becomes ill, the captain or mate on duty can decide whether it is necessary to put into port. Each boat carries a cell phone, which can be used to contact the Employer, although there are occasions on the ocean when such contact is not possible. There are approximately 11 captains and nine or ten mates employed out of Longview/Cathlamet, including three captains on inland boats.

David Seaberg is the port captain in Longview/Cathlamet. He is responsible for assigning crews to boats, and for dispatching the boats. He interviews all job candidates, and has final authority to hire and promote.

Seaberg always honors captains' requests that a particular individual not be assigned to their boats. Thus, when captain Shawn Sarff was unhappy with a particular deckhand, and told Seaberg not to put that deckhand with him, Seaberg thereafter assigned the deckhand to another boat. Captains recommend promotion of mates to captain, and of deckhands to mate. For example, Mark McKinley was promoted to relief captain based on the recommendation of captain Jim Strickland; Shawn Sarff was promoted from mate to captain on the recommendation of captain Rodney Ochiltree; and Bill Stucki was promoted from deckhand to mate on the recommendation of Sarff. Seaberg testified that the captains probably have more "ultimate involvement" in promotions than he does himself; that he does not go out on the boats. He said, "We trust [the captains] so much, and when they recommend it - they're out there sailing, we're not, and they know who can do the job and who can't do it. They're more qualified to choose that person [than], really, we are."

Offshore boats tow barges behind them. Connecting the barge to the boat is a process involving the entire crew. The captain maneuvers the boat. The mate is the "boss" on deck. The captain puts a crewman on the barge, who passes over a towing bridle to the boat. Not all crew members are equally agile. The captain decides which crew member will go aboard the barge, and which will stay on the boat. In docking, in calm conditions, the captain brings the boat alongside the barge, several lines between them are attached, and then the barge is nudged into the dock; in rough conditions, an assist boat is also

³ Undefined in the record.

⁴ Storms including 50-foot seas may occur offshore. High winds along the Columbia River can cause extremely rough water and, when combined with low temperatures, icing.

used. Inland boats equipped to push barges get behind the barge and fix lines as needed. Some inland boats tow rather than push barges. With respect to certain activities, Sarff testified, under cross examination, as follows:

Q The docking or tying up of the barge is something you've done in the past year how many times?

A All my life as an adult.

Q It gets a little routine after a while?

A Yes.

Q So although you make certain independent judgments on your job, many of them tend to be routine things that you've gone through again and again and again. Is that correct?

A Yes. We try to make them routine. It's safer if it's routine. Everybody knows what they're doing if it's routine.

The captains and mates keep a daily log in the wheelhouse, into which they enter such items as the daily activities of the boat, any disciplinary actions, fuel and oil, and maintenance. The log is faxed on a daily basis to the Employer's office in Longview.

Witnesses testified generally that captains and mates give different assignments to deckhands depending on the deckhands' qualifications, but there are no specific examples in the record, other than the aforementioned example of designating which deckhand will board a barge. There is also testimony that captains and mates can authorize overtime and choose which deckhand gets it, but there are no specific examples in the record of any captain or mate doing so, or of the circumstances under which overtime might be so authorized. There is contradictory testimony regarding whether captains negotiate pay rates for their crews; that is, one Employer witness testified that they do, while another Employer witness who is himself a captain, testified that he has never done so. That same captain testified that he has a deckhand whose home is in Cathlamet, and that when the boat is in that port, he will allow the deckhand to leave the boat to go home during his six hours off-watch.

In evidence is the Employer's "Responsible Carrier Operation Plan," which was prepared in cooperation with a voluntary program sponsored by the American Waterways Association in response to an incident some years ago in which an inland boat in the eastern United States struck a bridge, with the result that a train plunged into a river, killing several people. The document sets forth the Employer's policy with respect to operating procedures, safety, environmental matters, incident reporting, emergency response, incident investigation procedures, levels of authority, and hiring policy. A copy of the document is aboard all of the Employer's vessels, and there is a requirement that all crew members read it, although such requirement has not been strictly enforced.

The plan states that:

The Captain has complete responsibility for the safety of the crew and the vessel, which includes insuring that each crew member is capable of carrying out his duties in a safe and seamanlike manner and that the vessel is capable to handle the task that it is assigned to. The Captain is also responsible for ensuring that all safety and operating procedures are complied with on board

his vessel. The Captain must use the judgment of a prudent mariner and stop operations when conditions dictate. ...

The Captain of the vessel is the Master. In his absence his relief is Master. ...

The Master is responsible for the safe and efficient operation and performance of his crew, vessel, and tow, and for ensuring that the equipment is kept neat, clean, and in good working order. The Master must also ensure that company policy, rules, and regulations are followed.

The Master is responsible for setting the watchstanding schedule for the crew; ensuring that all crewmembers are familiar with their respective duties and stations in case of emergency; inspecting all areas of the boat and tow; ensuring that all barges are in navigable condition and reporting any deficiencies; maintaining the daily log; reporting personal injuries or illnesses of the crew; reporting accidents; and ensuring that proper safety equipment is on board and functioning properly.

In addition, the plan states that the Pilot (synonymous with "mate") is directly responsible to the Master and acts on his behalf when on watch, and must be familiar with the Master's responsibilities, authority, and duties in case the Master becomes incapacitated or leaves the vessel.

Conclusions as to captains and mates:

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

. . . [A]ny 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 direct them, or to adjust their grievances, or effectively 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.

The Board over the years has considered the supervisory status of captains, pilots, mates and chief engineers on tugs, generally in the river-barge context. See *Local 28, MMP (Ingraham Barge Co.)*, 136 NLRB 1175 (1962) (masters and mates are supervisors); *Mon River Towing*, 173 NLRB 1452 (1969) (captains are supervisors); *A.L. Mechling Barge Lines*, 192 NLRB 1118 (1971) (pilots and mates not supervisors); *A.L. Mechling Barge Lines* 197 NLRB 592 (1972) (masters and chief engineers are supervisors); *Universal Towing Co.*, 198 NLRB 1124 (1972) (captains and operators are supervisors). There is no per se rule, the particular facts dictating the result in a particular context.

In *Spentonbush Red Star Companies*, 319 NLRB 988 (1995), rev'd 106 F 3d 484 (1997), the Board in upholding the ALJ's decision, found the evidence insufficient to establish that the captains at issue therein possessed any of the indicia of statutory supervisory authority. In particular, the Board found that the captain's authority to set maintenance schedules for chipping, painting, and cleaning, to assign work to the crew and inspect such work, to direct the crew in attaching the tug to a barge, and to direct the mate in loading and unloading the barge, were routine matters not requiring any independent judgment, or amounted to no more than the type of direction exercised by a more experienced employee over one who is less skilled.

More recently, the Board has been closely assessing the role of highly skilled and responsible individuals who make critical decisions, relying on their skills and training, and then communicate the decisions to other individuals to be carried out. The issue has been whether their decisions/communications involve "assignment of work" within the meaning of Section 2(11), and whether they "responsibly direct" the work force.

For example, in *Providence Hospital*, 320 NLRB 717 (1996), the Board discussed at length the issue of "responsibly to direct," observing that the term is ambiguous, in that, "the plain meaning of "responsible" is not, however, sufficiently precise to fully resolve this issue. The definition ranges from being held accountable for one's own actions, to being held accountable for the actions of others, and to being reliable." In that case, the Board went on to say it expects "that the analysis of most cases raising supervisory issues will be made pursuant to the Board's traditional approach of analyzing whether the direction is done with independent judgment."

In *Mississippi Power & Light*, 328 NLRB No. 146 (1999), the Board reiterated Congress' reasoning for adding the phrase "responsibly to direct" to the Act's enumeration of supervisory powers. The Board said:

A professional, technical, expert, or experienced employee is often required, as part of the employee's own job, to make detailed and complex decisions. The judgment required in making those decisions does not, however, "transform" that employee into a supervisor and, the mere communication of that information to other employees does not mean that the alleged supervisor uses supervisory judgment in assigning and directing others, especially when such assignments and direction flow from professional or technical training and do not independently affect the terms and conditions of employment of anyone.

See also, *King Broadcasting Company*, 329 NLRB No. 39 (1999); *McGraw Hill Broadcasting Company, Inc.*, 329 NLRB No. 48 (1999).

The record herein reveals that crew captains have authority to effectively recommend transfer, in that their requests that particular crew members no longer be assigned to their boats are always honored.⁵ Further, the captains have authority to effectively recommend promotion. David Seaberg's testimony on this point makes it clear that management relies on its captains' assessments of individuals in promoting mates to captains and deckhands to mates. They are the highest authority on the vessels during their 30-day tour of duty. If they are not supervisors, then the port captain, Seaberg, is the first level supervisor, supervising the three (or more) person crews on perhaps a dozen vessels -- an extreme ratio of supervisor to employee, particularly when Seaberg never gets to observe their work, I also note that the captains do monitor their crews' performances on a daily basis. Finally, I note that it would be unlikely a crew would be sent of on 30-day voyages or tours of duty with no "on-site" supervision.

Accordingly, based on the foregoing, I conclude that the ocean captains are statutory supervisors, excluded from the unit, based on their regular ability to veto crew assignments and their effective recommendation of promotions.

Because the un rebutted testimony indicates that the river captains, whose trips are generally measured in hours, have the same crew veto and promotion recommendation authority as the ocean captains, I conclude that they are statutory supervisors as well.

As to the mates, they clearly are second in command on the vessels, subordinate to the captains. They do assign work, but there is no indication it requires independent judgment. Their heaviest "assignment" option seems to be selecting the more agile of two or three crewmen to go aboard a barge for the attachment of the towing bridle. Likewise, his direction of the "work force" (two or possibly three)

⁵ This evidence alone is not necessarily sufficient to support a finding of supervisory status. The Board has said that a skilled employee's turning down a specific helper on a few occasions does not confer supervisory authority. *Southern Illinois Sand Co.*, 137 NLRB 1490 (1962).

hardly indicates the need for independent judgment beyond that of an experienced hand. It is obvious that a mate is always just steps away from the captain when the latter is off-duty. For a mate to be a supervisor along with the captain would make a silly 1:1 ratio on supervisors to supervisees. For all of these reasons, I conclude that the mates are not supervisors. See *Spentonbush Red Star Towing*, supra.

Unit Issues.

There are approximately 12 engineers and 17 deckhands involved herein, in addition to the 9-10 mates. All are dispatched out of Longview/Cathlamet. About four regularly work on river boats. The Employer has no other unrepresented engineers or deckhands, but all mates are unrepresented, except in San Francisco. Seaberg testified that he assigns deckhands "anywhere" they are needed.

Some deckhands are licensed as able-bodied seamen, others as ordinary seamen. Three of the deckhands are crane operators, that is, they operate cranes mounted on barges to load logs. Deckhands cook, clean, handle lines, and perform general maintenance, such as painting the vessel. Engineers are responsible for the engine room and deck gear, and help out on deck when they "make break-tows."⁶

Deckhands who work on boats on the Columbia River are assigned to trips on a daily basis, that is, a trip lasting up to 12 hours each day. On longer trips upriver, such as to Lewiston, Idaho, the boat is underway for 12 hours, stops for 12 hours, then continues. Deckhands and engineers on outside boats, that is, ocean-going boats, are assigned to trips of approximately 30 days length, then have 30 days off. There is no record of any other distinctions between inside crew and outside crew, other than that an inside crew is on the river, while an outside crew is on the ocean. Offshore crew are paid a day rate, while inland crew are paid an hourly rate. The record is silent with respect to amounts. All deckhands receive the same benefits.

Petitioner seeks to represent only outside crew members. In this regard, Petitioner points out that different types of boats are used for offshore and inland work, the offshore boats being bigger, heavier, watertight, and generally having different bows than the river boats. Further, the hours, working conditions, and wages differ.

I note that both inland and offshore deckhands are assigned to boats by Seaberg, that they all perform similar functions, receive the same fringe benefits, and are subject to the same Employer policies. Further, there is no evidence that the inland boats are in a separate department of the Employer's organization. The home port of all the boats involved herein is Cathlamet, and Seaberg is the port captain for all such boats. The working conditions of inland and offshore differ in some respects, but are similar in others. Regrettably, the issue of interchange among inland and offshore deckhands was not explored in the record, and the only evidence in this regard is Seaberg's testimony that he assigns crewmen wherever they are needed. Offshore crew are not arguably a separate craft or departmental unit. On the record herein, I conclude that inland crewmen share a strong community of interest with offshore crewmen such that they must be included in the unit with them.

Petitioner seeks to represent only those mates who are employed at, or regularly dispatched out of, Longview/Cathlamet. The Employer contends that all its unrepresented mates, including those dispatched out of home ports in California, must be included in the unit. In so contending, the Employer relies on *Ocean Tow, Inc.*, 99 NLRB 480 (1952); *Inter-Ocean Steamship Lines*, 107 NLRB 330 (1954); and *Moore-McCormack Lines, Inc.*, 139 NLRB 796 (1962). In all of those cases, the Board stated its preference for "fleetwide" units, rather than single-vessel units, a principle to which the Board has

⁶ Undefined in the record.

adhered, although in *Keystone Shipping Co.*, 327 NLRB No. 163 (1999), the Board noted that special circumstances may indicate the unsuitability of applying the fleet-wide rule. Thus, the scope issue usually depends on what constitutes a "fleet." Is it all of the vessels operated by a particular employer in whatever waters? Or is it the vessels operated by an employer out of a particular port? Or, all vessels administratively attached to a distinct geographic segment? I note that in *Moore-McCormack*, supra, the Board refers to two "fleetwide" units of the same employer, one on the Pacific coast, and the other on the Atlantic and Gulf coasts. It thus appears that "fleetwide" is not necessarily synonymous with "employer-wide."

Assuming arguendo that "fleetwide" in the instant case would extend to the Employer's entire fleet, any preference for such a broad unit has been largely obliterated by the past fragmentation of the fleet. Thus, the fleet has been cut into smaller pieces already, at Port Hueneme, Grays Harbor, and San Francisco/upstream. Petitioner does not seek to represent any employees in the established piecemeal units that it does not already represent, nor does it seek to combine the one unit it already represents with the instant unit if successful in the vote. If I were to combine all mates (or unrepresented mates) fleetwide, it would create the odd result that the unit would include all mates, but not all deckhands or all engineers.

For all of these reasons, primarily separate supervision, lack of demonstrated interchange and prior fragmentation, I conclude that a unit limited to boats home-ported out of Cathlamet, Washington is the minimum appropriate unit, and that it need not include the miscellaneous, unrepresented mates in other ports.

I conclude that the appropriate unit here is one which includes only mates, engineers and deckhands on vessels operated by the Employer out of Longview/Cathlamet.

There are approximately 39 employees in the unit.⁷

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL ORGANIZATION OF MASTERS, MATES and PILOTS, PACIFIC MARITIME REGION, AFL-CIO.

⁷ Should Petitioner not wish to participate in an election in the unit found appropriate herein, it may withdraw its petition without prejudice by giving notice to that effect to the Regional Director within ten (10) days from the date of this Decision and Direction of Election.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before December 3, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by December 10, 1999.

DATED at Seattle, Washington, this 26th day of November, 1999.

/s/ PAUL EGGERT

Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

177-8540-4400
460-5067-3500

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BRUSCO TUG AND BARGE CO.

and

Case 19-CA-26716

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

COMPLAINT

International Organization of Masters, Mates and Pilots, Pacific Maritime Region, AFL-CIO, herein called the Union, has charged in Case 19-CA-26716, that Brusco Tug and Barge Co., herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., herein called the Act.

Based thereon the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Complaint and alleges as follows:

1.

The Charge was filed by the Union on October 21, 1999 and was served on Respondent by mail about that date.

2.

(a) Respondent is a State of Washington corporation, with office and place of business in Longview, Washington, where it is engaged in the business of operating inland and offshore tugboats on the West Coast of the United States.

Ex. D

(b) Respondent, during the past twelve months, which period is representative of all material times, in the course and conduct of its business operations described above in paragraph 2(a), derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Washington directly to points outside the State of Washington.

(c) Respondent has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3.

The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

4.

At all material times Roland "Bo" Brusco, Jr. held the position of Respondent's owner, and has been a supervisor within the meaning of Section 2(11) of the Act and an agent acting on behalf of Respondent within the meaning of Section 2(13) of the Act.

5.

(a) About October 20, 1999, Respondent promulgated and distributed to its mates, and since then has maintained, the following rule:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

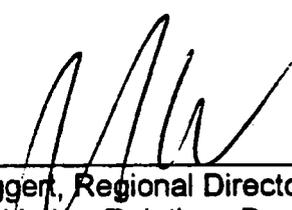
(b) Respondent's mates are employees within the meaning of the Act.

6.

By the acts described above in paragraph 5, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to this Complaint within fourteen (14) days from today, and that, unless it does so, all of the allegations in said Complaint shall be deemed to be admitted to be true and shall be so found by the Board. Respondent is also notified that pursuant to the Board's Rules and Regulations, Respondent shall immediately upon the filing of said Answer, serve a copy thereof on each of the other parties.

DATED at Seattle, Washington, this 31st day of January 2000.



Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG AND BARGE CO.

and

Case 19-CA-26716

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

DATE OF MAILING: January 31, 2000

AFFIDAVIT OF SERVICE OF COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid mail upon the following persons, addressed to them at the following addresses:

Certified Mail

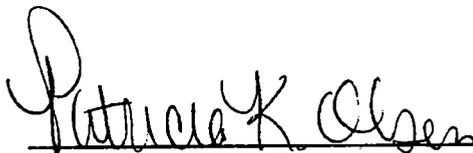
Z 391 404 518 Brusco Tug and Barge
Attn: Bo Brusco
548 - 14th Avenue
P.O. Box 1060
Longview, WA 98632

Regular Mail

Thomas M. Triplett, Attorney
Schwabe, Williamson & Wyatt
PacWest Center, Suite 1600
1211 S.W. Fifth Avenue
Portland, OR 97204-3795

John M. Singleton, Attorney
Masters, Mates & Pilots
700 Maritime Boulevard
Linthicum Heights, MD 21090

International Organization of Masters,
Mates & Pilots
Attn: Michael Simonsen
2333 Third Avenue
Seattle, WA 98121

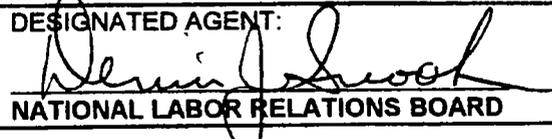


Patricia K. Olsen – Secretary

Subscribed and sworn to before me

on January 31, 2000.

DESIGNATED AGENT:



NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BRUSCO TUG AND BARGE CO.)
)
 and)
)
INTERNATINOAL ORGANIZATION OF)
MASTERS, MATES AND PILOTS,)
PACIFIC MARITIME REGION, AFL-CIO)

Case No. 19-CA-26716

ANSWER

1. Respondent admits the allegations of paragraph 1 of the Complaint.
2. Respondent admits the allegations of paragraph 2 of the Complaint.
3. Respondent admits the allegations of paragraph 3 of the Complaint.
4. Respondent admits the allegations of paragraph 4 of the Complaint.
5. Respondent admits the allegations of paragraph 5(a) of the Complaint. It denies the allegations of paragraph 5(b) of the Complaint.
6. Respondent denies the allegations of paragraph 6 of the Complaint.

Respondent prays that the Complaint be dismissed.

Respectfully submitted,

Schwabe Williamson & Wyatt

By: /s/ THOMAS M. TRIPLET
Thomas M. Triplett
Attorney for Respondent
Brusco Tug And Barge, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, I served the foregoing
ANSWER, on the following parties at the following addresses:

**John M. Singleton
International Counsel
International Organization of Masters, Mates
& Pilots, ILA, AFL-CIO
700 Maritime Boulevard
Linthicom Heights, Maryland 219090-1941**

**International Organization of Masters, Mates
& Pilots
Pacific Maritime Region
Attention: Captain Mike Simonson
2333 Third Avenue
Seattle, Washington 98121**

**John Faley
National Labor Relations Board
915 Second Avenue
Seattle, WA 98174**

by mailing to them a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to them at the addresses set forth above, and deposited in the U.S. Post Office at Portland, Oregon on said day with postage prepaid.

Schwabe Williamson & Wyatt

By: /s/ THOMAS M. TRIPLET
**Thomas M. Triplett
Attorney for Respondent
Brusco Tug And Barge, Inc.**

Brusco Tug and Barge Co. and International Organization of Masters, Mates and Pilots, Pacific Maritime Region, AFL-CIO. Case 19-CA-26716

April 11, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

Pursuant to a charge filed on October 21, 1999, the General Counsel of the National Labor Relations Board issued a complaint on January 31, 2000, alleging that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by promulgating and distributing to its employees classified as mates a rule that provides that any mate who participates in any union organizing campaign or who encourages any employee to join or participate in union activities will be terminated. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On February 24, 2000, the General Counsel filed a Motion for Summary Judgment. On February 28, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

According to the undisputed allegations in the Motion for Summary Judgment, on October 21, 1999, the Union filed a petition for a representation election in Case 19-RC-13872, in which it sought to represent certain employees of the Respondent, including mates. On November 26, 1999, the Regional Director for Region 19 issued a Decision and Direction of Election which found, among other things, that mates employed by the Respondent are employees under the Act, and not statutory supervisors as had been argued by the Respondent. The Respondent filed a timely request for review which challenged solely the Regional Director's determination that mates were employees, and not supervisors.

On December 29, 1999, the Board issued an unpublished Order denying the Respondent's request for review, therefore affirming the Regional Director's finding that the Respondent's mates are employees under the Act. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).)

The instant complaint alleges that on about October 20, 1999, the Respondent promulgated and distributed to its mates, and since then has maintained, the following rule:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

The complaint also alleges that the Respondent's mates are employees within the meaning of the Act. Accordingly, the complaint alleges that the Respondent's promulgation and maintenance of the above rule violates Section 8(a)(1) of the Act.

In its answer the Respondent admits the jurisdictional allegations of the complaint, and admits that on about October 20, 1999, it promulgated, distributed, and maintained the rule set forth above.¹ The Respondent's answer, however, denies the employee status of the mates, and consequently also denies the commission of any unfair labor practices. Thus, the only defense that the Respondent offers to the 8(a)(1) allegation here is a reiteration of its contention, raised and rejected in the representation proceeding, that the mates are not employees, but instead are statutory supervisors.

The issues raised by the Respondent's denials were fully considered by the Regional Director and the Board in Case 19-RC-13872. Further, in a letter attached to its answer, the Respondent's counsel stated that the only issue in this case is the status of the mates, and that the Respondent desired to stipulate the facts and rely solely on the record in the representation proceeding in the instant case so that the General Counsel "could file your motion for summary determination and the matter would move swiftly along its way for resolution." Subsequently, in a letter to the Respondent's counsel, the General Counsel verified a telephone conversation in which the Respondent's counsel stated that the Respondent does not desire to present any additional evidence regarding the status of the mates, but wishes to rely solely on the record in Case 19-RC-13872 because the Respondent desired to have the issue of whether the Board erred in finding mates to be employees "presented to the circuit court of appeals as quickly as possible."

Further, in its response to the Notice to Show Cause, the Respondent states that the sole question at issue raised by the instant complaint is whether mates are supervisors, and that "Respondent's position was fully explicated in its Request for Review and requires no further discussion." The Respondent's response asks that the Board "swiftly issue its decision" in this case, thereby "facilitating judicial review."

Thus, it is clear that there are no material issues of fact warranting a hearing in this case. All issues regarding the employee status of the mates raised by the Respondent's answer and response were or could have been litigated in the prior representation proceeding. The Re-

¹ The Respondent's answer also admits the labor organization status of the Union, and that the Respondent's owner, Roland "Bo" Brusco Jr., is a supervisor and agent of the Respondent within the meaning of the Act

spondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. In addition, the Respondent has not raised any other issue regarding its promulgation and maintenance of the rule at issue that warrants a hearing.²

Unlike in an 8(a)(5) case where an employer is refusing to bargain in order to challenge a union's certification, when, as here, independent violations of Section 8(a)(1) or (3) are alleged, and the resolution of those issues turns on the employee status of certain individuals, the determination in a previous representation proceeding that those individuals are employees rather than statutory supervisors does not have binding force and may be relitigated. *Serv-U Stores*, 234 NLRB 1143, 1144 (1978); *Air Transit, Inc.*, 256 NLRB 278, 279 (1981); *Union Square Theatre Management*, 326 NLRB 70 (1998). The Board, however, may accord a certain "persuasive relevance, a kind of 'administrative comity'" to the prior representation case findings, subject to reconsideration and to any additional evidence adduced in the unfair labor practice case.³

Thus, although the Respondent was entitled to relitigate the issue of the mates' status in the instant case, the Respondent does not seek to litigate that issue nor does it offer any additional evidence to support its contention that the mates are supervisors. Instead, the Respondent merely asserts that the Board erred in the prior representation case. We have carefully considered our previous decision in the representation case, and we reaffirm our finding in that case that the Respondent's mates are employees within the meaning of the Act. The Respondent has raised nothing new in this proceeding, and there are no contested issues of fact warranting a hearing. Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

² The Respondent's response asserts that the Respondent recently rescinded the alleged unlawful rule "as it applies to mates," but the Respondent concedes that this alleged rescission "goes merely to the remedy and not the substance of the Complaint." We find that the Respondent's assertion that it has rescinded the rule does not raise an issue requiring a hearing.

³ See *Serv-U Stores*, 234 NLRB at 1144, and *Air Transit, Inc.*, 256 NLRB at 279.

⁴ Member Hurtgen dissented from the denial of review in the representation case, Case 19-RC-13872, and he remains of that view. However, he notes that the Respondent has declined to pursue its right to relitigate the status of the mates in this proceeding, but merely relies solely on the record in the representation case. Thus, Member Hurtgen agrees that the Respondent has not raised any new matters that warrant a hearing in this unfair labor practice case. See *Air Transit, Inc.*, supra. In light of this, and for institutional reasons, he agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a State of Washington corporation, with an office and place of business in Longview, Washington, has been engaged in the business of operating inland and offshore tugboats on the West Coast of the United States. During the 12-month period preceding issuance of the complaint, which period is representative of all material times, the Respondent in conducting its business operations described above, derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Washington directly to points outside the State of Washington. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As discussed above, on about October 20, 1999, the Respondent promulgated and distributed to its mates, and since then has maintained, the following rule:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

The Respondent's promulgation, distribution, and maintenance of this rule clearly is unlawful. In view of the Board's finding in the representation case that the Respondent's mates are employees under the Act, this rule is invalid on its face, and constitutes the rawest form of interference, restraint, and coercion of employees in the exercise of Section 7 rights. Accordingly, we find that by these actions the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist, and to take certain affirmative action designed to effectuate the purposes of the Act. Specifically, we will require the Respondent to rescind the unlawful rule set forth above.

ORDER

The National Labor Relations Board orders that the Respondent, Brusco Tug and Barge Co., Longview, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, distributing, and maintaining a rule that prohibits its mates from participating in any union organizing campaign, or from encouraging any employee

to join or participate in union activities, under threat of discharge.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Rescind the following rule that was distributed to mates and maintained since about October 20, 1999:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

(b) Within 14 days after service by the Region, post at its facility in Longview, Washington, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the no-

⁵ If 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."

tice to all current employees and former employees employed by the Respondent at any time since October 20, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT promulgate, distribute, and maintain a rule that prohibits our mates from participating in any union organizing campaign, or from encouraging any employee to join or participate in union activities, under threat of discharge.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the following rule that was distributed to mates and maintained since about October 20, 1999:

Any mate who participates in any union organizing campaign, or who encourages any employee to join or participate in union activities, will be terminated.

BRUSCO TUG AND BARGE CO.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

<p>BRUSCO TUG AND BARGE CO. Employer</p> <p>and</p> <p>INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PACIFIC MARITIME REGION, AFL-CIO Petitioner</p>	<p>TYPE OF ELECTION (CHECK ONE)</p> <p><input type="checkbox"/> CONSENT</p> <p><input type="checkbox"/> STIPULATED</p> <p><input checked="" type="checkbox"/> RD DIRECTED</p> <p><input type="checkbox"/> BOARD DIRECTED</p> <p>CASE 19-RC-13872</p>	<p>(ALSO CHECK BOX BELOW WHEN APPROPRIATE)</p> <p><input type="checkbox"/> 8(b)(7)</p>
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CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

**INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO**

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

UNIT: All mates, deckhands, and engineer/deckhands employed by the Employer on vessels operated by the Employer out of its Longview/Cathlamet, Washington, home port; excluding captains, and all other employees.



Signed at Seattle, Washington,
on the 22nd day of September,
2000

Paul Eggert
Regional Director, Region 19
National Labor Relations Board

Copy mailed to the following 9/25/2000:

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 [West Reporter Image \(PDF\)](#)

247 F.3d 273, 167 L.R.R.M. (BNA) 2148, 2001 A.M.C. 1684, 345 U.S.App.D.C. 411

[Briefs and Other Related Documents](#)

[Judges and Attorneys](#)

United States Court of Appeals,
District of Columbia Circuit.
BRUSCO TUG & BARGE CO., Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 00-1183.

Argued Jan. 26, 2001.

Decided May 1, 2001.

Employer petitioned for review, and the National Labor Relations Board (NLRB) cross-applied for enforcement of Board decision finding that employer committed an unfair labor practice by interfering with its employees' right to organize. The Court of Appeals, Tatel, Circuit Judge, held that: (1) Board's determination that mates' direction of crewmen on tugboats did not make them supervisors for purposes of the National Labor Relations Act (NLRA) would be remanded for the Board to explain why its decision was not inconsistent with two prior Board decisions finding tugboat workers to be supervisors based on their direction of crewmen or, alternatively, to justify its apparent departure from Board precedent, and (2) employer waived issue whether work assignment responsibilities of mates on tugboats were indicative of supervisory status.

Enforcement denied; remanded.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↳ [231H Labor and Employment](#)

↳ [231HXII Labor Relations](#)

↳ [231HXII\(I\) Labor Relations Boards and Proceedings](#)

↳ [231HXII\(I\)5 Evidence in General](#)

↳ [231Hk1712 Presumptions and Burden of Proof](#)

↳ [231Hk1714 k. Particular Issues in General. Most Cited Cases](#)

(Formerly 232Ak539 Labor Relations)

The burden of proving supervisory status for purposes of the NLRA rests on the party that asserts it. National Labor Relations Act, § 2(11), as amended, 29 U.S.C.A. § 152(11).

[2]  [KeyCite Citing References for this Headnote](#)

↳ [231H Labor and Employment](#)

↳ [231HXII Labor Relations](#)

↳ [231HXII\(A\) In General](#)

↳ [231Hk977 Employees Within Acts](#)

↳ [231Hk982 k. Supervisory Personnel. Most Cited Cases](#)

(Formerly 232Ak67 Labor Relations)

Ex. H

Because the issue of supervisory status for purposes of the NLRA is heavily fact-dependent and job duties vary, per se rules designating certain classes of jobs as always or never supervisory are

generally inappropriate. National Labor Relations Act, § 2(11), as amended, 29 U.S.C.A. § 152 (11).

[3]  KeyCite Citing References for this Headnote

- ↳ 231H Labor and Employment
 - ↳ 231HXII Labor Relations
 - ↳ 231HXII(I) Labor Relations Boards and Proceedings
 - ↳ 231HXII(I)9 Hearing
 - ↳ 231Hk1806 Determination
 - ↳ 231Hk1807 k. In General. Most Cited Cases
(Formerly 232Ak599.1 Labor Relations)

While the National Labor Relations Board (NLRB) need not address every precedent brought to its attention, it must provide an explanation where its decisions appear to be "on point."

[4]  KeyCite Citing References for this Headnote

- ↳ 15A Administrative Law and Procedure
 - ↳ 15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
 - ↳ 15AIV(D) Hearings and Adjudications
 - ↳ 15Ak502 k. Stare Decisis; Estoppel to Change Decision. Most Cited Cases

An agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.

[5]  KeyCite Citing References for this Headnote

- ↳ 231H Labor and Employment
 - ↳ 231HXII Labor Relations
 - ↳ 231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
 - ↳ 231HXII(J)1 Review by Courts
 - ↳ 231Hk1888 Remand to Board
 - ↳ 231Hk1891 k. Representation Proceedings. Most Cited Cases
(Formerly 232Ak687.1 Labor Relations)

Determination of the National Labor Relations Board (NLRB) that mates' direction of crewmen on tugboats did not make them supervisors for purposes of the NLRA would be remanded for the Board to explain how its decision was consistent with two prior Board decisions finding tugboat workers to be supervisors based on their direction of crewmen or, alternatively, to justify its apparent departure from precedent. National Labor Relations Act, § 2(11), as amended, 29 U.S.C.A. § 152(11).

[6]  KeyCite Citing References for this Headnote

- ↳ 231H Labor and Employment
 - ↳ 231HXII Labor Relations
 - ↳ 231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
 - ↳ 231HXII(J)1 Review by Courts
 - ↳ 231Hk1858 Presentation of Objections to Board
 - ↳ 231Hk1860 k. Particular Objections. Most Cited Cases
(Formerly 232Ak668 Labor Relations)

Employer waived issue whether work assignment responsibilities of mates on tugboats were indicative of supervisory status for purposes of the NLRA, where employer failed to raise issue before

the National Labor Relations Board (NLRB). National Labor Relations Act, § 2(11), as amended, 29 U.S.C.A. § 152(11).

***274 **412** On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Thomas M. Triplett argued the cause for petitioner. With him on the brief was Karen O'Kasey.

Christopher W. Young, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Leonard R. Page, General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Margaret A. Gaines, Supervisory Attorney.

Before: WILLIAMS, RANDOLPH and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

Rejecting petitioner's argument that mates on its tugboats are supervisors within the meaning of the NLRA, the National Labor Relations Board found that petitioner, by interfering with its mates' right to organize, committed an unfair labor practice. Because the Board failed adequately to explain its decision, we deny enforcement and remand for further proceedings.

I

Section 8(a)(1) of the National Labor Relations Act prohibits employers from interfering with their employees' right to organize. 29 U.S.C. § 158(a)(1) (referring to the rights guaranteed in *id.* § 157). The Act's definition of protected "employee[s]" excludes "any individual employed as a supervisor." *Id.* § 152(3). A "supervisor" is:

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 ***275 **413** routine or clerical nature, but requires the use of independent judgment.

Id. § 152(11).

Petitioner Brusco Tug & Barge Co. tows and transports cargo along the West Coast. Brusco tugs tow log, chip and sand barges, as well as target sleds for the United States Navy. Approximately twenty-five tugs operate out of Brusco's home port in Cathlamet, Washington, performing both inland and offshore jobs. Manned by a master (also called a captain) and one deckhand, inland tugs primarily perform day jobs on the Columbia River. Offshore tugs—the focus of this case—take thirty-day trips along the Pacific coast, ranging as far north as Vancouver and as far south as Mexico. Offshore crews include a master, a mate, an engineer and one (or sometimes two) deckhands.

While at sea, offshore crews typically work six-hour shifts assigned by the master. The master and a deckhand or engineer alternate shifts with the mate and the other crewmen. Some tasks require participation of the entire crew; for instance, all crewmen work together to tie a barge to the tugboat. While the master maneuvers the boat, the mate directs the crewmen on the deck, coordinating the passing of the lines. The mate also selects a crewman to board the barge and pass its towing bridle to crewmen on the tug.

In October 1999, while the International Organization of Masters, Mates, and Pilots was engaging in an organizing campaign at Brusco's home port, the company's owner, Bo Brusco, sent a letter to his masters and mates, stating that "masters and mates are management" and would be terminated if they engaged in any organizing activity. Claiming that the letter interfered with the masters' and mates' right to organize, the union filed an unfair labor practice charge.

Shortly thereafter, an NLRB hearing officer heard evidence in a different matter regarding Brusco-

defining the collective bargaining unit for the purposes of the upcoming union election. *Brusco Tug & Barge Co. v. Int'l Org. of Masters, Mates, & Pilots*, No. 19-RC-13872 (Nov. 26, 1999). Over Brusco's objection, the officer ruled that mates should be included in the bargaining unit. Although recognizing that mates assign and direct other crewmen during tie-ups, he thought such actions required no independent judgment within the meaning of NLRA section 2(11) and were therefore not indicative of supervisory status. *Id.* at 6-7. He agreed with Brusco, however, that its masters were supervisors and therefore ineligible for inclusion in the bargaining unit. *Id.* at 6. A divided Board rejected Brusco's request for review of the hearing officer's determination.

A few months later, the Board addressed the union's still-pending charge that Bo Brusco's October 1999 letter amounted to an unfair labor practice. Not disputing that its letter interfered with the mates' ability to organize, Brusco renewed its argument that mates are statutory supervisors who lack the right to organize under the Act. Because the Board had already determined that Brusco's mates are employees within the meaning of the statute, it granted summary judgment against the company. *Brusco Tug & Barge Co.*, 330 N.L.R.B. No. 169 (April 11, 2000), 2000 WL 420616, at *3.

Insisting that its mates are supervisors, Brusco petitions for review. The company argues that its mates perform a wide range of supervisory tasks, and that the Board impermissibly departed from precedent in deeming them employees. The Board cross-applies for enforcement.

***276 **414 II**

[1] ¶ "Because of its expertise, the Board necessarily has a large measure of informed discretion" in determining if a worker is a supervisor. *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550 (D.C.Cir.1984) (internal citation omitted). We will overturn the Board's finding that Brusco's mates are statutory employees only if it is contrary to law, inadequately reasoned, see *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 576, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994), or unsupported by substantial evidence, *Passaic Daily News*, 736 F.2d at 1550. In this circuit, moreover, the burden of proving supervisory status rests on the party that asserts it—here, Brusco. See *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962 (D.C.Cir.1999). Unless Brusco demonstrates otherwise, the Board may thus presume that the mates are employees rather than supervisors.

[2] ¶ Citing Board decisions finding tugboat captains and mates to be supervisors, Brusco argues that mates, as a category, may not be considered employees. We disagree. 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. See *Ky. River Comty. Care, Inc. v. NLRB*, 193 F.3d 444, 453 (6th Cir.1999), cert. granted, 530 U.S. 1304, 121 S.Ct. 27, 147 L.Ed.2d 1050 (2000). To meet its burden, therefore, Brusco must do more than cite other cases finding mates to be supervisors; it must prove that its mates actually perform one or more of the supervisory tasks listed in NLRA section 2(11), and that, in doing so, they use "independent judgment."

Brusco next relies on its "Responsible Carrier Operation Plan," a voluntary plan drafted as part of a safety program sponsored by the American Waterways Association. According to Brusco, because the plan provides that "in [the master's] absence, his relief, the mate, is the master," Pet'r Br. at 7, and because the hearing officer found that Brusco's masters were supervisors (because they use independent judgment in recommending transfer and promotion, as well as directing and assigning crewmen), its mates are also supervisors. Responding, the Board disputes not only that the plan's provisions give mates all authority granted to masters, but also that the plan, which the company intended only as a "guideline," delegates any authority at all. Hearing Tr. at 163, *Brusco Tug & Barge Co.*, No. 19-RC-13872. In any event, as the Board points out in its brief, paper authority alone does not make a worker a supervisor. See *Beverly Enters.*, 165 F.3d at 962 (citing *Food Store Employees Union, Local 347 v. NLRB*, 422 F.2d 685, 690 (D.C.Cir.1969)). Brusco must provide specific evidence that its mates actually exercise supervisory authority.

Before the hearing officer, Brusco proved that its mates perform two of the supervisory tasks listed in the statute: "assign[ing]" and "direct[ing]" crewmen during the tie-up. *Brusco Tug & Barge Co.*, No. 19-RC-13872, at 6. Because the hearing officer considered these tasks "routine" and not to

"require[] the use of independent judgment," 29 U.S.C. § 152(11), however, he rejected Brusco's argument that the mates were statutory supervisors. *Brusco Tug & Barge Co.*, No. 19-RC-13872, at 6-7.

Direction

The "direction of the 'work force' (two or possibly three [crewmen])," the hearing officer concluded, "hardly indicates the need for independent judgment beyond *277 **415 that of an experienced hand." *Id.* In its brief before us, the Board elaborates: "[t]hose orders simply embody the mates' greater skills and experience, not managerial prerogatives." Resp't Br. at 17.

[3]  Brusco argues that the Board's decision conflicts with two cases in which the Board found tugboat workers to be supervisors based on their direction of crewmen: *Local 28, International Organization of Masters, Mates & Pilots*, 136 N.L.R.B. 1175 (1962), enforced, 321 F.2d 376 (D.C.Cir.1963), and *Bernhardt Bros. Tugboat Serv., Inc.*, 142 N.L.R.B. 851, enforced, 328 F.2d 757 (7th Cir.1963). Neither the hearing officer nor the Board addressed these two cases. While the Board need not address every precedent brought to its attention, it must provide an explanation where its decisions appear to be "on point." See *Gilbert v. NLRB*, 56 F.3d 1438, 1448 (D.C.Cir.1995); see also *id.* at 1445-48; *New England Grain & Feed Council v. ICC*, 598 F.2d 281, 285 (D.C.Cir.1979) ("While we are somewhat disturbed by the Commission's failure to explain why [an asserted precedent] is inapplicable here, that case is sufficiently distinguishable to assure that the Commission's oversight does not present a danger that it has arbitrarily departed from its own precedents.").

According to Brusco, *Local 28* and *Bernhardt Brothers* are both on point because, it claims, the direction given by the workers in the two cases is similar to that given by Brusco's mates. In *Local 28*, the Board found that mates' direction of crewmen "during locking and docking operations and in emergency situations ... involve[d] the exercise of independent judgment in the issuance of orders to deckhands and other deck employees." *Id.* at 1203. The direction provided by *Local 28*'s mates-coordinating crewmen in passing lines, *id.* at 1192—does indeed resemble the direction given by Brusco's mates. In its appellate brief, the Board attempts to distinguish *Local 28*, arguing that the mates in that case "had authority to issue orders to employees under pain of discipline." Resp't Br. at 24. This is no real distinction. As we read the hearing officer's findings, surely the crewmen on Brusco's tugs were not free to ignore mates' commands. Applying the definition of supervisor in NLRA section 2(11), the officer conceded that Brusco's mates "direct[ed]" crewmen, characterizing them as "boss[es] on deck." *Brusco Tug & Barge Co.*, No. 19-RC-13872, at 3, 6. He based his conclusion that Brusco's mates are statutory employees not on any suggestion that their direction is ineffective, but on his view that their actions require no independent judgment. Moreover, the *Local 28* Board expressly declined to base its determination that the mates were supervisors on their power to implement or recommend discipline. 136 N.L.R.B. at 1203. In that case, the authority to discipline came solely from the master: "[o]nly the master may enforce discipline on his boat." *Id.* at 1193.

Similarly, in *Bernhardt Brothers*, the hearing officer found that Bernhardt's pilots were supervisors because while on watch they "give[] orders to the crew in connection with the tow, the lookout, and the amount of power needed." 142 N.L.R.B. at 854. Although this, too, appears similar to Brusco's mates' responsibilities, the Board's brief makes no serious effort to distinguish *Bernhardt Brothers*. It asserts only that "all such cases are necessarily fact specific" and that there is no evidence that Brusco's mates' direction occurs while they are on watch, Resp't Br. at 21 n.5, giving no reason why direction on watch should be different from direction exercised at other times.

*278 [4]  [5]  **416 Because it is "axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent," *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1443 (D.C.Cir.1997) (internal citation omitted), we will remand for the Board to explain why its decision in this case is not inconsistent with *Local 28* and *Bernhardt Brothers* or, alternatively, to justify its apparent departures.

The Board's approach to the direction issue on remand will doubtless be affected by the Supreme Court's forthcoming decision in *NLRB v. Kentucky River Community Care, Inc.*, No 99-1815 (argued Feb. 21, 2001). There, the Sixth Circuit had rejected the Board's argument that nurses are not

supervisors because their direction of nurse's aides arises "by virtue of their training and expertise, not because of their connection with 'management.'" Ky. River Comty. Care, Inc. v. NLRB, 193 F.3d at 453. The Supreme Court granted certiorari to consider the viability of the Board's expert employee approach, NLRB v. Ky. River Comty. Care, Inc., 530 U.S. 1304, 121 S.Ct. 27, 147 L.Ed.2d 1050 (2000), precisely the theory the hearing officer relied on in finding that Brusco's mates' direction of crewmen involved no independent judgment.

Assignment

[6]  The hearing officer found that the mates' assignment responsibilities were not indicative of supervisory status, stating: "[The mates] do assign work, but there is no indication it requires independent judgment. Their heaviest 'assignment' option seems to be selecting the more agile of two or three crewmen to go aboard a barge for the attachment of the towing bridle." Brusco Tug & Barge Co., No. 19-RC-13872, at 6. The officer apparently based this conclusion on the testimony of one of Brusco's masters, who stated that both he and the mate assign crewmen during tie-up:

Well, we have some deck hands around that-say they cook really well and they paint really well, but they've got a bum knee, so that's the deck hand you don't want to have running up and down the barge. So you keep him aboard to handle the lines on board. There's other deck hands that are very athletic, but they can't cook very well, so those are the ones you send up on the barge to do the work up there. You know, it's however the job fits them, that they get the job.

Hearing Tr. at 125, Brusco Tug & Barge Co., No. 19-RC-13872. According to the Board, determining who has a "bum knee" or who cooks well is so simple that assignment based on these factors requires the exercise of no independent judgment: "[s]uch an obvious choice falls far short of the type of assignment of work based on an independent assessment of an employee's skills that would require the Board to find that a mate was a supervisor." Resp't Br. at 16.

Although this approach may well be permissible, we have some doubt about the Board's reasoning. Courts typically consider assignment based on assessment of a worker's skills to require independent judgment and, therefore, to be supervisory. See Alois Box Co., Inc. v. NLRB, 216 F.3d 69, 73-75 (D.C.Cir.2000) (upholding the Board's finding of supervisory status based in large part on the fact that the worker made "his own assessments of employees' skills or expertise"); Cooper/T. Smith, Inc. v. NLRB, 177 F.3d 1259, 1265 (11th Cir.1999); American Diversified Foods v. NLRB, 640 F.2d 893, 896 (7th Cir.1981); NLRB v. Pilot Freight Carriers, Inc. 558 F.2d 205, 209-210 (4th Cir.1977). But see *279 **417 Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 552 (9th Cir.1997) (finding no independent judgment even though assessment of skills required). This appears to be the rule in at least one circuit even where, as here, the assessment rests on quite simple factors. See Dynamic Mach. Co. v. NLRB, 552 F.2d 1195, 1201 (7th Cir.1977) (noting that the Board found a worker a supervisor despite the fact that his assignment "options were limited and only a few factors needed to be taken into account in assigning work"); NLRB v. Adam & Eve Cosmetics, Inc., 567 F.2d 723, 728-729 (7th Cir.1977) (overturning the Board's determination that a worker was not a supervisor, reasoning: "That the choices [the worker] had in assigning and directing work were severely circumscribed by the menial nature of the tasks performed and the limited skills of his coworkers ... does not mean that [he] was not called upon to use his own judgment in the course of the job."); American Diversified Foods, 640 F.2d at 896 (overturning ALJ determination that worker was not a supervisor, despite fact that assignment operated within "common sense limitations"). But see NLRB v. Hilliard Development Corp., 187 F.3d 133, 146 (1st Cir.1999) (upholding the Board's determination that "although the nurses consider the needs of individual residents, the matching of skills to requirements was essentially routine.").

Brusco cites none of these cases, however, nor does it even seem to challenge this aspect of the Board's reasoning. Not only does Brusco devote only two sentences in the fact section of its brief to assignment (and these do no more than point out that Brusco's mates "assess the relative ability and physical capabilities of the deckhands" in assigning employees, Pet'r Br. at 9-10), but more important, Brusco failed to raise this issue before the Board. See 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board ... shall be considered by the court"). We thus treat this issue as waived.

III

We deny enforcement and remand to the Board for further proceedings consistent with this opinion.

So ordered.

C.A.D.C., 2001.

Brusco Tug & Barge Co. v. N.L.R.B.

247 F.3d 273, 167 L.R.R.M. (BNA) 2148, 2001 A.M.C. 1684, 345 U.S.App.D.C. 411

Briefs and Other Related Documents ([Back to top](#))

- [2000 WL 35574475](#) (Appellate Petition, Motion and Filing) Brief for the National Labor Relations Board (Nov. 27, 2000)
- [2000 WL 35574895](#) (Appellate Brief) Brief of Appellant (Sep. 22, 2000)
- [00-1183](#) (Docket) (Apr. 25, 2000)

Judges and Attorneys ([Back to top](#))

[Judges](#) | [Attorneys](#)

Judges

- **Randolph, Hon. A. Raymond**

United States Court of Appeals, District of Columbia Circuit
Washington, District of Columbia 20001

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- **Tatel, Hon. David S.**

United States Court of Appeals, District of Columbia Circuit
Washington, District of Columbia 20001

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- **Williams, Hon. Stephen F.**

United States Court of Appeals, District of Columbia Circuit
Washington, District of Columbia 20001

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- **Page, Leonard R.**

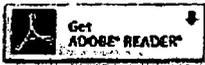
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Longview, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG AND BARGE CO.

and

Case 19-CA-26716

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On April 11, 2000, the National Labor Relations Board issued a Decision and Order in this proceeding¹ finding that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act by promulgating and distributing to its employees classified as mates aboard the Respondent's vessels a rule that provides that any mate who participates in any union organizing campaign or who encourages any employee to join or participate in union activities will be terminated. The Board rejected the Respondent's contention that its mates are statutory supervisors on the basis that the status of the mates was fully considered by the Regional Director and the Board in Case 19-RC-13872.

Subsequently, the Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order, and the Board cross-petitioned for enforcement of its Order. On May 1, 2001, the court denied enforcement

¹ 330 NLRB No. 169 (not published in Board volumes).

of the Board's order and remanded the case for further consideration in light of the court's opinion.² The court directed the Board to explain why its decision in this case is not inconsistent with *Local 28, Masters, Mates & Pilots*, 136 NLRB 1175 (1962), *enfd.* 321 F.2d 376 (D.C. Cir. 1963) and *Bernhardt Bros. Tugboat Service, Inc.*, 142 NLRB 851, *enfd.* 328 F.2d 757 (7th Cir. 1963) or, alternatively, to justify its apparent departures. *Id.* at 278. The court added that "the Board's approach to the direction issue on remand will doubtless be affected by the Supreme Court's forthcoming decision in *NLRB v. Kentucky River Community Care, Inc.*" *Id.*

On May 29, 2001, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct.1861 (2001). In that case, the Court upheld the Board's rule that the burden of proving Section 2(11) supervisory status rests on the party asserting it. However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting

² 247 F.3d 273 (D.C. Cir. 2001).

the possibility of “distinguishing employees who direct the manner of others’ performance of discrete tasks from employees who direct other employees.” *Kentucky River*, 121 S. Ct. slip op. at 14.

On July 26, 2001, the Board advised the parties that it had decided to accept the court’s remand and invited the parties to submit statements of position. The Employer and the Union submitted statements of position.³ Amicus curiae Local 333, United Marine Division, ILA, AFL-CIO, submitted a brief in support of the Union’s position.

The General Counsel moves the Board to vacate its decision in this case and suggests that the Board revoke the Union's certification in Case 19-RC-13872 and remand that case to the Regional Director for further consideration and to reopen the record. The Respondent supports the General Counsel's motion and urges that it be granted. The Union and amicus curiae Local 333 both oppose a reopening of the record, contending that *Kentucky River* does not alter the Board's finding that the Respondent's mates are not statutory supervisors.

After careful consideration, we have decided to vacate the Board's Decision and Order in Case 19-CA-26716 and to deny the General Counsel's motion for summary judgment. Further, we have decided to reopen the record in Case 19-RC-13872 and to remand it to the Regional Director for Region 19 for further consideration and to take additional evidence on the issue of whether the Employer’s mates “assign” and

³ The Union has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

“responsibly direct” other employees and on the scope or degree of “independent judgment” used in the exercise of such authority.⁴

ORDER

IT IS ORDERED that the Board's Decision and Order, 330 NLRB No. 169 (April 11, 2000), is vacated and that the General Counsel's motion for summary judgment is denied.

IT IS FURTHER ORDERED that the record in Case 19-RC-13872 is reopened, and the case is remanded to the Regional Director for Region 19 for further consideration and to take additional evidence on the issues specified above.

Dated, Washington, D.C., October 24, 2001.

PETER J. HURTGEN, CHAIRMAN

WILMA B. LIEBMAN, MEMBER

DENNIS P. WALSH, MEMBER

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁴ We do not find it appropriate to revoke the Board's Certification of the Union at this time.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BRUSCO TUG AND BARGE CO.

Employer

and

Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION ON REMAND

Pursuant to the Board's Order in 330 NLRB No. 169, the record in the above-referenced case was reopened for the purpose of taking additional evidence on the issue of "whether the Employer's mates 'assign' and 'responsibly direct' other employees and on the scope or degree of 'independent judgment' used in the exercise of such authority". Upon the entire record in this proceeding,¹ the undersigned finds:²

The Employer operates about 25 tugboats out of its homeport in Cathlamet, Washington, as well as about ten additional tugboats out of other West Coast ports. The mates involved in the instant proceeding all work out of Cathlamet.

The Employer operates its Cathlamet-based tugboats, along the Pacific Coast and on the Columbia River. Ocean-going tugs are manned by a crew consisting of a captain, a mate, an engineer and a deckhand. There is a second deckhand when a log barge is being towed, as loading and unloading log barges involves additional work. Ocean-going crews typically work rotations of 30 days on, 30 days off. At sea, the crewmembers are on duty during two six-hour watches in every 24 hours. The captain and engineer are on watches beginning at 6:00 a.m. and 6:00 p.m. The mate and deckhand are on watches beginning at 12 noon and 12 midnight. The boat is steered by the captain or the mate, depending on which is on duty.

The captain is the highest authority on the boat. He is responsible for navigation and safety, for ensuring that company policy is followed, that all necessary groceries and other supplies are acquired and on board, that the vessel is sea-worthy, and that the crew is capable of carrying out their duties. The captain has the authority to take the boat into an unscheduled port, or to stay in port, if weather conditions so warrant. The captain may put a crewmember off the boat for disciplinary reasons.

During his watch, the mate steers the boat, following a pre-determined course and is responsible for the safety and navigation of the boat. The deckhand, on the same watch as the mate, has the duty of

¹ Following the reopened hearing held on November 14, 2001, the parties filed briefs, which have been considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

preparing meals for the rest of the crew. The deckhand may also be instructed by the captain or the mate to perform certain routine maintenance tasks, such as chipping and painting. Some captains have an established duty roster for the deckhand to follow; others do not.

Ocean-going tugs generally tow only one barge at a time. Connecting a barge to a boat for towing purposes is called "making up a tow." The entire crew participates in making up a tow, and also in docking a barge. Generally, for either of these maneuvers, the captain steers the boat, either from the wheelhouse, or from the "Texas deck", an elevated platform above the wheelhouse from which the captain can steer and operate the winch for the towline, with a better view of the activities. The mate may be stationed either on the deck or on the barge. The mate gives instructions to the deckhand and the engineer with respect to where they should station themselves and which lines to "tie off" (or release) in what order.

When making up a tow, or docking, the crewmembers are each equipped with handheld radios and are all in constant contact with each other. Generally, the captain has, in advance, advised the mate as to what they will be doing with respect to making up a tow or docking, and how he wants it done. Other crewmembers may be present during these conversations, or the mate may pass on the instructions later. Crewmembers who have worked together before need little instruction, as each already knows what needs to be done, once given the plan.

The engineer is responsible for the proper functioning of the mechanical parts of the boat. If there is a malfunction or other problem with the engine during the mate's watch (during which the engineer is off watch), the mate can wake the engineer. The engineer then diagnoses the problem and determines whether it needs to be fixed immediately or if it can wait until his normal watch. Typically, the engineer is deferred to in such matters. The engineer is paid overtime for any time he works "off watch."

There are two methods of docking a barge – "hipping up" to the barge, and towing the barge into the dock. The captain decides which method will be used. Hipping up involves moving the tug to the side of the barge, securing the barge tightly alongside the boat, and then moving the two to the dock as a single unit. During this procedure, the deckhand boards the barge once the boat is alongside, to secure the lines. The captain decides which lines to tie where. Generally, captains like to tie off the lines in a certain order, following the same order every time, such as spring line first, then bow, then stern. The mate also boards the barge, stationing himself at a place of advantageous visibility so he can direct the captain (who is steering the boat)³ to the dock. Some captains prefer to board the barge themselves and have the mate steer. It is necessary to have someone on the barge because the barge is higher than the boat and blocks the view of the dock.

When the second docking method - towing the barge to the dock – is used, there is usually an assist boat, which takes the mate and the deckhand to the barge (which is some distance behind the boat). The mate then gives the captain and the assist boat instructions, such as the distance remaining to the dock, whether more or less speed is needed, and whether the assist boat should push or back away.

On the ocean, conditions such as weather can influence a decision to lengthen or shorten the towline, a decision that can be made by the mate as well as the captain. The procedure involves the mate and the deckhand (or the captain and the engineer) both going to the winch on the Texas deck, where the mate operates the controls while the deckhand watches to make sure that the line is spooling properly.

³ The boat and captain are obviously on the "water" side of the barge, not the "dock" side.

In rough seas, the barge may be more safely secured using surge gear, a decision made by the captain. In low visibility conditions, the mate may post the deckhand to keep watch, although this occurs only rarely. (The wheelhouse is only 20 feet from the bow.)

On ocean-going voyages, the mate has discretion to slow the vessel down to avoid breaking the tow "wire" (cable), but only the captain can decide to turn the boat around, whether or not to leave port, or whether to go back to port in bad weather. [There is contradictory testimony in the record that the mate can decide to go into port in bad weather, and that this may happen on any one boat once or twice during any one winter.] The captain decides what time the boat will get to the "bar"⁴ near the mouth of the Columbia River; if the captain says they need to get there at 2:00, for example, the mate will, if necessary, slow down the boat to arrive at 2:00.

During his watch, the mate can call out the captain during any unusual circumstances or an emergency. For example, if the mate thinks that crossing the Columbia River bar is going to be particularly severe, or that maybe they won't want to go in, he would call out the captain to make the decision. In any emergency, such as a fire on board, or a man overboard, the mate would call out the captain. During emergencies or abandoning ship, the mate is in charge of the deck and directing the crew, while the captain is on the bridge steering the boat. The mate would give any necessary instructions to the remaining crew, such as to bring a fire extinguisher or water hoses.⁵

On some, but apparently not all, boats the mate is responsible for safety and fire drills and the drill for broken-towline barge retrieval. On some boats, the captain decides when the drills will occur; on other boats the mate decides. All crewmembers, including those who are off watch, participate in drills. Those who are off watch receive overtime pay. Obviously, every such drill will require that someone work overtime.

In normal circumstances while at sea, there are projects for the deck "crew"⁶ to work on, such as painting or making repairs. Depending on the watch, the captain or the mate will instruct the deck crew to work on the project. The deck crew also does cleaning and cooking. The deckhand is on the mate's watch so that he has time to cook dinner for the captain and engineer. Captain Nordstrom testified that he relies on the judgment of the mate in determining the "staffing level needs" during the mate's watch. However, such testimony without more is not very helpful, inasmuch as the mate has few if any choices regarding the "staffing level" on his watch.⁷ A witness who had worked as a mate said that he would assign tasks according to whom he thought was best qualified. For example, the more physically strong crewman would be told to do the lashings, while the engineer would be told to handle any mechanical steps. Apparently this testimony was in reference to loading log barges in port, when there are two deckhands.

Some of the Employer's vessels ply only the Columbia River. Generally, these vessels make day runs of up to 12 hours, and carry a captain and one crewmember. During the summer of 2001, one vessel made the "fish run" which involved going a few hundred miles up the Columbia, passing through several locks. The fish run normally had a crew of four, including the captain and the mate (called the "pilot" on the river). They stood watches just as is done in the ocean-going vessels. When passing through locks or fish runs during the mate's watch, the mate would give instructions as to which side of the locks to tie up to, which lines to use, and where the deckhand should be stationed.

⁴ The bar is a relatively shallow area at the entrance to the River, where rough water can be encountered.

⁵ Presumably such instances would be highly infrequent.

⁶ The deck "crew" consists of a single deckhand, or when towing a log barge, two deckhands.

⁷ There is one deckhand on board on the mate's watch, except for log barges. There is no indication that the mate can call out the engineer (other watch) to work on the mate's watch, to do deckhand functions.

When passing through locks, certain decisions have to be made by either the captain (or the pilot (mate) if a fish run is involved,⁸ and the event happens on his watch). Such decisions include whether to tie to the port or starboard side; which lines to tie up, such as a bow line and a stern line; and where to station the deckhand to call out distances on the radio. The lockmaster is stationed on a certain side, and that is generally the side the boat ties up to, so that the "lock slip" (a piece of paper specifying the tonnage and commodities) can be handed to the lockmaster, unless the lockmaster has been called and given the information ahead of time. The wind direction and force can also influence the choice of which side to tie up to, as can the cleat configuration in relation to the length of the barge.

On the river, the boats are almost all push boats, rather than tow boats. Push "wires" on the front of the boat are tied to the barge and then cinched up tightly using electric winches on the boat. When traveling, the wires are kept tight, but may be adjusted from time to time, depending on river conditions. During loading or off-loading, the barge moves down or up in the water as cargo is added or removed; thus, the wires have to remain slack so they won't break. The pilot (mate) instructs the deckhand in to tighten or loosen the push wires in these relatively small numbers of instances where there is a mate on board.

Conclusion.

This remand is limited to the issues of whether mates "assign" and/or "responsibly direct" employees, and whether "independent judgment" is required in doing so. All other arguments concerning supervisory status have already been rejected by the Board and Court.

The Employer contends that mates exercise independent judgment in the responsible direction of employees or assignment of work when they: (1) assign work; (2) assign overtime; (3) handle safety matters; (4) cross the Columbia bar; (5) make up to a barge; (6) change the tow length; (7) travel through locks on the Columbia River; (8) docking; and (9) respond to adverse weather conditions.

(1) Assignment of work. Examples of the mates' assignment of work are: stationing the deckhand in the wheelhouse as an "extra set of eyes" during adverse conditions; or when the vessel is in a narrow area and the mate has to leave the wheelhouse and go to the stern deck. Other assignments would be instructing the deckhand to man the winch while the mate is lengthening or shortening the tow, or lubricating the tow line; assigning the deckhand duties during an emergency; instructing deckhands to perform certain tasks during docking and making up a barge, such as which line to use and where to tie up; instructing the deckhand to lash cargo; and instructing the deckhand to perform various general maintenance tasks, such as chipping and painting. The Employer contends that in making these assignments, the mate assesses the "relative ability, qualifications, experience, mental, and physical capabilities of the deckhands." I note that the Board has found that assignment of employees to specific jobs where such selection is dictated by who possesses the required skill is a "routine" matter. *Vapor Corporation*, 242 NLRB 776 (1979).

It must be kept in mind that during the vast majority of time the mate is on watch, there is only one deckhand, and the mate has no choice with respect to making assignments. During docking and making up a tow, and during emergency situations, the engineer is also present on deck, but at those times the captain is on duty and in charge of the vessel. Thus, during emergencies, and while in port, the mate is not acting in the captain's place, and cannot be said to have the same authority as the captain. If both the captain and the mate were supervisors, there would be a ratio of one supervisor to each employee aboard the vessel, which hardly seems likely in circumstances where captains have testified that everyone on board, including the deckhand, generally knows what they are supposed to do and needs little direction.

⁸ On normal runs, there is a captain plus one additional crewmember.

The record does not reveal that stationing the deckhand in the wheelhouse during adverse weather or while the mate is required to be on the stern deck requires any substantial degree of judgment.⁹ The need for an extra pair of eyes during bad weather is obvious, as is the need to have the deckhand watching things in the wheelhouse (including looking forward) while the mate is at the stern. Likewise, instructing the deckhand to man the winch is obvious, and does not require any independent judgment. These actions seem about as obvious and profound as stationing a worker behind a backing truck.

(2) Assignment of overtime. During emergency situations and emergency drills, and whenever there is a mechanical problem in the engine room on the mate's watch, the engineer is called out. The result is "off watch", overtime, pay for the engineer. The record does not establish that any independent judgment on the part of the mate is required in these situations. The engineer is called out for every emergency and every drill – the mate does not decide on each occasion whether or not to call out the engineer. The engineer is the one person on board who has expertise in the mechanical and electrical equipment in the engine room, and inasmuch as the safety of those aboard the vessel, the vessel itself, and its tow depend upon the proper functioning of the engine room equipment, the need for calling out the engineer in cases of malfunction is obvious, and does not require any independent judgment. There are no specific examples in the record of any mate at any time ever weighing the need to call out the engineer against the cost of the overtime thereby accrued.

(3) Handling of safety matters. The mate plays an active role during emergencies and emergency drills because the mate is "in charge" on the deck while the captain is in the wheelhouse during these events.

There are really two distinctly different events: one is routine (drills), the other not (emergencies). On some boats, the mate decides when the safety drills will be conducted. During drills and actual emergencies, the mate gives instructions to the deck crew, such as to bring hoses or to bring a fire extinguisher. There is no specific example in the record of any mate ever distinguishing in any way between deck crewmembers with respect to which one should bring the fire extinguisher or the hoses. On all vessels, the mate follows the captain's instructions with respect to the frequency and timing of emergency drills: some captains give the mate a free hand in this regard, some captains want certain drills always scheduled for certain times, and some captains don't want any drills at all. Thus the record does not establish that mates are required to use any independent judgment in connection with their activities during emergency drills, or even that the type of direction they give during those events amounts to "responsible" direction.

During actual emergencies, the mate gives instructions to the deck crew (the engineer and the deckhand), such as to bring a fire extinguisher or a hose. It is noted that in emergencies, the captain is always summoned if not already on deck and would surely be the one "in charge" of the implement of captain plus three. Obviously, the captain, in emergencies, is not deferring all decisions except boat maneuvering to the mate. One would have to assume that the emergencies, such as fire, are highly infrequent; if they were commonplace, the Employer would run into severe difficulty with insurers or the Coast Guard and have difficulty functioning, a fact not suggested in the record.

Further, the Board approved the conclusion of the ALJ in *Pantex Towing Corporation*, 258 NLRB 837, 842 (1981) that, "Even if...the man in the wheelhouse with his hand on the wheel was considered 'God' and his license was at stake and he was responsible for the crew's safety and [the employer's] property, the Board has held that neither the licensed status, in which an individual is responsible for the

⁹ If, indeed, any judgment is required, since such assignments would appear likely dictated by Coast Guard regulation and/or employer rules or industry practice.

safety of others, or responsibility for physical property alone, confers supervisory status”, citing *Graham Transportation Company*, 124 NLRB 960 (1959).

(4) Decision making regarding crossing the Columbia River bar. The record establishes that crossing the bar can be more difficult on some occasions than others, and is affected by weather and tidal conditions. The captain decides in advance what time he wants to arrive at the Columbia bar – presumably to encounter favorable tide conditions - and instructs the mate in that regard. In circumstances where the weather is particularly severe, such that he may want to not enter the river, the mate calls out the captain to make the decision. There is no specific evidence in the record demonstrating that mates give any particular direction to the deckhands when they are crossing the bar, nor any evidence establishing that any decision the mate might make regarding crossing the bar involves in any way any of the statutory indicia of supervisory status at issue here.

(5) Making up a barge. The entire crew participates in making up a barge. When they are making up a barge, the captain is usually in the wheelhouse, while the mate is on the barge, where he has a good view of everything. Some captains put the mate in the wheelhouse and go up on the barge themselves. The deckhand is also on the barge; the engineer is on the boat, ready to throw the lines across. The boat hips up to the barge, and the barge is made fast to the boat. Then the boat moves out into the water where there is more maneuvering room, and the towline is attached. Prior to arrival at the dock to make up the barge, the captain has told the mate (and either the rest of the crew directly, or indirectly via the mate) exactly how he wants the maneuver done. Docking a barge is a similar captain-determined process.

The record establishes that during docking and making up a barge, the mate gives instructions (in reality, passes on the captain’s prior instructions/plan) to the deckhand and engineer with respect to which line to tie up first and where, and similar matters. The entire crew is in communication with each other by radio; thus, the captain can monitor every word. The mate may be required to use some judgment as to which line to tie up first, depending on the situation before him.

(6) Changing the tow length. Deciding to lengthen or shorten the tow line because of weather conditions or some other reason may be a decision requiring independent judgment on the part of the mate, but the record fails to establish that such a decision amounts to *responsible direction of employees*, inasmuch as it involves the mate himself operating the winch, and the deckhand doing nothing more than watching the line to assure that it is spooling properly. The record does not demonstrate that directing the deckhand in these circumstances is anything more than a routine matter. Normally, there is only one person available to perform the task, the deckhand.

(7) Travel through locks on the Columbia River. The record establishes that in the summer of 2001 for the first time one boat was engaged in the “fish run”. River runs normally require a captain and a crewmember. During the fish run, there was a crew of four. At most, this involved perhaps two of the total number of mates employed by the Employer, for a very limited period of time. This brief, unprecedented blip in on-the-river experience adds little to evaluating the responsible direction of the work force, since the norm is to have only a captain and another crewmember.

(8) Docking. During procedures involving coming into or leaving a dock, all crewmembers are on deck. At these times, the captain is in charge of the vessel, and is in communication with all crewmembers by means of handheld radios. The captain has determined in advance how the barge will be docked or how the tow will be made up; the mate has only to carry out the captain’s wishes. The record fails to establish that the mate is required to use any independent judgment in directing employees in these maneuvers. (The only “judgment” indicated is in passing “directives” to the *captain*, who cannot see the scene, or to the assist boat.) There is no more “responsible direction” or independent judgment here than for a

construction rigger giving directions to a crane operator. Moreover, this is a matter largely pre-determined by the captain.

In examining the issue of the supervisory status of the mates, I am mindful of *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), in which the Court rejected the Board's interpretation of the phrase "independent judgment." The Board had found that a judgment - even a highly technical or difficult one such as one made by a professional employee - did not constitute "independent judgment" if the judgment required of such person was routine or typical for such a person when directing less-skilled employees in accordance with employer-specified standards. The Court did not make any broad statement that any employee who gives any direction at all to other employees is necessarily a supervisor; to the contrary, the statute specifically excludes judgments that are "merely routine or clerical in nature", and the legislative history clearly shows an intent to distinguish straw bosses and other lower level individuals from true supervisors, so as not to expansively exclude large portions of the work force from the protection of the Act. The Court recognized in *Kentucky River* that "independent judgment" is an ambiguous term as to the *degree* of discretion required. *Id.*, at 1867. "Many normally supervisory functions may be performed without the 'exercise of such a degree of ... judgment or discretion... as would warrant a finding' of supervisory status". *Ibid.*, quoting *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949). "It falls clearly with the Board's discretion to determine, within reason, what scope of discretion qualifies". *Kentucky River*, at 1867. The Act "by focusing on the 'clerical' or 'routine' (as opposed to 'independent') nature of the judgment, introduces the question of *degree* of judgment that we have agreed falls within the reasonable discretion of the Board to resolve". *Id.*, at 1868-69 (Emphasis added). Moreover, "It is undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer". *Id.*, at 1867. Thus, it is clear that there are judgments and there are judgments, made in the "responsible" direction of the work force. Some call for a high *degree* of discretion, some call only for routine or clerical *degree* of judgment. There is a line - not always a bright one - in between. It is up to the Board to set that line, and decide on which side an individual's *degree* of judgment lies.

I am mindful of *Local 28, International Organization of Masters, Mates and Pilots, AFL-CIO*, 136 NLRB 1175 (*Ingraham Tug and Barge*)(1962) ["Ingraham I"], and *Bernhardt Bros. Tugboat Service, Inc.*, 142 NLRB 851 (1963). In both of those cases, the employers involved operated towboats on the Mississippi River and its tributaries. A tow could include anything from one up to 15 or more barges, and might stretch ahead of the boat 1,000 feet or more. In both cases, the crew complement was approximately 10 individuals, including the captain. These circumstances were essentially repeated in the more recent *Ingraham Barge Company*, 336 NLRB No. 131 (2001) ["Ingraham II"], and *Alter Barge Lines, Inc.*, 336 NLRB No. 132 (2001). In the *Ingraham II*, the Board adopted the Administrative Law Judge's findings that the facts had not really changed since *Ingraham I*, where the Board had found the mates/pilots to be supervisors. Two members of the three-member panel in *Ingraham II* wanted to reverse *Ingraham I*, but could not or would not, lacking three members in favor. In the *Alter Barge* case, based on similar facts and findings by the same ALJ as in *Ingraham I* and having just adhered to *Ingraham I* in *Ingraham II*, the same Board panel found the *Alter Barge* mates/pilots to be supervisors as well.

These four cases are readily distinguishable from the instant case in that here the size of the crew complement is normally four, including the captain, and the potential size of any tow is minuscule in comparison. (Here, we are concerned with a maximum of two barges - usually one - whereas *Ingraham II* involved as many as 50 barges; and with crews of 2 compared to 10, on the river. Thus, while the mates herein may give some of the same types of instructions to crewmembers, as did the pilots in the four cited cases, the *degree* of judgment required is considerably less. The mate's role in locking carried significant weight in the four cited cases, whereas in the instant case a mate is involved in locking activity only on the fish run.

More specifically, in *Ingraham II*, a "vessel" consisted of the towboat¹⁰ and its associated barges. As the vessel moved up or down the Tennessee, Ohio, or Mississippi Rivers, barges were necessarily picked up or dropped off. A vessel might include 25 loaded and 25 empty or 15 loaded and 15 empty barges. Barges were placed end on end, side by side, "wired" together. The addition or subtraction of a barge or a number of barges could result in changing the configuration of the vessel by rearranging the barges due to such things as weight and height of the barge and the overall appearance of the mass of barges. A low barge might take on water over its bow if placed at the head of the mass of barges and an uneven or unsquare mass might result in steering difficulty. I further note from a review of most of the reported riverboat tug cases that river work involves frequent locking, constant changes in course, regular changes in the river channels, and "traffic" headed in the opposite direction. Here, the river work almost never involves a crew directed by a mate (only for the fish run). At sea, obviously the voyage would be much more routine, given the lesser number of potentially impinging vessels, the greater course options, the lack of locks, the ability to generally head on a steady course for long periods.¹¹

Thus, as to river work herein, there is virtually no opportunity for supervisory involvement by mates. As to sea work, normally there is a mate in charge of one deckhand, occasionally an engineer¹², and sometimes a second deckhand¹³. The captain is always immediately at hand, and is to be summoned for crises. Headquarters is also readily available by radio. Clearly, the sensitivity of instructions that a mate might need to give to crewmen in the *Ingraham* line of Mississippi River System Cases, and the degree of discretion involved, are of much greater magnitude than that required of the mates in the instant case. An *Ingraham* boat/barge combination compared to the Employer's boat/barge combination is in scale like comparing the Employer's boat/barge operation to a push boat in a lumber mill log pond. There is an order of magnitude difference in scope and complexity.

In conclusion, we are concerned here only with the "assigning work" and "responsible direction" indicia. River crews normally have no mate. For ocean crews, the captain is on watch half the time. The rest of the time the mate is on watch, with the captain immediately available on the small boat. For more difficult maneuvers - docking by hiping up or towing, making up a tow - the captain is on duty, along with the rest of the relatively small crew. The captain plans the activity; the mate essentially relays the directions. The crew knows the whole routine once the basic plan is communicated. At all other times, the boat is chugging along on a pre-determined course, generally out on the ocean, but sometimes on the Columbia. When emergencies or serious concerns arise on the mate's watch (e.g., to cross the bar? to use the surge gear?), he summons the captain.

This record indicates minimal independent judgment - maybe to change the length of the towline or to tell the deckhand to paint. Otherwise life on board is largely determined by tradition, routine, captain's orders, regulations, etc. Most of the mate's judgments are of the statutorily "routine" degree. There is nothing in the record that comes close to showing "responsible direction". In this regard there is no evidence that the mate is disciplined if his "crew" fails, or rewarded if it succeeds. There is no record that any appraisal of the mate calls for a review of how his "crew" performs. There is no hint of reward to the mate - say a bonus - for a job well done by the crew. These are factors that might indicate that one

¹⁰ While the boats are referred to as "tow boats", they in fact push the barges.

¹¹ In the event the Board were to find the instant case indistinguishable from the *Ingraham* and related cases, I respectfully recommend to the Board that these cases be reversed a precedent. The mate's duties in these cases involve a greater degree of judgment than the Employer's mates, but the degree of judgment demonstrated in those cases, in my view, still falls below the minimum required. Telling an employee to go forward to be a lookout in fog, or to tie a line to a clearer bollard at a lock, appears highly routine, predictable and repetitive. Moreover, in my view, the original cases do not contain a careful analysis of the facts, the degree of judgment and the statutory language and purpose.

¹² Recall that ordinarily the engineer does not work on the mate's watch.

¹³ Recall that a second deckhand is required only for log barges.

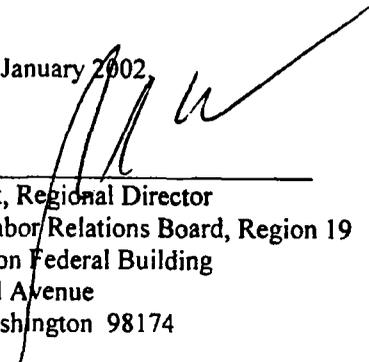
is held "responsible" for the direction of others. The "strongest" evidence of "direction" by the mate is when he gives docking instructions – "faster", "slower", "closer" – to the *captain* or the *assist boat*. The mate has no more authority or responsibility than a journeyman over an apprentice, or a rigger over a crane operator.

I conclude, therefore, that the Employer has not met its burden¹⁴ in establishing that the mates involved herein "assign" or "responsibly direct" employees, utilizing "independent judgment" to a degree exceeding a "merely routine or clerical nature".

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 21st 2002.

DATED at Seattle, Washington, this 7th day of January 2002.



Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

177-8580-4400

¹⁴ The Court in *Kentucky River*, supra, reaffirmed the Board's long-standing policy that the burden of establishing supervisory status falls upon the party claiming that such status exists.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG AND BARGE CO.,
Employer

and

Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES, AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO,
Petitioner

ORDER

Employer's Request for Review of the Regional
Director's Supplemental Decision on Remand is granted as it
raises substantial issues warranting review.

- WILMA B. LIEBMAN, MEMBER
- WILLIAM B. COWEN, MEMBER
- MICHAEL J. BARTLETT, MEMBER

Dated, Washington, D.C., October 18, 2002

Ex. K

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG AND BARGE CO.
Employer

and

Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES, AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO
Petitioner

ORDER

On October 18, 2002, the Board granted the Employer's Request for Review of the Regional Director's Supplemental Decision on Remand.

On September 29, 2006, the Board issued its decisions in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006), Golden Crest Healthcare Center, 348 NLRB No. 39 (2006), and Croft Metals, Inc., 348 NLRB No. 38 (2006), in light of the Supreme Court's decision in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). Oakwood Healthcare, Golden Crest, and Croft Metals, specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act. Accordingly, the Board remands this proceeding to the Regional Director for further appropriate action consistent with Oakwood Healthcare, Golden Crest, and Croft Metals, including reopening the record, if necessary.

ROBERT J. BATTISTA, CHAIRMAN

PETER C. SCHAUMBER, MEMBER

PETER N. KIRSANOW, MEMBER

Dated, Washington, D.C., September 30, 2006.

Ex L

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BRUSCO TUG AND BARGE, INC.

Employer

and

Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

Petitioner

SECOND SUPPLEMENTAL DECISION ON REMAND

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

I. Summary

The Employer is engaged in the operation of tugboats on the west coast of the United States. The International Organization of Masters, Mates & Pilots, Pacific Maritime Region, AFL-CIO (hereafter "the Petitioner") seeks to represent a unit of all mates, deckhands, and engineer/deckhands employed by the Employer on vessels operated by the Employer out of its Longview/Cathlamet, Washington homeport. The Employer contends that its mates are statutory supervisors and therefore should not be included in the unit.

This case is on remand to the Region for further appropriate action consistent with *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); and *Croft Metals, Inc.*, 348 NLRB No. 38 (2006). This

¹ Both parties timely submitted briefs, which were carefully considered.

² The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Ex. M

remand is limited to the issues of whether mates assign and/or responsibly direct employees, and whether "independent judgment" is required in doing so.³

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. I find that the mates' assignment and direction duties do not rise to the level to confer supervisory status.

Below, I have set forth the record evidence relating to the Employer's operations and the factors the Board analyzes in determining assignment and direction duties under *Oakwood Healthcare* and its progeny. Following the record evidence section, I

³ Set forth below is a brief outline of the procedural history of this case.

- October 21, 1999 - initial petition filed.
- November 26, 1999 - D&DE issued finding that a unit composed of all mates, deckhands, and engineer/deckhands to be appropriate.
- December 29, 1999 - the Board denied the Employer's Request for Review.
- May 2, 2000 - election held and the Union received a majority.
- July 31, 2000 - the Region issued a Second Supplemental Decision on Exceptions adopting the Hearing Officer's recommendation, inter alia, that the Employer's challenge to Relief Captain Mark McKinley's vote be overruled.
- September 6, 2000 - the Board denied review on the Second Supplemental Decision on Exceptions.
- September 22, 2000 - Certification of Representative issued.
- April 11, 2000 - the Board issued a Decision and Order in Case No. 19-CA-26716, finding that the Employer violated Section 8(a)(1) of the Act by promulgating, distributing, and maintaining the following rule: Any mate who participates in any Union organizing campaign, or who encourages any employee to participate in union activities, will be terminated.
- April 25, 2000 - the Employer filed a Petition for Review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit.
- May 1, 2001 - the Court issued its decision denying enforcement of the Board's Decision and Order. The Court remanded the case to the Board to explain "why its decision in this case is not consistent with [*Local 28, International Organization of Masters, Mates & Pilots*, 136 NLRB 1175 (1962), *enfd.* 321 F.2d 376 (D.C. Cir. 1963) and *Bernhardt Bros. Tugboat Serv., Inc.*, 142 NLRB 851, *enfd.* 328 F.2d 757 (7th Cir. 1963)] or alternatively, to justify its apparent departures." *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001).
- October 24, 2001 - the Board vacated its decision in Case No. 19-CA-26716, and remanded the present case to the Regional Director to reopen the record and for further consideration. The Board, however, did not revoke the Union's certification.
- January 7, 2002 - The Region issued a Supplemental Decision on Remand finding that the mates were employees.
- October 18, 2002 - the Board granted the Employer's Request for Review of the Regional Director's Supplemental Decision on Remand.
- September 29, 2006 - the Board issued its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Golden Crest Healthcare Center*, 348 NLRB No. 38 (2006), and *Croft Metals, Inc.*, 348 NLRB No. 38 (2006).
- September 30, 2006 - the Board remanded this case to the Regional Director for further appropriate action, including reopening the record if that was deemed necessary.
- October 25, 2006 - I issued an Order to Show Cause inviting the parties to request a reopening of the record for the purpose of receiving additional evidence and/or supplemental briefs.
- November 15, 2006 - With neither party requesting a reopening of the record, I issued an Order Setting a Due Date for Briefs.

have set forth a section analyzing the record evidence under the analysis of *Oakwood Healthcare*, and the procedures for requesting review of this decision.

II. Record Evidence

The Employer operates its Cathlamet-based tugboats along the Pacific Coast and on the Columbia River. The Employer operates a total of about 34 tug boats and tows a variety of barges and commodities.⁴ Ocean-going tugs are manned by a crew consisting of a captain, a mate, an engineer and a deckhand. There is a second deckhand when a log barge is being towed, as loading and unloading log barges involves additional work. Ocean-going crews typically work rotations of 30 days on, 30 days off. At sea, the crewmembers are on duty during two six-hour watches every 24 hours. The captain and engineer are on watches beginning at 6:00 a.m. and 6:00 p.m. The mate and deckhand are on watches beginning at 12:00 a.m. and 12:00 p.m. The boat is steered by the captain or the mate, depending on who is on duty.

A. The Captain

The captain is the highest authority on the boat. He is responsible for navigation and safety, for ensuring that company policy is followed, that all necessary groceries and other supplies are acquired and on board, that the vessel is sea-worthy, and that the crew is capable of carrying out their duties. The captain decides which crew member will work which 6 hour shift. The captain has the authority to take the boat into an unscheduled port, or to stay in port, if weather conditions so warrant. The captain may put a crewmember off the boat for disciplinary reasons. There is no dispute that the captain is responsible for the boat, crew, barges, and product hauled. Captain Nordstrom testified that if anything goes wrong on the boat, it is the captain who will be held responsible, regardless of who made the call. The Employer's headquarters is generally also readily available by radio.

At the time of the hearing, David Seaberg was the Employer's port captain in Cathlamet. He was responsible for assigning crews to boats. Generally crew members work together on the same boat for long periods of time.⁵ Seaberg always honors captains' requests that a particular individual not be assigned to their respective boats. Captains recommend promotion of mates to captain, and of deckhands to mate.

B. The Mate and Deckhand

During his watch, the mate steers the boat, following a pre-determined course and is responsible for the safety and navigation of the boat. The deckhand, on the same watch as the mate, has the duty of preparing meals for the rest of the crew. The deckhand may also be instructed by the captain or the mate to perform certain routine maintenance tasks, such as chipping and painting.

⁴ These include chip barges, log barges, sand barges, target sleds for the U.S. Navy, dump scows assisting dredging projects, and a self-loading barge for hauling rocks.

⁵ For example, Employer witness Captain Nordstrom testified that he has been working with the same engineer for 5 years, the same mate for 3 years and, the same deckhand for 2 years. Captain Sarff testified that he has worked with the same crew for 2 - 2 ½ years.

C. Engineer

The engineer is responsible for the proper functioning of the mechanical parts of the boat. If there is a malfunction or other problem with the engine during the mate's watch (during which the engineer is off watch), the mate can wake the engineer. The engineer then diagnoses the problem and determines whether it needs to be fixed immediately or if it can wait until his normal watch. Typically, the engineer is deferred to in such matters. The engineer is paid overtime for any time he works "off watch."

D. Making Up a Tow and Docking

Ocean-going tugs generally tow only one barge at a time. On the typical 30-day ocean voyage, a crew will haul four different loads. Connecting a barge to a boat for towing purposes is called "making up a tow." The entire crew participates in making up a tow, and also in docking a barge (bringing a barge into port). Generally, for either of these maneuvers, the captain steers the boat, either from the wheelhouse, or from the "Texas deck," an elevated platform above the wheelhouse from which the captain can steer and operate the winch for the towline, with a better view of the activities. The mate may be stationed either on the deck or on the barge. The mate gives instructions to the deckhand and the engineer with respect to where they should station themselves and which lines to "tie off" (or release) in what order.

When making up a tow, or docking, the crewmembers are each equipped with handheld radios and are all in constant contact with each other. Generally, the captain has, in advance, advised the mate as to what he will be doing with respect to making up a tow or docking, and how the captain wants it done. Other crewmembers may be present during these conversations, or the mate may pass on the instructions later. Crewmembers who have worked together before need little instruction, as each already knows what needs to be done once given the plan.

There are two methods of docking a barge – "hipping up" to the barge, and towing the barge into the dock. The captain decides which method will be used. Hipping up involves moving the tug to the side of the barge, securing the barge tightly alongside the boat, and moving the two to the dock as a single unit. During this procedure, the deckhand boards the barge once the boat is along side, to secure the lines. The captain decides which lines to tie where. Generally, captains like to tie off the lines in a certain order, following the same order every time, such as spring line first, then bow, then stern. The mate also boards the barge, stationing himself at a place of advantageous visibility so he can direct the captain (who is steering the boat) to the dock. Some captains prefer to board the barge themselves and have the mate steer. It is necessary to have someone on the barge because the barge is higher than the boat and blocks the view of the dock.

When the second docking method – towing the barge to the dock – is used, there is usually an assist boat, which takes the mate and the deckhand to the barge. The mate then gives the captain and the assist boat instructions, such as the distance remaining to the dock, whether more or less speed is needed, and whether the assist boat should push or back away.

E. Changing the Length of the Tow Line

On the ocean, conditions such as weather can influence a decision to lengthen or shorten the towline, a decision that can be made by the mate as well as the captain. The procedure involves the mate and the deckhand (or the captain and the engineer) both going to the winch on the Texas deck, where the mate operates the controls while the deckhand watches to make sure that the line is spooling properly.

F. Adverse Weather

In rough seas, the barge may be more safely secured using surge gear, a decision made by the captain. In low visibility conditions, the mate may post the deckhand to keep watch, although this occurs only rarely, as the wheelhouse where the mate would be steering is only 20 feet from the bow.

G. Emergencies and Drills

During his watch, the mate calls out the captain during any unusual circumstances or in an emergency. For example, if the mate thinks that crossing the Columbia River bar is going to be particularly severe, or that the captain will not want to cross, he would call out the captain to make the decision. In any emergency--defined in the record as fire on board, man overboard, or a break in the tow line--the mate would call out the captain. During emergencies, the mate is in charge of the deck and directing the crew, while the captain is on the bridge steering the boat. The mate would give any necessary instructions to the remaining crew, such as to bring a fire extinguisher or water hoses. The boat also has a "station bill" that sets forth what function each crewmember must perform in case of an emergency, such as where they need to be stationed, what equipment they need to bring with them, and what work they will perform. The mates simply make sure that the crew members are following the station bill.

On all vessels, the mate follows the captain's instructions with respect to the frequency and timing of emergency drills: some captains give the mate a free hand in this regard, some captains want certain drills always scheduled at certain times, and some captains do not want any drills at all. During a drill or an actual emergency, the mate is required to call all hands on deck. All crewmembers, including those who are off watch, participate in drills. Those who are off watch receive overtime pay. Obviously, every such drill will require that someone work overtime during the drill.

H. Crossing the Columbia River Bar

On ocean-going voyages, the mate has discretion to slow the vessel down to avoid breaking the tow "wire" (cable), but only the captain can decide to turn the boat around, whether or not to leave port, or whether to go back to port in bad weather. There is contradictory testimony in the record that the mate can decide to go into port in bad weather, and that this may happen on any one boat once or twice during any one winter. The captain also decides what time the boat will get to the "bar" near the mouth of the Columbia River. For example, if the captain decides to arrive at 2:00, the mate will, if necessary, slow down the boat to arrive at 2:00. However, if weather is severe or

there are heavy traffic conditions when the boat is about to cross the bar, the mate will wake the captain for the bar crossing.

I. Projects

In normal circumstances while at sea, there are projects for the deck "crew" to work on that have been assigned by the captain, such as painting or making repairs. Some captains have an established duty roster for the deckhand to follow; others do not.⁶ Depending on the watch, the captain or the mate will instruct the deck crew to work on the project. The deck crew also does cleaning and cooking. A primary reason the deckhand is on the mate's watch is so that he has time to cook dinner for the captain and engineer. Although Captain Nordstrom testified that he relies on the judgment of the mate in determining the "staffing level needs" during the mate's watch, such testimony without more is not very instructive, since the mate has few if any choices regarding the "staffing level" on his watch.⁷ Although the record provides no specific instances of a mate having to decide between two deckhands in directing a task, one witness who had worked as a mate testified generally that he would assign tasks according to whom he thought was best qualified. The hypothetical examples he gave were that he would assign the heavier work to the stronger of the two deckhands and he would assign more complex work to the more experienced deckhand.

J. Inland Vessels

Some of the Employer's vessels ply only the Columbia River. Generally, these vessels make day runs of up to 12 hours, and carry a captain and one crew member. Thus, obviously, there is no supervisory issue for mates on these runs. During the summer of 2001, one vessel made the "fish run"; which involved going a few hundred miles up the Columbia River and passing through several locks. The fish run normally had a crew of four, including the captain and the mate (called the "pilot" on the river). They stood watches just as is done in the ocean-going vessels. When passing through locks or fish runs during the mate's watch, the mate would give instructions as to which side of the locks to tie up to, which lines to use, and where the deckhand should be stationed.

When passing through locks, certain decisions have to be made by either the captain or the pilot (mate) if a fish run is involved, and the event happens on his watch. Such decisions include whether to tie to the port or starboard side; which lines to tie up, such as a bow line and a stern line; and where to station the deckhand to call out distances on the radio. The lockmaster is stationed on a certain side, and that is generally the side the boat ties up to, so that the "lock slip" (a piece of paper specifying the tonnage and commodities) can be handed to the lockmaster, unless the lockmaster has been called and given the information ahead of time. The wind direction and force

⁶ Captain Nordstrom testified that he has a duty roster that he will show to a new deckhand to let him know what his chores are. Nordstrom explained that his duty roster indicates what duties need to be performed daily, weekly, and monthly. Nordstrom also testified that he knows that a few other captains also have similar duty rosters for the deckhands.

⁷ Generally, there is only one deckhand on board on the mate's watch.

can also influence the choice of which side to tie up to, as can the cleat configuration in relation to the length of the barge.

On the river, the boats are almost all push boats, rather than tow boats. Push "wires" on the front of the boat are tied to the barge and then cinched up tightly using electric winches on the boat. When traveling, the wires are kept tight, but may be adjusted from time to time, depending on river conditions. During loading or off-loading, the barge moves down or up in the water as cargo is added or removed; thus, the wires have to remain slack so they won't break. The pilot (mate) instructs the deckhand to tighten or loosen the push wires on the fish run.

K. Accountability

There is no evidence that the mate is disciplined if his "crew" fails, or rewarded if it succeeds. There is no record that any appraisal/evaluation of the mate calls for a review of how his "crew" performs.

III. Application of *Oakwood Healthcare*

As set forth above, this remand is limited to the issues of whether mates assign and/or responsibly direct employees, and whether "independent judgment" is required in doing so. As reiterated in *Oakwood Healthcare*, the burden of proving supervisory status rests on the party asserting that such status exists. *Oakwood Healthcare*, supra, slip op. at 9 (citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)).

The Employer contends that its mates exercise supervisory authority under Section 2(11) of the Act in both "assigning" deckhands and in "responsibly directing" them. I address these contentions in turn below.

A. Assign

1) Standard set forth in *Oakwood*

In *Oakwood Healthcare*, the Board interpreted the Section 2(11) term "assign" to mean the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Id.* at slip op. 4. To "assign" for purposes of Section 2(11) "refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task." *Id.* at slip op. 4.

2) Mates Not Engaged in Assignment Under *Oakwood*

The Employer contends that its mates "assign" deckhands and engineers as they have "the authority to assign specific tasks to the deckhand during their watch" and decide "whether, on an *ad hoc* basis, to compel those off watch to perform overtime duties."⁸ The Board's decision in *Oakwood Healthcare*, is clear, however, that *ad hoc* instruction of an employee to perform a discrete task is not to be considered assignment. As the mate's duties here regarding instructions to deckhands and

⁸ Employer's Response to Order to Show Cause at p. 5.

granting of overtime to off watch employees are clearly done on an individual and *ad hoc* basis, these are examples of direction rather than assignment under *Oakwood Healthcare* and I analyze them as such below. See, for example, *Croft Metals, Inc.*, 348 NLRB No. 38, slip op. at 7 (2006), where the Board applying the *Oakwood Healthcare* analysis found that authority to sporadically switch task assignments was more akin to "direction" rather than "assignment" duties.

3) Moreover, No Evidence of Independent Judgment

Moreover, even assuming *arguendo* that these tasks could be considered assignments under *Oakwood Healthcare*, I find that there is no evidence that the mates use independent judgment in making these delegations. With regard to the mates' authority in instructing the deckhands, there is only one deckhand available to perform the task being assigned the vast majority of the time. As set forth in *Oakwood Healthcare*, *supra*, slip op. at 9, if as here there is only one obvious and self-evident choice, then the assignment is routine or clerical in nature and does not implicate independent judgment. Moreover, the record lacks examples of specific instances where a mate had to choose between two deckhands in directing the performance of a task on those rare occasions where there are two deckhands on the boat.

In addition, with regard to employees incurring overtime, the record shows that the mate will call out the engineer when there is a problem with the engine or the mechanical workings of the boat. As each boat carries only a single engineer, the mate has no discretion as to whom he calls out when there is a mechanical problem on the boat. The only other example of the mate calling out employees when they are off watch is during emergencies and safety drills. As set forth above, the mate is required to call everyone out in either of these situations and, thus, uses no discretion as to whom to call out during emergencies or emergency drills.

B. Responsibly Direct

1) Standard set forth in *Oakwood*

In *Oakwood Healthcare*, the Board interpreted the Section 2(11) phrase "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' (as explained below) and carried out with independent judgment." *Oakwood Healthcare*, *supra*, slip op. at 6 (internal quotation omitted). The Board, in agreement with several U.S. Courts of appeals, held that, for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. *Id.* at 6-7. The Board defined the element of "accountability" as follows:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also *must* be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does

not take these steps. *Id.* at 7. (Emphasis added)

2) Employer's Contentions

The Employer contends that its mates responsibly direct employees in: making up a tow; docking; changing the tow line length; emergencies and emergency drill situations; calling employees off watch; crossing the Columbia River bar; directing deckhands to perform projects; and maneuvering through the locks during inland runs.

As set forth below, I find that the record does not support the Employer's contention that its mates exercise independent judgment in directing employees as is required in the *Oakwood* analysis. Moreover, the Employer has failed to demonstrate that mates are held accountable or potentially accountable in any way for their direction of other employees. In order to make a finding of responsible direction, such accountability must be present. See *Oakwood Healthcare*, supra, slip op. at 6-7.

a) Making Up a Tow and Docking

The entire crew, including the captain, is present for making up the barge and docking. Prior to arrival at the dock to make up the barge, the captain tells the mate (and the rest of the crew either directly, or indirectly through the mate) exactly how the captain wants the maneuver done--down to which lines to tie up first and which side of the dock to approach. Docking a barge is a similarly captain-driven process. During both making up a tow and docking, the entire crew is in communication with each other by radio,⁹ enabling the captain to closely monitor the maneuver's execution. Under such circumstances, I do not find that the mate's role here in carrying out the captain's orders constitutes the use of independent judgment. As set forth in *Oakwood Healthcare*, supra, slip op. at 8, judgment is not independent if it is dictated or controlled by detailed verbal instructions by a higher authority. Moreover, there is no evidence in the record showing that the mate is held accountable in any way for the actions of the deckhand and/or the engineer during making up the tow or the docking process. In fact, Captain Nordstrom testified that if any thing goes wrong during these processes, it is the captain who will be held responsible, regardless of who made the call.

b) Changing the Length of the Tow Line

Deciding to lengthen or shorten the tow line because of weather conditions or some other reason may be a decision requiring independent judgment on the part of the mate, but the record fails to establish that such a decision amounts to *responsible direction of employees*, since it involves the mate himself operating the winch, and the deckhand doing nothing more than watching the line to assure that it is spooling properly. The record does not demonstrate that directing the deckhand in these circumstances is anything more than a routine matter. Moreover, there is no evidence in the record showing that the mate is held accountable in any way for the actions of the deckhand in connection with changing the length of the tow line.

⁹ Although the Employer points out that one witness testified that the engineer does not always have a radio during the process, that witness went on to say that this was because the engineer would be stationed in the wheelhouse next to the captain. Thus, the engineer would obviously be in immediate contact with the captain.

c) Emergencies and Drills

On all vessels, the mate follows the captain's instructions with respect to the frequency and timing of emergency drills: some captains give the mate a free hand in this regard, other captains want certain drills always scheduled at certain times, and some captains do not want any drills at all. During a drill or an actual emergency, the mate is required to call all hands on deck. Thus, whoever is off shift is called out and will receive overtime pay during the drill. The mate does not have discretion on who is called out during a drill. Also, the Employer's witnesses acknowledged that under Coast Guard regulation each boat has a "station bill" that details what function each crewmember must perform in case of an emergency, such as where they need to be stationed, what equipment they need to bring with them, and what work they will perform. In this regard I note that, the Board in *Oakwood Healthcare*, supra, slip op. at 8-9, held that direction which is dictated by an established plan is insufficient to establish independent judgment.¹⁰

The record, as described above, does not establish that mates are required to use any independent judgment in connection with their purported supervisory activities during emergency drills. Although there is evidence that on some boats the mate can decide when the drill will take place, the drill itself is routine and dictated by the directives set out in the station bill. Moreover, even if it was found that the mate's role in determining when the drills take place constitutes independent judgment, there is no evidence that the mates' are held accountable or are in any way potentially responsible for an employees' response during either an emergency or a drill. Rather, just the opposite is true as the Employer's witnesses admitted that it is the captain alone who is responsible for the ship and its cargo.

d) Calling Employees Off Watch

During emergency situations (see footnote 10 below) and emergency drills, and whenever there is a mechanical problem in the engine room on the mate's watch, the mate "calls out" the engineer. The result is "off watch" overtime pay for the engineer. The engineer is called out for every emergency, drill, and mechanical malfunction. The engineer is the one person on board who has expertise in the mechanical and electrical equipment in the engine room, and because the safety of those aboard the vessel, the vessel itself, and its tow depend upon the proper functioning of the engine room equipment, the need for calling out the engineer in cases of malfunction is obvious, and does not require any independent judgment. There are no specific examples in the record of any mate at any time ever weighing the need to call out the engineer against the cost of the overtime thereby accrued. Indeed, the engineer decides whether repairs can be put off or if they need to be fixed right away. Based on the record evidence, the mate exercises little if any discretion in calling the engineer "off watch;" rather such responsibility is of a "routine or clerical" nature not involving the use of independent

¹⁰ As set forth above, the events that count as emergencies are clearly delineated in the record as fire aboard the boat, man overboard, or loss of tow. There is no evidence in the record suggesting that mates have discretion to determine when an emergency exists or to deviate from the emergency plan established pursuant to Coast Guard regulation. See *Oakwood Healthcare*, supra, slip op at 9.

judgment. See *Oakwood Healthcare, Inc.*, supra, slip op. at 9. Moreover, there is no evidence in the record showing that the mate is held accountable in any way for the overtime accrued by the crew members.

e) Crossing the Columbia River Bar

The record establishes that crossing the bar can be more difficult on some occasions than others, and is affected by weather and tidal conditions. The captain decides in advance what time he wants to arrive at the Columbia bar—presumably to encounter more favorable tidal conditions—and instructs the mate in this regard. In circumstances where the weather is particularly severe, such that he may not want to enter the river, the mate will call out the captain to make the decision. There is no specific evidence in the record demonstrating that mates give any particular direction to the deckhands when they are crossing the bar. As the evidence in the record does not establish that the mate *directs employees* using independent judgment when crossing the Columbia bar, such activity does not establish supervisory authority. Moreover, even if the record showed that the mate directed employees while crossing the bar, there is no evidence in the record showing that the mate is held accountable in any way for the actions of the deckhand.

f) Projects

The record reveals that on all of the Employer's boats at issue here, deckhands are responsible for cooking and other maintenance tasks, such as chipping, painting, and general clean up of the boat. Some captains have a detailed duty roster for the deckhand to follow; others do not. There is no dispute that it is the captain who assigns these tasks to the deckhand. The record reveals that the captain may direct the mate to ensure that the deckhand follows through with a specific duty on an ad hoc basis. Examples given on the record were a captain instructing a mate to tell the deckhand to clean up an oil leak or to make sure certain lines were cut in preparation for docking. Such examples fail to demonstrate the mate's use of independent judgment as the mate is just passing on directives of the captain. *Oakwood Healthcare*, supra, slip op. at 8. As set forth above, there is scant evidence regarding those instances¹¹ when a mate might chose between two deckhands to perform a task. The hypothetical example given by an employee who used to work as a mate was that he would assign the heavier work to the stronger of the two deckhands and he would assign more complex work to the more experienced deckhand. I find that the mate's role in making such an assessment of a deckhand's obvious attributes does not rise to the level of independent judgment required to make a finding of supervisory status. Moreover, even if such assessment did rise to the level of independent judgment, the record evidence fails to demonstrate that the mate is held responsible in any way for the proper execution of these tasks. Thus, such direction is not "responsible" under *Oakwood Healthcare*. *Id.* at 7.

¹¹ Only on log barge runs are two deckhands assigned. On balance, the record indicates that the vast majority of the time there is only one deckhand assigned to the sea going tugboats. Moreover, the record shows that even on those log hauling tugboats that have two deckhands, one of those deckhands may be assigned to the captain's watch rather than to the mate's watch.

g) Inland Vessels (the "Fish Run")

The record establishes that in the summer of 2001 for the first time, one boat was engaged in the "fish run." River runs normally require only a captain and one crewmember (and therefore do not provide any supervisory opportunity for the Employer's mates). During the sole fish run, there was a crew of four. At most, this fish run involved perhaps two of the total mates employed by the Employer, for a very limited period of time. This brief unprecedented blip in on-the river experience adds little to evaluating the mate's responsible direction of the work force, since the norm is to have only a captain and another crew member. Moreover, the record evidence fails to demonstrate that the mate was responsible in any way for the actions of the other deckhands during the "fish run."

IV. Distinguishing this Case from other Tugboat Cases

I am mindful of *Local 28, International Organization of Masters, Mates and Pilots, AFL-CIO*, 136 NLRB 1175 (*Ingram Tug and Barge*)(1962) [*"Ingram I"*], and *Bernhardt Bros. Tugboat Service, Inc.*, 142 NLRB 851 (1963). In both of those cases, the employers involved operated towboats on the Mississippi River and its tributaries. A tow could include from one up to 15 or more barges, and might stretch ahead of the boat 1,000 feet or more. In both cases, the crew complement was approximately 10 individuals, including the captain. These circumstances were essentially repeated in the more recent *Ingram Barge Company*, 336 NLRB 1259 (2001) [*"Ingram II"*]; *Alter Barge Lines, Inc.*, 336 NLRB 1266 (2001); and *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002). In the *Ingram II*, the Board adopted the Administrative Law Judge's findings that the facts had not significantly changed since *Ingram I*, where the Board had found the pilots¹² to be supervisors. In the *Alter Barge* and *American Commercial Barge* cases, based on similar facts and findings in *Ingram I* and *Ingram II*, the Board found the *Alter Barge* and *American Commercial Barge* pilots to be supervisors as well.

Although these five cases are somewhat similar to the instant case, they are readily distinguishable for several reasons. First, the number of crew members and tow here is significantly smaller than in the *Ingram* cases. Second, the *Ingram* line of cases involves inland travel through locks, while the instant case involves primarily ocean-going vessels.¹³ Third, unlike the mates at issue here, the pilots in the *Ingram* line of cases directed crew members in complicated maneuvers without the captain's oversight.

As set forth above, in the instant case, the mate generally directs a single deckhand, while in the *Ingram* riverboat line of cases, pilots direct anywhere from two to five crewmembers. Thus, where a mate in the instant case generally has only one crew member to choose from, a pilot in the *Ingram* cases must use his discretion in deciding who to direct each time an issue arises. In addition, in the instant case there is a

¹² "Mates" and "pilots" are similar positions. On ocean-going vessels, the position is referred to as a "mate." On inland vessels, the position is referred to as a "pilot."

¹³ With the exception of the fish run as discussed above.

maximum of two barges being towed (usually only one) whereas *Ingram II* involved as many as 50 barges.¹⁴

In addition, the type of inland travel involved in the *Ingram* line of cases is significantly more complicated than the ocean-going voyages at issue in the instant case. For instance, in the *Ingram* line of cases, as the vessel¹⁵ moved up or down the Tennessee, Ohio, or Mississippi Rivers, barge configurations had to be maneuvered through locks and rearranged when barges were picked up and dropped off. A vessel might include 25 loaded and 25 empty or 15 loaded and 15 empty barges. Barges were placed end on end, side by side, and "wired" together. The addition or subtraction of a barge or a number of barges could result in changing the configuration of the vessel by rearranging the barges due to such things as weight and height of the barge and the overall appearance of the mass of barges. A low barge might take on water over its bow if placed at the head of the mass of barges and an uneven or unsquare mass might result in steering difficulty. I further note from a review of most of the riverboat tug cases that river work involves frequent locking, constant changes in course, regular changes in the river channels, and "traffic" headed in the opposite direction.

In the instant case, with the exception of the isolated fish run, the river work does not involve a crew directed by a mate. On the ocean, the voyage would be much more routine, given the smaller number of potentially impinging vessels, the greater course options, the lack of locks, lack of low bridges, and the ability to generally head on a steady course for long periods.

Moreover, unlike in the instant case, where the captain is on watch anytime a complicated maneuver is executed (e.g., making up a tow, docking, complicated bar crossing), in the *Ingram* line of cases, pilots would direct the multi-person crew in performing complicated maneuvers (e.g., docking, passing through the locks, and even rearranging the barge configuration), *without waking the captain*. Thus, although the mates herein may give some of the same types of instructions to crewmembers as did the pilots in the cited cases (e.g., directing crew members which lines to secure and release), it is clear that: 1) the mates in the instant case mainly act as a conduit relaying information from the captain to the crew; and 2) the degree of judgment required by pilots in the *Ingram* line of cases is significantly greater than that of mates in the instant case, considering both the multiple deckhands that the pilot is directing as well as the complexity of the maneuvers that the pilot undertakes while the captain is off watch.

Accordingly, in consideration of the far larger number of crew members under the pilot's direction in *Ingram* and its progeny, the relative size and complexity of the tow, and the greater responsibility given to the pilots while they are on watch, it is clear that the degree of judgment exercised by the mates here, is not comparable to that exercised by the pilots in the *Ingram* line of cases.

¹⁴ *Alter Barge Line, Inc.*, supra, at 1267, involved tows of anywhere from 24-40 barges; and *American Barge Lines*, supra, at 1070 fn.5 involved tows of 15 barges.

¹⁵ In this context a "vessel" refers to the towboat and its associated barges.

Moreover, even if the mates here had the same degree of responsibility as the pilots in the *Ingram* cases, there is no record evidence showing that they are held accountable for the actions of the deckhands under their direction as is now required for a finding of responsible direction under *Oakwood Healthcare. Id.*, supra, at 7. It is also worth noting that accountability was not explored or relied on in the *Ingram* line of cases. Accordingly, I find that *Ingram* and its progeny are inapposite for our consideration here.

V. Conclusion

In light of the above and the record evidence, I conclude that the Employer has not met its burden in establishing that the mates involved here “assign” or “responsibly direct” employees, utilizing “independent judgment” to a degree exceeding a merely routine or clerical nature.¹⁶ Moreover, there is no evidence that the mates are held accountable for the performance of the crew. Thus, I reaffirm the Certification of Representative that issued in this case on September 22, 2000.

VI. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by 5:00 p.m. EST, on January 4, 2007. The request may not be filed by facsimile.

If a party wishes to file one of these documents electronically, please refer to “E-Gov” on the National Labor Relations Board web site: www.nlrb.gov.

DATED at Seattle, Washington, this 21st day of December, 2006.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

¹⁶ Moreover, if both the captain and the mate were supervisors, there would be a ratio of one supervisor to each employee aboard the vessel here, which hardly seems likely in circumstances where captains have testified that everyone on board, including the deckhand, generally knows what they are supposed to do and need little direction.

NOTICE This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Brusco Tug and Barge, Inc. and International Organization of Masters, Mates & Pilots, Pacific Maritime Region, AFL-CIO, Petitioner. Case 19-RC-013872

December 14, 2012

DECISION ON REVIEW AND ORDER

**BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN**

The issue in this case is the supervisory status of the Employer's tugboat mates.

On December 21, 2006, the Regional Director for Region 19 issued a Second Supplemental Decision on Remand, finding that the mates are employees, not supervisors, and therefore properly included in the unit.¹

¹ The lengthy procedural history of this case dates back to October 1999, when the Petitioner initially sought to represent a unit of the Employer's mates, deckhands, and engineer/deckhands employed on vessels working out of the Employer's Longview/Cathlamet, Washington homeport. On November 26, 1999, the Regional Director issued a Decision and Direction of Election finding the petitioned-for unit appropriate. The Employer filed a request for review, which the Board (Chairman Truesdale and Member Liebman; Member Hurgen dissenting) denied on December 29, 1999. After the Petitioner won the May 2000 election and was certified as the employees' representative, the Board issued a Decision and Order in Case 19-CA-026716, finding that the Employer violated Sec. 8(a)(1) of the Act by maintaining a rule that any mate who participated in union activities would face termination. The Employer sought judicial review. The Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's Decision and Order. *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001). The court remanded the case to the Board to explain why its decision was not inconsistent with *Masters, Mates & Pilots Local 28 (Ingram I)*, 136 NLRB 1175 (1962), *enfd.* 321 F.2d 376 (D.C. Cir. 1963), and *Bernhardt Bros. Tugboat Service*, 142 NLRB 851 (1963), *enfd.* 328 F.2d 757 (7th Cir. 1964), or, alternatively, to justify the departure from precedent. The Board subsequently vacated its decision in Case 19-CA-026716 and remanded the representation case to the Regional Director for further consideration and a reopening of the record. On January 7, 2002, the Regional Director issued a Supplemental Decision finding that the mates were not statutory supervisors. The Board (Members Liebman, Cowen, and Bartlett) granted the Employer's request for review on October 18, 2002. On September 29, 2006, the Board issued its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), and *Craft Metals Inc.*, 348 NLRB 717 (2006). The Board then remanded the case to the Regional Director for further appropriate action in light of those decisions, including a reopening of the record if necessary.

Following the Board's remand of this case, the Regional Director issued an Order to Show Cause, inviting the parties to "Show cause, if any exists, why the record in this matter should be reopened for the purpose of receiving additional evidence and/or supplemental briefs regarding the authority of mates to assign, responsibly direct and exercise independent judgment within the meaning of Section 2(11), includ-

In accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Second Supplemental Decision. The Employer maintains that the mates are supervisors because they "assign" and "responsibly . . . direct" employees within the meaning of Section 2(11) of the Act. The Petitioner filed an opposition.

The Board granted the Employer's request for review on April 18, 2007, and the Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this case, including the briefs on review, we agree with the Regional Director's finding that the Employer failed to meet its burden of establishing that the tugboat mates are statutory supervisors based on the statutory criteria of assignment and responsible direction. Thus, we affirm the Regional Director's Second Supplemental Decision. We emphasize, however, that our decision turns on the facts of this case as presented in the record developed by the parties. We are not declaring that tugboat mates are not statutory supervisors in all cases in which their status is at issue.

I. FACTS

Overview

The Employer operates about 34 tugboats along the Pacific Coast and on the Columbia River out of a home port in Longview/Cathlamet, Washington.² The tugboats tow a variety of barges carrying different commodities. Ocean-bound tugboats are usually staffed by a crew of four: a captain, a mate, an engineer, and a deckhand.³ Occasionally, the crew includes a second deckhand, for

ing potential changed circumstances bearing on their status." The Regional Director further invited the parties to "provide documents and/or offers of proof in support of their written statements."

The Employer submitted a response asserting that "it is the Region's duty to assure that a complete record has been made" and that it "does not believe it necessary to supplement the record." The Employer further stated, however, that while it believes that the present record demonstrates the accountability showing required by *Oakwood Healthcare*, it would be prepared to supplement the record by affidavit or live testimony "should there be any ambiguity." The Employer also stated that, "if deemed appropriate," it would address in a supplemental brief the concerns it has with respect to the Regional Director's "key findings," the Regional Director's deviation from the D.C. Circuit's directive, and the Board's proper consideration of this case in light of *Oakwood Healthcare*, et al. The Regional Director then issued an order denying a further evidentiary hearing but allowing supplemental briefing. On December 21, 2006, the Regional Director issued the decision under review here.

² The Employer's operations encompass other home ports, but this case concerns only the individuals employed on the Employer's Longview/Cathlamet-based tugboats.

³ River-bound tugboats will be discussed below.

example, when a "log barge" is being towed.⁴ Crews work in rotations of about 30 days on, 30 days off. At sea, each crewmember is on duty for a 6-hour watch period, then off watch for a 6-hour period, and the pattern is continuously repeated. The captain and the engineer are on watch from 6 a.m. until 12 p.m., and then again from 6 p.m. to 12 a.m. The mate and deckhand are on watch from 12 to 6 a.m., and then again from 12 to 6 p.m.

The captain is the highest authority on a tugboat and steers it when on watch. Captains are Coast Guard licensed officers, and are responsible for the tugboat, crew, barges, and product hauled. In particular, captains are in charge of navigation and safety, verifying that the tugboat is seaworthy, ensuring compliance with company policy, acquisition of adequate supplies, and making sure that the other crewmembers are capable of performing their respective duties. If anything goes wrong on the tugboat, the captain will be held responsible regardless of which crewmember was actually at fault. Captains have authority to discipline crewmembers, as well as to recommend the promotion of mates to captain and deckhands to mate.

The mate, who is also a Coast Guard licensed officer, steers the tugboat when the captain is off watch. On the mate's watch, the mate is in charge. The engineer, also a licensed officer, operates and maintains the tugboat's mechanical systems, in particular, the engine. A deckhand is either an "able-bodied" or "ordinary" seaman. A deckhand's duties include maintenance work, assisting with tow-related maneuvers, preparing meals for the rest of the crew, cleaning, and painting.

"Making Up a Tow" and "Docking"

Ocean-bound tugboats generally tow one barge at a time; on a typical 30-day voyage, a crew hauls approximately four separate loads. Connecting a barge to a vessel for towing purposes is called "making up a tow." Bringing a barge into port is called "docking a barge" or "docking." The entire crew participates in both of these maneuvers, and the captain, mate, and deckhand all carry hand-held radios while performing them. Captain Richard Nordstrom estimated that making up a tow and docking take up about 1 percent of the crewmembers' time on any given 30-day voyage. Captain Shawn Sarff testified that making up a tow and docking are processes that become "a little routine" after a while.

In advance of making up a tow or docking, the captain advises the mate as to how the captain wants the procedure done. Other crewmembers may be present for the

⁴ The record does not answer the question of what percentage of the voyages involve a five-person crew

captain's orders, or the mate may pass on the instructions to the others. Generally, for either maneuver, the captain steers the tugboat from the wheelhouse or the Texas deck (an elevated platform above the wheelhouse). The mate is stationed either on the deck or on the barge, and gives directions to the deckhand. The mate tells the deckhand where the deckhand should station himself, on which side of the tugboat the lines will be placed, and which lines to release and in what order. The mate also tells the deckhand which tools to take with him and directs him in "bringing the wire to the winch."⁵

There are two methods of docking a barge: "hipping up" to the barge or towing the barge to the dock. The captain decides which method to use. *Hipping up* involves moving the tug to the side of the barge, securing the barge tightly alongside the tugboat, and moving both the tugboat and the barge to the dock as a single unit. During the hipping up procedure, the deckhand boards the barge once the tugboat is alongside it, in order to secure the towlines. The mate instructs the deckhand which line to tie first. There are three types of towlines. Captains prefer that the "spring" line (as opposed to the "stern" or "bow" lines) be tied first, but concerns such as weather, the size of the barge, the vessel's approach in lining up against the dock, how many lines will be tied and where the lines will be tied, inform the mate's decision as to which line to instruct the deckhand to tie.

The second method of docking a barge, towing the barge to the dock, involves the use of an assist boat that takes the mate and the deckhand to the barge. During this maneuver, it is necessary for the mate and sometimes the deckhand to stand on the barge because the barge is higher than the tugboat and blocks the captain's view of the dock. Once on the barge, the mate acts as the "eyes" of the captain, and directs the captain in steering the tugboat to the dock. According to Captain Nordstrom, the manner in which the mate directs the captain in steering the boat to the dock is comparable to the way an individual standing outside of a car uses hand signals to help the car's driver navigate.

Changing the Length of a Towline

Conditions such as weather, swells, barge weight, vessel traffic, and depth of the water can necessitate a change in the length of a towline. If it becomes necessary to change the length during the mate's watch, the

⁵ James Richard Barton testified that when he was working on the Employer's vessels as a mate, he would "go up on the barge and hand down the lines to the deckhand or engineer." He would then "come down and start the process of bringing the wire in. And [he'd] tell the deckhand to start bringing it in on the cap stand, which is basically like a winch, you hook it up to, and it sucks the gear up on board." Tr 128-129 (Nov. 14, 2001)

mate makes the decision. Once the decision is made, the mate and the deckhand go to the winch. The mate operates and controls the winch while the deckhand watches to make sure that the line is spooling properly. The mate may instruct the deckhand to start up the winch or the vessel hydraulics, to run or redirect the "fair lead," which leads the wires, or to lubricate the line. Captain Nordstrom testified that mates can in some instances direct deckhands to run the winch or to stay in the wheelhouse to monitor the radio or vessel traffic, but did not specify how often mates instruct deckhands to do so. Captain Nordstrom further testified that lines are often changed at the time of the watch switch so that all crewmembers are available.

Adverse Weather, Emergencies, and Drills

If the sea is rough, the captain may decide to utilize the vessel's "surge gear," a heavy chain that can be attached to the tow bridle on the barge. Although the mate may offer the captain an opinion as to whether the use of surge gear is necessary, it is the captain who ultimately makes the decision.

In low-visibility situations arising during the mate's watch, the mate may post the deckhand to keep watch on the bow. This posting occurs only rarely, as the wheelhouse is located only 20 feet from the bow, and the mate would usually wake the captain if weather conditions merit the posting.

If there is an emergency during the mate's watch, the mate wakes the captain. Any time the captain works during his normal off-watch period counts as overtime. The mate wakes the captain about two times during the course of a 30-day voyage, although this can occur more or less frequently depending on weather, engine problems, or emergencies. Emergencies are defined in the record as a fire, a man overboard, or a break in the towline. The mate calls all hands on deck in the case of an emergency, and is in charge of the crew's activities on the deck while the captain steers the boat. A station bill in each vessel sets forth every crewmember's responsibilities in case of an emergency, such as where the crewmember will be stationed, what equipment the crewmember will handle, and what work the crewmember will perform. The mate ensures that the other crewmembers perform their work in accordance with the station bill's requirements. For example, the mate may instruct the engineer and deckhand to don life jackets or get certain supplies.

The captain decides what time the vessel will arrive at the Columbia River bar near the mouth of the Columbia River. The mate, however, will wake the captain if he believes that adverse weather or heavy traffic conditions will make crossing the river bar particularly difficult or

inadvisable. If a storm warning issues during the mate's watch, the mate may turn the vessel back to the nearest port without seeking the captain's permission, although Captain Nordstrom testified that it is rare for the mate to do so. The captain typically makes such decisions.

If a crewmember becomes ill during the mate's watch and needs to be evacuated, the mate may call the Coast Guard to request an emergency evacuation without first waking the captain.

Mates conduct safety drills on board the tugboats. Drills include fire drills, man overboard drills, and loss of tow drills. Some captains give their mates a free hand in determining the frequency and the length of drills, other captains instruct their mates to schedule drills at certain times, and yet other captains do not have their mates conduct safety drills at all. All crewmembers participate in drills, and off-watch crewmembers are paid overtime for participating.⁶ The drill content is set forth in the vessel's station bill. Captain Nordstrom testified that mates may "throw something different" into a drill in an effort to make the drill a realistic approximation of an actual emergency. The record, however, provides no examples of these drill variations.

The Engineer

As stated above, the engineer is responsible for the proper functioning of the tugboat's mechanical systems. If the engine alarm has sounded or if the mate sees something "he does not like" with respect to the engine during the mate's watch, the mate wakes the engineer. The mate wakes the engineer about two to four times during a 30-day voyage. Because the engineer is off watch during the mate's watch, any work performed by the engineer during the mate's watch counts as overtime for the engineer.

Depending on the nature of the mechanical problem, the engineer may attend to it immediately or wait to take care of it during his watch. The mate typically accepts the engineer's assessment of the problem's time sensitivity, as the engineer is the individual most qualified to make the determination.

Projects and Determining Staffing Levels

The captain assigns projects to the crew while the tugboat is at sea. Projects range from painting the tugboat to cleaning the inside of a cupboard. Some but not all captains have an established duty roster for the engineer and deckhand to follow, and the mate may add tasks to the

⁶ James Richard Barton testified that the mate tends to conduct safety drills during the watch change, in order not to "disrupt a lot of the necessary sleep time." Barton also testified that if the drill was organized for "off-watch time," he "suppose[d]" that the mate would have to get that "okayed" by the captain. Tr 194-195 (Nov 14, 2001)

duty roster. Depending on the watch, the captain or mate will instruct the engineer or deckhand, respectively, to work on a project.

Captain Nordstrom testified that he relies on the judgment of the mate in determining the “staffing level needs” during the mate’s watch. However, the record reveals no specific instances where a mate had to decide which of two deckhands to perform a task. Rather, the record contains only hypothetical examples of a mate choosing the stronger of two deckhands for a project that required heavy lifting, the more experienced of the deckhands for a more complex project, the better cook or painter to cook or paint, or the deckhand without a “bum knee” to perform a physically strenuous activity.⁷

Inland Vessels

Some of the Employer’s tugboats make runs on the Columbia River. The record testimony relating to river-bound—as opposed to Pacific Ocean-bound—vessels is confusing and incomplete. It is not clear what percentage of the voyages are river-based, and, while there appear to be three different types of river voyages, none of these voyages is explained thoroughly in the record. River-bound “day boats” make runs lasting up to 12 hours, with crews consisting of a captain and a deckhand. Other vessels make multiday river trips and operate round the clock.⁸ Those vessels carry four-person crews, consisting of a captain, mate, and either two deckhands or a mate and a deckhand. One specific but undefined type of river trip, called a “fish run,” carries a crew of four: the captain, a mate (called a “pilot” on the fish run), and two deckhands.⁹ There are eight locks on the Columbia River system. When passing through locks, the captain or the mate, depending on the watch, contacts the lockmaster at the lock and requests clearance. The captain or mate decides whether to tie up on the vessel’s port or starboard side, which lines to tie up, and where to station the deckhand during the tie up procedure. The captain or mate generally ties the tugboat to the side of the lock where the lockmaster is located, to facilitate handing the lockmaster the “lock slip”—a document specifying the nature and tonnage of the load being towed. However, wind direction, current, and cleat configuration in

⁷ Henry Brusco, the Employer’s president, testified generally that, depending on the deckhands’ qualifications, the mate “will give them different tasks” based on what the mate feels the deckhands can handle.

⁸ The Employer sends vessels “as far east as Lewiston [Washington]” about 12 times per year. Those round-trip voyages last 7 days. Tr 43–44 (Nov 2, 1999).

⁹ Record testimony establishes that the Employer’s tugboats handled fish runs in the summer of 2001, but does not indicate whether the Employer’s vessels made the fish run during other time periods.

relation to barge length may influence the choice of which side to use for this procedure.

On the river, the Employer uses “push boats” rather than towboats. Push boats contain frontal push wires that are tied to the barge. During loading or offloading on river-bound voyages, the mate instructs the deckhand to tighten or loosen the “push wires.”

Relief Captains

The Employer employs a mate in the capacity of “relief captain” when a captain is off the vessel because of vacation or illness, or during the period between a captain’s leaving the Employer’s employment and the hiring of a new captain. The record does not reveal how often a mate works in the capacity of relief captain.

II. ANALYSIS

The burden of proving supervisory status rests on the party asserting it, in this case, the Employer.¹⁰ We agree with the Regional Director that the Employer failed to meet its burden of establishing supervisory status on the basis of assignment and responsible direction under the statute and *Oakwood Healthcare*, above. Although, as previously stated, other individuals employed as mates by this or other employers may be supervisors under the *Oakwood Healthcare* standard, the Employer has not shown that the mates at issue satisfy the standard.

Section 2(11) defines a “supervisor” as

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

To establish that individuals are supervisors, the party with the burden of proof must show: (1) that they have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) that their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) that their authority is exercised “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, supra, 348 NLRB at 687.

A party can prove the requisite supervisory authority either by demonstrating that the individuals actually exercise a supervisory function or by showing that they effectively recommend the exercise of a supervisory

¹⁰ *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003)

function. *Oakwood*, supra, 348 NLRB at 688. Further, “to exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Id. at 692–693. A “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. at 693; *G4S Regulated Security Solutions*, 358 NLRB No. 160, slip op. at 1 (2012).

The Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB at 1048. Supervisory status is not proven where the record evidence “is in conflict or otherwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). “[M]ere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority.” *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012); see also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Center*, supra, 348 NLRB at 731. Job descriptions, job titles, and similar “paper authority,” without more, do not demonstrate actual supervisory authority. *G4S Regulated Security*, 358 NLRB No. 160, slip op. at 2, relying on *Golden Crest*, supra.

The Employer asserts that the tugboat mates at issue here are supervisors based on their authority to “assign” and “responsibly to direct” other employees. We discuss these contentions below.

A. Assignment

In *Oakwood Healthcare*, 348 NLRB at 689, the Board defined “assign” as the act of designating an employee to a place, such as a location, department, or wing; appointing an employee to a time, such as a shift or an overtime period; or giving significant overall duties to an employee. To assign for 2(11) purposes refers to the “designation of significant overall duties to an employee,” and not to the “ad hoc instruction that the employee perform a discrete task.” Id. Choosing the order in which an employee will perform “discrete tasks within [the supervisory] assignments” does not demonstrate the authority to assign under Section 2(11). Id. See also *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298 (6th Cir. 2012); *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 8 (2011).

As stated above, under *Oakwood Healthcare*, the authority to assign must be exercised using independent judgment, and judgment is not considered independent if it is dictated or controlled by detailed instructions. Id. at

692–693. Moreover, the assignment authority must rise above the level of “routine or clerical” in order to constitute independent judgment. Id. at 693. Accord: *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3; *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), cited with approval in *NLRB v. Kentucky River Community Care, Inc.*, supra, 532 U.S. at 714.

Here, the Employer argues that the mates’ 2(11) assignment authority consists of: (1) making assignments “during emergencies, training, and adverse weather”; (2) assigning “all hands, including the Captain, to overtime shifts”; and (3) assigning deckhands “based upon skill or physical capability, to perform tasks that may be more onerous or taxing, in connection with docking, making up to the barge, and the like.”¹¹ We find, for the following reasons, that the Employer has not met its burden of showing supervisory status based on the mates’ alleged assignment authority.

1. Making assignments “during emergencies, training, and adverse weather”

The instructions the mate gives to the deckhand with respect to making up a tow and docking do not involve designating an employee to a place or time, or giving an employee significant overall duties as those terms are used in *Oakwood Healthcare*. *Oakwood*, supra, 348 NLRB at 689. Rather, they involve “ad hoc instruction that the employee perform a discrete task.” Id. Thus, the mate does not specifically designate the deckhand to participate in an overall duty such as making up a tow or docking; rather, all crewmembers, including the captain, participate in these procedures as part of their preassigned job duties. Directing the deckhand, during these procedures, where to stand, on which side of the vessel to place the lines, what lines to release and in which order, and which tools to use exemplify ad hoc assignments that do not rise to the level of supervision. *Oakwood*, 348 NLRB at 689. *Frenchtown Acquisition v. NLRB*, 683 F.3d at 311–312. In any event, the mate’s instructions to the deckhand while making up a tow and docking do not involve the requisite independent judgment. The captain advises the mate in advance how they are going to perform the particular maneuver, and the mate and deckhand remain in constant verbal communication with the captain throughout the process via handheld radios. Both maneuvers become “a little routine” after a while.¹² In fact, Captain Richard Nordstrom testified, he prefers to stay with the same crew, in large part, because of the routine he has established with that crew. Captain Nordstrom testified that he has completed nearly 200 “hook-

¹¹ Employer’s Request for Review p 38

¹² Testimony of Captain Sarff



ups" with his crew, and that each member of the crew "pretty much knows what they're supposed to do."

Similarly, it is not the mate who assigns the deckhand to the overall task of changing the length of toelines. That task is a basic part of the deckhand job. The mate's instructing the deckhand to go to the winch, watch to make sure the line is spooling properly, start up the winch or the hydraulics, run or redirect the fair lead, or lubricate the lines are discrete tasks within the overall process, and do not demonstrate supervisory assignment.

The limited assignments a mate makes on inland river trips also constitute nonsupervisory, ad hoc instructions. The mate does not assign the deckhand the overall duties of assisting in lock passage or loading and offloading—again, these are preassigned at a higher level. The mate's directions to the deckhand on tasks such as which side to tie up on, which lines to tie up, where the deckhand should stand, and whether to tighten or loosen the push wires concern only discrete tasks within the overall assignment.

The mate's responsibilities in the case of adverse weather, emergencies, and drills additionally fail to establish 2(11) assignment authority. On the occasions when the mate turns the vessel around because of inclement weather, no assignment is involved as it is the mate himself who is performing that task. Although the mates arguably assign tasks to the deckhand and engineer in emergency and drill situations, such instructions do not demonstrate the necessary independent judgment because the vessel's station bill sets forth each crewmember's responsibility. Rather, in those situations, the mate performs the important but nonsupervisory task of ensuring that the crewmembers carry out the duties the station bill specifies. Captain Nordstrom's testimony that mates may "throw something different" into a drill in order to make the drill a realistic approximation of an actual emergency fails to explain with the requisite specificity the mate's purported exercise of independent judgment. *G4S Regulated Security*, 358 NLRB No. 160, slip op. at 3-4.

2. Assigning "all hands, including the Captain, to overtime shifts"

Section 2(11) refers to supervisory authority over "other employees," and the term "employees" as used in Section 2(11) must be defined in accordance with Section 2(3). *McDonnell Douglas Corp v NLRB*, 655 F.2d 932, 936 and fn. 1 (9th Cir. 1981), cert. denied 455 U.S. 1017 (1982). See also *Mourning v. NLRB*, 559 F.2d 768, 770 fn. 3 (D.C. Cir. 1977). Because captains are stipulated supervisors, not 2(3) employees, a mate's action in waking a captain and thereby causing the captain to accrue overtime does not constitute a 2(11) assignment.

Nor has the Employer established the exercise of independent judgment with respect to the mate's assignment of overtime to the engineer. The mate wakes the engineer when the engine alarm sounds or when something relating to the engine looks suspicious. The engineer is the lone individual on the vessel who is trained in engine functioning and repair. Thus, summoning the engineer in that circumstance is not only the obvious choice, but the only choice. See *Oakwood Healthcare*, 348 NLRB at 693 ("If there is only one obvious and self-evident choice . . . then the assignment is routine or clerical in nature . . . and does not implicate independent judgment. . . ."). The authority to decide whether to wake the engineer in these circumstances, where the choice is "obvious and self-evident," does not, as our dissenting colleague contends, rise to the level of independent judgment in the assignment of overtime.

Once the engineer has been summoned, the mate typically accepts the engineer's assessment as to whether the problem should be fixed immediately or whether the matter can wait until the engineer's normal watch. Our dissenting colleague asserts that the mate has the "authority to decide whether to require the engineer to repair the problem on the spot." The Employer, however, provides no evidence of even a single instance in which a mate has required an engineer to address mechanical issues during off-watch time, and it has not shown that mates have the authority to do so. See *Golden Crest*, 348 NLRB at 729 (noting that the party seeking to establish supervisory status must show that the putative supervisor has the ability to *require* that a certain action be taken).

The Employer also offers no examples of a mate assigning the deckhand to an off-watch shift. The deckhand is on the same watch as the mate, so the only situation in which such an assignment could occur would be when a crew includes two deckhands. As discussed above, the record shows that five-person crews are the exception, not the rule, and the Employer offered no evidence of the frequency of their use. Captain Nordstrom's conclusory testimony that the mate determines "staffing level needs" when on watch cannot substitute for specific examples of mates assigning deckhands to off-watch shifts. *Golden Crest*, 348 NLRB at 731.

3. Assigning deckhands "based upon skill or physical capability, to perform tasks that may be more onerous or taxing, in connection with docking, making up to the barge, and the like"

Although the Employer asserts that a mate may choose which of several deckhands to perform a specific task based on their skill and ability, the Employer did not present evidence that this has ever actually occurred. The Employer offers hypothetical situations only, for

example, where a mate might select one deckhand over another based on their relative strength.¹³ The Employer points out that a river-bound fish run is staffed by a crew that includes two deckhands. However, the record gives no indication how frequently the tugboats handle the fish run, and the Employer presented no evidence of a mate or pilot selecting one deckhand over the other to perform a particular task. Thus, contrary to our dissenting colleague, we find that the Employer has failed to meet its evidentiary burden of showing that mates use independent judgment in selecting crew members to perform significant overall duties. *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3 (detailed, specific evidence needed to show supervisory authority).

4. Other assignment matters

Although the record reveals that the mate may post the deckhand to keep watch on the bow, the Employer presented no evidence suggesting that this was a regular occurrence. See *Croft Metals, Inc.*, supra, 348 NLRB at 722 fn. 14, citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986) (the exercise of “some supervisory authority in a . . . sporadic manner does not confer supervisory status”). In fact, the record shows that such a posting occurs only rarely, and the mate would likely summon the captain in that situation.

Similarly, the Employer fails to show that any particular mate serves as a relief captain with the frequency necessary to establish supervisory status. See *Oakwood Healthcare*, 348 NLRB at 699 (an employee engaged part of the time in a supervisory position and part of the time in a nonsupervisory position must spend a “regular” and “substantial” portion of time working in the supervisory capacity, and “regular” means according to a pattern or schedule as opposed to sporadic substitution).

¹³ Our dissenting colleague points to Captain Sarff’s testimony set forth by the D.C. Circuit at 247 F.3d at 278, as an example of nonhypothetical testimony establishing the “authority to assign deckhands to overall duties.” Sarff testified

Well, we have some deck hands around that—say they cook really well and they paint really well, but they’ve got a bum knee, so that’s the deck hand you don’t want to have running up and down the barge. So you keep him aboard to handle the lines on board. There’s other deck hands that are very athletic, but they can’t cook very well, so those are the ones you send up on the barge to do the work up there. You know, it’s however the job fits them, that they get the job.

This testimony does not, in our view, provide specific examples where mates have actually used independent judgment in deciding which crew member should do a particular task. Rather, the testimony provides only hypothetical examples of obvious choices, insufficient to constitute independent judgment under Sec. 2(11).

Our dissenting colleague also states that in the initial Decision and Direction of Election, the Regional Director found, based on this testimony by Captain Sarff, that mates do assign deckhands. But that finding and that decision preceded the Board’s adoption of the *Oakwood* standard.

For the foregoing reasons, the Employer does not meet its burden, as articulated in *Oakwood Healthcare*, of establishing that the Employer’s mates have 2(11) assignment authority.¹⁴

B Responsible Direction

In *Oakwood Healthcare*, 348 NLRB at 691, the Board stated that if an individual has employees “under” him and if that individual decides “what job shall be undertaken next or who shall do it,” that individual is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. Thus, direction is only supervisory if it is performed “responsibly.” Id. In *Oakwood Healthcare*, the Board found that responsible direction requires a finding that the person directing the performance of a task must be held accountable for the task’s performance. Id. at 692. The Board held that to establish accountability for purposes of responsible direction, it must be shown not only that the employer “delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary” but that “there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id. See *Golden Crest*, 348 NLRB at 731 (noting that although the employer established that charge nurses have the authority to direct CNAs, the employer failed to show responsible direction because there was no evidence that a charge nurse had experienced any “material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing CNAs”); *Entergy Mississippi*, 357 NLRB No. 178, slip op. at 5–7.

The Employer asserts that a mate has the authority to responsibly direct employees within the meaning of Section 2(11) because he has command of the tugboat during his watch and is the “boss of the deck” during docking and “making up to a barge.”¹⁵ The Employer further argues that mates are accountable under Federal law for their own actions and those of “their crew.” Id.

¹⁴ The Employer also asserts that mates exercise 2(11) assignment authority because they “effectively recommend that deckhands be reassigned to a different vessel because of personality conflicts or skill levels” and because they “effectively recommend promotion of deckhands to a mate position.” Employer’s Request for Review p. 38. Although framed by the Employer as examples of assignment authority, these allegations actually involve the mates’ transfer and promotion authority—issues not before the Regional Director on remand. Moreover, even assuming that these allegations involve assignment, the Employer presented no specific evidence in support of them. In its absence, we find that the Employer failed to show supervisory status based on the asserted authority to effectively recommend transfers or promotions. See *Golden Crest*, 348 NLRB at 731 (“purely conclusory evidence is not sufficient to establish supervisory status”), *Avante at Wilson, Inc.*, 348 NLRB at 1057 (same).

¹⁵ Employer’s Request for Review p. 38.

The Employer, however, offered nothing other than conclusory assertions of the mates' accountability for the deckhands' work. For example, it offered testimony to the effect that "masters and mates are ultimately responsible."¹⁶ It also cursorily asserts in its Request for Review that "[m]ost certainly the [m]ate is 'accountable,'" and that mates "are accountable, both for their own actions, and under federal law, [for the actions] of their crew."¹⁷ The Employer does not delineate, however, for what or how the mates are actually held accountable. As set forth above, "purely conclusory evidence is not sufficient to establish supervisory status." *Golden Crest*, 348 NLRB at 731; see also *G4S Regulated Security*, 358 NLRB No. 160, slip op. at 3-4.

The Employer cites *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484 (2d Cir. 1997), as support for its assertion that the mates are accountable under Federal law. In that case, the court focused, in part, on how the *captains*, who were found to be statutory supervisors, were held fully accountable and responsible for the work of their crews. As one example of accountability, the court looked to a deckhand's handling of hawsers. The court noted that the Coast Guard prepares regulations governing the length of towing hawsers, and a tug captain may have his license suspended for violating those regulations. The court then listed other examples of when a captain may be held accountable by law, such as in circumstances involving the pollution of waters and harbors or permitting a nonlicensed employee to operate the tug. Here, by contrast, the Employer has not presented any comparable accountability evidence concerning the mates. Thus, the Employer has failed to establish that the mates responsibly direct employees within the meaning of Section 2(11) of the Act.

Our dissenting colleague's principal response to our analysis of the mate's authority to responsibly direct work vel non is to assert that, under Federal maritime law, the next officer has the authority of the master in the master's absence. If a mate is in charge while the captain is off duty or asleep, and the captain is a supervisor, our colleague contends, then the mate, too, must be a supervisor. The argument is without merit.

We do not dispute our colleague's recitation and interpretation of maritime law. But this case is not about a mate's privileges and obligations under maritime law. Rather, the question is whether the mate is a supervisor under Section 2(11) of the Act. And if that question is answered in the affirmative, the mate is not an employee

¹⁶ Tr 106 (Nov 2, 1999)

¹⁷ The Employer, however, did not include any citations to the record in support of these assertions

under Section 2(3) of the Act, and does not enjoy the protection of Section 8(a) of the Act.

It should go without saying that the two statutory schemes serve separate purposes. The authority to demand obedience on board a vessel under maritime law is about the protection of life and property; disobedience is mutiny. See *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). Having that kind of authority doesn't answer the questions posed by the 2(11) indicia of supervisory status. For example, under the Act, it is well established that there can be individuals whose directives must be followed but who are not, for any one of a number of reasons, supervisors. The mate's ascendance to the privileges of the master does not mean that he assigns work for present purposes; all of the assignments may have been made by company rule or subject to detailed Federal and State regulation. Without an evidentiary record establishing 2(11) indicia, such questions cannot be answered merely by the assertion of maritime law.¹⁸

C. Pre-Oakwood Cases Involving the Supervisory Status of Mates and Pilots

We recognize that the Court remanded this case to the Board for an explanation of why the Board's finding that the mates were not 2(11) supervisors was not inconsistent with *Ingram I*, supra, 136 NLRB 1175, and *Bernhardt Bros*, supra, 142 NLRB 851. In *Ingram I*, the Board found that the employer's pilots and mates responsibly directed employees within the meaning of Section 2(11). Specifically, the Board adopted the administrative law judge's finding that "the most cursory appraisal of the swift on-the-spot judgments of the pilots and mates and the orders given pursuant thereto while maneuvering 1,000-foot tows in the face of unpredictable winds, current, and weather conditions reduces to sheer implausibility any characterization of such judgments and orders as routine." *Ingram I*, 136 NLRB at 1203. In *Bernhardt Bros*, the Board adopted the hearing officer's finding that the employer's pilots were supervisors, where the pilots, while on watch, decided if the weather was bad enough to require posting a lookout, where to place the lookout, and which crew member should serve in the lookout capacity. 142 NLRB at 854 (further recognizing that the pilot, while on watch, gave orders to the crew with respect to the tow and the amount of power needed).

¹⁸ Under the dissent's view, every licensed officer on a vessel could potentially serve in an emergency as captain, and would therefore be a statutory supervisor. In the present case, that would mean that most of the Employer's tugboats operate with a crew consisting of three supervisors and one employee.

The dissent makes much of the fact that the mate, in particular, is usually in charge 12 out of every 24 hours. But where the captain is only a shout away, that is not enough to confer supervisory status.



The Employer and our dissenting colleague have cited additional pre-*Oakwood* cases in which the Board determined mates and pilots to be statutory supervisors. See *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002) (finding supervisory assignment and responsible direction where the pilot was the highest ranking officer on duty during his shift, instructed the lead deckhand regarding locking and towing, posted a lookout when appropriate based on weather conditions, addressed staff shortages by waking a "call watch man," and changed the priority of the crewmembers' work by instructing the crew to stop work on one assignment and perform another assignment instead); *Ingram Barge Co (Ingram II)*, 336 NLRB 1259, 1259 fn. 1 (2001) (determining that pilots were supervisors because their duties "remain essentially as they were in 1962" when the Board decided in *Ingram I* that they were supervisors); *Alter Barge Line, Inc.*, 336 NLRB 1266 (2001) (same). See also *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543 (2006) (pilots), and *American River Transportation Co.*, 347 NLRB 925 (2006) (pilots).¹⁹

The existence of such precedent notwithstanding, *Oakwood Healthcare*, decided after the tugboat cases cited above, articulates the Board's current test for determining supervisory assignment and responsible direction.²⁰ In evaluating the supervisory status of the mates at issue in this case, therefore, we find pre-*Oakwood* cases dealing with the supervisory status of tugboat mates to be of limited precedential value. In *Entergy Mississippi*, 357 NLRB No. 178, slip op. at 5, the Board similarly rejected reliance on earlier cases that had been considered "under a different standard for determining supervisory status than the one set forth in *Oakwood Healthcare* pursuant to the Supreme Court's guidance in

¹⁹ Although the Employer cites Board cases in which mates or pilots were found to be supervisors under the Act, we note that in other cases, the Board has found them to be employees. See, e.g., *A. L. Mechlun Barge Lines*, 192 NLRB 1118 (1971).

²⁰ Prior to *Oakwood Healthcare*, 348 NLRB at 686, the Board's definitions of "assign" and "responsibly to direct" were in flux following criticism from the Supreme Court in *NLRB v. Kentucky River Community Care*, supra, 532 U.S. 706, and *NLRB v. Healthcare & Retirement Corp. of America*, 511 U.S. 571 (1994). In response to that criticism, the Board in *Oakwood* "refine[d] the analysis to be applied in assessing supervisory status," seeking to formulate "workable definitions that fit both the language of Section 2(11) and the overall intent of the provision." 348 NLRB at 686, 690. For example, with respect to "responsible direction," the Board specifically adopted the Fifth Circuit's accountability element in holding that for direction to be "responsible," the person directing 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." 348 NLRB at 391-392, citing *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986).

Kentucky River." The Board stated that "to revert to a standard that does not follow the principles set forth in *Oakwood Healthcare* would ignore the significant doctrinal developments in this area of law." Id.²¹

Even if the pre-*Oakwood* tugboat cases involving the supervisory status of mates and pilots were not eclipsed by *Oakwood Healthcare* and subsequent decisions, those cases are distinguishable on their facts. In each of those cases, the mates and pilots oversaw meaningfully larger crews than the crews here. See *Ingram I*, supra (two engineers and four deckhands); *Bernhardt Bros.*, supra (same); *Ingram II* (one or two engineers and four to six deckhands); *Alter Barge Lines*, supra (at least two deckhands).²² A mate overseeing a crew that includes more than one deckhand or engineer must exercise greater discretion in deciding which deckhand to choose in a given situation or which engineer to call on in the case of an engine failure. In addition, while not dispositive, we note, as did the Regional Director, that "if both the captain and the mate were supervisors, there would be a ratio of one supervisor to each employee aboard the vessel here, which hardly seems likely in circumstances where captains have testified that everyone on board, including the deckhand, generally knows what they are supposed to do and need little direction."²³

As in *Entergy*, we have applied the *Oakwood Healthcare* framework of analysis to the specific facts of this case. We have found, as we explained above, that the Employer has failed in its effort to establish supervisory status under *Oakwood*.

The Regional Director offered the parties the opportunity to reopen the record or submit supplemental briefs in

²¹ See also *Frenchtown Acquisition Co. v. NLRB*, supra, 683 F.3d at 305 fn. 2, in which the court found that the employer had improperly relied on "a litany of historic cases" to support its assertion that the court always found nurses working in nursing homes to be supervisors. In so finding, the court noted first that "except for one unpublished case, all of these cases were decided before the Supreme Court rejected this Circuit's reasoning and held that the employer bears the burden of proving supervisory status." Second, citing *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007), the court stated that "deciding who is a supervisor is a highly fact-intensive inquiry," and thus "rules designating certain classes of jobs as always or never supervisory are generally inappropriate." 683 F.3d at 305 fn. 2.

²² The Board's decision in *American Commercial Barge Line*, supra, does not specifically state how many deckhands worked on the vessels involved in that case. The crew was described as "a captain (or relief captain) and a pilot who alternate their duties in 6-hour shifts to steer the boat, an engineer and his assistant who maintain the engine and operating parts, a mate or lead deckhand who directs the work of the deck crew." 337 NLRB 1073. Thus, the crew in that case was plainly larger than that in the instant case. Similarly, the crews in *Marquette Transportation/Bluegrass Marine*, supra, 346 NLRB 543, and *American River Transportation Co.*, supra, 347 NLRB 925, were larger than the crews at issue in this case.

²³ Second Supplemental Decision on Remand fn. 16.

light of the Board's new decisions and potentially changed circumstances. As set forth above in fn. 1, however, the Employer declined the invitation, maintaining that the burden was on the Regional Director to "assure that a complete record has been made." Although we agree that the Regional Director has a responsibility to assure that a representation hearing results in a complete record, the Employer errs in its insistence that the Regional Director must decide on behalf of the parties whether a record should be supplemented in light of changed Board law. Rather, determining whether to supplement a record is a strategic decision to be made by the parties themselves. Here, the Employer, the party with the burden to show supervisory status in this case, elected not to supplement the record based on its belief that the preexisting record demonstrated accountability as required by *Oakwood Healthcare*. For the reasons fully discussed above, however, we have determined otherwise.

III. CONCLUSION

In sum, having undertaken the required "fact-intensive inquiry,"²⁴ we find, based on the discrete facts of this case as they are set forth in the record, that the Employer failed to establish supervisory status on the basis of assignment or responsible direction. Accordingly, we affirm the Regional Director's finding that the tugboat mates at issue here are not supervisors within the meaning of Section 2(11) of the Act.

ORDER

IT IS ORDERED that the Regional Director's Second Supplemental Decision on Remand is affirmed, and that this matter is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. December 14, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

²⁴ *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d at 305 fn. 2

MEMBER HAYES, dissenting.

Contrary to my colleagues, I would find that the tugboat mates are statutory supervisors under both *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and 50 years of Board and circuit court precedent finding that mates and pilots with authority similar to theirs are supervisors. The Employer established that the mates assign and responsibly direct crewmembers and have complete authority over the vessel's crew during their watch. Moreover, the mates are licensed officers entitled under Federal law to exact obedience from crewmembers under them. Their supervisory status is clear.

I. THE MATES ASSIGN ENGINEERS TO OVERTIME AND DECKHANDS TO SIGNIFICANT OVERALL DUTIES.

An individual is a supervisor under Section 2(11) of the Act if he or she possesses at least one of the supervisory indicia set forth in that statutory provision, holds that authority in the interest of the employer, and exercises it using independent judgment. *Oakwood Healthcare*, 348 NLRB at 687. Among those indicia is the authority to assign. In *Oakwood*, the Board defined "assign" as the act of designating an employee to a place; appointing an employee to a time, such as a shift or an overtime period; or giving significant overall duties to an employee. *Id.* at 689. And to exercise independent judgment, an individual must act free of the control of others and form an opinion or evaluation by discerning and comparing data, and with a degree of discretion that rises above the merely "routine or clerical." *Id.* at 693. As shown below, the Employer met its burden of demonstrating that its mates assign employees, and exercise independent judgment in doing so, as *Oakwood* defines those terms.

The mates assign the engineer to overtime when they determine that a mechanical issue with the tugboat requires the engineer's prompt attention when the engineer is offshift. They exercise independent judgment when they determine whether a mechanical issue is urgent enough to rouse the engineer to fix it on the spot, or whether it can wait until his regular shift. Contrary to my colleagues' implication, *Oakwood* does not limit independent judgment in assigning employees to determining who among various employees will do a particular job. The decision to make an assignment in itself may require significant discretion. Thus, in *Oakwood*, the Board said that "if [a] charge nurse makes the professional judgment that a particular patient requires a certain degree of monitoring," the nurse exercises supervisory authority when "he or she assigns an employee to that patient or responsibly directs that employee in carrying out the monitoring at issue." *Id.* at 694; see also *id.* at 693-694 (stating that even where policies dictate how to

respond to an emergency, a nurse's discretion to determine whether an emergency exists evidences independent judgment).

Here, Captain Richard Nordstrom testified that if the mate sees something he "does not like" or that does not "seem right," it is his decision whether to get the engineer and require that he work overtime. James Barton, who has worked as both master and mate, testified that whether to rouse the engineer is a "gray area" and gave several examples where he might decide to do so, such as if he notices the vessel is "running warm" or the oil pressure is starting to drop. The mate has discretion to decide whether to wait for the engineer to begin his shift and deal with the situation then, or to require that the engineer deal with the issue immediately. The mate must evaluate the urgency of the situation and the potential consequences to the cargo and crew of delay, and balance those considerations with the financial and regulatory consequences of requiring the engineer to work overtime, which increases the Company's payroll costs and implicates regulations limiting crew to 12-hour workdays. Having chosen to rouse the engineer, the mate also has authority to decide whether to require the engineer to repair the problem on the spot (and accrue more overtime), or to wait until the engineer's next shift. That he may choose to defer to the engineer's judgment does not negate his authority, as it is uncontroverted that the mate assumes the captain's duties and, in Mate William Stucki's words, is in "complete control of the vessel" during his watch. In sum, the mate assigns work to the engineer, and his discretion to determine whether and when to require (or permit) overtime involves the exercise of independent judgment under *Oakwood*.

The mates also assign deckhands to significant overall duties—such as cooking, painting, and working on the barge—and exercise independent judgment in doing so. The Court of Appeals for the District of Columbia recognized as much when it expressed skepticism of the General Counsel's argument that such assignments entail obvious choices and thus do not require independent judgment. *Brusco Tug & Barge Co. v NLRB*, 247 F.3d 273, 278–279 (D.C. Cir. 2001). Here, the mates' assignments are based on assessing various employees' skills, which is precisely what *Oakwood* requires. *Oakwood* does not require that a choice be particularly difficult, or hold that a supervisor is no longer a supervisor once he knows his employees' skills well enough to competently assign them to appropriate jobs. My colleagues find the evidence insufficient to demonstrate that mates have the authority to assign deckhands to overall duties. They dismiss the above examples as merely hypothetical. I disagree. Captain Shawn Sarff testified quite specifically

concerning these assignments. See *Brusco*, supra, 247 F.3d at 278. Based on his testimony, the Regional Director in the initial Decision and Direction of Election found that mates do assign deckhands. Applying *Oakwood*, I agree with the Regional Director's finding in this regard, and as stated above additionally find that the mates exercise independent judgment.

II. THE MATES RESPONSIBLY DIRECT DECKHANDS USING INDEPENDENT JUDGMENT.

Another indicium of supervisory status under Section 2(11) is the authority responsibly to direct employees. The Board in *Oakwood* held that "direction" requires that a putative supervisor has employees "under" him or her and the authority to instruct those employees as to what needs to be done and who will perform such tasks. 348 NLRB at 691. For direction to be "responsible," the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other. *Id.* at 691–692.

Here, for 12 hours out of every 24 hours, the mate is responsible for the vessel, tow, and crew and has the same duties and obligations as the captain. Captain Sarff testified that the mate "assumes my responsibilities when I'm off watch." Mate Stucki testified that "in the absence of the master, I am the master, I'm acting as the master, and I'm in complete control of the vessel to the best of my abilities." Captain Nordholm testified that "the mate has discretion to determine what needs to be accomplished by the deckhands on his watch."¹ The mates are in charge of the crew in emergencies and direct them in emergency drills. The mates also direct the crew throughout docking procedures, making up the barge, and changing the tow length. In directing deckhands through the docking process known as "hipping up," mates weigh such exigencies as the weather, the size of the barge, the vessel's approach to the dock, and the number of lines to be tied and where they will be tied. If the barge must be towed to the dock, the mate and deckhand board an assist boat that takes them to the barge, where the mate issues instructions to the deckhand (and the captain). I agree with the D.C. Circuit's suggestion that the mates' direction here is virtually identical to that which the Board has consistently found supervisory.

¹ It is ingrained in maritime law that, in the master's absence, the next officer has "all the privileges, duties, and obligations of the master." *Escandon v Pan American Foreign Corp.*, 12 F. Supp. 1006, 1007 (D. Tex. 1935), aff'd 88 F.2d 276 (5th Cir. 1937). My colleagues' contention that the captain is only "a shout away" is irrelevant in light of uncontroverted testimony that the mate, in Captain Sarff's words, has to "run the boat completely" on his watch, and that if the mate woke him whenever important decisions needed to be made, "I would never get any sleep."



Brusco, supra, 247 F.3d at 277 (citing *Bernhardt Bros Tugboat Service*, 142 NLRB 851, 854 (1963) (finding pilots are supervisors where they direct crew in connection with the tow, the lookout, and the amount of power needed, and are responsible for the tow), enfd. 328 F.2d 757 (7th Cir. 1964); *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*, 136 NLRB 1175, 1203 (1962) (finding mates are supervisors where they direct deckhands during locking and docking operations, which require obedience for the protection of person and property), enfd. 321 F.2d 376 (D.C. Cir. 1963)); see also *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543, 551 (2006) (finding pilots to be supervisors where pilot is the sole person in charge and is the highest level official on duty when on watch, with authority to navigate the vessel and barges, reprioritize work, and order employees to stand lookout, tie and untie barges, assist in the making of locks, and do all that is necessary for the safe navigation of the vessel); *American Commercial Barge Line Co.*, 337 NLRB 1070, 1071 (2002) (finding pilots to be supervisors where pilot is sole wheelhouse official responsible for the safety of the vessel, crew, and cargo during his watch).

As in the above cases, the mate's control of the vessel on his watch and his direction of the crew in making the barge, docking, and performing other tasks require independent judgment. As in *Ingram Barge*, supra, the mate's "judgments are complicated by variable changing factors, many of them unforeseeable, which do not permit his duties to be characterized as routine." 136 NLRB at 1203. Here, as there, "[t]he most cursory appraisal of the swift on-the-spot judgments of pilots and mates and the orders given pursuant thereto while maneuvering [tows] in the face of unpredictable winds, currents, and weather conditions reduces to sheer implausibility any characterization of such judgments and orders as routine." *Id.*; see also *Marquette Transportation*, 346 NLRB at 552 (various hazards require use of independent judgment while directing crew), citing *Bernhardt Bros.* and *Ingram Barge*, above. The mates here exercise the same discretion as did the mates and pilots in the above-cited cases. Contrary to my colleagues, *Oakwood* did not so redefine "independent judgment" as to warrant a different result here. Indeed, in *Marquette Transportation* the Board adopted the judge's analysis of independent judgment, which was substantively identical to the analysis in *Oakwood*. 346 NLRB at 550-552.² In finding no independent judgment, my colleagues cite testimony that the

² Also contrary to my colleagues, ample evidence indicates that mates may direct more than one deckhand. James Richard Barton testified extensively about a 2-1/2-month voyage during which, as a mate, he directed two crewmembers

Employer tries to make work such as docking and making up a tow as "routine" as possible in order to minimize hazards.³ They seize upon the lay use of the word "routine," as though that label can erase the record testimony establishing that the mates' direction of the crew is anything but routine as that word is used in Section 2(11) of the Act. But the Board has been down this road many times and has consistently found that direction similar to that which the mates exercise here requires a high level of discretion, as described above. And "even if a particular operation is performed again and again, it does not necessarily follow that it is routine." *Sun Refining & Marketing Co.*, 301 NLRB 642, 649 (1991) (hazardous operations at sea require constant monitoring and accountability due to constantly changing conditions); see *Spentonbush/Red Star Cos. v NLRB*, 106 F.3d 484, 491-492 (2d Cir. 1997). I find that the Employer has shown that its mates use independent judgment in directing the deckhands.

I also find that the testimony concerning the mates' accountability, the authority the mates possess and exercise on the back watch, and Federal maritime law establish that the mates are accountable for their direction of the deckhands. Unlike my colleagues, I do not dismiss as conclusory testimony that the "masters and the mates are ultimately responsible" for the vessel, or dismiss other testimony and evidence indicating that the mates are accountable, both for their own actions and, under Federal law, for the actions of their crew. As Captain Sarff testified, the captain does not bear responsibility for what occurs when he is asleep and the mate is in control of the ship. Further, under my colleagues' logic, the only individual who is "accountable" for the crew's actions is off duty 12 hours each day, during the better part of which he is asleep. I cannot subscribe to the notion that no supervisor is on duty for fully half of a 30-day voyage towing client cargo along the Pacific coast, considering the hazards of the sea and the Employer's and officers' liability for the safety of the cargo and crew. But more dispositive to the issue of accountability is the fact that the mates are licensed officers of the vessel, and Federal law requires crewmembers to obey their orders. *NLRB v. Delaware-New Jersey Ferry Co.*, 128 F.2d 130, 137 (3d Cir. 1942) (citing *Southern Steamship Co. v. NLRB*, 316

³ I recognize that my colleagues do not expressly pass on whether the mates exercise independent judgment in directing deckhands. But in their discussion of the mates' assignment authority, they acknowledge that the mates assign deckhands to various tasks in connection with docking and making up a tow, and then find that those assignments do not demonstrate independent judgment. Since those task assignments constitute direction, the majority does, in fact, pass on the issue of whether mates exercise independent judgment in directing deckhands

U.S. 31, 39 (1942)). Thus, “[the] duty of obedience owed by a deckhand to obey the orders of a licensed ship’s officer is greater than that of a worker at a bench in a factory to obey the direction of his foreman. If the latter refused obedience he would be insubordinate, but if the sailor refused obedience he would be mutinous if his act occurred upon waters within the admiralty jurisdiction of the United States.” *Id.* Because Federal law requires obedience, the officer giving legally binding orders must be accountable for the consequences of those orders.⁴

Finally, my colleagues say that *Oakwood* set out a new standard and that our prior tugboat cases are of limited precedential value. Yet our tugboat cases are not inconsistent with *Oakwood’s* principles, even if they do not use the same terminology. And nothing in *Oakwood* sug-

gests that the Board contemplated that it was sweepingly overruling 50 years of precedent establishing the supervisory status of tugboat pilots and mates whose duties and powers were identical to those of the mates here, and whose authority flows from Federal maritime law and is of an entirely different nature than that of putative supervisors in a hospital or on a shop floor. That being said, the mates here assign and responsibly direct the crew with independent judgment as those terms are defined in *Oakwood*. Accordingly, I find that they are supervisors and respectfully dissent from my colleagues’ contrary opinion.⁵

Dated, Washington, D.C. December 14, 2012

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

⁴ See also *Marquette Transportation*, above, 346 NLRB at 550 (finding that pilot is answerable for mishaps with tug and tow while it is under his control “by virtue of his license and is subject to Coast Guard regulations and scrutiny”) My colleagues suggest that my finding that mates responsibly direct deckhands principally relies on their authority under Federal maritime law. Although I do consider mates’ authority under maritime law probative on the issue of their accountability, my finding that they possess the authority to responsibly direct deckhands relies on my entire analysis, set forth above.

⁵ I dissented from the decisions in *Energy Mississippi, Inc.*, 357 NLRB No. 178 (2011), and *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012), cited by my colleagues.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

<p>BRUSCO TUG AND BARGE CO. Employer and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PACIFIC MARITIME REGION, AFL- CIO Petitioner</p>	<p>Case 19-RC-013872</p>
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ORDER REAFFIRMING THE CERTIFICATION OF REPRESENTATIVE

In light of the Board's Decision on Review and Order dated December 14, 2012, I reaffirm the Certification of Representative that issued in this case on September 22, 2000.

Dated: January 11, 2013



RONALD K. HOOKS, Director
National Labor Relations Board
Region 19
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SEATTLE, WA 98174-1006

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRUSCO TUG & BARGE, INC.

and

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES, & PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

Cases 19-CA-26716
19-RC-13872

**AFFIDAVIT OF SERVICE OF MOTION FOR PARTIAL RECONSIDERATION AND
MODIFICATION OF DECISION AND ORDER.**

I, the undersigned employee of the National Labor Relations Board, state under oath that on February 4, 2013, I served the above-entitled document(s) by *E-File, E-Mail and post-paid regular mail* upon the following persons, addressed to them at the following addresses:

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February 4, 2013.

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Signature

