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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

COOK INLET TUG & BARGE, INC.

Employer,

and

INLANDBOATMEN'S UNION OF THE
PACIFIC,

Petitioner.

Case No. 19-RC-106498

**EMPLOYER'S SUPPLEMENTAL
BRIEF IN SUPPORT OF ITS
OBJECTIONS TO REGIONAL
DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

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GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
*eighteenth floor
1191 second avenue
seattle, washington 98101-2939
206 464 3939*

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I. INTRODUCTION

Employer Cook Inlet Tug & Barge, Inc. (“Cook Inlet” or the “Company”) submits this supplemental brief pursuant to Section 102.67(g) of the Board’s Rules and Regulations. On January 23, 2014, the Board granted Cook Inlet’s Request for Review of the Decision and Direction of Election in the above-referenced matter¹ (the “Request for Review”), solely with respect to whether the Employer’s captains are statutory supervisors based on their authority to assign and direct.

The record at hearing, as described in this brief, provides amply support for the captains’ authority to assign and direct their crews. Cook Inlet also reiterates its position, as stated in its Request for Review, that the Regional Director’s decision departed from officially reported Board precedent, raising a substantial question of law, and that the Regional Director’s decisions on substantial factual issues are clearly erroneous on the record, prejudicially affecting the rights of Cook Inlet. Cook Inlet therefore respectfully requests that the Board: (1) find that the captains are statutory supervisors under Section 29 U.S.C. § 152(11) (“§2(11)) of the National Labor Relation Act (the “Act”), and as such must be excluded from the petitioned-for bargaining unit; and (2) reverse the Regional Director’s Decision and Direction of Election to the extent that it included the captains in the bargaining unit.

II. FACTS

The issue before the Hearing Officer was whether Cook Inlet Captains were statutory supervisors and therefore should be excluded from the petitioned-for unit. Cook Inlet presented testimony and documentary evidence at the hearing showing its captains possess indicia of supervisory status sufficient to exclude them from the bargaining unit. Specifically, it presented three live witnesses, current Captain Daniel Butts, former Captain (and current General Manager) Brad Kroon, and President Steve Scalzo. The witnesses confirmed that captains possess the authority to assign and responsibly direct employees. The Union presented

¹ The Decision and Direction of Election was issued by the Regional Director for Region 19 on July 19, 2013.

1 no evidence to contradict these individuals' statements, which were based on their personal
2 knowledge and actual experience in working at Cook Inlet.

3 Nevertheless, despite expressing no clear concern regarding the credibility of these
4 individuals, the Regional Director disregarded or minimized the witnesses' testimony to
5 conclude that captains are not supervisors. The Regional Director's Decision and Direction of
6 Election (hereinafter the "Decision") and the reasoning behind it depart from well-established
7 law on this subject to seriously prejudice Cook Inlet.

8 The evidence clearly showed that Cook Inlet Tug & Barge is a small company,
9 consisting of 14 employees operating 6 different vessels. These vessels operate in Cook Inlet
10 and for days at sea. Cook Inlet has a President, located in Seattle, and a General Manager and
11 an Operations Manager, located in Anchorage. The remainder of the employees are seagoing
12 personnel. The evidence uncontrovertibly demonstrated that the management of the entire
13 operation is in large measure delegated to the captains, as it must be, given the fact that there
14 are no intermediary supervisors responsible for the operations of the Company. The captains
15 are responsible for the vessels, their management and maintenance, and the management and
16 supervision of the crews. They direct the activities of the crews on the vessels. They assign
17 duties and schedules of crews.

18 The Regional Director has inexplicably concluded that Cook Inlet is a paragon of
19 egalitarianism, in which Cook Inlet's vessels, operating independently in all manner of
20 weather, sea, and operational conditions, for days or weeks at a time, do so without supervision.
21 This conclusion is unrealistic and unwarranted in light of the evidence presented. It ignores the
22 law with respect to supervisory status, the legal duties of the captain as set out in case law and
23 Coast Guard regulations, and the facts pertaining to the duties and responsibilities of captains at
24 Cook Inlet. The Regional Director has apparently created a new, unprecedented evidentiary
25 standard. Despite uncontradicted testimony about the way the Company is managed, the
26 Regional Director has concluded that a company may not meet its burden to establish

1 supervisor status unless its management decisions are fully supported by paper documentation.
2 Such a requirement is neither supported in the Act or in labor precedent.

3 **A. Cook Inlet presented credible and competent evidence that its crew**
4 **structure vests the captains with exclusive supervisory authority upon its**
5 **vessels.**

6 Cook Inlet is a regional tug boat company that was purchased by Foss Marine Holdings
7 in January of 2011. TR 13: 17-20. At the time of the purchase, Cook Inlet included three tugs
8 and a barge used primarily for ship handling, docking, regional towing, ice management, tanker
9 service, tank barge escort, and pusher tug service. TR 14: 10-22. Since that time, Cook Inlet
10 has expanded to include an additional ramp barge, two crew passenger boats, and an additional
11 conventional tug, as well as an increased number of employees. TR 15: 15-22.

12 Cook Inlet vessels operate in a large geographical area. Vessels periodically operate at
13 sea depending upon the job. TR 106: 16-25. However, much of its work is done in the Cook
14 Inlet region of Alaska, as well as throughout the Kenai Peninsula and Kodiak, and up into
15 Seward, Whittier, Homer, Valdez, and Prince William Sound. TR 16: 18-23; TR 17: 18-20.
16 Much of Cook Inlet's work is particularly demanding and includes management of severe
17 winds, heavy ice, large tides, currents, and ice flows. TR 18: 6-14.

18 Though not fully recognized by the Regional Director, the evidence at the hearing
19 showed that staffing levels vary considerably. Crew size and make-up vary depending on the
20 type and demands of a given job. TR 19: 6-18. Ship assist work will typically have one or two
21 deckhands in addition to the captain. TR 19: 9-11. With respect to other types of work, a
22 typical crew would range from two to six members, and would be determined at the captain's
23 discretion. TR 21: 3-9, 11-18. In making determinations about crew staffing, the captains
24 consider regulatory guidance, safe management practices, and customer requirements. TR 21:
25 11-12; TR 23: 12-21. The length of time at sea also varies based on the nature of a job and
26 weather conditions. Some jobs may take less than a day, while other can take from four or five
days for typical jobs, to seven days in other circumstances. TR 107: 9-23.

1 **B. Cook Inlet showed captains continually assess conditions and use their**
2 **judgment to assign responsibilities to deckhands.**

3 Mr. Butts testified that, as a captain, he is responsible for managing issues such as water
4 depth, tides, current, other traffic, keeping towline clear of bottom, and navigational aids.
5 TR 113: 3-7. Mr. Butts testified that the experience and skill levels of crew members vary,
6 TR 116: 15-24, that he assigns his crew members to jobs in order to manage these issues, and
7 that in so-doing, he considers the crew members' specific strengths:

8 Q: As a captain, how does what you do, in relation to this, relate to your
9 supervision and direction of your crew?

10 A: I need to direct the crew. If we're towing something and we got shallow
11 water, I have to direct them to bring in the winch and have so much tow wire
12 out. I have to direct them to make sure all the hatches are closed. If we're doing
13 a certain towing job, I need to direct them to, hey, have this on standby in case
14 we need it. Be in the engine room, because this has been happening with one of
15 the engines. So there's a number of different things where I direct the crew on
16 what I deem necessary and important.

17 Q: So how do you know which crew to send to what job and which crew to send
18 to what task?

19 A: I try to play to their strengths. Some are good at the engine room. And some
20 are good at getting the safety equipment. And then some are good at, you know,
21 getting the lines out. So we try to play to whatever strengths they have.

22 TR 113: 8-24.

23 Mr. Butts also testified that he sets work schedules:

24 Q: And how do you figure out what your work schedule is?

25 A: We look at the work we have ahead that we've been assigned to. And we
26 delegate to the crew members how much deck work we might be doing, how
27 much maintenance is done, in determining how to get enough proper rest for
28 everyone to perform their main duties safely.

29 TR 123: 14-19. Mr. Kroon's testimony was in accord, as he confirmed that Butts' testimony
30 was an accurate description of captains' responsibilities with respect to crew assessment and
31 assignments. TR 204: 14-205: 5.

1 **C. Cook Inlet showed that captains have the authority to responsibly direct.**

2 Cook Inlet presented testimony from its President, Steve Scalzo, regarding the scope of
3 the captains' authority to direct the Company's operations upon its vessels. Mr. Scalzo testified
4 that the Company's operations manager proposes anticipated schedules and locations for jobs,
5 but that "[t]he captain has full authority and is the only key person onsite to make the call"
6 regarding the feasibility of such proposals. TR 35: 1-25; 36: 1-6. According to Mr. Scalzo, the
7 captain "is the person in charge. He is our representative and his decision is final." TR 36: 4-6.
8 Scalzo stated the captain decides "how to do the job, the crew he needs to do the job, any
9 additional resources he may need to help support the job, the number of crew members, the
10 tasks that he's going to want them to perform, how he's going to want them." TR 36: 8-11.
11 Regarding decisions impacting safety, Scalzo said, "that decision is totally up to [the captain],
12 and nobody else in the company can override that decision, period." TR 36: 8-17.

13 Mr. Scalzo emphasized that the captains' authority to direct and manage their crews is
14 similarly absolute:

15 Q: So what's the captain's authority with respect to the direction and the
16 supervision of the crew?

17 A: He is the primary person responsible for the direction and control of the
18 crew. He ensures their adequacy and their capability. He directs them every
19 day. He helps mentor and train them. He gives them guidance on how he wants
20 the jobs done. He ensures that they do them that way. He has the right to hire
21 and to fire them. He has the right to work with them to help them improve their
22 skills, mentor them along as they may move up from a casual working person to
23 a deckhand to a deckhand engineer or mate to a captain. And we look to the
24 captains to do that job for us.

25 TR 37: 2-14.

26 Mr. Scalzo also testified that captains are responsible for maintenance of the
Company's vessels, and that the Company "hold[s] them accountable for keeping [vessels] in
good shape mainly for the performance of the work, but also to keep the value of the vessel for

1 shareholders.” TR 52: 10-14. Mr. Scalzo provided specific testimony about the ramifications
2 captains could face for inadequate care of the Company’s vessels:

3 HEARING OFFICER: Right. But when you hold them responsible how do you
4 hold them responsible? In other words, if the maintenance wasn’t done do you
5 fire them? What—what happens?

6 A: There’s—there’s a kind of a whole list of things that could happen. We work
7 with them on trying to make sure the vessels are maintained. But, yes, anything
8 from you’re doing a great job; to you are slacking on your maintenance, this is a
9 verbal warning; to hey you’re not following your maintain—they put together a
10 maintenance list and prioritize the items, you’re not following that priority list,
11 here’s a written letter saying you need to fix that up; to, potentially as a result of
12 an [Responsible Carrier Program] audit, we get a nonconformity, we would hold
13 that captain accountable right up and through and including termination if
14 they’re not taking care of the vessel adequately.

15 TR 52: 20-25, 53: 1-9.

16 Mr. Scalzo’s testimony made clear that while captains are held accountable for
17 improper operations, they also are rewarded for successful operations. For instance, in 2011,
18 exceptionally bad ice conditions threatened to compromise Cook Inlet’s use of its tie-up
19 facility in the Port of Anchorage. TR 60: 22-25; 61: 1-6. According to Mr. Scalzo, the
20 captains “exercised their own experience and judgment” to manage crews and permit the
21 Company to use the facility through the winter. TR 61: 13-25; 62: 1-16. Cook Inlet therefore
22 gave the captains “a special bonus in recognition of all the hard work and effort that went into
23 their supervision of the facility during that terrible year of ice.” TR 62:19-22.

24 Mr. Butts echoed Scalzo’s testimony, stating that he as a captain is ultimately
25 responsible for directing his crew in the safe operation of the vessel. He described his duties as
26 follows: “I am the end-all, be-all. I am the person in charge of the vessel, the safe operation of
the vessel, the safety of my crew, the safety of the environment, and getting the tasks done.”
TR 100: 5-15. Mr. Butts also discussed repercussions he could suffer if he failed in directing
his crew:

1 Q: Okay. When you talk about being ultimately responsible for your crew and
2 the direction and supervision of your crew, explain that to the Hearing Officer.

3 A: If the crew, through some negligence of their duty, does something to the
4 environment or the safety of the vessel, I'm directly responsible for their actions.

5 Q: And what does being directly responsible mean?

6 A: That means anywhere from a slap on the wrist from the company to going to
7 jail.

8 A: That's the responsibility. That's the essence of being a captain is you're
9 responsible for everything that happens onboard.

10 TR 100: 5- 101:24.²

11 Mr. Butts confirmed that the job description accurately reflects his responsibilities as
12 captain, that the description is contained in the Responsible Carrier Program (RCP) that he
13 maintains in his stateroom, and that he is aware other captains maintain in their staterooms.

14 TR 104: 21-25; 105: 1-11. Mr. Butts specifically confirmed that he performs functions listed in
15 the job description that would support the Board's finding that he satisfies the "responsibly to
16 direct" function under section 2(11) of the act. For instance, Mr. Butts testified that he directs
17 crew in all aspects of safe navigation (TR 105: 12-15); directs shipboard training and drills
18 (TR 106: 10-1); supervises, guides, and monitors the performance of the crew in matters of
19 navigation (by setting voyage plans; TR 107: 24-25; TR 108: 1-8); directs the crew in
20 preventive maintenance (TR 109: 16-25; TR 110: 1-9); and assists in determining working
21 schedules and establishing routes (TR 111: 1-4). Regarding his assistance in determining
22 working schedules and establishing routes, Mr. Butts' testimony effectively demonstrated the
23 discretion and independent judgment that is necessary to prove that his responsible direction of
24 his crew gives rise to his status as a supervisor:

25

26 ² In addition to his accountability to the employer, a captain also has accountability to the Coast Guard. *See, e.g., U.S. Coast Guard v. Scoto*, Docket no. 2010-0049, Enf. Activity No. 3648094 (Nov. 7, 2011), <http://www.uscg.mil/alj/decisions/2011/SR-2011-17%20Scoto.pdf> (last visited June 26, 2013).

1
2 Q: Okay. What does that mean [that you assist in determining working
schedules and establishing routes]?

3 A: That means we take into determination the workload of the crew, the work
4 ahead, the crew's safety, number one, the vessel safety, and we'd make a
5 determination based on all of that information of what we should be doing.

6 Q: Well when you say work schedules, what work schedules are you talking
about?

7 A: Work schedules as far as what we're doing, how many jobs we're doing, how
8 much rest we have.

9 Q: Can you determine that you don't have enough rest to do a job?

10 A: Yes.

11 Q: Wait a minute. But your operations manager back at the office is telling you
12 to go do that job.

13 A: And under a Coast Guard rule, I can't operate more than 12 hours in a 24
14 hour period. And if I deem that I'm going to go over my hours, I'm turning off
the boat.

15 Q: Okay. If the office tells you, and you're not over the 12 hour rule, but the
16 office tells you that you need to do a vessel assist right now, under these
17 conditions, and the conditions are, in your opinion, dangerous, where's your
authority?

18 A: If the conditions are dangerous enough that I warrant that it shouldn't be
19 done, I'm not going to do it.

20 Q: Who's going to make that call?

21 A: The captain?

22 Q: Why can't I, as the operations manager, make that call?

23 A: You're not there on the boat. And I wouldn't work at a company that I don't
24 have absolute control over the vessel, safety and the crew.

25 TR 111: 9-25; 112: 1-12.
26

1 Mr. Kroon confirmed Mr. Butts' testimony regarding the captains' responsible direction
2 of crew members regarding direction of safe navigation (TR 199: 1-4); voyage planning
3 (TR 199: 9-20; 201: 15-25; 202: 1-15); direction of shipboard training and drills (TR 202: 21-
4 23); establishing work schedules (TR 204: 14-25).

5 **D. Cook Inlet showed the Responsible Carrier Program Manual does not limit**
6 **captains' exercise of their judgment but was in fact created by captains.**

7 Captains make use of a manual called the Responsible Carrier Program ("RCP") to help
8 guide their operations. See E-Ex 2. The RCP provides operating guidelines and procedures,
9 but Mr. Scalzo stressed that "[t]he actual operation within these guidelines are [sic] left to the
10 discretion and judgment of the captains." TR 88: 8-10. Captain Butts also stated that he and
11 other captains were involved in revising the draft RCP to better reflect actual operations and
12 procedures. TR 156: 10-25; 157: 1-6. In addition, Mr. Kroon confirmed that the captains were
13 substantially involved in revising the draft RCP, which was produced from an outline of
14 policies and procedures developed by the American Waterways Operators Association.
15 TR 192: 7-21. Mr. Kroon stated that Cook Inlet made a decision to develop the RCP in
16 collaboration with the captains rather than adopting its sister company's policies. TR 192: 19-
17 25. Mr. Kroon also confirmed that the RCP is a "living document" that the Company changes
18 over time based on audits and discussions with the captains. TR 194: 8-25; 195: 1-3. Mr. Butts
19 confirmed his and other captains' participation in revising the RCP, therefore evidencing their
20 use of independent judgment to form the guidelines themselves. TR 156: 10-25; 157: 1-6.
21 Mr. Scalzo also confirmed that the RCP is a set of "guidelines" that captains must adapt to the
22 "unique operations" and conditions to use it "with their judgment, to then perform the work."
23 TR 25:11-26:2.

24 Cook Inlet uses the RCP as a responsible means of ensuring safe and consistent
25 operations. To the Regional Director, however, the fact that Cook Inlet is governed by Coast
26

1 Guard Regulation and by its own policies for safety meant supervisors were robbed of any
2 discretion.

3 We note the Coast Guard's requirements for a Management System, which are set forth
4 in its proposed Rulemaking for Inspection of Towing Vessels, as follows. 76 FR 49976-01.

5 § 138.220 *Towing Safety Management System (TSMS) elements.*

6 The Towing Safety Management System (TSMS) must include the elements listed in
7 paragraphs (a) through (e) of this section. If an element listed is not applicable to an owner
8 or managing operator, appropriate justification must be documented and is subject to
9 acceptance by the third party.

10 (a) Safety management system administration and management organization. A policy
11 must be in place that outlines the TSMS culture and how management intends to ensure
12 compliance with this subpart. Supporting this policy, the following procedures and
13 documentation must be included:

- 14 (1) Management organization—(i) Responsibilities. The management organization,
15 authority, and responsibilities of individuals. (ii) Designated person. Each owner or
16 managing operator must designate in writing the shoreside person(s) responsible for
17 ensuring the TSMS is implemented and continuously functions throughout management
18 and the fleet, and the shoreside person(s) responsible to ensure that the vessels are
19 properly maintained and in operable condition, including those responsible for
20 emergency assistance to each towing vessel. (iii) Master Authority. Each owner or
21 managing operator must define the scope of the master's authority. The master's
22 authority must provide for the ability to make final determinations on safe operations of
23 the towing vessel. Specifically, it must provide the authority for the master to cease
24 operation if an unsafe condition exists.

25 § 140.210 Responsibilities of the master and crew.
26

1 (a) The safety of the towing vessel is the responsibility of the master and includes:

2 (1) Adherence to the provisions of the Certificate of Inspection (COI);

3 (2) Compliance with the applicable provisions of this subchapter;

4 (3) Compliance with Towing Safety Management System (TSMS) applicable to the
5 vessel, if one is applicable; and

6 (4) *Supervision of all persons onboard in carrying out their assigned duties.*

7 (b) If the master believes it is unsafe for the vessel to proceed, that an operation endangers
8 the vessel or crew, or that an unsafe condition exists, the master must ensure that adequate
9 corrective action is taken and must not proceed until it is safe to do so.

10 (c) Nothing in this subpart shall be construed in a manner which limits the master or mate
11 (pilot), at his or her own responsibility, from diverting from the route prescribed in the
12 COI or taking such steps as he deems necessary and prudent to assist vessels in distress or
13 for other emergency conditions. (emphasis added).³

14 CITB has already implemented its Safety Management System, in the form of its Responsible
15 Carrier Program Manual. This document, *prepared by the captains*, tracks Coast Guard
16 requirements and clearly establishes that the masters are responsible for the safe operation of
17 their vessels and the management of the crews. It is also consistent with the masters' job
18 descriptions set out in the Employee Handbook. These written standards controvert the
19 Regional Director's conclusion with respect to the RCP and their impact on supervisory status.

20 **III. ISSUES PRESENTED**

21 Whether the Board should: (1) find that the captains are statutory supervisors under
22 §2(11) of the Act, and as such should be excluded from the petitioned-for bargaining unit; and
23 (2) reverse the Regional Director's Decision to the extent that it included the captains in the
24 bargaining unit.

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³ The Coast Guard also sets out the responsibility of the captains to manage the crews' duties and work hours.

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IV. ARGUMENT

Under the National Labor Relations Act, the definition of an employee eligible to bargain collectively specifically excludes “any individual employed as a supervisor.” 29 U.S.C. § 152(3) and § 157. 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 to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

The Board has repeatedly interpreted this provision to mean that a person is a supervisor under the Act if (1) she or he has authority to make any one of 12 enumerated actions or to “effectively recommend” any of those actions; (2) “the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) the authority is held in the interest of the employer. *Brusco Tug and Barge, Inc.*, 359 N.L.R.B. 43, slip. Op. at 5 (2012) (emphasis added), *citing NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-713, 121 S. Ct. 1861, 167 LRRM 2164 (2001); *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 687 (2006).

A. **Cook Inlet presented legally sufficient evidence of the captains’ supervisory authority to assign and direct their crews, and the Regional Director ignored officially reported precedent in concluding otherwise.**

As described above, Cook Inlet made abundant showings of the captains’ supervisory authority to assign and direct their crews. The Regional Director’s determination that these showings were insufficient conflicts with official reported precedent. Furthermore, in reaching the conclusion that there was insufficient evidence of supervisor status, the Regional Director significantly disregarded and/or downplayed the testimony at the hearing. While not openly discrediting that testimony, the Regional Director gave it so little weight as to render it

1 ineffective. The Board should reverse the Regional Director's Decision and find that the
2 captains are statutory supervisors.

3 **1. Assign**

4 The Board has defined "assign" as "the act of designating an employee to a place, such
5 as a location, department or wing; appointing an employee to a time, such as a shift or an
6 overtime period; or giving significant duties to an employee." *Brusco Tug & Barge, Inc.*, 359
7 N.L.R.B. 43, slip op. at 6, *citing Oakwood Healthcare*, 348 N.L.R.B. at 689. To assign means
8 the "designation of significant overall duties to the employee." *Id.* The testimony shows that
9 captains are able to "assign" employees as defined by *Oakwood Healthcare* in that they
10 exercise unmitigated control over the vessel and are responsible for its safe operation.
11 Captains' decisions for assignments vary depending on their judgment and the maintenance
12 needs of the ship, changing weather conditions, and emergency situations. Captains assign
13 crew members to specific duties, playing to their strengths and the captain's assessments of the
14 needs and priorities for the vessel.

15 In rejecting the evidence of captains' ability to make assignments, the Regional Director
16 mischaracterized the continuous instructions provided by the captains as "ad hoc instructions"
17 rather than a "designation of overall duties." Decision at p. 33. He again avoided the plain
18 meaning of the testimony, speculating instead that because the captain is often in the
19 wheelhouse, then there must not be discretion in what the captain assigns the deckhand, who,
20 the Regional Director reasoned, simply does the work needed outside of the wheelhouse. *Id.* at
21 p. 35. This oversimplification is not only unsupported by the evidence but actually conflicts
22 with ample testimony showing the captains must make judgment calls regarding the needs of
23 the ship in changing circumstances, particularly in the extreme climate conditions present in
24 Alaska.

25 The Regional Director also placed undue emphasis on the ratio of supervisors to
26 employees, a factor that officially reported precedent has emphasized is not determinative. *See*

1 *NLRB v. Prime Energy Lt. P'ship*, 224 F.3d 206, 211, 164 LRRM 3103 (3d. Cir. 2000) (holding
2 that NLRB regional director misconstrued record with respect to exercise of shift supervisor's
3 authority, and "no weight" should have been given to "the low ratios of Shift Supervisors to
4 Plant Operators"); *NLRB v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 163 n. 5, 161 LRRM 2139 (3d
5 Cir. 1999) ("We . . . never have adopted a ratio of supervisors to employees as the proper test to
6 determine supervisory status"). Moreover, the Regional Director's emphasis on the ratio of
7 supervisors to employees again discounted the witness testimony indicating that captains
8 preside over as many as six employees at a time, depending on the circumstances. *See*
9 Decision at p. 4 (discounting that testimony because "those circumstances were not detailed in
10 the record.").

11 **2. Responsibly to direct**

12 If an individual decides "what job shall be undertaken next or who shall do it," then he
13 or she is a supervisor if such direction is responsible, meaning he or she will be held
14 accountable for the task's performance, and if the individual exercises independent judgment in
15 giving the direction. *Brusco Tug and Barge*, 359 N.L.R.B. No. 43, slip op. at 7, *citing*
16 *Oakwood Healthcare*, 348 N.L.R.B. at 691-92. To establish the "responsibly to direct"
17 function under section 2(11) of the Act, the employer must therefore show that it "delegated to
18 the putative supervisor the authority to direct the work and the authority to take corrective
19 action, if necessary" and that "there is a prospect of adverse consequences for the putative
20 supervisor if he/she does not take those steps." *Oakwood Healthcare*, 348 N.L.R.B. at 692.

21 Cook Inlet easily satisfied this factor by showing that Captains are subject to discipline
22 and even criminal penalties for failing in their duties. TR 100: 05-101: 24. It also established
23 that Captains are rewarded for the superior performance of their vessels. As to independent
24 judgment, Cook Inlet established that captains are the ultimate decision makers for their
25 vessels, with authority trumping even that of the management in certain situations. Decision at
26 p. 18 (Captains "can decide not to do the job at all if the conditions are too unsafe at the time.")

1 Such authority over management is a significant indicator of supervisor status. *See Entergy*
2 *Gulf States, Inc. v. NLRB*, 253 F.3d 203, 206, 167 LRRM 2445 (5th Cir. 2001) (operations
3 coordinators were supervisors when, because of their grave responsibilities to ensure
4 continuous electrical service and their need to work without interruption, they had authority to
5 order even senior executives out of operations center).

6 As with the assign factor, the Regional Director mischaracterized the evidence as
7 constituting “ad hoc instruction.” He also reasoned that “authority to direct the work of
8 employees is not indicative of supervisory status, if it is based on greater technical expertise
9 and experience, rather than actual supervisory authority.” Decision at p. 38. This emphasis on
10 technical expertise is improper. The United States Supreme Court has explicitly rejected the
11 exclusion from supervisor status of those who use “professional or technical judgment in
12 directing less-skilled employees to deliver services” as creating a “startling” categorical
13 exclusion that would virtually eliminate “supervisors” from the act. *NLRB v. Kentucky River*
14 *Community Care*, 532 U.S. 706, 714, 121 S. Ct. 1861, 167 LRRM 2164 (2001). Because
15 judgment that is technical or professional is still independent, the captains’ technical expertise
16 does not preclude a finding of supervisory status here, and the Regional Director erred in
17 concluding otherwise.

18 Moreover, here again the Regional Director discounted the value of the testimony. He
19 wrote that “all of the Employer’s witnesses stated that captains could be held accountable for
20 deckhands’ errors, through discipline or discharge. However, the witnesses did not specify
21 what types of errors by deckhands would result in what levels of discipline for their captains.”
22 Decision at p. 38. This focus on minor details again unfairly undercuts the plain meaning of
23 the testimony. Further, to expect the witness to testify to the ultimate effect of every breach of
24 conduct that could be engaged in by a deckhand, and how that breach might in varying contexts
25 affect the discipline of a captain is unreasonable, unwarranted and is certainly not required
26 under NLRB precedent.

1 **3. Secondary indicia**

2 The Board may use non-statutory indicia, including differences in terms and conditions
3 of employment, attendance at management meetings, and the presence of other supervisors on-
4 site, as background evidence in resolving supervisory issues. *See, e.g., Empress Casino Joliet*
5 *Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000). Therefore, the Board should consider the
6 abundant evidence of secondary indicia of supervisory status to supplement its analysis of
7 captains authority to assign and direct their crews. For example, captains attend management
8 meetings (TR 45:7-10), receive higher pay than deckhands (TR: 184: 2-185: 13), are identified
9 as supervisors in the employee manual (E-Ex. 4), and receive Company credit cards with which
10 they are permitted to make equipment purchases at their discretion (TR 202: 16-20). Moreover,
11 if Captains are not supervisors, this means there are no supervisors overseeing the day-to-day
12 operations on Cook Inlet's vessels. In rejecting this evidence as probative of supervisor status,
13 the Regional Director stated, "evidence must still be presented that supports a finding that an
14 individual possesses one or more of the primary indicia set forth in §2(11)." Decision at p. 41.
15 Because, as described above, Cook Inlet did in fact present substantial evidence that captains
16 possess numerous indicia of supervisory status, these additional factors warrant consideration.

17 **4. Responsible Carrier Program and Coast Guard Regulations**

18 The Regional Director improperly put significant weight on the existence of the RCP
19 and Coast Guard Regulations to support his conclusion that Captains exercise insufficient
20 independent judgment. As the testimony established, the RCP is a set of guidelines within
21 which Captains apply their discretion and judgment for the safe operation of vessels. Decision
22 at p. 25. Indeed, Captains actually took part in writing and revising the RCP. The Regional
23 Director should not have placed such weight on the existence of code of operations, as it
24 effectively punishes an organization for having established guidelines for performance. By
25 concluding that abiding by government regulations and Company safety and procedural
26 guidelines deprives a supervisor of discretion, the Regional Director intimates that only the

1 opposite—a negligently run organization that violates applicable law and has no policies and
2 procedures—can have statutory supervisors. This is an untenable and undesirable position.
3 Furthermore, the reliance on the code is suspect here, where the Regional Director in other
4 areas discounted the existence of other guidelines and policies that supported Cook Inlet’s
5 claim. See Decision at p. 19 (discounting the value of captains’ disciplinary actions because
6 they are “far less formal than the procedures set out in [Cook Inlet’s] policies”).

7 **B. The Regional Director’s emphasis on weight as opposed to presence of**
8 **supervisory indicia departs from Board precedent.**

9 Cook Inlet proved the existence of both the assign and direct indicia of supervisor status.
10 Importantly, however, the analysis under Section §2(11) does not incorporate a balancing test
11 or a weighing of how many of the indicia are present. The Board and the courts have
12 repeatedly held that “[t]o qualify as a supervisor, it is not necessary that an individual possess
13 all of the powers specified in the Act. Rather, possession of any one of them is sufficient to
14 confer supervisory status.” *Lakeview Health Center*, 308 N.L.R.B. 75, 78 (1992) (emphasis
15 added); see also *NLRB v. Chicago Metallic Corporation*, 794 F.2d 527, 531 (9th Cir. 1986).
16 The Employer therefore must only provide specific evidence of any one of the 12 enumerated
17 actions to meet its burden of proof. See *NLRB v. Kentucky River Community Care*, 532 U.S.
18 706, 121 S. Ct. 1861, 149 L.Ed.2d 939 (2001). Cook Inlet more than satisfied this requirement
19 here.

20 It is the existence of the supervisory powers under Section 2(11) that determines whether
21 an individual is a supervisor, not the extent to which those powers have been actually
22 exercised. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003), quoting *NLRB v.*
23 *Roselon Southern, Inc.*, 382 F.2d 245, 247 (6th Cir. 1967). The actual exercise or the
24 frequency of the exercise of that authority is irrelevant to a determination of supervisory status.
25 See *Union Square Theatre Mgmt., Inc.*, 326 N.L.R.B. 70 (1998); *Beverly California Corp. v.*
26 *NLRB*, 970 F.2d 1548, 1550 at n. 3 (6th Cir. 1992). Rather, “[i]t is the existence of [a statutorily

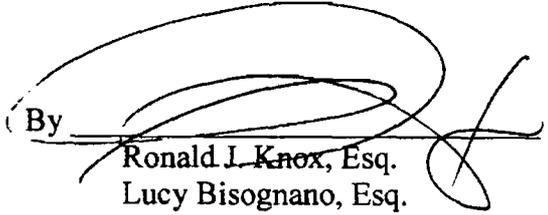
1 listed] authority that counts under the statute, and not the frequency of its exercise.” *Altercare*
2 *of Hartville v. NLRB*, 129 F.3d 365, 369 (6th Cir. 1997); *see also Biewer Wisconsin Sawmill*
3 *Inc.*, 312 N.L.R.B. 506, 507 (1993). It is possession of authority consistent with any of the
4 indicia of Section 2(11), and not the actual exercise of that authority, which is the evidentiary
5 touchstone. *Fred Meyer Alaska, Inc.*, 334 N.L.R.B. 646, 649 (2001); *Allstate Insurance Co.*,
6 332 N.L.R.B. 759, 760 (2000).

7 Cook Inlet provided competent evidence that Captains possess the authority to assign and
8 direct as described above. In the Decision, however, the Regional Director improperly rejected
9 some evidence as insufficient with regard to frequency, suggesting a minimum requirement for
10 weighing an indicator of supervisor status once its existence is established. Regarding the
11 assign factor, and despite clear proof that captains have been granted the requisite authority, the
12 Regional Director wrote, “Captain Butts testified that captains may veto changes to deckhands’
13 normal schedules if they need a person with particular capabilities to be onboard for a
14 particular job, but he testified that captains **do not often** veto schedule changes.” *Id.* at p.18
15 (emphasis added). In addition, the Regional Director’s conclusions with respect to other
16 indicia confirm his misplaced reliance on frequency and weight in making the supervisor
17 analysis:

- 18 • With regard to hiring, the Regional Director stated there was insufficient
19 documentary evidence showing the “**frequency or regularity** with which applicants
20 recommended for hire by captains are, in fact, hired.” Decision at p. 9 (emphasis
21 added).
- 22 • In discussing promotions, the Regional Director stated, “Butts offered no details
23 regarding the **regularity and/or frequency** with which a captain may bring on
24 another deckhand [to perform deckhand duties while deckhand selected as mate is
25 observing captain] without management approval.” *Id.* at p.11 (emphasis added).
26

1 Respectfully submitted this 6th day of February, 2014.

2 GARVEY SCHUBERT BARER

3
4 By 

Ronald J. Knox, Esq.

Lucy Bisognano, Esq.

6 *Attorneys for Employer Cook Inlet Tug &*
7 *Barge, Inc.*

1 **CERTIFICATE OF SERVICE**

2 The undersigned, not a party to the above-entitled case, over the age of eighteen years,
3 and competent to testify as to the matters described herein states as follows:

4 That on February 6, 2014, I caused a copy of the above "Employer's Supplemental
5 Brief Upon Granting of Its Request for Review" to be served on the following as set out below:

6 Alan Cote, President Via e-mail
7 Inlandboatmen's Union of the Pacific
8 1711 W. Nickerson St., Suite D
9 Seattle, WA 98119
E-mail: alan.ibu@mindspring.com

10 Emily M. Maglio Via e-mail
11 Leonard Carder, LLP
12 1188 Franklin Street, Suite 201
San Francisco, CA 94109
E-mail: emaglio@leonardcarder.com

13 Ronald J. Hooks Via email
14 Regional Director
15 National Labor Relations Board
16 Region 19
915 2nd Ave., Ste. 2948
Seattle, WA 98174
E-mail: Ronald.hooks@nlrb.gov

17 I declare under penalty of perjury in accordance with the laws of the State of
18 Washington that the foregoing is true and correct.

19 DATED at Seattle, Washington, this 6th day of February, 2014.

20
21 
22 Adina Davis, Legal Assistant

23 SEA_DOCS:1134852.3
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