

**Brusco Tug & Barge, Inc. and International Organization of Masters, Mates, & Pilots ILA, AFL-CIO.** Cases 19-CA-096559 and 19-RC-013872

March 18, 2015

DECISION, ORDER REAFFIRMING  
CERTIFICATION OF REPRESENTATIVE, AND  
NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND JOHNSON

On May 20, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 1099. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. The Board's May 20, 2013 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceeding. The prior proceeding, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give it preclusive effect. Accordingly, we consider below the representation issues that the Respondent has raised in this proceeding.

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the mates in the unit are supervisors under Section 2(11) of the Act and that the bargaining unit is therefore inappropriate. The Respondent also argues that the complaint was not validly issued

because the Acting General Counsel was not a proper recess appointee.<sup>1</sup>

In addition, in its response to the previously issued Notice to Show Cause, the Respondent contends that it changed the duties of its mates in about 2010, after the Board granted the Employer's request for review of the Regional Director's second supplemental decision but before the Board's original Decision on Review issued. The Respondent asserts that these changes could not have been litigated in the prior representation proceeding because they occurred after 2006, which was the last opportunity afforded by the Regional Director to submit evidence, and that it should now be permitted to present these facts at a hearing. We find no merit in this argument.

The Respondent's attempt to raise asserted changes in the mates' duties in this proceeding is untimely. As indicated, the asserted changes occurred in 2010, when the Respondent's Request for Review was pending before the Board. Although the Respondent could have filed a motion to reopen the record at that time under Section 102.65 of the Board's Rules and Regulations, it failed to do so until 2013, in response to the Board's February 13, 2013 Notice to Show Cause. The Respondent having failed to act "promptly on discovery of the evidence sought to be adduced," Section 102.65(e)(2), and having failed to provide good cause for that failure, we reject the proffer.<sup>2</sup>

With regard to the Respondent's argument that the certified bargaining unit is not appropriate because the mates in the unit are statutory supervisors, in view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the Regional Director's Second Supplemental Decision on Remand and the entire record in light of the request for review, the opposition to the request for review, and the briefs on review. We have also considered the Board's original Decision on Review and Order, and we agree with the rationale the majority sets forth. Thus, we agree with the Regional Director's finding that the Respondent failed to meet its

<sup>1</sup> For the reasons stated in *Benjamin H. Realty Corp.*, 361 NLRB 918 (2014), we reject this argument. In any event, the Acting General Counsel was not a recess appointee.

<sup>2</sup> *New Vista Nursing & Rehabilitation, LLC*, 357 NLRB 714, 715 (2011). Cf. *East Michigan Care Corp.*, 246 NLRB 458, 459 (1979), enf. 655 F.2d 721 (6th Cir. 1981) (refusing to consider precertification changes to nurses' duties that allegedly made them supervisors where the employer did not seek to introduce evidence of those changes in the representation proceeding by a motion to reopen the record or otherwise); *TEG/LVI Environmental Services*, 328 NLRB 483, 483 fn. 3 (1999) (observing that employer had failed to explain why asserted change affecting unit was first brought to the Board's attention in the employer's response to the notice to show cause).

burden of establishing that the tugboat mates are statutory supervisors based on the statutory criteria of assignment and responsible direction. Accordingly, we affirm the Regional Director's Second Supplemental Decision to the extent and for the reasons stated in the Board's original Decision on Review and Order reported at 359 NLRB 486, which we incorporate herein by reference.<sup>3</sup>

#### ORDER REAFFIRMING CERTIFICATION OF REPRESENTATIVE

Having rejected the Respondent's challenge to the composition of the bargaining unit, we reaffirm the Certification of Representative that issued on September 22, 2000, in Case 19-RC-013872 (copy attached hereto as an Appendix), which certified the International Organization of Masters, Mates, & Pilots ILA, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All mates, deckhands, and engineer deckhands employed by the Employer on vessels operated by [the 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.

#### NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

<sup>3</sup> In finding the mates at issue here to be statutory supervisors, our dissenting colleague relies on some of the rationale set forth in the prior dissent of former Member Hayes. For the reasons set forth by the majority in the Decision on Review and Order reported at 359 NLRB 486, we reject those arguments. For example, relying on the requirement in maritime law that engineers are required to obey the mate, a licensed officer, our dissenting colleague disagrees with the majority's finding in the vacated decision that the Employer had not shown that the mates could require the engineer to come on shift to address a mechanical issue. As the majority in the vacated decision stated, however, the two statutory schemes serve separate purposes, and supervisory status questions under the NLRA cannot be answered merely by the assertion of maritime law. Having undertaken the required fact-intensive review of the record presented to us, we find that the Employer did not meet its burden of showing that the mates are supervisors within the meaning of Sec. 2(11) of the Act.

1. The General Counsel is granted leave to amend the complaint on or before March 30, 2015, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before April 13, 2015.

NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before April 20, 2015 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

MEMBER JOHNSON, dissenting.

The mates at issue in this case are licensed officers responsible for the crew, the navigation, and the operation of the tugs at sea and on inland waterways for 12 of every 24 hours. According to my colleagues, however, the mates do not supervise the crew they oversee (never mind that the crew is required by Federal law to obey them). The unavoidable result of their decision is that, in the swiftly changing, unpredictable, and potentially hazardous marine environment, there is no supervision for a good half of each 30-day sea voyage when the mates control the operation of the vessel and are vested with the authority of the captain. As former Member Hayes cogently explained in the underlying representation decision, the majority's view, adopted by my colleagues here, arrives at a result that cannot be reconciled with the evidence, the standard the Board clarified in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), or the cumulative weight of 50 years of Board and court precedent establishing the supervisory status of pilots and mates on river- and sea-going vessels who have essentially the same authority as the mates here. And contrary to the bare assertion in the vacated decision, *Oakwood* did not change the *substance* of our analysis such that it "eclipsed" that precedent.

#### I. THE MATES ARE SUPERVISORS UNDER SECTION 2(11) OF THE ACT BECAUSE THEY ASSIGN AND DIRECT THE CREW USING INDEPENDENT JUDGMENT

I agree with Member Hayes that the mates assign deckhands under Section 2(11) of the Act for the reasons he stated. They assign engineers to overtime when they summon the engineer back to work to investigate possible mechanical problems and, at the mate's discretion, direct the engineer to make necessary repairs. If the mate has any concern about a mechanical issue, it is the mate's discretion to send the engineer back to work to investigate. The mate can order the engineer to fix a problem on the spot or wait until his or her regular shift begins. In addition to affecting the engineer's hours and pay, the decision to assign the engineer to overtime has regulatory

ramifications for the employer due to Federal restrictions setting a cap of 12 hours per every 24 that an employee may work on a vessel. The mates exercise independent judgment in determining both whether an issue is serious enough that it requires the engineer to work overtime to investigate a potential problem as well as whether the engineer must then repair the problem immediately or wait until his or her scheduled shift.

The majority in the vacated decision found that the Employer had not shown that the mates could *require* that the engineer come off shift to address a mechanical issue. 359 NLRB 486, 491 (2012). That is wrong as a matter of federal law, which requires the engineer to obey the mate, a licensed officer. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 39 (1942) (Federal law requires seamen to obey superior officers.). It is also clear from the record that the mates' directions are *directions*, not hopeful suggestions that the engineers apply their skills to prevent a mechanical failure at sea (see Second Supplemental Decision on Remand, finding that the mate "can wake the engineer". . . who "then diagnoses the problem"). The mate may well defer to the engineer, but that is the mate's decision. And as the D.C. Circuit said in remanding, "[a]s we read the hearing officer's findings, surely the crewmen on Brusco's tugs were not free to ignore mates' commands." *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 277 (D.C. Cir. 2001).

The majority in the representation decision also parroted the Regional Director's erroneous suggestion that independent judgment in assigning work is limited to deciding which of multiple employees to assign to a job by comparing their abilities. As said in *Oakwood*, where a putative supervisor "has the discretion to determine when an emergency exists" based on the individual's assessment of the particular circumstances, the decision involves the exercise of independent judgment. *Oakwood*, 348 NLRB at 693–694. Here, the decision to summon the engineer is analogous. It requires balancing competing factors including the mate's judgment of the seriousness of the problem, the financial and regulatory ramifications of compelling the engineer back to work, and the possible ramifications of not doing so.

Also as explained in the dissent, the mates responsibly direct the crew in hazardous procedures such as securing the barges, managing the towlines, docking, and in emergencies. When directing the crew in various at-sea procedures, the mates must account for exigencies of weather and multiple changing factors, requiring significant independent judgment, as the Board and courts have amply found in similar cases. See cases cited at 359 NLRB 486, 598. Further, as former Member Hayes

pointed out from the testimony, masters *and mates* are responsible for the vessel, and the captain is not responsible for what occurs when he is asleep. Mates need not and do not wake them every time they must make a supervisory decision.<sup>4</sup> The maritime circumstances, required obedience, and the Employer—and Coast Guard—imposed obligations of the mates as licensed officers and as masters during their shifts are sufficient to reasonably infer their accountability for what occurs on their watch.<sup>5</sup>

Accordingly, the mates are supervisors within the meaning of Section 2(11) of the Act, and the complaint in Case 19–CA–096559 should be dismissed.

## II. THE EMPLOYER'S REMAND REQUEST IS NOT UNTIMELY

In its February 2013 brief in response to the Notice to Show Cause, the Employer contends that the representation case should be remanded for a new hearing to take evidence of employee turnover and increased supervisory duties of the mates. My colleagues find that the Employer's request is untimely because the changes were made in 2010 and the Employer waited until 2013 to raise the issue with the Board. I disagree. First, the Board's original Decision on Review affirming the Regional Director's determination that the mates were employees under the Act is vacated and thus the representation case was still pending at the time of the Employer's brief, as it has been until the issuance of today's decision. Second, the Employer raises the issue at what would reasonably appear to be an appropriate time to do so—in response to the show cause notice. And third, as the D.C. Circuit has pointedly reminded us, nothing in the Board's rules require an employer "to advise the Board of every changed circumstance in its business operation and workforce between the date of a judge's decision and the Board's final disposition of the case." *Cogburn Health Center v. NLRB*, 437 F.3d 1266, 1272 (D.C. Cir. 2006). Although I need not reach the merits given my finding that the mates are supervisors, the Respondent's request for a new hearing is not untimely.

Accordingly, I respectfully dissent.

<sup>4</sup> Contrary to the majority in the underlying decision, the simple presence of the off-duty captain on the vessel does not circumscribe the mates' supervisory authority during their watch. *Alter Barge Lines, Inc.*, 336 NLRB 1266, 1271 (2001).

<sup>5</sup> *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543, 550 (2006) (pilot is answerable for any mishaps that occur with the tugboat and the tow *by virtue of his license*) (emphasis added).

APPENDIX

FORM NLRB-4279  
(Revised R19 - 6/94)

RC-RM-RD

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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

**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 Egan*  
Regional Director, Region 19  
National Labor Relations Board