

Nos. 15-1190, 15-1282

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRUSCO TUG & BARGE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ORGANIZATION OF MASTERS, MATES
& PILOTS, ILA, AFL-CIO**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JULIE BROIDO
Supervisory Attorney

MICHAEL R. HICKSON
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2996
(202) 273-2985

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRUSCO TUG & BARGE, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1190, 15-1282
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CA-096559
)	
and)	
)	
INTERNATIONAL ORGANIZATION OF)	
MASTERS, MATES & PILOTS, ILA, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties, Intervenors, Amici

Brusco Tug & Barge, Inc. (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. International Organization of Masters, Mates & Pilots, ILA, AFL-CIO (“the Union”) was the charging party before the Board and is the intervenor before the Court. The Company, the Board’s General Counsel, and the Union appeared before the Board in Case 19-

CA-096559. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Company's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on June 15, 2015, reported at 362 NLRB No. 115.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. However, a previous ruling in the same administrative case was before this Court in *Brusco Tug & Barge, Inc. v. NLRB*, No.13-1190. That action was held in abeyance based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) and subsequently dismissed following *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 6th day of September, 2016

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Relevant statutory provisions.....	3
Statement of the issues.....	3
Statement of the case.....	4
I. The Board’s findings of fact.....	4
A. The Company’s operations; Overview of ocean tugboats	4
B. Crewmembers’ general responsibilities	5
C. “Making up a tow” and “docking”	6
D. Changing the length of a towline	9
E. Crossing the Columbia River bar; Adverse weather	10
F. Emergencies and drills.....	11
G. Engine problems	12
H. Projects.....	13
I. Inland river runs.....	13
II. The procedural history	14
A. In the representation proceeding, a hearing is held; the Regional Director issues a decision and direction of election, finding the mates are employees; after an election, he certifies the union as employees’ collective-bargaining representative	14

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
B. Following this Court’s remand of the independent unfair-labor-practice case and the Supreme Court’s <i>Kentucky River</i> decision, the Board reopens the record in the representation case and remands it to the Regional Director, who issues a supplemental decision on remand	15
C. After issuing the <i>Oakwood</i> trilogy, the Board again remands the representation case to the Regional Director, who issues a second supplemental decision on remand, which the board affirms	17
D. The instant unfair-labor-practice proceeding: the Company refuses to bargain with the Union; following the Supreme Court’s <i>Noel Canning</i> decision, a properly constituted Board adopts the rationale of its earlier decision on review, and reaffirms the Regional Director’s second supplemental decision and the Union’s certification.....	19
III. The Board’s conclusions and order	22
Summary of argument.....	23
Argument.....	26
The Board reasonably found that the Company violated section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union.....	26
A. Substantial evidence supports the Board’s finding that the Company failed to carry its burden of proving that its mates are statutory supervisors	27
1. Applicable principles and standard of review	27
2. The Company failed to prove that its mates assign employees using independent judgment.....	31

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
a. Mates provide only ad hoc or discrete instructions, and do not assign employees, with respect to making up a tow and docking, changing the length of a towline, traversing locks, and posting employees in severe weather	32
b. Mates do not use independent judgment in carrying out the duties that the Company characterizes as assignment	34
(i) Mates do not use independent judgment in making up a tow and docking	35
(ii) Mates do not use independent judgment in responding to emergencies and scheduling/conducting safety drills	36
(iii) Mates do not use independent judgment in waking the engineer when engine problems arise	38
(iv) Mates do not use independent judgment on the rare occasions when they select one of two deckhands to perform a task	40
3. The Company failed to prove that the mates responsibly direct employees using independent judgment	43
4. The Company errs in relying on pre- <i>Oakwood</i> cases involving the status of tugboat mates	48
B. The Board did not abuse its discretion in denying the Company’s requests to reopen the record in the representation case and relitigate issues in the unfair-labor-practice case	53
1. The Board properly denied the Company’s untimely request to reopen the record	54

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
2. The Board acted within its discretion in denying the Company’s request to relitigate representation issues in the unfair-labor-practice case.....	57
Conclusion	63

TABLE OF AUTHORITIES

Cases	Page(s)
*735 <i>Putnam Pike Operations, LLC v. NLRB</i> , 474 F. App'x 782 (D.C. Cir. 2012)	28,35,37,39,44,45,48,50
<i>Alois Box Co. v. NLRB</i> , 216 F.3d 69 (D.C. 2000).....	43
<i>Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC v. NLRB</i> , 736 F.2d 1559 (D.C. Cir. 1984).....	54
<i>American Commercial Barge Line Co.</i> , 337 NLRB 1070 (2002)	52
<i>Am. River Transp. Co.</i> , 347 NLRB 925 (2006)	53
<i>APL Logistics, Inc.</i> , 341 NLRB 994 (2004), <i>enforced</i> , 142 F. App'x 869 (6th Cir. 2005)	58
* <i>Avista Corp. v. NLRB</i> , 496 F. App'x 92 (D.C. Cir. 2013)	29,30,38,39,41,51
<i>Bally's Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	30
<i>Bernhardt Bros. Tugboat Serv., Inc.</i> , 142 NLRB 851 (1963), <i>enforced</i> , 328 F.2d 757 (7th Cir. 1964)	16,49
<i>Beverly Enterprises-Mass., Inc. v. NLRB</i> , 165 F.3d 960 (D.C. Cir. 1999).....	29

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Brusco Tug & Barge Co. v. NLRB</i> , 247 F.3d 273 (D.C. Cir. 2001).....	16,42,43,46,49
<i>Buchanan Marine, L.P.</i> , 363 NLRB No. 58, 2015 WL 7873627 (Dec. 2, 2015)	52
* <i>Canadian Am. Oil Co. v. NLRB</i> , 82 F.3d 469 (D.C. Cir. 1996).....	54
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	43,50
<i>CHS, Inc.</i> , 357 NLRB No. 54, 2011 WL 3860606 (Aug. 12, 2011).....	39
<i>Cogburn Health Ctr., Inc. v. NLRB</i> , 437 F.3d 1266 (D.C. Cir. 2006).....	56,57
<i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006)	17,33,36,37
* <i>E. Michigan Care Corp.</i> , 246 NLRB 458 (1979), <i>enforced</i> , 655 F.2d 721 (6th Cir. 1981)	58,59
<i>Entergy Mississippi, Inc. v. NLRB</i> , 810 F.3d 287 (5th Cir. 2015)	48,50,51
<i>Entergy Mississippi, Inc.</i> , 357 NLRB 2150 (2011).....	51

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
* <i>Ex-Cell-O Corp. v. NLRB</i> , 449 F.2d 1058 (D.C. Cir. 1971).....	60
<i>Exxon Chem. Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004).....	26
* <i>Frenchtown Acquisition Co. v. NLRB</i> , 683 F.3d 298 (6th Cir. 2012)	29,31,35,37,39,45,48,50,51
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999)	3
<i>G4S Gov't Sols., Inc.</i> , 363 NLRB No. 113, 2016 WL 555916 (Feb. 10, 2016).....	42
<i>Golden Crest Healthcare Center</i> , 348 NLRB 727 (2006)	17,40,45
<i>Harry Asato Painting, Inc.</i> , 2015 WL 5734974 (Sept. 30, 2015)	55
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996).....	27,29
<i>Indeck Energy Servs. of Turners Falls, Inc.</i> , 318 NLRB 321 (1995)	58-59
<i>Joseph T. Ryerson & Son, Inc. v. NLRB</i> , 216 F.3d 1146 (D.C. Cir. 2000).....	57
<i>King Elec., Inc. v. NLRB</i> , 440 F.3d 471 (D.C. Cir. 2006).....	59

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Labor Ready, Inc.</i> , 330 NLRB 1024 (2000)	56
<i>Loparex LLC v. NLRB</i> , 591 F.3d 540 (7th Cir. 2009)	50
<i>Lynwood Manor</i> , 350 NLRB 489 (2007)	46
* <i>Manhattan Ctr. Studios, Inc.</i> , 357 NLRB 1677 (2011)	55,56
<i>Maine Yankee Atomic Power Co. v. NLRB</i> , 624 F.2d 347 (1st Cir. 1980).....	48
<i>Mars Home for Youth v. NLRB</i> , 666 F.3d 850 (3d Cir. 2011)	33,40,44,50
<i>Masters, Mates & Pilots (AFL-CIO) Local 28 (Ingram Barge Co.)</i> , 136 NLRB 1175 (1962), <i>enforced</i> , 321 F.2d 376 (D.C. Cir. 1963)	16,49
<i>Mercury Marine</i> , 259 NLRB 876 (1982), <i>enforced</i> , 703 F.2d 571 (7th Cir. 1983) (Table).....	59
<i>Micro Pac. Dev. Inc. v. NLRB</i> , 178 F.3d 1325 (D.C. Cir. 1999).....	33
<i>Nathan Katz Realty, LLC v. NLRB</i> , 251 F.3d 981 (D.C. Cir. 2001).....	49
<i>New Process Steel, L.P. v. NLRB</i> , 560 U.S. 674 (2010).....	60

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946).....	54
<i>NLRB v. Atl. Paratrans of N.Y.C., Inc.</i> , 300 F. App'x 54 (2d Cir. 2008).....	45
<i>NLRB v. Bell Aerospace Co. Div. of Textron</i> , 416 U.S. 267 (1974).....	30
* <i>NLRB v. Creative Food Design Ltd.</i> , 852 F.2d 1295 (D.C. Cir. 1988).....	56,60,61-62
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775 (1990).....	26
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	56
* <i>NLRB v. Hanna Boys Ctr.</i> , 940 F.2d 1295 (9th Cir. 1991).....	58,60
<i>NLRB v. Health Care & Ret. Corp. of Am.</i> , 511 U.S. 571 (1994).....	51
<i>NLRB v. J.H. Rutter-Rex Mfg. Co.</i> , 396 U.S. 258 (1969).....	61
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	61
<i>NLRB v. KDFW-TV</i> , 790 F.2d 1273 (5th Cir. 1986).....	47,48

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Kentucky River Cmty. Care, Inc.</i> , 532 U.S. 706 (2001).....	16-17,27,28,29,31,39,42,44,50,52,60
<i>NLRB v. Mr. B. IGA, Inc.</i> , 677 F.2d 32 (8th Cir. 1982)	60
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	20,60
* <i>NLRB v. NSTAR Elec. Co.</i> , 798 F.3d 1 (1st Cir. 2015).....	29,31,32,34,45,48,50,51
<i>NLRB v. Parents & Friends of the Specialized Living Ctr.</i> , 879 F.2d 1442 (7th Cir. 1989)	60
<i>NLRB v. Superior Fireproof Door & Sash Co.</i> , 289 F.2d 713 (2d Cir. 1961)	62
<i>NLRB v. Town & Country Elec., Inc.</i> , 516 U.S. 85 (1995).....	27
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013).....	19
* <i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006)	17,25,28-33,39,42-44,47,48,50-53,60
<i>Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB</i> , 445 F.2d 237 (D.C. Cir. 1971).....	29,30,41
<i>Pac Tell Grp., Inc. v. NLRB</i> , 817 F.3d 85 (4th Cir. 2016)	29,31,35,36

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Pace Univ. v. NLRB</i> , 514 F.3d 19 (D.C. Cir. 2008).....	57
<i>Parkwood Developmental Ctr., Inc. v. NLRB</i> , 521 F.3d 404 (D.C. Cir. 2008).....	54
* <i>Pearson Educ., Inc. v. NLRB</i> , 373 F.3d 127 (D.C. Cir. 2004).....	26,59
<i>Peoples Gas Sys., Inc. v. NLRB</i> , 629 F.2d 35 (D.C. Cir. 1980).....	61,62
<i>Pride Ambulance Co.</i> , 356 NLRB No. 128, 2011 WL 1298935 (Apr. 5, 2011).....	33,39
<i>Rd. Sprinkler Fitters Local Union No. 669 v. NLRB</i> , 789 F.2d 9 (D.C. Cir. 1986).....	54
<i>Rochelle Waste Disposal, LLC v. NLRB</i> , 673 F.3d 587 (7th Cir. 2012)	46
* <i>Salem Hosp. Corp. v. NLRB</i> , 808 F.3d 59 (D.C. Cir. 2015).....	29,37,45,57
<i>Scepter, Inc. v. NLRB</i> , 280 F.3d 1053 (D.C. Cir. 2002).....	56
<i>Shaw, Inc.</i> , 350 NLRB 354 (2007)	35,36,37,42,48
<i>Southern S.S. Co. v. NLRB</i> , 316 U.S. 31 (1942).....	47

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Specialty Healthcare & Rehab. Ctr. of Mobile, Inc.</i> , 357 NLRB 2119 (2011), <i>enforced</i> 727 F.3d 552 (6th Cir. 2013)	59
<i>Spentonbush/Red Star Companies v. NLRB</i> , 106 F.3d 484 (2d Cir. 1997)	47
<i>St. Anthony Hosp. Sys., Inc. v. NLRB</i> , 884 F.2d 518 (10th Cir. 1989)	59
* <i>Telemundo de Puerto Rico, Inc. v. NLRB</i> , 113 F.3d 270 (1st Cir. 1997).....	58,59
* <i>Thomas-Davis Med. Centers v. NLRB</i> , 157 F.3d 909 (D.C. Cir. 1998).....	54,56
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	30
<i>VIP Health Servs., Inc. v. NLRB</i> , 164 F.3d 644 (D.C. Cir. 1999).....	48
<i>York Mfg. Co.</i> , 171 NLRB 754 (1968)	56

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:	Page(s)
------------------	----------------

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 2(3) (29 U.S.C. § 152(3)).....	27
Section 2(11) (29 U.S.C. § 152(11)).....	3,15,17,18,23,25,27-31,33,34,44-46,50,53
Section 7 (29 U.S.C. § 157)	23
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	4,16,19,22,23,26
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	4,19,21,23,26
Section 9(c) (29 U.S.C. § 159(c))	3
Section 9(d) (29 U.S.C. § 159(d)).....	2
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2
Section 10(f) (29 U.S.C. § 160(f)).....	2

Regulations:

29 C.F.R. § 102.48(d)	54,55,56
29 C.F.R. § 102.65(e).....	54,55,56

Other Authorities:

Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).....	30
79 Fed. Reg. 74,308, 74,308 (Dec. 15, 2014).....	54

GLOSSARY

A. Deferred Appendix

Act National Labor Relations Act

Board National Labor Relations Board

Br. Company's opening proof brief

Company Brusco Tug & Barge, Inc.

SA. Deferred Supplemental Appendix

Union International Organization of Masters, Mates & Pilots, ILA,
AFL-CIO

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 15-1190, 15-1282

BRUSCO TUG & BARGE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ORGANIZATION OF MASTERS, MATES
& PILOTS, ILA, AFL-CIO**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Brusco Tug & Barge, Inc.
("the Company") to review, and the cross-application of the National Labor

Relations Board to enforce, a final Board Decision and Order (362 NLRB No. 115) issued against the Company on June 15, 2015. (A.447-51.)¹ International Organization of Masters, Mates & Pilots, ILA, AFL-CIO (“the Union”) has intervened on the Board’s side.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce. The Company’s petition for review and the Board’s cross-application for enforcement were timely; the Act imposes no limit on the time for filing actions to review or enforce Board orders. The Board’s Order is final, and the Court has jurisdiction over this case under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board to cross-apply for enforcement.

Because the Board’s Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 19–RC–013872) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d)

¹ Record references in this final brief are to the appendices using abbreviations defined in the attached Glossary. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice Order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

RELEVANT STATUTORY PROVISIONS

Relevant statutory and regulatory provisions are reproduced in the Addendum.

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether the Board reasonably found that the Company violated the Act by refusing to bargain with the Union as the collective-bargaining representative of the unit employees. Resolution of this issue turns on two subsidiary ones: whether substantial evidence supports the Board's finding that the Company did not carry its burden of proving that its mates are supervisors under Section 2(11) of the Act; and whether the Board acted within its discretion in rejecting the Company's requests to reopen the record in the representation proceeding and relitigate issues in the unfair-labor-practice case.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union after its employees voted in favor of union representation in a Board-conducted election. The Company does not dispute its refusal. Instead, it claims that the Board erred in finding that the Company failed to meet its burden of proving that its mates are statutory supervisors, and in rejecting its requests to reopen the record and relitigate issues. The relevant factual and procedural background and the Board's conclusions and Order are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations; Overview of Ocean Tugboats

The Company operates tugboats out of a home port in Longview/Cathlamet, Washington. (A.355,367;A.8,13,16-18,32,90-91,98.) Its ocean-bound tugs tow barges loaded with commodities like sand, rock, logs, and woodchips along the Pacific Coast; they also provide custom towing services.² (A.355,367-68;A.12,129-30,151.)

Ocean-bound tugboats are typically staffed by a crew of four: a captain (sometimes called a master), mate, engineer, and deckhand. (A.355,367;A.5-6,9,21,60,108,131,140,202.) Occasionally, the crew includes a second deckhand,

² The Company's inland river-bound tugboats are discussed in Section I below.

such as when towing a log barge. (A.355,363,367-68,372;A.21,31,60,82-83,108,131,141,182.) Crews work in rotations of about 30 days on the boat, followed by 30 days off. (A.355,368;A.25,34,61.) At sea, each crewmember is on duty for two six-hour watches per day. (A.355,368;A.21-22,35,58,107.) Generally, the captain and engineer are on watch beginning at 6 a.m. and 6 p.m.; the mate and deckhand are on watch beginning at 12 p.m. and 12 a.m. (A.355,368;A.107,161-62.) In the case of a five-person crew, the second deckhand may work on either the captain's or the mate's watch. (A.363n.11;A.67,113,137-38,233,276.) Crewmembers are paid overtime, or "off-watch time," for work performed during off-watch hours. (A.356-57,362,369;A.39-40,79,110.)

The Company's port captain, who works out of its Longview office, assigns crews to boats. (A.355;A.16,24-25,38,45,48,56,81-82.) He aims to keep the same individuals together to develop highly cohesive crews; generally, the same crewmembers tend to work together on the same boat for long periods of time. (A.355,371-72;A.69-70,87,92,94,97,133,148,266,275,283.)

B. Crewmembers' General Responsibilities

The captain is the highest authority on a tugboat and has "the final say on everything." (A.355,368;A.49,52,106-07,136-38.) He determines when the vessel will leave port, and steers it while on watch. He is in charge of navigation and safety, and verifies the tugboat's seaworthiness. Additionally, he ensures

compliance with company policy and the capacity of crewmembers to perform their duties. (A.355,368;A.24,38,43,49-52,56,62,66,68,73,89,106-07,136-38,163.)

The captain decides which crewmembers will work on a particular watch.

(A.355;A.67,137-38,233.) He also has authority to discipline them and

recommend their promotion. (A.355,368;A.57-59.) Ultimately, the captain is held

accountable for anything that may go wrong on the vessel, regardless of who was

at fault. (A.355,361,368;A.137.)

The mate steers the tugboat when the captain is off watch. During the mate's watch, he is in charge, and is responsible for the vessels' navigation and safety. (A.355,368;A.75,89,113,127,139,142,163,205-06,213,266-67.) The

deckhand prepares meals, cleans, paints, and performs other maintenance tasks.

(A.355,368;A.64,141,161,169,234.) The engineer operates and maintains the

tugboat's mechanical systems, including its engine. (A.356,368;A.40,139,282.)

He is the sole crewmember with specialized training, knowledge, and skill

concerning engine function and repair. (A.362,369,372;A.282.)

C. "Making Up a Tow" and "Docking"

The Company's tugboats generally tow just one barge at a time.

(A.356,368;A.174.) On a typical 30-day voyage, a boat uses the same barge to

haul four separate loads. (A.356,368;A.151.) The entire crew participates in

"making up a tow" (connecting a barge to a tugboat for towing purposes) and

“docking” (bringing a barge into port). (A.356,368,371;A.64,78,115,123-24, 153-54,165,211.) Together, these maneuvers comprise about 1 percent of the crewmembers’ total on-duty time on a given voyage. (A.368;A.168,188-90.)

In advance of making up a tow and docking, the captain advises the mate how he wants the procedure done. (A.356,361,368,371;A.64,115,125-26,137,142, 157-58,267-68,284.) If other crewmembers are not present when the captain gives orders, the mate relays them to the others. (A.356,368;A.137,157-58,284.)

Making up a tow and docking become “routine” with experience; crewmembers who have worked together previously need little instruction in executing the maneuver once informed of the captain’s plan. (A.356,368,371-72;A.71-72,79, 115,121,125-26,132-34,143-44,148-49,158-59,164,235-36,268,278,284.)

While making up a tow and docking, the captain, mate, and deckhand communicate through handheld radios, or by talking or shouting to one another. (A.356,361,368,371;A.64,116,125,144,153,213,269,278.) Generally, the captain steers the boat from the wheelhouse or the “Texas deck,” an elevated platform above the wheelhouse that gives him a better view of the crew’s activities.

Meanwhile, the mate, who is stationed on the deck or barge, tells the deckhand where to stand, where to place the lines, which lines to release, and which tools to bring. (A.356,368,371;A.64-65,78,113-17,124-25,137,141-42,154-56,207-08, 212,229.)

With respect to docking, the captain decides which of two methods to use: “hipping up” or towing the barge to the dock. (A.356,368;A.114-15.) Hipping up involves moving the tugboat to the side of the barge, securing the barge tightly alongside it, and then moving them together to the dock as a single unit. (A.368;A.65,78,114-16.) During this procedure, the deckhand boards the barge once the tugboat is alongside it; he first ties the barge to the boat and later ties the combined unit to the dock. (A.368;A.115,117,212.) There are three types of lines that can be used in tying up to the dock, and each captain has a standing preference concerning the order in which they should be tied. (A.356,368;A.64,119-20,137, 156-57,211-12.) The mate tells the deckhand which order to use, based on the captain’s preference and other concerns such as the weather, the barge size, and the vessel’s approach to the dock. (A.368;A.117-20,137,156-57,211-12,278-79,284-85.)

Whichever docking method is used, the barge will block the captain’s view of the dock, since it is higher than the tugboat. (A.356,368;A.78,142.) Thus, the mate boards the barge and, from that vantage point, guides the captain in steering the vessel to the dock. (A.356,368;A.78,115-16,142,149,228,269-70,277.) At times, the deckhand also joins in giving the captain such steering directions. (A.368;A.269-70,277.) Alternatively, some captains prefer to board the barge themselves and have the mate steer the boat. (A.356;A.142-43.) When using the

second docking method—towing the barge to the dock—an assist boat takes the mate and deckhand to the barge and then aids in the docking process by pushing the barge toward the dock. (A.356,368;A.65-66,116-17,269-70.)

D. Changing the Length of a Towline

When towing a barge, conditions such as weather, barge weight, vessel traffic, and water depth can require a change in the length of the towline. (A.357, 368;A.121-23,174,209.) Some captains have a standing order that this task normally be performed during the watch change, when all crewmembers are awake and available. (A.369;A.178-79.) A captain also may instruct his mate to lengthen or shorten the towline at a specific time within the mate's upcoming watch, or when the vessel reaches a specific geographic point. (A.177-78,279-80.) In other instances, the mate may decide on his own that it should be done during his watch. (A.368-69;A.121-22,175,210,231.)

The mate informs the deckhand that they are going to lengthen or shorten the towline, and may instruct him to start the winch motor. (A.368-69;A.121-22,175, 210,231.) The mate then operates the winch to lengthen or shorten the line, and the deckhand watches to ensure that the line is spooling properly. (A.357,369; A.122,175-76.) The mate also may instruct the deckhand to run or redirect the "fair lead," which leads the line, or to lubricate the line. (A.369;A.122,176-77,210, 250.) Alternatively, the mate may direct the deckhand to operate the winch, or to

monitor the radio or vessel traffic from the wheelhouse while the mate operates it.

(A.369;A.210,231,250-51.)

E. Crossing the Columbia River Bar; Adverse Weather

The captain decides what time the vessel will arrive at the bar near the mouth of the Columbia River. (A.357,369;A.51-52,89,273-74.) If the mate is on watch and the vessel is nearing the bar ahead of schedule, the mate slows it down in order to arrive at the time designated by the captain. (A.357;A.273-74.) If the mate believes that heavy traffic or severe weather will make the bar crossing particularly difficult or inadvisable, he will wake the captain before proceeding. (A.357-58,363,369;A.111,127-28,173,211.)

Apart from crossing the bar, if a storm warning issues during the mate's watch, he may turn the vessel back to the nearest port without seeking permission, although he typically would wake the captain to make that decision. (A.369;A.66-67,128,179-80.) If the mate does decide on his own to turn back, he will wake the captain to advise him that he has done so. (A.66-67.) The mate also generally decides how to navigate the boat and whether to adjust course during adverse weather that occurs on his watch; less experienced mates, however, wake the captain before adjusting course. (A.74.) If extreme low-visibility conditions arise, the mate may post the deckhand on the bow of the boat to keep watch. (A.357, 369;A.127.) Conditions that would merit such a posting are very rare, since the

wheelhouse is only 20 feet from the bow, and if they occur, the mate usually would wake the captain. (A.357,369,373;A.127-28,162.) Finally, the captain decides whether to utilize the vessel's "surge gear," a heavy chain that can attach the barge more securely to the boat in anticipation of rough seas. (A.357,369;A.123,149-50.)

F. Emergencies and Drills

Emergencies are defined as a fire on the vessel, a crewmember overboard, and a break in the towline. (A.357,362,369;A.112,146,214-15,232.) A station bill in each vessel sets forth each crewmember's responsibilities in the event of an emergency, such as where the crewmember will be stationed, what equipment he will handle, and what work he will perform. (A.357,362,369,372;A.112,186-87.) If an emergency arises on the mate's watch, he must wake all crewmembers. (A.357,362,369;A.109-11,164,214-15,232,248,250.) In addressing the emergency, the captain steers the boat while the mate directs the other crewmembers to ensure that they fulfill their duties as specified in the station bill. (A.357,362,369,372; A.112,186-87,216-17,285-86.) For example, the mate may instruct the engineer and deckhand to don life jackets or retrieve certain supplies, if required by the station bill. (A.369;A.112,216.)

Each captain decides whether safety drills will be conducted on his boat, and some captains mandate that there will be no drills. (A.357,362,369;A.44,146-47, 255,271,285.) Other captains order their mates to schedule drills at specified

times, and yet others give their mates a free hand in determining the frequency and length of the drills. (A.357,369;A.146,248,254-56,285.) If it is consistent with the captain's instructions, mates tend to conduct the drills during watch changes.

(A.369n.6;A.256.) Drills include those that mirror the three types of emergencies: fire on the vessel, crewmember overboard, and break in the towline.

(A.362,369;A.146,214-15.) As with real emergencies, all crewmembers must participate in the drills, the drill content is set forth in the vessel's station bill, and the mate directs activities to ensure that each crewmember performs his responsibilities as detailed in the station bill.³ (A.357,362,369,372;A.214-16,248, 250.)

G. Engine Problems

If the engine alarm sounds or the mate sees something amiss with respect to the engine during his watch, he wakes the engineer. (A.356,360,362,369,372; A.110,165-66,191,210-11,258-59,272.) On average, this occurs about two-to-four times during a 30-day voyage; about half of those occurrences involve the engine alarm. (A.369;A.165-66.) Depending on the nature of the problem, the engineer may address it immediately or wait until his watch. (A.356,369,372;A.167,191.)

The mate typically accepts the engineer's assessment of the problem's time

³ Additionally, if a crewmember sustains an "obvious" and "life-threatening" injury or illness during the mate's watch, the mate may call the Coast Guard to request an emergency evacuation without waking the captain. (A.369;A.76-77.)

sensitivity, since the engineer is the most qualified individual on the boat to make that determination. (A.356,369,372;A.139,166-68,191-92,282.)

H. Projects

The captain assigns projects like painting, cleaning, maintenance, and repairs for the crew to perform while the tugboat is at sea. (A.358,369;A.50,136, 141,143-44,169-170,183,185,190-91,234-35.) Some captains maintain an established duty roster detailing such tasks and the frequency with which they should be performed. (A.358,369;A.160-61,169-70,183,190-91,207.) The mate, in collaboration with the captain, may add tasks to the duty roster. (A.369-70; A.192.) During his watch, the mate may direct the deckhand to work on a particular project, although deckhands generally complete them without instruction. (A.358,370;A.47,113,136,141,143-44,147-49,169-70,185,190-91, 193,218,234-36,266-67.)

I. Inland River Runs

Some of the Company's tugboats perform inland runs on the Columbia River; inland boats push rather than tow the barge, using frontal wires. (A.370; A.13,19,36,65,88,198-99.) The Company's inland river work consists primarily of "day boats," which complete short runs lasting up to 12 hours, and are crewed only by a captain and a deckhand. (A.358,364,370;A.22,25,33,82,95,97,130,239-40,279.) Other inland boats make multiday river trips operating around the clock

with six-hour watch rotations; those are staffed by four-person crews comprised of a captain, a mate (sometimes called a pilot), and either two deckhands or a deckhand plus an engineer. (A.358,370;A.22-23,82,194,203,239-40.)

There are eight locks on the Columbia River system, which inland vessels may traverse on multiday trips. (A.370;A.23,194,240.) If the vessel approaches a lock during the mate's watch, the mate contacts the lockmaster and requests clearance. (A.370;A.194-95,242.) Once inside the lock, the mate instructs the deckhand regarding whether to tie up on the port or starboard side, which lines to use, and where the deckhand should be stationed during the tie-up procedure. (A.358,370,372;A.195,242-44.) Generally, the mate will tie up on the side of the lockmaster, to facilitate handing over a document known as a "lock slip," although factors such as wind, current, and cleat configuration also may influence the mate's decision. (A.358-59,370;A.196,243.)

II. THE PROCEDURAL HISTORY

A. In the Representation Proceeding, a Hearing Is Held; the Regional Director Issues a Decision and Direction of Election, Finding the Mates Are Employees; After an Election, He Certifies the Union as Employees' Collective-Bargaining Representative

In October 1999, the Union filed an election petition, later amended, seeking to represent the Company's captains, mates, engineers, and deckhands on vessels out of its Longview/Cathlamet, Washington port. (A.3-4,100,309.) In response, the Company contended that the captains and mates were supervisors under

Section 2(11) of the Act, and therefore should be excluded from the unit.

(A.5,99,486-87.) Following a hearing on the issue, the Board's Regional Director issued a Decision and Direction of Election finding that the Company had shown the captains to be supervisors but had failed to do so regarding the mates. (A.315-17.) Accordingly, he directed a secret-ballot election among the non-supervisory crewmembers, including the mates. (A.317.) The Company filed a request with the Board for review of the Regional Director's determination, which the Board denied. (A.327.) Subsequently, the Union won the election, and in September 2000, the Regional Director certified it as the exclusive collective-bargaining representative of the mates, engineers, and deckhands. (A.319-20.)

B. Following this Court's Remand of the Independent Unfair-Labor-Practice Case and the Supreme Court's *Kentucky River* Decision, the Board Reopens the Record in the Representation Case and Remands It to the Regional Director, Who Issues a Supplemental Decision on Remand

Meanwhile, during the representation case, the Union filed an unfair-labor-practice charge (Case No. 19-CA-026716) and the Board's General Counsel, after an investigation, issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by promulgating, distributing, and maintaining a rule that any mate engaged in union activity would be discharged. (A.321-24.) Relying solely on the record in the representation proceeding, the Company argued that the mates were statutory supervisors. (A.325-29.) In April 2000, the Board issued a

Decision and Order (330 NLRB No. 169), reaffirming its finding in the representation case that the mates were employees, and concluding that the Company violated the Act as alleged. (A.327-29.)

Thereafter, the Company petitioned for review and the Board cross-applied for enforcement of that Order, but the Court remanded the case so that the Board could explain whether its finding that the mates did not responsibly direct other employees with independent judgment was inconsistent with two prior Board decisions or, alternatively, to justify its apparent departure from that precedent.⁴ *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) (“*Brusco 2001*”). (A.330-37.) The Court added that “[t]he Board’s approach . . . on remand will doubtless be affected by the Supreme Court’s forthcoming decision” in *NLRB v. Kentucky River Community Care, Inc.*, which issued four weeks later. There, the Supreme Court rejected the Board’s view that individuals do not use “independent judgment” under Section 2(11) of the Act when they exercise professional or technical judgment based on training or experience in directing less-skilled employees. 532 U.S. 706, 712-21 (2001).

⁴ The two cases that the Court instructed the Board to address were: *Masters, Mates & Pilots (AFL-CIO) Local 28 (Ingram Barge Co.)*, 136 NLRB 1175 (1962) (“*Ingram I*”), enforced, 321 F.2d 376 (D.C. Cir. 1963); and *Bernhardt Bros. Tugboat Serv., Inc.*, 142 NLRB 851 (1963), enforced, 328 F.2d 757 (7th Cir. 1964).

Based on this Court's remand Order and the Supreme Court's *Kentucky River* decision, the Board issued a Supplemental Decision and Order vacating its earlier Decision and Order in the unfair-labor-practice case (330 NLRB No. 169),⁵ reopening the record in the representation case, and remanding that case to the Regional Director for further consideration and to take additional evidence on whether the Company's mates assign or responsibly direct other employees using independent judgment. (A.338-41.) The Board, however, declined to revoke the Union's certification as the representative of unit employees. (A.341.)

On January 7, 2002, the Regional Director, following a hearing pursuant to the Board's remand instruction, issued a Supplemental Decision on Remand. (A.342-50.) He found that the Company had failed to prove that the mates assign or responsibly direct other employees using independent judgment. (A.350.) Subsequently, the Board granted the Company's request for review of that decision. (A.351.)

C. After Issuing the *Oakwood* Trilogy, the Board Again Remands the Representation Case to the Regional Director, Who Issues a Second Supplemental Decision on Remand, which the Board Affirms

On September 29, 2006, the Board issued its seminal decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727

⁵ The unfair-labor-practice allegation in that case is not at issue here.

(2006). In the *Oakwood* trilogy, the Board substantially clarified and refined its interpretation of the terms “independent judgment,” “assign,” and “responsibly to direct” in Section 2(11) of the Act. On September 30, 2006, the Board remanded the representation case to the Regional Director for further action consistent with the *Oakwood* trilogy. (A.352.)

On remand, the Regional Director issued a show cause order inviting the parties to request reopening of the record. (A.354n.3,367n.1,375-76.) Neither party made such a request. Accordingly, on December 21, 2006, the Regional Director issued a Second Supplemental Decision on Remand, applying the *Oakwood* standards and finding that the Company had failed to establish that its mates assign or responsibly direct other employees using independent judgment and, thus, had failed to prove that they are supervisors. (A.353-66.) After granting the Company’s request for review, the Board (Chairman Pearce and Member Griffin; Member Hayes dissenting), on December 14, 2012, issued a Decision on Review and Order affirming the Regional Director’s Second Supplemental Decision. (A.367-76.) Accordingly, the Regional Director reaffirmed the Union’s certification as the representative of the unit employees. (A.380.)

D. The Instant Unfair-Labor-Practice Proceeding: the Company Refuses To Bargain with the Union; Following the Supreme Court's *Noel Canning* Decision, a Properly Constituted Board Adopts the Rationale of Its Earlier Decision on Review, and Reaffirms the Regional Director's Second Supplemental Decision and the Union's Certification

On January 15-16, 2013, the Union requested that the Company bargain with it, but the Company refused. (A.381-85.) The Board's General Counsel issued a complaint (Case No. 19-CA-096559), based on a charge filed by the Union, alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act. (A.299-305.) In its answer, the Company admitted its refusal but denied that it was unlawful, contending that the Union's certification was invalid. (A.306-08.)

The General Counsel filed a motion for summary judgment with the Board. (A.290-98.) The Board issued an Order transferring the case to itself and directed the Company to show cause why the motion should not be granted. (A.447.) The Company filed a response. (A.447.)

On May 20, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order granting the motion for summary judgment. *Brusco Tug & Barge, Inc.*, 359 NLRB No. 122, 2013 WL 2242450 (2013). The Company petitioned this Court for review, but the Court held the case in abeyance based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). *See Brusco Tug & Barge, Inc. v. NLRB*, No.13-1190 (May 31 Order).

On June 26, 2014, the Supreme Court issued *NLRB v. Noel Canning*, 134 S. Ct. 2550, holding that three recess appointments to the Board in January 2012, including those of Members Griffin and Block, were invalid under the Recess Appointments Clause. In response, the Board, which had regained a quorum of five Senate-confirmed members in August 2013, issued an Order setting aside its May 20, 2013 Decision and Order and retaining the case on its docket for further action. (A.447.) Subsequently, this Court, granting the Board's motion, dismissed the case pending before the Court. *See Brusco Tug & Barge, Inc. v. NLRB*, No. 13-1190 (August 18, 2014 Order).

On March 18, 2015, the Board (Chairman Pearce and Member Hirozawa; Member Johnson dissenting) issued a Decision, Order Reaffirming Certification of Representative, and Notice to Show Cause. (A.412-16.) The Board explained that after considering de novo the Regional Director's Second Supplemental Decision on Remand and the entire record in light of the request for review, the opposition, and the briefs, as well as the December 2012 Decision on Review and Order, it agreed with the rationale the majority set forth therein. (A.412-13.) Accordingly, the Board affirmed the Regional Director's Second Supplemental Decision to the extent and for the reasons stated in its original Decision on Review and Order, which the Board incorporated by reference. (A.413.)

In its March 2015 decision, the Board also noted that the Company, in its response to the Notice to Show Cause in 2013, had contended that it changed the duties of its mates in about 2010 and should be permitted to present those facts at a hearing. (A.412.) The Board rejected as untimely the Company's attempt to raise the asserted changes in duties, since the Company had failed to act promptly on discovery of the purported evidence sought to be adduced, and had failed to provide good cause for that failure. (A.412.) Finally, the Board reaffirmed the Union's Certification of Representative, granted the General Counsel leave to amend the complaint to conform with the current state of the evidence, and directed the Company to answer the amended complaint and show cause why summary judgment should not be granted. (A.413.)

On March 19, the Union again requested that the Company bargain, but the Company refused. (A.423,427.) The General Counsel issued an amended complaint, alleging that the Company's continuing refusal violated Section 8(a)(5) and (1) of the Act. (A.420-25.) In its answer, the Company admitted its refusal but contended, *inter alia*, that the Union's certification was invalid. (A.426-29.) Thereafter, the General Counsel filed a statement in further support of its motion for summary judgment. (A.417-19.) The Company filed a brief in opposition to the motion and in response to the notice to show cause. (A.447.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 15, 2015, the Board (Chairman Pearce and Members Hirozawa and Johnson) issued the Decision and Order (362 NLRB No. 115) now under review. (A.447-51.) The Board found that all representation issues raised by the Company were or could have been litigated in the prior representation proceeding, and that the Company did not offer to adduce any newly discovered and previously unavailable evidence, or allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (A.448.) The Board rejected the Company's contention that the passage of time and employee turnover occurring after the Union's certification constituted special circumstances warranting relitigation. (A.448.) It also rejected the Company's claim that it should be permitted to present facts at a hearing concerning purported changes to mates' duties alleged in its responses to the 2013 and 2015 notices to show cause. (A.447-48.) The Board found the Company's attempt to raise the alleged changes in duties procedurally improper, since the issue could have been litigated in the representation proceeding had it been timely asserted. (A.448.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (A.449.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, 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 (29 U.S.C. § 157). (A.450.) Affirmatively, the Board's Order requires the Company, upon request, to bargain with the Union and post a remedial notice. (A.450.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company failed to meet its burden of proving that its mates are statutory supervisors. Further, the Board acted within its discretion in rejecting the Company's requests to reopen the record in the representation case and relitigate issues in the unfair-labor-practice case. Accordingly, the Union was properly certified as the collective-bargaining representative of unit employees, and the Company violated Section 8(a)(5) and (1) of the Act by admittedly refusing to recognize and bargain with it.

The Company has not established that its mates assign other crewmembers using independent judgment under Section 2(11) of the Act. To begin, many of the mates' tasks that the Company cites only involve giving ad hoc instructions, and therefore do not show statutory assignment authority. Further, the Company failed to demonstrate that its mates use independent judgment in performing the duties that it characterizes as assignment. For example, in fulfilling some of those duties, mates simply follow or relay their captain's orders, or seek to ensure that coworkers comply with requirements detailed in the vessel's station bill. Other

choices made by the mates are obvious. For instance, when an engine problem occurs on the mate's watch, he wakes the only person on the boat with specialized knowledge concerning engine function and repair—the engineer. Additionally, the Company failed to present the specific, tangible examples required to satisfy its burden of proof. Thus, it offered no evidence of a single instance in which a mate declined to accept an engineer's expert assessment regarding whether a repair should be completed immediately, or where a mate actually selected one deckhand over another to perform a particular task in the rare circumstances where two deckhands are aboard a vessel.

The Company also has failed to show that its mates responsibly direct deckhands using independent judgment. Although it does not identify the tasks that it claims demonstrate such authority, the Company necessarily fails to establish independent judgment to the extent it relies on the same duties that it asserts constitute assignment. Moreover, the Company failed to prove that mates are held accountable for deckhands' work such that some adverse consequence may befall the mates if deckhands do not perform their work properly. Instead, the Company offered only vague and conclusory assertions, based largely on paper power, and therefore failed to show that mates' direction of deckhands is responsible under Section 2(11).

The Company further errs in relying on pre-*Oakwood* cases involving assignment and direction by mates and captains. Not only are those cases factually distinguishable, they were eclipsed in 2006 by the *Oakwood* trilogy, where the Board significantly clarified and refined the standards for establishing independent judgment, assignment, and responsible direction. In its heavy reliance on those historic cases, the Company ignores a decade of changed law.

Additionally, the Board acted well within its discretion in denying the Company's belated request to reopen the record in the representation case. The Board's rules require that a party move to reopen promptly on discovery of evidence. Thus, the Board properly rejected as untimely the Company's request that was based on alleged changes it purportedly had made to its mates' duties some three years earlier.

Accordingly, the Board also appropriately denied the Company's procedurally improper attempt, in the unfair-labor-practice case, to again raise purported changes in its mates' responsibilities. The Board's well-established no-relitigation rule bars such an effort to litigate an issue that could have been litigated in the underlying representation proceeding. Further, the Company did not show that it qualified under any of the limited exceptions to that rule. There was no "newly discovered" evidence because the Company's proffer concerned alleged facts that arose after the time of the representation hearings. Moreover, it is settled

that, where, as here, an employer challenges the Board's certification of employees' selection of union representation in a Board-supervised election, alleged post-election changes in job duties, employee turnover, and the passage of time do not meet the "special circumstances" exception.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) and (1) of the Act prohibits an employer from refusing to bargain collectively with the representative of its employees.⁶ 29 U.S.C. § 158(a)(5) and (1). Here, although the Company's employees chose the Union as their representative in a Board-supervised election, the Company admittedly has refused to recognize and bargain with it. (A.306-08,426-29.) The Company contends that its refusal is not unlawful because its mates are statutory supervisors and the Board erred in denying its requests to reopen the record and relitigate issues. It is undisputed, however, that the Board is entitled to enforcement of its Order if, as shown below, the Company's challenges fail. *See, e.g., Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004).

⁶ A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

A. Substantial Evidence Supports the Board's Finding that the Company Failed To Carry Its Burden of Proving that Its Mates Are Statutory Supervisors

1. Applicable principles and standard of review

The Act's protections extend to all workers who meet its definition of "employee."⁷ As the Supreme Court has repeatedly observed, that definition is strikingly broad. *See, e.g., NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91-92 (1995). Moreover, the Court has cautioned "that [the Board] and reviewing courts must take care to assure that exemptions from [the Act's] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

One such exemption from the definition of "employee" is "any individual employed as a supervisor." 29 U.S.C. § 152(3). Section 2(11) of Act defines the term "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.

⁷ *See* Section 2(3) of the Act (29 U.S.C. § 152(3)) ("The term 'employee' shall include any employee . . .").

29 U.S.C. § 152(11). Thus, as relevant here, the Act dictates that individuals are not supervisors unless (1) they have the authority to engage in at least one of the 12 specified supervisory functions, and (2) their exercise of that authority requires the use of independent judgment. *Kentucky River*, 532 U.S. at 713; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

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.” *Oakwood*, 348 NLRB at 693; *accord 735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App’x 782, 783 (D.C. Cir. 2012). 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.” *Oakwood*, 348 NLRB at 693; *accord 735 Putnam Pike*, 474 F. App’x at 783; *see also Kentucky River*, 532 U.S. at 713-14. Further, the judgment must involve a degree of discretion that rises above the “routine or clerical” in order to indicate supervisory status under Section 2(11). *735 Putnam Pike*, 474 F. App’x at 783; *Oakwood*, 348 NLRB at 693 & n.42; *see also Kentucky River*, 532 U.S. at 713-14 (“Many nominally supervisory functions may be performed without the exercis[e] of] such a degree of . . . judgment or discretion . . . as would warrant a finding of supervisory status under the Act”) (internal quotation marks omitted).

The burden of demonstrating supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 710-12; *Oakwood*, 348 NLRB at 687. It must support its claim with specific examples, based on record evidence. *Avista Corp. v. NLRB*, 496 F. App'x 92, 93 (D.C. Cir. 2013) (citing *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“*Oil Workers*”)); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305, 312 (6th Cir. 2012). Conclusory or generalized testimony does not suffice. *Beverly Enterprises-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 18 (1st Cir. 2015). Nor can a party satisfy its burden with inconclusive or conflicting evidence. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 69 (D.C. Cir. 2015); *Pac Tell Grp., Inc. v. NLRB*, 817 F.3d 85, 93, 95 (4th Cir. 2016). Further, it is settled that designations of theoretical or “paper power” are insufficient to prove supervisory status. *Beverly*, 165 F.3d at 962; *Oil Workers*, 445 F.2d at 243; *Frenchtown*, 683 F.3d at 308, 310, 314.

Consistent with the Supreme Court’s admonition in *Holly Farms* concerning exemptions from “employee” status (*see p.27 above*), this Court has specifically warned that “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights.” *Beverly*, 165 F.3d at 963; *accord Oakwood*, 348 NLRB at 688. Further, in interpreting and applying Section 2(11), the Board must be mindful of Congress’s

intent to distinguish truly supervisory personnel, who are vested with “genuine management prerogatives,” from employees—such as “straw bosses, leadmen, set-up men, and other minor supervisory employees”—who enjoy the Act’s protections although they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 280-83 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)); accord *Oakwood*, 348 NLRB at 688. Drawing that distinction among the “infinite variations and gradations of authority [that] can exist within any one industrial complex” is a matter that “lies . . . squarely within the Board’s ambit of expertise.” *Oil Workers*, 445 F.2d at 241 (internal quotation marks omitted).

Accordingly, the Board’s findings regarding supervisory status are “entitled to great weight,” and must be upheld as long as they are supported by substantial evidence. *Oil Workers*, 445 F.2d at 241; accord *Avista Corp.*, 496 F. App’x at 93. More generally, under the substantial evidence standard, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (internal quotation marks omitted).

2. The Company failed to prove that its mates assign employees using independent judgment

The term “assign” under Section 2(11) means “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, 348 NLRB at 689; *accord Pac Tell*, 817 F.3d at 92; *NSTAR*, 798 F.3d at 12. By contrast, an individual does not “assign” by giving employees “ad hoc instructions to perform discrete tasks,” or by “choosing the order in which [they] will perform discrete tasks within [their] assignments.” *Oakwood*, 348 NLRB at 689-90; *accord Pac Tell*, 817 F.3d at 92; *Frenchtown*, 683 F.3d at 311-12. As with every supervisory function listed in Section 2(11), authority to assign indicates supervisory status only if its exercise requires the use of independent judgment. 29 U.S.C. § 152(11). *Kentucky River*, 532 U.S. at 715.

The Company argues (Br.39-45) that its mates exercise supervisory authority to assign employees in connection with various duties and procedures, including making up a tow and docking; changing the length of a towline; traversing locks; scheduling and conducting safety drills; responding to emergencies, adverse weather, and engine problems; and, if two deckhands are on board, choosing one to perform a task. As demonstrated below, the Board reasonably rejected these claims, finding that the Company failed to meet its burden of proving that the mates assign employees using independent judgment.

- a. Mates provide only ad hoc or discrete instructions, and do not assign employees, with respect to making up a tow and docking, changing the length of a towline, traversing locks, and posting employees in severe weather**

Ample evidence supports the Board's finding (A.359-60,371-72) that the directions mates give to deckhands when making up a tow, docking, changing the length of a towline, and traversing locks involve only "ad hoc instructions to perform discrete tasks" (*Oakwood*, 348 NLRB at 689-90), and therefore do not constitute supervisory "assignment." As the Board found, mates do not designate the overall duty of participating in those procedures to the deckhands; rather, that is "part of [the deckhands'] preassigned job duties," a "basic part of the deckhand job" that is predetermined "at a higher level," without the mates' involvement. (A.371-72.)

Accordingly, the mates' directions to deckhands in performing those procedures do not evidence statutory assignment authority, but instead "concern only discrete tasks within the overall assignment," and "exemplify" ad hoc instruction, as the Board found. (A.371-72.) *See NSTAR*, 798 F.3d at 16-17 (utility dispatchers did not assign by creating "switching orders" that "relay a set of specific, individual actions that field employees must take to successfully complete [their] overall duties"); *Oakwood*, 348 NLRB at 689 ("ordering [a nurse] to

immediately give a sedative to a particular patient” does not constitute assignment).

Nor do mates give anything more than ad hoc instruction in posting a deckhand “to serve as [a] lookout[] or to the winch” (Br.45) in severe weather. *See Mars Home for Youth v. NLRB*, 666 F.3d 850, 855 (3d Cir. 2011) (instructing employees to respond to arising crises does not constitute evidence of assignment); *Pride Ambulance Co.*, 356 NLRB No. 128, 2011 WL 1298935, at *29 (Apr. 5, 2011) (switching drivers to different buses when their vehicles break down constitutes ad hoc instruction, not assignment).

In any event, the Company failed to present specific examples of a mate actually exercising such posting authority, and the record shows that the types of extreme weather conditions that might warrant such a posting are exceedingly rare, as the Board found. (A.357,369,373;A.127-28,162.) As this Court has recognized, and the Board found here (A.373), the “merely . . . sporadic” exercise of some supervisory authority does not confer Section 2(11) status. *Micro Pac. Dev. Inc. v. NLRB*, 178 F.3d 1325, 1330 & 1334 (D.C. Cir. 1999); *accord Croft Metals*, 348 NLRB at 722, n.14. Moreover, as the Board noted, the mate would likely wake the captain in those rare situations that might justify a posting. (A.357-58,363,369, 373;A.66-67,110-11,127-28,173,211.)

Finally, mates do not exercise assignment authority in turning a vessel back to port due to a storm because “it is the mate himself who is performing that task.” (A.372.) Thus, the record does not show, and the Company does not allege, that the mates’ deciding to return to port somehow entails their assigning (or even directing) other employees. *See NSTAR*, 798 F.3d at 20-21 (dispatchers’ authority to “shed load” from electrical grid irrelevant to determining their supervisory status because that task did not involve assignment or responsible direction of other employees).⁸

b. Mates do not use independent judgment in carrying out the duties that the Company characterizes as assignment

The Board also found the Company failed to establish that mates use independent judgment in performing duties that it claims constitute assignment. (A.358,360-64,371-73.) As shown below, substantial evidence supports that finding.

⁸ While the Company additionally claims, in the most cursory terms, that mates exercise authority to “assign” by “mak[ing] effective recommendations to reassign a deckhand to a different vessel” (Br.44), the Board reasonably determined that such purported authority would involve only “transfer” authority under Section 2(11), not “assignment.” (A.373n.14.) The Company articulates no basis for challenging that determination. Moreover, as the Board further found, “the [Company] presented no specific evidence in support of [these allegations].” (A.373n.14.)

(i) Mates do not use independent judgment in making up a tow and docking

Before making up a tow and docking, the captain advises the mate or the full crew “what he want[s] them to do, how he want[s] it done.” (A.267.) These “game plan” orders may be as specific as directing a particular deckhand to go “up on the barge to catch the lines” or “to put the lines [the captain] specifically tell[s] him in certain areas.” (A.64,125,157-58,267-68.) Thus, in performing the maneuvers, the mate simply passes on the captain’s orders, or, to the extent he directs the deckhand, acts within the parameters established by the captain’s “game plan.” (A.361,371.) It is settled that “[g]iving assignments based on management’s instructions does not show the requisite independent judgment.” *Frenchtown*, 683 F.3d at 312; *accord 735 Putnam Pike*, 474 F. App’x at 784.

Moreover, the captain participates in the execution of making up a tow and docking, and can monitor and intervene as he deems necessary, since he, the mate, and the deckhand carry handheld radios, and the captain can also often see their activities. (A.361,371.) *See Pac Tell*, 817 F.3d at 94-95 (managers’ frequent communication with putative supervisors indicated their minimal discretion in directing others); *Shaw, Inc.*, 350 NLRB 354, 356 (2007) (foremen’s ability to contact undisputed supervisors who regularly monitor employees’ work showed that foremen’s direction of employees was not supervisory).

Further, since these maneuvers become “routine” with experience (*see* p.7), deckhands generally need little instruction in executing them. (A.371-72.) As employee Mark McKinley testified: “once you go to [a] facility once or twice, everybody on the boat basically knows what they’re doing and you go out and do it. There’s very little direction given by anybody.” (A.278.) *See Pac Tell*, 817 F.3d at 94 (“When the work performed by employees ‘is routine and repetitive’ and does not require ‘more than minimal guidance,’ direction from a putative supervisor does not involve independent judgment”) (quoting *Shaw*, 350 NLRB at 356); *Croft Metals*, 348 NLRB at 722 n.14 (“The degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks”).

(ii) Mates do not use independent judgment in responding to emergencies and scheduling/ conducting safety drills

The Company also failed to show that mates use independent judgment in connection with emergencies and safety drills, as the Board found. (A.360,362, 372.) To begin, “the events that count as emergencies are clearly delineated in the record [and] [t]here is no evidence . . . suggesting that mates have discretion to determine when an emergency exists.” (A.362n.10.) Moreover, if an emergency arises on the mate’s watch, he is required to call all hands on deck; thus, he does not select particular crewmembers. (A.360,362.) Further, the

vessel's station bill dictates exactly what each crewmember should do in addressing emergencies. (A.362,372.) Thus, the mate simply "performs the important but nonsupervisory task of ensuring that the crewmembers carry out the duties the station bill specifies." (A.372.) See *735 Putnam Pike*, 474 F. App'x at 784; *Frenchtown*, 683 F.3d at 312; *Shaw*, 350 NLRB at 356. The same is true with respect to conducting safety drills. (A.372.)

As for scheduling the drills, some captains order their mates to refrain from having drills or to conduct them at specified times; those mates simply follow the captain's orders. (A.357,369.) While other captains let their mates do the scheduling, they tend to conduct the drills during watch changes, so as not to disrupt crewmembers' sleep time. (A.256.) Indeed, as employee James Barton testified, if a mate were to schedule a drill for a different time, he would likely have to "get that okayed" by the captain. (A.369n.6;A.256-57.) Further, the record is inconclusive concerning what other factors, if any, mates consider in determining the timing and frequency of drills. See *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 69 (D.C. Cir. 2015) (inconclusive evidence cannot satisfy burden); *Frenchtown*, 683 F.3d at 312 (employer's failure to provide concrete evidence of factors actually considered precluded a finding of independent judgment); *Croft Metals*, 348 NLRB at 722 (same).

Contrary to the Company's claim, it did not demonstrate that mates use independent judgment to "inject surprise" in safety drills. (Br.44.) Captain Nordstrom merely testified that he had told his mate to "throw something different" into the drills and "[not] always do it the same way" (A.146). Moreover, when Barton was asked a leading question about whether he "attempt[ed] to change the drill from time to time, [to] inject surprise," he simply responded, "[y]eah." (A.214.) As the Board rightly found, such vague and generalized testimony, which provides no examples of the supposed drill variations, "fails to explain with the requisite specificity the mate's purported exercise of independent judgment." (A.372.) (*see also* A.369.) *See Avista Corp.*, 496 F. App'x at 93 ("tangible examples" required) and cases cited above p.29.

(iii) Mates do not use independent judgment in waking the engineer when engine problems arise

The Company likewise failed to carry its burden of proving that mates use independent judgment in waking the engineer when engine problems occur. (A.360,362,372.) Whenever the engine alarm sounds, "even if it's a false alarm, or there's really nothing wrong," the mate must rouse the engineer. (A.166.) He also wakes the engineer when something relating to the engine looks suspicious, such as, "if the temperature gauge . . . starts to look abnormal." (A.211.) Contrary to the Company's claim (Br.43-44), it failed to present sufficient proof that mates'

decisions to summon the engineer in non-alarm situations require discretion of such a degree to rise above the “routine or clerical.” 29 U.S.C. 152(11); *Kentucky River*, 532 U.S. at 713-14; *735 Putnam Pike*, 474 F. App’x at 783; *Oakwood*, 348 NLRB at 693 & n.42. The limited record evidence is vague and does not include a single, specific example of a mate’s actual decision to wake or not wake the engineer in a non-alarm situation. *See Avista Corp.*, 496 F. App’x at 93; *Frenchtown*, 683 F.3d at 312; *CHS, Inc.*, 357 NLRB No. 54, 2011 WL 3860606, at *1 n.3 (Aug. 12, 2011). Consequently, as the Board correctly found, and contrary to the Company’s suggestion (Br.44), the record does not include any “specific example[] . . . of any mate at any time ever weighing the need to call out the engineer against the cost of the overtime thereby accrued.” (A.362.)

Moreover, as the Company appears to admit (Br.43), and the Board found, “[t]he engineer is the lone individual on the vessel who is trained in engine functioning and repair,” and therefore, in the event of an engine malfunction occurring on the mate’s watch, “summoning the engineer . . . is not only the obvious choice, but the only choice.” (A.372.) *See Oakwood*, 348 NLRB at 693 (decisions involving only “obvious” or “self-evident” choices do not implicate independent judgment); *accord Pride Ambulance*, 2011 WL 1298935, at *29.

Also due to the engineer’s unique expertise, the mate typically accepts his assessment as to whether the problem should be fixed immediately or can wait

until the engineer's watch. (A.372.) The Board majority soundly rejected the contention of dissenting former Member Hayes, quoted by the Company (Br.44), that the mate can require the engineer "to repair the problem on the spot," correctly explaining that the Company "provides no evidence of even a single instance" to support its claim. (A.372.) *See Mars Home*, 666 F.3d at 855 (for authority to be supervisory, individual must be empowered to require rather than merely request that action be taken); *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006) (same); *see also* cases cited p.29.

(iv) Mates do not use independent judgment on the rare occasions when they select one of two deckhands to perform a task

The Company errs in asserting (Br.41) that its mates, while on watch, use independent judgment by purportedly assigning deckhands tasks based on individualized assessments of their skills. To begin, it normally is not possible for a mate to choose between deckhands because there usually is only one deckhand on the boat. (A.355,360,363,367,372;A.21,60,108,131,140,202.) As the Board noted, "five-person crews are the exception, not the rule." (A.372.) Indeed, President Henry Brusco testified, discussing the "standard crew configuration for the ocean," that, "[w]e run four people on . . . all of our ocean boats but two." (A.21.) Moreover, even when there is a five-person crew, the second deckhand may work on the captain's watch. (A.363n.11;A.67,113,137-38,233,276.) As for

the inland river work, although multiday runs have four-person crews that may include two deckhands, they occur “[v]ery seldom.”⁹ (A.82.) Rather, the great majority of inland work consists of “day boats,” which are crewed only by a captain and a deckhand. Accordingly, circumstances usually foreclose the possibility of a mate choosing between two deckhands.

As the Board further found, “the record reveals no specific instances where a mate had to decide which of two deckhands to perform a task.” (A.370,372.) Instead, the Company offered “hypothetical situations only.”¹⁰ (A.358,360,363, 370,372-73&n.13.) As this Court has explained: “[w]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.” *Avista Corp.*, 496 F. App’x at 93 (quoting *Oil Workers*, 445 F.2d 237, 243 (D.C. Cir. 1971)).

Furthermore, the scant, hypothetical testimony about mates’ choosing between two deckhands concerns only “obvious choices,” as the Board found. (A.363,373n.13.) For example: choosing a “very athletic” deckhand over one with

⁹ As the Board noted, although a multiday fish run requires two deckhands, the record only establishes that the Company did this once, in the summer of 2001. (A.358,364,370n.9,373;A.194,198,203-04,224-25,226,261,263-65.)

¹⁰ Only with respect to the testimony of Captain Shawn Sarff does the Company contest the Board’s finding that the record evidence is merely hypothetical. (Br.41n.13.) As the Board explained, however, his testimony “does not . . . provide specific examples where mates have actually used independent judgment in deciding which crew member should do a particular task.” (A.373n.13;A.66.)

“a bum knee” to perform the task of “running up and down the barge” (A.66) does not involve independent judgment. *See* cases cited at p.39 above. Indeed, employee Barton twice expressly described mates’ decisions to pick one deckhand over the other as “obvious” choices. (A.219,237.) *See G4S Gov’t Sols., Inc.*, 363 NLRB No. 113, 2016 WL 555916, at *3 (Feb. 10, 2016) (“assigning work to employees on the basis of known job skills does not require use of independent judgment”); *Shaw*, 350 NLRB at 356 n.9 (same).

The Company does not advance its cause by noting (Br.42) that in *Brusco 2001*, 247 F.3d at 278, the Court “questioned” whether mates’ decisions to select one of two deckhands to perform a task were obvious such that they did not require independent judgment. The referenced statement is of limited import because it predated, not only the Board’s decision here, but also key developments in supervisory status law, including *Kentucky River* and the *Oakwood* trilogy. *See* pp. 50-53 below. Moreover, as the Company appears to concede (Br.6,42), *Brusco 2001* made no holding regarding whether mates use independent judgment in choosing one of two deckhands to perform a task. Rather, the Court expressly found that the Company had “failed to raise [that] issue before the Board” and therefore “treat[ed] [it] as waived.” 247 F.3d at 279.

To be sure, the Court did comment, in dicta, that it “ha[d] some doubt” about Board counsel’s reasoning that the mates’ choices between deckhands were

obvious and therefore did not require independent judgment. *Id.* at 278. It elaborated by commenting that courts “typically consider assignment based on assessment of a worker’s skills to require independent judgment.” *Id.*

Nonetheless, the Court acknowledged that the approach advocated by Board counsel “may well be permissible.” *Id.* Subsequent developments in the law of supervisory status have shown the Court’s acknowledgment to be prescient. Thus, in *Oakwood*, 348 NLRB at 693, which issued five years after *Brusco 2001*, the Board adopted this approach, holding that decisions involving “obvious” or “self-evident” choices do not require independent judgment. Under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984), the Board’s interpretations of independent judgment, assignment, and responsible direction are owed deference because they constitute reasonable interpretations of those ambiguous statutory terms.¹¹ *See* pp.50-51 below.

3. The Company failed to prove that the mates responsibly direct employees using independent judgment

Substantial evidence supports the Board’s finding that the Company did not carry its burden of showing that its mates responsibly direct other employees using

¹¹ The Company also errs in relying (Br.42) on *Alois Box Co. v. NLRB*, 216 F.3d 69 (D.C. 2000), a pre-*Oakwood* case that is factually distinguishable. There, in finding the evidence “barely sufficient” to sustain the Board’s finding of supervisory status, the Court relied in large part on the employer’s failure to call the putative supervisor as a witness, giving rise to an inference that his testimony would have been unfavorable to it. *Id.* at 74-75.

independent judgment. In its opening brief, the Company fails to specify the duties that purportedly constitute responsible direction. Instead, it merely makes a generic assertion that “mates ‘direct’ the deckhands regarding a variety of tasks and duties.” (Br.46.) To the extent the Company relies on the same actions that it characterizes as “assignment,” its argument fails because, as shown above (pp.34-43), it did not demonstrate that the mates use independent judgment in performing those tasks. *Kentucky River*, 532 U.S. at 713-15.

Additionally, the authority to direct another’s work does not indicate supervisory status unless it also is “responsible.” *Oakwood*, 348 NLRB at 691. To be “responsible” under Section 2(11), the putative supervisor “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 [other] are not performed properly.” *Id.* at 692; *accord 735 Putnam Pike*, 474 F. App’x at 784; *Mars Home*, 666 F.3d at 854.

Here, the Board reasonably found that the Company failed to carry its burden of proving that its mates “responsibly” direct deckhands because “[t]he [Company] . . . offered nothing other than conclusory assertions of the mates’ accountability for the deckhands’ work.” (A.374; *see also* A.413n.3; A.359,361-63.) For example, the Company offered (Br.46) conclusory testimony that “[t]he

masters and the mates are ultimately responsible.”¹² (A.51.) *See NSTAR*, 798 F.3d at 18 (manager’s testimony that putative supervisors “can be and have been held accountable” for “employee deficiencies” was “simply a conclusion without evidentiary value”); *Frenchtown*, 683 F.3d at 314 (conclusory and general testimony that putative supervisors are held responsible and could be disciplined does not satisfy burden of proof); *Golden Crest*, 348 NLRB at 730-31 (conclusory or speculative evidence of accountability is insufficient).

The Company errs in suggesting that, while on watch, a mate is “the captain’s surrogate” (Br.35,38-39,46), and therefore must be accountable for the deckhand’s work under Section 2(11). The testimony cited by the Company (A.50-51,69,78) is wholly conclusory and generalized, and fails to show that mates have ever been disciplined or faced the prospect of adverse consequences due to deckhands’ poor performance. *See 735 Putnam Pike*, 474 F. App’x at 784 (responsibility not shown where no evidence nurses were held accountable for others’ failures); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App’x 54, 57 (2d Cir. 2008) (responsibility not shown where no evidence of specific examples showing putative supervisors were disciplined, or warned they would be

¹² In addition to being conclusory, this testimony also conflicts with Captain Nordstrom’s testimony that the captain ultimately is held accountable for anything that may go wrong on the vessel, regardless of which crewmember was at fault. (A.355,361,368;A.137.) *See Salem Hosp.*, 808 F.3d at 69 (conflicting evidence cannot satisfy burden).

disciplined or suffer other adverse consequences, based on others' performance); *Lynwood Manor*, 350 NLRB 489, 490-91 (2007) (general testimony that nurses are held accountable for care given by aides was inadequate to carry burden where not accompanied by specific evidence establishing prospect of adverse consequences).

The Company gains no more ground in citing (Br.46) its "Responsible Carrier Operation Plan." (SA.1-64.) As Port Captain David Seaberg testified, the Company intended this document only "as a guideline." (A.89.) Moreover, the statement on which the Company principally relies—"[t]he Master is responsible for the safe and efficient operation and performance of his crew" (SA.53)—is, once again, purely conclusory.¹³ *See Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596-97 (7th Cir. 2012) (statute providing that license-holder is "responsible for directing . . . operations or supervising other operational staff in performing . . . operations" is insufficient proof of license-holder's accountability under Section 2(11)). In any event, it is well established that such "paper power" does not demonstrate supervisory status. *See* cases cited above p.29. Indeed, this Court previously rejected the very document at issue—the Responsible Carrier Operation Plan—as mere "paper authority." *Brusco 2001*, 247 F.3d at 276.

¹³ It should not escape notice that this language also does not even refer to the mate, but only to "[t]he Master." While the Company relies on the document's separate statement that "[i]n [the Captain's] absence his relief is Master" (SA.53), that statement is ambiguous as to whether "absence" refers to the captain's being off the boat or off watch.

The Company also does not help itself by making cursory reference to “tenets of maritime law.” (Br.46-47.) Thus, the Company cites *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), which has nothing to do with supervisory status. Moreover, the Company makes no attempt to explain the relevance of the passage that it quotes (Br.47), which speaks only of the “master” (not the mate), and says nothing about facing adverse consequences for the work of others. *Id.* Next, the Company cites *Spentonbush/Red Star Companies v. NLRB*, 106 F.3d 484 (2d Cir. 1997), a plainly distinguishable pre-*Oakwood* case where the court found that tugboat captains (not mates) were supervisors because they responsibly directed crewmembers. In so ruling, the court cited several specific examples showing how the captains were accountable by law for the work of their crews. *Id.* at 490-91. “Here, by contrast, the [Company] has not presented any comparable accountability evidence concerning the mates,” as the Board found. (A.374.)

The Company also wrongly claims that *Spentonbush* “set forth . . . essentially the same standard” for accountability announced in *Oakwood*. (Br.50.) *Spentonbush* simply quoted (*see* 106 F.3d at 490) the accountability standard articulated in *NLRB v. KDFW-TV*, 790 F.2d 1273, 1278 (5th Cir. 1986)—a

standard that was “change[d]” by *Oakwood*. See *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 294-95 (5th Cir. 2015).¹⁴

Finally, the Court should reject the Company’s claim (Br.38) that its mates must have 2(11) status because otherwise its boats would lack on-duty supervisors 12 hours a day. This contention is “without basis in the statutory definition of supervisors.” *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649-50 (D.C. Cir. 1999) (rejecting argument that field nurses “must be supervisors because, if they are not, [the employer] is left without any on-site supervision of [employees]”). “Congress did not direct that the [Act] be interpreted such that there must be ‘supervisors’ in every workplace” (*id.*), and “[t]he absence of a statutory supervisor does not automatically confer supervisory status on the highest-ranking person present.” *735 Putnam Pike*, 474 F. App’x at 784; accord *Frenchtown*, 683 F.3d at 315; *Shaw*, 350 NLRB at 356 n.15 (simply being “in charge” does not establish supervisory authority). Moreover, as the Board noted, during the mate’s watch, “the captain is only a shout away.” (A.374n.18.)

4. The Company errs in relying on pre-*Oakwood* cases involving the status of tugboat mates

The Company gains no ground in contending that the Board failed to adequately address pre-*Oakwood* decisions finding mates to be supervisors, and

¹⁴ Additionally, *NLRB v. KDFW-TV* was based on *Maine Yankee Atomic Power Company v. NLRB*, 624 F.2d 347, 361 (1st Cir. 1980), which also applied a standard superceded by *Oakwood*. See *NSTAR*, 798 F.3d at 11 n.8.

suggesting that those decisions mandate a different outcome here.¹⁵ (Br.48-52.)

To begin, as the Board noted (A.375n.21), and this Court has recognized, “[b]ecause the issue of supervisory status is heavily fact-dependent and job duties vary, per se rules designating certain classes of jobs as always or never supervisory are generally inappropriate.” *Brusco 2001*, 247 F.3d at 276; accord *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 990-91 (D.C. Cir. 2001). Thus, the Company cannot satisfy its burden of proving that its mates are supervisors simply by “cit[ing] other cases finding mates to be supervisors.” *Brusco 2001*, 247 F.3d at 276.

Indeed, as the Board found here, the cases cited by the Company “are distinguishable on their facts.” (A.375; see also A.364-65.) For example, as the Board noted, the mates in those cases “oversaw meaningfully larger crews than the crews here.” (A.364,375.) Thus, in *Ingram I* and *Bernhardt*, there were four deckhands per crew, as compared to the Company’s crews, where there normally is just one. See 142 NLRB 853-54; 136 NLRB at 1192. As the Board explained, a mate overseeing a crew of such size would exercise greater discretion in deciding which personnel would perform various tasks. (A.375.)

¹⁵ In some pre-*Oakwood* cases, the mates were called “pilots,” and in others the crews included “mates” and “pilots.” For the sake of simplicity, we refer to those positions as “mates.”

Even more fundamentally, as the Board explained (A.375&n.20), the cases cited by the Company predate the *Oakwood* trilogy, where the Board—seeking to formulate “workable definitions that fit both the [statutory] language . . . and [its] overall intent” (*Oakwood*, 348 NLRB at 690)—significantly clarified and refined the standards for establishing independent judgment, assignment, and responsible direction under Section 2(11) of the Act. *See 735 Putnam Pike*, 474 F. App’x at 783 (recognizing that *Oakwood* “clarified” standard for establishing independent judgment); *Entergy*, 810 F.3d at 293 (acknowledging that *Oakwood* “adopted . . . new interpretations of Section 2(11),” and that “there is no doubt . . . the Board intended *Oakwood* to mark a change in its application of Section 2(11)”; *NSTAR*, 798 F.3d at 6, 10 (recognizing that *Oakwood* set forth a “new,” “revised,” and “distinct” interpretation of Section 2(11)). Courts of appeals have unanimously upheld the *Oakwood* standards,¹⁶ and the Company does not dispute that they are owed deference because they constitute a reasonably defensible interpretation of the Act.¹⁷ *See Chevron*, 467 U.S. at 843-45.

¹⁶ *See, e.g., Entergy*, 810 F.3d at 293; *Frenchtown*, 683 F.3d at 304 n.1, 311 n.8, & 313-14; *Mars Home*, 666 F.3d at 854 n.2 & 855 n.3; *Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009). *See also 735 Putnam Pike*, 474 F. App’x at 783 (upholding Board’s finding that employer failed to prove supervisory status where Board’s decision “accurately reflects the evidence and comports with [*Oakwood*]”).

¹⁷ Thus, the Company’s statement (Br.50) that *Oakwood* “did not change [Section] 2(11)” misses the point. Section 2(11)’s terms “independent judgment,” “assign,” and “responsibly to direct” are ambiguous. *See, e.g., Kentucky River*, 532 U.S. at

In these circumstances, the Board appropriately determined that, because the pre-*Oakwood* decisions cited by the Company were “considered ‘under a different standard for determining supervisory status’” (A.375) (quoting *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154 (2011)), they were “of limited precedential value,” having been “eclipsed” by *Oakwood* and its progeny. (A.375.) See *Entergy*, 810 F.3d at 292-95 (where Board, applying *Oakwood* standards, found utility dispatchers were not supervisors, rejecting employer’s reliance on contrary pre-*Oakwood* rulings decided under different standards); *NSTAR*, 798 F.3d at 6, 9-11, 11 n.8 (same); see also *Avista Corp.*, 496 F. App’x at 93 (finding Board’s determination that utility dispatchers were not supervisors “easily survives review,” and noting, “[t]he Board primarily relied on [*Oakwood*], which undisputedly reflects sound law”); *Frenchtown*, 683 F.3d at 305 n.2 (rejecting employer’s reliance on “a litany of historic cases” that “ignore[d] a decade of changed law”).

The Company appears to suggest (Br.49-51) that the cases it cites, although they predate *Oakwood*, applied definitions of independent judgment, assignment, and responsible direction identical to those articulated in *Oakwood*. It gives just one specific example: an alleged “standard” (Br.51) for responsible direction

713; *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 579 (1994); *Frenchtown*, 683 F.3d at 304 n.1, 311 n.8, & 313. The Board in *Oakwood* revised its interpretation of those ambiguous statutory terms.

purportedly applied in *American Commercial Barge Line Company*, 337 NLRB 1070 (2002)—a case, the Company notes, that the Board cited approvingly in *Oakwood* when discussing its revised interpretation of “responsibly to direct.” (Br.50-51.) *See Oakwood*, 348 NLRB at 691-92 & n.37.

The Company’s suggestion is mistaken. In *American Commercial Barge Line*, the Board “neither defined accountability nor held that a showing of accountability was required to prove responsible direction.” *Buchanan Marine, L.P.*, 363 NLRB No. 58, 2015 WL 7873627, at *2 (Dec. 2, 2015). Indeed, the isolated and conclusory statement in *American Commercial Barge Line* that the Company highlights—“If a crew member does something wrong during the pilot’s watch, such as causing the tow to break loose, the pilot is held responsible” (337 NLRB at 1071) (Br.51)—is not explained in that decision. *See Buchanan*, 2015 WL 7873627, at *2. Certainly *American Commercial Barge Line* did not hold, as the Board later did in *Oakwood* (*see* 348 NLRB at 692), that for direction to be “responsible,” the putative supervisor must face the prospect of adverse consequences based on the job performance of those whom he directs.

Further, contrary to the Company’s suggestion (Br.50-51), the Board in *Oakwood* merely mentioned *American Commercial Barge Line* as an example of a post-*Kentucky River* decision that had considered “an accountability element” for responsible direction. 348 NLRB at 691-92 & n.37. *Oakwood*, however, in no

way suggested that the 2002 case articulated or applied the *same* accountability standard announced in *Oakwood*.

The other cases cited by the Company (Br.48-49) were also, without exception, decided under different standards than the ones adopted in *Oakwood*. Thus, although those cases found that the mates responsibly directed employees, they did not apply the concept of accountability articulated in *Oakwood*. For example, none of those pre-*Oakwood* cases analyzed whether the mates faced the prospect of adverse consequences based on the work of others, as the Board noted here. (A.366,375n.20.) Also, while some of the cited cases additionally found that the mates assigned employees, those decisions made no distinction between assignment and responsible direction. Instead, they discussed the two different types of Section 2(11) authority as if they were one and the same.¹⁸ *Oakwood*, however, makes it clear that the Board now “ascribe[s] distinct meanings to ‘assign’ and ‘responsibly to direct.’” 348 NLRB at 688-90.

B. The Board Did Not Abuse Its Discretion in Denying the Company’s Requests To Reopen the Record in the Representation Case and Relitigate Issues in the Unfair-Labor-Practice Case

The Company challenges (Br.52-59) the Board’s denial of its requests to reopen the record in the representation case and relitigate representation issues in

¹⁸ See, e.g., *Am. River Transp. Co.*, 347 NLRB 925 (2006).

the unfair-labor-practice case. As shown below, however, the Board acted well within its discretion in denying both requests.

1. The Board properly denied the Company's untimely request to reopen the record

This Court affords the Board “an especially ‘wide degree of discretion’” regarding representation proceedings. *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)); accord *Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC v. NLRB*, 736 F.2d 1559, 1564 (D.C. Cir. 1984). Additionally, the Board’s interpretation of its rules and regulations must be given “controlling weight” unless “plainly erroneous or inconsistent with the regulation itself.” *Canadian Am. Oil*, 82 F.3d at 473; accord *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008). Further, this Court reviews the Board’s decision whether to grant a request to reopen the record only for an abuse of its discretion. *Thomas-Davis Med. Centers v. NLRB*, 157 F.3d 909, 912 (D.C. Cir. 1998); *Rd. Sprinkler Fitters Local Union No. 669 v. NLRB*, 789 F.2d 9, 14 (D.C. Cir. 1986).

Under the Board’s rules, a motion to reopen the record is an “extraordinary” request. 29 C.F.R. §§ 102.48(d)(1), 102.65(e)(1).¹⁹ The rules mandate that, in a

¹⁹ Section 102.48 addresses unfair-labor-practice cases, while Section 102.65 deals with representation cases. Various amendments to the Board’s rules and regulations as pertaining to representation cases became effective on April 14, 2015. See 79 Fed. Reg. 74,308, 74,308 (Dec. 15, 2014). The rules in effect when

representation proceeding, such a motion “shall be filed promptly on discovery of the evidence sought to be adduced.” 29 C.F.R. § 102.65(e)(2). This “requires that a movant act without delay” when seeking to reopen the record. *Manhattan Ctr. Studios, Inc.*, 357 NLRB 1677, 1679 (2011). Additionally, the movant must “specify . . . why [the evidence] was not presented previously.” 29 C.F.R. § 102.65(e)(1).²⁰

In March 2013, the Company requested to reopen the record, alleging that it had changed its mates’ duties in about 2010. (A.412;A.388-406.) Given this lengthy delay, the Company’s undisputed knowledge of the alleged changes, and its failure to explain its three-year silence, the Board reasonably found that the Company had “failed to act ‘promptly on discovery of the evidence sought to be adduced,’” and “to provide good cause” for doing so. (A.412, quoting 29 C.F.R. § 102.65(e)(2).) That finding accords with precedent. Indeed, the Board has consistently denied motions to reopen the record where a party’s delay after discovering additional evidence was substantially shorter. *See Harry Asato Painting, Inc.*, 2015 WL 5734974, at *2 (Sept. 30, 2015) (almost five-month

the Board’s orders issued, as cited here and reproduced in the Addendum, are on the Board’s website at https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

²⁰ The regulations establish virtually identical requirements for motions to reopen the record in an unfair-labor-practice proceeding. *See* 29 C.F.R. §§ 102.48(d)(1) (movant must “state . . . why [the evidence] was not presented previously”); 102.48(d)(2) (motion “shall be filed promptly on discovery of such evidence”); *Manhattan Ctr. Studios*, 357 NLRB at 1679 n.11.

delay); *Manhattan Ctr. Studios*, 357 NLRB at 1682 (twenty-seven-week delay); *Labor Ready, Inc.*, 330 NLRB 1024, 1024 (2000) (three-and-a-half-month delay); *York Mfg. Co.*, 171 NLRB 754, 754 n.2 (1968) (three-month delay). Accordingly, the Board properly exercised its discretion in denying the Company's motion to reopen. *See Thomas-Davis*, 157 F.3d at 911-12 (Board did not abuse its discretion in denying untimely motion to reopen record).

The Company errs in relying (Br. 54) on *Cogburn Health Center, Inc. v. NLRB*, 437 F.3d 1266 (D.C. Cir. 2006), which did not address the requirement that parties move to reopen the record "promptly on discovery" of evidence (*see* 29 C.F.R. §§ 102.48(d)(2), 102.65(e)(2)). Further, *Cogburn* rejected the Board's finding of untimeliness because the changes at issue there were "gradual, incremental, and cumulative." 437 F.3d at 1272. By contrast, the Company here sought to reopen the record in March 2013 based on changes that purportedly had taken effect three years earlier. Finally, unlike the instant case, *Cogburn* involved an affirmative bargaining order issued under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and the evidence that the employer sought to adduce related specifically to the appropriateness of that order. *Gissel* cases implicate distinct factual and legal concerns not found in other contexts. *See Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *NLRB v. Creative Food Design Ltd.*, 852

F.2d 1295, 1299, 1302-04 (D.C. Cir. 1988). *Cogburn* is therefore inapplicable here.

2. The Board acted within its discretion in denying the Company's request to relitigate representation issues in the unfair-labor-practice case

“It is well established that in the absence of newly discovered evidence or other special circumstances requiring reexamination of the decision in the representation proceeding, a respondent is not entitled to relitigate in a subsequent refusal-to-bargain proceeding representation issues that were or could have been litigated in the prior representation proceeding.” *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 73 (D.C. Cir. 2015) (quoting *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1151 (D.C. Cir. 2000)). “Newly discovered evidence” and “special circumstances” constitute “limited exceptions” to the no-relitigation rule, and “[t]he court will not disturb the Board’s application of [the] rule absent an abuse of discretion.” *Pace Univ. v. NLRB*, 514 F.3d 19, 23-24 (D.C. Cir. 2008); accord *Salem Hosp.*, 808 F.3d at 73. Representation issues subject to this rule include those involving supervisory status. See *Salem Hosp.*, 808 F.3d at 73.

Here, the Board soundly exercised its discretion in applying the no-relitigation rule to reject the Company’s “procedurally improper” attempt, in the unfair-labor-practice case, to raise alleged changes in its mates’ duties purportedly bestowing them with supervisory status. (A.448;A.431-45.) As the Board found,

the Company plainly sought “to litigate an issue that could have been litigated in the representation proceeding had it been timely raised” there. (A.448.)

Further, the Board properly determined that the Company did not offer to adduce any “newly discovered evidence.” (A.448.) It is well established that evidence is newly discovered only if it concerns “facts which existed at the time of the hearing in the underlying [representation] proceeding.” *E. Michigan Care Corp.*, 246 NLRB 458, 459 (1979), *enforced*, 655 F.2d 721 (6th Cir. 1981); *accord NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1299 (9th Cir. 1991), *as amended on denial of reh’g* (Oct. 30, 1991). Thus, proffered evidence involving facts allegedly “arising after the [representation] hearing”—here, the Company’s claims about post-hearing changes in 2010—cannot qualify as “newly discovered evidence.” *APL Logistics, Inc.*, 341 NLRB 994, 994 & n.2 (2004), *enforced*, 142 F. App’x 869 (6th Cir. 2005); *accord Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 278 (1st Cir. 1997).

The Board also acted well within its discretion in determining that the Company had not shown “special circumstances” requiring a reexamination of the representation decision. (A.448.) To begin, the Board, with court approval, has long held that purported changes to bargaining unit employees’ job duties—including those allegedly conferring supervisory status—do not constitute “special circumstances.” *Indeck Energy Servs. of Turners Falls, Inc.*, 318 NLRB 321, 321

& n.5 (1995); *Mercury Marine*, 259 NLRB 876, 876-77 (1982), *enforced*, 703 F.2d 571 (7th Cir. 1983) (Table); *E. Michigan Care*, 246 NLRB at 460-61, *enforced*, 655 F.2d 721 (6th Cir. 1981). As the First Circuit has explained, “[i]f an employer, dissatisfied with the upshot of a representation proceeding, could manufacture circumstances sufficient to require reconsideration simply by shifting duties around, then Board certifications would be little more than hollow gestures.” *Telemundo*, 113 F.3d at 277 n.5; *see also St. Anthony Hosp. Sys., Inc. v. NLRB*, 884 F.2d 518, 524 (10th Cir. 1989) (employers should not be “allow[ed] . . . to nullify unfavorable elections simply by modifying the job responsibilities of a particular position”).

Likewise, the Board properly rejected the Company’s proffer of employee turnover as purported evidence of “special circumstances.” (A.448&n.5.) In a test-of-certification case like this one, turnover cannot relieve an employer of its bargaining obligation. *Specialty Healthcare & Rehab. Ctr. of Mobile, Inc.*, 357 NLRB 2119, 2119 & n.2 (2011), *enforced* 727 F.3d 552 (6th Cir. 2013). Indeed, as this Court has held, “it is well settled that post-election [employee] turnover is an insufficient ground to set aside an election,” or to “render a certification no longer appropriate.” *Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 133 (D.C. Cir. 2004) (internal quotation marks omitted); *accord King Elec., Inc. v. NLRB*, 440 F.3d 471, 474 (D.C. Cir. 2006).

Additionally, the Board properly found that the passage of time since the Union's certification did not constitute "special circumstances" warranting relitigation of representation issues. (A.448,n.5&n.6.) Where, as here, the Board has validly certified employees' selection of union representation in a secret-ballot election, and the employer has refused to honor that certification, the passage of time—even if partly attributable to administrative delay—cannot prevent enforcement of a Board order requiring the employer to bargain. *See Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 1060, 1063 (D.C. Cir. 1971); *Hanna Boys Ctr.*, 940 F.2d at 1299-1300 & n.2; *NLRB v. Parents & Friends of the Specialized Living Ctr.*, 879 F.2d 1442, 1457-58 (7th Cir. 1989); *NLRB v. Mr. B. IGA, Inc.*, 677 F.2d 32, 34 (8th Cir. 1982); *see also Creative Food*, 852 F.2d at 1299, 1303 (where employer voluntarily recognized union, it "effectively agreed to treat the [union] as if it won an election"; thus, purported near-total employee turnover and passage of several years was irrelevant, and Board's bargaining order was properly enforced).

It also should be noted that three intervening watershed legal developments (*Kentucky River*, *Oakwood*, and *Noel Canning*), as well as 27 months when the Board had only two members (*see New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 677-78 (2010)), contributed substantially to the lifespan of this case. Furthermore, it is the Company's continuing unlawful refusal that has denied the employees their right to union representation, and the Supreme Court has broadly held that

“the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.”

NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 264-65 (1969); *see also NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962) (rejecting employer’s argument that enforcement of Board’s order should be denied or conditioned on holding new election based on *inter alia* lapse of time preceding Board’s issuance of order, stating that although “[i]nordinate delay in any case is regrettable,” employer’s argument lacked statutory basis and had “no merit”).

The Company errs in citing (Br.58-59) cases where courts considered passage of time or administrative delay in fundamentally different contexts. None of the cited cases involved a test of certification. Rather, they involved an employer’s withdrawal of recognition based on an asserted belief that a majority of employees no longer supported the union. As the Court has recognized, such cases present a “radically different” situation. *Creative Food*, 852 F.2d at 1299. Further, the Court has explained that *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), which the Company cites (Br.58), “addressed a singular factual situation” where “following the employer’s unlawful withdrawal of recognition, the union requested, conducted, and lost an election.” *Creative Food*, 852 F.2d at

1303; *see also Peoples Gas*, 629 F.2d at 50 (emphasizing “the narrowness of [the Court’s] holding”).²¹

²¹ The Company likewise errs in relying (Br.58-59) on *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713 (2d Cir. 1961), which was also not a test-of-certification case. Moreover, it involved unique facts not present here—the employees’ attempt to resign from the union and a finding that the union effectively had “abandoned” them. *Id.* at 722-24.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

/s/ Julie B. Broido

JULIE B. BROIDO

Supervisory Attorney

/s/ Michael R. Hickson

MICHAEL R. HICKSON

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-2996

(202) 273-2985

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

September 2016

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRUSCO TUG & BARGE, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1190, 15-1282
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CA-096559
)	
and)	
)	
INTERNATIONAL ORGANIZATION OF)	
MASTERS, MATES & PILOTS, ILA, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,866 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 6th day of September, 2016

STATUTORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

National Labor Relations Act, 29 U.S.C. § 151, et seq.

Section 2(3) ii

Section 2(11) ii

Section 7 ii

Section 8(a)(1)..... ii

Section 8(a)(5)..... ii

Section 9(c) iii

Section 9(d) iii

Section 10(a) iii

Section 10(e) iv

Section 10(f)..... iv

Regulations

29 C.F.R. § 102.48(d)v

29 C.F.R. § 102.65(e).....v

THE NATIONAL LABOR RELATIONS ACT

Section 2 of the Act (29 U.S.C. § 152) provides in relevant part:

* * *

(3) The term “employee” shall include any employee . . . but shall not include . . . any individual employed as a supervisor

* * *

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

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

* * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . .

. . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

REGULATIONS

29 C.F.R. § 102.48(d) provides in relevant part:

(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for . . . reopening of the record A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously. . . .

(2) . . . a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. . . .

29 C.F.R. § 102.65(e) provides in relevant part:

(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report . . . to reopen the record A motion . . . to reopen the record shall specify briefly . . . the additional evidence sought to be adduced, why it was not presented previously

(2) A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRUSCO TUG & BARGE, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1190, 15-1282
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CA-096559
)	
and)	
)	
INTERNATIONAL ORGANIZATION OF)	
MASTERS, MATES & PILOTS, ILA, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Michael T. Garone
Thomas M. Triplett
Schwabe, Williamson and Wyatt
549 SW Mill View Way
Bend, OR 97702

James B. Coppess
AFL-CIO
Office of General Counsel
815 16th Street, NW
6th Floor
Washington, DC 20006

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
This 6th day of September, 2016