HNY FERRY, LLC D/B/A NYC FERRY

Employer

And

MARINE ENGINEERS' BENEFICIAL
ASSOCIATION, DISTRICT 1-PCD, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

HNY Ferry, LLC d/b/a NYC Ferry ("Employer") is engaged as a commuter ferry service. On November 9, 2018, Marine Engineers' Beneficial Association, District 1-PCD, AFL-CIO ("Petitioner") filed a representation petition under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all captains, excluding all other employees.

The Petitioner seeks to represent a unit of the Employer's employees who are classified as captains. The Employer asserts that the petitioned-for unit is inappropriate because captains are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that captains exhibit the primary indicia of Section 2(11) supervisors by assigning, responsibly directing, disciplining, promoting, and rewarding employees. The Petitioner submits that the Employer has failed to meet its burden of proving that captains have the requisite authority under Section 2(11) of the Act, and therefore the petitioned-for unit of captains is appropriate and an election should be directed.

A hearing was held before Nicole Lancia, a Hearing Officer of the National Labor Relations Board ("Board"). The parties presented oral arguments. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

I. FACTS

A. Employer's Operations

The Employer is a commuter ferry service that transports passengers between ports located in Manhattan, Brooklyn, and the Bronx. It operates a fleet of 21 vessels on six routes throughout New York harbor, making stops at multiple ports. The City of New York predetermined the routes and contracted with the Employer to operate the service. The Employer provides service 16 hours a day, seven days a week. Of the 21 vessels, 17 of them are subchapter T class, with a 150 passenger capacity, and a manning requirement of a captain and two deckhands. The other four vessels are larger with a 350 passenger capacity, a manning
requirement of a captain, a senior deckhand, and three additional deckhands. The larger vessels can also be manned by a single captain and two deckhands, but the capacity would be limited to 150 passengers. During the course of the routes, the vessels are never more than two miles away from the Employer’s home port.

B. Management Structure

Director of Marine Operations William Buckley oversees the Employer’s marine operations. Reporting to him, there are five port captains, 39 captains, and approximately 90 deckhands. Buckley and the port captains oversee the daily activities of the vessels, including executing service seven days a week, and are responsible for the safety of the vessels, crew, and passengers. Port captains are salaried, while captains and deckhands are paid hourly with captains receiving a higher rate.

One port captain is always on duty at any given time. They manage the ferry crew from an onshore office. According to the port captain job description, port captains “hire, train, motivate, discipline and manage the day-to-day activities of the members of the marine operations department,” which includes captains and deckhands. Similarly, in announcements of new port captains, the Employer states, “As a Port Captain, […] is responsible for supervising the Captains and Crew, overseeing project safety, training as well as regulatory compliance programs.” Port captains can access video of all the vessels in service at any time through their cell phones. Port captains can be reached by captains or deckhands at all times while vessels are in service. Occasionally, port captains conduct ride-alongs to make sure that vessels are operating smoothly and Employer policies are being followed.

As part of their duties, port captains create the weekly crew schedules and assignments for captains and deckhands. The separate schedules for each classification contain the same information, including assignment to a specific route. Captains have no role in assigning deckhands to their vessel, nor do they decide which vessel or route they will be assigned to each day. Captains must follow the route on a set schedule; captains cannot choose to operate a different route or stop at different intervals. Adverse weather conditions are the only exception. Captains can cancel or modify a route, or determine whether to serve a terminal, due to strong winds or other inclement weather conditions.

Port captains’ duties also include handling all requests for schedule changes, leave, time off, and overtime for both captains and deckhands. Captains have no involvement in approving any of these requests for deckhands. Further, if a deckhand requests assignment to a different vessel, the port captains determine whether to reassign the deckhand. The record demonstrates that Buckley and the port captains have sent out multiple emails that instruct all crew, including deckhands, to contact all five port captains via text if they are (1) running late, (2) meeting their

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1 Additionally, there are three part-time captains that are not sought to be included in the proposed unit.

2 No documents were proffered showing the differences in the pay rates.
vessel at Pier 11, or (3) have any scheduling issues. Although captains are not formally part of any notification system regarding attendance-related matters, a deckhand may notify a captain if they have a personal relationship.

Captains are the highest-ranking employee onboard a vessel. They report to the port captains and Buckley. The captain job description states that captains direct the vessel's activities and operate the vessel safely and efficiently while supervising onboard employees. The record reflects that captains are responsible for training the crew, performing drills and exercises throughout the day, inspecting the vessels, and reporting back to management on how the crews are performing, as well as, anything else that relates to the vessel. The job description also requires that captains "[e]nsure employees are properly uniformed, demonstrate appropriate attitudes, and are technically competent in their area of responsibility, [and] that all crewmembers are providing their best efforts." The Employer expects captains to adhere to and enforce all company procedures and policies.

Deckhands report to the captain while the vessel is in service. Their primary responsibilities are to assist in the boarding and disembarking of passengers, take tickets, and perform janitorial services onboard the vessel. They also complete hourly engine room checks and serve as lookouts, tie lines, and monitor equipment in the pilothouse, as needed. Deckhands are required to follow captains' instructions while at sea.

Finally, the Employer's Human Resources Director Sanela Charles is involved in personnel matters. Charles helped prepare the employee handbook, assists with recruitment and onboarding, and oversees employee relations including payroll, employee performance reviews, and discipline.

C. Rules and Regulations Regarding Captain Duties

On the water, captains are the master of the vessel. They act as the Employer's representative and provide information concerning ferry operations to the public and the United States Coast Guard. Captains must maintain a license through the United States Coast Guard and are required to follow all Coast Guard Rules and Regulations. Both the Coast Guard and the Employer hold captains responsible for any violation of Coast Guard rules.

The Employer also maintains a Safety Management Program (SMP) which sets forth the Employer's safety and pollution culture and responsibilities. The SMP is based on 33 CFR 96, Subpart B, and the International Safety Management (ISM) Code. The SMP states that: the captain "has the overriding authority and responsibility with respect to safety and pollution prevention on board his or her vessel and can request assistance from the Company as necessary;" the captain is responsible for motivating the crew in observation of that policy; and,

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3 The majority of the time, deckhands report directly to the Brooklyn Navy Yard, the home port for the Employer. However, they also have the ability to report to Pier 11 in Manhattan, depending on their schedule, as long as they notify the port captains and Buckley in advance.

4 The job description for deckhands states that the position reports to the captain. 
the captain receives authority from the highest levels of company management. The SMP also states that port captains shall be ultimately responsible for the implementation and execution of the onboard safety program. The SMP does not state that a captain will be disciplined if crew does not follow company policies or procedures.

As part of the SMP, the captain is required to report any marine casualty, accident, non-conformity with the SMP, hazardous conditions, or near-misses. The captain’s incident report details the accident and the circumstances under which it occurred. The reporting system is also required by federal and international law.

The SMP further includes a list of Safe Operating Procedures which specifies captain and deckhand responsibilities for a number of situations, including adverse weather procedures, deck openings, rail jumpers, and personal protective equipment. According to Buckley, deckhands are required to follow these procedures and the captain is required to enforce the procedures and direct the crew to follow them. In the event of an emergency, captains are responsible for directing the movement of the vessel and the actions of the crew. A former deckhand, Zachary Atzert, confirmed that deckhands would follow a captain’s instructions during an emergency.

Additionally, as part of the SMP and United States law, captains are required to conduct monthly safety drills. Port captains schedule the safety drills and captains complete drill log sheets after the drills are completed. Captains decide which drill to perform, lead the drills and direct the crew during the drill. Captains also conduct non-safety drills or trainings of company policy, such as, gangway etiquette, rider communications, and first aid. The captains follow scripts for the drills that are part of a large binder created by the Employer called Training Talk. The Training Talk binder contains approximately 70 different scripts and memoranda for captains to follow in conducting the drills. As an example, the “Emergency Station Bill” Training Talk covers the effective chain of command that should be followed during an emergency. That Training Talk memorandum states that the station bill is posted on all decks in a visible location and “dictates each crewmember’s responsibility in emergency situations” which include fire, flooding, abandon ship, and man overboard.

D. Daily Operations

When captains and deckhands arrive at the home port, the “call to board” shows the boat assignments for that shift, as per the port captains’ orders. The port captains prepare daily paperwork for captains to pick up before they sail. Included in that paperwork is a Daily Vessel Checklist, which is a two-page document listing tasks that deckhands must complete during their shift. The same checklist is given to every captain for every route, every day. Captains must use the checklist and cannot make up their own checklist. The Employer expects captains to verify

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5 Port captains complete initial safety drills with new deckhands and subsequent drills are completed by captains.

6 The drill log record sheets are safety-focused and captains can choose between fire, man overboard, abandon ship, security, spill response, or a captain’s choice miscellaneous category.
that the listed tasks are completed by the crew and that the checklist is submitted to the port captains at the end of the shift.

Prior to undocking, the captain conducts a meeting with the deckhands to set clear expectations for their duties throughout the shift, including greeting and boarding passengers, performing engine room checks, cleaning the vessel, and sometimes standing watch at the helm when directed by the captain. The captain and the deckhands then conduct a series of pre-sail checks. The captain performs a final pre-sail walkthrough to ensure vessel safety and readiness. Once the pre-sail checks are complete, the ferry leaves port and follows a predetermined route and makes stops according to a fixed schedule.

The Daily Vessel Checklist, mentioned above, provides specific tasks for deckhands broken down into the following sections: Start-up Duties; Hourly Topside Check; Shutdown Duties; Inventory; Pilot House Equipment; Hourly Engine Room Checks; Machinery; Alarms; and Additional Notes. The deckhands report to the captain after deckhands complete the tasks, and the captain initials each task after they verify it is complete. The checklist mostly contains janitorial tasks such as cleaning the restroom, sweeping the decks, removing trash, and restocking cleaning supplies. Additionally, deckhands are supposed to do a topside check once an hour, as well as, an engine room check to ensure that the blower, cooling pump, and battery charger are working and that there are no signs of oil, coolant, fuel, or water leaks.

According to Buckley, captains can determine which deckhands perform which tasks and can assign duties that do not appear on the checklist, as well as, instruct deckhands to perform walkthroughs at additional times than the hours shown on the checklist. However, former deckhand Atzert testified that while captains could ask deckhands to perform additional specific tasks, deckhands typically would “follow the script” and “do what we were told on this list” without the involvement of the captain to split up the tasks.

The other primary duties of the deckhands, aside from their daily janitorial duties, is boarding passengers and taking tickets. The Employer maintains a Boarding Procedure Manual that lists guidelines and instructions for deckhands, captains and other employees to follow during the boarding process. The 16-page manual includes specific, detailed instructions for deckhands to follow during the boarding process. Buckley emailed a copy of the manual to all deckhands. The manual contains instructions such as “Forward Cabin doors must remain closed while the vessel is maneuvering to the dock;” “Deckhands will wait for a verbal or ‘thumbs up’ signal from the captain before lowering or raising boarding ramps;” and “Deckhands must announce the route and direction loudly, assertively, and repeatedly during the passenger boarding process.” The Boarding Procedure manual also lists 26 specific deckhand responsibilities to be split up into Deckhand 1 and Deckhand 2 responsibilities, with a requirement that deckhands will rotate during the course of the day between Deckhand 1 and Deckhand 2 responsibilities.
Examples of the Deckhand 1 responsibilities are:
- Upon arrival, with vessel secure and ramp in down position, Deckhand 1 will proceed off the vessel and up the gangway to open the gate.
- Deckhand 1 will count passengers, check app tickets, take paper tickets and ask unticketed riders to step aside to allow ticketed riders to board the vessel.
- Deckhand 1 is responsible for counting passengers on the boat.
- With all allowable passengers boarded, Deckhand 1 will close the boarding gate and proceed down the gangway.
- Deckhand 1 will then proceed through the Aft Cabin Doors onto the stern deck to provide a proper lookout and “All Clear” notification to the Captain via the Loud Hailer Speaker, VHF Handheld, or passing notification to the Captain with a visual thumbs up signal via Deckhand 2.
- Deckhand 1 will remain on the Main Deck to maintain safe watchkeeping of the deck.

Deckhand 2 responsibilities include:
- Upon arrival, with vessel secure Deckhand 2 will lower the ramp upon signal from the Captain.
- Deckhand 2 will open the Main Cabin Doors to allow passengers to disembark the vessel.
- Deckhand 2 will greet boarding passengers and provide assistance or guidance as necessary while managing the safe transition of passengers from ramp to vessel.
- Deckhand 2 will remain on the Top Deck to maintain safe watchkeeping of the deck.
- Deckhand 2 will perform Engine Room checks at least once per hour.

Notably, port captains and Buckley routinely send out detailed instructions and other important notifications to captains and deckhands via email. The emails contain reminders about Employer policies regarding uniforms, trash and security, as well as instructions regarding passenger boarding or route changes. Some emails contain safety alerts with pictures that provide directives to crew on proper safety measures to take aboard the vessel. One email instructed that deckhands not use the concession area of the vessels, and provided a diagram of an onboard storage closet to use instead for cleaning supplies and personal items. Another notified crew that they are no longer responsible for filling water tanks at the end of the day because the engineering staff is now responsible. Many of the emails reminded captains and deckhands of specific procedures outlined in the SMP or Daily Vessel Checklist, including a requirement of posting a stern lookout prior to departing a dock. The posting of a stern lookout is part of a Coast Guard Navigation rule that every vessel must follow, and the Employer’s procedure required a deckhand to be designated as the lookout and follow specific directions to complete their lookout duties. Buckley testified that he sent these emails to all crew in order to promote good communication and ensure that the entire team was aware of specific policies or directives. He expected captains to enforce the requirements contained in the emails.

Additionally, Buckley and port captains sent emails directly to captains about how to operate the vessels. Those emails include instructions on how to navigate around certain marinas, proper horn usage, specific announcements to make when approaching docks, and proper tie-up procedures at the FDNY dock.
E. Supervisory Factors

1. Captain’s Authority to Assign

The Daily Vessel Checklist and the Boarding Procedure Manual, created by Buckley and the port captains, set forth the overall duties of the deckhands, as discussed above. The captain is supposed to stay in the pilothouse for the duration of the route. He or she is allowed to leave the pilothouse only to use the restroom when the vessel is docked. However, when a captain pulls the vessel into ports for stops along the route, the captain pushes the vessel up against the dock with the engines running and the vessel is not tied up to the dock. Once pushed up, the captain can ask a deckhand to stand watch over the pilothouse for a restroom break.

According to Buckley, captains can determine which deckhand will perform Deckhand 1 and Deckhand 2 responsibilities from the Boarding Procedure based on deckhands’ experience and qualifications. Additionally, captains can instruct deckhands to deviate from the boarding procedures if they believe something is better suited for the vessel. Captains can also instruct deckhands to not allow a passenger to board.

The captain is also responsible for responding to any problems that arise on route - mechanical, customer-related, or otherwise. As part of that responsibility, the captain can assign deckhands specific tasks, such as investigating an alarm coming from an engine room, standing lookout in difficult weather, monitoring unruly passengers, or denying access to would-be passengers. Captains also contact a port captain or the dispatch department to report any issues. Captains decide whether the ferry needs to go out of service due to a mechanical problem. For example, a captain noticed that a bilge alarm went off and instructed a deckhand to inspect the area and report back to the captain. The deckhand informed the captain that there was water in the area, and after the captain himself checked, he notified the port captain that the ferry would be returning to port and instructed the deckhand to pump out the water.

The record reflects an instance of unruly passengers where the deckhand failed to monitor the situation. Specifically, the captain observed a group of passengers acting weirdly, congregating on the upper deck with one of them sitting in a prohibited area. The captain instructed a deckhand to tell the passengers that sitting in that area is prohibited and instructed him to remain on the upper deck for the remainder of the voyage to monitor the passengers. At some point, two of the passengers purposefully jumped off the vessel and the deckhand was unaware that they had jumped. Buckley and a port captain reviewed the vessel’s camera footage and discovered that the deckhand was using his cell phone at the time. As a result, the Employer issued the deckhand a discipline for violating the Employer cell phone policy. The captain was not disciplined.

Regarding difficult weather, captains can decide whether to close a route or serve a particular terminal due to adverse weather conditions. According to Buckley, the Employer does not override a captain’s decision. If a captain chooses to shut down a route, the Employer puts out advisories to riders that a route is suspended or that a terminal is closed. Before reopening the route or terminal, a captain will pilot a vessel without passengers to assess the situation. Former
deckhand Atzert, however, testified about a specific instance where a port captain overrode a captain’s decision to close a terminal. In May 2018, a captain deemed it unsafe to dock at the Greenpoint terminal and proceeded to the next stop on the route. Shortly after, a port captain radioed all the captains and told them that the Greenpoint terminal was open and instructed them to pick up passengers from there. Later that day, it appears that the Employer closed the terminal, however, the record does not reflect the decisional process.

In the event a route is cancelled and a ferry goes out of service, Buckley and port captains will instruct the captain to either stay on the water and conduct drills, or return to home port and run drills or perform safety inspections.

2. Captain’s Authority to Responsibly Direct

According to Buckley, if a captain directs a deckhand to perform a task and the deckhand does it incorrectly, captains are held responsible. Furthermore, he testified that captains can also delegate their own responsibilities and duties to deckhands, and a captain could be disciplined if the deckhand did not properly discharge those duties.

The Employer presented several specific examples of incidents where it claims that captains were disciplined because of deckhand performance. In all examples, however, the captains themselves were found to have violated the Employer’s policies.

On October 15, 2018, a captain was disciplined for violating the Employer’s personal electronic device policy. During a ride along with a deckhand who was a trainee to be a captain, the deckhand was operating the vessel and it had a collision with a fender at the Astoria port. After the Employer investigated and reviewed onboard camera footage, the captain was disciplined for not paying attention while the trainee was operating the vessel.

In two others situations that occurred in November 2017 and March 2018, vessels drifted off fender racks while the vessels were boarding passengers. The Employer reviewed the onboard camera footage and found that the deckhands were not in the proper position during boarding and the captains were distracted.

In the November 2017 incident, video footage revealed that the captain was in the pilothouse but with his back turned away from the helm. As a result, the Employer issued discipline to the captain because (1) boarding of passengers without deckhands in proper position for boarding, and (2) not maintaining a helm watch while boarding passengers. Buckley stated that if the captain had been paying closer attention and maintained a helm watch, he would have recognized that the deckhands were not in proper position and would have corrected the situation. The captain acknowledged that he did not follow proper procedure and accepted full responsibility for his actions.

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7 As described above, the captain was not disciplined for the deckhand’s failure to monitor passengers who jumped.
In the March 2018 incident, video footage revealed that the captain was in the pilothouse but that he was “completely engrossed” in his personal electronic device and did not maintain effective situational awareness as he did not realize the deckhands were smoking on the barge, rather than standing at the bow of the vessel during the boarding process. The captain was found to have violated the Employer’s personal electronic device policy, failed to have deckhands in proper position for passenger boarding, and did not maintain an effective helm watch while the vessel was docked and engaged in passenger boarding operations. In both instances, there was no evidence that the deckhands were disciplined for not being in the proper position during the boarding process.

Buckley also discussed an August 29, 2017 incident where a captain was issued a verbal warning discipline where a passenger sustained a leg injury when she stepped onto an improperly secured deck hatch. After returning to port, Buckley interviewed the crew and discovered that the crew did perform some pre-sail inspection of the vessel but missed the unsecured hatch. The captain accepted responsibility for the incident because he did not properly ensure that his crew performed all of the pre-sail tasks and safety inspections.

Later that day, there was another incident where a captain asked a deckhand to stand watch at the helm while the captain used the restroom during a short layover in service. The deckhand entered the pilothouse and walked to the back of it, not directly to the helm. At the same time, another vessel approached and its wake caused the Employer’s vessel to rock back and forth. The deckhand realized that the vessel was out of position and he attempted to correct it, but ultimately tore the railing off the vessel’s bow as it made contact with the ramp at the terminal. The captain rushed back upstairs and repositioned the vessel. He then notified the port captain, took the vessel out of service and returned to home port. The Employer’s investigation revealed that the captain did not use enough power to stay safely pressed up in the slip to maintain proper position and that the captain failed to give any instruction or guidance to the deckhand prior to leaving the pilothouse. Buckley testified that he spoke to the captain and stated that if he had provided better direction and instruction to the deckhand, the situation could have been avoided. The captain took responsibility for the incident and was disciplined for not providing better direction and instruction to the deckhand. The deckhand was not disciplined for this incident.

On May 17, 2018, a captain was issued a verbal counseling for his performance. A passenger filed a complaint with the Employer stating that they missed the boat because the ferry left prior to the scheduled departure time. Buckley reviewed the camera footage and determined two minutes prior to the scheduled departure time, based on a partially obstructed view from the bow of the vessel, the deckhands signaled to the captain that no one was waiting to board the ferry. At 17:38, the passenger arrived at the gate but the deckhands did not see him, and a minute later, at 17:39, the vessel departed without the passenger. The captain was disciplined because he failed to maintain proper position and that the captain failed to give any instruction or guidance to the deckhand prior to leaving the pilothouse. Buckley testified that he spoke to the captain and stated that if he had provided better direction and instruction to the deckhand, the situation could have been avoided. The captain took responsibility for the incident and was disciplined for not providing better direction and instruction to the deckhand. The deckhand was not disciplined for this incident.

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8 There was no evidence that a deckhand was disciplined for leaving the hatch unsecured and open.
deckhands went up to the gate and physically checked for passengers. The deckhands did not receive any discipline for failing to walk up to the gate.

Lastly, in July 2018, a captain received a verbal warning after he instructed deckhands to remove an individual from the ferry because the passenger posed a safety concern by refusing to comply with the captain’s order to stop taking photos on the barge. The passenger filed a complaint with the Employer. Buckley reviewed the camera footage and determined that the captain should not have denied entry to the vessel and should not have instructed the deckhands to remove her. Buckley then issued a discipline to the captain for poor judgment and poor customer service. The deckhands were not disciplined for removing the passenger.

3. Captain’s Authority to Effectively Recommend Discipline

The Employer maintains a progressive discipline policy. The policy has four steps: (1) verbal warning, (2) written warning, (3) final warning; and (4) termination. If the Employer determines that discipline is warranted, Buckley or a port captain will draft up a Disciplinary Action Form with a level of discipline on it and send it to HR Director Charles to review. Charles will then review an employee’s personnel file. If they have no previous discipline, Charles designates the discipline as a verbal warning. If the employee has previous discipline, Charles issues discipline one step higher than the employee’s last discipline. The Disciplinary Action Forms list the employee’s name, position, supervisor name, incident date, discipline type and reason, a description of the incident and a description of the corrective action. The supervisor name listed on the deckhand disciplinary action forms in evidence states “Port Captains.” The forms are supposed to be signed by the deckhand as well as a port captain or Buckley.

Charles and Buckley testified that if a captain has an issue with a deckhand or if an incident occurs involving a deckhand, the captain is required to report it to Buckley and the port captains. Captains will provide a factual statement, normally via email, that recounts the situation. In instances where there was a marine casualty or injury, captains complete incident reports.

Buckley testified that after receiving the captain’s report, he will have a discussion with the captain and ask if the captain recommends discipline. According to Buckley, the Employer relies on the captain’s recommendation when one is provided. Buckley stated that captains generally just recommend discipline, not a specific type of discipline. Charles similarly testified that Buckley has verbal follow-up discussions with captains about discipline recommendations where the captains did not include a written discipline recommendation in their email. Charles noted, however, that she is not always involved in those conversations. Charles testified that Buckley usually meets with her and explains the situation. Charles then asks him if he spoke to the captain for feedback and whether he reviewed camera footage. Charles testified that the Employer reviews vessel camera footage to have backup documentation to make sure the Employer has correct information for the discipline. Following the report and the verbal discussion with the captain, either Buckley or a port captain draft the disciplinary action form.
The Employer provided four examples where it disciplined a deckhand because of a captain’s recommendation. In the specific situations discussed, none of the reports or emails contain recommendations of discipline, rather they provide a strictly factual account.\(^9\)

In October 2017, a deckhand was issued a final warning after he held up the departure of a vessel by walking off of it at the last minute to pick up a food delivery order. Once underway, the deckhand did not speak with the captain to explain or apologize for the situation. At the end of the shift, the captain and the deckhand got into a heated argument and the deckhand used threatening and inappropriate language. That evening, the captain wrote an email to a port captain describing the day’s events and the deckhand’s performance, as well as, his “total lack of respect” and “terrible attitude.” The email did not contain any disciplinary recommendation but Buckley testified that he had a conversation with the captain who told him that the deckhand should be disciplined. The Employer had a meeting with the deckhand the following day to discuss the incident.\(^10\) A few days later, the discipline issued.

In May 2018, a deckhand was issued a verbal warning. According to the disciplinary action form, a captain notified a port captain that the deckhand had jumped from a crew shuttle to the pier while the vessel was still moving. A port captain reviewed the vessel’s camera footage and he observed the reported safety violation. The port captain then instructed the captain to complete an incident report for unnecessary risks. According to Buckley, he reviewed the incident report and spoke to the captain who recommended that the deckhand be disciplined. Buckley testified that there was no recommendation in the incident report.\(^11\)

In a different May 2018 discipline, a deckhand was terminated for untangling a line without the consent of the captain. As a result, the vessel moved and struck a few FDNY vessels with all vessels sustaining damage. The captain immediately secured the vessel and notified the port captain of the incident. The captain then wrote a statement and filled out an incident report. Neither the statement nor the incident report included a disciplinary recommendation. According to Buckley, he had a verbal conversation with the captain who recommended discipline for the deckhand. Charles testified that she reviewed the captain’s statement and made the determination that the deckhand did not follow instructions. Charles then reviewed the deckhand’s personnel file which included a prior final warning. Based on the disciplinary history, the deckhand was terminated. Notably, no disciplinary action was taken against the captain for the deckhand’s performance by either the Employer or the Coast Guard. Buckley testified that he gave the captain a verbal warning but did not record the verbal warning as a discipline.

In April 5, 2018, a captain had a deckhand removed from the vessel for poor work performance. Specifically, the deckhands loaded passengers on the wrong slip. The captain asked

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\(^9\) Additionally, the captain who assigned the deckhand to monitor the passengers that jumped also wrote a report detailing the facts of the incident but did not include a discipline recommendation.

\(^10\) There is no evidence of who attended the meeting other than the deckhand.

\(^11\) The captain was not disciplined for improperly supervising the deckhand because the deckhand was on the crew shuttle as a passenger and was not assigned to work at the time.
both deckhands to report to the pilothouse to discuss it. One deckhand yelled at the captain and used foul language. The captain told her that she was getting off his boat. The captain then called the port captain on duty and requested that the deckhand be removed from the boat and replaced with a different deckhand. The port captain reviewed the camera footage and then arranged for a deckhand swap at Pier 11. Buckley testified that the captain made the decision to remove the deckhand and the port captain merely coordinated the exchange, notwithstanding that the port captain first reviewed the camera footage before arranging the swap. In the disciplinary action form, the Employer wrote “[a]fter discussing the incident with [the captain] and reviewing video footage recorded in the pilot house of [the vessel], Marine Operations instructed that [the deckhand] disembark the vessel at Pier 11 to be replaced by another deckhand.”

The captain emailed a report two days after the incident describing the deckhand’s poor performance over the past few days, noting that the other deckhand completed the majority of the deckhand tasks including engine room checks, opening the doors and lowering the ramp at every landing, watching the stern, and the majority of the end of shift cleaning. The captain stated that the deckhand was disrespectful, unprofessional and rude. He concluded his email by stating that he did not want the deckhand working on his boat because she did not respect him. The email did not mention discipline or provide any discipline recommendations.12

Following the captain’s email, the Employer performed an investigation, collected written statements from multiple employees and reviewed video footage from the pilothouse, main cabin, and exterior decks. Based on that investigation, the Employer determined that the deckhand confronted the captain in an aggressive and insubordinate manner. The Employer also reviewed video footage of prior shifts that the deckhand worked with the captain and observed that she, among other things, frequently violated the Employer’s cell phone policy, failed to perform engine room checks, failed to be stationed properly for watches and boarding, and failed to fully participate in shared cleaning and maintenance responsibilities. As a result, the Employer issued the deckhand a final written warning with a five-day suspension. The disciplinary action form states that the deckhands conduct violated the Employer’s behavior standards and that she was “not performing routine deckhand job responsibilities up to company expectations.”13

4. Captain’s Authority to Effectively Reward

As part of the captains’ job duties, they provide feedback on the deckhands’ performance. Buckley testified that the Employer relies on the captains to provide feedback because they are with the deckhands all day. Around January 2018, the Employer provided each captain a packet of feedback forms for every deckhand. The forms were created by Buckley, the port captains, and the Human Resources department. In the instructions attached to the packet, the Employer states, “[p]lease use the enclosed forms to provide feedback regarding the deckhands you have

12 Charles testified that Buckley and the captain had a discussion about what action to take but she was not privy to it.

13 Charles testified that the deckhand was disciplined because she did not follow the captain’s instructions when it came to performance.
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worked with this year.” It goes on to state, “[i]f you identify any of these skills as a particular
strength or weakness, recording that feedback will greatly help us tailor individual deckhand
evaluations.” Buckley also spoke with captains and told them that the Employer was going to use
their feedback as part of the deckhand evaluation form.

To complete each feedback form, the captain answers 20 “yes or no” questions and rates
deckhands on a score of 1 to 5 in three categories: Teamwork, Deck General, and Customer
Service. There is also a space at the bottom of the feedback form to fill in additional comments.\footnote{For example, the Employer introduced into evidence a packet of one captain’s feedback forms for all deckhands. Of the 80 feedback forms, only three contains additional comments that included, “A well-educated Knowledgeable pain in the ass,” “Displays a thorough understanding of Duties and Responsibilities,” and “Quick Learner, shows interest and asks questions. Would do well if paired with an Experienced Deckhand.”}

If the captain could not provide feedback because he or she was not familiar with a particular
deckhand, the captain could check a box labeled “Check if skipped intentionally” and not
complete a form for that deckhand.\footnote{The feedback form packet in evidence contains 39 completed forms and 31 forms where the “skipped intentionally” checkbox was checked.} The feedback form instructions and the form itself do not
specify how the feedback will be used, or for what purpose. The form does not specify that it will
be utilized to determine whether an employee should be rewarded or promoted.

After the captains completed and returned the packet, the Employer created a Google
spreadsheet which had the captains listed in rows and deckhands listed in columns. Each
deckhand column was further divided into three columns, one for each category score,
Teamwork, Deck General, and Customer Service. The scores from the captains’ feedback forms
were inputted into the spreadsheet. The Employer then took an average of the category scores,
resulting in three averages. The Employer then took those three averages and averaged them
together for an overall feedback average. The Employer also included an attendance score from 1
to 5, based on attendance records, as well as, a uniform score from 1 to 5, based on whether
deckhands wore their proper uniforms. Buckley testified that the uniform score was developed
by port captains based on their observations as well as feedback from the captains. The Employer
then calculated the average of the overall feedback average score, the attendance score, and the
uniform score, with the feedback average weighted three times as much, to calculate an overall
average score. Buckley testified that the overall average scores were given to deckhands on their
annual performance evaluations in April 2018.\footnote{Any comments that captains included in the “Additional Comments” section of the feedback forms were also inputted into the spreadsheet. Buckley and the port captains then inserted those comments into the deckhand performance evaluations. None of the additional comments recorded in the spreadsheet reference raises or promotions.}

Buckley further testified that the final overall average scores that the deckhands received
were used to establish a pay increase on their hourly rate as part of their evaluations. Buckley
could not recall if there was a document that showed the relationship between the scores and
raises. Buckley also stated that he and the port captains make the ultimate decisions on raises, not
the captains.
The deckhands received annual performance evaluations in April 2018. Charles testified that she created the evaluation form based on the factors listed in the feedback forms. At the top of the performance evaluation, it lists the deckhand’s name and title and lists the port captains as the supervisor.

The evaluation was broken down into 3 sections, Company Culture, Performance, and Strengths and Opportunities. At the end of the evaluation, there was a summary and signatures section that listed “current hourly wage,” “new hourly wage,” and “new overtime rate,” as well as signature lines for the deckhand, manager which was either Buckley or a port captain, and Human Resources. Captains do not sign the performance evaluations and they do not review them at any stage. Additionally, the Employer did not ask captains whether any particular deckhand should receive a raise.

The Performance section of the evaluation was broken down into the following performance areas: Deck General, Customer Service, Teamwork/Cooperation, Grooming/Standard of Appearance, Safety and Housekeeping, and Attendance. For each of those areas, the Employer awarded a rating of Front Runner, Pace Setter, Core Performer, Needs Improvement, or Under Performer. Additionally, there is a Notes section after each area. According to Charles, the feedback scores and the ratings on the evaluations are linked and the Employer gave names to the possible 1 through 5 scores. Thus, if the employee scored low, they would be an Under Performer or Needs Improvement. Port captains completed the evaluations by taking the average feedback scores and converting them to ratings. Port captains also took captains’ comments from the feedback forms and inserted them into the Company Culture, Strengths and Opportunities, or the Performance notes sections. The evaluations were then sent to Charles, who reviewed them and sometimes asked the port captains to provide more specific details or give an example in the notes sections. Charles then would decide the amount of a wage increase, if any, based on the evaluation ratings.

There is no evidence of any negative consequences for captains if a deckhand receives a poor performance evaluation. Additionally, there is no evidence that deckhand performance or direction of deckhands are criteria or factors in the annual performance evaluations for captains.

5. Captain’s Authority to Effectively Recommend Promotion

In addition to using the feedback forms for annual evaluations, Buckley testified that the feedback also impacted whether deckhands were eligible for promotion to senior deckhand or captain. Current deckhands submit resumes when a promotional position is available. Buckley, port captains, and Charles will then conduct interviews and review their feedback scores. Buckley stated the feedback scores are not the sole factor in determining a promotion and there are many different factors that contribute to the Employer’s decision. In addition to the feedback forms, Buckley also had direct conversations with captains as to whether a particular deckhand should be promoted. Buckley also testified that he and the port captains make the ultimate decision of who gets promoted. Charles recalls one specific instance in June or July 2018 where she suggested that a deckhand be promoted but Buckley and the port captains told her the Employer cannot promote her because her captain feedback is not great. There is no
documentary evidence specifying which deckhand Charles mentioned or what her feedback scores were compared any other deckhands who sought the promotion.

6. Captain’s Involvement in Other Areas

Charles testified that captains provide feedback during deckhands’ initial 90-day probationary periods. Charles recalled one occasion where two captains told her that a certain deckhand was not following instructions and not helping out. As a result, the Employer terminated that employee during their probationary period.

The crew member handbook states that “the initial employment period gives the Crew Member’s supervisor a reasonable period of time to evaluate performance.” No written evaluation forms for captains to evaluate deckhands were adduced, however, Charles testified that port captains complete 90-day reviews for each employee based on captain feedback. There is no section in those reviews that captains complete.

According to Buckley, captains are also responsible for training the deckhands, as well as, those who are training to become a captain. Port captains initially train deckhands when they are hired. Once deckhands are approved for service, the Employer expects that captains and senior deckhands continue to train deckhands to perform their job well.

Captains are involved with the training of captain trainees, who are deckhands that have captain’s licenses and want to become captains. The Employer can schedule the captain trainees for split shifts where they perform deckhand duties for part of the day and after the vessel comes out of service, a captain can train the trainee on operating the vessel. If a trainee does something that causes damage or injury while operating the vessel and the captain is the captain of record, that captain could be held accountable for it and disciplined. According to Buckley, the Employer receives feedback and information from the captain throughout the training process and the captain completes training assessment forms that rate the trainee’s job performance in boat handling, traffic awareness, and bridge resources. The assessment also includes a recommendation about whether to continue or not continue the training and whether the trainee is ready for ride-along shifts. Buckley testified that he and the port captains make the decision to remove a trainee from the program, but they take a captain’s recommendation very seriously. Buckley also testified that he and the port captains decide which trainee will get promoted and the order in which they will be promoted.

 Charles stated that there is a “50/50 possibility” that captains email their feedback to the port captains but the Employer failed to introduce any specific evidence of such emails.
II. LEGAL PRINCIPLES AND ANALYSIS

A. Supervisory Status

Section 2(11) of the Act defines supervisors as follows:

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

To establish that the individuals are supervisors, the party asserting supervisory status must show: (1) that they have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and, (3) that their authority is exercised “in the interest of the employer.” Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006). A party can prove the requisite authority either by demonstrating that the individuals actually exercise a supervisory function or by showing that they effectively recommend the exercise of a supervisory function. Id. at 88. The authority to effectively recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. See Children’s Farm Home, 324 NLRB 61, 61 (1997). Where “putative supervisors are not shown to possess any of the primary indicia of supervisory status enumerated in Sec. 2(11), secondary indicia are insufficient to establish supervisory status.” Golden Crest Healthcare Center, 348 NLRB 727, 731, fn. 10 (2006).

In considering whether the individuals at issue here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors rather than “straw bosses, leadmen, set-up men and other minor supervisory employees.” Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. Id. at 1689. Indeed, such “minor supervisory duties” should not be used to deprive such individual of the benefits of the Act. NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4). In this regard, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protections of the Act. See, e.g., Vencor Hospital - Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997).

The party asserting that an individual has supervisory authority has the burden of proof. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001); Dean & Deluca New York, Inc., 338 NLRB 1046 (2003). “[W]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” Phelps
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Community Medical Center, 295 NLRB 486, 490 (1989); see also Brusco Tug & Barge, Inc., 359 NLRB 1099 (2012), incorporated by reference at 362 NLRB No. 28 (2015). Purely conclusory evidence is not sufficient to establish supervisory status; rather the party must present evidence that the employee actually possesses the Section 2(11) authority at issue. Lynwood Manor, 350 NLRB 489, 490 (2007). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere “paper accountability,” absent independent evidence of the possession of the described authority. Golden Crest Healthcare, 348 NLRB at 731, citing Training School at Vineland, 332 NLRB 1412, 1416 (2000).

In applying the above-mentioned case law, and based on the record evidence, as amplified below, I conclude that the evidence is insufficient to establish that the job classification of Captain is a supervisory position within the meaning of Section 2(11) of the Act. Therefore the petitioned-for unit of captains is appropriate.

1. The Authority to Assign

The authority to assign also demonstrates supervisory status. The Board has defined “assign” to mean the “designating of an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” Golden Crest Healthcare, 348 NLRB at 728, citing Oakwood Healthcare, 348 NLRB at 689. To prove independent judgment, it must be shown that, when the putative supervisor makes a decision exercising the supervisory authority, that decision is “free of the control of others” and “not..., dictated or controlled by detailed instructions.” Oakwood Healthcare, 348 NLRB at 687. As such, “ad hoc instruction that [an] employee perform a discrete task” is insufficient to establish supervisory status. Id. Further, in order to establish authority to assign, the disputed supervisor must have “the ability to require that a certain action be taken.” Golden Crest Healthcare, 348 NLRB at 729 (emphasis in original). The Board will not find supervisory status where the assignments are “routine” and not “based on anything other than the common knowledge, present in any small workplace, of which employees have certain skills and which employees work well together.” Armstrong Machine Co., Inc., 343 NLRB 1149, 1150 (2004).

The Employer has failed to establish that captains assign employees to a designated route, shift, time, or vessel. Port captains create the deckhand schedule and assign deckhands to their shifts, vessels and routes. Captains do not have the authority to transfer deckhands from one vessel to another, nor do they have the ability to assign overtime. While the Employer asserts that captains have the authority to cut a route short or not stop at a particular port, there is no evidence that deckhands were impacted by having their start or end times changed or cut short. To the contrary, Buckley testified that if a captain decides to stop running a route, captains and deckhands work the remainder of their shift conducting inspections or drills. Thus, there is insufficient evidence to conclude that captains have the authority to assign by designating a deckhand to a place or a time. See Cook Inlet Tug & Barge, Inc., 362 NLRB No. 111, slip op. at 1-2 (2015) (captains do not exercise supervisory assignment authority where, inter alia, they are not involved in setting work schedules of deckhands even though they determined the specific hours the crew worked).
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The Employer also failed to establish that captains assign or create “significant overall
duties” for deckhands. The record reflects that the captains do not assign daily overall duties to
deckhands. Rather, the port captains and Buckley, via the Daily Vessel Checklist, the Boarding
Procedure, the SMP, and emailed instructions, assign overall daily tasks. As Atzert testified,
deckhands know exactly what is expected of them and “follow the script” when they report to
duty. Thus, the evidence shows that deckhands report to the vessel assigned to them by the port
captains, and they follow the checklists and procedures to perform their duties. The Daily Vessel
Checklist provides detailed instructions to the deckhands as to their pre- and post-sail duties, as
well as, their hourly checks and cleaning responsibilities. Similarly, the Boarding Procedure lays
out the deckhands’ exact duties while boarding and unloading passengers. Moreover, any
instructions from captains to deckhands to perform duties on the checklist or boarding
procedures, such as instructing a deckhand to check a bilge alarm, perform an additional
walkthrough, or open a gate, are not sufficient to establish assignment authority. See Oakwood
Healthcare, 348 NLRB at 687 (no independent judgment where assignment “dictated or
controlled by detailed instructions”).

Additionally, the majority of the evidence that the Employer claims establishes the
captains’ authority to assign, including telling deckhands to monitor passengers, serve as
lookouts, and check on alarms, “constitutes ad hoc instructions to perform discrete tasks, not
assignment in the statutory sense.” Cook Inlet Tug & Barge, 362 NLRB No. 111, slip op. at 1,
citing Brusco Tug & Barge, 359 NLRB at 490, Oakwood Healthcare, 348 NLRB at 689, and
Frenchtown Acquisition v. NLRB, 683 F.3d 298, 311-12 (6th Cir. 2012). The Board has found
similar ad hoc instructions insufficient to establish supervisory status. For example, in Brusco
Tug & Barge, the Board held that the mates’ directions to deckhands on tasks such as “which
side to tie up on, which lines to tie up, where the deckhand should stand, and whether to tighten
or loosen the push wires concern only discrete tasks within the overall assignment” and
constitute nonsupervisory, ad hoc instructions. 359 NLRB at 491. Similarly, in Cook Inlet Tug &
Barge, captains’ instructions to deckhands to “close hatches, bring in winches, and have relevant
equipment ready for use” were ad hoc instructions to perform a discrete task. 362 NLRB No.
111, slip op. at 1. Thus, the ad hoc assignments here are not sufficient to confer supervisory
status.

While the Employer asserts that captains also have the ability to select a particular
deckhand of the two assigned deckhands—based on the captain’s familiarity with the deckhands’
skills and whether they can perform the task, the Board has held that such routine assignment
lacks independent judgment to establish supervisory authority. See Cook Inlet Tug & Barge, 362
NLRB No. 111, slip op. at 2 (“[B]asing an assignment on whether an individual is capable of
performing the job does not involve independent judgment”); Shaw Inc., 350 NLRB 354, 356 fn. 9
(2007) (“Assigning employees according to their known skills is not evidence of independent
judgment”); Armstrong Machine Co., Inc., 343 NLRB at 1150 (routine assignments based on
“the common knowledge . . . of which employees have certain skills . . .”). Thus, the Board will
not find supervisory status where individuals assign tasks on the basis of a binary choice of
whether the assignee is capable of performing the work. See Croft Metals, 348 NLRB 717, 722
(2006) (switching of tasks by lead persons among employees assigned to their line or department
was insufficient to confer supervisory status); Central Plumbing Specialties, 337 NLRB 973, 975
(2002) (finding employee who gave out work assignments, moved employees from one activity

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to another, told drivers which deliveries to make, and instructed employees to unload trucks when deliveries were made, was not a supervisor where evidence did not also show that such assignments involved independent judgment). See also \textit{CHS, Inc}, 357 NLRB 514, 514 fn. 3 (2011) (no independent judgment where purported supervisor trained most of the employees to whom he assigned work).

Here, the record contains no evidence that the assignments over which captains have discretion require any specialized skill on the part of the captain beyond individual preference as all deckhands undergo the same training and are capable of performing their assigned tasks. \textit{Brusco Tug \\& Barge Co.}, 359 NLRB at 486 (independent judgment not shown in absence of detailed specific evidence on putative supervisor selecting one employee over another to perform a particular task). Compare, e.g., \textit{Oakwood Healthcare}, 348 NLRB at 689 (describing scenario where a nurse uses independent judgment where she must weigh employees' different skill levels and training in assigning them to patients). Thus, I find that the evidence fails to establish that the "assignments" are made with any supervisory discretion as required by \textit{Oakwood Healthcare}.

Further, in \textit{Brusco Tug \\& Barge}, the Board held that a mate's instructions to deckhands during adverse weather, emergencies, and drills failed to establish 2(11) assignment authority. 359 NLRB at 490-91. See also \textit{Entergy Mississippi Inc.}, 357 NLRB 2150, 2157 (2001) (removing field employees from their assigned tasks to work on a trouble case is mere ad hoc instruction); \textit{Greenpark Care Center}, 231 NLRB 753, 755 (1977) (where the assignment is temporary in nature, its duration being only the time needed to assist during the emergency or absence, the transfer of employees is insufficient to confer supervisory status). In \textit{Brusco Tug \\& Barge}, the instructions did not demonstrate the necessary independent judgment because the vessel's station bill set forth each crewmember's responsibility, and in those occasional situations, the mate merely ensured that the deckhands carried out their duties that the station bill specified. 359 NLRB at 491. See also \textit{Cook Inlet Tug \\& Barge}, 362 NLRB No. 111, slip op. at 2 fn. 9 ("station bill stated that deckhands should 'report to the captain assist as directed' in emergency situations"). Similarly, here the Employer's policies, via its own emergency station bill, Training Talk drill binder, and its SMP, outline captain and deckhand responsibilities and assignments during emergencies and drills. Thus, while the Employer asserts captains assign deckhands duties during emergencies and adverse weather, it failed to establish that any of the assignments fall within the scope of "significant overall duties," but are instead discrete ad hoc tasks as contained in the Employer's policies.

I further note that the record evidence regarding emergencies is merely hypothetical, lacking in specificity and first-hand testimony, and therefore, fails to establish independent judgment. See \textit{Cook Inlet Tug \\& Barge}, 362 NLRB No. 111, slip op. at 2 fn. 9 (no finding of independent judgment where "record contains no examples of a captain making assignments in emergency situations and no indication of what they would consider in such situations"); \textit{Chevron Shipping Co.}, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without specific explanation are insufficient to establish supervisory status). Here, there was only generalized testimony that captains instruct crew during emergencies and there were no examples of actual assignment in emergency situations.
Lastly, while some evidence shows that captains can decide not to serve particular terminals or shut down a route because of adverse weather, the Employer failed to establish that such a choice demonstrates that captains exercise assignment authority. In that regard, Buckley testified that if a vessel comes out of service for weather or another emergency situation, Buckley and the port captains instruct the captain to stay out and run drills with the deckhands, or come back to home port and perform safety inspections. Thus, the captains do not decide what to do with the vessel or the deckhands after a vessel comes out of service. Accordingly, I find that the Employer failed to establish that captains assign within the meaning of Section 2(11).

2. The Authority to Responsibly Direct

The Board defines “responsibly to direct” as: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ and carried out with independent judgment.” Golden Crest Healthcare, 348 NLRB at 730, citing Oakwood Healthcare, 348 NLRB at 691. The Board has held that, for the direction to be “responsible,” the person directing the performance must be held accountable for the performance. Golden Crest Healthcare, 348 NLRB at 730. Regarding this accountability element, the Board has explained:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

*Id.*, citing Oakwood Healthcare, 348 NLRB at 692.

Even if a putative supervisor is found to direct the performance of others, the employer will not be able to establish supervisory status absent evidence that “the putative supervisor’s rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person’s terms and conditions of employment.” *Id.* at 731. Here, then, the Employer must show that captains exercise independent judgment in deciding whether deckhands’ performance meets appropriate standards; that they can take corrective action in response to deficient performance; and that they are held accountable for deckhands’ performance and can suffer adverse consequences if those deckhands perform poorly. Community Education Centers, Inc., 360 NLRB 85, 85 (2014). The Employer must establish that “captains are held accountable for errors of their crew members... including a[] showing of an adverse consequence that would befall a captain for a deckhand’s poor performance.” Buchanan Marine, L.P., 363 NLRB No. 58, slip op. at 1 (2015). The Employer has not made that showing.

The Employer failed to establish that the captains are either held accountable for the poor performance of their crew, or rewarded for the positive performance of their crew. The few instances noted by the Employer where a captain was purportedly held accountable for a deckhand’s mistake or policy violation do not establish responsible direction. Rather, the evidence demonstrates that the captains are accountable for their own work, i.e., their own failure and errors, and not those of the deckhands. See Community Education Centers, 360 NLRB at 85-
A review of the disciplines where captains were allegedly held accountable for deckhand performance shows that the captain was disciplined for his or her own performance issues. For example, of the seven captain disciplines in evidence, two of them were issued because the captains violated the Employer's personal electronic device policy, one was issued where the captain admitted he did not follow proper procedure, another was issued where the captain failed to properly inspect the vessel prior to departure, another was issued because the captain violated the Employer's boarding policy, and another was issued because the captain improperly denied entry to a passenger. In the remaining discipline where the captain asked a deckhand to stand watch at the helm, the captain was disciplined for failing to give instructions and guidance to deckhand prior to going to the restroom. The captain was not disciplined for the deckhand's poor performance, i.e., wrongly attempting to position the vessel after a wake caused it to rock back and forth. See e.g., Buchanan Marine, L.P., 363 NLRB No. 58, slip op. at 3 fn. 4 (evidence did "not show that the captain's accountability for a late-arriving vessel is based on failings of the mate as opposed to the captain's own failure"). As such, the Employer did not meet its burden of showing that captains are held accountable for deckhands' performance and can suffer adverse consequences if those deckhands perform poorly.

Indeed, the Employer introduced evidence of four deckhand disciplinary forms where deckhands were disciplined for poor performance. However, the Employer failed to produce any evidence that the captains directing those deckhands suffered any adverse consequences at all, including any formal disciplinary action, for their failure to take corrective action.

The Employer also failed to establish that deckhand performance had any impact, positive or negative, on the evaluations, pay, or job tenure of captains. Additionally, no captain evaluations were offered in evidence and thus, no documentary evidence supports that captains are evaluated on their ability to direct deckhands or suffered negative consequences for poor performance of the deckhands. Despite ample testimony from the Employer about deckhand performance reviews, there was no testimony about captain performance reviews. This lack of evidence is construed against the Employer, as the party asserting supervisory status. Elmhurst Extended Care Facilities, Inc., 329 NRLB 535, 536, fn. 8 (1999).

Additionally, the Employer failed to show that its Safety Management Program (SMP) establishes that the Employer holds the captains accountable. Although the Employer's SMP states that the captain has the overriding authority and responsibility with respect to safety and pollution prevention on the vessel in accordance with United States and international law, and that the captain receives that authority from the highest levels of company management, none of the provisions of the SMP state that the captain will suffer any specific adverse consequence to his employment if a deckhand does not follow the required procedure. Instead, the SMP merely states that captains are "responsible" for safety which is insufficient to establish accountability. See Buchanan Marine, L.P., 363 NLRB No. 58, slip op. at 3.

Contrary to the Employer's argument on the record, I find that the United States Court of Appeals for the Second Circuit's decision in Spentonbush/Red Star Cos v. NLRB, 106 F.3d 484 (2d Cir. 1997) is not applicable here. Unlike that case, the Employer did not establish that captains could be held accountable through the loss of a captain's license for a deckhand's
failure to follow Coast Guard rules and regulations. While Buckley testified that captains need to maintain a license from the Coast Guard and that the Employer won’t schedule a captain who does not have a license, the record does not show that captains could lose their licenses if deckhands fail to follow Coast Guard rules and regulations. In any event, as the Board has stated, that decision has limited precedential value. See Buchanan Marine, L.P., 363 NLRB No. 58, slip op. at 2 ("questions of supervisory status under Section 2(11) of the Act cannot be answered merely by the assertion of maritime law [and] the two statutory schemes serve separate purposes, and the existence of authority that derives from the privileges and obligations of maritime law . . . doesn’t answer the questions posed by the 2(11) indicia of supervisory status"), citing Brusco Tug & Barge, 359 NLRB 493.

Although the Employer asserts that captains are supervisors and accountable based on their job titles and descriptions, hierarchy within the company structure, and testimony by Buckley and Charles that the captain is the direct supervisor of deckhands on the vessel, the Board has long held that evidence of actual authority trumps paper authority. Valley Slurry Seal Co., 343 NLRB 233, 235 (2004), Franklin Home Health Agency, 337 NLRB 826, 829 (2002); Oakwood Healthcare, 348 NLRB at 690 fn. 24 (rather than job titles and descriptions, the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor). Thus, the captain job description that states, in part, that captains “supervise onboard employees” and the deckhand job description states deckhands report to the captain, are insufficient to establish 2(11) supervisory status without actual evidence of direction.

Thus, the Employer has failed to establish that captains responsibly direct employees within the meaning of the Act because it did not present any specific evidence indicating that they are held accountable for their direction. As in Golden Crest Healthcare, the Employer has failed to demonstrate that any supervisor “has experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing,” and has not established that there is even “a prospect” of such material consequences. 348 NLRB at 731 (emphasis in original).

3. The Authority to Discipline or Effectively Recommend Discipline

The Employer may also establish supervisory status by showing that disputed supervisors have the authority to discipline or effectively recommend the discipline of employees. To effectively recommend discipline, “the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management.” Veolia Transportation Services, Inc., 363 NLRB No. 98, slip op. at 7 (2016).

The Employer has not met its burden in demonstrating that the captains have authority to discipline or effectively recommend discipline of the deckhands. The Employer’s progressive discipline policy contains four steps: verbal warning, written warning, final warning, and termination. Importantly, the record does not show that captains can issue or have the authority to issue any level of discipline including verbal or written warnings. Captains do not complete, sign, or even review disciplinary action forms before they are issued to deckhands. Thus, it is undisputed that captains do not discipline deckhands.
The Employer claims that captains effectively recommend discipline because (1) they report deckhand misconduct and other incidents to Buckley and port captains and (2) they provide a verbal recommendation of discipline. It is undisputed that none of the reports or emails introduced into evidence contain a written recommendation. Such reports, standing alone cannot establish authority, because factual accounts that do not include any recommendation are not supervisory. *Ohio Masonic Home*, 295 NLRB 390, 393-94 (1989). The Board has held that “[a]n employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will affect employees’ job status.” *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). See also *Loparex LLC*, 353 NLRB 1224, 1237 (2009) (Board held shift leaders were not 2(11) supervisors where the employer admitted shift leaders “do not mete out discipline to their employees,” but only “report performance related problems”), enforced 591 F.3d 540 (7th Cir. 2009); *Rest Haven Nursing Home*, 322 NLRB 210, 211-12 (1996) (LPNs whose involvement in the disciplinary process was to report problems to management were not 2(11) supervisors); *Ken-Crest Services*, 335 NLRB 777, 778 (2001) (program managers were not supervisors because their “limited role in the disciplinary process is nothing more than reportorial”).

Here, the emails and written reports that captains send to Buckley and port captains do nothing more than serve as a recitation of events. When an alleged supervisor does “little more than report employee infractions to management,” such action does not constitute discipline or an effective recommendation. *Willamette Industries*, 336 NLRB 743, 743 (2001); see also *Veolia Transportation*, 363 NLRB No. 188 (2016) (merely reporting incidents insufficient for finding of supervisory authority). As such, in the instant case, captains’ reporting function to Buckley and the port captains of deckhand misconduct and performance issues does not render them supervisors.

As to the discipline recommendations via verbal discussions, there is no evidence of any instance where the recommended action was taken without independent investigation by port captains or Buckley, or that the Employer simply “signed off” on the captains’ recommendations. While Buckley summarily testified that the Employer relies on a captain’s recommendation when one is provided, the Employer’s own witnesses gave testimony that indicates an independent investigation takes place. Thus, Charles admitted that she asks Buckley if he reviewed camera footage prior to issuing each discipline. Additionally, there is evidence that an independent investigation occurs to determine the level of discipline to issue. In that regard, Buckley testified that captains generally only recommend discipline but do not specify what action should be taken, while Charles admitted that she personally reviewed every deckhand’s personnel file prior to issuing discipline to determine what discipline to issue.

Moreover, the disciplinary forms state that the Employer reviewed video footage, collected written statements, and spoke to the deckhands involved, prior to issuing the discipline. Thus, the Employer has not established that captains made recommendations to discipline employees and such recommendations were typically accepted by upper management without further investigation. Compare *Progressive Transportation Services*, 340 NLRB 1044, 1044-46 (2003) (individual found to have authority to effectively recommend discipline where she signed disciplinary notices on the line designated for “supervisor signature” and issued them to offending employees after she brought disciplinary issues to the attention of her superior, who
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did not conduct an independent investigation of the incident but rather decided the level of discipline and advised the individual on the wording of the discipline notice based on the incident as the individual described it) and Mountaineer Park, Inc., 343 NLRB 1473, 1474-75 (2004) (Director of Housekeeping routinely “sign[ed] off” on disciplinary recommendations made by purported supervisors “without conducting any sort of investigation”) (emphasis in original).

The Employer also claims that as part of the disciplinary process, captains can remove deckhands from vessels. The record reflects one instance where a deckhand was removed in the middle of a shift. Even assuming that the captain had power to remove the deckhand, he did not effectively recommend discipline. Instead, a port captain reviewed onboard camera footage before arranging for a new deckhand to replace the poorly behaving one. Thus, the Employer conducted an independent investigation prior to removing the deckhand. Further, there was no evidence that the offending deckhand who was removed suffered any adverse consequences at the time, including docking pay, cutting the shift short, etc. See Veolia Transportation, 363 NLRB No. 188, slip op. at 8 (employer failed to establish that removal from service constitutes discipline). Moreover, after the deckhand was removed, the Employer engaged in an extensive independent investigation to determine if discipline was warranted based on continued poor performance. According to the disciplinary action form that was ultimately issued, the Employer collected written statements from at least three people, reviewed video footage of the day in question, and also reviewed video of prior shifts that the deckhand had worked.

Thus, the evidence is insufficient to establish that captains have the authority to discipline employees or to effectively recommend such actions because their written statements are reportorial and any verbal discipline recommendations are not taken without independent investigation.

4. The Authority to Effectively Recommend Reward

The Employer contends that captains effectively recommend employee rewards for the purposes of Section 2(11). In support of this, the Employer relies on: (1) the fact that captains complete deckhand feedback forms and (2) testimony that those feedback forms are the basis for deckhands’ annual performance evaluations that determine whether a deckhand receives a raise.

The authority to evaluate is not one of the indicia of supervisory status set out in Section 2(11) of the Act. See Elmhurst Extended Care Facilities, 329 NLRB at 536. Nevertheless, the Board analyzes the evaluation of employees to determine whether it is an “effective recommendation” of promotion, wage increase, or discipline. Phelps Community Medical Center, 295 NLRB at 490; GS4 Regulated Security Solutions, 358 NLRB 1701, 1703 (2013). If the evaluation does not, by itself, directly affect the wages and/or job status of the individual being evaluated, the Board will not find the individual performing the evaluation to be a statutory supervisor on that basis. See Williamette Industries, 336 NLRB at 743; Vencor Hospital - Los Angeles, 328 NLRB at 1140.

To establish that participation in an evaluation process constitutes the effective recommendation of reward the evidence must show: (1) pay changes as a possible result from the
evaluation; (2) a direct correlation between the employee evaluations and the evaluated employee’s merit increases; and (3) no independent investigation or alteration by the putative supervisor’s superiors. NLRB v. Hillard Development Corp., 187 F.3d 133, 145 (1st Cir. 1999), citing Hillhaven Kona Healthcare Center, 323 NLRB 1171, 1171-72 (1997).

The Employer falls short of establishing that captains effectively recommend employee rewards. While deckhands receive annual performance evaluations that may contain raises, captains do not complete those evaluations. Captains only complete individual feedback forms. Most importantly and obviously, those feedback forms that captains complete contain no recommendation from them regarding raises, promotions, or any other type of employee reward. Rather, the captains rate deckhands on a score of 1 to 5 in three categories: Teamwork, Deck General, and Customer Service, and in some instances also write additional comments. The feedback forms do not call for the captains to make recommendations about raises or promotions and there was no evidence that captains injected such recommendations in connection with the feedback forms. Specifically, in a review of the Employer’s spreadsheet that compiled the feedback form data, none of the additional comments referenced rewards, raises or promotions.

Further, although Buckley and Charles testified that feedback forms that captains complete impact wage increase decisions, they conceded that other factors are also considered, including attendance and adherence to the uniform policy. The Board requires a direct correlation between an evaluation and a resulting personnel action. It is not sufficient that an evaluation is one of the factors considered. Elmhurst Extended Care Facilities, 329 NLRB at 536-538; Modesto Radiology Imaging, 361 NLRB 888, 889-890 (2014) (it is not enough that appraisals “play a role” and are “one of the criteria considered” in determining employees’ wage increases); Ten Broeck Commons, 320 NLRB 806, 813 (1996) (merit increases determined by a combination of factors and not solely on the employee’s performance appraisal). Compare Bayou Manor Health Center, 311 NLRB 955, 955 (1993) (LPs assigned numerical scores to a number of items covering work performance and personal characteristics, and the scores given directly determined the amount of the employee’s merit increase and departmental bonus, with no other factors considered). Thus, the captains’ limited participation in the evaluation process is insufficient to establish statutory supervisors.

Even assuming the feedback ratings could be used as recommendations regarding raises or promotions, the evidence does not show that such recommendations were “effective.” While the Employer claims that the feedback scores are directly linked to raises, the Employer did not establish who was responsible for determining that breakdown, i.e., a score of 4.0 or more equaled a fifty-cent wage increase, or who was responsible for determining the amount of a raise. The record was also devoid of any discussion of what numerical score was necessary for an increase. Instead, the Employer relied on imprecise testimony that the feedback form-scores are linked to the performance evaluation scores which grant rewards. Further, the Employer made no attempt to explain how it determined ratings for the Grooming/Standard of Appearance, Safety and Housekeeping, and Attendance sections of the evaluations, which do not have the same titles as the feedback form categories. The burden is on the Employer to show that captains effectively recommend reward. Even assuming that the feedback ratings could be seen as reward recommendations, the incomplete and vague evidence that the Employer relies on is not sufficient to meet the burden of showing that those recommendations were “effective.”
Additionally, the fact that someone other than the captains created the breakdown of what scores receive what raise, demonstrates that there is independent investigation and alteration by the Employer of any alleged recommendation of a pay raise. Moreover, the record contains no examples that an evaluation resulted in a pay increase based solely on a captain’s input.

Additionally, the Employer did not show that it informed captains that the feedback forms they were completing were used by the Employer as effective recommendations for raises. The Employer’s instructions, at most, stated that the feedback “will greatly help us tailor individual deckhand evaluations” but did not specify how the feedback would be used, for what purpose, or that it would be used to determine raises. Even Buckley’s testimony only stated that he spoke to the captains and informed them that the Employer was going to use their feedback as part of the deckhand evaluation form, but did not mention anything about raises. The Board declines to find supervisory status based on alleged authority that the putative supervisors were not notified they possessed. *Golden Crest Healthcare*, 348 NLRB at 730 fn. 9. For this reason, as well as those discussed above, the Employer has failed to establish that captains effectively recommend reward.

5. The Authority to Effectively Recommend Promotions

The Employer argues that captains are able to effectively recommend promotion because their feedback is considered in deciding to promote deckhands to senior deckhand or captain positions. However, as stated above, the authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB at 61. There is no evidence that captains are able to select or effectively recommend the individual that is promoted to senior deckhand or captain. Importantly, the feedback forms that captains complete contain no recommendation from them regarding promotions. Further, while the Employer asserts that captains also have conversations with management over recommendations for deckhands who are interested in being promoted to the position of senior deckhand or captain, it is undisputed that many different factors contribute to the Employer’s ultimate decision, which is made by Buckley and the port captains. I find that the Employer has not met its burden in establishing that captains, by simply completing feedback forms or offering verbal recommendations, are effectively recommending promotion of deckhands.

6. Secondary Indicia

As the Board noted in *Golden Crest Healthcare*, “[i]t is well established where, as here, putative supervisors are not shown to possess any of the primary indicia of supervisory status enumerated in Sec. 2(11), secondary indicia are insufficient to establish supervisory status.” *Golden Crest Healthcare*, 348 NLRB at 731, fn. 10. In the instant case, the Employer has referenced certain secondary indicia of supervisory status, including that the Employer holds captains out to be supervisors, that the captains earn slightly higher wages than deckhands, that captains play a role in training deckhands and captain trainees, and that the captains are the highest-ranking persons on the vessels. Such factors might bolster a claim of supervisory status, but only where there is evidence that the alleged supervisors possess one or more of the powers set out in Section 2(11). Without such evidence, secondary indicia are not sufficient to justify a
supervisory finding. See Pacific Coast M.S. Industries, 355 NLRB 1422, 1423 fn. 13 (training, pay differential); Williamette Industries, 336 NLRB at 744 (holding out as supervisor); Sam's Club, 349 NLRB 1007, 1014 (2007) (pay differential); House of Mosaics, Inc., 215 NLRB 704, 712 (1974) (training). See also Chrome Deposit Corp., 323 NLRB 961, 962 (1997) (performing on-the-job training is insufficient to establish supervisory status).

It is immaterial that the captain is the "master of the vessel" and the highest-ranking individual aboard the vessel. Similar to the Board in Buchanan Marine L.P., I note that "nothing in the statutory definition of "supervisor" implies that service as the highest ranking employee on site requires finding that the employee must be a statutory supervisor." 363 NLRB No. 58, slip op. at 2. The Board further stated that:

a finding that captains are not supervisors for purposes of the Act does not mean that their commands need not be obeyed by the crew, or that the Employer may not discipline crew members for failing to obey them; it simply means that the captains may vote whether to be represented for purposes of collective bargaining, and be represented as part of a unit that selects a representative.

Id. Thus, I do not need to find that captains possess Section 2(11) indicia solely because they are in charge of the vessel.

Relatedly, contrary to Member Miscimarra's dissents in Cook Inlet Tug & Barge, and Buchanan Marine, L.P., it is not "wholly implausible to conclude that all supervisory authority is vested in individuals on shore and not also in the captains . . . " Cook Inlet Tug & Barge, 362 NLRB No. 111, slip op. at 5 fn. 9 (Miscimarra, dissenting). Those dissents focus on tugboat operations with "work that frequently involves hazardous conditions and substantial variation from job to job" and where the tugboats are generally at sea for several weeks with captains being responsible as the highest-level employee. See Cook Inlet Tug & Barge, 362 NLRB No. 111, slip op at 5 and Buchanan Marine L.P., 363 NLRB No. 58, slip op at 7.

Initially, I note that unlike a tugboat operation, the ferry operation in the instant case is the opposite of "potentially high-risk operations." Cook Inlet Tug & Barge, 362 NLRB No. 111, slip op. at 5 fn. 7 (Miscimarra, dissenting). Here, there is abundant testimony that the Employer's operation is particularly routine, run like a subway line with a predetermined route, on a set schedule. Thus, day in and day out, the vessels make the same stops at the same ports at the same times. There was no evidence presented that the ferry service carries "a risk of catastrophic environmental consequences." Id., slip op at 5 fn. 8.

Importantly, unlike the tugboats in those cases and prior Board cases that were away from port for a significant length of time, the vessels here are never more than a few minutes and a few miles from port. Compare Buchanan Marine, 363 NLRB No. 58, slip op. at 5 (tugboats operate "24 hours a day for up to seven days"); Brusco Tug & Barge, Inc., 359 NLRB at 487 (tugboats at sea for 30 days). Significantly, in describing a scenario where a captain could decide to use a bilge pump at sea or return to home port and pump out water there, Buckley testified that "we're not 80 miles from our home port. We're a mile and a half." Moreover, captains are in constant communication with the port captains on shore about vessel operations, including
weather, personnel, and maintenance issues. See e.g., Chevron U.S.A., 309 NLRB at 71 (where it was found that the absence of statutory supervisors on the boats do not confer any greater authority on the launch captains, noting that the shore-based supervisors may be contacted at any time by radio or telephone). Additionally, port captains have the ability to view livestreams of the onboard cameras, and indeed review footage in real time when necessary.

Further, I note that if captains are found to be supervisors, the ratio of supervisors to employees would be problematic. There are about 39 captains and approximately 90 deckhands, which would result in a 1-to-2 ratio of supervisors to employees. This is an unusually top-heavy ratio. Oakwood Healthcare, 348 NLRB at 715-716; Beverly California Corp. v. NLRB, 970 F.2d 1548, 1555-1556 (9th Cir. 1992) (classifying 25% of nursing home staff as supervisors makes ranks of supervisors “pretty populous”); NLRB v. Res-Care, Inc., 705 F.2d 1461, 1468 (7th Cir. 1983) (33% found to be high); Airkaman, Inc., 230 NLRB 924, 926 (1977) (one to three ratio is unrealistic and excessively high).

In sum, I find that the employer has not satisfied its burden of proving that the captains are statutory supervisors.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer’s rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated, and I find, that the Employer is a Delaware corporation with its principal place of business located at 110 Wall Street, New York, New York, and operations located at and out of the Brooklyn Navy Yard, is engaged in the business of providing transportation services to the public in the City of New York and surrounding areas. During the past 12 months, a representative period, the Employer in conducting its operations, derived gross revenues in excess of $250,000 and purchased and received goods and services valued in excess of $5,000 directly from points outside the State of New York. Accordingly, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. I find that the following unit is appropriate within the meaning of Section 9(b) of the Act:
INCLUDED: All captains.

EXCLUDED: All other employees, including deckhands, part-time employees (those regularly scheduled for 24 hours per week or less), seasonal employees (those scheduled to work 4 months or less), casual employees, shore-based maintenance employees, concession employees, guest service employees, ticket agents, employees working on routes or services pursuant to new contracts, employees working on affiliated, sister company, or third-party contract activities, the Port captain, the Port Engineer, office clerical employees, confidential employees, managerial employees, and guards, and professional employees and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Marine Engineers’ Beneficial Association, District 1-PCD, AFL-CIO.

A. Election Details

The election will be held on Thursday, January 24, 2019, from 10:00 am to 4:00 pm at Brooklyn Navy Yard, GMD Shipyard, Dry Dock 3, Training Room, 63 Flushing Ave, Brooklyn, NY.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending Sunday, January 6, 2019, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.
C. Voter List

As required by Section 102.67(l) of the Board’s Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the regional director and the parties by Friday, January 11, 2019. The list must be accompanied by a certificate of service showing service on all parties. The region will no longer serve the voter list.

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee’s last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency’s website at www.nlrb.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board’s Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working
day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

**RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board’s Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board’s Rules and Regulations.

A request for review may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board’s granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 9, 2019

[Signature]
John J. Walsh, Jr.
Regional Director
National Labor Relations Board
Region 02
26 Federal Plz Ste 3614
New York, NY 10278-3699