

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

SUNRISE OPERATIONS, LLC,)	
)	<u>CONSOLIDATED</u>
Respondent,)	
)	Case No. 20-CA-219534
and)	Case No. 20-CA-227593
)	Case No. 20-CA-230861
INTERNATIONAL ORGANIZATION OF)	
MASTERS, MATES & PILOTS,)	
ILA/AFL-CIO,)	
)	
Charging Party.)	
)	

**RESPONDENT SUNRISE OPERATIONS, LLC'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

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INTRODUCTION AND STATEMENT OF THE CASE

The Board does not have jurisdiction over this case. The Administrative Law Judge's Recommended Decision and Order ("RDO") is incompatible with the undisputed record evidence, material parts of which she simply ignored, and it is contrary to controlling law that applies to those facts. The RDO should be reversed and the Second Consolidated Complaint should be dismissed.

The Charging Party represents a bargaining unit comprised entirely of U.S. Coast Guard Licensed Deck Officers (LDOs)¹ who command Sunrise Operations, LLC's U.S. flag commercial oceangoing cargo vessels operating between the West Coast and Hawaii. The LDOs responsibly direct the work of the unlicensed crew working on these vessels. Pursuant to federal maritime law, the terms of the parties' collective bargaining agreement, international maritime conventions, undisputed evidence on the duties performed by the LDOs and almost 50 years of Board law – some involving the Charging Party – the LDOs are statutory supervisors under Section 2(11) of the Act, and are not covered by the Act.

The ALJ's conclusions are laden with error, as they ignore and conflict with the overwhelming record evidence, most of which is undisputed, and the ALJ relies upon authority that is no longer good law in reaching the determination that the LDOs are not Section 2(11) supervisors. Prominent among the ALJ's errors is her application of dated authority to discern supervisory status that has been rendered null in part by *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706–707 (2001).

Supervisory status is clear based on (i) the record facts establishing the command authority and onerous responsibilities that the LDOs perform daily; (ii) the terms of the parties' collective

¹ The LDOs are the Captain (or Master), Chief Mate (or First Officer), Second Mate and Third Mate. They supervise a crew of 16 – 20 who work on board each vessel.

bargaining agreement, which establish the parties' mutual understanding of nearly 40 years that the LDOs aboard the Sunrise vessels are all supervisors and regularly perform a host of supervisory duties; (iii) Board precedent, which has consistently found that LDOs on deep-sea oceangoing vessels are statutory supervisors; and (iv) the Charging Party's admissions in prior Board cases that the LDOs it represents on vessels like those at issue here are supervisors under the Act; and (v) U.S. maritime law establishing the command authority and responsibility of LDOs over the crew, among other things. 46 U.S. Code Ch. 32; 33 C.F.R. Part 96. Last, it is undisputed that the Charging Party is not certified and has never sought certification under Section 9 of the Act for LDOs serving aboard deep sea cargo vessels.² The ALJ failed to acknowledge or distinguish these facts and authorities.

Second, even if jurisdiction existed, the ALJ's conclusion that Sunrise was the successor to the predecessor vessel owner, thereby obligating Sunrise to contract terms it did not assume when it purchased the vessels, is squarely contradicted by the record and controlling Board authority. Thus, Sunrise cannot be liable for unilaterally changing and/or repudiating collective bargaining agreement terms that it never assumed concerning the location of arbitrations between the parties. Sunrise purchased less than 30 percent of the seller's assets, hired a fraction of the seller's employees and did not continue the seller's business in substantially the same form. And the record evidence refutes the ALJ's conclusion that Sunrise ever adopted or agreed to be bound to an unsigned, incomplete 1984 MOU purportedly obligating Sunrise to arbitrate all grievances at the Union's headquarters in Linthicum Heights, Maryland.

² In plain violation of Section 9 of the Act, the consequence of the RDO is to force Sunrise to recognize and bargain with a mixed unit of supervisors and employees, to which Sunrise has never consented and which is contrary to the parties' mutual intent stated in their CBA that the bargaining unit comprised only supervisors. Reversal of the RDO is required.

Last – again, even if NLRB jurisdiction existed, which it does not – the ALJ’s conclusions that Sunrise violated Section 8(a)(5) by failing to respond properly to various information requests posed by the Charging Party cannot be sustained on the record. Sunrise responded appropriately and timely to the Union’s information requests identified in the Second Consolidated Complaint. Specifically, many of the Union’s requests that Sunrise lawfully refused to comply with sought the identity of directors and officers of Sunrise’s parent organization and other affiliates; the identities of parties owning more than 10 percent of this privately held company; the familial relationships between company officials, organizational charts of companies other than Sunrise’s; and intercompany loans, intracompany financial issues, shared customers, etc. – none of which concern the terms and conditions of employment of the bargaining unit and are altogether irrelevant. Likewise, Sunrise did not violate the Act by failing to provide the Union with extensive and detailed information about new vessels currently under construction that Sunrise neither leases nor owns and will never lease or own. It is undisputed that Sunrise neither has possession nor the control over the drawings and the detailed proprietary information the Union seeks. Finally, Sunrise did not unreasonably delay in providing the Union with an updated roster and calculations regarding wage payments. The evidence demonstrates that Sunrise made a good faith effort to respond to these requests in a timely manner; it did provide the information requested; and the Union suffered no injury as a result of the modest delay in receiving it.

For the reasons explained in this brief, the RDO should be rejected and the Second Consolidated Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

I. BACKGROUND – SUNRISE

Sunrise is a limited liability company that bareboat charters four U.S.-flag oceangoing vessels that transport cargo between the West Coast and Hawaii: the Horizon Pacific, Horizon

Enterprise, Horizon Reliance and Horizon Spirit (collectively, the “Sunrise Vessels”). (Tr. 437.) The Sunrise Vessels are large 893 feet-long by 105 feet-wide container steamships, each weighing 12,000 tons and carrying approximately 25,000 tons of cargo. (*Id.*) The Sunrise Vessels are powered by 32,000 horsepower engines and cruise at 24 miles per hour. (*Id.*) At this speed, it takes the Sunrise Vessels approximately one mile to come to a full stop and approximately half of a mile to complete a full circle. (Tr. 447–448.)

The Sunrise Vessels primarily travel two routes: the first route runs from Honolulu to Oakland, Oakland to Los Angeles, and then Los Angeles to Hawaii; and the second route runs from Los Angeles to Honolulu and Honolulu back to Los Angeles. (*Id.*) Both routes take approximately two weeks to complete. (*Id.*) These Pacific Ocean routes are congested with numerous ocean-going vessels, large and small, as well as barges. (Tr. 448.) The traffic is particularly dangerous for the Sunrise Vessels when they approach ports in Hawaii or the West Coast, as those ports are typically congested with 25 to 50 ships at any given time. (*Id.*)

Given this size and complexity of the Sunrise Vessels, Sunrise staffs each of the Sunrise Vessels with approximately 25 licensed and unlicensed personnel. (Tr. 438.) The unlicensed crew (*i.e.*, the unlicensed deck department, engine department and steward department crew) are represented by the Seafarers International Union (“SIU”), while the LDOs (*i.e.*, the Master, Chief Mate, Second Mate and Third Mate)³ are represented by the International Organization of Masters, Mates & Pilots (“MM&P”). (Tr. 438–439.) By law, the Master is the senior officer aboard the vessels and has absolute authority over the Sunrise Vessels at all times.⁴ (Tr. 439.)

³ On some voyages, the Sunrise Vessels enlist an additional Third Mate (second Third Officer). (Tr. 439.)

⁴ Neither the Counsel for the General Counsel nor the Union contest the supervisory status of the Captain and Chief Mate aboard the Sunrise Vessels, and the ALJ declined to make a finding as to whether Captain and Chief Mate were Section 2(11) supervisors. Thus, because the supervisory status of the Captain and Chief Mate is not presently at issue before the Board, Sunrise’s brief will not recite the record evidence regarding the duties and responsibilities of the Captain and/or Chief Mate.

II. BACKGROUND – MM&P

MM&P is a maritime labor organization that divides its membership into four separate membership groups: (i) the Inland Waterways membership group; (ii) the Offshore membership group; (iii) the Pilot membership group; and (iv) the Federal membership group. (Tr. 52, 128–129, 232.) The Inland Waterways membership group, for example, represents individuals aboard tugs and some larger vessels that operate in the *inland waterways*. (Tr. 128.) Whereas, the Offshore membership group represents licensed LDOs aboard *deep-sea ocean going vessels operating offshore* of the United States, including those LDOs at issue in this matter. (Tr. 128, 246–247.)

Not only does MM&P differentiate its members who work on inland vessels from its members who work on deep-sea ocean going vessels, the MM&P also has differing membership requirements for these two membership groups. (R–1 at 5–6.) For example, while the MM&P Constitution expressly requires the members in its Offshore Membership group to “possess an appropriate and valid United States Guard Merchant Marine Officer License or Credential for oceangoing vessels, or for specific vessels covered under contracts where the employer contributes to one or more of the Offshore, or other evidence of professional capability acceptable to the General Executive Board,” the MM&P Constitution has no such requirement for its Inland Waterway members. (*Id.*)

In 1981, MM&P negotiated – on behalf of the LDOs in its Offshore group – a multi-employer collective bargaining agreement (“1981 CBA”) with over one hundred employer entities operating U.S. flag deep-sea ocean going vessels at the time. (GC–2 at 194.) Neither in 1981 nor anytime to and including the present did MM&P or any person seeking representation by MM&P file a petition under Section 9 of the NLRA to certify LDO members. (Tr. 140.)

III. LDO LICENSING, PRIVILEGES AND SUPERVISORY DUTIES ABOARD THE SUNRISE VESSELS

A. Licensing

LDOs are those personnel who have been licensed by the U.S. Coast Guard to command large U.S.-flag oceangoing vessels of unlimited tonnage. (Tr. 392–393.) Any individual who desires to become a deck officer on any U.S.-flag oceangoing vessel must obtain this license. (Tr. 205.) There are two ways in which an individual can obtain a LDO license from the U.S. Coast Guard – both of which are rigorous and take years of training, experience, education and testing. (Tr. 337.) The first way requires the individual to obtain a Bachelor’s of Science in Marine Transportation from a maritime academy; and thereafter pass a series of seven exams. (*Id.*) The second way does not require the individual to obtain a degree, but instead requires that the individual (i) sail as an able-bodied seaman (*i.e.*, non-licensed) for 1,080 days at sea; (ii) take certain training classes from the U.S. Coast Guard; and (iii) pass a series of seven exams. (*Id.*) Once an individual receives an LDO’s license, the U.S. Coast Guard retains the ability to revoke that license, at any time, for a variety of reasons, including incompetence, substance abuse, poor or incompetent supervision, failure to report, and/or failure to obey a lawful order. (Tr. 462.)

Since the 1981 CBA was executed, there has been a dramatic increase in the number of regulations bearing on and expanding the LDOs’ supervisory responsibilities while serving on U.S.-flag vessels. (Tr. 485.) These increased regulatory requirements have significantly expanded the LDOs’ supervisory responsibilities. (Tr. 485.) For example, after the Exxon Valdez incident, the Oil Pollution Act of 1990 came into effect and vessels became responsible for preventing water pollution. (Tr. 487; *see also* 33 U.S.C. § 2701 *et seq.*) As a result, the LDOs are now personally responsible for ensuring that Sunrise Vessels are compliant with U.S. and international environmental regulations and not polluting the waters in port or at sea. (Tr. 487.) Failure to

adhere to the Oil Pollution Act of 1990 could result in the U.S. Coast Guard's revocation of the LDO's license as well as a variety of civil penalties, including but not limited to a civil penalty of up to \$25,000 per day of violation. (33 U.S.C. § 2716a(a), § 1321(6)–(7).)

B. LDO Accommodations and Privileges

LDOs are highly respected within the offshore oceangoing maritime industry and thus, the MM&P – through its 1981 CBA – demands special accommodations for its LDO members that are not available to unlicensed seaman. (*See generally* GC–2 at 237–240.) The MM&P insists that the LDOs' rooms are located at the top of the vessel, while the unlicensed crew members' rooms are located at the bottom of the vessel. (Tr. 469.) In fact, the 1981 CBA requires that livestock, portable privies and even the port workers' quarters, if any, to be “as far as practicable” from the LDOs' living areas. (GC–2 at 238.) Likewise, the LDOs have exclusive dining facilities separate and apart from the unlicensed crews' dining room. (GC–2 at 237; Tr. 228–229, 469.) The LDOs also have access to recreational facilities on the vessels that may not be used by the unlicensed crew members. (GC–2 at 238; Tr. 229, 469.) The 1981 CBA further requires that “an entertainment system” be installed in the LDO recreational facilities that “consist[s] of full length feature films exchanged on a reasonable basis.” (GC–2 at 239.) The LDOs are also entitled to first class air transportation when traveling to or from the vessels. (Tr. 469:23–25, 470:1–2.) If Sunrise is unable to secure a first class plane ticket for the LDO, Sunrise must pay the LDO the difference in cash between the first class air travel and whatever class was furnished. (GC–2 at 239.) These transportation benefits are not available to the unlicensed crew. (Tr. 470.) If the lodging provided to the LDOs does not meet the stringent standards set forth in the 1981 CBA, the LDOs are entitled to certain remuneration. For example, if the LDOs' bed linens are not changed within the seven days required by the 1981 CBA, the LDOs must be given two hours of premium pay. (GC–2 at 237.) Likewise, if the LDOs' living quarters are not furnished in accordance with

the 1981 CBA, the LDO must be paid a pre-determined sum of money referred to as a “quarters allowance.” (*Id.*)

Although the 1981 CBA was executed nearly forty years ago, the MM&P continues to demand that Sunrise provide every accommodation to the LDOs exactly as specified in that CBA. In fact, one of MM&P’s information requests at issue in this case seeks information to ensure its LDOs were receiving these special accommodations on any new ships under construction, including: whether all LDOs will have, among other things, an “upholstered, high backed recliner type chair” and a “TV jack or hook up to vessel entertainment system” in their quarters, and whether a committee would be selected to “establish standards for Officer’s Recreation Room, their furniture and décor.” (GC–26.) This information request also sought the verification that absolutely “no unlicensed crew will be located on the officer decks.” (*Id.*)

C. The CBA Stipulates the LDOs Have Supervisory Status

The 1981 CBA requires Sunrise to bestow supervisory status upon the LDOs represented by MM&P. Subsection one of the 1981 CBA’s “Duties of Officers” Section, entitled “Supervisory and Professional,” states, “The duties of the licensed deck officers, including masters, *shall* be maintained as supervisory and professional.” (GC–2, §21(1) at 240) (emphasis added). Section 21(1) of the CBA remains in effect and has never been amended or removed by any later MOU. (Tr. 132–133, 480–481.) Likewise, subsection five of Section 21, entitled “Shipboard Supervision Requirements,” enumerates supervisory duties to be performed by the LDOs:

Licensed Deck Officers shall have the shipboard *supervision* of all hull maintenance, cargo gear maintenance, lifesaving equipment, firefighting and safety equipment, and all cargo activity. Licensed Deck Officers shall *supervise* the opening and closing of hatches, the spotting or trimming of cargo booms or any other type of cargo gear whatsoever. They may activate hydraulic and electric type hatch cover systems or any other type of shipboard cargo gear.

(GC-2, §21(5) at 241) (emphasis added). Section 21(5) remains in effect today and has never been amended or removed by any later MOU. (Tr. 484.)

The 1981 CBA's mandates enumerating and describing the supervisory duties, responsibilities and status of the LDOs continues throughout the CBA. Section 22 of the 1981 CBA, entitled "Jurisdiction," subsection one provides, in relevant part:

For the safety of and the responsibility for the vessel, its passengers, the crew and the vessel's cargo, the Master or Licensed Deck Officer in charge shall have executive authority, to the extent permitted by law, over the vessel, its personnel, and all of its appurtenances. The executive authority of the Master or the Licensed Deck Officer in charge shall include vessel stability, damage control, lifesaving and firefighting equipment and emergency situations.

(GC-2, §22(1) at 241). Subsection three of Section 22, entitled "Specific Operational and Supervisory Jurisdiction," describes the LDO's broad supervisory jurisdiction:

Specifically, the Organization, through the Licensed Deck Officers, shall have the jurisdiction over the operation of all equipment of the vessel pertaining to navigation (including pilotage, mooring operations and stability) and the exchange of navigational information utilizing the frequency or frequencies available in the area in which the vessel is operating for the exchange of navigational information including specifically, in accordance with applicable law, the bridge-to-bridge communication system.

The Master or Licensed Deck Officer in charge may direct any other Licensed Deck Officer to make such exchange of navigational information under the direction of the Master or Licensed Deck Officer in charge. The Licensed Deck Officers shall also have the supervisory jurisdiction aboard the vessel over its cargoes and over the maintenance, inspection and upkeep of the hull, its cargo gear, cargo spaces, decks, deck houses, deck store rooms, and mast houses and other areas of the vessel that are now and customarily have been maintained by the deck department of the vessel. Control and operation of the console control apparatus on the barge crane of a LASH vessel, or any other cargohandling mechanism on present vessels and on any newly constructed vessels, shall be under the supervisory jurisdiction of the Licensed Deck Officers.

(GC-2, §22(3) at 241.) The 1981 CBA requires that the Master or LDO in charge "have the authority to direct that maintenance or repair of equipment be undertaken by the department

responsible for said maintenance and repair.” (GC–2, §22(8) at 242.) The LDOs’ supervision of cargo operations is further elaborated upon in Section 23 of the CBA:

Part of the duties of Licensed Deck Officers employed under this Agreement are the supervision of cargo activity to insure the safe handling, stowage and carriage of cargo. No additional compensation shall be due any Licensed Deck Officer during his regular duty hours except as may be described in this Agreement. When required to perform duties of a nonsupervisory nature or other cargo related duties as may be described in this Section, he shall receive, in addition to any other compensation payable, the penalty rate or premium rate as described below. Proper log entries shall be made to support payments due.

(GC–2, §23 at 243.) MM&P General Counsel Terrasa confirmed “that is still the duties of the Licensed Deck Officers. They supervise the longshoremen ... on the cargo operations.” (Tr. 139.)

The 1981 CBA requires the LDOs to protect their own supervisory jurisdiction over the unlicensed crew:

The Master or Licensed Deck Officer in charge of a watch shall not permit any person to operate or control any of the equipment mentioned or related thereto which is under the jurisdiction of the Licensed Deck Officers, unless said person is a Licensed Deck Officer or is a crew member acting under the direct orders of the Master or Licensed Deck Officer, provided that the maintenance or repairs of said computer or related servomechanism is being performed as directed by the Master or Licensed Deck Officer; the operation and control of the computer or servomechanism shall be permitted in connection with such work. If such operation of the computer or servo-mechanism is undertaken by a person other than the Licensed Deck Officer or the Master, in the regular course of maintaining or repairing said computer or related servo-mechanism, then in such case an entry reciting the time and date said operation is exercised shall be made in the Deck Log Book by the Licensed Deck Officer on watch.

(GC–2, §22(5) at 242.) Section 22(3) remains in effect today. (Tr. 137.)

D. The Second Mate and Third Mate

The CBA states that “The Second Officer is the Navigating Officer and, subject to the direction of the Master, is in charge of all navigational equipment, and is responsible for maintaining charts; publications, and navigational equipment, in accordance with all pertinent navigation regulations and statutes” and preparing the passage plan. (Tr. 478–479; R–5 at 331;

GC-2, §21(1) at 240.) “The Third Officers stay on a regular navigational watch at sea and assist in the normal operation of the vessel as directed by the Department Head.” (*Id.*) In addition to the supervisory duties outlined in the CBA, both the Second Mate and Third Mate are responsible for evaluating and supervising the use of the equipment on the vessel, including but not limited to: lines, pilot ladders, lifeboats and the gangway. (Tr. 460.) The International Convention for the Safety of Life at Sea (“SOLAS”), an international maritime treaty which sets minimum safety standards in the construction, equipment and operation of ocean going merchant ships, requires inspections of the lifeboats, the contents of those lifeboats (*e.g.*, life rafts, life flares, smoke bombs, etc.), and every piece of lifesaving equipment on the vessel (*e.g.*, fire hoses, axes, firemen suits, etc.). (Tr. 460–461.)

The Third Mate is responsible for the SOLAS safety inspections aboard each of the Sunrise Vessels. (Tr. 461.) During these safety inspections, the Third Mate must use his or her judgment to determine whether the safety equipment is in working order. (*Id.*) Thus, for every lifesaving piece of equipment on the vessel, the Third Mate must decide whether that equipment is (i) in good condition (*e.g.*, not frayed, sundrenched, broken, etc.); (ii) the appropriate size; (iii) the appropriate strength; and (iv) in the appropriate location. (Tr. 461.) Likewise, the Second Mate aboard the Sunrise vessels is responsible for performing safety inspections on all of the navigation equipment on the bridge immediately prior to the vessel arriving to or departing from a port. (Tr. 409.) During this safety inspection, the Second Mate “make[s] a determination whether the navigation equipment is properly functioning.” (*Id.*)

The Second and Third Mates also supervise the tying of the ship during entry and exit from ports. (Tr. 405–406.) During the tying-up process, the Master assumes his position on the bridge, the Chief Mate and Second Mate or Third Mate assume their positions on either end of the vessel

(*i.e.*, the bow and the stern). (Tr. 459.) As the tugboat comes alongside the vessel, the Master radios the Second or Third Mate to “take the tug’s line.” (*Id.*) Without any further input from the Master, the Second Mate or Third Mate issues commands to the unlicensed crew regarding the tying-up of the vessel. (*Id.*) The Second Mate or Third Mate exercises discretion when commanding the unlicensed crew members to tie-up the vessel, as he or she determines, and then communicates to the crew, how much line the crew members must pull and how the line should be tied once pulled to the proper length. (Tr. 459–460.) The Second Mate and Third Mate’s instructions are particularly critical, as the failure to properly tie-up the vessel may result in serious injury and/or death. (Tr. 460.)

The Second Mate and Third Mate also each supervise critical aspects of the federally regulated monthly abandon ships drills, which are performed regularly to prepare for emergency events at sea, such as if the vessel caught fire or if the vessel began to sink. (Tr. 454.) During this drill, the Master is in command on the bridge of the vessel. (*Id.*) The Second Mate becomes the Officer of the Watch. (*Id.*) The Chief Mate takes charge of one lifeboat, the Third Mate takes charge of the other lifeboat, and the rest of the crew reports to one of the two lifeboats. (Tr. 409–410, 454, 457.) Thus, the Chief Mate is in charge of one half of the crew, and the Third Mate is in charge of the second half of the crew. (Tr. 409, 457.) The Chief Mate and the Third Mate then order their crewmembers to take the numerous actions required to release the lifeboat. (Tr. 457–458.) In the event of an emergency, the Third Mate and the Chief Mate, “are responsible for ensuring every person aboard that vessel safely evacuates.” (Tr. 110.)

In addition, while the Master and the Chief Mate have the authority to issue discipline (Tr. 464), the Second Mate and Third Mate frequently make recommendations to the Master and/or the Chief Mate regarding which crew members should be disciplined. (Tr. 464–465.) For example,

if the Third Mate is standing watch from 12:00 am to 4:00 am and realizes that the helmsman the Third Mate is supervising is not properly attentive to his/her duties, the Third Mate will not wake the Master to tell him or her about the helmsman's poor performance. (Tr. 465.) Instead, the Third Mate will inform the Master at breakfast that morning and recommend that the helmsman be removed from his position or given remedial training. (*Id.*) Critically, the Master and Chief Mate must act on the disciplinary recommendations of Second Mate and Third Mate, as such recommendations implicate the safety of the vessel. (*Id.*) Unlike the unlicensed crew, the Second Mate and Third Mate do not receive job evaluations because they are "rotary" and therefore must be rehired unless they are negligent. (GC-2.)

The most critical role the Second Mates and Third Mates perform is serving as the "Officer of the Watch" or "OOWs" when the Master "delegate[s] his/her navigation and conning responsibilities to" the Officer of the Watch every day when at sea. (R-5 at 312.) The Second Mates and Third Mates assume the position of Officer of the Watch for one-third of the day, respectively, for every day the Sunrise Vessels are at sea. (Tr. 440-441.) The Second Mate is on watch and in command of the vessel and all its crew from 4:00 am to 8:00 am and from 4:00 pm to 8:00 pm; one Third Mate is on watch and in command of the vessel and all its crew from 12:00 am to 4:00 am and from 12:00 pm to 4:00 pm; and the other Third Mate is on watch and in command from 8:00 pm to 12:00 am and from 8:00 am to 12:00 pm. (Tr. 440.)

The International Safety Management ("ISM") Code, to which the United States is signatory, and has ratified and adopted (*see* 46 U.S. Code Ch. 32; 33 C.F.R. Part 96), establishes that the Officer of the Watch is (i) in charge of the bridge team; (ii) responsible for safety of the crew, vessel and cargo; and (iii) responsible for pollution prevention of the vessel. (Tr. 440.) Pursuant to federal law, the Officer of the Watch has absolute authority with respect to the

aforementioned responsibilities and cannot negotiate these responsibilities away. (Tr. 440–441.) In other words, when the Second Mate or Third Mate assumes the watch, he or she serves as the master’s representative and legally assumes full control of the vessel, its pollution prevention and all of its crew. (Tr. 464.) To be properly relieved, “another qualified licensed deck officer must be physically present on the bridge to take command” of the vessel. (Tr. 358.) While serving as the Officer of the Watch, the Second Mate and Third Mate may remove a crew member from his or her position if the LDO deems him incompetent or unable to follow a lawful order. (Tr. 464.)

Officers of the Watch are “in charge of the bridge watch,” which consists of a helmsman and a lookout. (Tr. 404–405, 414.) The Officer of the Watch supervises the helmsman—an unlicensed crew member and part of the SIU bargaining unit—to ensure that he is steering safely. (Tr. 353, 442.) In the exercise of these duties, the Officer of the Watch gives orders to the helmsman, including directions to change the course of the vessel. (Tr. 442, 446.) When issuing directions to the helmsmen, the Officer of the Watch must consider and evaluate a variety of environmental factors, such as the strength of the current and the location of other vessels. (Tr. 447.) The Officer of the Watch also gives directions to the lookout, an unlicensed crew member. (Tr. 453.) These directions are particularly critical given that the vessel’s radar does not pick-up smaller, less-dense vessels, such as sailboats and other small craft that are frequently encountered when entering and leaving port. (Tr. 450–451.) In addition, the Officer of the Watch communicates with other vessels to ensure safe passage and that the vessels navigate a safe distance from one another. (Tr. 448.) For example, if the Officer of the Watch identifies a vessel in its path, which happens often during a typical voyage, the Officer of the Watch must take action and formulate a course of action to avoid the other vessel. (Tr. 449–450.) After the Officer of the Watch charts his new course, he contacts the other vessel to inform it that he will be adjusting his

course and passing the other vessel at a certain distance and on a particular course. (Tr. 407–408, 449.) The Officer of the Watch does not stop and call the Master each time this occurs to obtain approval for these vital and time sensitive actions. (Tr. 408.)

The ISM Code also requires every vessel to maintain a Safety Management System (“SMS”) that meets the minimum international safety standards. (Tr. 470–471; R–5.) The Sunrise SMS accurately reflects the extensive scope of the Officer of the Watch’s duties and responsibilities on the Sunrise Vessels. (Tr. 471–475; R–5.) The Sunrise SMS specifies that the Officer of the Watch “is the Master’s representative when on the bridge” and is responsible for, among other things, (i) the safe navigation of vessel; (ii) the safety of the vessel’s personnel; and (iii) pollution prevention. (Tr. 474; R–5 at 59.) Given that the Officer of the Watch is “in command of the bridge” (Tr. 357) and is therefore “responsible for the safe navigation of the vessel until properly relieved” (R–5 at 40), the Officer of the Watch must supervise and direct the unlicensed crew, including the unlicensed lookout and helmsmen, who accompany the Officer of the Watch on the bridge (*id.* at 42). In his or her capacity as the Officer of the Watch, the Second Mate and Third Mate can “dismiss the helmsman or another able-bodied seaman on his watch if he sees the safety of the vessel is at risk.” (Tr. 522.)

With respect to his or her supervision of the lookout, the Officer of the Watch must ensure, among other things, that lookouts are (i) awake, alert, and briefed in what to look for and how to report; (ii) properly posted in a safe position that allows sight and hearing of all navigational hazards and other vessels; and (iii) able to rapidly and reliably communicate with the Officer of the Watch. (*Id.*) The Officer of the Watch must also ensure that a dedicated lookout having no other duties is posted whenever (i) inside or approaching areas of low visibility; (ii) arriving at or

departing from a port; and (iii) during any other period as directed by the Officer of the Watch. (*Id.*)

When supervising the helmsmen, the Officer of the Watch must ensure, among other things, that (i) the vessel is properly steered; (ii) the ordered courses are maintained; (iii) the helmsmen have no other duties when assigned to the helm; (iv) the helmsman are always in contact with the Officer of the Watch; and (v) the helmsman are readily available whenever automatic steering is engaged. (*Id.*) In addition, the Officer of the Watch must “frequently monitor[]” the helmsmen in order to “verify proper steering.” (*Id.*) Critically, the “helmsmen shall not be permitted to change the steering mode without a proper order from the OOW.” (*Id.*) These requirements are strictly enforced by both Sunrise and the United States Coast Guard. (Tr. 473.) In fact, a Third Mate aboard the Exxon Valdez had his license revoked by the United States Coast Guard for failing to supervise a helmsman while the Third Mate was serving as the Officer of the Watch. (*Id.*)

The Officer of the Watch is not only in charge of the bridge team, but is also responsible for the safety of the cargo. (Tr. 356–357, 404.) The Officer of the Watch plays an active role in directing the proper and safe loading of cargo onto the vessel, as he or she is required to “coordinate and supervise work carried out by crew and longshoreman to ensure efficiency in shifting of vessel, preparing holds for loading, ensuring vessel’s cargo gear is properly prepared and maintained in good working order and securing of holds and cargo on completion of operation.” (Tr. 478; R–5 at 210.) Likewise, when unloading the cargo, the Officer of the Watch must “coordinate and supervise work carried out by the crew to ensure efficiency in shifting vessel, preparing holds for washing, maintaining efficiency of vessel’s cargo gear and securing holds and stowing lashing gear on completion.” (Tr. 478; R–5 at 211.)

While the Officer of the Watch is responsible for complying with the Master's standing orders, the Officer of the Watch may contravene the Master's standing orders without first consulting the Master. (Tr. 509.) Although the Officer of the Watch "shall call the Master when there is any doubt about navigational safety or question about bridge operations," "the Watch Officer shall take immediate action as necessary to ensure the safety of the vessel, personnel and cargo or--prevent pollution." (R-5 at 41.) For example, if the Officer of the Watch determines that the vessel may collide with another vessel, he or she will deviate from the Master's standing orders to avoid that vessel without first contacting the Master. (Tr. 408; 509-510.)

Every crew member is required to sign the "Shipping Articles." (Tr. 491; R-6) The "Shipping Articles" obligate all unlicensed crew to "be obedient to the lawful commands of the master, or of an individual who lawfully succeeds the master, and of their superior officers in everything related to the vessel, and the stores and cargo of the vessel, whether on board, in boats, or on the shore." (R-6.) Every time the Second Mate or Third Mate is on duty as the Officer of the Watch, he or she assumes the position of Master and the crew must adhere to his or her orders. (Tr. 492.) The Shipping Articles state that "if a seaman considers himself or herself to be aggrieved by any breach of this agreement or otherwise the seaman shall present the complaint to the master or the officer in charge of the vessel in a quiet and orderly manner." (Tr. 492; R-6.) These obligations are currently in effect on the Sunrise Vessels. (Tr. 492.)

IV. SEA-LAND, CSX, AND HORIZON

One of the signatories to the 1981 CBA was Sea-Land Service, Inc. ("Sea-Land"). (GC-2 at 194.) In 1999, CSX split Sea-Land into three separate entities (an international liner service; a domestic liner service; and a terminal operating group) to facilitate the sale of its international liner

service to Maersk, which occurred that same year.⁵ (See Daniel Machalaba, *CSX Will Divide Sea-Land Unit, Names Three to Head Operations*, WALL STREET JOURNAL (Mar. 17, 1999), <https://www.wsj.com/articles/SB921607771230024681>.) In 2003, CSX renamed part of its domestic liner service “Horizon Lines, Inc.” and sold it to Carlyle-Horizon Partners, L.P. (“Carlyle-Horizon Partners”). (News Release, Carlyle Investment Management LLC, The Carlyle Group Announces Sale of Horizon Lines to Castle Harlan (May 23, 2004), <https://www.carlyle.com/media-room/news-release-archive/carlyle-group-announces-sale-horizon-lines-castle-harlan>.) In 2004, Carlyle-Horizon Partners sold Horizon Lines, Inc. to a private equity firm named Castle Harlan Partners IV. L.P. (“Castle Harlan”). (*Id.*) Soon thereafter, Castle Harlan divested its ownership and Horizon Lines, Inc. became a publicly-traded company. (Press Release, Horizon Lines, Horizon Lines Receives Notice Regarding NYSE Listing Criteria (May 31, 2011), <https://www.prnewswire.com/news-releases/horizon-lines-receives-notice-regarding-nyse-listing-criteria-122899149.html>.)

V. SUNRISE’S ACQUISITION OF A FRACTION OF HORIZON LINES’ ASSETS

In 2014, Horizon Lines decided to sell its business. (Tr. 276–278.) At the time, Horizon Lines’ two main competitors in the Hawaii trade lane business were Pasha Hawaii and the Matson Navigation Company (“Matson”). (Tr. 277.) Matson also competed with Horizon Lines in the Alaska and Puerto Rico markets. (Tr. 276–277.) Because Matson’s market share of the Hawaii trade lane far exceeded both Horizon Lines and The Pasha Group’s market shares, Matson would have obtained a large enough market share to be considered a monopolist in the Hawaii trade lane business if it acquired Horizon Lines in its entirety. (Tr. 277.) Accordingly, Horizon Lines, Inc.,

⁵ Sea-Land operates currently as a division of Maersk Group. Sea-Land services the Americas, the Mediterranean and Asia. <https://shipsandports.com.ng/return-of-the-sea-land/>.

The Pasha Group (led by its Senior Vice President and General Counsel, Amy Sherburne-Manning), SR Holdings LLC, and Sunrise Operations LLC entered into a Contribution, Assumption, and Purchase Agreement (“CAPA”), dated November 1, 2014.⁶ (GC–3.) Pursuant to the CAPA, SR Holdings LLC, a subsidiary of The Pasha Group, would purchase Horizon Lines’ Hawaii trade lane business, which accounted for approximately 30% of Horizon Lines’ assets and liabilities, and immediately thereafter, Matson would purchase Horizon Lines, Inc. (Tr. 277–278, 285, 288; GC–3.) Notably, when Matson purchased Horizon Lines, Inc., Matson acquired Horizon Lines’ Alaska and Puerto Rico trade lanes, as well as Horizon Lines’ intellectual property and corporate services for its trade lane businesses such as its finance, human resources, and information services departments. (Tr. 285, 288.) The CAPA also contained the terms of SR Holdings’ use of the Horizon trademark, as that trademark belonged to Matson as the successor to Horizon Lines. (GC–3 at 56.)

After executing the CAPA, the parties engaged in the process of obtaining approval of the transaction from the federal government pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976. (Tr. 277; GC–6.) The parties obtained final approval of the transaction from the Department of Justice on or around April 21, 2015. (Tr. 279.) In connection with the closing of the transaction, Horizon Lines and Sunrise negotiated and entered into an Assignment and Assumption Agreement, the purpose of which was to expressly delineate the collective bargaining obligations that Sunrise was assuming from Horizon Lines immediately prior to the time SR Holdings LLC acquired Sunrise Operations LLC. (Tr. 280–281; GC–7.) Ms. Sherburne-Manning, in conjunction with outside counsel, led the negotiation of the Assignment

⁶ SR Holdings LLC was a subsidiary formed by The Pasha Group to acquire Horizon’s Hawaii trade lane assets and liabilities under the CAPA. Sunrise Operations LLC was a subsidiary of Horizon Lines formed to consolidate Hawaii vessel-related assets and liabilities from the other vessels that would remain in Horizon Lines Inc. and were acquired by Matson Navigation when it purchased Horizon Lines, Inc.

and Assumption Agreement on behalf of SR Holdings as the imminent purchaser of Sunrise. (Tr. 253; 275–276.)

During the negotiations and due-diligence process, Horizon Lines produced to Mr. Sherburne-Manning, on behalf of Sunrise, every collective bargaining agreement that Horizon Lines had entered into with the MM&P, the SIU, and the Marine Engineers' Beneficial Association ("MEBA"), respectively. (Tr. 281–282.) In order to ensure that Horizon Lines had produced each and every collective bargaining agreement it was bound to with respect to its Hawaii trade lane business, Ms. Sherburne-Manning created a schedule for each union listing every collective bargaining agreement that Horizon Lines had produced during the due diligence period. (Tr. 281.) These schedules became part of the final Assignment and Assumption Agreement dated May 29, 2015. (Tr. 281–282; GC–7.) Accordingly, it was Ms. Sherburne-Manning's "understanding that the collective bargaining agreement that Horizon Lines had with MM&P that was being assigned to and assumed by Sunrise Operations, LLC . . . were the documents listed on Schedule A." (Tr. 282.) As Ms. Sherburne-Manning never received a copy from Horizon Lines of the unsigned and undated 1984 Memorandum of Understanding ("1984 MOU") that MM&P now alleges Sunrise is bound to, the 1984 MOU was not included in Schedule A. (Tr. 282; GC–7.)

Gabriel Terrasa, MM&P's General Counsel, testified that he read the Assignment and Assumption Agreement, including Schedule A, on May 26, 2015 – three days before the parties executed the agreement. (Tr. 116; GC–7.) Yet, Mr. Terrasa did not file an unfair labor practice charge or contract grievance, or initiate any other action or communication to assert that Schedule A did not accurately list all the all the Horizon/MM&P labor agreements or otherwise defend MM&P's rights as MM&P now alleges here, until September 2018. (Tr. 116–117; 326.)

VI. THE UNION'S INFORMATION REQUESTS

A. Union's September 19, 2017 Information Request

On September 19, 2017, MM&P Vice President Lars Turner sent a letter to Sunrise, alleging that The Pasha Group, Pasha Hawaii Holdings, LLC ("Pasha Hawaii") and Sunrise were a "single employer," and demanding a host of documents relating not only to Sunrise, but also to The Pasha Group and Pasha Hawaii from September 1, 2014 to the present.⁷ (GC-13.) The document categories included, but were not limited to, **any** (i) documents reflecting all of the directors and officers of The Pasha Group and Pasha Hawaii; (ii) documents reflecting stockholders holding over 10% of stock in the Pasha Group and Pasha Hawaii; (iii) documents reflecting the familial relationships between any director, officer of major stockholder of The Pasha Group and Pasha Hawaii; (iv) invoices reflecting any common customers or vendors of The Pasha Group, Pasha Hawaii and Sunrise; (v) employee handbooks and employee policies for LDOs working on vessels owned, in whole or in part, by The Pasha Group or Pasha Hawaii; (vi) documents reflecting the benefits plans offered to LDOs employed or working on vessels owned, in whole or in part, by The Pasha Group or Pasha Hawaii; (vii) applications or hiring documents for LDOs employed by or working on any vessels owned, in whole or in part, by The Pasha Group or Pasha Hawaii; (viii) documents showing loans between or among The Pasha Group, Pasha Hawaii Holdings and Sunrise operations; (ix) rental or lease agreements between or among The Pasha Group, Pasha Hawaii and Sunrise Operations; (x) documents showing any services, including financial, legal and human resources services, rendered by the Pasha Group or Pasha Hawaii; and (xi) documents showing any financial arrangements for compensation of services for

⁷ On September 1, 2014, Sunrise Operations was not in existence, and all the vessels currently operated by Respondent were owned and operated by Horizon Lines, Inc. Respondent had nothing to do with the vessels relevant to this case until the end of May 2015.

or rendered by The Pasha Group or Pasha Hawaii. (Tr. 154–155; GC–13.) At the time of the information request, an unfair labor practice charge – filed by the Union on July 19, 2017 – was already pending against Sunrise and The Pasha Group, wherein the Union alleged Sunrise Operations and The Pasha Group, were a single employer d/b/a Pasha Hawaii Holdings, LLC. (See Case No. 20-CA-202809.)

A. Union’s March 2, 2018 Information Request

The Union renewed its September 19, 2017 request in a letter dated March 2, 2018. (Tr. 159; GC–18.) The Union, through counsel, stated that it was seeking information to support its single/joint employer theory in the upcoming interest arbitration to settle the parties’ 2017 contract re-opener negotiations:

In preparation for the interest arbitration and to evaluate the reasonableness of our revised last, best and final offer that we plan to present at the interest arbitration on April 26, MM&P renews its request for the following information to be delivered electronically to the undersigned by Friday, March 9, 2018.

(GC–18). At the time this letter was issued on March 2, 2018, the Union had pending a complaint with the Region 20 Regional Director that Sunrise had breached the terms of the settlement agreement the parties entered into in January 2018, which pertained to a series of unfair labor practice charges pending against Sunrise before the Board alleging single/joint employer status. (Tr. 211–212.) On March 14, 2018, Sunrise, through counsel, responded to each of the information requests, explaining its objections and invited the Union to “meet and discuss [the Union’s] information requests at a mutually acceptable time and place. (GC–19 at 3–4.) The Union did not respond to this invitation to meet and explain the relevance of the requests to which Sunrise objected. (GC–20 at 1–3.) On March 19, 20, and 23, 2018, Sunrise produced relevant information requested, with the exception of the specific information that related exclusively to the Pasha

Group and Pasha Hawaii. (Tr. 160–165; GC–20.) Again, the Union did not respond or in any manner assert Sunrise’s response was deficient in any respect.

B. September 12, 2018 Correspondence Regarding Grievance Proceedings

On September 12, 2018, Sunrise received notice from the American Arbitration Association that the Union had requested a panel of AAA arbitrators from the Maryland/District of Columbia area to resolve a grievance filed by the Union. (Tr. 103; GC–12 at 5–6.) As Sunrise’s operations are all based on the west coast, Sunrise insisted the parties adjudicate the dispute in San Francisco, California before a San Francisco-based panel in compliance with Section XXXVI(1) of the 1981 CBA, which states:

All disputes relating to the interpretation or performance of this Agreement which may arise between the Parties to this Agreement shall be determined by a Licensed Personnel Board [“LPB”] consisting of two persons appointed by the Organization and two persons appointed by the Company. . . . Unless some other place is mutually agreed upon, the Board shall meet in New York, or in San Francisco for PMA Companies, promptly upon the written notice from either the Organization or the Company.

(GC–2 at 256.) In response, the Union sent Sunrise an unsigned and incomplete MOU dated June 16, 1984 (GC–12 at 2, at 182–186) purporting to establish that the forum for all arbitrations was the Union’s Headquarters in Linthicum Heights, Maryland (*id.* at 185). Sunrise insisted that the arbitration be held in San Francisco pursuant to Section XXXXVI(1) of the CBA. (GC–12 at 1–2.) The Union responded stating only, “If that is the position you are taking, we will meet at the NLRB.” (*Id.* at 12.)

C. Union’s September 27, 2018 Information Request

On September 27, 2018, Mr. Turner sent a letter to Mr. Washburn, requesting “an updated Fleet Roster showing who is assigned permanent [sic] to each vessel and any ‘open’ unassigned billets.” (GC–21 at 1.) That same day, Mr. Washburn forwarded Mr. Turner’s information request to Sunrise’s Senior Port Engineer, who promptly responded to Mr. Washburn’s email with the

requested information on October 1, 2018. (Tr. 494; R-3 at 1-2.) On October 30, 2018, Mr. Turner met with Sunrise for several hours but never raised the subject of the Union's outstanding information request. (Tr. 226-228, 494; R-3 at 1-2; R-7 at 1.) On or around December 4, 2018, Mr. Washburn realized that he had inadvertently forgotten to forward the roster to Mr. Turner. (Tr. 495.) Accordingly, Mr. Miozzi sent the roster to Mr. Turner on December 4, 2018 with Sunrise's apologies.⁸ (GC-22 at 1.) On December 4, 2019, Mr. Turner emailed Mr. Miozzi and identified "errors" in the roster. (R-3 at 2.) Mr. Turner knew that there were "errors" on the roster because he already had the information he was requesting, as he had access to the current roster information through MM&P's web portal. (Tr. 153, 213-216.) On December 10, 2018, Mr. Miozzi sent Mr. Turner a "corrected" roster. (R-7 at 1.)

D. Union's October 11, 2018 Information Request

On October 11, 2018, Mr. Turner sent a letter to Sunrise demanding that Sunrise provide MM&P with proof that it paid the wages owed to its members pursuant to an award issued by an arbitrator during a recent interest arbitration, including information showing the underlying calculations, the name of the employee to whom the payment was made, the payment date, check number and date or estimated date of payment delivery. (GC-23 at 1-2.) Despite its best efforts, Sunrise was unable to provide MM&P with this information until December 2018, as it took Sunrise's payroll manager a significant amount of time to obtain the necessary contribution information from the MM&P Taft-Hartley benefit plans; accurately perform the calculations for each MM&P LDO who worked aboard one of the four vessels during the preceding 17 months; and generate the report to verify that the MM&P members received accurate pay and benefit contributions. (Tr. 497-498.) Complicating matters, prior to June 1, 2018, Marine Transport

⁸ Mr. Washburn testified that he did not intentionally delay in sending the roster to Mr. Turner. (Tr. 495.)

Management, Inc., a third party and an affiliate of Crowley Maritime Corporation, managed payroll for Sunrise. (Tr. 73, 309, 553.) Yet, Sunrise's commitment to accurately calculating the wages owed is underscored by the fact that Mr. Turner could only identify one of its members, out of the seventy-seven MM&P members who worked aboard the Sunrise Vessels during this period of time, who had a "small outstanding issue" with the pay and/or contributions due to him. (Tr. 225–226, 497.)

E. Union's November 7, 2018 Information Request

On October 30, 2018, in response to a demand by MM&P, Mr. Washburn met with Mr. Turner and his colleague, Jeremy Hope, in San Francisco to share a basic rough sketch of the type of vessel that Keppel is constructing. (Tr. 226–228.) During this meeting, Mr. Turner and Mr. Hope were permitted to review a PDF of the sketch on Mr. Washburn's computer for several hours. (*Id.*) Subsequently, in a letter dated November 7, 2018, the Union, through counsel, demanded that Sunrise answer no less than thirty-seven questions regarding the Keppel vessel sketch, among other things, the technical details, dimensions and various and sundry items concerning the furnishing of the officers' quarters. (Tr. 227–228; GC–26 at 1–2.) The same day, Respondent's counsel responded to the Union and informed it that he had forwarded the list of questions to Mr. Washburn and that Sunrise would do its best "to answer as soon as reasonably possible." (GC–31 at 1.) On December 10, 2018, Sunrise's counsel emailed the Union and responded to the few questions that Sunrise could answer, given its extremely limited knowledge of details about the vessels Keppel was building. (GC–32 at 1.) In this email, counsel reiterated that (i) Sunrise was neither the owner nor manager of the Keppel vessels; (ii) the vessels would not be delivered until late 2020; and (iii) the vessels were not covered by the parties' collective bargaining agreement. (*Id.*) Accordingly, the only information Sunrise had in its possession regarding the Keppel vessels was the sketch that Sunrise shared with the Union. (*Id.*)

VII. THE ADMINISTRATIVE LAW JUDGE'S DECISION

Following a three-day hearing and the parties' submission of post-hearing briefs, ALJ Lisa D. Ross issued her decision and recommended order on May 11, 2020. The ALJ made the following findings regarding the Board's jurisdiction over this matter:

- The Board has jurisdiction over this matter because the Respondent's second and third mate LDOs are not Section 2(11) supervisors. (ALJD at 17, 19.)
- The Board has jurisdiction over this matter because the Respondent is a successor employer to Horizon Lines. (ALJD at 4–5, 7.)
- The Board has jurisdiction over this matter because the Union is the exclusive bargaining representative of the LDOs. (ALJD at 19–20.)
- The Board has jurisdiction over the claims asserted in Paragraph 8(a)–(e) of the Second Consolidated Complaint because the Union's filing of its ULP Charge regarding its September 19, 2017 and March 2, 2018 information requests was timely. (ALJD at 13–14.)

The ALJ also made the following conclusions of law:

- By refusing to provide and/or unreasonably delaying in furnishing necessary and relevant information to the Union, Respondent violated Sections 8(a)(5) and (1) of the Act. (ALJD at 21.)
- Respondent also violated Sections 8(a)(5) and (1) of the Act when it failed/refused to bargain in good faith with the Union by refusing to continue to meet for arbitration proceedings at the Union's headquarters in Linthicum Heights, Maryland as stated in the parties' Memorandum of Understanding dated June 16, 1984. (*Id.*)
- The unfair labor practices committed by Respondent affect commerce within the meaning of Sections 2(6) and (7) of the Act. (*Id.*)

Because the ALJ's jurisdictional findings and conclusions of law flow from fundamental misapplications of controlling precedent and ignore undisputed, material record evidence, the ALJ's decision should be reversed in its entirety.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the ALJ erred in finding that the Second Mates and Third Mates aboard Sunrise's vessels were not supervisors under Section 2(11) of the Act, where the undisputed record evidence demonstrates that the Second Mates and Third Mates regularly and actively perform numerous supervisory functions, including the supervisory authority to command the vessel while serving as Officer of the Watch; to responsibly direct the unlicensed crew requiring the exercise of independent judgment; and to recommend discipline. Exceptions 1, 4, 114, 116–129, 131–132, 142–146.
2. Whether the ALJ erred in concluding that Sunrise was the successor to Horizon Lines where the undisputed evidence establishes that Sunrise bought only 30% of Horizon Lines' assets and liabilities; acquired less than 30% of Horizon Lines' employees; and acquired none of Horizon Lines' intellectual property or corporate services, such as its finance, human resources, and information services. Exceptions 1, 3–30, 73–74, 83–91, 109–115, 133, 142–146.
3. Whether the ALJ erred in concluding that the Union's September 19, 2017 request for information was untimely where the undisputed record evidence demonstrates that the Union did not file a Charge in relation to its September 19, 2017 request for information until May 2, 2018 – nearly eight months after the request was made. Exceptions 1, 92–97, 114, 142, 144–146.
4. Whether the ALJ erred in concluding that the Union is a Section 9(a) representative of the LDOs where the ALJ based her entire finding on the erroneous assumption that Sea-Land is the predecessor to a variety of corporate entities, including Sunrise. Exceptions 1, 3–30, 73–74, 114, 130–136, 142–146.
5. Whether the ALJ erred in concluding that Sunrise failed to bargain in good faith with the Union when it declined to arbitrate disputes at the Union's headquarters in Linthicum Heights, Maryland where the undisputed record evidence establishes that the Union's basis for the location of the arbitration was an unsigned 1984 Memorandum of Understanding ("1984 MOU") with an unidentified company that was not assumed by Sunrise during its purchase of Horizon Lines' Hawaii trade lane. Exceptions 1, 3–30, 58–61, 66–80, 137–141, 143–146.
6. Whether the ALJ erred in concluding that Sunrise violated the Act by refusing to respond to the Union's September 19, 2017 and March 2, 2018 information requests where the undisputed record evidence establishes that (i) the Union's information requests sought information related to employees and operations of companies other than Sunrise; (ii) the Union's information request also related to an unfair labor practice charge the Union filed against Sunrise alleging that Sunrise, its parent company and its parent's subsidiary were single/joint employers; (iii) both the Region and the General Counsel's Office of Appeals issued decisions dismissing the Union's single/joint employer charges; (iv) the Union failed to explain why the information requested was relevant; and (v) the Union did not accept Sunrise's offer to meet and confer over the information requests. Exceptions 1, 4–35, 57, 81–91, 98–99, 142, 144–146

7. The ALJ erred in concluding that Sunrise violated the Act by unreasonably delaying in furnishing information responsive to the Union's September 27, 2018 information request where the undisputed record evidence establishes that (i) immediately after Mr. Washburn received the request from the Union, Mr. Washburn forwarded that request to Sunrise's Senior Port Engineer for his immediate response; (ii) Sunrise's Senior Port Engineer emailed the requested information to Mr. Washburn three days after receiving the information request; (iii) Mr. Washburn had a good faith belief that he then forwarded the Senior Port Engineer's email containing the requested information to the Union; (iv) Mr. Washburn met with the specific Union official who sent the information request for several hours on October 30, 2018, but the Union official made no mention of the information request; (v) the Union already had the information it was requesting from Sunrise; and (vi) the Union actually had better access to the information requested because the information requested the Union members' personal information. Exceptions 1, 4-30, 36-43, 81, 99-102, 142, 144-146.
8. The ALJ erred in concluding that Sunrise violated the Act by unreasonably delaying in furnishing information responsive to the Union's October 11, 2018 information request where the undisputed record evidence shows that (i) the Union's information request required Sunrise to produce a plethora amount of information showing the underlying calculations, the name of the employee to whom the payment was made, the payment date check number and date or estimated date of payment delivery; (ii) Sunrise's only payroll manager devoted a significant amount of time to the Union's request, which required her to obtain necessary contribution information from the MM&P Taft-Hartley benefit plans and then accurately perform the calculations for each MM&P LDO who worked aboard one of the four vessels during the preceding 17 months and generate the report to verify that the MM&P members received accurate pay and benefit contributions; (iii) this process was further complicated by the fact that Sunrise's payroll manager had to obtain some of the responsive information from Marine Transport Management because it had managed Sunrise's payroll prior to June 1, 2018; and (iv) the Union testified that only one of its seventy-seven MM&P members who had worked aboard the Sunrise Vessels during this period of time, noted a "small outstanding issue" with the pay and/or contributions due to him. Exceptions 1, 4-30, 44-46, 57, 81, 102-107, 142, 144-146.
9. The ALJ erred in concluding that Sunrise violated the Act by unreasonably delaying in furnishing information responsive to the Union's November 7, 2018 information request where the undisputed record evidence shows that the ships at issue, which the Union had no jurisdiction over, were in the early stages of its construction, would not be completed for at least two years, were neither the property of Sunrise nor any Pasha-related entity and Sunrise (i) provided the Union with the little information it knew about the technical details of the vessels; (ii) showed the Union the only rendering of the ships it had in its possession (*i.e.*, a basic sketch of the vessel); and (iii) even produced to the Union a letter from Keppel expressly rejecting Sunrise's request to see the blueprint drawings of the new vessels for dissemination to the Union. Exceptions 1, 4-30, 47-57, 62-65, 81, 108-113, 142, 144-146.

ARGUMENT

VIII. THE ALJ'S DECISION RESTS SOLELY ON LEGAL DETERMINATIONS AND IS THEREFORE SUBJECT TO *DE NOVO* REVIEW.

The Board reviews an ALJ's legal determinations *de novo*. See *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950) (“[W]e base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner’s findings.”). Further, when considering an ALJ’s credibility-based factual findings, the Board gives deference only to those findings that are based on the judge’s assessment of the demeanor of the witnesses. *Id.* If the ALJ’s purported credibility determinations are based on factors other than witness demeanor, the Board examines the record independently. See *Damnor Co.*, 260 NLRB 816, 817 n.2 (1982). Moreover, as the ALJ is in no better position than the Board to assess the inherent probabilities of substantive testimony, the judge’s opinions as to such probabilities are entitled to no special deference. *Betances Health Unit*, 283 NLRB 369, 370 (1987). Thus, an ALJ “cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolution by uttering the magic word ‘demeanor.’” *Permaneer Corp.*, 214 NLRB 367, 389 (1974).

Here, the ALJ seeks to insulate her decision from meaningful review by means of a footnote, dropped at the outset of her recitation of the “Background Facts” (ALJD at 3 n.7), reciting boilerplate language: “The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. In assessing credibility, I have relied primarily on witness demeanor. I also have considered factors such as: the context of the witness’ testimony, the quality of the witness’s recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole.”

This formulaic tactic is precisely what the Board's decisions proscribe. The ALJ's generic qualification that, in effect, "all of my factual findings are based on credibility determinations, which, in turn are based (at least in part) on my assessment of the witnesses' demeanor," should be summarily rejected as an effort to deprive Sunrise of meaningful and proper appellate review.

Further, most of the witness testimony is undisputed. The ALJ's findings of fact, therefore, cannot be said to be grounded in her assessment of the demeanor of witnesses at trial. Rather, the ALJ's determinations here were based on a materially incomplete, subjective and speculative evaluation of the extensive scope and importance of the supervisory nature of the LDOs' duties, particularly when the LDOs serve as Officers of the Watch – in other words, her purported application of Board law to her materially incomplete evaluation of undisputed record evidence. These legal determinations are entitled to no special deference, and as shown below, they are rife with error and should be reversed.

IX. THE ALJ'S DETERMINATION THAT THE BOARD HAS JURISDICTION OVER THIS MATTER IS NOT SUPPORTED BY THE RECORD OR BOARD PRECEDENT.

Despite Sunrise asserting four jurisdictional-based affirmative defenses and submitting extensive and largely un rebutted record evidence in support of those defenses, the ALJ dedicates approximately three pages of her decision to these critical jurisdictional challenges. This is astonishing given that Sunrise's principal jurisdictional defense – whether the bargaining unit is comprised solely of Section 2(11) supervisors – requires a "fact intensive and careful examination of the relevant facts and circumstances in each case." *USF Reddaway, Inc.*, 349 NLRB 329, 339 (2007).

Not only did the ALJ fail to follow and apply the Board's instruction in *USF Reddaway, Inc.* in reviewing the record evidence, she also predicated her legal analysis on a mix of partially

abrogated and unpersuasive authorities to conclude the Second and Third Mates are not statutory supervisors. These flaws are fatal to her RDO, and they require reversal and the dismissal of the Second Consolidated Complaint in its entirety.

A. The ALJ’s Finding That Second and Third Mates Are Not Statutory Supervisors Is Contradicted by Undisputed Record Evidence and Binding Authority.

1. The ALJ’s Sole Reliance upon *Chevron* Warrants the Reversal of Her Decision on Jurisdictional Grounds.

Instead of examining any of the record evidence before her to determine whether the Second and Third Mates here acted as supervisors while serving as OOWs, the ALJ declared that because the Board had already determined that LDOs do not possess statutory status while serving as OOWs, the Second and Third Mates aboard the Sunrise Vessels couldn’t possibly satisfy any test for supervisory status while serving as OOWs. Even putting aside the ALJ’s complete failure to properly evaluate the record *before her* when coming to her decision, the ALJ’s finding of no supervisory status must be reversed on the independent basis that the **sole** authority she relied upon for the finding that the Second and Third Mates on the Sunrise Vessels do not possess supervisory status while serving as OOWs – *Chevron Shipping Co.*, 317 NLRB 379 (1995) – has been abrogated, in relevant part, by the U.S. Supreme Court.

The Board in *Chevron* acknowledged that LDOs “exercise substantial responsibility for ensuring that the ships’ functions are carried out properly,” yet it concluded the LDOs’ “authority to direct the work of the crew” – which would render the LDOs statutory supervisors under Section 2(11) of the Act – was based on their “greater technical expertise and experience, rather than being an indication of supervisory authority.” *Id.* at 382. But, this reasoning was expressly rejected in 2001 by the Supreme Court. In *NLRB v. Kentucky River Community Care, Inc.*, the Supreme Court

explained that greater technical expertise and experience is indeed a factor to be considered and not discounted in determining supervisory authority:

The Board's test for determining supervisory status is inconsistent with the Act. The Act deems employees to be "supervisors" if they 1) exercise 1 of 12 listed supervisory functions, including "responsibly direct[ing]" other employees, (2) use "independent judgment" in exercising their authority, and (3) hold their authority in the employer's interest, § 2(11). The Board rejected respondent's proof of supervisory status on the ground that employees do not use "independent judgment" under § 2(11) when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." This interpretation, by distinguishing different kinds of judgment, introduces a categorical exclusion into statutory text that does not suggest its existence.

532 U.S. 706–707 (2001).

Subsequent to the Supreme Court's decision in *Kentucky River*, at least one ALJ presented with facts almost identical to the record evidence here confirmed *Kentucky River*'s abrogation of *Chevron*'s "technical expertise and experience" reasoning and found that the licensed engineers working aboard U.S.-flag deep-sea oceangoing vessels were supervisors under the Act:

Pursuant to Title 46 of the United States Code, merchant mariners working aboard vessels engaged in foreign and intercoastal voyages are required to sign documents referred to as "Shipping Articles." As set forth in 46 U.S.C. § 10304 the Articles must include a provision stating in substance that:

the seamen agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the master, or of an individual who lawfully succeeds the master, and of their superior officers in everything related to the vessel, and the stores and cargo of the vessel, whether on board, in boats, or on the shore.

All licensed engineering officers are "superior officers" to the unlicensed seamen. For at least the past 30 years all of the deep sea licensed marine engineer jobs referred by the Union's hiring hall have been covered by collective bargaining agreements containing the following provision:

The parties agree that all of the engineers to whom this Agreement is applicable, are “supervisors” within the meaning of the Labor Management Relations Act of 1947 as amended.

. . . .

Obtaining an engineer officers license is a difficult and lengthy process requiring three years of formal schooling in one of five or six maritime academies and/or a combination of many years of schooling and on-the-job training. Graduates from the academies graduate with a bachelor of science degree, as well as a Coast Guard license as a third assistant engineer or some other third officer position. It is a coveted license and not easily earned. . . .

The unlicensed crew must have certifications from the Coast Guard to perform specific functions on board the ship for which they are hired. The deep sea vessels of the type involved in this proceeding are approximately 900 to 1200 feet in length, and some 75 to 100 feet wide. . . . [W]hen a licensed engineer is standing watch he has complete control and authority over the engine room. The licensed engineer, as the superior officer of the unlicensed crew member, directs his work, and has the authority to pull him off a specific job and assign him another job. It is up to the licensed engineer to assess the situation and decide whether the unlicensed person is capable of handling any particular job. The unlicensed crew member is required to assist the licensed engineer in every way possible. Similarly, the licensed engineer should provide instruction to the unlicensed crew member whenever possible, and verbally warn or reprimand him when such warnings or reprimands are warranted.

District No. 1, 2003 WL 249694, at *1 (NLRB Div. of Judges Jan. 27, 2003). The ALJ then concluded this evidence demonstrated that the second and third engineers were supervisors under Section 2(11) of the Act:

Second assistant engineers and third assistant engineers are licensed officers with significant schooling, training and education. They are superior officers to the unlicensed personnel, and their separate and private quarters, shipboard amenities and considerably higher pay further emphasizes their distinct and superior status from that of the unlicensed crew. They are solely accountable for all work of the crew members that they direct, and take the blame for the deficiencies of the unlicensed personnel. Thus, the work product of the unlicensed crew members is direct reflection of the skills of the second assistant engineers and third assistant engineers, who readily understand that they bear this responsibility and must pay the consequences when some assignment they delegate to a crew member has not been carried out or has been done improperly. These licensed officers must necessarily exercise “independent judgment” in assessing and evaluating the nature of the of the required work in conjunction with the skills of the subordinate

unlicensed personnel who are available to assist, as it appears that there are no manuals or standing orders that would guide them in this endeavor. Then, acting upon such assessments, they may assign the work in accordance with their evaluation of the abilities of the unlicensed personnel, or do the work themselves in an instance where they have no confidence in the abilities of a crew member, or request the services of a different crew member in whom they do have confidence.

Id. After finding that the second and third licensed engineers were statutory supervisors, the ALJ correctly refused to apply the *Chevron* decision, persuasively explaining it is no longer good law:

The facts in *Chevron* upon which the Board relied are dissimilar to the facts in the instant case and, in my opinion, preclude a meaningful comparison. Further, in *Chevron* the Board stated:

We are not unmindful that the licensed junior officers exercise substantial responsibility for ensuring that the ships' functions are carried out properly, and that the crew and cargo remain safe. We believe, however, that their authority to direct the work of the crew is based on their greater technical expertise and experience, rather than being an indication of supervisory authority.

However, the Supreme Court in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), has found that greater technical expertise and experience (which licensed engineers clearly possess over the crew members they direct), is indeed a factor to be evaluated, rather than discounted, in determining supervisory authority.

It is clear that there is no categorical answer to the status of second assistant and third assistant engineers as each case is fact specific. Given the facts presented by the Union in this proceeding, when applied in a manner consistent with the Supreme Court's *Kentucky River* decision (*supra*), I find that the Union has demonstrated that second assistant and third assistant licensed engineers are statutory supervisors.

Further, this case is a hiring-hall case and specifically relates to licensed engineers referred by the Union to employers having an agreement with the Union as follows:

The parties agree that all of the engineers to whom this Agreement is applicable, are "supervisors" within the meaning of the Labor Management Relations Act of 1947 as amended.

Id.

ALJ Ross did not perform this type of "fact intensive and careful examination of the relevant facts and circumstances in each case," in compliance with *USF Reddaway, Inc.*, 349 at

339, in evaluating the supervisory status of the LDOs in this case. Instead, the ALJ based her legal conclusions upon the now-defunct reasoning of *Chevron*. The ALJ's jurisdictional finding should be reversed on these grounds alone.

2. The ALJ's Failure to Consider Material Record Evidence Also Requires Reversal of the RDO on the Statutory Supervisor Issue.

“Issues of supervisory status are fact intensive and careful examination of the relevant facts and circumstances in each case is necessary.” *USF Reddaway, Inc.*, 349 NLRB at 339. This maxim is especially relevant when adjudicating the supervisory status of personnel in the U.S. flag ocean vessel industry. For example, in *Brusco Tug & Barge, Inc.*, the Board found that the tugboat mate aboard a tugboat consisting of a four-person crew was not a Section 2(11) supervisor. 359 NLRB 486 (2012). But in doing so, the Board “emphasized” that its decision “turn[ed] on the facts of this case as presented in the record developed by the parties” and that it was “not declaring that tugboat mates are not statutory supervisors in all cases in which their status is at issue.” *Id.*

Here, most of the testimony presented at the hearing concerned the supervisory duties of the Sunrise LDOs, and in particular the Second and Third Mates, as the ALJ acknowledged. (ALJD at 17.) Yet, the ALJ simply failed to acknowledge, much less discuss, most of the material record evidence regarding the supervisory status of Second Mates and Third Mates, citing to just a few pages of witness testimony and only two exhibits. The ALJ altogether ignored compelling and vital record evidence on this central issue in the case.

First, the ALJ failed to even acknowledge the CBA provisions squarely addressing the supervisory status of the Second Mate and Third Mate – contract terms that continue in effect today. (Tr. 132–139, 480–484.) These collective bargaining provisions, which have been in the CBA since at least 1981 and many successor contracts, necessarily reflect the MM&P's and its employer counterparties' long standing binding agreement and understanding that the LDOs are

statutory supervisors. As detailed in the Statement of Facts above at pages 7–11, the CBA mandates in no uncertain terms that the LDOs must engage in a variety of supervisory activities. (GC–2, §§21–22 at 241–242.)

Second, the ALJ failed to address record evidence demonstrating that both federal law and international maritime conventions hold Second Mates and Third Mates personally accountable for incidents (such as environmental compliance and safe navigation) occurring during their watch when they are legally in command of the vessel at sea. Board precedent establishes that laws and regulations of this import when offered into the record must be weighed as evidence to support the supervisory status of Second Mates and Third Mates. *See, e.g., Brusco Tug*, 59 NLRB at 49. In fact, the Board has even chastised an employer for failing to enter such evidence at trial:

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

Id.

Here, the record is replete with evidence that the LDOs at issue in this case are held accountable by law for failing to, among other things: (i) ensure the safe navigation of vessel; (ii) protect the safety of the vessel’s personnel; (iii) prevent pollution; and (iv) supervise unlicensed crew in the operation of the vessel. (Tr. 473–474; R–5 at 42, 59.) In fact, Sunrise presented un rebutted witness testimony that a Third Mate aboard the Exxon Valdez had his license revoked

by the United States Coast Guard for failing to supervise a helmsman while the Third Mate was serving as the Officer of the Watch. (Tr. 473.) The ALJ failed to weigh any of this evidence.

Third, the ALJ refused to take any account of Mr. Washburn's unrebutted testimony concerning the job duties and responsibilities of LDOs aboard the Sunrise Vessels because he purportedly "has no independent or expert knowledge regarding the supervisory status of Respondent's LDOs much less Section 2(11)'s standards for evaluating one's supervisory status." (ALJD at 19.) The ALJ did not cite to any case law in support of her assertion that a witness such as Mr. Washburn, who serves as the senior Sunrise manager for all vessel and personnel matters, must qualify as an "expert" on LDOs' duties and/or possess specialized knowledge about "Section 2(11) standards" for his or her testimony to be credited or weighed. In fact, the ALJ ignores extensive and unrebutted record testimony establishing Mr. Washburn's personal knowledge of these Sunrise Vessels, how they operate and what the LDOs do. Mr. Washburn has thirty-five years of experience in the maritime industry, including experience serving aside LDOs as a U.S. Coast Guard licensed engineer – and union member – on U.S.-flag deep sea oceangoing ships. (Tr. 436.) In his capacity as the Senior Vice President of Sunrise, Mr. Washburn's "overall responsibility is everything to do with the vessels, the crew, the fuel, the labor, the condition of the overhauls, the regulatory, the environmental aspects. Just everything that has to do with the vessels is under [his] management." (Tr. 436–437.) The ALJ's dismissal of Mr. Washburn's testimony concerning the LDOs duties was arbitrary and capricious.

The caprice of ALJ Ross' disregard for Mr. Washburn's testimony contrasts sharply with the analysis and evaluation typically engaged in by ALJs considering nearly identical issues concerning the supervisory status of maritime personnel. For example, the ALJ in *District No. 1* credited and relied upon the testimony of the Manager of Labor Relations and Vessel Operations

for Sunrise's competitor, Matson Navigation Company. 2003 WL 249694, at *1 (NLRB Div. of Judges Jan. 27, 2003). Like Mr. Washburn, Matson's Manager of Labor Relations had worked as a licensed marine engineer for 21 years, though he had never worked aboard the actual vessel at issue in that case. *Id.* Notably, the Matson manager's testimony emulated Mr. Washburn's testimony, particularly with respect to the manager's testimony that "the *officers on each ship*, including the licensed marine engineers, as an extension of Matson's management, are hired to insure the safety of the crew, the ship, and its cargo." *Id.* (emphasis added).

3. The ALJ Failed to Address Board Precedent Finding LDOs Are Statutory Supervisors – Including Precedent to Which MM&P Was Party

In support of its argument that the Second Mates and Third Mates do, in fact, possess supervisory authority, Sunrise pointed to a significant body of Board law where the Board recognized MM&P LDOs serving on U.S.-flag offshore deep seagoing vessels as Section 2(11) supervisors. For example, in *International Organization of Masters, Mates & Pilots (Newport Tankers Corp.)*, the Board expressly concluded "[t]he Offshore Division is the largest division of MMP and is comprised solely of licensed deck officers, all of whom are supervisors within the meaning of Sec. 2(11) of the Act." 233 NLRB 245 (1977). *Id.* at 245 n.5. In her decision, the ALJ failed to address, much less distinguish this on-point Board authority.

Sunrise also briefed Board decisions where MM&P, itself, represented to the Board that the LDOs in its Offshore Division are statutory supervisors. For example, in its defense against another unfair labor practice charge concerning the picketing of two U.S.-flag deep sea oceangoing vessels, the MM&P asserted without qualification that "all licensed deck officers are supervisors within the meaning of Section 2(11) of the Act." *Int'l Org. of Masters, Mates & Pilots*, 219 NLRB 26, 40 n.1 (1975). Likewise, in *International Organizations of Masters, Seatrains – an oceangoing vessel operator – filed a Charge against the MM&P*. 220 NLRB 164, 165 (1975). In its Answer,

the MM&P asserted that the Offshore Division of the MM&P – the same division to which the LDOs in this case belong – could not violate the Act because the Offshore Division confines its membership to individuals who are supervisors within the meaning of the Act. *Id.* Therefore, according to the MM&P, its Offshore Division membership did not constitute a labor organization within the meaning of the Act. *Id.* In his opinion, the ALJ reasoned that “a careful reading of the testimony, following the rather lengthy examination of [the witness] in this respect, leads me to conclude that all deck officers, including the second and third officers, are, indeed, supervisory personnel.” *Id.* at 169 n. 3. The Board upheld the ALJ’s decision. *Id.* at 164. Again, ALJ Ross failed to address any of this authority.

Nor did ALJ Ross address the authority submitted from U.S. district and circuit courts ruling that LDOs working aboard large ocean-going vessels are statutory supervisors. *See, e.g., Marine Transport Lines, Inc. v. Int’l Org. of Masters, Mates & Pilots*, 636 F. Supp. 384, 386 (S.D.N.Y. 1986) (“The master collective bargaining agreement (the ‘Master Agreement’) about which this litigation centers was negotiated by the defendant Union and 109 operators of U.S.–flag oceangoing vessels, and established the terms and conditions of employment of defendant’s members, who as licensed deck officers are considered supervisory personnel under the National Labor Relations Act.”); *Int’l Org. of Masters, Mates & Pilots v. Victory Carriers, Inc.*, 1985 WL 514, at *3 (S.D.N.Y. Apr. 19, 1985) (“Licensed deck officers are ‘supervisors’ within the meaning of 29 U.S.C. § 152(11).”); *Wong v. Keystone Ship. Co.*, 609 F. Supp. 673, 674 (N.D. Cal. 1985) (“Plaintiff’s complaint and the declarations of the parties establish that there is no genuine issue with respect to the following material facts: Plaintiff’s duties and responsibilities as a licensed deck officer and Second Mate made him a “supervisor” within the meaning of the National Labor Relations Act”); *Wallace v. Int’l Org. of Masters, Mates and Pilots*, 547 F. Supp. 155, 156

(S.D.N.Y. 1982) (“Plaintiff is a licensed deck officer who at times has been employed as a supervisor aboard United States flagships.”); *Jensen v. Farrell Lines, Inc.*, 658 F.2d 27 (2d Cir. 1981) (“Appellants are ten licensed deck officers and engineers who are supervisory employees in the maritime shipping industry.”); *Int’l Org. of Masters, Mates and Pilots, AFL-CIO v. NLRB*, 575 F.2d 896, 904 (D.C. Cir. 1978) (“Licensed deck officers are “supervisors” within the meaning of 29 U.S.C. § 152(11) (1970).”); *Newport Tankers Corp. v. NLRB*, 575 F.2d 477 (4th Cir. 1978) (“Deck officers are supervisors who, in their daily activities represent the employer in adjusting grievances of unlicensed seamen.”); *Int’l Org. of Masters, Mates and Pilots, Marine Div., Intern. Longshoremen’s Ass’n, AFL-CIO v. NLRB*, 539 F.2d 554, 556 (5th Cir. 1976) (“Petitioner MM&P is the principal labor union representing the licensed deck officers who serve in the United States Merchant Marine. Licensed deck officers on large merchant vessels, such as the Ultramar and the Sugar Islander, are ‘supervisors’ within the meaning of the Act, *see* 29 U.S.C. § 152(11), as one of their duties, among others, is the adjustment of grievances that arise on shipboard.”); *McKay v. Gleason*, 1971 WL 786, at *1 (E.D.N.Y. Aug. 20, 1971) (“The NLRB on August 13 declined to issue any notice of hearing on the charge because the classifications sought by MMP (master and deck officers) were supervisors and not employees within the meaning of the Act.”).

B. The ALJ’s Conclusion That the Second and Third Mates Are Not Supervisors Compels Sunrise to Recognize and Bargain with a Mixed Supervisor/Employee Bargaining Unit -- Which is Unlawful.

“An employer has no obligation to agree to bargain in a combined unit.” *In Re Integrated Health Services, Inc.*, 336 NLRB 575, 580 (NLRB 2001); *see also Russelton Med. Group, Inc. and United Steelworkers of Am., AFL-CIO-CLC*, 302 NLRB 718 (NLRB 1991). We acknowledge that this principle is not absolute: “While a mixed unit of employees and supervisors is not unlawful, the Board cannot certify one, **and neither can it compel an employer to bargain in respect to supervisors.**” *Beverly Manor Convalescent Centers*, 275 NLRB 943, 948 n.6 (NLRB 1985)

(emphasis added); *cf. Russelton Med. Group*, 302 NLRB 718, 718 (1991) (“[W]e find that the combined unit of professional and nonprofessional employees does not constitute a unit appropriate for collective bargaining, because the professional employees have never been given the opportunity to decide if they wish to be included in this [combined] unit.”)

There is no dispute that since at least 1981, the parties’ collective bargaining agreement unambiguously states the parties’ mutual intent and understanding that the LDOs – including the Second and Third Mates – are statutory supervisors. Subsection one of the CBA’s “Duties of Officers” section is titled “Supervisory and Professional and provides that “[t]he duties of the licensed deck officers, including masters, shall be maintained as supervisory and professional.” (GC–2, §21(1) at 240). Section 21(1) of the CBA remains in effect and has never been amended or removed by any later MOU in nearly 40 years. (Tr. 132–133, 480–481.) As detailed in the Statement of Facts above at pages 7–11, the CBA goes on at length and in detail throughout numerous sections specifying the extensive supervisory and command responsibilities that the LDOs perform; the authority the LDOs exercise over the crew; and the many accommodation, dining, recreational and travel benefits and privileges that are available only to LDOs – all of which further distinguish and separate them from the rank-and-file crew.

This undisputed record materially distinguishes the circumstances here from the Board cases holding that a mixed unit of supervisors and employees is not unlawful where the employers had voluntarily included supervisors in a unit with employees, and later used that as a defense to alleged violations of the Act. *See, e.g., Union Plaza Hotel & Casino*, 296 NLRB 918, 918 n.4, 924 (NLRB 1989) (employer voluntarily recognized a *mixed* bargaining unit for several years).

C. The ALJ’s Finding That Sunrise Is the Successor to Horizon Lines Is Unsupported by the Record Evidence and Contrary to Binding Authority.

“The test for determining whether a company is a successor to a predecessor employer with an obligation to recognize and bargain with an incumbent union depends on two factors: (1) whether there is substantial continuity of business operations, *i.e.*, whether the new employer conducts essentially the same business as the predecessor employer, and (2) whether there is continuity in the workforce, *i.e.*, whether a majority of the new employer’s substantial and representative complement of employees in an appropriate unit are former employees of the predecessor employer.” *Ridgewood Health Care Ctr.*, 367 NLRB No. 110 at *2–3 (Apr. 2, 2019).

At the hearing, only one witness – Amy Sherburne-Manning – had first-hand, personal knowledge of the transaction where Sunrise acquired Horizon Lines’ Hawaii trade lane business. Ms. Sherburne-Manning testified without contradiction that she led the negotiations for this transaction and was intimately involved in the due diligence process. (Tr. 253, 275–276.) Ms. Sherburne-Manning further testified to the terms of that transaction, namely that SR Holdings – the parent company of Sunrise – purchased only 30% of Horizon Lines’ assets and liabilities and acquired “less than 30% of [Horizon Lines’] employees.” (Tr. 285, 288.) Ms. Sherburne-Manning also testified that an unrelated company, Matson, Inc., purchased the vast bulk of Horizon Lines’ business, acquiring 70% of Horizon Lines’ assets and liabilities, comprising Horizon Lines’ Alaska and Puerto Rico trade lanes, as well as all of Horizon Lines’ intellectual property and corporate services, including its finance, human resources, and information services. (Tr. 285, 288; R–2.) Neither the CGC nor the Union introduced any evidence pertaining to this transaction or otherwise contradicted Ms. Sherburne-Manning’s testimony. Nonetheless, the ALJ did not address Ms. Sherburne-Manning’s *undisputed* testimony regarding the obvious and material absence of continuity between Horizon Lines and Sunrise.

Additionally, the ALJ misapplied Board precedent in reasoning that Sunrise was a successor to Horizon Lines “because it continued to operate Horizon’s Hawaii trade lane business.” (ALJD at 5.) The proper inquiry examines whether Sunrise continued to operate Horizon Lines’ business operations *as a whole*, which included, the Alaska and Puerto Rico trade lanes, as well as Horizon Lines’ intellectual property and corporate services. *See Ridgewood Health Care Ctr.*, 367 at *2–3. The ALJ’s finding of successorship based on the faulty premise that Horizon Lines’ “operations” only included its Hawaii trade lane business is contradicted by undisputed record evidence and contrary to “successor” principles under established Board law.

D. The ALJ’s Finding That the Union Timely Filed Its Charge Is Based on Speculation and Is Not Supported by the Record Evidence or Board Precedent.

On September 19, 2017, the Union sent an information request to Sunrise asking for a variety of documents related to Sunrise’s parent company, as well as to the parent company’s subsidiary. (GC–13.) However, the Union did not file a Charge relating to its Union’s September 19, 2017 request for information until May 2, 2018 – nearly eight months after the initial request. (GC–1(a), (m).) Accordingly, the record evidence unequivocally establishes that the allegations in the Second Consolidated Complaint pertaining to the Union’s September 19, 2017 information request are untimely pursuant to Section 10(b) of the Act.

In her decision, the ALJ misrepresents Sunrise’s position by stating that Sunrise took issue with the timeliness of *both* the Union’s September 19, 2017 information request and its March 2, 2018 information request. To the contrary, Sunrise’s post-hearing brief only objects to the timeliness of the Union’s September 19, 2017 information request. (R. Post-Hr’g Br. at 56–57 (Dec. 20, 2019).) As a result of the ALJ’s misunderstanding of Sunrise’s timeliness argument, the ALJ neglected to address Sunrise’s actual timeliness argument altogether. Instead, she concluded, without any citation to the record or Board precedent, that “even assuming, *arguendo*, that the

Union had ‘clear and unequivocal notice’ that Respondent did not intend to respond to its September 19, 2017 request, Respondent cannot show that the March 2, 2018 information request, which is practically identical to the September 2017 information request, was untimely.” (ALJD at 14.) The ALJ’s failure to address Sunrise’s affirmative defense of untimeliness with the respect to the Union’s September 19, 2017 information request necessitates not only the reversal of the ALJ’s finding that Sunrise violated the Act by failing to timely respond to that request, but also the ALJ’s finding that the Board had jurisdiction over this claim.

E. The ALJ’s Determination That the Union Is a Section 9(a) Representative of the LDOs Is Based on Demonstrably False Assumptions.

In response to Sunrise’s argument that the bargaining unit of MM&P-represented LDOs aboard the Sunrise Vessels has never been certified, nor has MM&P ever sought certification for this bargaining unit under Section 9 of the Act, the ALJ answered with a *non sequitur* – “the evidence overwhelmingly demonstrates that the Union was the exclusive bargaining representatives for the LDOs.” (ALJD at 19.) The ALJ defends this contention saying “the Union had a series of CBAs with Respondent’s predecessor employer CSX, Sea-Land and Horizon,” and “Respondent’s predecessors recognized the Union as the exclusive bargaining representative for the LDOs.” (ALJD at 19–20.) But, each of those employers only recognized MM&P as the exclusive representative of the LDOs, in which every CBA unambiguously defined LDOs as statutory supervisors. And, it remains an undisputed fact that MM&P has never been certified under Section 9 of the Act, nor has it ever petitioned for certification.

As detailed in the Statement of Facts, the ALJ’s account of Sunrise’s lineage is materially incorrect. After the 1981 CBA, CSX split Sea-Land into three separate entities (an international liner service; a domestic liner service; and a terminal operating group) and sold Sea-Land’s international liner service to Maersk. CSX thereafter created an entirely new entity that included

only a portion of Sea-Land's assets and liabilities. The ALJ's mistaken assertion that Sea-Land is the predecessor to a variety of corporate entities, including Sunrise, formed the sole basis for the ALJ's finding that the Union was the Section 9 exclusive bargaining representative for the LDOs.

X. THE ALJ'S DETERMINATION THAT SUNRISE FAILED TO BARGAIN IN GOOD FAITH WITH THE UNION WHEN IT DECLINED TO ARBITRATE DISPUTES AT THE UNION'S HEADQUARTERS IS CONTRADICTED BY UNDISPUTED RECORD EVIDENCE.

The dispute between MM&P and Sunrise regarding the proper locale for arbitrations centered on the parties' disagreement as to whether Sunrise assumed an unsigned⁹ 1984 MOU through Sunrise's purchase of Horizon Lines' Hawaii trade lanes. As discussed above, Ms. Sherburne-Manning was the only witness who had personal knowledge of this transaction. (Tr. 253, 275–276.) Ms. Sherburne-Manning testified without challenge that Horizon Lines represented that it had produced to SR Holdings every collective bargaining agreement that Horizon Lines' Hawaii trade lane business was bound to. (*Id.*) Ms. Sherburne-Manning also testified that in order to ensure that Horizon Lines had in fact produced each and every collective bargaining agreement it was bound to with respect to its Hawaii trade lane business, Ms. Sherburne-Manning created a schedule for each union that listed every collective bargaining agreement that Horizon Lines had produced during the due diligence period. (Tr. 281.) These schedules were included in the Assignment and Assumption Agreement that Horizon Lines executed, and Ms. Sherburne-Manning testified that it was her “understanding that the collective bargaining agreement that Horizon Lines had with MM&P that was being assigned to and assumed by Sunrise Operations, LLC . . . were the documents listed on Schedule A,” which did not include the 1984 MOU. (Tr. 281-282; GC–7.)

⁹ The 1984 MOU was unsigned by any party, including MM&P, and it did not contain the identity of any employer. (GC-7.)

On May 26, 2015, Ms. Sherburne-Manning sent a copy of Schedule A to MM&P's General Counsel, who admitted he read the Assignment and Assumption Agreement – including Schedule A – three days before Horizon and Sunrise executed the agreement. (Tr. 116; GC–7.) Mr. Terrasa admitted he did not file on behalf of MM&P an unfair labor practice charge or contract grievance, or initiate any other action or communication to assert that Schedule A did not accurately list all the all the Horizon/MM&P labor agreements or otherwise claim that the 1984 MOU should be included in the agreements Horizon was obligated to assign to Sunrise. (Tr. 116–117, 326.)

Yet, the ALJ weighed none of this undisputed evidence. The ALJ's finding that Sunrise was bound by the 1984 MOU and that its refusal to abide by the 1984 MOU was a Section 8(a)(5) violation is unsupportable on the record evidence and must be rejected.

XI. THE ALJ'S FINDINGS CONCERNING THE UNION'S INFORMATION REQUESTS MISAPPLIES BOARD PRECEDENT AND IGNORES THE RECORD EVIDENCE.

A. Sunrise's Response to the Union's September 19, 2017 and March 2, 2018 Information Requests Complied with the Act.

Aside from the fact that, as discussed in Part II.C *supra*, the claim relating to the Union's September 19, 2017 information request should be dismissed on timeliness grounds, the Union's claims regarding both the September 19, 2017 and March 2, 2018 information requests should also be dismissed because the ALJ ignored much of the undisputed record evidence. Specifically, the ALJ neglected to address the record evidence that (i) the Union never demonstrated the relevance of either its September 19, 2017 or March 2, 2018 information requests; (ii) the information requests demanded various documents from Sunrise regarding other Pasha entities; and (iii) Sunrise offered to meet and confer over the March 2, 2018 information request, but the Union never responded. (*See* GC–19; GC–20.)

As a result of the ALJ's failure to address the aforementioned record evidence, the ALJ also declined to evaluate Sunrise's legal argument that it was not required to respond to either information request because the Union failed to meet its burden of proving the relevance of the requested information. Board precedent plainly states that mandatory bargaining subjects are confined to "issues which settle an aspect of the relationship between the employer and the employees," *KIRO, Inc.*, 317 NLRB 1325, 1326 (1995), and where "the information sought concerns matters outside the bargaining unit, such as those related to single employer or alter ego status, a Union bears the burden of establishing the relevance of the requested information." *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 967 (2006).¹⁰

Likewise, the ALJ misstated Board law in stating that Sunrise's argument that an employer "need not produce [the] requested information [if] the employer reasonably believes that the subject of the information requested may [be] related to an unfair labor practice charge" *Stephan Co.*, 352 NLRB 79, 88 (2008), has been rejected by the Board. (ALJD at 14.) The ALJ did not cite to any authority supporting her assertion, relying instead on two inapposite cases, *National Broadcasting Company, Inc.* 352 NLRB 90 (2008) and *Kellogg's Snack*, 344 NLRB 756 (2005).

B. Sunrise Did Not Unreasonably Delay in Responding to the Union's September 27, 2018 Information Request.

In her decision, the ALJ held that Sunrise unreasonably delayed in responding to the Union's September 27, 2018 information request because (i) "the Board has held that a two-month delay in furnishing relevant information violates Section 8(a)(5) of the Act"; and (ii) "Respondent's reason for the two-month delay, Washburn forgot to turn the document over, failed

¹⁰ Underscoring the irrelevance of the Union's request, the Region dismissed the Union's single/joint employer charges against Sunrise. (See Case No. 20-CA-219534, Decision to Partially Dismiss (Dec. 31, 2018); R. Post-Hr'g Br., Ex. A (Dec. 20, 2019).) The ALJ granted the CGC's motion to strike these pleadings (ALJD at 6 n. 10), in violation of 29 CFR §102.45(b), despite the fact they were submitted into the record as Exhibit B to Respondent's Petition to Revoke. (R. Pet. to Revoke, Ex. B (Oct. 29, 2019), and they are "orders" previously entered in this case. (See Case No. 20-CA-219534, Decision to Partially Dismiss (Dec. 31, 2018); Appeal Denial Letter (July 3, 2019).)

to justify the delay.” (ALJD at 15.) There is no *per se* rule that an employer will always be found in violation of the Act if it delays in furnishing the requested information within a specified time frame. *See, e.g., In Re W. Penn Power Co.*, 339 NLRB 585, 587 (2003). Rather, Board precedent requires the ALJ to consider the *totality of the circumstances* when evaluating whether the employer’s delay was justified. *Id.*

The ALJ did not consider the full record on this issue; specifically, that (i) immediately after Mr. Washburn received the request from Mr. Turner, Mr. Washburn forwarded that request to Sunrise’s Senior Port Engineer; (ii) Sunrise’s Senior Port Engineer emailed the requested information to Mr. Washburn three days after receiving the information request; (iii) Mr. Washburn had a good faith belief that he then forwarded the Senior Port Engineer’s email containing the requested information to the Union; (iv) Mr. Washburn met with the Union official who sent the information request for several hours on October 30, 2018, but the Union official made no mention of the information request; (v) the Union already had the information it was requesting from Sunrise; and (vi) the Union actually had better access to the information requested because it concerned its own members’ personal information. (Tr. 226–228, 495; R–3 at 1–3; R–7 at 1; GC–21 at 1; GC–22.) Sunrise made a reasonable good faith effort to respond to the information request as promptly as circumstances allowed. *See, e.g., Postal Service*, 352 NLRB 1032, 1050 (2008).

C. Sunrise Did Not Unreasonably Delay In Providing the Union with Information Responsive to Its October 11, 2018 Information Request

The ALJ’s finding that Sunrise violated the Act by delaying in providing the Union with information responsive to its October 11, 2018 information request fails for the same reasons as discussed in Section IV.B above. The ALJ erroneously states that aside from Sunrise’s explanation that Mr. Washburn delayed in responding to this request because he “had been traveling almost

non-stop and [Respondent] had...a host of competing priorities. . . . Respondent provided no evidence to support its rational regarding the delay.” (ALJD at 16.) That is false. The record discloses Sunrise was delayed in responding to the Union’s request because (i) the Union’s information request required Sunrise to produce extensive information showing the underlying calculations, the name of the employee to whom the payment was made, the payment date check number and date or estimated date of payment delivery; (ii) Sunrise’s only payroll manager devoted a significant amount of time to the Union’s request, which required her to obtain necessary contribution information from the MM&P Taft-Hartley benefit plans, accurately perform the calculations for each MM&P LDO who worked aboard one of the four vessels during the preceding 17 months, and generate the report to verify that the MM&P members received accurate pay and benefit contributions; and (iii) this process was further complicated because Sunrise’s payroll manager had to obtain some of the responsive information from the third party, Marine Transport Management, that had managed Sunrise’s payroll prior to June 1, 2018. (Tr. 73, 225, 309, 497–498, 553; GC–23 at 1–2.)

D. Sunrise’s Response to the Union’s November 7, 2018 Information Request Complied with the Act

The ALJ’s seriously erred finding that Sunrise was required to answer thirty-seven questions posed by the Union concerning the various technical details concerning two ships that (i) were in the early stages of its construction; (ii) were neither the property of Sunrise nor any Pasha-related entity; (iii) would not be completed for at least two years; and (iv) the Union had no jurisdiction over. (Tr. 226–228; GC–26 at 1–2; GC–32 at 1.) The ALJ ignored the foregoing record evidence, as well as undisputed evidence that Sunrise provided the Union with all the information it possessed about the technical details of the vessels. The ALJ likewise ignored undisputed evidence that Sunrise asked the company constructing the vessels to answer the

Union's questions, though the builder refused in order to protect proprietary design information. (*See id.*) The ALJ, likewise, ignored the General Counsel's Office of Appeals decision recognizing that "[t]he ships that the Union claims will be replacement vessels [for the Sunrise Vessels] are in early stages of construction and will not be completed until 2020. Thus, the Union's allegations [that Sunrise was interfering or threatening to interfere with the formation or administration of the Union] are not ripe for review." (*See* Case No. 20-CA-219534, Appeal Denial Letter (July 3, 2019); R. Pet. to Revoke, Ex. B (Oct. 29, 2019)).

CONCLUSION

For the foregoing reasons, the ALJ's findings that Sunrise violated the Act should be reversed and the Second Consolidated Complaint should be dismissed in its entirety.

Dated: June 15, 2020

SUNRISE OPERATIONS, LLC

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CERTIFICATE OF E-FILING AND SERVICE

Kara E. Cooper, one of the attorneys for Sunrise, certifies that on June 15, 2020, she caused the foregoing Respondent Sunrise Operations, LLC's Brief in Support of Its Exceptions to the Administrative Law Judge's Recommended Decision and Order to be filed electronically through the National Labor Relations Board's electronic filing system and served by email upon:

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