UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

SUNRISE OPERATIONS, LLC
A WHOLLY OWNED SUBSIDIARY OF THE
PASHA GROUP

and

Case Nos. 20-CA-219534
20-CA-227593
20-CA-230861

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

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. SECTION 8(a)(5) VIOLATIONS – RESPONDENT'S FAILURE TO TIMELY PROVIDE NECESSARY AND RELEVANT INFORMATION TO THE UNION (RESPONDENT'S EXCEPTION NOS. 81, 142) 2
A. September 19, 2017 and March 2, 2018 Single Employer Information Requests (Respondent's Exception Nos. 32-35, 88-91) 3
1. Relevance Of Information Requests Regarding A Single Employer (Respondent's Exception Nos. 22-24, 29-30, 82-87) 3
2. The Filing of An Unfair Labor Practice Charge Does Not Excuse Respondent Providing Single Employer Information To The Union (Respondent's Exception Nos. 31, 98-99) 6
3. The ALJ Correctly Dismissed Respondent's Claim Of Untimeliness (Respondent's Exception Nos. 92-97) 7
B. Respondent's Undue Delay In Providing A Presumptively Relevant Fleet Roster (Respondent's Exception Nos. 36-43, 100-103) 8
C. Respondent's Undue Delay In Informing The Union About Its Implementation Of The Arbitration Award (Respondent's Exception Nos. 44-46, 104-107) 10
D. Respondent's Failure To Provide Information To The Union's November 7, 2018 Information Request (Respondent's Exception Nos. 47-55, 108-113) 11
III. SECTION 8(a)(5) VIOLATION – FAILURE TO ABIDE BY THE PARTIES' 1984 MOU DICTATING THAT ARBITRATIONS BE HELD IN LINTHICUM HEIGHTS, MARYLAND (RESPONDENT'S EXCEPTION NOS. 9-15, 58-61, 66-80, 137-141, 143) 12
IV. RESPONDENT'S AFFIRMATIVE DEFENSES LACK MERIT (RESPONDENT'S EXCEPTION NO. 114) 14
A. The Board's Jurisdiction Over These Cases 14
1. The Bargaining Unit is Not Comprised of Section 2(11) Supervisors (Respondent's Exception Nos. 4, 116-129) 15
A. Respondent Must Still Bargain With The Union 18
2. Voluntary Recognition (Respondent's Exception Nos. 3, 130, 133-136) 19
B. Respondent Is A Successor Employer (Respondent's Exception Nos. 5-8, 16-21, 115) 20
V. ALJ'S MOTION TO STRIKE PORTIONS OF RESPONDENT'S POST-HEARING BRIEF WAS CORRECT (RESPONDENT'S EXCEPTION NOS. 25-28, 56-57, 62-65, 131-132) 22
VI. CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

A & L Underground,
302 NLRB 467 (1991)..... 7
Baldwin Shop 'N Save,
314 NLRB 114 (1994)..... 4
Barnard Engineering Co.,
282 NLRB 617 (1987)..... 3
Barrington Plaza & Tragniew, Inc.,
185 NLRB 962 (1970)..... 19, 20
Beverly Manor Convalescent Centers,
275 NLRB 943 (1985)..... 18
Boston-Needham Industrial Cleaning Co.,
216 NLRB 26 (1975)..... 21
Bronx Health Plan,
326 NLRB 810 (1998)..... 21
Bundy Corp.,
292 NLRB 671 (1989)..... 9
Chevron Shipping Co.,
317 NLRB 379 (1995)..... 15, 16, 17
Corson & Gruman,
278 NLRB 329 (1986)..... 4
D&F Industries, Inc.,
339 NLRB 618 (2003)..... 4
Dedicated Services,
352 NLRB 753 (2008)..... 7
Dodger Theatricals Holdings, Inc.,
347 NLRB 953 (2006)..... 4
Dodgers Theatrical Holdings, Inc.,
347 NLRB 953 (2006)..... 6
E.I. Du Pont De Nemours & Co. & Amphill Rayon Workers, Inc.,
366 NLRB No. 178 (2018)..... 10
In re Cannelton Industries, Inc.,
339 NLRB 996 (2003)..... 4
International Credit Service,
240 NLRB 715 (1979)..... 9
International Organization of Masters, Mates & Pilots (Newport Tankers Corp.),
233 NLRB 245 (1977)..... 18
Int'l Org. of Masters, Mates & Pilots,
219 NLRB 26 (1975)..... 18
Kellogg's Snack,
344 NLRB 756 (2005)..... 6
Knappton Maritime Corp.,
292 NLRB 236 (1988)..... 3, 4

Kroger Co.,
226 NLRB 512 (1976)..... 5
Local 12 Engineers,
237 NLRB 1556 (1978)..... 9
M. Scher & Sons, Inc.,
286 NLRB 688 (1987)..... 3
Maben Energy Corp.,
295 NLRB 149 (1989)..... 4
Magnet Coal, Inc.,
307 NLRB 444 (1992)..... 4
National Broadcasting Company, Inc.,
352 NLRB 90 (2008)..... 6, 7
NBC,
318 NLRB 1166 (1995)..... 6
NLRB v. Health Care & retirement Corp. of America,
511 U.S. 571 (1994)..... 17
NLRB v. Kentucky River community Care, Inc.,
532 U.S. 706 (2001)..... 15, 16, 17
Pennco Inc.,
212 NLRB 677 (1974)..... 9
Pulaski Construction Co.,
345 NLRB 931 (2005)..... 6, 7
Quality Engineered Products,
267 NLRB 593 (1983)..... 9
Ref-Chem Company,
169 NLRB 376 (1968)..... 20
Regency Service Carts,
345 NLRB 671 (2005)..... 5
Ridgewood Health Care Ctr,
367 NLRB No. 110 (2019)..... 21
Saks & Co. v. NLRB,
634 F.2d 681 (2d Cir. 1980)..... 21
Shamrock Dairy, Inc.,
119 NLRB 998 (1957)..... 20
Shamrock Dairy, Inc.,
124 NLRB 494 (1959)..... 20
Standard Dry Wall Products,
91 NLRB 544 (1950)..... 4, 5
Stewart Granite Enterprises,
255 NLRB 569 (1981)..... 21
Union Plaza Hotel & Casino,
296 NLRB 918..... 19
USF Reddaway, Inc.,
349 NLRB 329 (2007)..... 15
Woodland Clinic,
331 NLRB 735 (2000)..... 9

Zims Food-liner, Inc. v. NLRB,
495 F.2d 1131 (7th Cir. 1974)..... 21

Statutes

29 U.S.C. Section 152..... 17

I. INTRODUCTION

On May 11, 2020, Administrative Law Judge Lisa D. Ross[1] (ALJ) issued a decision in this case finding that Sunrise Operations, LLC, a wholly owned subsidiary of the Pasha Group, (Respondent) violated Section 8(a)(5) and (1) of the Act when it failed/refused to: (1) furnish and/or unreasonably delayed in furnishing necessary and relevant information to the Union; and (2) continue to abide by Section 36 of a Memorandum of Understanding (MOU) dated June 16, 1984, which required the parties to meet for arbitration proceedings in Linthicum Heights, Maryland. (ALJD 1:12-15; 2:17-18; 12:13-14; 20:30-31; 21:1-2; 21:9-15) (Respondent's Exceptions Nos. 81, 91, 99, 102, 107, 113, 137-138, 141-144). Respondent excepts to many of the ALJ's factual findings, failure to find facts in favor of Respondent and credibility determinations. (Respondent's Exceptions Nos. 2-24, 29-55, 59-61, 66-80, 83-86, 88-90, 92-96, 101, 104-106, 108-112, 115-128, 133-135, 139-140). Most of these exceptions are based on Respondent's theories that it has no obligation to bargain with the Union because: 1) the Board lacks jurisdiction either because the Union was never certified by the National Labor Relations Board (Board) or because the unit in question is comprised solely of supervisors; 2) Respondent is not a successor employer and; 3) one of the information requests is untimely. However, these theories were all previously presented to the ALJ and the ALJ soundly dismissed them. (ALJD 5:8; 14:26-48; 15:1-7, 17:38-47; 18:1-48; 19:1-16; 19:18-31; 20:1-11). Respondent also excepts to the ALJ's decision to strike certain portions of its post-hearing brief, which included evidence that was never

[1] Hereafter referred to as the ALJ. All references to the Administrative Law Judge's Decision are noted as "ALJD" followed by the page number(s). All references to the transcript are noted by "Tr." followed by the page number(s). All references to General Counsel's Exhibits and Respondent's Exhibits are noted by "GC Exh." and "R. Exh.", respectively followed by the exhibit number(s).

presented during the hearing. (Respondent's Exception Nos. 25-28, 56-57, 62-65, 131-132).[2] Finally, Respondent excepts to the ALJ's remedy and recommended cease and desist order and Appendix (Respondent's Exception Nos.145-146) on the grounds that they are contrary to the record evidence and applicable precedent, but does not present an argument on this matter in its supporting brief.

In this Answering Brief, Counsel for the General Counsel (General Counsel) will demonstrate that the ALJ's factual findings and credibility determinations were fully supported by the record and will respond to Respondent's exceptions based on the following topics: 1) Respondent's refusal and failure to timely provide necessary and relevant information to the Union was unlawful; 2) Respondent's failure to continue to abide by a 1984 MOU between the parties also violated the Act; 3) Respondent's affirmative defenses are meritless; and 4) the ALJ was correct in granting General Counsel's motion to strike portions of Respondent's post-hearing brief.

II. SECTION 8(a)(5) VIOLATIONS – RESPONDENT'S FAILURE TO TIMELY PROVIDE NECESSARY AND RELEVANT INFORMATION TO THE UNION (RESPONDENT'S EXCEPTION NOS. 81, 142)

In her decision, the ALJ found that Respondent violated Section 8(a)(5) and (1) of the Act when it failed/refused to furnish and/or unreasonably delayed in furnishing necessary and relevant information request by the Union. (ALJD 12:20-23). The ALJ broke down the separate violations based on each of the Union's information requests. Respondent excepts to each violation as discussed below.

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[2] Respondent continues to engage in the same pattern of introducing facts in its exceptions brief that are not part of the record, and then citing to newspaper articles in support. See p. 17-18 of Respondent's exceptions brief.

A. <u>September 19, 2017 and March 2, 2018 Single Employer Information Requests (Respondent's Exception Nos. 32-35, 88-91)</u>

The Union twice requested information regarding whether Respondent was operating as a single employer with The Pasha Group (TPG) and Pasha Hawaii on September 19, 2017 and March 2, 2018. (GC Exh. 13 &18). The ALJ correctly found that Respondent's delay in providing a response and failure to provide the Union with any information whatsoever regarding TPG and Pasha Hawaii was unlawful. (ALJD 13:19-25; 15:6-7).

1. <u>Relevance Of Information Requests Regarding A Single Employer (Respondent's Exception Nos. 22-24, 29-30, 82-87)</u>

Respondent claims that the ALJ neglected to address whether the Union ever demonstrated the relevance of its requests. Yet, the Union expressly stated its belief that these entities were operating as a single employer in both of its information requests. (GC Exh. 13 & 19). The ALJ appropriately discussed the relevancy of the single employer information requested, stating that "the Union's request for the aforementioned documents was relevant to determine who was the employer for the LDOs on the four vessels the Union represented." (ALJD 13:38-40). Similarly, "these documents are relevant because the Union was informed by Horizon, SR Holdings, Pasha and Pasha Hawaii themselves that SR Holdings, Respondent, Pasha and Pasha Hawaii may all be the owner of the found vessels and/or may be the employer to the LDOs on the vessels." (ALJD 13:46; ALJD 14:1-3).

The Board has long held that a union is entitled to information regarding whether Respondent is operating as a single employer so long as the union's belief that Respondent is operating as a single employer is reasonable and based on objective evidence. See *M. Scher & Sons, Inc.* 286 NLRB 688, 691 (1987). See also *Barnard Engineering Co.* 282 NLRB 617, 619 (1987); *Knappton Maritime Corp.* 292 NLRB 236

(1988); *Maben Energy Corp.*, 295 NLRB 149, 152 (1989); *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 967 (2006). The Union does not have to prove the existence of this relationship, nor does the information that triggered this request have to be accurate. See *Magnet Coal, Inc.* 307 NLRB 444 fn. 3 (1992). The Union is not obligated to disclose the factual basis for its belief to the employer at the time of the information request, just the reason for its request. *Baldwin Shop 'N Save*, 314 NLRB 114, 121 (1994); *Corson & Gruman*, 278 NLRB 329, 333-334 fn. 3 (1986), enfd. 811 F.2d 1504 (4th Cir. 1987). It is sufficient that the General Counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief. *In re Cannelton Industries, Inc.*, 339 NLRB 996, 997 (2003) (citation omitted). See also *Knappton Maritime Corp.*, supra at 238-239.

Here, the ALJ correctly determined that the Union had a reasonable belief that the entities in question were operating as a single employer based on several pieces of objective evidence presented on the record. The ALJ credited the Union's witness, Vice President Lars Turner's (Turner) explanation for the relevancy and necessity of this information stating that "the Union needed these documents in order to resolve comments made by Respondent's Senior Vice President of Vessel operations Ed Washburn (Washburn) during negotiations that *Pasha*, not Respondent would pick which Union would represent the LDOs on the four vessels." (ALJD 7:43-45; 8:1). "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *D&F Industries, Inc.*, 339 NLRB 618 (2003), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

Respondent argues that the ALJ's findings of fact are not grounded on her assessment of the demeanor of the witnesses at trial and are materially incomplete, subjective and speculative. However, the ALJ specifically cited to various instances where Respondent's main witness' demeanor was "short, direct, extremely vague" and "disingenuous" at best. (ALJD 11:fn. 13). She specifically cited his appearance, and hence demeanor, incredible stating, "Overall, Washburn's **appearance** left me with the impression that he was committed to sharing as little information as possible unless it benefitted Respondent, and accordingly, except where noted in this decision, I found Washburn's entire testimony less than fully credible." *Id.* Furthermore, the preponderance of the evidence clearly demonstrated that the Union's two information requests were relevant and Respondent was obligated to respond to them. Accordingly, the Board should not disturb the ALJ's credibility and findings of facts.

The record established that Respondent failed to respond entirely to the Union's September 19, 2017 information request and failed to provide any information regarding TPG and Pasha Hawaii in its response to the Union's March 2, 2018 information request. An employer must timely respond to a union's request seeking relevant information even when the employer believes it has grounds for not providing the information. *Regency Service Carts*, 345 NLRB 671, 673 (2005) ("When a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished"); *Kroger Co.*, 226 NLRB 512, 513- 514 (1976). Accordingly, the ALJ's finding that the Union demonstrated the relevancy of its information requests was correct and she was warranted in dismissing Respondent's relevancy defense.

2. **<u>The Filing of An Unfair Labor Practice Charge Does Not Excuse Respondent From Providing Single Employer Information To The Union (Respondent's Exception Nos. 31, 98-99)</u>**

Respondent also claims that the ALJ misstated Board law regarding whether an employer is required to produce information that may be related to an unfair labor practice charge, claiming that she did not cite any authority to support her assertion and relied on two inapposite cases *National Broadcasting Company, Inc.*, 352 NLRB 90 (2008) and *Kellogg's Snack*, 344 NLRB 756 (2005).

However, the ALJ clearly cited to *National Broadcasting Company, Inc., supra* in support of her assertion, stating that in this case the Board found that information requested by the union relevant to single employer status was not considered pretrial discovery and did not change the nature and relevancy of the union's information request. (ALJD 14:41-47). Respondent is attempting to assert that any information request that is related to an unfair labor practice charge is tantamount to pretrial discovery. However the Board specifically rejected this notion in *National Broadcasting Company, Inc., supra* and affirmed the ALJ's finding that the information requested "by the Union here is 'garden variety' information, **relevant to single employer status**, which has been consistently been deemed relevant and ordered to be turned over to Unions, without being considered 'pretrial discovery.'" *Id* citing *Dodgers Theatrical Holdings, Inc.*, 347 NLRB 953, 967 (2006); *NBC*, 318 NLRB 1166, 1169 (1995); *Pulaski Construction Co.*, 345 NLRB 931, 936 (2005). "The information requested here does not request that Respondent supply the Union with names of witnesses it intends to call, evidence it intends to rely, or any other information that would delve into Respondent's litigation strategy at the arbitration." *Id.* "**Indeed, if this information request is deemed to be**

"pretrial discovery," virtually every information request could be so characterized." *Id.* "Therefore, the fact that the Union has actually filed its arbitration request, and the case has been scheduled for arbitration, does not change the nature and relevancy of the Union's information request." *Id.* The information request in *National Broadcasting Company, Inc.* like the information requests here involve single employer status and is not tantamount to pre-trial discovery. The ALJ was correct in her decision to dismiss Respondent's claim of pretrial discovery and its refusal to provide such 'garden variety' information was unlawful.

3. **The ALJ Correctly Dismissed Respondent's Claim Of Untimeliness (Respondent's Exception Nos. 92-97)**

Finally, Respondent contends that the ALJ misrepresented its position by stating that Respondent took issue with **both** the Union's September 19, 2017 and March 2, 2018 information requests, and as a result neglected to address its actual timeliness argument altogether. However, the ALJ did not misrepresent Respondent's position, nor did she fail to address its timeliness argument. The ALJ fully discussed that the six-month period for issuing complaint does not begin to run when the Union first issues the information request (i.e. September 19, 2017), but rather, then it received actual or constructive notice of the unlawful conduct that constitute the alleged unfair labor practice. (ALJD 14:16-18). The burden of showing such clear and equivocal notice falls on the party raising Section 10(b) as an affirmative defense. (ALJD 14: 21-22; *Dedicated Services*, 352 NLRB 753, 759 (2008); *A & L Underground*, 302 NLRB 467, 469 (1991)). Here, Respondent clearly did not meet this burden, and failed to cite any evidence to show the Union had received actual or constructive notice that Respondent was not going to respond to its September 19, 2017 information request. Thus, the ALJ properly dismissed Respondent's untimeliness defense.

The ALJ continued on to find that even if Respondent had met its burden of showing notice, which it did not, it is still obligated to provide the relevant information since the Union timely filed an additional complaint over the March 2, 2018 information request which was nearly identical to the September 19, 2017 information. (ALJD 14:28-30). The ALJ was not asserting that Respondent's position was that both requests were untimely, but rather that Respondent's refusal to provide information to either request was unlawful and its untimeliness defense held no merit. (ALJD 14: 30-31). The record reflects that Respondent failed to meet its burden and the ALJ properly dismissed Respondent's untimeliness defense.

B. Respondent's Undue Delay In Providing A Presumptively Relevant Fleet Roster (Respondent's Exception Nos. 36-43, 100-103)

On September 27, 2018, the Union requested an updated Fleet Roster showing who was assigned permanently to each vessel and showing if there were any open unassigned billets. (GC Exh. 21). Although Respondent admitted that by October 1, 2018, it had the information, it failed to send it to the Union. (R Exh 3; Tr. 495). Instead, it sent a one-page document in response to the Union's information request on December 4, 2018, approximately two and a half months after it was first requested. (GC Exh. 22). It did not offer any explanation for its delay in providing the information, other than it may have been overlooked. (GC Exh. 22; Tr. 170, 495). The ALJ accordingly found Respondent's delay unlawful. (ALJD 15:36-37).

Respondent argues that the ALJ failed to consider the totality of circumstances for its delay. However, the ALJ did consider the totality of the circumstances and found Respondent's explanation lacking. Respondent simply repeated its argument that Washburn had a good faith belief that he sent the information but did not actually do so until two months later. The Board has consistently found an unexplained delay in

furnishing relevant information to be unlawful. See e.g. *Woodland Clinic*, 331 NLRB 735, 736 (2000) (delay of seven weeks unreasonable, absent explanation); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (employer replied within two weeks, providing some information, but did not supply rest of information required until six weeks later and no explanation provided for "foot dragging"); *International Credit Service*, 240 NLRB 715, 718-719 (1979), enfd. in relevant part 651 F.2d 1172 (6th Cir. 1981) (unexplained delay of six weeks unreasonable); *Local 12 Engineers*, 237 NLRB 1556, 1558-1559 (1978) (information supplied six weeks after initial request and after charge filed); *Pennco Inc*., 212 NLRB 677, 678 (1974) (employer unreasonably failed to respond to information requests for over one month and did so only after charge filed). In *Bundy Corp*., 292 NLRB 671 (1989), the Board found that the employer's delay in providing information for a period of two and a half months was unlawful. More specifically, the Board found the employer's explanation for its delay unconvincing, stating, "Respondent cites its corporate officials' preoccupation with an impending acquisition, the Union's own failure to repeat its requests for information during the numerous telephone conversations with the Respondent during that period, and its implicit belief that it was not obliged to comply with Spillman's initial demand for information. We find the Respondent's reasons for its delay to be specious, particularly in light of the nature of the requested material, which could readily have been obtained from the Respondent's plant or home office files." *Id* at 672. Similarly, here Respondent could have easily sent the requested information within a one-week period but failed to do so, citing nothing more than its Washburn's forgetfulness as its explanation. Based on established Board caselaw and a consideration of the totality of the circumstances in this

case, the ALJ correctly determined that Respondent unlawfully delayed in responding to the Union's information request and appropriately found Respondent's weak explanation for the delay unpersuasive.

C. Respondent's Undue Delay In Informing The Union About Its Implementation Of The Arbitration Award (Respondent's Exception Nos. 44-46, 104-107)

On October 11, 2018, the Union sent an information request to Respondent asking if it had already implemented any of the terms of the arbitrator's decision and award that was issued on August 3, 2018. (GC Exh. 23, p. 1; Tr. 171). Although Respondent admitted on the record that it implemented the terms of the award within approximately a week of the August 3, 2018, decision, it did not respond to the Union until December 4, 2018. (ALJD 8:40-42; GC Exh. 25; Tr. 176; Tr. 524-525). Respondent again argues that the ALJ failed to consider the totality of the circumstances for its delay. More specifically, Respondent argues that the ALJ failed to consider the extensive information that needed to be produced which required calculations that was further complicated by its payroll system. However, the ALJ did consider Respondent's explanation for the delay and once again found it lacking. The ALJ correctly noted that Respondent failed to proffer an explanation for why at the time of the request it did not communicate to the Union that there would be a delay and the reasons therefore. (ALJD 16:6-8). Instead, it simply delayed in providing the information requested for two months and only later attributed it to Washburn having had to travel non-stop and dealing with a host of competing priorities. (ALJD 16:1-8). As cited by the ALJ, the Board has dismissed these types of delayed justifications. *See. E.I. Du Pont De Nemours & Co. & Amphill Rayon Workers, Inc.*, 366 NLRB No. 178 (2018). Accordingly, the ALJ was correct in

finding that Respondent unlawfully delayed in providing the Union with the information it requested on October 11, 2018.

D. Respondent's Failure To Provide Information To The Union's November 7, 2018 Information Request (Respondent's Exception Nos. 47-55, 108-113)

On November 7, 2018, the Union sent an information request to Respondent regarding the requirements for the officers' quarters on two new containerships that were being built. (ALJD: 16:23-25; GC Exh. 26; Tr. 175-176). The Union based its information request on Section 5, Subsection 4 – New Construction and Major Reconversion of the Master CBA, which requires that the Licensed Deck Officers' quarters be constructed with certain specifications. (ALJD 16:26; GC Exh. 2, p. 210; Tr. 176). The Union did not receive a response to requests 1-3, 5-20, 23-27 and 29(a)-(c), 29(e)-(h). (ALJD 10:6-7; GC Exh. 32; Tr. 182-183). Respondent argues that it provided the Union with all the information it possessed about the technical details of the vessels and that the ALJ ignored evidence that it had requested that the builder answer the Union's questions and ignored the General Counsel's Office of Appeals decision stating that the replacement vessels are in early stages of construction and will not be completed until 2020.

However, Respondent did not argue that it had provided the Union with all of the information that it had requested. Rather, it argued that Respondent was not obligated to furnish information about vessels it does not manage or own. (ALJD 16:29-31; GC Exh. 32). The ALJ correctly found that: 1) the Union had a reasonable belief based on objective factual evidence for seeking these documents; 2) such information was relevant and necessary; and 3) that Respondent was obligated to respond to such a request.

(ALJD 16:29-32; ALJD 17:3-5). The ALJ did not ignore the evidence that Respondent presented regarding the technical details of vessels, rather she dismissed Respondent's excuse for not providing said information and correctly found that its failure to provide that information was unlawful.

III. SECTION 8(a)(5) VIOLATION – FAILURE TO ABIDE BY THE PARTIES' 1984 MOU DICTATING THAT ARBITRATIONS BE HELD IN LINTHICUM HEIGHTS, MARYLAND (RESPONDENT'S EXCEPTION NOS. 9-15, 58-61, 66-80, 137-141, 143)

Respondent previously recognized and abided by a June 16, 1984 MOU which dictates that all arbitration be held in Linthicum Heights, Maryland, by: 1) not presenting any objections to the entire CBA, including the 1984 MOU, after it was received in July 2017 from the Union (ALJD 11:36; Tr. 91); 2) testifying that during the 2017 re-opener negotiations, Respondent did not take the position that the 1984 MOU did not apply (Tr. 547); 3) engaging in two different arbitrations with the Union in Linthicum Heights, Maryland (ALJD 11:1-4; Tr. 97, 102); 4) submitting the entire CBA, including the 1984 MOU, as Joint Exhibit 1 during an arbitration that occurred on April 26, 2018. (ALJD 11:6-7; Tr. 100; GC Exh. 10); and 5) implementing all of the pay procedures and 401(k) provisions contained within the 1984 MOU. (ALJD 11:26-28; Tr. 107-108; GC Exh. 2)

However, beginning on September 12, 2018, when the Union filed for another arbitration, Respondent insisted that the panel of arbitrators and the arbitration itself must take place in San Francisco. (ALJD 11:11-14; Tr. 103; GC Exh. 12, p. 4). Respondent based its claim that San Francisco was the correct location on the grievance arbitration provision from the master CBA. (ALJD 11:14-15; Tr. 104; GC Exh. 2, p. 256). The Union repeatedly explained that the arbitrations have taken place and continue to take place in Linthicum Heights, Maryland because the grievance arbitration provision from

the 1984 MOU amends this language. (Tr. 105; GC Exh. 2, p. 2-3). Respondent claimed for the first time that it was not bound by the 1984 MOU because it was never part of the Assignment and Assumption Agreement it signed with Horizon Lines. (ALJD 11:16-18; Tr. 547; GC Exh. 12, p.1-2).

The ALJ did not find Respondent's explanation for the failure to abide by the 1984 MOU credible, specifically stating "Washburn could not explain why, despite Respondent not having, seeing or recognizing the 1984 MOU, Respondent admittedly implemented all of the pay procedures and the 401(k) provisions contained therein." (ALJD 11:24-27). Instead, she correctly found that Respondent was aware of the 1984 MOU, had knowledge of the location of the arbitration proceedings by previously meeting with the Union for arbitration proceedings in Linthicum Heights, Maryland and by complying/implementing the pay procedures and financial provisions contained within the 1984 MOU. (ALJD 12:8-11). Accordingly, Respondent violated the Act when it failed to continue meeting and conferring with the Union in Linthicum Heights, Maryland.

Respondent argues that the ALJ failed to weigh evidence that its General Counsel Amy Sherburne-Manning (Manning) testified that Horizon never presented the 1984 MOU as part of the Assignment and Assumption Agreement (AAA) and therefore Respondent never agreed to be bound by such an MOU. Respondent also argues that the ALJ failed to consider that the Union's General Counsel, Gabriel Terrasa (Terrasa) did not file an unfair labor practice charge or contract grievance to assert that the 1984 MOU was missing at the time that the Union received the AAA. Whether or not Terrasa agreed to file an unfair labor practice charge at the time is irrelevant as to whether Respondent is

ultimately bound by the MOU. Furthermore, the ALJ found Terrasa's testimony credible, unlike Washburn. (ALJD 10:13-14). Terrasa testified that he did not file an unfair labor practice charge at the time because he had received assurances from Respondent that it would abide by the full CBA and the Union was not actually a contractual party to the AAA. (Tr. 144)

The ALJ clearly considered Respondent's explanation that the 1984 MOU was not part of the AAA at the time that it took over the operations from Horizon and therefore was not bound by it but did not find it credible. (ALJD 11:16-22) Respondent's argument lacks credibility especially as the ALJ noted because Respondent complied with the terms of the 1984 MOU when it implemented certain pay and benefits protocols within the 1984 MOU. (ALJD 20:43-45). Had Respondent not agreed to be bound by the 1984 MOU it would have never implemented those other provisions. The Board should not overrule the ALJ's findings because the preponderance of the relevant evidence establishes that the ALJ was correct in finding Respondent's explanation for failing to continue to abide by the 1984 MOU incredible and thus a violation of the Act.

IV. RESPONDENT'S AFFIRMATIVE DEFENSES LACK MERIT (RESPONDENT'S EXCEPTION NO. 114)

Respondent re-asserts several affirmative defenses in its exceptions, all of which the ALJ considered and found meritless (ALJD 17:9-11). The ALJ was correct in her determinations as discussed below.

A. <u>The Board's Jurisdiction Over These Cases</u>

Respondent dedicates the majority of its exceptions to its theory that the Board lacks jurisdiction over these cases because the bargaining unit is comprised solely of 2(11) supervisors and the Union was never certified as the 9(a) representative of the

licensed deck officers (LDOs). Respondent argues that the ALJ's determination that the Board has jurisdiction is neither supported by the record nor by Board precedent. However, as demonstrated below, the ALJ conducted a careful examination of the record and found that the Board indeed has jurisdiction.

1. **The Bargaining Unit is Not Comprised of Section 2(11) Supervisors (Respondent's Exception Nos. 4, 116-129)**

In its Answer, Respondent first asserted that the LDOs are an inappropriate unit because they are Section 2(11) supervisors under the Act. (GC Exh. 1(cc), p. 12). During the hearing Respondent argued that Second and Third Mates are supervisors because they have the ability to recommend discipline for employees. (ALJD 18:15-18; Tr. 516). The ALJ soundly dismissed this theory because Respondent failed to proffer any examples that *their* second and third mates actually performed these functions. (ALJD 18:18-19). Respondent appears to have abandoned this argument in its exceptions and instead insists that: 1) the LDOs have technical expertise and experience while serving as Officers of the Watch (OOWs) which renders them supervisors; 2) were previously labelled as 'supervisors' within the CBA and several maritime laws and thus are 2(11) supervisors); and 3) were deemed as 2(11) supervisors in other NLRB cases which involved the Union and therefore should be considered 2(11) supervisors in this case. Respondent also claims that the ALJ failed to conduct a "fact intensive and careful examination of the relevant facts and circumstances in each case" as prescribed by *USF Reddaway, Inc.*, 349 NLRB 329, 339 (2007) and that her reliance on *Chevron Shipping Co.*, 317 NLRB 379 (1995) is misplaced since the Supreme Court's decision in *NLRB v. Kentucky River community Care, Inc.*, 532 U.S. 706 (2001) abrogated in relevant part *Chevron*.

However, Respondent's misstates the Supreme Court's decision in *Kentucky River*. In *Kentucky River*, the Supreme Court rejected the Board's categorical interpretation that "employees do not use 'independent judgment' when they exercise 'ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer's specific standards." *Id* at 713. This does not mean that all employees who exercise professional or technical judgment in directing less-skilled employees are necessarily 2(11) supervisors as Respondent claims. Indeed, the Supreme Court specifically highlighted the LDOs in *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995) stating that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." *Id* at 714-715. Thus, affirming the decision in *Chevron*, not abrogating it as Respondent claims. Here, Respondent has made such exercises as an abandoned ship drill, tying up the vessel, and conducting lifeboat inspections routine in nature, because it admitted that there is a standard placard next to the lifeboat (which is the same on every ship in the world) which dictates the abandoned ship drill and these drills are an established routine that happens the same way and take about an hour a month to complete. (Tr. 454-460, 514, 535, 541). Furthermore, a review of Respondent's Safety Management Administration policies dictates how each situation should be approached. (R. Exh. 5). Additionally, the ALJ correctly cited that the LDOs either must follow the Master's established orders <u>or</u> seek clarification from the superior on duty on handling any particular situation or adhere to the established protocols found in Respondent's Safety Management Administration policies. (ALJD 18:41-44; Tr. 342, 347, 395-396, 398, R. Exh. 5). Therefore, the ALJ was correct in

relying on *Chevron* in support of her finding that the LDOs in this case are not 2(11) supervisors, because none of the tasks that they perform require independent judgment and Respondent's defense that the LDOs engage in greater technical expertise and experience as OOWs and hence are 2(11) supervisors is meritless.

Second, Respondent claims that the ALJ ignored evidence that the LDOs were labelled supervisors in various documents such as the CBA and/or other maritime laws. However, just because a CBA or a maritime law deems an LDO to be a supervisor, does not necessarily mean that they are a 2(11) supervisor under the National Labor Relations Act (the Act). As the ALJ correctly noted, "Individuals are statutory supervisors under Section 2(11) of the Act if: (1) they hold the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, responsibly direct them, adjust grievances or effectively recommend such action; (2) their "exercise of such authority is not…merely routine or clerical nature, but requires the use of independent judgment; " and (3) their authority is held "in the interest of the employer." (ALJD 17: 28-33) citing 29 U.S.C. Section 152, see also *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) citing *NLRB v. Health Care & retirement Corp. of America*, 511 U.S. 571, 573-574 (1994). Here, the record evidence failed to show that Respondent's Second and Third Mates partake in any of these supervisory functions. Simply citing to the label of 'supervisor' in any contract is insufficient to establish an LDO as a 2(11) supervisor and the ALJ was correct in determining that they are not supervisors under the Act.

Finally, Respondent claims that the ALJ ignored previous Board precedent that established the LDOs as supervisors. Ironically, Respondent's defense is a contradiction

unto itself. Respondent initially claimed that the ALJ did not do a fact intensive analysis in this case and instead categorically dismissed the LDOs are nonsupervisory. Yet at the same time, Respondent essentially argues a fact intensive analysis should not be undertaken here and that the LDOs should categorically be deemed 2(11) supervisors because they were previously deemed 2(11) supervisors in NLRB cases that involving this Union in the past. Respondent wants the ALJ to ignore that the duties of the LDOs in this case are different from the LDOs' duties in other Board cases. Here, the ALJ correctly and carefully examined the duties of Second and Third Mates and found that they do not perform the functions of 2(11) supervisors, specifically stating that the evidence revealed "they have no authority to hire/fire, discipline or recommend discipline, transfer, lay off, promote or suspend, schedule, reschedule, recall or assign any LDOs." (ALJD 17:42-44). These facts significantly differ from the LDOs in *International Organization of Masters, Mates & Pilots (Newport Tankers Corp.),* 233 NLRB 245 (1977) and *Int'l Org. of Masters, Mates & Pilots,* 219 NLRB 26, 40 n. 1 (1975) wherein the ALJs determined that the LDOs had the ability to adjust grievances and thus were 2(11) supervisors. Respondent failed to meet its burden of showing that the LDOs here perform any of the twelve supervisory functions and the ALJ was correct in her conclusion that they are not 2(11) supervisors under the Act.

A. Respondent Must Still Bargain with the Union

Respondent argues that even if the Second and Third Mates are not supervisors, it is unlawful for it to bargain with a mixed supervisor/employee bargaining unit, stating that the Board cannot certify such a unit or compel an employer to bargain in respect to supervisors, citing *Beverly Manor Convalescent Centers,* 275 NLRB 943, 948

n. 6 (1985). At the same time, Respondent acknowledges where the employer has voluntarily included supervisors in a unit with employees and later uses that as a defense against alleged violations of the Act, it is not unlawful to have a mixed unit of supervisors and employees. See *e.g. Union Plaza Hotel & Casino*, 296 NLRB 918, 918 n. 4, 924 (1989). Yet, Respondent fails to distinguish here how it and its predecessor employers did not voluntarily recognize the bargaining unit. Indeed, the record evidence established that the Union had a series of CBAs with employers such as CSX, Sealand and Horizon, which recognized the Union as the exclusive bargaining representative of the bargaining unit. (ALJD 19:30-31; Tr. 142, GC Exh. 2). Furthermore, Respondent admitted that it has never not recognized the Union as the exclusive collective bargaining representative of the bargaining unit and it never believed that the Union had lost the majority support of its membership. (ALJD 20:4-6; GC Exh. 1(cc), p. 5; Tr. 521, 541). The presumption that the Union was the majority representative at the time the contract was executed applies even in a successorship situation. See *Barrington Plaza & Tragniew, Inc.*,185 NLRB 962, 963 (1970), enfd. in part 470 F.2d 669 (9th Cir. 1972). So, by Respondent's own logic and *Union Plaza*, Respondent is obligated to bargain with the Union even if it is found to be a mixed bargaining unit, since the Union was voluntarily recognized as the exclusive bargaining representative by a series of predecessor employers and Respondent itself.

2. Voluntary Recognition (Respondent's Exception Nos. 3, 130, 133-136)

Respondent also contends that the Board lacks jurisdiction over these cases because the Union was never certified as the 9(a) representative by the Board. Respondent fails to cite a single case in support of this position and instead relies upon its

argument that the bargaining unit in question is made up entirely of supervisors. As the Board well knows, certification is not the only means by which a Union can become the exclusive bargaining representative of a bargaining unit. As noted above, the Union had a series of CBAs with Respondent's predecessor employers CSX, Sealand and Horizon. (ALJD 19:30-31; Tr. 142; GC Exh. 2) and each of these predecessors and Respondent itself recognized the Union as the exclusive bargaining representatives for the bargaining unit. (ALJD 20:1-6; GC Exh. 1(cc), p. 5; GC Exh. 2; Tr. 521, 541). Again *Barrington Plaza & Tragniew, Inc., supra*, holds that in a refusal-to-bargain case involving a previously recognized union, the requisite proof of majority status need not take the form of a Board certification or card showing: the existence of a prior contract, lawful on its face, raises a dual presumption of majority--a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.[3] The presumption applies not only to a situation where the employer charged with a refusal to bargain is itself a party to the preexisting contract, but also to a successorship situation. *Id.* Thus, the ALJ was fully warranted in dismissing Respondent's claim that the Board lacked jurisdiction over this matter because the Board had never certified the Union as a 9(a) representative. (ALJD 20:7-9).

B. Respondent Is A Successor Employer (Respondent's Exception Nos. 5-8, 16-21, 115)

Respondent repeats its argument that it is not a successor employer because it only acquired approximately 30% of Horizon Lines assets and liabilities, and less than

[3] Citing *Shamrock Dairy, Inc.*, 119 NLRB 998, 1002 (1957) and *Shamrock Dairy, Inc.*, 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (DC Cir. 1960), cert. denied 364 U.S. 892 (1960); *Ref-Chem Company*, 169 NLRB 376, 380 (1968) enforcement denied 418 F.2d 127 (5th Cir. 1969).

30% of its employees. Respondent claims that the ALJ misapplied Board precedent by failing to inquire as to whether Respondent continued to operate Horizon Lines' business *as a whole*, instead of just the Hawaii trade lane, citing *Ridgewood Health Care Ctr*, 367 NLRB No. 110 (2019) in support. But nowhere in *Ridgewood Health Care Ctr* does the Board state that the obligation to bargain is based upon a continuity of the business *as a whole*. Rather, the Board has previously ruled in *Bronx Health Plan*, 326 NLRB 810, 812 (1998), enfd. 203 F.3d 51 (DC Cir. 1999), that "It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation." citing *Saks & Co. v. NLRB*, 634 F.2d 681, 685 (2d Cir. 1980); *Zims Food-liner, Inc. v. NLRB*, 495 F.2d 1131, 1140-1142 (7th Cir. 1974), cert. denied 419 U.S. 838; *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981); *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26, 28 (1975). Here, the ALJ correctly determined that Respondent is a successor employer because it retained a majority of the LDOs that were represented by the Union when the vessels were owned by Horizon and continues to operate the oceangoing vessels (previously owned by Horizon) transporting goods amount the ports of Oakland, CA, Los Angeles, CA and Honolulu, HI. (ALJD 4:40-42, 5:1-2). Respondent cannot show that simply because it only acquired 30% of Horizon's assets and liabilities, that it no longer owes an obligation to the Union, when none of its business operations nor employees have changed. The ALJ was fully warranted in determining that Respondent is a successor employer and violated its duty to bargain

when it failed to respond to the Union's information requests and abide by the 1984 MOU.

V. ALJ'S MOTION TO STRIKE PORTIONS OF RESPONDENT'S POST-HEARING BRIEF WAS CORRECT (RESPONDENT'S EXCEPTION NOS. 25-28, 56-57, 62-65, 131-132)

Respondent makes a brief argument in the final pages of its exceptions that the ALJ ignored undisputed evidence regarding Respondent asking the company constructing the vessels to answer the Union's questions and the General Counsel's Office of Appeals decision recognizing that the ships in question will not be completed until 2020. The ALJ did not ignore this evidence, because it was never introduced into the record. Respondent attempted to introduce statements and exhibits pertaining to these issues belatedly in its post-hearing brief. The ALJ rightfully concluded that allowing such statements to stand would be giving Respondent the ability to introduce facts not in evidence and then argue its position therefrom, denying the General Counsel due process under Section 102.45 (b) of the Board Rules and Regulations. (ALJD 10:fn 12). Respondent once again attempts to undermine General Counsel's due process by inserting additional facts not in evidence in pages 17 and 18 of its exceptions brief and basing part of its argument on said facts. The ALJ was correct in granting General Counsel's motion to strike and Respondent should not be entitled to insert facts it finds favorable to its position ad hoc.

VI. CONCLUSION

General Counsel respectfully submits that Respondent's exceptions are unsupported by the record and should be denied in their entirety. The clear preponderance of all the relevant evidence fails to demonstrate that the ALJ's credibility rulings were

incorrect. Rather, her credibility determinations were correctly based upon witness demeanor, the internal consistency of testimony and/or corroboration, or lack thereof, and should not be disturbed. Further, the ALJ's findings of fact and conclusions of law were fully supported by the record evidence.

Dated at San Francisco, California, this 6th day of July, 2020.

Respectfully submitted,

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