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UNITED STATES OF AMERICA

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

14

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In the Matter of:

CASE NOS. 20-CA-219534  
20-CA-227593  
20-CA-230861

16

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

18

and

**CHARGING PARTY UNION'S  
ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S  
DECISION AND ORDER**

19

INTERNATIONAL ORGANIZATION  
20 OF MASTERS, MATES & PILOTS,  
ILA/AFL-CIO,  
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1 **I. STATEMENT OF THE CASE**

2 On May 11, 2020, Administrative Law Judge Lisa D. Ross (“Judge Ross” or  
3 “ALJ”) correctly found that Sunrise Operations, LLC, a wholly-owned subsidiary of The  
4 Pasha Group (“Sunrise” or “Respondent”) violated the National Labor Relations Act  
5 (“Act” or “NLRA”) by refusing to provide and/or unreasonably delaying in furnishing  
6 necessary and relevant information to the International Organization of Masters, Mates &  
7 Pilots (“Union” or “MM&P”), and by failing/refusing to bargain in good faith with the  
8 Union when it refused to continue to meet for arbitration proceedings at the Union’s  
9 headquarters in Linthicum Heights, Maryland. The ALJ rejected Respondent’s defense  
10 that the NLRB did not have jurisdiction because the unit at issue is made up of supervisors,  
11 holding that Second Mate and Third Mate positions in the unit are not supervisory.<sup>1</sup>

12 On June 15, 2020, Respondent filed exceptions to nearly all of the ALJ’s findings.  
13 As demonstrated herein, Respondent misstates the law and the evidence to justify its  
14 exceptions. Judge Ross correctly considered the entirety of the record, made appropriate  
15 credibility determinations as necessary based on her observations, and correctly applied  
16 Board law to the facts. The Union therefore respectfully urges the Board to adopt the  
17 ALJ’s findings and conclusions that Respondent violated the Act as stated above.

18  
19 **II. INTRODUCTION**

20 MM&P has represented licensed deck officers (“LDOs”) on four containerships  
21 operating on the trade lane between the U.S. West Coast and Hawaii for many decades  
22 even before the vessels were acquired by The Pasha Group (“Pasha” or “TPG”) and its  
23 subsidiaries Pasha Hawaii Holdings LLC (“PHH”), SR Holdings LLC, and Respondent  
24 Sunrise Operations LLC from Horizon Lines in May 2015. Respondent has never been  
25 transparent about the relationship between it and TPG, PHH and SR Holdings, but from

26  
27 <sup>1</sup> Citations to “ALJD” refer to Judge Ross’s Decision in this case. Citations to “Tr.” refer  
28 to the transcript in this case. Exhibits in this case will be cited as follows: General Counsel as “GC  
Exh.”, Respondent as “R. Exh.”, and Union as “U. Exh.” Citations to Respondent’s brief will be  
“Resp. Brf.”

1 the information available to the Union, they appear to operate as a single employer. To  
2 prevent evasion of successorship contractual obligations through corporate sleight of hand  
3 and preserve the job security maintained over decades for the permanent employees it  
4 represents, the Union has asked for information to evaluate whether these entities operate  
5 as a single employer under the NLRA. Pasha’s attempts to limit the collective bargaining  
6 obligations to its hollowed-out subsidiary Sunrise has caused tremendous uncertainty for  
7 the MM&P-represented LDOs who have been crewing these containerships for decades.  
8 The concern has been particularly acute since 2018, when Respondent repudiated the  
9 contractual arbitration provision, effectively stopping all contract disputes from proceeding  
10 to arbitration as two other disputes had, in Linthicum Heights, Maryland as required under  
11 the parties’ CBA, since Pasha’s acquisition.

12 This consolidated case concerns a successor employer (Respondent) that has  
13 violated the NLRA by completely failing to provide requested information, unduly  
14 delaying production of other information, and by unilaterally ceasing to follow one select  
15 part of the 1984 amendments to the parties’ collective bargaining agreement (“CBA”), the  
16 provision fixing the location of arbitration hearing. If these NLRA violations are left  
17 unremedied, the nearly 40-year-old CBA would become meaningless because no  
18 contractual violation could be remedied in arbitration. Rather than defend against the  
19 violations on the merits, Respondent focuses largely on its claim that the entire bargaining  
20 unit is made up of supervisors as defined in Section 2(11) of the Act. Respondent,  
21 however, failed to meet its burden of proving that the MM&P-represented LDOs are  
22 statutory supervisors. Respondent’s lone witness’s total experience on the vessels at sea  
23 was just one day in the four years since the acquisition. The record and case law  
24 demonstrate there are no supervisors in the unit. Accordingly, Respondent’s statutory  
25 supervisor defense, along with a laundry list of equally meritless defenses, do not undercut  
26 the ALJ’s well-reasoned decision.

27 ///

28 ///

1 **III. FACTUAL BACKGROUND**

2 Since the acquisition of Horizon’s Hawaii trade lane business, it has been unclear to  
3 the Union which entities are the employer. In the Contribution, Assumption and Purchase  
4 Agreement (“CAPA”), TPG is listed on the title page and in the opening paragraph as part  
5 of the agreement [GC Exh. 3, p. 1 & p. 5]. In the Assignment and Assumption  
6 Agreement—to which MM&P was not a party—the non-Horizon side of the purchase was  
7 defined as “The Pasha Group (‘Pasha Parent’), SR Holdings LLC (‘Pasha Sub’ and,  
8 together with Pasha Parent, ‘Pasha’)”; only Sunrise signed as assuming the CBA [GC Exh.  
9 7]. The TPG CEO, George Pasha IV, sent a letter to MM&P’s President Donald Marcus  
10 before the sale on behalf of SR Holdings LLC, advising, “SR Holdings will purchase all of  
11 the membership interests in Sunrise, which in turn will be the owner of the four Sunrise  
12 Subsidiaries that each own one of the Hawaii Vessels” [GC Exh. 6, pp. 1-2]. The  
13 Assignment and Assumption Agreement, which one person, Michael Zendan, has signed,  
14 lists TPG as a party to the CAPA, but states without elaboration that Sunrise will assume  
15 certain obligations in connection with MM&P [GC Exh. 7, p. 1 & p. 4]. After the  
16 acquisition, Respondent assumed the entire CBA, including the arbitration hearing location  
17 [GC Exh. 6, p. 2 (George Pasha, IV, wrote “Upon and following the closing of the  
18 potential purchase outline above, Sunrise will honor the contractual obligations set forth in  
19 the Agreement,” which was earlier defined without any limitations as the “current  
20 collective bargaining agreement between Horizon Lines and Masters, Mates & Pilots (the  
21 ‘Agreement’) as amended”); Tr. 80:11-81:14 (Gabriel Terrasa testifying that Respondent  
22 paid into the Union’s trust funds, employed the LDOs, paid them based on the CBA, and  
23 processed the Union’s grievances); Tr. 547:1-548:23 & 553:1-2 (Edward Washburn,  
24 Respondent’s Senior Vice President of Vessel Operations, acknowledging that the  
25 repudiation of this lone obligation did not occur until after May 29, 2018)].

26 Pasha Hawaii executives are integrally involved in labor relations applicable to the  
27 LDOs involved in this case. On May 30, 2015, the day after the acquisition was  
28 completed, Pasha Hawaii’s Bill Peterson emailed MM&P masters on the four vessels

1 welcoming them to Pasha Hawaii—without mentioning Sunrise:

2 I'd like to introduce myself, my name is Bill Peterson and I am Vice  
3 President of Operations for Pasha Hawaii. I want to welcome you, your  
4 officers and crew to Pasha Hawaii, a subsidiary of The Pasha Group. As  
5 you're aware we acquired the Hawaii trade-lane business of Horizon Lines  
6 yesterday and as a result, Pasha Hawaii assumes operations for Horizons'  
7 Hawaii business, including its four container ships, (Horizon Enterprise,  
8 Horizon Pacific, Horizon Reliance, and Horizon Spirit). The Horizon  
9 Consumer will be on Time Charter to Pasha Hawaii from Matson until early  
10 July.

11 [GC Exh. 30, p. 1]. Peterson identified the Liner Operations team, with five of the six  
12 team members coming from TPG, who are there to “ensure there is no ambiguity for the  
13 Senior Vessel Personnel (which includes LDOs) about what they are supposed to do and  
14 when.” [*Id.*, p. 2]. Peterson continues that the masters’ “knowledge of these ships and this  
15 trade are recognized and I am looking for your help to make this endeavor a success.”  
16 [*Id.*]. Peterson introduced Ed Washburn as “our” (i.e., Pasha Hawaii’s) Vice President of  
17 Engineering and Technical Services, who will work “closely” with Crowley/MTM and  
18 will “play a lead role in our New Build program” for replacement vessels [*Id.*, p. 5].

19 The four former Horizon Lines containerships, Enterprise, Spirit, Pacific and  
20 Reliance, were re-branded with the Pasha logo and say “Pasha Hawaii” on the hull of the  
21 ships, and are described on the Pasha Hawaii website as part of the company’s fleet [GC  
22 Exhs. 14-17], for example “Pasha Hawaii’s Spirit ships thousands of containers per month  
23 between the U.S. Mainland and Hawaii” [GC Exh. 14].

24 Applying and comprehending the single employer relationship became more acute  
25 when Pasha Hawaii—and not Respondent—announced it was building new containerships  
26 that the Union believes were intended to replace the vessels on which it represents LDOs  
27 [GC Exhs. 27-29]. The Union sent its first information request in September 2017 to  
28 which it did not receive a response [GC Exh. 13]. The Union sent a follow up letter to the

1 request on March 2, 2018 [GC Exh. 18], after the NLRB charge in 20-CA-202809 had  
2 been settled on January 29, 2018 [Tr. 380:21-24]. There were no other NLRB charges  
3 pending at that time, and Respondent did not introduce any pending Board charges into the  
4 record. Throughout 2018, Respondent failed to either respond at all or timely respond to  
5 the Union’s information requests related to contract enforcement. Most notably, in an  
6 interest arbitration, the parties had agreed to all economic terms, but not the corpus of the  
7 employer [GC Exh. 24, p. 4 (“During these negotiations, the parties exchanged proposals  
8 and counterproposals. They ultimately agreed on the economic aspects of a modified  
9 collective bargaining agreement. They were unable to agree upon the identity of the  
10 parties to the agreement, the wording of a preamble to the agreement, and the wording of  
11 union security language in the agreement.”)]. Respondent did not need to wait for the  
12 August 3 Arbitration Award to know what was due to LDOs under the reopener  
13 negotiations because the parties had resolved the economics at the table by January 2018  
14 [*Id.*]. Respondent’s delayed response to the Union’s October 11, 2018 request for  
15 information on implementation of the Arbitration Award and retroactive pay inquiry [GC  
16 Exh. 23] is therefore particularly egregious because all economic terms for the small unit  
17 had been known for 10 months.

18           During 2018, Respondent decided unilaterally to cease taking grievances to  
19 arbitration. Washburn acknowledged that Respondent assumed and followed the 1984  
20 MOU, which contained the Linthicum Heights, MD arbitration location, from the  
21 acquisition and throughout the reopener negotiations in 2017. Washburn testified that  
22 Respondent changed its position before the 2019 negotiations because “I didn’t agree that  
23 we took arbitration in Linthicum Heights. The first time this was referred to me, I looked  
24 at it, and I saw there was no name, it’s crooked, the words run off the page, and it was  
25 unsigned.” [Tr. 547:1-10]. Washburn admitted that Respondent continued to comply with  
26 many of the other 1984 provisions after his review without reverting to the terms of the  
27 1981 agreement. Specifically, Respondent does not double premium time and overtime  
28 (allowed in the 1981 agreement), voyages stayed at 120 days (not 180 days), and

1 Respondent continued providing LDOs with 401(k)s (which did not exist in the 1981  
2 Agreement) [*Compare* Tr. 548:4-23 with GC Exh. 2]. When asked why Respondent did  
3 not revert to the 1981 double counting of premium and overtime pay, Washburn  
4 responded: “Because that wouldn’t make sense for a company, and I didn’t even know  
5 that reference was in here. As I read these things, that didn’t really matter to me. All I  
6 knew was what my concern was where I had to go for arbitration.” [Tr. 548:8-12].

7 The NLRB issued a consolidated complaint challenging the multiple refusals to  
8 provide information, multiple undue delays in providing information, and repudiation of  
9 the agreement’s arbitration provision [GC Exh. 1]. On May 11, 2020, Judge Ross issued a  
10 Decision and Order finding that Respondent violated the NLRA by engaging in the  
11 activities alleged in the amended consolidated complaint.

12

#### 13 **IV. LEGAL ARGUMENT**

14 The ALJ correctly determined that Respondent is not relieved from its NLRA  
15 violations based on its Section 2(11) supervisory unit defense. Respondent did not show  
16 that a single LDO was a supervisor. The ALJ also correctly determined that Respondent is  
17 the successor to Horizon Lines, that it unlawfully repudiated the arbitration provision of  
18 the 1984 MOU in 2018, and that the Union’s information requests were not a substitute for  
19 pre-trial discovery. The ALJ’s order that Respondent provide the information and proceed  
20 with arbitration hearings in Linthicum Heights should be adopted by the Board.

21

#### 22 **A. The NLRB has jurisdiction over these cases because Respondent has not 23 demonstrated that LDOs are statutory supervisors.**

24 Despite the nearly 40-year-old collective bargaining agreement governing the LDOs  
25 impacted by these unfair labor practices, Respondent nevertheless argued that the  
26 bargaining unit is comprised solely of statutory supervisors. Respondent did not meet its  
burden of showing that any, let alone all, of the LDOs are statutory supervisors.

27 ///

28 ///

1                   **1.     MM&P-represented LDOs are not statutory supervisors.**

2                   Because the respondent, as the proponent of a finding of supervisor status, bears the  
3 burden of proof on that issue, the Board must construe the lack of evidence against it. *See,*  
4 *e.g., Glades Elec. Cooperative*, 366 NLRB No. 111 (2018), citing *Wackenhut Corp.*, 345  
5 NLRB 850, 854 (2005); *Dean & Deluca N.Y., Inc.*, 338 NLRB 1046, 1048 (2003). A  
6 respondent has not proven supervisory status where the record evidence is inconclusive or  
7 otherwise in conflict. *See Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989). The U.S.  
8 Supreme Court recognized in *Kentucky River* that it is “easier to prove an employee’s  
9 authority to exercise 1 of the 12 listed supervisory functions than to disprove an  
10 employee’s authority to exercise any of those functions.” *NLRB v. Ky. River Community*  
11 *Care, Inc.*, 532 U.S. 706, 711 (2001) (herein “*Kentucky River*”). Even with the easier task,  
12 Respondent failed to prove LDOs, particularly second and third mates, perform any of the  
13 12 enumerated statutory supervisory functions.

14                   Respondent appears to be asserting that LDOs can categorically be declared Section  
15 2(11) supervisors merely by virtue of the position they occupy without any accounting for  
16 how much has changed in recent years or providing evidence as to how the LDOs function  
17 on the four vessels. The NLRB has rejected such categorical declarations, including in the  
18 maritime industry and for LDO bargaining units. Instead, employers must provide specific  
19 examples of the exercise of supervisory authority, rather than simply assert the employees  
20 have authority based on conclusory statements or unexercised “paper authority”:

21                   The Board construes a lack of evidence on any of the elements necessary to  
22 establish supervisory status against the party asserting that status . . . . Job  
23 descriptions, job titles, and similar ‘paper authority,’ without more, do not  
24 demonstrate actual supervisory authority.

25 *Brusco Tug & Barge, Inc. v. NLRB*, No. 15-1190, 696 Fed. Appx. 519, 521 (D.C. Cir.  
26 2017), *enforcing* 362 NLRB 257 (2015) (adopted by reference in 359 NLRB 486 after it  
27 was vacated by *Noel Canning*); *accord Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731  
28 (2006); *see also Alternate Concepts, Inc.*, 358 NLRB 292, 294 (2012) (“Mere inferences or

1 conclusionary statements, without detailed, specific evidence, are insufficient to establish  
2 supervisory authority.”).

3         This requirement of specificity applies to claims of “responsible direction,” which is  
4 the basis of most of Respondent’s arguments that second and third mates are supervisors.  
5 *See Brusco Tug*, 696 Fed. Appx. 519, 521 (“The company, which bore the burden of proof  
6 on this issue, could not identify any occasion in which a mate was disciplined or faced  
7 adverse consequences because of a deckhand's poor performance.”); *Buchanan Marine*,  
8 *L.P.*, 363 NLRB No. 58 (Dec. 2, 2015) (“[T]he employer bears the burden of showing that  
9 the captains are held accountable for the errors of their crew members, rather than simply  
10 stating that they are. Here, Respondent has not provided evidence showing how or for what  
11 captains are held accountable, including any showing of an adverse consequence that  
12 would befall a captain for a deckhand’s poor performance.”). Respondent has not  
13 provided any examples of its LDOs being held accountable for the activities of employees  
14 who they are purportedly supervising.

15         Demonstrating that 2(11) supervisory activities involve the necessary exercise of  
16 independent judgement similarly requires specific evidence. *Croft Metals, Inc.*, 348  
17 NLRB. 717, 722 (2006) (“The Employer adduced almost no evidence regarding the factors  
18 weighed or balanced by the lead persons in making production decisions and directing  
19 employees. Thus, we cannot conclude that the degree of discretion involved in these  
20 activities rises above the routine or clerical.”); *Cook Inlet Tug & Barge, Inc. &*  
21 *Inlandboatmens Union of the Pac.*, 362 NLRB 1153, 1153 (2015) (“[A]s the testimony that  
22 captains play to individual deckhands’ strengths is vague and/or entirely hypothetical, the  
23 Employer has failed to establish that the instruction is anything more than ‘routine,’ i.e., it  
24 does not involve the exercise of independent judgment.”). Respondent has not provided  
25 any credible evidence suggesting that LDOs exercise independent judgement; rather, it is  
26 clear that to the extent that LDOs exercise any authority, they do so either in routine ways  
27 (e.g. identifying another employee not fit to stand watch) or in a manner dictated by  
28 detailed employer policies or shore-side management.



1           The role of maritime law in determining the decisions to be made does not make the  
2 employees supervisors because labor and maritime law serve separate purposes. In *Brusco*  
3 *Tug*, the D.C. Circuit enforced the Board’s order, where the Board recognized: “The  
4 ‘authority to demand obedience on board a vessel under maritime law is about the  
5 protection of life and property; disobedience is mutiny,’” but “[h]aving that kind of  
6 authority doesn’t answer the questions posed by the 2(11) indicia of supervisory  
7 status.” 362 NLRB at 259, citing *S. Steamship Co. v. NLRB*, 316 U.S. 31  
8 (1942). “[U]nder the Act, it is well established that there can be individuals whose  
9 directives must be followed but who are not, for any one of a number of reasons,  
10 supervisors.” 359 NLRB 486, 493 (Dec. 14, 2012), incorporated by reference after *Noel*  
11 *Canning*, 362 NLRB at 258. The Board cautioned: “Without an evidentiary record  
12 establishing 2(11) indicia, such questions cannot be answered merely by the assertion of  
13 maritime law.” *Id.* The Court enforced the Board’s Order, where the “company, which  
14 bore the burden of proof on this issue, could not identify any occasion in which a mate was  
15 disciplined or faced adverse consequences because of a deckhand’s poor performance.”  
16 696 Fed. Appx. 521.

17           Respondent appears to argue that *Brusco Tug* only applies when there is no specific  
18 evidence of how employees may be held responsible under maritime law [Resp. Brf., pp.  
19 36-37]. But this interpretation ignores *Buchanan Marine, L.P.*, which made clear that even  
20 when employees are *actually* accountable under maritime law, maritime law still does not  
21 bear on the question of Section 2(11) authority. 363 NLRB No. 58 (Dec. 2, 2015). In that  
22 case, Board reaffirmed and expanded the holding of *Brusco Tug*, rejecting the employer’s  
23 claim that a captain had Section 2(11) authority because he could lose his license for a  
24 deckhand's actions. The Board explained: “[E]ven assuming that the Coast Guard would  
25 hold a captain accountable for violating maritime law in that circumstance, it does not  
26 follow that the Employer also would, and supervisory authority must be exercised ‘in the  
27 interest of the employer’ under Section 2(11).” Slip op. at \*6. The Board found the  
28 “employer has failed to establish accountability by its mere assertion of maritime law in

1 the absence of specific evidence showing that the Employer holds its captains accountable  
2 for a deckhand’s failure to follow that law.” *Id.* The Board reasoned that it was in no way  
3 overriding maritime law by holding that it did not bear on the question of supervisory  
4 status: “[A] finding that captains are not supervisors for purposes of the Act does not  
5 mean that their commands need not be obeyed by the crew, or that the Employer may not  
6 discipline crew members for failing to obey them; it simply means that the captains may  
7 vote whether to be represented for purposes of collective bargaining, and be represented as  
8 part of a unit that selects a representative.” *Id.* at \*9.

9 **(c) CBA provisions purportedly bestowing supervisory**  
10 **authority on LDOs are irrelevant to their status as**  
11 **statutory supervisors.**

12 Respondent’s reliance on a few lines of the 1981-1984 industry-wide agreement to  
13 prove all LDOs for Respondent regularly function as supervisors nearly forty years later is  
14 unavailing. As noted above, “paper authority” such as a job description or handbook is  
15 insufficient to demonstrate actual supervisory authority. *Golden Crest*, 348 NLRB at 731.  
16 This rule also applies to collective bargaining agreements. *See Building Contractors*  
17 *Assn., Inc.*, 364 NLRB No. 74 (2016). In *Building Contractors*, to demonstrate  
18 supervisory status an employer relied on a CBA provision stating that employees in the  
19 positions at issue were agents of the employer and had the “right to hire and discharge  
20 employees.” Slip op. at \*76. The Regional Director rejected this argument, noting that a  
21 CBA is not the same as “actual duties,” which is what matters under the Act. The Board  
22 concurred with the Regional Director’s decision and reasoning, and denied the employer’s  
23 request for review of the decision. *Id.* at n 1.

24 Even if the paper authority of a collective bargaining agreement could be evidence  
25 of Section 2(11) supervisory status, the specific provisions in the 1981 Agreement say  
26 nothing about whether the “supervisory” activities described are performed using  
27 independent judgement, and there was no evidence outside the CBA showing that these  
28 activities are performed with independent judgement. The CBA provisions do not adopt or  
reference the Section 2(11) standard or the NLRA, and there is no truth to Respondent’s

1 claim that “[t]here is no dispute that since at least 1981, the parties’ collective bargaining  
2 agreement unambiguously states the parties’ mutual intent and understanding that the  
3 LDOs—including the Second and Third Mates—are statutory Supervisors” [Resp. Brf. 41  
4 (citing exclusively to the 1981 Agreement and testimony regarding the 1981 Agreement  
5 for record support)]. The Union—in this case and other maritime cases cited, *e.g. Brusco*  
6 *Tug*—has asserted that LDOs are not Section 2(11) supervisors.

7 **(d) The vast and detailed regulatory scheme for containership**  
8 **vessels has removed LDOs’ independent judgment and**  
9 **discretion.**

10 A significant change in the shipping industry has been the overwhelming regulatory  
11 scheme that controls and circumscribes the discretion LDOs once had with regard to terms  
12 and conditions such as manning, hours of work or rest, training, duties, skills and job  
13 functions. This is demonstrated by Respondent’s detailed and thorough Safety  
14 Management System (“SMS”) Guide [R. Exh. 5]. The purpose of the SMS Guide “is to  
15 require a uniform process” [*Id.* at p. 10, p. 12], and the Guide details every aspect of the  
16 LDO’s functions onboard [*Id.* at Tab 2].<sup>2</sup>

17 Thomas Percival, who was the Manager of Labor Relations and Vessel Operations  
18 from Matson (the other containership liner on the Hawaii trade lane with Pasha), as  
19 summarized by the ALJ in *District No. 1, Marine Engineers Beneficial Ass’n*, 2003 WL  
20 249694 (2003) (NLRB Division of Judges, Case 20-CB-11282), explained the  
21 international requirement for a SMS:

22 [E]very ship is required to have a set of operating manuals, called ISM  
23 manuals. These manuals, which are apparently voluminous, are updated on a  
24 regular basis, and the portions of the manual relating to specific operations of

25 \_\_\_\_\_  
26 <sup>2</sup> Respondent spent significant time on the role of LDOs, including the masters and chief mates, in  
27 the drills that occur once a month, but even if these routine, pre-scripted drills could somehow  
28 qualify as supervisory work, the short time spent on the drills is insufficient to deprive employees  
of the NLRA’s coverage. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (explaining  
for the NLRB to find an employee qualifies as a supervisor, the employee must spend a “regular  
and substantial portion of their work time performing supervisory functions”).

1 the ship are kept at various locations where they are convenient to those  
2 operations, including the engine room. While there is scant record evidence  
3 regarding the specific contents of the manuals, apparently the manuals are  
4 very specific and state when and how and at what intervals each duty or  
5 function should be carried out. The provisions of the manuals are to be  
6 adhered to, and, according to Percival, there had better be a good explanation  
7 for deviating from them. Percival characterized the provisions of the manual  
8 as “guidelines” to be followed on a consistent and routine basis unless  
9 something else becomes of more immediate importance.

10 *Id.* at 4. While concluding the employer there met its burden of proof in establishing that  
11 licensed engineers performed supervisory functions, this decision was based on the pre-  
12 *Oakwood* standard for evaluating assignment and responsible direction of work. Further,  
13 the decision did not address licensed deck officers. Moreover, as noted by the ALJ, his  
14 decision was made without examination of the content of the actual manuals.

15 This regulatory scheme specifies the crew size—with significantly fewer crew  
16 members manning vessels than in the past. Smaller crews have changed the dynamic on  
17 vessels such that old cases regarding supervisory status are less relevant as they rely on  
18 work environments where there were larger crews. *Brusco Tug*, 696 Fed. Appx. at 521  
19 (“The Board also found the earlier cases distinguishable on their facts, because in the  
20 relevant precedent the crews were larger, creating more opportunity for mates to choose  
21 between employees to complete significant tasks.”); *see also Ky. River*, 532 U.S. at 713-14  
22 (explaining “as reflected in the Board’s phrase ‘in accordance with employer-specified  
23 standards,’ it is also undoubtedly true that the degree of judgment that might ordinarily be  
24 required to conduct a particular task may be reduced below the statutory threshold by  
25 detailed orders and regulations issued by the employer”). Judgment is not independent  
26 when it is dictated by policy. *Buchanan Marine*, 363 NLRB No. 58 at \*10 (“Likewise, we  
27 find that the provisions of Respondent’s Safety Management System (SMS) provide no  
28 support for the claim that Respondent holds the captains accountable. Those provisions

1 give detailed instructions, including standard operating procedures, for the operation of the  
2 vessel. While they refer to the captain's potential loss of license for failing to ensure  
3 compliance with directives, none of those provisions states that the captain will suffer any  
4 specific adverse consequence to his employment if a mate or deckhand does not follow the  
5 required procedure. Instead, the SMS provisions contain the same broad statements that  
6 captains are 'held accountable' that the Board has typically found insufficient to establish  
7 accountability.'").

8  
9 **(e) Recent maritime cases support MM&P's position that LDOs are not Section 2(11) supervisors.**

10 The NLRB is charged to render its own analysis based on actual evidence of  
11 whether employees qualify as supervisors under the NLRA. *See Kentucky River*, 532 U.S.  
12 at 713. To the extent that there are analogous cases, they contradict Respondent's  
13 supervisory unit defense.

14 In the most analogous case, the NLRB—enforced by the D.C. Circuit—decided the  
15 supervisory status issue of mates in favor of MM&P. In *Brusco Tug.*, MM&P filed a  
16 representation petition in Region 19 seeking to represent a unit of mates, deckhands, and  
17 engineer/deckhands employed by Brusco. On *three* separate occasions, the Regional  
18 Directors of Region 19 held, contrary to Brusco's contention, that the mates were not  
19 supervisors under the Act. Incidentally, the first decision was pre-*Kentucky River*, the  
20 second was post-*Kentucky River* but pre-*Oakwood*, and the third was post-*Oakwood*. Thus,  
21 under all three standards existing in the last 15 years, the mates in that case were found to  
22 be non-supervisory employees covered by the NLRA.

23 The NLRB's decision in *Brusco Tug* is consistent with its certification of licensed  
24 crew units based on MM&P representation petitions. *See Trustees of Columbia University*  
25 *in the City of New York*, (2-RC-22354) (declaring MM&P as exclusive collective  
26 bargaining representative of licensed crew when issuing certification) (cited in *Trustees of*  
27 *Columbia Univ. in the City of N.Y.*, 350 NLRB No. 54, n.3 (2007)); *Metson Marine*  
28 *Services, P.R., Inc.* (Case No. 24-RC-8301) (2003) (conducting an NLRB election in a unit

1 composed of “[a]ll full time and regular part-time landing craft employees employed by  
2 the Employer at Naval Station Roosevelt Roads, Ceiba, P.R., including captains, engineers,  
3 oilers, O.S. (ordinary seamen) and A.B. (able bodied seamen), but excluding land-based  
4 employees, office clericals, guards and supervisors as defined by the Act”); *Operating*  
5 *Eng’rs Local Union No. 3 and IOMM&P*, 340 NLRB 1089, 1091-92 (2003) (granting  
6 work to employees represented by MM&P in classifications including captains and  
7 deckhands).

8           Additionally, in *Chevron Shipping Co.*, 317 NLRB 379 (1995), in a MEBA-  
9 representation petition, the NLRB found second and third mates and second and third  
10 assistant engineers were not supervisors within the meaning of Section 2(11) because they  
11 did not exercise independent judgement, as their discretion was constrained by the  
12 masters’ standing orders, regulations, and employer policies. Respondent claims that the  
13 ALJ improperly relied on *Chevron Shipping Co.* [Resp. Brf., pp. 31-32], but confuses the  
14 “professional or technical judgment” portion of the decision’s reasoning, which was  
15 abrogated by *Kentucky River*, with the employer regulations portion of the decision’s  
16 reasoning which was affirmed by *Kentucky River*. See 532 U.S. at 714; Cf. *Cook Inlet Tug*,  
17 362 NLRB at 1155 n.14 (“To the extent the Regional Director even applied *Chevron*  
18 *Shipping* in his analysis, his otherwise thorough discussion makes clear that he did not  
19 categorically exclude captains from supervisory status based on their use of technical or  
20 professional judgment.”). Union, the General Counsel, and the ALJ, however, did not rely  
21 on a theory that LDOs are not supervisors because they use technical or professional  
22 judgment.

23           To make its case, Respondent relies on a number of very old Board, district court,  
24 and circuit court cases where LDOs were determined to be supervisors that are when  
25 oceangoing vessels lacked regular shoreside communication when at sea. The most recent  
26 of these cases is from *34 years ago* [Resp. Brf. 38-40]. These cases demonstrate nothing.  
27 The Board has made clear that pre-*Oakwood* cases were decided under a different standard  
28 and are not applicable. *Brusco Tug*, 359 NLRB at 493-95.

1 Brusco argued, just as Sunrise has, that mates were supervisors based entirely on  
2 outdated decisions covering other employers; the Board rejected Brusco’s argument:

3 The existence of such precedent notwithstanding, *Oakwood Healthcare*,  
4 decided after the tugboat cases cited above, articulates the Board's current  
5 test for determining supervisory assignment and responsible direction. In  
6 evaluating the supervisory status of the mates at issue in this case, therefore,  
7 we find pre-*Oakwood* cases dealing with the supervisory status of tugboat  
8 mates to be of limited precedential value. In *Entergy Mississippi*, 357 NLRB  
9 No. 178, slip op. at 5, the Board similarly rejected reliance on earlier cases  
10 that had been considered “under a different standard for determining  
11 supervisory status than the one set forth in *Oakwood Healthcare* pursuant to  
12 the Supreme Court's guidance in *Kentucky River*.” The Board stated that “to  
13 revert to a standard that does not follow the principles set forth in *Oakwood*  
14 *Healthcare* would ignore the significant doctrinal developments in this area  
15 of law.”

16 *Id.* at 494.

17 Further, it is the circumstances of the current-day LDOs in this bargaining unit that  
18 matter, not the very different circumstances of LDOs on other ships in the early 1980s.  
19 Since the 1990s, the shipping industry has seen a regulatory and technological  
20 transformation that has transferred supervisory functions shore-side, routinized the work of  
21 LDOs, and removed discretion that LDOs may previously have had. These cases are thus  
22 entirely inapposite.

23  
24 (f) **Respondent failed to prove that Masters and Chief Mates  
are statutory supervisors.**

25 Although masters and chief mates have more personnel-related responsibilities than  
26 second and third mates, Respondent has not met its burden of proving that they exercise  
27 these responsibilities with the requisite independent judgment or regularity.  
28

1 (i) **Technological advances have taken away masters’**  
2 **Section 2(11) supervisory authority.**

3 Historically, the ship officers’ authority, particularly the master, was absolute by  
4 necessity; once the vessel left port, it was not seen or heard of for weeks or months. In  
5 order to maintain order and discipline, it was required for the master to have absolute  
6 authority to act on behalf of the owner of the vessel in dealing with any and all vessel and  
7 crew matters. These conditions no longer exist [*e.g.* U. Exh. 1, p. 10 (master sending  
8 memorandum shoreside for approval to terminate, which was not granted because a final  
9 letter of warning was issued instead)]. Since around the 1990s, electronic communications  
10 via satellite phones or email have change the industry so that a vessel superintendent — the  
11 master’s supervisor—can be “virtually” present in the vessel at any given time [Tr. 110:11-  
12 15, 112:18-114:2]. Whenever matters necessitating personnel action arise, the master is a  
13 phone call or email away from his superintendent or the Human Resources Personnel.  
14 Masters regularly and routinely communicate with shore-side management via these means  
15 [*E.g.* GC Exh. 30, pp. 3-4; Tr. 536:13-538:4 (Washburn)].

16 The significance of the technological advances to the operation of a vessel are  
17 illustrated in *Trustees of Columbia University in the City of New York*, 350 NLRB 574  
18 (2007). In that case, Columbia University operated a research vessel, the *R/V Maurice*  
19 *Ewing*, which was used to conduct underwater research around the world. MM&P sought  
20 to represent two separate bargaining units: one consisting of all licensed officers (Case 2-  
21 RC-22354) and another consisting of the unlicensed crew (Case 2-RC-22355). MM&P  
22 won the election for the licensed officers, and the Board certified MM&P as the collective  
23 bargaining representative of those licensed officers. *Id.* at n.3. The Union lost the election  
24 on the unlicensed crew by a tie vote.

25 The Union filed objections on the basis that the employer had refused to provide, as  
26 part of the *Excelsior* List, the email addresses of the crew. The Union argued that because  
27 the vessel and its crew were at sea for most of the pre-election period between the filing of  
28 the petition and the manual election, the *de facto* home of the crew was the vessel, where

1 the crew was allowed to use email to communicate with the mainland and conduct  
2 personal business. Accordingly, the Union argued, providing home addresses in the  
3 *Excelsior* List for these employees was tantamount to knowingly providing wrong  
4 addresses. Ultimately, the Board dismissed the objections, holding that there was no  
5 authority to order such production. For the purposes of this case, however, two things  
6 should be noted. First, the Board certified a unit containing the licensed officers in this  
7 vessel. Second, communication via electronic means between the vessels and shore is so  
8 common today that the employer provided free access to email to the crew during their  
9 time off duty. *Id.* at slip. op. at 2 (“Although there is no evidence whether the vessel  
10 received U.S. mail while at sea, the crew did have access to the Employer's e-mail system  
11 aboard the vessel for personal business when they were not on watch.”).

12         Technological advances since the 1990s make shore-side management ever more  
13 present in the vessels. No longer are officers left to their independent judgment in making  
14 labor relations decisions. Management is a phone call or email away to weigh in and make  
15 decisions. The NLRB has recognized that technological changes mean onshore employees  
16 can qualify as the statutory supervisors instead of the master. *See Matson Terminals, Inc.*  
17 *v. NLRB*, 637 F. Appx. 609, 610 (D.C. Cir. 2016) (“After an objective and detailed review  
18 of the testimony and other evidence, the Regional Director concluded that Matson failed to  
19 establish that the superintendents and senior superintendents at issue are supervisors under  
20 the NLRA because they do not exercise any of the statutorily enumerated supervisory  
21 functions using the requisite independent judgment... . The Regional Director  
22 acknowledged that the Board had reached a contrary determination in a 2000 decision, but  
23 he ultimately concluded that technological innovations and changes in Matson’s operations  
24 that facilitate more centralized and remote planning and supervision justified a different  
25 result in this case. We find no basis in the record to disturb the Regional Director’s well-  
26 reasoned determination.”). These technological advances did not exist, and therefore,  
27 could not have been considered by the Board in decisions regarding ship masters from 34  
28 years ago or earlier than that.

1  
2 **(ii) The masters’ rank is insufficient to prove**  
3 **supervisory status.**

4 Respondent cannot claim that masters are supervisors merely because they are the  
5 highest ranking employee on the vessel. “[H]ighest rank is a secondary indicium of  
6 supervisory status which does not confer 2(11) status where, as here, the putative  
7 supervisors are not shown to possess any of the primary indicia of supervisory status.”  
8 *Young Bros.*, 2017 WL 1279531, at \*1 (Mar. 8, 2017); *Buchanan Marine, L.P.*, 363 NLRB  
9 No. 58 (“Contrary to the dissent, however, the question before us is not whether the  
10 tugboat is at large on the high seas without any person aboard whose commands must be  
11 obeyed. Obviously, the captain is such a person. But that does not answer the question  
12 posed by the Act. The sole question the Board must answer when making a supervisory  
13 determination is whether the party asserting supervisory status has proved that the person  
14 issuing commands possesses one or more of the indicia set forth in Section 2(11). Thus, we  
15 rely upon the text of the Act—specifically, the 12 enumerated types of 2(11) authority—  
16 and not other considerations, such as whether it is plausible to conclude that supervisory  
17 authority is vested in another individual. As the Third Circuit has observed, ‘[t]o do  
18 otherwise would be to usurp Congress’s authority to promulgate the law.’ *NLRB v.*  
19 *Attleboro Associates, Ltd.*, 176 F.3d 154, 163 fn. 3 (3d Cir. 1999). . . . In any event,  
20 nothing in the statutory definition of ‘supervisor’ implies that service as the highest  
21 ranking employee on site requires finding that the employee must be a statutory supervisor.  
22 *See Training School at Vineland*, 332 NLRB 1412, 1412 (2000).”).

23 Further, the Board has for decades held that any blanket conclusion that would take  
24 an employee out of the NLRA’s ambit of protection based on position title alone is  
25 impermissible, and the U.S. Supreme Court unequivocally so held in *Kentucky River*, 532  
26 U.S. at 713 (“Many nominally supervisory functions may be performed without the  
27 exercise of such a degree of judgment or discretion as would warrant a finding of  
28 supervisory status under the Act.” (emphasis supplied and internal quotation and  
alterations omitted) (citing *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949))).

1  
2 (iii) **Disciplinary decisions are made and controlled  
shore-side.**

3 A few weeks before the November 2019 hearing, on the former Horizon vessel,  
4 Reliance, the master and chief mate had a disagreement over an overtime issue. The  
5 master (Captain J. Mark Tuck) did not like the way the chief mate (Steve Itson) handled  
6 the interaction, and Captain Tuck reported the incident to shore-side management,  
7 requesting termination. Respondent instead issued a final warning letter [U. Exh. 1, p. 10].  
8 The Board has found that a captain contacting the front office about an issue with a mate,  
9 with the front office then investigating and deciding to suspend the mate, is not the  
10 effective recommendation of discipline. *Spentonbush/Red Star Cos.*, 319 NLRB 988  
11 (1995). Because Respondent requires the masters to contact the Designated Person Ashore  
12 to always be accessible about anything irregular that occurs on the vessels, even the master  
13 does not discipline crew members using independent judgement in the post-SMS and  
14 satellite phone world [Tr. 536:1-19; R. Exh. 5, pp. 17-18; U. Exh. 1, p. 10]. *See Int'l*  
15 *Photographers of the Motion Picture Indus.*, 197 NLRB 1187, 1191 (1972) (Board  
16 disagreed with ALJ's finding that directors of photography responsibly direct the camera  
17 and electrical crews because "such direction is only routine since the evidence indicates  
18 that the principal director, from whom the director of photography receives all his  
19 instructions, is always present to supervise the crews.").

20 Further, even where the employee made the actual disciplinary decision, the NLRB  
21 has discounted single instances of issuing discipline. Instead, to prove supervisory status  
22 on disciplinary issues, an employer must show those employees are **routinely** involved in  
23 discipline to find the primary indicia of supervisory status. *See Young Bros.*, 2017 WL  
24 1279531 (Mar. 8, 2017) (finding employer failed to show supervisory status of barge  
25 superintendent because "the single instance of the use of a report form completed by a  
26 Barge Terminal Superintendent to support subsequent discipline, cited by the Employer  
27 and our dissenting colleague, is insufficient to show that those forms routinely play a  
28 consistent and specific role in the Employer's progressive discipline system").

1  
2 (iv) **Work assignments are not based on independent  
judgment.**

3 That chief mates announce work assignments and ensure the unlicensed crew  
4 complete those assignments does not render them statutory supervisors, thereby stripping  
5 them of NLRA protection, particularly where all assignments are scripted in great detail in  
6 the SMS Guide [R. Exh. 5]. The NLRB already rendered this finding in a case involving a  
7 MEBA-filed RC petition. *See Chevron Shipping Co.*, 317 NLRB at 381 (concluding  
8 second and third mates are not supervisors by explaining that “although the contested  
9 licensed officers are imbued with a great deal of responsibility [for directing the unlicensed  
10 employees, assigning tasks, and ensuring the safety of the ship and its cargo], their use of  
11 independent judgment and discretion is circumscribed by the master’s standing orders, and  
12 the Operating Regulations, which require the watch officer to contact a superior officer  
13 when anything unusual occurs or when problems occur”).

14 The vessels’ schedules are set by Respondent, not by the master or mates [GC Exh.  
15 30, p. 4]. Further removing the LDO’s independent judgment, the officers’ work  
16 schedules are set forth in the CBA [GC Exh. 2, pp. 258-261], where Respondent and  
17 Union have jointly determined the work hours and assignment of those hours. *See Cook  
18 Inlet Tug*, 362 NLRB at 1153 (“[T]here is no evidence that captains are involved in setting  
19 the work schedules of deckhands. Higher management performs this function, assigning  
20 both captains and deckhands to an alternating schedule of 1 week on, 1 week off. Once this  
21 schedule is set, there is no evidence that captains can require deckhands to deviate from  
22 it.”); *see also Directors Guild of Am.*, 198 NLRB 707, 707 (1972) (explaining that “many  
23 of the activities for which additional compensation is paid are provided for by the  
24 collective-bargaining contract or by general practice in the industry and that in making  
25 adjustments the seconds’ authority is limited by the previously fixing of the amount of  
26 additional pay a second may grant”).

27 For example, the CBA sets forth the work schedules aboard ship and the  
28 employment rotations (dispatches) for rotary and relief officers from the hiring hall as well

1 as the parameters for the employment rotations of permanent senior officers (masters and  
2 chief mates), which is ultimately approved by the employer [*e.g.* GC Exh. 2, p. 258]. *See*  
3 *Cook Inlet*, 362 NLRB at 1153 (“[M]uch of the evidence that the Employer asserts  
4 demonstrates the captains’ authority to assign—such as telling deckhands to close hatches,  
5 bring in winches, and have relevant equipment ready for use—constitutes ad hoc  
6 instruction to perform discrete tasks, not assignment in the statutory sense.”). Independent  
7 judgment is not used when direction is self-evident. *Brusco Tug*, 696 Fed. Appx. at 520  
8 (finding “substantial evidentiary support in the record” for the Board’s conclusion that  
9 “port captain assigns deckhands to particular ships and the mates make only obvious or  
10 self-evident work assignments that do not require independent judgment” where the boats  
11 have small crews with little choice “between employees to perform significant tasks”).

12 Determining the hours likely needed to complete the assignments has been found  
13 insufficient to establish Section 2(11) status. *Id.* (“Although captains appear to determine  
14 the specific hours the crew will work during the weeks they are on the boat, the evidence  
15 about this practice is not sufficient to establish that captains use independent judgment in  
16 doing so.”). Although unexpected problems can arise requiring the crew member to take  
17 longer on a particular assignment, masters do not employ independent judgment is not  
18 used when the work is clearly dictated by such external factors. *See Young Bros.*, 2017 WL  
19 1279531 (Mar. 8, 2017) (holding ability to delay lunch break did not indicate supervisory  
20 status where “the decision to delay is dictated by the pace of the work and nature of the  
21 cargo”).

22  
23 **2. Respondent waived any challenge to the unit’s appropriateness by**  
24 **voluntarily recognizing and bargaining with MM&P.**

25 MM&P never conceded that any of the LDOs are supervisors within the meaning of  
26 NLRA Section 2(11).<sup>3</sup> But, as the ALJ noted, even if the Board were to find that some of

27  
28 <sup>3</sup> Respondent’s statement that the Union does not contest the supervisory status of masters and  
first mates [Resp. Brf., p. 4] is a complete falsity. Throughout these proceedings, the Union has

1 the LDOs are supervisors, Respondent would still have an obligation to bargain over the  
2 entire Unit which would be enforceable through the Board process.<sup>4</sup> The Board, therefore,  
3 would still have jurisdiction to enforce that bargaining obligation because the employer, by  
4 voluntarily recognizing and bargaining with the Union over the entire unit, has waived any  
5 right to challenge the appropriateness of the Unit.

6 In *E.G. & H., Inc. v. NLRB*, 949 F.2d 276 (9th Cir. 1991), the Court enforced a  
7 Board Order finding that the employer had violated NLRA Section 8(a)(5) by refusing to  
8 execute and give effect to a collective bargaining agreement—similar to one of the  
9 allegations in the instant charge. The employer there argued that the Board was without  
10 jurisdiction to enforce the bargaining obligation because some of the employees in the unit  
11 were supervisors. The Court rejected the claim that inclusion of some supervisors in the  
12 unit negates the NLRB’s jurisdiction to remedy bargaining violations in a mixed unit:

13 The Board argues that ‘in the absence of extraordinary circumstances  
14 or a clear denial of employees’ rights, once an employer has recognized a  
15 union . . . the employer may not . . . repudiate the bargaining relationship on  
16 the ground that the Board might have found a different unit appropriate had  
17 the matter been brought before it initially.’ We agree with the Board. The  
18 Employers’ argument is an attempt to defeat a section 8(a)(5) charge by  
19 seizing upon a wholly irrelevant issue.

20 In *Arizona Electric Power Cooperative, Inc.*, 250 N.L.R.B. 1132  
21 (1980), upon which the Board relied in its decision, the employer had  
22 argued that load dispatchers were supervisors and should not be included in  
23 the bargaining unit. The Regional Director, however, ruled that the load  
24 dispatchers were employees, and the employer did not contest the unit  
25 certification which included the load dispatchers. The employer then

26 \_\_\_\_\_  
27 taken a strong position that none of the LDOs are supervisors.

28 <sup>4</sup> The ALJ did not make a finding as to whether masters or chief mates are statutory supervisors,  
instead holding that this determination was unnecessary because second and third mates are  
clearly not supervisors [ALJD 17:40].

1 proposed that the chief load dispatcher be included in the unit, even though  
2 the parties had stipulated that he was a supervisor. The union agreed to his  
3 inclusion in the unit. The parties then agreed to a contract. During its term,  
4 the employer withdrew recognition from the union for all load dispatchers  
5 on the ground that they were supervisors. *Id.* at 1132-33. The Board noted  
6 that the contract had been “executed with full knowledge of the nature of the  
7 present duties of the dispatchers” and held that the employer had violated  
8 the Act by its withdrawal of recognition from the union for the load  
9 dispatchers. *Id.* at 1133. The Board stated that it could “appropriately issue a  
10 bargaining order covering a unit which it could not have initially certified  
11 under the Act, but concerning which the parties have knowingly and  
12 voluntarily bargained.” *Id.* . . .

13 We note that the Supreme Court has not repudiated the notion that  
14 where an employer has consented to a bargaining unit that includes  
15 supervisors, the NLRB properly may find the employer guilty of an unfair  
16 labor practice with respect to that bargaining unit. In *NLRB v. News*  
17 *Syndicate Co.*, 365 U.S. 695 (1961), where the bargaining unit included  
18 supervisors, the NLRB had found that both the employer and the union had  
19 committed unfair labor practices by operating an unlawful closed shop and  
20 preferential hiring system. The court of appeals reversed, holding that the  
21 alleged discrimination had not occurred. The Supreme Court affirmed,  
22 holding the contract at issue to be lawful. *See id.* at 696-99. The Court did  
23 not discuss the issue of “unit appropriateness,” but it noted in passing that  
24 while an employer could not be compelled to recognize a union containing  
25 supervisors, the employer certainly could do so voluntarily. *Id.* at 699 n. 2.  
26 The authority of the Board to recognize a union containing supervisors  
27 would have little meaning if the NLRB were powerless to enforce any  
28 agreements reached with such a union.

1 *E.G. & H*, 949 F.2d at 278-80. The status of the individuals in the bargaining unit or the  
2 appropriateness of the unit are irrelevant to the unfair labor practices charged, and the  
3 Board must—consistent with the Ninth Circuit’s mandate—enforce the Act with regards to  
4 this Unit for which Respondent has explicitly consented to bargain.

5  
6 **B. Respondent is the successor employer to Horizon Lines.**

7 The ALJ correctly determined that under governing Board law, the Respondent is  
8 the successor employer to Horizon Lines even though it only purchased 30 percent of its  
9 assets. Respondent claims that “the proper inquiry examines whether Sunrise continued to  
10 operate Horizon Line’s business operations *as a whole*” [Resp. Brf., p. 43]. This is an  
11 incorrect statement of the law, which requires only substantial continuity of business  
12 operations and substantial continuity of workforce. *Ridgewood Health Care Ctr.*, 367  
13 NLRB No. 110, slip op at \*2-3 (Apr. 2, 2019). The Board has made it abundantly clear  
14 that the substantial continuity of business operations inquiry involves looking at whether  
15 there are changes in the nature of the business being operated, from the perspective of the  
16 employees, and not on how much of a business is purchased. *See Bronx Health Plan*, 326  
17 NLRB 810, 812 (1998), *enfd.* 203 F.3d 51 (D.C. Cir. 1999). Factors in the inquiry include  
18 “whether or not there has been a long hiatus in resuming operations, a change in product  
19 line or market, or a change of location or scale of operations. . . . However, a change in  
20 scale of operation must be extreme before it will alter a finding of successorship.” *Id.*  
21 (quoting *Mondovi Foods Corp.*, 235 NLRB 1080, 1082 (1978)). None of these factors are  
22 present here, as the ships continue to operate in essentially the same manner as they did  
23 under Horizon Lines. That only 30 percent of the Hawaii line was purchased is not an  
24 extreme change in scale; as in *Bronx Health Plan*, there was *no* change in scale from the  
25 perspective of the respondent’s employees, which is what matters under the test. *See id.*  
26 The fact that Horizon’s corporate services were not purchased has no bearing on any of  
27 these factors, as Respondent has not demonstrated that this had any effect on the nature of  
28 the business as it relates to the employees’ likely desires concerning unionization. *See id.*

1 Therefore, because there is clear continuity of both workforce and business operations,  
2 Sunrise is a successor employer.

3  
4 **C. Respondent unlawfully repudiated the parties' arbitration provision  
that has been in place since 1984.**

5 The ALJ correctly decided that the Respondent adopted the entire collective  
6 bargaining agreement between Respondent and MM&P, including the 1984 MOU. As the  
7 ALJ found, Respondent was aware of the MOU, implemented its provisions, had three  
8 years' understanding with the Union that it was part of the CBA, and then abruptly reneged  
9 on the arbitration location provision when it suited them [ALJD 10:10-12:15].

10 Respondent further adopted the MOU when it assured MM&P that it was agreeing  
11 to the collective bargaining agreement as a whole, without qualification, after being  
12 informed that it included more than just the documents included in Schedule A of the  
13 Assignment and Assumption Agreement [Tr. 86:9-16; 144:16-145:5]. In *Pepsi-Cola*  
14 *Distributing Co.*, 241 NLRB 869 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981), the NLRB  
15 ruled that if a successor employer adopts the entire collective-bargaining agreement, it  
16 must continue the terms and conditions of employment to the same extent as the  
17 predecessor and bargain over any changes, even when the terms are not reflected in the  
18 collective bargaining agreement and the benefit was unknown to the successor at the time  
19 of purchase. *Id.* at 870; *see also U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993)  
20 (“Having done things that are lawful only if a collective bargaining agreement is in force  
21 [i.e., deducted union dues], U.S. Can is in a pickle. For neither labor law nor the common  
22 law of contracts permits one to riffle through terms, building a ‘contract’ out of the ones  
23 you like while discarding the rest.”); *Rosdev Hospitality*, 349 NLRB 202 (2007) (holding  
24 that compliance is required even if the employer did not know of a practice at the time it  
25 adopted a collective bargaining agreement).<sup>5</sup>

26  
27 <sup>5</sup> *Pepsi-Cola* was reaffirmed in *SMI/Division of DCX-CHOL Enters.*, 365 NLRB No. 152, (Dec.  
28 15, 2017) (“The Respondent was not obligated to adopt its predecessor’s CBA with the Union as  
its initial terms and conditions of employment. But when the Respondent voluntarily chose to do

1 Failing to abide by the terms of such an adopted collective bargaining agreement is  
2 an unlawful unilateral change. In *Atrium Plaza Health Care Center*, 317 NLRB 606  
3 (1995), the NLRB held that the successor made an unlawful unilateral change to the  
4 method of calculating employee vacation and sick leave a few days after adopting the  
5 union’s contract without mentioning any changes to calculations. *Id.* “It is axiomatic that,  
6 once a bargaining agreement is executed, the terms of that agreement, as well as any other  
7 established conditions of employment that may have existed, may not thereafter be altered  
8 unilaterally.” *Id.*

9 **D. Respondent’s defense that MM&P’s information requests were**  
10 **substitutes for pre-trial discovery is baseless.**

11 As the ALJ correctly found, the Union had legitimate, substantial reasons for  
12 wanting the information in its September 2017 and March 2018 requests for bargaining  
13 and contract enforcement purposes [ALJD 13:19-20:7]. Respondent argues that it  
14 nonetheless had a right to refuse to answer these requests because they amounted to a  
15 substitute for pre-trial discovery in a unfair labor practice proceeding [Resp. Brf. 47].  
16 There is no evidence, however, that MM&P’s proffered reasons for wanting this  
17 information were invalid or pretextual. Further, the Union sent the second request, which  
18 was virtually identical to the first, was sent *after* the charge at issue was settled. The  
19 Union sent its first information request in September 2017 to which it did not receive a  
20 response [GC Exh. 13]. The NLRB charge in 20-CA-202809 was settled on January 29,  
21 2018 [Tr. 380:21-24]. Then, when the Union sent its follow-up letter to the request on  
22 March 2, 2018 [GC Exh. 18], there were no other NLRB charges then pending. The Board  
23 has held that the rule against pre-trial discovery is completely inapplicable in a situation  
24 where the charge has already been dismissed at the time the request was made. *Wyman*  
25 *Gordon Pa., LLC*, 368 NLRB No. 150 at n. 15 (Dec. 16, 2019).

26 \_\_\_\_\_  
27 so, Board precedent is clear that, as a matter of law, it also adopted the existing practices that had  
28 informed and given meaning to the provisions of the CBA as its initial terms and conditions of  
employment.”). In *SMI*, the Board explained a successor need not explicitly adopt the CBA as  
occurred in *Pepsi-Cola*.

1 **V. CONCLUSION**

2 For the foregoing reasons, Respondent’s exceptions misstate the facts and its  
3 arguments fail under the weight of record evidence and applicable law. Judge Ross  
4 correctly considered the entirety of the record, made credibility determinations as  
5 necessary based on her observations, and correctly applied Board law to the facts.  
6 Respondent utterly failed to satisfy its burden that any of the employees represented by  
7 MM&P are supervisors, let alone that such status could relieve it of the duties to fully  
8 honor the CBA and provide requested information relevant to the Union’s representational  
9 obligations. The Union therefore respectfully urges the Board to adopt the ALJ’s findings  
10 and legal conclusions that Respondent violated the Act.

11  
12 DATED: July 6, 2020

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