

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

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

**RESPONDENT SUNRISE OPERATIONS, LLC’S ANSWERING BRIEF TO THE  
CHARGING PARTY’S CROSS-EXCEPTION TO THE  
ADMINISTRATIVE LAW JUDGE’S DECISION AND ORDER**

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## INTRODUCTION

The International Organization of Masters, Mates and Pilots, ILA/AFL-CIO (“MM&P” or “the Union”) has filed a single cross-exception to Administrative Law Judge Lisa Ross’ (“ALJ”) Recommended Decision and Order (“RDO”). Specifically, MM&P cross-excepts to the ALJ’s finding that “[i]t appears that the General Counsel concedes that the master mate officer is a supervisor”<sup>1</sup> (ALJD 17, line 25) on the basis that the Counsel for General Counsel (“CGC”) did not even “appear” to concede the issue of supervisory status with respect to any unit members. (Union Br. at 4.) The record evidence from the hearing, including the CGC’s opening statement and Response to Sunrise’s Exceptions, squarely refutes the Union’s contention.

MM&P’s cross-exception necessarily contradicts the CGC’s argument advocating that the Second Mate and Third Mate are not statutory supervisors by contrasting their duties with the Master and Chief Mate<sup>2</sup> who the CGC concedes are Section 2(11) supervisors. In other words, the CGC’s position that the Second Mate and Third Mate do not possess supervisory status is actually *dependent* upon the Masters and the Chief Mates being classified as supervisors. Therefore, it **did** appear that the CGC conceded the supervisory status of the Masters and Chief Mates aboard the Sunrise vessels at issue. Without this concession, the CGC’s argument would be nonsensical.

Even if the CGC did not concede the supervisory status of the Master and Chief Mate positions, which she did, MM&P’s assertion that the Masters and Chief Mates, the two most senior

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<sup>1</sup> It appears that the ALJ erroneously combined two distinct positions – “Master” and “Chief Mate/Chief Officer” – into one position as there is no such thing as a “master mate officer.” However, the MM&P does not cross-exception to the ALJ’s RDO on this basis.

<sup>2</sup> On the fourth and final page of its brief, the MM&P refers to “First Mates.” To be clear, the term “First” is synonymous with “Chief Mates” and “Chief Officers,” which are the preferred terms in the maritime industry. It appears MM&P also prefers the term “Chief Mate” as it never once used the term “First Mates” during the hearing and only once used the term in its post-hearing brief.

manager positions aboard oceangoing U.S.-Flag vessels, are not Section 2(11) supervisors completely ignores the realities of the deep sea commercial service industry, defies the record in this case, the express terms of the parties' CBA and over 50 years of NLRB precedent on this issue. To be clear, MM&P is claiming that the Master and the Chief Mate in charge of a 893 feet-long by 105 feet-wide, 12,000 ton containership that extends from 25 feet underneath the water to 131 feet above the water line and carries 25,000 tons of cargo from California to Hawaii during a two-week voyage across the Pacific Ocean with a crew of 25 are not supervisors. (Tr. 437–438, 448.)

### **ARGUMENT**

#### **I. THE CGC CONCEDED THAT THE MASTERS AND CHIEF MATES ABOARD THE SUNRISE VESSELS ARE SECTION 2(11) SUPERVISORS.**

In support of its argument that the CGC did not appear to concede the issue of supervisory status with respect to the Master and Chief Mate positions,<sup>3</sup> MM&P relies on two questions that the CGC posed to a single witness over the course of a three day hearing. MM&P speculates that the CGC posed these questions “in an effort to show that the Master did not truly have supervisory authority in this area.” (Union Br. at 3.) MM&P’s conjecture regarding the CGC’s “intent” in asking a question while cross-examining a witness is not remotely credible, especially here where the CGC’s purported intent cannot be reconciled with her opening statement, her direct and cross-examination of various witnesses, and her post-hearing brief.

The CGC effectively conceded the supervisory status of the Masters and Chief Mates aboard the Sunrise Vessels at the outset of the hearing. During the parties’ opening arguments,

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<sup>3</sup> MM&P also seems to suggest that CGC could not have conceded a legal position without expressly stating so on the record. Board law says otherwise. *See, e.g., Fredericksburg Glass and Mirror, Inc.*, 323 NLRB 165, 175 n.42 (1997) (finding supervisor status in part due to the fact that “Respondent[s] implicitly concede[] that [the supervisor] had authority effectively to recommend discharge”)

the CGC made no mention of the Master and Chief Mate positions, much less asserted that they are not statutory supervisors. Instead, she argued that the bargaining unit at issue was appropriate regardless of whether the supervisory status of the Second Mate and Third Mate resulted in a mixed unit or a unit consisting solely of supervisors—thereby assuming that the Master and Chief Mate on the Sunrise vessels are supervisors:

Finally, Respondent will present several red herrings during the trial, claiming that one, the Union is not a labor organization under the law or that the unit of licensed deck officers is not an appropriate unit, questioning whether the Board even has jurisdiction over this matter. But the evidence will show that MMP is a labor organization that has long been recognized as the 9(a) representative of the licensed deck officers and that the unit is an appropriate unit because it **does not consist entirely of supervisors**, as claimed by Respondent. Indeed, the Board has actually found that **second and third mates were not statutory supervisors**, and you can look to Chevron U.S.A. 317 N.L.R.B. Number 53, from 1995, to support that. **And even if supervisors are included in the unit**, the Board has long held that that does not qualify -- disqualify the Union from representing nonsupervisors.

(Tr. 49–50) (emphasis added).

The CGC did not call a single witness who had served as a Master or Chief Mate. Critically, the CGC’s line of questioning seeking to establish the employee status of the Second and Third Mates focused on eliciting witness testimony regarding **the differences** between the Master and Chief Mate positions and the Second Mate and Third Mate positions. (*See, e.g.*, 344–347, 350, 375–377, 395, 397–398, 415–416.) These purported differences would be of no consequence unless the CGC had conceded the supervisory status of the Masters and Chief Mates.

The CGC’s post-hearing brief further undermines MM&P’s contention that she did not concede the supervisory status of the Master and Chief Mate positions as the CGC’s legal argument relies upon the erroneous assumption that the Second Mates and Third Mates must defer to the Master and Chief Mate and do not exercise independent judgment:

Respondent argues that the Board lacks jurisdiction because the bargaining unit, including Second and Third Mates, consists entirely of 2(11) supervisors and therefore is an inappropriate unit.

. . . .

Furthermore, while Second and Third Mates perform various tasks that require training and skill, such as the Office [sic] of the Watch (hereafter OOW), these tasks do not exercise any independent judgment. The LDOs must always follow the Master's orders, and there is always a higher officer such as the Master or the Chief Mate who is always on call to clarify those orders. When the OOW encounters a situation such as entering or leaving port, being in heavy traffic, navigating in foul weather conditions, or there is an actual or potential threat to the safety of the vessel, personnel or cargo, the Master is then required to be on the bridge.

(CGC Post Hr'g Br. at 26, 28–29.) The CGC concludes the supervisory status section of her brief by stating “Here, the record established that Second and Third Mates duties are routine in nature. . . . Thus, **they are employees under the Act** and form an appropriate bargaining unit.” (*Id.* at 29) (emphasis added). Nowhere does the CGC directly or indirectly refute Respondent's affirmative defense that Masters and Chief Mates serving on the Sunrise vessels are Section 2(11) supervisors.

MM&P, too, predicated its argument regarding the supervisory status of the Second and Third Mates on a comparison of their work duties to those of the Masters and Chief Mates. For example, while questioning Sunrise's Operations Vice President, Ed Washburn, MM&P asked if the Masters and Chief Mates are designated as “management” under a certain Convention and whether the Second Mates and Third Mates are designated as “operational” under that same Convention. (Tr. 533–534.) Similarly, MM&P asked its witness whether the Master and Chief Mate are “still on call” when they break for dinner, seeking to elicit evidence that the Second and Third Mates exercise no independent judgment. (Tr. 417.) There is no purpose in asking these questions other than to elicit testimony that only the Masters and Chief Mates possess the authority to direct the crewmembers.

And, MM&P's own witnesses conceded the fact that the Masters and Chief Mates are statutory supervisors. MM&P's General Counsel testified unambiguously that "[t]he master is the one in command of the vessel" (Tr. 136) and a Second Mate presented by the CGC testified "[the unlicensed deck crew's] supervisor is the chief officer." (Tr. 361.)

The record forcefully demonstrates that the CGC conceded that the Master and Chief Mate are statutory supervisory positions. MM&P's cross-exception to this finding exposes the Union's flawed strategy in this case: rely upon the concession that the Master and Chief Mate possess supervisory status when it helps MM&P's argument, but deny the concession when it does not. MM&P's position is untenable and should be rejected.

## **II. MASTERS ABOARD THE SUNRISE VESSELS ARE SECTION 2(11) SUPERVISORS.**

Even had the CGC not conceded the supervisory status of the Masters and Chief Mates, which she did, MM&P's contention that Masters do not possess supervisory authority over the twenty-five crew members aboard an enormous containership crossing the Pacific Ocean on two week voyages defies the record and logic.

Under federal law, the Master is the senior officer aboard and has absolute authority over the vessel. (Tr. 439.) The MM&P's CBA confirms this fact, stating that "[t]he Master is the Licensed Deck Officer in command of the vessel at all times." (GC-2, §21(1) at 240.) Likewise, "[t]he Master, or in the Master's absence, a Mate designated by the Master, [is] in charge of the watch and will coordinate and oversee the watch organization and safe navigation of the vessel." (R-5 at 62; Tr. 475.) The Master "has authority over all aspects of the vessel's operation at all times, in port and when underway. This authority extends to all matters of ship handling, navigation and operations, including interpretation of laws, rules and regulations, risk and safety management, cost control, personnel administration and labor related matters." (R-5 at 310; Tr.

478.) The Master's authority is "complete" and "overriding" with respect to safety and pollution prevention, regardless of whether the vessel is operating under normal or extreme circumstances. (*Id.*) Thus, "notwithstanding . . . the presence of senior shore side management onboard, the Master retains the authority to take whatever action he/she considers appropriate relevant to his/her responsibilities after taking into consideration prevailing conditions." (*Id.*) Critically, the Master is held responsible for his crews' errors. For example, the Master will be held responsible if he fails to prevent the discharge or spilling overboard of any petroleum products, as the Master has both a legal and job obligation to prevent pollution. (R-5 at 315-316; Tr. 478.)

In addition to having complete authority of the vessel, the Master is responsible for (i) ensuring the seaworthiness of his vessel and the efficient operation of systems/equipment onboard; (ii) implementing Safety, Pollution Prevention and Drug and Alcohol policies; (iii) motivating crewmen in observation of Company policies; (iv) issuing appropriate orders and instructions in a clear and simple manner (e.g. standing orders, night orders, etc.); and (v) verifying that specified management systems and other contractual requirements are observed. (R-5 at 311; Tr. 478.)

It is important to note that the Master performs supervisory duties both prior to and during the voyage. For example, in preparation for a voyage the Master must ensure (i) the vessel's seaworthiness; (ii) that there are sufficient stores, provisions, bunkers and water for the intended voyage; (iii) that there are sufficient and current charts and navigational publications; (iv) that a navigation passage plan has been prepared and reviewed; and (v) that the officers required to perform duties onboard during departure from port, and immediately thereafter, have received adequate rest prior to sailing. (R-5 at 313; Tr. 478.) During the voyage, the Master is responsible for (i) the safe navigation and seaworthiness of his vessel at all times; (ii) ensuring that all officers fully understand their roles and responsibilities, in accordance with current legislation and the

SMS; (iii) establishing guidelines regarding safe navigational practices; (iv) issuing standing orders (or endorsing those in existence); (v) issuing night orders; (vi) the safe and proper conduct of cargo/ballast operations; (vii) ensuring the time and cost effective operation of the vessel; (viii) ensuring that vessel defects are reported and repaired; (ix) confirming that all cases of personnel illness and injury receive prompt and appropriate medical attention; (x) keeping the vessel clean and sanitary at all times; (xi) ensuring personnel receive adequate rest and proper food; (xii) safeguarding and disbursing Company funds as needed; and (xiii) confirming that all of the vessel's operations are being carried out with due regard to accident prevention, safety, the vessel, cargo and the protection of the environment. (R-5 at 314-318; Tr. 478.)

The Master also has specific personnel and administrative duties. Specifically, the Master is responsible for coordinating administrative duties associated with the operation of the vessel, including: (i) controllable costs; (ii) correspondence; (iii) radio communications; (iv) stores; (v) provisions; (vi) vessel/cargo security; (vii) personnel, including health, welfare, performance and conduct of all persons onboard; (viii) labor relations and training; (ix) the vessel's documents, including management system documentation, and governmental and company publications; (x) working hour limitations; and (xi) official correspondence, including the preparation and filing of official radiograms, records and reports and the safekeeping of vessel's official papers and documents. (R-5 at 317; Tr. 478.) The Master is responsible for appraising the performance of the Chief Mate and ensuring that appraisals of junior officers and crewmembers are performed. (*Id.*) The Master also approves hires, fires, disciplines and grants time-off to the crew. (GC-33; Tr. 466-468.) For example, a Master aboard the Horizon Reliance recently terminated a Chief Mate for unprofessionalism and for failing to adhere to the Master's orders. (Tr. 518, 554.)

Upon boarding the Sunrise Vessels, every crew member must execute a document called the “Shipping Articles,” which states, in no uncertain terms, that all unlicensed crew must “be obedient to the lawful commands of the master, or of an individual who lawfully succeeds the master, and of their superior officers in everything related to the vessel, and the stores and cargo of the vessel, whether on board, in boats, or on the shore.” (R-6.)

This record evidence – which is undisputed -- plainly establishes the Master “has authority over all aspects of the vessel’s operation at all times, in port and when underway” and that “[t]his authority extends to all matters of ship handling, navigation and operations, including interpretation of laws, rules and regulations, risk and safety management, cost control, personnel administration and labor related matters.” (R-5 at 310; Tr. 478.) The Master performs most, if not every single supervisory function enumerated in Section 2(11) of the Act.

### **III. CHIEF MATES ABOARD THE SUNRISE VESSELS ARE SECTION 2(11) SUPERVISORS.**

As the CGC conceded throughout the adjudication of this case, the record evidence establishes that the Chief Mates on the Sunrise vessels are also supervisors within the meaning of the Act. “The Chief Officer is second in command of the vessel and the designated officer in charge in the absence of the Master.” (R-5 at 325; Tr. 478:17–23.) Subordinate deck officers report to the Chief Mate and consider his or her orders binding. (*Id.*) The CBA acknowledges the Chief Mate’s supervisory role aboard the vessel, stating that “[t]he Chief Officer is the Head of the Deck Department and as such performs the supervisory duties outlined in this agreement. In addition, he performs the duties of the Master as necessary in the Master’s absence.” (GC-2, §21(1) at 240.)

“The Chief Officer is responsible to the Master for the operation, administration, and supervision of all deck operations—and for assignment of duties of subordinate deck officers in

port and while underway.” (*Id.*) This responsibility includes (i) assisting the Master in controlling costs applicable to Deck operations, including the planning and supervision of work, department overtime, requisition and preparation; (ii) controlling the use of deck stores ensuring efficiency and economy; (iii) guarding against wasteful, irregular and/or unsafe practices; (iv) ensuring that all store rooms, vessel spaces and lockers under his control are maintained in an orderly manner; (v) maintaining all spaces and equipment relevant to the Deck Department; (vi) timely preparing all reports and records associated with the Deck Department; (vii) keeping accurate records as to the installation date of mooring lines and wires and winch brake testing, lifeboat davit wires, and the stock and consumption of Deck Department stores and spare parts; (viii) ensuring that deck operations are carried out safely; and (ix) maintaining and repairing all safety, lifesaving, firefighting and gas detection equipment. (R-5 at 326, 328; Tr. 478.)

In addition to these duties, the Chief Officer engages in voyage preparations prior to the vessel’s departure from port. In so doing, the Chief Officer ensures that (i) the Deck Department is adequately manned and has adequate stores for the planned voyage; (ii) all pre-sailing checks have been successfully completed prior to departure; (iii) particular attention is given to watertight closures; and (iv) the Deck Log Book indicates that the vessel has been inspected and is rigged/secured for sea. (R-5 at 327; Tr. 478.)

The Chief Mate is responsible to the Master for the “safe and proper” handling of cargo and ballast. (R-5 at 328; Tr. 478:17-23.) The Chief Mate must ensure that (i) safety precautions with respect to cargo handling are observed; (ii) regulations relating to cargo are followed; (iii) accurate records and reports of cargo handling are drafted; and (iv) the preparation of holds and equipment are properly carried out. (*Id.*) The Chief Mate “is responsible to the Master for compliance with international, national and local laws and regulations (as well as with Company

policy) concerning the discharge of pollutants in the marine environment.” (*Id.*) This responsibility requires the Chief Mate to “take appropriate steps to ensure subordinate officers comply with all regulations and policy.” (*Id.*)

Like the Master, the Chief Mate also has specific personnel and administrative duties. The Chief Mate is responsible for the administration of the deck operations, including (i) controlling costs; (ii) ensuring the security of vessel and cargo; (iii) supervising personnel; (iv) training, including training relating to the vessel’s firefighting and emergency equipment; (v) handling labor matters; (vi) preparing and timely submitting all correspondence, reports, and records as required by Sunrise; and (vii) controlling and maintaining the Deck Department’s records including plans, manufacturer’s instructions, systems, equipment, reports and correspondence. (R–5 at 328–29; Tr. 478.) In supervising the personnel aboard the Sunrise vessels, the Chief Mate must “frequently inspect deck spaces to ensure proper operation of systems/equipment and that personnel are attentive to their duties.” (R–5 at 329; Tr. 478.) In addition, the Chief Mate approves overtime and adjusts grievances brought to him or her by other members of the crew. (Tr. 466, 467.) The Chief Mate may also hire, terminate and issue discipline to crew members, including, but not limited to, issuing disciplinary warnings. (GC–33; Tr. 464–468, 522.)

The evidence plainly establishes that Chief Mates working on the Sunrise vessels are Section 2(11) supervisors.

### **CONCLUSION**

For the foregoing reasons, the ALJ’s finding that the CGC appeared to concede the supervisory status of the Master and Chief Mate should be affirmed and the Second Consolidated Complaint should be dismissed in its entirety.

Dated: July 13, 2020

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**CERTIFICATE OF E-FILING AND SERVICE**

Kara E. Cooper, one of the attorneys for Sunrise, certifies that on July 13, 2020, she caused the foregoing Respondent Sunrise Operations, LLC's Answering Brief to the Charging Party's Cross-Exception to the Administrative Law Judge's Decision and Order to be filed electronically through the National Labor Relations Board's electronic filing system and served by email upon:

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