

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

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

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

William G. Miossi
Kara E. Cooper
WINSTON & STRAWN LLP
1901 L Street NW
Washington, D.C. 20036
(202) 282-5000
wmiossi@winston.com
kecooper@winston.com

Counsel for Respondent Sunrise Operations, LLC

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INTRODUCTION

Neither the General Counsel's nor Union's Answering Briefs make any effort to justify or excuse the ALJ's remarkable failure to conduct a detailed, fact-specific analysis of the supervisory duties and responsibilities performed by the LDOs at issue, none of which are disputed. Instead, they each recite a handful of Board cases that concluded the disputed personnel were not Section 2(11) supervisors based on facts peculiar to those cases, which are factually dissimilar to the record evidence here – thus, makeweight. In fact, the CGC's and Union's Answering Briefs simply repeat precisely the same manifest errors as the ALJ's RDO in failing to support their assertions that the LDOs lack supervisory status with citations to specific record evidence. In addition to the aforementioned deficiencies, the Union's Answering Brief is further undermined by its transparent attempt to champion one side of an argument when it helps dispute Respondent's position, but later reject that same argument when it undermines the Union's own position. As a result, the Union's Answering Brief contradicts itself to such a degree that its arguments regarding the supervisory status of the LDOs aboard the Sunrise vessels are wholly unconvincing.

ARGUMENT

I. The Answering Briefs Fail to Identify Specific Facts That Support Their Supervisory Status Claims.

The parties agree that Respondent's central jurisdictional defense – whether the bargaining unit is comprised solely of Section 2(11) supervisors – requires a “fact intensive and careful examination of the relevant facts and circumstances in each case.” *USF Reddaway, Inc.*, 349 NLRB 329, 339 (2007). Yet, even a cursory comparison of Respondent's Exceptions Brief to the CGC's and the Union's Answering Briefs¹ reveals how little record evidence the CGC and Union

¹ References to Respondent's Brief In Support of Its Exceptions to the Administrative Law Judge's Decision and Order are cited to as “Resp. Br. at ___.” References to the CGC's Answering Brief are cited to as “CGC Br. at ___.” References to the Union's Answering Brief are cited to as “Union Br. at ___.”

rely upon in arguing that certain LDOs aboard the Sunrise vessels lack supervisory authority. The Answering Briefs' conclusory analyses are little more than a rehash of the RDO – where the ALJ largely ignored the record evidence in favor of rote recitations of prior Board decisions predicated on materially different facts and applying a standard of review that has been abrogated in relevant part by the U.S. Supreme Court.

For example, the Union's Answering Brief emphasizes *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015), where the Board held that certain LDOs represented by the MM&P were not Section 2(11) supervisors. But, the Union omits entirely the operative facts that decision was based on; specifically, the small harbor tugboats at issue were staffed with only six crew and operated exclusively in local waters on the Hudson River, the New York Harbor and/or the Long Island Sound. The reality of the *Buchanan Marine* tugs' working conditions pale in comparison to the 893 feet-long by 105 feet-wide, 12,000-ton containership carrying 25,000 tons of cargo from California to Hawaii on two-week voyages operating 24 hours a day in international waters across the Pacific Ocean with a crew of 25 or more. The demands and nature of the duties and responsibilities of the Sunrise LDOs categorically do not compare to the work of small tugboats working 8 hour shifts within sight of land. *Buchanan Marine* is inapposite; it has no bearing here.

II. The CGC's Answering Brief Suffers from the Same Infirmities as the ALJ Decision.

The CGC's Answering Brief merely repeats the ALJ's selective reading of the record by pointing to a few facts in the record and maintaining that those facts out of context are enough to endorse the ALJ's finding of no supervisory status. But, determining supervisory status does not turn on finding that an LDO *lacks* any *one* of the twelve indicia of supervisory status – the proper inquiry is whether the LDOs *possessed* any *one* of the twelve indicia of supervisory status.

Indeed, the CGC attempts to defend the ALJ's refusal to consider material record evidence like the CBA, federal regulations and international treaties bearing directly on the LDOs' duties –

which all unequivocally help establish the supervisory status of LDOs aboard deep-sea oceangoing U.S.-Flag containerhips – asserting “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”).” (CGC Br. at 17.) Yet, Respondent has never once maintained that any one thing is determinative of the LDOs’ supervisory status. Respondent argues that the ALJ should have taken account of *all* evidence of supervisory status, including the parties’ CBA, federal regulations, and international treaties, which vest the Second and Third Mates with enormous and consequential authority and personal liability while serving as the Officer of the Watch each day during the two-week round-trip voyages across the Pacific Ocean. The ALJ’s failure to take any of this into account alone warrants the reversal of her decision.

The CGC’s attempt to rehabilitate *Chevron* – the *sole* authority the ALJ relied upon for the finding that the Second and Third Mates on the Sunrise vessels do not possess supervisory status while serving as Officer of the Watch – also fails. *See Chevron Shipping Co.*, 317 NLRB 379 (1995). Respondent does not contend that all “employees who exercise professional or technical judgment in directing less-skilled employees are necessarily 2(11) supervisors,” as the CGC alleges. (GC Br. at 16.) Nor did we state that *Chevron* was abrogated in its entirety. (Resp. Br. at 1.) Rather, Respondent argues that the ALJ erroneously based her decision regarding the supervisory status of the LDOs on *Chevron*, wherein the Board declined to take into account the critical fact that the LDOs “exercise substantial responsibility for ensuring that the ships’ functions are carried out properly” when determining whether the LDOs had “authority to direct the work of the crew”; reasoning that such authority could not be considered because it was based on the LDOs’ “greater technical expertise and experience.” *Chevron*, 317 NLRB at 382. Because the ALJ altogether neglected a fact-specific analysis of the LDOs at issue here in favor of adopting

the *Chevron* decision in its entirety, the fact that Supreme Court abrogated this application of *Chevron* squarely discredits and undermines ALJ's determination of supervisory status.

The CGC's Answering Brief also has no answer to Respondent's argument that it cannot be compelled to bargain with a mixed unit of employees and supervisors where it is undisputed that the parties at no time *voluntarily* included supervisory personnel in a unit with employees. The CGC's response that an employer that *voluntarily* agrees to a mixed supervisory/employee unit cannot later use that as a defense against alleged violations of the Act, misses the mark entirely. It is not disputed that dating from at least 1981 until the Union's allegations in this case, MM&P has unequivocally maintained that the bargaining unit at issue in this proceeding was comprised entirely of supervisors – the evidence is in parties' CBA and NLRB decisions (many involving MM&P) dating back 50 years that establish the statutory supervisor status of MM&P represented LDOs serving on deep sea ocean cargo vessels. It is true that Respondent and its predecessors voluntarily recognized this statutory supervisor LDO bargaining unit, but neither Sunrise nor any of its predecessors ever voluntarily recognized a bargaining unit containing both supervisors and employees.² It is unlawful to compel Respondent to bargain with such a mixed unit against its will, which is the inevitable consequence of the RDO.

Last, the CGC ignores a mountain of record evidence Respondent presented at trial and thoroughly detailed in both its Post-Hearing and Exceptions briefs, demonstrating that Respondent is not a successor to Horizon Lines. Indeed, the CGC's assertion that "none of [Horizon's Lines]

² Likewise, the Union argues that the parties' "mutual intent and understanding" was that the LDOs lacked supervisory status because "The Union – in this cases and other maritime cases . . . has asserted that the LDOs are not Section 2(11) supervisors." (Union Br. at 12.) Yet the only "other maritime" case MM&P cites to in support of this assertions is a case from December of 2015. (*Id.*) To be clear, this position was a complete about-face from the position that the MM&P had been espousing for decades (*i.e.*, its members were supervisors and should be treated as such). (*See* Resp. Br. at 38–40) (collecting cases wherein MM&P recognized supervisory status of the LDOs it represented).

business operations nor employees have changed” since Respondent purchased 30% of Horizon’s assets and liabilities – is squarely contradicted by the record evidence. (CGC Br. at 21.) As Pasha General Counsel Amy Sherburne-Manning explained at trial, SR Holdings – the parent company of Sunrise – purchased only 30% of Horizon Lines’ assets and liabilities and acquired “less than 30% of [Horizon Lines’] employees.” (Tr. 285, 288.) Ms. Sherburne-Manning also testified that an unrelated company, Matson Navigation Company, purchased the vast bulk of Horizon Lines’ business, acquiring 70% of Horizon Lines’ *assets and liabilities*, comprising Horizon Lines’ Alaska and Puerto Rico trade lanes, *as well as all of Horizon Lines’ intellectual property and corporate services, including its finance, human resources, and information services.* (Tr. 285, 288; R–2.) Neither the CGC nor the Union introduced any evidence pertaining to this transaction or otherwise contradicted Ms. Sherburne-Manning’s testimony. Nor have they cited to any evidence supporting their successorship allegations.

III. The Union’s Answering Brief Is Thoroughly Undermined by Its Own Contradictions.

A. Mr. Washburn’s Credibility

The Union’s Answering Brief maintains that Respondent failed to produce “any *credible* evidence suggesting that LDOs exercise independent judgement.” (Union Br. at 8.) In so doing, the Union argues that the ALJ properly refused to credit any of Ed Washburn’s testimony because he lacked credibility. The Union’s unsupported claim that Mr. Washburn lacks credibility is convenient (but wrong), as it allows the Union to ignore, rather than address the undisputed, specific record evidence establishing the supervisory status of the LDOs at issue.³

³ While it has no relevance to the instant case, the Union’s claim that Mr. Washburn’s “entire experience aboard the former-Horizon vessels in the four years since Respondent acquired Horizon’s Hawaii trade-lane consists of one day at sea with his 13 year-old daughter and her friend” (Union Br. at 9) is an egregious misrepresentation of Mr. Washburn’s testimony that is wholly unsupported by the testimony the Union cites to in support of this statement (Tr. 445:12–15).

The Union argues that Mr. Washburn’s testimony should not be considered as part of the record evidence at all:

Given his lack of direct experience of what occurs on these ships, Washburn’s first-hand testimony was limited to when he was aboard ships as an engineer—not an LDO—several decades ago, and an unspecified amount of time aboard Horizon Line ships as a manager before Respondent acquired the line. . . . The ALJ thus correctly determined that Washburn’s testimony on the supervisory issue was essentially baseless opinion.

(Union Br. at 9.) The record establishes otherwise. Mr. Washburn is the senior Sunrise manager for all vessel and personnel matters and as such, has personal knowledge of the Sunrise vessels, how they operate and what the LDOs do. The undisputed record evidence establishes that in his capacity as the Senior Vice President of Sunrise, Mr. Washburn’s “overall responsibility is everything to do with the vessels, the crew, the fuel, the labor, the condition of the overhauls, the regulatory, the environmental aspects. Just everything that has to do with the vessels is under [his] management.” (Tr. 436–437.)

As Respondent elaborated upon in pages 37 and 38 of its Exceptions Brief, the ALJ in *District No. 1* credited and relied upon the testimony of Thomas Percival, the Manager of Labor Relations and Vessels Operations for Sunrise’s competitor, Matson Navigation Company, in determining whether the LDOs at issue in that case were Section 2(11) supervisors. 2003 WL 249694, at *1 (NLRB Div. of Judges Jan. 27, 2003). The ALJ did so despite the fact that Mr. Percival had never worked aboard the vessel at issue in that case. *Id.*

Yet, a few pages after the Union’s Answering Brief discredits the entirety of Mr. Washburn’s testimony on grounds that he never personally served as an LDO aboard the Sunrise vessels, the Union astonishingly cites to Mr. Percival’s testimony in the aforementioned *District No. 1* case for the proposition that LDOs lack independent judgment and discretion because they follow the Respondent’s Safety Management System (“SMS”) Guide. (Union Br. 12–14.) The

Union's reliance upon Mr. Pervical's testimony in support of its contention that the LDOs aboard the Sunrise vessels strictly followed the SMS contradicts and undermines its earlier argument that Mr. Washburn's testimony must be discredited on the basis that he never served aboard one of the four vessels managed by Sunrise.

B. Technological Advances in the Industry

The Union – not the CGC – has taken the position that even the Masters and Chief Mates aboard the Sunrise vessels do not possess supervisory status. For a comprehensive rebuttal of the Union's argument, Respondent refers the Board to its Answering Brief to the Union's Cross-Exception. The Union further elaborated upon this position in its Answering Brief, alleging that the Masters and Mates on the Sunrise vessels are not Section 2(11) supervisors due to the technological advances since the 1990s, which have purportedly eradicated their supervisory duties and responsibilities. (Union Br. at 16–18.) In support of this argument, the Union relies solely upon the testimony of its lawyer – Gabriel Terrasa – who has never been to sea. (*Id.*; Tr. 131.) Mr. Terrasa (i) did not begin representing MM&P until 2000; (ii) has never served aboard any ocean-going vessel whatsoever; (iii) has never been licensed by the Coast Guard; and (iv) admitted on cross-examination that he had “no firsthand knowledge whatsoever of what technology existed or didn't exist aboard deep-sea cargo vessels with the U.S. Flag in 1981.” (Tr. 67, 110–113, 143.) The only “technological advances” in the maritime industry since 1981 that Mr. Terrasa tried to identify are the introduction of cell phones and personal computers:

Q. And based on your experience representing Masters, Mates & Pilots, have the conditions changed since 1981 aboard offshore ships?

A. Very much so.

Q. And can you explain how it changed?

A. Well, for starters, the law changed. . . . And second, the technology is different. Back in 1981, there were no cell phones. There were no computer communications with the ships. So the management -- the shoreside

management is, right now, virtually present in the ships, whereas in 1981 they were not.

....

Q. Do the vessels at issue in this hearing, the Enterprise, Spirit, Pacific, and Reliance -- do you know whether they have satellite phones present onboard ship?

A. I can't tell you for sure.

Q. Do you know whether there's technology aboard ship that makes it possible to communicate with the shore --

A. Yes.

Q. -- personnel 24/7 on the ships?

A. Yes, there is.

Q. Okay. And do you know whether that technology existed in 1981?

A. No.

(Tr. 110, 113–114.)

Mr. Terrasa also testified that “[t]he level of regulation on the ships through Coast Guard regulations, through international treaties that controlled the conduct in which the businesses run in the vessels significantly more now than it was in 1984, as well, so that what the mariners, from the captain to deckhand do, is highly regulated.” (Tr. 112.) But when the Union’s counsel attempted to shore up Mr. Terrasa’s vague testimony by asking him the “approximate year of the international conventions” he referenced in his testimony, he said he did not know, but that it was *sometime* between the date the parties’ executed the 1981–1984 CBA and the present. (Tr. 113.) He also asserted that “[t]he Coast Guard have increased regulation for the industry,” but was unable to provide any specific testimony regarding these purported regulations. Mr. Terrasa admitted on cross-examination that he could not name any regulation or convention that has altered the obligations or duties of the LDOs since 1981. (Tr. 143–144.)

The Union’s reliance upon Mr. Terrasa’s vague and unsupported testimony – about a topic he clearly has no personal or expert knowledge of – to support its argument that Masters and Chief Mates lack supervisory status cannot be reconciled with its wholesale rejection of the testimony of

Mr. Washburn – a licensed maritime professional who has worked for decades in the industry and is responsible for the personnel and overall operations of the Sunrise vessels.

C. The Parties' 1981–1984 Collective Bargaining Agreement

The Union also argues that “Respondent’s reliance on a few lines of the 1981–1984 industry-wide agreement to prove all LDOs for Respondent regularly function as supervisors nearly forty years later is unavailing.” (Union Br. at 11.) In support of this argument, the Union argues that “‘paper authority,’ such as a job description or handbook is insufficient to demonstrate actual supervisory authority.” (*Id.*) This argument is entirely inconsistent with the rest of the Union’s Brief for a number of reasons.

First, the Union would have the Board ignore material terms of its *own* CBA because the CBA is an “industry-wide agreement” that was executed “nearly forty years” ago. (*Id.*) Yet, if Respondent were to use precisely the same argument to diminish the authority of other provisions in the CBA, the Union would surely and rightfully vigorously defend the CBA and accuse Respondent of manifest breach. In this dispute, for example, the Union actually attempts to bind Respondent to an unsigned 1984 Memorandum of Understanding (“MOU”) that fails to even identify any parties to the agreement other than the MM&P.

The Union also accuses the Respondent of only “rel[ying] on a few lines of the 1981–1984 industry-wide agreement” to prove supervisory status of the LDOs. (*Id.* at 11.) In support of this argument, the Union cites to *Building Contractors*, which held that the Respondent could not establish the supervisory status of its employees by relying upon a single statement in the parties’ CBA that the employees had the “right to hire and discharge employees.” (*Id.*) (citing *Building Contractors*, 364 NLRB No. 74, slip op. at 76 (2016)). As a preliminary matter, to say that the CBA only contains “[a] few lines” of text regarding the supervisory status of the LDOs is a rather

bold misrepresentation of fact. In fact, the CBA refers to the supervisory status of its members no less than thirty times in almost a dozen separate and material sections.

Additionally, the CBA in *Building Contractors* is nothing like the CBA here. The CBA in *Building Contractors* only stated that employee had the “right to hire and discharge employees.” In contrast, the 1981–1984 CBA contains numerous substantive provisions detailing the supervisory status of the LDOs. For example, Section 21(1) of the CBA provides, “The duties of the licensed deck officers, including masters, *shall* be maintained as supervisory and professional.” (GC–2, §21(1) at 240) (emphasis added.) Further, the CBA provides in clear terms that the Union’s LDOs engage in a wide array of supervisory activities – and in 40 years not one of these provisions has ever been amended. (*See* Resp. Exceptions Br. at 8–10.)

CONCLUSION

For the foregoing reasons, the Second Consolidated Complaint should be dismissed in its entirety.

Dated: July 20, 2020

SUNRISE OPERATIONS, LLC

By: /s/ William G. Miossi
One of its Attorneys

William G. Miossi
Kara E. Cooper
WINSTON & STRAWN LLP
1901 L Street NW
Washington, D.C. 20036
(202) 282-5000
wmiossi@winston.com
kecooper@winston.com

CERTIFICATE OF E-FILING AND SERVICE

Kara E. Cooper, one of the attorneys for Sunrise, certifies that on July 20, 2020, she caused the foregoing to be filed electronically through the National Labor Relations Board's electronic filing system and served by email upon:

Yasmin Macariola
Field Attorney
Counsel for the General Counsel
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738
Yasmin.Macariola@nlrb.gov
Jill.Coffman@nlrb.gov

Gabriel A. Terrasa
International Organization of Masters,
Mates & Pilots ILA/AFL-CIO
700 Maritime Blvd., Ste. B
Linthicum, MD 21090-1953
GTerrasa@tslawmd.com

Lisa Demidovich
Bush Gottlieb A Law Corporation
801 N. Brand Blvd., Ste. 950
Glendale, CA 91203-1260
LDemidovich@bushgottlieb.com

/s/ Kara E. Cooper
Kara E. Cooper