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**Brusco Tug and Barge, Inc. and International Organization of Masters, Mates & Pilots, Pacific Maritime Region, AFL-CIO, Petitioner.** Case 19-RC-013872

December 14, 2012

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES  
AND GRIFFIN

The issue in this case is the supervisory status of the Employer's tugboat mates.

On December 21, 2006, the Regional Director for Region 19 issued a Second Supplemental Decision on Remand, finding that the mates are employees, not supervisors, and therefore properly included in the unit.<sup>1</sup>

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<sup>1</sup> The lengthy procedural history of this case dates back to October 1999, when the Petitioner initially sought to represent a unit of the Employer's mates, deckhands, and engineer/deckhands employed on vessels working out of the Employer's Longview/Cathlamet, Washington homeport. On November 26, 1999, the Regional Director issued a Decision and Direction of Election finding the petitioned-for unit appropriate. The Employer filed a request for review, which the Board (Chairman Truesdale and Member Liebman; Member Hurtgen dissenting) denied on December 29, 1999. After the Petitioner won the May 2000 election and was certified as the employees' representative, the Board issued a Decision and Order in Case 19-CA-026716, finding that the Employer violated Sec. 8(a)(1) of the Act by maintaining a rule that any mate who participated in union activities would face termination. The Employer sought judicial review. The Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's Decision and Order. *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001). The court remanded the case to the Board to explain why its decision was not inconsistent with *Masters, Mates & Pilots Local 28 (Ingram I)*, 136 NLRB 1175 (1962), enf'd. 321 F.2d 376 (D.C. Cir. 1963), and *Bernhardt Bros. Tugboat Service*, 142 NLRB 851 (1963), enf'd. 328 F.2d 757 (7th Cir. 1964), or, alternatively, to justify the departure from precedent. The Board subsequently vacated its decision in Case 19-CA-026716 and remanded the representation case to the Regional Director for further consideration and a reopening of the record. On January 7, 2002, the Regional Director issued a Supplemental Decision finding that the mates were not statutory supervisors. The Board (Members Liebman, Cowen, and Bartlett) granted the Employer's request for review on October 18, 2002. On September 29, 2006, the Board issued its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727 (2006); and *Croft Metals, Inc.*, 348 NLRB 717 (2006). The Board then remanded the case to the Regional Director for further appropriate action in light of those decisions, including a reopening of the record if necessary.

Following the Board's remand of this case, the Regional Director issued an Order to Show Cause, inviting the parties to "Show cause, if any exists, why the record in this matter should be reopened for the purpose of receiving additional evidence and/or supplemental briefs regarding the authority of mates to assign, responsibly direct and exercise independent judgment within the meaning of Section 2(11), includ-

ing potential changed circumstances bearing on their status." The Regional Director further invited the parties to "provide documents and/or offers of proof in support of their written statements . . ."

The Employer submitted a response asserting that "it is the Region's duty to assure that a complete record has been made" and that it "does not believe it necessary to supplement the record." The Employer further stated, however, that while it believes that the present record demonstrates the accountability showing required by *Oakwood Healthcare*, it would be prepared to supplement the record by affidavit or live testimony "should there be any ambiguity." The Employer also stated that, "if deemed appropriate," it would address in a supplemental brief the concerns it has with respect to the Regional Director's "key findings," the Regional Director's deviation from the D.C. Circuit's directive, and the Board's proper consideration of this case in light of *Oakwood Healthcare*, et al. The Regional Director then issued an order denying a further evidentiary hearing but allowing supplemental briefing. On December 21, 2006, the Regional Director issued the decision under review here.

Having carefully considered the entire record in this case, including the briefs on review, we agree with the Regional Director's finding that the Employer failed to meet its burden of establishing that the tugboat mates are statutory supervisors based on the statutory criteria of assignment and responsible direction. Thus, we affirm the Regional Director's Second Supplemental Decision. We emphasize, however, that our decision turns on the facts of this case as presented in the record developed by the parties. We are not declaring that tugboat mates are not statutory supervisors in all cases in which their status is at issue.

## I. FACTS

### Overview

The Employer operates about 34 tugboats along the Pacific Coast and on the Columbia River out of a home port in Longview/Cathlamet, Washington.<sup>2</sup> The tugboats tow a variety of barges carrying different commodities. Ocean-bound tugboats are usually staffed by a crew of four: a captain, a mate, an engineer, and a deckhand.<sup>3</sup> Occasionally, the crew includes a second deckhand, for

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<sup>2</sup> The Employer's operations encompass other home ports, but this case concerns only the individuals employed on the Employer's Longview/Cathlamet-based tugboats.

<sup>3</sup> River-bound tugboats will be discussed below.

example, when a “log barge” is being towed.<sup>4</sup> Crews work in rotations of about 30 days on, 30 days off. At sea, each crewmember is on duty for a 6-hour watch period, then off watch for a 6-hour period, and the pattern is continuously repeated. The captain and the engineer are on watch from 6 a.m. until 12 p.m., and then again from 6 p.m. to 12 a.m. The mate and deckhand are on watch from 12 to 6 a.m., and then again from 12 to 6 p.m.

The captain is the highest authority on a tugboat and steers it when on watch. Captains are Coast Guard licensed officers, and are responsible for the tugboat, crew, barges, and product hauled. In particular, captains are in charge of navigation and safety, verifying that the tugboat is seaworthy, ensuring compliance with company policy, acquisition of adequate supplies, and making sure that the other crewmembers are capable of performing their respective duties. If anything goes wrong on the tugboat, the captain will be held responsible regardless of which crewmember was actually at fault. Captains have authority to discipline crewmembers, as well as to recommend the promotion of mates to captain and deckhands to mate.

The mate, who is also a Coast Guard licensed officer, steers the tugboat when the captain is off watch. On the mate’s watch, the mate is in charge. The engineer, also a licensed officer, operates and maintains the tugboat’s mechanical systems, in particular, the engine. A deckhand is either an “able-bodied” or “ordinary” seaman. A deckhand’s duties include maintenance work, assisting with tow-related maneuvers, preparing meals for the rest of the crew, cleaning, and painting.

#### “Making Up a Tow” and “Docking”

Ocean-bound tugboats generally tow one barge at a time; on a typical 30-day voyage, a crew hauls approximately four separate loads. Connecting a barge to a vessel for towing purposes is called “making up a tow.” Bringing a barge into port is called “docking a barge” or “docking.” The entire crew participates in both of these maneuvers, and the captain, mate, and deckhand all carry hand-held radios while performing them. Captain Richard Nordstrom estimated that making up a tow and docking take up about 1 percent of the crewmembers’ time on any given 30-day voyage. Captain Shawn Sarff testified that making up a tow and docking are processes that become “a little routine” after a while.

In advance of making up a tow or docking, the captain advises the mate as to how the captain wants the procedure done. Other crewmembers may be present for the

<sup>4</sup> The record does not answer the question of what percentage of the voyages involve a five-person crew.

captain’s orders, or the mate may pass on the instructions to the others. Generally, for either maneuver, the captain steers the tugboat from the wheelhouse or the Texas deck (an elevated platform above the wheelhouse). The mate is stationed either on the deck or on the barge, and gives directions to the deckhand. The mate tells the deckhand where the deckhand should station himself, on which side of the tugboat the lines will be placed, and which lines to release and in what order. The mate also tells the deckhand which tools to take with him and directs him in “bringing the wire to the winch.”<sup>5</sup>

There are two methods of docking a barge: “hipping up” to the barge or towing the barge to the dock. The captain decides which method to use. *Hipping up* involves moving the tug to the side of the barge, securing the barge tightly alongside the tugboat, and moving both the tugboat and the barge to the dock as a single unit. During the hipping up procedure, the deckhand boards the barge once the tugboat is alongside it, in order to secure the towlines. The mate instructs the deckhand which line to tie first. There are three types of towlines. Captains prefer that the “spring” line (as opposed to the “stern” or “bow” lines) be tied first, but concerns such as weather, the size of the barge, the vessel’s approach in lining up against the dock, how many lines will be tied and where the lines will be tied, inform the mate’s decision as to which line to instruct the deckhand to tie.

The second method of docking a barge, towing the barge to the dock, involves the use of an assist boat that takes the mate and the deckhand to the barge. During this maneuver, it is necessary for the mate and sometimes the deckhand to stand on the barge because the barge is higher than the tugboat and blocks the captain’s view of the dock. Once on the barge, the mate acts as the “eyes” of the captain, and directs the captain in steering the tugboat to the dock. According to Captain Nordstrom, the manner in which the mate directs the captain in steering the boat to the dock is comparable to the way an individual standing outside of a car uses hand signals to help the car’s driver navigate.

#### Changing the Length of a Towline

Conditions such as weather, swells, barge weight, vessel traffic, and depth of the water can necessitate a change in the length of a towline. If it becomes necessary to change the length during the mate’s watch, the

<sup>5</sup> James Richard Barton testified that when he was working on the Employer’s vessels as a mate, he would “go up on the barge and hand down the lines to the deckhand or engineer.” He would then “come down and start the process of bringing the wire in. And [he’d] tell the deckhand to start bringing it in on the cap stand, which is basically like a winch, you hook it up to, and it sucks the gear up on board.” Tr. 128–129 (Nov. 14, 2001).

mate makes the decision. Once the decision is made, the mate and the deckhand go to the winch. The mate operates and controls the winch while the deckhand watches to make sure that the line is spooling properly. The mate may instruct the deckhand to start up the winch or the vessel hydraulics, to run or redirect the “fair lead,” which leads the wires, or to lubricate the line. Captain Nordstrom testified that mates can in some instances direct deckhands to run the winch or to stay in the wheelhouse to monitor the radio or vessel traffic, but did not specify how often mates instruct deckhands to do so. Captain Nordstrom further testified that lines are often changed at the time of the watch switch so that all crewmembers are available.

#### Adverse Weather, Emergencies, and Drills

If the sea is rough, the captain may decide to utilize the vessel’s “surge gear,” a heavy chain that can be attached to the tow bridle on the barge. Although the mate may offer the captain an opinion as to whether the use of surge gear is necessary, it is the captain who ultimately makes the decision.

In low-visibility situations arising during the mate’s watch, the mate may post the deckhand to keep watch on the bow. This posting occurs only rarely, as the wheelhouse is located only 20 feet from the bow, and the mate would usually wake the captain if weather conditions merit the posting.

If there is an emergency during the mate’s watch, the mate wakes the captain. Any time the captain works during his normal off-watch period counts as overtime. The mate wakes the captain about two times during the course of a 30-day voyage, although this can occur more or less frequently depending on weather, engine problems, or emergencies. Emergencies are defined in the record as a fire, a man overboard, or a break in the towline. The mate calls all hands on deck in the case of an emergency, and is in charge of the crew’s activities on the deck while the captain steers the boat. A station bill in each vessel sets forth every crewmember’s responsibilities in case of an emergency, such as where the crewmember will be stationed, what equipment the crewmember will handle, and what work the crewmember will perform. The mate ensures that the other crewmembers perform their work in accordance with the station bill’s requirements. For example, the mate may instruct the engineer and deckhand to don life jackets or get certain supplies.

The captain decides what time the vessel will arrive at the Columbia River bar near the mouth of the Columbia River. The mate, however, will wake the captain if he believes that adverse weather or heavy traffic conditions will make crossing the river bar particularly difficult or

inadvisable. If a storm warning issues during the mate’s watch, the mate may turn the vessel back to the nearest port without seeking the captain’s permission, although Captain Nordstrom testified that it is rare for the mate to do so. The captain typically makes such decisions.

If a crewmember becomes ill during the mate’s watch and needs to be evacuated, the mate may call the Coast Guard to request an emergency evacuation without first waking the captain.

Mates conduct safety drills on board the tugboats. Drills include fire drills, man overboard drills, and loss of tow drills. Some captains give their mates a free hand in determining the frequency and the length of drills, other captains instruct their mates to schedule drills at certain times, and yet other captains do not have their mates conduct safety drills at all. All crewmembers participate in drills, and off-watch crewmembers are paid overtime for participating.<sup>6</sup> The drill content is set forth in the vessel’s station bill. Captain Nordstrom testified that mates may “throw something different” into a drill in an effort to make the drill a realistic approximation of an actual emergency. The record, however, provides no examples of these drill variations.

#### The Engineer

As stated above, the engineer is responsible for the proper functioning of the tugboat’s mechanical systems. If the engine alarm has sounded or if the mate sees something “he does not like” with respect to the engine during the mate’s watch, the mate wakes the engineer. The mate wakes the engineer about two to four times during a 30-day voyage. Because the engineer is off watch during the mate’s watch, any work performed by the engineer during the mate’s watch counts as overtime for the engineer.

Depending on the nature of the mechanical problem, the engineer may attend to it immediately or wait to take care of it during his watch. The mate typically accepts the engineer’s assessment of the problem’s time sensitivity, as the engineer is the individual most qualified to make the determination.

#### Projects and Determining Staffing Levels

The captain assigns projects to the crew while the tugboat is at sea. Projects range from painting the tugboat to cleaning the inside of a cupboard. Some but not all captains have an established duty roster for the engineer and deckhand to follow, and the mate may add tasks to the

<sup>6</sup> James Richard Barton testified that the mate tends to conduct safety drills during the watch change, in order not to “disrupt a lot of the necessary sleep time.” Barton also testified that if the drill was organized for “off-watch time,” he “suppose[d]” that the mate would have to get that “okayed” by the captain. Tr. 194–195 (Nov. 14, 2001).

duty roster. Depending on the watch, the captain or mate will instruct the engineer or deckhand, respectively, to work on a project.

Captain Nordstrom testified that he relies on the judgment of the mate in determining the “staffing level needs” during the mate’s watch. However, the record reveals no specific instances where a mate had to decide which of two deckhands to perform a task. Rather, the record contains only hypothetical examples of a mate choosing the stronger of two deckhands for a project that required heavy lifting, the more experienced of the deckhands for a more complex project, the better cook or painter to cook or paint, or the deckhand without a “bum knee” to perform a physically strenuous activity.<sup>7</sup>

#### Inland Vessels

Some of the Employer’s tugboats make runs on the Columbia River. The record testimony relating to river-bound—as opposed to Pacific Ocean-bound—vessels is confusing and incomplete. It is not clear what percentage of the voyages are river-based, and, while there appear to be three different types of river voyages, none of these voyages is explained thoroughly in the record. River-bound “day boats” make runs lasting up to 12 hours, with crews consisting of a captain and a deckhand. Other vessels make multiday river trips and operate round the clock.<sup>8</sup> Those vessels carry four-person crews, consisting of a captain, mate, and either two deckhands or a mate and a deckhand. One specific but undefined type of river trip, called a “fish run,” carries a crew of four: the captain, a mate (called a “pilot” on the fish run), and two deckhands.<sup>9</sup> There are eight locks on the Columbia River system. When passing through locks, the captain or the mate, depending on the watch, contacts the lockmaster at the lock and requests clearance. The captain or mate decides whether to tie up on the vessel’s port or starboard side, which lines to tie up, and where to station the deckhand during the tie up procedure. The captain or mate generally ties the tugboat to the side of the lock where the lockmaster is located, to facilitate handing the lockmaster the “lock slip”—a document specifying the nature and tonnage of the load being towed. However, wind direction, current, and cleat configuration in

<sup>7</sup> Henry Brusco, the Employer’s president, testified generally that, depending on the deckhands’ qualifications, the mate “will give them different tasks” based on what the mate feels the deckhands can handle.

<sup>8</sup> The Employer sends vessels “as far east as Lewiston [Washington]” about 12 times per year. Those round-trip voyages last 7 days. Tr. 43–44 (Nov. 2, 1999).

<sup>9</sup> Record testimony establishes that the Employer’s tugboats handled fish runs in the summer of 2001, but does not indicate whether the Employer’s vessels made the fish run during other time periods.

relation to barge length may influence the choice of which side to use for this procedure.

On the river, the Employer uses “push boats” rather than towboats. Push boats contain frontal push wires that are tied to the barge. During loading or offloading on river-bound voyages, the mate instructs the deckhand to tighten or loosen the “push wires.”

#### Relief Captains

The Employer employs a mate in the capacity of “relief captain” when a captain is off the vessel because of vacation or illness, or during the period between a captain’s leaving the Employer’s employment and the hiring of a new captain. The record does not reveal how often a mate works in the capacity of relief captain.

## II. ANALYSIS

The burden of proving supervisory status rests on the party asserting it, in this case, the Employer.<sup>10</sup> We agree with the Regional Director that the Employer failed to meet its burden of establishing supervisory status on the basis of assignment and responsible direction under the statute and *Oakwood Healthcare*, above. Although, as previously stated, other individuals employed as mates by this or other employers may be supervisors under the *Oakwood Healthcare* standard, the Employer has not shown that the mates at issue satisfy the standard.

Section 2(11) defines a “supervisor” as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To establish that individuals are supervisors, the party with the burden of proof must show: (1) that they have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) that their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) that their authority is exercised “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, supra, 348 NLRB at 687.

A party can prove the requisite supervisory authority either by demonstrating that the individuals actually exercise a supervisory function or by showing that they effectively recommend the exercise of a supervisory

<sup>10</sup> *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

function. *Oakwood*, supra, 348 NLRB at 688. Further, “to exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Id. at 692–693. A “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. at 693; *G4S Regulated Security Solutions*, 358 NLRB No. 160, slip op. at 1 (2012).

The Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB at 1048. Supervisory status is not proven where the record evidence “is in conflict or otherwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). “[M]ere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority.” *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012); see also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Center*, supra, 348 NLRB at 731. Job descriptions, job titles, and similar “paper authority,” without more, do not demonstrate actual supervisory authority. *G4S Regulated Security*, 358 NLRB No. 160, slip op. at 2, relying on *Golden Crest*, supra.

The Employer asserts that the tugboat mates at issue here are supervisors based on their authority to “assign” and “responsibly to direct” other employees. We discuss these contentions below.

#### A. Assignment

In *Oakwood Healthcare*, 348 NLRB at 689, the Board defined “assign” as the act of designating an employee to a place, such as a location, department, or wing; appointing an employee to a time, such as a shift or an overtime period; or giving significant overall duties to an employee. To assign for 2(11) purposes refers to the “designation of significant overall duties to an employee,” and not to the “ad hoc instruction that the employee perform a discrete task.” Id. Choosing the order in which an employee will perform “discrete tasks within [the supervisory] assignments” does not demonstrate the authority to assign under Section 2(11). Id. See also *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298 (6th Cir. 2012); *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 8 (2011).

As stated above, under *Oakwood Healthcare*, the authority to assign must be exercised using independent judgment, and judgment is not considered independent if it is dictated or controlled by detailed instructions. Id. at

692–693. Moreover, the assignment authority must rise above the level of “routine or clerical” in order to constitute independent judgment. Id. at 693. Accord: *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3; *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), cited with approval in *NLRB v. Kentucky River Community Care, Inc.*, supra, 532 U.S. at 714.

Here, the Employer argues that the mates’ 2(11) assignment authority consists of: (1) making assignments “during emergencies, training, and adverse weather”; (2) assigning “all hands, including the Captain, to overtime shifts”; and (3) assigning deckhands “based upon skill or physical capability, to perform tasks that may be more onerous or taxing, in connection with docking, making up to the barge, and the like.”<sup>11</sup> We find, for the following reasons, that the Employer has not met its burden of showing supervisory status based on the mates’ alleged assignment authority.

#### 1. Making assignments “during emergencies, training, and adverse weather”

The instructions the mate gives to the deckhand with respect to making up a tow and docking do not involve designating an employee to a place or time, or giving an employee significant overall duties as those terms are used in *Oakwood Healthcare*. *Oakwood*, supra, 348 NLRB at 689. Rather, they involve “ad hoc instruction that the employee perform a discrete task.” Id. Thus, the mate does not specifically designate the deckhand to participate in an overall duty such as making up a tow or docking; rather, all crewmembers, including the captain, participate in these procedures as part of their preassigned job duties. Directing the deckhand, during these procedures, where to stand, on which side of the vessel to place the lines, what lines to release and in which order, and which tools to use exemplify ad hoc assignments that do not rise to the level of supervision. *Oakwood*, 348 NLRB at 689. *Frenchtown Acquisition v. NLRB*, 683 F.3d at 311–312. In any event, the mate’s instructions to the deckhand while making up a tow and docking do not involve the requisite independent judgment. The captain advises the mate in advance how they are going to perform the particular maneuver, and the mate and deckhand remain in constant verbal communication with the captain throughout the process via handheld radios. Both maneuvers become “a little routine” after a while.<sup>12</sup> In fact, Captain Richard Nordstrom testified, he prefers to stay with the same crew, in large part, because of the routine he has established with that crew. Captain Nordstrom testified that he has completed nearly 200 “hook-

<sup>11</sup> Employer’s Request for Review p. 38.

<sup>12</sup> Testimony of Captain Sarff.

ups” with his crew, and that each member of the crew “pretty much knows what they’re supposed to do.”

Similarly, it is not the mate who assigns the deckhand to the overall task of changing the length of towlines. That task is a basic part of the deckhand job. The mate’s instructing the deckhand to go to the winch, watch to make sure the line is spooling properly, start up the winch or the hydraulics, run or redirect the fair lead, or lubricate the lines are discrete tasks within the overall process, and do not demonstrate supervisory assignment.

The limited assignments a mate makes on inland river trips also constitute nonsupervisory, ad hoc instructions. The mate does not assign the deckhand the overall duties of assisting in lock passage or loading and offloading—again, these are preassigned at a higher level. The mate’s directions to the deckhand on tasks such as which side to tie up on, which lines to tie up, where the deckhand should stand, and whether to tighten or loosen the push wires concern only discrete tasks within the overall assignment.

The mate’s responsibilities in the case of adverse weather, emergencies, and drills additionally fail to establish 2(11) assignment authority. On the occasions when the mate turns the vessel around because of inclement weather, no assignment is involved as it is the mate himself who is performing that task. Although the mates arguably assign tasks to the deckhand and engineer in emergency and drill situations, such instructions do not demonstrate the necessary independent judgment because the vessel’s station bill sets forth each crewmember’s responsibility. Rather, in those situations, the mate performs the important but nonsupervisory task of ensuring that the crewmembers carry out the duties the station bill specifies. Captain Nordstrom’s testimony that mates may “throw something different” into a drill in order to make the drill a realistic approximation of an actual emergency fails to explain with the requisite specificity the mate’s purported exercise of independent judgment. *G4S Regulated Security*, 358 NLRB No. 160, slip op. at 3–4.

## 2. Assigning “all hands, including the Captain, to overtime shifts”

Section 2(11) refers to supervisory authority over “other employees,” and the term “employees” as used in Section 2(11) must be defined in accordance with Section 2(3).” *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 and fn. 1 (9th Cir. 1981), cert. denied 455 U.S. 1017 (1982). See also *Mourning v. NLRB*, 559 F.2d 768, 770 fn. 3 (D.C. Cir. 1977). Because captains are stipulated supervisors, not 2(3) employees, a mate’s action in waking a captain and thereby causing the captain to accrue overtime does not constitute a 2(11) assignment.

Nor has the Employer established the exercise of independent judgment with respect to the mate’s assignment of overtime to the engineer. The mate wakes the engineer when the engine alarm sounds or when something relating to the engine looks suspicious. The engineer is the lone individual on the vessel who is trained in engine functioning and repair. Thus, summoning the engineer in that circumstance is not only the obvious choice, but the only choice. See *Oakwood Healthcare*, 348 NLRB at 693 (“If there is only one obvious and self-evident choice . . . then the assignment is routine or clerical in nature and does not implicate independent judgment. . . .”). The authority to decide whether to wake the engineer in these circumstances, where the choice is “obvious and self-evident,” does not, as our dissenting colleague contends, rise to the level of independent judgment in the assignment of overtime.

Once the engineer has been summoned, the mate typically accepts the engineer’s assessment as to whether the problem should be fixed immediately or whether the matter can wait until the engineer’s normal watch. Our dissenting colleague asserts that the mate has the “authority to decide whether to require the engineer to repair the problem on the spot.” The Employer, however, provides no evidence of even a single instance in which a mate has required an engineer to address mechanical issues during off-watch time, and it has not shown that mates have the authority to do so. See *Golden Crest*, 348 NLRB at 729 (noting that the party seeking to establish supervisory status must show that the putative supervisor has the ability to *require* that a certain action be taken).

The Employer also offers no examples of a mate assigning the deckhand to an off-watch shift. The deckhand is on the same watch as the mate, so the only situation in which such an assignment could occur would be when a crew includes two deckhands. As discussed above, the record shows that five-person crews are the exception, not the rule, and the Employer offered no evidence of the frequency of their use. Captain Nordstrom’s conclusory testimony that the mate determines “staffing level needs” when on watch cannot substitute for specific examples of mates assigning deckhands to off-watch shifts. *Golden Crest*, 348 NLRB at 731.

## 3. Assigning deckhands “based upon skill or physical capability, to perform tasks that may be more onerous or taxing, in connection with docking, making up to the barge, and the like”

Although the Employer asserts that a mate may choose which of several deckhands to perform a specific task based on their skill and ability, the Employer did not present evidence that this has ever actually occurred. The Employer offers hypothetical situations only, for

example, where a mate might select one deckhand over another based on their relative strength.<sup>13</sup> The Employer points out that a river-bound fish run is staffed by a crew that includes two deckhands. However, the record gives no indication how frequently the tugboats handle the fish run, and the Employer presented no evidence of a mate or pilot selecting one deckhand over the other to perform a particular task. Thus, contrary to our dissenting colleague, we find that the Employer has failed to meet its evidentiary burden of showing that mates use independent judgment in selecting crew members to perform significant overall duties. *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3 (detailed, specific evidence needed to show supervisory authority).

#### 4. Other assignment matters

Although the record reveals that the mate may post the deckhand to keep watch on the bow, the Employer presented no evidence suggesting that this was a regular occurrence. See *Croft Metals, Inc.*, supra, 348 NLRB at 722 fn. 14, citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986) (the exercise of “some supervisory authority in a . . . sporadic manner does not confer supervisory status”). In fact, the record shows that such a posting occurs only rarely, and the mate would likely summon the captain in that situation.

Similarly, the Employer fails to show that any particular mate serves as a relief captain with the frequency necessary to establish supervisory status. See *Oakwood Healthcare*, 348 NLRB at 699 (an employee engaged part of the time in a supervisory position and part of the time in a nonsupervisory position must spend a “regular” and “substantial” portion of time working in the supervisory capacity, and “regular” means according to a pattern or schedule as opposed to sporadic substitution).

<sup>13</sup> Our dissenting colleague points to Captain Sarff’s testimony set forth by the D.C. Circuit at 247 F.3d at 278, as an example of nonhypothetical testimony establishing the “authority to assign deckhands to overall duties.” Sarff testified:

Well, we have some deck hands around that—say they cook really well and they paint really well, but they’ve got a bum knee, so that’s the deck hand you don’t want to have running up and down the barge. So you keep him aboard to handle the lines on board. There’s other deck hands that are very athletic, but they can’t cook very well, so those are the ones you send up on the barge to do the work up there. You know, it’s however the job fits them, that they get the job.

This testimony does not, in our view, provide specific examples where mates have actually used independent judgment in deciding which crew member should do a particular task. Rather, the testimony provides only hypothetical examples of obvious choices, insufficient to constitute independent judgment under Sec. 2(11).

Our dissenting colleague also states that in the initial Decision and Direction of Election, the Regional Director found, based on this testimony by Captain Sarff, that mates do assign deckhands. But that finding and that decision preceded the Board’s adoption of the *Oakwood* standard.

For the foregoing reasons, the Employer does not meet its burden, as articulated in *Oakwood Healthcare*, of establishing that the Employer’s mates have 2(11) assignment authority.<sup>14</sup>

#### B. Responsible Direction

In *Oakwood Healthcare*, 348 NLRB at 691, the Board stated that if an individual has employees “under” him and if that individual decides “what job shall be undertaken next or who shall do it,” that individual is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. Thus, direction is only supervisory if it is performed “responsibly.” *Id.* In *Oakwood Healthcare*, the Board found that responsible direction requires a finding that the person directing the performance of a task must be held accountable for the task’s performance. *Id.* at 692. The Board held that to establish accountability for purposes of responsible direction, it must be shown not only that the employer “delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary” but that “there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* See *Golden Crest*, 348 NLRB at 731 (noting that although the employer established that charge nurses have the authority to direct CNAs, the employer failed to show responsible direction because there was no evidence that a charge nurse had experienced any “material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing CNAs”); *Entergy Mississippi*, 357 NLRB No. 178, slip op. at 5–7.

The Employer asserts that a mate has the authority to responsibly direct employees within the meaning of Section 2(11) because he has command of the tugboat during his watch and is the “boss of the deck” during docking and “making up to a barge.”<sup>15</sup> The Employer further argues that mates are accountable under Federal law for their own actions and those of “their crew.” *Id.*

<sup>14</sup> The Employer also asserts that mates exercise 2(11) assignment authority because they “effectively recommend that deckhands be reassigned to a different vessel because of personality conflicts or skill levels” and because they “effectively recommend promotion of deckhands to a mate position.” Employer’s Request for Review p. 38. Although framed by the Employer as examples of assignment authority, these allegations actually involve the mates’ transfer and promotion authority—issues not before the Regional Director on remand. Moreover, even assuming that these allegations involve assignment, the Employer presented no specific evidence in support of them. In its absence, we find that the Employer failed to show supervisory status based on the asserted authority to effectively recommend transfers or promotions. See *Golden Crest*, 348 NLRB at 731 (“purely conclusory evidence is not sufficient to establish supervisory status”); *Avante at Wilson, Inc.*, 348 NLRB at 1057 (same).

<sup>15</sup> Employer’s Request for Review p. 38.

The Employer, however, offered nothing other than conclusory assertions of the mates' accountability for the deckhands' work. For example, it offered testimony to the effect that "masters and mates are ultimately responsible."<sup>16</sup> It also cursorily asserts in its Request for Review that "[m]ost certainly the [m]ate is 'accountable,'" and that mates "are accountable, both for their own actions, and under federal law, [for the actions] of their crew."<sup>17</sup> The Employer does not delineate, however, for what or how the mates are actually held accountable. As set forth above, "purely conclusory evidence is not sufficient to establish supervisory status." *Golden Crest*, 348 NLRB at 731; see also *G4S Regulated Security*, 358 NLRB No. 160, slip op. at 3-4.

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

Our dissenting colleague's principal response to our analysis of the mate's authority to responsibly direct work vel non is to assert that, under Federal maritime law, the next officer has the authority of the master in the master's absence. If a mate is in charge while the captain is off duty or asleep, and the captain is a supervisor, our colleague contends, then the mate, too, must be a supervisor. The argument is without merit.

We do not dispute our colleague's recitation and interpretation of maritime law. But this case is not about a mate's privileges and obligations under maritime law. Rather, the question is whether the mate is a supervisor under Section 2(11) of the Act. And if that question is answered in the affirmative, the mate is not an employee

under Section 2(3) of the Act, and does not enjoy the protection of Section 8(a) of the Act.

It should go without saying that the two statutory schemes serve separate purposes. The authority to demand obedience on board a vessel under maritime law is about the protection of life and property; disobedience is mutiny. See *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). Having that kind of authority doesn't answer the questions posed by the 2(11) indicia of supervisory status. For example, under the Act, it is well established that there can be individuals whose directives must be followed but who are not, for any one of a number of reasons, supervisors. The mate's ascendance to the privileges of the master does not mean that he assigns work for present purposes; all of the assignments may have been made by company rule or subject to detailed Federal and State regulation. Without an evidentiary record establishing 2(11) indicia, such questions cannot be answered merely by the assertion of maritime law.<sup>18</sup>

### C. Pre-Oakwood Cases Involving the Supervisory Status of Mates and Pilots

We recognize that the Court remanded this case to the Board for an explanation of why the Board's finding that the mates were not 2(11) supervisors was not inconsistent with *Ingram I*, supra, 136 NLRB 1175, and *Bernhardt Bros.*, supra, 142 NLRB 851. In *Ingram I*, the Board found that the employer's pilots and mates responsibly directed employees within the meaning of Section 2(11). Specifically, the Board adopted the administrative law judge's finding that "the most cursory appraisal of the swift on-the-spot judgments of the pilots and mates and the orders given pursuant thereto while maneuvering 1,000-foot tows in the face of unpredictable winds, current, and weather conditions reduces to sheer implausibility any characterization of such judgments and orders as routine." *Ingram I*, 136 NLRB at 1203. In *Bernhardt Bros.*, the Board adopted the hearing officer's finding that the employer's pilots were supervisors, where the pilots, while on watch, decided if the weather was bad enough to require posting a lookout, where to place the lookout, and which crew member should serve in the lookout capacity. 142 NLRB at 854 (further recognizing that the pilot, while on watch, gave orders to the crew with respect to the tow and the amount of power needed).

<sup>18</sup> Under the dissent's view, every licensed officer on a vessel could potentially serve in an emergency as captain, and would therefore be a statutory supervisor. In the present case, that would mean that most of the Employer's tugboats operate with a crew consisting of three supervisors and one employee.

The dissent makes much of the fact that the mate, in particular, is usually in charge 12 out of every 24 hours. But where the captain is only a shout away, that is not enough to confer supervisory status.

<sup>16</sup> Tr. 106 (Nov. 2, 1999).

<sup>17</sup> The Employer, however, did not include any citations to the record in support of these assertions.



The Employer and our dissenting colleague have cited additional pre-*Oakwood* cases in which the Board determined mates and pilots to be statutory supervisors. See *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002) (finding supervisory assignment and responsible direction where the pilot was the highest ranking officer on duty during his shift, instructed the lead deckhand regarding locking and towing, posted a lookout when appropriate based on weather conditions, addressed staff shortages by waking a “call watch man,” and changed the priority of the crewmembers’ work by instructing the crew to stop work on one assignment and perform another assignment instead); *Ingram Barge Co. (Ingram II)*, 336 NLRB 1259, 1259 fn. 1 (2001) (determining that pilots were supervisors because their duties “remain essentially as they were in 1962” when the Board decided in *Ingram I* that they were supervisors); *Alter Barge Line, Inc.*, 336 NLRB 1266 (2001) (same). See also *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543 (2006) (pilots), and *American River Transportation Co.*, 347 NLRB 925 (2006) (pilots).<sup>19</sup>

The existence of such precedent notwithstanding, *Oakwood Healthcare*, decided after the tugboat cases cited above, articulates the Board’s current test for determining supervisory assignment and responsible direction.<sup>20</sup> In evaluating the supervisory status of the mates at issue in this case, therefore, we find pre-*Oakwood* cases dealing with the supervisory status of tugboat mates to be of limited precedential value. In *Entergy Mississippi*, 357 NLRB No. 178, slip op. at 5, the Board similarly rejected reliance on earlier cases that had been considered “under a different standard for determining supervisory status than the one set forth in *Oakwood Healthcare* pursuant to the Supreme Court’s guidance in

*Kentucky River*.” The Board stated that “to revert to a standard that does not follow the principles set forth in *Oakwood Healthcare* would ignore the significant doctrinal developments in this area of law.” Id.<sup>21</sup>

Even if the pre-*Oakwood* tugboat cases involving the supervisory status of mates and pilots were not eclipsed by *Oakwood Healthcare* and subsequent decisions, those cases are distinguishable on their facts. In each of those cases, the mates and pilots oversaw meaningfully larger crews than the crews here. See *Ingram I*, supra (two engineers and four deckhands); *Bernhardt Bros.*, supra (same); *Ingram II* (one or two engineers and four to six deckhands); *Alter Barge Lines*, supra (at least two deckhands).<sup>22</sup> A mate overseeing a crew that includes more than one deckhand or engineer must exercise greater discretion in deciding which deckhand to choose in a given situation or which engineer to call on in the case of an engine failure. In addition, while not dispositive, we note, as did the Regional Director, that “if both the captain and the mate were supervisors, there would be a ratio of one supervisor to each employee aboard the vessel here, which hardly seems likely in circumstances where captains have testified that everyone on board, including the deckhand, generally knows what they are supposed to do and need little direction.”<sup>23</sup>

As in *Entergy*, we have applied the *Oakwood Healthcare* framework of analysis to the specific facts of this case. We have found, as we explained above, that the Employer has failed in its effort to establish supervisory status under *Oakwood*.

The Regional Director offered the parties the opportunity to reopen the record or submit supplemental briefs in

<sup>19</sup> Although the Employer cites Board cases in which mates or pilots were found to be supervisors under the Act, we note that in other cases, the Board has found them to be employees. See, e.g., *A. L. Mechling Barge Lines*, 192 NLRB 1118 (1971).

<sup>20</sup> Prior to *Oakwood Healthcare*, 348 NLRB at 686, the Board’s definitions of “assign” and “responsibly to direct” were in flux following criticism from the Supreme Court in *NLRB v. Kentucky River Community Care*, supra, 532 U.S. 706, and *NLRB v. Healthcare & Retirement Corp. of America*, 511 U.S. 571 (1994). In response to that criticism, the Board in *Oakwood* “refine[d] the analysis to be applied in assessing supervisory status,” seeking to formulate “workable definitions that fit both the language of Section 2(11) and the overall intent of the provision.” 348 NLRB at 686, 690. For example, with respect to “responsible direction,” the Board specifically adopted the Fifth Circuit’s accountability element in holding that for direction to be “responsible,” the person directing the employee “must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” 348 NLRB at 391–392, citing *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986).

<sup>21</sup> See also *Frenchtown Acquisition Co. v. NLRB*, supra, 683 F.3d at 305 fn. 2, in which the court found that the employer had improperly relied on “a litany of historic cases” to support its assertion that the court always found nurses working in nursing homes to be supervisors. In so finding, the court noted first that “except for one unpublished case, all of these cases were decided before the Supreme Court rejected this Circuit’s reasoning and held that the employer bears the burden of proving supervisory status.” Second, citing *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007), the court stated that “deciding who is a supervisor is a highly fact-intensive inquiry,” and thus “rules designating certain classes of jobs as always or never supervisory are generally inappropriate.” 683 F.3d at 305 fn. 2.

<sup>22</sup> The Board’s decision in *American Commercial Barge Line*, supra, does not specifically state how many deckhands worked on the vessels involved in that case. The crew was described as “a captain (or relief captain) and a pilot who alternate their duties in 6-hour shifts to steer the boat, an engineer and his assistant who maintain the engine and operating parts, a mate or lead deckhand who directs the work of the deck crew.” 337 NLRB 1073. Thus, the crew in that case was plainly larger than that in the instant case. Similarly, the crews in *Marquette Transportation/Bluegrass Marine*, supra, 346 NLRB 543, and *American River Transportation Co.*, supra, 347 NLRB 925, were larger than the crews at issue in this case.

<sup>23</sup> Second Supplemental Decision on Remand fn. 16.

light of the Board's new decisions and potentially changed circumstances. As set forth above in fn. 1, however, the Employer declined the invitation, maintaining that the burden was on the Regional Director to "assure that a complete record has been made." Although we agree that the Regional Director has a responsibility to assure that a representation hearing results in a complete record, the Employer errs in its insistence that the Regional Director must decide on behalf of the parties whether a record should be supplemented in light of changed Board law. Rather, determining whether to supplement a record is a strategic decision to be made by the parties themselves. Here, the Employer, the party with the burden to show supervisory status in this case, elected not to supplement the record based on its belief that the preexisting record demonstrated accountability as required by *Oakwood Healthcare*. For the reasons fully discussed above, however, we have determined otherwise.

### III. CONCLUSION

In sum, having undertaken the required "fact-intensive inquiry,"<sup>24</sup> we find, based on the discrete facts of this case as they are set forth in the record, that the Employer failed to establish supervisory status on the basis of assignment or responsible direction. Accordingly, we affirm the Regional Director's finding that the tugboat mates at issue here are not supervisors within the meaning of Section 2(11) of the Act.

### ORDER

IT IS ORDERED that the Regional Director's Second Supplemental Decision on Remand is affirmed, and that this matter is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. December 14, 2012

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Mark Gaston Pearce, Chairman

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Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>24</sup> *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d at 305 fn. 2.

MEMBER HAYES, dissenting.

Contrary to my colleagues, I would find that the tugboat mates are statutory supervisors under both *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and 50 years of Board and circuit court precedent finding that mates and pilots with authority similar to theirs are supervisors. The Employer established that the mates assign and responsibly direct crewmembers and have complete authority over the vessel's crew during their watch. Moreover, the mates are licensed officers entitled under Federal law to exact obedience from crewmembers under them. Their supervisory status is clear.

### I. THE MATES ASSIGN ENGINEERS TO OVERTIME AND DECKHANDS TO SIGNIFICANT OVERALL DUTIES.

An individual is a supervisor under Section 2(11) of the Act if he or she possesses at least one of the supervisory indicia set forth in that statutory provision, holds that authority in the interest of the employer, and exercises it using independent judgment. *Oakwood Healthcare*, 348 NLRB at 687. Among those indicia is the authority to assign. In *Oakwood*, the Board defined "assign" as the act of designating an employee to a place; appointing an employee to a time, such as a shift or an overtime period; or giving significant overall duties to an employee. *Id.* at 689. And to exercise independent judgment, an individual must act free of the control of others and form an opinion or evaluation by discerning and comparing data, and with a degree of discretion that rises above the merely "routine or clerical." *Id.* at 693. As shown below, the Employer met its burden of demonstrating that its mates assign employees, and exercise independent judgment in doing so, as *Oakwood* defines those terms.

The mates assign the engineer to overtime when they determine that a mechanical issue with the tugboat requires the engineer's prompt attention when the engineer is offshift. They exercise independent judgment when they determine whether a mechanical issue is urgent enough to rouse the engineer to fix it on the spot, or whether it can wait until his regular shift. Contrary to my colleagues' implication, *Oakwood* does not limit independent judgment in assigning employees to determining who among various employees will do a particular job. The decision to make an assignment in itself may require significant discretion. Thus, in *Oakwood*, the Board said that "if [a] charge nurse makes the professional judgment that a particular patient requires a certain degree of monitoring," the nurse exercises supervisory authority when "he or she assigns an employee to that patient or responsibly directs that employee in carrying out the monitoring at issue." *Id.* at 694; see also *id.* at 693–694 (stating that even where policies dictate how to

respond to an emergency, a nurse's discretion to determine whether an emergency exists evidences independent judgment).

Here, Captain Richard Nordstrom testified that if the mate sees something he "does not like" or that does not "seem right," it is his decision whether to get the engineer and require that he work overtime. James Barton, who has worked as both master and mate, testified that whether to rouse the engineer is a "gray area" and gave several examples where he might decide to do so, such as if he notices the vessel is "running warm" or the oil pressure is starting to drop. The mate has discretion to decide whether to wait for the engineer to begin his shift and deal with the situation then, or to require that the engineer deal with the issue immediately. The mate must evaluate the urgency of the situation and the potential consequences to the cargo and crew of delay, and balance those considerations with the financial and regulatory consequences of requiring the engineer to work overtime, which increases the Company's payroll costs and implicates regulations limiting crew to 12-hour workdays. Having chosen to rouse the engineer, the mate also has authority to decide whether to require the engineer to repair the problem on the spot (and accrue more overtime), or to wait until the engineer's next shift. That he may choose to defer to the engineer's judgment does not negate his authority, as it is uncontroverted that the mate assumes the captain's duties and, in Mate William Stucki's words, is in "complete control of the vessel" during his watch. In sum, the mate assigns work to the engineer, and his discretion to determine whether and when to require (or permit) overtime involves the exercise of independent judgment under *Oakwood*.

The mates also assign deckhands to significant overall duties—such as cooking, painting, and working on the barge—and exercise independent judgment in doing so. The Court of Appeals for the District of Columbia recognized as much when it expressed skepticism of the General Counsel's argument that such assignments entail obvious choices and thus do not require independent judgment. *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278–279 (D.C. Cir. 2001). Here, the mates' assignments are based on assessing various employees' skills, which is precisely what *Oakwood* requires. *Oakwood* does not require that a choice be particularly difficult, or hold that a supervisor is no longer a supervisor once he knows his employees' skills well enough to competently assign them to appropriate jobs. My colleagues find the evidence insufficient to demonstrate that mates have the authority to assign deckhands to overall duties. They dismiss the above examples as merely hypothetical. I disagree. Captain Shawn Sarff testified quite specifically

concerning these assignments. See *Brusco*, supra, 247 F.3d at 278. Based on his testimony, the Regional Director in the initial Decision and Direction of Election found that mates do assign deckhands. Applying *Oakwood*, I agree with the Regional Director's finding in this regard, and as stated above additionally find that the mates exercise independent judgment.

## II. THE MATES RESPONSIBLY DIRECT DECKHANDS USING INDEPENDENT JUDGMENT.

Another indicium of supervisory status under Section 2(11) is the authority responsibly to direct employees. The Board in *Oakwood* held that "direction" requires that a putative supervisor has employees "under" him or her and the authority to instruct those employees as to what needs to be done and who will perform such tasks. 348 NLRB at 691. For direction to be "responsible," the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other. *Id.* at 691–692.

Here, for 12 hours out of every 24 hours, the mate is responsible for the vessel, tow, and crew and has the same duties and obligations as the captain. Captain Sarff testified that the mate "assumes my responsibilities when I'm off watch." Mate Stucki testified that "in the absence of the master, I am the master, I'm acting as the master, and I'm in complete control of the vessel to the best of my abilities." Captain Nordholm testified that "the mate has discretion to determine what needs to be accomplished by the deckhands on his watch."<sup>1</sup> The mates are in charge of the crew in emergencies and direct them in emergency drills. The mates also direct the crew throughout docking procedures, making up the barge, and changing the tow length. In directing deckhands through the docking process known as "hipping up," mates weigh such exigencies as the weather, the size of the barge, the vessel's approach to the dock, and the number of lines to be tied and where they will be tied. If the barge must be towed to the dock, the mate and deckhand board an assist boat that takes them to the barge, where the mate issues instructions to the deckhand (and the captain). I agree with the D.C. Circuit's suggestion that the mates' direction here is virtually identical to that which the Board has consistently found supervisory.

<sup>1</sup> It is ingrained in maritime law that, in the master's absence, the next officer has "all the privileges, duties, and obligations of the master." *Escandon v. Pan American Foreign Corp.*, 12 F. Supp. 1006, 1007 (D. Tex. 1935), *aff'd*, 88 F.2d 276 (5th Cir. 1937). My colleagues' contention that the captain is only "a shout away" is irrelevant in light of uncontroverted testimony that the mate, in Captain Sarff's words, has to "run the boat completely" on his watch, and that if the mate woke him whenever important decisions needed to be made, "I would never get any sleep."

*Brusco*, supra, 247 F.3d at 277 (citing *Bernhardt Bros. Tugboat Service*, 142 NLRB 851, 854 (1963) (finding pilots are supervisors where they direct crew in connection with the tow, the lookout, and the amount of power needed, and are responsible for the tow), enfd. 328 F.2d 757 (7th Cir. 1964); *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*, 136 NLRB 1175, 1203 (1962) (finding mates are supervisors where they direct deckhands during locking and docking operations, which require obedience for the protection of person and property), enfd. 321 F.2d 376 (D.C. Cir. 1963)); see also *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543, 551 (2006) (finding pilots to be supervisors where pilot is the sole person in charge and is the highest level official on duty when on watch, with authority to navigate the vessel and barges, reprioritize work, and order employees to stand lookout, tie and untie barges, assist in the making of locks, and do all that is necessary for the safe navigation of the vessel); *American Commercial Barge Line Co.*, 337 NLRB 1070, 1071 (2002) (finding pilots to be supervisors where pilot is sole wheelhouse official responsible for the safety of the vessel, crew, and cargo during his watch).

As in the above cases, the mate's control of the vessel on his watch and his direction of the crew in making the barge, docking, and performing other tasks require independent judgment. As in *Ingram Barge*, supra, the mate's "judgments are complicated by variable changing factors, many of them unforeseeable, which do not permit his duties to be characterized as routine." 136 NLRB at 1203. Here, as there, "[t]he most cursory appraisal of the swift on-the-spot judgments of pilots and mates and the orders given pursuant thereto while maneuvering [tows] in the face of unpredictable winds, currents, and weather conditions reduces to sheer implausibility any characterization of such judgments and orders as routine." Id.; see also *Marquette Transportation*, 346 NLRB at 552 (various hazards require use of independent judgment while directing crew), citing *Bernhardt Bros.* and *Ingram Barge*, above. The mates here exercise the same discretion as did the mates and pilots in the above-cited cases. Contrary to my colleagues, *Oakwood* did not so redefine "independent judgment" as to warrant a different result here. Indeed, in *Marquette Transportation* the Board adopted the judge's analysis of independent judgment, which was substantively identical to the analysis in *Oakwood*. 346 NLRB at 550-552.<sup>2</sup> In finding no independent judgment, my colleagues cite testimony that the

<sup>2</sup> Also contrary to my colleagues, ample evidence indicates that mates may direct more than one deckhand. James Richard Barton testified extensively about a 2-1/2-month voyage during which, as a mate, he directed two crewmembers.

Employer tries to make work such as docking and making up a tow as "routine" as possible in order to minimize hazards.<sup>3</sup> They seize upon the lay use of the word "routine," as though that label can erase the record testimony establishing that the mates' direction of the crew is anything but routine as that word is used in Section 2(11) of the Act. But the Board has been down this road many times and has consistently found that direction similar to that which the mates exercise here requires a high level of discretion, as described above. And "even if a particular operation is performed again and again, it does not necessarily follow that it is routine." *Sun Refining & Marketing Co.*, 301 NLRB 642, 649 (1991) (hazardous operations at sea require constant monitoring and accountability due to constantly changing conditions); see *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 491-492 (2d Cir. 1997). I find that the Employer has shown that its mates use independent judgment in directing the deckhands.

I also find that the testimony concerning the mates' accountability, the authority the mates possess and exercise on the back watch, and Federal maritime law establish that the mates are accountable for their direction of the deckhands. Unlike my colleagues, I do not dismiss as conclusory testimony that the "masters and the mates are ultimately responsible" for the vessel, or dismiss other testimony and evidence indicating that the mates are accountable, both for their own actions and, under Federal law, for the actions of their crew. As Captain Sarff testified, the captain does not bear responsibility for what occurs when he is asleep and the mate is in control of the ship. Further, under my colleagues' logic, the only individual who is "accountable" for the crew's actions is off duty 12 hours each day, during the better part of which he is asleep. I cannot subscribe to the notion that no supervisor is on duty for fully half of a 30-day voyage towing client cargo along the Pacific coast, considering the hazards of the sea and the Employer's and officers' liability for the safety of the cargo and crew. But more dispositive to the issue of accountability is the fact that the mates are licensed officers of the vessel, and Federal law requires crewmembers to obey their orders. *NLRB v. Delaware-New Jersey Ferry Co.*, 128 F.2d 130, 137 (3d Cir. 1942) (citing *Southern Steamship Co. v. NLRB*, 316

<sup>3</sup> I recognize that my colleagues do not expressly pass on whether the mates exercise independent judgment in directing deckhands. But in their discussion of the mates' assignment authority, they acknowledge that the mates assign deckhands to various tasks in connection with docking and making up a tow, and then find that those assignments do not demonstrate independent judgment. Since those task assignments constitute direction, the majority does, in fact, pass on the issue of whether mates exercise independent judgment in directing deckhands.

U.S. 31, 39 (1942)). Thus, “[the] duty of obedience owed by a deckhand to obey the orders of a licensed ship’s officer is greater than that of a worker at a bench in a factory to obey the direction of his foreman. If the latter refused obedience he would be insubordinate, but if the sailor refused obedience he would be mutinous if his act occurred upon waters within the admiralty jurisdiction of the United States.” *Id.* Because Federal law requires obedience, the officer giving legally binding orders must be accountable for the consequences of those orders.<sup>4</sup>

Finally, my colleagues say that *Oakwood* set out a new standard and that our prior tugboat cases are of limited precedential value. Yet our tugboat cases are not inconsistent with *Oakwood’s* principles, even if they do not use the same terminology. And nothing in *Oakwood* sug-

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<sup>4</sup> See also *Marquette Transportation*, above, 346 NLRB at 550 (finding that pilot is answerable for mishaps with tug and tow while it is under his control “by virtue of his license and is subject to Coast Guard regulations and scrutiny”). My colleagues suggest that my finding that mates responsibly direct deckhands principally relies on their authority under Federal maritime law. Although I do consider mates’ authority under maritime law probative on the issue of their accountability, my finding that they possess the authority to responsibly direct deckhands relies on my entire analysis, set forth above.

gests that the Board contemplated that it was sweepingly overruling 50 years of precedent establishing the supervisory status of tugboat pilots and mates whose duties and powers were identical to those of the mates here, and whose authority flows from Federal maritime law and is of an entirely different nature than that of putative supervisors in a hospital or on a shop floor. That being said, the mates here assign and responsibly direct the crew with independent judgment as those terms are defined in *Oakwood*. Accordingly, I find that they are supervisors and respectfully dissent from my colleagues’ contrary opinion.<sup>5</sup>

Dated, Washington, D.C. December 14, 2012

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Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

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<sup>5</sup> I dissented from the decisions in *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (2011), and *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012), cited by my colleagues.