

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION
OF MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO,

Union,

And

BRUSCO TUG AND BARGE, INC.,

Employer.

Case No. 19-RC-13872

REQUEST FOR REVIEW

Thomas M. Triplett
Schwabe, Williamson & Wyatt, P.C.
1500 – 1900 Pacwest Center
1211 S. W. 5th Avenue
Portland, Oregon 97204
Telephone: (503) 222 – 9981
Facsimile: (503) 796 – 2900
E-mail: ttriplett@schwabe.com

Attorneys for Employer
Brusco Tug & Barge Co.

TABLE OF CONTENTS

	Page
PROCEDURAL BACKGROUND -----	1
ISSUE -----	3
FACTS -----	4
The Company and Nature of its Business-----	4
Organization-----	5
Staffing -----	5
Employment Policies and Practices -----	6
A. The Manual -----	6
B. Exercise of Authority -----	8
PRELIMINARY REMARKS -----	18
SUMMARY OF ARGUMENT-----	19
ARGUMENT-----	21
A. Preliminary -----	21
B. Decision of the District of Columbia Circuit Court -----	22
C. <i>Kentucky River Community Care</i> -----	23
D. Aftermath of <i>Kentucky River</i> -----	24
E. Board Precedent -----	26
F. The Record and Its Application-----	31
CONCLUSION-----	40

TABLE OF AUTHORITIES

Cases	Pages
<i>Allentown Mack Sales and Service</i> , NLRB 522 U.S. 359 (1998) -----	20
<i>Alois Box Co. v. NLRB</i> , 216 F.3d. 73-75 (D.C. Cir. 2000) -----	20, 38
<i>Alter Barge Lines, Inc.</i> , 336 NLRB No. 132 (2001) -----	27
<i>American Commercial Barge Line Company</i> , 337 NLRB No. 168 (8/1/02) -----	28, 29, 30
<i>Bernhardt Bros. Tugboat Serv., Inc.</i> , 142 NLRB 851, enf., 328 F.2d. 757 (7 th Cir. 1963) -----	20, 22, 27, 30, 39
<i>Beverly Enterprises-Minnesota, Inc. v. NLRB</i> , 266 F.3d. 785 (8 th Cir. 2001) -----	26
<i>Brusco Tug & Barge v. NLRB</i> , 247 F.3d. 273 (D.C. Cir. 2001) -----	2, 30
<i>Capital Transit Company</i> , 114 NLRB 617 -----	22
<i>China v. Walsh</i> , 74 U. S. 53 (1869) -----	23
<i>Copper/T Smith, Inc. v. NLRB</i> , 177 F.3d. 1259 (11 th Cir. 1999) -----	21, 38
<i>Croft Metal's, Inc.</i> , 348 NLRB No. 39 (2006) -----	3
<i>Entergy Gulf States v. NLRB</i> , 253 F.3d. 203 (5 th Cir. 2001) -----	26
<i>Extendicare Homes, Inc</i> , 348 NLRB No. 70 (2006). -----	31
<i>Golden Crest Healthcare Center</i> , 348 NLRB No. 39 (2006) -----	3
<i>Ingram Barge Company</i> , 336 NLRB No. 131 (2001) -----	27
<i>International Organization of Masters, etc. v. NLRB (Ingram Barge Co.)</i> 136 NLRB 1175, enf'd. 321 F2d 376 (D. C. Cir. 1963)-----	30
<i>Kentucky River Community Care, Inc. v. NLRB</i> , 193 F3d. 444 (6 th Cir. 2000), Affirmed 121 S.Ct. 1861 (2001) -----	2, 19, 21, 22, 23, 24, 25, 26, 28, 30, 31, 39
<i>Local 28, International Organization of Masters, Mates and Pilots</i> , 136 NLRB 1175 (1982), enf. 321 F.2d. 376 (D.C. Cir. 1963) -----	20, 22, 26, 39
<i>Majestic Star Casino, LLC</i> , 335 NLRB No. 36 (2001) -----	28
<i>Marquette Transportation</i> , 2001 NLRB Lexis 655 (2001) -----	28

Cases	Pages
<i>McAllister Brothers, Inc.</i> , 278 NLRB 601 (1986) -----	30
<i>Meridith Corp. v. NLRB</i> , 679 F.2d. 1332, 1335 (10 th Cir. 1982) -----	21
<i>Mississippi Power and Light Co.</i> , 328 NLRB No. 146 -----	25
<i>Multimedia KSDK v. NLRB</i> , 303 F3d 896 (8 th Cir. 2002) -----	26
<i>National Labor Relations Board v. Quinnipiac College</i> , 256 F3d 68 (2 nd . Cir. 2001) -----	29
<i>NLRB v. Adam and Eve Cosmetics, Inc.</i> , 567 F.2d 723, 728 (7 th Cir. 1977) -----	22
<i>NLRB v. Kentucky River Community Care, Inc.</i> , 532 U.S.706 (2001)-----	29
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB No. 37 (2006) -----	3, 21, 37, 38
<i>Packard Motor Car Co. v. NLRB</i> , 330 U.S. 485 (1947) -----	21
<i>Packard Motor Car Co.</i> , 61 NLRB 4, enf. 157 F. 80 (6 th Cir. 1946) -----	21,
<i>Public Service Company of Colorado v. NLRB</i> , No. 00-9523 (10 th Cir. 11/23/01) --	24
<i>Spentonbush/Red Star Companies v. NLRB</i> , 106 F3d 484 (2 nd Cir. 1977) -----	23, 37
<i>West Penn Power Co. v. NLRB</i> , 337 F2d 993, 996 (3 rd Cir. 1964) -----	22

Pursuant to Board Rules and Regulations, Section 102.67, Brusco Tug and Barge, Inc (“Employer” or “Brusco” herein) requests review of the Regional Director’s Second Supplemental Decision on Remand, dated December 21, 2006.

The basis for this Request is:

- A. The Regional Director has departed from precedent; and
- B. The Regional Director’s fact findings are clearly erroneous.

PROCEDURAL BACKGROUND

MM&P filed a Petition seeking a bargaining unit consisting of:

“All employees employed in the Off Shore Division, including Masters, Mates, able bodied Seaman, Engineers and Cooks, excluding guards and supervisors as defined in the Act.”

During a hearing on November 2, 1999 the MM&P successfully moved to amend its Petition to read:

“All employees employed in the Longview Division, including Masters, Mates, Deckhands/Engineers and Deckhands performing offshore towing out of the Employer's Longview, Washington port, excluding all other employees, guards and supervisors as defined in the Act.” (Tr. 9, 10, 199-200).¹

The Regional Director held:

- A. Masters are supervisors within the intendment of 2(11) of the Act; and
- B. Mates are statutory employees within the intendment of the Act.

On December 10, 1999 Brusco timely filed a Request for Review. On December 29, 1999, over the dissent of Member Hurtgen, the Board denied Employer's Request. Thereafter an election was conducted and the MM&P was certified, by a narrow margin, as the exclusive representative of the bargaining unit.

Contemporaneous to these proceedings, the Employer informed mates that they were not

to involve themselves in the pending election campaign. The MM&P filed charges, asserting that mates were statutory employees and that the Employer's actions transgressed the Act. The Region issued a Complaint; the matter was resolved in favor of the General Counsel upon summary judgment. 330 NLRB No. 169. The Employer timely petitioned the District of Columbia Circuit Court. It held that the Board failed to adequately explain its apparent departure from settled precedent. It admonished the Board, upon remand, to be guided by the pending Supreme Court decision in *Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444 (6th Cir. 2000). *Brusco Tug & Barge v. NLRB*, 247 F.3d. 273 (D. C. Cir. 2001). Finally, the Circuit Court squarely stated:

“As we read the Hearing Officer’s findings, surely the crewmen on Brusco’s tugs were not free to ignore mates commands. Applying the definition of supervisors in the NLRA Section 2(11), the officer conceded that Brusco’s mates ‘direct(ed) crewmen’, charactering them as ‘boss(es) on deck.’”

On May 21, 2001 the Supreme Court affirmed *Kentucky River Community Care, Inc. v. NLRB*, 121 S.Ct. 1861 (2001). Thereafter, on October 24, 2001 the NLRB vacated its decision and remanded to the Regional Director to reopen the record and for further consideration.

The General Counsel filed a motion and brief requesting the following: vacate the unfair labor practice finding; vacate the certification of election; and remand for further hearings under the *Kentucky River* principles. The respondent joined in that motion, which was resisted by the charging party and *amicus curae*.

The NLRB denied the General Counsel's motion to vacate the certificate "at this time"; vacated the unfair labor practice finding; and remanded for supplemental election hearings to determine "whether the Employer's mates 'assign' and 'responsibly direct' other employees and as to the scope or degree of 'independent judgment' used in the exercise of such authority."

¹ The terms Master and Captain are used interchangeably and have the same meaning.

In the Region's Supplemental Decision and Order, it directed that evidence be adduced relating to assignment of work, including overtime, together with examples of responsible direction in connection with docking, passage through locks, and the like.

The hearing was conducted November 14, 2001. On January 7, 2002 the Regional Director issued his Supplemental Decision and Order which held that mates were not supervisors.

Employer timely filed a Request for Review of the Supplemental decision on January 19, 2002. On October 18, 2002 the NLRB granted Employer's Request for Review. Nearly four years later, on September 30, 2006, the NLRB remanded this case for proceedings consistent with its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No 37 (2006), *Golden Crest Healthcare Center*, 348 NLRB No 39 (2006), and *Croft Metal's, Inc.*, 348 NLRB No 39 (2006).

On October 25, 2006 the Regional Director issued a Show Cause Order to demonstrate why the record should be reopened or supplemental briefing be allowed. Petitioner did not respond. Employer stated:

“While Employer believes the present record adequately reflects the ‘held accountable’ aspect of this issue, should there be any ambiguity, then we would be prepared to supplement the record, by affidavit or live testimony.”

On November 15, 2006 the Regional Director issued an order denying further evidentiary hearing, but allowing supplemental briefing. On December 21, 2006 the Regional Director issued his Second Supplemental Decision on Remand, finding that mates are not supervisors. He based this decision, in part, on the accountability standard enunciated in *Oakwood*.

ISSUE

Whether mates make assignments to other employees and if so, whether and to what extent independent judgment is exercised in making the assignments.

Whether mates responsibly direct other employees and if so, whether and to what extent independent judgment is exercised in making the assignments.

FACTS

The logicians formula, all “a” is “b” but not all “b” is “a”, applies here. Like Yurtle the turtle, a captain is master of all he surveys. A mate is his surrogate; his eyes, ears, and voice of authority during the 12 hours the Captain is off watch and becomes the deck boss when all hands are turned out. As the facts developed in the hearings reflect, a mate necessarily makes assignments of work; necessarily directs the work of others; and clearly exercises substantial judgment in the exercise of these duties.²

The Company and Nature of its Business

The Employer is engaged in the transportation business. It is a tug boat operator which hauls barges, one to four at a time, upon the Columbia River system and on offshore traffic from Ensenada Mexico to Canada and Alaska. (Tr. 17, S. Tr. 124). On the Columbia River it makes 12 trips per year (each seven day voyages), through eight lock systems from Cathlamet, Washington to Lewiston Idaho, a distance of nearly 400 miles. Ports of call include Camas, Washington (120 miles from the ocean); Longview, Washington (65 miles from the ocean; Eureka, California; Coos Bay, Oregon; Astoria, Oregon; and Newport, Oregon among others. (Tr. 23-35, 44, 121, S. Tr. 149). Of course, all of its off shore vessels ply the Columbia River to their home port in Cathlamet. (Tr. 164). Its off shore services include towage of wood chips, loading, transporting and off loading logs, and carriage of general cargo and acting as a dredge tender. It has 24-25 vessels which are home ported on the Columbia River.

It has several types of vessels. Those that are off shore have V-Bows, and are both heavier and more water tight than river boats. The river boats generally push rather than tow

barges. They are less water tight, not suited to rough water; have less free board and have a pilot house 30-40” over the deck and are not suited for ocean transportation. (Tr. 31).

Organization

Henry Brusco is the President of Employer. (Tr. 16). Its CEO is “Bo” Brusco. Reporting to him is David Seaberg, Port Captain. (Tr. 28, 45). He makes the ultimate decisions, based upon recommendation from captains and mates on both the size of and the individuals who will crew a vessel on each voyage. Operations managers report to him from their vessels. (Tr. 28, 81, 103, 150). The captains and mates report to him.

Staffing

There are two configurations of staffing the vessels. On most trips, there will be a captain, a mate, an engineer and a deckhand. (Tr. 42, 43, 50-54). On some trips an additional deckhand will be deployed. There is no requirement for deckhands to be licensed. Generally there will be an AB card holder and an ordinary seaman on board. (S. Tr. 11). The deckhand duties include maintenance, handling lines in the order dictated by the mate, assisting with make up of tow to barge, docking, helping go through locks, observing for water traffic and in low visibility and cooking. (Tr. 122) The deckhands’ skills, experience and physical abilities differ widely. (Tr. 51) On the log barges, there will be a crane operator deployed for the voyage. (Tr. 102).

The Captain and the mate are Coast Guard licensed officers. (Tr. 21-22, 27-28; S. Tr. 12). They have special safety training as well as Bridge Resource Management training. (S. Tr. 97). As will be discussed more fully, the Captain and the mate share the responsibility for the vessel and its crew. At the time of watch change, they exchange information allowing each other to know the status of matters. (S. Tr. 9, 126-127). They also represent the Company in

² The things they do are not repetitive. Things change every day. (S. Tr. 211).

communicating with customers about arrival times, delays, need for an assist boat and the like. (Tr. 53). Both the Captain and the Mate are authorized to extend the credit of the company in purchase of materials and supplies. (Tr. 137)

Employment Policies and Practices

Brusco is informal in its operations. It has no employment manual or written policies other than as set forth in its “Responsible Carrier Operation Plan.” (Er. Ex. 5). That document sets forth a variety of policies and procedures to enhance safe operation. It is on all vessels and is required reading by the master and mate. (Tr. 32, 97, 119, 148). Salient to the inquiry here is the following:

A. The Manual

1. The captain has complete responsibility for the safety of the crew and the vessel, which includes insuring that each crew member is capable of carrying out his duties in a safe and seaman-like manner and that the vessel is capable to handle the task that it is assigned to. The captain is also responsible for insuring that all safety and operating procedures are complied with on board his vessel. The captain must use the judgment of a prudent mariner and stop operations when conditions dictate. (Er. Ex. 5, A-1).

2. The captain is responsible for insuring that the most recent copy of the safety rules is on board the vessel and “at least once a year, the captain must review the safety rules with the crew, and note the review in a safety meeting report.” (Er. Ex. 5, D-1 & 2).

3. The captain and mate are responsible for conducting and supervising all (safety) drills. They are also responsible for assigning stations and responsibility for each crew member on board and insuring that each crewmember’s role is explained thoroughly before any drills are held. (Er. Ex. 5, B-9).

4. The captain or mate is responsible for insuring that crew members safely perform welding/cutting work, and are properly trained and operating in compliance with good safety practices. (Er. Ex. 5, B-10).

5. The master or mate is responsible for insuring that the environmental practices described in the procedure are implemented. This includes garbage disposal, handling of waste oil, used filters, hazardous waste disposal, and sanitary systems. (Er. Ex. 5, C-1, 2 & 3).

6. When an incident arises, crew members are responsible to immediately report emergency situations to the captain or mate, and the captain or mate is responsible for implementing an emergency response plan. (Er. Ex. 5, D-1).

7. In the organizational level of authority, it is stated:

a. The captain/master of the vessel is the master and, in his *absence, his relief, the mate, is the master.*

b. The master/mate “is responsible for the safe and efficient operations and performance of his crew, vessel and tow, and insuring that the equipment is kept neat, clean, and in good working order.”

c. The master/mate must also insure the Company policies, rules and regulations are followed.

d. The master/mate is required to report all violations of Company policy or violations of federal, state, or local law to the home office.

e. The master/mate has responsibility to advise the office of anticipated crew shortages or overages

f. The master/mate is required to make frequent regular inspections of crew quarters and other facilities to insure neatness, cleanliness, safety and proper

maintenance.

g. The master/mate is required to insure that all barges are in navigable condition.

h. The master/mate must maintain the vessel's daily log and see that it is posted at the end of each six (6) hour watch by the master/mate.

B. Exercise of Authority

1. The mate is the surrogate of the captain on the mate's watch. Captain

Sarff testified:

“Q: What authority does a mate have with Brusco when a captain is off watch?”

“A: He assumes my responsibilities when I'm off watch.” (Tr. 129), see also (Tr. 116).

Mate Stucki confirmed:

“Q: What is your understanding as to your authority when you are on watch?”

“A: I understand my authority as such 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.” (Tr. 144).

See also Tr. 42-43, 106, 117, 130, 146; S. Tr. 75, S. Tr. 16, 248 (captain runs his watch and mate runs his watch.). The mate seldom wakes the captain when the latter is off watch. (S. Tr. 75). **Masters and mates are ultimately responsible.** (Tr. 105-106).

Shortly after assuming watch, the mate meets with the deckhand(s), and provides instruction for the watch. (S. Tr. 83, 127).

The primary duty of the captain or the mate, while on watch, is to navigate the vessel safely and to direct the deckhands or engineers in the maintenance of the vessel. (S. Tr. 45).

The mate, on his watch, will be at the helm; decide whether to turn to the left or right, to move

forward/backward; what he is going to have the deckhand do; whether to assign or allow the deckhand to go out on the deck; whether to post the deckhand at the winch. (S. Tr. 30, 84, 134). He may assign the deckhand to the wheelhouse, as an extra set of eyes if poor visibility or traffic become a concern. (S. Tr. 72). The degree of directive given varies, voyage by voyage, as a function of the experience of the deckhand crewing the boat. (S. Tr. 56). On all voyages different tools or techniques may have to be deployed because conditions constantly change. (S. Tr. 52). As Captain Nordholm stated, “the mate has discretion to determine what needs to be accomplished by the deckhands on his watch.” (S. Tr. 84).

At certain times all hands are up. This is generally true in a docking maneuver. Typically the captain steers the tugboat and the mate is in charge of the deckhands. The mate gives direction to the captain; e.g. full rudder, stop, more power. These are commands that must be observed. (S. Tr. 152-153, 246). Similar commands are given by the mate to the assist boats, helping the ship to dock. This activity will be further discussed under the docking heading, *infra*.

2. Relief Captains

Brusco uses relief captains. There were two at the time of the original hearing. Each was allowed to vote in the election as a mate. A relief captain serves a portion of their time as a mate. Additionally, they fill in as a captain, when a captain is off the boat due to illness, vacation, or the like. They also serve as captain during the interim between a captain leaving the employment of Brusco and the appointment or hiring of a new captain, if the relief captain is not promoted to that position. (Tr. 41, 84, S. Tr. 229).

Mark McKinley worked as a relief captain. A relief captain is one that is not assigned to a specific vessel.³ (Tr. 263-264). Until February of 1999, he worked exclusively as a mate. From March of 1999 until December, he worked 2/3 of his time as a captain and the balance as a

mate. (Er. Ex 9, Tr. 271). In the latter part of December, 1999 or first part of January 2000 he was converted to a full time captain. He was one of two relief captains allowed to vote in the election.

3. Promotions

Promotion of deckhands to mates are based upon recommendations of the masters and mates. (Tr. 51, 93, 112, 115-116, 134-135, 156-157). Masters and mates are uniquely qualified to make these recommendations as only they have first hand knowledge of the capability of the crew. Neither the port captain nor the president is similarly situated. (Tr. 155-156).

4. Discipline

Masters have authority and have exercised the authority to discipline deckhands. (Tr. 138, 187). The exercise of that authority includes putting a disruptive crewmember on shore (Tr. 117) or deciding that a deckhand not be reassigned to a vessel. (Tr. 156-157) Mates have similar authority during their watch. (Tr. 117, 116, 129, 144).

5. Time Records.

The Captain/mate maintain the ship's log, which includes entries concerning the maintenance on the vessel, its location, significant events, and any problems involving deckhands. (Tr. 46, 48). The Captain/mates keep time records of the Deckhands working for them. The Deckhands get paid only on the basis of those records. (Tr. 46, 48, Er. Ex. 6).

6. Assignment of Work

The master and mate have authority to and do make recommendations that a deckhand be assigned to a different vessel, because of skill or personality issues. (Tr. 151, 156).

A master, or his relief, the mate, assigns specific tasks to the deckhands. (Tr. 151, S. Tr. 100, 101, 103, 108-110). This includes assignment to the wheelhouse as an extra set of eyes

³ . All references in this paragraph are to the hearing on June 6-7, 2000.

during adverse conditions; (S. Tr. 72, 183-184); to watch the wheel (S. Tr. 168), to the winch to lengthen or shorten the tow or to lubricate it (S. Tr. 25, 92, 131, 183); to redirect the fair lead into the winch; to go to the engine room to check its operation (S. Tr. 165-166); to various duties and responsibilities in the event of emergency, see *infra*; to responsibilities in connection with docking, making up a tow; to lash cargo, while directing both type of lashing and placement of cargo (S. Tr. 139-140, 176) and to general maintenance, *infra*. The deckhand constantly checks with the mate to be instructed on what needs to be accomplished next. (S. Tr. 83). And the mate checks to make sure that the deckhand has properly performed his work. (S. Tr. 84) The mate has the responsibility to assess the relative ability, qualifications, experience, mental and physical capabilities of the deckhands in making these specific job assignments. (Tr. 49, 52-53, 123-25, S. Tr. 140, 168). They are to use “their best judgment” in making these assignments.

7. Overtime

No person, under Coast Guard regulations, is to work in excess of 12 hours in a day, with limited exceptions. Emergencies, adverse weather, poor visibility, heavy traffic and the like qualify as exceptions. When a crewmember is called from off watch, it overtime. All hands, including the licensed officers, are paid overtime if called to work when off watch. The mates have authority to determine if and by whom overtime is to be worked. These decisions are made on a daily basis. (Tr. 52-53, 86, 90, 118-119, S Tr. 137).

The mate has discretion to wake the captain in the event of an emergency or severe weather. This does not occur often as it would interfere with the Captain rest. (S. Tr. 13, 14 175). It is the responsibility of the mate to assess the degree of danger or emergency in deciding whether to call the captain or others from off watch. (S. Tr. 14, 30, 132). A mate would be subject to reprimand if he awoke the captain frequently. (Tr. 141).

On a recurrent basis the mate will call the engineer out. (S. Tr. 196). This may be because an engine alarm has sounded or because something starts “to look abnormal” or he sees something “he does not like.” (S. Tr. 79-80, 131-132). The mate and the engineer will discuss whether repairs are needed and if they need to be done now or can wait for the engineer’s watch. The mate then determines when the work is to be done. (S. Tr. 81, 19). The engineer may also be called out by the mate to speed the boat up to avoid an approaching storm. (S. Tr. 37).

Other occasions when overtime is authorized and directed by the mate include emergency drills. The mate determines the time and frequency of these drills, see *infra*. All employees who are off watch are on overtime during these drills.

Finally, the mate may call upon an off watch person, to man the winch, to act as an extra set of eyes, etc. as the circumstances justify. The bottom line is that the captain and the mate respect each others judgment in assigning overtime. The Company expects that the captain and the mate will exercise their “best judgment” in authorizing overtime. (S. Tr. 14, 206).

8. Safety Matters

Masters/mates have full and complete authority on all safety matters, and they exercise independent judgment involving safety as a regular part of their duties. Safety is divided into three categories: First, there is the occasional emergency; second, there is the constant concern in every movement of the vessel that requires continuous evaluation of the equipment and the crew to assure tasks are accomplished safely; third there are the safety drills which are intended to train the crew when fire, loss of tow, or man overboard occurs. (Tr. 44, S. Tr. 15). In all such matters the master’s/mate’s authority is complete.

Generally the mate is the safety officer and is in charge of all safety trainings. (S. Tr. 53-54, 134, 247). They have discretion when to have these drills. (S. Tr. 194). The drills are for

fire, abandonment of ship, man overboard, and loss of a tow. The training exercises are not to be mere routine, but are to inject surprise to force judgmental responses. (S. Tr. 53, 180). The number of drills vary, ship by ship, but are to be frequent. (S. Tr. 192).

During a fire drill and, in the event of a fire, the initial responsibility of the officer on watch is to assess the fire and determine how best to fight it. An all hands general alarm is sounded. The mate controls fighting the fire and directs the deckhands and engineer, while the captain steers and positions the boat. The mate directs the deckhand as to the type of equipment to be used; whether to use or the type of extinguisher to use; deployment of hoses or carbon dioxide; and whether to evacuate the area or abandon ship. (S. Tr. 15, 135-137, 247).

Of course similar training is required to acquaint the crew with the appropriate responses to a man overboard, loss of a tow, or the procedure for abandonment of a vessel. In training the mate is in charge of the crew and issues directives to resolve any problem. (S. Tr. 136-137). He also varies the training to make seek to address the variables of an emergency. (S. Tr. 15, S. Tr. 192).

Of course, emergencies and preparation for them are not the only safety concerns. Anyone with a modicum of knowledge about sailing realizes that the sea is a fickle companion and without the ability to make immediate response to weather, traffic or the like, disaster lurks behind every swell of the ocean or bar crossing of the Columbia. In an actual emergency the mate is in charge of the deck and the crews and is to formulate a plan of action to address it. (Tr. 15, S. Tr.135-138).

An excellent example is making a decision whether to proceed in adverse weather. (Tr. 45, 162). A constant is the variableness of conditions. Rain, squalls, fog, hurricane-like storms, and the proximity of traffic are encountered on the ocean or in the Columbia River system. (Tr.

44, 125, 133). This requires continuous evaluation by the master and by the mate to assure safe passage. Additionally, concerns may arise with respect to fuel or mechanical issues. The mate has the authority to turn to port if he judges it to be prudent. (Tr. 125.126, 141-142, S. Tr. 94-95). Also, the mate can turn and jog the ship to avoid adverse conditions. (S. Tr. 30). In short, the master and on his watch, the mate, is in command and exercise that command (Tr. 104-112, 124, 129, 140-141, 144) to assure the safety of the crew. Weather and tides may trigger the need for the mate to assign crew members as a lookout or to the winch which controls the tow line.

The mate is also authorized to change course, if deemed prudent, because of weather or traffic. He will alert the captain to these changes at watch change. Further the mate is authorized to assess the nature and degree of injury to a member of the crew; to call in the Coast Guard for an emergency evacuation of an injured or ill crewmember if the circumstances warrant. (S. Tr. 94-95). If he deems it life threatening, he will call in the Coast Guard helicopter without awakening the Captain, as every minute can count. (Tr. 143).

Another safety issue relates to loading of the fish, log and general cargo barges. Total weight of the cargo, the distribution of the cargo, and whether it is listing is critical. Additionally the cargo must be lashed in a way that is secure and so that it will not move in transit. The mate is specially trained in cargo loading; gives instructions to the crane operators as well as to the deckhands to assure the proper method and type of lashing has been used, and proper weight and height distribution achieved. (S. Tr. 120-121, 176-178, 185-186).

9. Crossing a Bar

Crossing a bar, such as the Columbia, presents potential serious safety risks. A decision must be made whether to cross or to loiter, awaiting more favorable weather, visibility, or tidal conditions. (S. Tr. 87- 88). The captain or the mate, on their watch, exercise the authority to

determine whether to cross. Equally they determine if it is necessary or appropriate to call all hands out or merely one to stand watch. (Tr. 109-113). Frequently the captain is not up when crossing the bar and the mate makes the sole judgment whether to proceed. (S. Tr. 57).

10. Making Up to the Barge

There are two ways to tie a barge to an ocean going towboat: hip to hip or in tow. (S. Tr. 17, 69). The captain or mate must decide, given the variables of dock space, type of cargo, type of barge, weather, tides, etc., which to deploy. (S. Tr. 18). Generally all hands are up when making up to a barge. (S. Tr. 27). The captain operates the tug boat and the mate is the “boss” of the deck, directing the deckhands. (S. Tr. 27-28, 57). He becomes the eyes of the captain. (S. Tr. 49). Occasionally, the captain and the mate will trade or exchange roles during this process. (S.Tr. 49). When the Captain is in the wheel house, the mate gives commands to him that are to be obeyed with respect to movement of the tug boat. (S. Tr. 108, 152-153). The Mate instructs the deckhands as to which type and what order lines (spring line first or other) or cables are to be used and attached. (S. Tr. 20-23, 25, 66-68, 133). He determines if surge gear is to be deployed because of the weather or other adverse conditions. (S. Tr. 57). The mate directs the deckhand to bring the wire to the capstand (a form of winch); instructs the deckhand what tools to use to complete the task, such as hammers or torches; to turn certain shackles over; and to give commands to the assist boat and tug, e.g. when to push, when to pull, which direction, how much speed to use. (S. Tr. 128-129). They do not use the same types of cable or bridle each time the barge and tugboat are made up to each other. (S. Tr. 154). The captain generally cannot see the crew and thus orders and commands by the mate are communicated by hand held radio. (Tr. 145). On a variety of occasions, after the tie up is complete, it is determined to redo the tie up because it does not appear functional. (S. Tr. 24, 29).

11. Changing The Tow Length.

In a variety of circumstances, it becomes necessary to change the length of the towline. The mate is authorized, on his shift, to decide if the line should be shortened or lengthened. (S. Tr. 24, 92). He does so without conferring with the Captain. The variables which may influence the decision include crossing a bar, weather, navigation room, depth of water, and traffic. (S. Tr. 24, 89, 130, 157). It is “kind of a judgment call” what length of tow is appropriate to the situation. There is no mechanical formula. (S. Tr. 25, 130). During this process the mate informs the deckhand when the process will start; directs the deckhand when to start the winch or get the hydraulics started; directs them to stand by the winch; sometimes to run or redirect the fair lead; sometimes to lubricate the line and, depending upon where the winch controls are located, to operate the winch. (S. Tr. 25, 92, 131). In some instances, if there is heavy traffic, the deckhand will be directed to be in the wheelhouse to monitor the radio or other traffic. (S. Tr. 131, 183).

Push knee tugs are used in the river. Of course they are attached by wire or cable, in pushing the barge along the river. From time to time it is necessary to change the length of the wire or cable or to change their position. (S. Tr. 118-120). The mate will direct the deckhand to stand by the winch to release the wires if something unexpected happens and to provide input to the Mate. (S. Tr. 118-120).

12. Locks

There are eight locks on the Columbia River system. Each are traversed (S. Tr. 114), on the fish run and on the 12 one week trips annually made to Lewiston, Idaho. When approaching a lock, the officer on watch, contacts the lock and requests clearance. The Captain may be off watch and not participate. (S Tr. 173). Once granted, the captain or mate navigates the tug and

barge into position. The captain or mate must have requisite boat handling skill, as well as knowledge of each lock, current, tide, and the potential sequencing or positioning by the deckhands of the lines. Both deckhands are called to duty. They are directed to don their life jackets; have their hand held radios ready; told that they are to stand by for instruction; instructed to post themselves on the barge, near the wing wall; directed where to place the lines; instructed when and which lines to use to tie up within the lock; and to check the winches if there is more than one barge. (S. Tr. 114-118, 175, 176). The decision on which side to tie off on is influenced by the winds and current as is the navigational approach to the locks. (S. Tr. 116-117, 175-179). A decision to change the tie up may occur if “it does not look right for some reason.” (S. Tr. 116).

13. Docking

Generally voyages start and conclude from a dock. Given the fact that each towboat has a large barge in tow, the process is complex and wrought with safety concerns if not handled properly. Variables include weather, size of the barge, position of cleats, time of day, size of the dock; current, tides, etc. (S. Tr. 133). All hands are up for docking.

Generally the mate is on the barge providing directions or commands to the captain in the wheel house. (Tr. 144, S. Tr. 19, 129). They can and do change position, each assume the others role. The directions include: slow, speed up; direction changes; need for the assist board to push or back away. (S. Tr. 19, 190). The mate directs the deckhands, by radio, where to place the lines on deck, whether to initiate the tie up with the spring, off shore or breast line; the kinds of line to be deployed; how many lines to use; and the direction the lines should be tied. (S. Tr. 16, 20, 22, 129, 133, 135).

14. Loading

The mate directs the crane operator when loading logs. The key is to make sure that the weight of the logs is properly distributed to avoid capsizing the vessel. (S. Tr. 120, 176, 178.

15. Testimony of McKinley

Mr. McKinley is a protagonist for the Union. He has attended all hearings in this matter, even though no longer an employee of Brusco. His over zeal to label mates as mere robots performing the will of the captains flies squarely in the face of all other testimony and must be viewed with suspicion.

He testified on direct that a mate could “absolutely not” authorize overtime. And that it was “totally” the captain’s choice. (S. Tr. 226-227). On cross-examination, however, he admitted it would be “insane” for the mate not to have and exercise the authority to call the engineer to duty during off watch time. (S. Tr. 228-230).

Later he had to acknowledge that Capt. Nordholm’s testimony was substantially accurate; and that both the captain and the mate must be obeyed when issuing orders. (S. Tr. 241).

Given the flights of hyperbole, to which Mr. McKinley was given, it is proper to regard his testimony with suspicion.

PRELIMINARY REMARKS

There is a certain irony in this matter. Representation cases are to proceed with celerity. However, the petition in this matter was filed in September 1999. Thus the issue presented, whether mates in 1999 were supervisors, may well be stale, but is certainly not moot. Indeed much water has passed over the dam during the seven year interval, not the least of which is the heightened responsibilities imposed by Home Land Security of deck officers for security. This record does not reflect what the current job responsibilities of mates are, nor, given the issue,

would that be permissible. Perhaps the office of a Unit Clarification will ultimately have to be invoked.

Second, the Regional Director misstates the position of the Employer in regard to the appropriateness of an additional evidentiary hearing. The Employer advised that it did not think that an additional hearing was necessary, unless the Regional Director thought there to be any uncertainty whether mates were “accountable.” The Regional Director proceeded to deny a hearing, while at the same time concluding that mates were not “accountable.” For this reason alone the Decision should be remanded to supplement the record.⁴

SUMMARY OF ARGUMENT

The Supreme Court in *Kentucky River Community Care, Inc. v. NLRB*, 121 S. Ct. 1861 (2001) set aside the NLRB litmus test for determining whether certain key employees responsibly directed other employees, through the use of independent judgment. While holding that the Board had discretion to determine the qualifying scope and degree of discretion vested in a putative supervisor, it rejected, in stern language, the notion that particular types of judgment, i.e. those based upon professional or technical skill or experience, did not qualify.

After a lapse of many years the Board set forth in *Oakwood*, supra, the governing standards. These standards have not been considered by the Board in the context of mates. It is the contention of the Employer that the Regional Director has ignored these standards and denigrated the authority and position of a mate and placed him in an irreconcilable conflict between fealty to the Union and the Employer.

Second, the Regional Director may have ignored the law of the case doctrine. He found that “There is nothing in this record that comes close to showing ‘responsible direction.’” The

⁴ Historically the hearing officer in a representation proceeding is mandated to make a complete record. Manual, 11188.1.

District of Columbia found that Mates responsibly directed deckhands and others, and did not remand for re-determination of that issue. Nonetheless, the Regional Director appears to have ignored this mandate.

Third, the District of Columbia Circuit Court reversed, in part, because of an apparent departure by the NLRB from precedent, i.e. *Local 28, International Organization of Masters, Mates, and Pilots*, 136 NLRB 1175 (1982), enf. 321 F2d 376 (D.C. Cir. 1963) and *Bernhardt Bros. Tugboat Serv., Inc.*, 142 NLRB 851, enf. 328 F2d 757 (7th Cir. 1963), or, in the alternative, to justify its departure from this precedent.

The Regional Director purported to find salient factual distinctions between the cases. Employer contends that such factual differences do not justify departure from these precedents. The towboat industry most certainly needs clear and certain guidelines within which to conduct their affairs.

Fourth, the D.C. Circuit properly questioned the standard applied by the Board in determining the degree of discretion required in making assignments. *Alois Box Co. v NLRB*, 216 F3d 69, 73-75 (D.C. Cir. 2000) provides the correct rule of decision.

Finally, the Regional Director has taken liberties with the record. He made findings unsupported by substantial evidence; has demeaned the degree of judgment exercised by inappropriately focussing on the kind of judgment exercised. Indeed, one is reminded of *Allentown Mack Sales and Service*, NLRB 522 U.S. 359 (1998):

“Reasoned decision making, in which the rule announced is the rule applied, promotes sound results, and unreasoned decision making the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably administrative law judges), and effective review of the law by the courts.”

Here the Regional Director has deployed all the right words from *Oakwood* but has