

gerrymandered the fact findings to circumvent its holding.

For each of the reasons stated, Review should be granted; the decision of the Regional Director reversed; and the Certification set aside.

## ARGUMENT

### A. Preliminary

The sole question presented is whether mates are supervisors within the meaning of the Act. 29 USC 152 (11) defines a Supervisor to be an 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.”

This section of the Act is read in the disjunctive. *Copper/T Smith, Inc. v. NLRB*, 177 F.3d 1259 (11<sup>th</sup> Cir. 1999). Accordingly, possession of any one of the twelve powers is sufficient, providing it is accompanied by the exercise of independent judgment; and the power or authority is held “in the interest of the Employer. *Meridith Corp. v. NLRB*, 679 F2d 1332, 1335 (10<sup>th</sup> Cir. 1982), *Kentucky River Community Care, Inc. v. NLRB*, 121 S.Ct. 1861 (2001). The Board, in its last, directed the Regional Director to reconsider his prior Supplemental Decision in light of the *Oakwood* decision.

Prior to 1947, the NLRB excluded supervisors from the unit, which they supervised, except where there was an established history of inclusion. *Packard Motor Car Co.*, 61 NLRB 4, enf. 157 Fed 80 (6<sup>th</sup> Cir. 1946). A unit of all supervisors was also found appropriate by the Supreme Court in 1947. *Packard Motor Car Co. v NLRB*, 330 U.S. 485 (1947). These decisions were trumped by Congress in 1947, with the passage of the Taft-Hartley Act. Congress had two powerful concerns in amending the law. First, was its legitimate concern that supervisors have

an unwavering, undivided loyalty to the Employer; second, that the Employer should be held responsible for the commission of unfair labor practices by its supervisors. These underpinnings of the statutory definition provide a basing point to commence analysis.

It is certain that exercise of supervisory powers need not be constant. Rather, the existence of the power and the need to exercise it at the drop of a hat suffices. *West Penn Power Co. v. NLRB*, 337 F2d 993, 996 (3<sup>RD</sup> Cir. 1964), *Local 28, MM&P*, 136 NLRB 1175. See also *Capital Transit Company*, 114 NLRB 617, fns 10 and 30. Further, the fact that the work supervised might be labeled as menial does not detract from a finding of exercise of independent judgment. *NLRB v. Adam and Eve Cosmetics, Inc.*, 567 F2d 723, 728 (7<sup>th</sup> Cir. 1977).

B. Decision of the District of Columbia Circuit Court

The District of Columbia Circuit Court denied enforcement. It remanded for proceedings consistent with its opinion. The gist of the decision was as follows:

1. The Board must explain why its decision is not inconsistent with *Local 28, International Organization of Masters, Mates and Pilots*, 136 NLRB 1175 (1982 enf. 321 Fed 376 (D.C. Cir 1963) and *Bernhardt Bros. Tugboat Serv., Inc.*, 142 NLRB 851, enf. 328 F 2d 757 (7<sup>th</sup> Cir 1963), or, in the alternative, justify its departure from this precedent.

2. The Supreme Court Decision in *Ky. River Community Care, Inc.*, supra, would provide controlling legal precedent.

3. Mates possess the authority to responsibly direct and to assign other employees in the performance of their work.

4. In dicta, it questioned the determination that mates, when making assignments to deckhands, did not exercise independent judgment because the choices were obvious.

C. Other Circuit Court Decisions

The Second Circuit took the Board to task in *Spentonbush/Red Star Companies v. NLRB*, 106 F3d 484 (2<sup>nd</sup> Cir., 1997). There the question was whether captains were supervisors. The Court found that tug captains occupy a position markedly different from that of a foreman or lead person on a shore based operations. It recognized that the captain has the lives of crew and the safety of the ship and cargo entrusted to his care. And his commands must be obeyed. The roots of this authority derive from the common usages and jurisprudence of the middle ages. See *China v. Walsh*, 74 U.S. 53 (1869). It noted that a key factor is whether the captain is held fully accountable for the performance and work product of the employees he directs. It then proceeded to provide illustrations of this accountability: a tow captain can have their license suspended if deckhands handling of the hawser is of the wrong length; statutes governing pollution of waters and penalties imposed for violation, violation of established anchorage grounds subjects the owner, master or *person in charge* of a vessel to penalties; assessment of penalties for allowing an unlicensed person to operate the tug; and penalties may be imposed for allowing a deckhand to stand watch if intoxicated. *Ibid* 490-491. The court concluded its recitation by holding, “We logically assume that *Spentonbush* intended and required that its masters obey the maritime and navigation law, and such obedience surely was in *Spentonbush*’s interest.”

While this decision addresses solely master, the mate, a licensed officer become the person in charge on his watch and is every bit as accountable as is the captain.

C. *Kentucky River Community Care*

In *Kentucky River Community Care* the Board held that registered nurses were not supervisors because:

“\* \* \* the practice of a nurse supervising a nurse’s aid in administering patient care is ‘routine’ since the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with ‘management.’”

The Sixth Circuit rejected this analysis. 193 F3d 444, 453 (6<sup>th</sup> Cir. 1999). The Supreme Court granted Certiorari, 531 U.S.1304 (2000).

The NLRB urged the court that the nurses were not supervisors because:

“\* \* \* employees do not use ‘independent judgment’ when they exercise ‘ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with Employer-specified standards.’”

The Court accepted two components of the Boards argument. First, that it falls within the Board’s discretion to determine what scope of discretion qualifies. Second, the degree of discretion might fall beneath the qualifying standard, if performance of a particular task is straight jacketed in Company orders or regulations.

The court categorically rejected, however, the Board’s argument that particular types of judgments, i.e. technical or professional judgments in directing less skilled employees, did not qualify as independent. Justice Scalia commented:

“What supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate ‘supervisors’ from the Act.”

As the District of Columbia found, the Regional Director and the Board applied its pre-*Kentucky River Community Care* litmus test. Once that test was rejected, only the scope and degree of discretion granted to a mate remains relevant to whether they exercise independent judgment.

D. Aftermath of *Kentucky River*

*Kentucky River* has immediately spawned progeny. In *Public Service Company of*

*Colorado v. NLRB*, No. 00-9523 (10<sup>th</sup> Cir. Nov 23, 2001) the 10<sup>th</sup> Circuit denied enforcement and granted review. The issue was the status of transmission operators, senior transmission operators, and senior system operators. These employees were responsible for monitoring and directing the flow of electricity over transmission lines.

The first two categories of employees were primarily responsible for manipulation of the network to facilitate emergency and routine maintenance. They would design and oversee implementation of switching procedures. Their key work was to determine if load requirements permitted shutting down the system to permit maintenance. If it did, then the operator would schedule the work and provide a detailed switching order. If during execution of the order the operator determined that the procedure was not being properly executed, he could stop it. In emergencies, the operator could either make computer adjustments or instruct others to make changes in electrical output. The court noted that these employees are expected to exercise judgment, experience and training to devise solutions to problems and that their instructions must be carried out “with precision” to assure safety of field employees and the integrity of the system.

The NLRB, applying a clone of *Kentucky River, Mississippi Power and Light Co.*, 328 NLRB No. 146, held that these employees did not exercise the right type of judgment to qualify as supervisors. The 10<sup>th</sup> Circuit rejected this analysis on the strength of the Supreme Court’s decision.

The Union sought to distinguish *Kentucky River*, urging:

“That is, the Union seeks to draw a line between the act of directing employees as they go about their tasks and that of directing the tasks themselves. It argues that supervisory status is established under *Mississippi Power* only where the independent judgment is with reference to the problem of directing employees \* \* \* rather than solving concrete technical problems on which co-workers might be working. Under such a

test, if one employee merely passes on instructions on how to solve a technical or practical problem, that employee has not exercised ‘ independent judgment’ in connection with ‘responsible direction’ of ‘ other employees’ regardless of the amount of independent judgment that went into the solution of the actual problem.”

The 10<sup>th</sup> Circuit squarely rejected this argument, as should the Board. See also *Entergy Gulf States v. NLRB*, 253 F.3d. 203 (5<sup>th</sup> Cir. 2001).

The Second Circuit in *National Labor Relations Board v. Quinnipiac College*, 256 F3rd 68 (2<sup>nd</sup> Cir. 2001) also reversed the Board based upon *Kentucky River*. The issue was the status of shift supervisors of security officers. It noted that the term responsibly direct means merely to be answerable for the discharge of a duty or obligation; i.e. to be accountable. It then focussed upon the meaning of independent judgment. It held that assignment of duties in an emergency and supervision of their execution sufficed. See also *Beverly Enterprises-Minnesota, Inc. v. NLRB*, 266 F.3d. 785 (8<sup>th</sup> Cir. 2001).

*Multimedia KSDK v. NLRB*, 303 F3d 896 (8th Cir. 2002). In this case the NLRB held that producers of newscasts were statutory employees. A panel of the 8th Circuit granted enforcement, but upon rehearing, it was held that, *Kentucky River* controlled, and therefore, each producer was a supervisor. The rationale of the decision was that the presence of experience, skills, and training, do not detract from, rather they may enhance the nature and degree of independent judgment exercised.

A simple example elucidates the Court’s analysis. If Tiger Woods is faced with a ten foot, side hill put at Augusta with a stimpometer reading of 12; against the grain and a quartering wind, no independent judgment is involved. However for the rank amateur, it is all independent, undoubtedly flawed, unmitigated judgment.

E. Board Precedent

The District of Columbia Circuit Court strongly intimated that the *Local 28* and *Bernhardt* decisions were indistinguishable. It invited the Board to provide a principled distinction, something that its counsel, after pointed inquiry by the Court, had been unable to provide. As will be demonstrated, while there are modest factual nuances which differ, there are no appropriate ways to distinguish the holdings.

In *Bernhardt*, the Employer operated tugboats which plied the Mississippi River. The question was whether pilots responsibly directed other crewmembers. The sole evidence of exercise of judgment considered was:

1. Whether the weather was bad enough to require a lookout against navigational hazards; and if so, when and where to place them and what crewmember should be assigned.
2. The pilot, while on watch, gave orders to the crew in connection with the tow, the lookout, and the amount of power needed.

The Board held that this sufficed to constitute exercise of independent judgment.

In *Local 28*, the Board held that mates, there called pilots, were supervisors, based upon exercise of the power to responsibly direct employees. 136 NLRB at 1202-1203. The key to the decision was the fact finding that, during locking, docking, and in emergency situations the exercise of independent judgment was required in issuing orders to deckhands which must be obeyed.

In two recent cases, *Ingram Barge Company*, 336 NLRB No. 131 (2001) and *Alter Barge Lines, Inc.*, 336 NLRB No. 132 (2001), the Board declined to overturn these prior precedents. In *Alter*, Administrative Law Judge Robertson, relied upon certain key facts: the pilots were in

charge while the captain was off duty; the pilots navigated the vessels and directed the crew in relation to tow, safety and navigation; the pilot made log entries; and he had responsibility, should the circumstances dictate, to post a watch. In *Ingram Barge Company*, Administrative Law Judge Robertson's key findings were: pilots were charged with the operation of the boat and barge for 12 hours each day; that the pilot could direct crew members to change positions, e.g. from painting to tightening a tow; and that the pilot had to be alert to weight distribution of cargo during the loading and unloading process.

In the wake of *Kentucky River*, Administrative Law Judge Cullen, has twice held, on remand, that pilots on towboats were supervisors. *Marquette Transportation*, 2001 NLRB Lexis 655 (2001) and the *Majestic Star Casino, LLC*, 335 NLRB No. 36 (2001). These two cases carefully analyze the strictures of the Circuit's decision in *Brusco* and hold that duties similar to those present in this record compelled a finding of supervisory status.

The Regional Director set upon a course to distinguish *Bernhardt* and *Local 28*, by noting the number of barges towed and the frequency of tie up and release. Certainly the Circuit Court must have understood these factual differences from its own reading of these cases. It is inconceivable that it would have remanded merely to explain the obvious. Yes, there are factual distinctions. Do these differences warrant a different conclusion? No, because the critical aspect of each decision is that there is no indication from the text of either opinion that the number of barges influenced the outcome. It is not the number of times independent judgment must be exercised, rather it is the fact that it must be exercised as part of one's duties that controls. The record in this case does not allow a principled distinction of these cases.

Further the Region Director ignores *American Commercial Barge Line Company*, 337 NLRB No. 168 (August 1, 2002). There the General Counsel charged that respondent violated

8(a)(3) by discharging river pilots on tugboats for engaging in protected activities. The central issue was the status of pilots. More particularly the question was whether they were statutory employees entitled to the protections of the Act or were supervisors and, thus, beyond its pale.

Administrative Law Judge Lawrence W. Cullen initially held that pilots were statutory employees and thus entitled to the protections of the Act. In the wake of *NLRB v. Kentucky River Community Care, Inc.* 532 U.S.706 (2001), the NLRB remanded for further consideration. Upon review, a supplemental decision was issued holding that pilots are supervisors. The NLRB upon review of exceptions unanimously upheld this decision.

The facts in *American Commercial Barge Line* parallel those present here. They included the following:

- A. The captain and the pilot rotate six-hour shifts. The pilot was the highest-ranking official on board during his watch;
1. The pilot communicates with the deck hand by radio;
  2. The pilot instructs the deckhand what is to be done during passage through locks and towing work;
  3. The deckhand must obey the pilot;
  4. The pilot has authority to post a lookout if or when felt appropriate;
  5. The pilot can and does wake other crewmembers when he determines that it is appropriate even if it necessitates overtime compensation;
  6. Passage through locks involves many variables, including weather, current, tow configuration, etc. which the pilot must consider; and
  7. The pilot has authority to stop the vessel or make to port based upon assessment of safety factors.

Summing up the evidence, the Board stated:

“In sum, the pilots assign and responsibly direct the lookouts and have discretion to wake the call watchman. The pilots make navigation decisions based on their evaluation of the nonroutine factors including the river condition, problems with the boat, a ‘green’ (inexperienced) man on crew, the type of cargo, whether barges are full or empty, and weather and traffic conditions. The pilots do not check with others before ordering that action be taken. Indeed, when the pilot is on watch, he is the sole wheelhouse official responsible for the safety of the vessel, crew and cargo \* \* \*.”

Based upon this evidence the Board held that pilots responsibly direct and assign the work of others and that such activities involve the exercise of independent judgment. In reaching this Decision the NLRB rejected the holding in *McAllister Brothers, Inc.*, 278 NLRB 601 (1986), enfd. 819 F2d 439 (4<sup>th</sup> Cir. 1987) because inconsistent with *Kentucky River*.

Of key significance to this case, the NLRB found no material difference of duties between *American Commercial, Bernhardt Bros. Tugboat Services*, 142 NLRB 851, enfd. 328 F2d 757 (7th Cir. 1964) and *International Organization of Masters, etc. v. NLRB (Ingram Barge Co.)*, 136 NLRB 1175, enfd. 321 F2d 376 (D.C. Cir. 1963). In *BruscoTug & Barge Co. v. NLRB*, 247 F2D 273 (D.C. Cir 2001) the Circuit Court found that Local 28 was indistinguishable from the record in this case. Yes, it is true that there are some factual variances between this record and that present in *American Commercial*. None warrant a different ultimate conclusion.

Finally, *Oakwood*, supra, *Oakwood* is the center piece of this Request for Review. The Board addressed the status of charge nurses, who filled in for Nurse Managers during their off hours. The Board stated that its task was to distinguish between straw bosses and true supervisors vested with management prerogatives. As to assignment of work, it held that assignment to certain departments, certain shifts, or certain significant tasks, qualified if independent judgment was required. A permanent assignment of a nurse to administer drugs would qualify, but not ad hoc instructions as to the order of performing tasks. The power to

assign “bum” versus “plum” assignments meets the standard.

Turning to the “responsibly direct” test, the Board noted that the Senate was concerned that a person on the shop floor could be held responsible for the poor work of those he oversaw but not be deemed a supervisor. The Board held that a person who has “men under him” and decides what job to be undertaken next is a supervisor provided that the direction is responsible and is carried out with independent judgment. The term responsible direct means to be held accountable for the performance and work product of those directed. In other words the failure of those who are directed to properly perform can lead to “adverse consequence” for the putative supervisor. The concept was captured in part, as follows:

“The directing employee will rightly understand that his interest, in seeing that a task is properly performed, are to some extent distinct from the interests of those under his direction. That is, in directing others, he will be carrying out the interest of management—disregarding, if necessary the employees’ contrary interests.”

Finally, the Board addressed the independent judgment issue sharpened by the Supreme Court *Kentucky River* decision. The individual must act or recommend action free of control of others and form an opinion by considering alternatives. And, of course, the judgment must not be of a routine or clerical nature. A judgment is not routine or clerical however, if it is based upon experience or training which allows consistent decisions to be made. That is particularly true in the maritime industry where training is targeted at making response to emergency routine but time, tides and circumstances make daily choices anything but routine. See also, *Extendicare Homes, Inc*, 348 NLRB No. 70 (2006).

F. The Record and Its Application

1. Regional Director's Findings

The Regional Director's findings of fact are a confluence of many competing factors.

First, there is enormous pressure to make immediate determinations in election matters. Second, he marshaled, selectively scintillas of fact to hold that a mate is a mere drone, while ignoring overwhelming evidence about their central role in the direction and assignment of crew members. Third, all fact finders unavoidably view events through their own unique prism. Fourth, this decision is a cut and paste product, incorporating uncritically and verbatim a prior Regional Directors decision. In sum these findings should be disregard and the transcript and exhibits be accorded the deference to which they are entitled.

Unfortunately, this confluence of factors led the Regional Director astray. As will be shown, the Director used portions of the Union's Brief as fact findings, not recognizing in this nearly 500 page transcript that there was no record supporting these findings. Secondly, he added gratuitous factual statements not part of the record. Third, he marshaled, selectively, scintillas of fact to hold that a mate is a mere drone, while ignoring overwhelming evidence about their central role in the direction and assignment of crew members. In sum, these findings should be disregarded and the record accorded the deference to which it is entitled.

Page 3, The Captain. Perchance it is coincidence that paragraph 4, page 1 of the Decision and page 5, paragraph 2 of the Union's brief have such a familiar ring. A copyright attorney would have a field day. We do not lament the accuracy of the paragraph, but rather lament its and the following paragraphs under inclusiveness. The effect is to demean the role of a mate.

Captain Sarff testified:

“Q. What authority does a mate have when a captain is off watch?

“A. He assumes my responsibilities when I'm off watch.” (Tr. 129)  
Matt Stucki testified:

“Q. What is your authority when you are on watch?

“A. I understand my authority is 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)

Page 3, The mate and deckhand. The Regional Director informs the reader that a mate merely steers the boat on a "predetermined course" and tells the deckhand to cook a meal, paint and chip. What is left out of this rudimentary description, of course, is the nuts and bolts of the mate's normal shift.

Certainly a decision is made, by the customer that a tug and the towed vessel, the barge, will travel from one port to another. En route, however, the mate must constantly remain vigilant to the presence of traffic; adjust course to its presence; constantly monitor changes in wind, tides, weather and the like and adjust course to respond to Mother Nature fickleness. Constant judgment must be made. Shall I position the deckhand in the wheel house as an extra set of eyes; shall I have him check the engine gauges if something seems amiss; should I wake the captain because I assess there to be an emergency; should I wake the other deckhand because I assess an urgent emergency developing; should I change the length of the tow to respond to the elements and should I instruct the deckhand to lubricate the tow line? Judgments based upon experience and training are made every shift which must be obeyed by the deckhand. This is not the job, as the Regional Director intimates, of a drone.

Page 4, paragraphs 1 and 2. Generally, the statements made in this paragraph are correct. However, they are under inclusive and fail to recognize the variables involved in these operations and therefore the need of mates to exercise judgment.

First, during the mate's watch he must provide direction to the deckhand during a tie up with the barge: side of the vessel where the lines are to be placed; other items needed for tie up (S. Tr. 16); while generally the captain will dictate that the two vessels be placed in a hip up or towed position, weather and special circumstances can and will change those plans, requiring on

the spot judgments by the mate; on tow landings, the mate gives instruction to the captain and to the employees on the assist vessel; to slow down, speed up, push or back away. (S. Tr. 19). At the same time the mate is directing the deckhand, telling him what lines to use; where he wants the lines tied; whether to start the cranes, all of which instructions vary as circumstances develop. (S. Tr. 20-21).

Finally, the Regional Director is wrong about all crew members having a radio. The engineer does not. (S. Tr. 63).

Page 4, Making up the tow. Again the Regional Director has paraphrased the Union's Brief in regard to engineers. See page 11, paragraph 1. First, and foremost, the mate must exercise judgment to determine whether to wake the engineer and require that he work overtime. This judgment is based on two stimuli: engine alarm has sounded; or because, in the judgment of the mate something starts "to look abnormal" or he sees something "he does not like." (S. Tr. 79-80, 131-132). It is not true, however, notwithstanding contrary findings of the Regional Director and a miss-cite to the record by the Union, that the engineer decides whether to repair the problem immediately or on his watch. After discussion with the engineer about the problem, the mate determines when the work is to be done. (S. Tr. 81, 19). Generally, but not always, the mate will agree with the engineer.

Page 4, Making up the tow, paragraph 4. The key misstatement in this paragraph is: The captain decides which lines to tie where "during the hip up of barge to tug". Not even the Union had the temerity to make this claim. The mate determines the order of the lines to use, as he is in charge of the hook up. (S. Tr. 66-67). With respect to the order of tying which lines off, there is no formula as individuals vary the order. (S. Tr. 67). It is also very important to recognize that the captain and the mate work interchangeably in the tie up and docking, as they trade positions

from time to time. (S. Tr. 49).

Page 5, Changing the length of the tow line. The Regional Director's recitation of the process of changing the tow length omits the variables which require judgment: e.g. It is "kind of a judgment call" what length of tow is appropriate to a situation, there being no mechanical formula (S. Tr. 25, 130); when, if at all, to shorten or lengthen the tow line; whether to have the deckhand run the fair lead or to lubricate the line; whether he or the deckhand should operate the winch; and whether, during this operation, to station the deckhand in the wheelhouse to monitor the radio or other traffic. (S. Tr. 25, 92, 131, 183).

Page 5, Adverse weather. The Regional Director found that only the captain decided whether to use surge gear in rough waters. This is not accurate. The testimony was that "for the most part" he made this decision (S. Tr. 56); that he values advice from others (S. Tr. 57); and that the mate instructs the deckhands about the use of surge gear. (S. Tr. 28).

Page 5, Crossing the bar. The Regional Director states that there is contradictory evidence whether a mate has authority to take the boat to port to seek shelter from inclement weather and appears to have found this authority does not exist. This is incorrect. There was not contradictory evidence on this issue. Mates are authorized and have turned to port to avoid adverse weather. (Tr. 125, 126, 141-142; S. Tr. 94-95). In the winter this may happen three or four times per month.

Page 5, Emergency, par 1. The Regional Director correctly found that a mate may call the captain off watch because of adverse conditions. Clearly, the judgment of whether the circumstances warrant calling the captain out compel exercise of independent judgment, just as whether to call out the engineer or an additional deckhand to act as a watch does.

In an emergency, the mate will sound the alarm, compelling all hands to come to their

duty stations. In such emergencies, the mate is in charge of giving direction, both to the deckhand and engineer and to the captain. *Supra 10-11*. These instructions are not, as the Regional Director would characterize them, menial, rather they involve choices between alternative means and methods of responding to the emergency. *Supra 10-11*.

Page 5, Emergency, paragraph 2. Generally the mate is the safety officer and determines when and what safety drills are to be performed. (S. Tr. 53-54, 137, 247). There is no Coast Guard regulation requiring these drills and thus the timing of conducting them and their length is an exercise of judgment. *Supra*.

Page 6, Projects. The Regional Director dismissed the testimony of Captain Nordstrom, that he relied upon the decision of the mate to determine off watch staffing levels, suggesting that the work of the engineer was limited. There is no testimony that an engineer merely works on the engine or mechanical maintenance. Indeed any fair reading of this record reflects that the engineer also serves as a deckhand, in docking and tie up procedures; and can be called as an additional watch to the wheelhouse. (Tr. 90). The Director demeans the role of the deckhand by suggesting he is primarily a cook. There is no evidence to support this statement. Further, the Director demeans the degree of judgment called for in assigning tasks to whether one or the other is more physically fit. This entirely overlooks that this decision does require weighing of alternatives. Further it omits consideration of the evidence that a mate was and considers the relative skills of deckhands in making assignments. *Supra 3-4*.

Page 6, Inland Vessels. The Regional Director dismisses up river travel by Brusco, as a blip in time, confined to a single vessel in the summer of 2001. See also page 6 numbered paragraph 7 of the Decision. In the zeal to circumvent the obvious direction and judgment exercised in passing through the locks, the Region overlooks the fact that the Company has runs

which go to Lewiston, Idaho on the Columbia River, as well as intermediate ports. (Tr. 24).

These trips take seven days and there are about 12 each year. (Tr. 44).

Finally, the Regional Director entirely overlooks a key category of employee. This is the relief captain, both of whom were allowed to vote in this election and may have impacted the outcome. A relief captain serves a portion of their time as a mate. Additionally, they fill in as captain, when the 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).<sup>5</sup> One of the captain spent 2/3's of his time as a captain during the nine months preceding the first election hearing, supra,; and was a full time captain at the time that he voted.

## 2. Application of the record to the law

There is substantial temptation to prolong this brief by a line and verse application of the facts to the law. That temptation will be withstood. Only a brief overview will be provided.

Of course, the Regional Director must first determine whether the existence of the power to responsibly direct and/or assign exists. Brusco contends that the law of the case applies and that the Circuit Court has already determined that the requisite power exists. Even if that were not true, the record evidence overwhelming supports, indeed compels, such a finding be made. Most certainly the Mate is "accountable". *Supra 22*. Both in word and in deed the power has been vested and exercised. Further, as the *Spentonbush*, supra, demonstrates federal law holds mates accountable, as a licensed officer, for that which occurs on their watch.

The Regional Director held that a mate does not make assignments or effective recommend them, within the intendment of *Oakwood*. He holds that the assignments here are

merely ad hoc, i.e. what to do first.

This conclusion both distorts the record and is overbroad extension of the *Oakwood* principles. First, mates effectively recommend that deckhands be reassigned to a different vessel because of personality conflicts or skill levels. Second mates effectively recommend promotion of deckhands to a mate position. Third, key assignments are made during emergencies, training and adverse weather. Fourth, mates assign all hands, including the Captain, to overtime shifts. Finally the mate can and does assign 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.

In addition to these types of assignment satisfying the *Oakwood* standard, the Regional Director's decision creates an unfortunate expansion of it. These assignments have everything to do with safety. They must be carried out verbatim or the crew, vessel and cargo may perish and the public would become the victim of spills. This is not the mere sequencing of tasks. They are commands to be observed. And each command can place a crew member in a heightened jeopardy of injury or death. It is respectfully submitted that the proper rule is expressed in *Alois Box, Inc. v. NLRB*, 216 F3d 69, 73-75( D.C. Cir. 2000), *Cooper/T.Smith, Inc.*, 177 F3d 1259, 1265(11<sup>th</sup> Cir. 1999) and should be applied here.

Turning to the issue of "responsible direction", there can be no question but that mates, as licensed officers, are given command of the vessel during their watch. Further, both the initial hearing officer and the District of Columbia Circuit Court of Appeals found, mates are the "boss of the deck", during docking and making up to a barge. And, as stated before, they are accountable, both for their own actions, and, under federal law, that of their crew.

Rather the true question is whether a mate exercises independent judgment in making

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<sup>5</sup> See *Canonie Transportation*, 289 NLRB 299(1988) holding that such persons are supervisors.

assignments or in directing the work of others. Presumably, the Union will concede that a mate constantly exercises judgment. Rather it will urge that it is mere routine and does not involved discretionary factors. Such an argument flies squarely in the face of this Board's decisions in *Local28, Bernhardt* and the progeny of *Kentucky River*. *Supra* 19-24

There is no written recipe for a mate to direct the work of others. Thus the exercise of his judgment is not tethered by detailed rules or regulations. He must, both on his watch and while acting as boss of the deck during docking and make up exercises, be constantly vigilant to changing conditions and be prepared to issue instantaneous orders to address such situations. Neither the river nor the ocean allow for hesitancy in making judgments.

What judgments does a mate make? Whether to cross the bar and call up additional personnel to assist. Whether to lengthen or shorten the tow to adjust to times, weather, bar crossings, traffic, winds, visibility, and the like. Whether to turn to Port or to jog during inclement weather. Whether and the type and nature of commands to be given to deckhands, assist boats and the captain when coming into a dock. Whether to change course because of adverse weather. Assessing whether the engine is properly operating and if not, whether to call the engineer off watch. Whether to wake other members of the crew to assist in inclement weather. How to navigate the waters entering into a lock system; how, where, and when to tie up the barge in the locks. Whether to have an ill crew member evacuated from the ship because of illness or injury. Whether and when to hold emergency drills and to whom various tasks are assigned during that exercise. This list could continue on ad nauseam but the point is clear. Mates are possessed of authority to command obedience to their orders; in issuing the orders, a host of variables exist. Their choices of directing or assigning who and what is to be performed; requirement of overtime, making up to a barge; passage through locks; coming to port; crossing

the bar; shortening or lengthening the tow; etc. involve a host of factors to be selected among. As such, they exercise independent judgment and must be considered to be supervisors.

#### CONCLUSION

It is respectfully submitted that the Board should grant review; hold that Mates are supervisors; vacate the Election Certificate; and remand to the Regional Director for proceedings consistent with same.

Dated: January 3, 2007.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January 2007, I served the foregoing REQUEST FOR REVIEW, via FedEx on the following parties at the following addresses:

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