

**The Bridgeport and Port Jefferson Steamboat Company and Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO.** Case 29-CA-14930

November 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On August 2, 1991, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent's grant of supervisory authority to the captains of its boats violated Section 8(a)(5), (3), and (1) of the Act. He found the supervisory positions to be a sham. He concluded that the Respondent bargained to impasse over the non-mandatory subject of altering the scope of the bargaining unit, and that the Respondent did so in order to weaken the Union. The Respondent excepted to the judge's findings. We find merit in these exceptions.

The Respondent operates boats, the *Grand Republic* and the *Park City*, that carry passengers, automobiles, and cargo across Long Island Sound from Port Jefferson, New York, to Bridgeport, Connecticut. A one-way trip takes slightly more than an hour, with daily service available throughout the year. Service is more frequent on weekends and in the summer. There are also charter cruises and moonlight cruises during the summer months. Each boat carries about 1000 passengers and about 100 cars. The crew is normally composed of six or seven members—captain, mate, chief engineer, two able-bodied seamen, one ordinary seaman, and one oiler. There is also a purser on board with responsibility for concession operations. Additional personnel are required if there are more than 500 passengers aboard or if a boat is operating after 10 p.m. Crews work 8-hour shifts. Boats leave the dock at 6 a.m. and operate until 9 or 11 p.m. The Respondent employs dockhands at both ports. The Respondent's office is near the dock at Port Jefferson. There, daily supervision is exercised by Vice President and General Manager Frederick Hall, Operations Manager or Port Captain John Alban, and Port Engineer Mario Dezalic. The three engage in occasional walkarounds on the boats to check the general cleanliness and safety of the vessels. They also monitor maintenance such as rust and buckling problems.

The parties' collective-bargaining agreement covers a unit of licensed and unlicensed employees, including

captains, pilots, mates, chief engineers, assistant engineers, oilers, able-bodied seamen, and ordinary seamen. Specifically excluded are all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act. The Respondent has had a series of contracts with the Union, usually of 3-year duration, for nearly 30 years. The last one of this length expired on June 15, 1988. Thereafter the parties concluded a 1-year agreement until June 15, 1989, and a 9-month agreement until April 3, 1990.

On April 14, 1988, the Respondent issued "Operational Regulations" to its *Park City* captains to be effective immediately. The captains were made responsible for the operation, maintenance, and safety of the vessels and held accountable for their condition and performance. The senior captain was required to formulate a master plan for the general maintenance of the vessel. The associate captain was to follow the plan and captains were to "submit monthly evaluation reports of their crews to the Port Jefferson Office." In addition, the captains were to exercise tighter control over supplies and machinery malfunctions. The "Crew Operation Regulations" required the captains to issue daily orders for the crew's maintenance activity—deck maintenance, outside painting, interior maintenance, and constant trash pickup. The crew was to be engaged in maintenance work at all times, the only exceptions being the captain's designation of a second seaman on the bridge or some crewmembers on the gangway to monitor the loading of cars. The regulations instituted a progressive disciplinary system for infractions which included "disregarding or willfully disobeying the captain's orders."<sup>1</sup> Captains received evaluation forms for each crewmember for the monthly submissions.

On April 18, 1988, the Respondent issued a directive to the crew of the *Grand Republic* for the purpose of providing "a more pleasing and efficient ferry service and . . . a more pleasant and desirable place for the ferry crews to work in." The Respondent noted that the *Grand Republic* was "in a very sorry condition . . . dirty, unwashed, unattended and in general in very poor condition" and that crewmembers were "somewhat to blame." The Respondent therefore insti-

<sup>1</sup>The complete list is as follows:

1. Failure to follow directives for [sic] Port Jefferson Office.
2. Disregarding or willfully disobeying the Captains [sic] order.
3. Being under the influence of any substance that impairs one's faculties.
4. Not reporting for work on time.
5. Abusiveness to passengers, using profane language within hearing of passengers or making indecent gestures within passengers [sic] sight.
6. Wasting or destroying supplies or materials on board.
7. Inability at performing job function.
8. Arguing or fighting aboard.
9. Reporting for duty in a dirty or repugnant condition.
10. Any other act of misconduct.

tuted a new "systematic plan" under the supervision of the captain "for the complete maintenance and care for all the deck areas" of the vessel. Captains were to inspect the deck area weekly and submit monthly evaluations of all crewmembers to the Port Jefferson office. These evaluations were to become part of each employee's personnel record. The directive noted that "crew members who will not or are not doing their share of the work will be subject to disciplinary action" and that "[a]nyone in this crew who does not intend to follow the Captains [sic] orders and do his share of the work on board this vessel [sic] should look for employment elsewhere."

The captains thereafter ignored the Respondent's directives and the Respondent imposed no discipline on them.

On June 24, 1988, the Respondent filed a unit clarification petition in which it sought to exclude from the bargaining unit captains, mates, and chief engineers on the grounds that they were statutory supervisors. On September 29, 1989, the Regional Director dismissed the petition. On May 2, 1990, the Board denied the Respondent's request for review.<sup>2</sup>

On February 28, 1990, the parties commenced negotiating for a new contract.<sup>3</sup> At that time, the Respondent resubmitted the job description proposal which the Union had rejected during negotiations for the 9-month contract which was about to expire. This proposal conferred supervisory authority on captains, mates, and chief engineers.<sup>4</sup> The Respondent also made proposals on insurance and pensions, holidays, overtime, grub money, vessel manning, vessel tieups, and crew

<sup>2</sup>The Regional Director's "Decision and Order Dismissing Petition" was admitted into evidence as G.C. Exh. 2.

<sup>3</sup>There were 10 negotiating sessions between February 28 and May 3, 1990.

<sup>4</sup>The job description proposal stated:

**CAPTAINS:** All captains employed by the Company shall exercise all of the authority and responsibility conferred upon them by maritime custom and law, shall have the authority and responsibility to hire employees in accordance with the hiring provision of this agreement, to evaluate employees, to fire or otherwise discipline employees, to direct and assign all work on their vessels, and direct the operations of their vessels in the interest of the Company, and shall be obligated to exercise these responsibilities on behalf of the Company.

**MATES:** All mates employed by the Company shall have the authority and responsibility to hire deck department employees in accordance with the hiring provisions of this agreement, to evaluate such employees, to fire or otherwise discipline such employees, to direct and assign the work of such employees in the interest of the Company, and shall be obligated to exercise these responsibilities on behalf of the Company.

**CHIEF ENGINEERS:** All chief engineers employed by the Company shall have the authority and responsibility to hire engine room employees in accordance with the hiring provisions of this agreement, to evaluate such employees, to fire or otherwise discipline such employees, to direct and assign the work of such employees in the interest of the Company, and shall be obligated to exercise these responsibilities on behalf of the Company.

changes, and proposed eliminating the exclusive hiring hall provision in the existing contract.

The parties immediately disagreed on the job description proposal. The Union stated that it would not negotiate an issue disposed of in the Board unit-clarification proceeding. The Respondent stated that it would not sign an agreement without the proposal. At the fourth meeting, the Respondent eliminated chief engineers from the proposal. The Respondent continued, however, to demand that the Union accept the proposal as to captains and mates,<sup>5</sup> stating that the proposal and a 1-year contract duration were essential to the Respondent's willingness to sign a contract. The Union countered with a request for a written stipulation that the Respondent would not file another unit-clarification petition if the Union accepted the proposal. The Respondent rejected this request.

On May 8, 1990, the Respondent notified the Union that it was implementing the proposed job duties for captains at that time and would expect to do so for mates in the future. The parties stipulated that neither of them changed position on the job-description proposal after April 25, 1990, the penultimate negotiating session.

On May 9, 1990, the Respondent sent the following memo to all captains:

We wish to restate and confirm what the Company expects of you as the master of its vessels.

As a general proposition, we expect all of our captains to exercise all of the authority and responsibility conferred upon them by maritime law and custom. This, of course, is a weighty responsibility. As supreme commander of the vessel, you are responsible for directing the operation of the vessel as a whole. In order for you to be able to carry out this responsibility, you have the authority and responsibility to evaluate the qualifications and work of the members of your crew, to discipline or discharge crew members, and direct and assign all work performed on your vessel.

We firmly believe that the safe and efficient operation of the vessels depends upon your fulfillment of these responsibilities, and we are counting on you to perform them.

The Respondent also implemented the 4-percent across-the-board increase in wages that it had previously proposed. There was no additional compensation for captains.<sup>6</sup>

Up to the time of the hearing, which commenced on March 19, 1991, the captains had declined to perform

<sup>5</sup>The Respondent eliminated hiring authority as to captains and mates.

<sup>6</sup>The compensation for captains was approximately \$4 to \$5 an hour more than for the next highest paid employee.

their new duties and the Respondent had taken no disciplinary measures against them. The Respondent did not implement its job proposal as to mates. The Respondent testified that it took no action against the captains because the present litigation was pending. The Respondent also testified that it wanted the captains “to do these duties . . . to ensure that the vessels were run properly” and to obviate the “problem . . . [that] nobody considered themselves in charge.”<sup>7</sup>

As indicated above, the judge found that the Respondent had violated Section 8(a)(5), (3), and (1) of the Act by bargaining with the Union to impasse over assigning supervisory duties to captains, thereby altering the scope of the bargaining unit, and that the Respondent did this for discriminatory reasons. The judge further found that the Respondent’s creation of the supervisory positions was a sham. He noted that the Board’s unit clarification proceeding found that the captains were not supervisors. The judge held that the ratio of supervisors to employees either with captains, mates, and engineers as supervisors, or with captains and mates as supervisors, was “preposterous.” The judge also noted that these newly proposed supervisors were not afforded salaried status with increased compensation for their additional responsibilities but were hourly rated with the same time-and-a-half for overtime and across-the-board 4-percent wage increase as other unit employees.

The judge therefore found that the Respondent had insisted to impasse on removing job classifications from the bargaining unit and that this action constituted an insistence on a change in unit scope that violated Section 8(a)(5) of the Act. While acknowledging that there was “no independent evidence of animus in the case,” the judge also found that the Respondent’s conduct was discriminatory in violation of Section 8(a)(3). He reasoned that the Respondent was attempting to deprive bargaining unit employees of Section 7 rights on the basis of what, as noted above, he had concluded was a sham proposal to turn them into supervisors. In his 8(a)(3) analysis, he listed these additional factors as support for his “sham proposal” finding: the length of time this bargaining unit had existed, the lack of any objective justification for making the change, and the captains’ sanction-free defiance of the Respondent’s May 9 directive. In finding no objective justification, the judge noted the absence of such circumstances as “rapid expansion of the Company, the imposition of new and more burdensome regulations,” or some kind of natural “disaster.” He minimized the Respondent’s expressed concern over passenger complaints about lack of cleanliness on the

ships and surliness of employees by observing that the Respondent had evidently felt no compulsion to take any action on such complaints in the past.

The Respondent excepted to these findings and conclusions of the judge. We find merit in these exceptions.

We do not agree with the judge that the Respondent’s conferring supervisory responsibilities on the captains of the *Grand Republic* and *Park City* violated Section 8(a)(5) and (3) of the Act. The Respondent’s conduct did not violate Section 8(a)(5) and (1) because, contrary to the conclusions of the judge and our dissenting colleague, we find that the Respondent’s efforts were not a sham aimed at undermining the Union but a sincere effort to provide onsite supervision of its vessels through the performance of supervisory duties by its captains.

Repeatedly, from April 14 and 18, 1988, onwards, the Respondent sought to achieve its goal of on-vessel supervision and responsibility. The Respondent’s April 1988 directives make clear the Respondent’s concern about vessel maintenance, machinery malfunctions, supply sufficiency, general cleanliness, and employee behavior. These directives placed captains in charge of a system establishing responsibility and authority for maintenance and crew discipline. In addition, in the bargaining for the 9-month contract and in the bargaining for a successor to that contract, the Respondent made new proposals designed to vest the captains with unmistakable supervisory authority.<sup>8</sup> Thereafter, the Respondent reaffirmed its wish that captains exercise on-site supervisory responsibilities on the *Grand Republic* and *Park City* in its May 9, 1990 memo. As Hall, the Respondent’s vice president and general manager, testified, the Respondent wanted the captains “to do these duties . . . to ensure that the vessels were run properly” and to obviate the “problem . . . [that] nobody considered themselves in charge.”

We find no sham. The Respondent’s directives, memos, job description proposal, and statements, clearly signaled that the duties of the captains who were promoted to supervisors had changed. The Respondent did not merely retitle bargaining unit employees who, despite the classification change, would merely have continued to perform solely bargaining unit work. Instead, the Respondent required the captains to perform supervisory tasks and imbued them with the authority of statutory supervisors and managers—powers and responsibilities that they had not clearly exercised in the past.<sup>9</sup>

Further, the Respondent’s conduct reflects legitimate managerial concern. The evidence is replete with the

<sup>7</sup>The parties engaged in two additional bargaining sessions on February 7 and March 5, 1991. However, these meetings produced no agreement on the issues separating the parties, including the issue of the captains’ supervisory responsibilities.

<sup>8</sup>These proposals were not considered by the Board in the unit clarification proceeding, Case 29–UC–355.

<sup>9</sup>*St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 626 (1984).

Respondent's apprehension that only constant supervision on the vessels could guarantee the maintenance and orderliness it desired. The general rule is that employers are entitled to make their own nondiscriminatory decisions as to how best to supervise their operations. As triers of fact we may not simply substitute our own subjective judgment of what we would have done were we in the Respondent's position.<sup>10</sup>

In situations comparable to that here, we have found acceptable employers' reclassification of certain employees as supervisors because there was a perceived need for more direct control of the employers' operations. For example, in *Luther Manor Nursing Home*,<sup>11</sup> the employer stated that more supervision was needed on the floor of the home because the existing supervisors, registered nurses, were busy and could not complete their other duties as well as their supervisory duties. The employer therefore assigned supervisory tasks to licensed practical nurses.<sup>12</sup> In *Lutheran Home of Kendallville, Indiana*,<sup>13</sup> the employer showed that the only two supervisors were rarely present at the facility at night or during the weekends. The employer offered licensed practical nurses a new supervisor-nursing position in the belief that first-line supervision "was the key to a good or poor operation."<sup>14</sup>

Similarly, we find that the Respondent here sought onsite supervision on its boats to ensure quality operations and conferred supervisory duties on its captains to achieve this goal. We are not persuaded that the Respondent's conferral of authority on the captains of the *Grand Republic* and the *Park City* was a sham. The Respondent promoted these employees into true supervisory positions.

Neither the decision to create new supervisory positions nor the selection of individuals to fill these positions is a mandatory subject of bargaining.<sup>15</sup> An employer, however, may have an obligation to bargain with a union if its action reduces bargaining unit work. For instance, if an individual promoted to a supervisory position continues to perform former bargaining unit work, that loss of work to the bargaining unit may

<sup>10</sup> *Hydro Conduit Corp.*, 254 NLRB 433, 441 (1981); *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978).

<sup>11</sup> 270 NLRB 949, 959-960 (1984).

<sup>12</sup> The employer was found to have violated Sec. 8(a)(5) and (1) of the Act not because of any bad faith in the creation of the supervisory position but only because it had taken the action unilaterally. *Id.* at 960. As explained below, the assignment of supervisory duties to bargaining unit employees is a mandatory subject of bargaining whenever the newly created supervisors continue to perform their former duties as well and the amount of work still within the bargaining unit is thereby reduced.

<sup>13</sup> 264 NLRB 525 (1982).

<sup>14</sup> The Board accordingly found that the employer violated Sec. 8(a)(5) and (1) only because the decision to give bargaining unit members supervisory duties in addition to their former unit work was a mandatory subject of bargaining, and the employer had acted unilaterally. *Id.* at 525 fn. 2.

<sup>15</sup> *St. Louis Telephone Employees Credit Union*, supra at 627-628.

be a change in the terms and conditions of employment that could give rise to a bargaining obligation under Section 8(d) of the Act.<sup>16</sup> That is true here. The Respondent, however, in our judgment bargained the issue to impasse with the Union in good faith. The Respondent was thereafter free to implement the proposed change without running afoul of the Act. We therefore find that the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged and we shall dismiss the complaint in this respect.<sup>17</sup>

We also find that the Respondent's conduct did not violate Section 8(a)(3) and (1) of the Act. The judge relied heavily on his finding of a sham in making this determination, and listed several factors in support—the long-established bargaining unit, the lack of objective reasons for the change, past neglect of complaints, and failure to discipline the wayward captains. As we have set forth previously, we are not persuaded that the promotions were a sham. The Respondent's action removes only one classification from the unit. Approximately seven other classifications remain in the unit. The legitimate managerial concerns discussed above negate the other factors cited by the judge. The Respondent determined that it needed onsite supervision and provided it by making its captains supervisors. As the judge noted, there is no independent evidence of animus here. Offering supervisory positions to bargaining unit employees is not "inherently discriminatory" conduct.<sup>18</sup> Indeed, we have found nothing inherently discriminatory when an employer, shortly after union certification, promoted certain bargaining unit employees to the supervisory positions in a reorganization aimed at better management.<sup>19</sup> Similarly, we are not persuaded that the Respondent's continued assignment of supervisory duties to its captains from April 1988 onwards was anything other than what it appears to be on its face: the provision of onsite supervision to manage the operation more effectively.

We, of course, accept the proposition that the captains were not supervisors as of the time of the hearing in Case 29-UC-355. The directives of April 1988 were deemed to be insufficient to confer supervisory

<sup>16</sup> *Tesoro Petroleum Corp.*, 192 NLRB 354, 359 (1971).

<sup>17</sup> We note that the judge also found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by conditioning the acceptance of a contract on the Union's agreement to a wage proposal for supervisors. The judge did not include this matter in his Conclusions of Law or his recommended Order. However, the Respondent excepted. This violation is subsumed in our dismissal of the 8(a)(5) complaint. We find the Respondent lawfully bargained to impasse on the issue of supervisory promotions which occasioned the loss of bargaining unit work. Thus the Respondent, in enacting its across-the-board 4-percent wage increase, was merely lawfully implementing its last contract offer prior to impasse.

<sup>18</sup> *Lutheran Home of Kendallville, Indiana*, supra at 527-528.

<sup>19</sup> *Kendall College*, 228 NLRB 1083, 1088-1089 (1977), enf. 570 F.2d 216 (7th Cir. 1978).

authority.<sup>20</sup> That conclusion, however, is not dispositive of the issue of whether the Respondent's subsequent efforts were also insufficient to invest the captains with supervisory authority.<sup>21</sup> Nor is the unit clarification decision dispositive of the issue of whether these subsequent efforts were unlawfully motivated. As to that issue, we note that our dissenting colleague concedes that the initial efforts in April 1988 were lawfully motivated. We fail to see why the subsequent efforts to achieve *the same goal* should be deemed unlawfully motivated simply because they were successful and the earlier efforts were not. The Respondent at all times was seeking to achieve the lawful goal of ensuring that the captains would be an arm of management and would use their supervisory authority to carry out entrepreneurial goals "in the interests of the employer."<sup>22</sup> After the initial efforts of April 1988 failed, the Respondent gave the captains greater and more specific authority. We see no basis for inferring that these additional steps to achieve the same lawful goal were discriminatorily motivated.

In addition, our dissenting colleague makes much of the fact that, at one time, the Respondent sought to confer supervisory authority not only on the captains but also on the chief engineers and mates. Suffice it to say in response that the General Counsel does not attack those efforts to confer supervisory authority on the latter two classifications.

The Respondent's actions here are not analogous to those cases where wholesale promotion of bargaining unit employees to supervisory positions is part of a pervasive pattern of misconduct clearly evincing an employer's animus and attempt to destroy a bargaining unit.<sup>23</sup>

We recognize that the captains have never actually performed their supervisory duties, and thus the Regional Director, affirmed by the Board, found that they

<sup>20</sup>The directive regarding employee evaluations was deemed insufficient in part because no captain complied with the instructions and, as of the time of the unit clarification proceeding, the Respondent had taken no further action to put its evaluation system into effect (G.C. Exh. 2 at 20). This resulted in a disciplinary system in which captains took no meaningful role.

We note also that, as the Respondent's witness Vice President and General Manager Hall testified, the Respondent had not, as of the time of the hearing in the present case, required the captains to perform the supervisory duties prescribed in the 1990 proposals on which the Respondent went to impasse. As Hall explained, the Respondent did not wish to force the captains to perform those duties pending the completion of the instant litigation. Because the instant case challenges the Respondent's assignment of supervisory responsibilities, we would not fault the Respondent for not immediately enforcing this assignment.

<sup>21</sup>The decision in Case 29-UC-355 did not consider these subsequent efforts.

<sup>22</sup>See Sec. 2(11) of the Act.

<sup>23</sup>See, e.g., *Regency Manor Nursing Home*, 275 NLRB 1261 (1985); *Venture Packaging*, 294 NLRB 544 (1989), enfd. 923 F.2d 855 (6th Cir. 1991).

were not in fact supervisors. However, there is an explanation for the fact that captains have not performed their supervisory duties. The Respondent has said that, pending the completion of the instant litigation, it will not force the captains to perform their supervisory responsibilities. Because the instant case challenges the Respondent's assignment of supervisory responsibilities, we would not fault the Respondent for not immediately enforcing this assignment. Accordingly, we do not believe that the General Counsel has established that the assignment of responsibilities was a sham.

Accordingly, we find no merit to the 8(a)(3) and (1) allegation and we shall also dismiss the complaint in this respect.

#### ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting.

I do not agree with my colleagues that the Respondent here "sought on-site supervision on its boats to ensure quality operations *and conferred supervisory duties on its captains to achieve this goal.*" (Emphasis added.) I would adopt the judge's finding that the Respondent's goal in proposing to assign Section 2(11) duties<sup>1</sup> to the captains was to exclude them from the bargaining unit and thus win at the bargaining table what it lost before the Board in its unit clarification petition. Consequently, I would adopt the judge's further finding that the Respondent violated Section 8(a)(5) of the Act by insisting to impasse on its bargaining position whose purpose was the alteration of the scope of the unit, a nonmandatory subject of bargaining.

Although I agree with my colleagues that "the general rule is that employers are entitled to make their own nondiscriminatory [sic] decisions as to how best to supervise their operations," that is not the issue before us. Rather, the issue is whether the Respondent's bargaining *proposal* to assign supervisory duties to its captains was bona fide or sham. The resolution of this issue determines whether the *proposal* was a mandatory or permissive subject of bargaining and whether the Respondent violated Section 8(a)(5) by bargaining to impasse over the proposal.<sup>2</sup>

<sup>1</sup>Sec. 2(11) defines as a "supervisor":

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.

<sup>2</sup>If the proposal was bona fide, as the majority finds it was, then the Respondent was required to bargain over the reduction in unit work that would result from the promotion of the captains out of the unit, a mandatory subject of bargaining. See *Lutheran Home*, 264 NLRB 525, 525 fn. 3 (1982). If, however, the promotion was a

The starting point of my analysis of whether the Respondent's proposal to assign supervisory duties to its captains was bona fide or sham is the Respondent's assignment of new duties to the captains and crews of its two vessels (the *Park City* and *Grand Republic*) in April 1988. Like my colleagues, I would find that the Respondent's assignment of new duties to the captains in April 1988 was bona fide and that the Respondent's purpose in making these new assignments was to improve the maintenance and operation of the *Park City* and *Grand Republic*.<sup>3</sup>

After it promulgated its April 1988 directives, the Respondent filed its unit clarification petition in which it sought to exclude the captains from the unit on the ground that they were statutory supervisors.<sup>4</sup> In assert-

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sham, as the judge found and as I would find, then the Respondent sought, under the guise of making the captains supervisors, to alter the scope of the unit, a permissive subject of bargaining. A party that bargains to impasse over the scope of the bargaining unit commits an unfair labor practice by taking a permissive subject of bargaining to impasse. See, e.g., *Facet Enterprises v. NLRB*, 907 F.2d 963, 975-976 (10th Cir. 1990).

<sup>3</sup>In order to accomplish its goal, the Respondent assigned specific duties to the captains that required increased "supervision" of the crews in the performance of maintenance and related duties. Thus, under the "Operational Regulations" issued to the captains of the *Park City* on April 14, 1988, the Respondent augmented the duties of the captains to include, inter alia, responsibility for the operation, maintenance, and safety of the vessel and accountability for its condition and performance. The captains were also required to fill out monthly evaluation reports on the crews and were expected to exercise tighter control over supplies and machinery malfunctions. Similarly, on April 18, 1988, the Respondent issued a directive to the crew of the *Grand Republic* that instituted a new "systematic plan" for the complete maintenance and care of the deck areas. The captains were to oversee this plan by inspecting the deck area weekly and by submitting monthly evaluations of all crewmembers to the Port Jefferson office.

<sup>4</sup>In its petition and at the bargaining table, the Respondent also sought to exclude mates and chief engineers from the unit as statutory supervisors. Because the Respondent's April 1988 directives did not assign new responsibilities to employees in these classifications, it is difficult to fathom why the Respondent's avowed purpose of improved vessel operation and maintenance would now require the assignment of supervisory duties to them. Indeed, the Respondent's bargaining position reveals that it was not required, for when the attempt to exclude the three classifications did not succeed, the Respondent first dropped the classification of chief engineer from the proposal, then that of mate (although the Respondent vowed to again propose the exclusion of the mates once it won the exclusion of the captains). The majority would confine the discussion here to the captains alone because the Respondent's original proposal reveals its ultimate goal, the exclusion of *three* classifications from the unit by nominally assigning supervisory duties to nearly half the bargaining unit. In these circumstances, I agree with the judge that the proposed ratio of supervisors to unit employees would be "preposterous" and that it is further evidence that the Respondent's proposal was a sham.

Finally, because the Respondent dropped its efforts to exclude chief engineers and mates from the bargaining unit, the lawfulness of the Respondent's proposal as it applies to those two classifications is not at issue here. In these circumstances, there is no reason why the General Counsel should "attack" the Respondent's efforts in this regard.

ing that the captains were statutory supervisors, the Respondent relied primarily on the assignment of "supervisory" duties set out in the April 1988 directives. After considering all the evidence,<sup>5</sup> the Regional Director found that the captains (as well as mates and chief engineers) were *not* supervisors because they did not possess or exercise authority to perform any of the duties set out in Section 2(11) of the Act. Consequently, he dismissed the petition. The Board affirmed. Thus, while the Respondent "sought onsite supervision on its boats to ensure quality operations," this "supervision," as defined in the April 1988 directives and considered by the Regional Director and the Board, was not sufficient to confer 2(11) supervisory status on the captains and thus warrant their exclusion from the bargaining unit.

Even while the unit clarification petition was pending before the Board, however, the Respondent proposed at the bargaining table to assign to the captains, mates, and chief engineers the very duties defined in Section 2(11) of the Act whose omission from the petition resulted in its dismissal.<sup>6</sup> The majority posits that the Respondent merely "reintroduced at bargaining the [April 1988] job description proposal *which conferred statutory supervisory status on the captains.*" (Empha-

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<sup>5</sup>The majority errs when it asserts that the Regional Director found that the captains were not supervisors because they "never actually performed their supervisory duties." In fact, the Regional Director, affirmed by the Board, found that the captains, mates, and chief engineers were not supervisors because they did not possess "authority to exercise substantial independent judgment in carrying out those actions enumerated as supervisory indicia in Sec. 2(11) of the Act." In reaching this conclusion, the Regional Director carefully considered the evidence presented, *including the captains' additional duties set out in the April 1988 directives*. In finding that the captains did not exercise independent judgment, the Regional Director emphasized several factors, including, inter alia, the close contact between the shipboard crew and the Port Jefferson office, the "strong and active supervision" exercised by the Respondent's officials at the Port Jefferson office, the Respondent's "tight control" of operations and discipline, and the routine nature of the captains' limited assignment and direction of employees. Because the Respondent's operations have not changed, these factors continue to evidence the the captains' lack of authority to exercise independent judgment on behalf of the Respondent. Finally, the Regional Director also observed that if the Respondent's position were accepted, it would result in an "unrealistic" ratio of supervisors to employees because at the time of the hearing there were approximately 27 individuals in the bargaining unit and the Respondent proposed to assign supervisory duties to 10 of them, even while it was carrying on an effort to reduce the size of the crews. In these circumstances, I agree with the Regional Director's characterization of the proposed ratio as "unrealistic" and, as noted above, with the judge's characterization of it as "preposterous."

<sup>6</sup>The Regional Director issued his decision on September 29, 1989. The Respondent first proposed to assign supervisory duties to the captains, mates, and chief engineers during bargaining for the 9-month contract that ran from June 15, 1989, to April 3, 1990. The Respondent did not, however, insist on its proposal at that time. It was only during the negotiations for the following contract, *after* the petition had been dismissed, that the Respondent introduced its proposal and implemented it after bargaining to impasse.

sis added.) The majority's assumption—that the Respondent's proposal to assign specific 2(11) duties to the captains, mates, and chief engineers was merely a continuation at the bargaining table of its bona fide efforts to improve vessel maintenance and operation as embodied in the April 1988 directives—is inconsistent with the Regional Director's finding that the captains were not statutory supervisors.

I would find, as did the judge, that the Respondent's proposal was not a continuation of bona fide efforts to improve operations, but a continuation of its effort to exclude the captains, mates, and chief engineers from the bargaining unit. Losing before the Board, the Respondent pursued its strategy at the bargaining table by salting the captain's, mate's, and chief engineer's job descriptions with specific 2(11) duties, duties it had not included in either its April 1988 directives or in its unit clarification petition. For these reasons, I would find that the Respondent's proposal was a sham and that the Respondent violated 8(a)(5) by bargaining to impasse over the alteration of the scope of the unit, a permissive subject of bargaining.<sup>7</sup>

I also agree with the judge that the Respondent's conduct in offering its sham proposal was unlawfully motivated because its purpose was to reduce and weaken the bargaining unit, not to improve operations. Thus, I would find that it was discriminatory and therefore violated Section 8(a)(3). I believe that the judge's analysis of this issue, including, *inter alia*, the long-established bargaining unit that included the captains, mates, and chief engineers, and the lack of objective consideration that would now warrant their removal from the unit, requires such a finding. I would find that the Respondent violated the Act as alleged and would affirm the judge's decision.<sup>8</sup>

<sup>7</sup>The majority's reliance on *Luther Manor Nursing Home*, 270 NLRB 949 (1984), and *Lutheran Home*, 264 NLRB 525 (1982), is misplaced because, contrary to the majority's assertion, the situations in those cases are not "comparable to that here." In *Luther Manor Nursing Home*, *supra*, the Board found that the respondent's promotion of licensed practical nurses (LPNs) to supervisors was bona fide where the respondent demonstrated that more supervisors were needed, the LPNs had previously performed supervisory duties that would now be included in their job descriptions, and the LPNs received a 90-cent-per-hour wage increase to cover the added responsibilities. *Id.* at 959–960. In *Lutheran Home*, *supra*, the Board found the promotion of LPNs to supervisory positions was bona fide where the respondent demonstrated a need for increased supervision, the promoted LPNs would receive a 30-cent-per-hour wage increase, the LPNs were offered the promotions but not required to take them, and the promotions resulted in only 4 LPNs leaving a bargaining unit of 57 employees. *Id.* at 525–528. In the present case, by contrast, the Respondent has failed to demonstrate a need that requires the promotion of the captains out of the bargaining unit; the captains have not previously performed supervisory duties; the captains will receive no increase in wages to compensate them for their additional duties; and the Respondent's original proposal would result in 10 employees leaving a bargaining unit of 27 employees.

<sup>8</sup>I find it unnecessary to address the judge's finding that the Respondent violated Sec. 8(a)(5) by bargaining to impasse over the

wages of supervisors, a permissive subject of bargaining. The judge did not specifically include this issue in his Conclusions of Law and recommended Order and the resolution of the issue presented does not require its discussion.

*Elias Feuer, Esq.*, for the General Counsel.

*Kenneth A. Margolis, Esq.*, of New York, New York, for the Respondent.

*Albert M. Cornette*, of Staten Island, New York, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on an unfair labor practice complaint,<sup>1</sup> issued by the Regional Director for Region 29, which alleges that Respondent Bridgeport and Port Jefferson Steamboat Company<sup>2</sup> violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the complaint alleges that the Respondent bargained with the Union to impasse over a nonmandatory subject of bargaining, namely the assignment of supervisory duties to nonsupervisory employees, ferry boat captains, so that they would be excluded from an existing collective-bargaining unit, and that it did so for discriminatory reasons which violate Section 8(a)(3) of the Act. The Respondent admits that it bargained to impasse over the disputed subject but denies its proposal to assign supervisory functions to ferry boat captains was a mandatory subject of bargaining. It insists that its proposal in this regard was prompted solely by business considerations. The issues here were joined on these contentions.<sup>3</sup>

### FINDINGS OF FACT

#### I. THE UNFAIR LABOR PRACTICES ALLEGED

For many years the Respondent corporation has operated a ferry boat or boats which cross Long Island Sound from Port Jefferson, on the New York side to Bridgeport on the Connecticut side. Its boats, the *Grand Republic* and the *Park City*, carry automobiles and passengers who want to make a

<sup>1</sup>The principal docket entries in this case are as follows:

Charge filed by Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO (Union) against the Respondent on June 15, 1990, and amended on July 31, 1990, and again on August 21, 1990; complaint issued by the Regional Director for Region 29 against the Respondent on October 12, 1990, Respondent's answer filed on October 26, 1990; hearing held in Brooklyn, New York, on March 19–21, 1991; briefs filed with the me by the General Counsel and the Respondent on or before June 5, 1991.

<sup>2</sup>Respondent admits, and I find, that it is a Connecticut corporation which maintains its principal office and place of business at Port Jefferson, New York, where it is engaged, *inter alia*, in the transportation by ferry boat of passengers, vehicles, and freight between Port Jefferson, New York, and Bridgeport, Connecticut. In the course and conduct of this business, the Respondent performs transportation services valued in excess of \$50,000 outside the State of New York as a link in interstate commerce. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

<sup>3</sup>Certain errors in the transcript are noted and corrected.

shortcut from one city to the other, thereby avoiding a 4-hour automobile trip into and out of New York City. A one-way trip across Long Island Sound takes slightly more than an hour. The balance of the crew's time during each trip is spent in loading and unloading cars and cargo. Each boat carries about 1000 passengers and about 100 cars.

The boat service operates each day throughout the year although with much greater frequency in the summer and on weekends. Until 1986, the Respondent operated only the *Grand Republic*. It acquired the *Park City* in that year. Some of the time during the winter months one of the two boats is idle. In addition to the ferry service, the Respondent also operates charter cruises and moonlight cruises during the summer months. In the summer months, crews regularly work a great deal of overtime but in winter only the senior members of each crew work a full week. Each crew is normally composed of six or seven members, although additional personnel are required if there are more than 500 passengers aboard or if a boat is operating after 10 p.m. Crews usually work an 8-hour shift each day. Depending on the season and the day of the week, the first boat leaves the dock at 6 a.m. Boats operate at least till 9 p.m. and as late as 11 p.m. In addition to boat crews, the Respondent also employs dockhands at each port.

Respondent is owned by another shipping company known as McAllister Brothers, which had long maintained an interest in the Company. It acquired total ownership in 1982. Respondent maintains its office near the dock at Port Jefferson and operates under day-to-day supervision of Vice President and General Manager Frederick Hall. His immediate subordinates are Operations Manager or Port Captain John Alban and Port Engineer Mario Dezalic. Respondent has had a series of contracts with the Union, normally of 3-year duration, for nearly 30 years. Until recently, one of the standard provisions of these contracts was an exclusive hiring hall provision.

On June 24, 1988, the Respondent filed a unit clarification petition in the Regional Office in Brooklyn in which it sought to exclude from the bargaining unit captains, mates, and chief engineers employed on its two vessels. It claimed that they were statutory supervisors. Following 20 days of hearings which concluded on November 18, 1988, the Regional Director issued an exhaustive and detailed decision in which he dismissed the petition. (Case 29-UC-355, dated September 29, 1989.) His decision was affirmed by the Board on appeal in a decision dated May 2, 1990. While the Respondent was attempting to exclude captains, mates, and chief engineers from the bargaining unit through the processes of the Board, it was taking unilateral action and also making collective-bargaining proposals which would have the same effect.<sup>4</sup>

<sup>4</sup>In its brief, the Respondent insisted that it never proposed during negotiations that either captains or any other designations of company personnel be taken out of the bargaining unit and placed in some other unit. It further contended that it was quite amenable to negotiating with the Union concerning the wages, hours, and terms and conditions of persons who would, under its other proposals, become statutory supervisors. While true, the contention is also irrelevant, since, after becoming statutory supervisors, a class of persons who were formerly employees can no longer be part of a bargaining unit over which the Act has any jurisdiction or over which the Board can take any cognizance. Any bargaining unit subject to the Act can

The contract between the parties to this proceeding that was signed in 1985 expired on June 15, 1988, whereupon a new contract of 1 year's duration was concluded. At the expiration of this contract on June 15, 1989, a new 9-month contract was concluded that expired on April 3, 1990. There has been no contract between the parties since that date. All the events transpiring in this case took place against this background.

Shortly after Alban became operations manager in March 1988 and before the filing of the UC petition, Alban issued several memoranda to captains and crewmembers outlining the duties that he expected captains to perform. In a message sent to the crew of the *Grand Republic* on April 18, 1988, he stated that he was instituting a new program for the maintenance and care of the ferries which he said would be followed and executed by the captain of each crew. The program was to include a systematic plan for the maintenance and care of all deck areas. It required a weekly inspection of the deck area and contained threats to crewmembers who were not doing their share of the work with unspecified disciplinary action. Captains would be required to submit to the office each month a crew evaluation form commenting on the behavior and performance of each crewmember. These reports would be kept in each employee's personnel record. Crewmembers were informed that any one who did not intend to follow the captain's orders and do his share of work on board the vessel "should look for employment elsewhere."

A detailed memo was prepared and circulated on April 14, 1988. It stated that the captain of each vessel would be charged with the overall responsibility for the operation, maintenance, and safety of his vessel and would be held accountable for its performance and condition. Senior captains were called on to formulate a master plan for the general maintenance of each vessel. Captains were also called on to issue orders each day to the on deck crew regarding daily maintenance activities. A set of work rules was established, which carried with them disciplinary sanctions. One ground for disciplinary action was "disregarding or willfully disobeying the captains's order." Fitness report forms for crewmembers were prepared and given to each captain for submission to the office at the end of each month.

The response by the captains of the two vessels to these instructions was to ignore them, which they did without suffering any personal sanctions. No master plans for maintenance were prepared, no personnel evaluation forms were filled out, and no discipline was administered by captains to errant crewmembers.

Negotiations commenced for a renewal or extension of the existing 9-month agreement a few months after the Regional Director dismissed the UC petition. The first of 10 negotiating sessions took place on February 28, 1990.<sup>5</sup> Albert

only be composed of persons who lack indicia of supervisory authority. Any undertaking on the part of an employer or a union to negotiate a contract on behalf of others is wholly voluntary and outside the purview of collective bargaining, as that term is defined in the Act.

<sup>5</sup>Negotiating sessions took place on February 28, March 13, 20, and 28; April 2, 9, 17, 19, and 25; and May 3. All meetings, except the April 19 meeting with the Federal mediator, took place at a building on Battery Place in lower Manhattan which houses both the

*Continued*

Cornette was chief spokesman for the Union and Attorney Kenneth Margolis was chief spokesman for the Respondent. At the initial meeting, the Respondent submitted a proposal entitled "Employees Subject to Orders of Employer's Appointee," which came to be known as the job descriptions proposal. It had been rejected by the Union at the negotiating sessions in 1989 which lead to the adoption of the 9-month agreement that was about to expire. At that time, the Respondent did not press its position. During the 1990 negotiations, Respondent took a harder bargaining stance.

The original job descriptions proposal stated:

**CAPTAINS:** All captains employed by the Company shall exercise all of the authority and responsibility conferred upon them by maritime custom and law, shall have the authority and responsibility to hire employees in accordance with the hiring provisions of this agreement, to evaluate employees, to fire or otherwise discipline employees, to direct and assign all work on their vessels, and direct the operations of their vessels in the interest of the Company, and shall be obligated to exercise these responsibilities on behalf of the Company.

**MATES:** All mates employed by the Company shall have the authority and responsibility to hire deck department employees in accordance with the hiring provisions of this agreement, to evaluate such employees, to fire or otherwise discipline such employees, to direct and assign the work of such employees in the interest of the Company, and shall be obligated to exercise these responsibilities on behalf of the Company.

**CHIEF ENGINEERS:** All chief engineers employed by the Company shall have the authority and responsibility to hire engine room employees in accordance with the hiring provisions of this agreement, to evaluate such employees, to fire or otherwise discipline such employees, to direct and assign the work of such employees in the interest of the Company, and shall be obligated to exercise these responsibilities on behalf of the Company.

The Respondent admits that if these proposals had been accepted the three classes of employees involved would have become statutory supervisors. In addition to this proposals the Respondent also made a number of other proposals, relating to such subjects as insurance and pensions, holidays, overtime, grub money, vessel manning, and a revision of the existing contractual limitations on vessel tieups and crew changes. A new proposal advanced by the Respondent at this time was the elimination of the exclusive hiring hall provision in the existing contract.

The parties were at loggerheads over the subject of job descriptions from the very outset of negotiations. Cornette told Margolis that the Union was not going to negotiate something which had already been decided in the unit clarification proceeding, namely job descriptions. Margolis replied that he was not going to sign an agreement which did not contain the Company's job descriptions proposal. The subject came up again at every session. At the March 28 meeting the Company withdrew its proposal relating to the new job description for chief engineers, but continued to insist on its

Respondent's corporate offices and the Union's health and welfare trust fund office.

proposal relating to captains and mates. At that, time Margolis told Cornette that if the Union would agree on the pending job descriptions proposal other contract items would fall into place, but he insisted that if the Union failed to do so there would be no contract.<sup>6</sup> This statement turned out to be correct.

On or about April 9, the Respondent further revised its job descriptions proposal relative to captains and mates by eliminating the portion authorizing them to hire other personnel. However, it still retained the section permitting these classifications to discharge employees and to exercise the other functions set forth in the original proposal. Cornette suggested certain general wording to the effect that captains would operate vessels in accordance with company policy but he would go no further.

On May 8, 1990, Margolis wrote Cornette the following letter:

At our meeting of May 3, 1990, I stated that the Company is unwilling to make further improvements to its last proposal, which was set forth in my letters of April 6 and April 20, 1990. The Union once again rejected that proposal. At the conclusion of the meeting, I requested that you contact us in the event there is any change in the Union's position. Thus far, we have not heard from you.

This is to advise you that, in light of our current deadlock, the Company intends to implement immediately the following portions of its last proposal:

1. Wages. As you know, our proposal included both a 4% increase in the hourly rates of all current employees, and daily wage rates which would be applicable where the Company elects to operate on an hourly basis. We will be implementing the 4% increase as of the week of May 14, 1990.

2. Employees Subject to Orders of Employer's Appointee. Our proposal on this subject included job descriptions for both captains and mates. We are implementing the proposed job duties for captains now, and we expect to do so for mates in the future.

Margolis offered a 2-year contract at this point in exchange for agreement to the remaining job descriptions language, but Cornette refused. I credit Cornette's testimony that when the question came up again at the April 17 negotiations he asked Margolis if he would provide the Union a written statement to the effect that and if the Union agreed to the new job descriptions language the Company would not file a new unit clarification case with the Board seeking to exclude captains and others from the bargaining unit. Margolis refused. Other requests by Cornette for written assurance in this regard met with a similar refusal.

At the April 25 session, Margolis declared that the parties were at impasse. At the hearing both parties stipulated that, during negotiations, neither party changed its position on job descriptions after April 25, both parties modified their positions on other issues both before and after that date, and the

<sup>6</sup>At a previous meeting, the Company told the Union that it was contemplating the addition of a third boat and, for that reason, needed the latitude to tie up at night in Bridgeport as well as at Port Jefferson. Under previous practice, all tieups and crew changes had taken place at Port Jefferson. No new vessel has yet been acquired.

Respondent insisted, as a condition of reaching an overall agreement, that there be agreement on the Respondent's proposal relating to job descriptions as it lay on the bargaining table on that date.

On May 9, Hall sent a memo to all captains, which read:

We wish to restate and confirm what the Company expects of you as the master of its vessels.

As a general proposition, we expect all of our captains to exercise all of the authority and responsibility conferred upon them by maritime law and custom. This, of course, is a weighty responsibility. As supreme commander of the vessel, you are responsible for directing the operation of the vessel as a whole. In order for you to be able to carry out this responsibility, you have the authority and responsibility to evaluate the qualifications and work of the members of your crew, to discipline or discharge crew members, and direct and assign all work performed on your vessel.

We firmly believe that the safe and efficient operation of the vessels depends upon your fulfillment of these responsibilities, and we are counting on you to perform them.

The Respondent implemented the 4-percent across-the-board increase in wages which it had previously proposed, but no additional money was given to captains to compensate them for their new supervisory responsibilities.<sup>7</sup> Between the date of the announcement and the hearing in this case, which took place in April of the following year, the Company did not implement its proposal relating to the job descriptions of mates. On receipt of the above-quoted memo, the Respondent's captains refused to perform their newly assigned duties. The Respondent did not take any action against them for their disobedience, stating at the hearing that it did not wish to press this matter while the present litigation was pending. With the above-noted exception, the Union's membership has continued to work without a contract under the unilaterally implemented changes. On February 7 and March 5, 1991, additional bargaining sessions took place between the Union and the Respondent. However, these meetings did not produce agreement on any of the basic differences between the parties nor did either party modify the previous positions taken on any matters at issue in this case.

## II. ANALYSIS AND CONCLUSIONS

The General Counsel characterizes the dispute in question as bargaining to impasse over the question of modifying the scope of a bargaining unit. Because modifying the scope of a unit is a nonmandatory subject, it is an unfair labor practice for an employer to condition agreement on a union's willingness to agree to such a change. He cites several cases in support of this proposition. *Bozzutto's, Inc.*, 277 NLRB 977 (1985); *Salt River Valley Water Users*, 204 NLRB 83 (1973). On the other hand, the Respondent characterizes the dispute here in question as bargaining to impasse over the subject of assigning supervisory duties to bargaining unit personnel, a move which takes such personnel from the unit and thereby impacts unit work. Such subjects are mandatory subjects of bargaining, on which proposals may be made and

lawfully pressed to impasse because the erosion of bargaining unit work affects wages, hours, and terms and conditions of employment within the unit. It cites several cases to support this proposition of law. *Tesoro Petroleum Corp.*, 192 NLRB 354 (1971); *Kendall College*, 228 NLRB 1083 (1977); *Fry Foods*, 241 NLRB 76 (1979), enfd. 607 F.2d 267 (6th Cir. 1979). Taking work out of a bargaining unit and reassigning that work either to supervisors or subcontractors is a mandatory subject of bargaining because of the obvious impact of such actions on job opportunities within the unit. *Long Island Nursing Home*, 297 NLRB 47 (1989). The results of a case should not turn on how legal issues are framed; especially where, as here, an element of both propositions of law is involved in what the Respondent in fact did during the 1990 negotiations.

A proposal to assign supervisory duties to existing bargaining unit personnel has the intended effect of removing work from the unit because nonunit personnel, namely the newly created supervisors, will henceforth perform bargaining unit duties in addition to their supervisory functions. Because the proposal affects unit work, it is a mandatory subject. Such a proposal must be distinguished from two closely related situations which involve the negotiation of non-mandatory subjects of bargaining. Negotiations over the selection of supervisors, where the result is to remove an individual from a unit job slot to a preexisting supervisory job slot—in short, a promotion—is a nonmandatory subject of bargaining because an employer is wholly free under the Act to select its own supervisors. *KONO-TV Mission Telecasting Corp.*, 163 NLRB 1005 (1967); *Wincharger Corp.*, 172 NLRB 83 (1968). The decision to create new supervisory positions and to staff them by the promotion of individuals from the bargaining unit, where the eventual if not immediate effect is to hire other employees to replace the promoted supervisors, is not a mandatory subject of bargaining because the effect of such action does not impinge on unit work. Such situations, occurring typically when a company is undergoing rapid and substantial expansion, leaves bargaining unit work intact while providing a new supervisory superstructure separate and apart from the expanded unit itself. *St. Louis Telephone Employees Credit Union*, 273 NLRB 625 (1984); *Wincharger Corp.*, supra. The decisions in these cases presume, even if they do not articulate, the legal proposition set forth above. A supervisor cannot be a part of a statutory bargaining unit even if the parties agree that he may remain and further agree to bargain over his wages, hours, and terms and conditions of employment, because the only bargaining units over which the Board may take cognizance are those composed exclusively of employees as defined in Section 2(3) of the Act. Respondent's action in filing a UC petition implicitly acknowledged this proposition.

In this case, the Respondent tried long and hard to remove captains, mates, and chief engineers from a long-existing bargaining unit by the contention that their existing duties in fact made them supervisors and hence ineligible to be a part of a statutory unit. The Regional Director and the Board found to the contrary and directed that they remain a part of the unit because, in fact, they were not supervisors. These determinations are not subject to collateral attack in this proceeding and must perforce provide the starting point for any rationale advanced to resolve the issues here. *Highland Ter-*

<sup>7</sup>The Company also implemented its proposal eliminating the exclusive hiring hall provision in the earlier contract.

*race Convalescent Center*, 233 NLRB 87 (1977). It is abundantly clear that what the Respondent was attempting to accomplish in negotiations during the spring of 1990 was to win at the bargaining table what it had lost (or was in the process of losing) before the Board. In determining the existence, vel non, of a violation of Section 8(a)(5) of the Act, it is immaterial if a respondent's motive in taking a position during bargaining was prompted solely by business considerations or by some underlying discriminatory intent. Rather, the question presented is whether it may bargain as it did in this context for any reason at all.

The Respondent's initial proposal to assign supervisory duties to unit personnel involved three employees aboard each of its two vessels. If accepted, its supervisory hierarchy in each instance would mean that three individuals would be exercising supervisory authority over four or five rank-and-file employees, depending on the ship's complement on any given day. The effect would be a 1-to-1 or 1-to-2 ratio of supervisors to employees. Its revised proposal, eliminating chief engineers from supervisory responsibility, would result in a 1-to-2 or 1-to-3 ratio of supervisors to unit employees on each vessel. Such ratios are preposterous, and a long line of Board precedent would clearly preclude such a result in determining supervisory status.

Moreover, nothing in the Respondent's proposal, as originally made or as eventually implemented, provided for the removal of supervisors from the ranks of its hourly rated personnel by the assignment of annual salaries. While salaried status, as distinguished from hourly rated status, is not a sine qua non of supervisory rank, the Respondent's proposal also provided that all newly created supervisors would continue to receive time-and-a-half for overtime just as they did as unit employees. Receipt of overtime premiums is a further indicia of rank-and-file status. In the case of the Respondent's employees, overtime has been and remains an important part of every seagoing employee's compensation package, especially during the busy summer months. More importantly, the Respondent's proposal did not provide for any increase in compensation to captains and mates, whether by hourly wages or by salary, for increased supervisory responsibilities, referred to by Hall in his May 9 memo as the "weighty responsibilities" of the "supreme commander" of the vessels.<sup>8</sup> All that they received was an across-the-board 4-percent wage increase which every other employee received as well. In *KONO-TV Mission Telecasting Corp.*, supra, the Board looked to the award of increased compensation for new supervisory duties in order to determine whether the newly created classification was truly a supervisory position or whether a proposed change amounted merely to the retitling of an old job. No monetary recognition for new responsibilities can be found in any of the Respondent's bargaining proposals.

In light of these objective considerations, the Respondent's proposal to transform captains and mates into supervisors was a sham, quite apart from any considerations of motive. Taken in the context of the still pending UC case, it came as part of a two-pronged effort to remove these classifications from the bargaining unit, one effort being made in a Board proceeding and the other at the bargaining table. Accordingly, the General Counsel's framing of the issue in the

<sup>8</sup>In a letter to Cornette, dated April 2, 1990, Margolis referred to the responsibilities of a ship's captain as "awesome."

case is the accurate one. The Respondent's proposal was designed to alter the scope of an existing bargaining unit. The substance of the proposal—to invest unit employees with new supervisory functions—was merely a means to this end. Because Respondent's proposal was so designed, it was merely a permissive, not a mandatory, subject of bargaining on which it was not free to insist to impasse and on which it was not free to act unilaterally and apart from a proceeding undertaken pursuant to Section 9 of the Act. On April 25, the Respondent violated Section 8(a)(1) and (5) of the Act by conditioning approval of a contract on the Union's acceptance of its proposal on this nonmandatory subject.

The Respondent was also bargaining with the Union over wages, hours, and terms and conditions of supervisory employees. The amount it offered for captains and mates was 4-percent increase, the same amount it offered to rank-and-file employees. At the deadlock on April 25, the Respondent was, in effect, conditioning the acceptance of a contract on the Union's agreement to a wage proposal for supervisors, a subject which is plainly nonmandatory. By conditioning acceptance of the contract to the Union's agreement concerning a wage increase for supervisors, the Respondent again violated Section 8(a)(1) and (5) of the Act.<sup>9</sup>

The complaint also alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by attempting to exclude unit personnel from the bargaining unit through the device of transforming them into supervisors. The Respondent is quite correct in contending that there is no independent evidence of animus in the record of this case, a factor relied on by the Board in other cases to strike down, as discriminatory, bargaining proposals aimed at creating supervisory positions.

However, the absence of animus does not foreclose an inquiry into whether the Respondent was guilty of discriminatory bargaining. As found above, the bargaining proposal which gave rise to this litigation was and remains a sham. Its predominant purpose was and remains to exclude certain unit employees, who now enjoy the protections of Sections 7 and 8 of the Act, from continuing to enjoy any of those statutory protections. As supervisors, they would have no guaranteed right to strike, no legal right to union representation, and would be available, in the event of a strike, to operate the Respondent's business behind a picket line. From the Union's standpoint, the removal of captains and mates from the unit would mean not only a smaller and less powerful unit; it would also mean that the Union would no longer be in a position to require their inclusion under the union-security clause or to insist that their dues be checked off. This wholesale change in status of key unit employees was advanced for the first time in 1988 after these employees had been part of the bargaining unit for nearly 30 years. The timing of this proposed change did not coincide with any discernible objective event or cause, such as the rapid expansion of the Company, the imposition of new and burdensome government regulations, or a disaster that brought into focus the inadequacies of its previous supervisory hierarchy. The only perceptible event which occurred in conjunction with the filing of the UC petition and the advancement of these new job

<sup>9</sup>There is no merit to the Respondent's contention that it cannot be found guilty of such a violation because the precise violation was not specifically alleged in the complaint. The issue was raised at the hearing and was fully litigated.

description proposals was the hiring of a new operations manager.

It is not the province of the Board to pass on the wisdom of business justifications advanced by the Respondent in support of its bargaining position or to second-guess its judgment, but the Board has every right to inquire into the bona fides of its assertion that business judgment and not something else was what prompted its bargaining posture. In this case, the Respondent relied on a great deal of florid rhetoric to the effect that the captain is the supreme commander of the ship and that lives and property are at stake whenever he takes the helm, but thus it has always been. The Respondent notes that it received about 50 to 60 letters a year from its more than 600,000 passengers, complaining about either the cleanliness of the ships or the surliness of an employee, but it also admits that it has never investigated any of these complaints. Here, again, complaints of this kind are nothing new, but the Respondent now relies on them to explain a bargaining proposal which has been seriously disruptive of its relations with a union which has represented its employees for nearly 3 decades. Once it took unilateral action and directed captains to assume their new supervisory functions, its captains flatly refused to do so and the Respondent took no action to enforce its directive, stating that it preferred to await the outcome of this case before taking disciplinary action aimed at forcing compliance with its proposal. Its year-long declination to risk any adverse reaction in bringing about assertedly needed supervisory changes is at least some indication that these changes were not prompted by quite the degree of necessity that its rhetoric would suggest. In short, Respondent's job descriptions proposal and its memos ostensibly putting one of them into effect worked a serious and adverse consequence to the statutory rights of affected employees, impinged on the Union's bargaining status, and were timed to coincide with no objective events necessitating their implementation. And when push came to shove, the Respondent backed away from forcing them into effect, notwithstanding the dire necessity it claimed had warranted making the proposal in the first place.

The business justification for the proposed issue and its implementation involved considerations which, if they had any validity, addressed matters which were no different in kind or degree from those with which the Company had been faced for 30 years and which it was content, until 1988, to handle by employing captains, mates, and chief engineers as rank-and-file union members. In light of these circumstances, I conclude that the Respondent's asserted reasons for making and implementing its job descriptions proposal were not its real reasons and that its real reason was the revision of the bargaining unit, the paramount result of which was to strip several employees of their rights under the Act. Accordingly, I conclude that by advancing and implementing the proposals in question, the Respondent here violated Section 8(a)(1) and (3) of the Act. Because these issues came to deadlock on April 25 in the context of unfair labor practices, the Respondent was not privileged to implement them unilaterally, as it did, even if they might be deemed mandatory subjects of bargaining. *Nu-Southern Dye & Finishing Co.*, 179 NLRB

573 (1969); *Cypress Lawn Cemetery Assn.*, 300 NLRB 609 (1990).

On these findings of fact and on the entire record, considered as a whole, I make the following

#### CONCLUSIONS OF LAW

1. Respondent Bridgeport and Port Jefferson Steamboat Company is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All licensed and unlicensed employees, including captains, pilots, mates, engineers, oilers, able-bodied seamen, and ordinary seamen, employed by the Respondent on its vessels operating between Bridgeport, Connecticut, and Port Jefferson, New York, and on charter and excursion trips operating from those ports, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is the exclusive collective-bargaining representative of all employees in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By insisting to impasse on nonmandatory subjects of bargaining and by unilaterally implementing proposals in derogation of the integrity of the existing collective-bargaining unit, the Respondent has violated Section 8(a)(5) of the Act.

6. By the acts and conduct set forth above in Conclusion of Law 5, undertaken for the purpose of excluding employees from the bargaining unit and removing from them the protections of the Act, the Respondent has violated Section 8(a)(3) of the Act.

7. The aforesaid unfair labor practices constitute a violation of Section 8(a)(1) of the Act and have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend to the Board that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I will recommend that the Respondent be required to withdraw its job descriptions proposal from negotiations and that it rescind any orders or instructions it has issued implementing those descriptions. I will also recommend that the Respondent be required to post the usual notice, informing its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]