NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Riverboat Services of Indiana, Inc. *and* Thomas Trundy *and* Thomas Goodridge *and* Adam Doncet *and* Robert Palmer, Jr. Cases 13–CA–36708, 13–CA–36735, 13–CA–36758, 13–CA–36764

November 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 23, 1999, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a brief in response to the General Counsel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

In its exceptions to the judge's finding that it violated Section 8(a)(1) of the Act by discharging the Charging Parties, the Respondent argues, inter alia, that the complaint should be dismissed because the Charging Parties, who were employed as assistant chief engineers on the Respondent's motor vessel, *Showboat Mardi Gras*, were supervisors under Section 2(11) of the Act. We disagree. On May 29, 2001, the Supreme Court issued *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, in which, inter alia, it upheld the Board's rule that the burden of proving 2(11) supervisory status rests with the party asserting it. Id. at 711–712. We agree with the judge that the Respondent has failed to meet this burden.

In support of its contention that the assistant chief engineers were statutory supervisors, the Respondent relies on the description of their duties as set forth in its handbook. According to the handbook, these duties included being "responsible to the Chief Engineer for the training and discipline of his unlicensed crew [and] directi[ing] and manag[ing] unlicensed crew in their duties."[3] However, this handbook description, by itself, is not sufficient to establish that these individuals were in fact statutory supervisors. Rather, the Respondent has the burden to prove that the assistant chief engineers exercised independent judgment in carrying out such duties. See *Capri Sun, Inc*., 330 NLRB 1124, 1132 (2000). We find that the Respondent has failed to adduce any evidence that the assistant chief engineers exercised independent judgment in disciplining, managing, or directing the work of unlicensed crew or in standing watch.

To the contrary, the record shows that their authority was limited and circumscribed. Indeed, as to discipline, the record contains no probative evidence that their involvement in discipline went beyond referring any problems to their superiors.

Moreover, although the Charging Parties (the assistant chief engineers at issue) testified that unlicensed engine room employees would be expected to follow their instructions, the record shows that such employees' duties were limited to routine maintenance and repair and were directly supervised by the chief engineer. As the judge noted, when the Charging Parties were discharged, only one such employee was assigned to each shift, so that the Respondent's contention that the assistant chief engineers were supervisors depends on a finding that each unlicensed engine room employee has two supervisors.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In excepting to the judge's finding that the August 11 and October 10, 1997 letters to the Coast Guard signed by the Charging Parties constituted protected concerted activity, the Respondent notes, inter alia, that the consolidated complaint refers only to the October 10 letter. We find that the August 11 letter was an integral part of the appeal to the Coast Guard to restore the requirement that engineers on the vessel have unlimited licenses, and that this issue was fully litigated at the hearing.

Chairman Battista does not pass on whether both letters can be found protected where, as here, only one of them is alleged as protected in the General Counsel's complaint. However, Chairman Battista agrees that the discharge would be unlawful without regard to the August 11 letter.

[2] We will modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co*., 335 NLRB 142 (2001).

We will substitute a new notice in accordance with *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001).

[3] In rejecting the Respondent's reliance on the employee handbook, the judge noted, among other things, that the duties and responsibilities set forth therein do not overlap the supervisory functions set out in Sec. 2(11). Assuming that the duties and responsibilities listed in the employee handbook do overlap the supervisory functions listed in Sec. 2(11), the judge's finding to the contrary does not affect our decision, as we agree that the Respondent has failed to show that the assistant chief engineers exercised independent judgment in dealing with unlicensed engine room employees.

In addition, as the judge noted, the Respondent has failed to specify, through documentary evidence or probative testimony, any directions an assistant chief engineer would give an unlicensed employee involving a deviation from well-established routine. Without evidence that direction of the work of unlicensed employees involved independent judgment and responsibility, the Respondent's argument that the assistant chief engineers' direction of crew members demonstrates supervisory authority must fail. *Chevron Shipping Co.*, 317 NLRB 379, 381–382 (1995) (cited with approval in *Kentucky River*, supra, 532 U.S. at 714) (junior officers' supervisory status was not established, as the employer failed to provide details supporting assertions that they responsibly directed unlicensed personnel).

Finally, although assistant chief engineers were expected to take charge of the engine room when the chief engineer was absent, they did not regularly stand watch without a chief engineer, and the chief engineer on watch was rarely absent from the vessel and was accessible by telephone or radio at all times. Such limited authority does not establish supervisory status. *Chevron Shipping Co.*, supra, 317 NLRB at 381 (junior licensed officers are not supervisors, where, inter alia, superior officers are constantly present or available).[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Riverboat Services of Indiana, Inc., East Chicago, Indiana, its officers, agents, successors, and assigns, shall take the action in the recommended Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees by telling them that other employees have been discharged for engaging in activities that are protected by Section 7 of the Act.

WE WILL NOT discharge our employees for engaging in activities that are protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of this Order, offer Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

[4] The Respondent argues that the judge erred by "fail[ing] to consider" the testimony of Rolle DuCote, the Respondent's port captain, that an assistant chief engineer can be in sole charge of the engine room when the vessel sails out and can handle disciplinary problems with a crew member on his own. We disagree. With respect to the first point, DuCote testified that the vessel cannot sail without a chief engineer. Thus, his testimony was consistent with the judge's findings. With respect to the latter point, DuCote's testimony regarding the purported authority of assistant chief engineers to discipline unlicensed crewmembers was devoid of detail as to whether such authority involved the exercise of independent judgment. *Chevron Shipping Co.*, supra, 317 NLRB at 381.

WE WILL make Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer whole for any loss of earnings or other benefits that they have suffered as a result of their unlawful discharges, with interest.

WE WILL, within 14 days from the date of this Order, expunge from our files any reference to the discharges of Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against them.

RIVERBOAT SERVICES OF INDIANA, INC.

Richard D. Andrews, Esq., for the General Counsel.
Julia D. Mannix, Esq., of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me in Chicago, Illinois, on July 26 and 27, 1999. On January 14, 21, 23, and 29, 1998, the charges in Cases 13–CA–36708, 13–CA–36735, 13–CA–36758, and 13–CA–36764 were filed by individuals Thomas Trundy, Thomas Goodridge, Adam Doncet, and Robert A. Palmer Jr., respectively, alleging that Riverboat Services of Indiana, Inc. (the Respondent) had violated Section 8(a)(1) of the Act by discharging the Charging Parties in January 1998, because they had engaged in certain concerted activities that are protected by Section 7 of the Act; to wit: contacting a governmental agency in an attempt to better their terms and conditions of employment. Based on those charges, the General Counsel issued a complaint on October 23, 1998. The Respondent filed an answer admitting that this matter is properly before the National Labor Relations Board (the Board), but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[1] and upon my observations of the demeanor of the witnesses,[2] and after consideration of the briefs that have been filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

As it admits, at all material times the Respondent, an Indiana corporation, with an office and place of business in East Chicago, Indiana (the Respondent's facility), has been engaged in the business of providing management services to the casino gambling vessel *Showboat Mardis Gras* by providing personnel to operate the vessel. During the 12-month period ending September 30, 1998, the Respondent, in conducting the business operations, performed services valued in excess of $50,000 in states of the United States other than Indiana. The Respondent is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The *Showboat Mardis Gras* is a casino boat that docks in East Chicago and occasionally sails on to Lake Michigan. The vessel carries up to 4250 persons at a time. The supervisors and employees of the Respondent are not involved in the operation of the casino that is on the vessel; supervisors and employees of another employer operate the casino. The Respondent's supervisors and employees are involved only in the maintenance and operation of the vessel. Although the casino is not operated between the hours of 5 and 9 a.m., the vessel itself is in operation 24 hours a day, 7 days a week. The Respondent's operation is staffed by crews that work 8 hours a day; therefore, each day's operations requires three crews. The Respondent maintains a total of six crews at a time to perform the operation of the vessel. (The vessel itself is sometimes referred to as the "*M/V Showboat Mardis Gras*" to indicate its Coast Guard designation as a motor vessel, as opposed to a sail vessel.)

Overall responsibility for the daily operation of the vessel is that of the captain (or master). The operation under the captain is divided into two departments, the deck department and the engine department. The deck department operates under a mate (not "first mate," because there is no "second mate" in the Respondent's operation). The engine department consists of the engine room and electrical and mechanical facilities of the vessel, and it is headed by the chief engineer (who is essentially autonomous, but who ultimately reports to the captain). Immediately subordinate to the chief engineer in the engine department is the assistant chief engineer. (The four Charging Parties in this case were assistant chief engineers at the times of their discharges.) The captain, the mate, the chief engineer, and the assistant chief engineer are the only ship's personnel who are licensed by the United States Coast Guard, and those four officers are collectively referred to as the "licensed officers" of the vessel. Until December 1997, each of the Respondent's six crews consisted of 20 nonlicensed personnel in addition to the 4 licensed officers. Until December, the nonlicensed personnel included 18-able-bodied and ordinary seamen in the deck department and an oiler and a wiper in the engine department. In December, however, the Respondent discontinued the employment of employees in the classification of wiper. Therefore, in January, the month in which the Charging Parties were discharged, the Respondent employed six crews, each consisting of 4 licensed officers and 19 nonlicensed personnel.

During 1997, several of the licensed officers of the *Showboat Mardis Gras* engaged in concerted activity. In January 1998, several of those licensed officers, including the four Charging

[1] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, *and that restarting is meaningless*, I sometimes eliminate redundant words; *e.g.*, "Doe said, he mentioned that . . ." becomes "Doe mentioned that . . .". In my quotations of the exhibits, I sometimes simply correct *meaningless* grammatical errors rather than use "[sic]." Some extraneous usages of "you know" are omitted.

[2] Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

Parties, were discharged.[3] Charges under Section 8(a)(1) of the Act were filed on behalf of some of the licensed officers who engaged in the concerted activities, including the four Charging Parties. On the ground that they were supervisors within Section 2(11) of the Act, the General Counsel declined to issue complaints on behalf of the discharged captains, mates, and chief engineers who had engaged in the protected activities and were discharged; the General Counsel did, however, issue the instant complaint on behalf of the Charging Parties who, again, were assistant chief engineers. The complaint herein alleges that the Charging Parties were employees whose concerted activities were protected by the Act, that they were discharged because of those protected concerted activities, and that by those discharges the Respondent violated Section 8(a)(1). For purposes of this case only, the parties stipulated that the Respondent's captains, mates, and chief engineers are supervisors. The Respondent admits that it discharged the Charging Parties, but it contends that they were supervisors at the times of those discharges; it contends, therefore, that the activities of the Charging Parties could not have been protected by the Act and that their discharges could not have been a violation of it. Alternatively, the Respondent contends that the Charging Parties were discharged for reasons other than their concerted activities. The Respondent further contends that, even if the assistant chief engineers were employees, and even if they were discharged for engaging in concerted activities, it did not violate Section 8(a)(1) by discharging them because their activities were not protected by Section 7; the Respondent contends that the concerted activities of the Charging Parties were not protected because they did not give it notice of their grievances before they engaged in their concerted activities over those grievances. Finally, the Respondent denies knowledge of one of the Charging Parties' concerted activity at the time that it discharged him.

A. Evidence Presented by the General Counsel

As a United States motor vessel that carries passengers commercially, the *Showboat Mardis Gras* is required to possess a certificate of inspection by the Coast Guard. A certificate of inspection details, inter alia, the minimum number of crew members and their Coast Guard license qualifications. For captains, mates, and engineers (chief and assistant chief), the highest license qualification status is "unlimited." With an unlimited license, a captain, a mate, or an engineer may lawfully work on vessels without restrictions according to vessel tonnage, horsepower, or passenger capacity and without restriction to certain waters in Coast Guard jurisdiction. An officer who has not received an unlimited license from the Coast Guard may receive a "limited license" which restricts the individual to working on ships with stated restrictions on tonnage, horsepower or passenger capacity, or restrictions on the waters in which the officer may work. When the *Showboat Mardis Gras* first sailed in late 1996 or early 1997, its certificate of inspection required that all captains, mates, and engineers have unlimited licenses. At some time in the spring of 1997, however, the Coast Guard changed the certificate of inspection of the *Showboat Mardis Gras* to allow its owners to employ and utilize engineers who held only limited licenses.[4] The Charging Parties credibly testified that the lowering of the license requirements concerned them because they feared that the change could affect both safety and their future earnings. It is undisputed that engineers who have unlimited licenses generally make greater wages than engineers who have only limited licenses.

Until January 6, Michael Gaffney was a chief engineer (and therefore a supervisor) on the *Showboat Mardis Gras*. During 1997, Gaffney, who did not testify, circulated among certain of the Respondent's captains, mates, and engineers two letters that requested the Coast Guard to reinstate the requirement of the original certificate of inspection that all engineers (chief and assistant chief) have unlimited licenses. The first letter, dated August 11, states, inter alia: "We feel that the lowering of licensing standards substantially reduces passenger safety by not requiring experienced personnel to crew the vessel." The letter asks for detailed information of how the Coast Guard could have come to lower the licensing requirement for *Showboat Mardis Gras*. The August 11 letter was signed by 12 of the Respondent's captains, mates, and engineers, including Gaffney and Charging Parties Goodridge, Doncet, and Palmer (but not Trundy). Headquarters of the Coast Guard treated the August 11 letter as a request to change the certificate of inspection back to requiring unlimited licenses, and it referred the request to a Chicago-based marine inspection officer. That officer denied the request by letter dated August 26.

Gaffney's second letter to the Coast Guard requesting reinstatement of the unlimited-license requirement for engineers on the *Showboat Mardis Gras* was dated October 10. Four pages long, the letter appeals the inspection officer's August 26 denial of the August 11 request. The October 10 appeal concludes that granting the appeal, and again requiring the *Showboat Mardis Gras* to have only engineers who possessed unlimited licenses: ". . . would ensure that any future engineers would have a minimum level of experience to operate this vessel safely." The appeal was signed by 16 captains, mates, and engineers including Gaffney and Charging Parties Goodridge, Palmer, and Trundy (but not Doncet). The Coast Guard's Chicago-area officer-in-charge of marine inspections, by letter dated October 31, denied the October 10 appeal. On November 17, Gaffney filed an appeal of that denial to the Coast Guard's district commander. (Only Gaffney signed the November 17 appeal.) On December 19 the Coast Guard's district commander granted Gaffney's appeal. The above documents do not show that copies were sent to the Respondent, but by letter dated December 31, the Coast Guard's officer-in-charge of marine inspections notified the Respondent:

> Currently a clause in the Certificate of Inspection (COI) for the M/V SHOWBOAT permits an individual holding a license as Chief Engineer Limited or Assistant Engineer Limited to serve as Chief Engineer or Assistant

[3] Unless otherwise indicated, all dates subsequently mentioned are between February 1, 1997, and January 31, 1998.

[4] Just why the Coast Guard made this change was not proved. As discussed infra, the Respondent favored the change, whether it requested it or not.

Chief Engineer, respectively. As a result of a recent appeal regarding this manning level, this endorsement must be removed from your COI.

Therefore, the M/V SHOWBOAT is required to carry only engineers with unlimited licenses. An amended COI is enclosed with the clause in question removed. In order that you may adjust to this new arrangement, I will allow you to delay compliance with this new manning scale until March 15, 1998.

During January 1998, the Respondent discharged 12 of the 18 captains, mates, and engineers who signed either or both of Gaffney's August 11 and October 10 letters to the Coast Guard. In alphabetical order, the captains, mates, and engineers who signed either or both of the letters, and the dates that any of them were discharged, are:

(1) Mate Ed Anderson signed only the October 10 letter and was discharged on January 7.

(2) Mate Robert Bearden signed only the October 10 letter and was discharged on January 6.

(3) Captain Thomas Bell signed only the October 10 letter and was discharged on January 6.

(4) Assistant Chief Engineer Adam Doncet (a Charging Party) signed only the August 11 letter and was discharged on January 22.

(5) Chief Engineer Michael Gaffney signed both letters and was discharged on January 6.

(6) Assistant Chief Engineer Thomas Goodridge (a Charging Party) signed both letters and was discharged on January 14.

(7) Captain Steve Habelmehl signed both letters but was not discharged.

(8) Mate Dean Horton signed only the August 11 letter and was discharged on January 15.

(9) Chief Engineer Dwane Hunt signed both letters but was not discharged.

(10) Mate Eric James signed both letters but was not discharged.

(11) Mate Mark LaValley signed both letters but was not discharged.

(12) Assistant Chief Engineer Derek Melanson signed only the October 11 letter but was not discharged.

(13) Captain Dennis Myatt signed both letters and was discharged in January, but the exact day was not established.

(14) Assistant Chief Engineer Robert Palmer (a Charging Party) signed both letters and was discharged on January 23.

(15) Chief Engineer Neil Reilly signed both letters but was not discharged.

(16) Captain James A. Stemwedel signed both letters and was discharged in January, but the exact day was not established.

(17) Assistant Chief Engineer Thomas Trundy (a Charging Party) signed only the October 11 letter and was discharged on January 8.

(18) Chief Engineer Robert Wood signed only the October 11 letter and was discharged on January 28.

That is, in January, of the Respondent's 24 licensed officers (again, 4 per crew on 6 crews), the Respondent discharged 12. Each of those 12 discharged licensed officers had signed either Gaffney's August 11 letter or Gaffney's October 10 letter to the Coast Guard requesting reinstatement of the unlimited-license requirement for engineers on the *Showboat Mardis Gras.* Six of the 18 licensed officers who signed either of Gaffney's letters to the Coast Guard were not discharged. Of the five assistant chief engineers who signed either letter, only Melanson was not discharged.

Bobby Heitmeier is the Respondent's president. Thomas Gourguechon is the Respondent's director of marine operations. Gaffney was notified of his January 6 discharge by a letter of that date from Gourguechon and Heitmeier stating:

> You are hereby notified upon receipt of this notice that your employment as chief engineer on the M/V Showboat is terminated. This termination is effective immediately. The reasons given for this termination are as follows:
>
> Unauthorized communication and correspondence with regulatory bodies having jurisdiction over the operation of the vessel. Unauthorized correspondence and the regulator's response has had a material adverse effect on the company's ability to efficiently run its business.

Charging Party Goodridge testified that on January 10 or 11, after Trundy and several others had been discharged (as listed above), he encountered Chief Engineer (and admitted supervisor) Robert Gates as Gates was leaving work and Goodridge was coming on duty. According to Goodridge:

> He [Gates] said that he didn't want to see anybody else get fired, and then he turned and he walked out the door, and he said, "but Trundy . . . signed the Coast Guard letter."

Based on this testimony by Goodridge, the complaint alleges that, in violation of Section 8(a)(1), the Respondent, by Gates, impliedly threatened its employees with discharge because they had engaged in protected concerted activities. The Respondent did not call Gates to deny this testimony by Goodridge, and I found the testimony credible.

Gourguechon discharged each of the four Charging Parties, or he had one of the captains to do it. Each of the four Charging Parties was given a memorandum from Gourguechon and Heitmeier (the Gourguechon-Heitmeier memorandum) stating:

> You are hereby notified upon receipt of this notice that your employment as assistant chief engineer on the M/V Showboat is terminated. This termination is effective immediately.

Unlike the Respondent's memorandum to Gaffney, none of the memoranda to the Charging Parties stated reasons for the discharges that they announced. About their individual discharge interviews: (1) Goodridge testified that Gourguechon approached him at the start of his shift and told him: "You've won the lottery." Gourguechon handed Goodridge the Gourguechon-Heitmeier memorandum and asked Goodridge for his employee identification badge. (2) Palmer testified that one Captain Scully only told him not to punch in and gave him the

Gourguechon-Heitmeier memorandum without further comment. (3) Doncet testified that Gourguechon approached him at the start of his first shift after having been off for 21 days; Gourguechon asked Doncet if he was "Adam," and Doncet replied that he was. Gourguechon then handed Doncet the Gourguechon-Heitmeier memorandum; when Doncet asked why he had gotten no warning of his impending discharge, Gourguechon replied that he had learned that Doncet was to be discharged only that morning. Doncet asked Gourguechon if Gourguechon would give him a recommendation to another employer, and Gourguechon replied that he would and gave Doncet his business card. (4) Trundy testified that when he arrived at work he was met by Gourguechon; Chief Engineer (and supervisor) Neil Reilly was also present. Gourguechon handed Trundy the Gourguechon-Heitmeier memorandum in an envelope; according to Trundy:

> Well, I just asked him [Gourguechon] if I could take a look at the letter.
>
> And he said, "Sure. But you won't find any reason that you [are] fired in there." . . .
>
> I read the letter and, well, the chief [Reilly] asked, "You mean, there's no reason you're firing him?"
>
> And he [Gourguechon] said, "No."
>
> And then so I left. I just left after that.

Gourguechon testified, but he denied none of this testimony, and I found all of it credible. It is therefore undisputed that none of the four Charging Parties were given reasons for their discharges. The Charging Parties also testified credibly that they were not told in advance that there were any work-related problems with their employment and that they had no reason to believe that they might be discharged for any work-related reason. The General Counsel subpoenaed the personnel files of the four Charging Parties; none contained any indication that the Respondent had had any problems with their work performances before they were discharged.

Gourguechon was first called to testify by the General Counsel as an adverse witness. Gourguechon testified that he saw a copy of Gaffney's October 10 letter to the Coast Guard "a couple of weeks after it went out." (Gourguechon explained: "Yeah, actually, I think there was a copy laying around somewhere that I did look at.")

Gourguechon further testified when examined by the General Counsel that the decisions to discharge Gaffney and the four Charging Parties were made by several individuals that included himself and Heitmeier. Gourguechon testified that Gaffney was discharged for "violation in the chain of command, how things worked on a vessel." When asked if that answer meant what was expressed in the above-quoted discharge notice to Gaffney, Gourguechon replied that it was. When asked what the reason for Trundy's discharge was, Gourguechon replied: "I think the consensus was that it was really time to get some, you know, different, new blood into the engine room." When asked why Doncet was discharged, Gourguechon replied: "I think for the same reason." When asked why Goodridge was discharged, Gourguechon replied: "I think it was the same reason. That we felt that it was just time to make a change in the crew." When asked why Palmer was discharged, Gourguechon replied: "I honestly don't recall." Gourguechon testified that he decided that "new blood" was needed in the engine department of the *Showboat Mardis Gras* because there had been several instances of poor work that had cost the Respondent a great deal of money, but he attributed none of the poor work to Gaffney or the four Charging Parties; in fact, Gourguechon admitted that he could remember no employment faults with any of the four Charging Parties.

B. Evidence Presented by the Respondent

On the issue of the supervisory status of the Charging Parties, Gourguechon testified that he created an employee handbook at some unspecified point during the summer of 1997. Included in the handbook is:

> DUTIES AND RESPONSIBILITIES OF THE ASSISTANT ENGINEER
>
> The Assistant Engineer reports directly to the Chief Engineer and is responsible to the Chief Engineer for the proper and efficient standing of his watch. He is the senior officer in the engine room when the Chief Engineer is absent. He is responsible to the Chief Engineer for the training and discipline of his unlicensed crew. The basic duties and responsibilities of the Assistant Engineer, when carried [out] are:
>
> 1. To take charge of the engine room watch as directed by the Chief Engineer.
> 2. To assist the Chief Engineer as directed.
> 3. To direct and manage unlicensed engineering crew in their duties.
> 4. To develop work schedules for engineering crew.
> 5. To inspect work performed by engineering crew.
> 6. To be capable of assuming the duties of Chief Engineer, should he become incapacitated.
> 7. To keep engine room logs and records.
> 8. To ensure compliance of USCG regulations.
> 9. To direct fire fighting and damage control efforts in machinery spaces.

(The Respondent produced no other documentary evidence in support of its contention that the assistant chief engineers were supervisors.) Gourguechon testified that the assistant chief engineers are required to be able to assume and perform all of the listed duties. All of the Charging Parties were hired before the summer of 1997, and on cross-examination Gourguechon acknowledged that he did not know whether any of them ever received the handbook. Each of the Charging Parties credibly denied receiving the handbook. Gourguechon further testified that the *Showboat Mardis Gras* always carries a more comprehensive manual on board and that that manual includes the above-quoted responsibilities of the assistant chief engineers, but there is no evidence that any of the Charging Parties ever saw that manual.

On brief, the Respondent relies on certain testimony that the Charging Parties gave on cross-examination as proof that the assistant chief engineers were supervisors at the times of their discharges. The Charging Parties admitted that they were in charge of the engine room when the chief engineer was not present. The vessel, however, cannot sail without the chief engineer on board; also, when the vessel is in port (which is the great majority of the time), the chief engineer may leave the

vessel to take lunch on the dock, but even then, according to the unchallenged testimonies of the Charging Parties, he is in immediate radio contact with the captain and assistant chief engineer. The Charging Parties admitted that the oilers on their shifts would be expected to follow any instruction that they might give and that it would be insubordination if they failed to do so; they further admitted that, in extreme circumstances (such as the boat's sinking) a deck hand would also be expected to follow their instructions. When asked what they would do if an unlicensed crew member (such as an oiler, deck hand, or (when they existed) a wiper) failed to follow their instructions, the Charging Parties replied that they would report the matter to the chief engineer or the captain who would take the matter from there. The Respondent introduced no evidence that the assistant chief engineers could do anything more in the way of discipline of other employees.

Scott Funke was hired by the Respondent as an assistant chief engineer on January 23. Funke testified that he possessed and executed many responsibilities that the Charging Parties denied possessing or executing. Because Funke was hired after Trundy, Doncet, and Goodridge were discharged, and because Funke was hired only on the same day that Palmer was discharged, his testimony was not probative on any point, and I shall not detail it.

On the issue of why the four Charging Parties were discharged, Gourguechon testified on direct examination that at some point before the January discharges, the Respondent had several wiring problems that could have been caused by the work of the Charging Parties and that after the discharges the Respondent experienced fewer of such problems. Gourguechon testified that he did not discharge the Charging Parties because of their complaints to the Coast Guard; he further testified that, before Gaffney's letters were sent to the Coast Guard, none of the Charging Parties complained to him about safety. Gourguechon further testified that, at the time that he discharged the Charging Parties, the Respondent had no plans to lower the wages of the assistant chief engineers or any other classification. Gourguechon did, however, admit that, with a requirement of only limited licenses for the chief engineers and assistant chief engineers, the Respondent would have a "vastly larger pool of potential [engineer] candidates to draw from." Finally, Gourguechon was asked and he testified:

> Q. Are there people that signed these [Gaffney's August 11 and October 10] letters still serving aboard the Showboat in the capacity of a licensed officer?
>
> A. Yes.
>
> Q. Did you fire at the same time that you fired some of the people whose names appeared on those letters in January of 1998, did you fire anybody else?
>
> A. Yes.
>
> Q. Did you fire a whole bunch of people or one or two others?
>
> A. It went on for a while, yes.
>
> Q. Is that the "cleaning house" that you talked about . . . in your [Section 611(c) examination]?
>
> A. Yes.

(In fact, Gourguechon had not testified at any previous point that he had engaged in "cleaning house"; as quoted above, Gourguechon only testified that he discharged Trundy, Goodridge, and Doncet because the Respondent wanted "new blood" in the engine department.) Gourguechon never did testify as to who, if anyone, he discharged in addition to the letter-signers as a part of his "cleaning house." Gourguechon testified that the Respondent discharged Captain Myatt for rifling the personnel file of another captain, but he did not give any reasons for firing the other licensed officers who had signed Gaffney's August 11 or October 10 letters to the Coast Guard, other than that he discharged Trundy, Goodridge, and Doncet (but not Palmer, whom he could not remember) in order to secure "new blood" for the engine department, as quoted above.

C. Analysis and Conclusions

The Respondent's first defense to this action is that, as assistant chief engineers, the Charging Parties were supervisors within Section 2(11) at the times of their discharges and that their concerted activities were therefore not protected by Section 7 of the Act. Section 2(11) defines "supervisor" as:

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

As stated in *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991): "[T]he burden of proving supervisory status rests on the party asserting it." The first issue in this case is whether the Respondent has met that burden in regard to the Charging Parties. I find that it has not.

On brief, the Respondent first argues that the Board should make the factual finding that the Charging Parties had the same authorities as Funke (who, again, was hired after three of the four Charging Parties were discharged) because: "There is a complete absence of evidence that Scott Funke's duties and responsibilities were any different than [sic] the assistant engineers before him." Such argument completely misapprehends the law of *NLRB v. Bakers of Paris, Inc.*, supra, that the party advancing the proposition that an individual is a supervisor has the burden of proving it. The Respondent had the burden of proving that the Charging Parties had the same authorities as Funke; the General Counsel did not have the burden of proving that Funke's authorities were different from those of the Charging Parties.

Also on brief, the Respondent cites *Crest Tankers, Inc.*, 287 NLRB 628 (1987), as specific authority the proposition that assistant engineers should be held to be statutory supervisors. The Respondent does not recite any of the facts involved in *Crest Tankers*, and it is apparently asking for a conclusion that that case establishes that assistant chief engineers are to be held statutory supervisors as a matter of genre. Each case, of course, stands on its own facts. *Crest Tankers*, for example, involved a fleet of ocean-going oil tankers, not a single casino boat that is ordinarily tied up at a dock. Moreover, in *Crest Tankers*, the

chief engineer was in the engine room only one-half hour per day; assistant engineers regularly stood two 4-hour watches per day at which times they were solely in charge of the tankers' engine rooms (which were necessarily of greater size and complexity than the engine room involved here). In this case, only the chief engineers are scheduled to take engine room watches; for each 8-hour shift, a chief engineer is scheduled to be on watch 8 hours a day, and, according to Coast Guard regulations, the boat cannot sail without him. The Respondent's assistant chief engineers do not regularly stand watch alone in the engine room; they are in the engine room without the presence of the chief engineers only at irregular times, such as when the chief engineers might take lunch on the dock or when the chief engineers visit other areas of the boat as the needs arise. At all such irregular times, the chief engineers are in close proximity to the engine room, and they are immediately reachable by radio or internal telephone system. *Crest Tankers*, therefore, is readily distinguishable on its facts.

On brief, the Respondent argues that, at the times of the discharges of the Charging Parties, each assistant chief engineer on each 8-hour shift supervised two employees, one oiler and one wiper.[5] In so arguing, however, the Respondent ignores the fact that, at the time of the discharges of the Charging Parties, the Respondent had discontinued employing any employees in the classification of wiper. (Again, the Charging Parties were discharged in January; the Respondent had abolished wiper classification in December.) Therefore, the Respondent's position is immediately reduced to the proposition that it employed one assistant chief engineer to supervise one oiler on each shift. More than that, because the Respondent contends that the chief engineers were also the supervisors of the oilers, it is in a position of contending that on each shift it employed two supervisors in the engine department (the chief engineer and the assistant chief engineer) to supervise one employee (the oiler). An oiler is strictly unskilled labor; oilers do no more than routine maintenance and repair work; oilers are not licensed by the Coast Guard; and there are no prehire requirements for oilers. The Respondent's express position that, after the wiper position was discontinued in December, there was in the engine department a supervisory ratio of two supervisors (the chief engineer and the assistant chief engineer) to one unskilled employee (the oiler) defies logic and demands incredulity. Finally on the point of supervisory ratios, mates are stipulated supervisors, and, on brief, the Respondent attempts to equate mates and assistant chief engineers solely because assistant chief engineers are paid the same as mates. That argument ignores, however, the fact that each mate has 18-able-bodied and ordinary seamen reporting directly to him.

There is no record evidence that would tend to demonstrate that any of the assistant chief engineers, particularly the Charging Parties, ever exercised any of the authorities enumerated by Section 2(11). The Respondent is therefore reduced to arguments that the oiler (and, in emergencies, unlicensed personnel who are not assigned to the engine department) *would be* expected to follow directions of the assistant chief engineer. The Respondent can cite, however, no direction that an assistant chief engineer might give an oiler (or others) that might require the exercise of independent judgment, a prerequisite to finding that an individual is a supervisor under Section 2(11). The Respondent also argues that it would be insubordination for an oiler (or other employee in emergencies) to refuse a direction of the assistant chief engineer. There is no evidence that an oiler (or anyone else) has ever been cited for insubordination because he has not followed a directive of an assistant chief engineer. Moreover, the Charging Parties testified that if such an occasion ever arose, they would not discipline the employee themselves; rather, they would report the matter to the chief engineer or captain who would handle the matter. Such "reportorial" functions are not the equivalent of any authority enumerated by Section 2(11), especially where there is no evidence that any such reports have ever been made or, if made, they affected any employee's employment status. See *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998).

Ultimately, of course, the Respondent is not required to demonstrate that the Charging Parties, as assistant chief engineers, ever *exercised* any authority listed by Section 2(11); the Respondent successfully proves that the Charging Parties were supervisors if it proves that they *possessed* any one of those authorities, whether they exercised any one of the statutorily listed authorities or not.[6] The issue is whether the Respondent proved that the Charging Parties did possess any one of the authorities listed by Section 2(11). For such proof, the Respondent relies heavily on the wording of his employee handbook as quoted above. The handbook lists 9 duties, or authorities, of the assistant chief engineers. If any one of the authorities that are listed by the handbook was also listed by Section 2(11), and if the Respondent showed that exercises of such authority required independent judgment, then the Respondent would have proved the supervisory status of the assistant chief engineers. The handbook's listing of the duties (or authorities) of the assistant chief engineers, however, includes none of the authorities that are listed by the statute. (Moreover, the Respondent did not prove that the handbook had even been published to the Charging Parties because they credibly denied that they had ever seen the handbook.)

The Respondent further cites a statement in the handbook that "[i]nsubordination, including the refusal to follow an officer's or supervisor's instruction . . . could lead to discipline up to and including termination." It is true that the assistant chief engineers are licensed "officers," but the handbook nevertheless does not tell any employees, such as the oiler, that the officer whose instruction he might disobey would be the officer who effectuates discipline for disobedience. Certainly, the handbook does not prove the conclusion that assistant chief engineers could dispense discipline without an independent investigation by the chief engineer or the captain. Finally on the point of the handbook, the Respondent on brief says that Trundy agreed that a duty of an assistant chief engineer was to develop work schedules; Trundy, however, agreed only that the handbook (which he had never seen before) did indicate such,

[5] For example, one topic line in the Respondent's brief is: "The Assistant Engineers' Duties with Regard to Wipers and Oilers are Supervisory."

[6] *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949).

but he credibly denied that he had ever developed a schedule for any other employees.

For all of the above reasons, I find and conclude that the Respondent has failed to prove that any of the Charging Parties were supervisors within Section 2(11) at the times of their discharges. The next issue therefore is whether the Respondent discharged the Charging Parties for their protected concerted activities in violation of Section 8(a)(1).

The law is that the General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that protected concerted activity was a motivating factor in an employer's action that is alleged to constitute violative discrimination. A prima facie case of discrimination is established where it is found that: (1) the subject employee has engaged in protected concerted activities; (2) the employer possessed knowledge (or a suspicion) of that protected activity; (3) the employer has imposed discharge or other adverse action upon the employee; and (4) the employer had possessed some animus, or hostility, toward the employee's protected activity. Once a prima facie case is established, the burden shifts to the employer to come forward with evidence that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To meet its burden under *Wright Line*, it is not enough for an employer to show that an employee for whom General Counsel has presented a prima facie case of discrimination engaged in misconduct for which the employee *could have* been discharged, or otherwise disciplined. The Respondent must show that it "*would have*" discharged, or otherwise disciplined, the employee for the misconduct in question. *Structural Composites Industries*, 304 NLRB 729, 730 (1991); emphasis is original. Moreover, such evidentiary demonstration must be by a preponderance of the evidence, and, if it is not, a violation will be found.[7] Therefore, the first inquiry is whether the record contains a prima facie case of discrimination, or credible evidence that the Respondent knew or suspected that the Charging Parties had engaged in protected concerted activity, and that the Respondent's decision to discharge the employees was motivated, at least in part, by animus toward that activity. *Chelsea Homes*, 298 NLRB 813 (1990).

The Respondent contends that the activities of the Charging Parties in signing Gaffney's letters to the Coast Guard were not protected by Section 7 because it actually had no plans to lower the wages of the assistant chief engineers (or anyone else), and because the employees did not first give it a chance to remedy any safety complaints that they had. The Supreme Court has held that concerted appeals to Governmental bodies are protected by Section 7 of the Act when they have the object of improving employees' terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); see also *Electrical Workers Local 769*, 327 NLRB 13 (1998) (employees petitioned a municipal court for injunction against harassment for making safety complaints), and *Walls Mfg. Co. v. NLRB*, 321 F.2d 752 (D.C. Cir. 1963), enfg. 137 NLRB 1317 (1962) (employees wrote a letter to a State agency complaining about unsanitary conditions). When the Charging Parties signed Gaffney's letters to the Coast Guard requesting that the Respondent again be required to employ only engineers with unlimited licenses, they had the object of securing at least a theoretical floor under their wages as assistant chief engineers. Gourguechon admitted that he realized the obvious supply-and-demand effect of the Charging Parties' objective when he admitted that, with the right to hire engineers with only limited licenses, the Respondent had a "vastly larger pool of potential [engineer] candidates to draw from." The fact that the Respondent had no current intention of reducing the then-current wages of the engineers did not detract from the nature of the employees' intention of acting concertedly in an attempt to reduce the Respondent's ability to do so in the future (which attempts proved successful). The Charging Parties also had as an object of their concerted activities insuring their safety, as well as the safety of the passengers of the *Showboat Mardis Gras*, when they asked the Coast Guard to upgrade the requirements for engineers on the vessel. Moreover, the fact that the Charging Parties failed to give the Respondent an opportunity to respond to their safety concerns before sending their letters did not detract from the statutorily protected nature of their endeavors. It is well established that Section 7 of the Act protects concerted activities "whether they take place before, after, or at the same time" that a concerted demand is made. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (unannounced strike over having to work in bad weather).

Therefore, it must be concluded that the activity of the Charging Parties in writing to the Coast Guard, both on August 11 and October 10, was concerted activity that was protected by the Act.

The issue becomes whether the Respondent knew that each of the Charging Parties had engaged in the protected activity of writing to the Coast Guard. As evidence of relevant knowledge, the General Counsel placed into evidence two of Gaffney's letters to the Coast Guard. The first letter, dated August 11, was signed by Doncet (as well as by Goodridge and Palmer). The second letter, dated October 10, was not signed by Doncet (although it was signed by Trundy, Goodridge, and Palmer). The Respondent admits timely knowledge of the October 10 letter which Doncet did not sign, but it denies knowledge of the August 11 letter which Doncet did sign. The issue is whether the Respondent may be charged with knowledge of Doncet's involvement in the concerted attempt to have the Coast Guard again require the Respondent to use only engineering officers with unlimited licenses, even though Doncet did not sign the Gaffney letter of which the Respondent admits knowledge. Ultimately, I find that it can, but first I shall address the General Counsel's case that the Respondent violated Section 8(a)(1) by discharging Trundy, Goodridge, and Palmer.

The first issue is whether the Respondent harbored animus toward the admittedly known protected activities of Trundy, Goodridge, and Palmer. The Respondent agues first that it could not have had any animus toward the concerted activities that caused its certificate of inspection for the *Showboat Mardis*

[7] *Wright Line*, supra at 1087; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Gras to be reverted to requiring engineering personnel who had only unlimited licenses because it had no plans to cut wages of the engineers at the time that the appeal was granted. I reject this contention. As Gourguechon admitted, by reducing the "pool" of potential employees to those who had unlimited licenses, the action of the Coast Guard in response to Gaffney's appeals increased the Respondent's potential labor costs. Moreover, Gourguechon's discharge letter to Gaffney stated that "the regulator's response has had a material adverse effect on the company's ability to efficiently run its business"; this was a plain indication that the increased labor costs were considered actual, not just potential, by the Respondent.

The discharges began on January 6, or immediately after the Coast Guard's letter would have been received by the Respondent (given that a weekend and a holiday ensued immediately after the Coast Guard's December 30 letter to the Respondent announcing the success of the protected concerted activities). This timing, alone, is evidence of animus toward the concerted activities that resulted in the Coast Guard's letter. Deduction based on the element of timing, however, is not necessary to find that the element of animus exists. Again, Gourguechon stated in his letter discharging Gaffney that his discharge was caused by his contacting "regulatory bodies having jurisdiction over the operation of the vessel." At trial, Gourguechon admitted that this reference was to Gaffney's appeals to the Coast Guard. Also, it is undenied that Chief Engineer Gates plainly told Goodridge that Trundy had been discharged because he signed the Coast Guard letter. Telling an employee that another employee had been discharged because of his protected concerted activities is a violation of Section 8(a)(1), as I find and conclude.[8] Gates' statement to Goodridge further is an admission that at least Trundy was discharged for his protected activities.

That is, Gourguechon told Gaffney (in writing) that he was discharged because of his part in the concerted activity of contacting the Coast Guard. Gaffney's part in the concerted activities was not protected because he was a supervisor within Section 2(11). The concerted activities of the Charging Parties were, however, protected, and Gates told Goodridge that Trundy had been discharged because of his part in those protected activities. There is no reason to believe that the Respondent's animus was confined to the parts that Gaffney and Trundy played in the concerted activities, especially in view of the timing of the discharges that immediately followed the Coast Guard's announcement of the success of the concerted activities. Plainly that animus would have extended to any licensed officer whom the Respondent knew had signed the concerted appeals to the Coast Guard. In view of the proven animus, and in view of the Respondent's admissions that it knew that Trundy, Goodridge, and Palmer had signed Gaffney's October 10 appeal, I find and conclude that General Counsel has presented prima facie cases that the Respondent discharged Trundy, Goodridge, and Palmer because of their protected concerted activities in violation of Section 8(a)(1). The Respondent's defense for those three discharges therefore must be examined. (Again, the lawfulness of Doncet's discharge will be considered separately below.)

When the General Counsel asked Gourguechon why he discharged Palmer, Gourguechon replied: "I honestly don't recall." This was hardly a statement of a defense, much less a presentation of a preponderance of the evidence, as required by *Wright Line*. Rather, Gourguechon's answer was an admission that the Respondent had no reason for Palmer's discharge. As stated by the Fourth Circuit Court of Appeals in *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977), albeit in a context of employer resistance to union activities, as opposed to this case's context of protected concerted activities:

> The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance. But if the employee is a good worker and his breach of the work rules trivial, the more rational explanation for discharge may be invidious motivation. Such motivation can be found from the absence of any good cause for discharge. This must be so unless we are willing to assume something we know to be false: that businessmen hire and fire without any reason at all.

In view of its demonstrated animus, the Respondent's failure to state or prove any defense for the discharge of Palmer compels the conclusion that Palmer's discharge was the product of the Respondent's invidious motivation of opposition to the employees' protected concerted activities, and Palmer's discharge was therefore a violation of Section 8(a)(1).

Similarly, Gourguechon testified that he discharged Trundy and Goodridge only because the Respondent wanted "new blood" in the engine room. Gourguechon, however, suggested no reason why the Respondent sought "new blood" for the engine room only after it received the Coast Guard's December 30 letter announcing the success of the protected concerted activities. At one point, Gourguechon testified that he had found some improper wiring on the vessel, implying that the Charging Parties had done it. On cross-examination, however, Gourguechon admitted that the improper wiring could have been done before the Respondent accepted delivery of the vessel. Gourguechon further testified that some expensive circuit breakers had been improperly wired and had been ruined; Gourguechon first testified that he researched and found that the Charging Parties had done the faulty wiring; then he testified only that the circuit breakers had failed on the Charging Parties watches (although, as assistant chief engineers, the Charging Parties did not have regularly scheduled watches, as discussed above); then Gourguechon admitted that he did not know if the Charging Parties had anything to do with the failures of the circuit breakers; and then Gourguechon admitted that he did not find out about the faulty wiring that the Charging Parties may have done until after their discharges. Faulty wiring on the part of the Charging Parties, therefore, could not have been a reason for their discharges.

Trundy and Goodridge (and Palmer) had perfect employment records; although subpoenaed, the Respondent could produce no negative memoranda from any of their personnel files. Neither Trundy or Goodridge (nor Palmer) was given any reason to believe that his job were in peril because of any work-related

[8] *Bestway Trucking*, 310 NLRB 651, enfd. 22 F.3d 177 (7th Cir. 1994); *JEL Painting and Decorating*, 303 NLRB 1029 (1991).

problem. Gourguechon could recall no problem that he had ever had with any of the Charging Parties. Gourguechon further did not deny Trundy's testimony that he (Gourguechon) told Chief Engineer Riley that he had "no reason" to discharge Trundy. In summary, the "new blood" defense, unsupported as it is by any claim of fault on the part of Trundy or Goodridge (or Doncet), is no defense whatsoever. Rather, the Respondent's "new blood" defense is one of those subjective, self-serving, tell-them-anything types of defenses that the trier of fact is not required to accept,[9] and I do not.

I therefore find and conclude that the Respondent violated Section 8(a)(1) by discharging Trundy and Goodridge, as well as Palmer, because of their admittedly known protected concerted activities.

The more difficult problem arises in the consideration of Doncet's case. Again, Doncet signed Gaffney's August 11 letter to the Coast Guard, but he did not sign Gaffney's October 10 letter. Gourguechon, however, admitted only to knowledge of the October 10 letter. The Respondent contends that, even if the Board agrees with my conclusion that Trundy, Goodridge, and Palmer were unlawfully discharged, no violation as to Doncet can be found because there is no direct evidence that it knew that Doncet had participated in the protected concerted activities that were initiated by Gaffney and which resulted in the Coast Guard's reestablishment of the requirement that it employ only engineers with unlimited licenses. The issue, therefore, is whether the Respondent can be charged with knowledge of Doncet's participation in the protected activities, even absent direct evidence of such knowledge. I find that it can.

As the Board stated in *Montgomery Ward & Co.*, 316 NLRB 1248 (1995):

> Initially, we agree with the judge that a prerequisite to establishing that [two named alleged discriminatees] were wrongfully discharged is finding that the Respondent knew of their union activities. *Mack's Supermarkets*, 288 NLRB 1082, 1101 (1988). This "knowledge" need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985); *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 944 (1978). Indeed, the Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment. *Greco & Haines*, supra; *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979); *General Iron Corp.*, 218 NLRB 770, 778 (1975). The Board additionally has relied on factors including the delay between the conduct cited by the respondent as the basis for the discipline and the actual discharge, and—in the case of multiple discriminates—that the discriminatees were simultaneously discharged. See, e.g., *Darbar Indian Restaurant*, 288 NLRB 545 (1988); *Abbey's Transportation Services*, supra [284 NLRB 698 (1987), enfd. 837 F.2d 575 (2d Cir. 1988)].
>
> Finally, the Board has inferred knowledge where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. *Whitesville Mill Service Co.*, supra [307 NLRB 937 (1992)]; *De Jana Industries*, 305 NLRB at 849; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." See generally *General Films* [*Inc.*], 307 NLRB 465, 468 (1992).
>
> The factors on which the Board relies when inferring knowledge do not exist in isolation, but frequently coexist. [Footnote omitted.] For example, in *BMD Sportswear Corp.*, 283 NLRB 142, 142–143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988), the Board reversed the judge and found that the General Counsel had established that alleged discriminatees were unlawfully laid off, even in the absence of direct evidence that the employer knew of their union activities. There the respondent had demonstrated antiunion animus, discriminated against other employees, proffered unsubstantiated reasons for the layoffs, and the layoffs were proximate to the start of the union organizing campaign. See also *Active Transportation*, 296 NLRB 431, 432 (1989), enfd. 924 F.2d 1057 (6th Cir. 1991).

Of course, the Board's references to union activities in *Montgomery Ward* would apply to protected concerted activities as well.

In this case, the General Counsel showed that the Respondent discharged 12 of the 18 licensed officers who had signed either Gaffney's August 11 or October 10 letter to the Coast Guard. As quoted above, when the Respondent's counsel asked Gourguechon at trial if he had fired anybody who had *not* signed one of those letters during his house-cleaning, Gourguechon evasively replied, "It went on for a while, yes." Gourguechon was not asked to elaborate, and the Respondent did not otherwise present any evidence that it discharged any licensed officer who had not signed one of Gaffney's letters. Based on this failure of evidence, I find that the Respondent discharged only licensed officers who had signed one of Gaffney's letters to the Coast Guard. This, of course, would include Doncet. It is further too much for this trier of fact to believe, and I do not believe, that it was by simple coincident that only those who had signed one of Gaffney's letters to the Coast Guard were selected for expurgation during the Respondent's January exercise of "cleaning house" (or search for "new blood," as Gourguechon characterized the discharges before being led by counsel to call them "cleaning house," as quoted above). I find that, except where the Respondent demonstrated some other reason, those who fell victim of the "cleaning house" exercise were selected because the Respondent knew that they had signed one of Gaffney's letters. The one exception was Myatt whom

[9] The Board is not required to accept self-serving declarations of motive. *Shattuck Denn Mining Corp.*, 151 NLRB 1329 (1965), enfd. 362 F.2d 466 (9th Cir. 1966). See also *Taylor Machine Products*, 317 NLRB 1187, 1213, enfd. 136 F.3d 507 (6th Cir. 1998).

Gourguechon testified he discharged because he found Myatt rifling the file of another captain. (Moreover, the Respondent's introduction of this evidence about Myatt was an obvious admission that it needed an explanation for its discharges of those who had signed one of Gaffney's letters.) I therefore find that the Respondent knew, or at least suspected, that Doncet was engaged in the protected activities that resulted in the discharges of 11 of the 12 signers of Gaffney's letters to the Coast Guard. The pretextual nature of the "new blood" defense offered for Doncet's discharge fortifies my conclusion that the Respondent knew, or suspected, that Doncet was engaged in the same course of protected activities that was engaged in by Trundy, Goodridge, and Palmer, all of whom it unlawfully discharged.

In summary, in this case there exist: (1) the fact that only those who signed one of Gaffney's concerted letters to the Coast Guard were discharged; (2) the fact that Doncet signed one of those letters; (3) the fact of the suspicious and otherwise unexplained timing of Doncet's discharge (again, coming as it did almost immediately after the Respondent received notice of the success of the licensed officers' appeal to the Coast Guard and coming essentially simultaneously with the discharges of Trundy, Goodridge, and Palmer that I have found above to be unlawful); and (4) the sham nature of the "new blood" defense that the Respondent offered for Doncet's discharge.[10] Given these facts, and upon the above-cited authorities, I find that Respondent knew of Doncet's participation in the employees' protected concerted activities of contacting the Coast Guard in an attempt to better their terms and conditions of employment.

Because the Respondent has only offered sham defenses to the General Counsel's prima facie case that it unlawfully discharged Doncet, I find and conclude that it discharged Doncet, as well as Trundy, Goodridge, and Palmer, in violation of Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce or in an industry affecting commerce within Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(1) by threatening employees that other employees had been discharged because they had engaged in activities that are protected by Section 7 of the Act.

3. The Respondent has violated Section 8(a)(1) by discharging Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer because they had engaged in activities that were protected by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Riverboat Services of Indiana, Inc., East Chicago, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees by telling them that other employees had been discharged for engaging in activities that are protected by Section 7 of the Act.

(b) Discharging its employees because they have engaged in activities that are protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they previously enjoyed.

(b) Make Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer whole for any loss of earnings or other benefits that they have suffered as a result of the discrimination against them, computed on a quarterly basis from the date of their discharges to the date of proper offers of reinstatements, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges of Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer, and within 3 days thereafter notify Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer in writing that this has been done and that their discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in East Chicago, Indiana, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 13 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced,

[10] The sham nature of the defenses is further reflected by: (1) Gourguechon's telling Goodridge "You've won the lottery" to announce his discharge; and (2) Gourguechon's agreement to give Doncet a positive employment recommendation.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to each current employee and former employee employed by the Respondent at any time since January 8, 1998, the date of the first unfair labor practice found herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. September 23, 1999

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act (the Act) and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you by telling you that other employees have been discharged because they engaged in activities that are protected by Section 7 of the Act.

WE WILL NOT discharge or otherwise discriminate against you because you have engaged in activities that are protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they previously enjoyed.

WE WILL make Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer whole for any loss of earnings or other benefits resulting from their unlawful discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer, and WE WILL, within 3 days thereafter, notify Adam Doncet, Thomas Trundy, Thomas Goodridge, and Robert Palmer in writing that this has been done and that their discharges will not be used against them in any way.

RIVERBOAT SERVICES OF INDIANA, INC.