

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

AMERICAN WATERWAYS, INC.

Employer

and

Case 36-RC-5903

INLANDBOATMEN'S UNION OF THE PACIFIC,  
the Marine Division of the INTERNATIONAL  
LONGSHORE AND WAREHOUSE UNION

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All cruise employees employed by the Employer on its vessels operating in the Portland, Oregon area, including hourly captains; but excluding all professional employees, office clerical employees, sales department employees, confidential employees, contract employees, statutory supervisors (including but not limited to, the Operations Manager, cruise manager, maintenance managers, salaried captains, chefs) and statutory guards.

The Employer runs public and chartered river cruises in the Portland, Oregon area. The Union seeks to represent only the "operations" employees, i.e., the hourly captains, engineers, and deckhands. The Employer asserts that the unit petitioned for is an inappropriate fragment, that only a unit of all on-board employees is appropriate. It also contends that the captains are statutory supervisors. Finally, contrary to the Union, which seeks an immediate election, the Employer contends that an election accommodation must be made for employees who return in the peak periods, either by delaying the election, or by having a mail ballot with some unspecified eligibility formula.

The parties stipulated that any unit must include the senior deckhands, deckhands and engineers; exclude the chefs, cruise managers, salaried captains and maintenance manager (all as statutory supervisors), contract employees (the piano player is the only one reflected in the record) and sales department employees (lack of community of interest). I accept their stipulations.

### **FACTS**

The Employer began operations in 1994 with the Portland Spirit, 150' long, 36' beam, 540 maximum passengers, or 340 sit-down (dinner) passengers. In 1996 it added the Willamette Star, 75', 20' beam, 149 passengers, 80 sit-down. Just recently it added the Crystal Dolphin, 84', 26' beam, currently 90 passengers (the record does not reflect the number of sit-downs). Each boat has multiple decks. Waterways operates both charters and public trips, on the Willamette and Columbia Rivers; sometimes one deck will be used for a charter, another for the public. Trips vary from sightseeing to bingo to corporate events, private weddings, and various kinds of theme cruises. A key distinguishing feature of the Employer's boats is that each has a full galley; meals are cooked on board, not just warmed up or catered. Each vessel is capable of running any kind of trip on the Employer's menu; they generally are in the 2-3 hour range. The boats load and are moored at various Portland locations. There is also an office staffed by various administrative, supervisory and sales personnel. About 75% of revenue is derived from private charters, the balance from trips open to the public.

Dan Yates is corporate President. The Executive Chef is in charge of all food preparation service functions. The Bar Manager supervises all bar functions and personnel. The Operations Manager, Captain Brian Kennedy, is a supervisor of all personnel that operate the vessels, i.e., the captains, engineers and deckhands; this function includes exterior maintenance of the boats. He also supervises Dennis Corwin, Maintenance Manager, responsible for maintenance of the boats' interiors.

The Employer's business volume varies with the seasons. The early year is slow, with 28-35 trips per month in January through March. Business increases over April and May until the busy summer season begins, with about 125-130 trips in the summer months. Business starts to decrease in September to 100 trips, then decreases substantially (unspecified) in October and November, but returns to another peak (100) in December during the holiday season. All told, there were about 820 trips in 1998, but that will increase to over 1000 with the addition of the Dolphin.

There do not appear to be any permanent or semi-permanent assignments to specific vessels or crews; rather, there is a pool of employees who are assigned to vessels and trips, depending on workload and employee availability. Seniority does appear to play some role for the captains for vessel assignment. The size of the work force will approximately double in each category between the February 1999 level of 70 and the summer 1999 peak of about 140. (

Some of this will be due to the addition of the Dolphin). Employee availability varies, because many, if not most, have other jobs as well, at least during certain portions of the year. Some employees work year 'round, but many are college students, who work during the summer peak, go back to school in the fall, possibly return briefly at the holiday peak and then go back to school until summer. Of the anticipated increase in staff of 70 between mid-February and summer, somewhere between 25 and 50 % are likely to be returnees from last year; the rest will be new hires.

During the slow times in the operations department, there will not be enough work to give all employees the number of hours they might wish in their regular position. Thus, some captains may work as engineers or senior deckhands during the off season. Others may elect not to work if they can't work as a captain. The same situation would be true for senior deckhands or engineers. All persons in a classification are paid the same, whether the incumbent is seasonal, part-time or full-time.

There is no formalized recall system. At the end of the summer, students<sup>1</sup> go back to school. This is mutually convenient, since the Employer's business begins to decline about that same time. Many intend to return again sometime in the next year; all are welcome to return, unless they have been terminated or formally quit. There is no "right" to return and no formal recall system. Nevertheless, there is frequently a mutual expectation of continued employment. Some keep in touch during the year; sometimes an Employer "friend" will maintain the contact. Students are invited to the Thanksgiving party even if not currently on the payroll. In any event, when students return, they are put to work without any new-employee formalities of drug tests or employment applications. If a student does not return for a year,<sup>2</sup> he will be treated as a quit and have to re-apply and be re-tested.

Any Employer vessel may be moved with no minimum Coast Guard crewing requirement. However, with passengers aboard, there are Coast Guard regulations for minimum crew size, depending on the passenger load. The Employer also increases crew size with the passenger load for obvious operational reasons. By regulation, each passenger-ed boat must have a captain and two deckhands. The Spirit must also have a senior deckhand. An engineer must be added when the passenger load reaches 150; only the Spirit has that capacity. At full capacity, the Spirit would have an additional 3-4 deckhands over the minimum crew, while the Willamette and the Dolphin would simply add a senior deckhand. Obviously, the size of the bar and food service crews will increase with the number of passengers.

The captain is the only employee who must have a Coast Guard license, a 100-ton ticket. No other employee need have any particular license or experience level, according to the regulations. Employees handling liquor must have the appropriate permits.

The routine for the operations crew is as follows:<sup>3</sup> The crew must be ready for passenger loading 45 minutes before scheduled sailing time. For the vessel's first sailing of the day, it appears that the crew's actual reporting time is well in advance, so they may accomplish

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<sup>1</sup> I use "student" herein as a shorthand term for those employees who leave at the end of the season.

<sup>2</sup> Another shorthand, general term.

<sup>3</sup> The record is weak concerning the routines of the rest of the crew.

their pre-departure duties. Passenger loading begins 30 minutes before sailing. A deckhand keeps the customers at bay until the loading time, and then sequences their entry in groups. The captain greets each guest and poses for a photo with them. An Employer photographer takes the photo, for printing during the trip. After the captain finishes the greeting phase and cautions them about the ramp, a deckhand monitors the customer's passage on the ramp to the vessel, providing assistance as necessary. The deckhand also counts the passengers, for safety reasons as well as billing purposes. Next, the passengers meet the cruise manager, who hands them off to a busser or server for seating at their assigned table.

Prior to sailing the captain goes to each deck and makes a brief safety pitch to the assembled guests; then certain non-operations employees sing a greeting. At this point guests are encouraged to take their time and tour the ship, since not all customers can be served simultaneously. The operations crew releases the lines and the trip begins.<sup>4</sup>

During the trip, there is eating and drinking. There may be live piano music. Passengers may go on an open deck, roam the boat, or just sit. They are encouraged to make a visit to the wheelhouse, where the captain will permit them to take the wheel, and give them a "captain's" certificate. The voyage proceeds along the river and back, returning within 2-3 hours. The route has pre-set geographic limits; the exact route may have been selected by the customer.

While en route, the cooks cook, the servers serve and the bartenders pour. The captain remains at the helm for most of the trip, except for brief absences to tend to personal matters. She may permit anyone to take the wheel and navigate solo during an absence of her choosing, but ordinarily does not do so beyond the minimum needed, since her license is "on the line." Some of the cruises are weddings, and some of the captains can and do perform marriages on board.<sup>5</sup> The rest of the operations crew makes the rounds of the entire vessel, monitoring the safety of the vessel and the passengers, tidying up as they progress about the boat. They will empty ashtrays, pick up litter, take tableware to the dishwasher, inspect the heads, check on the engine room, etc. Generally, they are expected to "help out" the rest of the staff, as needed. The deckhand job description calls for them to "notice [whether] the food and beverage staff are in need of assistance. If so, give them a hand. Check with the bar. Do they need keys? Glasses? Booze?" The record demonstrates that deckhands routinely do perform these assistance functions, especially "backbar" duties, albeit not on a steady basis.

As the trip ends, deckhands tie up the vessel, then help the passengers exit via the ramp. The captain thanks each individually and gives a "good-bye." Once the last passenger leaves, the shutdown procedure begins, including filling fluids, pumping sewage, general cleanup and helping out until the entire shut-down operation is complete.

Frequently there are back-to-back sailings, in which case the turnaround is very short. During the turnaround, sewage will be pumped out, fresh water pumped on board, the vessel thoroughly cleaned and re-set for the next trip. There may have to be loading of supplies, food or beverages. This process can become more complicated because one of the vessels accomplishes its turnaround by tying up next to a second; all of the transfers of goods and trash

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<sup>4</sup> Bartenders sometimes serve as an official deckhand to satisfy regulations.

<sup>5</sup> This is not because such authority comes with their captain's ticket, but because they have tendered the appropriate fee to a well-known mill.

for the second vessel have to be accomplished across the decks of the docked vessel. During the turnaround procedure, each department has its duties, but in the end the operations crew is expected to help out wherever they are needed, provided their own assignments are complete.

Two captains are salaried and excluded from the unit. The others are paid in the \$12-\$14 per hour range. Senior deckhands and engineers are paid between \$8 and \$10, as are cooks; deckhands start at the Oregon minimum wage of \$6.50 and can increase to \$8.00; dishwashers are paid from \$7 to \$8. Servers are also paid the minimum wage; the record does not reflect the wage of the bussers, but presumably it is near or at the minimum as well.

As noted, about 75% of the Employer's business comes from charters. For all charter trips, there is a 17% service charge automatically tacked on; likewise for any groups of 8 or more. Thirty percent of the pool is allocated to the house, in part to cover employee taxes on the tips. Fifty-five percent of the pool is allocated to the wait staff, who apparently pass a portion on to the bussers. Several percent - the exact amount is unclear - is allocated to the operations department, to be shared by all but the captains and their superiors. Bartenders share in the pool as well. Within each department, tips are divided according to the number of hours worked by each individual.<sup>6</sup>

While the percentage allocated to the wait staff is many times the percentage turned over to, for example, operations, this does not mean that the amount per hour a waitperson receives is larger than the operations staff's hourly tip amount by the same factor, since the wait staff alone, excluding the bussers, is about 2-1/2 times the size of the non-captain operations staff. The record does not reflect how the tips received by other groups calculate out per hour, but for operations it appears that it translates to about \$3.50 per hour<sup>7</sup> worked overall, on top of a wage rate of \$6.50-\$10 per hour.<sup>8</sup>

There is certain ship maintenance, such as chipping paint and re-painting, which must be performed periodically, but cannot be performed during the regular shifts. Unlike a ship at sea, where crew can paint while enroute, the Employer's vessels must be taken out of service.<sup>9</sup> The Employer elects, when feasible, to have such work performed by its employees. To that end, it assigns a captain to head the operation and then finds crew members of whatever ilk to perform the work. Recently, when the Dolphin was added, very substantial re-modeling was done, by various employees. A head cook was a welder, galley personnel performed lagging<sup>10</sup>

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<sup>6</sup> On public trips or portions thereof (for parties smaller than eight) the wait staff and bartenders are tipped in the usual "voluntary" manner; tips are then shared in the customary manner. Operations employees get no tips in those circumstances.

<sup>7</sup> This includes hours worked on both charter and other trips, where operations does not generally have much opportunity for tips. Thus, the \$3.50 is the overall average value of tips per hour, not just the value on trips with tip pools.

<sup>8</sup> The record shows that the operations pool is roughly \$45,000 per year, split over roughly 13,000 operations hours, or about \$3.50 per hour.

<sup>9</sup> The cruise experience would hardly be enhanced by the chipping sounds, paint fumes and wet paint. Moreover, the crew is ordinarily fully occupied with cruise duties when on board.

<sup>10</sup> Heat insulating.

and a substantial portion of the painting was done by servers. All personnel engaged in such operations are paid \$8, regardless of their usual pay.

All employees have a common employee handbook, are subject to the same rules, punch a timeclock, are subject to the same drug testing program and attend periodic all-employee meetings. There is an all-employee holiday party. All are trained on vessel emergency procedures.

There have been minimal permanent transfers between operations and the rest of the crew and vice-versa. In the employer's three-year history, one employee with a captain's license was hired as a bartender, then later moved over to the wheelhouse, and one or two operations employee moved into service.

While any employee could be called upon to briefly help out operations, such as in tying or untying, or monitoring an exit during docking or undocking, or a bartender can double as a required deckhand, this does not happen with regularity. The record does not reflect that any non-operations employee substitutes in for an operations employee, or vice versa, for a full, exclusive shift.

The hourly captains report to the Operations Manager, who normally is not on board. He is, however, generally readily reachable by one electronic means or another, at the office, captaining another vessel or at home. The operations staff on board on any given trip reports to the captain; the balance of the staff reports through admitted statutory supervisors to the particular cruise manager assigned to the trip. The record does not reflect any role played by the cruise manager with respect to the operations staff, excepting perhaps a "request" for brief assistance.

The captain has the ultimate authority on the vessel in case of emergency, such as foul weather, collision, grounding, fire, medical emergency, etc. During such times it would be fair to say that he responsibly directs the crew, utilizing independent judgment. Of course, such emergencies occur only rarely (excepting perhaps medical emergencies, which it would appear follow standardized first aid/call 911 procedures). He may direct that a trip be canceled, although he will apparently consult first with the Operations Manager to see if he would prefer to risk the trip himself. A captain may direct that a passenger or crew member who is a risk to the vessel be put ashore, but this would occur only in cases of most obvious misconduct, requiring no independent judgment. The record reflects no such emergencies (except medical) or forced de-boardings.

Beyond the true safety-threatening emergencies described above, the operations work is quite routine. There are established checklists for startup and shutdown, as well as lists for daily and weekly maintenance/safety check procedures. The tasks in general are routine and familiar to all but the greenest employee (i.e., one with less than a few months' experience). Even then, a new employee would not be assigned to work alone without another more experienced deckhand. The captain observes what has not been done and brings any specific need to an employee's attention. Surely the captain requires some substantial experience and judgment in "driving" the boat in difficult contexts or close maneuvers, but he himself routinely

has the helm in all cases<sup>11</sup> if there is no showing that any instructions to crew, except for during an emergency, involve independent judgment.

Hiring is conducted independently by the Operations Manger. Evaluations are performed, sometimes hit-and-miss, sometimes on a schedule. These are done by the Operations Manger, based upon the various captains' comments in their end-of-trip oral reports, as well upon the former's own observations when serving as captain. The record does not reflect that the captains make recommendations, as opposed to reports. The evaluations are not part of a formal wage increase procedure. This same information gathering procedure is used in deciding whether to keep a new deckhand beyond his probationary period, whether to grant a wage increase and whether to promote to senior deckhand or presumably engineer. Testimony shows that at least some negative comments or suggestions or recommendations from captains have not been followed. There is no showing that any personnel action has been taken on the basis of a specific recommendation by a captain, much less without independent evaluation.

The captain is the highest paid operations employee. The hourly captains are straight hourly, punch a timeclock and receive the same fringe benefits as all other non-managerial employees similarly situated. They do not share in the tip pool.

If an operations employee is to be late or absent, they are to call the Operations Manager. If there is a no-show, or an employee becomes ill, the captain will initiate a procedure to find a replacement. At least one captain would first call the Operations Manager. The task may be partially delegated to an engineer or a deckhand; the process is always to go down a list of names, trying to divine who is most likely to be available, and get *someone*, without regard to overtime or anything but minimum qualifications and availability. There is no showing that an employee must agree to respond to a call. Overtime is requested of an operations crew member by the captains as necessary to get a routine completed or a critical repair done. Scheduling and time off is arranged by the office.

There was testimony that a captain "could" fire an operations employee, but no description of when or how. There is no evidence that this has ever happened. One captain testified he did not believe he had such authority. Discipline is handled by the Operations Manger, taking into accounts the post-trip oral reports of the various captains.

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<sup>11</sup> The captain allows passengers to briefly steer the ship and may permit an operations crew member wanting helm time to do so, but normally under their immediate observation, and presumably only in no-risk circumstances.

## ANALYSIS

### Captains

The party asserting supervisory status has the burden of proving it. True supervisory status requires any one of the statutory supervisory authority indicia coupled with true independent judgment in exercising that authority. Recommendation made regarding one of the authority indicia does not count unless “effective”, i.e., followed without independent verification or analysis. Titles are not determinative.

“Captain” is a term that tends to generate images of authority, unquestionable authority on the high seas backed by draconian punishments for insubordination - lashes, the brig, imprisonment. Indeed, this might still be a partially valid description when it comes to large vessels on the high seas. But, supervisory status does not depend on title or images or “somewhere else”, it depends on actual authority; we must be careful not to squeeze a river cruise boat, with trips measured in hours, on sheltered water, into the same mold as a ship on the high seas, gone from the home port for months at a time.

In this case, the captains have virtually no authority, except in the infrequent/nearly non-existent emergency.<sup>12</sup> In all other situations, they are not involved with the statutory authority indicia, or their role is merely to report without recommendation, or no exercise of independent judgment is involved. Moreover, the “voyages” are extremely brief, and only up and down the river, not on the high seas. In the instant case, much of the authority role of the captain - the title, the uniform, the shoulder bars, greeting the guests as they board and de-board - seems to be Employer-enhanced for the passengers’ benefit as part of a fantasy element’s<sup>13</sup> of the trip, but not part of supervisory reality.

While a captain could lose his license for negligence, and also put the Employer at severe financial risk, the same is true for a truck driver or a tour bus driver or a nurse. While as suggested by the Employer, it would be “folly” to have no one “in charge” of the vessel, it does not follow that the person “in charge” must be a statutory supervisor, as opposed to a leadperson, especially when there is a second-level supervisor aboard and when the Operations Manager is generally available for consultation or more. Based on the entire record as well as the foregoing, I find and conclude that the captains are experienced leadpersons, not statutory supervisors, and shall include them in the unit. *Chevron, U.S.A., Inc.*, 309 NLRB 59 (1992); *Spentonbush/RedStar Companies*, 319 NLRB 988 (1995).

### Unit

The Union seeks a small, operations unit. The Employer contends that only a boats-wide unit is appropriate. As a general proposition, a Petitioner is entitled to any unit of its choosing, as long as it is *an* appropriate unit; it need not be the optimal unit. Contrary to the Petitioner’s position on brief, it is generally not the Employer’s burden to prove the Petitioner’s

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<sup>12</sup> Indeed, the record does not reflect one actual emergency action by a captain, other than to make an brief medical analysis on whether to call 911 and what first aid to apply. Presumably if emergencies were regular, the Employer would encounter Coast Guard and insurance difficulties.

<sup>13</sup> E.g., taking the helm or getting a “captain’s” certificate.

unit inappropriate, as there is no presumption that a petitioned-for unit *is* appropriate; while certain units (not involved herein) are presumptively appropriate, it is not because they have been sought by a petitioner. In determining whether a unit is *an* appropriate unit, we look to those strands of relationship that tie the sought unit with the balance of the employees as “like”, and those that segregate the proposed unit from the others as “unlike.” Separate supervision and degree of interchange are major, but not conclusive, factors; all factors of differentiation and similarity are examined.

In the instant case, operations - which includes all of the unit sought, and no others - is separately supervised at the first level, the Operations Manager. In addition, there has been no “exclusive”, shift-long interchange between Operations and the rest of the crew, and almost no transfers, with the exception of one bartender becoming a captain, and “one or two” moves from operations to service, in the three years of the Employer’s existence. In addition, the operations employees make the boat “go”, while the others serve the customers - distinguishable functions.

However, the foregoing separateness over-simplifies the situation and ignores a plethora of commonality factors among the two groups - many of them small when examined in isolation, but assuming greater proportion in the aggregate. I note that the Operations employees, with the exception of the captain, require minimal skills and no license to perform their work, not even the basic Coast Guard “Z” card. The other employees also require no license, or a routine license for dispensing alcoholic beverages or handling food. Unlike examples from much larger vessels operating in open waters on long trips, here the rest of the operations crew does not assume navigational watches, does not take over the helm alone,<sup>14</sup> except to allow the captain the briefest of breaks to grab a snack or “hit the head.”

There is a high degree of integration between the operations crew and the rest of the crew in enhancing customer service, from the very beginning of the trip to the very end. The operations crew makes the initial customer contact, followed by the photo op with the captain and deckhand’s assistance on the ramp. During the voyage, the captain addresses the guests about safety and house rules, and invites them to the wheelhouse for a turn at the helm. The captain hosts the guests in the wheelhouse, and gives them certificates. Enroute, the deckhands float about the ship, monitoring the guests’ safety, tidying up all areas of the vessel (picking up debris, returning dirty dishes to the dishwasher, checking the heads) and chatting with the guests. They cover all areas of the vessel, including all areas where customers are to be found. Operations employees, especially the deckhands, are expected to make themselves useful to the rest of the crew. They don’t don waiters’ garb, but they will do whatever is needed to enhance the customers’ experience in the service arena. In particular, they are to help out at the back bar, bringing necessary supplies liquor, etc.

All employees wear a uniform of one kind or another, with minimal differences between departments. All, even the non-supervisory captains, punch a timeclock. All are subject to the same employee handbook, drug testing policy and benefits policies. Every employee is trained in what to do in the case of the various types of on-board emergencies. All are paid wage scales that overlap, with the exception of the captains, who are the highest paid; thus, dishwashers (and likely bussers) are in the same range as the deckhands, while cooks, senior

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<sup>14</sup> They may take the helm if the captain chooses to assume the risk to his license, in order to earn credit toward Coast Guard licenses. However, it does not appear that the captain leaves the wheelhouse under such circumstances.

deckhands and engineers are in a common range. All are potential ship maintenance and remodeling hands, at a common pay rate.

There are other similarities, especially in the area of cleanup/maintenance. Thus, deckhands police the outer areas of the vessel, wiping handrails, cleaning windows, wiping down deck tables and chairs, cleaning the heads and swabbing the decks. Dishwashers and galley personnel clean the kitchen, sweeping and mopping the areas around equipment, and dry mopping the galley floors. Bussers and servers are responsible for "ship cleanliness" and assist the Maintenance Manager in cleaning the interior, as do the deckhands. Presumably the former have certain cleanup responsibilities during the cruise and as part of their close-down procedures.<sup>15</sup> The bartender is responsible for cleanup in the bar area.

Another important similarity concerns the tipping procedure. It would appear that operations personnel do not receive tips in any significant amount for the 25% of the work that involves public cruises, while the servers do and share tips with the bussers. Beyond that, the record does not show if there is further tip-sharing with the kitchen crew. However, for the 75% of revenues that arise from charter work, the Employer tags on the 17% "service fee" which is shared with all crew members, except managers, supervisors and captains. As discussed in detail supra, this works out to a substantial portion of the crew's compensation, including that of the operations employees, especially the deckhands.<sup>16</sup> For the operations crew, their share worked out to approximately \$3.50 per hour on a base wage as low as \$6.50 per hour, the Oregon minimum wage. The record does not reflect the hourly return of the tip pool for the servers, but they, too, receive minimum wage.

Based on the foregoing and the entire record, I find and conclude that it would be inappropriate to permit an operations unit. In so concluding, I am aware that the Union has cited a case with many similarities to the instant situation, wherein the Board found an operations unit to be appropriate on a casino boat operation. *Florida Casino Cruises, Inc.*, 322 NLRB 857 (1997). I view that case as on the outer limits of permitting a separate marine or operations unit, and distinguishable in several important respects from the instant situation.

First, the *Florida* operation appears to have involved a more traditional, larger, ship-like, craft-like, operation. There was only one ship, with a crew of 136, including 18 in the marine crew unit. The captain was an admitted supervisor. In addition there was a first mate, a second mate, a chief engineer, an assistant engineer and multiple able-bodied seamen (ABs). It appears that the first mates, second mates, chief engineers and ABs had the Coast Guard licenses bearing these same titles.<sup>17</sup> The mates and ABs served navigation watches.

Second, there was less integration of the marine crew into other aspects of the ship's operations, and vice versa. The marine crew was not assigned to the ship security/surveillance detail. The ABs performed the routine vessel maintenance, such as chipping paint and painting;

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<sup>15</sup> The record does not reveal exactly how the interiors of the boats are cleaned. There is evidence that employees don't leave until cleanup, or certain elements of same, are completed. However, we don't know who wipes the tables and chairs in the bar and restaurant and sweeps or mops the floors on a daily basis. A job description makes reference to potential janitors, but the record reflects no such individuals.

<sup>16</sup> The amounts described in the record may be after-tax amounts, since an unspecified, but large, portion of the "house" 30% share of the tip pool is apparently used to cover the "taxes" on the tips.

<sup>17</sup> See footnote 4 and related text in *Florida Casino*.

there was no indication that the rest of the crew ever performed such work. The marine crew's duties confined them to a much larger degree to the operational areas of the ship. The assistance of operations employees on the service component of the vessel was only occasional and did not extend into departments beyond food and beverage, such as the casino operations. Moreover, their occasional assistance was "voluntary." There is no indication in the *Florida* decision that marine crew was expected to roam the entire ship while at sea; in fact, that function was performed by another, non-unit classification.

Third, the Employer's service fee sharing arrangement is woven into the entire compensation structure (except for captains). In *Florida*, there was no mandatory set service fee arrangement. Rather, tips were earned in the customary "voluntary" fashion by those who customarily are tipped in our culture, such as waitstaff, bartenders and dealers, based on specific services directly rendered. The marine crew, on the other hand, received no "regular" tips, as they apparently had few tipping opportunities. Thus, the service staffs were very dependent on tips, since they received only minimum wage, whereas marine crew were paid a handsome flat rate per trip and received only minimal tips. In the instant case, tips form an important part of almost every employee's pay structure; there are categories in both the operations department and the food department that receive minimum wages, plus their share of the tip pool.

Accordingly, notwithstanding the similarities between the instant case and the *Florida* case, I find the differences make the situations distinguishable, taking the proposed unit across the boundary into "fragment" territory. Based on all of the facts in the record and set forth above, and noting the significant differences from the *Florida* case, I shall direct an election in a unit of all cruise employees. See, generally, *Seaboard Marine Ltd.*, 327 NLRB No. 108 (1999).

### **Election Timing, Eligibility**

The Employer's operations are "seasonal", in the sense that the number of employees rises and falls substantially - by a factor of 2 or perhaps a bit more - during the year, on a predictable basis. There are two cyclical peaks: three months of summer, and the month of December. There is a regular core group of employees that works year 'round, albeit some on a part-time basis during the slower periods. The employees that complete one "season" have no "right" to work the next peak or the next year, but there is a mutual expectancy that anyone who worked one of the peaks the in Year 1 will return the next peak, or for the same peak in Year 2, if they choose to do so, unless they have voluntarily or involuntarily been terminated, or missed a year.

It is estimated that as low as 25% or as high as 50% of the employees needed for the coming summer peak will be returnees. It would appear that this "returnee" percentage this year will likely be in the 35% range; this will be lower than under ordinary circumstances, since the overall size of the workforce will increase this year due to the addition of the Dolphin. Thus, there will be more vacancies to fill this summer than usual, but with the number of returnees based on last year's smaller employee complement.

Seasonal employees receive the same compensation as comparable full-year, part-time employees<sup>18</sup> and work along-side them in generally identical positions.

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<sup>18</sup> The record is fuzzy about benefits for full-time, full-year employees; they may be enhanced.

Under these facts and circumstances, it would be inappropriate to exclude the summer help from voting eligibility, since they will be a substantial part of the unit. On the other hand, it is Board policy, when there is a large non-seasonal complement, especially with two distinct peaks, not to postpone the election until a peak. See, e.g., *Baugh Chemical Co.*, 150 NLRB 1034 (1965).

The Union takes the position that there should be a “normal” election as soon as possible, among the employees then actually working. The Employer argues that the election should be postponed, or the election should be conducted as soon as possible by mail, with some (unstated) eligibility formula for seasonals.

I agree with the Employer’s position that the balloting should be done in either of its two suggested manners. I note that the delay in holding off on an election until, say, a mid-June eligibility date would not involve a severe delay. In view of the reasonableness of either option, and the Employer’s position that either would be appropriate, I will permit the Union to select an option within 5 days of the issuance of this decision. I do this, because in either event there will then be agreement among the parties. Otherwise, I will go forward with an immediate mail ballot.<sup>19</sup>

In the event that there is an immediate election, which would be by mail, I shall direct an eligibility formula. The purpose of a formula is to permit those employees who have a continuing association with the unit to vote, while excluding those who have only a passing, one-time employment. Accordingly, I would permit any employee not already on the payroll as of the standard voting eligibility date to vote if they have worked the summer 1998 season, *plus* the holiday 1998 season, *or* the holiday 1997 season *or* the summer 1997 season, provided they have not since formally quit or been discharged. I define the seasons as June 1 through Labor Day and November 15 through January 1. A minimum of 8 days<sup>20</sup> or 12 trips in a holiday season, or 20 days or 30 trips in a summer season, will be required to qualify for that season. See, generally *Daniel Ornamental Iron Co.*, 195 NLRB 334 (1972).

In the event that the delayed election option is selected, the election will be conducted, absent contrary agreement by the parties, sometime during the last 10 days of June 1999, with an eligibility date of the last completed payroll period prior to the issuance of the Notice of Election.<sup>21</sup>

There are approximately 120 employees in the unit.

### **DIRECTION OF ELECTION**

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<sup>19</sup> The record is replete with references to students at college.

<sup>20</sup> By this I mean any 8 calendar days with at least one trip each, OR 12 individual cruises, regardless of the number of days (for example, 6 two-cruise days). Likewise, for the summer season. In applying the formula, for simplicity, time spent on non-cruise activity, such as painting, will not earn eligibility.

<sup>21</sup> The Union indicated a willingness to participate in any election directed. Since the unit found is larger than that sought, I will permit the Petitioner 10 days from today to submit an additional showing-of-interest.

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INLANDBOATMEN'S UNION OF THE PACIFIC, THE MARINE DIVISION OF THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION.

### **LIST OF VOTERS**

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters must be filed with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before March 31, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **NOTICE POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 7, 1999.

**DATED** at Seattle, Washington, this 24th day of March, 1999.

/s/ PAUL EGGERT

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