

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

BRUSCO TUG AND BARGE CO.

Employer

and

Case 19-RC-13872

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

Petitioner

**SUPPLEMENTAL DECISION ON REMAND**

Pursuant to the Board's Order in 330 NLRB No. 169, the record in the above-referenced case was reopened for the purpose of taking additional evidence on the issue of "whether the Employer's mates 'assign' and 'responsibly direct' other employees and on the scope or degree of 'independent judgment' used in the exercise of such authority". Upon the entire record in this proceeding,<sup>1</sup> the undersigned finds:<sup>2</sup>

The Employer operates about 25 tugboats out of its homeport in Cathlamet, Washington, as well as about ten additional tugboats out of other West Coast ports. The mates involved in the instant preceding all work out of Cathlamet.

The Employer operates its Cathlamet-based tugboats, along the Pacific Coast and on the Columbia River. Ocean-going tugs are manned by a crew consisting of a captain, a mate, an engineer and a deckhand. There is a second deckhand when a log barge is being towed, as loading and unloading log barges involves additional work. Ocean-going crews typically work rotations of 30 days on, 30 days off. At sea, the crewmembers are on duty during two six-hour watches in every 24 hours. The captain and engineer are on watches beginning at 6:00 a.m. and 6:00 p.m. The mate and deckhand are on watches beginning at 12 noon and 12 midnight. The boat is steered by the captain or the mate, depending on which is on duty.

The captain is the highest authority on the boat. He is responsible for navigation and safety, for ensuring that company policy is followed, that all necessary groceries and other supplies are acquired and on board, that the vessel is sea-worthy, and that the crew is capable of carrying out their duties. The captain has the authority to take the boat into an unscheduled port, or to stay in port, if weather conditions so warrant. The captain may put a crewmember off the boat for disciplinary reasons.

During his watch, the mate steers the boat, following a pre-determined course and is responsible for the safety and navigation of the boat. The deckhand, on the same watch as the mate, has the duty of

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<sup>1</sup> Following the reopened hearing held on November 14, 2001, the parties filed briefs, which have been considered.

<sup>2</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

preparing meals for the rest of the crew. The deckhand may also be instructed by the captain or the mate to perform certain routine maintenance tasks, such as chipping and painting. Some captains have an established duty roster for the deckhand to follow; others do not.

Ocean-going tugs generally tow only one barge at a time. Connecting a barge to a boat for towing purposes is called “making up a tow.” The entire crew participates in making up a tow, and also in docking a barge. Generally, for either of these maneuvers, the captain steers the boat, either from the wheelhouse, or from the “Texas deck”, an elevated platform above the wheelhouse from which the captain can steer and operate the winch for the towline, with a better view of the activities. The mate may be stationed either on the deck or on the barge. The mate gives instructions to the deckhand and the engineer with respect to where they should station themselves and which lines to “tie off” (or release) in what order.

When making up a tow, or docking, the crewmembers are each equipped with handheld radios and are all in constant contact with each other. Generally, the captain has, in advance, advised the mate as to what they will be doing with respect to making up a tow or docking, and how he wants it done. Other crewmembers may be present during these conversations, or the mate may pass on the instructions later. Crewmembers who have worked together before need little instruction, as each already knows what needs to be done, once given the plan.

The engineer is responsible for the proper functioning of the mechanical parts of the boat. If there is a malfunction or other problem with the engine during the mate’s watch (during which the engineer is off watch), the mate can wake the engineer. The engineer then diagnoses the problem and determines whether it needs to be fixed immediately or if it can wait until his normal watch. Typically, the engineer is deferred to in such matters. The engineer is paid overtime for any time he works “off watch.”

There are two methods of docking a barge – “hipping up” to the barge, and towing the barge into the dock. The captain decides which method will be used. Hipping up involves moving the tug to the side of the barge, securing the barge tightly alongside the boat, and then moving the two to the dock as a single unit. During this procedure, the deckhand boards the barge once the boat is alongside, to secure the lines. The captain decides which lines to tie where. Generally, captains like to tie off the lines in a certain order, following the same order every time, such as spring line first, then bow, then stern. The mate also boards the barge, stationing himself at a place of advantageous visibility so he can direct the captain (who is steering the boat)<sup>3</sup> to the dock. Some captains prefer to board the barge themselves and have the mate steer. It is necessary to have someone on the barge because the barge is higher than the boat and blocks the view of the dock.

When the second docking method - towing the barge to the dock – is used, there is usually an assist boat, which takes the mate and the deckhand to the barge (which is some distance behind the boat). The mate then gives the captain and the assist boat instructions, such as the distance remaining to the dock, whether more or less speed is needed, and whether the assist boat should push or back away.

On the ocean, conditions such as weather can influence a decision to lengthen or shorten the towline, a decision that can be made by the mate as well as the captain. The procedure involves the mate and the deckhand (or the captain and the engineer) both going to the winch on the Texas deck, where the mate operates the controls while the deckhand watches to make sure that the line is spooling properly.

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<sup>3</sup> The boat and captain are obviously on the “water” side of the barge, not the “dock” side.

In rough seas, the barge may be more safely secured using surge gear, a decision made by the captain. In low visibility conditions, the mate may post the deckhand to keep watch, although this occurs only rarely. (The wheelhouse is only 20 feet from the bow.)

On ocean-going voyages, the mate has discretion to slow the vessel down to avoid breaking the tow “wire” (cable), but only the captain can decide to turn the boat around, whether or not to leave port, or whether to go back to port in bad weather. [There is contradictory testimony in the record that the mate can decide to go into port in bad weather, and that this may happen on any one boat once or twice during any one winter.] The captain decides what time the boat will get to the “bar”<sup>4</sup> near the mouth of the Columbia River; if the captain says they need to get there at 2:00, for example, the mate will, if necessary, slow down the boat to arrive at 2:00.

During his watch, the mate can call out the captain during any unusual circumstances or an emergency. For example, if the mate thinks that crossing the Columbia River bar is going to be particularly severe, or that maybe they won’t want to go in, he would call out the captain to make the decision. In any emergency, such as a fire on board, or a man overboard, the mate would call out the captain. During emergencies or abandoning ship, the mate is in charge of the deck and directing the crew, while the captain is on the bridge steering the boat. The mate would give any necessary instructions to the remaining crew, such as to bring a fire extinguisher or water hoses.<sup>5</sup>

On some, but apparently not all, boats the mate is responsible for safety and fire drills and the drill for broken-towline barge retrieval. On some boats, the captain decides when the drills will occur; on other boats the mate decides. All crewmembers, including those who are off watch, participate in drills. Those who are off watch receive overtime pay. Obviously, every such drill will require that someone work overtime.

In normal circumstances while at sea, there are projects for the deck “crew”<sup>6</sup> to work on, such as painting or making repairs. Depending on the watch, the captain or the mate will instruct the deck crew to work on the project. The deck crew also does cleaning and cooking. The deckhand is on the mate’s watch so that he has time to cook dinner for the captain and engineer. Captain Nordstrom testified that he relies on the judgment of the mate in determining the “staffing level needs” during the mate’s watch. However, such testimony without more is not very helpful, inasmuch as the mate has few if any choices regarding the “staffing level” on his watch.<sup>7</sup> A witness who had worked as a mate said that he would assign tasks according to whom he thought was best qualified. For example, the more physically strong crewman would be told to do the lashings, while the engineer would be told to handle any mechanical steps. Apparently this testimony was in reference to loading log barges in port, when there are two deckhands.

Some of the Employer’s vessels ply only the Columbia River. Generally, these vessels make day runs of up to 12 hours, and carry a captain and one crewmember. During the summer of 2001, one vessel made the “fish run” which involved going a few hundred miles up the Columbia, passing through several locks. The fish run normally had a crew of four, including the captain and the mate (called the “pilot” on the river). They stood watches just as is done in the ocean-going vessels. When passing through locks or fish runs during the mate’s watch, the mate would give instructions as to which side of the locks to tie up to, which lines to use, and where the deckhand should be stationed.

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<sup>4</sup> The bar is a relatively shallow area at the entrance to the River, where rough water can be encountered.

<sup>5</sup> Presumably such instances would be highly infrequent.

<sup>6</sup> The deck “crew” consists of a single deckhand, or when towing a log barge, two deckhands.

<sup>7</sup> There is one deckhand on board on the mate’s watch, except for log barges. There is no indication that the mate can call out the engineer (other watch) to work on the mate’s watch, to do deckhand functions.

When passing through locks, certain decisions have to be made by either the captain (or the pilot (mate) if a fish run is involved,<sup>8</sup> and the event happens on his watch). Such decisions include whether to tie to the port or starboard side; which lines to tie up, such as a bow line and a stern line; and where to station the deckhand to call out distances on the radio. The lockmaster is stationed on a certain side, and that is generally the side the boat ties up to, so that the “lock slip” (a piece of paper specifying the tonnage and commodities) can be handed to the lockmaster, unless the lockmaster has been called and given the information ahead of time. The wind direction and force can also influence the choice of which side to tie up to, as can the cleat configuration in relation to the length of the barge.

On the river, the boats are almost all push boats, rather than tow boats. Push “wires” on the front of the boat are tied to the barge and then cinched up tightly using electric winches on the boat. When traveling, the wires are kept tight, but may be adjusted from time to time, depending on river conditions. During loading or off-loading, the barge moves down or up in the water as cargo is added or removed; thus, the wires have to remain slack so they won’t break. The pilot (mate) instructs the deckhand in to tighten or loosen the push wires in these relatively small numbers of instances where there is a mate on board.

### ***Conclusion.***

This remand is limited to the issues of whether mates “assign” and/or “responsibly direct” employees, and whether “independent judgment” is required in doing so. All other arguments concerning supervisory status have already been rejected by the Board and Court.

The Employer contends that mates exercise independent judgment in the responsible direction of employees or assignment of work when they: (1) assign work; (2) assign overtime; (3) handle safety matters; (4) cross the Columbia bar; (5) make up to a barge; (6) change the tow length; (7) travel through locks on the Columbia River; (8) docking; and (9) respond to adverse weather conditions.

(1) Assignment of work. Examples of the mates’ assignment of work are: stationing the deckhand in the wheelhouse as an “extra set of eyes” during adverse conditions; or when the vessel is in a narrow area and the mate has to leave the wheelhouse and go to the stern deck. Other assignments would be instructing the deckhand to man the winch while the mate is lengthening or shortening the tow, or lubricating the tow line; assigning the deckhand duties during an emergency; instructing deckhands to perform certain tasks during docking and making up a barge, such as which line to use and where to tie up; instructing the deckhand to lash cargo; and instructing the deckhand to perform various general maintenance tasks, such as chipping and painting. The Employer contends that in making these assignments, the mate assesses the “relative ability, qualifications, experience, mental, and physical capabilities of the deckhands.” I note that the Board has found that assignment of employees to specific jobs where such selection is dictated by who possesses the required skill is a “routine” matter. *Vapor Corporation*, 242 NLRB 776 (1979).

It must be kept in mind that during the vast majority of time the mate is on watch, there is only one deckhand, and the mate has no choice with respect to making assignments. During docking and making up a tow, and during emergency situations, the engineer is also present on deck, but at those times the captain is on duty and in charge of the vessel. Thus, during emergencies, and while in port, the mate is not acting in the captain’s place, and cannot be said to have the same authority as the captain. If both the captain and the mate were supervisors, there would be a ratio of one supervisor to each employee aboard the vessel, which hardly seems likely in circumstances where captains have testified that everyone on board, including the deckhand, generally knows what they are supposed to do and needs little direction.

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<sup>8</sup> On normal runs, there is a captain plus one additional crewmember.

The record does not reveal that stationing the deckhand in the wheelhouse during adverse weather or while the mate is required to be on the stern deck requires any substantial degree of judgment.<sup>9</sup> The need for an extra pair of eyes during bad weather is obvious, as is the need to have the deckhand watching things in the wheelhouse (including looking forward) while the mate is at the stern. Likewise, instructing the deckhand to man the winch is obvious, and does not require any independent judgment. These actions seem about as obvious and profound as stationing a worker behind a backing truck.

(2) Assignment of overtime. During emergency situations and emergency drills, and whenever there is a mechanical problem in the engine room on the mate's watch, the engineer is called out. The result is "off watch", overtime, pay for the engineer. The record does not establish that any independent judgment on the part of the mate is required in these situations. The engineer is called out for every emergency and every drill – the mate does not decide on each occasion whether or not to call out the engineer. The engineer is the one person on board who has expertise in the mechanical and electrical equipment in the engine room, and inasmuch as the safety of those aboard the vessel, the vessel itself, and its tow depend upon the proper functioning of the engine room equipment, the need for calling out the engineer in cases of malfunction is obvious, and does not require any independent judgment. There are no specific examples in the record of any mate at any time ever weighing the need to call out the engineer against the cost of the overtime thereby accrued.

(3) Handling of safety matters. The mate plays an active role during emergencies and emergency drills because the mate is "in charge" on the deck while the captain is in the wheelhouse during these events.

There are really two distinctly different events: one is routine (drills), the other not (emergencies). On some boats, the mate decides when the safety drills will be conducted. During drills and actual emergencies, the mate gives instructions to the deck crew, such as to bring hoses or to bring a fire extinguisher. There is no specific example in the record of any mate ever distinguishing in any way between deck crewmembers with respect to which one should bring the fire extinguisher or the hoses. On all vessels, the mate follows the captain's instructions with respect to the frequency and timing of emergency drills: some captains give the mate a free hand in this regard, some captains want certain drills always scheduled for certain times, and some captains don't want any drills at all. Thus the record does not establish that mates are required to use any independent judgment in connection with their activities during emergency drills, or even that the type of direction they give during those events amounts to "responsible" direction.

During actual emergencies, the mate gives instructions to the deck crew (the engineer and the deckhand), such as to bring a fire extinguisher or a hose. It is noted that in emergencies, the captain is always summoned if not already on deck and would surely be the one "in charge" of the implement of captain plus three. Obviously, the captain, in emergencies, is not deferring all decisions except boat maneuvering to the mate. One would have to assume that the emergencies, such as fire, are highly infrequent; if they were commonplace, the Employer would run into severe difficulty with insurers or the Coast Guard and have difficulty functioning, a fact not suggested in the record.

Further, the Board approved the conclusion of the ALJ in *Pantex Towing Corporation*, 258 NLRB 837, 842 (1981) that, "Even if...the man in the wheelhouse with his hand on the wheel was considered 'God' and his license was at stake and he was responsible for the crew's safety and [the employer's] property, the Board has held that neither the licensed status, in which an individual is responsible for the

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<sup>9</sup> If, indeed, any judgment is required, since such assignments would appear likely dictated by Coast Guard regulation and/or employer rules or industry practice.

safety of others, or responsibility for physical property alone, confers supervisory status”, citing *Graham Transportation Company*, 124 NLRB 960 (1959).

(4) Decision making regarding crossing the Columbia River bar. The record establishes that crossing the bar can be more difficult on some occasions than others, and is affected by weather and tidal conditions. The captain decides in advance what time he wants to arrive at the Columbia bar – presumably to encounter favorable tide conditions - and instructs the mate in that regard. In circumstances where the weather is particularly severe, such that he may want to not enter the river, the mate calls out the captain to make the decision. There is no specific evidence in the record demonstrating that mates give any particular direction to the deckhands when they are crossing the bar, nor any evidence establishing that any decision the mate might make regarding crossing the bar involves in any way any of the statutory indicia of supervisory status at issue here.

(5) Making up a barge. The entire crew participates in making up a barge. When they are making up a barge, the captain is usually in the wheelhouse, while the mate is on the barge, where he has a good view of everything. Some captains put the mate in the wheelhouse and go up on the barge themselves. The deckhand is also on the barge; the engineer is on the boat, ready to throw the lines across. The boat hips up to the barge, and the barge is made fast to the boat. Then the boat moves out into the water where there is more maneuvering room, and the towline is attached. Prior to arrival at the dock to make up the barge, the captain has told the mate (and either the rest of the crew directly, or indirectly via the mate) exactly how he wants the maneuver done. Docking a barge is a similar captain-determined process.

The record establishes that during docking and making up a barge, the mate gives instructions (in reality, passes on the captain’s prior instructions/plan) to the deckhand and engineer with respect to which line to tie up first and where, and similar matters. The entire crew is in communication with each other by radio; thus, the captain can monitor every word. The mate may be required to use some judgment as to which line to tie up first, depending on the situation before him.

(6) Changing the tow length. Deciding to lengthen or shorten the tow line because of weather conditions or some other reason may be a decision requiring independent judgment on the part of the mate, but the record fails to establish that such a decision amounts to *responsible direction of employees*, inasmuch as it involves the mate himself operating the winch, and the deckhand doing nothing more than watching the line to assure that it is spooling properly. The record does not demonstrate that directing the deckhand in these circumstances is anything more than a routine matter. Normally, there is only one person available to perform the task, the deckhand.

(7) Travel through locks on the Columbia River. The record establishes that in the summer of 2001 for the first time one boat was engaged in the “fish run”. River runs normally require a captain and a crewmember. During the fish run, there was a crew of four. At most, this involved perhaps two of the total number of mates employed by the Employer, for a very limited period of time. This brief, unprecedented blip in on-the-river experience adds little to evaluating the responsible direction of the work force, since the norm is to have only a captain and another crewmember.

(8) Docking. During procedures involving coming into or leaving a dock, all crewmembers are on deck. At these times, the captain is in charge of the vessel, and is in communication with all crewmembers by means of handheld radios. The captain has determined in advance how the barge will be docked or how the tow will be made up; the mate has only to carry out the captain’s wishes. The record fails to establish that the mate is required to use any independent judgment in directing employees in these maneuvers. (The only “judgment” indicated is in passing “directives” to the *captain*, who cannot see the scene, or to the assist boat.) There is no more “responsible direction” or independent judgment here than for a

construction rigger giving directions to a crane operator. Moreover, this is a matter largely pre-determined by the captain.

In examining the issue of the supervisory status of the mates, I am mindful of *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), in which the Court rejected the Board's interpretation of the phrase "independent judgment." The Board had found that a judgment - even a highly technical or difficult one such as one made by a professional employee - did not constitute "independent judgment" if the judgment required of such person was routine or typical for such a person when directing less-skilled employees in accordance with employer-specified standards. The Court did not make any broad statement that any employee who gives any direction at all to other employees is necessarily a supervisor; to the contrary, the statute specifically excludes judgments that are "merely routine or clerical in nature", and the legislative history clearly shows an intent to distinguish straw bosses and other lower level individuals from true supervisors, so as not to expansively exclude large portions of the work force from the protection of the Act. The Court recognized in *Kentucky River* that "independent judgment" is an ambiguous term as to the *degree* of discretion required. *Id.*, at 1867. "Many normally supervisory functions may be performed without the 'exercise of such a degree of ... judgment or discretion... as would warrant a finding' of supervisory status". *Ibid.*, quoting *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949). "It falls clearly with the Board's discretion to determine, within reason, what scope of discretion qualifies". *Kentucky River*, at 1867. The Act "by focusing on the 'clerical' or 'routine' (as opposed to 'independent') nature of the judgment, introduces the question of *degree* of judgment that we have agreed falls within the reasonable discretion of the Board to resolve". *Id.*, at 1868-69 (Emphasis added). Moreover, "It is undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer". *Id.*, at 1867. Thus, it is clear that there are judgments and there are judgments, made in the "responsible" direction of the work force. Some call for a high *degree* of discretion, some call only for routine or clerical *degree* of judgment. There is a line - not always a bright one - in between. It is up to the Board to set that line, and decide on which side an individual's *degree* of judgment lies.

I am mindful of *Local 28, International Organization of Masters, Mates and Pilots, AFL-CIO*, 136 NLRB 1175 (*Ingraham Tug and Barge*)(1962) ["Ingraham I"], and *Bernhardt Bros. Tugboat Service, Inc.*, 142 NLRB 851 (1963). In both of those cases, the employers involved operated towboats on the Mississippi River and its tributaries. A tow could include anything from one up to 15 or more barges, and might stretch ahead of the boat 1,000 feet or more. In both cases, the crew complement was approximately 10 individuals, including the captain. These circumstances were essentially repeated in the more recent *Ingraham Barge Company*, 336 NLRB No. 131 (2001) ["Ingraham II"], and *Alter Barge Lines, Inc.*, 336 NLRB No. 132 (2001). In the *Ingraham II*, the Board adopted the Administrative Law Judge's findings that the facts had not really changed since *Ingraham I*, where the Board had found the mates/pilots to be supervisors. Two members of the three-member panel in *Ingraham II* wanted to reverse *Ingraham I*, but could not or would not, lacking three members in favor. In the *Alter Barge* case, based on similar facts and findings by the same ALJ as in *Ingraham I* and having just adhered to *Ingraham I* in *Ingraham II*, the same Board panel found the *Alter Barge* mates/pilots to be supervisors as well.

These four cases are readily distinguishable from the instant case in that here the size of the crew complement is normally four, including the captain, and the potential size of any tow is minuscule in comparison. (Here, we are concerned with a maximum of two barges - usually one - whereas *Ingraham II* involved as many as 50 barges; and with crews of 2 compared to 10, on the river. Thus, while the mates herein may give some of the same types of instructions to crewmembers, as did the pilots in the four cited cases, the *degree* of judgment required is considerably less. The mate's role in locking carried significant weight in the four cited cases, whereas in the instant case a mate is involved in locking activity only on the fish run.

More specifically, in *Ingraham II*, a “vessel” consisted of the towboat<sup>10</sup> and its associated barges. As the vessel moved up or down the Tennessee, Ohio, or Mississippi Rivers, barges were necessarily picked up or dropped off. A vessel might include 25 loaded and 25 empty or 15 loaded and 15 empty barges. Barges were placed end on end, side by side, “wired” together. The addition or subtraction of a barge or a number of barges could result in changing the configuration of the vessel by rearranging the barges due to such things as weight and height of the barge and the overall appearance of the mass of barges. A low barge might take on water over its bow if placed at the head of the mass of barges and an uneven or unsquare mass might result in steering difficulty. I further note from a review of most of the reported riverboat tug cases that river work involves frequent locking, constant changes in course, regular changes in the river channels, and “traffic” headed in the opposite direction. Here, the river work almost never involves a crew directed by a mate (only for the fish run). At sea, obviously the voyage would be much more routine, given the lesser number of potentially impinging vessels, the greater course options, the lack of locks, the ability to generally head on a steady course for long periods.<sup>11</sup>

Thus, as to river work herein, there is virtually no opportunity for supervisory involvement by mates. As to sea work, normally there is a mate in charge of one deckhand, occasionally an engineer<sup>12</sup>, and sometimes a second deckhand<sup>13</sup>. The captain is always immediately at hand, and is to be summoned for crises. Headquarters is also readily available by radio. Clearly, the sensitivity of instructions that a mate might need to give to crewmen in the *Ingraham* line of Mississippi River System Cases, and the degree of discretion involved, are of much greater magnitude than that required of the mates in the instant case. An *Ingraham* boat/barge combination compared to the Employer’s boat/barge combination is in scale like comparing the Employer’s boat/barge operation to a push boat in a lumber mill log pond. There is an order of magnitude difference in scope and complexity.

In conclusion, we are concerned here only with the “assigning work” and “responsible direction” indicia. River crews normally have no mate. For ocean crews, the captain is on watch half the time. The rest of the time the mate is on watch, with the captain immediately available on the small boat. For more difficult maneuvers - docking by hiping up or towing, making up a tow – the captain is on duty, along with the rest of the relatively small crew. The captain plans the activity; the mate essentially relays the directions. The crew knows the whole routine once the basic plan is communicated. At all other times, the boat is chugging along on a pre-determined course, generally out on the ocean, but sometimes on the Columbia. When emergencies or serious concerns arise on the mate’s watch (e.g., to cross the bar? to use the surge gear?), he summons the captain.

This record indicates minimal independent judgment – maybe to change the length of the towline or to tell the deckhand to paint. Otherwise life on board is largely determined by tradition, routine, captain’s orders, regulations, etc. Most of the mate’s judgments are of the statutorily “routine” degree. There is nothing in the record that comes close to showing “responsible direction”. In this regard there is no evidence that the mate is disciplined if his “crew” fails, or rewarded if it succeeds. There is no record that any appraisal of the mate calls for a review of how his “crew” performs. There is no hint of reward to the mate – say a bonus – for a job well done by the crew. These are factors that might indicate that one

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<sup>10</sup> While the boats are referred to as “tow boats”, they in fact push the barges.

<sup>11</sup> In the event the Board were to find the instant case indistinguishable from the *Ingraham* and related cases, I respectfully recommend to the Board that these cases be reversed a precedent. The mate’s duties in these cases involve a greater degree of judgment than the Employer’s mates, but the degree of judgment demonstrated in those cases, in my view, still falls below the minimum required. Telling an employee to go forward to be a lookout in fog, or to tie a line to a clearer bollard at a lock, appears highly routine, predictable and repetitive. Moreover, in my view, the original cases do not contain a careful analysis of the facts, the degree of judgment and the statutory language and purpose.

<sup>12</sup> Recall that ordinarily the engineer does not work on the mate’s watch.

<sup>13</sup> Recall that a second deckhand is required only for log barges.

is held “responsible” for the direction of others. The “strongest” evidence of “direction” by the mate is when he gives docking instructions – “faster”, “slower”, “closer” – to the *captain* or the *assist boat*. The mate has no more authority or responsibility than a journeyman over an apprentice, or a rigger over a crane operator.

I conclude, therefore, that the Employer has not met its burden<sup>14</sup> in establishing that the mates involved herein “assign” or “responsibly direct” employees, utilizing “independent judgment” to a degree exceeding a “merely routine or clerical nature”.

### **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 January 21<sup>st</sup> 2002.

**DATED** at Seattle, Washington, this 7<sup>th</sup> day of January 2002.

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<sup>14</sup> The Court in *Kentucky River*, supra, reaffirmed the Board’s long-standing policy that the burden of establishing supervisory status falls upon the party claiming that such status exists.