

IN THE MATTER OF LICENSE NO. 334349 AND ALL OTHER SEAMAN'S  
DOCUMENTS

Issued to: Manuel NEVES, Jr.

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1979

Manuel NEVES, Jr.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 1 August 1972, an Administrative Law Judge of the United States Coast Guard at San Diego, California, suspended Appellant's seaman's documents for six months on 12 months' probation upon finding him guilty of the charge of violation of a statute [46 U.S.C. 224a]. the specification found proved alleges that while serving as Master on board Fishing Vessel CONSTITUTION under authority of the license above captioned, from or on about 25 June 1972 to on or about 11 July 1972, Appellant did willfully employ or engage to perform duties of mate on board the CONSTITUTION, a fishing vessel of over 200 gross tons, a person or persons not licensed to perform such duties in violation of 46 U.S.C. 224a (R.S. 4438a) for a fishing voyage on the high seas which began and terminated at San Diego, California.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of CONSTITUTION.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved and then entered an order suspending all documents issued to Appellant for a period of six months on 12 months' probation.

The entire decision was served on 2 August 1972. Appeal was timely filed.

#### *FINDINGS OF FACT*

F/V CONSTITUTION is a motor propelled documented fishing vessel of two hundred or more gross tons. From 25 June 1972 to 11 July 1972/the vessel was engaged on a voyage outside the line dividing the inland waters from the high seas. During this time Appellant served as Master of the vessel under authority of his duly issued license. Appellant was the only licensed deck officer aboard the vessel for the voyage in question.

During the course of the voyage some person or persons were employed to perform the duties of navigating officer of the watch without being possessed of a license as required by 46 U.S.C. 224a.

Appellant, as Master of the vessel, violated 46 U.S.C. 224a.

#### *BASES OF APPEAL*

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) the decision of the U. S. District Court in *United States v Silva*, S.D. Cal. (1967), 272 F. Supp. 46, takes away any grounds for proceeding against Appellant's license for violation of 46 U.S.C. 224a; and

(2) the decision of the Court of Appeals in *Bulger v Benson*, CA 9 (1920), 262 F. 929, rules out the possibility of action under R.S. 4450 for violation of 46 U.S.C. 224a.

APPEARANCE: Driscoll, Harmsen, & Carpenter, San Diego, California, by Samuel Carpenter, Esquire.

### OPINION

#### I

Appellant's reliance upon *United States v Silva*, D.C. S.D. Cal. (1967), 272, F. Supp. 46, is misplaced and, in part, is caused by surplus language in that decision itself. *Silva* dealt with imposition of a monetary penalty for violation of 46 U.S.C. 224a; the instant case deals with suspension of a Master's license.

The issue in *Silva*, as seen by the court, was whether 46 CFR 157.30-10, in purporting to set minimum manning requirements for officers aboard uninspected vessels subject to 46 U.S.C. 224a was valid. The regulatory matter stated to be an issue is the first sentence in the second item enumerated under paragraph (c) of the regulation:

"If an uninspected vessel engages on a voyage of over 12 hours duration, such vessel shall have a master, mate, chief engineer, and assistant engineer and such officers shall be in charge of their respective watches continuously. . . "

The court held the regulation unauthorized under the power granted by 46 U.S.C. 224a.

Insofar as the court appears to rely on 46 U.S.C. 223 as applicable and somehow controlling, I must reject its dictum.

#### II

Two matters must be mentioned here to clarify the picture.

One is that the court specifically held that:

"The vessel CATHY LYNN and its part owner Manuel A. *Silva* are subject to all such requirements as section 224a shall impose but that in the present instance there has been no violation." p. 49.

The National Transportation Safety Board, in Order No. EM-25, August 1, 1972, construes the *Silva* opinion as enabling "The vessel's managing owner to avoid any responsibility under the statute by listing no mate on the crew list" and as creating "a changed relationship between the master and the managing owner." The court, however, said nothing about "listing no mate on the crew list." The inescapable fact was that in the stipulation of uncontested facts referred to by the court (p.47), it was agreed that no person was employed to serve as mate aboard the vessel. Obviously, since the statute prohibits employment, by owner or master of an unlicensed person to serve as mate, if no one was employed to serve as mate there was no violation of the statute. On the agreed fact, the court was eminently correct in holding that "in the present instance there has been no violation."

With this in mind, it is clear that all else the court said is *dictum*; even the issue as framed by the court itself is irrelevant. This is not the place to attempt to correct the original error of complaining that the vessel had "sailed short one mate," or the failure to argue that "employ" was susceptible of varied applications, or the failure of the court itself to see that the regulation as quoted by it was not the regulation that existed at the time of the offense. Suffice it to say that an owner may violate 46 U.S.C 224a, that a master may violate 46 U.S.C. 224a, and that no relationship between master and owner with respect to that section was changed by the *Silva* decision.

### III

It is conceded that 46 U.S.C. 224a does not authorize a regulation requiring any specific number of mates on a fishing vessel. More important, it has not been argued that 46 U.S.C. 223 applies to fishing vessels.

The objectionable wording of 46 CFR 157.30-10(c) may be overlooked, since it was not charged that Appellant violated that regulation but rather that he violated the statute. It may be pointed out, however, that the language of that paragraph of the regulation as it existed prior to 6 December 1966 (and as it existed at the time of the offense in the "Silva" case) formulated a good rule of evidence to the effect that when a vessel subject to 46 U.S.C. 224a engaged on a voyage of more than 12 hours with only one licensed deck officer aboard there was *prima facie* a violation of the statute in that someone without a license must have been employed to perform the duties of "navigating officer in charge of the watch" at such times as the duly licensed officer was not so functioning.

The rule of evidence still obtains. Since Appellant was the only licensed deck officer aboard CONSTITUTION for a voyage of over two weeks' duration, some other, unlicensed, person was employed to perform that navigating officer's duties, and since Appellant was Master of the vessel he was, *pro tanto*, the offending employer. See Decisions on Appeal, Nos. 1574 and 1858.

#### IV

Appellant insists that 46 U.S.C. 223 is a more specific statute than is 46 U.S.C. 224a and therefore is solely applicable to this case. This is incorrect.

Section 223 is entirely inapplicable to the case, while section 224a is controlling. The fact that fishing vessels are excluded from the scope of section 223 does not exclude them from the scope of section 224a.

Section 223 applies only to inspected vessels. CONSTITUTION is not an inspected vessel. Even if CONSTITUTION were an inspected vessel, the fact that a minimum number of officers, plus others judged desirable for the safe navigation of the vessel, could not be entered in its certificate of inspection, would not exclude it from the requirement that any persons employed as deck officers, be they two, five, or ten, be licensed as called for by section 224a and the Convention it implements.

V

Appellant also argues that a violation of 46 U.S.C 224a is not a "violation of a statute" as contemplated by R.S. 4450 (46 U.S.C. 239). For this proposition he relies on *Bulger v Benson*, CA 9 (1920), 262 R. 929. Appellant states that this decision holds that a violation of R.S. 4442 (46 U.S.C. 214) was not grounds for action against a license, even though the section is part of Title 52, Revised Statutes. The decision in *Bulger v Benson* need not be re-analyzed here. (See Decision on [Appeal No. 1574](#)). It is enough to note that the opinion states only that reference to a "violation" of R.S. 4442 in the notice of hearing and charges was surplusage. More accurately, it may be said here that it was meaningless.

The section, much like a subsection (g) of R.S. 4450, gives authority to suspend or revoke a license. Obviously, to commit an act of misconduct or negligence for which suspension or revocation may be ordered is not to violate the act or section which only authorizes the action to suspend or revoke. The statute violated by Appellant in this case was a substantive one and a part of Title 52, Revised Statutes. Thus, the violation was properly stated as a basis for action under the charge, "Violation of a Statute." 46 CFR 137.05-20(b).

ORDER

The order of the Administrative Law Judge dated at San Diego, California, on 1 August 1972, is AFFIRMED.

T. R. SARGENT  
Vice Admiral, U. S. Coast Guard  
Acting Commandant

Signed at Washington, D. C. this 26th day of July 1973.

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