

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-969299
Issued to: James E. FORREST

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2195

James E. FORREST

This appeal has been taken in accordance with 46 United States Code 239(g) and CFR 5.30-1.

By order dated 25 May 1978, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, after a hearing at Norfolk, Virginia, on 25 April 1978, suspended Appellant's Merchant Mariner's Document for a period of two months on probation for 12 months upon finding him guilty of negligence. The specification of negligence was found proved in part. The specification alleges that Appellant, while serving as Tankerman aboard T/B ATC-133, under authority of the captioned document, did, on or about 26 February 1978, wrongfully fail to secure the Tank Barge ATC-133 properly for sea.

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

The Investigating Officer introduced into evidence the testimony of two witnesses, one document, and 13 photographs.

Appellant rested without introducing any evidence.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and the specification, in part, had been proved. He then entered an order of suspension for a period of two months on probation for 12 months.

The decision was served on 26 May 1978. Appeal was timely filed on 22 June 1978, and perfected on 18 September 1978.

FINDINGS OF FACT

Appellant was serving under authority of his merchant mariner's document, certificated as Tankerman, Grades A, B, C, D, E, on 26 February 1978, when he loaded the Tank Barge ATC-133 at an oil loading dock located near Norfolk, Virginia. Because of the disposition of this appeal, no further findings are necessary.

BASES OF APPEAL

This appeal has been taken from the Decision and Order of the Administrative Law Judge. It is conceded that the charge and specification were legally deficient in that they did not state the acts for which Appellant was held liable, that the Government failed to present evidence defining the standard of care to which Appellant was held, and that the Government failed to prove that Appellant had acted in a negligent fashion.

APPEARANCE: Bowman & Hudgins, Mathews, Virginia, by Donald H. Bowman, Esq., and Richard H. Harfst, Esq.

OPINION

I

Before addressing Appellant's contentions, I need make one observation. The specification alleges that Appellant "while

serving as Tankerman aboard T/B ATC-133, under authority of the captioned document, did on or about 26 February 1978 wrongfully fail to properly secure the Tank Barge ATC-133 for sea." The Administrative Law Judge found this specification proved "in part." However, he has not indicated which "part" is found proved and which "part" is not. Close reading of his decision and order leads me to conclude that the Administrative Law Judge intended to indicate that he had found that Appellant failed properly to secure several of the appliances located on the tank barge, but that Appellant was not responsible for securing the entire vessel "for sea." When an Administrative Law Judge finds only a portion of a specification proved, he should indicate clearly that which is proved and that which is not. In this fashion the parties and any others who read the decision will know precisely which portion of the specification supports the charge.

II

Appellant contends that the specification does not allege facts sufficient to constitute an offense. Concededly, the specification should have recited additional facts. Nevertheless, the specification does allege one fact essential to pleading a cognizable offense, that Appellant failed properly to secure the barge which he had load. The specification is legally sufficient in that it does satisfy the requirements of 46 CFR 5905-17(b).

Another, somewhat related, reason exists for rejecting this contention of Appellant. At the hearing, the Administrative Law Judge initially questioned the sufficiency of the specification by asking "[i]n what respect" had Appellant failed properly to secure the tank barge. R. 7. In order to satisfy the Administrative Law Judge, the Investigating Officer offered to amend the specification. However, it was indicated by Appellant that amendment was not considered necessary because Appellant's attorneys and the Investigating Officer had communicated. Sufficiently to enable Appellant to "generally...understand the charges." The Administrative Law Judge then held the specification sufficient. Review of the remainder of the hearing indicates that Appellant clearly understood which acts constituted the basis for the charge. Hence, the rule of *Kuhn v. C.A.B.*, 183 F.2d 839 (D.C.CIR. 1950), applies. In an administrative proceeding, where the parties clearly understand what the issues are and have a fair

opportunity to be heard during the hearing on these issues, they cannot thereafter claim surprise or lack of due process of law because of alleged deficiency in language of a particular specification, provided the specification is legally sufficient.

III

It is contended that the Government never established the standard of conduct against which Appellant's actions were to be measured. With this contention I agree. At the hearing, the Investigating Officer presented testimony from the Personnel Manager of the towing company which employs Appellant. His description of the duties of a Tankerman was vague, at best. Nevertheless, the Investigating Officer ultimately rested without first having clearly established exactly what were Appellant's duties aboard the tank barge he had loaded. Subsequently, the Investigating Officer submitted a brief to the Administrative Law Judge in which he stated that "the customary methods are ill defined as an industry standard and are largely in the formation stage through application and trial and error." He then suggested substituting standards different from those he had attempted to establish with the testimony of the Personnel Manager. In finding Appellant guilty of negligence, the Administrative Law Judge measured Appellant's conduct against the substituted standards. This was improper because Appellant was not permitted the opportunity, on the record, to be apprised of the substituted standard against which his actions were to be measured and to present proof of his adherence to that standard, or to attempt to show that the standard proffered by the Investigating Officer was not the proper one. (A "post-hearing conference was held to delineate the issues." It apparently was attended by the Investigating Officer and one of Appellant's attorneys. This "post-hearing conference" was not conducted on the record, nor was it held for the purpose of submitting proposed findings and conclusions per 46 CFR 5.20-150(a). Under 5 U.S.C. 556(c)(6), it would be possible, by regulation, to empower Administrative Law Judges to conduct post-hearing conferences "for the settlement or simplification of the issues by consent of the parties;" however, no regulation authorizing this practice has been issued. Moreover, because no record was made, it is impossible to determine what took place during this conference. Were I to treat this as merely a reopening of the original hearing, I should be forced to find that the administrative law judge violated 46 CFR 5.20-35 which

provides, "[t]he Administrative Law Judge shall...cause a complete record of the proceedings to be kept." Hence, even if the standard of conduct question was resolved during this conference, I now am unable to so determine.)

IV

Appellant contends that the Government did not prove, by substantial evidence of a reliable and probative character, the Appellant acted in a negligent fashion. I agree.

Appellant was directed to load the Tank Barge ATC-133, which was moored at an oil loading dock. His duties consisted of boarding the moored vessel, loading it, securing the oil transfer appliances, and departing. Appellant was not otherwise involved with the operation or manning of the tank barge, and was not even present on the following day when the tank barge was taken under tow.

On 27 February 1978, after encountering heavy weather while under tow in the Chesapeake Bay, the tank barge sank by the stern. A quantity of oil leaked from several of its tanks. Commercial divers first inspected and worked upon the barge. Subsequently, Coast Guard personnel also dove on the tank barge. At the hearing, one of the latter, a Coast Guard Petty Officer, described his observations and the actions he and his fellow divers undertook to prevent the leaking of additional oil from the tank barge. The Investigating Officer attempted to establish, from this Petty Officer's testimony alone, that Appellant had failed properly to secure all of the loading appliances, in particular several ullage caps and "tanktops." No direct evidence was offered to support this allegation, and I find the circumstantial evidence presented severely lacking in substance. No reliable evidence was offered to rebut Appellant's arguments that the heavy weather on the Chesapeake Bay reasonably could have caused the loosening of various of the appliances on the tank barge. Neither was the extent or nature of the actions undertaken by the commercial divers properly established. Hence, Appellant has raised substantial doubt as to his responsibility for the loose ullage caps and "tanktops" discovered after the tank barge sank. This doubt has not been rebutted adequately.

For the reasons stated, the decision of the Administrative Law Judge must be vacated.

ORDER

The order of the Administrative Law Judge, dated at Norfolk, Virginia, on 25 May 1978, is VACATED, and the charge DISMISSED.

R. H. SCARBOROUGH
VICE ADMIRAL U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 26th day of March 1980.

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Charges and Specifications

rule of *Kuhn v. C.A.B.* applied
specification held sufficient
specification found proved by ALJ "in part"

Negligence

not proved by substantial evidence

Standard of Conduct not established on record

***** END OF DECISION NO. 2195 *****

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