

In the Matter of License No. 39246
Issued to: JOHN F. FINNEY

BY ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

440

JOHN F. FINNEY

By virtue of the authority reposed in me as Commandant of the United States Coast Guard, and because of the very unique problem presented here, I have *ex proprio motu* reviewed the Examiner's decision in the above entitled case.

On 15 and 16 September, 1949, a hearing was conducted before a Coast Guard Examiner at Coeur d'Alene, Idaho, pursuant to 46 U.S.C. 239. John F. Finney was charged with "negligence" supported by four specifications alleging in substance that while serving as operator on board the American merchant vessel MV SEEWEEWANA, under authority of the license above described, on or about 26 August, 1949, he did:

"First Specification: * * *take in tow and operate a barge carrying passengers for hire, said barge having no documents on board issued by the Collector of Customs."

"Second Specification: * * *unlawfully operate an uninspected barge carrying passengers for hire, which said barge you did know or by the exercise of reasonable care should have known had no certificate of inspection on board, issued by the Coast

Guard."

"Third Specification: * * *unlawfully take in tow and operate a barge, the DANCEWANA, with an improper and unauthorized display of lights while carrying passengers for hire."

"Fourth Specification: * * *unlawfully fail to maintain a proper lookout on board the barge DANCEWANA, said barge being operated in tow and carrying passengers for hire."

At the hearing, the person charged was given a full explanation of the nature of the proceedings and he was represented by counsel of his own selection. Finney entered a plea of "guilty" to the first and second specifications; and he pleaded "not guilty" to the third and fourth specifications.

The Investigating Officer introduced in evidence the testimony of three witnesses and then rested his case. In defense, Finney offered in evidence his own testimony under oath and that of three other witnesses.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and counsel for the person charged, the Examiner found the charge of "negligence" and all four specifications proved. He then entered an order dated 16 September, 1949, suspending License No. 39246, and all other certificates, licenses and documents held by John F. Finney, for a period of twelve months on twenty-six months' probation.

On 4 October, 1949, John F. Finney, as owner and operator of the MV SEEWEEWANA and barge DANCEWANA, was assessed navigation fines in the amount of \$1200 by the Commander of the Thirteenth Coast Guard District. These fines were based on statutory violations committed on 26 August, 1949, which were substantially the same acts as the offenses alleged in the first, second and fourth specifications as set out above. The maximum fine of \$500 was assessed under 46 U.S.C. 38 for violation of 19 C.F.R. 3.50 (formerly 46 C.F.R. 1.55) which requires that marine documents must

be kept on board. The \$500 penalty, permitted by 46 U.S.C. 497 for violating 46 U.S.C. 391 (improperly stated to be 46 U.S.C. 404 and 46 U.S.C. 399) which states that a passenger-carrying vessel of over one hundred gross tons must have a Certificate of Inspection, was also imposed. And the additional \$200 fine was incurred under 33 U.S.C. 159 in violation of 33 U.S.C. 221 (Article 29 of the Inland Rules of the Road) for failure to have a lookout posted on the barge DANCEWANA. Upon application for relief from these penalties, the fines were mitigated to \$150, \$400 and \$50, respectively, by letter of the Commander, Thirteenth Coast Guard District, dated 17 November, 1949.

On 13 December, 1949, an appeal was taken from this mitigated order and it was contended that there is no Federal jurisdiction because Lake Coeur d'Alene, Idaho, is not an interstate navigable body of water; that John F. Finney did attempt to acquire the necessary marine documents from the Customs office; that since the barge did not admeasure one hundred gross tons or more, no certificate of inspection was required; and that there was no statutory requirement that a lookout be posted. Upon review, it was ordered that the owner should be relieved from the penalty assessed for failure to have the barge inspected since the tonnage of the DANCEWANA was determined to be 31.04 gross and net; that the charge for failure to have documents on board should be dismissed because the administration of this penalty is within the province of the Commissioner of Customs; and that the fine imposed for failing to have a lookout posted should be dismissed since monetary penalties may only be imposed under 33 U.S.C. 221 when a violation accounts for a marine disaster. Consequently, no penalties were incurred under statutes which are administered by the Coast Guard.

It is seen from the above that the conclusions of the Examiner in the hearing proceedings are not wholly consistent with my disposition of the navigation fines and it is considered desirable that the suspension imposed as a result of the hearing should be suitably modified to reflect the action taken by me with respect to the fines. Because of the peculiar circumstances that there has been no formal appeal of the Examiner's decision, the appeals taken in connection with the assessment of the navigation fines shall be considered as applicable to the suspension proceedings so far as this is necessary to attain the desired consistency.

FINDINGS OF FACT and CONCLUSIONS

I hereby adopt the "Findings" and "Conclusions" contained in the Examiner's decision of 16 September, 1949, with the following exceptions:

1. Finney made every reasonable effort to obtain marine documents for the barge DANCEWANA from the Customs Office. These efforts were attended by considerable delay and confusion and, in the meantime, at least tacit permission was granted for him to operate the barge without documents. Therefore, the First Specification is found "not proved" and dismissed.
2. It was determined through the Adjuster of Admeasurements, Bureau of Customs, that the tonnage of the barge DANCEWANA was 31.04 gross and net. Since the vessel was less than 100 gross tons, no certificate of inspection was required. The Second Specification is found "not proved" and dismissed.

OPINION

Concerning the question of jurisdiction, it has been held that the Spokane River, which connects with Lake Coeur d'Alene, Idaho, and crosses into the State of Washington, is a navigable river. *Spokane Mill Company v. Post (1892)*, 50 Fed. 429. Therefore, the waters of Lake Coeur d'Alene are navigable waters of the United States and vessels navigating the lake are subject to the Federal navigation laws. See also *United States v. Appalachian Electric Power Co. (1940)*, 311 U.S. 377, 407-9, which states that an interstate waterway is classified as navigable even though artificial aids and improvements may be needed to make it available for traffic.

The third specification charged the improper and unauthorized display of lights. It is believed that the evidence shows that the lights displayed on the barge improperly interfered with the regular running lights and, hence, this specification was properly found proved.

With respect to the fourth specification, I have ruled that monetary penalties may not be imposed for failing to have a lookout unless the violation contributes to a marine disaster. But this does not mean that remedial action cannot be taken against the license of the person charged, under a general charge of

negligence, despite the absence of any marine accident. Therefore, the fourth specification was properly found proved.

In view of the foregoing observations that only two of the four specifications should have been found "proved", the order of the Examiner dated 16 September, 1949, is modified to read as follows:

ORDER

"License No. 39246, and all other certificates of service, licenses and documents held by John F. Finney, are hereby suspended for a period of three (3) months. The suspension ordered shall not become effective provided no charge under R.S. 4450, as amended (46 USC 239) is proved against you for acts committed within twelve (12) months of September 16, 1949. If this probation is violated, the order for which probation was granted shall become effective with respect to all certificates of service, licenses, or merchant mariner's documents here involved, and also any certificates of service, licenses, or merchant mariner's documents acquired by you during the period of probation, at such time as designated by any Examiner finding the violation, and may be added to or form a part of any additional order which he may enter." As so modified, said Order is AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 23rd day of January, 1951.

***** END OF DECISION NO. 440 *****