

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1001679
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Karl Hanson

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1956

Karl Hanson

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 17 December 1971, an Administrative Law Judge of the United States Coast Guard at New York, N. Y. suspended Appellant's seaman's documents for 3 months on 12 months' probation upon finding him guilty of negligence. The specification found proved below alleges that while serving as the Person in Charge on board the tank barge B. NO. 110 under authority of the document above captioned, on or about 21 April 1971, Appellant negligently failed to perform his duties by allowing cargo transfer operations to take place without giving his immediate supervision to an unqualified person, while he was in the cabin of the barge reading a book.

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 a certified

copy of the certificate of inspection of the tank barge B. NO. 110, an amendment to the certificate of inspection, and the testimony of a Coast Guard boarding officer.

In defense, Appellant offered in evidence his own testimony and that of one witness.

The Administrative Law Judge rendered a written decision in which he amended the charge and specification and concluded that the charge and specification was proved. He then served a written order on Appellant suspending all documents, issued to him, for a period of 3 months on 12 months' probation.

The entire decision and order was served on 27 December 1971. Appeal was timely filed.

FINDINGS OF FACT

On 21 April 1971, Appellant was serving as the senior deck officer on duty on board the tank barge B. NO. 110 and acting under authority of his document while the barge was in the port of Bayonne, New Jersey. Due to the disposition of this case, no further findings of fact are necessary.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Appellant was deprived of due process and in effect denied a hearing on the charge for which he was found guilty.

Due to the disposition to be made of this ground for appeal, it is necessary to enumerate or discuss Appellant's other contentions.

APPEARANCE: Newman & Schlau of New York, New York.

OPINION

Appellant contends that he was deprived of due process by the Administrative Law Judge's amendment of the charge and specification following the hearing to find negligence proved. The Appellant was initially charged with misconduct in that he wrongfully failed to have a tankerman on duty while the vessel was engaged in transfer operations. Proof, however, was directed towards showing failure to comply with the requirements of various regulations including 46 CFR 35.35-1, 35.35-20, and 35.35-35.

Relying on the decision in *Kuhn v. Civil Aeronautics Board* (CA, D.C., 1950) 183 F.2d 839 and noting the action of the Commandant in Decision on [Appeal No. 1839](#) the Judge amended the charge and specification to find that the Respondent, "[W]hile serving as the Person in Charge under authority of his certification as Tankerman did negligently fail to perform his duties by allowing cargo transfer operations to take place without giving his immediate supervision to an unqualified person while he was in the cabin of the barge reading a book."

Appellant contends that since the issue of negligence was never raised at the hearing and he did not have actual notice and an opportunity to defend against a charge of negligence the *Kuhn* case gives no support to the Administrative Law Judge's action in amending the charge to negligence. Negligence, as used in these proceedings, is defined in 46 CFR 137.05-20(a) (2). It includes "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform."

I agree with Appellant that the record does not reflect his actual notice that negligence was in issue. Without such notice Appellant was not afforded the opportunity to present evidence against the charge of negligence by presenting proof that a reasonably prudent person of the same station under the same circumstances would have acted similarly. Therefore, I agree that the issue of negligence was not litigated and the amendment of the charge and specification to find negligence proved is not supported by the *Kuhn* decision.

II

One might argue that the *Kuhn* doctrine could support a further amendment of the charge and specification to find violation of a regulation proved. The Investigating Officer made it clear during the hearing that the applicability of 46 CFR 35.35-35 was in issue. The Appellant was also examined and cross-examined with respect to his compliance with the requirements thereof. Although I can, when I find variance between what was alleged and what was proved, use the *Kuhn* doctrine to amend the pleadings to conform to the proof of a litigated issue, I feel that in this case it is inappropriate to so invoke. I feel reasonably certain that all of the issues surrounding such a charge might not have been raised at the hearing.

CONCLUSION

It is concluded that the charges and specifications were inappropriately laid and that the *Kuhn* doctrine is not applicable since the matters involved were not litigated.

I further find that it would not serve the ultimate purpose of these remedial administrative proceedings to remand the case due to the intervening time period.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 17 December 1971, is Vacated and the charge is DISMISSED.

T. R. Sargent
Vice Admiral, United States Coast Guard
Acting Commander

Signed at Washington, D. C., this 27th day of June 1973.

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