

In the Matter of License No. 207096 and all other Seaman Documents
Issued to: LEON G. HODGES

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1425

LEON G. HODGES

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 5 November 1962, an Examine of the United States Coast Guard at Houston, Texas suspended Appellant's seaman documents for twelve months upon finding him guilty of negligence. The specification found proved alleges that while serving as Master and Tankerman on board tug PAN SIX under authority of the license above described, on or about 7 and 8 November 1959, while the tug was tied up along the SS AMOCO VIRGINIA at Houston, Texas, Appellant failed:

"to discontinue cargo loading operations, and to take other precautionary safety measures, when the presence of gasoline was noticed on the surface of the water alongside of, and in the immediate vicinity adjacent to the SS AMOCO VIRGINIA, a failure which contributed to the casualty of the Barge HTCO N. 40. "

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

The Investigating Officer introduced in evidence the testimonies of three witnesses.

In defense, Appellant offered in evidence the testimonies of four witnesses and his own testimony. In addition, Appellant submitted the stipulated testimonies of three other witnesses.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved.

FINDINGS OF FACT

On 7 and 8 November 1959, Appellant was serving as Master and

Tankerman on the tug PAN SIX and acting under the authority of his license while the tug was in the port of Houston, Texas.

On the afternoon of the 7th, the tug PAN SIX, with barges HTCO 40 and HTCO 46 in tow, tied up alongside a tanker, the SS AMOCO VIRGINIA. The barges HTCO 40 and HTCO 46 were moored stern to stern on the starboard side of the tanker, which was moored port side to the dock heading downstream at the Hess Terminal in the Houston Ship Channel.

About 1815 the two began pumping house brand gasoline directly into the tanks of the AMOCO VIRGINIA. Appellant was acting in the capacity of Tankerman under his limited pilot's license and was in charge of the two barges. At about 2200 he and his Chief Engineer became aware of excessive gasoline fumes in the area of the loading operations, and they noted that the odor of the fumes became stronger with the passage of time. Various inspections of the equipment on the barges were made by both Appellant and the Chief Engineer, but they failed to find any leaks. However, gasoline was sighted by these two seamen on the surface of the water between, and in the vicinity of, the tanker and the barges. The Loading Mate on the tanker was notified of the situation, but he did nothing to correct it. Appellant allowed the pumping to continue.

At about 0025 on 8 November, the fuel on the surface of the water in the Houston Ship Channel caught on fire and rapidly spread to the tanker and the barges. The tug PAN SIX was able to escape with little or no damage by getting under way. The barge HTCO 40 sustained extensive damage from the fire and an explosion caused by the fire.

APPELLANT'S PRIOR RECORD: None

BASES OF APPEAL

The following assignments of error are raised on appeal by Appellant:

Point 1. The Hearing Examiner erred in overruling Appellant's motion to strike the specification charging Appellant with negligence.

Point 2. Assuming arguendo that Appellant could be charge with negligence under 46 U.S. Code 239(b) and the Coast Guard regulations, the Hearing Examiner erred in holding and finding that the Investigating Officer had discharged his burden of proving negligence.

Point 3. The Hearing Examiner erred in holding and finding that Appellant could have discontinued loading operations without the consent of the senior deck officer in charge of loading the SS AMOCO VIRGINIA.

Point 4. There is insufficient evidence in the record to establish that Appellant's failure to discontinue loading operations or take other precautionary safety measures contributed to the casualty of the barge HTCO 40.

Point 5. It is also contended that the Examiner, by withholding his decision in this case until the issuance of the Commandant's Appeal Decision No. 1351, allowed his findings and conclusions to be colored by that decision contrary to section 5(c) of the Administrative Procedure Act [5 U.S.C. 1004(c)].

APPEARANCE: Wells, Duncan and Beard of Beaumont, Texas, by
George E. Duncan of counsel, on the brief for
Appellant

OPINION

Appellant's first argument of error is essentially an attack on the jurisdiction of the Coast Guard to bring an action against Appellant's license on the ground of "negligence". The argument is made that 46 U. S. Code 239(b) is limited to acts of incompetence or misconduct and since section 239(b) should be strictly constructed because it is penal in nature, negligence is not a proper charge.

The charge of negligence originated not under section 239(b) but under section 239(g) of Title 46 of the U.S. Code. This latter section specifically provides for the revocation or suspension of a document or license on the ground of negligence. The Examiner therefore did not err in refusing to dismiss the specification on Appellant's motion.

It should be noted that although the term negligence was not defined in the Coast Guard regulations governing these proceedings at the time Appellant was charged, prior decisions of the Commandant have held that 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, constitutes negligence. Commandant's Appeal Decisions No. 362, 400, 417, 544, 1011, 1184 and 1200. The latter part of the definition applies in this case.

A review of the record indicates that Appellant became aware of the presence of gasoline fumes about 2200. Both he and his Chief Engineer thereafter conducted several inspections on the barges with negative results. The Loading Mate on the SS AMOCO VIRGINIA was notified of the presence of excessive fumes and gasoline on the water, but he did nothing to correct the increasingly hazardous situation. When it was apparent, after the passage of a reasonable amount of time, that the Loading Mate had not acted to alleviate the danger, it became incumbent on Appellant to initiate affirmative action and to stop pumping gasoline to the tanker. It is my opinion that, in the face of the potential explosive situation this is what a reasonably prudent man of Appellant's station and under the same circumstances, would have done. This point is clearly illustrated by the testimony of two expert tankermen who testified that Appellant should have stopped the pumps on the barges until the source of the leakage of gasoline into the water was located and eliminated. It follows that unless Appellant is exonerated from his failure to act by other circumstances, he is guilty of negligent conduct.

Appellant contends that the Tank Vessel Regulations (46 C.F.R. 35.35 et seq.) and the instructions which he received from his employer, absolved him from any responsibility for the casualty of the barge HTCO 40, since he was required by both the employer and the regulations to rely wholly on the Loading Mate's instructions during the transfer operations. In other words, the contention is made that Appellant's duty to act extended only to inspecting the barges and notifying the Loading Mate that excessive quantities of gasoline were present on the water; and that any further action to correct the increasingly hazardous situation was the responsibility of the Loading Mate.

A reasonable interpretation of the Tank Vessel Regulations in question indicates that their primary purpose is to provide guidelines for the normal operational procedures of transferring inflammable liquids either from ship to dock or ship to ship. There is nothing in these regulations which states that safety problems of an emergency nature were intended to be covered by these operational procedures.

The Manual for the Safe Handling of Inflammable and Combustible Liquids, which is published by the Coast Guard, emphatically states that whenever there are excessive quantities of inflammable liquids on the water, the Tankerman in question should discontinue transfer operations until the source of the trouble has been located and corrected. There is evidence in the record that Appellant attended a "safety" school sponsored by his employers during which this same idea was reiterated. It therefore can not be successfully argued that Appellant's interpretation of certain

sections of the Tank Vessel Regulations should prevail.

It is noted that Mr. Gunstream, who was the Assistant Operations Manager of the company employing Appellant, testified that he told all tug captains to follow instructions given by the officers in charge of loading operations on board the tankers. But he also testified that these instructions were limited to routine operational procedures and were not intended to cover emergency situations.

It is reasonable to conclude that Appellant was responsible for the safety of the tug and the barges involved in the casualty. To shift this entire responsibility onto the shoulders of the Loading Mate on the AMOCO VIRGINIA is not justified under the circumstances. That there was nothing which prevented Appellant from taking independent action is further apparent from the fact that once the fire broke out Appellant did not ask the Loading Mate for permission to depart the scene of the danger.

The argument is made that there is insufficient evidence in the record to support the conclusion that Appellant's failure to discontinue the loading operations contributed to the casualty of the barge HTCO 40. The facts, however, are undisputed that the damage to the barge was caused by the fire resulting from the igniting of the fuel on the water, and by an internal explosion in one of the barge's tanks which was caused by the fire. It is reasonable to conclude that Appellant's failure to stop pumping gasoline led to a greater concentration of gasoline on the water, as indicated by the increasing strength of the fumes, and therefore, that Appellant's negligence contributed to the casualty of barge HTCO 40.

Appellant's last assignment of error may be dismissed without extended discussion. Section 5(c) of the Administrative Procedure Act [5 U.S.C. 1004 (c)] was intended to prevent contamination of "judging" in an administrative proceeding with that of "investigation" or "prosecution". In other words, it would be improper for a Hearing Examiner to conduct an investigation, bring the charge, and thereafter sit in judgment. See Davis, Administrative Law Treatise §13.01 et seq. There is nothing in the court decisions interpreting section 1004(c) which prohibited the Hearing Examiner's action in delaying his decision in this case until the final decision was rendered in another appealed case (Commandant's Appeal Decision No. 1351) arising from the same disaster and involving similar issues.

CONCLUSION

It is my opinion that other parties were guilty of

contributory negligence which led to this casualty. Considering this and the evidence which shows that Appellant's negligence to unintentional carelessness, the order of suspension will be modified to a period of four months. This is justified because the danger presented by the gasoline on the water was so great, as demonstrated by the result, that "any disregard of safety precautions constituted a serious offense of negligence." Commandant's Appeal Decision No. 1351.

ORDER

The order of the Examiner date at Houston, Texas, on 5 November 1962, is modified to provide for an outright suspension of four months.

As MODIFIED, the order is AFFIRMED.

D. McG. Morrison
Vice Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D.C., this 9th day of October 1963.