

In the Matter of License No. 208968
Issued to : JAMES EARL JOHNSON

DECISION OF THE COMMANDANT

1427

JAMES EARL JOHNSON

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 10 May 1962, an Examiner of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's seaman documents for three months outright plus three months on twelve months' probation upon finding him guilty of negligence. The specifications found proved allege that while serving as Master on board the United States MV EAGLE OILER under authority of the license above described, on or about 26 August 1961, Appellant

(1) had in tow and navigated the tank barge JB-556, loaded with combustible liquids in bulk, without there being a valid certificate of inspection on board;

(2) failed to sound a timely danger signal on approaching another vessel "as required by law"; and

(3) attempted to pass an ascending vessel in a meeting situation without having exchanged proper whistle signals.

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

The Investigating Officer introduced in evidence the testimony of two Coast Guard Officers, an employee of the St. Louis Marine Inspection Office, the pilot of the tug RAY WAXLER, the Master and several crewmembers of RAY WAXLER, and the deckhand of EAGLE OILER. Documents relative to the collection of a monetary penalty for violation of the inspection laws, a copy of an entry in RAY WAXLER's log, and publications pertaining to channel conditions in the Mississippi River were also offered and accepted in evidence.

In defense, Appellant offered in evidence his own testimony, that of his employer, and that of a former employee of the owner of the barge JB-556.

In addition, one witness called by the Investigating Officer used and marked a chart under cross-examination. Although this chart was not offered or accepted in evidence in open hearing, it was appended to the record and is considered to be properly a part of it.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and three specifications had been proved. The Examiner then served a written order on Appellant suspending all documents issued to Appellant for a period of three months outright plus three months on nine months' probation.

The entire decision was served on 10 May 1962. Appeal was timely filed on 9 June 1962. A promised supporting brief has not been filed and I proceed to review and decide without it.

FINDINGS OF FACT

On 26 August 1961, Appellant was serving as Master on board the United States MV EAGLE OILER and acting under authority of his license while the ship was operating in the Mississippi River in St. Louis harbor.

On that date EAGLE OILER was pushing the barge JB-556 which was loaded with a cargo of fuel oil. This tow collided with the tow of RAY WAXLER, which was pushing two loaded tank barges. The collision occurred above the Municipal Dock, St. Louis, on the Missouri side of the river, at 1340 (Zone plus 6 Time). The weather was clear and visibility was unimpaired.

Appellant was piloting EAGLE OILER at all times material.

At some time prior to the collision the pilots of the two tows sighted each other, apparently simultaneously. The descending EAGLE OILER was under the McKinley Highway and Railroad Bridge on the Illinois side of the river. The ascending RAY WAXLER was just below Mile 181, on the Missouri side. Each tow was making about four and one half to five miles an hour.

Chart 11 of the Army Engineers' charts for the Upper Mississippi River encompasses this area. It shows a channel line favoring the Missouri side from Mile 180 to Mile 181.7, then angling toward the Illinois side on which, from Mile 182, it leads to the McKinley Bridge.

On 26 August 1961 there were two black buoys established, one at each end of the crossing section of the channel. However, notices of the Corps of Engineers indicated that the Illinois side was navigable throughout the area in question at that time.

At the time of first sighting, which must have been about ten minutes before collision, Appellant intended to follow the line of the buoys to the Missouri side. He assumed that RAY WAXLER would alter course to cross the river and he concluded that a port to port passing would be proper. At the same time the pilot of RAY WAXLER, who intended to follow the line of buoys to the Illinois side, assumed that EAGLE OILER would hold to the left descending bank, making a starboard to starboard passing necessary.

The record is not as clear as might be on the details of the approach of the tows. Specific times and distances are not established. But there is substantial evidence to reconstruct the general course sufficiently.

Appellant and the pilot of RAY WAXLER both at first attempted radio communication but were unsuccessful. When Appellant was rounding the upper black buoy, turning toward the Missouri side, not having heard a signal from the ascending vessel, he initiated a one-blast signal. Shortly thereafter RAY WAXLER sounded a two-blast proposal, not having heard EAGLE OILER. At the time of Appellant's signal the tows were about a mile apart, and at the time of RAY WAXLER's they had closed to about three quarters of a mile or less.

RAY WAXLER's signal was not heard by Appellant.

Some time thereafter RAY WAXLER altered course slightly to the right to commence crossing the river. Both vessels sounded danger signals, not heard by the other, and both commenced to back down. RAY WAXLER sounded several other signals, including a proposal to pass starboard to starboard. The only signal heard by Appellant was a three-blast signal, possibly half a minute before collision, and probably actually part of a danger signal.

Despite the reversing of the engines of both craft, they collided anyway. The angle of impact is not known, but the forward starboard corner of ST-124, RAY WAXLER's lead barge, came in contact with the center of the forward end of JB-556.

There is evidence of some material damage to JB-556, none to the other barges or the towboats. There is no evidence of personal injury although it appears that Appellant was in a hospital for some days after the casualty.

On the night of 26 August a Coast Guard Officer from the St. Louis Marine Inspection Office boarded JB-556 and looked for its certificate of inspection. None was found in the customary container provided for one and none was found after search of all

accessible places on the barge. An employee of the owner of the barge assisted in this search.

On 18 September 1961 a duplicate certificate of inspection was issued by the St. Louis office in lieu of one reported lost.

On 16 January 1962, Edward Reidy, representing the owners of the barge, advised the Commander, Second Coast Guard District, that he had personally placed a valid certificate of inspection aboard the barge about 20 January 1961, and that the owners did not know how or when the certificate was removed from it.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged in the notice of appeal that

- (1) there was a failure of jurisdiction because Appellant was not operating EAGLE OILER under authority of his license;
- (2) the decision is contrary to the evidence;
- (3) the examiner misconceived and misapplied the law; and
- (4) the proceedings were used "to convict" Appellant "without implication of the unlicensed pilot" of the other tug "for the benefit of the owners and insurers of M/V RAY WAXLER."

Since no brief support and specify these grounds was submitted I have directed my review to the objections and contentions entered upon the record of hearing.

OPINION

I

The initial question here is one of jurisdiction. The argument was first made that since a diesel towboat is not required to have a licensed pilot, Appellant was not serving under authority of his license as a deck officer of a central Western Rivers vessel.

The examiner advanced two theories in support of his holding that there was jurisdiction to proceed under R.S. 44450, as amended, on charges of negligence. With respect to the specifications dealing with whistle signals, the examiner held that the acts alleged were violative of 33 CFR 95.09 ("Danger and Cross Signals") and 33 CFR 95.19 ("Passing Signals"). The reasoning then goes that these regulations were promulgated under authority of

R.S. 4233A, as added 21 May 1948; that this Act was "obviously a continuation of and substitute for the provisions of Revised Statute 4412"; and that, since R.S. 4412 was part of Title 52 of the Revised Statutes, the "Western Rivers" rules are regulations issued thereunder. Then, since R.S. 4450, as amended, confers jurisdiction over acts violative of such regulations irrespective of the condition of service under authority of a license or document, jurisdiction exists here.

This opinion cannot be adopted.

First, it seems clear that the acts alleged were not alleged as violations of the regulations. The specification as to the danger signal explicitly refers to a signal required by law at one half mile's distance. 33 CFR 95.09 contains no such provision. The specification as to passing signals asserts that there was no exchange of "proper whistle signals." But 33 CFR 95.19 prescribes no signals at all, simply defining when signals prescribed elsewhere shall be given.

It is clear that the acts were alleged as violative of 33 U.S.C. 343, which is not part of Title 52, Revised Statutes.

Toward the same conclusion, it is noted that although R.S. 4233A (33 U.S.C. 353) contains provisions similar in part to those of R.S. 4412, 4233A was never part of Title 52 and it is the sole authority cited for the regulations classified to 33 CFR 95. And lastly, to preclude any connection of these regulations with Title 52, R.S. 4412 was repealed on 28 March 1958 (72 Stat. 49).

Jurisdiction over the offense of navigating a loaded tank barge without a certificate of inspection can be bottomed on this theory, but jurisdiction over the violations of Rules of the Road must be predicated upon service under authority of the license.

Appellant contended on the record that he was not serving under authority of his license. This he did in three ways.

He first argued that since uninspected diesel towboats are not specifically required to have licensed officers as such, he could not be serving under authority of his license.

I have frequently and consistently held that when such a license is not required by law, but when its possession is made by the employer a condition of employment, and the nature of the employment is the kind of activity for which the license is issued, jurisdiction attaches and will be exercised. (Decisions on Appeal 491, 700, 824, 1030, 1281, 1400.)

But in this case, after a second argument by Appellant, the examiner found as a fact that "the owners and/or operators [of EAGLE OILER] did not require as an incident to employment of Mr. Johnson that he have a license." (D-2)

Whether this is fully supported in the record is questionable. The evidence on this point is the testimony of the owner under examination by Appellant's counsel:

"Q. Is it necessary in your business for a man to have a license as a Pilot to do the type of work that he was doing?

A. No, sir.

Q. In the absence of a license and any document did you verify his experience and his qualifications through those sources that you have indicated?

A. Yes, sir."

This is not an affirmative statement that the owner did not require the license but is only a statement that a license is not necessary under the law. At any rate, the evidence does not constitute the affirmative showing, needed in other cases and to be made by the investigating officer, that the license was a condition of employment.

But even assuming that the owner did not in fact require a license, this case is clearly distinguishable from the line cited above. Here, Appellant was the only person aboard EAGLE OILER holding any document issued by the Coast Guard. He holds a license as mate of steam and motor vessels navigating rivers.

46 CFR 31.15-5 required in the circumstances of this case that EAGLE OILER have on board at least one licensed officer or one tanker man.

What the owner's original thought was on hiring Appellant two years earlier is immaterial. The law required such a person to be aboard, Appellant was the only such person aboard. The law was complied with and Appellant was in fact serving under authority of his license.

But Appellant raises another question, urging that if he was required to be aboard it was merely as tanker man, not as a licensed officer. Thus, he argues only his performance of duty as a tanker man is subject to scrutiny, his activities as master and pilot being outside the scope of the requirement and therefore not

under authority of his license.

Against this the investigating officer argued the indivisibility of the license.

This latter view I must accept.

Once Appellant undertook service on a vessel aboard which, by law and regulation, he was required to have a license or document, all of his actions which touch upon marine safety become subject to the remedial provisions of R.S. 4450, as amended.

An analogy may be drawn here from misconduct cases. Many acts of misconduct of seamen do not involve activity in duties for which they hold the requisite rating. An off-duty seaman may commit assault and battery upon a shipmate. The act had nothing to do with his performance as an AB or an oiler or a steward. But the act renders his document amenable to disciplinary action because it touches on marine safety.

There is no doubt that had Appellant committed an unlawful homicide aboard EAGLE OILER his license would properly be in jeopardy. Just so, once he is aboard in required service, any act tending to endanger life or property in the navigation of the vessel is subject to the jurisdiction of these proceedings.

In passing, it may be pointed out here that since the acts involved disobedience of the statutory rules for navigation they could as well have been charged as "Misconduct" as "Negligence."

II

Turning now to the factual issues involved in the meeting of the two tows, it appears at first that the record is sufficiently clear to establish that Appellant did not sound a timely danger signal as asserted. Appellant himself testified that his danger signal was blown when the vessels were 600 to 700 feet apart. The statute calls for the signal at one half mile.

There is also no doubt that Appellant attempted to negotiate a passing without having exchanged proper whistle signals and that this was a failure to exercise reasonable care.

The statute prohibits the pilot of the descending vessel to initiate a proposal. Appellant, on his own testimony, did so initiate a proposal without having heard a signal from the upbound tow.

However, since the general rule for the exchange of signals in

33 U.S.C. 343 includes the timely sounding of a danger signal, I am inclined to believe that the specification of failure to blow a timely danger signal is included within the compass of the general failure to exchange proper whistle signals.

III

As to the specification alleging navigation of JB-556 without there being a valid certificate of inspection aboard, it was argued that the evidence was insufficient to establish that the certificate was not on board at the time the vessel was in navigation.

The testimony of the Coast Guard officer who boarded the barge was that he searched for and could not find a certificate. Neither the owner nor an employee of the owner could account for it.

It is a reasonable inference that if it could not be found on board by persons deliberately searching for it, persons thoroughly familiar with the structure and operation of tank barges, it was not on board.

It is also a reasonable inference, absent any evidence to the contrary, that if it was not on board when searched for it was not on board when the vessel was being navigated within a matter of hours earlier.

The examiner found as a fact that it was not on board and there is no reason to disturb this.

IV

It was additionally argued that if the certificate were not aboard this was merely a technical violation since a duplicate certificate was issued when the loss of the original was discovered, indicating that the barge was found to be in compliance with requirements and that its operation on 26 August 1961 was otherwise entirely proper.

On the record it could not be said that the operation of the barge was in compliance with its certificate because there is no evidence of what grade of cargo the barge was certificated for, but I specifically do not consider this as Appellant was not charged with navigating without compliance with the terms of the certificate and, if he were, the burden would have been on the investigating officer to prove it.

But the absence of a certificate, far from being a mere technicality, indicates a failure by Appellant to perform a duty. A master of a towing vessel has at times specific duties relative to making records as to the nature of the cargo in unmanned barges. 46 CFR 35.01-10 calls for entries in the tug's log concerning the grade of cargo carried when shipping papers are not on the barge. Further the master of a towing vessel may be liable to fine and imprisonment if he navigates a tank barge without complying with the regulations concerning the grade of cargo which may be carried.

Additionally, a tanker man is required to know whether cargo he may be pumping can lawfully be placed aboard a barge.

I make reference here to the official publication "Specimen Examination Questions for Licenses as Master, Mate and Pilot of Central Western Rivers Vessels." In the questions for "Mate," the license which Appellant holds, there appears under the heading "Tankerman" at page 29:

"26. If a tank barge was issued a certificate of inspection stating that the barge could carry grades D and E cargo, would you, if so ordered by the owners, load this barge with gasoline?"

Clearly the master of the tow and the tanker man have the duty to know the grade of cargo carried and the grades permitted aboard the barge. Reference to the certificate of inspection is necessary to insure compliance with the law.

V

As to Appellant's last point in his grounds for appeal, I see

nothing in this record, nor has anything been submitted by Appellant outside the record, to support his assertion that anything was done in this case by Coast Guard officials for the benefit of the owners and insurers of RAY WAXLER.

No question as to RAY WAXLER's operation is in issue here and none is decided.

CONCLUSION

I therefore conclude that the specification relative to failure to sound a danger signal (originally specification three) is duplicitous of other matters found proved.

The other specifications found proved by the examiner were proved by reliable, probative and substantial evidence.

ORDER

The finding of the examiner as to original specification three is VACATED.

In all other respects, the findings and order of the examiner are AFFIRMED.

E.J. ROLAND
Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 11th day of October 1963