

IN THE MATTER OF LICENSE NO. 289261 MERCHANT MARINER'S DOCUMENT
Z-505313 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: WILLIAM ALEXANDER BIRD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1718

WILLIAM ALEXANDER BIRD

This appeal has taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order date 26 September 1967, an Examiner of the United States Coast Guard at Galveston, Texas, suspended Appellant's seaman's documents for three months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as chief engineer on board SS LONE STAR STATE under authority of the document and license above described, on or about 22 May 1967, Appellant wrongfully permitted the starboard boiler to be operated without sufficient water, thereby causing damage to the boiler tubes, while the vessel was at Galveston, Texas.

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 in evidence the testimony of four witnesses and a pertinent entry in the vessel's engine log.

In defense, Appellant offered in evidence the testimony of two witnesses.

After the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on 3 October 1967. Appeal was timely filed on 12 October 1967, and perfected on 17 January 1968.

FINDINGS OF FACT

On 22 May 1967, Appellant was serving as chief engineer on

board SS LONE STAR STATE and acting under authority of his license and document while the ship was in the port of Galveston, Texas.

On the date in question, Appellant had just returned to the vessel from vacation. (Because of deficiencies in the record, some findings cannot be made here, but in view of the ultimate disposition of the case this is not material).

At about 1550 on 22 May 1967, one Joseph P. McMahon, night engineer, assumed duties aboard LONE STAR STATE. At the time, the engineering plant was operating under the following conditions:

- (1) The port boiler was undergoing work which rendered it inoperative for a period of several hours;
- (2) The main propulsion was inoperative because of needed repairs;
- (3) as a consequence of (2) above the electric feed pump was inoperative;
- (4) two auxiliary reciprocating feed pumps were available for use, either of which would normally have supplied an operating boiler with sufficient water; and
- (5) the starboard boiler was the only source of power in operation.

There was an emergency diesel which, when later resorted to, proved inoperative.

There is no evidence as to whether the ship was working cargo at any time.

When night engineer McMahon assumed the watch there existed the problem that there was leakage of fuel oil into cargo space. The first assistant engineer transferred ballast to correct a list in an effort to prevent entry of fuel into the cargo space. When the first assistant had done this he left the engineroom and was never seen or heard of again with respect to the matter of this case.

McMahon found that the water level in the starboard boiler was going down. He sent for the first assistant. The messenger found Appellant who asked whether there was trouble. Informed that there was, Appellant proceeded to the engineroom in ordinary clothing. When he arrived in the engineroom, the situation was found to be (although who found it to be so, or who caused it to be so, cannot be ascertained from the record) that the D. C. heater and the

feedwater tanks had been dumped into the double bottom.

The only way to supply feed to the starboard boiler was to pump from the double bottom. Appellant ordered both auxiliaries to be used for this purpose, and ordered salt water spraying to prevent vapor-binding of the pumps.

Difficulty was encountered in the use of one of the auxiliaries. The water level in the boiler fluctuated according to pump operation. After about two hours of fighting to keep the boiler in operation, Appellant was advised that one of the auxiliary pumps could not be restored to service. Appellant then secured the plant.

One engineer attached to the vessel later saw one sagged tube in the boiler. The vessel was issued a permit to proceed to Mobile, Alabama, apparently for work on some seventy tubes in the starboard boiler.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that there is insufficient evidence upon which to find Appellant negligent and that only hindsight could reveal a mere error in judgment.

APPEARANCE: Royston, Razor & Cook, by Edward J. Patterson, Jr.,
 of Galveston, Texas

OPINION

I

Ordinarily, the findings of an examiner will not be disturbed if they are based upon reliable, probative, and substantial evidence, even if there is conflicting evidence in the record. Ordinarily also, the hearing examiner assigns weight to the evidence, and resolves questions of credibility when facts are in dispute. In this case the issues are not as clearly cut out as usual. The problem is not purely with credibility, which may best be resolved by personal hearing, but with reliability, which can be as well evaluated on the record as on personal hearing.

For the reasons set out herein, on reevaluation of the reliability of the evidence, finding of the Examiner that Appellant "permitted the starboard boiler to be operated without sufficient water thereby causing damage to the boiler tubes" cannot be approved.

II

The first matter requiring discussion is the reiterated finding of the Examiner that Appellant had operated the boiler for a period of two hours with water at a dangerously low level. In the Examiner's "Finding No. 22" appears this statement:

"This action on the part of the Chief Engineer for a period of about two hours is clear negligence as such operation obviously would and did about the herein mentioned damage to the starboard boiler which caused same to become inoperative."

Emphatic disagreement must be made with this finding. All of the evidence shows that during these two hours Appellant was fighting to restore the water level to normal. He was properly concerned with the problem facing him, but it cannot be said that his efforts to restore the boiler were clearly negligent for that period of time. As long as there was water in sight, Appellant was justified in exerting efforts to restore normal water level and he was not operating the boiler with the water at a "dangerous low level."

If Appellant is to be found negligent, the finding cannot be on a general view that for two hours or more he permitted operation of the boiler with water at a "dangerously low level," but on a fact finding that he negligently operated the boiler after the water had gone from sight.

III

The evidence upon which the Examiner primarily relies is the testimony of the vessel's second assistant engineer who said that he had advised Appellant that the water was out of sight in the gauge glass. This testimony must be reevaluated.

The Examiner's eleventh finding begins:

"Mr. Cameron observed the Second Assistant Engineer Mr. Smith 'glued' there at the water gauge on the drum of the starboard boiler the whole time of the 'crisis.'"

This statement is couched as a finding of fact, not as a recitation of testimony of a witness. As a finding of fact it implies that the second assistant engineer was in fact figuratively "glued" to the gauge glass. This posture of the second assistant of course, buttresses the reliability of his testimony as to water level.

The reliability of the testimony on which this finding is

based is belied, however, by the testimony of Smith himself, who described his activities during the crisis thus:

"I was there, I didn't glue myself to the watching of the pumps, but ..." (R-65)

"I was up and down between the two levels - I would go up and look at the boiler level and then come back down - part of the time I was manning the water hose and then checking on the water level and - "(R-65).

"Watching the eyehigh - checking on the water in the boiler and then when the pump was holding it, I don't - I think Sir, I really don't recall what happened after that. I could have left the engineroom." (R-65).

This witness, who had testified, as quoted just above, that he was "watching the eyehigh," Later explained why he did not look at the eyehigh but at the gauge glass. (R-69).

The following dialogue is also found in the testimony of this witness:

"INVESTIGATING OFFICER: Now, after you went up and looked at the gauge glass and it was adequate, where did you go then?

"WITNESS: I don't recall.

"INVESTIGATING OFFICER: Well, did you remain in the engineroom?

"WITNESS: I couldn't answer that because I really don't know.

"INVESTIGATING OFFICER: Well, were you in the engineroom for the rest of the time?

"WITNESS: Well, I came - if I had left, I don't recall if I did or not, but if I did I came back."
(R-65-66).

The testimony of this witness is scrutinized to this extent for several reasons, but at the moments its significance is stressed with respect to the Examiner's finding that this person was "'glued' there at the water gauge on the drum of the starboard boiler the whole time of the 'crisis'."

If the testimony of the witness Smith is to be conclusive as

to water level, its reliability is naturally enhanced if it is shown that he was at all times in direct observation of the water level. But Smith's own testimony destroys the buttress which the Examiner erects from the testimony of the witness Cameron.

IV

Not only must the Examiner's eleventh finding be discounted, but it must be seen that the testimony of the witness Smith itself displays inherent weaknesses which must be kept in mind in considering his testimony as to "low water."

Smith testified that he advised Appellant that the water was out of sight. When asked whether he had told him this more than once, he stated that he could not remember. (R-68). At the same point in the record, the witness said:

"... I recommended to the chief that we secure the plant because in my estimation the water was out of sight in the gauge glass and the boiler should not be in operation any longer."

When asked the time of this recommendation, he said, "I couldn't give you a time," and then gave an estimate, with relation to the time the plant was secured, in these words:

"I was caught up in a chain of events there and there was so much confusion and everything that I couldn't give you a actual time. I could say five minutes, but I don't know if that would be true." (R-69).

Against this is the testimony of the night engineer, McMahan, that there had been difficulties with the pumps, and that possibly as late as five minutes before the plant was secured he was reporting to Appellant that there was low water but that it was still showing in the glass. (R-46). There is also the testimony of the third assistant engineer that less than seventy seconds before the plant was secured he blew down the glass (the fact of blowing down is admitted in the testimony of the witness Smith), and that there was half inch of water in the glass. The third assistant testified that he was annoyed when the lights dimmed and he wondered why the plant had been secured. (R-86). To this may also be added the testimony of the night engineer that the plant was secured at the time when he reported to Appellant that the forward auxiliary feed pump could not be restored to service. (R-53). This witness also testified as follows:

"COUNSEL: Your testimony is that at all times until the Chief ordered the plant shut down there was water in the

gauge glass?

"WITNESS: There was water showing in the gauges glass, yes, sir." (R-51).

The same witness also testified:

"INVESTIGATING OFFICER: Did you attempt to light off the starboard boiler again that evening?

WITNESS: No, Sir.

"INVESTIGATING OFFICER: Why not?

"WITNESS: Well, there was no water showing.

"INVESTIGATING OFFICER: There was no water showing where?

"WITNESS: In the glass; she had gone out after we secured her.

"INVESTIGATING OFFICER: The water left the boiler after you secured it?

"WITNESS: Well, it left the glass, the level in the glass left." (R-48-49).

V

On this state of the record it is apparent that the testimony of the one witness upon whom the Examiner relied to make a finding that the boiler was operated with the water "dangerously low." (i.e., as has been specified in I above, out of sight in the gauge glass) was inherently unreliable and was flatly contradicted by the testimony of the third assistant and the night engineers who saw water in the gauge glass either up to or after the moment the boiler was secured.

The picture given on this record is one of Appellant's making every effort to restore normal water supply to a boiler, the vessel's one source of power, the feedwater for which had been negligently dumped into the double bottom, until the time came when he was informed that one of his two available pumps had become inoperative, at which time he "gave up the fight" and secured the boiler.

Low as the water may have been, it was not "dangerously low" for the two hour period found by the Examiner, and the reliable

evidence in the record indicates that it was not "dangerously low" when the boiler was secured but only that Appellant recognized that he could not maintain the status quo when the forward pump was lost, and surrendered to the fact that he would necessarily lose the water with only one pump remaining operative.

VI

The question remains whether an inference could be made from the extent and the nature of the damages sustained by the boiler as to the cause of the casualty and the responsibility therefor.

Some evidence was introduced that a "low water" operation could produce tube damage. Testimony of the witnesses who so stated also admitted that other causes could produce tube damage.

The only evidence as to damage to the starboard boiler of LONE STAR STATE is to be found in the testimony of the witness Smith. His testimony on this question is reproduced in full:

"INVESTIGATING OFFICER: Have you had an opportunity to -- since 7:45 on the evening of 22 May -- to inspect or look at the starboard boiler?

" WITNESS: Yes, Sir.

"INVESTIGATING OFFICER: When did you look at it?

"WITNESS: I took a quick look at it, Sir, shortly after it had been taken off the line. I just took a quick look at it and observed some tubes that was burned. I didn't take a thorough look at it.

"INVESTIGATING OFFICER: Are you aware of any repairs being made to the starboard boiler?

"WITNESS: Yes, Sir, the water walls have been cut open, screen tubes have been cut open and I am not positive as to what drum was opened.

"INVESTIGATING OFFICER: How many tubes are involved here, you say, being --

WITNESS: (Silence)

"INVESTIGATING OFFICER: Not the exact number, just an estimate.

"WITNESS: I would say there would be 40 on the water

walls and 70 tubes -- screen tubes, that I know of.

"INVESTIGATING OFFICER: Do you know of any repairs needed to any economizers?

"WITNESS: No, Sir, I don't.

"INVESTIGATING OFFICER: You say you saw one sided tubes when you made that initial inspection, based upon your personal -- your own personal knowledge, what normally causes a tube to sag?

"WITNESS: Plugage of tube or denial water causing overheating or sagging, possibly low water condition, rating of a tube with oil to the point you would not have a heat transfer.

"INVESTIGATING OFFICER: Are you aware of any damages to any tubes on this particular boiler when you went aboard it?

"WITNESS: No, Sir, I wasn't. It was observed that there was a steam leak from somewhere because you could see an issuance of steam.

"INVESTIGATING OFFICER: Was this indicative of 70 tubes leaking?

"WITNESS: 70 tubes leaking, no sir, I don't believe this many tubes were involved.

"INVESTIGATING OFFICER: I have no further questions.

"COUNSEL: Mr. Smith, you're not telling us are you that it is your opinion as an engineer that based on what you saw that one sagging tube -- you're not telling us that a reasonable probability is the fact that the chief engineer tried to keep the plant on the line and because he did it caused all of this 70 tubes leaking. You are telling us that -- you don't know what to be a fact now do you?

"WITNESS: No, Sir, I wasn't answering this as a fact. I was asked if I had observed the boiler and I said I saw this one tube sagged. I have no idea what the cause of the sagging was.

"COUNSEL: That one tube -- it could have been burned before this time?

"WITNESS: Yes, it could have.

"COUNSEL: You say there was an issuance of steam, well, that could of indicated that the boiler had been misused or needed repair or needed attention.

"WITNESS: Yes, Sir.

Particular attention must be given to the answer to the eighth question in the series quoted. The word "sided" is necessarily to be construed as "sagged" in view of the answer to the eleventh and next to last question quoted.

Up to the moment that that eighth question had been asked, there was no testimony by the witness on the record of hearing that he had seen one tube "sagged." This indicates that the Investigating Officer was questioning on the basis of information available to him outside the record of this hearing.

The important fact is that this witness is the only one utilized to tie in the damages to the boiler which required repair to the damage which might have been occasioned during the "crisis" in question. Since this witness could testify from personal observation only that one tube was seen to have sagged after the "crisis" but not necessarily because of the "crisis," the connection has not been shown.

VII

It may be that evidence not adduced at hearing could have proved operation of the boiler such as to cause the damages which required repair. Appellant cannot be found negligent under such conditions.

It may be that proper expert testimony analyzing the activities described on this record might have been the basis for other charges and other findings against Appellant. But the charges were not brought and there was no litigation as to other possible faults. (Cf. Kuhn v. Civil Aeronautics Board, CA D.C. 1950, 193 F.2nd 839)9

VIII

In view of the disposition of this case, no attention need be given to the propriety of the order of the Examiner which both as to suspension and terms of probation extended to all seaman's documents issued to Appellant.

CONCLUSION

The evidence in this record is not sufficient to sustain a finding that Appellant at any time permitted the starboard boiler of LONE STAR STATE to be operated without sufficient water and the evidence does not sustain a finding that any particular operation of the boiler caused the damages that had later to be repaired.

ORDER

The findings and order of the Examiner dated 26 September 1967 at Galveston, Texas, are SET ASIDE. The charge are DISMISSED.

W. J. SMITH
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 17th day of July 1968.

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