

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 26983
Issued to: RAYMOND F ALT
AND
LICENSE NO.112379
Issued to: WILFRED E. JOSSY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1999

RAYMOND F. ALT
AND
WILFRED E. JOSSY

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 14 November 1973, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended individually the license held by each Appellant for a period of 12 months on 18 months' probation upon finding each guilty of misconduct. The specification found proved against Appellant Alt alleges that while serving as operator aboard the DIXIE LEE, under authority of the above-captioned license, on or about 20 August 1973, he wrongfully operated a foreign built boat carrying passengers from a U.S. port and returned to a U.S. port in violation of 19 CFR 4.80(e). The specification found proved against Appellant Jossy is identical to the above except that it alleges serving as operator aboard the JERI-JO III.

At the hearing, Appellants were represented by professional counsel. Appellants entered pleas of not guilty to the charges and specifications.

The Investigating Officer introduced in evidence stipulations of facts agreed to between the Appellants, their counsel, and the Investigating Officer.

In defense, Appellants offered in evidence their own testimony and that of one other witness.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charges and specifications had been proved. The Administrative Law Judge entered an order suspending the licenses, issued to Appellants, for a period of 12 months on 18 months' probation.

The entire decision was served on 19 November 1973. Appeal was timely filed on 5 December 1973. A brief in support of appeal was received on 11 March 1974.

FINDINGS OF FACT

On 20 August 1973, Appellants were individually serving under authority of their duly issued United States Coast Guard licenses while operating the vessels DIXIE LEE and JERI-JO III, respectively. Each vessel is a citizen-owned, foreign built, thirty-two foot Grand Banks single screw, diesel cruiser, of less than five net tons. The DIXIE LEE is registered with the State of Oregon and has been issued Certificate of Number OR 815 DM. The JERI-JO III is also registered with the State of Oregon, having been issued Certificate of Number OR 472 EG.

On the above date, both Appellants were operating their respective vessels out of Hammond, Oregon, on charter fishing voyages which extended to waters of the Pacific Ocean and, without intervening ports of call, returned to the same pier in Hammond, Oregon. The passengers on board each vessel were carried for a monetary consideration. Appellants had been engaged in the charter fishing business for a period of between two and three years each with the same vessels prior to their receipt of the present charges on August 20, 1973. Each received a warning from Customs officials that their activity constituted a violation of certain provisions of the Jones Act on August 3, 1973.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellants have three basic contentions. First, it is contended that the use of the licenses and the operation of the vessels in question was not misconduct. Second, that the use of the vessels was not in violation of 19 CFR 4.80(e). And finally, that the regulation insofar as applied to Appellants is invalid.

APPEARANCE: Pozzi, Wilson & Atchison of Portland, Oregon, by
Keith E. Tichenor, Esq.

OPINION

Initially, I note that the hearing in this case was consolidated upon motion by counsel and held in joinder. Both Appellants were present and represented by professional counsel. No issues have been raised concerning the procedure followed in this regard.

The gist of Appellants' first contention is that the statute

under which they were charged, 46 U.S.C. 239, is penal in nature and requires proof of willful or wrongful conduct to sustain a charge of misconduct. It is argued that the uninterrupted operations by Appellants previous to the present charges without objection by government officials together with Appellants' interpretation that the relevant statutes did not apply to them cannot be construed as wrongful conduct.

The argument that 46 U.S.C. 239 is penal in nature is neither novel nor persuasive. The cases relied on by Appellants have been fully considered in previous decisions and held by me to be not controlling. See Decision on Appeal No. 1574. It is unnecessary to show evil purpose or criminal intent to establish misconduct within the terms of 46 U.S.C. 239 and the regulations thereunder. Misconduct, as defined at 46 CFR 137.05-20, means " . . . a human behavior which violates some formal, duly established rule, such as the common law, the general maritime law, a ships' regulation or order, or shipping articles." When the activity engaged in is prohibited by a specific regulation in implementation of a statute and the activity was intentionally engaged in, there has been misconduct within the above-quoted regulation. The fact that enforcement proceedings were not commenced against Appellants or others prior to the present charges can in no way be considered a valid defense to the commission of an unlawful act. Finally, Appellants were on notice that their activities were prohibited prior to the receipt of these charges. The fact that they chose to interpret the statutes as not applying to them does not convert their subsequent activities into lawful operations. I find that there is sufficient evidence in the record to prove that a duly established rule was violated when Appellants engaged in the coastwise trade with foreign-built vessels contrary to the express provisions of 19 CFR 4.80(e).

Appellants' second and third points are in pari materia and will be considered together. It is contended that Appellants were not in violation of 19 CFR 4.80(e) because that regulation was promulgated pursuant to statutory provisions which do not extend to the class of vessel operated by them; thus as applied to them it is overly broad and constitutes a violation of Appellants right to due process of law. Implicit in this argument is the contention that the Administrative Law Judge erred when he held the regulation was presumed to be a valid interpretation and application of the statutes under which it was promulgated.

It is my opinion and my decision herein that neither the Coast Guard nor any of its officials may authoritatively interpret the coastwise trading laws nor rule upon the validity of the interpretations of those laws made by the agency charged with their administration. In this case, the responsible agency is the U.S.

Customs Service. The cited regulation was duly promulgated according to law and is entitled to a presumption of validity by the Coast Guard and all of its officials. The Administrative Law Judge was correct in his ruling that the regulation was valid and that it applied on its face to Appellants' activities.

It is clear from the record that at the time in question Appellants were engaged in taking out fishing parties for hire. The U.S. Customs Service has interpreted this activity as coastwise trade and the prohibition upon engaging in the coastwise trade by foreign-built vessels is well established. Suspension and revocation proceedings conducted under the authority of 46 U.S.C. 239 are proper means of enforcing the coastwise trading laws. I find that there is sufficient evidence to support the findings and conclusions of the Administrative Law Judge and hereby affirm the decision and order entered in this case.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington on 14 November 1973, is AFFIRMED.

C. R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D. C., this 9th day of May 1974.

INDEX

Defenses

mistake of law

Hearings

nature of, remedial or penal

Misconduct

General elements of
motivation need not be established
prior notice of
violation of statute as

Notice

of wrongful conduct

Presumptions

of validity of regulation

Regulations

authority to interpret
presumption of validity of
violations of wrongful per se

Remedial proceedings

administrative proceedings

Statutes

violations of as misconduct

Vessel

coastwise trade, engaged in