

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-575940
LICENSE NO. 451272
Issued to: Joel Michael SEARS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2058

Joel Michael SEARS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1 and 3

By order dated 21 October 1975, an Administrative Law Judge of the United States Coast Guard at New York, New York suspended Appellant's seaman documents for three months plus six months on twelve months' probation upon finding him guilty of misconduct and negligence. The specifications found proved allege that while serving as an operator on board the uninspected towing vessel MAUREEN MORAN under authority of the document and license above captioned, on or about 20 September 1975, Appellant:

- (1) wrongfully absented himself from the wheelhouse for a period of approximately 15 minutes, leaving the responsibilities of navigation of the vessel and its tow to an unlicensed deckhand, thereby contributing to a collision between the tow and a pier, and
- (2) failed to post a proper lookout, notwithstanding the fact that the vessel was being navigated from the lower wheelhouse and the light barge in tow alongside to port partially obstructed vision from the wheelhouse on the port side, thereby contributing to the collision.

At the hearing, Appellant elected to act as his own counsel and entered a plea of guilty to the charge and specification of misconduct and not guilty to the charge and specification of negligence.

The Investigating Officer introduced in evidence the testimony of the deckhand who was at the wheel of the MAUREEN MORAN at the time of the collision.

In defense, Appellant offered in evidence his own testimony as well as 3 letters attesting to his professional competence as an operator of towboats.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charges and supporting specifications had been proved by evidence and by plea. He then served a written order on Appellant suspending all licenses and documents, issued to Appellant, for a period of three months outright plus six months on twelve months' probation.

The entire decision and order was served on 28 October 1975. Appeal was timely filled on 7 November 1975.

FINDINGS OF FACT

On 20 September 1975, Appellant was serving as an operator on board the uninspected towing vessel MAUREEN MORAN and acting under authority of his license while the vessel was towing the empty tank barge RHODE ISLAND south on the Hudson River.

The towing vessel MAUREEN MORAN is equipped with two vertical wheelhouse, the upper wheelhouse being approximately 25 feet above the lower. On the aforementioned date the vessel was being navigated from the lower wheelhouse. The towing vessel is 105 feet long, or approximately 1/3 the length of the barge. The barge RHODE ISLAND was lashed to the port side of the MAUREEN MORAN, on the aft starboard third of the barge. Because of the "light" condition of the barge it rode high in the water in a manner which partially obstructed the view from the port window in the lower wheelhouse.

Appellant was assigned the 1800-2400 watch as the licensed operator on this date. Donald Joseph Schenck, a deckhand who is unlicensed as an operator, served under the Appellant during this watch. At approximately 1850, at the direction of the Appellant, Schenck took control of the wheel in the lower wheelhouse. Shortly thereafter the Appellant left the wheelhouse in order to go to the "head". He was absent from the wheelhouse for approximately 15 minutes. At 1910, while the vessel was under the control of Schenck, the RHODE ISLAND collided with the northern bulkhead of the Kennedy Marina, located on the eastern shore of the river near Yonker's, New York. The bulkhead of the marina extends some three hundred feet out into the channel of the river.

When Schenck took control of the wheel it was daylight and visibility was good, yet because of the visual obstructions of the barge he could not see the New York shore out of the port side window. There was no lookout posted at the time of the collision.

46 USC 405(b)(2) requires, in part, that uninspected towing vessels, when underway, be under the actual direction and control of operators licensed for such service.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that irrespective of Appellant's guilty plea to the charge of misconduct, certain mitigating factors excuse his conduct. He states that he was unaware of the content of 46 USC 405(b)(2), section 405 having been amended to include this subsection in 1972. He further contends that the Coast Guard was derelict in its obligations to towboat operators in not publishing a "local notice to mariners" regarding this statutory change. Appellant argues that prior to this amendment no license was required for operators of towing vessels of less than 200 gross tons, and that industry customary practice permits operators to train deckhands in the art of navigation of towing vessels. He states that he operated under the premise that such "on the job training" was permissible and left the deckhouse only because he personally considered Schenck to have sufficient navigational training and operational competence to handle the vessel during his brief absence. Further, Appellant argues that it is an unrealistic interpretation of the pertinent statute to say that an officer of the watch must call for a licensed relief officer to take the helm in order to momentarily retire to the head.

With reference to the charge of negligence, Appellant argues that the Administrative Law Judge made erroneous factual findings regarding the position of the MAUREEN MORAN in relation to its tow and the degree of visual obstruction from the pilothouse. These facts findings were based upon the erroneous and factually disputed testimony of the deckhand. He further argues that a lookout was not necessary under the prevailing conditions at the time he left the wheelhouse, and that had he posted a greater operational risk because of communication difficulties.

Finally, the Appellant argues that at the time of the collision, he was not operating the vessel under authority of his license as a matter, but under the endorsement to that license for operators of uninspected towing vessels, implying that the Government is without statutory authority to do more than revoke the endorsement.

APPEARANCE: Appellant pro se.

OPINION

I

The temporary absence from the wheelhouse of the licensed operator (officer of the watch) on an uninspected towing vessel is not, in every case, an absolute violation of 46 USC 405(b)(2), as this absence does not necessarily constitute relinquishment of "actual direction and control" over the vessel. If the circumstances are such that an unlicensed crew member can temporarily steer the vessel, without any appreciable increase in risk to its safe navigation then the licensed operator may momentarily leave the wheelhouse (after giving appropriate instructions to the crewman) and still maintain "actual direction and control". Thus, in a situation where the course is straight, the visibility good, and the traffic sparse, the licensed operator might allow an unlicensed mate to take the wheel for training purposes. And where the proven navigational competence of the crewmember is high, the licensed operator might briefly leave the wheelhouse and still maintain actual control of the vessel. But, in this case, the Appellant was operating with a reduced degree of control when he himself was at the wheel, since the evidence indicates that his view was partially obstructed by his tow, and since he had not posted a lookout nor was he utilizing radar equipment to compensate for this reduction in visual capacity. Further, the Appellant left the wheelhouse without offering any instructions to the deckhand Schenck as to the existence of approaching obstacles which extended into the river. Under these conditions of increased navigational risk, the Appellant should have called for a licensed replacement before leaving the bridge, and by not doing so he forfeited the actual control of the vessel to an unlicensed mate who was unqualified to operate the vessel under the prevailing conditions. Therefore, I find that the evidence substantiates the Appellant's plea of guilty to the charge of misconduct. The finding on this charge is affirmed.

II

With regard to Appellant's proposed excuse of "ignorance" of the statutory changes to 46 USC 405, suffice to say that ignorance of the law is no excuse, particularly when that law is one which has a direct bearing on the industry and profession in which he is employed. Appellant's license had been specifically endorsed after the 1972 amendments, to indicate the Coast Guard's recognition that he met the regulatory requirements as an operator of uninspected towing vessels. The fact that he was required to submit his license for this endorsement should have served to apprise him of the new rules regarding qualifications for uninspected towboat operators. Therefore, it is difficult to accept his argument that he was unaware that operator's are required to be licensed by the Coast Guard.

Notices to mariners are issued by the Coast Guard for purposes of notifying the marine industry of information relating to hydrological discoveries, changes in channels and navigational aids, and information relating to the safety of navigation. It was not designated for, nor is it presently used as a means of publishing changes in Federal statutes or Coast Guard regulations.

III

The Administrative Law Judge made the factual finding that the portside view from the wheelhouse was partially obstructed by the barge in tow. This finding was based upon testimony to that effect by the witness Schenck. The credibility of Schenck was examined by the Administrative Law Judge and the decision to accept his testimony as fact will not be overturned on appeal unless found to be arbitrary and capricious. I do not find it to be so. There was adequate evidence of a probative and reliable nature to substantiate the factual finding concerning obstruction of view from the pilothouse. Schenck testified that he could not see the New York shore out the port window, and that he was unaware of the existence of the marina until after occurrence of the collision. Under these conditions of reduced visibility, and particularly in light of Schenck's inexperience as a towboat operator, a lookout should have been posted in the upper wheelhouse where the view was not impeded. Collision with a known and charted stationary object because of a restricted line of sight and failure to overcome the limitations thereof by posting a lookout, is demonstrative of a lack of ordinary care. The finding of negligence is affirmed.

IV

The Appellant was operating under authority of his license as endorsed, at the time of this incident. Therefore, there was clearly jurisdiction under R.S. 4450 to proceed against that license. However, in his position as operator of a towboat, Appellant was not acting under authority of his merchant mariner's document. Therefore, that portion of the order of the Administrative Law Judge dealing with suspension of the seaman document is vacated.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 21 October 1975, is as modified herein, AFFIRMED.

E. L. Perry
Vice Admiral, U. S. Coast Guard
Vice Commandant

Singed at Washington, D.C., this 10th day of May, 1976.

INDEX

Licenses

uninspected towing vessel

Lookout

failure to maintain proper

Misconduct

of operator when control of vessel relinquished to
unlicensed deckhand

Negligence

lookout, failure to maintain

Towboats, uninspected

licensed operator's direction and control