

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 442 203
Issued to: Amigo SORIANO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2088

Amigo SORIANO

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.

By order dated 8 July 1976, an Administrative Law Judge of the United States Coast Guard at Seattle Washington suspended Appellant's license no. 442 203 for six months on twelve months' probation upon finding him guilty of violation of a statute. The specification found proved alleges that as President of Swiftsure, Inc., owner of M/V MARLIN, O.N. 568 721, an uninspected vessel, on or about 24 January 1976, Appellant specifically directed the master of said vessel to get underway from Seattle, Washington, wrongfully carrying freight for hire in willful violation of 46 U.S.C. 367 and 404.

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

The Investigating Officer introduced in evidence with the approval of Appellant and his counsel a stipulation of fact (T-7). See CG Exhibit 1.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending License No. 442 203 issued to Appellant, for a period of six months on twelve months' probation.

The entire decision and order was served on 9 July 1976. Appeal was timely filed on 5 August 1976.

FINDINGS OF FACT

On January 24, 1976, Appellant was President of Swiftsure, Inc., owner of the M/V MARLIN, O.N. 568721, and the holder of merchant mariner's license no. 442 203. On this date and all other

relevant times the M/V MARLIN, an oil-screw vessel of 483 gross tons, did not possess a valid U.S. Coast Guard Certificate of Inspection. On or about 22 January 1976, the M/V MARLIN began loading cargo in Seattle, Washington, in preparation for a voyage to Yakutat, Alaska, and various other Alaskan ports.

On or about 23 January 1976, Appellant was visited by LT(jg) Kenneth I. JOHNSON, USCG, singly and in the company of LT(jg) William R. BARKER, USCG, concerning about 20 tons of general cargo aboard the vessel that was totally unconnected with the fishing industry for various consignees likewise, totally unconnected with the fishing industry. A partial listing of the cargo and the consignees illustrates this point: machinery parts for an air taxi service, wheels for the U.S. Forest Service, generators and furniture for the F.A.A., groceries and liquor for the Yakutat Community Corporation, a showcase for the Yakutat City School, liquor and propane for the Yakutat airport lodge, and foodstuffs for Mallott's General Store. During these visits Appellant was asked if he knew that carriage of this cargo raised a question of violation of 46 U.S.C. 404. Appellant at that time stated that he was aware of the possible problem and that the cargo would be carried anyway.

On 24 January 1976, LT(jg) Johnson discussed the question of a possible violation of 46 U.S.C. 404 with the prospective Master of M/V MARLIN. The Master then contacted Appellant with this problem and was told the nature and destination of the cargo. Appellant also told the Master of M/V MARLIN that the vessel would sail with the cargo on board. That same day the vessel sailed with the cargo aboard. The cargo was duly landed at the Yakutat Fisheries pier and delivered to the consignees. Swiftsure, Inc. was paid for the carriage of the cargo.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the proceeding lacked jurisdiction over the Appellant because he was not acting under the authority of his license at the relevant times. Appellant further contends that the M/V MARLIN was within the exception contained in 46 U.S.C. 367 and 404. Further, Appellant contends that his actions were not within the purview of 46 U.S.C. 239.

APPEARANCE: Max D. SORIANO, Esq.

OPINION

I.

The Administrative Law Judge in this case denied Appellant's primary contention, i.e. that the R.S. 4450 proceeding looking toward the suspension or revocation of Appellant's license for willful violation of a provision of Title 52 of the Revised Statutes was without jurisdiction, on the basis of 46 CFR 5.01-40. That contention, briefly stated, is that in order for Appellant's license to be subject to suspension or revocation for willful violation of a provision of Title 52 of the Revised Statutes, Appellant must at the time of the violation be acting under authority of his license. For the reasons which underlie the statement codified in 46 CFR 5.01-40, Appellant's interpretation of RS 4450 can not prevail.

In Commandment Appeal Decision 491 (DEDERICK), these reasons are clearly set forth. In this decision, I stated as follows:

The limiting words "acting under authority of his license" have no reference to acts in violation of the provisions of Title 52 of the Revised Statutes or regulations issued thereunder. This is not the result of any Congressional oversight; on the contrary it was the clear intent of the Congress. U.S.C. Title 46, sec. 239, as it reads today is largely the result of a complete rewriting of section 4450 of the Revised Statutes made in section 4 of the Act of May 27, 1936, 49 Stat. 1381. As the bill passed the House of Representatives, the language relative to "acting under authority of his license" applied to violations of provisions of title 52 of the Revised Statutes as well as to misconduct and incompetency. In the Senate, the bill was amended and the language rearranged, so that the limiting phrase applied only to misconduct and incompetency. (1936) 80 Cong. Rec. 4392, 6028, 6029.

This position has been reaffirmed in Commandant Appeal decision 1574(STEPKINS).

Soriano v. United States, 494 F.2d 681 (9th Cir. 1974), and Dietze v. Siler, Civ. No. 75-3501 (E.D. La. 14 June 1976), cited by Appellant are inapposite. These cases deal with the "incompetency and misconduct" clause of RS 4450 not with the "violation of any provision of Title 52 of the Revised Statutes" clause. Nothing said in those cases has any application to this controversy. No other court decisions relevant to this matter have been cited nor have any been found.

There must, of course, be some connection between the violation(s) of statute or regulation charged and the license or the type of action or activity contemplated thereby in order to properly support suspension or revocation of that license.

However, this limitation is more concerned with the appropriateness of the action than with jurisdiction. Clearly, directing the sailing of a vessel subject to the inspection laws and accepting cargo for the transportation on that vessel is a function at least in part, of the Master, or other person-in-charge of the vessel. Clearly, there is a connection between the charge in this case and the type of activity contemplated under this license. It is equally clear that this proceeding had jurisdiction over Appellant's license.

II

Appellant was found to have willfully violated 46 U.S.C. 367 and 46 U.S.C. 404. Since 46 U.S.C. 367 is not part of Title 52 of the Revised Statutes, it can not serve as a basis for the suspension in this case. 46 U.S.C. 404 is part of Title 52 of the Revised Statutes, i.e. Section 4426 thereof.

Appellant contends that because M/V MARLIN landed the above-stated cargo at a pier used for (among other things) the landing of cargo destined for use in the processing of fishery products, that the plain language of the statutory exception for vessels "engaged in fishing as a regular business" to be "cannery tender or fishing tender vessels of not more than five hundred gross tons used in the salmon or crab fisheries of [various states] which are engaged exclusively in the carriage of cargo to or from ... a facility used or to be used in the processing or assembling of fishery products." I agree with the Administrative Law Judge in this case that "the significant factor in the question of statutory violation is not the particular pier on which the cargo is landed but the consignee", and I might add the connection between the cargo and the fishing industry.

As previously stated the stipulation in the record clearly shows that M/V MARLIN was not, on this particular voyage, engaged exclusively in the carriage of cargo to the fishing industry in Alaska since a substantial portion of her cargo was obviously non-fishery related and consigned to non-fishery consignees. Thus, M/V MARLIN did not, on the voyage in question, fall within the statutory exception and was required to be inspected pursuant to the requirements of 46 U.S.C. 404. The record also clearly shows that Appellant was aware of the problem and deliberately chose to proceed in violation of this inspection requirement.

CONCLUSION

Appellant was in willful violation of one of the provisions of Title 52 of the Revised Statutes, RS 4426 (46 U.S.C. 404). This action was within the purview of 46 U.S.C. 239.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington, on 8 July 1976, is AFFIRMED.

E. L. PERRY
VICE ADMIRAL, U. S. COAST GUARD
ACTING COMMANDANT

Signed at Washington, D. C., this 3rd day of January, 1977.

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