

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT Z-102 9399  
AND LICENSE NO. 410374  
Issued to: William P. JENSEN

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

2111

William P. JENSEN

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 14 January 1976, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, after hearing held at Port Arthur, Texas, suspended Appellant's license for two months plus three months on twelve months' probation upon finding him guilty of inattention to duty. The specification found proved alleges that while serving as chief mate on board the United States SS TEXACO NORTH DAKOTA under authority of the document and license above captioned, on or about 2 and 3 October 1973, Appellant wrongfully failed to supervise the tank cleaning operations in progress which produced a combustible gas mixture accumulation in the after pumproom resulting in an explosion and fire while said vessel was underway in the Gulf of Mexico.

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

Testimony of live witnesses was introduced by both sides and, by stipulation, the previous testimony of witnesses taken before a Marine Board of Investigation, which had held proceedings looking into the TEXACO NORTH DAKOTA casualty, was made part of the record.

Appellant also testified in person on his own behalf.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved.

The charges in this case were brought against Appellant's license, No. 410374, and the merchant mariner's document issued to him. A merchant mariner's document is issued in lieu of two certificates created by statute, a certificate of service and a certificate of identification. The "Z-number," established originally for certificates of identification, is commonly used as

an identifier of a particular merchant mariner's document. After finding the charge proved, the Administrative Law Judge entered an order which purported to

- (1) suspend "License Number Z-102 9399 and all other valid licenses" issued to Appellant, and
- (2) suspend further, on probation, "Your said document."

The confusion of numbers and terminology here renders the poorly stated order ambiguous and possibly unenforceable, but special remedy will not be needed in this case.

The entire decision was served on 26 January 1976. Appeal was timely filed and was perfected on 1 February 1977.

#### FINDINGS OF FACT

On 2 or 3 October 1973, Appellant was serving as chief mate on board the United States SS TEXACO NORTH DAKOTA and acting under authority of his license while the ship was at sea in the Gulf of Mexico.

In view of the disposition to be made of this case, no further findings are appropriate.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge went outside the record for evidence and information and, in fact, abdicated his fact finding authority by utilizing reports of investigative bodies for his decision.

APPEARANCE: Jones, Walker, Waechter, Poitevant, Carrere and Denegre, New Orleans, La., by Frank C. Allen, Jr. Esq.

#### OPINION

On 18 November 1975, when the case had been under consideration by the Administrative Law Judge for over three weeks after the hearing had been terminated, Appellant's counsel, who had learned that publication of the results of casualty investigation (a tripartite document, consisting of the report of the Board of Investigation, the Commandant's "Action" thereon, and the determination of probable cause by the National Transportation Safety Board) was contemplated for 20 November 1975, asked for a delay in release until the Administrative Law Judge should have

rendered his decision in the suspension and revocation proceeding. The reply made to this was that statutory provisions made the publication necessary.

Under the holding of Pangburn v Civil Aeronautics Board (CA 1, 1962), 311 Fed. 2nd. 349, it is not intrinsically erroneous for a regulatory agency to publish findings in on area under one formal aspect even if another record before a trier of facts for the agency still is open. This does not absolve the trier of facts in the pending case from the duty of making his decision on the record made before him. He may not, of course, draw upon facts, or assumed facts, established in the other proceeding by evidence not before him, in arriving at findings of conclusions.

Appellant here proposes a parallel text analysis of the written decision of the Administrative Law Judge set against the reports of the Marine Board of Investigation and of the National Transportation Safety Board. He urges lengthy similarities in text as indicating that the trier of facts here simply adopted, without crediting the sources, the reports of those two bodies as his own statement.

One point as to the Marine Board of Investigation report must be examined in detail. The written decision of the Administrative Law Judge contains this statement:

"It was stipulated by both parties that the transcript, exhibits and findings of fact of the Marine Board of Investigation would also be admitted into evidence and made part of this record." D-10.

The colloguy on the record pertinent to this point is reproduced:

"JUDGE: ... it was suggested that possibly, to fill out the record before me both sides might wish to offer a copy of the transcript of the Marine Board of Investigation held before three officers of the Coast Guard led by Captain Alley, now retired. The Investigating Officer also suggested that perhaps the Commandant's action which is the Commandant's report after reviewing the transcript of the Marine Board and their findings. [sic] Following that, counseland the Investigating Officer went outside and discussed this matter privately, then counsel, I understand, discussed it with his client and now are more or less ready to advise me of how they feel about this matter.

. . . .

"MR. ALLEN: ... I'll object to any further proceedings in this matter for the record since the matter had already been

closed. The Coast Guard had rested its case. That's for the record, now..... Insofar as stipulation is concerned, I would be willing to stipulate the testimony of the--

"JUDGE: Marine Board?

. . . . .  
MR. ALLEN: - The testimony as it came forth in the Marine Board. I will also be willing to stipulate the Findings of Fact by the board of inquiry. However, I cannot agree to stipulate as to any conclusions or recommendations, I will stipulate to anything of a factual nature because I Think, if it please the Court, my appreciation of Your Honor's job and I'm certainly not trying to tell Your Honor what your job is, is to get the facts before you and then Your Honor reaches his own conclusions.

"JUDGE: That's correct.

. . . . .  
"MR. ALLEN: . . . And, I believe the findings of fact by the Marine Board may be a summary of those facts. My problem with the Commandant's action is that they are not really in the nature of findings of facts. They are remarks or conclusions or comments, so, I cannot do that. But, I have no problem with the record. That's the record. That's what the people sitting in that chair testified to.

"JUDGE: All right, Well, then I take it that the Investigating officers have no objection to the Marine Board testimony and the Findings of Fact of the Marine Board going into this record.

"SENIOR INVESTIGATING OFFICER: Your Honor, we would have no objection to the testimony given to the Marine Board. The Findings of Fact of the Marine Board we would object to because their testimony would speak for itself. There's no reason to review the summation of their testimony or to have the ideas of the Marine Board injected into it. I mean, if you're going to be a trier of facts, then let's try the facts as oath was given.

"JUDGE: It is my understanding that -

"MR. ALLEN: The only thing we can agree on -

"JUDGE: The only thing you have agreed to is actually the transcript of the actual testimony and exhibits given at the Marine Board.

"MR. ALLEN: Yes, sir.

"JUDGE: All right, That will be admitted as - do I understand that it's in two volumes?

"MR. ALLEN: Yes, sir, it is.

. . . . .  
"JUDGE: All right. Wel, then the transcript of the

Marine Board will be deemed both sides' exhibit, and exhibit of the Respondent and an exhibit of the Coast Guard.

"MR. ALLEN: Let's just make it the Judge's exhibit. It doesn't make any difference.

"JUDGE: All right, Judge's Exhibit III. That will probably simplify the record." R-234-238.

It is clear from this that one and only one of the various items discussed was to be "admitted into this record" and that was the previously recorded testimony of witnesses who appeared before a certain Marine Board of Investigation. That record of testimony is, alone, the document marked Exhibit III and incorporated into the record. It is evident that the statement of the Administrative Law Judge in his decision, quoted above, is wrong.

It would behoove an Administrative Law Judge, under conditions like this, not only to make no apparent error in his understanding of what was before him on the record, but in view of the potentials which were variously discussed and rejected, findings by the Board, conclusions and recommendations by the Board, and Commandant's "action" on the Board's report, to make it clear beyond cavil that such sources of influence from outside the record were specifically excluded from consideration.

Added to this is the fact that the report of the National Transportation Safety Board, which openly acknowledges utilizing sources of information apart from the proceedings of the Marine Board of Investigation, was published before the Administrative Law Judge entered his decision in this case and carries a close resemblance to much of the form and matter contained in his decision, issued later.

This is not the occasion for setting down rules of propriety as to taking cognizance of published reports in a given area of expertise. Controlling here is the undeniable fact that the Administrative Law Judge misconceived the nature of the record before him and has permitted an unexplained similarity between his decision and unacknowledged other reports touching on the same fact situation to appear.

It might not be impossible to sift through the record and ascertain that each individual finding of fact by the initial trier of facts in this case has some foundation in the record so that findings found to be without support could be rejected on this review, leaving a residue of properly supportive material. This task, if studiously undertaken, could not obliterate the appearance of impropriety which has been the subject of extended comment by Appellant. Nor can the matter be remanded to the administrative

Law Judge under directions for reconsideration because the appearance of prejudicial activity could not be wiped out by recitations of disclaimer.

The charges in this case and the general subject matter of the occurrence are, however, of serious import and cannot lightly be dismissed once for all because of prejudicial error in handling on initial hearing. The immediate disposition will allow the judgment as to further proceedings to be made by the investigative arm of the agency.

ORDER

The decision of the Administrative Law Judge entered at Houston, Texas, on 14 January 1976, is SET ASIDE, and the charges are DISMISSED without prejudice to reinstitution of proper proceedings in the matter.

E. L. PERRY  
Vice Commandant

Signed at Washington, D.C., this 20th day of Sept. 1977.

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