

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT NO. Z-439-90-9914  
Issued to: TERRYL WAYNE HEBERT

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

2118

TERRYL WAYNE HEBERT

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 22 November 1976, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana admonished Appellant upon finding him guilty of misconduct. The specification found proved alleges that while serving as a tankerman on board the tank barge EXXON 267 under authority of the document above captioned, on or about 13 July 1976, Appellant:

wrongfully failed to properly supervise the transfer of bunker "C" oil to tank barge EXXON 267 at the Exxon facility at Chalmette, Louisiana, in that as person in charge he wrongfully failed to remain in the immediate vicinity of the transfer operation thereby contributing to the pollution of the Mississippi River, a navigable water of the United States.

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 the testimony of two witnesses and one exhibit.

In defense, Appellant offered in evidence the testimony of one witness.

At the end of the hearing, the Judge deferred rendering a decision. The Judge subsequently concluded that the charge and 1 specification had been proved. He then served a written order of admonishment on Appellant.

The entire decision and order was served on 14 December 1976. Appeal was timely filed on 20 December 1976.

FINDINGS OF FACT

On 13 July 1976, Appellant was serving as a tankerman on board the tank barge EXXON 267 and acting under authority of his document while the tank barge was in the port of Chalmette, Louisiana. Tank barge EXXON 267 had been receiving oil from the EXXON onshore facility on July 12th and 13th. The person in charge of the transfer operation, as defined by 33 CFR 155.105, had been Mr. Diez whose watch ran from 1800 on the 12th to 0600 on the morning of the 13th. Diez had been scheduled to be relieved from duty by a Mr. Wardell at 0600. However, when Wardell did not show up at the appointed time, Diez was relieved by Appellant.

Prior to relieving Diez, Appellant had walked to the terminal facility man's shack on the dock and signed a "Declaration of Inspection" (DOI) at 0550. A DOI must be completed and signed by all individuals who assume the duties of the "person in charge" of an oil transfer operation. See 33 CFR 156.150. The DOI certifies that the signatory has followed a set of procedures and familiarized himself with all details of the transfer operation. In addition to promulgating regulations directing the manner in which transfer operations will take place, the Coast Guard has also issued "Navigation and Vessel Inspection Circular No. 9-73", which has as its subject guidelines concerning the pollution prevention regulations. Included within the circular is an enclosure that discusses certain sections as of the pollution prevention regulations in a form designed for the layman. On page 8 of the enclosure is a discussion of the term "person in charge" which states that:

The operator, or his agent must designate in advance those individuals who may serve as person-in-charge. There should be a current list of such designated individuals available. The person who signs the Declaration of Inspection(DOI) described in Section 156.150 is normally the person-in-charge until his relief signs the DOI. (Emphasis added)

On page 11 of the same enclosure the requirements for oil transfers under 33 CFR 156.20 are explained in pertinent part as:

- (s) In making crew changes or in changing the watch during cargo transfer operations, the on-coming member of the crew should ensure all the provisions of the Declaration of Inspection(DOI) are being met. When he signs the form, he becomes the person-in-charge. (Emphasis added).

After Diez was relieved by Appellant, he went to the EXXON LOUISIANA, the tug on which he usually worked, for orders from his captain. The tug's captain instructed Diez to return to the tank barge and relieve Appellant as person in charge of the transfer operation since the captain needed Appellant to work on another

barge. Diez returned to the barge between 0615 and 0630 and informed Appellant that he was being relieved. Diez did not sign the DOI prior to replacing Appellant as person in charge. However, after checking out the tank barge to see that all systems were operating normally, Diez started toward the terminal facility man's shack to sign the DOI. Before Diez reached the shack, Mr. Wardell, the individual who had originally been assigned to relieve Diez, arrived at the dock at about 0645 or 0650. Appellant was on the tug going to another assignment.

Diez did not sign the DOI because of Wardell's arrival. After a few minutes conversation with Diez, Wardell took over as the person in charge of the oil transfer operation. However, he also neglected to sign the DOI prior to taking over as person in charge. Wardell supervised the transfer operations until approximately 0730 when he decided to change into another set of clothes located in his car. Wardell went to his car without shutting down the transfer operation and upon his return to the tank barge noticed that fuel was escaping from the No. 1 tank onto the barge and a small amount fell into the river.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) Appellant was not the person-in-charge of oil transfer operations aboard the tank barge EXXON 267 at the time of the discharge.
- (2) Appellant did not wrongfully fail to supervise or remain in the immediate vicinity of the transfer operation.
- (3) Appellant's departure did not contribute to the discharge
- (4) There was no discharge of a harmful quantity of oil.

#### OPINION

The crux of the charge against Appellant revolves around whether he was the person in charge of the transfer operation aboard the EXXON 267 when the discharge occurred at 0730 or whether he had already been properly relieved by Mr. Diez. This issue in turn centers upon whether Appellant had a duty to see that the individual relieving him had signed the DOI in compliance with 33 CFR 156.150 prior to leaving his post. I cannot find in this case that Appellant had a duty to see that his relief signed the DOI.

Appellant had taken over the transfer operation for

approximately 15 minutes to relieve Diez when his assigned replacement failed to arrive. Appellant in turn was relieved by Diez after the captain of the tug to which he was attached ordered him to do so and free Appellant for another task. Diez testified that Appellant had asked him to sign the DOI (TR97) and that it was simply a matter of trust on Appellant's part that Diez would sign it. I find that Appellant's reliance upon the word of an experienced tankerman with whom he was familiar was not wrongful. This can be distinguished from the situation where, for instance, Appellant left his post after ostensibly being relieved by a total stranger and did not see that he signed the DOI. The Judge accepted the finding that Diez was on his way to sign the DOI and would have done so had not the overdue Wardell arrived. If Diez had made it to the terminal facility Man's shack and signed the DOI, or had Wardell signed after his arrival, there would be no grounds for holding Appellant liable for the discharge.

However, the paragraph from Navigation and Vessel Inspection Circular No. 9-73, page 8, states that the signatory of the DOI normally remains the person in charge until his relief signs a new DOI. I concur with Appellant's contention that the use of the word "normally" implies that there may be situations where the last signatory of the DOI would not be regarded as the person in charge. I therefore hold that the mere fact that Appellant was the last person to comply with his duty under 33 C.F.R. 156.150 is insufficient in itself to hold Appellant liable for the subsequent discharge. Sanctioning Appellant for being the only person out of three to obey the pollution prevention laws is not consistent with their purpose.

In addition, I note that the paragraph on page 11 of Navigation and Vessel Inspection Circular No. 9-73 contains the only statement I have found that specifies who has the duty of complying with 33 C.F.R. 156.150. This section states the on-coming member of the crew should ensure that all of the provisions of the DOI are met. I note that the Judge in his findings of fact recognizes that this circular is the promulgated policy of the Commandant. Therefore, while Appellant may have been wise in personally seeing that his relief signed the DOI and thereby absolved him from liability for subsequent discharges, he was under no duty to do so.

In conclusion, I find that Appellant did not wrongfully leave his post after being informed by a tankerman with whom he was familiar that he had been ordered to return to his tug and that he was relieved. Had either of the two tankermen following Appellant complied with their statutory duty, there would have been no basis for charging Appellant for misconduct. Liability should not attach to a seaman for the omissions of others.

CONCLUSION

I conclude that there has not been substantial evidence of a reliable and probative nature to support the finding that Appellant wrongfully failed to properly supervise the transfer of bunker "C" oil to tank barge EXXON 267 in Chalmette, Louisiana, in that as person-in charge, he wrongfully failed to remain in the immediate vicinity of the transfer operation thereby contributing to the pollution of the Mississippi River, a navigable water of the United States.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana on 22 November 1976, is VACATED.

O. W. Siler  
Admiral, U. S. Coast Guard  
Commandant

Signed at Washington, D.C., this 11th day of April 1978.

INDEX

Duty (new)  
    failure of I.O. to properly allege

Failure to perform duties  
excuse: discharge from duties  
excuse: substitute worker

Words and phrases  
persons in charge