

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-952266 AND
LICENSE NO. 03544
Issued to: EMERITO RIVERA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2126

EMERITO RIVERA

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

By order dated 21 December 1976, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida suspended Appellant's license for 3 months on 12 months' probation with respect to all seaman's documents issued to Appellant upon finding him guilty of negligence. The specification found proved alleges that while serving as operator of the United States M/T CABO ROJO and /or the M/T PUERTO NUEVO under authority of the documents above captioned, on or about 18 October 1976, Appellant wrongfully and negligently failed to navigate the Barge MIAMI, with the assistance of the towing vessels PUERTO NUEVO and CABO ROJO, with caution, notwithstanding the proximity of a visible buoy, thereby contributing to a collision between the MIAMI and the Bahia de San Juan lighted buoy 13 (LLNR1291)

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 four exhibits and the testimony of one witness.

In defense, Appellant offered in evidence three exhibits and the testimony of three witnesses, as well as his own.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and the specification had been proved. He then entered an order suspending Appellant's license for a period of 3 months subject to 12 months' probation with respect to all documents issued to Appellant.

The entire decision and order was served on 27 December 1976. Appeal was timely filed on 6 January 1977.

FINDINGS OF FACT

Appellant was one of approximately 12 licensed operators employed by Caribe Tugboat Corporation to operate its several uninspected towing vessels. On 18 October 1976 the 89.4 foot tugboats CABO ROJO and PUERTO NUEVO were sent by the company to tow the barge MIAMI to the TMT Terminal on Isla Grande in San Juan Bay, Puerto Rico. The MIAMI, an inspected unmanned vessel, 400 feet in length with a 100-foot beam, carrying 160 to 180 foot containers, had been towed from Jacksonville, Florida by the ocean tug BULWARK, whose draft was too deep to permit entry into the berthing area. The BULWARK was to release the MIAMI in the area within the Bay just off the west tip of Isla Grande in waters bounded by the San Antonio Approach Channel, the Anegado Channel, and the Deep Draft Anchorage.

The operators commonly used different towing vessels. On this assignment Appellant took charge of the CABO ROJO with Mr. David Carr assisting while Mr. Milton Gomez took charge of the PUERTO NUEVO. The tugs reached the barge at approximately 11:30 on the morning of the 18th. The towing vessels came along the barge's starboard side; the CABO ROJO made fast to the barge's quarter and the PUERTO NUEVO to the barge's bow. The BULWARK cast off the towing bridle setting the MIAMI adrift. The Appellant departed the CABO ROJO and boarded the MIAMI to assume the role as docking master in command of both tugboats and barge for purposes of bringing the MIAMI into its assigned berth at the TMT Terminal. Although the Caribe Tugboat Corporation does not require all of the seaman who function as docking masters to possess an operator's license, the company does require such qualification of those who act as docking master for barges of the MIAMI size.

The barge had been secured to the BULWARK by means of a bridle made of heavy anchor chain. The bridle consisted of two 90-foot lengths of chain which were run from the port bow and starboard bow and joined together by another length of chain which led to the towing vessel. When the BULWARK released the MIAMI the bridle was allowed to drop to the bottom of the Bay. The MIAMI was to be towed to its berth, approximately a mile away, stern first, with the bridle dragging.

The Appellant gave the PUERTO NUEVO orders to get underway in a southerly direction so as to proceed between buoy No. 13 (approximately 300 yards away to the south) and Isla Grande. Two small fishing vessels lay in Anegado Channel approximately 500 yards to the south, ahead of and in the intended path of the tow. The Appellant responded by ordering the PUERTO NUEVO hard left rudder, then stop and back full. About the same time, Appellant ordered the CABO ROJO to sound a prolonged blast of its whistle. The fishing vessels did not move and Appellant maneuvered the tow

to clear buoy no. 13 and avoid the fishing vessels. As the MIAMI was maneuvered stern first, the port side of the MIAMI cleared the buoy but the chain bridle fouled the buoy anchor cable and the buoy began to drag. The Appellant ordered the tow to continue with the buoy dragging to avoid obstructing any vessel traffic in the channel.

At all times during the towing operation the Appellant, as docking master, gave all orders to the two towing vessels and each vessel was subject to his command; he was in command of the entire towing operation. The Appellant is the holder of an operator's license issued by the Coast Guard, qualifying him as operator of uninspected towing vessels upon oceans, not more than 200 miles off shore and inland waters of the United States, not including western rivers; which license qualifies Appellant as operator of towing vessels such as the CABO ROJO and the PUERTO NUEVO.

BASES OF APPEAL

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

- (1) The Coast Guard is without jurisdiction in this matter as Appellant, while acting as docking master, was not serving under authority of his license.
- (2) The Administrative Law Judge erred in his finding of negligence in that Appellant followed local custom and exercised good seamanship in allowing the chain bridle to drag the bottom of the Bay.
- (3) The Administrative Law Judge erred in finding that the MIAMI's bridle fouled the anchor chain of buoy No, 13 before Appellant took action to avoid colliding with two fishing boats.

APPEARANCE: Jimenez & Fuste of San Juan, Puerto Rico by Mr.
Paul E. Calvesbert, Esq.

OPINION

I

Appellant's assertion that he was not serving under the authority of his license is without support. The general manager of Caribe Tugboat Corporation testified that the company required that the docking master for the towing of barges the size of the MIAMI carry an operator's license (page 92). Appellant apparently agrees with this conclusion as expressed on page 13 of his brief. Appellant recognizes that 46 C.F.R. 5.01-35 (a) provides:

"A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate of document held by him either when the holding of such license, certificate or document is required by law or regulation or is required in fact as a condition of employment."

Appellant asserts, however, that the regulation is inapplicable based upon the court's reasoning in Soriano v. United States, 494 F.2d 681 (9th Cir. 1974). Regardless of the dicta contained in the Soriano case, the court's holding is based upon the infringement of an area traditionally reserved to the states. The states' rights consideration readily distinguishes the Soriano case from the present. I find that case unconvincing.

The record shows that Appellant in the capacity of the docking master did more than act as lookout or simply give hand signals, he assumed command of the entire towing operation giving all orders and making all decisions (page 33,40-43, 45-46, 57-58, 75-82, 92-93, 94-95). He did not advise or recommend maneuvers to the towing vessels, he gave direct orders which the personnel aboard the vessel were obliged to follow. Appellant was the recognized "man that's upstairs" (page 82) and neither Mr. Carr nor Mr. Gomez could countermand his orders (pages 40 and 81). The Administrative Law Judge had substantial evidence before him that it was a condition of employment the Appellant, while serving in such a capacity, be licensed. In addition, as the operator of the CABO ROJO, Appellant was required to be licensed by 46 USC 405 (b) (2), which provides:

"An uninspected towing vessel in order to assure safe navigation shall, while underway, be under the actual direction and control of a person licensed by the Secretary to operate in the particular geographic area and by type of vessel under regulations prescribed by him."

In this case it was not only a condition of employment that required Appellant to be licensed but also a requirement of the law. Jurisdiction of the Coast Guard could be asserted in either situation under the authority of 46 U.S.C. 239 (b). Appellant's argument, that the officer's Competency Certificates Convention of 1936 did not apply to the CABJO ROJO, is irrelevant and has no bearing on the fact that a license was a condition of Appellant's employment and required by 46 USC 405.

II

Appellant contends that the findings of the Administrative Law Judge with regard to dragging the MIAMI's chain bridle are in error. Appellant asserts that he followed the local custom and

exercised good seamanship in allowing the chain bridle of the barge to drag the bottom of the bay. It was stipulated at page 72 that dragging the bridle was a method employed "to keep the barge steady and to avoid shearing from side to side." The inherent danger of such practice is that the dragging bridle may engage and damage some underwater object, which is exactly what happened in this case. There was no showing that dragging the bridle was necessary. In fact, it appears that the bridle was dropped to the bottom of the bay as a matter of convenience rather than necessity. In any event, I find that this "local custom" is no defense in this case. The charge of negligence in this case arises not from the practice of dragging the bridle but from the collision with the buoy, i.e. the bridle fouling the buoy anchor cable. While there may be situations in which dragging the bridle facilitates maneuvering, this does not excuse the operator from failing to use due care to ensure that the bridle does not cause damage.

Appellant asserts that the record does not support the Administrative Law Judge's Finding Number 23, that the Appellant permitted the chain bridle of the barge to foul buoy No. 13's anchor chain before he took notice of the two fishing boats. I agree with Appellant that Finding Number 23 is in error as to when Appellant took notice of the two fishing boats, but this error is not grounds for reversal. Appellant testified that such vessels blocked the channel "most of the time" (page 96) and that the two particular fishing vessels, at the time in question, were "anchored in" the "middle of the channel" (page 95). It is evident from the record that the two fishing vessels and buoy No. 13 were within 500 yards of the tow when it got underway. The weather was clear and the view unobstructed. Appellant should have been aware of the presence of the fishing boats prior to getting underway and should have made allowances for safely passing the buoy and the fishing boats accordingly. It appears that he took no action to avoid the boats until he "was passing the buoy about 35 feet away" (page 94).

As noted by the Administrative Law Judge in his opinion "a prima facie case of negligence is established when a moving vessel strikes a stationary object." In colliding with a known, visible, or charted stationary object the presumptions are all against the moving vessel and she is presumed at fault unless she exonerates herself. *The Mendocino* (E.D. La., 1929) 34 F2d 785. See also Appeal Decisions 579 (Nelson) and 1131 (Ougland). The evidence presented by Appellant in the record is insufficient to rebut the presumption of negligence.

CONCLUSION

I conclude that substantial evidence of a reliable and probative nature has been presented to support the findings of the

Administrative Law Judge that Appellant, while serving under the authority of his license wrongfully and negligently navigated the barge MIAMI with the towing vessels CABO ROJO and PUERTO NUEVO and thereby caused the barge to collide with lighted buoy No.13.

ORDER

The order of the Administrative Law Judge, dated at Jacksonville, Florida on 21 December 1976, is AFFIRMED.

R.H. SCARBOROUGH
VICE ADMIRAL U. S. COAST GUARD
VICE COMMANDANT, ACTING

Signed at Washington, D.C., thus 3rd day of July 1978.

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