

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-288562
LICENSE NO. 439833
Issued to: Clifton A. REGISTER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2166

Clifton A. REGISTER

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 15 June 1978, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, after a hearing at Jacksonville, Florida, on 25, 27, and 29 April 1978, suspended Appellant's license for a period of three months on probation for twelve months upon finding him guilty of negligence. The one specification of the charge of negligence found proved alleges that Appellant, "while serving as Pilot aboard M/V PUERTO RICO, under authority of the captioned documents, did on or about 1040, 25 March 1978, while entering the Saint Johns River from seaward, failed[sic] to reduce the speed of the M/V PUERTO RICO sufficiently in that the wake generated by said vessel was excessive and caused damage to personal property on the adjacent shoreline."

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

The Investigating Officer introduced into evidence the testimony of five witnesses and six documents.

In defense, Appellant introduced into evidence the testimony of five witnesses, his own included, and three photographs.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of suspension for a period of three months on probation for twelve months

The decision was served on 19 June 1978. Appeal was timely filed on 14 July 1978, and perfected on 1 August 1978.

FINDINGS OF FACT

On 25 March 1978, Appellant, acting under the authority of his duly issued license, was serving as pilot aboard M/V PUERTO RICO as it prepared to enter the Saint Johns River in Florida, from seaward. PUERTO RICO is 653.4 feet long and 92.8 feet wide, is of 14,770 gross tons, and then was underway drawing 34.9 feet. At approximately 1037, with Appellant at the conn and PUERTO RICO at full speed ahead (approximately 15.7 knots), the number "2" ("sea") buoy was taken to starboard. At approximately 1044, PUERTO RICO entered that portion of the river mouth bounded by two rock jetties, each approximately 1 1/3 miles long and 7-8 feet high. At approximately 1049, PUERTO RICO passed buoy "10," which is stationed near the western end of the north jetty. Shortly before this, Appellant first observed that PUERTO RICO's wake had caused a wave which was striking the jetty near its midpoint. Appellant previously had observed people both on the north jetty and the beach adjoining it. At approximately 1050, Appellant ordered PUERTO RICO's speed reduced to "maneuvering speed" and at approximately 1051 1/2 reduced further to half speed ahead. PUERTO RICO's wake caused an extraordinarily high wave which rolled over the north jetty and the beach adjoining it. This wave caused slight personal injury and minor personal property damage.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. Appellant has argued nine separate grounds of appeal. Because of the disposition of this appeal, not all of Appellant's contentions will be addressed.

APPEARANCE: Forester & Hodge, Jacksonville, Florida, by James E. Hodge, Esq.

OPINION

I

Appellant contends that the Coast Guard lacked jurisdiction to investigate, bring charges, and conduct this hearing because there was no "marine casualty" within the meaning of R.S. 4450, as amended, 46 U.S.C. 239. Appellant is mistaken in his belief that a marine casualty is a necessary antecedent to the commencement of revocation and suspension proceedings. Acts of negligence committed by a merchant mariner acting under the authority of his license may be investigated and charges brought without there having been a prior "marine casualty." 46 CFR 5.05-1(a)(3), 5.05-15(a)(1); Decisions on Appeal Nos. 651, 1353, 1755, 2085.

II

Appellant contends that the specification failed to allege facts sufficient to constitute negligence and should have been dismissed upon his motion made at a "pre-trial conference."¹

The Administrative Law Judge properly denied this motion because the specification does allege facts sufficient to establish jurisdiction and it put Appellant on notice as to the gist of the offense for which he was charged, as required by 46 CFR 5.05-17(b). A specification need not meet the technical requirements of court pleadings, provided it states facts which, if proved, constitute the elements of an offense. Decisions on Appeal Nos. 2013, 2100, 2155. Moreover, it is patently clear from review of the record that Appellant never had any doubt as to exactly what was at issue. His contention, therefore, is without merit.

III

Appellant contends that the dismissal of charges against the Master of PUERTO RICO, who initially was charged in the same incident, required dismissal of the charge against him also. Review of the record reveals no material nexus between the cases. The record further indicates that the Coast Guard Investigating

¹The Administrative Law Judge conducted two sessions, on the record, of a "pre-trial conference" on 25 and 27 April 1978. Strictly speaking, this term is a misnomer. Pursuant to 5 U.S.C. 556(c)(6), the Coast Guard presumably could empower its Administrative Law Judges, by regulation, to "hold conferences for the settlement or simplification of the issues by consent of the parties." However, no regulation authorizing this practice has been issued. Hence, what was termed a "pre-trial conference" by the Administrative Law Judge was either a nullity (insofar as the formal revocation and suspension preceeding itself is concerned) or the first session of the hearing. Because, in either event, the outcome of this appeal will not be affected, I shall treat this as the initial portion of the hearing. However, I do not condone the failure of the Administrative Law Judge to comply strictly with the applicable regulations, particularly 46 CFR 5.20-35.

Officer dismissed the charge against the Master for lack of substantial evidence. In these circumstances, neither abuse of discretion nor inconsistency of treatment is apparent. Of greater significance, it is irrelevant to Appellant's case whether proceedings were or were not undertaken against another as the result of this incident. The issue to be resolved at Appellant's hearing was whether Appellant was at fault, not whether anyone else was also at fault. see e.g., Decisions on Appeal Nos. 417, 2012.

IV

The ultimate issue, whether Appellant was guilty of negligence, is, admittedly, an extremely close question.

Several factors weigh heavily against finding the charge proved. The Administrative Law Judge has premised his conclusion that negligence was proved upon a specific finding of fact, that Appellant navigated PUERTO RICO at full speed until 1051 1/2, approximately 2 1/2 minutes after passing buoy "10." I must reject this finding because it is not supported by substantial evidence. It is clear that Appellant did order a reduction to "maneuvering speed," almost immediately after passing buoy "10" at approximately 1050. (Inexplicably, the velocity corresponding to PUEERTO RICO'S "maneuvering speed" was not determined. Nevertheless, because "maneuvering speed" lies somewhere between "full speed" and "half speed," the Administrative Law Judge's specific finding of fact cannot stand.) It also is clear that the customary practice among local pilots is to navigate vessels of the size of PUERTO RICO through the jetties and past buoy "10" at or near full speed, in order to overcome the effects of potential hazardous currents and eddies which could be encountered at virtually any time. Lastly, the occurrence of the wave generated by PUERTO RICO's wake could be characterized only as an extraordinary event, one never before experienced by any who testified and were at all familiar with this section of the river. Hence, neither custom nor experience could have forewarned Appellant of the potential for creating a "freak" and potentially dangerous wave of this nature. In light of these factors, closer analysis of Appellant's actions is necessary.

Negligence is defined as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform." 46 CFR 5.05-20(a)(2). The Administrative Law Judge found Appellant negligent for his failure to take two actions. First, Appellant, aware that people were present in the area of the north jetty,

failed to slow PUERTO RICO as soon as he was abreast of buoy "10." Second, contrary to the custom among local pilots, Appellant failed to look to determine whether PUERTO RICO was causing a wake until approaching buoy "10." (It might be added that the Administrative Law Judge properly did not find that the creation of the large wave amounted to negligence per se, nor did he find that Appellant violated any statutes, regulations, or other similar prescriptions). The key to resolving this question of negligence lies in focusing on the "circumstances" encountered by Appellant that morning. He was conning a large, not easily maneuvered vessel through a narrow channel bounded by rock jetties on either side. His and the experience of other local pilots forewarned him of potentially hazardous currents and eddies which could imperil his vessel at virtually any point during his transit through the jetties and the section of the river immediately thereafter. Appellant did comply with the local pilot custom which dictated maintaining full or nearly full speed until abreast of or beyond buoy "10."² As PUERTO RICO neared buoy "10," Appellant, already aware that people were on and in the vicinity of the north jetty, first observed PUERTO RICO's wake and that it was causing a slight wave which, at that time, was striking the jetty about midpoint.³ When satisfied that he would not substantially risk the safety of his vessel by doing so, Appellant ordered a reduction to "maneuvering speed," followed shortly thereafter by a further reduction to "half speed."⁴ My conclusion, in light of the

² There is no evidence or contention that this custom itself constitutes a negligent practice. To the contrary, the overwhelming weight of the evidence is to the effect that it is necessary to maintain full speed on a vessel like PUERTO RICO in order to ensure maneuverability sufficient to overcome anticipated, but unpredictable, currents and eddies.

³The only evidence of what Appellant observed was the testimony of Appellant himself. It is not entirely clear from the Administrative Law Judge's decision whether he believed Appellant's testimony that the latter saw only a slight wake and resulting wave. However, the Administrative Law Judge's discussion as to the appearance of a wave when viewed from ashore, as contrasted with that from aboard a ship, leads me to conclude that the Administrative Law Judge did believe Appellant's testimony on this point.

⁴I am unwilling uncritically to accept as perfectly accurate the recorded times relied upon by the Administrative Law Judge. No testimony or other evidence was admitted to establish the accuracy of the times recorded in Investigating Officer's exhibits 2 and 3, extracts from the bridge and engine room bell books, respectively.

circumstances I have reviewed, is that negligence was not proved. Certainly a pilot in the circumstances of Appellant has a duty not to unnecessarily endanger people and property ashore through the creation of a powerful wake. Yet, it must not be forgotten that his primary duty is to navigate in a fashion which does not unduly imperil his vessel. In the circumstances here it simply is not apparent that Appellant went so far beyond the which was required to satisfy the latter duty as consequently to breach the former. Appellant complied with local custom, one born of considerable experience, by entering the river at full speed. There was no reason for him to anticipate the creation of a huge, "freak" wave, nor was he able to perceive its hazardous nature as he looked from the bridge of PUERTO RICO. Perhaps Appellant could and should have slowed sooner, but on this record I am unable to reach that conclusion with assurance. Whether Appellant should have looked earlier to see if he were creating a wake is irrelevant to proof of the charge of negligence, because it is clear that Appellant could have made the decision to slow no sooner than he actually did make that decision, upon reaching buoy number "10." "While second guessing Appellant on the appropriateness of undertaking such actions is appealing, speculation of this sort cannot soundly or equitably be the basis for action under RS 4450 to suspend or revoke a license." Decision on Appeal No. 2152. The charge and specification of negligence must therefore be dismissed.

ORDER

The order of the Administrative Law Judge, dated at Jacksonville, Florida, on 15 June 1978, is VACATED, and the charge DISMISSED.

R.H. SCARBOUROGH
VICE ADMIRAL, U. S. COAST GUARD
Vice Commandant

Testimony was taken from the third mate, who had prepared the bridge bell book, but he was never asked to explain the manner in which he determined the accuracy of the time he listed for each event.

The third mate's testimony does, however, underscore the difficulty in uncritically relying upon the accuracy of the recorded times to establish the basis for a finding of negligence. The excerpt from the bridge bell book clearly indicates that buoy "10" was passed at 1049. Yet, with this document apparently in hand, the third mate responded to a question from the Administrative Law Judge, "[w]hat is it happened at buoy 10?" with the reply, "[t]hat's when speed was reduced to manuevering speed at time 1050." (emphasis added) T.R. 53-54.

Signed at Washington D. C. this 18 day of September 1979.

INDEX

Administrative Proceedings

"Pre-trial conference" not authorized

Changes and Specifications

Dismissal of charges against another irrelevant

Specification held sufficient

Evidence

Of critical times not sufficient

Hearings

"Pre-trial" conference not authorized

Investigations

Prior "marine casualty" no necessary to conduct

Jurisdiction

In the absence of "marine casualty"

Negligence

not proved