

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT and LICENSE NO. 427814
Issued to: Robert C. MILLER Z-311259

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

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Robert C. MILLER

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 November 1978, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's license outright for a period of six (6) months upon finding him guilty of negligence. The one specification of negligence found proved alleged that Appellant, while serving as Chief Engineer aboard SS LURLINE, under authority of his license, on or about 22 December 1977, failed to take adequate precautions to prevent the overfilling of fuel oil tanks and subsequent spilling of a harmful quantity of oil into the navigable waters of the United States.

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 two witnesses and five documents.

In defense, Appellant introduced into evidence the testimony of one witness.

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 six months.

The decision was served on 13 November 1978. Appeal was timely filed on 14 November 1978, and perfected on 10 January 1979.

FINDINGS OF FACT

On 22 December 1977, Appellant was serving as Chief Engineer aboard SS LURLINE under authority of his license while the vessel was engaged in fuel transfer operations at the Seventh Street Matson Terminal, Oakland Outer Harbor, Oakland, California. SS

LURLINE, O.N. 549900, was operated at the time in question by Matson Navigation Company and moored at Seventh Street Matson Terminal, Oakland, California.

At or about 1720 on 22 December 1977, during fuel oil transfer operations oil overflowed the vessel's No. 3 inboard double bottom tanks through vent pipes, ultimately being discharged on deck and into the harbor waters.

At the pre-transfer conference, Appellant assumed the duties of the "person in charge." The vessel's posted Fuel Oil Transfer Proceedings require the person in charge to align the system, control valves to remain with tank capacities, and gauge the tanks to ascertain their condition.

LURLINE possesses two fueling control stations. The main station, amidships on the hangar deck, consist of a transfer valve manifold, with no tank gauges. The engineroom control station consists of transfer valve manifolds, with gauges known as pneumericators situated nearby. The duties of the person in charge could all be carried out at the engineroom station. Emergency transfer shutdown could be effected on the pumping barge, or at either of LURLINE's stations.

The transfer on 22 December included both ship's bunkers and cargo oil. At about 1500 bunkering was complete and cargo oil transfer commenced. About 2,000 barrels were in each of the No. 3 inboard double bottom tanks and in each of the No. 3 deep tanks at the time. The double bottoms have a 2,631 barrel capacity while the deep tanks will each accommodate 4,000 barrels. About 1700, Appellant informed the Second Engineer that he was going to bring both No. 3 double bottom tanks up to 2,500 barrels. At the same time the deep tanks were being filled. The pumping capacity of the fuel barge was 2,800 barrels per hour, maximum. Thus, capacity was available for at least one hour of pumping if no alteration of valve alignment occurred. Shortly after 1700 Appellant left the engineroom control station and went to the salon for the 1700 meal. No formal relief of Appellant as person in charge occurred. At about 1720, No. 3 inboard double bottom fuel tanks overflowed through their fore and aft vent pipes into five gallon containment bins and then onto the main deck. Oiler Lewis heard oil splash on the deck, which was then awash with rain water. He caused the bargeman to shut down the pumps. Approximately 20 barrels of oil overflowed onto the hangar deck. Despite heavy rain, partial containment of the oil was effect utilizing sawdust. Approximately one barrel of oil (42 gallons) was discharged into the navigable waters of Oakland Harbor. A containment boom install around the two vessels caught all the water-borne oil. Appellant was in the vessel's messhall at the time of the spill.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's brief on appeal asserts numerous errors on the part of the Administrative Law Judge. Appellant contends that the Administrative Law Judge repeatedly communicated with members of the Coast Guard concerning his case while it was under submission and denied due process of law to Appellant by refusing to allow evidence in support of a motion to disqualify. Appellant also asserts that certain findings resulted from improper inclusion of evidence from another case which was not properly of record in the instant proceeding. Appellant contends as well that he had paid off LURLINE prior to the pollution incident. Several other arguments are raised, but need not be addressed.

APPEARANCE: HALL, Henry, Oliver & McReavy, San Francisco, California, by John E. Droeger, Esq.

OPINION

I

At the outset it should be noted that substantial evidence of a probative nature in the record sustains the Administrative Law Judge's finding that on 22 December 1977, while on board SS LURLINE, Appellant was acting under the authority of his duly issued license. Exhibits CG #2 and CG #3 A&B establish that on the date in question the Appellant was serving aboard SS LURLINE in his capacity as Chief Engineer. CG #2 further establishes that on 22 December 1977 Appellant signed off by virtue of the end of voyage. CG #3 A&B reflects that the Appellant as Chief Engineer assumed duties as a "Person In Charge of Oil Transfer Operation." By the submission of these unchallenged exhibits, the Investigating Officer established a prima facie case supporting the contention that Appellant was acting under the authority of his license at all relevant times on 22 December 1977. Decision on Appeal No. 2037. The burden of going forward thus shifted to Appellant to refute the evidence of the documents. Decision on Appeal No. 2082. Appellant proffered not a scintilla of evidence to meet this burden. The Administrative Law Judge therefore was justified in drawing all reasonable inferences from the evidence adduced. Decisions on Appeal Nos. 1195, 1189, 747. I therefore conclude that the determination that Appellant was acting under the authority of his license on 22 December 1977 is supported in the record by substantial evidence of a probative nature.

II

46 CFR 5.20-15(b) requires a person seeking to disqualify an administrative law judge to file an affidavit or statement "sworn to before a Coast Guard officer or official authorized to administer oaths setting forth in detail the facts alleged to constitute the grounds for disqualification." Section 5.20-15(c) places a duty on the administrative law judge to insure that all matters relating to such claim appear in the record.

Under the criterion established by the regulations cited above, it is clear that counsel for Appellant failed to satisfy the regulations with his affidavit dated 30 October 1978. The affidavit was deficient in that it was not properly a sworn statement as contemplated by the regulation. It is also clear that further matters relating to the claim of disqualification might have been included in the record if Appellant had been allowed to adduce evidence on the subject of disqualifying contacts. The Administrative Procedure Act (5 U.S.C. §§551-59) prescribes certain standards by which administrative hearings may be measured. The standards enunciated in 5 U.S.C §§556(d) and 557(d) support the conclusion that improper contact by an Administrative Law Judge and members of the agency concerned may constitute grounds sufficient to justify a ruling adverse to the party committing such violation. The regulations appearing at 46 CFR 5.20-15 reflect the spirit and intent of the provisions of the Administrative Procedure Act. It was an abuse of discretion for the Administrative Law Judge to refuse to allow Appellant to adduce evidence to support the motion for disqualification without stating for the record a clear basis for denying the motion as required by 46 CFR 5.20-1(a).

III

The opinion of the Administrative Law Judge misapprehends the proper application of 33 CFR 156.160. The regulation prescribes the proper conduct for persons who are engaged in transfer operations. The "person in charge" has those duties prescribed by the vessel's posted oil transfer procedures and may be subject to charge for failure to comply with the procedures. 33 CFR 156.120(o). The purpose of having a single experienced person in charge of the vessel transfer operations is to have responsible supervision of each phase of the operation to insure that all personnel properly perform their duties.

If Appellant negligently failed to perform his duties per the oil transfer procedures he would be subject to charges. On the record, however, it does not appear that Appellant acted unreasonably under the circumstances by going to dinner at 1700. The Capacities of the double bottom tanks and deep tanks were sufficient to allow him in to dine and return prior to any realignment being required. Also absent is any foundation other

than the conjecture of one of the witnesses as to the underlying cause of the spill. Absent such information, proof that Appellant did not fulfill his duties in a reasonably competent fashion is simply nonexistent. Although a standard of conduct was established, the Investigating Officer failed to prove a negligent violation of the standard. Decision on Appeal Nos. 2142 and 2075. It is well established that the mere fact of a spill does not constitute proof of negligence. If some event occurred which caused the spill and which Appellant was duty bound to be present for then that event would have to be placed in the record in order to found a conclusion of guilty. Such an event is clearly not proved on this record.

CONCLUSION

In light of the foregoing, it can serve no useful purpose to remand this case for further proceedings.

ORDER

The order of the Administrative Law Judge, dated at San Francisco, California, on 8 November 1978, is VACATED, the findings of fact SET ASIDE, and the charges DISMISSED.

R. H. SCARBOROUGH
VICE ADMIRAL U. S. COAST GUARD
Vice Commandant

Signed at Washington, D.C., this 9th day of February 1981.

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