UNITED STATES OF AMERICAN
UNITED STATES COAST GUARD vs.
LICENSE NO. 504269 and MERCHANT MARINER'S DOCUMENT
Issued to: Lawrence Douglas TRIGG Z-796076-D1

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2243

Lawrence Douglas TRIGG

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

By order dated 16 January 1980, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for one month, plus two months on nine months' probation, upon finding him guilty of the charge of "inattention to duty." The specification found proved alleges that while serving as Second Assistant Engineer on board SS AMERICAN ARGOSY under authority of the document and license above described, on or about 24 May 1979, while the vessel was in Baltimore, Appellant negligently failed to adequately conduct oil transfer between No. 7 starboard fuel oil tank and No. 2 starboard settling tank, causing overflow of the settling tank into Baltimore Harbor and pollution of navigable waters of the United States (about 2 barrels).

The hearing was held at New York, New York, on 20 June, 20 July, 16 August and 20 September 1979.

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

The Investigating Officer's evidence consisted of the testimony of one witness, the engine log, and documents concerning tank loading.

In defense, Appellant offered his own testimony. Appellant also offered one document which was not admitted.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. With the consent of Appellant, a written order was served on his counsel on 16 January 1980 suspending all licenses issued to Appellant for a period of one month plus two months on nine months' probation.

Appeal was timely filed on 5 February 1980 and perfected on 9 July 1980.

FINDINGS OF FACT

On 24 May 1979, Appellant was serving as Second Assistant Engineer on board SS AMERICAN ARGOSY and acting under the authority of his license while the vessel was in the port of Baltimore, Maryland. On the date in question, Appellant was in charge of conducting fuel oil transfer between a No. 7 starboard deep tank and a No. 2 starboard settling tank.

Appellant had joined AMERICAN ARGOSY, a container ship, as Second Assistant Engineer on 21 May 1979 in the port of New York. On that day the vessel loaded Bunker C oil in the deep tanks, and after loading heat was not applied to these tanks. On 23 May 1979, while the vessel was in the port of Philadelphia, the Chief Engineer, Charles T. Maher, made a tour of the engine spaces with Appellant to instruct him concerning the proper procedures to be followed in transferring oil from the deep tanks to the settling tanks. Transfer of oil is normally the responsibility of the second assistant engineer. As part of these instruction, Appellant was told not to transfer oil while he was on watch, not to fill the settling tanks higher than 24 feet, to pump only from starboard to starboard and from port to port in order to avoid a list, to observe the level of oil in the settling tanks by checking the pneumercators for each tank, and to check the accuracy of each pneumercator as soon as possible after first coming on board by manually gauging the tank with a sounding tape.

While the vessel was on route from Philadelphia to Baltimore via the C&D Canal on 24 May 1979, Appellant stood the customary watch of the second assistant from 0400 to 0800. After being relieved and at about 0855, Appellant commenced transferring fuel oil from the No. 7 port and starboard deep tanks to the No. 2 port and starboard settling tanks. The temperature of the oil was estimated to be approximately 100°/ Fahrenheit and was being pumped at something less than 140 gallons per minute (the maximum rate under ideal conditions). Shortly after starting the fuel oil transfer pump, Appellant checked the level of fuel oil in the respective tanks by their respective pneumercators. Appellant purged the pneumercators as instructed by the Chief, but failed to check their accuracy by manually gauging the tanks with the sounding tape. He also failed to gauge the tanks manually during transfer. At about 1015, Appellant was called to do another job by the first assistant engineer and worked on this job without securing the fuel oil transfer pump. However, it became necessary to make further adjustments as part of this job and Appellant secured the transfer pump for a brief period. At approximately

1025, Appellant restarted the fuel oil transfer pump and then went into the shaft alley to check the levels of the No. 7 deep tanks to make certain that these tanks had pumped out evenly so as not to cause the vessel to list.

At approximately 1035, the chief engineer was notified by company shore personnel that oil was being discharged overboard from the vessel. A quantity of bunker C oil estimated to be about two barrels was discharged over the side of the vessel into Baltimore Harbor. No oil was discharged onto the deck of the vessel. The settling tanks in question are equipped with a high level alarm which is normally activated when the oil reaches approximately the 26th foot level. The alarm for the tank in question was not operating this day and Appellant had not been advised of this fact prior to the occurrence of the overflow.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. The grounds for the appeal are that: (1) the evidence adduced at the hearing does not establish that Appellant breached an established standard of care; (2) the Administrative Law Judge's failure to admit Appellant's evidence and consider it materially prejudiced his ability to defend himself; (3) the vessel was unseaworthy by reason of a malfunctioning alarm system; and (4) the order is excessive in view of Appellant's excellent record.

APPEARANCE: Zwerling & Zwerling, New York, New York, by Sidney Zwerling, Esq.

OPINION

I

Counsel's assertions that the evidence of record fails to establish breach of the standard of care demanded in the transfer of fuel oil is without merit. Appellant holds a first assistant engineer's license and has been sailing as second assistant engineer for ten years. Appellant failed to monitor the pneumercators properly. During the transfer he never used the tape to sound the settling tanks manually and he also failed to check the pneumercators by manually sounding the tanks soon after he came on board. While conceding that pneumercators are erratic, Appellant went on to state that it was not his practice to use a tape and he had not taken a sounding of a settling tank in the past ten years. He testified further that he left the tank to check the levels in the source tanks just as the settling tanks were being topped off. An engineer who fails to monitor the contents of a

fuel tank to which fuel is being transferred by use of a sounding tube and an ullage tape is negligent. Decision on Appeal No. 1755.

II

The defense of unseaworthiness of the vessel due to the acknowledged malfunction of the high alarm on the starboard settling tank is without merit. Any reliance by Appellant on an alarm the state of readiness of which is unknown to him is further evidence of his inattention to duty.

III

At the hearing the Administrative Law Judge refused to admit a prior statement of the government's witness. The statement in question was made by the Chief Engineer to a Coast Guard investigator shortly after the incident and was offered to impeach him. This written document was offered at the 20 September 1979 session when the Chief was no longer available. (He testified at the 16 August 1979 session.) The statement was in the possession of the defense attorney at the time the Chief testified but it was not utilized in cross examination. It is argued that this denial impaired the Respondent's ability to defend himself and was prejudicial. Respondent cites Decision on Appeal Nos. 2033 and 1765 in support of his contentions and further argues that the document in question could and should have been admitted as a business record.

In Decision on Appeal No. 2033 I found that flexible adherence to the Federal Rules of Evidence was all that was required. 46 CFR 5.20-95(a). The admission of a certain document in the absence of that actual custodian thereof under Rule 902(4) which allows certified copies of public records to be admitted when certified by the custodian or other person authorized to make the certification was not error under the facts of that case. There the crew list bore the official seal of the Bureau of Customs and the signature of the custodian. The sworn statement of the Investigating Officer as to the identity of the signee was also admitted in evidence. The crew list was admitted as an official record.

In Decision on Appeal No. 1765, I found that "...the rules of evidence for criminal and civil proceedings are relaxed and hearsay becomes to some extent usable;...there need not be a mechanical or automatic rejection of certain testimony." There, a Coast Guard officer, whose duties included arranging for vessel inspections, testified to a request made to him, purportedly by the owner of the vessel who was subsequently charged with "wilfully" operating a vessel with an expired certificate of inspection.

Rule 806(6) of the Federal Rules of Evidence provides that records of a regularly conducted activity can be admitted into evidence as an exception to the hearsay rule and the availability of the declarant is immaterial.

Basically, any form of data compilation, if kept in the course of a regularly conducted business, the practice of which it was to make the data compilation, and made by a person or transmitted from a person whose duty it was to have the knowledge, is admissible as an exception to the hearsay rule if the above elements are shown through the testimony or other qualified witness.

Rule 613(b) of the Federal Rules of Evidence provides that extrinsic evidence of a prior inconsistent statement by a witness is <u>not</u> admissible unless the witness if afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.

The Advisory Committee noted that a measure of discretion is conferred upon the judge to allow for eventualities such as the witness becoming unavailable before the statement is discovered.

The contention that the document is admissible as a hearsay exception ignores the basic requirement that a witness whose testimony is sought to be impeached by a prior inconsistent statement must be given an opportunity to explain. There is no rigid foundational requirement or time sequence. The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing an opportunity for the witness to explain. The Federal Rules allow the judge discretion to allow the statement into evidence if it is discovered <u>after</u> the witness becomes unavailable.

Here, the existence of the prior statement was known to the Counsel for the Respondent prior to the witness testifying. He chose not to use it at that time. (Further, counsel did not provide a copy of the statement with his brief for my review on appeal.) I find that the ruling on the admissibility of the prior inconsistent statement was correct.

IV

The final contention of Appellant is that the sanction imposed by the Administrative Law Judge is excessive. The order calls for an outright suspension of Appellant's license for one month and an additional suspension of two on nine months' probation.

Appellant argues that for a first offense of "inattention to

duty" the table at 46 CFR 5.20-165 suggests as an average order only an admonition and therefore in light of Appellant's excellent record admonition alone is appropriate in this case. The first fact to be considered on this argument is that the same table suggests an average order of an outright three months' suspension for a first offense of inattention to duty ("intentional"). The average order quoted by Appellant, although he did not indicate it as such, is the one cited for an "inattention to duty, unintentional." The facts of this case cannot be said to indicate definitely an intentional or an unintentional inattention to duty. They do, however, indicate some form of inattention to duty between the two. Inattention to duty has been characterized as negligence. The two degrees indicated in the table simply recognize a difference in degree of inattentiveness, for purposes of Average Orders. The order in this case falls between an admonition, (inattention to duty, unintentional, first offense), and three months outright (inattention to duty, intentional, first offense.) Counsel admits the fact that the cited regulation is meant only to serve as a guide in entering an order and is not meant to interfere with the fair and impartial adjudication of each case. Here, the order was appropriately made to lie between the two average orders in this case where the degree of inattentiveness was more than unintentional but somewhat less than intentional. The Administrative Law Judge is not and cannot be bound by the Table of Average Orders. I cannot say that the record reflects an abuse of discretion by the Administrative Law Judge, particularly where the order states his consideration of all facts and circumstances and the remedial objective of this type of proceeding.

Appellant cites Commandant v. Coleman, NTSB Order EM-73, as authority for the fact that the Administrative Law Judge must consider mitigating factors and argues that the Administrative Law Judge is limited to an admonition under the circumstances of this case because they are so close to that of the Coleman case.

Counsel is quite correct that the Administrative Law Judge must consider mitigating factors. However, his further argument that the Coleman case limits the order in this case to an admonition is not correct. An order must by molded so that it is appropriate for a particular person based on the unique facts and circumstances pertinent to each individual case. An administrative Law Judge cannot be bound to a certain order in an earlier case because some of the charges and some of the facts in a later case are the same as the earlier one.

CONCLUSION

Substantial evidence of a reliable and probative nature exists to support the findings and order of the Administrative Law Judge.

The contentions of Appellant are without merit.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 29 January 1980, is AFFIRMED.

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

Signed at Washington, D.C., this 2nd day of April 1981.