

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT LICENSE NO. 35695
Issued to: Clifford R. Freeman

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2248

Clifford R. Freeman

This review has been taken in accordance with Title 46 United States Code 239(g) and 46 CFR 5.30-1.

By order dated 19 June 1980, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman's documents for three months, plus three months on twelve months' probation, upon finding him guilty of misconduct. The specification found proved alleged that while serving as operator/person-in-charge on board M/V IKE D and tow, under authority of the license above captioned, on or about 17 January 1980, Appellant, while navigating the Mississippi River near New Orleans, La., above the Huey P. Long Bridge, in darkness between the hours of sunset and sunrise, wrongfully failed to show the required navigation lights on his towing vessel and the barge in tow.

The hearing was held at New Orleans, La., on 21 February, 11 and 25 March, 1 and 29 April, 8 May, 16 June, and 2 July 1980.

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 one witness and two documentary exhibits.

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

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending the operator's license issued to Appellant for a period of three months plus three months on twelve months' probation.

The entire decision was served on 2 July 1980. Appeal was timely filed on 18 July 1980 and perfected on 27 January 1981.

FINDINGS OF FACT

On 17 January 1980, Appellant was serving as operator/person-in-charge on board the tow boat IKE D and tow and acting under authority of his license while the vessel was underway in the Mississippi River above the Huey P. Long Bridge.

On the night in question, Appellant was engaged in barge fleeting operations on the left descending bank of the Mississippi in a fleet area maintained by his employer, American Commercial Barge Lines (ACBL). The work involved the shifting of barges within the moored tiers and the making up of northbound tow flotillas of empty barges.

During the evening of 17 January 1980 a Coast Guard patrol boat was underway on the Mississippi River to inspect some terrestrial ranges. The Coast Guard vessel, with Chief Warrant Officer Stephan D. Willman on board, observed IKE D in the area above the Huey P. Long Bridge. IKE D was displaying white lights only, with no running lights visible. The Coast Guard vessel attempted to contact IKE D by radio but failed to do so. While maneuvering around IKE D and the tow it was pushing ahead, the Coast Guardsmen observed that there were no visible lights on the barge and no port running light displayed on IKE D.

The report of boarding completed by CWO Willman mistakenly identified the operator of IKE D as "Clifford Russell" vice Clifford Russell Freeman. The remainder of the information on the report, including Appellant's home address, was accurate. During his testimony CWO Willman identified Appellant as the operator of IKE D at the time in question.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that (1) the offense as charged does not sound in misconduct; (2) the law makes no provision for barges being maneuvered in fleeting areas; (3) failure to cite other vessels similarly in violation of the Rules of the Road constitutes discriminatory application of the law; and (4) suspension of Appellant's license is unwarranted.

APPEARANCE: Jones, Walker, Waechter, Poitevent, Carrere & Denegre of New Orleans, Louisiana, by Donald L. King, Esq.

OPINION

The violation of a duty established by a formal rule or regulation is "misconduct" for the purpose of these proceedings. 46 CFR 5.05-20(a)(1). See Decisions on Appeal Nos. 2210, 2141,

2136 and 1986. No requirements exists in this remedial proceeding that "unlawful behavior or willful misconduct" be proved in the sense that Appellant employs these concepts. These are administrative proceedings not criminal actions, and the Administrative Law Judge was correct in concluding that a violation of the requirements of the Rules of the Road constituted misconduct. The fact that a barge being pushed ahead by IKE D was not equipped with the required lights was never contested. It also was established that the IKE D was not showing the required port running light. Regulations at 33 CFR, Part 95, prescribe the Pilot Rules for Western Rivers, which includes the length of the Mississippi River above the Huey P. Long Bridge. At 33 CFR 95.29, the lights for barges towed ahead or alongside are enumerated. The tow of IKE D was clearly not in compliance with this rule. Neither was the proper side light being shown on IKE D. Misconduct was thus established by substantial evidence of a reliable and probative character.

II

The essence of Appellant's second point is that no provision is made by the Rules of the Road for barges being maneuvered in fleeting areas, thus custom is controlling. His evidence tended to show that fleet operations are habitually conducted without insuring that lights are displayed on the barges being maneuvered in the fleeting areas. More properly stated, the Western Rivers do not exempt such barges from the general rule requiring lights on barges being pushed ahead, towed alongside, or towed astern. The rule of 33 CFR 95.29 is generally applicable, with no exception for fleeting operations, and no amount of local custom to the contrary will defeat its operation. See 33 U.S.C. 311-12; see also, Griffin On Collision §253 (custom may not conflict with established law) and Decision On Appeal No. 1073.

II

It was not established on the record what violations were noted on other vessels the evening of 17 January 1980 which led the Coast Guard to take action against those vessels to cause them to comply with the governing rules. At most it was established that the infractions involved improper display of lights, that the vessels brought their flotillas into compliance after being hailed by the Coast Guard, and that IKE D was not the only vessel cited. It was not established whether other R.S. 4450 proceedings arose as a result of the boardings accomplished by CWO Willman. The crux of the matter is that IKE D and tow, under the operation and control of Appellant were in violation of the applicable Rules of the Road. Although many reasons exist which would lead to or prevent a boarding from resulting in a remedial proceeding, there appears to

be no indication herein that the Investigating Officer abused his discretion, or some prejudice peculiar to Appellant existed. See Decision on Appeal No. 2052.

IV

The sanction ordered by the Administrative Law Judge was composed in part of a sanction of three months' suspension resulting from the vacation of a probation ordered in a prior proceeding. Appellant was under a one year probation on an order of three months' suspension. The offense proved in the instant case occurred within the twelve month period. Decision on Appeal No. 1756 and others make clear that the Administrative Law Judge has no discretion in such a case, but must revoke the probation and implement the earlier order. The further suspension for three months on twelve months' probation is the remedial sanction based solely on the present charge proved. As such, the order is neither excessive nor unwarranted under the circumstances.

CONCLUSION

The Administrative Law Judge properly found the charge of misconduct, supported by one specification, proved by substantial evidence comporting with 46 CFR 5.20-95(b).

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 19 June 1980, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 8th day of June 1981.