UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
License No. 462 569 and MERCHANT MARINER'S DOCUMENT
Issued to: James Kiely Z-344 46 0052

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2253

James Kiely

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 30 April 1980, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's license for three months on twelve month's probation upon finding him guilty of inattention to duty. The specification found proved alleges that while serving as Chief Mate on board SS WORTH under authority of the license above captioned, on or about 2 June 1978, at Texaco Eagle Point Westville, New Jersey, on the Delaware River, Appellant failed to adequately supervise a ballast loading operation on his vessel, causing pollution of the navigable waters of the United States.

The hearing was held at San Francisco, California, on 15 October and 7 December 1979, 17 and 29 January 1980, and 30 April 1980.

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

The Investigating Officer introduced in evidence statements of the Second Mate, Mr. William T. Smith; an affidavit of service on Appellant of 5 October 1979 by the Investigating Officer; and a Master's Report of Seaman Shipped or Discharged (CG-735(T)) dated 17 October 1979 for SS WORTH.

In defense, Appellant offered in evidence the sworn testimony of the pumpman, Mr. Ray U. Hart; and statements of BM3 Jones, USCG and BM 2 Bobby Jay Stout, USCG.

Also entered in evidence was a Stipulation Re Testimony of William T. Smith signed by the Investigating Officer and counsel for Appellant.

After the last day of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and single specification alleging inattention to duty had

been proved. He then entered an order suspending all licenses (but not the document) issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on Appellant on 5 May 1980. Appeal was timely filed on 8 May 1980 and perfected on 28 July 1980.

FINDINGS OF FACT

On 2 June 1978, Appellant was serving as Chief Mate on board the SS WORTH and acting under authority of his license while the vessel was at Texaco Eagle Point, Westville, New Jersey on the Delaware River.

On 2 June 1978, SS WORTH had unloaded its cargo of oil at the Texaco facility at Westville, New Jersey, when Texaco personnel came on board claiming that the vessel had retained oil on board that was listed on the papers as oil to be off loaded.

It was decided to pump ballast into the number two center cargo tank to level the vessel to show the Texaco personnel that no excess oil was on board.

It was decided to load the tank with two pumps, rather than the one pump normally used, to rush the ballasting operation, in order to complete the paperwork involved and to make the tide for leaving port the same night.

Throughout the ballasting operation, the pumpman, Ray Hart, was in the console room controlling the pumps and monitoring the level of fluid in the number two center tank by gauges (connected to mechanical tapes on floats in the tanks).

Appellant was in charge of the ballasting operation from the beginning.

Appellant was involved in paperwork with Texaco personnel in his office when about 42 to 90 gallons of oil overflowed from the tank at about 1415 on 2 June 1978.

About 15-20 gallons were estimated to have reached the Delaware River from the number two tank overflow.

Throughout the ballasting operation, the Master, Appellant, the Second Mate, and the pumpman were in radio contact with each other.

The Second Mate was the deck officer on watch from 1200 to

1600 on 2 June 1978, but Appellant was in overall charge of the ballast operation from its beginning.

The procedure on this vessel was for the pumpman to notify the deck officer when the ullage was 21 feet in order to begin visual verification of the ullage.

The oil overflow occurred about a half hour after the ballasting began, and before the ullage reading in the console room reached 21 feet (about 1415 on 2 June 1978).

BASES OF APPEAL

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

1) there is no evidence the Appellant was the person in charge at the time of the spill.

2) nothing the Appellant did or failed to do contributed to the oil pollution;

3) there is no evidence for some statements in the decision which supported the decision and order; and

4) the charges were unreasonably delayed, prejudicing the Appellant's defense (latches).

APPEARANCE: Mr. John E. Droeger of Hall, Henry, Oliver & McReavy.

OPINION

Appellant's first contention is without merit. Mr. Ray U. Hart testified (at page 46 of the Record) that Appellant was in charge of the ballast operation from the beginning. The Second Mate's statement, dated 4 January 1979, and the Stipulation Re Testimony of William T. Smith, state and Appellant was standing by for him, although the Second Mate was on watch during the ballast operation, so he could go to the bridge to lay out a course for Jacksonville. The statement and stipulation are corroborated by the direct testimony of Mr. Hart, the pumpman. The determination of credibility of witnesses' testimony is a matter reserved to the Administrative Law Judge, Decision on Appeal No. 2115, and will be upheld on appeal, unless shown to be clearly arbitrary and capricious. Decision on Appeal No. 2108. Such is not the case here, where the testimony of the defense witness is corroborated by the statement of the Second Mate on watch.

Appellant's contention that he did nothing to contribute to

the spill is refuted by the evidence that he relieved the Second Mate on watch from visually checking the ullage, and was in his office going over papers with the facility personnel rather than directly supervising the ballast operation.

Appellant's contention that some statements in the decision are not supported by the evidence is not the standard of review in these cases. The test for upholding a decision on appeal is that it be supported by substantial evidence from the record as a whole. Decision on Appeal No. 1654. The decision in this case is supported by substantial evidence of a reliable and probative nature.

Appellant's laches argument fails because there is no clear evidence that Appellant's defense was prejudiced by the approximately one and a half year delay. The defense witness, Mr. Hart, testified in detail as to the events and clearly indicated that Appellant was in charge of the ballast operation. There was no evidence of intentional misconduct or oppressive design on the part of the government. In accordance with the standard set forth in Decisions of Appeal Nos. 1382 and 2064, no unreasonable delay was shown and no substantial resulted from the government's delay in charging Appellant.

CONCLUSION

The findings are based on substantial and reliable evidence on the record as a whole and support the charge of inattention to duty.

ORDER

The order of the Administrative Law Judge entered at San Francisco, California on 30 April 1980 is AFFIRMED.

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

Signed at Washington, D.C., this 10th day of June 1981.