

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT LICENSE NO. 488588
Issued to: George F. Hopkins Z-035 24 8673

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2258

George F. Hopkins

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

By order dated 28 January 1980, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for three months, on twelve months' probation, upon finding him guilty of negligence. The specifications found proved alleged that while serving as Second Mate on board SS MONTPELIER VICTORY under authority of the license above captioned, on or about 27 January 1979, Appellant:

- negligently navigated the said vessel by failing to ascertain the said vessel's position between approximately 1600 and 1650;
- did negligently plot upon the chart the 1610 fix incorrectly;
- did negligently alter the vessel's course from 287° gyro to 300° without first properly fixing the vessel's position, contributing to the grounding of the said vessel; and
- did negligently turn over the deck watch to the Third Officer, Walter S. BENECKY, without properly advising him of the vessel's position, thereby contributing to the grounding of the said vessel.

The Administrative Law Judge found that the latter two specifications were proved as matters in aggravation with respect to the first two specifications found proved, and not as independent offenses.

The hearing was held at Houston, Texas, on 13 February 1979, at which time a change of venue was granted to Appellant. Therefore the hearing convened in New York, New York, on 6 March 1979, continuing to 11 September 1979.

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

The Investigating Officer introduced in evidence nine documentary exhibits and the testimony of two witnesses.

In defense, Appellant offered in evidence one documentary exhibit and his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He then served a written order on Appellant suspending his license for a period of three months on twelve months' probation.

The entire decision was served on 7 February 1980. Appeal was timely filed on 12 February 1980 and perfected on 1 July 1980.

FINDINGS OF FACT

On 27 January 1979, Appellant was serving as Second Mate on board SS MONTPELIER VICTORY and acting under authority of his license while the vessel was at sea westbound along the Florida Keys. Appellant assumed the watch at about 1600 after familiarizing himself with existing conditions and plotting a 1556 fix.

This fix checked closely with the fixes plotted by the Third Mate on the prior watch.

Shortly thereafter, Appellant became somewhat confused over the identity of a lighthouse, and summoned the Master to the bridge. At about 1603 the Master arrived and verified that the structure was Rebecca Shoal Light. At the direction of the Master, Appellant utilized the vessel's radar for a range and a visual bearing of the lighthouse to determine the vessel's position. The fix, plotted at 1610, placed the vessel five miles south of its intended trackline. The radar was operating properly, as were the gyro compass and the course recorder. The fathometer was secured because of prior erratic operation.

During the afternoon the vessel had shown a southerly drift but never deviated significantly from the pre-dawn trackline. The speed of advance, computed from the 1340 fix to the 1528 fix during the Third Mate's watch, was 16.9 knots - reasonably consistent with the Master's estimate of 17.5 knots.

The 1610 observation plotted by Appellant was not placed on the same chart as earlier fixes. A smaller scale chart was employed since the vessel was passing beyond the edge of the larger scale chart that had been in use. The 1610 "fix" was never compared to the earlier fixes, and the particulars were nowhere recorded. The Master did not supervise Appellant's fixing of the vessel's position. Upon being informed of the 5 mile deviation from track, the Master examined the course recorder and ultimately

instructed Appellant to prepare a course line which would cause the vessel to take Flashing Red Buoy 8A (off Dry Tortugas) abeam to starboard (on the original heading), distant .8 miles. Appellant determined that a course of 300°t would accomplish this, and with the approval of the Master directed the helmsman to the new course. The Master departed the bridge at about 1615.

Comparison of the 1556 and 1610 fixes, both obtained by Appellant, demonstrates that for the fixes to be accurate the vessel would have made good a course of 235°t and a speed of 25 knots, this while steering 287°t and turning for 17.5 knots. Although Appellant has doubts as to the accuracy of the latter fix, he took no steps to verify the 1610 position while he was on watch.

At about 1647 Appellant was relieved by Third Officer Benecky. Appellant advised his relief of the course and speed, time to pass Buoy 8A, and his doubts about the accuracy of the 1610 fix. Dry Tortugas Light was then visible through binoculars, but not to the unaided eye. Appellant advised that a fix should be plotted by reference to Dry Tortugas Light when it was visible to the naked eye. At about 1653 Appellant departed the bridge.

The Third Officer never obtained the fix as recommended. Although the Light was available at 1658, Benecky did nothing. At about 1702, responding to the helmsman's report of a nun buoy, Benecky ordered left 15° rudder, subsequently increasing the rudder angle to left 20°. Although swinging left towards fair water, the vessel grounded at 1708 and stranded distant 3 miles from Dry Tortugas Lighthouse. After about seven hours the vessel was refloated and resumed the voyage, without appreciable damage. In a separate hearing under R.S. 4450, Third Officer Benecky was found guilty of negligence as a result of charges arising from the same incident.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that Appellant is relieved of the responsibility for the stranding by reason of acting pursuant to the Master's instructions, and by virtue of the established negligence of the Third Mate. Appellant also contends that the evidence fails to prove a breach of any standard of care.

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

OPINION

I

There is a superficial appearance of validity to Appellant's insistence that there was no standard of care set forth by which the alleged fault of the first specification found proved could be tested. The specification did no more than allege that for a fifty minute period Appellant did negligently navigate the vessel by failing to ascertain the vessel's position. It was, on its face, insufficient. There was nothing in the date of the alleged offense, 29 January 1979, to put one on notice of special considerations, nor is there an intrinsic significance either in the period 1600-1650 or in the span of fifty minutes to warrant the assertion that a failure to ascertain a position is negligent. Similarly, there was no allegation as to place or even general area of operation to create an apprehension that the conduct was faulty.

It is needless to speculate whether, for example, an addition to the specification alleging the area of operation and the time since the last fixed position would have been enough to impute fault to a failure to act in this regard. On the record the essentials were in fact understood, contested, and resolved. The Administrative Law Judge noted the application of the holding as to notice in Kuhn v. Civil Aeronautics Board, 183 F.2nd 839 (D.C. Cir. 1950) (although more specifically in connection with the "1610 fix" specification), and arrived at findings which support the recognition of negligence in Appellant's action.

Having made an error, through a failure to exercise the ordinary precautions in accepting his "1610" position, and knowing that the vessel was operating in the vicinity of the western Florida Keys, Appellant was clearly negligent in not taking steps to verify, or correct if necessary, the determinations made. While Appellant urges that his doubts and his passing on those doubts to the officer who relieved him somehow exonerate him from fault, the fact of his own doubt and his transmitting of his suspicion simply reinforce the knowledge that his handling of the situation was not up to the standard to be expected in the ordinary practice of deck watchstanders.

As was pointed out in the initial decision, the nature of Appellant's error at the time of the "1610 fix" remains in doubt; he could either have misread the range on the radar equipment (indeed, although unlikely, the equipment might have been deranged), or have translated a correct reading into an incorrect plot. The fact is, however, that the error could and should have been corrected immediately one of several reactions to be expected of the deck officer. The comparison between the results of the 1610 observation and the earlier recorded fixes should have been automatic. The fact that another chart of a different scale had been used should have been the stimulus for more care rather than an excuse for error.

In all, it may be said that in the absence of a rule setting times for the ascertainment of a vessel's position or an immediate recognition, from the customary practice, that fifty minutes is too long a period for not ascertaining a ship's position the specification itself was defective. It must also be said, nevertheless, that, since the locale and conditions of the vessel's operation were clear on the record and the question of the propriety of Appellant's conduct in fact was litigated, the deficiency in the allegation was cured and the standard of care is inherent in the understanding of the functions and responsibilities of a deck officer of the watch.

II

Appellant seeks to avoid responsibility for his acts on the theory that he did no more than carry out the master's orders and that the neglect of the mate who relieved him was the real cause of the stranding.

The master, after assuring Appellant that the aid to navigation which he had questioned was indeed Rebecca Shoal Light, directed Appellant to obtain a fix and, having been advised of the apparently ascertained position of the ship, further directed him to lay off a course to leave a certain buoy abeam (of the original trackline of the vessel) at a distance of eight tenths of a mile. Appellant determined that such a course from the position plotted would be 300°t, and the master directed him to come to that heading. The master may well have been at fault here in not, having notice of Appellant's uncertainty about aids and a marked discrepancy from previous determinations, more intensively attending to the work immediately in hand. However, he had not ordered Appellant to obtain an incorrect position of the vessel. He relied implicitly, possible too much so, on the accuracy of Appellant's observations and computations. The actual errors were, however, Appellant's own, and, master or no master, it was his responsibility not to have made them and, having made them, to correct them.

With respect to the apparent negligence of the relieving mate under whose supervision the vessel actually stranded, it was not an intervening cause such as to sever Appellant's chain of effectiveness. The failure of that mate to do anything did not alter the direction or impact of Appellant's negligence; it merely failed to prevent the natural and probable consequences of obtaining and failing to correct a false position.

Appellant's negligence was independent of that of any other officer and was sufficient of itself to have brought about the harm which occurred to the vessel.

III

The Administrative Law Judge meticulously noted that the third and fourth specifications found proved were merely enlargements or aggravations of the matters alleged in the first two specifications found proved. As a consequence he found the third and fourth allegations were, as proved, merged with the first and second. The "merger" was not isolated on a "one to one" basis. The language actually used is: "However, these two specifications are deemed merged in the [first and second] specifications, since in essence they allege subsequent acts which were negligent only by virtue of the fact that they were predicated on the negligent acts found proved in the [first and second] specifications."

It may be that the care exercised by the Administrative Law Judge was induced by a recognition that only the second pair of specifications linked alleged conduct to the causality of the stranding while the first two alleged erroneous actions without imputing consequences to them. The "merger" view does in fact accept the link and is permissible because, as previously noted, the litigation and the evidence itself established that the improper "fix plotting" at 1610 was the ultimate cause of the event.

Be that as it may, I must disagree with the Administrative Law Judge on the matter of the specification dealing with advice to the relieving mate concerning the vessel's position. Without more, there might be possible a dispute whether to advise another of an incorrect position is well expressed in language of not "properly advising...of the vessel's position." This need not be explored; there is more. It was found as a fact that Appellant "informed [his relief] that he was not sure of the 1610 fix". In spite of this, Appellant was in fact relieved of the watch. As far as that relief was concerned Appellant gave information that was as close as could be to his state of mind.

Here again, the original language of the specification leaves something to be desired. There is nowhere in the rules, written or customary, an absolute duty to advise a prospective relief on the deck watch of the vessel's position. There is no need here to clarify what, then, under a more appropriate allegation, would constitute under particular circumstances, a "vessel's position," even with a qualifying "proper" somewhere attached.

Insofar as a relieving officer may be entitled to information as to the correct or "true" position of the vessel or as to the "best estimated position" under the circumstances, he is entitled to refuse to relieve if the situation is not satisfactorily presented. Here, Appellant did not, in fact, wrongly advise his

relief that "such" was the vessel's position when "such" was not the vessel's position. Nor did he leave by silence an implication that "such" was the vessel's position when in fact it was not. He affirmatively declared that he had doubt as to the position plotted.

That it was his fault that an incorrect position was plotted and a further fault that he failed to take the reasonable corrective action are irrelevant. What he did pass on to his relief was the truth (or so we must assume), that he doubted the charted position, and not only was this the subjective truth; it was objectively confirmed that the position was not only doubtful but was wrong. I conclude that, bad as the situation was, there was no specific fault precisely in the "advice" given to Appellant's relief.

The fact that this specification was not proved does not alter in the slightest the linkage of the causality of the stranding, alleged now only in the third specification found proved, with the substantive faults of determining an incorrect position and failing to take reasonable steps to correct the error.

CONCLUSION

I conclude that the fourth specification found proved was not proved and that the other specifications and the charge of negligence were proved as found.

ORDER

Except that the fourth specification found proved is found NOT PROVED and is hereby DISMISSED, the findings and the order of the Administrative Law Judge entered at New York, NY, on 28 January 1980, are AFFIRMED.

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

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