

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 18549
Issued to: Jimmie R. MOORE

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2416

Jimmie R, MOORE

This appeal has been taken in accordance with 46 U.S.C. 7702 and former 46 CAR 5.30-1 (currently 46 CFR Part 5, Subpart J.).

By order dated 30 May 1984, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license for three months on twelve months' probation upon finding proved the charge of negligence. The specification found proved alleges that Appellant, while serving as operator aboard the M/V THERESA SELEY, under the authority of the captioned document, on or about 1 September 1983, did fail to operate the vessel in safe and prudent manner in the area of miles 956-959, Ohio River, to wit, operating said vessel in the above river area when its draft exceeded the channel project depth, resulting in damage to and subsequent pollution from the vessel.

The hearing was held at Paducah, Kentucky, on 1 November 1983.

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

The Investigating Officer introduced in evidence eight exhibits and the testimony of three witnesses.

In defense, Appellant introduced in evidence seventeen exhibits and the testimony of four witnesses.

On 30 May 1984, the Administrative Law Judge rendered a decision in which she concluded the charge and specification of negligence had been proved, and issued a written order suspending Appellant's license for three months on twelve months' probation.

The complete Decision and Order was served on 31 May 1984. Appeal was timely filed on 8 June 1984. After receiving the Decision and Order, Appellant submitted a document entitled "Motion to Re-Open for Reconsideration of the Decision and Order or Alternatively to Allow Additional Proof in Clarification of the Evidence." On 18 June 1984, the Administrative Law Judge entered a ruling on the motion in which she permitted depositions to be

taken for clarification of two points. The Appeal was perfected on 25 February 1985.

FINDINGS OF FACT

At all relevant times on 1 September 1983, Appellant was serving as Operator aboard the M/V THERESA SELEY, a 200-foot, 7000 horsepower uninspected towing vessel, under the authority of his license which authorizes him to serve as Operator of Uninspected Towing Vessels. The M/V THERESA SELEY has a draft of approximately 9'8". Between approximately 1200 and 1400 on 1 September 1983, Appellant was serving as pilot and operator of the M/V THERESA SELEY with a 15-barge tow upbound between Miles 959 and 956, Ohio River. The configuration of the barges was five long and three wide. Each barge had a draft of approximately 8'8".

The channel of the Ohio River between Miles 956 and 959 has a bottom classified as rocky. The area is bounded by two low wicket dams, Lock and Dam 53 located downstream at Mile 962.6, and Lock and Dam 52 upstream at Mile 938.9. The Army Corps of Engineers utilizes these dams to assist in maintaining a Congressionally-mandated channel project depth of nine feet for this portion of the Ohio River. In August and September of 1983, the Ohio River was at low stage with water levels below normal. The normal reading for the upper gauge at Lock and Dam 53 is 16.9 feet; however, on 1 September 1983, a gauge reading of 14.4 feet and falling was reported to the M/V THERESA SELEY when it passed Lock and Dam 53. This was 2.5 feet below normal pool for that section of the Ohio River. The dam wickets are not raised by the Corps of Engineers until the level reads approximately 14.0 feet at the upper gage. The water level on 1 September 1983 did not fall to 14.0 feet, and so Lock and Dam 53 remained open. The lower gauge at Lock and Dam 52 was 0.9 feet above normal pool at the time the M/V THERESA SELEY passed Lock and Dam 53.

Appellant assumed the watch as operator a few minutes before 1200 on 1 September 1983. Shortly thereafter, the M/V THERESA SELEY struck bottom. Appellant continued the voyage, and the vessel experienced more grounding as it proceeded up through Mile 956. At 1400, while underway, an internal inspection by the Engineer revealed that the towboat was taking on water and leaking fuel oil. Appellant continued to Mile 951 where the barges were tied off. Thereafter, Appellant intentionally grounded the M/V THERESA SELEY near Mile 952 to increase its stability and prevent it from sinking.

APPEARANCE: W. Scott Miller, Jr., Esq., and Stephanie R. Miller, Esq., Miller and Miller, Suite 602, One Riverfront Plaza, Louisville, Kentucky 40202.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends:

1. There is no basis under any statute, regulation, or "rule of the road" for the negligence alleged in the specification.

2. The proof introduced by the Investigating Officer did not relate to the specification.

3. The proof offered by the Investigating Officer did not substantiate the charge.

4. Appellant presented undisputed proof that the vessel's draft did not exceed the actual channel depth.

5. Certain findings of fact are not based on the record and are erroneous in their conclusions.

6. The Administrative Law Judge made conclusions not based upon the record, but upon erroneous findings of fact.

7. The case law cited by the Administrative Law Judge is not applicable.

OPINION

I

Appellant first contends there is no basis under any statute, regulation, or "rule of the road" for the negligence alleged in the specification. In particular, Appellant claims that it is not negligent to operate a vessel with a draft exceeding the "project channel depth."

The standard of care applicable to the Appellant is found within a well-established presumption adopted in admiralty and in Coast Guard suspension and revocation proceedings. A rebuttable presumption of negligence arises when proper evidence is presented of a vessel grounding. Mid-America Transportation Co., Inc. v. National Marine Service, Inc., 497 F.2d 776 (8th Cir.1974), later appeal 526 F. 2d 629 (8th Cir. 1975), cert. denied 425 U.S. 937 (1976); Appeal Decisions 2409 (PLACZKIEWICZ), 2382 (NILSEN), 2211 (DUNCAN); Appeal Decision 2173 (PIERCE), affd sub nom. Commandant v. Pierce, NTSB Order EM-81 (1980). In appropriate circumstances the presumption alone is sufficient to prove a case of negligence. Appeal Decision 2211 (DUNCAN).

The standard of care is well-known. An operator is under a continuing duty to know where his vessel is at all times, and he should be in possession of all other pertinent facts relating to the voyage. See Mid-America Transportation Co., 497 F.2d at 780. this duty is comparably described in Appeal Decision 2367 (SPENCER), an allision case:

Appellant is responsible for knowing how the towboat with its tow can cope with any particular set of navigational conditions considering its horsepower, handling, his own experience, and the size and configuration of the tow. ... The master of a vessel. ... With respect to the navigation and maneuvering ability of the vessel this duty extends to operators of uninspected towing vessels as well as masters of vessels.

Similarly, Appeal Decision 2370 (LEWIS) also held that:

The master or operator of a vessel is expected to know the available information regarding the waterway that he is traversing and the characteristics of his vessel... Failure of a master or operator of a vessel to make proper use of such information with the result that he chooses to move his vessel when the state of the tide and weather make that dangerous is negligence...

The Investigating Officer presented sufficient evidence of the grounding of the M/V THERESA SELEY to create a rebuttable presumption of negligence and sufficient to make a prima facie case of negligence against the Appellant. Appeal Decisions 2266 (BRENNER), 2216 (SORENSEN), and 2177 (HOMER).

I agree that the specification did not accurately detail the negligent actions of the Appellant. However, the specification did provide sufficient information about the grounding of the M/V THERESA SELEY to raise the corresponding presumption of negligence. Appellant's awareness at the outset of the hearing of this issue to be litigated is undeniable. a review of the record clearly reveals that the Appellant and his counsel had full knowledge of the basic grounding issues requiring determination and that he had been afforded an ample opportunity to respond to them. See Appeal Decision 2174 (TINGLEY), aff'd Commandant v. Tingley, NTSB EM-86 (1981). The rule in Kuhn v. Civil Aeronautics Board, 183 F. 2d 839, 842 (D.C. Cir. 1950), states that when "parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern." See also Commandant v. Buffington, NTSB Order EM-57

(1977).

Accordingly, I find that the factual allegation of negligence was fully litigated and that Appellant's notice thereof was timely.

II

Appellant next asserts that the proof introduced by the Investigating Officer did not relate to the specification with which the Appellant was charged. Alternatively, Appellant contends that the proof offered by the Investigating Officer did not substantiate the charge of negligence. These arguments fail for the reasons stated below.

As stated in Part I of this opinion, the specification provided Appellant with adequate notice of the basis for the charge of negligence.

The Investigating Officer clearly established that while operating the M/V THERESA SELEY the Appellant repeatedly grounded the vessel in the three mile stretch of the Ohio River at Miles 959 to 956. The vessel's log entries from 1 September 1983 specifically stated that during Appellant's watch the vessel was "hitting ground all through...Mile to 956." These groundings were confirmed by the testimony of the Master of the M/V THERESA SELEY, who stated that the vessel was hitting bottom "all the way up from Mile 959 to Mile 956." The vessel damage observed by the Master and the Coast Guard on-scene investigator, and as detailed in the 1400, 1 September 1983 vessel log entry, further corroborated the grounding of the M/V THERESA SELEY during Appellant's watch.

The grounding evidence presented by the Investigating Officer was sufficient to raise a rebuttable presumption of negligence. Furthermore, such proof is prima facie evidence of negligence. Consequently, the Administrative Law Judge did not err when she denied Appellant's Motion to Dismiss at the close of the Coast Guard's case.

At this juncture in his appeal, Appellant implies that the Master of the M/V THERESA SELEY should have been charged with negligence as well. It is irrelevant to Appellant's case whether proceedings were or were not undertaken against another as the result of this incident. The issue to be resolved was whether Appellant was at fault, not whether anyone else was also at fault. Appeal Decision 2402 (POPE) and 2166 (REGISTER).

III

Appellant claims that he presented undisputed proof that the M/V THERESA SELEY's draft did not exceed the actual channel depth. Appellant's contention that he is blameless because his own evidence proves mathematically that the grounding could not have occurred is without merit.

Even though the Appellant attempted to show the actual depth of the river exceeded the draft of the M/V THERESA SELEY, the evidence clearly demonstrates the M/V THERESA SELEY experienced multiple groundings on the rocky bottom of the Ohio River between Miles 959 and 956. Appellant introduced Army Corps of Engineer sounding taken the same day of the grounding which showed channel depths greater than the draft of the M/V THERESA SELEY. However, these soundings were made earlier in the day and they did not cover the complete width of the navigable channel. The log maintained by Lock and Dam 53 fully established that the river level continued to fall after the soundings were taken.

Appellant also attempted to show the M/V THERESA SELEY struck an uncharted obstruction and not the rocky channel bottom. This evidence did not rebut the presumption of negligence established by the multiple groundings "all through...Mile 959 to 956." Furthermore, the bottom conditions along that portion of the river remain fairly constant. Appellant's own witness, Mr. John Bleidt, stated the area is characterized by very little sedimentation and fall-in. (Respondent's Exhibit D, pp.7, 11, and 17.)

IV

Appellant next contends that the Administrative Law Judge made, findings which are not based upon the record and are erroneous in their conclusions. I agree in part and disagree in part.

The Administrative Law Judge found that the draft of the M/V THERESA SELEY was ten feet since it was equipped with ten-foot wheels. The evidence established that even though the M/V THERESA SELEY was equipped with ten foot wheels, its draft could indeed be 9'8" on the date in question due to the unique tunnel structure along the bottom of the vessel's hull. Accordingly, the Administrative Law Judge's finding that a ten-foot screw on a towboat cannot be operated in less than ten feet of water is hereby modified to read that a towboat with ten-foot screws may have a draft of 9'8". However, based upon the totality of the record, this change does not substantially affect the reasoning of the opinion. Appellant grounded the M/V THERESA SELEY, then continued to proceed up the Ohio River, even though the river's water level

was below normal pool and falling. The Administrative Law Judge's finding that the draft was ten feet instead of the actual 9'8" does not obviate Appellant's negligence.

The Administrative Law Judge was correct in finding that an operator can reasonably expect that there may be depths as shallow as nine feet in the Ohio River channel. It is undisputed from the record that the Army Corps of Engineers would not guarantee a depth greater than nine feet for the Ohio River. While evidence suggested that the Corps often dredges to a depth exceeding the nine-foot project depth, the Corps emphatically would not guarantee any depth exceeding nine feet at normal pool. Consequently, a prudent navigator on this portion of the Ohio River could expect to find areas that have only a nine foot depth.

V

Appellant claims generally that the Administrative Law Judge made conclusions not based upon the record, but upon the erroneous findings of fact. However, I find there is substantial evidence of a reliable and probative nature to support the Administrative Law Judge's conclusion that the charge of negligence is proved, as required by 46 CFT §5.63 (previously 5.20-95(b)).

The Investigating Officer met the burden of proof by establishing the facts of the multiple groundings and Appellant's responsibility for the vessel's navigation. It was thereafter incumbent on the Appellant to overcome the presumption that his navigation of the vessel had been deficient. The Appellant failed to do so.

There are no charted depths for these waters. The only datum available to Appellant from which the depth of the channel could be determined was the project channel depth of nine feet. Gauges along the Ohio River permit vessel traffic to ascertain the actual water level as it fluctuates. Appellant knew or should have known that the Ohio River in the vicinity of Lock and Dam 53 was 2.6 feet below normal pool and falling. This information was readily available in the M/V THERESA SELEY's log. Appellant's decision to proceed upriver when the water level was below and was continuing to fall below the reference level upon which the Corps' nine foot project depth is based constituted negligence. The Administrative Law Judge's discussion of this evidence served merely to show that the presumption was un rebutted.

There was no persuasive evidence produced by the Appellant that would rebut the presumption of negligence accompanying the grounding of the M/V THERESA SELEY. Appellant presented no reliable evidence indicating the vessel struck anything other than

the river channel bottom. Therefore, the charge of negligence was proved.

VI

Appellant finally asserts that the case law cited by the Administrative Law Judge is not applicable since Appellant had no other alternative than to proceed upstream through the Ohio River channel.

The Administrative Law Judge found Appellant negligent based upon the fact that he should not have been operating the M/V THERESA SELEY on that portion of the Ohio River given the then existing state of the river level and the vessel's characteristics. Additionally, the Appellant's contention that he had no alternative is negated by the testimony of the Master of the M/V THERESA SELEY, who acknowledged that a vessel could hold up such a transit, thus preventing the further grounding of the vessel through Mile 956.

The Administrative Law Judge correctly found that the custom of operators to transit the area under similar circumstances did not provide evidence of reasonable care. The negligence of others will not serve to excuse the negligence of one accountable in suspension and revocation proceedings. It is well established that custom and usage do not justify negligence. "Methods employed in any trade, business or profession, however long continued, cannot avail to establish as safe in law that which is dangerous in fact." Tug Ocean Prince, Inc. v. United States, 584 F. 2d 1151 (2d Cir. 1978); see also Appeal Decision 2261 (SAVOIE).

CONCLUSION

The findings of the Administrative Law Judge except as modified herein are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations. The order is appropriate.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri on 30 May 1984 is AFFIRMED.

B.L STABILE
Vice Admiral, United States Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 3rd day of January, 1986.

