

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Leopold KLATT Z-1220028

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2498

Leopold KLATT

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By his order dated 30 January 1989, an Administrative Law Judge of the United States Coast Guard at Alameda, California, issued an admonishment to Appellant upon finding proved the charge of violation of law. The charge was supported by one specification which was found proved. The specification alleged that Appellant, while serving as master under the authority of the captioned documents, on board the S/S COVE LIBERTY on or about 11 March 1988, did wrongfully discharge oil from his vessel into U.S. navigable waters in violation of 33 U.S.C. SS1321.

The hearing was held at Alameda, California on 12 April 1988. Appellant appeared at the hearing and was represented by professional counsel. Appellant entered, in accordance with 46 C.F.R. SS5.527(a), an answer of deny to the charge and specification.

The Investigating Officer introduced seven exhibits into evidence and called two witnesses.

Appellant introduced four exhibits into evidence and testified under oath in his own behalf.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved, and entered a written order admonishing Appellant.

The Decision and Order was served on Appellant on 1 February 1989. Notice of Appeal was timely filed on 1 February 1989. Following the receipt of the transcript of the proceedings,

Appellant's brief was timely received with approved extensions on 15 June 1989. Accordingly, this matter is properly before the Vice Commandant for disposition.

FINDINGS OF FACT

At all times relevant, Appellant was serving as Master aboard the S/S COVE LIBERTY, a merchant vessel of the United States, under the authority of his above-captioned document and license. Appellant's license authorized him to serve as Master of steam or motor vessels of any gross tons upon oceans; also, first class pilot of steam or motor vessels of any gross tons upon the waters of Prince William Sound between Hinchbrook Entrance and Rocky Point, Alaska; also radar observer (unlimited).

On 11 March 1988, the SS COVE LIBERTY was moored starboard side to the AMORCO Wharf, Carquinez Strait, Martinez, California. Ballasting operations commenced at about 1040 that same day, and terminated at about 1450. The ballast was loaded by drawing sea water through the port and starboard sea suctions. Four cargo pumps were used to load the ballast through the suctions. Approximately 20 to 25 minutes after closing the starboard sea suction, dockside workers observed an oily sheen on the water approximately 20 to 30 feet forward of the bridge of the SS COVE LIBERTY, in the immediate area of the starboard sea suction. Appellant took immediate steps to determine the source of the oil. No apparent problems were discovered. Appellant also took steps to contact the Coast Guard within 5 minutes of the detection of the oily sheen. It was estimated that approximately 2 to 5 gallons of oil were discharged into the water.

Appearance by: Norman J. Ronneberg, Jr., Acret & Perrochet, One Embarcadero Center, 3rd Floor, San Francisco, CA. 94111

BASES OF APPEAL

The Appellant asserts the following bases of appeal:

1. The Coast Guard violated Appellant's constitutional right to substantive due process by attempting to suspend or revoke his license: (a) for reasons unrelated to his skills, ability, and maritime competence; and, (b) for the apparent fault or negligence of third parties, when Appellant was found to be free of negligence in both his personal and supervisory capacity;

2. The civil penalty provision of the Clean Water Act does not impose absolute responsibility or strict liability on the master of a vessel for the purposes of suspending or revoking his license.

OPINION

I

I do not agree with Appellant's assertion that his constitutional right to substantive due process was violated by subjecting his license and document to the suspension and revocation proceedings authorized by statute.

Appellant's license and document were made subject to the suspension and revocation proceedings in accordance with the provisions of 46 U.S.C. 7703 which states in part:

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if, when acting under the authority of that license, certificate or document, the holder -
(1) has violated or failed to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters. (emphasis supplied)

This statute is implemented by regulation in 46 C.F.R. 5.33.

The charge and specification alleged that Appellant had violated 33 U.S.C. 1321 by discharging oil into Carquinez Strait, a navigable water of the United States. Title 33 U.S.C. 1321(b) enunciates the policy against discharging oil into navigable waters:

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States. . . . or which may affect natural resources
(3) The discharge of oil . . . into or upon the navigable waters of the United States. . . in such quantities as may be harmful as deter-

mined by the President. . . is prohibited. . .

Clearly, this statute's intent is to protect the navigable waters of the United States. Accordingly, jurisdiction under 46 U.S.C. 7703(1) is extant. Contrary to Appellant's contention, neither the culpability nor negligence of Appellant or of third parties is an issue. Appellant has not been charged with negligence. The charge and specification allege solely a violation of law. All that need be demonstrated is that the master was the "person in charge", responsible to ensure that no oil was discharged from the SS COVE LIBERTY.

The law violated - 33 U.S.C. 1321 is a strict liability statute. U.S. v. Dixie Carriers, 627 F. 2d 739 (5th Cir. 1980); U.S. v. Tex-Tow, Inc., 589 F. 2d 1310 (7th Cir. 1978); Master of Oswego Barge, 664 F. 2d 327, 333 (2nd Cir. 1981). Title 33 U.S.C. 1321(b)(6)(A) provides:

. . . Any owner, operator or person in charge of any vessel from which oil. . . is discharged in violation of paragraph (3)(i) of this subsection. . . shall be assessed a civil penalty. . . (emphasis supplied)

The Coast Guard has construed the term "person in charge" broadly to include those individuals having on-scene and immediate operational responsibilities over a vessel. See, 434 Coast Guard Law Bulletin 24. Similarly, other agencies have broadly interpreted the term to include individual employees. See, U.S. v. Mobil Oil Corp., 464 F. 2d 1124 (5th Cir. 1972); U.S. v. Republic Steel Corp., 491 F. 2d 315 (6th Cir. 1974); U.S. v. Apex Oil Co., 530 F. 2d 1291 (8th Cir. 1976). Accordingly, the term "person in charge" includes the master of the vessel who had the full responsibility for the seaworthiness of the vessel as well as ultimate responsibility for the vessel's activities. See, Decision on Appeal No. 2434 (CORVELEYN).

Appellant, as master of the SS COVE LIBERTY, is responsible for the violation of 33 U.S.C. 1321 if it is determined that the discharge of oil came from the SS COVE LIBERTY. There was sufficient evidence presented at the hearing in the form of statements of eyewitnesses to the incident (Exhibits 5 and 6) which clearly support the conclusion that the discharge emanated from the SS COVE LIBERTY.

Appellant did not directly dispute that the discharge came from his vessel. He submitted a stipulation of "no contest" to the Coast Guard

charge that 2 to 5 gallons of oil were discharged from the SS COVE LIBERTY. The statements from the witnesses clearly indicate that there was sufficient oil in the water to create a sheen on the water. A sheen on the water is indicative of a harmful quantity of oil according to regulations promulgated pursuant to Presidential Executive Order No. 11548, 35 Fed. Reg. 11, 677 (July 20, 1970). Those regulations set forth in 40 C.F.R. Part 110.3 provide in part:

For purposes of section 311(b) of the Act, discharges of such quantities of oil into or upon the navigable waters of the United States or adjoining shorelines in such quantities that it has been determined may be harmful. . . include discharges of oil that: . . . (b) Cause a film or sheen upon or discoloration of the surface of the water. . . .

As the Administrative Law Judge stated in his opinion:
". . . the emission of that oil from SS COVE LIBERTY is clearly established by the testimony of . . . independent witnesses. . ."

Based on the foregoing, I find that Appellant was properly charged under the provisions of applicable law and regulation as the master of the SS COVE LIBERTY was responsible for the discharge of a harmful quantity of oil into a navigable water and was not denied any constitutional right of due process. A thorough review of the record clearly reflects that the Administrative Law Judge conducted the proceedings in full consonance with the requirements of the Administrative Procedures Act, 5 U.S.C. 554, et seq., and the governing regulations, 46 C.F.R. Subchapter A, Part 5, Subpart H.

II

Appellant next asserts that the civil penalty provisions of 33 U.S.C. 1321 do not impose absolute responsibility or strict liability on the master for purposes of suspension and revocation proceedings. I do not agree.

As stated, supra, the explicit provisions of 33 U.S.C. 1321(b)(6)(A) provide for the strict liability of a civil penalty for the "person in charge" as well as the owner or operator of a vessel when a discharge of a harmful quantity of oil is made into navigable waters. The provisions of 46 U.S.C. 7703 make the master's license and document subject to suspension and revocation proceedings when he violates a provision of law or regulation intended to protect

navigable waters. All of the criteria have been met in this case. The mere violation of the law in issue herein renders Appellant's license and document subject to suspension and revocation proceedings. Contrary to the contentions of Appellant, negligence or willfulness on the part of the master or vessel operator are not prerequisites in a charge of violation of law, where as here, neither scienter nor willfulness are prima facie elements of the charge. See, Appeal Decision 2490 (PALMER); Appeal Decision 2445 (MATHISON); Appeal Decision 2248 (FREEMAN). Similarly, Appellant's assertion that the Coast Guard has the burden of proving how the spill occurred, citing to Appeal Decision 2232 (MILLER) and Appeal Decision 2054 (LEESE), is without merit. Appellant's reliance on these cases is misplaced. In both of those cases, the respondent was charged with negligence, not a violation of law. Accordingly, finding a causal link between the discharge and the master was a prerequisite to finding such a charge proved.

Appellant also asserts that a sanction issued under 46 U.S.C. 7703 in this case is tantamount to a "criminal penalty." I do not agree.

The fact that Appellant is responsible for a violation of law or regulation and his license and document are consequently subject to suspension and revocation proceedings does not make such action punitive rather than remedial in nature. Contrary to Appellant's contention, these proceedings have never been construed as criminal or quasi-criminal. Appeal Decision Nos. 2379 (DRUM), 2167 (JONES), and 1931 (POLLARD). As stated in 46 C.F.R. 5.5, these proceedings are remedial and not penal in nature, intended to maintain standards of competence and conduct essential to promote safety of life and property at sea.

Although the exact cause or reason for a discharge of oil may be unknown, and is not required to be known to charge the master for violating 33 U.S.C. 1321, there are several potential causes which could reflect upon the master's execution of his duties. These may be things such as defective equipment, improper maintenance, insufficient training of personnel, or inattention to detail. Accordingly, subjecting the master's license and document to suspension and revocation proceedings is soundly based in the policy that such actions are remedial in nature, designed to promote the safety of lives and property at sea.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated at Alameda, California on 30 January 1989 is AFFIRMED.

CLYDE T. LUSK, JR.
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington D.C., this tenth day of April, 1990.

***** END OF DECISION NO. 2498 *****