

NTSB Order No.
EM-123

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 20th day of August, 1985

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

PERRY STEPHEN MANN, Appellant

Docket ME-107

OPINION AND ORDER

Appellant challenges a June 12, 1984 decision of the Vice Commandant (Appeal No. 2363) affirming a three month suspension of his merchant mariner's license (No. 16342) as ordered by Administrative Law Judge Charles J. Carroll, Jr. on July 8, 1982 following an evidentiary hearing completed on July 7, 1981.¹ The law judge had sustained a charge of misconduct on finding proved specifications alleging that appellant on February 16 and 17, 1981 violated 46 USC 390c(a) by operating, as "captain" or master, a passenger-carrying vessel that did not hold a certificate of inspection issued by the Coast Guard.² On appeal to the Board, the

¹Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

²At the time of the voyages at issue in proceeding, 46 USC 390c(a) prohibited the operation or navigation of passenger-carrying vessels that were certificated. 46 USC 390(b) defined a "passenger-carrying vessel" as a vessel which, among other things, "carrie[d] more that six passengers". A passenger was defined in 46 USC 390(a) to include:

"every person carried on board a passenger-carrying vessel other than-

- (1) the owner or his representative;
- (2) the master and the bona fide members of the crew engaged in the business of the vessel who have contributed no consideration for their carriage and who are paid for their services;
- (3) any employee of the owner of the vessel engaged in the

appellant, by counsel, contends that the Coast Guard decision must be reversed because it, among other things, is contrary to evidence establishing that no violation of the statute occurred.³ For the reasons discussed below, we agree that the suspension order cannot be sustained.

The vessel appellant operated on the relevant dates, the M/V CAPTAIN HORNBLOWER, had been chartered by a Chicago company, Gorman Publishing Co., hereinafter the "charterer", from Hornblower Yachts, Inc., an entity engaged in the business of arranging pleasure cruise charters for vessels it either owned or leased and who, for purposes of this opinion, will be referred to as the vessel owner.⁴ The purpose of these charters was to provide dinner cruises on the Bay for employees of Gorman and business associates invited by Gorman who were attending a trade show in San

business of the owner, except when the vessel is operating under a bareboat charter;

(4) any employee of the bareboat charterer of the vessel engaged in the business of the bareboat charterer;

(5) any guest on board a vessel which is being used exclusively for pleasure purposes who has not contributed any consideration, directly or indirectly, for his carriage; or

(6) any person on board a vessel documented and used for tug-boat or towboat service of fifty gross tons or more who has not contributed any consideration, directly or indirectly, for his carriage."

The provisions of section 390 subsequently were repealed and re-enacted, in somewhat different language, in Title 46 United States Code, section 2101, et seq. See 97 Stat. 604, 605 (August 26, 1983).

³The Coast Guard has filed a reply brief opposing the appeal.

⁴Hornblower Yachts was the lessee of, and holder of a purchase option on, the M/V CAPTAIN HORNBLOWER at the time of the charters involved herein and owned a sister vessel, the M/V ADMIRAL HORNBLOWER. The latter vessel is vertificated, and Hornblower Yachts had, several months before the charges were filed against appellant, initiated efforts to have the M/V CAPTAIN HORNBLOWER issued a certificate of inspection. Although the record does not disclose whether such a certificate had in fact been issued, it does appear that the Coast Guard has determined that the vessel is eligible for certification.

Francisco.⁵ The Coast Guard and the appellant agree that if Gorman was a demise or bareboat charterer of the vessel, then the participants on board were guests of Gorman and not "passengers" within the meaning of 46 USC 390, and that the vessel was not required to have a certificate of inspection. If, on the other hand, Gorman was not the demisee of the vessel, then, in the Coast Guard's view at least, those aboard, excluding appellant and the crew, were passengers, and the vessel could not have been operated lawfully without a certificate of inspection.⁶

Section 390 does not define the term bareboat or demise charter. Nevertheless, the term long has been constructed by the courts to describe the relationship created when a vessel owner has "completely and exclusively relinquish[ed] `possession, command and navigation'" of his vessel to another. See Guzman v. Pichirilo, 369 U.S.698, 699 (1962), citing, among other cases, United States v. Shea, 152 U.S. 178 (1894). The Coast Guard's position in this case essentially is that such a relinquishment of control over the vessel was not effectuated in this instance because, among other things, it was not intended, at least not by the charterer, notwithstanding the unequivocal language to the contrary in the written charter agreements, and, therefore, a valid bareboat charter did not exist.⁷ Further, the Coast Guard asserts that "[s]ince [it] was not a party to the agreement it should not be bound by that agreement in its enforcement of the vessel inspection laws "(Reply at 8).⁸ We find ourselves unable to accept the Coast

⁵There were, respectively, 66 and 48 employees and guest of Gorman on board on the two evenings at issue, none of whom were charged for the cruises.

⁶Appellant contends that without regard to the validity of the charter the participants qualified as guest within the meaning 46 USC 390(a)(5) since this was a pleasure cruise and they paid no consideration for the voyage.

⁷The charter agreement for February 17, 1981, for example, stated, inter alia, that "Charaterer shall, at its own cost and expense, man, operate, victual, fuel, maintain and supply the vessel. Owner retains no possession or control whatsoever during the charter period." See C.G. Exh. 4. The February 16 agreement states, in this respect, that "[i]t is hereby mutually agreed that full control and management of the vessel is hereby transferred to the charterer for the term hereof."

⁸Since the Coast Guard presumably never is a party to a private charter agreement its point in this connection is not entirely clear to us. We acknowledge that there may be instances

Guard's view of the mater. We believe that absent proof that appellant knew or reasonably should have known that the charterer did not understand the nature of the agreement it had executed and that the owner did not intend to be bound thereby, the appellant was entitled to rely on the agreement as an arms-length transaction reflecting the signatories' intentions.⁹ The record before us reveals no basis for any conclusion that the appellant, who did not participate in negotiating or arranging the charters, had any knowledge that the parties might have envisioned some relationship not described by the charter agreements. In these circumstances, assuming that the possibility that the charterer did not understand or intend all of the legal consequences of the agreement it executed and that the owner did not intend to relinquish control of his vessel affected the agreements' validity as a bareboat charter, appellant's license should be subject to a remedial sanction only if the actual operation of the charters was inconsistent with a genuine bareboat transaction. We perceive no indication that it was.

There is no evidence that during the term of the charter the vessel owner in fact exercised or attempted to exercise, either personally or by constituting appellant an agent, the control over the vessel that the charter agreements purported to transfer entirely to the charterer.¹⁰ In connection we recognize that the

in which the Coast Guard may properly "look beyond" the terms of an agreement to ascertain its true character. At the same time, however, the Coast Guard's well-intentioned concern that the vessel inspection laws not be thwarted by purported charter agreements must in appropriate circumstances yield to congressional will to exempt certain charters from the reach of those laws.

⁹The Coast Guard does not argue that the written charter agreements were themselves in any way inadequate for purposes of establishing a bareboat charter. We note in this respect that "[n]o technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command and control." United States v. Shea, supra, 152 U.S. 178, 14 S.Ct. 519 (1984).

¹⁰The Coast Guard's reliance on precedent to the effect that courts are reluctant to find a demise where the purposes of the charter can be accomplished without such a transfer is misplaced. Those cases largely involve the efforts of courts, in the context of suits for damages assertedly caused by the unseaworthiness of a vessel, to discern the legal relationships between vessel owners and those using their vessels where their written agreements, if any, did not resolve the issue.

charterer did not seek out appellant's services as master nor did it pay him directly for his services. We recognize also that appellant frequently has been engaged as master on vessels made available for charter by Hornblower Yachts. We do not agree, however, with the Coast Guard's contention that these factors compel the conclusion that appellant operated the charters on behalf of the owner. In the first place, it does not appear that the charterer had no choice contractually in the matter of selecting a master-or in how to pay for his services. Even if the charterer had no choice, moreover, the fact that the owner offered the position to appellant and subsequently paid him from funds received from the charterer (whose invoice for the charters included discrete amounts for the services of a master and the crew) does not establish control by the owner over the appellant during the charters.¹¹ In the second place, contrary to the Coast Guard's apparent view of the issue, the employment of the master "by the owner is not fatal to the creation of a demise charter..., for a vessel can be demised complete with captain if he is subject to the orders of the demise during the period of the demise." Guzman v. Pichirilo, supra, 369 U.S. at 701. The Coast Guard presented no evidence that appellant was subject to the order of anyone save the charterer on the voyages in question.

In view of the foregoing we conclude that the evidence does not establish that the appellant knew or should have known that these voyages were not being operated as bareboat charters in accordance with the written agreements that had been executed.¹² As a result, assuming, arguendo, that the vessel was required to

¹¹We think it also of no consequence vis a vis the appellant, at least, that the dinners for the cruises were furnished by a caterer in which the vessel owner had a financial interest. There was no showing that the charterer was not free to retain the services of a different caterer.

¹²We recognize that the appellant was aware that the Coast Guard and the vessel owner were engaged in ongoing, protracted discussions on whether the charter agreements the owner was using placed the vessel beyond the reach of the inspection statute and that the Coast Guard on two occasions, including on February 16, after the first of the two Gorman charters had been operated, had expressed the view that they did not. Nevertheless, the issue before us is not whether the Coast Guard is correct in its position that valid bareboat charters were not created, but whether appellant's operation of the CAPTAIN HORNBLOWER was consistent with the terms of the charter agreements that were valid on their face and whether he had knowledge that the intent of the vessel owner and the charterer was not reflected by the agreements.

have a certificate of inspection, an issue we do not reach, no legitimate enforcement interest would be served by a suspension of appellant's license for his operation of the uninspected vessel.¹³

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is granted, and
2. The order suspending appellant's marine license is reversed.

GOLDMAN, Vice Chairman and BURSLEY, Member of the Board, concurred in the above opinion and order. BURNETT, Chairman, filed a dissent.

Commandant v. Mann, Docket ME-107

BURNETT, Chairman, dissenting:

I dissent from the majority's decision not to hold appellant accountable for the operation of an uninspected vessel on the two dates in issue. I think the circumstantial evidence, if not more that sufficient to establish that the appellant knew or should have known that valid bareboat charters had not been created between the vessel owner and the charterer, should have at least prompted appellant to inquire as to the bona fides of the relationship the charter agreements purported to establish. To the extent that such an obligation may not generally be understood to exist by masters engaged in similar charter operations, an argument could be made that the sanction in the instant matter, if the Coast Guard's charges were upheld, should be minimal, perhaps no more than an admonition. In any event, I would not allow this appellant to avoid liability entirely in circumstances where he could have easily ascertained the actual intent of the parties with respect to the control and management of the vessel during the charters.

Jim Burnett
Chairman

¹³The record demonstrates that at least some of the Coast Guard personnel involved in the prosecution of this incident see the exemption for bareboat charters as a "loophole" in the inspection laws and believe that those small vessel owners who would avail themselves of the exemption should be cited. See Appellant's Exh. A. If the Coast Guard believes that there is a safety issue involved in exempting bareboat charters from the certification requirements, its resources should be directed to bringing about a change in the inspection laws.

