

NTSB Order No. EM-179
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 27th day of October, 1995

ROBERT E. KRAMEK, Commandant, United States Coast Guard,

v.

MARK R. EMERY,
Docket ME-160

ORDER DISMISSING APPEAL

The Vice Commandant has moved to dismiss the appeal in this proceeding on the ground that the Board lacks jurisdiction to decide the legal issue it presents. For the following reasons, we will grant the motion to dismiss, to which the appellant submitted a memorandum in opposition.

In this proceeding the Coast Guard suspended appellant's license (No. 639033) and merchant mariner's document (No. 370701102) for 24 months (8 outright and 16 remitted on 24 months' probation) on unrelated charges of misconduct (reporting to his place of marine employment, 'in anticipation of operating the commercial passenger vessel FRIENDSHIP,' while intoxicated) and violation of law (conviction in a Michigan court of driving while intoxicated). Only the latter charge concerns us here.

The violation of law charge sustained against the appellant rests on 46 U.S.C. # 7703(3), a statute that authorizes the

suspension or revocation of a seaman's license or document if he has been convicted of an offense such as driving while intoxicated.(1) On appeal, the appellant, while not challenging the factual predicate for this charge, contends that the statute itself is unconstitutional. In its motion to dismiss the Coast Guard asserts, correctly, we think, that the appellant's contention should be re-directed to the courts, for the Board is not empowered to review the constitutionality of the authority 46 U.S.C. # 7703(3) bestows on that agency. (2)

The appellant, albeit not directly disputing the Coast Guard's position that constitutional challenges of the kind presented on this appeal ordinarily must be resolved in the federal courts,(3) suggest that it was necessary for him to raise the issue before the Board in order to avoid a judicial ruling,

(1)46 U.S.C. # 7703(3) provides as follows:

7703. Bases for suspension or revocation

A license, certificate of registry, or merchant mariner's document issued by the Secretary [of Transportation] may be suspended or revoked if the holder--

* * * *

3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 205(a) (3) (A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401 note).

(2)The parties have not directed our attention to any case in which we have explicitly disavowed authority to pass on the constitutional validity of a statute administered by the Coast Guard. However, our decision in Commandant v. Raymond. NTSB Order EM-175 (1994), cited in the Coast Guard's motion, clearly held that challenges to the constitutionality of Coast Guard regulations, there involving drug testing, could not be entertained. It follows that the Board cannot properly rule on the constitutionality of the statutory provisions that establish the Coast Guard's regulatory responsibilities.

(3)The appellant suggests, nevertheless, that our decision in Commandant v. Blake. 6 NTSB 1645 (1989)(Holding, among other things, that no unconstitutionally seized evidence had been admitted against him at his revocation hearing), reveals an inconsistency in our precedent on the subject. We disagree. That we are not empowered to review the constitutionality of the Coast Guard's authority to revoke a license or document does not mean that we lack the power to insure that no constitutional error occurs during the Coast Guard's adjudication of a specific case involving the exercise of that authority.

had he not done so, that he had failed to exhaust his administrative remedies. While we do not necessarily agree that the question had to be brought to us in the first instance, our disposition of the Coast Guard's motion to dismiss should satisfy any applicable exhaustion requirement.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Coast Guard's motion to dismiss is granted, and
2. The appellant's appeal is dismissed.

HALL, Chairman, FRANCIS, .. Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above order.