

In The Matter of License No: 106813
Issued to: DAVID A JONES

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

489

DAVID A. JONES

This appeal comes before me by virtue of Title 46 United States Code 239(g) and 46 Code of Federal Regulations Sec. 137.11-1.

On 4 August, 1950, an Examiner of the United States Coast Guard at New York City suspended License No. 106813 issued to David A. Jones upon finding him guilty of "misconduct" based upon two specifications alleging that while serving as Master on board the American SS FLYING ARROW, under authority of the document above described, between 24 April and 8 May, 1950, he did "wrongfully permit the equipment of one of the vessel's lifeboats to remain out of the said lifeboat while the vessel was at sea"; and, on or about 10 July, 1950, while the vessel was navigating the Panama Canal, he did "wrongfully hazard the safety of one Peter C. Wilbraham and one Paul J. Clarke, able bodied seamen aboard said vessel by ordering said seamen to work on the forward part of the stack in close proximity of the vessel's steam whistle." Two other specifications were found "not proved" by the Examiner.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Appellant was represented by counsel of his own selection and he entered a

plea of "not guilty" to the charge and each of the four specifications.

Thereupon, the Investigating Officer and counsel for Appellant made their opening statements and the Investigating Officer introduced in evidence the testimony of several witnesses who were members of the crew on the FLYING ARROW for the voyage covering the dates contained in the specifications.

In defense, Appellant offered in evidence his own testimony under oath and the testimony of the Chief Engineer on the FLYING ARROW.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel, the Examiner found the charge "proved" by proof of the above two specifications and entered an order suspending Appellant's License No. 106813, and all other licenses, documents and certificates issued to him, for a period of six months on twelve months probation.

From that order, this appeal has been taken and it is urged that, on the facts and on the law, there is no basis for concluding that Appellant was guilty of "misconduct" within R.S. 4450 because there is no evidence sufficient to establish that Appellant acted "wrongfully." Proof of the ultimate facts alleged, that the lifeboat was not equipped, does not *per se* prove that Appellant acted "wrongfully"; nor is the Examiner's finding that Appellant committed an "error in calculation" or an "error of judgment," by violating the regulations pertaining to lifeboat equipment [46 C.F.R. 59.10a(b)] consistent with the finding that he acted "wrongfully." Since Appellant had taken all necessary precautions to protect the two seamen who painted the stack, he did not hazard their safety nor did he have any intention of doing so. Therefore, Appellant did nothing which was "wrongful" in this respect.

APPEARANCES: Messrs, Hunt, Hill and Betts of New York City by A. V. Cherbonnier, Esquire, of Counsel

FINDINGS OF FACT

Appellant was acting under the authority of his License No. 106813 as Master of the American SS FLYING ARROW on a foreign voyage extending from 10 March, 1950, to 17 July, 1950.

Prior to her departure on the voyage from New York, the vessel passed annual inspection. Some work was done on the starboard lifeboat at this time but it was not painted.

On about 24 April, 1950, while the FLYING ARROW was at Bombay, India, Appellant issued orders for the starboard lifeboat to be completely stripped, chipped, and painted. A reasonable length of time, in which to complete this job in the intended manner and replace the equipment in the lifeboat so that it would be ready for immediate use, was a minimum period of about one week. This work was begun two days before the vessel was scheduled to depart from Bombay and, consequently, the starboard lifeboat had no equipment in it while the vessel was at sea enroute from Bombay to Manila, Philippine Islands. The boat was given three or four coats of red lead (over a period of at least three or four days) before it was painted. The job was completed and the equipment was fully replaced in the boat on about 8 May, 1950 - approximately two weeks after the work had been commenced.

Despite the fact that the port lifeboat was at all times ready for use and it was large enough to accommodate the entire crew and passengers on the FLYING ARROW, this was a violation of Title 46 Code of Federal Regulations 59.10a(b) which provides, in part, that "lifeboats * * * shall be fully equipped before the vessel leaves port, and the equipment shall remain in the boat * * * throughout the voyage."

In the afternoon of July, 1950, the FLYING ARROW anchored on the Pacific side of the Panama Canal awaiting her passage through the Canal on the following day. The vessel's stack had been recently painted but a subsequent storm had ripped most of the paint off the forward part of the stack. Appellant and the Chief Mate discussed the matter and agreed that the damage should be repaired while the vessel was transiting the Canal. During the remaining hour of working time available after the FLYING ARROW had anchored on 9 July, the Chief Mate rigged boatswains' chairs and made other necessary preparations for painting the stack on the following morning.

On 10 July, 1950, the FLYING ARROW got underway at 0600 and completed her passage through the Panama Canal by approximately 1500. At about 0900 on this date, Wilbraham and Clarke turned to under orders from the Chief Mate to paint the forward part of the stack. The vessel was then following a winding course through Culebra Cut and the minimum visibility of the water to be traversed up ahead was approximately half a mile. The pilot who was in charge of the navigation of the vessel, an apprentice pilot and the Junior Third Mate who was the officer on watch, were in the wheelhouse. Appellant was on the wing of the bridge outside of the wheelhouse. One-way traffic was in effect on Culebra Cut. In addition to the shore signal towers which gave visual warnings of any approaching traffic, the pilot was aided by a ship-to-shore radio-phone. The pilot on the FLYING ARROW talked with the pilot on another vessel at the far end of the Cut who was waiting for the FLYING ARROW to clear the Cut before taking the other vessel through in the opposite direction.

The whistle of the FLYING ARROW is about three and one half feet down on the forward part of the stack and a boatswain's chair was rigged about two feet from the whistle. The pilot was requested to give a few minutes notice prior to blowing the whistle while the men were working on the stack and the Junior Third Mate was instructed to immediately notify the men on the stack if any such notice was received from the pilot. Appellant considered that this would give the men ample time to remove themselves from any danger of being injured by the steam from the whistle.

While Clarke was making the gear ready to paint the stack, Wilbraham followed the customary procedure of going to the wheelhouse and requesting that the whistle be secured while he and Clarke were working on the stack in the vicinity of the whistle. The pilot stated that the whistle could not be secured while the ship was passing through the Canal. Wilbraham walked out of the wheelhouse onto the wing of the bridge where he met Appellant and told him that the painting would not be done unless the steam whistle was secured. Appellant ordered Wilbraham to paint the stack or he would be put in irons. Wilbraham then joined Clarke and the two seamen painted the forward part of the stack. The whistle was not sounded during this time but fumes were being constantly emitted from the stack and some of this smoke got on the

two seamen and dirtied the fresh paint.

There is no record of any disciplinary action, other than two admonitions by Investigating Officers, having been taken against Appellant during his twenty-five years at sea.

OPINION

I am in agreement, for the most part, with the views expressed by the Examiner concerning the two specifications which were found proved. But it is my opinion that the conduct of Appellant, in permitting the starboard lifeboat to remain completely stripped of equipment while the FLYING ARROW was at sea, was something more than an "error in calculation" or an "error of judgment."

Appellant claims that proof of the facts that the lifeboat was not equipped and that a Coast Guard regulation was thereby violated does not *per se* establish that Appellant acted "wrongfully." There is no necessity to resolve this question since there is the additional proof, which was stipulated between the parties, that the annual inspection of the FLYING ARROW was satisfactorily completed before the vessel left on her voyage and less than two months before the events occurred on which this specification is based.

Since the regulations require that the "inspectors shall satisfy themselves that every lifeboat, together with its equipment, of all vessels, is in every respect in good condition and ready for immediate use" (46 C.F.R. 59.39), the presumption arises that the starboard lifeboat was "in good condition and ready for immediate use" at the time of the annual inspection. In the absence of any evidence to controvert this *prima facie* proof, it must be accepted as conclusive on this particular issue. This is sufficient to establish that Appellant's action was "wrongful" since he permitted this presumably seaworthy lifeboat to be in an unseaworthy condition while the vessel was at sea.

If there were proof that the lifeboat had been rendered unseaworthy by some intervening event between the time of the annual inspection and the time alleged in the specification, there

would be some merit in Appellant's contention that the violation of the regulation was not "wrongful." Since Appellant permitted the status of the boat to become completely useless on the high seas, his action was more than an excusable "error of judgment" and it was wrongful conduct.

With respect to the specification alleging that Appellant wrongfully hazarded the safety of two seamen by ordering them to paint the stack although the nearby whistle was not secured, Appellant puts great stress on the contention that no such order was given "wrongfully" since Appellant did not have any intent that the safety of the seamen should be endangered. The use of the word "wrongfully" in the specification does not necessitate the proof of an intent to hazard the safety of the seamen. If the word "willfully" had been used in the specification, then it might be required to show that Appellant had a specific intent or purpose to do something wrong. The two words are not synonymous because although the meaning of "wrongful" is comprehended within the definition of "willful," the reverse is not true for the reason pointed out above.

But Appellant further urges that the men were not, in fact, in any danger of being injured by the steam from the whistle because Appellant had taken such precautions as would protect them against any chance of the whistle being sounded before the seamen had been given ample time to stand clear.

As pointed out by the Examiner, there was testimony to the effect that an emergency situation might have arisen which would require the immediate use of the whistle. Several witnesses testified that in their experience they had never known a stack to be painted while the vessel was underway. There was also uncontradicted evidence that it was customary for the seamen to request or verify that the whistle is secured before men attempt to paint the stack. This leads me to the conclusion that, Appellant, despite the precautions taken, "wrongfully" required this routine maintenance work to be performed at a time when the steam whistle could not legally be secured.

This is in accord with the line of court decisions which require that seamen be furnished a safe place to work. A case

similar to this is one in which it was said that the test of "reasonable safety" varies with prevailing conditions and depends upon whether the requirement of the seaman is one which a reasonably prudent superior would order under the circumstances. *Matson Navigation Company v. Hansen (CCA 9, 1942)*, 132 F. 2d 487. The court held that the seaman was entitled to damages for being required to work in an unsafe place since " * * * the operation [performed by the seaman] could have waited the smooth waters of Honolulu harbor" instead of being done while the vessel was at sea.

There is no need for me to elaborate on the views expressed by the Examiner pertaining to this specification. Strict discipline of the general nature practiced by Appellant is extremely desirable on American merchant marine vessels but, in this instance, Appellant went beyond the limits of discipline by requiring seamen to perform work which might unnecessarily have caused them to be seriously injured. Fortunately, these men were not injured but I have repeatedly stated that the purpose of these proceedings is remedial, and that the charge of misconduct is based upon conduct constituting potential as well as actual danger to life and property at sea.

CONCLUSION

The period of suspension and probation will be reduced to some extent due to the technical nature of the first specification in view of the fact that 46 C.F.R. 59.10a(b) was amended in November, 1950, by adding the provision that cargo vessels may have lifeboats cared for at sea if the remaining lifeboats are "sufficient to accommodate all persons on board" and "are fully equipped and ready for use at all times"; and also because of the absence of any direct order from Appellant to Clarke pertaining to painting the stack (although it was indirectly Appellant's order passed on to the two seamen by the Chief Mate).

No implication may be drawn, from this decision, that seamen are at liberty to disobey the orders of their superior officers whenever the seamen feel that compliance with orders might result in their personal danger. It should be noted that Wilbraham carried out Appellant's order, when it was not retracted, even though he had serious misgivings concerning the undertaking

assigned to him.

ORDER

The order of the Examiner dated 4 August, 1950, is hereby modified to read as follows:

That License No. 106813, issued to Appellant, and all other licenses, documents and/or certificates, be, and the same are hereby suspended for a period of three (3) months. This suspension shall not be effective provided no charge is proved against Appellant under Section 4550 of the Revised Statutes of the United States, as amended, for acts committed within sixs (6) months from 4 August, 1950.

A C. Richmond
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 1st day of June, 1951.

***** END OF DECISION NO. 489 *****

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