

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD,
Complainant,
vs.

License Number 764942

ISSUED TO:
GARY B. EVANS
Respondent

Docket Number: 99-0285

DECISION AND ORDER

PETER A. FITZPATRICK
United States Administrative Law Judge

APPEARANCES:

FOR THE COAST GUARD

LCDR R.J. Raksnis
CWO Stephen E. Sattler
United States Coast Guard
Marine Safety Office
1502 23rd Street
Wilmington, North Carolina 28405

FOR THE RESPONDENT

Geoffrey A. Losee, Esq.
ROUNTREE & SEAGLE, LLP
2419 Market Street
Wilmington, North Carolina 28403

I.
STATEMENT OF THE CASE

On October 19, 1999 the Coast Guard Investigating Officer filed a Complaint against the Respondent containing the following pertinent Jurisdictional and Factual Allegations:

JURISDICTIONAL ALLEGATIONS

The Coast Guard alleges that you failed to report the marine casualty following the allision between the barge, MARINERS HARBOR, and the Thomas Rhodes Highway Bridge as it was being towed by the tug, NEPTUNE, along the North Cape Fear River. This is a direct violation of the reporting requirements listed in 46 CFR 4.05-1. Additionally, the Coast Guard alleges that you served as Operator of the tug NEPTUNE without holding the proper credential in violation of 46 CFR 15.401.

1. Respondent's address is as follows:

[REDACTED ADDRESS]

2. Respondent holds the following Coast Guard-issued credential(s):
License Number 764942.
3. Respondent acted under the authority of that license on December 31, 1998, by: serving as Operator onboard the tug, NEPTUNE (O.N. D593075), as required by law or regulation.

**FACTUAL ALLEGATIONS –
Misconduct/Violation of Regulation**

1. The Coast Guard alleges that on December 31, 1998, the Respondent was serving as the Operator onboard the Tug NEPTUNE (Official Number D593075) as it was towing the barge, MARINERS HARBOR (Official Number D261965), northbound along the North Cape Fear River;
2. The Coast Guard alleges that during the transit, the MARINERS HARBOR allided with the Thomas Rhodes Highway Bridge causing approximately \$7,000 damage to the fendering system;

3. The Coast Guard alleges that the Respondent failed to report the allision with the Thomas Rhodes Highway Bridge to the cognizant Officer in Charge, Marine Inspection as required by the Notice of Marine Casualty regulations found in 46 CFR 4.05-1;
4. The Coast Guard alleges that the Respondent served as Operator onboard the NEPTUNE without holding the proper towing endorsements and appropriate tonnage allowances. The NEPTUNE is a documented towing vessel of 190 gross tons under the laws of the United States. The Respondent's license authorizes service as, "Master of Near Coastal Steam or Motor Vessels of Not More Than 100 Gross Tons."

The proposed order sought was 6 months Outright Suspension of Mr. Evans' Coast Guard License.

Mr. Evans denied all the allegations of the Complaint and requested a hearing. The case was assigned to this Judge by Notice of Assignment dated October 21, 1999. The hearing was set for Wilmington, NC on December 1, 1999. Subsequently, Mr. Evans sought a one-month continuance until January, 2000 and the request was granted. His request for a change of venue to Port Canaveral, Florida, however, was denied. Subsequently, the hearing was set for January 20, 2000 at the Federal Courthouse at Wilmington by Order dated November 29, 1999.

Later, a second continuance was requested by Mr. Evan's counsel on January 10 and I scheduled a Pre-Hearing Conference by telephone to hear that motion on January 12, 2000. Mr. Losee, Respondent's attorney, and LCDR Raksnis were present. Counsel indicated that he had been retained on the 10th and needed time to prepare. The Coast Guard asserted that the witnesses had already been rescheduled once and that it would be

difficult to reschedule again. I ruled that the hearing would proceed as scheduled but that I would be receptive to a 30-day continuance for the presentation of the defense.

The hearing convened as scheduled and the Respondent, his counsel, and the Investigating Officers were present. The Coast Guard presented seven witnesses (including the Respondent, Gary Barton Evans) and sponsored 20 exhibits. The list of witnesses and exhibits is set out in Attachment One.

At the outset, the Investigating Officer requested the opportunity to present certain distantly located witnesses by telephone. That motion was granted. (Transcript of January 20, 2000 (hereinafter referred to as Vol. I) Tr. 9). Also, the Coast Guard's motion to allow the submission of the unsworn statement of Mr. Vive Griffin, a witness who died after the incident involved but before the hearing, was reserved pending the proffer of the document. (Vol. I Tr. 10-11). There were no other preliminary matters. (Vol. I Tr. 11-12).

At the conclusion of that session I granted Respondent's request for a continuance to present the defense. The second session was set for March 8, 2000 at Wilmington. Another Pre-Hearing Conference by telephone was held the week before the March 8, 2000 hearing and at that time Mr. Losee sought leave to file affidavits with a Motion for Summary Judgment. That request was opposed by the Investigating Officer and denied. (Transcript of March 8, 2000, (hereinafter referred to as Vol. II) Tr. 5-7).

At the outset I ruled that IO Exhibits 8 and 9 were not admitted. I continued my previous ruling to reserve a decision on the admissibility of IO-7. (Vol. II Tr. pp. 13-17).

I have now examined the law with regard to the unsworn statement of the deceased potential witness, Vive Griffin, and found that this issue is addressed Subpart H – Evidence in 33 C.F.R. 20.802. In relevant part it states:

§ 20.802 Admissibility of evidence.

(a) The ALJ may admit any relevant oral, documentary, or demonstrative evidence, unless privileged. Relevant evidence is evidence tending to make the existence of any material fact more probable or less probable than it would be without the evidence.

(b) The ALJ may exclude evidence if its probative value is substantially outweighed by the danger of prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

Mr. Griffin's statement reflects his discussion with Respondent on New Year's Eve and is substantiated by testimony of Mr. Harper and Mr. Goff. I find the statement is relevant to the material issues in this case. I do not believe the danger of prejudice or confusion of the issues outweighs its probative value. Accordingly, IO-7 is admitted. See Appeal Decision No. 2603 (HACKSTAFF), pp 4-5 (1998).

At the second session, Mr. Evans was called by his counsel and resumed his testimony. Mr. Darrell Culp also testified for the defense. One exhibit (Respondent's A) was offered and admitted. After both sides rested and closing arguments were presented, I indicated that I had "grave reservations with respect to the credibility of Captain Evans' testimony." (Vol. II Tr. 133). I announced that I felt Evans was not telling the truth. I also indicated that the evidence in support of the Coast Guard's case was "very powerful" and "... a very strong case [was] made out here on these matters [sic]." (Vol. II Tr. 134). I took the case under advisement to carefully review the evidence but ordered that Mr. Evans' Coast Guard License be impounded pending the decision.

In view of the fact that Evans was alleged to have hit a highway bridge and also failed to notify the Coast Guard of the incident, his continued operation under his license during the interim, in light of the "powerful" evidence presented, was not appropriate since he constituted a danger to life and property.

The case is now ripe for decision.

II. FINDINGS OF FACT

1. Gary B. Evans is the holder of United States Coast Guard License No. 764942 which authorizes him to serve as Master of Near Coastal Stream or Motor Vessels of Not More Than 100 Gross Tons. The license was issued at Miami on September 27, 1995 and expired 5 years from that date.
2. On December 31, 1998 and January 1, 1999, the tug NEPTUNE (O.N. D593075) was a United States vessel owned by Inter Development Corporation, Miami, Florida. The Certificate of Documentation issued to the vessel on November 19, 1998 and in effect on the dates above, shows that the vessel displaces 190 Gross Tons. (IO-13).
3. The Certificate of Admeasurement issued by the Coast Guard to BRENTON (the previous name of the NEPTUNE) shows that the vessel by that measurement system, displaced 190.97 Gross Tons and 101 Net Tons. (Id.).
4. The barge MARINERS HARBOR is an unmanned, steel, tank barge which displaces 1278 Gross Tons. It is 229.40 feet in length and 42.9 feet at the beam. It has a draft of 14.5 feet. (IO-15).
5. On December 31, 1998 the NEPTUNE and the MARINERS HARBOR were moored at Roderick Marine Terminal at Peter's Point on the Northeast Cape Fear River. (Tr.

38-39). Coast Guard Chief Petty Officer W.E. Olmstead boarded the MARINERS HARBOR on the morning of December 31, 1998 accompanied by Petty Officer Chalk. (Tr. 40-41). The barge was inspected to determine “. . . it was not carrying any material that it was not supposed to be.” (Tr. 42). Olmstead found that all the tanks “were very dry.” (Id.). The barge was “empty and it was very tight.” (Tr. 43).

Chief Olmstead conferred with the on-site representative (Hardin) and was advised that the NEPTUNE brought the MARINERS HARBOR to the terminal. (Vol. I Tr. 43). The Coast Guard officials departed in mid to late morning on that same day (December 31). (Vol. I Tr. 44).

6. The following morning (January 1), Chief Olmstead drove past Roderick Terminal on his way to work at the Marine Safety Office, Wilmington and observed that the NEPTUNE and the MARINERS HARBOR were not there. (Vol. I Tr. 46). Once at the office, he called various sources and discovered that the flotilla had been refused passage by the bridge tender at the Navassa Railroad Bridge on New Year's Eve. (Vol. I Tr. 47). He also determined that it had eventually passed through that draw and was moored further up stream at the High Rise Services Terminal. (Vol. I Tr. 47-48).
7. The Thomas Roads Highway Bridge spans the North Cape Fear River between Point Peter and the Navassa Railroad Bridge. (Vol. I Tr. 159). The only route for a tug and barge between Point Peter and the High Rise Services Terminal is up the North Cape Fear River and under the Thomas Rhodes Highway Bridge. (See Vol. I Tr. 160-161).
8. On the evening of December 31, 1998 at approximately 1800, Kenneth Goff was serving aboard the tug CAPTAIN JIMMY as Captain. He was downbound from the

- International Paper Plant at Riegelwood . (Vol. I Tr. 162, 178). He was monitoring Channels 13 and 16 and overheard the bridge operator on the Navassa Railroad Bridge warn another flotilla that it was about to hit the bridge. (Vol. I Tr. 163).
9. As Goff approached the Navassa Railroad Bridge he observed the NEPTUNE and a barge awaiting his passage below the bridge at the "old fertilizer dock." (Vol. I Tr. 164-166). The Captain of the NEPTUNE asked if Goff would assist. (Vol. I Tr. 166). Goff declined but relayed the request to his supervisor. (Id.). At the time the NEPTUNE was made up on the barge's "hip." (Vol. I Tr. 164).
 10. The CAPTIN JIMMY continued down river and approached the Thomas Rhodes Bridge. Goff noticed the red fender lights on one end were out. He also observed that the handrail and decking on the fender system were damaged. (Vol. I Tr. 169).
 11. During the approximately 18-24 hours on Goff's trip up to the paper plant and return, there was no other river traffic except the NEPTUNE. (Tr. 170-171). Very little commercial traffic transits the North Cape Fear River near the High Rise. (Vol. I Tr. 171). A dinner boat, the HENRIETTA, is seen in the area "once in a while." (Id.). Goff reported the damage he had seen to his supervisor. (Vol. I Tr. 173).
 12. The Coast Guard was notified of the damage to the bridge by William Murrell, Hanover Towing, on the Tuesday following New Year's Day. (Vol. I Tr. 49). Immediately, Chief Olmstead dispatched Petty Officer Meier to the site and he took photographs of the damage to the bridge that same day (January 6, 1999). (Vol. I Tr. 99-103). (IO Exhibits 5, 6). Meier also visited the High Rise terminal and took pictures of the MARINERS HARBOR that same day. (Vol. I Tr. 107) (IO-5,6).

13. On January 27, Chief Olmstead, another Coast Guardsman, and Officer T. Eason of the Wilmington Police Department inspected the Thomas Rhodes Bridge and took wood and paint samples from the most heavily damaged area. (Vol. I Tr. 60). Four samples were taken, placed in separate envelopes and sealed with tamper-proof tape. (Vol. I Tr. 61). Next, the team attempted to get samples from the MARINERS HARBOR at the High Rise Terminal but the heavy flotsam and debris in the water prevented them from approaching the barge. (Vol. I Tr. 61-62). The samples from the bridge were brought to the Marine Safety Office and secured in the vault. (Vol. I Tr. 62-63).
14. Over one month later, on February 17, 1999 Petty Officer Meier and Fireman Shannon Davis visited the MARINERS HARBOR at the High Rise and took four paint samples from the barge. (Vol. I Tr. 113-114). See IO Exhibits 2, 6-5, 6-7). Each sample was identified and sealed in a separate envelope and secured at the Marine Safety Office. (Vol. I Tr. 114-116).
15. Subsequently, all the samples were sent by Certified U.S. Mail to the North Carolina State Bureau of Investigation Laboratory with a Request for Examination of Physical Evidence. (IO-3)(Vol. I Tr. 188-189). There, the material was were received by D. Burwell and delivered to Mrs. B. Flanagan, Special Agent and Forensic Chemist. (Id). Eight samples were involved – four from the bridge and four from the MARINERS HARBOR. (IO-3). Each sample was examined by microscope to determine the physical characteristics of the material. (Vol. I Tr. 193). Some of the material was selected and subjected to a microchemical analysis. Solvents and reagents are applied to determine if there was a change in physical properties. (Vol. I

Tr. 193). Next, three samples (Item Nos. 3, 5, and 6) were subjected to infrared spectroscopy to determine the organic composition. (Id). Finally, the samples were subjected to elemental analysis using a scanning electron microscope with energy dispersive x-rays. (Tr. 193). After all the tests were completed, Mrs. Flanagan described the results as follows (Vol. I Tr. at 198-200):

“Q Please report the results of your analysis in this case, in the analysis of samples three, five and six.

A The examination on items three, five and six revealed that they all three consisted of paint chips having a black, dull black, coarse layer, and an orange red, rather coarse layer also. And the testing that I performed showed that there were no differences in their physical or chemical composition. And so, I concluded that they could have originated from the same source.

Q And, once again, if you could refer to SBI5 form and repeat what samples three, five and six are.

A Item three is wood fragments from the Thomas Rhodes Bridge piling. Item five is from the bow of MARINERS Harbor and also item six from the boat.

XXX

Q Were you able to match the paint samples taken from items three, five and six?

A Yes, I determined that they had the same organic and inorganic composition.

Q Are you confident that your test was completed in accordance with your lab practices?

A Yes, it was.

Q Did you complete a written report of your analysis and your conclusions?

A Yes, I did.”

Mrs. Flanagan also observed that the paint chips in sample number 3 (Item 3) were imbedded into the wood. (Tr. 199) and it was likely that resulted from an impact.

(Id).

16. The North Carolina State Bureau of Investigation Laboratory Report issued on April 9, 1999, concluded (IO-11):

“The paint chips in Item 3 were compared to the first two layers of paint in Items 5 and 6 and it was determined that they were physically and chemically consistent. Therefore, the paint chips in Items 3, 5, and 6 could have shared a common origin.”

The report describes Item 3 as a sample taken from the bridge piling. Item Nos. 5 and 6 are paint samples from the barge. (IO-11).

17. James Harper is a Bridge Operator for the CSX Railroad. On the night of December 31, 1998 and early morning of January 1, 1999, he was operator of the Hilton Railroad Bridge and overheard the conversation between the Navassa bridge operator and the Respondent on the NEPTUNE. (Vol. I Tr. 143-144). Vive Griffin was the operator of the Navassa Railroad Bridge during those same hours. (Vol. I Tr. 145). Mr. Griffin died in the interim between the incident on December 31, 1998 and the date of the hearing on January 20, 2000. (Vol. I Tr. 147).

18. Darrell Culp was serving as an unlicensed engineer aboard the NEPTUNE on December 31, 1998 and January 1, 1999. (Vol. II Tr. 77-78). Mr. Culp, who was in the engine room of the NEPTUNE during the flotilla's transit under the Thomas Rhodes Bridge, did not feel the vessel hit anything. (Vol. II Tr. 81-82). The engine log maintained by Culp may not contain accurate data. (Vol. II Tr. 99-100).

III.
ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Respondent, Gary B. Evans and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard in accordance with 46 U.S.C. § 7703 (West Supp. 1999).
2. On December 31, 1998 and January 1, 1999 the NEPTUNE was owned by Inter Development Corporation, Miami Florida and was endorsed for both the Coastwise Trade and for Registry. The vessel displaces 190 Gross Tons.
3. Gary B. Evans was required to hold a Coast Guard License to operate the NEPTUNE. He held such license but it was limited to 100 Gross Tons.
4. While he was serving as Operator of the NEPTUNE, Gary B. Evans negligently allided with the Thomas Rhodes Highway Bridge on the North Cape Fear River.
5. Gary B. Evans failed to notify the cognizant Officer in Charge, Marine Inspection as required by 46 C.F.R. § 4.05-1.
6. Gary B. Evans operated the NEPTUNE without holding proper authority in that his license was limited to vessels of 100 Gross Tons. The NEPTUNE displaces 190 Gross Tons.
7. All Jurisdictional and Factual Allegations asserted against Gary B. Evans in the Complaint filed on October 19, 1999 are **PROVED** by a Preponderance of the Evidence.

IV.
OPINION

1. The Coast Guard has jurisdiction of Respondent and this matter pursuant to 46 U.S.C. § 7703, which states that a Merchant Mariner's document may be suspended or revoked for Misconduct or Negligence. The Coast Guard has the burden of proving

the allegations of the Complaint by a preponderance of the evidence or “by substantial, reliable and probative evidence.” See 33 C.F.R. § 20.701, 702; Appeal Decisions No. 2468 (LEWIN), 2477 (TOMBARI), 2603 (supra); See also, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 100-103 (1981). The proceeding is conducted under the Coast Guard Rules of Practice at 33 C.F.R. Part 20 and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

The allegations are that the Respondent allied with the Thomas Rhodes Highway Bridge, on December 31, 1999; that he failed to notify the Coast Guard of the incident as required by regulation; and that he was not properly licensed to operate the NEPTUNE in that his license was limited to vessels of not more than 100 Gross Tons (the NEPTUNE displaces 190 Gross Tons). The allegations are **PROVED** by a Preponderance of the Evidence.

2. Turning first to the limitations of the Respondent’s license, the evidence reveals that the Coast Guard issued a Certificate of Documentation to the NEPTUNE on November 19, 1998. (IO-13). That document described the vessel’s tonnage as 190 Gross and 101 Net Tons. (Id). That Certificate was on the NEPTUNE at the time of the incident here. (Vol. I Tr. 244-245). Indeed, the Respondent himself acknowledged that fact (Id) and testified that he did not really dispute that he was wrong in this regard. (Vol. I Tr. 238).

In view of the express limitation on Coast Guard License No. 764942, issued to the Respondent on September 27, 1995 restricting service to vessels of not more than

100 Gross Tons, and the NEPTUNE'S Certificate of Documentation indicating that the vessel's Gross Tonnage is 190, this allegation is clearly PROVED.

3. The principal dispute at the hearing involves the allegation that the Respondent allided with the Thomas Rhodes Highway Bridge on the evening of December 31, 1998 causing \$7,000 to the fendering system. Mr. Evans denies that the NEPTUNE hit the bridge while under his command on the 31st. (Vol. II Tr. 28). Indeed, Evans testified at the hearing that earlier that morning a Coast Guard boarding team approached the tug and barge by patrol boat and asked us "when we came in." (Vol. II Tr. 21). "I gave them that information." (Id). Evans also stated that the Coast Guard team (including BM2 Meier) requested information on a bridge (Thomas Rhodes Highway Bridge) which they noticed had been damaged that morning. (Vol. II Tr. 21-22). Moreover, Evans also testified that he noticed the damage when he went under that bridge later that same evening. (Vol. II Tr. 23).

The evidence in support of the allegation is described below. First, it is undisputed that the NEPTUNE, with the MARINERS HARBOR on the hip, departed Peter's Point at approximately 1700 on December 31, 1998, bound for High Rise Terminal Service on the North Cape Fear River. (Vol. II Tr. 19, 25). That route required the flotilla to pass under the Thomas Rhodes Highway Bridge. (Vol. I Tr. 160-162). When the flotilla approached the Navassa Railroad Bridge, which is the next bridge upstream from the highway bridge, the Bridge Tender refused to allow the flotilla to pass since he perceived that the flotilla would hit the bridge. He became very agitated and was afraid for his own safety. He had to be calmed down by

another bridge tender (James Harper) on duty at the nearby Hilton Railroad Bridge. (See Vol. I Tr. 147-148).

That exchange was also overheard by Kenneth Goff who was operating another tug (CAPTAIN JIMMY) with a barge downstream from the International Paper Plant at Riegelwood. (Vol. I Tr. 162). Goff testified that he heard the Bridge Tender say, "You're gonna hit the bridge, you're gonna hit the bridge." (Vol. I Tr. 153). Moreover, Mr. Harper (the Bridge Tender at the Hilton Bridge) testified that he had been stationed at the Navassa Bridge at one time and had never seen a tug try to navigate through the Navassa Bridges with a barge on the hip. Mr. Harper testified that when he worked on the Navassa Railroad Bridge he had 40-50 tug and barge movements per month. "None of them are on the hip, and none of them are towing. It's just a normal hookup with the tugboat in behind the barge." (Vol. I Tr. 156).

Also, Captin Goff testified that the round trip from the Thomas Rhodes Bridge to the paper plant at Reigilwood and return takes about 18-24 hours. During the trip involved here he had not seen any traffic (other than the NEPTUNE with MARINERS HARBOR) on the river. (Vol. I Tr. 170). He also testified that he did not notice any damage to the highway bridge on the transit upstream. (Vol. I Tr. 170).

Mr. Goff also testified that Hanover Towing, his employer, has the only commercial traffic that he knows of that transits the area. Infrequently another tug will go to the High Rise Terminal and the dinner boat, HENRIETTA, occasionally will ply those waters. (Id.) However, tug and barge traffic not operated by Hanover to supply the paper plant is not common.

Finally, the Coast Guard introduced the results of the North Carolina SBI Laboratory Report which concluded that the paint chips (Item #3) taken from the bridge piling (damaged area of the fendering system at the Thomas Rhodes Highway Bridge) was physically and chemically consistent with the paint chips (Items #5 and 6) taken from the barge (MARINERS HARBOR). Those paint chips, the report concluded, "could have shared a common origin."

I am of the opinion that the collection, preservation, and testing of the samples was done properly and that the results do support the conclusion as reported. Chief Olmstead testified that a Coast Guard team with Officer Eason from the Wilmington Police Department took wood and paint samples at the Thomas Rhodes Highway Bridge on January 27, 1999. (Vol. I Tr. 59). The samples were taken from the damaged area of the fender where the impact appeared to have been most severe. (Vol. I Tr. 60). Four specimens were taken and sealed in plastic or ziplock bags. (Id at 61). They were wrapped with tamper-proof tape and later deposited in the vault at the Marine Safety Office. (Vol. I Tr. 61-63).

Four more samples were taken by another Coast Guard team including Petty Officer Meier and Fireman Davis on February 17, 1999 from the MARINERS HARBOR at the High Rise Terminal. Again, the samples were placed in separate envelopes and sealed.

Subsequently, all samples were sent to the SBI Laboratory where they were subjected to a series of tests. Mrs. Flanagan described the four tests applied to the selected samples. She also confirmed that the laboratory report accurately reflected the results of those tests. (Vol. I Tr. 201). The North Carolina SBI Laboratory is a

laboratory accredited by the Association of Crime Laboratory Directors and has not lost that stature since it was acquired. (Vol. I Tr. 198). At the time the tests here were preformed the laboratory was fully accredited. (Id).

I have reviewed this evidence and the claims of the Respondent. With regard to his statement that the Coast Guard already knew of the damage to the Thomas Rhodes Highway Bridge on the morning of December 31, 1998 before he transited that draw, I reject his statement as lacking in credibility. It directly conflicts with Olmstead's testimony that the first notification the Coast Guard had of the damage was the report by Mr. William Murrell of Hanover Towing who, in turn, related the report of the damage from Mr. Goff. (Vol. I Tr. 48-50). That was "early the week following . . . New Year's Day" (Vol. I Tr. 49)

Moreover, Captin Goff testified that he had not seen any damage to the bridge on his passage upstream within 18-24 hours of his return on the evening of December 31, 1998.

Moreover, I do not believe the statements of Mr. Culp who was in the engine room of the NEPTUNE on the passage under the bridge. He claims he did not feel any impact resulting from an allision. (Vol. II Tr. 81-82). I have grave reservations about the accuracy and credibility of his assertions. First, as brought out by the Investigating Officer, Culp was serving as Engineer aboard the NEPTUNE without a Coast Guard license or document. (Vol. II Tr. 83-84). Yet the vessel exceeded 100 Gross Tons as reflected on the Certificate of Documentation (IO-13). 46 U.S.C. § 8701 specifically requires that at least a Merchant Mariner's Document is required for service aboard a vessel of that tonnage. (Vol. II Tr. 84-86).

Moreover, Culp did not know whether the information in his log entries was either accurate or complete. (Vol. II Tr. 98-101). Sometimes he made a log entry when the engines were lit and shut down and other times he didn't. (Id.). Also, he himself, was not sure as to whether the log entries he made were accurate. (Id.). On the whole, I do not believe his testimony is trustworthy.

Reviewing all of the evidence on this issue, I believe the Coast Guard has established by a preponderance of the evidence that the MARINERS HARBOR under the command of the Respondent hit and damaged the fendering system of the Thomas Rhodes Highway Bridge on December 31, 1998. I do not believe the Respondent's denial to the contrary. The law is well settled that a presumption of negligence arises where a moving vessel hits a fixed object, such as a bridge. See Appeal Decision No. 2594 (GOLDEN) p. 4 (1997). That presumption applies here and has not been rebutted by Respondent as discussed above.

4. The remaining allegation is that Respondent failed to report the allision with the Thomas Rhodes Highway Bridge as required by 46 C.F.R. § 4.05-1. That section reads:

Subpart 4.05 – Notice of Marine Casualty and Voyage Records

§ 4.05-1 Notice of marine casualty

(a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Marine Safety Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in ---

- (1) An unintended grounding, or an unintended strike of (allision with) a bridge;

No notice of the allision with the highway bridge by the NEPTUNE or its tow was ever made to any office of the Coast Guard by the Respondent, or for that matter, by anyone else representing the vessel. The damage to the bridge was brought to the attention of the Coast Guard by William Murrell from Hanover Towing. (Vol. I Tr. 49-50). Indeed, the Respondent has continued to this day to deny that he hit the bridge despite the preponderance of evidence to the contrary.

In view of my findings above regarding the allision between the flotilla under Respondent's command and the highway bridge involved here, I find that this allegation of failure to notify the Coast Guard is **PROVED** by a Preponderance of the Evidence.

V.
ORDER

The parties will have 14 days from service of this Decision to submit evidence in mitigation or aggravation of the sanction to be imposed. The Respondent's Merchant MARINERS Personnel Record or record of past offenses is to be submitted by the Investigating Officer.

Also, recommendations regarding the proposed sanction in light of the evidence submitted at the hearing will be received.



PETER A. FITZPATRICK
United States Administrative Law Judge

Done and dated May 25, 2000 at
Norfolk, Virginia

**ATTACHMENT ONE
LIST OF WITNESSES AND EXHIBITS**

WITNESS LIST

Coast Guard Witnesses:

1. Walter Eugene Olmsted
2. Matthew Meier
3. James Harper
4. Kenneth Goff
5. Beth O'Quinn Flanagan
6. Timothy E. Dickerson
7. Gary Barton Evans

Respondent's Witnesses:

1. Gary Barton Evans
2. Darrell W. Culp

EXHIBITS

Coast Guard Exhibits:

1. Digital photograph of the Thomas Rhodes Highway Bridge
2. Sample Transmittal to NC SBI Lab
3. Request for Examination of Physical Evidence to N.C. State Bureau of Investigation
4. Estimate for repairs to bridge
- 5A, 5B, 5C, 5D, 5E, 5F, 5G, 5H – photographs
- 6-1, 6-2, 6-3, 6-4, 6-5, 6-6, 6-7, 6-8, 6-9 – photographs
7. Statement of Vive Griffin

8. Statement of James Harper
9. Statement of Kenneth Goff
10. C.V. of Beth O'Quinn Flanagan
11. Lab report
12. Copies of log book entries
13. Documentation info on tug
14. Vessel description summary on tug
15. Vessel description summary on barge
16. Copy of Captain Evans' license
17. Engineer Culp's log
18. Chart drawn in court
19. Drawing by Mr. Meier
20. Drawing by Mr. Meier

For the Respondent

- A. Drawing by Captain Evans

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing DECISION AND ORDER upon the following parties to this proceeding at the address indicated by federal express:

LCDR R.J. Raksnis
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Lucinda H. Shinault, CLA
Lucinda H. Shinault, CLA
Legal Assistant to the Administrative Law Judge

Done and dated May 25, 2000 at
Norfolk, Virginia