

IN THE MATTER OF LICENSE NO. 404 289
MERCHANT MARINER'S DOCUMENT NO. BK-29590-C1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Albert B. WATTS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1986

Albert B. WATTS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 13 September 1972, an Administrative Law Judge of the United States Coast Guard at Port Arthur, Texas suspended Appellant's license and seaman's documents for three months outright upon finding him guilty of misconduct. The specification found proved alleges that while serving as Master on board the SS TEXACO MISSISSIPPI under authority of the license above described, on or about 11 September 1969, Appellant did authorize the discharge of an oily mixture from the vessel in violation of the Oil Pollution Act of 1961 as amended.

At the hearing, Appellant was represented by professional Counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony

of the Chief Mate, three expert witnesses and the pilot of the aircraft which detected the discharge, and ten exhibits.

In defense, Appellant offered in evidence the testimony of two experts.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then entered an order suspending all documents issued to Appellant for a period of three months outright.

The entire decision and order was served on 27 September 1972. Appeal was timely filed on 4 October 1972.

FINDINGS OF FACT

On 11 September 1969, Appellant was serving as Master on board the SS TEXACO MISSISSIPPI and acting under authority of his license while the ship was at sea. On that date the SS TEXACO MISSISSIPPI was sailing in the North Atlantic on a course of 232° T at a speed of approximately 13.5 knots. The vessel was en route from Detroit, Michigan, where it had discharged its cargo of gasoline and lubricating oil, to Jacksonville, Florida. During the period leading up to the incident in question, the ship had been cleaning its cargo tanks and pumping the residue into number 6 tank, which had a capacity of 10,000 barrels. This residue had been settling in number 6 tank for about 24 hours prior to the time discharge was begun.

The vessel's Oil Record Book and the testimony of the Chief Mate established that at 1700GMT, while still in the North-West Atlantic Zone, a prohibited oil dumping zone under the Oil Pollution Act of 1961 and 33 CFR 151, the vessel began discharging the contents of number 6 tank, which contained approximately 7000 barrels of slops, including 500 barrels of oil residue. The vessel continued to discharge slops intermittently until the tank was empty at about 0300 GMT the following day. The pump being used to empty the tank had a pumping rate of between 1860 and 2860 barrels per hour. The vessel passed out of the prohibited zone about one and one half hours before number 6 tank was empty.

Shortly after discharge began Captain Keith Wrenn of the Canadian Air Force flew over the vessel and noted that it was discharging some substance in the water which "displayed bright bands of color". He continued to observe the vessel for a period of 45 minutes to one hour and took numerous photographs of the vessel's wake.

The photographs taken by Captain Wrenn were studied by two separate scientific groups which had conducted experiments on detection of oil discharges from ships through photographic means. Both groups compared Captain Wrenn's photographs to the ones that they had taken during their controlled experiments and concluded that the Texaco Mississippi had been discharging an oily mixture in excess of 100 parts per million, the maximum allowed in a prohibited zone by the Act.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's numerous stated grounds of appeal will not be dealt with individually, but rather can be condensed and discussed under the following contents:

- (1) that Appellant was improperly charged in that he was charged with misconduct rather than violation of a statute.
- (2) that the use of the Oil Record Book as evidence violated Appellant's right against self-incrimination
- (3) that the Administrative Law Judge's findings are not supported by the weight of the evidence
- (4) that the Administrative Law Judge erred in failing to consider the Table of Average Orders in suspending Appellant's license for three months outright.

OPINION

Appellant's first point on appeal - that he should have been charged for violation of a statute rather than misconduct - is without merit. 46 CFR 137.05-20(b) authorizes a charge of "violation of statute" only where the statute violated is part of Title 52 of the Revised Statutes. The Oil Pollution Act of 1961 is not part of Title 52. Violation of a statute not a part of Title 52 is chargeable as misconduct as violation of "formal, duly established rule." 46 CFR 137.05-20(a) (1).

II

As Appellant noted in his brief, the constitutionality of the record keeping requirements of the Oil Pollution Act of 1961 is not a matter for final determination at an administrative hearing. In any case the question of the constitutionality of the use of the Oil Record Book is not appropriate in this hearing since the Fifth Amendment right against self-incrimination is applicable only to criminal actions, and an R.S. 4450 suspension and revocation proceeding has never been held to be a criminal action.

III

The primary issue raised on appeal by Appellant is whether the findings of the Administrative Law Judge are supported by substantial evidence on the record.

The first method of proof considered by the Administrative Law Judge was the testimony of Captain Wrenn in which he compared what he saw to a table which describes how different amounts of oil would appear visually in the water. Based on this Captain Wrenn estimated that 1500 gallons of oil were discharged during the period of his observation. The Administrative Law Judge correctly concluded that this manner of proof was unreliable because no evidence had been introduced by the Investigating Officer to establish the authenticity or manner of preparation of the table. However, where the reliability and authenticity of this table or similar tables are established to the satisfaction of the Administrative Law Judge, this type of evidence may be valuable in proving violations of oil pollution laws.

The second method of proof considered was the testimony of

three scientific witnesses who had conducted experiments relating to detection of oil discharges from ships by means of photographic comparisons. The Administrative Law Judge also rejected this evidence on the basis that the experiments in which the comparative photographs had been developed were not scientifically proven. While the rejection of the testimony appears to be correct in this case due to the equivocal nature of some of the testimony and the strong rebuttal testimony of Appellant's highly qualified expert, this does not mean that proof of this nature is inevitably unacceptable. If and when a stronger foundation for the reliability of this method of ascertaining and evaluating oil discharges from vessels can be established, it should prove to be a highly valuable enforcement technique.

The third method of proof, the one relied upon by the Administrative Law Judge in his findings, was based on the entries in the Oil Record Book, the testimony of the Chief Mate and "simple mathematics." The Oil Record Book confirms the Chief Mate's testimony that the discharge of the slops contained in number 6 tank was begun well within the prohibited zone. Utilizing the excerpts from the Official Ship's Log, the Oil Record Book and the chart showing the vessel's position during discharge, it seems accurate to conclude that discharge from number 6 tank began at about 1700 GMT on 11 September and was completed at about 0300 GMT on 12 September. This confirmed by the Chief Mate's testimony. Assuming that the vessel was traveling at 13.5 knots, which is undisputed in the record, the evidence indicates that the ship did not depart the prohibited zone until about 0130 GMT on 12 September. As to the contents of number 6 tank, the Chief Mate's testimony was that the tank contained about 7000 barrels of slops, including about 500 barrels of oil. This mixture had been settling in number 6 tank for about 24 hours prior to discharge but some other washing were introduced into the top of the tank on 11 September. The Official Ship's Log indicates the vessel was moving in moderate to heavy sea and swells until the afternoon of 11 September. The rate of discharge of the pump being used to pump out number 6 tank was approximately 1800-2800 barrels per hour.

Captain Wrenn in his answers to interrogatories states that he observed the Texaco Mississippi for a period of about one hour around 1930 GMT on 11 September and that the vessel was discharging for the entire period. He also stated that the discoloration in the vessels wake extended for a distance of 30-40 miles.

Considering the pumping rate at the minimum of 1800 barrels per hour, this means that over 4000 barrels were discharged during the period from about 1700 GMT to 1930 GMT while the vessel was still well within the prohibited zone. If pumping had continued, the entire contents of number 6 tank would have been discharged by 2200 GMT, long before the vessel departed the prohibited zone. On the other hand the Chief Mate testified that pumping was intermittent and it is probable that pumping was discontinued during the early evening for supper, begun again later and completed about 0300 GMT (2300 local time).

Thus, the evidence indicates that the tops of number 6 tank containing the majority of the oil residue were not pumped out until the ship had departed the prohibited zone. The question then becomes whether or not the oil had settled out to the point that all of the portion discharged within the prohibited zone, which amounted to at least 5000 barrels, contained less than 100 parts per million of oil. I think not. The washing when first introduced into number 6 tank would have been fairly homogeneous mixture of oil suspended in water. During the 24 hour settling period the contents of the tank were *continuously* agitated by the movement of the vessel through moderate to heavy seas and swells. It was also agitated to some degree by the introduction of some additional washings on 11 September; even though these washings were introduced through the top of the tank, they would still cause some agitation. Appellant's expert witness, Mr. Lasday, testified that even under these conditions the greatest percentage, in the high 90's would have settled to the top. The fact is, however, that for the bottom contents of the tank to have contained less than 100 parts per million over 99.9 per cent of the oil or all but 0.7 barrels would have had to settle out.

My conclusion is borne out by the statements made by Captain Wrenn in his answers to interrogatories. The Administrative Law Judge discounted Captain Wrenn's statements of what he saw based on inconsistencies; however, part of the inconsistency was derived from a misreading of Captain Wrenn's answers. When Captain Wrenn stated that "the substance had the appearance of small globules of reddish brown, semiliquid as seen from the air," he was not referring to what he observed in the Texaco Mississippi's wake, but rather was in answer to a question concerning whether he had ever observed a ship pumping rusty bilge water and what it looked like. Since Captain Wrenn's testimony is in the form of answers to

interrogatories, I am in as good a position to evaluate it as the Administrative Law Judge. Based on Captain Wrenn's experience and prior observations of ships discharging oil, I find his testimony very credible. The one seeming discrepancy, whether the bands of color he saw were continuous, is not critical in regards to his opinion that what he was seeing was oil in the water. His statements were that he saw a constant pattern of color except as broken by the motion of the sea.

The evidence in the record is that number 6 tank contained water, oil residue and some rust from the tanks. It contained nothing other than oil which would have given off the bright color patterns seen by Captain Wrenn.

It is my conclusion that the decision of the Administrative Law Judge is supported by the evidence on the record and that Captain Watts authorized the discharge of slops containing more than 100 parts per million of oil in a prohibited zone.

IV

Appellant's final argument is that the Administrative Law Judge disregarded the Table of Average Orders and that an admonition was in order in the instant case. The Table of Average Orders is just that, an average. Where the circumstances warrant, the Administrative Law Judge can issue an order of greater severity. In this case it is hard to understand why it was necessary for the Texaco Mississippi to discharge any part of its slops within the prohibited zone. Captain Watts could have easily waited until he departed the prohibited zone before he began discharge. On the facts presented it cannot be said that the Administrative Law Judge's order is too severe.

ORDER

The order of the Administrative Law Judge at Port Arthur, Texas on 13 September 1972, is AFFIRMED.

C. R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D. C., this 15th day of August 1973.

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