

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1198091
Issued to: Alton Bowie JOYNER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2020

Alton Bowie JOYNER

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, now 5.30-1.

By order dated 22 July 1974, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for three months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as a Tankerman on board the T/B OCEAN 80 under authority of the document above captioned, on or about 25 October 1972, Appellant, while said vessel was moored in Carteret, New Jersey, was negligent in his duties in that, during cargo transfer operations, he left the said vessel unsupervised for a period in excess of 30 minutes.

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

The Investigating Officer introduced in evidence two exhibits and the sworn testimony of one witness.

In defense, Appellant offered in evidence the sworn testimony of two witnesses and an exhibit containing the testimony of a witness before a Coast Guard Marine Board of Investigation on 15 January 1973.

After the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He entered an order suspending all documents, issued to Appellant, for a period of three months on twelve months' probation.

The entire decision and order was served on 31 July 1974. Appeal was timely filed on 26 August 1974, and perfected on 2 December 1974.

FINDINGS OF FACT

On 25 October 1974, Appellant was serving as a Tankerman on board the T/B OCEAN 80 and acting under authority of his document while the ship was in the port of Carteret, New Jersey.

At about 2115 on 24 October 1972, the vessel was tied up at the General American Transportation Corp. dock for loading of No. 2 fuel oil and gasoline. Loading commenced at about 2200 and it was agreed that Appellant would stand the regular watch beginning at midnight.

At about 0520 on 25 October 1972, Appellant was seen on the forward deck checking the progress of the loading operation. At about 0530 he left the barge and proceeded to the dock house, where he remained chatting with the dock man for approximately 15 minutes. He then returned to the vessel to check the loading progress. After an undetermined period aboard the barge, Appellant returned to the dock house, informed the dock man that all was well and sat by a window. As the two men conversed, the dock man looked out the window a number of times and observed nothing unusual on the barge. At about 0559 a series of explosions followed by a fire commenced aboard the vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that

- (1) The Administrative Law Judge improperly found the specification proved despite a material variation between the findings of fact and the facts alleged;
- (2) The evidence fails to support the finding that Appellant was absent for a period in excess of 15 minutes: and
- (3) The Judge applied an erroneous standard of conduct.

APPEARANCE: Bigham Englar Jones & Houston, New York

OPINION

The specification found proved originally alleged that Appellant was negligent "by not giving immediate supervision to cargo transfer operations while . . . awake and/or asleep in the deck house." Upon motion of the Investigating Officer, this specification was amended during the hearing to allege negligence "in that you during cargo transfer operations left the vessel unsupervised for a period in excess of 30 minutes." The evidence of record is such that the Judge found an absence in excess of 15 minutes rather than the 30 minutes alleged. He, nevertheless, found the specification proved with the explanation that the period of absence was of no particular significance in light of Appellant's "duty to give his immediate attention to all aspects of the loading . . . during the entire period of the loading."

Appellant contends that this variation between the allegations and the findings is of material significance, that it deprived him of notice as to the issue to be litigated and that it affected the conduct of the defense. Under the circumstances, this appeal is not well taken. The leading case on notice as to the issues to be litigated is *Kuhn v. Civil Aeronautics Board*, 183 F. 2d 839, 841 (D.C. Cir. 1950), wherein it was stated as follows:

It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise.

If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings.

A review of the record in the instant case shows that the evidence presented by both sides was aimed precisely at the question of Appellant's failure to properly supervise the loading operation by reason of his absence from the vessel. The fact of Appellant's absence, rather than its duration, formed the basis for the charge and finding of negligence. Under the circumstances it is quite understandable that Appellant found it necessary to offer the bulk of his defense evidence in a manner calculated to minimize the duration of his absence from the barge. Having in fact been absent for no justifiable purpose, Appellant had no other defense. However, while his efforts in defense were somewhat successful relative to the findings as to the length of his absence, this must not be allowed to obscure the true issue. Appellant failed to prove that he had not absented himself from the vessel without proper excuse.

The Administrative Law Judge properly articulated and applied the standards of "constant attention" and "continuously checking" as noted in Appeal Decision No. [1839](#) (BRENNAN). A tankerman seated in the dock house simply does not measure up to those standards of performance. The Investigating Officer made out a *prima facie* case of negligence by virtue of his evidence as to Appellant's absence. Appellant failed to offer in rebuttal sufficient proof of proper exercise of his responsibilities.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 22 July 1974, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 7th day of April 1975.

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