

In the Matter of License No: A-7370
Issued to: LAWRENCE J. DUGAS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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LAWRENCE J. DUGAS

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 12 January, 1950, an Examiner of the United States Coast Guard at New Orleans, Louisiana, suspended License No. A-7370 issued to Lawrence J. Dugas upon finding him guilty of "negligence" based upon three specifications alleging in substance, that while serving as Master on board the American S. S. ENGINEER, under authority of the document of above described, on or about 3 January, 1950, while piloting said ship in the vicinity of Mile 98 AHP, Mississippi River, he failed to cause a lookout to be stationed on his tow; he failed to initiate or answer whistle signals executed by an approaching vessel; and failed to exercise that degree of prudence and good judgment commensurate with good seamanship as a consequence of which his tow collided with and caused substantial damage to the MV ROSARIO.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Motions, by counsel for Appellant, to continue the hearing and strike all three specifications were denied by the Examiner. Appellant was

represented by counsel of his own selection and he entered a plea of "not guilty" to the charge and the first two specifications. He refused to plead to the third specification on the ground that it was too vague and indefinite. The Examiner entered a plea of "not guilty" to the third specification for Appellant.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of the Master, Pilot and six members of the crew of the ROSARIO at the time of the collision. After submitting this evidence together with several documentary exhibits, the Investigating Officer rested his case. Appellant then waived his opening statement and rested.

When the Investigating Officer had completed his argument, counsel moved to dismiss the three specifications on the ground that there was no evidence showing Appellant was acting under authority of his Federal license or that he was on board the ENGINEER at the time of the accident. After making a finding to this effect, the Examiner permitted the Investigating Officer to testify in order to establish this requisite of proof. The Examiner then found the charge "proved" by proof of the three specifications and entered an order suspending License No. A-7370 and all other valid licenses, certificates and documents issued to Appellant, for a period of three months. A temporary license was issued to Appellant by the Examiner pending decision on appeal.

From that order, this appeal has been taken, and it is urged (1) that Appellant was not afforded sufficient opportunity to prepare a defense; (2) that the specifications were so vague and indefinite that Appellant was unable to determine what acts of negligence he was being charged with; (3 to 5) that the allegations of fact contained in the specifications do not constitute negligence; (6) that the Examiner erred in reopening the hearing, after both the Coast Guard and the defendant had rested their cases and after the Examiner made a finding of fact showing that the prosecution had not proved the specifications, in order to allow the Investigating Officer to prove that part of the specification which the Coast Guard had not proved; (7) that the Examiner erred in allowing the Investigating Officer to testify as to statements made by the Appellant to him in a preliminary investigation; and (8) that the Examiner erred in receiving any testimony of the Investigating Officer since such testimony was illegally obtained.

Counsel in elaboration of Points 6 to 8, submits a memorandum brief in which he discusses at length the various phases of the case touching these points and argues that the reopening of the hearing was unfair and amounted to a denial of justice. He submits that the Investigating Officer had every opportunity to present the Government's case and if it failed to prove its case, as was found by the Examiner, then the Government should not be given multiple opportunities to do so. Counsel further states that this is the first instance within his knowledge that the doctrine of surprise has been invoked in connection with a failure to produce evidence. It is contended that the decision of the Examiner should be reversed and set aside because it is contrary to the law and the evidence.

APPEARANCES: Messrs. LEMLE, MORENO and LEMLE of New Orleans,
Louisiana Pat F Bass, Esquire, of Counsel

Based upon my examination of the Record submitted, I hereby make the following

FINDING OF FACTS

On 3 January, 1950, Appellant was serving as Master on board the American S. S. ENGINEER, under authority of License No. A-7370, while said vessel was crossing the Mississippi River in the vicinity of Mile 98 AHP. The ENGINEER is a tug and, at the times mentioned, she had in tow on her starboard side a barge, the deckhouse of which was as high as the tug's pilothouse and there was no lookout posted on the bow of the barge.

At 1855 on this date, the ENGINEER was in a collision with the MV ROSARIO which had gotten underway from the east bank of the Mississippi River at 1842 and, after turning around, had headed down the river in midstream at about eight knots. The river at the point of collision is about three-fourths of a mile wide. At the time of, and just prior to, the collision the weather was clear and visibility good.

At about 1846, the pilot who was conning the ROSARIO sighted a green light and two regulation towing lights leaving a wharf on the east bank and heading out into the river. The lights were about a mile away and bearing two points on the port bow of the

ROSARIO. It was later ascertained that these lights were on the Tug ENGINEER and its tow; and that the green light observed was on top of the pilothouse of the ENGINEER which was proceeding from the east side on a course across the river at an angle of about forty-five degrees.

At 1850, since the bearing of the lights from the ROSARIO had remained constant, the ROSARIO gave one whistle blast and immediately her helm was put over to the right about ten degrees in order to alter course to starboard. There was no reply to this signal and the ENGINEER continued on her crossing course with the ROSARIO. Two minutes later, when the ENGINEER was about 600 to 700 yards away, the ROSARIO sounded a second one-blast signal and her wheel was put over an additional ten degrees to the right. The ENGINEER did not answer this signal either and she continued on the collision course. At 1854 when the ENGINEER was about 300 feet distant, the ROSARIO blew a third one-blast whistle signal and her wheel was put hard right which was 35 degrees. Again, the ENGINEER failed to answer the signal or change her course.

When the distance between the two vessels had closed to 50 feet, the ROSARIO's helm was shifted to hard left and just about the time she began to respond to this, the collision occurred near the west bank of the river. There were no signals of any kind blown by the ENGINEER and the ROSARIO did not blow a danger signal.

Just prior to the collision, it could be seen that the deckhouse on the barge totally obstructed the view to starboard from the pilothouse of the tug. At this same time, a man on top of the deckhouse of the barge was seen running from the stern to the bow, then wave his arms and shout before running back to where he had come from.

The head of the barge in tow of the Tug ENGINEER came in contact with the port side of the ROSARIO about one-third of the distance of the ship aft of her bow. The damage was about three feet above the waterline and extended for a length of about thirty feet and was between six and ten feet high. The ROSARIO did not take on any water and proceeded to an anchorage after the collision. The Tug ENGINEER and her barge did not appear to be in any danger.

On 4 January, 1950, an investigation was started under R.S. 4450 to determine the facts and circumstances surrounding the collision. Appellant and his present counsel were present throughout the entire investigation. The investigation was completed on 5 January, 1950, and Appellant was served with a copy of the charge and specifications at about 0900 on 6 January, 1950. This hearing was commenced on 7 January, 1950, at 0900 because the ROSARIO was due to sail and this was the only opportunity to get men from the ROSARIO to testify before she sailed.

There is no record of any previous disciplinary action having been taken against Appellant during his seventeen years at sea on American merchant marine vessels.

OPINION

Appellant's major contention is that the Examiner improperly reopened the hearing and, after having done so, he further erred in that he permitted the Investigating Officer to introduce inadmissible evidence, which had been illegally obtained, into the record in order to establish that Appellant was acting as Master of the ENGINEER under authority of his Federal License No. A-7370 and that he actually was on board the ENGINEER at the time of the collision with the ROSARIO on 3 January, 1950.

The determination of these propositions raises several queries: 1. Was the hearing actually "reopened"? 2. If so, was this procedure permissible? 3. If this procedure was correct, was the testimony of the Investigating Officer, as to statements made by the Appellant at the investigation, properly received in evidence? 4. If not, is this evidence necessary to support the specifications.

In order to arrive at the proper conclusion concerning these questions, it is first necessary to determine whether the facts brought out by the Investigating Officer's testimony are jurisdictional. It is my opinion that the only jurisdictional fact involved is whether Appellant was acting as Master of the ENGINEER under authority of his Federal license so as to give the Coast Guard the power to proceed under Title 46 United States Code 239. In a similar case, it was held that whether a person is an alien is a jurisdictional fact but the administrative finding that the alien

knowingly possessed certain printed matter was not such a jurisdictional fact. *United States ex rel. Tisi v. Tod (1923)*, 264 U.S. 131.

Whether Appellant was actually on board the ENGINEER must be put in the latter category and classified as a quasi jurisdictional fact which must be alleged and proved but, when properly alleged and established, it cannot be attacked collaterally. The court pointed out this distinction between facts which are jurisdictional and those which are quasi jurisdictional in *Noble v. Union River Logging R. Co. (1892)*, 147 U.S. 165. This quasi jurisdictional fact is sufficiently established herein by the presumption of negligence on the part of the Master of the burdened vessel, in a crossing situation, in the absence of clear exonerating evidence to the contrary. *Wilson V. Pacific Mail S.S. Co. (1928)*, 276 U.S. 454. This, of course, is dependent upon support of the jurisdictional fact that Appellant was acting as Master of the ENGINEER under authority of his Federal license at the time in question.

Although it is immaterial to the ultimate basis of this decision, it seems that the first question above should be answered in the negative. The Examiner had neither closed the hearing nor even rendered his decision so it is not appropriate to say that he "reopened" the hearing; and it was proper under the circumstances, to admit further evidence. But this is of no significance in this case since, in answer to the third question, the testimony of Appellant, which was given during the investigation, should not have been admitted over objection by counsel. Nevertheless, I do not feel that this evidence is necessary to establish the jurisdictional fact in question.

In administrative proceedings, the determining body may look beyond the record proper without invalidating its action unless substantial prejudice is shown to result. *United States v. Pierce Auto Freight Lines (1946)*, 327 U.S. 515. And reference may be had to an agency's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error. *Market St. Ry. Co. v. R.R. Commission of California (1945)*, 324 U.S. 548. Based on these authorities, I take official notice from the official records of the United States Coast Guard

that Appellant was the holder of License No. A-7370 and that he was the Master of the ENGINEER on 3 January, 1950. The "Record of License Renewed" shows that Appellant was issued License No. A-7370 at New Orleans on 25 January, 1946. And the "Report of Marine Casualty," submitted in connection with this collision in accordance with statutory requirements, is signed by Appellant as "Master - M/V ENGINEER."

The propriety of taking this action on appeal may be questioned by Appellant on the ground that his rights have been prejudiced to the extent that he is hereby precluded from setting up his defense. Appellant could have submitted evidence on his behalf and still raised the question of jurisdiction at any time. In *Sisto v. C.A.B.* (1949), 179 F 2d 47, the court refused to remand the case to let Sisto put in his defense after he had stood mute and relied on technical errors. In effect, the court stated that if he had a defense he should have put it in at the time before the hearing examiner. It is my belief that this is equally applicable to this case.

It would make these proceedings highly technical to prohibit jurisdictional facts from being settled, by consideration of official records, on appeal to me when they could be established by my remanding the case in accordance with accepted judicial appellate practice to remand causes for further proceedings where justice demands that course in order that some defect in the record may be supplied (*Villa v. Van Schaick* (1936), 299 U.S. 152); by a remand to this administrative body, by the courts, wherein further evidence may be taken if necessary to supply the basis for findings (*Ford Motor Co. v. N.L.R.B.* (1939), 305 U.S. 364); or by a court, on judicial review of this administrative order, determining de novo the question of fact relating to jurisdiction by receiving new evidence to decide whether this body acted within the scope of the statutory authority conferred. (*United States v. International Freighting Corp.* (D.C.N.Y., 1937), 20 F. Supp. 357, citing *Crowell v. Benson*, 285 U.S. 22, and other cases.) In fact, this would be pointless since the same ultimate result would be attained. To reach the same objective without judicial intervention is to further the purpose of administrative proceedings, - to secure substantial justice in an orderly manner with a minimum of technical requirements.

I do not feel that there is sufficient merit in Appellant's

claim, that he was not given sufficient time to prepare a defense, to consider this prejudicial error. Appellant retained counsel not later than the day following the accident and both Appellant and his counsel were present at the investigation. Hence, they were in just as good a position to prepare a defense as the Investigating Officer was to prepare his case. Furthermore, the Investigating Officer agreed to continue the hearing with respect to Appellant's defense witnesses. It was necessary to expedite the presentation of the Investigating Officer's case because his witnesses were preparing to sail on the ROSARIO.

Appellant also urges that the specifications are too vague and that they do not allege facts which constitute negligence. As to the first specification, there is substantial evidence to find that there was no lookout posted at the bow of the barge; that because of the deckhouse on the barge, visibility to starboard was blocked from the pilothouse of the ENGINEER; and that, therefore, it was negligent to fail to post a proper lookout on the barge.

Concerning the second specification, it was certainly negligent for the ENGINEER to fail to answer or initiate sound signals when the situation became so precarious. The precaution of blowing the danger signal in such crossing situations is specifically required by Rule 80.7 of the Pilot Rules for Inland Waters. (Former Pilot Rule VII.)

With respect to the third specification, although it is agreed that it would have been preferable to specifically set forth the acts of negligence committed, it can hardly be contended that the ENGINEER's movements complied with the requirements of good seamanship. And as Master of the vessel, it was Appellant's responsibility to see that she did, or to submit a satisfactory explanation for her erratic performance. From all that appears in the record, there is nothing that indicates the ENGINEER attempted to stay clear of the ROSARIO or that there was any justifiable excuse for her failure to do so. Appellant's attention is called to the recent case of *Kuhn v. C.A.B.* (C.C.A. D.C., 1950),

F. 2d , in which it was held that whether or not the allegations in the complaint encompass an issue upon which the final order was based in part is not important where it is clear that the party had actual notice that the issue was involved. Appellant had ample notice that he was being charged with

negligence and what the nature of the charge was.

CONCLUSION

For the reasons set out above, I observe no reason why the order imposed by the Examiner should not be upheld.

ORDER

The Order of the Examiner dated 12 January, 1950, should be, and it is, AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 16th day of November, 1950.

***** END OF DECISION NO. 460 *****

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