UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Richard F. STEWART 563 254

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2393

Richard F. STEWART

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-l.

By order dated 3 August l982, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, suspended Appellant's license for two months upon finding him guilty of negligence. The specification found proved alleges that, while serving as undocking master on board the M/V AL-TAHA, under authority of the captioned license on 19 January 1982, Appellant did navigate the M/V AL-TAHA aground on a charted shoal in Boston Harbor, Massachusetts.

The hearing was conducted in Boston, Massachusetts, on 12 and 14 April and 3 May 1982.

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

The Investigating Officer introduced in evidence the testimony of four witnesses and eighteen exhibits.

In defense, Appellant called one witness and offered one exhibit.

Subsequent to the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and the specification, as amended, were proved. He then served a written order suspending the license issued to Appellant for a period of two months.

The Decision and Order was served on 5 August 1982. The Appeal was timely filed on 9 August 1982 and perfected on 17 August 1983.

FINDINGS OF FACTS

On 19 January 1982 the M/V AL-TAHA was moored starboard side to Pier 2 (Simpson) at Bethlehem Shipyard, East Boston, Massachusetts. The M/V AL-TAHA is a single screw Liberian flag bulk carrier (Liberian O.N. 5030), 600 feet in length with a beam of 75 feet. It had a draft of 32'9" forward, 33'9" aft, and charted depths between the main channel and Pier 2 ranged from 29 to 39 feet. At the time the M/V AL-TAHA got underway, the tide added 2 feet of water to the charted depths. On that day the vessel's agent requested Boston Tow Boat Co. to provide necessary undocking assistance and contacted the Boston Pilots' Association for a pilot.

At all times pertinent herein, Appellant was the holder of the captioned license and was employed by Boston Tow Boat Company. Appellant's license authorizes him to serve as master of freight and towing vessels of not over 500 gross tons and as a First Class Pilot, any gross tons, upon the waters of Boston Harbor. Appellant does not have a pilot commission from the Commonwealth of Massachusetts.

At about 1345 on 19 January 1982 the assigned Boston pilot, Captain Mitchell, boarded the M/V AL-TAHA. Appellant and the tugs CABOT and DALEY arrived at about 1420. Appellant gave all helm and engine orders aboard the M/V AL-TAHA, and directed the activities of the tugs CABOT and DALEY from the time the M/V AL-TAHA left the pier until relieved by the Boston pilot when the M/V AL-TAHA reached the main ship channel.

In preparation for getting underway, the two tugs were made fast to the port side of the M/V AL-TAHA. At about 1443 Appellant began to move the M/V AL-TAHA away from Pier 2 using her engines and the two tugs. Appellant, using the tugs CABOT and DALEY, backed the M/V AL-

TAHA toward the main ship channel. At about 1500 the M/V AL-TAHA was near the edge of the channel, about 600 yards from the pier. Appellant then directed the tugs to push her bow to starboard and turn the M/V AL-TAHA to head downstream. To complete this turning maneuver, Appellant also ordered the M/V AL-TAHA's engine to go full speed astern. At 1513 the tugs were still pushing but all motion had ceased and Appellant stopped the M/V AL-TAHA's engines. The Master of the M/V AL-TAHA's noticed that the bow had stopped swinging and suspected his vessel was aground. Appellant told the Master the bow was sitting on the bank but that this was not unusual. Appellant then gave various engine orders and heavy vibrations were felt in the engineroom. At about 1530 the Master called the Third Engineer in the engineroom and asked him to check for any cracks in the vessel's hull and for any water seeping into the engineroom. By 1548 the M/V AL-TAHA was able to move toward the channel at half speed ahead. One minute later Appellant departed and the tugs were dismissed. The Boston Pilot took the M/V AL-TAHA from that point on out to sea.

Before departing the M/V AL-TAHA, Appellant gave the Master a document entitled "Federal Licensed Docking Masters for Boston Harbor and Tributaries." That document indicates Appellant provided the M/V AL-TAHA undocking services from Pier 2 (Simpson) to the stream and expected a payment of $56.00. The document indicates that the tugs reported alongside at 1420, the M/V AL-TAHA got underway at 1450, and the tugs were dismissed at 1550.

As the M/V AL-TAHA headed out to sea the Master noticed his vessel had a slight port list. This list increased, and at 0500 on 20 January the Master discovered the port ballast tanks were flooded.

The MM/V AL-TAHA returned to Boston, was dry docked, and off loaded her cargo. A survey of her bottom revealed buckled plating between frames 58 and 880; fractured plated; bent frames in the ballast tanks; and a 160-foot-long crease in the bottom plating along the port side of the keel which extended from the engine spaces forward to about midships. At the hearing there was conflicting testimony regarding the cause of this damage and when it occurred. The Administrative Law Judge found that the vessel had grounded on 19 January 19882 based on the testimony of the Master and the damage to the vessel.

Boston Towboat Co. and the International Organization of Masters, Mates and Pilots entered into a labor agreement to be effective from

June 16, 1979 until June 15, 1982. In Article I, section 1, Boston Towboat Co. recognizes the Masters, Mates and Pilots Organization as the sole collective bargaining agent for all of its *licensed* Deck Officers. That section also states that fitness and ability, as well as seniority, are to be considered in promoting personnel. Fitness and ability are defined as including *license* certification. Article I, section 2 of that agreement provides that to be eligible for promotion to permanent master, an employee must have served at least 720 days as a *licensed* officer with the company. A relief captain is required to have all pilotage for the usual operating areas in addition to a radar certificate prior to promotion top permanent master.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant asserts that:

1. There was no subject matter jurisdiction under 46 U.S.C. 239.

2. The Administrative Law Judge erred when he modified the specification.

3. The charge was not proved by the necessary quantum of evidence.

APPEARANCE: Glynn & Dempsey, Boston, Massachusetts, by Thomas J. Muzyka.

OPINION

Appellant claims the Coast Guard had no jurisdiction over his license since he was acting as a pilot on a foreign flag vessel and was subject only to state regulation by virtue of 46 U.S.C. 211 and 46 U.S.C. 215. I do not agree.

The jurisdiction of the Coast Guard extends to acts of incompetence, misconduct, negligence or unskillfulness by one acting under the authority of a license. 46 U.S.C. 239, 46 CFR 5.01-

30(a)(1). One is acting under the authority of a license when that license is either required by law or regulation, or is required in fact as a condition of employment. 46 CFR 5.01-35(a).

As an undocking master, Appellant directed the activities of the tugs CABOT and DALEY in maneuvering the M/V AL-TAHA from the pier and punching it aground. One who directs and controls the operation of a towing vessel must be licensed by the Coast Guard. R.S. 4427, as amended, 46 U.S.C. 405(b); see also 46 CFR 157.30-45(a). Appellant's license as Master of Freight and Towing Vessels of not more than 500 Gross Tons authorizes him to direct and control towing vessels in Boston Harbor. 46 CFR 10.16-5(d). Appellant was both licensed to direct and control the tugs, and in fact did so on 19 January 1982.

A docking master is in command of the entire towing operation. His license is subject to suspension or revocation for negligence during the docking maneuvers. Decision on Appeal No. 2126 (*RIVERA*). In RIVERA, as here, the docking master was not aboard the tug. However, the location of the person issuing orders does not conclusively determine whether he is directing and controlling the tug or tugs involved. To hold otherwise would allow one who directs a towing vessel to avoid the licensing requirements of 46 U.S.C. 405 by boarding the barge or other vessel involved.

The finding that Appellant's federal license was a condition of his employment is also well supported. The text of the labor agreement between Boston Tow Boat Company and the International Organization of Masters, Mates and Pilots provides that prior to promotion to permanent master one must have two years' service as a licensed officer and have a federal First Class Pilot license with a radar observer endorsement.

In addition, the bill that Appellant delivered to the Master of the M/V AL-TAHA was labeled "Federal Licensed Docking Master for Boston Harbor and Tributaries." Thus, Appellant held himself out as a federally licensed docking master and did business on the strength of his license.

The agent for the M/V AL-TAHA testified that he understood that when ordering towboats from Boston Towboat Co., he would receive the services of a man licensed to take the vessel out. He specifically referred to a "Master of the tow boat license." He stated that he believed the vessel was required to use licensed people, although he

could not quote the statute. The agent remembered always receiving a bill for docking master services containing "something to the effect that the person be licensed."

This evidence supports the finding that Appellant, as a docking master in Boston Harbor, was required to hold a Coast Guard license to operate tugs by those who employed him.

Appellant contends that 46 U.S.C. 211 and 46 U.S.C. 215 bar the exercise of jurisdiction over his license. I disagree.

In 1789 the states' authority to regulate pilotage until further provisions were made by Congress was affirmed. l Stat. 54 (46 U.S.C. 211); See also *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187 (l912); and *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (l851). Subsequently, Congress has enacted several further provisions.

The development of steam engines, and the resulting boiler explosions, led Congress in 1852 to require federal licenses for the pilots of U.S. steamers carrying passengers. Act of Aug. 30, 1852, ch. 106, 9, 10 Stat. 61, 67. In 1864 Congress extended the coverage of the 1852 Act to steam tug-boats and towing-boats and certain other vessels. Act of June 8, 1864, ch. 113, 14 and 5, 13 Stat. 120. The pilots of tug-boats and towing-boats were to be licensed in the same manner as pilots of steamers carrying passengers. *Id.*, 5. This federal pilotage requirement was extended to seagoing steam vessels subject to the navigating laws when underway, except on the high seas. Act of July 25, l866, ch. 234, 9, l4 Stat. 227, 228.

In l871 Congress consolidated and extended the applicability of the various navigation and inspection laws. Act of Feb. 28, l871, ch. l00, l6 Stat. 440. The requirement was extended to included pilots of all steam vessels. Id., 14, 16 Stat. 446.

Thus, by 1871, the basic allocation of authority between the United States and the states which exists today had been established. These laws were codified in the Revised Statutes of 1878 with few changes. The original 1864 requirement for a federal license, as codified in 4427 of the Revised Statutes, extended only to those tugs or towing-boats propelled in whole or in part by steam. By 1969, of 5883 documented towing vessels, only 27 were propelled by steam. In

1972 Congress amended 46 U.S.C. 405 (R.S. 4427) to require a licensed operator on all towing vessels of 26 feet or more in length. Pub. L. No. 92-339, 86 Stat. 423. Congress found that licensing of those charged with control of towboats was urgently needed and long overdue. S. Rep. 926, 92d Cong., 2d Sess. 2, reprinted at 1972 U.S. Code, Cong. & Ad. News 2760, 2761. Congress was "... aware that some states ... have enacted pilotage laws applicable to U.S. towing vessels" but said "[t]hese State laws appear to complement the objectives of [46 U.S.C. 405(b)(2)]. Id. at 2762.

In the Motorboat Act of l940 Congress made negligent operation of a vessel a crime subject to either a fine or imprisonment or both. 46 U.S.C. 526l and 526m, 54 Stat. l66. A civil penalty was also provided for negligent operation of a vessel, 46 U.S.C. 5260. Those sections were repealed by the Federal Boat Safety Act of 1971, re-enacted at 46 U.S.C. 1461(d), 1483 and 1484, and subsequently codified at 46 U.S.C. 2302. The penalty for violating 46 U.S.C. 1461(d) applies to a state pilot who negligently pilots a foreign vessel. *Williams v. United States*, No. 80-980-CIV-T-EX (M.D. Fla. April 29, 1983) (order granting partial summary judgment).

Pilotage of foreign vessels and U.S. registered vessels on the Great Lakes became an area of exclusive federal regulation in l960. Great Lakes Pilotage Act of l960, Pub. L. 86-555, 74 Stat. 259, 46 U.S.C. 2l6-2l6i, subsequently codified at 46 U.S.C. 9302.

In the Ports and Waterways Safety Act of 1972, Congress authorized the Coast Guard to regulate pilotage on U.S. and foreign vessels engaged in foreign trade where the states have failed to act. 33 U.S.C. 1226.

From these Acts of Congress, it is clear that pilotage is not an area of exclusive state authority. There is an extensive body of law requiring federal licenses for certain pilots and vessel operators. Even where a federal license is not required, the negligent acts of a state pilot can be subject to federal civil penalty actions or criminal prosecution. 46 U.S.C. 1461(d); *Williams v. United States* No. 80-980-CIV-T-EK (M.D. Fla. April 29, l983).

There is no language in 46 U.S.C. 211 which indicates any limitation in the federal licensing authority under 46 U.S.C. 405(b)(2). The use of the phrase "[u]ntil further provision is made by Congress..." in 46 U.S.C. 211 does not support any interpretation that 46 U.S.C. 211 is an absolute and unchangeable barrier to further

Congressional action. As a matter of statutory construction, the more recent expressions of Congress regarding pilots and operators of towboats (in 1864, l87l and 1972) are "further legislative provision(s)" made by Congress within the meaning of the Act of 1789. In the Act of 1972, Congress anticipated and approved the concurrent application of State pilotage laws and federal license requirements to the same towing vessel. S. Rep. 926, supra, at 2. Here, Appellant and the State licensed pilot were aboard the vessel being towed, rather than the towboat. This difference in the location of the federal license holder does not change the relationship between 46 U.S.C. 211 and 405(b)(2). For these reasons, 46 U.S.C. 211 is no bar to action against Appellant's federal license.

In addition, 46 U.S.C. 215 does not prohibit the exercise of jurisdiction over Appellant's Coast Guard license. The predecessor of 215 was first enacted in 1867. Four years later Congress saw no inconsistency in re-enacting in the same statute both the federal licensing requirement for towboat operators and the provisions of 215. That Congress re-enacted 46 U.S.C. 405 given the existence of 215 indicates these two provisions are compatible and that the license requirement for towboat operators would not annul or affect any state pilotage scheme. Taking action against Appellant's required federal license for his conduct in directing and controlling the tugs CABOT and DALEY does not affect or annul the power of Massachusetts to require a state pilot on the M/V AL-TAHA.

Appellant further suggests that he may be liable to a penalty for acting as a pilot without a state license and therefore should not be subject to the jurisdiction of the Coast Guard. Even if he may be penalized under Massachusetts' law for acting as pilot of the AL-TAHA without a state license, as distinguished from directing and controlling the tugs DALEY and CABOT, he is also subject to the concurrent jurisdiction of the Coast Guard over his required federal license.

The cases Appellant cites regarding Coast Guard jurisdiction over pilots on foreign vessels and U.S. vessels sailing under register do not apply here because he is required by federal statute to hold a Coast Guard license. *Soriano v. United States*, 494 F.2d 681, 684 (9th Cir. l974); and *Dietze v. Siler*, 414 F.Supp. 1105 (E.D. La. 1976). See also Appeal Decision No. 2126 (RIVERA). Dietze and Soriano are further distinguished by the fact that Appellant did not hold a state pilot license.

In summary, Appellant was required by law to have a Coast Guard license to direct the movement of tugs. Appellant was also required to have a Coast Guard license as a condition of his employment. The Coast Guard's exercise of jurisdiction over Appellant's license does not conflict with the Commonwealth of Massachusetts' authority to regulate pilotage. The determination by the Administrative Law Judge that there was jurisdiction over Appellant's license was correct.

II

Appellant asserts that the Administrative Law Judge erred when he amended the specification after the conclusion of the hearing. I disagree.

After the hearing the Administrative Law Judge, *sua sponte*, amended the specification by substituting the phrase "undocking master" for "pilot."

Whether charged as undocking master or pilot, Appellant had actual notice of what conduct was in question. The entire proceeding concerned Appellant's conduct in maneuvering the M/V AL-TAHA from the dock to the main channel. Whether he was referred to as a "pilot" or "undocking master" does not affect any matters at issue. Confusion in the term used to describe Appellant was evident during the hearing. Both the Investigating Officer and Appellant's counsel interchangeably used the terms "pilot," "docking master" and "undocking master." In his proposed findings of fact, Appellant refers to himself as an "undocking master."

An Administrative Law Judge may amend charges and specifications to correct minor errors. See 46 CFR 5.20-65; Decision on Appeal No. 2332 (LORENZ). Only if there is prejudice, a lack of notice or no fair opportunity to litigate, does he exceed his discretion. Decision on Appeal No. 2209 (SIEGELMAN).

III

Appellant contends that there was insufficient evidence to establish that a grounding occurred or that he was negligent. I disagree.

Appellant claims that his negligence was not proved because no evidence was presented concerning the standard of care against which his conduct should be measured. He cites Decision on Appeal No. 2080 (FULTON) as requiring proof of such a standard of care. Testimony regarding the standard of care is not necessary or required by FULTON where that standard has been announced in earlier decisions or is readily apparent from the customary principles of good seamanship and common sense. Decision on Appeal No. 2302 (FRAPPIER). That same logic applies here. As in FRAPPIER, Appellant was negligent in failing to await a higher tide before moving his vessel. Where, as here, the vessel's draft exceeds the charted depth of water and the vessel grounds, no expert testimony is needed to establish negligence.

Appellant further disputes the weight given to the evidence by the Administrative Law Judge. The question of what weight to accord the evidence is for the Administrative Law Judge. His determination will not be set aside unless the evidence he relied upon is inherently incredible. Decisions on Appeal Nos. 2333 (AYALA) and 2302 (FRAPPIER). Here the Administrative Law Judge relied upon the testimony of the Master that the vessel grounded. This testimony, combined with the evidence that the draft of the M/V AL-TAHA exceeded the charted depth of water in her intended path, supports the Administrative Law Judge's finding that Appellant navigated the M/V AL-TAHA aground. The finding that Appellant was negligent was, therefore, supported by the evidence.

CONCLUSION

The Coast Guard had jurisdiction over Appellant's actions in this case. There was substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. The hearing was fair and conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge, dated at Boston, Massachusetts on 3 August 1982 is AFFIRMED.

B. L. STABILE
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 5th day of July, 1985.

***** END OF DECISION NO. 2393 *****

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