UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. (REDACTED)
Issued to: Robert Wayne BRAZELL

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2398

Robert Wayne BRAZELL

This appeal has been taken in accordance with 46 U.S.C. 239g and 46 CFR 5.30-1.

By order dated 13 March 1981, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's merchant mariner's document for four months upon finding proved the charge of negligence. The specification found proved alleged that Appellant, while serving as tankerman aboard T/B TT-7002, did on or about 24 December 1980, fail to adequately supervise cargo loading operations causing a discharge of oil into the navigable waters of the United States, the Neches, River.

The hearing was held at Port Arthur, Texas, on 13 February 1981.

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 seventeen exhibits and the testimony of five witnesses.

In defense, Appellant offered in evidence his own testimony, the testimony of one additional witness, and five exhibits.

After the end of the hearing, the Administrative Law Judge rendered a written Decision and Order in which he concluded that the charge and specification had been proved. He ultimately served the written Decision and Order on Appellant suspending Merchant Mariner's Document [REDACTED] and all other licenses and documents issued to Appellant for a period of four months.

The Decision and Order was not served until 8 February 1985. However, Appellant's counsel's filed and perfected this appeal on 15 April 1981.

FINDINGS OF FACT

On 24 December 1980 Appellant was serving under authority of his merchant mariner's document as tankerman aboard the T/B TT/7002 and three adjacent barges. The four barges together with a tug were secured to a dock on the Neches River for loading. T/B TT-7002 was outboard of one other barge and in the forward position of the tow.

On 24 December 1980, Petty Officer Plowman, U.S. Coast Guard was on duty. At about 0600 his office received a call that there had been a spill of a product known as vacuum gas oil at the Amoco Oil Company Dock. Petty Officer Plowman proceeded to the scene and arrived at about 0730. He observed that the T/B TT-7002 had overflowed at the No. 2 and No. 3 tank hatches and estimated that about 20 barrels of the product was in the water adjacent to the barge. He took samples from one of the tanks on the barge and also from the river. Laboratory testing established that the product was the same from both samples. Petty Officer Plowman also noticed that the spill on T/B TT-7002 went over the vessel's side and into the water. He did not notice spillage on any of the other barges and there were no other known spills in the river that day. He noticed that the vacuum gas oil had a green tint, looked that way in the water, and that some of it gave a darker appearance in the water after being there awhile. In totally, eight samples were taken from the barge and the Neches River. Seven of the eight samples matched.

The relief operator on the tug, who also served as a tankerman, testified at the hearing. Appellant relieved him at midnight on 24 December 1980. He stated that the loading rate on the Declaration of Inspection was listed as 4000 barrels per hour. However, the actual loading rate was 4300 to 4400 barrels per hour. At about 0540 he awoke and went onto the barges. There, Appellant told him that there had been a spill. When he saw the spill, he saw that there was vacuum gas oil in the water around the tugboat and barges. It looked green and black to him. The relief operator, Mr. Moore put a mop handle into the water to test the spill and when he took it out, the vacuum gas oil appeared green and black on the handle. Vacuum gas oil was coming out of all three cargo hatches and three ullage hatches on T/B TT/7002.

The dockman from the Amoco Oil Company Dock testified that he was on duty from midnight to 0800 of the day in question. He identified Appellant as the tankerman is charge at the time of the spill and saw the oil in the water. He testified that the loading rate was approximately 4800 barrels per hour and that the 4000 barrels per hour rate on the Declaration of Inspection was only an estimate. He stated that the loading rate changes depending on whether the shore tank is full or nearly empty and this change is common procedure. There is no particular gauge that gives the loading rate.

The tank facility foreman for Amoco also testified. He was the supervisor for the plant side and has approximately 30 years experience working for Amoco. He performs all the oil calculations for Amoco at this tank facility. He calculated how much product was in the shore tanks, how much product was loaded in the four tank barges, and concluded that 3300 barrels were spilled.

Appellant, in his own testimony, admitted that he was gauging the barges primarily by looking at the draft marks. At 0520, he observed the draft on the starboard side of T/B TT-7002 to be approximately 9' 11 1/2". He stated that he gauged the cargo tanks only every 20 minutes just prior to "topping off" and admitted that he should have been checking his tanks every five or ten minutes. Instead of continuing to monitor the flow of oil at this critical stage, he left and began to secure the flotilla for getting underway. At the time of the spill, he was on another barge. Appellant heard a splash and upon investigating found oil

overflowing onto the deck T/B TT-7002. He called the person in charge of the shore facility to shut down loading. Immediately thereafter, he closed the tank valves.

Initially, it appeared that about 20 barrels of product had been discharged into the river. However, a significant amount of oil was subsequently discovered downstream and Amoco officials estimated that 3300 barrels of oil had been spilled.

BASES OF APPEAL

This appeal is taken from the order imposed by the Administrative Law Judge. Appellant urges that:

1. His actions did not constitute negligence;

2. The findings that the amount of product spilled was 3300 barrels and that 7 of 8 samples taken by the Coast Guard in the vicinity matched the product on T/B TT-7002 are clearly erroneous; and

3. It was error to admit into evidence certain records of the Amoco tank facility over objection.

APPEARANCE: Henry A. King. Esq., Milling, Benson, Woodard, Hillyer, Pierson & Miller, 1100 Whitney Building, New Orleans, LA 70130.

OPINION

I

Appellant urges that his action should not be considered negligent. I do not agree.

In support of this contention, Appellant argues that his conduct was reasonable when measured against what others of the same station operation under the same circumstances would have done. He argues vigorously that the loading rated had increased to 4800 barrels per hour from the stated rate of 4000 barrels per hour set forth in the Declaration of Inspection and that he should have

been entitled to rely upon the rate stated in the Declaration of Inspection. He further argues that the tank facility had changed the grade of product loaded to a lighter grade which would result in the barge topping out at a lower draft than on earlier occasions.

The standard against which a person in charge of an oil transfer operation is judged is established by specific regulations as well as by what a prudent individual under the same circumstances would do. See Appeal Decision 2287 (RICKER). 33 CFR 156.160 requires each person in charge of an oil transfer to be in immediate vicinity whenever oil is transferred to or from a vessel. It further requires the person to supervise all critical procedures. 33 CFR 156.120(wa) requires the person in charge to know among other things:

(a) the identity of the product to be transferred; and,

(b) the transfer rate.

In addition, 46 CFR 35.35-35 specifically requires the person in charge to "observe rate of loading for the purpose of avoiding overflow of tanks."

Appellant, by his own testimony, had last visually gauged the tanks 20 minutes prior to the spill. At that time he estimated that it would take another 35 to 45 minutes to finish pumping. He was, nevertheless, attempting to load the barge to a ten foot draft. At that time, the draft on the starboard side was 9' 11 1/2". Since the barge had a list, he estimated that the draft on the port side would have been about 9' 7 1/2". In spite of the fact that the barge was nearly loaded, he did not slow the rate of loading nor check the level in the tank more frequently. By his own admission he should have gauged the tank more often. In response to questions by the Administrative Law Judge, Appellant testified:

> I'm at fault myself...In the way that I didn't properly observe the tank ullages. In other words, instead of checking it every twenty minutes I should have been checking every five to ten or every fifteen minutes.

By his own admission, Appellant had not met the standard of

care required for a tankerman loading oil on a vessel. Appellant's own testimony supports the finding of the Administrative Law Judge that he was negligent in failing to properly supervise loading of the tank barge.

II

Appellant also urges that the evidence does not support the findings that the amount of product spilled was 3300 barrels and that 7 of the 8 samples taken by the Coast Guard matched the product loaded on T/B TT-7002. These findings are supported by the evidence. However, even if they were not they would not require setting aside the finding of negligence.

With respect to the amount of the spill, Appellant argues vigorously that his witnesses estimated the amount of product spoliated lesser amounts, and that the Amoco employee who calculated the amount of product lost did so based on company records and had not personally either calibrated the storage tanks nor measured the amount of product in them before and after loading. With respect to whether or not the samples taken at various locations in the Neches River matched the product in T/B TT-7002, Appellant argues that the report of the laboratory analysis states only that the samples may be from the same source and mentions that there was a "variation in one of the sulphur peaks on the FPD pattern." These matters are questions of fact. The evidence in this case, although it might have supported conclusions other than the conclusion reached by the Administrative Law Judge, also supports the Administrative Law Judge's conclusion. "It is the function of the Administrative Law Judge to evaluate the credibility of witnesses and resolve inconsistencies in the evidence." Appeal Decision 2386 (LOUVIERE). See also Appeal Decisions 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER) and 2116 (BAGGETT). Since the Administrative Law Judge's findings are supported by evidence in the record, they will not be disturbed on appeal even though there is conflicting evidence.

Even if, as Appellant urges, the amount of product spilled was found to be a lesser amount and the various samples taken from the Neches River were not found to have come from T/B TT-7002, the finding that the specification was proved and that Appellant was negligent would not be affected. As discussed above, it is clear

that Appellant, while overseeing the loading of T/B TT-7002, did not check the level of the product in the barge tanks as often as he should have. This alone supports the findings that the charge and specification were proved.

That oil was spilled into the water and that the amount of product lost totaled 3300 barrels are merely aggravating circumstances. This is, of course, true even though Appellant's negligence might not have come to Coast Guard attention except for the spill. Whether or not the samples taken from the river match the product on the barge, and whether or not 3300 bbls of product were missing after T/B TT-7002 was loaded are relevant only to the questions of whether or not there was an oil spill and the extent or size of such a spill. Even on appeal, the existence of the spill is not contested. The general extent of the spill, although not the exact amount of product lost, is adequately supported by evidence that more oil was found in the general vicinity, even though there were no other known spills. Nevertheless, the Administrative Law Judge's conclusion that 7 of the 8 samples taken from the river matched the product in T/B TT-7002 is a reasonable interpretation of the laboratory reports and his finding that the amount of oil discharged was 3300 bbls is supported by the testimony of the tank farm foreman and Amoco records. These findings will not be disturbed.

III

Appellant urges that certain business records of the Amoco facility should not have been admitted into evidence because they are hearsay and the Coast Guard did not call the individual preparing the records during its case-in-chief. I do not agree.

Appellant's interpretation of 46 CFR 5.20-95 which limits the acceptance of hearsay evidence if the declarant is readily available to appear as a witness is incorrect. That provision does not limit acceptance of hearsay evidence which falls into one of the exceptions listed in the Federal Rules of Evidence. Rather, it expands upon that evidence which may be received to include additional hearsay evidence when the declarant is not available. In this instance, the records complained of fall within the business record exception to the hearsay rules as set forth in Federal Rule of Evidence 803(6).

Although I agree with Appellant that he was entitled to question the individuals who made the measurements recorded in the Amoco facility records, the Administrative Law Judge offered him the opportunity to call these individuals as witnesses. Appellant does not assert, and the record does not indicate, that he ever requested that they be called to testify. Therefore, I find no error in the Administrative Law Judge's actions in this regard.

CONCLUSION

There is substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 13 March 1981 is AFFIRMED.

B.L. STABILE
VICE ADMIRAL, U.S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this *15th* day of *July* 1985.

***** END OF DECISION NO. 2398 *****

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