UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 409861
Issued to: Joseph E. SISK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2041

Joseph E. SISK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 16 May 1975, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license for the three months upon finding him guilty of negligence. The specification as found proved alleges that while serving as operator of the towboat M/V JOSEPH M. JONES, under authority of the license above captioned, on or about 26 February 1975, Appellant negligently overtook the M/V T.M. NORSWORTHY and tow and negligently attempted at Mile 636, Ohio River to pass it under circumstances involving risk of collision and without the assent or knowledge of the Pilot of the T.M. NORSWORTHY, which was then engaged in a difficult and dangerous flanking maneuver to round a bend under conditions of very high water and strong currents.

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

The investigation Officer introduced in evidence the testimony

of witnesses.

In defense, Appellant offered in evidence his own testimony.

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. He then entered an order suspending Appellant's license for a period of three months outright.

The entire decision was served on 21 May 1975. Appeal was timely filed, and perfected on 29 July 1975.

FINDINGS OF FACT

On 26 February 1975, Appellant was serving as operator of the towboat M/V JOSEPH M. JONES and acting under authority of his license while the vessel was proceeding down the Ohio River with a tow of four empty sulfur barges. On that morning the tow was approaching Mile 636 of the river. M/V T. M. NORSWORTHY, with a tow of eight barges, two abreast, was descending the river ahead of, and being overtaken by, the JOSEPH M. JONES tow. The NORSWORTHY tow had just ahead of it a bend in the river from Mile 636 to Mile 638 requiring a turn of about one hundred thirty five degrees to the right.

When Appellant was about one mile astern of NORSWORTHY he called the other pilot and engaged in conversation about that pilot's maneuver, which involved "flanking" and backing on the engine. When Appellant announced that he saw enough room for him to pass, the other pilot responded, in effect, "If you can see that, you can see better than I can." The radio telephone conversation ended with no oral agreement having been made for JONES tow to pass. Appellant then sounded a whistle signal proposing an overtaking on the right. No reply was received to the signal. Appellant attributed both the termination of the voice-radio exchange and lack of response to his signal to the preoccupation of the other pilot with his maneuver.

At the time, the JONES tow was close in to the right descending bank conforming its course to the bank and the NORSWORTHY tow was angled sharply across the river. Appellant

elected to try the passage between NORSWORTHY and the right descending bank. Most of the lead barge of the JONES tow cleared the stern of NORSWORTHY but the collision which occurred gouged a short hole in the port quarter of that barge and opened a long qash in the forward port of the barge immediately astern of it. The NORSWORTHY's stern was badly damaged. The collision occurred at about 0515 at Mile 636.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that Appellant was denied due process by an amendment of the original specification by the Administrative Law Judge, resulting in his being found at fault without notice of what the fault was, and that this charge was improperly laid because it should have been "violation of a statute" under 46 CFR 5.05-20(b), with attendant requisites, rather that "Negligence." Certain deviations from procedure set up in Part 5 of title 46 CFR are urged as error and, additionally, the conclusion is attacked on the grounds that Appellant used his best judgement and could not be accountable for NORSWORTHY'S backing into his tow.

APPEARANCE: Jones, Walker, Waechter, Poitevant, Carrere and Denegre, New Orleans, La., by John R. Peters, Jr., Esq.

OPINION

I

The principal ground for appeal here is a "due process" argument. Appellant's position is that he was found guilty of an offense which is different from the offense alleged, of which he had no notice, and on which he had no hearing. If his argument is

correct, there is a lack of administrative due process.

Appellant asserts that he brought to hearing for the alleged fault of failure to have his tow under control, that this fault was not proved (in that his tow was established in fact to have been under control at all times), and that after the hearing was over the Administrative Law Judge, in preparing his decision, changed the fault to one of violation of the Rules of the Road - a matter not charged or litigated - hence a finding without notice and hearing.

Examination of the record reveals that such was not the case, but that the requirements of due process for notice, litigation on hearing, and findings based on substantial evidence was met.

II

To begin, it is well to dispel a mistaken notion on Appellant's part.

He states:

> "46 CFR 5.05-20(b) requires that where the offense charged is `violation of statute1 or `violation of regulation,' then `The " specification" shall state the specific statute or regulation by title and section number,and the particular manner in which it was allegedly violated.' Since the Administrative Law Judge based his opinion on a violation of 33 USCS 347, there should have been a specification stating the specific statute by title and section number. Futhermore, the charge should have been `violation of statute' rather that `negligence.' Both of these procedural irregularities prevented Respondent Sisk from preparing his defense."

There is misapprehension here of what is meant be "violation of statute" in subsection 5.05-20(b).

46 U,S,C, 239 spells out the general grounds, or "charges," on which action may be taken under the statute to suspend or revoke a license. One of the grounds is "violation of any of the provisions

of title 52 of the Revised Statutes or of any of the regulations issued thereunder." An act in violation of a statute not included in title 52 of the Revised Statutes or of a regulation promulgated under the authority of a statute not so included cannot be specified as a offense under this charge. Any violation of applicable statute or regulation is, of course "misconduct" as defined at 46 CFR 5.05-20(a) and may, under certain conditions, amount to "negligence." This principle includes violations of title 52 of the Revised Statutes as well as of any other law. The peculiar aspect of the specific charge discussed in subsection 5.05-20(b) is that it is available also in cases in which the "service under authority of a license" element is not present, as is needed for the charges of "Misconduct" an "Negligence." Thus, it is a rare case in which the "violation of statute" provision is appropriate and necessary for use because of the absence of the "service" element.

The charges in this case could not have been laid under the charge that Appellant urges and even if circumstances had been such that they could have been there was no reason for such treatment as long as the "service under authority" element was present.

III

With respect to the immediate issue of asserted lack of notice an consequent denial of opportunity to litigate the matter in which fault was specifically found, it is true that the Administrative Law Judge did, after the hearing, announce in his decision that:

> "The facts found proved and issues relating thereto were fully litigated. The pleading of the Coast Guard in its fact allegations under the Charge of Negligence is, therefore, amended to conform to these conclusions."

Looking to the conclusion stated just before this declaration, we find, in essence, that:

> "[Appellant] negligently overtook the M/V T. M. NORSWORTHY and tow and negligently attempted at Mile 366 to pass it under circumstances involving risk of collision and without the assent or knowledge of the Pilot of the T.M. NORSWORTHY, which was then engaged in a difficult and

dangerous flanking maneuver to round a bend under conditions of very high water and strong currents."

Given also the undisputed fact of collision, this constitutes such an amendment as to place on record an adequate statement of the fault ultimately found. Under the rationale of *Kuhn* v *Civil Aeronautics Board*, CA D.C. (1950), 183 F, 2nd 839, this action was entirely permissible (and the specific amendment was most desirable) if, in fact, the matters were litigated. Decision on Appeal No. 1792.

Appellant complains that he was found to have violated the "Rules of the Road" when in fact he had not been charged with a violation of the rules but only with losing control of his tow, and that nothing in the development of the hearing apprised him of a "rules of the road" question.

It must be acknowledge that the specification as preferred was initially defective. Losing control of a tow is not in an of itself negligent and the addition of the qualifier "wrongfully" does not amount to adequate notice. Incorporation of the fact of collision into allegation would have gone far to remedy this deficiency, but the point here is that as worded the specification sounds instantly in "Rules of the Road." The term "an overtaking situation" used in connection with another vessel on the Ohio River,a term of statutory significance to any mariner, gives instant warning that a rules of the road question is in the offing.

At R-21, when the Investigating Officer, having established the fact of collision, asked a witness whether any person aboard T.M. NORSWORTHY has been injured by the occurrence, Appellant's counsel objected, declaring that the matter was irrelevant because, "He is not charged under any other statute, he's not charged with the violation of rules of the road." The Administrative Law Judge remarked that the damage that occurred was possibly reflective of "how it occurred" and was therefore relevant. Counsel assented, but the Investigating Officer withdrew the question anyway. The point here is that the possibility of a "rules of the road" matter was not absent from Appellant's and counsel's minds. They were keenly aware that such a question was at least on the verge of entering the case.

At R-43, when the Investigating Officer had arrested his case-in-chief, Appellant moved to dismiss on the grounds that the evidence failed to prove that "Captain Sisk did not at all times have control of the vessel and tow." The Investigating Officer then refereed to Rule 21 of the "Western Rivers Rules" (33 U.S.C. 346) in connection with the duty of a steam vessel approaching another and urged the conclusion that Appellant "did not maintain proper control [by] slowing or stopping vessel to avoid collision."

Counsel replied to this that "we'll put on evidence concerning that... "but repeated that the specification made no reference to Rule 21 or to "any violation of any rules of the road." The Administrative Law Judge then formulated his understanding of the issue:

> "...I think the specification is...sufficient to give notice that it was fundamentally to handle the vessel properly in an overtaking situation which resulted in collision." R-45.

He then went on to advise that it was proper in these proceedings to conform the pleadings to the evidence "so long as the issues involved were litigated by the parties." Noting that he objected to the import that the Administrative Law Judge "would be in effect changing the specifications or stating that the specifications are merely a notice type of pleading," Counsel declared, "We'll go forward..."

Since the statement on the Administrative Law Judge was eminently correct and since the objection was based on a mistaken belief that the rules of criminal indictment and procedure are binding in administrative proceedings such as these, there was at this point sufficient notice that the application of the rules of the road was under consideration.

Further, the matter of the radio conversation prior to the collision having been raised by the testimony of the operator of T.M. NORSWORTHY, Appellant specifically discussed in his own testimony the matter of overtaking with details of voice radio communication and signal given under the Rules. Of this, he

testified:

> "And I said, 'Now I'll have to know right away, I'm closing the gap rapidly.' I said, 'If you think it's not all right just say so and I'll stay back here.' No more conversation. I assumed he got too busy to reply and I did blow that horn." R-54, 55.

In addition, Appellant declared:

> "...I assumed that his silence meant it was all right. He never at any time told me `Don't come by' because had he done so I wouldn't..." R-55.

With reference to his whistle signal, Appellant had testified:

> "Now, I can't positively swear that he answered. I just, I'd have to tell the truth, the doors were closed, the windows closed and I'm watching what I'm doing and it would have been very hard to see that one whistle light come on under these circumstances. But I would never have gone down there if I hadn't thought it was safe." R-55.

The significance of this testimony in connection with Appellant's claim of lack of notice is not in its cogency toward establishing facts but in the mental state of Appellant at the time he gave it. The entire thrust of the testimony is to persuade the trier of facts that he understood his obligations under Rule 22 of the Western Rivers Rules (33 U.S.C. 347 - "Overtaking vessels to keep out of way; signals"), that he attempted in good faith to comply with the Rule, that there was strong doubt in his mind that his proposal to pass had been assented to, that the apparent failure of the overtaken vessel to reply was ascribable to the busy-ness of its operator engaged in a difficult maneuver, and sound judgment of his ability to pass safely Appellant committed no fault in reliance on that judgment to elect to overtake and pass.

The merits of Appellant's defense are at this point irrelevant; what matters is that the line of defense is that of a person who knows that his conduct as operator of an overtaking vessel is what is in question and that he has proposed that conduct as justifiable under the "Rules of the Road." The testimony is not

that of a person who believes he can defend simply by showing that at all times he was in control of his tow and deliberately executed a maneuver (thereby negating the only thing, as he would have it on appeal, with which he was charged: loss of control), but it is that of a person well aware of what the true issue is.

Most apt to the grounds here considered is the recent holding of a Federal Court, *Armad* v *United States*, C-74-2386 SC, D.C. ND Cal., Aug 29 1975, in which was approved a change made by a Coast Guard administrative law judge amending a specification alleging wrongful "mutual combat" to one alleging "assault and battery." After the investigating officer's case-in-chief was concluded, the administrative law judge noted that assault and battery had been raised by the evidence and made formal amendment to the specification in his written decision issued four months after the hearing had ended. The court said, "In short, plaintiff's procedural due process rights were not violated by the absence of a 'detailed' notice of the charge against him [citing *Kuhn* v *Civil Aeronautics Board*, *supra*]."

In the instant case, Appellant not only had the notice required for administrative due process but actually litigated the issue and contested the alleged fault in his own defense case.

IV

Subsidiarily to this major complaint, Appellant urges three technical failures to comply with the regulations governing these hearings.

He urges first that a substantial amendment to the specification was required, by 46 CFR 5.20-65(c), to have been made by the process of withdrawing the specification and serving a new notice upon Appellant before hearing. Assuming that the reference to the overtaking situation in the specification preferred was not sufficient to give adequate notice in and of itself and that the amendment by the Administrative Law Judge was therefore a substantial change, it can be seen that the cited subparagraph is ideal and directory. It provides an orderly method for clarification and ascertainment when a person charged is confused but it is not the only method available under the laws and practice of administrative procedure to grant due process to the interested

party.

As to the argument that the amendment called for should, under 46 CFR 5.05(b), have been couched in terms of violation of a statute as well as having undergone the withdrawal and re-referral procedure of paragraph (c) of that section, I have already dealt with the matter in "I" above.

For a third refinement, Appellant urges that the Administrative Law Judge violated 46 CFR 5.20-155(b) by not making a "separate conclusion" on the specification originally preferred. This is a mere quibble, since the specification originally preferred was amended in the decision issued and a conclusion was stated as to that specification as amended.

V

Consistently with his argument of lack of notice, Appellant says almost nothing on his appeal on the merits of the case. He does however, mention:

> "While realizing that the law implies a substantial burden on an overtaking vessel as pointed out heretofore an overtaking vessel need not anticipate erratic maneuvers by the privileged vessel."

I have chosen not to construe this as a waiver of the claim of not having had notice (although it does imply that a defense on the merits of the overtaking situation was entered) but it is worth a brief comment.

The alleged "erratic" movement of the overtaken vessel was a sternway as a result of which, it was argued, that vessel backed into the tow of JOSEPH M. JONES which would otherwise have passed clear with ample room for safe passage. The theory was rejected, and properly, by the Administrative Law Judge.

On initiating a radio conversation with T.M. NORSWORTHY while still about a mile astern of that vessel, Appellant was aware of the fact that the tow being overtaken was executing a difficult maneuver. The pilot told Appellant that he was "flanking," as Appellant would have expected, and that "I went into this thing a little early... I'm going to have to punch ahead and redo it" R-54

(Appellant's testimony.) In fact, while acknowledging the other operator's experience on the river, Appellant perceived his maneuver to be not quite the best method for rounding a bend. R-50. Whether or not T.M. NORSWORTHY ever actually made sternway, Appellant was well aware that it was backing. R-49 and R-53. With this admitted knowledge of the activity of the other tow it is difficult to see that Appellant could urge that he had the right to rely on "non-erratic" behavior while it was in the process of being overtaken.

The fundamental flaw in this argument, is, in truth, even deeper. Appellant well recognized that his voice communication with the other tow had been cut off and he then resorted to a whistle signal to which he heard no reply. Without regard to the evidence of record that his attempt to set an agreement by radio was shaken off by the other pilot and that the whistle signal was never heard by the other pilot, it is clear that Appellant, knowing that the other pilot was occupied with his maneuver and himself ascribing the lack of response by radio or whistle to his proposal to the immediate engagement of the other pilot with own difficulties, not having obtained consent to the passing, had no right to rely on any special effort of the other to relieve him of fault. See: The *Pleides*, CA 2 (1926), 9 F. 2ND 804; *The Holly Park*, CA 2 (1930), 39 F. 2nd 572; *The Marion E. Bulley*, CA 2 (1938), 94 F. 2ND 646; *Stevens* v *U.S. Lines*, CA 1 (1951), 187 F. 2nd 670. Under the conditions known to Appellant the attempted passing of the overtaken vessel without agreement was an unwarranted risk of collision, which did in fact occur.

ORDER

The order of the Administrative Law Judge, dated at St. Louis, Missouri, on 16, May 1975, is AFFIRMED.

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

Signed at Washington, D. C. , this 29th day of Oct. 1975.

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