UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 411202
Issued to: John R. NEWHOUSE

DECISION OF THE COMMANDANT
UNITED STATES OF AMERICA

2061

John R. NEWHOUSE

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 10 December 1975, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland suspended Appellant's license and document for three (3) months on twelve (12) months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as Master on board the United States M/V MYRON C. TAYLOR under authority of the license above captioned, on or about 12 May 1975, Appellant violated the provisions of the Coastwise Load Line Act, 46 U.S.C. 88c, in wrongfully permitting the M/V MYRON C. TAYLOR, O.N. 228960, to be so loaded as to submerge her lordliness on a voyage from Rogers City, Michigan, to Lorain, Ohio.

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 several documents and the testimony of one witness, the Coast Guard

Inspector.

In defense, Appellant testified in his own behalf.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all licenses and documents issued to Appellant, for a period of three (3) months on twelve (12) months' probation.

The entire decision and order was served on 15 December 1975. Appeal was timely filed on 12 January 1976.

FINDINGS OF FACT

On 12 and 13 May 1975, Appellant was serving as Master on board the M/V MYRON C. TAYLOR and acting under authority of his license while the ship was on a voyage from Rogers City, Michigan to Lorain, Ohio in the Great Lakes.

The M/V MYRON C. TAYLOR, a self-unloader type bulk cargo vessel (O.N. 228690), departed Rogers City on 12 May 1975 with a cargo of 14296 tons of limestone. Prior to her departure drafts fore and aft were taken by the first and third mates. The drafts, as recorded in the TAYLOR'S log, were 22 feet 1 inch forward and 22 feet 4 inches aft. Additionally, her freeboard was checked on the outboard side by visual observation of her load line and by measuring her midship draft with a "draft board." Using this method her midship outboard draft was calculated at 22 feet 2 5/8 inches. Prior to departure the TAYLOR'S inboard freeboard and inboard midship draft were not observed. However, her load line was observed after her departure by dockside personnel and no report of her load line being submerged was made.

On 13, May 1975, while the TAYLOR was underway on the Black River in the approaches to Lorain, Ohio, a Coast Guard Inspector, Chief Warrant Officer Clark C. Logsden, received a report that the Lorain Coast Guard Station had "observed the TAYLOR coming into the river with her load line submerged." Upon receiving this information Warrant Officer Logsden proceeded to the dock and

watched the TAYLOR pass by approximately 100 feet off the dock. As he watched the TAYLOR go by "it seemed to (Logsden) that she was submerged on her load lines."

When the TAYLOR was approximately one ship length from the unloading dock, Appellant commenced preparations for unloadiing. The preparations included swinging the unloading boom to starboard and pumping ballast water to compensate for "boom list." In docking the TAYLOR Appellant placed her bow in a mudbank and swung her stern into the dock. While her lines were still being made up Warrant Officer Logsden boarded the TAYLOR, announced that he would be making a load line inspection, and requested that the pumping of ballast water cease. By that time at least 300 tons of ballast water had been pumped aboard the TAYLOR.

Once aboard Warrant Officer Logsden proceeded, with the assistance of one of the mates, to take ballast readings. After sounding the ballast tanks he had the coxswain of a board from the Coast Guard Station take draft readings fore and aft. Warrant Officer Logsden himself then took midship freeboard readings. The freeboard readings observed by Warrant Officer Logsden were 9 feet 6 inches on the port side and 9 feet 2 inches on the starboard side, for an average observed freeboard of 9 feet 4 inches. Warrant Officer Logsden then proceeded to the bridge, examined the load line certificate, and noted that the mid-summer freeboard was 10 feet 1 inch. From this information Warrant Officer Logsden concluded that the TAYLOR was submerged below her load lines in violation of the Coastwise Load Line Act, 46 U.S.C. 88c.

BASES OF APPEAL

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

(1) The charge and specification are legally incorrect since a violation of 46 U.S.C. 88c is not within the purview of 46 U.S.C. 239,

(2) The Investigating Officer failed to present a *prima* facie case of either a loadline violation or misconduct and thus it was error for the Administrative Law Judge not to have granted Appellant's motion to dismiss,

(3) The Administrative Law Judge erred in making evidentiary findings which were unsupported by the record and these errors result in reversible error, and

(4) The penalty imposed is unduly harsh and excessive when the record is viewed as a whole.

APPEARANCE: Ray, Robinson, Keenen and Hanninen by David M. Spotts.

OPINION

I.

The substance of Appellant's initial argument is that since the Coast Guard Load Line Act provides its own system of penalties, 46 U.S.C. 88g, the sanctions in 46 U.S.C. 239 cannot be used against one who violates the Load Line Act. In other words Appellant contends that the remedies in 46 U.S.C. 88g are exclusive. In support of this argument he cites *Bulger v. Benson*, 262 F.929 (9 Cir, 1920) and *In the Matter of License 308840 and MM Document No. Z181417 (In Re Edelheit's License),* 1968 A.M.C. 1034. However, neither of these cases provide any meaningful support to Appellant.

Appellant correctly states that the factual setting in his case is similar to that in the Edelheit case. However, the procedural setting is not. There edelheit had been charged with "violation of a statute" rather than "misconduct" and the Hearing Examiner dismissed the charge since the load line laws were not part of Title 52 of the Revised Statutes. In a later case, Appeal decision 1842 (SORIANO), the examiner's rest the idea that a master's license could not be proceeded against under 46 U.S.C. 239 for violation of the load line laws. My reasoning for differing with the result reached by the Administrative Law Judge is set out at some length at pages 16-19 of the SORIANO opinion and need not be repeated here. For the purposes of the present case it is sufficient to note that I specifically held that "violation of a load line law is clearly `misconduct' authorizing action to suspend or revoke a license." See also Appeal Decisions 1697 (CAMENOS),

1827 (CANDARAS), and 1805 (MEYER).

Appellant's argument based upon the holding in *Bulger v. Benson* has also been dealt with previously. In Appeal decision 1574 (STEPKINS) I extensively discussed *Bulger v. Benson* and found it inapplicable to these proceedings, a view which I have reaffirmed on numerous occasions. Additionally, in the same decision, I made the following observations with regard to whether remedial action under 46 U.S.C. 239 may be taken for violation of a statute which has its own system of sanctions:

> If the act alleged happens to be a violations of a statute not in Title 52, it may be charged as "misconduct" "negligence", or "inattention to duty", as appropriate, not withstanding that there may be a monetary penalty provided within the statute itself. . .
>
> The election to pursue one remedy provided by statute does not preclude other authorized action; when Congress has provided more than one method of dealing with conduct, whether in separate (as in R.S. 4450 and, *e.g*. the Rules of the Road) or in the same statute (as in 46 U.S.C. 526a), all methods may be utilized.

Contrary to Appellant's assertion, the alleged violation is clearly within the purview of 46 U.S.C. 239 and both the charge and specification are legally correct.

II.

Appellant's next two arguments are related. In one Appellant urges that the Investigating Officer failed to present a *prima facie* case and in the other that the Administrative Law Judge made findings of fact which were unsupported by the record. Both arguments are concerned essentially, with the sufficiency of the evidence. For purposes of these proceedings the standard for measuring the sufficiency of the evidence is that the charge and specification must be supported by substantial evidence of a reliable and probative character. 46 CFR 5.20-95. Since I have concluded, after careful examination of the record, that

substantial evidence does not exist to support the charge and specification against Appellant's license, his two arguments need not be specifically addressed.

In finding a lack of substantial evidence in this case I am initially concerned with evidence that was, or should have been, available but was never presented at the hearing. The testimony of two other Coast Guard witnesses could have been of considerable assistance in this case. The first was the person who observed the TAYLOR from Lorain Coast Guard Station and reported to Warrant Officer Logsden that she was "coming into the river with her load line submerged." This report was used by the Administrative Law Judge to support his ultimate conclusion that the TAYLOR was submerged below her mid-summer load line. Opinion, p. 13. This report is, with respect to proof that the TAYLOR was overloaded, hearsay. While strict adherence to the rules of evidence is not required in these administrative proceedings, 46 CFR 5.20-95 requires "that hearsay evidence shall be rejected if the declarant is readily available to appear as a "witness."

In the absence of some contrary evidence in the record it must be presumed that this Coastguardsman located at a nearby Coast Guard Station was "readily available" and, this, it was error for the Administrative Law Judge to consider the report as supporting evidence of a violation. On the other hand, had this witness been produced and questioned fully about the circumstances of his observations, valuable evidence in support of the specification might have been obtained.

The other witness was the coxswain of the Coast Guard vessel that assisted Warrant Officer Logsden in his load line investigation. If the TAYLOR was submerged below her load line this witness could have provided direct evidence of that fact from his own observations. Additionally he could have testified as to the draft readings that he observed. In this regard it is important to note that the Administrative Law Judge sustained Appellant's objection to Warrant Officer Logsden testimony regarding the draft readings observed by the coxswain. Transcript, p. 25. Curiously, while excluding this evidence at the hearing, the Administrative Law Judge did use the draft readings observed by the coxswain in his findings of fact, nos. 14 and 18. Naturally, if the Administrative Law Judge used this evidence to reach his

ultimate conclusion, he would be in error.

In addition to these witnesses there was other evidence that, if produced, would have shed considerable light on this case. This would include a copy of the Load Line Certificate and information concerning the pumping capacity of the TAYLOR's ballast pumps and a means of converting the ballast tank soundings to the amount of ballast on board. Presumably, the latter information could have been readily obtained from the TAYLOR's chief Engineer.

The Administrative Law Judge, in finding the charge and specification proved, relied on three observations that the TAYLOR was submerged below her mid-summer load line. The first was the hearsay report that someone at Lorain Coast Guard Station had observed the TAYLOR with her load line submerged. As previously discussed this report cannot be used to support the guilty finding. The second observation is Warrant Officer Logsden's initial sighting of the TAYLOR when he was standing on the dock. With respect to this observation the Administrative Law Judge made the following finding of fact:

> CWO Logsden thereupon proceeded to the west shore of the said river, at an estimated 100 to 120 yards from the vessel, at the American Shipbuilding Company Shipyard from which he could observe the vessel's port side as she proceeded underway up the river. From his observations, CWO Logsden *determined* that the load line of the vessel was submerged.

This finding is unsupported in the record and, at least in part, directly contrary to the evidence. Warrant Officer Logsden's testimony on this point appears at three places in the transcript. First, on direct examination at page 21, he stated:

> I walked down to the dock, which was close to my office, and as I watched her go by it *seemed* to me that she was submerged on her load line.

On cross-examination Appellant's counsel asked a short series of questions concerning this initial observation at pages 55-56:

Q. As the vessel went past the shipyard and the dock where you were standing - -

A. Yes, sir.

Q. - - it is necessary for the vessel to turn?

A. Yes, sir.

Q. To follow the river?

A. Yes, sir.

Q. What effect does a turn have on the vessel?

A. It depends on the speed; it will probably list over.

Q. List over? That would submerge one side more than the other?

A. Yes, sir.

Q. How far away were you from the vessel?

A. 100 feet.

And, at page 62 on recross-examination, the follow exchange occurred:

Q. When you observed the vessel for the first time, was she on an even keel?

A. I couldn't say. I observed her from the dock. All I can say, she was *alleged* overloaded because her overloading marks were out of sight.
Q. I'm just talking about her list.

A. I have no idea.

The Administrative Law Judge is wrong in concluding from the record, that, at the time of his initial observation, "CWO Logsden determined that the load line of the vessel was submerged." At this point Warrant Officer Logsden had made no determinations - the TAYLOR merely seemed submerged on her load line and was alleged overloaded. Additionally, in the Administrative Law Judge's finding, the 100 feet testified to by Warrant Officer Logsden becomes 100 to 120 yards. Thus, despite the finding of the Administrative Law Judge, Warrant Officer Logsden's initial observation provides little in support of the charge and specification.

The remaining observation of submergence is Warrant Officer Logdden's Load Line Inspection. Initially I note that, based on the record evidence, section 3-9-20D of the Merchant Marine Safety Manual (CG-203) was not followed. This section requires the investigator to observe, as part of his inspection, the position of the applicable load line in respect to the surface of the water on both the port and starboard sides.

While the failure to make these observations need not be fatal in every case, where, as in this case, the other observations made during the inspection are somewhat doubtful, the absence of carefully observed load line submergence weighs heavily against finding a violation.

The other observation mentioned in the Merchant Marine Safety Manual include draft readings, which in this case were excluded from evidence, and midships freeboard readings. With respect to the freeboard readings obtained by Warrant Officer Logsden, the record casts considerable doubt on their accuracy. First, Warrant Officer Logsden was unable to recall, with any precision, the method used to obtain the TAYLOR's freeboard. Transcript, p. 53-55. Appellant's description of the method used to determine freeboard, while perhaps subject to some bias, also inspires no confidence on the accuracy of the measurement. Transcript p. 93-94. second, Warrant Officer's Logsden's measurements of freeboard were made after he knew that the TAYLOR had been pumping ballast water, yet he made no attempt to account for this in his calculations. The Administrative Law Judge recognized this fact and, by making independent calculations, attempted to correct this

error. Unfortunately, his calculations, attempted to correct this error. Unfortunately, his calculations are subject to question due to a lack of support in the record for the assumptions he made with respect to the amount of ballast water pumped. Finally, although I have gone outside the record to make the calculations, observations reported in Warrant Officer Logsden's Load Line Inspection Report (I.O. Exhibit No. 2) are inconsistent with the measurements in the TAYLOR's Load Line Certificate. The Load Line Certificate, on file at Coast Guard Headquarters states that the TAYLOR's extreme mid-summer draft is 22 ft 2 1/8 inches. Added to her allowable mid-summer freeboard of 10 feet 1 inch, the total is 32 ft 3 1/8 inches. However, when the average draft and average freeboard from the Inspection Report are added together, the total is only 32 feet, a shortfall of 3 1/8 inches. The missing 3 1/8 inches adds to the doubt surrounding the freeboard measurement.

In conclusion, none of the three observations of load line submergence relied on by the Administrative Law Judge provide substantial evidence of a violation of the Coastwise Load Line Act. Thus, the charge and specification must be dismissed.

III.

Due to the result in this matter it is unnecessary to discuss Appellant's final assertion of error concerning the propriety of the sanction imposed by the Administrative Law Judge.

ORDER

The order of the Administrative Law Judge dated at Baltimore, Maryland on 10 December 1975, is VACATED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 22nd day of June 1976.

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