

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 04805
Issued to: Patrick D. GILLMAN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2066

Patrick D. GILLMAN

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 21 January 1976, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for three months outright plus six months on fifteen months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as Operator on board the tug SACHEM, with the barge THE CLYDE in tow, under authority of the license above captioned, on or about 26 July 1975, Appellant did, while said vessels were on Lake Erie,

FIRST, wrongfully navigate the barge THE CLYDE without navigation lights displayed as required by the Great Lakes Rules of the Road, and

SECOND, wrongfully navigate the tug SACHEM without keeping a proper lookout as required by the Great Lakes Rules of the Road.

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

The Investigating Officer introduced in evidence the testimony of four witnesses, two stipulations, and three exhibits.

In defense, Appellant, after making motions at the completion of the Investigating Officer's presentation, rested.

Following the hearing, the Judge rendered a written decision in which he concluded that the charge and both specifications had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of three months outright plus six months on fifteen months' probation.

The entire decision and order was served on 26 January 1976. Appeal was timely filed on 23 February 1976.

FINDINGS OF FACT

On 26 July 1975, Appellant was serving as Operator of the uninspected tug SACHEM and acting under authority of his license while the vessel was in the port of Marblehead, Ohio. The tug was in Marblehead to pick up the barge THE CLYDE, which was loaded with a cargo of stone, for a voyage to Huron, Ohio. At the time of the SACHEM's arrival in Marblehead the wind was from the northeast with gusts to 25 miles per hour, and seas were four to six feet. Visibility was unlimited. The barge THE CLYDE was moored with her bow at the inner end of the slip, with two light barges moored abreast of each other and aft of THE CLYDE. THE CLYDE was moored only by a stern line since the bow line had broken loose due to the severe weather, and the bow was swinging out into the slip. After the SACHEM moved one light barge to the opposite side of the slip, two of its crewmen went aboard the other light barge and from there jumped onto THE CLYDE's stern. The towing bridle from the tug was then passed to those crewmen by heaving lines and secured to the port and starboard towing bits. No attempt was made to pass portable running lights to the barge. The crewmen then jumped approximately four feet back to the tug so that the barge could be towed stern first out of the slip before she could damage the other barges. At approximately 2:40 A.M. the tug and tow proceeded on a voyage to Huron, Ohio.

Approximately twenty minutes after the tug and tow left the

slip, the tug engines were put in neutral and the SACHEM immediately lost headway. Joseph Turner, winchman and deckhand, then stepped out of the deckhouse on the main deck, looked aft, and saw a cabin cruiser which he believed was across the towline and continuing on its journey. The vessel which TURNER observed was not identified. TURNER went to the pilot house where he and Appellant observed the cabin cruiser which appeared to proceed on its way. Appellant then put the engines ahead and the tug continued to Huron.

Following the arrival of the tug and tow in Huron, it was discovered that, at approximately the time of the sighting of the cabin cruiser, a cabin cruiser had attempted to cross between the tug and barge, had hung up on the towline, and had been run down by the barge. Four persons aboard the cabin cruiser died as a result of the collision. The unlit barge was not sighted by anyone aboard the cabin cruiser until after it was caught on the towline.

At no time during the voyage of the SACHEM and THE CLYDE was any crew member assigned to stand as lookout.

BASES OF APPEAL

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

1. "The specifications as charged do not conform to the requirements of 46 CFR 5.05-17(b)(1) and do not meet their purpose of appraising Appellant of the offenses of which he is charged, so as to enable him to adequately prepare his defense;
2. No statute or regulation requires navigation lights on a barge on the Great Lakes when being towed;
3. Under the special circumstances which existed, there is no requirement for navigational light placement on the barge THE CLYDE
4. There was no failure of proper lookout, since the small craft that was to be seen was indeed actually seen."

APPEARANCE: Foster, Meadows, and Ballard, Detroit, Michigan;
Raymond A. Ballard, Esq.

OPINION

I

Appellant contends that the first specification is deficient in that it does not specify the particular statutory or regulatory provision under which he is charged. An examination of the specification, in terms of the requirements contained in 46 CFR 5.05-17(b), cited by Appellant, reveals that all necessary elements for an adequate specification are present. The basis for jurisdiction is stated as "while serving as Operator aboard the uninspected tug SACHEM with the barge THE CLYDE in tow, under authority of the captioned documents." The date and place of offense are stated as "on or about 26 July 1975, while said vessels were on Lake Erie." The statement of the facts constituting the offense appears as "wrongfully navigate the Barge THE CLYDE without the navigation lights displayed as required by the Great Lakes Rules of the Road." This last passage sufficiently defines the offense to enable Appellant to prepare his defense. Because the holder of an Operator's license is charged with the knowledge of the Rules of the Road applicable to the waters over which he operates (46 CFR 187.20-10(a)(1)), reference to the body of rules, combined with a description of the offense, gives him adequate notice of the offense with which he is charged.

II

It is not necessary to rule on Appellant's argument that the definition of "canal boats" in 33 CFR 90.19a is limited by its own terms to that section in which it appears. The analyses of the relationship between 33 CFR 90.19a and 90.19 provided by both the Administrative Law Judge and Appellant are misplaced. All parties concerned failed to recognize that no recourse to regulations is necessary in determining what lights were required to be carried by the CLYDE.

Contrary to Appellant's contention that no statute or regulation is applicable, the requirements for lights to be carried

on the CLYDE may be found at 33 U.S.C. 255, which reads as follows:

"A sailing vessel under way and *any vessel being towed* shall carry the side lights mentioned in section 252 of this title.

A *vessel in tow* shall also carry a small bright light aft, but such light shall *not* be visible forward of the beam."
(emphasis added)

The findings of fact support a conclusion that Appellant acted in violation of 33 U.S.C. 255.

III

Appellant seeks to invoke Rule 27 of the Great Lakes Rules of the Road (33 U.S.C. 292) as a justification for his embarking upon the voyage without the required light. He contends that it was necessary in the interest of protection of property, to move THE CLYDE away from the slip where it had been moored. It is not necessary to determine whether it was necessary to determine whether it was necessary to move the vessel, because Appellant did more than merely move it clear of the immediate danger. THE CLYDE was towed from Marblehead, Ohio, to Huron, Ohio, a distance of several miles. Although Rule 27 does authorize departure from the rules in order to avoid immediate danger, this cannot be read as permitting Appellant to create a serious and continuing danger by departing on a voyage at night with an unlighted barge in tow. Once the tug and barge were clear of the slip, the immediate danger to the vessels, dock, and conveyer system adjacent to the slip terminated. Upon termination of the immediate danger it immediately became incumbent upon Appellant to comply with the Rules of the Road.

IV

Appellant's arguments concerning the adequacy of the second specification are generally covered in part I of this opinion. Although no one rule or regulation expressly requires the stationing of a lookout, the rules of navigation should be familiar enough to an experienced licensed Operator that they do not have to be spelled out in order for him to know what duty he is charged

with breaching. To charge that Appellant "did...wrongfully operate the tug SACHEM, without keeping a proper lookout..." sufficiently apprises him of the offense with which he is charged.

V

Finally, Appellant argues, "The absence of a lookout specifically assigned as such with no other duties is not required under the rules or the law, if what is to be seen is actually seen."

This argument is without merit in this case because the record clearly indicates that what was to be seen was not seen by anybody on the SACHEM. A witness at the hearing related how he observed a cabin cruiser "clear the tow line and proceed on its journey." (R.30) What was to be seen was a cabin cruiser which never cleared the tow line, but, rather, hung up on the tow line and was run down by the tow.

The timing of the observation of the cabin cruiser crossing the towline is also significant. When asked where he first saw the boat, the witness responded, "I first saw it when I stepped out the galley door, and just crossed our tow line." (R. 51) The same witness later added, "I think he had crossed. I'll be safe to say he was across it when I first saw him." (R. 51)

It is apparent that whatever was seen from the tug was not seen until it was too late to take any action to prevent a mishap. This fortuitous sighting of a cabin cruiser by a crew member enroute from the galley to the bridge does not establish the presence of an adequate lookout under the circumstances.

VI

The order of the Administrative Law Judge provides that, in addition to the captioned license, "MMD SS#376-20-4915" was suspended. There is no indication in the record that the described Merchant Mariner's Document exists. Further investigation of this matter revealed that the Merchant Vessel Personnel Division, Office of Merchant Vessel Safety, United States Coast Guard Headquarters, has no record of a Merchant Mariner's Document having ever been issued to Appellant.

At the start of the hearing, Appellant was advised that the hearing is solely concerned with his right to hold his Operator's License and the endorsements thereon. (R. 3) No reference was made to any Merchant Mariner's Document which may be issued to Appellant. This advice was consistent with the charge sheet (CG-2639), served on Appellant, on which all references to a Merchant Mariner's Document were crossed out.

Therefore, the order may properly impose sanctions against Appellant's license only.

CONCLUSION

Although improperly characterized by the Investigating Officer and the Administrative Law Judge, due to their application of the incorrect regulation, the first specification was sufficient, both in terms of 46 CFR 5.05-17 (b) (1) and in apprising Appellant of the offense with which he was charged. Appellant was guilty of failure to equip the barge THE CLYDE with navigation lights as required by Rule 6, Great Lakes Rules of the Road (46 U.S.C. 225).

The special circumstance rule does not provide Appellant with an adequate defense for his failure to equip the barge with navigation lights for the duration of a voyage from Marblehead, Ohio, to Huron, Ohio.

Although no statute or regulation expressly requires the keeping of a proper lookout, that requirement is a well-established rule of navigation. Appellant is guilty of failure to maintain an adequate lookout under the circumstances.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 21 January 1976, is AFFIRMED insofar as it applies to Operator's License No. 04805. The remainder of the Order is VACATED for the reasons noted above.

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

Signed at Washington, D. C., this 20th day of July 1976.

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