

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-529214
LICENSE NO. 453652
Issued to: James L. FULTON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2080

James L. FULTON

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 18 July 1975, an Administrative Law Judge of the United States Coast Guard at New York, New York admonished Appellant upon finding him guilty of negligence. The specification found proved alleges that while serving as Master on board the SS NOTRE DAME VICTORY under authority of the license and document above captioned, on 30 January 1975, Appellant did hazard his vessel by proceeding up the Delaware River in an unsafe manner without assistance of tugboats when the vessel's ship's service generator was inoperable and the portable 500 kw generator was operating in an unreliable manner and there were no immediate backup ship's service generating capabilities.

A second charge concerning an improper logging was dismissed.

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

The Investigating Officer introduced in evidence excerpts from the ships log, other documents, and the testimony of the Chief

Engineer (SS NOTRE DAME VICTORY), Delaware River Pilot aboard the NOTRE DAME VICTORY and the Marine Superintendent of Ecological Shipping Corporation, operator of the vessel.

In defense, Appellant testified in his behalf and offered in evidence the expert testimony of Captain Cecil Davies, Keystone Shipping Company.

At the end of the hearing, the Judge reserved decision. On 18 July 1975, he rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order admonishing Appellant.

The entire decision and order was served on 8 August 1975. Appeal was timely filed on 8 August 1975.

FINDINGS OF FACT

On 30 January 1975, Appellant was serving as Master on board the SS NOTRE DAME VICTORY and acting under authority of his license and document while the ship was at sea.

The main steam generator broke down at Ras At Tannura, Saudia Arabia and the ship's standby diesel service generator was put into operation. The vessel proceeded to Bahrain where an ABS surveyor provided a seaworthy certificate to proceed to Cape Town, South Africa. The surveyor at Cape Town recommended that a 350 kw portable diesel generator be put on board as a back-up capability for the ocean voyage and his recommendation was followed.

Off the coast of Brazil, the standby diesel service generator broke down and the vessel was required to proceed on the 350 kw portable generator. The vessel was ordered into Barbados for repairs to the standby diesel service generator, but the repairs were unsuccessful. A 500 kw portable diesel generator was flown to Barbados for use, and was placed alongside the 350 kw generator. The vessel was then ordered to Trinidad to discharge its cargo and for further repairs. When those repairs also proved to be unsuccessful, the vessel was ordered to return to its owner's

shipyard in Philadelphia, and the ABS surveyor in Trinidad issued a seaworthy certificate for this purpose.

Before departure from Trinidad, the Master ordered clean diesel fuel oil for use in operating the two portable generators. However, the oil which was delivered was actually "Black Marine Diesel." Since the two generators could not be put in parallel, the electrical load was divided between them. The 350 kw generator was used to pump fuel, lube oil and the vacuum pumps, among other pieces of machinery. The 500 kw generator was used for operating deck machinery, steering, air conditioning and other domestic uses. The 350 kw generator had been in use for 8 days prior to arrival in Barbados, as well as for 24 days while in port. It continued to operate without any difficulty until the vessel arrived in Philadelphia.

The "Black Marine Diesel" fuel delivered in Trinidad had the effect of causing excessive sediment to be deposited on the filters of the 500 kw generator. When the filters on this generator would begin to clog up the pressure gauge on the generator would move first to the caution sector, and then to the danger sector. The time period that the generator operated in the caution sector was at least several hours, and up to 13 hours in one instance. The amount of time that it was capable of operating in this sector was indefinite, because at no time did the generator shut off automatically. After the time periods stated above, the Chief Engineer would secure the generator himself in order to remove the dirty filters and install clean ones. As a result of this clogging, the filters on the 500 kw generator were changed a total of 3 times on the between Trinidad and Philadelphia.

When the vessel reached the Breakwater Anchorage at the mouth of the Delaware River, the filters had already been changed twice, and no additional filters were aboard. The 500 kw generator had been operating in the red zone for some time so the Chief Engineer secured it and transferred the entire load to the 350 kw generator. The vessel came into the Breakwater Anchorage on the reduced power of the 350 kw generator.

Shortly after the vessel anchored at the Breakwater the Chief Engineer delivered the following note to the Master

(Appellant):

"I cannot assure you that we will have full power for the Delaware River passage, due to low grade diesel fuel and excessive sediment. There is no standby power available on this ship, therefore I caution you to exercise care and advise the owners of my comments."

At the Breakwater Anchorage, the Master ordered new filters for the 500 kw generator. While waiting for their arrival, the Delaware River Pilot came aboard and was apprised of the situation by the Master. He did not recommend the use of tugs to take the vessel up the river. When the filters were changed, the vessel proceeded without incident. The river trip took approximately 6 hours. The shortest period of time that the filters had to be changed between Trinidad and Philadelphia was 33 hours.

Appellant's expert witness (Captain Davies) was of the opinion that the use of tugs for the trip up the Delaware River would have been improper, and might have resulted in more of a hazard than a benefit. The Government's witness (Mr. Dowd) testified that as a matter of maritime safety, Appellant made the right judgment in deciding to proceed up the river in this fashion. The Delaware River pilot on board the vessel did not recommend the use of tugs, and testified that tug assistance up the river would depend on how extreme the situation was, but that in his experience he could recall only one instance in which tugs were actually used.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that findings of fact Number 1, 18 and 21 are not supported by substantial evidence in the record, that the Judge incorrectly summarized the evidence presented at the hearing, that the specification is improper because it requires *immediate* back-up generating capabilities at all times, that it is improper because neither a marine casualty nor a violation of a statute or regulation was alleged or proven, and that the Judge abused his discretion by going outside the scope of the evidence presented at the hearing.

APPEARANCE: Raymond T. Letulle, Esq. of Krusen Evans and

Byrne, Philadelphia, Pennsylvania.

OPINION

46 C.F.R. 5.05-20(2) defines negligence as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform." The Judge found that a reasonably prudent master would not have come up the river without tugs; however, nowhere in the record is there any support for this finding. No evidence whatsoever was presented by the government on the issue of the standard of care to which Appellant should be held, and the Judge did not take judicial notice of any factors which might have shown that a reasonably prudent master would have requested tugs in this situation. The only testimony to be found in the record on this issue is favorable to Appellant. The sole expert witness to testify stated that he approved of Appellant's decision (Tr. 194-195). The Marine Superintendent for Ecological Shipping Corp., called by the government, testified on cross examination that he thought Appellant had made the right choice (Tr. 124-126). The Delaware River pilot aboard the vessel at the time in question, when informed that the portable generators were all the power the vessel had, that the filters were changed twice between Trinidad and the Breakwater Anchorage, and that Appellant was waiting for additional filters before proceeding up the river, did not recommend that tugs be requested for assistance. It is true that the pilot testified in response to a hypothetical question that he would have recommended that "maybe we need tugboats at the head of the Liston Range, Bouy 42 of the channel, where the channel narrows." (Tr. 103). However, the basis for this response was a factual description of the situation which was both incomplete and incorrect. The Judge himself noted this, but allowed the answer to stand nonetheless, since it was adequate in light of the limited number of facts he was given. (Tr. 103). When given a more complete set of facts, the pilot withdrew from his first position (Tr. 113, 117).

The burden in this case was on the government to show that Appellant, by not requesting tugs, acted in a manner that was contrary to what a prudent master would have done under the same circumstances. This is especially so where there was no allegation that Appellant violated any statute or regulation.

CONCLUSION

The government failed to present substantial evidence of a reliable and probative nature to support a finding that Appellant was negligent in failing to request tugs from the mouth of the Delaware River to a berth in Marcus Hook, Pennsylvania under the circumstances of this case.

ORDER

The order of the Administrative Law Judge dated at New York, on 18 July 1975, admonishing Respondent is VACATED.

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

Signed at Washington, D. C., this 8th day of OCTOBER 1976.

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