UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT CDB-210721 and
LICENSE NO. 479446
Issued to: Jack Selwyn CHAPMAN, CBD-210721

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2127

Jack Selwyn CHAPMAN

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 26 April 1977, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's seaman's documents for three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as master on board M/V VIRGINIA CLIPPER under authority of the license above captioned, on or about 13 April 1977, Appellant wrongfully navigated the vessel from Baltimore, Maryland, to Norfolk, Virginia, without having on board one of the licensed engineers required by the certificate of inspection, in violation of 46 U.S.C. 222(R.S. 4436).

At the hearing, Appellant was represented by non-professional counsel, the president of the company which owns VIRGINIA CLIPPER, and entered a plea of guilty to the charge and specification.

Despite the plea of guilty, the Investigating Officer introduced in evidence a copy of the certificate of inspection of the vessel.

In defense, Appellant offered in evidence testimony of the company official who acted as his counsel.

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

The entire decision was served on 26 April 1977. Appeal was timely filed.

FINDINGS OF FACT

On 13 April 1977, Appellant was serving as master of M/V VIRGINIA CLIPPER and acting under authority of his license while the ship was at Baltimore, Maryland. VIRGINIA CLIPPER is an inspected vessel, with the certificate requiring a complement of two licensed engineers, one chief and one third assistant.

Shortly before 13 April 1977, VIRGINIA CLIPPER, which had a more or less regularly employed crew (with ten persons required in the service of the vessel and a total of sixteen authorized), was at Norfolk, Virginia, with the immediate prospect of a voyage to Baltimore, Maryland, and return to Norfolk.

Norfolk is the home of Norfolk, Baltimore and Carolina Lines, Inc., owner of the vessel.

Two licensed chief engineers, Gallop and Moore, were in the regularly employed complement, Moore usually filling the required berth of chief engineer and Gallop serving as the third assistant called for in the certificate. Shortly before the sailing from Norfolk, Moore became ill and had to be hospitalized. Some efforts were made by the owner to obtain a replacement, but on sailing a shoreside employee of the company, a man with experience as a marine engineer but unlicensed, was placed aboard the vessel to serve as assistant, Gallop, of course, being qualified as chief. The voyage to Baltimore was made without incident, and on 13 April the vessel, with no change in the manning situation, departed for Norfolk.

At Norfolk a replacement licensed engineer who had been obtained by the company from Florida was waiting for the vessel.

The operations of VIRGINIA CLIPPER in this case are such that no agreement in writing between master and crew is required by law.

BASES OF APPEAL

This appeal has been taken from the decision of the Administrative Law Judge.

It is urged that the Administrative Law Judge erred in his construction of R.S. 4436, when he held that the clause governing the deprivation of services of a person required by the certificate of inspection, permitting the vessel to sail short-handed if in the judgement of the master the vessel was sufficiently manned, did not apply at the commencement of a voyage.

It is also contended that the order of suspension is too severe and was imposed after improper considerations.

APPEARANCE: Vandeventer, Black, Meredith and Martin, Norfolk, Va., by Carter T. Gunn, Esq.

OPINION

I

The fact that an administrative law judge's interpretation of a statute is open to challenge on appeal after a guilty plea comes about from a peculiar set of circumstances. The specification alleged as misconduct a violation of 46 U.S.C. 222 (R.S. 4436) in that Appellant had navigated the vessel on 13 April 1977 from Baltimore, MD, to Norfolk, VA, without a licensed engineer required by the certificate of inspection. While Appellant pleaded guilty his non-professional counsel, president of the company that owns VIRGINIA CLIPPER, was sworn as a witness and offered evidence that:

(1) The loss of the licensed engineer was without Appellant's fault, within the meaning of the exception allowed in the

second paragraph of 46 U.S.C. 222;
(2) efforts were made to obtain adequate replacement, unsuccessfully; and
(3) in Appellant's judgement the vessel was "sufficiently manned" for the voyage.

While analysis of the statute convinced the Administrative Law Judge that the allowance that "the vessel may proceed on her voyage" did not apply to an initial departure, he obviously took for granted that the first sentence in the second paragraph of the section was in general applicable. It was clear, then, that the evidence proffered on Appellant's behalf constituted in theory a defense to the allegation, and the plea should have been changed, under the circumstances, to "not guilty."

The interpretation placed on the statute, elaborated on in hindsight in the written decision, was predicated upon a holding in *United States v The Science*, D. C. Pa., 1863, Fed. Cas. No. 16239. The statute in force governing that decision was Act August 30, 1852, ch, 106, 10 Stat. 61. The provisions considered relevant applied only to passenger vessels, and a distinction was made between departure from a port and engagement "on her voyage." The law has been amended several times since then. R.S. 4463, derived from Act Feb. 28, 1871, c.100,14, 16 Stat. 446, also applied only to passenger vessels and prohibited departure from any port undermanned, with recognition that there might be loss of services from among licensed officers "on her voyage."

At this time, the holding of the case in *The Science* is still valid, properly understood. The statute does not literally forbid departure from every port that a vessel may be at in the course of a voyage, for on this supposition only a deficiency occurring while at sea could be ameliorated by the temporary remedy. From this is derived a distinction between "initial departure from port on a voyage" and "departure from an intermediate port on a voyage." The present language of the statute, however, dating from 1908, broadens the coverage from passenger vessels to all inspected vessels and eliminates the reference to departure from ports. The deficiency permitted is not in terms limited to one occurring after the "commencement" of a voyage or after "departure from the first port of departure."

If the Administrative Law Judge's interpretation were correct in preserving the distinction, there was an important matter raised by Appellant's evidence that was overlooked. On cross-examination by the Investigating Officer it was elicited from the witness that although the allegation was of a shortage on sailing from Baltimore on 13 April the loss of the licensed engineer had actually occurred at Norfolk before departure from that place. Since the operation was described by the witness as a "round trip" starting and ending at Norfolk, it would have been necessary to consider that Baltimore was merely an intermediate port and that the offense, as conceived by the Administrative Law Judge, must have occurred at another time and place than alleged.

These faults, that Appellant's position was not recognized as contesting the violation of the statute itself, and that if there was a violation under the theory of the Administrative Law Judge it probably occurred at a different time and place, need not be corrected, and the validity of the distinction between initial departure port and intermediate port does not call for significant ruling here.

II

While the statute originally dealt only with deprivation of service of licensed officers, at a time when "complement" was left to the judgement of masters and owners, the 1908 amendment, which empowered the inspectors to determine "complement" and record the requirements on the certificate of inspection, authorized the determination of a complement" of licensed officers and crew." Unlike certain other statutes, this clearly distinguishes between "licensed officer" on the one hand and "crew" (or unlicensed persons) on the other. The varieties of difference in terminology in the inspection and seamen's welfare laws need not be explored. In this statute, this distinction is made.

The first sentence of the second paragraph speaks only of deficiency in the "crew." The former specific references to licensed officers in this context have been eliminated. A vessel may not, under this statute, be navigated at all with a deficiency of a required licensed officer.

There is no dispute as to the facts here and nothing would be

altered on a remand of the case. Although the theory on which the finding of misconduct may be based is different from the theory adopted by the administrative law judge, there was no failure of notice. The specification alleged only an act violative of the statute and the facts ultimately appearing constituted a violation of the statute. Appellant cannot complain that he had inadequate notice as to the theory on which the matter was to be heard since, in fact, the Administrative Law Judge's theory was not formulated until after argument had been heard. On the whole record, the plea of guilty is supported by the facts and the specification was properly to be found proved.

III

Appellant's complaint that the order is too severe would ordinarily be disposed of on the theory that the trier of facts is initially in the best position to evaluate the proper remedy for an offense found proved and that an order should not be disturbed unless it is clearly out of line with the circumstances so as to be arbitrary and capricious. Appellant has, however, pointed to the record as the basis for his complaint.

The Administrative Law Judge turned to the matter of an appropriate order and declared first that a record of action under R.S. 4450 taken thirty years ago, which had resulted in an order on probation, would not be considered at all. He then said, "In an ordinary case like this, because of your previous good record except for this matter 30 years ago, I would enter an admonishment. But I'm going to do a little more, I'm going to suspend your documents..." Taken alone(and assuming no explanation before or later) this appears arbitrary and capricious. There is an acknowledgment that admonition is sufficient and appropriate for the instant case and then an unexplained statement that a more severe order will be entered. The Administrative Law Judge then went on to say that he was expressly excluding from consideration "any suggestions or statements that this occurrence is not singular to this one occasion." (This reference is undoubtedly to an admission made by the owner of VIRGINIA CLIPPER that the vessel had on some occasion within the previous year been found to have a deficiency in manning. The questioning was cut off by the Administrative Law Judge for the reason that it appeared irrelevant and that the owner was not "charged with anything.") Following

that disclaimer the Administrative Law Judge warned both Appellant and the owner to "straighten up and fly right" if there had been prior similar instances of violation.

It was recognized at the time that even an acknowledged failure of the owner was irrelevant and the owner was not the person charged in the case. It is also evident that prior fault of the owner is in no way attributable to Appellant in the absence of evidence linking him to the fault. Appellant contends that the fault of the owner was obviously the motivating factor in the imposition of a more severe order than what was called for. Even if, in truth, the disclaimer of consideration of possible faults of the owner need not be rejected, the record remains with no more than an order recognized as appropriate and a more severe order imposed for no apparent reason. The order will accordingly be amended.

ORDER

The findings of the Administrative Law Judge are AFFIRMED. The order entered in the decision dated at Norfolk, VA, on 26 April 1977 is MODIFIED so that Appellant's record will reflect that he was ADMONISHED for navigating M/V VIRGINIA CLIPPER on 13 April 1977 without a licensed officer required by the certificate of inspection.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant, Acting

Signed at Washington, D.C., this EIGHTEENTH day of JULY 1978.

INDEX

***** END OF DECISION NO. 2127 *****

Top