UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO(Redacted)
Issued to: Ben D. DANCE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2139

Ben D. DANCE

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 June 1977, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's seaman's documents for one month on three months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a tankerman on board the United States tank barge BAYOU TECHE under authority of the document above captioned, on or about 12 May 1977, Appellant did "transfer asphalt in said barge while not having sufficient capacity with the deck discharge containment."

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of two witnesses.

Appellant testified in his own behalf.

At the end of the hearing, the Administrative Law Judge reserved decision. He later concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of one month on three months' probation.

The entire decision was served on 27 June 1977. Appeal was timely filed.

FINDINGS OF FACT

On 12 May 1977, Appellant was serving as a tankerman on board the tank barge BAYOU TECHE and acting under authority of his document while the vessel was loading cargo.

[No further findings are appropriate in view of the disposition to be made.].

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the entire case was misunderstood.

APPEARANCE: Appellant, *pro se*.

OPINION

I

Appellant was charged specifically with an offense of misconduct while serving as a tankerman aboard the tank barge BAYOU TECHE. The offense was the transferring of asphalt in the barge without "having sufficient capacity within the deck discharge containment." Some attention must be given to the regulations bearing upon the matter to identify the offense intended. (It is not necessary that the regulations be pleaded, of course, as long as they exist as a standard for conduct applicable to the case in hand.)

33 CFR 156.120 provides that "no person" may transfer oil to or from a vessel unless conditions "(a)" through "(u)" are met. The specification does not allege transfer "from" or "to" the vessel, only "in" the vessel, but the deficiency is subject to cure by the evidence in the litigation. Since the command is universal it applies even to a "tankerman" (not merely, as some regulations do, to a "person in charge") so that the allegation as to service is sufficient, subject to proof that as tankerman the party did make the transfer.

One of the conditions, "(j)," is that the "discharge containment required by 154.530, 155.310, and 155.320... as appropriate, is in place." It was clear in the context of the case presented that 155.310 was the one considered applicable. This, on its face, is directed to an operator of a tank vessel, but the incorporation by reference in 156.120 is valid and the condition is binding on each person who transfers oil.

Which of the three conditions or standards set in section 155.310(c) applies to the situation in this case is not described in the specification. The Investigating Officer's opening statement declares that "the hose being used was approximately six inches in diameter. Although this statement was made in the context of an explanation of why the decision had been made to prefer charges against another person without further investigation, it serves to clarify the issue with respect to Appellant. At best, however, it means that the case will be shown to be within the first or second of the three situations covered by the cited subsection (c). It is possible that this issue is resolved by the evidence. (That point will be returned to.)

It is clear then that what Appellant has been charged with, and what must be proved to support the specification, is that BAYOU TECHE had a capacity for 250 or more barrels of cargo oil, and that there was no fixed container or enclosed deck area sufficient to contain 3 barrels (if the hose in use was of 6 inches or less inside diameter) or 4 barrels (if the hose in use was of greater than 6 inches inside diameter) during a transfer of oil to or from the vessel, with Appellant being the transferor.

The Administrative Law Judge found the specification "proved." However, he also ventured the following statements in the initial decision, issued more than 2 months after the hearing.

> "[The] misconduct consists in signing a Declaration of Inspection indicating that adequate containment equipment was used when in fact it was not, and in failing to drain the product from the containment system when it was over half full," and
>
> "[he] was guilty of misconduct in not seeing that said container was emptied prior to its attaining such amount of product."

These clearly represent a misconception of the issues. It is as though the specification at hearing was meant to allege that whatever the size of the container the amount of product in it was

so great that the container could no longer receive the total amount of three or four barrels called for. This is not, of course, what the regulation speaks of and it is not the offense charged. By the same token, the second statement quoted above implies that Appellant would not have been guilty of misconduct had he dumped the product from the container at any one unidentified moment before the quantity said to have been in the container had been reached. This also is a misconception since the gravamen of a violation of this regulation lies precisely in the size of the container and has nothing to do with what is or is not in it at any given moment.

It is of course also true that the "misconduct" here would not lie in signing a declaration without having done something else first; the signing of the declaration had relevance to this case, as charged, only in aiding to establish the responsibility of Appellant for the transfer operation.

Overall, it appears that Appellant was actually found guilty of offenses for which he was not charged, with insufficient attention given to the specific issue presented by the allegation on which the hearing was held.

II

The evidence here also poses questions. Neither witness called to establish the case was even about dimensions of the hose in use so as to connect the operation described with the relevant regulatory standard. One of the witnesses, however, the "shoreside" man employed by the facility, replied, in response to the question: "What side was the dock hose connected to on the barge?" "Our dock hose is eight inch." The non-responsive answer brought an immediate repetition of the question with a proper reply, but at least, inadvertently, there entered the record a critical figure.

Assuming that the key to the application of 155.310 has been clearly established, the evidence as to the size of the container provided and available becomes the whole, real case. Here, an eyewitness, whose inspectional visit to the scene of the transfer was the sole motive power in the investigation, recalling past examination which had persuaded him to report and insufficient containment system only vaguely and approximately described dimensions of the container. The witness testified: "I did measure the drip pans to the best of my knowledge, I think the

length was 64 inches and the width was 24, and the height was about 14 or 13 inches." It may be taken that the punctuation is not precise and that what was to the best of the witness's knowledge was not the fact of measurement but the dimensions measured. It appeared that a writing had been made, possibly as a record of the measurements, but it was not produced.

Appellant testified under oath that while he had never measured the container he knew it to be, from experience, the largest of the types used by his employer, owner of BAYOU TECHE, and that judged in that experience it was larger than the dimensions stated in the approximation. In the face of actual measurements forthrightly produced such a refutation would have little weight, but here it tends to restore the *status quo* of no evidence. Conjoined with the presumption arising from the fact that 155.310 applies to the entire operation of the barge, not merely to the transfer operation of the time, that the barge had a certificate of inspection attesting to its conformity to equipment requirements, and the container is an item of fixed equipment of the vessel, it must be concluded that the evidence to establish the insufficiency alleged was inadequate.

The evidence is also defective in that a true picture of the situation, allowing certainty of application of the regulations, is obviously not presented. Apart from the unresponsive statement of the witness as to the size of hose in use, there is no clear description of the actual operation involved in the transfer. The fact that the container in question was under the manifold on the starboard side of the barge was specifically adverted to in the Investigating Officer's statement, and the witness who testified to the size of the hose on the shoreside vaguely linked the transfer to the starboard side of the barge. The "Opinion" of the initial decision was "corrected" (with no evidence of service of the correction upon Appellant) in part to read as follows:

> "To further compound this violation of regulations the *drip pan contained in the starboard loading arm* was more than half filled with product making it grossly inadequate to take care of any additional spillage." (Emphasis in original.)

Besides emphasizing the improper theory of fault applied, this reflects the gap in the picture of the operation. There is nowhere in the record evidence as to the loading arm, even though the size of loading arm is the determining element for container capacity in the appropriate case.

III

The total effect of deciding the case on findings of misconduct which were not in issue and the inadequacy of the evidence on the issue presented renders it unnecessary to look into other procedural defects which of themselves might necessitate reversal.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 26 June 1977, is VACATED; the findings are SET ASIDE; the charges are DISMISSED.

R.H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C., this 9th day of November 1978.

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