UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 02740 and
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: Albert T. McKINNEY

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2153

Albert T. McKINNEY

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 23 February 1977, an Administrative Law Judge of the United States Coast Guard at Buffalo, New York, suspended Appellant's seaman's documents for 9 months upon finding him guilty of inattention to duty. The specifications upon which hearing was held were, after amendments made on the record:

> "FIRST: In that you, while serving as Master aboard EILEEN C - which was pushing the tank barge NEPCO 140, under authority of the captioned documents -- being the holder of the captioned documents, did -- on or about 23 June 1976 while said vessel was navigating the St. Lawrence River, fail to properly maintain, or to have maintained, the position of the tug, during conditions of reduced visibility due to fog, while approaching an anchorage area, resulting in the grounding of the NEPCO 140 on a shoal near LB - 217, off Mason Point, New York.
>
> "SECOND In that you, while serving as Master aboard EILEEN C, under authority of the captioned documents, being the holder of the captioned documents, did on or about 23 June 1976, while said vessel was navigating the St. Lawrence River, fail to post a person assigned the sole duty of lookout, for the purpose of keeping a proper lookout."

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 twenty-one exhibits and the testimony o two witnesses.

In defense, Appellant offered in evidence seven exhibits and the testimony of one witness.

At the close of the hearing decision was reserved until briefs could be considered. The Administrative Law Judge subsequently held that "each of the specifications and the Charge" had been proved. Decision was entered on 23 February 1977. In the decision the second specification was recited without the words "being the holder of the captioned documents." Appeal was timely filed and perfected on 14 June 1977.

FINDINGS OF FACT

EILEEN C is an uninspected towboat of 199 gross tons, 91.2 feet in length. NEPCO 140 is an oil barge, 465 feet in length. On 22 June 1976, EILEEN C was engaged in pushing the loaded NEPCO 140, with a draft of 23 feet, from Murray Bay, Canada, to Oswego, New York, via the St. Lawrence Waterway.

In the crew of EILEEN C were Appellant, two undocumented seamen, and one Paul O. Janson, who holds a license as master of freight and towing vessels of not more than 1,000 tons, and as chief mate, oceans, with certain Great Lakes pilotage qualifications. One other person usually a member of the crew was not aboard on the voyage in question.

At 1300 on 22 June, one Vincent P. Keogh, a Canadian registered pilot, boarded EILEEN C at Snell Lock.

Appellant stood a watch that evening, accompanied by Keogh. At about 2350, Janson relieved Appellant on watch. When Appellant left the wheelhouse of EILEEN C to retire at midnight visibility was about two miles in fog. Commencing about 0032 on 23 June warnings were broadcast by radio of decreasing visibility in American Narrows, toward which EILEEN C was progressing. At 0053 this visibility was announced as about three quarters of a mile.

At Pullman Shoal Light No. 194, about 0130, the pilot noted that visibility was about one quarter of a mile. Appellant was given no notice of any of these observations as to visibility.

Approaching Light No. 198, the pilot found that the tow was being set to the right. To counter this he changed heading five degrees to the left. This was insufficient, and the tow touched bottom outside the channel to the right. NEPCO 140 was holed on the bottom in two places and commenced leaking cargo. Appellant had been roused by the grounding and took charge in the wheel house. The tow was not "hung up" and Appellant got it back in the channel, to continue ahead.

Because of the leaking cargo, communications was set up with the Coast Guard station at Alexandria Bay. Appellant was advised to bring the tow in Mason Point, "as high as possible," so that containment gear could be rigged. Using Buoy 217, visually, as a reference, Appellant brought the tow to anchor at about 0245. At 0255 it was found that the forward end of NEPCO 140 was aground and that the barge had been freshly holed there, resulting in greater cargo leakage.

[These findings are curtailed and much detail is omitted since the discussion in Opinion treats of some of these matters is more relevant context.]

BASES OF APPEAL

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

(1) Appellant did not fail to maintain a proper lookout as the conditions did not warrant any special precautions when he turned over the watch to the mate.

(2) The Judge cannot, without notice, determine that a prima facie case has been proved against Appellant nor were presumptions cited applicable to this case.

(3) The Judge erroneously attributed the errors of the crew and pilot to Appellant as master of the vessel.

(4) Appellant did not fail to maintain the tug in the channel and, in finding that he did, the Judge ignored relevant evidence.

(5) The Judge failed to give proper consideration to the finding that the Buoy 217 had moved nearly 200 feet from its designated position.

APPEARANCE: Healy & Baillie of New York, New York by John C. Koster, Esq.

OPINION

I

Without any attempt to trace the details through the charges, arguments, and initial decision in this case, details which demonstrate an awareness of a problem and a failure to confront it, it is easy to note that there is here first to be considered a question of jurisdiction. In essence, the specifications allege that Appellant was serving as master of EILEEN C under authority of his license. There is no doubt that he was the "master" of EILEEN C. It was accepted without contention at the hearing that he was the "captain," and the vessel's marine document as of the time of the occurrences in question, of which I here take official notice although it was not made part of the record, reflects that he was the master, with another person also endorsed as alternate master. There is no doubt either that Appellant was in fact serving aboard EILEEN C under authority of his license.

Appellant's license, issued under authority of R.S. 4427 (b) (46 U.S.C 405 (b)) and 46 CFR 10.16, is as "operator" of uninspected towing vessels. EILEEN C is an uninspected towing vessel of less tonnage that would subject her to the requirements of R.S. 4438a (46 U.S.C 224a) even if the conditions for operation of that statute had existed. There is no law or valid regulation that requires EILEEN C to have aboard, as certain other vessels must, a "duly licensed master." The basic jurisdictional question then is whether Appellant was serving as "master" under authority of his license so that the license may be suspended for a dereliction purely and simple as "master" of the vessel.

At the outset, the discussion here is limited to the second specification dealing with the alleged inattention to duty in failing to "post" a lookout. Different considerations come into the matter in the case of the grounding specification. The "lookout" allegation dealt with conduct of Appellant either when he was "off watch" or, if he was on watch, when he should have anticipated activities in the future.

II

Two possibilities immediately appear which might furnish a predicate for a finding of jurisdiction.

One is by way of analogy from the area of "misconduct" considerations. A person is held to be acting under authority of a seaman's license or certificate when in the course of his employment aboard a vessel he commits, say, an assault and battery. It would be universally recognized as specious to argue that since assault and battery are not "authorized" by the document the offender was not "acting" under its "authority." More closely, off-duty acts and even acts ashore have been held cognized in suspension and revocation proceedings. (46 CFR 5.01-35: last sentence.) The analogy fails, of course, because on the face of the matter we are here talking about a duty, or a lack of attention to that duty, and a duty precisely as "master" of the vessel.

The duties of a "master" of the uninspected vessel are distinguished from the duties of an "operator" as envisioned in R.S. 4427 (b). Prior to the 1972 amendment to R.S. 4427 the law was silent as to the "manning" of such vessels and the qualifications of those employed aboard. The term "master" had significance in relation to them in two respects. One use of the term developed from the laws governing documentation of vessels. In this sense, every "vessel of the United States" must have a master who is a citizen of the United States. A specific reference in this context declares that when a licensed vessel has more than one master endorsed on its document "the master actually in charge of the vessel" takes on all the responsibilities of a "master" under law, but this same section of law permits a person not even employed aboard the vessel to be the "master" of record in "domestic commerce" generally. This has little bearing on the question here, and the other context, that of the traditional concept of "master" as one understood to be in ultimate authority over a vessel for its activates as a vessel, has even less. The fact is that, whatever the functions of a "master" of such vessel may be, when the matter of regulation of uninspected vessels was before the Congress and the subjects of "manning" and qualifications and duties of those to be required were specifically addressed, Congress abstained from setting standards or requirements for "master" and instead looked only to the narrower function of "actual direction and control" of the vessel. The language here is identical with that used in R.S. 4401 (46 U.S.C. 364) relative to the requirement for the more or less temporary direction and control of certain vessels by licensed pilots. The statutory provision carved out, as it were, from all the conceivable duties and functions of persons working on towing vessels, the limited area of "actual direction and control" to be regulated by the requirement for a license.

Since the statute does not purport to regulate the duties of

a master as "master" and since the license is neither a requirement for a person serving as master nor, indeed, a source of authority to act as master, the performance of duties of master, outside of and apart from duties as an operator in actual direction and control, cannot be subjected to scrutiny for the purpose of suspension or revocation of an "operator's" license.

A second possible predicate for assertion of jurisdiction may be looked for in the "condition of employment" provision of 46 CFR 5.01-35. In the past, there have been cases in which jurisdiction was maintained in the instance of a licensed master hired as master of an uninspected towboat when the holding of that license was required as a condition of employment. The theory or doctrine does not encompass the case here.

First, there is no evidence at all that Appellant was employed as "master" with the holding of an "operator's license" as a condition of his employment. Second, when the "condition of employment" doctrine has supplied the basis for jurisdiction, the duties involved in the employment (e.g. "pilot," "master") have been duties associated with the very area of activity covered by the license; here, the license, as noted above, does not purport to cover the duties of "master." A third point of difference, which need to be examined in detail, is that even if attempt were made to establish by the usual means the condition that a license was required, the condition does not appear susceptible of proof. There is no doubt that Appellant's holding of his license was a condition of his employment as operator; as to service as master, however, it would have to be observed that the other person employed as operator on EILEEN C did in fact hold a license as master (limited) and chief mate (unlimited). It could not easily be maintained that Appellant was hired as master on the essential condition that he hold an operator's license when another person employed held in fact a master's license which, by superior standing, authorizes the holder to serve as an operator, (46 CFR 10.16-5 (d)). Without exploring in further detail, it also appears unlikely that the "condition of employment" could be established even if the other "operator" held only an "operator's license" and not a master's license.

Further supportive of this view that the jurisdiction here asserted cannot be maintained is the express limitations placed on the hours of service of a licensed operator. An operator may not, for a time in excess of twelve hours in any twenty four hour period, "work a vessel ... or perform other duties..." If a person serving under authority of his operator's license could be held, on pain of suspension or revocation of that license, for the nonperformance of a "duty" as "master" of a vessel, he might well

be suffering for non-performance of an act which the law itself forbids him to perform.

III

There is one other possibility that must be considered. It is that the term "master" in the specification is not essential nor controlling, that the allegation could as well have used the phrase "serving as licensed operator..." That an attempt was made to construe the allegations so seems clear even though no formal change was made to the charges to have them conform to the evidence.

It must be observed here that a good part of the theory of the argument against Appellant was precisely that in his capacity as "master" some standards of performance attached that were distinct from those of a mere "operator." While the specification dealing with the "lookout" question used the rather definite language of failure "to post" a lookout, the specification originally preferred, later amended in open hearing, spoke vaguely and generally of inattention to duty in that "no person [was] assigned the sole duty of lookout." It was made clear in argument that the theory was that the inattention was not charge as occurring at a particular time nor in a particular set of circumstances but that Appellant was at fault "overall" since he knew that one person usually carried in the crew of the vessel ("second mate") was absent on this occasion,and therefore he should have looked to the matter of availability of "someone" throughout the period of 23 June 1976, including periods when Appellant was not on watch. (Rather strangely, while two seamen, presumably unlicensed and uncertificated, were aboard the vessel, the initial decision makes no specific reference to their utilization or non-utilization at any pertinent time.)

The findings and the ultimate conclusions of the initial decision, however, seek to make more definite the fault of Appellant and to connect it with an active function at a particular time. It is said, after a recitation of the condition of the Canadian pilot, of the function of the other licensed operator, and of the absence of the "missing mate," "But knowing all those things, he nevertheless left the wheelhouse and retired to his bunk without even posting a lookout on the bow of the barge."

If this were a fault, the finding would have the virtue of placing it at a time, at least, when Appellant was acting as "operator." Fault or not, however, it fails to establish the jurisdiction. If conditions were such as to require "posting" a lookout, the time of Appellant's leaving the wheelhouse is only

arbitrarily selected as the moment of the offense. Given the conditions, of course, of subsequent marked decrease in visibility, and of subsequent broadcast warnings (never, incidentally, conveyed to Appellant), it is clear that the duty to "post" a lookout could not be found in fact to have preexisted Appellant's departure from the watch and if it did arise at all that came later. Despite the effort to "pinpoint" the alleged failure, the gravamen of the offense charged and found is still that, somehow, as master, he failed to anticipate the possibility that a special lookout might later become necessary.

It is not necessary to elaborate on the fact that on the whole record even this offense was not adequately established even if jurisdiction were sustainable. The initial decision narrowly declared a duty to have placed a lookout on the bow of the barge. The presence of a lookout on the bow of the barge would not have had any effect on the groundings of the tow and there was no specific showing, from other evidentiary sources, that what "lookout" was maintained was not "adequate" to the circumstances encountered.

IV

There remains for consideration the case on the first specification, dealing with the second grounding of the vessel. Here the jurisdiction is not an issue (accepting as done a change from service as "master" to service a "operator") since Appellant had in fact assumed the direction and control of the vessel and was acting as the operator at the time. On the face of the matter we have a case of grounding of a tow in a place where reasonably the tow had no business to be (*prima facie* evidence of "in attention to duty" on the part of the operator), an attempted excuse in that a buoy which was relied upon to ascertain the tow's position was out of charted position, and the crushing counter that a navigator is not permitted to rely on only a floating aid for ascertainment of his position but must prudently use all means at hand to avoid grounding.

The instant case is not, however, actually that simple. Two examples indicate the departure here from the ordinary negligent grounding.

It was specifically alleged that Appellant failed to maintain properly the position of the tug while approaching the anchorage area. The initial decision focuses on two factors, the reliance upon the off-station buoy and the failure to utilize the vessel's radar in obtaining a more precise fix.

The findings relative to the grounding leave much to be

desired. Two statements are made as to the location of Buoy 217:

(1) "The location of Buoy 217 was not represented on Chart No 14773 as exactly on the eighteen-foot shoal, which is about one eighth of an inch to the left of the buoy mark on the chart."
(2) "To confirm the chart marking of Buoy 217 to its position as exactly as it can be determined (between 100 feet and 200 feet in a westerly direction), the buoy mark would have to be moved leftwards between eight-one-hundredths (0.08) and sixteen-one-hundredths (0.16) of an inch."

I must take this first statement to deal with the charted position of the buoy and the second to be describing the actual position of the buoy, as displaced from its charted position and as ascertained by observation at the time. One eighth inch is 0.125 in, just about halfway between the extremes mentioned in the second statement. "Westerly" is not precise at all and "left" on the chart is in the direction of just about 225/d/t, but if "left" in both statements means the same thing then the finding is that the actual position of the buoy was right on the 18 foot depth on the chart. In other words the buoy was almost exactly over the "shoal."

Two other findings then become significant. One is that, "At about 0255 the crew discovered that the NEPCO 140 had gone aground on an eighteen-foot shoal adjacent to Buoy 217." Although indirectly stated, this finds the grounding at the 18 foot mark, that is at the buoy. However, the place is also fixed by the finding that "...Buoy 217 was between 200 and 250 yards off the starboard bow of the EILEEN C. The EILEEN C's heading was West Northwest." The record furnishes no means of ascertaining the portion of the length of EILEEN C to be included in this "range" taken on the buoy, but NEPCO 140 is 465 feet in length. Adding half of EILEEN C's length to this gives 510 feet. The reasonable approximation then is that the distance from the head of NEPCO 140 at anchor to buoy 217 was between 90 and 240 feet. With the buoy still to the west of the tow ("off the starboard bow" on a heading of WNW), the nicety of the findings poses a contradiction. The possibilities are that:

(1) The buoy was directly on the 18 ft. mark and the barge's head was aground at that mark, and the radar range was in error;

(2) the buoy was further off station to the west than the evidence appeared to indicate; or
(3) The barge was not aground.

No substitute findings can be made with precision. It is uncontested that the barge was aground; it is admitted that the buoy was off station. It does not matter whether the buoy was further off station than was found in the initial decision or whether the barge was aground precisely at the 18 foot spot or some other point where the depth was less than 23 feet. It is true, nevertheless, that had the buoy been on station and had the anchoring been accomplished in the same relationship to the buoy, there would have been no grounding.

As to the use of means of ascertaining the tow's position, the initial decision points out that the radar was not used *before* the grounding but was used *after* the grounding.

"There appears to be no sound reason why [Appellant]...could not have relied on the tug's radar before the second grounding, as he did after the grounding in establishing the tug's position..." There is no other reference to means of ascertaining position which might have been available to Appellant but which were not used.

The difficulty here is that the use of the radar which is considered to have been desirable and effective had it been accomplished in timely fashion was merely a range and bearing taken on Buoy 217. Obviously, a radar "range and bearing" on a buoy does not escape the condemnation, spread over much of the initial decision, of reliance on a floating aid to navigation.

With this, then the total situation must be looked at. It may appear that the matter could be remanded for better findings as to the actual facts of the fault in grounding buttressed by a better evaluation of the means reasonably to have been utilized by Appellant at the time. It is true, for instance, that had the buoy been at its charted point the barge would not have been at the point of grounding, wherever that was, but would have been in water of up to 33 feet in depth. It may be that the use of a leadsman at the forward end would have given sufficient warning of the shoaling, and it may be that the approach to the buoy was too close in any case. On the other side, however, is the fact that the vessel was considered to be in an emergency situation. The intent was, to minimize pollution, to take the vessel in as close as possible to Mason Point so that containment gear could be rigged. Visibility was less than quarter mile. There were no aids to navigation other than the buoy available for use. According to the

chart the shore line, which was beyond the range of visibility, provided no prominences which would have rendered observations convenient and useful. That no other aid to navigation was accessible is highlighted by the fact that the one subsequent observation that is furnished as a standard example for conduct was made on the same buoy the use of which visually is condemned.

For the tow to move in as close to Mason Point as possible in order for the containment gear to be rigged involved a definite risk. In the reduced visibility, with the already critical condition of the tow in mind, Appellant had little choice in his maneuvering. There was no guaranty of security anywhere from the buoy to the eighteen foot curve, but the prospects east and south of the buoy were best in view of the purpose of the maneuver. Even use of a leadsman would probably not have altered the outcome since the tow was "anchored" before it was "found" to have grounded.

It may be that Appellant used poor judgment in electing to anchor as close to the buoy as he did, considering the ever present possibility of the condition that actually was encountered, that is, an off-station position of the floating aid, but under all the circumstances the error was not plainly that of a failure to attend to a duty.

CONCLUSION

I conclude that no proper jurisdiction was established for the proceeding on the second specification and that no actionable and specific inattention to duty was established with respect to the grounding.

ORDER

The order and findings of the Administrative Law Judge dated at Buffalo, New York on 23 February 1977 are SET ASIDE. The charge are DISMISSED.

R.H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
Vice Commandant

Signed at Washington, D.C., this 30th day of April 1979.

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