UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 117818
Issued to: Charles FOSSANI, Sr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2169

Charles FOSSANI, Sr.

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 19 July 1977, an Administrative Law Judge of the United States Coast Guard at New York, New York suspended Appellant's seaman's documents for twelve months upon finding him guilty of misconduct. The specifications found proved allege that while serving as "Operator on board MV SUPER CAT under authority of the license above captioned, on or about 5 January 1977, Appellant committed eight assaults or assaults and batteries on, or uttered threats to, four passengers aboard SUPER CAT.

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 several witnesses.

In defense, Appellant offered in evidence the testimony of certain witnesses and certain documents.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of twelve months.

The entire decision was served on 4 August 1977. Appeal was timely filed.

FINDINGS OF FACT

SUPER CAT. O.N. 541178, is a motor vessel of 99 gross tons, 75.1 feet in length, inspected and certified to carry passengers, owned by Twin Lakes Marine Corporation. Appellant is a principal shareholder in the corporation. Charles FOSSANI, Jr., who holds an "operator's" license issued by the Coast Guard (of the same nature as Appellant's), is the master of record of SUPER CAT.

On 5 January 1977, SUPER CAT, with Appellant and his son, Charles FOSSANI, Jr., aboard, was actually engaged in the carriage of passengers, an employment for which the vessel is licensed, from out of Highland, N.J., to sea for recreational fishing of the commercial passengers.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that there was no jurisdiction under R.S. 4450 to proceed against Appellant's license.

APPEARANCE: Kisloff, Hoch & Flanagan, Boston, Massachusetts, by F. Dore' Hunter, Esq.

OPINION

I

The question of jurisdiction is of the utmost importance in this case and was argued extensively at hearing. The initial decision gave close attention to the apparent difficulties and resolved the issue in favor of the jurisdiction. There are still latent difficulties however and extensive review of all the statutes and consideration of all the analogies that present

themselves is a task of greater magnitude than the matter itself, weighed even with speculation as to future and collateral implications, warrants.

It must suffice for the disposition of this case to note that the one regulatory interpretative statement relative to the situation (46 CFR 5.01-35) does not embrace it. It is clear from analysis of the statutes touching on the case, the evidence adduced at the hearing, and the concessions made implicitly and explicity in the arguments and the theories they assume, that Appellant was not required by law, regulation, a certificate of inspection, or quasi-contractual term, to hold the license held by him as a "condition of employment." The theory of the initial decision is an invocation of a form of estoppel: Appellant holds a license; Appellant acted as if he was acting under authority of that license; Appellant cannot be heard to deny that he was acting under the authority of the license; therefore, jurisdiction to suspend or revoke the license under R.S. 4450 for "misconduct" attaches.

Without attempt to resolve whether 46 CFR 5.01-35 must be read as definitional or merely illustrative, it is clear that critical to the question in the instant case as decided at hearing are the acts of Appellant relied on to create the estoppel. As summed up in the initial decision they are:

(1) Appellant signalled to his son in the wheelhouse to slow the vessel down, and the son did so;

(2) when passengers demanded that the son "call the Coast Guard" Appellant declared that he (Appellant) was "in charge";

(3) when the son announced that the vessel would depart the fishing grounds early, Appellant declared that the vessel would remain out as scheduled;

(4) a long time user of SUPER CAT regarded Appellant as "captain" of the vessel and the son as only the "driver".

In addition, two other facts had been urged as supportive of the position which were noted by the Administrative Law Judge but accorded less weight, if any:

(1) Appellant had supervised the taking in of lines at unmooring and had signaled to the wheelhouse to get underway, and

(2) Appellant had taken the wheel for a brief period during the day.

Appellant resists the inference from these activities by emphasizing that Appellant was properly aboard the vessel as "representative of the owner" and had, precisely as such, a degree of authority in the management of the vessel. At the time of the slowing down he notes that he was engaged in the business of the vessel in an enclosed space, below, collecting fares, arranging lotteries, and the like, when the vessel's passage through ice disturbed him and the vessel. The admonition to slow down was for the convenience of all, he says, and for the good of the vessel itself.

It is true, as Appellant contends, that the activities connected with getting underway and the handling of the wheel for a spell are compatible with the function of a deckhand, and this was recognized in the initial decision. It is also true that the unmooring activity shows, with the son actually in the wheelhouse being advised of conditions on deck, the responsibility as "operator" actually devolving on the son, and that even a pure "passenger" could at times, without *ipso facto* fault, handle the wheel.

The assertions of Appellant about being "in charge" are a different matter. While it is trite to note that the assertion of a power does not confer the power, it is of this type of action or utterance that estoppel is made. There is here, however, a distinct ambiguity in the assertions and, indeed, in the legal concepts themselves.

Appellant described himself, on two occasions of embarrassing stress when he was in the midst of confusion and allegedly engaged in gross misconduct, as being "in charge." While the references to the concept of "owner" at hearing were taken, as terms, out of context (since SUPER CAT, despite assumptions apparently made, is not and cannot be a vessel subject to the definition given in 46

U.S.C. 390), an "owner" has, as Appellant points out, some status with respect to the vessel peculiarly different from that of a crew member or passenger. The regulations to which recourse might be had here yield no conclusive solution. Mention is made of persons connected with the operation of a vessel in a variety of ways:

(1) "operator of. . .[a] vessel" (46 CFR 185.10-1)

(2) "owner, or person in charge of a vessel" (46 CFR 185.15-1)

(3) "owner, master, agent, or person in charge of a vessel" (46 CFR 185.15-3)

(4) "persons operating. . . vessels" (46 CFR 185.20)

(5) "operator in charge of . . . [a] vessel" (46 CFR 185.25-1)

This variety does not bespeak so much confusion of concepts as recognition that the traditional concepts of individual identities and functions of the customary "merchant marine" just do not precisely fit the organization and operation of a craft like SUPER CAT, and that only a certain analogy may be found.

II

It is indisputable, as Appellant insists, that there is nothing that he did that day that he could not have done without illegality (prescinding from the specific illegality of the misconduct charged) without holding the license which he has. As an unlicensed owner, or even as an uncertificated deckhand, he could have acted as he did, and it goes without saying that if his license were revoked he could perform in the same way the very next day aboard the same vessel in the same circumstanceS. It is not essential that it be found, for the asserted jurisdiction, that Appellant have declared in terms, "I am in charge in the sense that as a licensed operator I am clothed with authority to act as I do," but the language used is not, under all the conditions, by any means conclusive. It is necessary then to look closely to the rationale of the Administrative Law Judge and the accompanying

feeling.

While the effect is referred to as minimal in the decision-making, the relationship of Appellant to the master-operator could not be avoided. These reflections appear in the initial decision:

(1) "In addition,. . . [Appellant] possessed a domineering personality and the subtlety of a suggestion is foreign to his nature";

(2) Appellant "informed his son in no uncertain terms. . ."

(3) "It was precisely because . . . [Appellant] possessed a license that he had the knowledge and experience to repeatedly countermand his son's decisions."

Along with this, the decision cites Decision on Appeal No. 491 (Supplemental) and 46 CFR 5.01-35 as holding that jurisdiction may attach even when no law or regulation requires the person whose license is in issue to hold the license for the precise activity at the time of the activity.

This last I have considered above. While the earlier decision and the regulation do sustain jurisdiction beyond the ordinary case of a specific requirement in statute or regulation for the holding of the license, the reach set forth is only to a service for which the holding of a license is required in fact, and we have here a novel assertion. The third observation outlined above is not of persuasive reliability because there is no real connection between knowledge and experience and "service" under authority of a license such as to create jurisdiction. The dominance of the father over the son seen in the operation is as much a factor against the "acting under authority" finding as it is for it, since the domineering father, principal interest holder in the vessel, obviously needs no license to influence the son.

III

It appears to me that the decisive element in the initial

decision lies in the fourth of the items in the summation of facts provided. In full, it is stated:

> ". . . a defense witness who made about 200 trips on the SUPER CAT and who travelled with. . . [Appellant] to the hearing on the day they testified, admitted on cross-examination that. . . [Appellant] was the captain of the SUPER CAT and as far as he knew his son just `drives' the vessel."

Damaging as this may appear (although Appellant counters it with the facts that the son is the master of record and that the passengers, at the time, turned to the son as "captain" of the vessel), it precisely pinpoints the essence of the difficulty.

The term "master" is somewhat ambiguous even in the statutes in connection with a vessel like SUPER CAT, and the term "captain," of very infrequent statutory appearance, is among the vaguest of concepts when applied to smaller vessels. The language of the witness is significant. Appellant was not, in his judgement based on long experience, the "driver" of the vessel. Colloquial as the term may be, and unknown though it is to the statutes, its easy use focuses upon an important point: the license involved here is no sense a "master's" or "captain's" license. There is no statute that may be directly invoked for the case in hand, but *mutatis mutandis* we can see that this situation fits in closely with that of the uninspected vessel carrying passengers for hire and the uninspected towboat; the "operator's" license held by Appellant is akin, essentially, to the licenses issued for purposes of those vessels. It is not a license as a merchant marine officer, nor does it connote authority to serve in any sense as the "master" of any kind of vessel. It is therefore necessary to avoid confusing the concepts of "service as . . . (one capacity or another)" and "licensed as- operator."

I wish to make it clear that the conduct of an "operator" who is serving, in law, as an operator is completely subject to action to suspend or revoke a license on all the grounds customarily available, and I will not rule out that in a proper case the jurisdictional basis may be found on a predicate of a license -holder's actions alone, without additional evidence of legal or other in-fact requirement of holding the license as a "condition of

employment." On consideration, however, in the light of the statutes applicable and the regulations relied on, and of the far from defined functions of "operator," I am not persuaded that the specific acts used to create the estoppel are sufficient in this case.

I recognize that the conduct alleged is of a nature that is entirely incompatible with service as a licensed operator, but also that suspension or revocation of the license is not the sole remedy for the alleged wrong. The conduct comes within applicable criminal laws and is in fact self-defeating purely as an economic consideration. Nothing useful is lost, in the interest of maritime safety, in recognizing that the essentials of jurisdiction were just not established in the complicated situation posed.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 19 July 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 5th day of November 1979.

INDEX

Master
    function of; "operator" not a master

Operator's license
    not a master's license

Passenger Vessel, Small
    manning requirements

Small Passenger Vessel Act
    not applicable to motor vessel over 65 feet

***** END OF DECISION NO. 2169 *****

Top