

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 434121
Issued to: William H. KELLEY

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2229

William H. KELLEY

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 10 November 1977, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, suspended Appellant's license for six months upon finding him guilty of negligence. The specification found proved allege that while serving as master on board the United States M/V VINCENT TIBBETTS, under authority of the license above captioned, on or about 10 August 1977, Appellant:

- (1) failed properly to navigate the vessel between Long Island and Portland Harbor, Maine, with a resultant grounding of the vessel on Cow Island;
- (2) did "fail to notify U.S. Coast Guard Personnel about the grounding on Cow Island on or about 10 August 1977", and
- (3) failed to maintain a proper-lookout.

The hearing was held at Portland, Maine, on 17 August 1977.

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 and five documents.

In defense, Appellant offered in evidence his own testimony, and one document, a sketch.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and three specifications had been proved. He then entered an order suspending Appellant's license for a period of six months.

The entire decision was served on 14 November 1977. Appeal was timely filed.

FINDINGS OF FACT

On 10 August 1977, Appellant was serving as master of VINCENT TIBBETS and acting under authority of his license.

VINCENT TIBBETS is a tank vessel of 1233 gross tons, equipped with gyro-compass, gyro pilot, two radar sets, and radio telephone. The gyro system had no warning for malfunction.

At 2320 on 10 August 1977, the vessel got underway from the King Resources Terminal on Long Island in Casco Bay, Maine, with about 2900 barrels of diesel fuel cargo aboard. Appellant piloted the vessel, manually steering himself, to a point where the vessel, on a heading of 285°t, had Buoy R "10" abeam to port distant about 250 yards. The projected course would take the vessel to a point north of the Buoy N "4", northwest of the north point of Cow Island, which has no light upon it.

With the immediate onset of heavy fog, Appellant placed the vessel on automatic steering, intending a setting of 285°t, detailed a crewmember to go forward as lookout, and switched on a radar. Speed of the vessel was reduced to five knots. The man

detailed to lookout duty asked whether he should not first call the next watch and he was instructed to do so. The battery powered radar gave signs of malfunctioning.

Shortly thereafter, possibly five minutes later, Appellant turned on the other radar set. In about one minute it began to present a clear picture and Appellant "saw" Cow Island dead ahead. He immediately reversed the engine, but the vessel grounded at about 2330.

Appellant notified his owner of the grounding by radio telephone. The vessel was refloated at about 0830 the next morning.

BASES OF APPEAL

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

- (1) there was no fault of failure to maintain a proper lookout because:
 - (i) a lookout had promptly been designated on the onset of fog but had reasonably been permitted to delay taking station so as to call the next watch;
 - (ii) a lookout is required only in order to help prevent collision and there was no risk of collision here.
- (2) there was a right to rely on the automatic pilot and the weather conditions on clearing the pier made it reasonable not to have radar in readiness for use not to have a lookout already posted; the gyro failure being unanticipated and unknown left no other means available to prevent grounding.

APPEARANCE: Glynn & Dempsey, Boston, Massachusetts, by Richard R. Dempsey, Esq.

OPINION

The allegation is that Appellant was negligent in failing to notify the Coast Guard of the grounding. The specification does not state in terms a standard of conduct against which Appellant's action may be judged. Since a marine casualty was involved, and it is indeed a marine casualty that would be the fact reported, the appropriate statutes and regulation immediately present themselves as a guide. But the Investigating Officer, in explaining to the Administrative Law Judge the theory of the case, spoke of reporting to "local U.S. authorities" as constituted by "Executive Order" and as "the Coast Guard." This immediately conjures up the FWPCA, since it is not by "Executive Order" that the Coast Guard is designated as recipient of "casualty reports."

The "notification" requirements of FWPCA (33 U.S.C. 1321(b)(5)) contain the very phrasing used, "notify the appropriate agency of the United States Government" and the FWPCA itself is referred to in the initial decision. This requirement, however, is applicable only when there is "knowledge of any discharge of oil or a hazardous substance from such vessel...." No discharge of anything is alleged in the specification, so that either of two conditions obtains:

- (1) the specification gives notice only as to what it alleges on its face, the failure to report a marine casualty, or
- (2) the specification is defective in not alleging that there was a spill, of which there was knowledge, which was not reported by Appellant.

In the first instance, there is no evidence that Appellant failed to comply with the applicable statutes or regulations. In the second instance there is no direct evidence that Appellant had knowledge of an oil spill, there is no finding based on justifiable inference from circumstantial evidence that he had knowledge of a prohibited discharge, and there is no finding as to a discharge at all until after the Coast Guard personnel had arrived on the scene after notice from other sources that a vessel was aground.

There was a finding made that a "Coast Guard pollution team" found, after 0835, 11 August, "a string of oil off its [VINCENT

TIBBETTS's] port bow," but there is no inference drawn that the oil came from the vessel and the summed up general statement at the end of the decision states categorically,

"There was...no oil pollution caused by the grounding."

After adverting to the general intent expressed by Congress in 33 U.S.C. 1251, the Administrative Law Judge concludes: "...it was imprudent for...[Appellant] not to have notified Coast Guard by radio himself of the grounding."

Since Appellant was charged with negligence and not misconduct, it is not controlling that no statutory or regulatory command was violated by his omission to notify the Coast Guard immediately of the grounding, but since he was in fact charged with negligence, a finding of mere imprudence does not support the averment. It need hardly be added that no specific result demonstrative even of imprudence was shown or found to have occurred.

II

Appellant's principal contention is that having set the vessel on automatic steering control he had discharged his duty in this respect and had a right to rely on the gyro system to take the vessel safely to its next point of course change. The error or failure of the gyro system was unanticipated, and Appellant cites *Dutton* to establish that gyro failures occur.

Of course, even the cited passage from the text undermines Appellant's argument. It clearly points out the dangerous consequences of such failures. When Appellant points out that with zero visibility and no lighted aid to navigation on the island he was required to pass around he had nowhere else to turn to correct the course error induced by the failure, he simply points up even more the faults which led to the grounding.

Appellant was clearly on notice, both in his direct experience and from his knowledge of the mariner's equipment, that gyro systems do fail. When the weather denied him the use of the other

means usually available to ascertain his position on a current basis he was doubly on notice of his vulnerability to mechanical error. With two radar sets on board, with personnel available to serve as lookout, and with the known incidence of poor visibility in the Gulf of Maine and its bays and harbors at the season, it is not enough for Appellant to say that he had not "reasonable time" to have ascertained the gyro-pilot error. Prudent seamanship required that he be prepared to undertake the run he embarked on with safety, especially in view of the known hazards immediately to be encountered on the passage.

It may be noted here that the Administrative Law Judge was somewhat reluctant to accept the proffered explanation that a malfunction of the gyrocontrol caused the grounding, because of the absence of incidental confirming details, but ultimately decided to give Appellant "the benefit of the doubt" and find that such an error had occurred. On review here it must be observed that the account given of malfunction still does not square with the facts so as to merit attention as a plausible counterthrust to the presumption arising from the grounding. Appellant clearly asserts that the error was such that while the apparent direction in which the vessel was being steered was 285° t the actual direction was 270° t. This actual direction, he testified, would necessarily carry the vessel from where it was last known with certainty to be to the point where it actually grounded. The fact is, nevertheless, that if the vessel was where Appellant placed it in his testimony at the time he set the automatic control in operation and if the vessel had traveled in the direction which he says the master gyro would have dictated, he would have grounded the vessel more than two hundred yards north of the point actually arrived at. A two hundred yard discrepancy in a run of just about one thousand yards is a significant difference and indicates that even Appellant's exculpatory explanation opens more questions than it answers.

III

With respect to the lookout, the theory propounded by the Investigating Officer, that lack of a lookout is a "violation" of 33 U.S.C. 221, was correctly rejected by the Administrative Law Judge in timely fashion on the record. The issue presented was properly whether conditions were such that the presence of

Appellant alone in the wheelhouse of the vessel constituted the maintaining of a proper lookout. The answer is found in the evidence of operation of the vessel in sharply reduced visibility, and, just as the use of a lookout is not dictated by statutory rules of the road, so the maintaining of a lookout is not directed exclusively to avoiding collision with other vessels. The lookout at sea has been a requirement for hundreds of years before there was statutory law aimed at reducing the hazards of collision between vessels, and the lookout provides many more services than merely the timely sighting of ships in fog. The navigation of this vessel in reduced visibility in a bay with islands and channels to be followed clearly demanded a proper lookout. In fact, Appellant's designation of a person to serve as lookout is an acknowledgement of the duty.

The excuse that the lookout was permitted to do something else for the convenience of the administration of the ship's routine means merely that Appellant elected to take the risk of not having a proper lookout at the wrong time.

CONCLUSION

The findings, based upon substantial evidence, support the allegations that Appellant negligently caused the grounding of VINCENT TIBBETTS and failed to maintain a proper lookout on that occasion.

The allegation of negligence in failing to notify authorities of the fact of grounding of the vessel was not proved.

ORDER

The findings of the Administrative Law Judge as to the second specification of the charge of negligence are SET ASIDE and that specification is DISMISSED. As modified hereby, the findings and order of the Administrative Law Judge entered at Boston, Massachusetts, on 10 November 1977 are AFFIRMED.

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

Signed at Washington, D.C., this 18th day of August 1980.

***** END OF DECISION NO. 2229 *****

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