UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 499 864
Issued to: David RABREN BK-337-439

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2235

David RABREN

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 28 November 1978, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's license for one month, plus three months on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleged that while serving as Pilot on board SS GULF TIGER under authority of the license above captioned, on or about 13 August 1978, Appellant did, while inbound in Tampa Bay, Florida, wrongfully ground said vessel. A second specification, found not proved, alleged that while serving in the above capacity Appellant negligently piloted said vessel at excessive speed, thereby contributing to the grounding.

The hearing was held at Tampa, Florida, on 22 November 1978.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony

of two witnesses and nine exhibits.

In defense, Appellant offered in evidence his own testimony.

After the hearing the Administrative Law Judge rendered a written decision in which he concluded that the charge and first specification had been proved. He then served a written order on Appellant suspending his license for a period of one month plus three months on twelve months' probation.

The entire decision was served on 7 December 1978. Appeal was timely filed on 2 January 1979 and perfected on 7 March 1979.

FINDINGS OF FACT

On 13 August 1978, Appellant was serving as Pilot on board SS GOLF TIGER and acting under authority of his license.

SS GOLF TIGER, a modified T-2 tanker of 12,305 gross tons, 552 feet in length and 75 feet wide, loaded with gasoline and jet fuel to a draft of 30 feet 7 inches forward and 31 feet 7 inches aft, was proceeding through Tampa Bay en route to Port Tampa. The vessel was at the time a "coastwise seagoing steam vessel" within the meaning of R.S. 4401 (46 U.S.C. 364) and Appellant was acting on board as the required Federal pilot under authority of his Federal license.

At about 0907, with weather and current conditions being irrelevantly neutral, GULF TIGER, after a pause at the beginning of Cut "G" to allow traffic to clear, was set on full maneuvering speed and proceeded up the cut in the middle of the channel, squarely on the range marking the center line.

At the western end of "G" the channel turns from an inbound track of 279 degrees true into Cut J with an inbound track of 358 degrees true. J is charted at a width of 400 feet with only the inner quarters available to a vessel of the draft of GULF TIGER at the time.

From Buoy G, the last buoy on Cut G inbound, to the center line of Cut J is a distance of 1980 feet. GULF TIGER came up on

Buoy G making a speed of between 8 and 9 knots directly on the range of the channel. A hard rudder turn was made and GULF TIGER came to rest on a northwesterly heading with the forward end aground on the western side of Cut J, south of Buoy "J". The vessel remained grounded for about 13 hours.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that the Administrative Law Judge erred in finding Appellant guilty of negligence due to improper and unwarranted use of an evidentiary presumption of negligence.

APPEARANCE: Wagner, Cunningham, Vaughan, Hapner & Genders of Tampa, Florida, by Roger Vaughan, Esq.

OPINION

I

That Appellant was the *per*son bearing the responsibility for the vessel's piloting was adequately established. He was identified by the master as the pilot taken aboard in the regular course of entry into Tampa Bay and he was identified with the actual performance of the function of "pilot." On the question of jurisdiction, it was established after the formal proceedings on the record were closed, but with no objection by Appellant, that GULF TIGER was a "coastwise seagoing steam vessel" within the meaning of R.S. 4401 (46 U.S.C. 364) and that Appellant was acting under authority of his license.

It is therefore clear that the grounding of GULF TIGER at a place where it should not have been was attributable to Appellant.

The Administrative Law Judge took great pains to make clear that his order in this case pertained only to Appellant's license, noting that Decision on Appeal No. 1593 makes clear that, when negligence was in issue and found proved, if the negligence was of a sort peculiar to the function of a licensed officer an order should properly apply to the license involved in the negligent act

and not to other license or certificates held by the person. For this reason the order was made inapplicable to Appellant's "merchant mariner's document."

What was overlooked here is that Appellant holds no license or certificate amenable to action under R.S. 4450 other than the one captioned. Appellant holds a "merchant mariner's document' only per *accidens*. It does not stand in lieu of a certificate of service (Appellant has never been issued one) or of a certificate of identification (Appellant holds a continuous discharge books, as is evident from his identifying numbers, "BK-337 439"). Only licenses, certificates of registry, and certificates of service are amenable to action under R.S. 4450.

II

The charges framed here and proceeded under without comment leave much to be desired. The difficulty with the first specification is minor; it is merely that in these proceedings the term "wrongful" sounds more in "misconduct" than in "negligence." It is true that in the most general sense an act of negligence is wrongful, just as it is true that many acts in breach of standards of conduct which are normally classed as "misconduct" are the product of pure negligence. For analogy, it may be pointed out that historically both breaches of contract and "torts" are "wrongful" acts, but the law, for the convenience of procedure and remedies, recognizes a difference and seeks to preserve clarity in action. Actually, under the concept that a grounding of a vessel in place where it should not in the orderly would of navigation and piloting be found is presumptively caused by the fault of the navigator responsible, the specification alleging grounding need not be qualified by pejorative adverbs.

The second specification was, however, deficient on its face. It alleged only "excessive speed" although it asserted a connection between the speed and a grounding. Speed may be excessive in an absolute sense, as when there is an ordinance setting a maximum, or in a relative sense, as when a vessel is proceeding in reduced visibility. It is quite certain that a relative sense is the only kind relevant in the instant case, but there are no qualifications expressed. The fact allegations could as well encompass a case in which a disabled vessel drifted to a stranding. Without "Speed"

the vessel would not have grounded, but the speed is not cause.

The theory of this case was presumably that a certain speed was excessive in the context of maneuvering a loaded tank vessel in a narrow channel system through a turn of almost a right angle.

The fact is, however, that if the specification had been artfully drawn it would have been superfluous anyway. The general allegation of negligence in grounding is sufficient. Since no more need initially be proved no more need be pleaded. It is indeed necessary for the proponent to be prepared to rebut specific defenses against the general allegation but anticipation does not go so far as to call for rebuttal pleading.

III

It was the preferral of the special allegation sand the findings made thereon that cause a problem in the review of this case.

There was ample evidence as to the speed of the vessel in the record, even though, on the general allegation, there was no need for the specific speed to have been proved. The argument ultimately presented gave a valid interpretation of the evidence. The Administrative Law Judge, apparently confused by consideration of the average speed made by GULF TIGER after starting from almost dead in the water at the east end of Cut G, concluded that he could not arrive at any finding as to speed and declared that there was not sufficient evidence.

I disagree, strongly, on this record. There was some lack of precision in the testimony of course, but even conflicts in evidence are usually susceptible of resolution. While there were incorrect computations, as well as more accurate computation, of "average speed" presented, there was absolute certainty that for twenty some minutes prior to the grounding the vessel had been proceeding at full maneuvering speed. There was a revolutions-speed table introduced into evidence. There were two direct estimates of the vessel's speed at the immediate time of interest made by the master of the vessel stating that it was proceeding at 7.5-8 and 8.5-9 knots. There was testimony from Appellant himself that after the vessel accelerated through Cut G,

it had reached the speed which he considered proper for his maneuvering.

The finding made in the initial decision on the question of speed, a finding which resulted in a specific dismissal of the allegation (even though defective) dealing with "speed," was clearly wrong.

This error was compounded by the handling of the evidence of "sheer." This evidence was brought into the record by the master of the vessel who was, almost perforce, a witness called by the Investigating Officer. His testimony, in harmony with a statement he had earlier submitted, mentioned a sheer as occurring before the grounding. A sheer is a fact and all relevant facts are usable in the consideration of a case like this. It is the kind of fact, however, that may contribute to an exonerating defense to a charge of negligence. It is not, therefore, to be ignored or suppressed but is to be explained fully.

I perceive that the function of an investigating officer operating under the "Casualty Investigation Regulations" of 46 CFR 4 to be somewhat different from that undertaken under Part 5 of that title. Under Part 4 the investigator is bound to resort to all sources of information. Thus, in dealing with a grounding, it is inevitable that he will call upon the helmsman o/f the vessel in order to verify heading, orders to the wheel, and the like, especially when an element like "sheer" is introduced. In a hearing under Part 5, since it is initially sufficient merely to prove the fact of grounding in a place where the ship in the normal course of operation should not have been, there is not the same burden to produce or inquire into the knowledge of the man at the wheel. This type of evidence may well be part of a defense and may even be necessary if the defense is to attempt to rebut the inference of negligence to be drawn from a grounding itself.

We were given no evidence from any independent source of the headings of the vessel, orders to the wheel, or the relationship of such things to positions in the channel. We have the testimony of the master that the vessel sheered, "to the south" and "to the west." Twice he refers to the sheer as occurring during the turn from Cut G to Cut J. Nevertheless, he specifies that the vessel was "right on the range" of Cut G when the sheer began. Appellant

himself contributed that the vessel was precisely on the range when the sheer began, that his attention was drawn from general observation of conditions to the appearance of the range itself by the clicking of the steering repeater, that he saw from the appearance of the range that the vessel had gone to the south (to its left), and that he reacted by ordering "excessive" rudder to counteract the sheer.

Both witnesses placed the vessel at a point "about 50 yards" short of Buoy G when the sheer started. Neither specified whether the distance of fifty yards was forward of the stem of the vessel or forward of the bridge.

Be that as it may, the Investigating Officer conceded in proposed findings of fact and it was specifically found that the sheer occurred and that it began when the vessel was precisely on the range of Cut G with Buoy G fifty yards ahead. Although in the absence of other evidence that the heading of the vessel had charged to the left a different view of what was going on in fact might have been arrived at, the version proposed was accepted.

Overlooked completely it seems was another important fact intimately associated with the cause of the grounding. On the evidence GULF TIGER was proceeding at full maneuvering speed while required to make a turn in loaded condition of about 85 degrees to the right from one narrow channel to another, a turn which had to be accomplished with an advance of no more than 1000 feet along its track (and possibly as little as 800 feet). Despite this Appellant had not done anything to commence a turn. Less than one minute before this right turn would have had to be completed, if it was to be negotiated successfully, Appellant was engaged only in general observation of conditions and it was only an unexpected clicking of the repeater (unexpected because he had given no order to the wheel at all) that alerted him to ascertain the condition of the vessel.

It may well be concluded that to think of sheer, in these conditions, as possibly contributing to the vessel's being only half way through its turn when it ran out of the channel, is entirely irrelevant.

Sheer or no sheer, the vessel was going to ground when it was permitted at that speed to reach that point in the channel with no

other action taken.

It is unfortunate that the introduction of matters which did not have to be proved in order to support the charge should have led to misconception and error, since but for the obfuscation raised by these efforts, more significant evidence might have been adduced. The fundamental problem presented is that Appellant elicited evidence from the Master attesting to the quality of the Pilot's actions which tended to rebut the inference of negligence arising from the grounding.

Contrary to Appellant's assertions, however, a presumption does not disappear merely because contrary evidence is offered. Rebuttal merely return to the Investigating Officer the burden of going forward with his case. The Administrative Law Judge may still draw all permissible inferences from the underlying facts which gave rise to the presumption, *i.e.*, the fact of grounding outside a well-defined channel. In appropriate circumstances the presumption alone may be sufficient to prove a case of negligence. Such is not the case, however, when substantial evidence is adduced showing the lack of fault of the party charged. Appellant's own testimony, and that of the Master, were sufficient to return the burden of proceeding with evidence to the Investigating Officer. Unfortunately, the Investigating officer, perhaps infected with the confusion permeating the proceeding, failed adequately to elaborate the conditions of speed, momentum and constriction of maneuvering area which may well have rendered Appellant's "sheer" defense meaningless with regard to the ultimate grounding. The obligation of the Investigating Officer is to establish by substantial evidence of a reliable and probative character the elements of the offense charged. On this record I can only conclude that burden was not successfully met by the agency. Thus the decision of the Administrative Law Judge, in light of his dismissal of the matter of "excessive speed," cannot be sustained because of the absence of such evidence.

CONCLUSION

It is undoubtedly better that one case be allowed to escape remedial action than that the appearance be given that faulty administrative action will be upheld in spite of deficiencies in the proceedings.

ORDER

The order of the Administrative Law Judge dated at Jacksonville, Florida, on 28 November 1978, is VACATED and the charges DISMISSED.

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

Signed at Washington, D.C. this 9th day of FEB 1981.

***** END OF DECISION NO. 2235 *****

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