

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 08028
Issued to: Fred G. Brenner

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2266

Fred G. Brenner

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 5 January 1981, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's License for a period of one month and further suspended it for two months on probation for two months, upon finding him guilty of negligence. The specification found proved alleged that Appellant, while serving as Operator aboard the Tug FORT MCHENRY, under the authority of the captioned document, did at about 0625 on or about 5 December 1980, in the James River in the state of Virginia, at or near the city of Richmond, fail to safely navigate said vessel in such a manner as to preclude the barge she was pushing from grounding on the edge of the channel.

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

The Investigating Officer introduced into evidence the testimony of five witnesses and four documents, one being a video tape recording of the vessels during the period in question.

In defense on the merits, Appellant introduced no documentary evidence nor did he call any witnesses.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged, had been proved. He then entered an order of suspension for a period of one month and further suspension of two months on probation for two months.

The decision was served on 10 December 1980. Notice of Appeal was filed on 11 December 1980. Appeal was perfected on 18 May 1981.

FINDINGS OF FACT

On 5 December 1980, Appellant was serving under the authority of his Coast Guard issued license No. 08028 as operator of the Tug FORT McHENRY, which was made up to the stern of T/B INTERSTATE 25. At approximately 0530, on 5 December 1980, Appellant took over the control of the tug from his relief captain. Appellant's flotilla was proceeding in a northerly direction toward Richmond, Virginia, near Nun Buoy 172. At this point the James River is 100 feet wide with a mean low water depth of 17 feet. T/B INTERSTATE 25 was loaded with No. 6 oil and had a draft of approximately 11 to 11.6 feet. The weather was clear and the tide was low. At approximately 0630 on 5 December 1980, the barge went aground at the bow on its starboard side approximately 20-50 feet north of Nun Buoy 172. At approximately 1130, Coast Guard officials arrived on scene and the barge was refloated by the tide at approximately 1230, without further assistance. There was neither property damage, nor pollution involved in the incident.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that there is insufficient evidence to prove a grounding occurred. Further, if a grounding did occur it was within the marked channel. Appellant also contends that the sanction for the alleged violation was too severe.

APPEARANCE: Randolph DeKrone, Baltimore, Maryland,
non-professional counsel

OPINION

I

Appellant argues, quite surprisingly, that there was insufficient evidence to prove that the barge was aground. Appellant seems to believe that a failure of the Coast Guard to take soundings at the point of alleged grounding is sufficient to outweigh other evidence that there was a grounding. The barge was acknowledged to be aground by each of the witnesses, who had personal knowledge concerning whether the vessel was aground. The fact that the vessel remained stationary for approximately six hours, without anchor or any other mechanical device to secure it, left no other plausible inference except the vessel was aground. The Appellant offered no evidence to contradict the evidence that supported a finding that the vessel was aground. This issue on appeal is without merit.

II

Appellant's position is that the Administrative Law Judge erred in his finding of negligence since there was insufficient evidence to prove that he was not navigating within the channel. Contrary to Appellant's position, all of the evidence adduced placed the barge on the starboard edge of the channel. Witnesses' testimony with the aid of charts, placed the barge on the starboard edge of the channel north of Nun Buoy 172. Appellant during the mitigation phase of the hearing stated "I thought I was in the channel." In the view of low tide, that was known to the Appellant, it would have appeared more prudent to remain near the center of the channel. Nonetheless, Appellant's flotilla grounded while transiting a well charted channel and created a rebuttable presumption of negligence sufficient to make a *prima facie* case of negligence against Appellant. See NTSB Order EM-88, NTSB (1981); and Decisions on Appeal Nos. [2177](#), [2113](#), [1200](#), [1131](#), [579](#). This presumption does not shift the burden of proof from the Coast Guard, but it does require Appellant

to come forward with some evidence to rebut the presumption. In this case, absolutely no evidence was proffered, to rebut the established presumption or explain the cause of the grounding.

In his opinion, the Administrative Law Judge expressed his view that the probable cause of the grounding was the exceptionally low water depth in the river caused by a severe northwest storm a few days prior to the incident. This conclusion does not help Appellant since he knew the conditions and in the exercise of customary prudence should have taken adequate precautions. The theory of the Administrative Law Judge was not determinative in this case. I find the charge of negligence proved solely upon the basis of the un rebutted presumption.

III

It is my view that the Administrative Law Judge considered all pertinent factors in deciding upon an appropriate sanction, i.e., record of Appellant, lack of injury and property damage. I am convinced that the sanction reached was totally appropriate and within the discretion of the Administrative Law Judge. See Appeal Decision No. [1994](#). I see no abuse of that discretion and therefore I will not tamper with it.

Order

The order of the Administrative Law Judge dated 5 January 1981 at Norfolk, Virginia, is AFFIRMED.

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

Signed in Washington, D.C., this 13th day of October 1981.

***** END OF DECISION NO. 2266 *****

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