UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 468276 and MERCHANT MARINER'S DOCUMENT
Issued to: Edward James Pitts Z 975 328

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2272

Edward James Pitts

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

By order dated 9 March 1981, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's seaman's documents for one month, plus three months on twelve months' probation upon finding him guilty of one charge of negligence and one charge of misconduct. The respective supporting specifications found proved alleged: that while serving as Operator on board the M/V MORANIA #16 and Tow Barge MORANIA #400 under authority of the license above captioned on 19 February 1980, Appellant's flotilla collided with berth 2 of South Carolina State Ports Authority Columbia Street Terminal in Charleston, South Carolina; and that Appellant, while serving as aforesaid, wrongfully exceeded the scope of his license by navigating from the high seas into inland waters to wit: Charleston Harbor, S.C., without having aboard a properly licensed pilot as required by 46 U.S.C. 364. A third charge, sounding in "Violation of Law," was found not proved.

The hearing was held at Charleston, South Carolina on May 22, 1980.

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

The Investigating Officer introduced in evidence eleven exhibits and the testimony of four witnesses.

In defense, Appellant offered in evidence his own testimony and eleven exhibits.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charges of negligence and misconduct and their supporting specifications had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of one month, plus three months on twelve months' probation.

The entire decision was served on 13 March 1981. Appeal was timely filed on 24 March 1981 and perfected on 2 June 1981.

FINDINGS OF FACT

On February 19, 1980, Appellant was serving as Operator on board the tug MORANIA No. 16 and acting under authority of his license while the vessel was push-towing the barge MORANIA 400 while underway in the port of Charleston, South Carolina. MORANIA No. 16 is of 191 gross tons and 94.7 feet in length. The tank vessel MORANIA 400 is of 5,651 gross tons and 398 feet in length. On the date in question, the vessels above were enroute the Charleston Exxon Terminal from the open sea with a cargo of asphalt. At about 0830 on 19 February 1980, the flotilla was in a push-tow configuration, in transit up the Cooper River in Charleston harbor. From the time the flotilla entered the harbor, to its arrival pierside at the Exxon Terminal, it was under the direction and control of Appellant. The services of a licensed pilot were neither sought nor utilized. While proceeding up river, Appellant was in communication with a pilot aboard a downbound U.S. Navy ship, USS SANTA BARBARA. Appellant was advised that the navy vessel needed to pass under the center span of the Hog Island Reach Bridge, to the east of Drum Island. Appellant also learned that a Navy was submarine outbound behind SANTA BARBARA. To avoid

encountering this traffic, Appellant elected to pass west of Drum Island and proceed to the Exxon Terminal pier via Town Creek Lower and Upper Reaches. To accomplish this, Appellant was required to pass through Custom House Reach and enter Town Creek Lower Reach. While attempting this maneuver, the flotilla allied the South Carolina Ports Authority (SCPA) Pier at Columbus Street. Prior to the allision, Appellant observed a dredge anchored on the west side of Custom House Reach which he had to avoid as the shaped course to enter the Town Creek Lower Reach. A flood tide was running in a northerly direction at the time, which was acting on the port quarter of the tug, tending to force the flotilla onto a more westerly heading than desired. In the vicinity of the dredge, the fairway was approximately 1,125 feet wide; the fairway tapers over a distance of about 400 yards into the Town Creek Lower Reach. The Reach itself has a channel width of about 500 feet.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge erred in his interpretation of 46 U.S.C. 405(b). The gist of Appellant's assertion is that the statute permits licensed operators of uninspected towing vessels to pilot tugs and barges on coastwise voyages. Appellant also challenges the findings of negligence on two grounds: disregard of his own testimony concerning the presence of a dredge in the vicinity of the allision; and reliance by the Administrative Law Judge on a mark, not drawn to scale, on a chart admitted into evidence.

APPEARANCE: Joseph C. Smith, Esq., of Burlington, Underwood & Lord, New York, New York.

OPINION

I

Appellant reasons that he was operating under his license at all relevant times and that Congress intended the authority conveyed by the license to apply to coastwise voyages and voyages

in inland waters. He concludes that his operation of the flotilla in the waters of Charleston Harbor was therefore within the scope of his Coast Guard issued license and no misconduct occurred. After an extensive discussion of legislation and regulations dealing with pilotage requirements, Appellant further asserts that the Coast Guard has violated the requirements of the Administrative Procedure Act by urging a "novel" interpretation of the pilotage laws without providing prior notice to the public and the opportunity for hearings and comment.

The issue of whether the operator of a tugboat of less than 1,000 gross tons can serve as the pilot, not only of a tug, but also of an accompanying barge that is in excess of 1000 gross tons carrying petroleum products, has recently been the subject of review in the United Stated District Court of the District of Columbia. *Moran Maritime Associates v. United States Coast Guard*, No. 80-3008 (D.D.C. order entered July 15, 1981) *appeal docketed*, No. 81-2012 (D.C. Cir. Sept. 11, 1981). On facts essentially identical to those of Appellant, the court concluded that 46 U.S.C. 405(b) and federal regulations do properly require a licensed pilot on flotillas which include a tank barge in excess of 1,000 tons carrying petroleum products. I accept the reasoning and decision of the District Court as controlling on this aspect of Appellant's argument on appeal, as well as being dispositive of Appellant's claim that the requirement for a licensed pilot in the instant proceedings constitutes imposition of standards not previously applied to operators.

II

Appellant asserts that the decision of the Administrative Law Judge exhibits clear error in finding negligence proved, since it was based in some measure on a mark placed on a chart to designate the position of a dredge. Yet is it clear that the evidence relating to the location of the dredge and its pipeline was elicited from Appellant. Admittedly, the position indicated was an approximation, not a pinpoint fix of the dredge's position. I am not persuaded, however, that the Administrative Law Judge attempted to treat the position indicated by Appellant as an exact one. The Judge noted in the decision that an area of 150 yards by 100 yards was covered by Appellant's mark, and that Appellant's indication of the pipeline's position, even though an approximation, could not

fairly be characterized as extending into the channel. The Appellant's evidence was probative of the likely position of the dredge and pipeline, and could properly be used in conjunction with the facts concerning the channel's configuration and dimensions to determine the credibility of Appellant's claim that his flotilla was embarrassed. As Appellant notes in his brief, he should not be judged by hindsight,but by the facts known at the time, or which should have been known. Knowledge of tides, currents, and vessel maneuvering characteristics are just such facts. Since Appellant is charged with knowledge of all these, and had knowledge as well of the dredge's position as he approached from Custom House Reach, nothing untoward intervened to embarrass the flotilla. All facts necessary to ensure a safe passage were or should have been known by Appellant before he attempted and failed to negotiate the bend in the channel in the vicinity of the dredge. Although several alternative courses of action suggest themselves, I will not speculate on which would have been appropriate. It is enough to recognize that the channel configuration, taken in concert with the other evidenced, does not support Appellant's claim that he was free of negligence or poor seamanship. The record contains substantial evidence of a reliable and probative character to support the conclusion of the Administrative Law Judge. *See* Appeal Decision Nos. 2153 and 1880.

CONCLUSION

The decision of the Administrative Law Judge was founded on substantial evidence in accordance with 46 CFR 5.20-95(b). While I find that the charges in this case were proved, I am impressed by the Administrative Law Judge's comments regarding Appellant's demeanor throughout the proceedings. I am also persuaded that Appellant's spotless prior record - thirty years of maritime employment, fourteen, of which were as a holder of various Coast Guard issued licenses - says much for the care and competence of this Operator. In consequences, I believe mitigation of the remedial order is appropriate in this case.

ORDER

The order of the Administrative Law Judge dated at Jacksonville, Florida, on March 9, 1981, is MODIFIED to three months suspension on twelve months' probation.

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

Signed at Washington, D.C., this 30th day of March 1982.

***** END OF DECISION NO. 2272 *****

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