IN THE MATTER OF LICENSE NO. 348061 AND ALL OTHER SEAMAN'S DOCUMENTS Z-434783
Issued to: Menelaus CANDARAS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1827

Menelaus CANDARAS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 30 April 1968, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's license for six months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as master on board SS EVILIZ under authority of the license above captioned on or about 17 May 1967, Appellant "wrongfully allowed the said vessel to be overloaded approximately ten (10) inches when the vessel was preparing to depart the port of San Francisco, California for a foreign voyage."

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

The Investigating Officer introduced in evidence the testimony of a Coast guard officer who had examined and boarded the vessel, a voyage record of EVILIZ, and a copy of the vessel's load line

certificate.

In defense, Appellant offered in evidence his own testimony and that of other witnesses connected with EVILIZ.

After the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all licenses issued to Appellant for a period of six months on twelve months' probation.

The entire decision was served on 1 June 1968. Appeal was timely fled on 17 June 1968 and perfected on 19 March 1970.

FINDINGS OF FACT

At all times hereinafter mentioned Appellant was serving as master on board a merchant vessel of the United States, the SS EVILIZ, under authority of his duly issued License No. 348 361 and Merchant Mariner's Document No. Z-434 783, while said vessel loaded a full cargo of rice at Sacramento, California, and then shifted to San Francisco Bay, preparing for a voyage to Yokohama.

Shipping Articles were opened on 15 May 1967 and were still open on 17 May, since a complete crew had not been signed on.

After joining the vessel on 13 May, the master talked with the chief engineer about the amount of fuel and water on board and told the chief engineer to sound all the tanks. The master was later informed that the fore and after peak tanks had 478 tons of fresh water, their full capacity, and that the deep tanks had 107 tons of fresh water that had been brought in the vessel from the prior voyage. The master then ordered the chief engineer to discharge ballast so the ship could load a maximum cargo.

The master then proceeded to load the vessel on his calculations of dead weight, and ordered the chief mate to load 11,818 tons of cargo, the amount he calculated making allowances for fuel and water.

The chief engineer resigned at 1530 on 15 May; the first

assistant resigned at 1600 on 15 May; the second assistant resigned at 1620 on 15 May; and at 1630 on 15 May the third assistant informed the master he was resigning, but would stay on until the vessel went down river to San Francisco.

About 1700 on 15 May the chief mate informed the master that the Plimsoll marks were getting critical. The master told the chief mate to sound the No. 3 double bottom tanks and was informed that the tanks were full, containing 450 tons of water. The master then told the night engineers to discharge the No. 3 double bottom tanks.

Late on the night of the 15th the master received a call that the plant was down and there was only one night engineer on board. He went back to the vessel about 0130 the following morning, and the engineer succeeded in raising steam, but the water in the No. 3 double bottoms was not pumped out.

By 1700 on 16 May the stevedores reported to the master they had loaded 11,818 tons of cargo. They later informed him 40 tons extra had been loaded because it could not be divided. The master was then ordered to clear the dock for another vessel and preparations were made to get underway to go downstream to San Francisco. Before leaving Sacramento the master calculated the vessel's draft at 27' 1" in salt water, making allowance for fuel and necessary water for the voyage. The master was aware that the ship was well over her marks at Sacramento.

Early in the morning of 17 May the vessel proceeded down the river and through San Pablo Bay to San Francisco Bay and anchored in Anchorage #7. The shipping commissioner came aboard and signed on the crew and paid off a few men. The ship was still short two engineers, but arrangements had been made to fly them from New York.

While lying at anchor in San Francisco Bay ballast was pumped from about 1300 to 1600 on 17 May. The total water pumped was 70 - 80 tons.

On 17 May the Coast Guard notified the master by letter that the vessel was detained for survey in accordance with the provisions of 46 U.S. Code, Sec. 85f.

At 2200 on 17 May, some six hours after all pumping had ceased, the freeboard of the vessel was measured by an inspecting Coast Guard officer and all of the vessel's tanks were sounded. On the starboard side of the vessel the water was at the summer mark of the Plimsoll marks, and on the port side no Plimsoll mark was visible. The freeboard amidships on the starboard side was 10' 5-1/4" and on the port side the freeboard was 8' 6". The mean freeboard amidships was about 9' 5-5/8". The vessel's draft, according to the marks about three feet abaft the steam and on the stern were as follows: forward starboard 27', port 27' 3"; aft starboard 28' 9", port 29' 9"; giving a mean draft of 28' 2-1/4".

The soundings in the tanks were as follows:

Forepeak - 113.2 tons fresh water.

Afterpeak - 127.5 tons of fresh water.

No. 1 starboard deep tank - 33 tons of water.

No. 1 port deep tank - 44 tons of water.

No. 3 starboard deep tank - 83 tons.

No. 3 port deep tank - 105 tons.

Port reserve feed tank - 62 tons of water.

Starboard reserve feed tank - 66 tons of water.

Starboard void in engine room - 40 tons of water.

Port void in engine room - 10 tons of water.

Starboard tank potable water - 20 tons.

Port tank of potable water - 28 tons.

Total - 731.7 tons of water on board.

Fuel tank soundings were as follows:

No. 4 double bottoms port - 95 tons.

No. 4 double bottoms starboard - 116 tons.

No. 4 deep tank port - 110 tons.

No. 4 deep tank starboard - 110 tons.

No. 5 deep tank port - 75 tons.

No. 5 deep tank starboard - 53 tons.

Port fuel settler - 29 tons.

Starboard fuel settler - 50 tons.

Total - 638 tons fuel oil.

The International Loadline Certificate issued to the SS EVILIZ by the American Bureau of Shipping on 12 March 1965 and in effect on May 17, 1967, shows minimum permissible freeboard from the deck line to the summer mark as 10' 5-1/4", the summer line being even with the upper edge of the line through the center of the disc. Summer marks apply the year round outside San Francisco Bay.

The certificate also indicates that the fresh water allowance for all freeboards is 7 and 1/4 inches. Due to the mixture of river water in San Francisco Bay, 20% of the fresh water allowance is estimated as a proper correction for water off Pier 45 at San Francisco, and the same correction is considered reasonable for Anchorage # 7 in San Francisco Bay.

BASES OF APPEAL

Examiner. It is contended that:

1) there can be no violation of the Load Line Act (46 U.S.C. 85-85g) until a vessel is actually at sea, and

2) the Examiner's opinion shows that what he found was either "misconduct" or "violation of a statute" but not "negligence" and, therefore, the finding that a charge of "negligence" had been proved was erroneous.

APPEARANCE: Marvin Schwartz, of New York, New York, by Burton M. Epstein, Esquire, of counsel.

OPINION

I

The basic question raised is whether 46 U.S.C. 85c is to be strictly construed, such that a vessel to which the Act of March 2, 1929, ch. 508, 45 Stat. 1492, as amended (46 u.s.c. 85-85g) applies is automatically in violation of 46 U.S.C. 85c if at any time it is so loaded as to submerge its applicable load line or it is so loaded that its applicable load line would have been submerged if the vessel had been at sea. Specifically, we are considering the case of a vessel at anchor in San Francisco Bay, in such condition of load that its summer load line marks were submerged. Summer load lines are always applicable at sea outside San Francisco.

In the instant case a threshold question is whether the vessel was subject to the Act in the first place.

46 U.S.C. 85 specifies that the Act applies to "Merchant vessels...loading at or proceeding to sea from any port or place... for a foreign voyage by sea." There can be no doubt that the Act applies to a vessel "loading at... a port or place in the United States... for a foreign voyage by sea" as well as to a vessel while "proceeding to sea."

The question might have been raised here that EVILIZ was not loading at San Francisco where the submergence was detected since it had already loaded at Sacramento. Construction of the statute as a whole renders the question irrelevant. Once a vessel commences to load it becomes subject to the Load Line Act, and 46

U.S.C. 85c is applicable at all times in which the vessel is subject to the jurisdiction of the United States.

The language of 85c is clear and unambiguous. Once a vessel has been so loaded that its applicable load line mark would be submerged at sea, the section has been violated.

II

Counsel has argued that the section should be construed so as to be inapplicable in the case in which it is the intent of the master to discharge ballast, or whatever, before proceeding to sea. "A violation of this statute", it is said, "occurs *only* when the vessel is actually in seawater..." While I agree with the contention that the purpose of the statute is safety at sea, I read 85c, as I have said above, to apply in port. The statute appears to be specifically deigned to inhibit violations at sea by reaching to vessels while they are still in port.

This view is reinforced by a view of the amendments to the Act made by the Act of August 31, 1962, &.6. 87-620, 1, 76 Stat. 415. 46 U.S.C. 85c was not amended by this Act, but it can be seen that prior to the amendment there was no monetary penalty for violation of 85c as such. The original penalty attached only when there was a departure or an attempt to depart from port. The amendment to 46 U.S.C. 85g(a) provided specifically for a penalty for any violation of the statute by a vessel "found operating, navigating, or otherwise in use upon the navigable waters of the United States." EVELIZ was such a vessel.

Appellant complains that this construction creates an "irrevocable violation." That it does, and 46 U.S.C. 85g recognizes this. If a mere violation of 46 U.S.C. 85c occurs, a single flat penalty applies. If, however, the violation involves an attempt to proceed to sea the penalties increase according to the inches of unlawful submergence. 46 U.S.C. 85g(c).

III

Appellant argues that the Examiner, in reading the

specification as alleging a violation of 46 U.S.C. 85c and finding it proved on that basis, erred in holding the charge of "Negligence" proved, since the charge should then have been "Misconduct", or "Violation of a Statute under 46 CFR 137.05-20(b)."

A violation of 46 U.S.C. 85c is not a "violation of a statute" within the meaning of the cited paragraph. That paragraph applies only to violations of section of Title 52 of the Revised Statutes, and the Load Line Act is not part of that title. for clarification of that paragraph, I add that violation of any statute or regulation is "misconduct" under R.S. 4450 and the only purpose of the paragraph,and the provision of law on which it is base, is to reach certain acts of misconduct which may not involve service under authority of a license or certificate. Occasions for the use of this provision are extremely rare. Few situations can be contemplated in which a violation of a section of Title 52 of the Revised Statutes will not constitute misconduct under R.S. 4450.

I accept Appellant's argument that no negligence on his part was established. However, the issue of unlawful submergence was litigated. Under the doctrine of *Kuhn* v. *Civil Aeronautics board*, CA D.C. (1950), 183 F. 2nd 839, and the recognized procedures of amending pleadings to conform to proof the charge of "Negligence" may be amended to "Misconduct."

IV

The record is clear that the overloading occurred without Appellant's knowledge and contrary to orders which he had given. When he became master of the vessel at Sacramento he ordered his chief engineer to discharge a certain amount of ballast water to permit a certain amount of load. At Sacramento, the chief engineer, and the first and second assistants, left the vessel. The third assistant then announced that he too would leave the vessel but agreed to stay aboard to get the ship to San Francisco. Appellant ordered the night engineer at Sacramento to discharge water ballast, but no action was taken under that order since the night engineer lost the plant and had to devote al his efforts to recover it.

More cargo was loaded at Sacramento than Appellant had

authorized and directed. The vessel was ordered from its berth at Sacramento, and Appellant had no alternative but to go down the river to San Francisco. On arrival there, at the anchorage, he again ordered discharge of water ballast by the new chief engineer. After three hours the discharge was stopped because the discharge system in certain compartments was found stopped by blank flanges. the new chief engineer needed hours to locate the blanks and to provide means for further discharge. It was during this time that the overloading was detected by the Coast Guard.

The detection of the overloading was made late on 17 May 1967. The charges in this case were served early on 18 May 1967 and the hearing was held that afternoon at Appellant's request. The hearing began at 1500 on that date and concluded, without material interruption, on the same day. discharge of ballast had been going on before and even during the actual hearing.

Evidence of which I may take cognizance, although not submitted at the hearing, tends to prove that a provisional order of detention was issued on 18 May 1967, the day of the hearing, and that a final order of detention, dated on 19 May 1967, was issued and was withdrawn on the same date.

It is my opinion that the totality of the evidence adduced did not prove that Appellant committed other than a technical violation of 46 U.S.C. 85c.

The language of 46 U.S.C. 85c renders overloading a *malum prohibitum*. Elements such as "intent" and "due care" are gone from consideration. Once EVILIZ was overloaded Appellant had violated the law, and, as discussed in I and II above, there was, in Appellant's words, an "irrevocable violation."

Since the violation as charged and found proved was a technical violation, and no finding was made by the Examiner that Appellant intended to sail the vessel overloaded, the matters in mitigation which led the Examiner to place his entire order on probation lead me to believe that, with the finding indelibly placed on Appellant's record, an order of admonition will satisfy the remedial purpose of this proceeding.

ORDER

The charge in this case is amended from "Negligence" to "Misconduct". The findings of fact made by the Examiner are AFFIRMED. His order, entered at San Francisco, California, on 30 April 1968, is MODIFIED to provide that Appellant is hereby ADMONISHED.

C.R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 1st day of Dec. 1970.

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***** END OF DECISION NO. 1827 *****

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