

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT
AND ALL OTHER SEAMAN'S DOCUMENTS Z-380563
Issued to: William J. BRENNAN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1839

William J. BRENNAN

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 29 March 1970, an Examiner of the United States Coast Guard at Corpus Chisti, Texas suspended Appellant's seaman's documents for two months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as person in charge of the tank barge ALAMO 1200 under authority of the document above captioned, on or about 19 May 1969, Appellant:

- (1) wrongfully failed to insure that a person holding a valid license as master, mate, pilot, or engineer or a certificate tankerman was on duty to perform transfer operations, thereby contributing to a marine casualty, and
- (2) wrongfully allowed tank hatches to remain open without flame screens when not under the supervision of the

senior crew members of the crew on duty when ALAMO 1200 was not in a gas free condition, thereby contributing to a marine casualty.

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

The Investigating Officer introduce the testimony of five witnesses.

In defense, Appellant offered in evidence his own testimony and a letter dated 13 November 1967 signed by the Commander, Eight Coast Guard District.

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

The entire decision was served on 3 April 1970. Appeal was timely filed on 29 April 1970. Although Appellant had until 12 August 1970 to add to his appeal, he has not done so.

FINDINGS OF FACT

On 19 May 1969, Appellant was serving as master of the towboat CATHY ANN.

At about 1830 on the evening of 18 May 1969, CATHY ANN moored two barges ALAMO 600 and ALAMO 1200, the latter outboard of the former, at a loading facility of the Permain Oil Corporation at LAVACA, TEXAS. CATHY ANN was then moored about 50 to 70 feet from the barges, so that a person aboard CATHY ANN, in order to get aboard ALAMO 1200, would have to go ashore, proceed to the location of the barges, and cross ALAMO 600 to reach ALAMO 1200.

Appellant holds a merchant mariner's document endorsed as

"tankerman." No other person involved in the case held either a license or a tankerman's certification. By virtue of being the master of CATHY ANN and being in charge of the operation of the barges, Appellant was the "person in charge" of ALAMO 1200, and since no other person was present who could qualify as "person in charge," remained so throughout the operation under consideration.

The loading of ALAMO 600 and ALAMO 1200 normally took about twelve to thirteen hours. After the commencement of loading of crude oil aboard ALAMO 600, Appellant left the barge and returned to CATHY ANN, not to leave until a fire began aboard ALAMO 1200 at about 0620 on 19 May 1969.

When Appellant left the barges he left one Claude W. Chapman, one of the crew of CATHY ANN, to supervise the loading of the barges. He gave Chapman some instructions. When ALAMO 600 was loaded, transfer of crude oil to ALAMO 1200 was commenced. At about 0600 on 19 May 1969, another crewmember of CATHY ANN, on James Walter Nicholson boarded ALAMO 1200. About one more hour of cargo transfer was to be expected.

Although Nicholson had not been advised specifically of the nature of the cargo being handled he knew it was oil or gasoline. He had been ordered specifically not to smoke on the barges. He had never handled oil transfer before.

When Nicholson boarded, he was the only person on either barge, and he noted that the manholes of the port and starboard #4 were open and were not equipped with screens. After about fifteen minutes Nicholson noted that a thread string was hanging from his shorts. He reached into his pocket for a knife to cut it. Not finding a knife he took out his cigarette lighter to burn the string off. When he ignited the lighter, fumes from the open hatches were ignited and Nicholson's clothes began to burn and his body was burned. He went over the side into the water.

The cook aboard CATHY ANN became aware of the fire and called a warning. Appellant, who was in the head, heard the warning and

came out. Chapman, who also was in CATHY ANN'S galley, also heard the warning, went ashore, boarded ALAMO 1200 and extinguished the fire by securing the open hatches.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner made three errors:

- (1) in finding that Nicholson had not been told of the dangers in loading crude oil;
- (2) in concluding that Appellant was "not on duty" at the time of the fire when in fact Appellant had been awake at all times while Nicholson was aboard ALAMO 1200 (his previous sleeping being irrelevant) and was within "voice hailing distance" of ALAMO 1200 during that period; and
- (3) in concluding that any action by Appellant contributed to the casualty which was solely caused by Nicholson's igniting his cigarette lighter.

OPINION

It must be noted first that Appellant does not contest the fact that he was the person in charge of ALAMO 1600 within the meaning of 46 CFR 35.35-1. In fact he argues that he was the person in charge and that he was performing his duties as he understood them in the light of the letter of Commander, Eight Coast Guard District, which he introduced into evidence. The terms of this letter will be discussed later. But an interesting point is raised here by the wording of the regulation, and the specific allegation in the charge that Appellant's two acts of misconduct were committed "while serving as person in charge...(of)...ALAMO 1200."

It seems obvious that if it is alleged that one is a "person in charge" and it is established that one is not on duty at the time of an alleged act of misconduct, and is not the "person in

charge," the charges, as formulated, do not lie. On the other hand the regulation forming the basis for the charge is not artfully drawn and is ambiguous as to who is a "person in charge." It provides that it is the duty of "owners, masters, or *persons in charge* of an unmanned tank barge to "insure that a person holding a valid license as master, mate, pilot, or engineer, or a certificated tankerman is on duty to perform transfer operations, which licensed person or certificated tankerman shall be considered as the *person in charge* of the unmanned tank barge." (Emphasis added.)

The person on whom this regulation imposes the duty to provide a qualified person to perform transfer operations need not be a licensed or documented person. The owner obviously need not have a license or document. The "master" of an uninspected motor towboat need not be licensed. A "person in charge" may be a towboat captain such as Appellant who need not be licensed, not certificated as a "tankerman," (although the Appellant in the instant case was so certificated). Moreover, the "person in charge," who must assure that a qualified person performs transfer operations may even be a shoreside employee of a company which has only a contractual relationship with the water carrier who is to carry the company's flammable or combustible liquid cargo in bulk. Thus under many conditions, an action under R.S. 4450 for failing to insure that a qualified person was on duty to perform transfer operations could not be lodge against an owner, master, or person in charge of an unmanned tank barge. A criminal action under R.S. 4417a (46 U.S.C. 391a) would constitute the government's sole remedy against any such shoreside or unlicensed or undocumented person.

It is clear, however, that person who performs transfer operations (who unfortunately, from the viewpoint of clarity is also referred to as the "person in charge") must be a licensed or documented person.

Succinctly, it does not matter who the owner, master, or person in charge of an unmanned tank barge may be or whether he is specially qualified, his only duty is to insure that a qualified person is on hand to supervise transfer of cargo. It is only in a second sense of the regulation, that "the person in charge" of the unmanned tank barge must be a qualified person.

Initially then Appellant, as "person in charge" of the barge ALAMO 1200 , is chargeable with *misconduct* only if he did not insure that cargo transfer was accomplished under the supervision of an authorized person, and he is chargeable under R.S. 4450 only because he happens to hold a merchant mariner's document endorsed as "tankerman."

II

Appellant contends that he was the "person in charge" of ALAMO 1200 both as to the duty to provide a qualified person to perform transfer operations and as to supervision of the transfer operation (being qualified for the latter duty by virtue of his tankerman's certificate). The question then is, immediately, whether he can be charge with failure to insure that qualified person was on duty to perform transfer operations. It is not contested that Appellant was certificated to perform transfer operations and the regulation does not require that separate individuals discharge the two functions. Such the investigating officer is bound by the allegation that Appellant was the "person in charge," I do not see how Appellant can be held at fault for failure to insure that a qualified person was "in charge." On other hand, if he was not the "person in charge," the allegation that he was the "person in charge" and any basis for the charge must fall.

III

In the light of this confusion attributable to a poorly drafted regulation I am far from persuaded that Appellant can be held to have committed acts of misconduct while serving under authority of his tankerman's certificate. There is no doubt, however, that while serving under authority of that certificate he acted in a *negligent* manner.

For one thing Appellant, as the only person qualified to handle the cargo transfer, and by virtue of his primary engagement, was unquestionable the only member who could be considered a senior

member of the crew. 46 CFR 35.30-10 prohibits the opening of and leaving open any tank hatch except under the supervision of a senior crew member on duty. While Appellant was asleep on the tug, while he was breakfasting, and while he was in the head, he was clearly not supervising the transfer operations on the barges. In fact, it must be inferred from the record, since that is no evidence of any reports having been made to him, that he was not even aware that the tank hatches had been opened and remained open.

IV

Turning to the specific bases of appeal I agree with Appellant that the Examiner erred in finding that he was "not on duty" at the time but at the same time I find that Appellant was not properly performing his duties regarding the transfer operation.

Appellant argues that since he was wake at all times during the period while Nicholson was at work his earlier sleeping became irrelevant. However, since, except for about one hour, cargo handling was proceeding and Appellant was not supervising the activity while he was aboard the tug, he had left the operation in the hands of unqualified persons. Even without a casualty this is inattention to duty.

Here, it is believed that Appellant's reliance on the letter of Commander, Eighth Coast Guard District, is misplaced. The letter declares the obvious in saying that a tankerman need not be physically on board the barge in question because there are duties which require him to leave the barge. The caution that he tankerman must at least be in calling distance cannot be construed as permitting him to be any where for any conceivable purpose not connected with cargo handling as long as a person on the barge with strong lungs could reach his ear with a great shout. When the statement in the letter is placed in context it is seen that the controlling concepts are "constant attention" and "continuously checking."

By no stretch of the imagination can this letter be construed as authorizing the supervisor to be asleep even if he were asleep on the barge itself. Sleeping is not the condition of "constant attention" that the letter speaks of twice.

Appellant makes much of the point that even if he had been aboard the barge he could not have prevented Nicholson from igniting his light and that Nicholson had been told not to smoke. This argument shows the inadequacy of the instruction given to Nicholson because he did not smoke and did not intend to. It also emphasizes Appellant's negligence in leaving the actual cargo handling to a man who had never before been engaged in the transfer of flammable or combustible liquid cargo (except, as a deckhand, to rig hose) and who had not been so indoctrinated and trained that it would have been against second nature not to recoil from doing what he did alongside two open tanks.

While it is speculatively true that if Appellant had been at the far end of the barge from Nicholson he could not have prevented him from igniting the lighter, it can also be seen that such as inexperienced person should not have been permitted to be on the barge except under the immediate supervision of a qualified person who could have prevented the actin.

VI

Most of the above has necessarily, because of the initial considerations involved, dealt with Appellant's second point on appeal. To turn to Appellant's first point, that the Examiner erred in finding that Nicholson had not been seen instructed as to the dangers involved in handling crude oil, it is noted that there is evidence to support the finding in Nicholson's testimony, and, on Appellant's case, no effort was made to rebut this. In fact, there is ample evidence in Appellant's own testimony that he gave no such training or advice to Nicholson. There was no error in this finding.

VII

Appellant's third point is that there is nothing to connect his conduct, as a causative element, to the casualty.

Appellant's negligent performance of duty in leaving unqualified person to conduct cargo handling set the background for

the casualty. The one act argued as a sole and intervening efficient cause such as to absolve Appellant from contributory fault is the igniting of the lighter by Nicholson. It is clear that the stage for this act was set by Appellant's negligence.

CONCLUSION

It is concluded that the charges here were inappropriately laid in that if Appellant, a qualified tankerman, was in fact serving as "person in charge" of ALAMO 1200 he cannot be held to have failed to insure that a qualified person was serving as "person in charge." He was, however, negligent in the performance of his duties.

The finding of the Examiner that Appellant was not "on duty" is amended, to find that Appellant was on duty and negligently failed to perform his duties.

Technically, these conclusions vary from the Charge and Specifications, but the matters involved were litigated before the Examiner and new findings are permissible. *Kuhn v Civil Aeronautics Board*, CA D.C. (1950), 183 F. 2nd 839.

The pleadings are amended to conform to the proof so that the record will in the future reflect precisely what was found.

The charge is amended from "MISCONDUCT" to "NEGLIGENCE." The specific acts of negligence found proved are that while Appellant was serving as "person in charge" of ALAMO 1200 on 18 and 19 May 1969, under authority of his certification as tankerman, he negligently:

- (1) failed to perform his duties by allowing cargo transfer operations to take place for about eleven hours without giving immediate supervision to unqualified persons, while he was, in order, asleep, eating, and in the head aboard CATHY ANN; and
- (2) permitted tank hatches to be opened and to remain open while not under his immediate supervision as the only qualified person on the scene.

Appellant's negligence contributed to a casualty aboard ALAMO 1200 on 19 May 1969.

Two findings and conclusions of the Examiner are MODIFIED accordingly.

ORDER

The order of the Examiner dated at Corpus Christi, Texas on 29 March 1970, is AFFIRMED.

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

Signed at Washington, D. C., this 20th day of May 1971.

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