IN THE MATTER OF LICENSE NO. 312153 MERCHANT MARINER'S DOCUMENT
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Lewis Jackson ROWELL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1716

Lewis Jackson ROWELL

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 25 August 1967, an Examiner of the United States Coast Guard at San Francisco, California suspended Appellant's seaman's documents for six months upon finding him guilty of negligence. The specification found proved alleges that while serving as Chief Engineer on board SS WHITTIER VICTORY under authority of the document and license above described, on or about 11 August 1966, Appellant failed to utilize all available means in an effort to minimize damage to the vessel's machinery, when salinity was evident within the vessel's condensate system, thereby causing the premature failure of the propulsion and auxiliary electrical plant.

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 two expert witnesses, the testimony of one engineer of the vessel who was present during most of the critical period aboard WHITTIER VICTORY, and certain documents.

In defense, Appellant offered in evidence the testimony of the master of the vessel, his own testimony, and one document relative to boiler feed water analysis prior to the casualty.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months.

The entire decision was served on 29 August 1967. Appeal was timely filed on 18 September 1967, and perfected on 11 April 1968.

FINDINGS OF FACT

The Findings of Fact made by the Examiner are quoted in full and adopted, with one exception which will be mentioned in the "Opinion" below.

(1) "that at all times hereinafter mentioned Lewis Jackson Rowel was serving as Chief Engineer on board a merchant vessel of the United States, the SS WHITTIER VICTORY, under authority of his duly issued License No. 312 153 and Merchant Mariner's Document No. Z-396 988.

(2) the ship sailed from Los Angeles for Saigon on 9 August 1966, and at 0510 on 11 August 1966, the second assistant notified the chief engineer that both boilers were carrying over. The chief and the first assistant went below at once, and the chief remained there in entire charge of the work almost continuously for the next two or three days.

(3) the chief ordered the water level lowered in both boilers, because of the rolling of the vessel, and both boilers were blown down twice but the carry-over continued. The vessel had been slowing all morning and the chief had reported the trouble to the master.

(4) chemicals were added to the feed water and to the port boiler, but this produced foaming and the carry-over continued.

(5) late in the evening of 11 August 1966 the chief engineer advised the master that he was unable to locate the source of the trouble and that it was getting worse. The master then determined to head for the nearest port, which was San Francisco, a distance of about 280 miles.

(6) the port boiler was then secured, and on the next morning it was opened, but it was too hot to get into. It appeared to have leakage so it was closed up and refilled.

(7) when steaming on only the starboard boiler there still appeared to be a carry-over. Since priming could be caused by overfilling, the water level was first checked. Then the water in the starboard boiler was tested and the first assistant engineer was unable to get a test reading because of excessive salinity. He told the chief he got no reading.

(8) while steaming on the starboard boiler, some small explosions were heard which were thought to be tubes rupturing. That boiler was then secured and water was found in the fire box.

(9) after the explosions were heard in the starboard boiler and it was secured, steam was again raised in the port boiler and it was put on the line. A call for assistance was sent from the vessel and a tug was requested from San Francisco. Ultimately, the vessel was towed to that port.

(10) after leaving Los Angeles, the vessel had encountered a moderate northerly blow with winds estimated at force six, accompanied by a moderately heavy sea, causing the vessel to roll 20 to 30 degrees. The vessel carried a deck load and some heavy equipment in the No. 4 tween deck. After the engine trouble was reported, the master

told the engineer to give him what turns he could so the vessel's head could be held to the sea, to prevent a possible shift of cargo.

(11) the source of the contaminated water in the boilers was leaking tubes in the main condenser. Although the salinity indicator could have been used to check the entire system when trouble first developed, it was not used until the following day.

(12) as a result of the prolonged carry-over, both boilers were salted, with the port boiler superheater badly salted. The high pressure turbine was heavily damaged, the low pressure turbine was damaged but "salvageable" [sic]; and the estimated cost of returning the vessel to San Francisco and making the necessary repairs was about a quarter of a million dollars."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. In view of the disposition of this case there is no reason to spell out the grounds for appeal stated.

It must be observed, however, that Counsel has misconceived the matter in issue. The specification found proved, from which finding appeal has been taken, is cited incorrectly. Appellant states that the fault which was found is that the did ".... on or about 11th day of August, 1966 fail.... to utilize all available means in an effort to minimize damage to the vessel's condensate system thereby causing the premature failure of the propulsion and auxiliary electrical plant." The actual specification alleged a failure to minimize damage to the "vessel's machinery" did not mention the vessel's condensate system as damaged at all, except by implication.

APPEARANCE: Jarvis, Miller & Stender, San Francisco, Cal., by Eugene A. Broadsky, Esq.

OPINION

I

The specification in this case originally read that Appellant did "fail to utilize all available means in a effort to minimize damage to the vessel's machinery, thereby causing the premature failure of the propulsion and auxiliary electrical plant." This specification had apparently puzzled Appellant, and the Examiner too. (R-3). In any event, the Investigating Officer moved, before arraignment, to amend the specification read thus: "did.... fail to utilize all available means in an effort to minimize damage to the vessel's machinery *when salinity was evident within the vessel's condensate system*, thereby causing the premature failure of the propulsion and auxiliary electrical plant (the underscored words were added by the amendment.)

There seems little doubt that the original wording, construed as liberally as possible in favor of negligence even in an administrative and remedial proceeding such as this. Even *after* the amendment, the Examiner expressed doubts about the validity of the specification. Appellant's counsel vigorously renewed his objection. (R-4). For some reason, *after* an off-the-record discussion (R-5), it was decided, possibly because of potential inconvenience to available witnesses, to proceed on the amended specification without a ruling on Appellant's motion. The hearing did so proceed, and expeditiously.

However, the amended specification carries over some of the problems caused by the original and seems to have added problems not earlier raised.

The language, "minimize damage" and "premature failure," appears to imply inevitable damage and ultimately necessary failure which certain omitted actions available to Appellant could have mitigated or postponed.

The amending language places the time of Appellant's negligent failure to act as after "salinity was evident within the vessel's condensate system." Obviously, there must be evidence and a supportable finding that there came a time when "salinity was evident within the vessel's condensate system" after which Appellant failed "to utilize all available means in an effort to minimize damage...."

In his Opinion the Examiner makes the following statement:

"....it is considered that he was negligent in that he failed to consider for more than twenty-four hours that the carry-over could have been caused by salting, and to make tests to determine the primary cause of the salting."

With this predicate for a finding of negligence must be compared the allegations of the specification that the failure of Appellant to act to minimize damage occurred after salinity was evident in the condensate system. The specification, as framed, could not be found "proved" without amendment, if Appellant's fault was that he did not detect salinity as the cause of the priming soon enough, not that he failed to do something after salinity was "evident within the vessel's condensate system."

II

The fact found by the Examiner for which no support can be found in the record is stated in the second sentence of No. 12: "Although the salinity indicator could have been used to check the entire system when trouble first developed, it was not used until the following day."

The only witness who testified against Appellant, other than the experts, was the first assistant engineer. His testimony is so often unresponsive to the questions asked of him, and the questioning itself was so rambling, that little reliability can be placed on it.

He testified first thus:

"Q. When was the water tested?
A. When was the water tested?

"Q. Yes
A When it first started carrying over, when the first called me, and the Chief, and I couldn't get a sample. I couldn't get a test sample." R-53

To the question, "How fast can you determine if there is salt in the system?" he replied, "When you get the test." R-53.

Then follows:

"Q. How long would it have taken to have determined if salt water existed there, with the use of the salinity indicator?
A. Well it's according to what kind of condition the salinity indicator would be in.

"Q. Was the salinity indicator working?
A. I never heard it." CR-53,54)

Later, this exchange occurred:

"Q. .... From the time the priming was firs determined, which was approximately five o'clock Thursday morning, until this time. When did you first determine that there was salt?
A. After we singled it up.

"Q. In other words, it took the whole day to determine there was salt in the systems?
A. I didn't take no tests." R-57,58.

This is the only evidence introduced against Appellant upon which the Examiner's finding could have been based. It must be noted that this testimony does not say that the salinity indicator was "not until the following day." It does not even say that the salinity indicator was or was not ever used.

Neither can this testimony be construed to mean that the fact of salting was not determined until the following day. The answer of the witness that salting was first discovered "after we singled it up" is obviously unreliable. What "after we singled it up," as stated by the witness, means is unfathomable. It might be said that something was "singled up" when boilers were alternated, but that occurred as soon after the priming was detected as was possible. The reference to "singling up" was obviously taken by the Examiner as meaning that one or another of the condensers could be

by-passed so as to isolate it as the cause of the admission of salt water. The truth is that the main condenser could not be "isolated" or "by-passed" as long as the main propulsion was in operation, except by venting to the atmosphere, a procedure which will be discussed below.

On cross-examination, the witness was asked, "Who has the duty of testing for the chemical content of the water? Was it you or one of the others?" as to be expected, the witness replied, "The second assistant." But the person who would be expected to give the best information as to the ascertainment of salt, the second assistant, was not called as a witness.

On the entire testimony of the first assistant there is no basis for the opinion-finding of the Examiner, quoted above, that Appellant was negligent in not detecting the cause of the priming soon enough. With the elimination of the one sentence in Finding No. 12, there is absolutely no basis in the Finding of Fact to support a conclusion of negligence.

III

The closing argument of the Investigating Officer in this case may well have been persuasive to the Examiner. The argument was, to a certain extent, impermissible in that it amounted to expert testimony on the subject of priming and the procedures to be followed when it occurs.

At R-78, the Examiner interrupted the closing argument to ask, "Specifically what should he have done at 0530?" The Investigating Officer proceeded to explain what should have been done without reference to any evidence in the record. At R-81, the Investigating Officer, in effect, testified that he himself had plugged condenser tubes at sea in rebuttal of an argument that the conditions described in the record showed that examination of the condenser, and emergency action upon it, were prevented by the conditions obtaining.

An Examiner may consult agency personnel for expertise, but the expertise certainly may not come from the investigator of the case in hand, whether by way of testimony or argument.

IV

While a remand could be ordered in this case, no useful purpose would be served by rehearing. In the first place, it must be understood that the negligence attributed to Appellant was not a negligence stemming from a breach of duty but a negligence stemming from a failure to make the best judgment, or to make the prudent judgment, or even to follow an accepted practice known to those of his profession under the conditions given.

As mentioned above, the evidence adduced at hearing dealt with practices reasonably to be followed when priming occurs. The Investigating Officer introduced into evidence the testimony of two expert witnesses and a "Marine Instruction Manual" for the system of boiler and feedwateer feeding for the plant on this ship. There was also introduced the radio communications between the ship and its operators concerning the emergency encountered.

There is no doubt that Appellant followed the procedures recommended in the "Manual," even without reference to the booklet. There is also no doubt that the procedures directed from shore authorities had already been undertaken by Appellant before the instructions had been received.

On the merits of the case, then, the testimony of the two expert witnesses must be closely scrutinized.

While a probable cause of salt water in the feedwater is a condenser defect, there are, however, as admitted by these witnesses, other causes for priming than salinity of feedwater. There is no evidence in this record of earlier condenser defects. There is no evidence of faulty maintenance of the condenser.

There is evidence that this old vessel, recently reactivated, had made one voyage from the United States to Southeast Asia without mishap, and had experienced no difficulty with the condenser on its second such voyage from New Orleans to Los Angeles, and thence to the point when difficulty was encountered.

In other words, when Appellant was advised of priming, there was no reason for him to think of condenser fault and salinity as the cause, but other choices of diagnosis were available to him as

probable. (In this connection it may be recalled that only one witness testified as to making a salinity tests, but there is no evidence that no other person made salinity tests. If the findings of the Examiner, as amending the specification, could properly be found proved,there would have to be affirmative evidence that no such tests had been made or that, if they had, they should have apprized Appellant of salt water entering the feed at the main condenser.)

The expert witnesses testified that if there is fault in the condenser such as to permit the "massive" entry of seawater only one course of action was available, to shut down the main propulsion, open the condenser, and plug the defective tubes. There was evidence that "pinhole" defects in the condenser could be corrected by use of sawdust or oatmeal which would be sucked into apertures so as to seal them off. There was also evidence that the condenser damage was of such extent that use of the "sawdust" or "oatmeal" treatment would not have been effective at all.

Over all of these considerations lies the order of the master that 30+ revolutions must be maintained to prevent the ship from broaching and possibly, in the vision of the master himself, capsizing. It must be understood that the reasonability of the master's belief is not in question here. Appellant was ordered to maintain a certain number of revolutions. To comply with this order he could not secure the main propulsion.

It then becomes academic whether he acted quickly enough to ascertain salinity as the cause of the priming. No matter when he had ascertained the cause, the cure of plugging condenser tubes was not available to him because the main propulsion had to be kept up.

V

It was urged at the hearing that had Appellant ascertained the salinity of the feedwater early enough he could have bypassed the circulatory system, used feed from the double bottoms, and vented to the atmosphere, thereby preserving the propulsion machinery from further damage. This argument seems to be pure hindsight when the question of negligence at a given time is considered.

The evidence indicates that such a procedure would have allowed operation for less than one day. Since the extent of the storm was unknown even to the master, who required operation of the main propulsion, it cannot be said that Appellant was at fault in failing to resort to an expedient which might have resulted in suicide of the ship.

In his closing argument, the Investigating Officer argued that if Appellant had used his uncontaminated water damage would have been minimized:

> ".... however, had they decided earlier that they couldn't secure the main engine and had isolated the condenser, taken boiler feed from the double bottom and at least headed in toward the tug coming out, much of this damage could have been averted. As the Chief says, he didn't have enough water. He possibly would have run out, but he could then have gone back on sea water and made it." R-80.

This argument overlooks some vital pieces of evidence and bridges some gaps in the evidence.

The testimony of the master is unequivocally that Appellant recommended on the morning of 12 August 1967 that the ship put in to the nearest port. The master agreed and determined that the nearest port was San Francisco. But the very first message sent from the ship (Exhibit 4), dated 1200 Zone+7 Time on 12 August shows that the master advised his operator that he was unable to head for San Francisco at that time because of sea conditions. It was not until eight hours later that a master's message could announce that the vessel was able to proceed toward San Francisco.

It seems clear that no point identifiable in this record can be said to be the one when Appellant should have commenced using uncontaminated water which as used steam would be vented to the atmosphere, until, at the earliest, the master had definitely headed for San Francisco. Up to that time Appellant had no idea as to how long he would be required to provide propulsion and therefore could not prudently resort to an irreversible loss of water after which he could proceed on seawater.

It may be that once the master was able to proceed toward San

Francisco and it was known that a tug was on the way to meet the ship, Appellant could have minimized damage by shifting to the use of uncontaminated water for a limited period of time. It may be that this failure was negligent. If this is the substance of Appellant's fault, he was not charged with it, the question was not litigated, and it is not what he was found guilty of.

It may also be observed that the Examiner made no findings as to the time of any event after "late in the evening of 11 August 1966" (Finding No.5), except for the rejected finding in No. 12. This may possibly have been the result of his conclusion that the alleged negligence of Appellant was established as prior to the morning of 12 August, with subsequent time becoming irrelevant. But in connection with the Investigating Officer's theory of using uncontaminated water and venting to the atmosphere, and utilizing seawater thereafter (which could be a factor in determining whether a remand might serve a useful purpose), it is seen that Exhibit 16 snows the vessel to be proceeding toward San Francisco at 2055 (Zone+7 Time) on 12 August. Rendezvous with the tug, according to Exhibit 20, was accomplished at about 1000 on 14 August.

The uncontroverted testimony of Appellant was that he could use uncontaminated water and vent to the atmosphere for about twenty hours, If it is assumed that Appellant should have followed this practice, recourse to contaminated water would have been required at about 1700 on 13 August, and use of contaminated water would have continued for sixteen hours after the uncontaminated water had been exhausted. In the absence of expert testimony and in the improbability of obtaining reliable testimony on the matter, it would be idle to speculate how much less damage would have been done had Appellant adopted this course of action, and the propriety of remand for ascertainment of whether this was negligence in the first place, and whether the minimizing of damage would have been significant, is not apparent.

VI

Complete review of this record indicates that appropriate charges, with proper marshaling and presentation of evidence might have resulted in a supportable finding of negligence upon the part of Appellant. Such speculation is not appropriate in determining, at this stage, whether a rehearing should be ordered.

The casualty in this case occurred on or about 11 August 1966. The hearing was completed on one day, 23 August 1966. The decision did not emanate until 25 August 1967, a year after the actual hearing was completed. Reversal of the Examiner's findings at this late date with order for rehearing would not contribute to expeditious disposition of cases involving safety at sea.

CONCLUSION

On the evidence adduced at the hearing there is no sufficient reason to find Appellant guilty of negligence.

(1) as originally charged,
(2) as charged on amendment, or
(3) on any theory substituted by the Investigating Officer or the Examiner.

There is also no good reason to order a rehearing on remand so that errors may be corrected.

ORDER

The order of the Examiner dated at San Francisco, Cal., on 25 August 1967, is VACATED. The Findings are SET ASIDE, and the charges are DISMISSED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 12th day of July 1968.

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