

IN THE MATTER OF LICENSE NO. 371176
Issued to: Herbert CARNES Bk-272692

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1739

Herbert CARNES

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 23 April 1968, an Examiner of the United States Coast Guard at New York, N. Y. suspended Appellant's license for one month upon finding him guilty of negligence. The specifications found proved allege that while serving as night engineer on board SS EXILONA under authority of the license above captioned on or about 28 or 29 December 1967, Appellant, while the vessel was at Hoboken, N. J.,

- (1) did "allow the vessel's engine room to remain vulnerable to flooding from the sea by failing to assure that the opening to the sea created by the removal of the bonnet from the main overboard discharge valve was blanked off";
- (2) did "permit the vessel's engine room to become flooded by failing to assure that an opening to the sea created by the removal of the bonnet from the vessel's main overboard discharge valve was 'blanked off' prior to and during cargo loading operations"; and

- (3) did "fail to notify the night mate in charge of the vessel that said vessel's main overboard discharge valve bonnet had been removed making the engineroom subject to flooding."

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 introduced in evidence the testimony of the night mate on duty at the time of the vessel's flooding, and that of the machine shop foreman of the company doing the repair job on the overboard discharge valve.

In defense, Appellant offered in evidence his own testimony and that of an expert night engineer.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and all specifications had been proved. The Examiner then entered an order suspending Appellant's license for a period of one month.

The entire decision was served on 20 March 1968. Appeal was timely filed on 11 April 1968. The Examiner then entered, *suasponete*, a supplemental decision modifying the wording of the "Opinion" section of his decision in minor respects. This decision was served on 24 April 1968. Appeal was timely perfected on 15 June 1968.

FINDINGS OF FACT

On the night of 28/29 December 1967, Appellant was serving as night mate on board SS EXILONA and acting under authority of his license while the ship was at a pier in Hoboken, New Jersey.

(Since the only findings of fact made by the Examiner, except as to jurisdictional facts, are couched in the words of the specifications without detail, I substitute here facts ascertainable from the Examiner's "Opinion" and found supportable in the record.)

Late in the afternoon of 28 December 1967, Appellant assumed duties as night engineer aboard EXILONA. When he came on duty he was given instructions as to preparation of a boiler for repairs to be made the next morning. He was not advised as to any plan to create an aperture in the ship's side by way of the engineroom by the removal of the bonnet of the main overboard discharge valve on the starboard side, nor was he advised as to any plan for loading cargo that night.

Not long after assuming duty as night engineer Appellant became aware of the shore workers engaged in removing the bonnet of the valve from the ship's side. The precise time of the creation of the opening in the hull cannot be ascertained, but it was before 1930 because at that time the foreman of the machine shop had gone ashore and advised the port engineer by telephone that he was taking the internals of the valve to the shop, that he would probably not have it back in place until morning, and that he had no means available to blank off or plug the opening.

After the opening had been created, Appellant went on deck and looked over the side to see how much "freeboard" there was between the hole, which was about twenty four inches long by eight inches wide, and the water surface. He ascertained the height to be about eighteen inches.

By about midnight, Appellant was aware, from the activities of mates and surveyors, that the vessel was being readied for the immediate intake of liquid cargo in bulk, even though he was never so officially informed.

At midnight, one Jay Hundertmark assumed duties as night mate. He was never informed by anyone that there was an unusual opening in the ship's side. At about 0015 or 0020, loading of liquid bulk cargo was commenced in the lower number 4, starboard.

Appellant was aware that cargo operations had begun, even though not officially so notified.

At about 0500 Appellant was advised that there was a "leak" in the engineroom. He saw a large flow of water entering from the hole left by the removal of the bonnet. He ordered the bilge pumps

into operation and ran to the saloon to warn those in charge of cargo loading. After ascertaining where the cargo was going he told the mate either "to stop loading" or to load into the port tank" or both.

He returned to the engineroom and attempted to stop the flow of water by the use of mattresses, first from the inside, then from outboard. These efforts were unsuccessful. Eventually the plant was secured and abandoned.

Cargo loading had proceeded until 0700.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Because of the disposition to be made of this case only those arguments of Appellant which apply to the specification are recited.

Appellant argues that no standards were entered into evidence to show that there was a duty on the part of Appellant to have acted other than he did as night engineer of the vessel.

APPEARANCE: Frank J. Blizard, Jr., Esq., of Middletown, N. Y.

OPINION

I

It is believed that the first specification, in and of itself does not state a separate and complete offense of negligence.

The vessel was at Hoboken, N. J. It was not underway. The aperture created by the removal of the bonnet from the main discharge valve was not brought about by Appellant's order. Although the findings of fact made by the Examiner do not identify even an approximate time when the aperture was made on "the night of 28/29 December 1967," his opinion makes it clear that the opening was made prior to 1930-2000, because during that period the supervisor of the shoreside repair gang reported to the port engineer by telephone that he would have to take valve components

off the ship to the shop, and that he had no way of "blanking off" or plugging the opening. The flooding eventually was found at about 0500 of the following morning. The flooding was caused by the loading of cargo, commencing at about 0200 on 29 December.

The specification does not allege that Appellant permitted the engineroom to "become" vulnerable to flooding. Appellant had nothing to do with creating the opening. Work on the valve was not within his cognizance and the person within whose cognizance it came, the port engineer, was, according to the evidence adduced against Appellant, made fully aware of the condition created.

As to Appellant's permitting the engine room to "remain" vulnerable to flooding, the specification is both too broad and too precise. It is too broad in that for a period of several hours the vessel was vulnerable, if certain other conditions developed, but was safe; and in that for a period of several hours after a new condition had arisen (the loading of cargo) it remained vulnerable but less safe, until the casualty occurred. The specification does not sufficiently allege when Appellant's duty to act arose.

The specification is too precise in stating that Appellant erred in failing to blank off or plug the opening. There were other remedies available to prevent the casualty which occurred. Even if other persons could have or should have thought of blanking off or plugging, and were responsible for the failure to do so, and even if Appellant can be found negligent under a total view of the case, the allegation of the specification implies that Appellant had a duty to blank off or plug the aperture. Without more of a statement of conditions, Appellant had no such absolute duty.

A specification should be so framed that if all its allegations are found established the offense charged must be found proved. The specification here would admit of proof that no hazard existed at first, that no cargo was loaded aboard, and that the engine room was not flooded. It could hardly be asserted that Appellant was negligent under these conditions.

This is not to be construed as implying that there can be no negligence without a casualty. All it means is that matters of "negative" evidence (*i.e.* that a person charged failed to elect any one of several choices available) are not enough to

support a separate specification of negligent acts, although the facts not necessarily to be pleaded may contribute to a finding on a more general specification or negligent conduct.

II

To move to the third specification, I do not think that the ultimate finding of the Examiner can be sustained upon the facts of the case. Although the specification again broadly covers the night of "28/29 December 1967," it is noted that the "night mate" who testified against Appellant was a person who came on watch at midnight of 28 December 1967 (0000, 29 December). It must be assumed that this "night mate" is the one whom Appellant is specifically charged with failing to notify of the opening in the hull.

This specification, too, is considered as not alleging a separate and complete offense. There was no showing that Appellant was charged with a duty of reporting to any mate the condition of the hull at any time, and much less a showing that he had a duty to explain or report conditions to a mate who assumed duties many hours after Appellant himself did. The presumption is that the relieved officer must report conditions to the officer who relieves him. In this case, the mate who was relieved at midnight of 28 December 1967 was the person who had the duty to report the ship's condition to the "night mate" who relieved him. This "night mate" was the one to whom Appellant was supposedly to report the opening in the ship's side.

It cannot be accepted that Appellant was under a duty to report the opening, which had existed for several hours by the time the mate came on watch, to the mate who came on at midnight at the time the mate came on watch. This duty was lodged elsewhere.

Here again, the specification, like the first, is too broad. It does not indicate at approximately what time the duty of Appellant arose to notify the "night mate" of the existing conditions. From the evidence adduced it can be assumed that the specification was intended to cover only the period of time as to which the witness "night mate" testified, from midnight on.

Thus, the specification is presumed to have no meaning as to

"28 December 1967." If a charge of negligence is to be found proved against Appellant under this specification, it cannot be supported even by a narrowing of the time to the period after midnight of 28 December 1967, without reference to other facts.

Under the circumstances of this case, the third specification cannot be considered as properly alleging an offense, although the facts alleged thereunder might be provable under a more comprehensive specification.

III

The second specification found proved poses a somewhat different problem. This specification introduces the element, not alleged in either of the other two, that the engineroom was "flooded" because the aperture had been left in the vessel's side during cargo loading operations.

Appellant argues that he had not been advised that the side of the ship was open nor that cargo was to be loaded that night. In fact, however, he knew that the opening existed and he knew, by his own testimony, that cargo was being loaded from the very moment that the loading started. When he discovered the flooding of the engine room he went to the saloon to notify "people loading cargo," and told them to load into the other side. R-43.

Appellant knew that a vessel had flooded and sunk at this pier many years earlier. He had this recollection in mind when he looked over the side after the bonnet had been removed and saw that there were eighteen inches of freeboard up to the hole in the side. R-50. He estimated that at the condition of load of the vessel when he arrived aboard there would be a rate of immersion of one inch per 45-50 tons of cargo loaded. R-42. He knew that the vessel was being prepared for the immediate loading of liquid cargo. R-49. And at about 0020 he became aware of the loading of cargo even if he had not been informed of the fact by any other person. R-49. At all times he was aware of the existence of the opening in the ship's side.

Appellant may not have had a specific duty to blank off or plug up the hole in the ship's side at any given time. Appellant may not have had a specific duty to notify the night mate of the

existence of the opening in the ship's side. And Appellant may not have been grossly negligent in a position of prime responsibility (although this record would indicate that someone was).

But, as night engineer, Appellant recognized his duty to take action when he became aware of the beginning of the flooding of the engine room. As the officer in charge of that engine room, under all the circumstances of this case, and with the knowledge of the conditions which he had, he had the duty to have anticipated the eventuality which occurred.

While Appellant testified that he thought he need not fear any hazard because he could rely upon the expected exercise of expertise by the shoreside authorities to avert what actually occurred, a prudent officer with the information available would have done something in the hours available to forestall the flooding. Since a prudent officer would have taken one of several actions available during the time available, it appears that Appellant was negligent.

The question then is whether the apparent negligence of Appellant can be found alleged within the specification, so that it could properly be found proved.

If the words "by failing to assure that an opening to the sea created by the removal of the bonnet from the vessel's main overboard discharge valve was `blanked off;' prior to and" are deleted from the specification, in accordance with the rationale of section I of this opinion, there remains a valid statement of negligent conduct:

". . .in that you did...permit the vessel's engineroom to become flooded...during cargo loading operations."

Appellant did this, although he may not have been the primary offender in the casualty involved.

To advert here to Appellant's specific ground for appeal applicable to the specification here involved, it may be said that written standards are not needed in these proceedings. There is no statute defining the duties of any grade of engineer although classification into grades is authorized. Regulations determine

only qualifications. Duties of a grade or position are ascertainable under the customary practices of the sea.

The specification here alleges that Appellant was serving as a "night engineer in port." The duties and responsibilities of a "night engineer" in an American port are not spelled out in any statute or regulation. They may not even be spelled out in a company's contract for the supplying of night engineers. But there is no doubt that a "night engineer," under the custom and practice of the industry, is hired to preserve the plant entrusted to him (apart from special instructions given), and this preservation is both from internal and external hazards.

CONCLUSION

It is concluded that the first and third specifications should be dismissed, and that the second specification should be found proved only to the extent indicated in section III of the Opinion above.

It is appropriate that the Examiner's order should be modified, and it is modified to provide for an admonition, rather than a suspension.

ORDER

The ultimate findings of the Examiner with respect to the first and third specifications are SET ASIDE, and those specifications are DISMISSED. The findings, however, are AFFIRMED as to evidentiary facts.

The finding of the Examiner with respect to the words in the second specification: "by failing to assure that an opening to the sea created by the removal of the bonnet from the vessel's main overboard discharge valve was `blanked off,' prior to and," is SET ASIDE as an ultimate finding of fact and that position of the specification is DISMISSED. The finding is, however, AFFIRMED as to an evidentiary fact.

The findings of the Examiner with respect to the second

specification, as MODIFIED, are affirmed.

The order of the Examiner, dated at New York, N. Y., on 23 April 1968, is modified to provide for an ADMONITION to be entered in Appellant's record.

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

Signed at Washington, D. C., this 22nd day of NOVEMBER 1968.

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