UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Billy Ray MOULDS Z1270245

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2503

Billy Ray MOULDS

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By an order dated 14 February 1990, an Administrative Law Judge of the United States Coast Guard at Port Arthur, Texas, suspended Appellant's Merchant Mariner's License and Merchant Mariner's Document for two months remitted on none months probation upon finding proved the charges of negligence and misconduct.

The charge of negligence is supported by one specification alleging that Appellant, while operating under the authority of his license and document as operator of the M/V VANPORT and tow, on or about 30 July 1989, failed to safely navigate his vessel and tow while transiting the Gulf Intracoastal Waterway (GICW), resulting in a collision with the M/V MARINE INLAND and tow.

The charge of misconduct is supported by five specifications alleging that Appellant, while operating under the authority of his license and document as operator of the M/V VANPORT and tow while transiting the GICW: (1) Wrongfully failed to safely navigate his vessel while in an overtaking situation; (2) wrongfully failed to

maintain a proper lookout; (3) Wrongfully failed to proceed at a safe speed; (4) Wrongfully failed to render a required sound signal; (5) Wrongfully failed to sound the danger signal.

The hearing was held at Port Arthur, Texas on 31 October and 7 December 1989. Appellant was represented at the hearing by professional counsel.

The Investigating Officer called two witnesses, who testified under oath, and presented fourteen exhibits which were admitted into evidence. Appellant testified on his own behalf under oath, and presented five exhibits which were admitted into evidence. Upon finding proved the charge of negligence and the supporting specification and the charge of misconduct and specifications one through four, the Administrative Law Judge suspended Appellant's license and document for two months remitted on nine months probation. Specification five of the misconduct charge was found not proved.

The complete Decision and Order was issued on 14 February 1990 and served on Appellant on 27 February 1990. Appellant filed notice of appeal on 27 February 1990 and perfected his appeal by filing a brief on 13 April 1990. Accordingly, this matter is properly before the Vice Commandant for disposition.

FINDINGS OF FACT

At all times relevant, Appellant was serving as operator of the M/V VANPORT, a merchant vessel of the United States. Appellant, at all times relevant, was the holder of the above captioned license and document which were issued by the U.S. Coast Guard on 24 August 1988 and authorized him to serve as operator of uninspected towing vessels upon the Great Lakes and inland waters excepting waters subject to regulations for preventing collisions at sea.

On 30 July 1989, at approximately 2100, Appellant's vessel was pushing a tow of five barges (3 empty and 2 loaded) west on the GICW (Sabine-Neches Canal), near mile 289, with Appellant serving as operator and lookout. Appellant was familiar with this area having made several previous passages. The flotilla's overall length was approximately 1,103 feet. The M/V MARINE INLAND and tow were at this time proceeding ahead of Appellant's vessel and tow on the GICW. The M/V MARINE INLAND and tow were attempting to transit under the West Port Arthur Bridge, with a horizontal clearance of 240 feet.

Approaching a sharp bend of approximately 90 degrees in the GICW northeast of the West Port Arthur Bridge, Appellant did not sound a whistle signal. This is a blind bend due to its angle and because of the existence of several oil tanks on the right descending bank of the GICW. After proceeding through the bend, the M/V VANPORT flotilla's speed was approximately 10 knots as it attempted to overtake the M/V MARINE INLAND and tow, which were traveling west at approximately 1 to 1 1/2 knots. At this time, the M/V VANPORT and tow collided with the M/V MARINE INLAND and tow.

Appearance: Kyle Stallones, Eastham, Watson, Dale & Forney, 20th Floor, Niels Esperson Bldg, Houston, TX 77002.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant asserts the following bases of appeal:

1. The Administrative Law Judge erred in allowing the Investigating Officer to add the charge of misconduct and five specifications against Appellant;

2. The Administrative Law Judge erred in disregarding the testimony of Appellant and Mr. Ronald Crow, first mate on board the M/V VANPORT;

3. The Administrative Law Judge erred in permitting the use of telephonic testimony over the objection of Appellant;

4. The Administrative Law Judge erred in failing to find the negligence of the operator of the M/V MARINE INLAND and its tow the sole proximate cause of the collision;

5. The Administrative Law Judge erred in admitting evidence over the objection of Appellant;

6. The Administrative Law Judge erred in finding that Appellant had violated Inland Rule 13;

7. The Administrative Law Judge erred in finding that Appellant had violated Inland Rule 34;

8. The Administrative Law Judge erred in finding that Appellant had failed to maintain a proper lookout.

OPINION

I

Appellant asserts that the Administrative Law Judge erred in permitting the Investigating Officer to add the charge of misconduct with its five supporting specifications only the day before the hearing. I do not agree.

Appellant contends that negligence and misconduct are wholly different theories, presenting different issues, and requiring different defenses and that adding this new charge the day before the hearing precluded him from preparing a proper defense.

In amending or adding a charge or specification, the essential requirement is that the individual charged is given full opportunity to understand the substance of the charge and an opportunity to prepare his defense and justify his conduct. *Citizens State Bank of Marshfield, MO v. FDIC*, 752 F.2d 209 (8th Cir. 1984); Appeal Decision 2478 (DUPRE); Appeal Decision 2326 (MCDERMOTT); Appeal Decision 2309 (CONEN); Appeal Decision 2013 (BRITTON).

Regarding the instant case, Appellant's counsel was not served with the additional charge and its five supporting specifications until the evening before the hearing. However, the record reflects that as early as 27 September 1989, the Investigating Officer had explained the substance of the five specifications (later charged as misconduct) that would be used to support the charge of negligence. These specifics were again detailed to Appellant's counsel at a pre-hearing conference the day before the hearing (30 October 1989). TR pg. 19.

Additionally, it is significant that the Administrative Law Judge gave Appellant the opportunity for a continuance, if requested, following the presentation of the government's case. TR pg. 20. Appellant did not request a continuance and consequently failed to

avail himself of the opportunity for additional time deemed necessary to further prepare his defense.

Based on the foregoing, I find that Appellant did have adequate notice of the substance of the charge and specifications in issue and was provided sufficient time to prepare a defense. Accordingly, it was not error for the Administrative Law Judge to allow the charge of misconduct and the five supporting specifications to stand.

II

Appellant asserts that the Administrative Law Judge erred in disregarding the testimony of Appellant and First Mate Ronald Crow. He further asserts that the Administrative Law Judge gave unfounded weight to the testimony of the operator of the M/V MARINE INLAND. I do not agree.

Determining the weight of evidence and making credibility findings are within the sole purview of the Administrative Law Judge. Appeal Decision 2156 (EDWARDS); Appeal Decision 2116 (BAGGETT); Appeal Decision 2472 (GARDNER). In the instant case, it is true that conflicts exist in the testimony, however, these conflicts were sufficiently addressed by the Administrative Law Judge. Only in exceptional circumstances, will his resolution of those conflicts be disturbed. The rule in this regard is well established.

> When . . . an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, that determination will not be disturbed unless it is inherently incredible.

Appeal Decision 2472 (GARDNER); Appeal Decision 2390 (PURSER), aff'd *sub nom Commandant v. Purser*, NTSB Order No. EM-130 (1986); Appeal Decision 2356 (FOSTER); Appeal Decision 2344 (KOHAJDA); Appeal Decision 2340 (JAFFE); Appeal Decision 2333 (AYALA); Appeal Decision 2302 (FRAPPIER); and Appeal Decision 2275 (ALOUISE).

Additionally, it must be noted that the findings of the Administrative Law Judge need not be completely consistent with all evidence in the record as long as sufficient evidence exists to reasonably justify the findings reached. Appeal Decision 2492 (RATH); Appeal Decision 2282 (LITTLEFIELD).

A review of the record reflects that there is sufficient basis in fact for the Administrative Law Judge to resolve any inconsistencies in the evidence. Moreover, the Administrative Law Judge has sufficiently detailed his credibility determinations (as required by Appeal Decision 1285 (DONOVAN)). Decision and Order, Findings of Fact 23-26.

III

Appellant asserts that it was improper for the Administrative Law Judge to employ telephonic testimony during the hearing because it deprived the Appellant and the Administrative Law Judge of the opportunity to confront the witness and to observe the demeanor of the witness.

Title 46 C.F.R. 5.535(f) specifically permits the Administrative Law Judge to utilize telephonic testimony. This procedure ensures judicial economy and actually serves to aid a respondent by facilitating testimony when it would otherwise be impossible or inconvenient for the witness to travel because of long distances. Appeal Decision 2492 (RATH); Appeal Decision 2476 (BLAKE); Appeal Decision 2252 (BOYCE). In Appellant's case, the telephone procedures used by the Investigating Officer and the Administrative Law Judge adequately ensured the identity of the witness, permitted adequate cross-examination under oath, and were governed by decorum and sufficient formality. TR pp. 106-185.

Accordingly, the use of telephonic testimony was proper and in full compliance with governing regulations.

IV

Appellant asserts that the Administrative Law Judge erred in failing to find the negligence of the operator of the M/V MARINE INLAND as the sole proximate cause of the collision. I do not agree.

The record does not support Appellant's contention that the operator of the M/V MARINE INLAND was the sole proximate cause of the collision. On the contrary, the record established Appellant's negligence as alleged in the charge and supporting specification.

In particular, the record reflects that Appellant, pushing a tow of barges over 1,000 feet in length, at night, around a blind bend in a restricted channel did not post a separate lookout. Additionally, the record illustrates that Appellant's vessel and tow was in an overtaking position astern of the M/V MARINE INLAND and tow. Appellant failed to sound required whistle signals while negotiating a blind bend. Additionally, Appellant attempted to overtake the M/V MARINE INLAND after being requested by the M/V MARINE INLAND to reduce speed since she required more time to pass under the bridge.

V

Appellant asserts that the Administrative Law Judge erred in admitting evidence over Appellant's objection. Specifically, Appellant contends that the Administrative Law Judge erroneously admitted excerpts from the official log book of the U.S. Coast Guard Marine Safety Office, Port Arthur, TX. and Form CG 2692, Report of Maritime Accident, Injury or Death, since these excerpts constituted hearsay as defined in the Federal Rules of Evidence. Appellant contends that the Administrative Law Judge permitted various hearsay statements from witnesses over Appellant's objections. Appellant also asserts that error was committed in permitting a witness testifying by telephone to refresh his recollection with a writing without giving Appellant the opportunity to inspect the writing.

I do not agree that prejudicial error was committed in these instances.

It has been firmly established that strict adherence to the Federal Rules of Evidence is not required in these proceedings. Hearsay evidence *per se* is not necessarily inadmissible. 46 C.F.R. 5.537; Appeal Decision 2183 (FAIRALL), dismissed on Coast Guard motion *sub nom. Commandant v. Fairall*, NTSB Order EM-89 (1981); Appeal Decision 2432 (LEON), dismissed on Coast Guard motion *sub nom. Commandant v. Leon*, NTSB Order EM-138 (1936); Appeal Decision 2413 (KEYS). As long as the hearsay evidence is relevant and material, it is generally admissible in administrative

proceedings. *Hoska v. U.S. Dept. of the Army*, 677 F.2d 131 (D.C. Cir. 1982). Hearsay evidence may be used to support an ultimate conclusion, as long as the findings are not solely based on hearsay. Appeal Decision 2404 (McALLISTER).

The information in the Form CG-2692 was used to establish the speed of the M/V MARINE INLAND, however, there was also support for that finding in the testimony of the operator of the vessel. See, TR pg. 119.

Moreover, it can be reasonably argued that admission of these two exhibits is permitted under Rule 803 of the Federal Rules of Evidence as official records kept in the course of business by a governmental agency. See, TR pg. 58. Accordingly, the admission of the Coast Guard log and Form CG-2692 was proper.

Similarly, the admission of hearsay testimony over Appellant's objection was proper. Even assuming arguendo that it was an error to admit these exhibits and testimony, such error would be considered harmless since under the Administrative Procedure Act, the mere admission of hearsay evidence is not to be taken as prejudicial error. *See, Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453 (D.C. Cir. 1967); *Federal Administrative Procedure Sourcebook*, 125 (1985).

Under this same basis of appeal, Appellant urges that it was an error for the Administrative Law Judge to permit a witness testifying telephonically to refresh his recollection from a note.

I do not find prejudicial error in the witness' use of a writing to refresh his recollection during telephonic testimony. The witness only referred to a personal note to recall one factual point, the identification number of a barge. No other information or data was recited. TR pg. 124. While Appellant was not able to visually review this writing, he certainly had every opportunity to cross-examine the witness as to its content and form. TR pg. 125. The fact that the note was not made part of the record is not prejudicial error considering the substance and nature of the information adduced from the writing. While technically a note used by the witness to refresh his recollection is part of the record, its absence does not constitute an omission of a substantial nature where the information recited or referred to is relatively insignificant. Appeal Decision 2492 (RATH).

VI

Appellant asserts that the Administrative Law Judge erred in finding that Appellant had violated the "overtaking rule" in Rule 13 of the Inland Rules of the Road, 33 U.S.C. 2013 (Rule 13). I do not agree.

Appellant argues that an overtaking situation never materialized because the vessels were never within sight of each other. Consequently, he asserts that Rule 13 is inapplicable.

There is sufficient evidence to find that an overtaking situation existed and that Appellant violated Rule 13. The key elements in this rule are set forth in pertinent part in Rule 13 as follows:

> (b) A vessel shall be deemed to be overtaking when coming up with another vessel from a direction more than 22.5 degrees abaft her beam; that is, in such a position with reference to the vessel she is overtaking, that at night she would be able to see only the sternlight of that vessel but neither of her sidelights.

The testimony of the First Mate on board Appellant's vessel (TR pgs. 208, 214, and 229-230) credibly establishes that Appellant's vessel was within sight of the M/V MARINE INLAND, could only view the white sternlights of the M/V MARINE INLAND and could not view its sidelights. The fact that the vessels were within sight of each other prior to the collision is corroborated by the operator of the M/V MARINE INLAND and tow. TR pg. 121. Accordingly, the Administrative Law Judge's findings in this regard are well founded and will not be disturbed.

VII

Appellant asserts that the Administrative Law Judge erred in finding that Appellant violated Rule 34 of the Inland Navigation Rules, 33 U.S.C. 2034 (Rule 34(e)) by failing to sound whistle signals while transiting a blind bend. Appellant urges that he

utilized his radiotelephone in the place of whistle signals as permitted by Rule 34(h). I do not agree.

By the plain language of Rule 34(e), it is mandatory to sound one prolonged whistle blast when nearing a ". . . bend or an area of a channel or fairway where other vessels may be obscured by an intervening obstruction. . ." There is no provision in the Navigation Rules to utilize radiotelephone communications in place of a whistle signal at a blind bend.

Moreover, it is noteworthy that Rule 34(h) applies only to a meeting, crossing or overtaking situation. Accordingly, Appellant's interpretation and application of Rule 34(h) to the blind bend situation is incorrect.

The record reflects that the bend which Appellant's vessel negotiated near the confluence of the Sabine-Neches Canal (GICW) and Port Arthur Canal, northeast of the West Port Arthur Bridge, was essentially a blind bend based on the topography of the area and the existence of several oil tanks on the right descending bank of the Sabine-Neches Canal. TR p. 273, Respondent Exhibit C. Rule 34(e) applied to this situation, and Appellant, as operator of the M/V VANPORT was required to sound a prolonged blast on the vessel's whistle when nearing this area.

VIII

Appellant asserts that the Administrative Law Judge erred in finding that Appellant failed to maintain a proper lookout and urges that there is no requirement to post a separate lookout. I do not agree.

The specific facts and circumstances of each situation determine if a separate, dedicated lookout is required. The Administrative Law Judge is in the best position to determine whether the circumstances of the case permit the helmsman to serve as a proper lookout. Appeal Decision 2422 (WATSON); Appeal Decision 2474 (CARMIENKE). The size of the vessel and its tow and the opportunity of the operator to have an unfettered view must be taken into consideration. *Anthony v. International Paper Co.*, 289 F.2d 574 (4th Cir. 1961). An operator serving as helmsman on a tug and tow with restricted

visibility ahead is not a proper lookout. Appeal Decision 2482 (WATSON). *See also*, S. Rep. No. 979, 96th Cong., 2nd Sess. 7-8 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN NEWS 7068, 7075.

Considering the length of the tow, the fact that it was night, the proximity of other vessel traffic and a 90 degree blind bend in the GICW, I believe the Administrative Law Judge's finding to be reasonable and supported by reliable, probative and substantial evidence.

IX

Although not raised by Appellant, it is noted that charge I and its supporting specification is multiplicious with charge II, specification 3 for the purpose of determining a sanction. The charge of negligence is based upon Appellant's failure to adequately control his vessel and tow. Charge II, specification 3 is based upon Appellant's failure to proceed at a safe speed as required by statute. While the charges and specifications emanate from essentially the same course of conduct, they are composed of different elements. Appeal Decision 2496 (McGRATH). The exigencies of proof may require multiplicious or alternative charging in a particular case. See, Appeal Decision 2491 (BETHEL).

Accordingly, the charges will stand for findings purposes but are considered multiplicious for the awarding of a sanction. However, having reassessed the sanction, I find that the suspension of Appellant's Merchant Mariner's License and Document for two months remitted on nine months probation is neither unfair nor disproportionate for the charges and specifications found proved.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The order of the Administrative Law Judge, dated on 14 February 1990, at Houston, Texas is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 20th day of August 1990.

5. EVIDENCE

5.160 Weight

Weight of testimony determined by ALJ

Will not be disturbed unless inherently incredible

5.115 Testimony

conflicting, to be weighed by ALJ

12. ADMINISTRATIVE LAW JUDGES

12.50 Findings

Will be upheld unless evidence inherently incredible

CITATIONS

Appeal Decisions cited: 2458 (GERMAN), 2008 (GOODWIN), 2089 (STEWART), 2119 (SMITH), 2222 (FIOCCA), 2207 (CLARK), 2390 (PURSER),

2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), 2302 (FRAPPIER), 2427 (JEFFRIES), 2490 (PALMER), 2376 (FRANK), 2400 (WIDMAN), 2463 (DAVIS)

NTSB Cases Cited: None

Federal Cases Cited: Grover v. U. S., 200 Ct. Cl. 337 (Ct. Cl. 1973)

Statutes & Regulations Cited: 46 USC 7702, 46 CFR 5.701(b)(1); 46 CFR 5.519(a)(1)

***** END OF DECISION NO. 2503 *****

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