UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Paul J. GIACHETTI Z-106898

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2470

Paul J. GIACHETTI

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR Part 5, Subpart J.

By order of 13 November 1985, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's license and merchant mariner's document, upon finding proved the charge of misconduct. The specifications found proved allege that Appellant did, while serving as master aboard the SS MORMACSTAR, under the authority of the captioned documents, on or about 9 October 1984, fail to obey the orders of the Military Sealift Command Preparedness Group One to get the vessel underway for convoy exercises and a surveillance run; and that Appellant did, while serving as stated, on the same date, commit an act of barratry by instituting an illegal job action by wrongfully refusing to sail the vessel as ordered by its owner and the Department of the Navy, thereby causing the vessel to be placed off hire from its charter, an act which was to the injury of the owner.

The hearing was held at Philadelphia, Pennsylvania, on 21 May and 12 June 1985. Appellant was present at the hearing, and was represented by professional counsel. He denied the charge and specifications.

The Investigating Officer introduced in evidence the testimony of two witnesses, and also introduced nine exhibits.

Appellant introduced twenty-two exhibits and his own testimony.

The complete Decision and Order of the Administrative Law Judge was issued on 13 November 1985. Appeal was timely filed on 4 December 1985, and was perfected on 28 April 1986.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the captioned documents as master of the SS MORMACSTAR. The MORMACSTAR is a tank vessel owned by Moore McCormack Bulk Transport, and time chartered to the Military Sealift Command (MSC) for use as a water tanker by the Near Term Prepositioned Force, supporting the Rapid Deployment Force. It was operating from Diego Garcia in the Indian Ocean during the period in question.

The International Organization of Masters, Mates and Pilots (MM&P) is a union representing licensed deck officers in negotiations with shipowners over terms of their contracts. Appellant was a member of MM&P, and had been a member for approximately forty-one years at the time of the events which gave rise to these proceedings. The employment contract between MM&P and Moore McCormack (and three other companies) covering MM&P members had expired on 15 June 1984. Appellant and the other deck officers of the vessel, who were also members of MM&P, were being paid under the terms of the expired contract while negotiations continued.

Appellant had been employed by Moore McCormack for approximately thirty years. He had served as the permanent master of the MORMACSTAR since it had been launched in 1975. He began the tour of duty during which these events occurred on 18 July 1984; it was scheduled to last approximately four months.

On 1 October 1984 the president of Moore McCormack advised Appellant that the company had decided not to renew the contract with MM&P, and offered a new employment contract which was less favorable to Appellant and the other deck officers. The new contract was to take effect on the next change of articles for the officers on board at the time.

On 3 October Appellant received a message from the president of

MM&P stating that because the companies had broken off negotiations with MM&P, all masters and mates on vessels owned by Moore McCormack and the other companies whose contracts had expired were to cease all work immediately, except for work involving the security of the vessel and cargo. The purpose of this job action was to get Moore McCormack and the other companies to resume negotiations with MM&P on a new employment contract for MM&P members.

On 4 October Appellant received sailing orders for the period 8 to 15 October from the MSC. The orders scheduled the MORMACSTAR to get underway at 0830, 9 October to participate in convoy exercises and surveillance operations.

On 5 October Appellant received a message from MM&P stating that the message of 3 October applied to all vessels owned by Moore McCormack and the other companies, including the vessels at Diego Garcia chartered to the MSC. He also received a message from the president of MM&P that stated that the Coast Guard had historically recognized maritime labor controversies and would not proceed against an officer's license in a case arising out of such a controversy.

On 7 October Appellant informed MM&P, Moore McCormack, and the commander of the Navy forces in Diego Garcia that he and all his mates were supporting the MM&P job action, and that he would not sail the MORMACSTAR as directed in the sailing orders. He stated that the security and safety of the ship and cargo would be maintained. Also on that day he received a message from Moore McCormack ordering him to comply with the MSC sailing orders.

On 8 October Appellant advised Moore McCormack that because he was unable properly to discharge his duties under the circumstances, he was refusing to perform any duties except those related to the safety and security of the vessel and cargo, and that he was awaiting relief or a fair MM&P contract.

On 9 October Appellant informed the MSC, Moore McCormack, and MM&P that he would not comply with the sailing orders for that day, but that he was ready to get underway in any emergency affecting national security. Appellant did not get the MORMACSTAR underway at all during the period covered by the sailing orders. He did comply with requests from the Navy to perform radar surveillance of the port at Diego Garcia, and to relay messages to and from ships in the area.

Appellant was relieved as master of the MORMACSTAR on 14 October. The MSC placed the MORMACSTAR off hire for eleven days due to the

failure of the vessel to sail in accordance with the sailing orders.

BASES OF APPEAL

Appellant makes several contentions on appeal. Only one will be addressed, because it is dispositive. Appellant contends that the action against his license is prohibited by 46 CFR 5.03-20, which prohibits the Coast Guard from exercising its authority for the purpose of favoring any party to a maritime labor controversy.

Appearance: Bank, Minehart & D'Angelo, Suite 3211, Philadelphia Saving Fund Building, Twelve South Twelfth Street, Philadelphia, Pennsylvania, 19107, by Melvin Alan Bank, Esq.

OPINION

The facts and issues presented by this case are of substantial significance in an area not often raised on appeal. With painstaking reflection and analysis of these issues, I render the following opinion.

Appellant contends that the action against his license is prohibited by 46 CFR 5.03-20 (now 46 CFR 5.71). The regulation in effect at the time of the alleged offenses and the hearing was as follows:

"Under no circumstances shall the statutory machinery of the Coast Guard be used for the purpose of favoring any party to a maritime or other labor controversy. However, if a situation affecting the safety of the vessel or persons on board is presented, and a complaint in writing is lodged, the matter shall be thoroughly investigated and when a violation of existing statutes or regulations is indicated appropriate action shall be taken."

46 CFR 5.03-20. The new version of the regulation, at 46 CFR 5.71, is substantially the same. The purpose of the regulation is to clarify the Coast Guard's practice of nonintervention in legitimate maritime labor controversies. (19 F.R. 171, Jan 9, 1954). The regulation was changed in 1962, further narrowing the exception under which the Coast Guard will take action against a license or document to issues relating to safety only. (27 F.R. 9863, Oct 5, 1962). It has been the Coast Guard's policy to avoid the appearance of partisanship in maritime labor controversies. Furthermore, action against an individual's license or document could affect that person's livelihood

and therefore, would have a chilling effect upon the exercise of whatever rights may exist under the various labor statutes.

There are no previous decisions that squarely confront the language of this regulation as this case does. The Administrative Law Judge cited several previous decisions in support of his opinion. First, he looked to Appeal Decision 627 (BLADES). (Decision & Order at 24). This is the earliest decision in this area, however it predates the effective date of the regulation in question. Furthermore, that case dealt with labor activity of crew members in violation of their shipping articles, which is not the case before me. The Administrative Law Judge, also, cited Appeal Decision 1008 (KLATTENBERG, et al), which involved the safety of the vessel when crew members' labor activity disrupted the unloading of cargo. (Decision & Order at 24). I agree with that holding that a master must be able to give orders to his crew pertaining to the safety of the vessel and have them carried out. However, here Appellant is the vessel's master who took steps to ensure the safety of the vessel during the period of the maritime labor controversy. His conduct has never been characterized as unlawful or criminal. The Administrative Law Judge, also, relied on Appeal Decision 2150 (THOMAS). (Decision & Order at 25). In that case, appellant alleged that his arrangement with the second assistant engineer to stand his watches amounted to a maritime labor controversy when the second assistant disagreed with appellant's understanding of the arrangement, and the appellant was found absent without leave. On appeal, the Commandant held that a maritime labor controversy can not be fabricated after the fact to excuse a seaman's actions.

Neither THOMAS, supra, nor the regulation in question define a maritime labor controversy. In understanding the meaning of the term, maritime labor controversy, the language in 29 U.S.C. 113(c), is helpful. This is the labor statute providing definitions of terms arising in the determination of court jurisdiction in labor matters. The statute defines 'labor dispute' as follows:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The courts have also struggled with the proper scope of a labor dispute when the underlying conduct appears to violate other statutory

provisions. When confronted by a legitimate labor controversy, the courts have generally deferred to the framework of labor law to resolve the difficult issues that arise from the give and take of labor/management relations. See, also, *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 80 S.Ct. 779, 4 L.Ed.2d 797 (1960); *Corporate Printing Co., Inc. v. New York Typographical Union No. 6, Intern. Typographical Union*, 555 F.2d 18, (C.A.N.Y. 1977); Cf. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, La.*, 457 U.S. 702, 102 S.Ct. 2673, 73 L.Ed.2d 327 (1982); *United Steelworkers of America, AFL-CIO v. Bishop*, 598 F.2d 408 (C.A. Ala. 1979). In *Scott v. Moore*, 680 F.2d 979 (C.A. Tex. 1982), rev'd on other grounds sub. nom., *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983), the court held:

"A labor dispute exists...where unlawful conduct occurs in conjunction with some legitimate union activity and a labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme."

With the definition in 29 U.S.C. 113(c) and its case law as background and in light of the facts in this case, it would appear there is no question that a maritime labor controversy existed at the time of the alleged labor practices between MM&P and Moore McCormack. Appellant was a member of the union that was clearly negotiating terms of a new contract, prior to the strike. (Decision and Order at 8). As master of the MORMACSTAR, he was directed by the union to participate in the strike of Moore McCormack by ceasing all work relating to the vessel except for matters requiring the security of the vessel. (Decision and Order at 9). I note that the dispute resulted in a case before the National Labor Relations Board in which several shipping companies, including Moore McCormack, charged MM&P with unfair labor practices. The Board's Administrative Law Judge found that some of MM&P's actions during the dispute were unfair labor practices. *N.L.R.B. Decision JD-61-86*, dated 21 March 1986. That, however, does not mean that a legitimate maritime labor controversy did not exist. See *N.L.R.B. v. Modern Carpet Industries, Inc.*, 611 F.2d 811 (10th Cir. 1979). Therefore, I find that Appellant was involved in a maritime labor controversy prior to and during the period of time in question, and THOMAS, supra, does not apply in this case.

The Administrative Law Judge concluded that the regulation in question did not prohibit the proceeding because the maritime labor

controversy was over before the action against Appellant's license started. (Decision and Order at 26). Even assuming the Administrative Law Judge was correct in his finding that the maritime labor controversy between MM&P and Moore McCormack was over at the time of the license action, the legal conclusion that the regulation no longer prohibited the action is not correct. The fact that the Coast Guard does not commence an action while a maritime labor controversy is active does not change the applicability of the regulation in question. The purpose of the regulation is to avoid charges of partisanship and discrimination in labor controversies. (19 F.R. 171, Jan 9, 1954). In order to achieve that purpose, the prohibition against license action must continue after the maritime labor controversy is settled.

The finding of a maritime labor controversy does not end the analysis required in this matter. The statutory cornerstone that underlies the Coast Guard's authority to suspend or revoke merchant mariner's licenses and documents is 46 U.S.C. 7701 and its predecessors. Under this statute, the purpose of suspension and revocation proceedings is to promote safety at sea. Under the regulation in question, I may uphold a suspension or revocation order, in the face of a maritime labor controversy, if a situation affecting the safety of the vessel or persons on board is presented. 46 CFR 5.71; KLATTENBERG, supra. No claims were made, in the record before me on review, that there was a situation affecting the safety of the vessel or persons on board in this case. (Decision and Order at 5-14). The MORMACSTAR was at anchor in the port at Diego Garcia. Appellant stated that duties relating to the safety of the vessel and cargo would be performed, and there is no indication that they were not. (Decision and Order at 11) I find that the safety of the vessel and the persons on board were not affected by the labor activity engaged in by the Appellant.

CONCLUSION

This case arose out of a legitimate maritime labor controversy, and Appellant's actions did not affect the safety of the vessel or persons on board. License action is part of the statutory machinery of the Coast Guard, and would be applicable in this case, except for the operation of 46 CFR 5.71. It is the objective of this regulation to prevent this statutory machinery from becoming a foil in the hands of either side of a maritime labor controversy under any circumstances. Action against Appellant's license under these circumstances, absent a situation affecting the safety of the vessel, would be in contravention of the regulation. However, future cases

arising from the relationships of similar parties, where national security interests, maritime labor controversies and maritime safety are involved, will be subject to the same careful review as this case has merited to ensure that the regulation and its safety exception are properly invoked.

ORDER

The decision and order of the Administrative Law Judge dated on 13 November 1985, at New York, New York, are VACATED. The findings are SET ASIDE. The charge and specifications are DISMISSED.

CLYDE T. LUSK, JR
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 23rd day of August, 1988.

GIACHETTI

1. ENABLING AUTHORITY

.55 Regulations

purpose of labor dispute regulation (46 CFR 5.71)

application of the labor dispute regulation (46 CFR 5.71) as a bar to suspension and revocation proceedings

4. PROOF AND DEFENSES

.57 Labor Dispute

defined

unfair labor practices not a bar to this defense

purpose of labor dispute regulation (46 CFR 5 .71)

application of the safety exemption

defense is raised when safety not an issue

Appeals Cited: Appeal Decision 627 (BLADES); Appeal Decision 1008 (KLATTENBERG, et al); Appeal Decision 2150 (THOMAS);

Cases Cited: *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 80 S.Ct. 779, 4 L.Ed.2d 797 (1960); *Corporate Printing Co., Inc. v. New York Typographical Union No. 6, Intern. Typographical Union*, 555 F.2d 18, (C.A.N.Y. 1977); *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, La.*, 457 U.S. 702, 102 S.Ct. 2673, 73 L.Ed.2d 327 (1982); *United Steelworkers of America, AFL-CIO v. Bishop*, 598 F.2d 408 (C.A. Ala. 1979). *Scott v. Moore*, 680 F.2d 979 (C.A. Tex. 1982), rev'd on other grounds sub. nom., *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983); *N.L.R.B. v. Modern Carpet Industries, Inc.*, 611 F.2d 811 (10th Cir. 1979);

Statutes Cited: 29 U.S.C. 113(c).

Regulations Cited: 46 CFR 5.03-20; 46 CFR 5.71.

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