

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 008622
Issued to: William A. ALLBRITTEN

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2442

William A. ALLBRITTEN

This appeal has been taken in accordance with 46 USC 7702 and 46 CFR 5.701.

By order dated 6 November 1985, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's license for one month remitted on three months' probation upon finding proved the charge of negligence. The specification found proved alleges that Appellant, while serving as operator aboard the M/V MIRIAM M. DEFELICE, under the authority of the captioned document, while the vessel was towing the barge GULF FLEET 263 and navigating in conditions of fog and restricted visibility on the St. Johns River, failed to navigate the vessel with caution causing the barge to strike the Buckman Bridge.

The hearing was held at Jacksonville, Florida, on 2 August; 5, 13 and 20 September; and 2 October 1985.

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

The Investigation Officer introduced in evidence eight

exhibits.

In defense, Appellant introduced in evidence eight exhibits, his own testimony, and the testimony of two additional witnesses.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been proved, and entered a written order suspending all licenses and/or documents issued to Appellant for one month remitted on three months' probation.

The complete Decision and Order was served on 8 November 1985. Appeal was timely filed on 5 December 1985 and perfected on 31 December 1985.

FINDINGS OF FACT

Appellant is the holder of a Coast Guard mariner's license which authorizes him serve a Master of steam or motor vessels of any gross tons upon oceans. His license is also endorsed as follows: First-Class pilot on the St. Johns River from the sea to St. Elmo W.-Acosta Bridge, Jacksonville, Florida, and Radar Observer.

On 22 November 1984, Appellant was serving as a Pilot aboard the M/V MIRIAM M. DEFELICE, an uninspected towing vessel of 198 gross tons, 118.7 feet in length. The MIRIAM M. DEFELICE was towing the barge GULF FLEET 263, an inspected deck barge 260 feet in length, on a stern hawser shackled to a towing bridle attached to the bow of the barge. The GULF FLEET 263 was laden with a cargo of containers of varying sizes.

The flotilla departed Green Cove Springs, Florida, on the St. Johns River, at approximately 0430 on 22 November 1984 on a voyage to Puerto Rico. During this evolution, Appellant was at the helm of the vessel, and was steering. The normal operator of the MIRIAM M. DEFELICE, who was in the pilothouse with Appellant, operated the throttles and was in ultimate control of the flotilla. At about 0500, the GULF FLEET 263 allided with the fender system at the Buckman Bridge. The area of the St. Johns River where the casualty occurred is not encompassed within the pilotage endorsement of Appellant's federal pilot's license.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant urges that:

1. The Coast Guard lacked jurisdiction over Appellant's license.

2. The presumption of negligence raised by the allision had been rebutted.

Because of the disposition of the first of these contentions, the second is not discussed.

Appearance: Almer W. Beale, Esq., Toole, Bubb & Beale, P.A., 2508 Southern Bell Tower, P.O. Box 1500, Jacksonville, Florida 32201

OPINION

Appellant contends that the Coast Guard has no jurisdiction in this instance, because Appellant's status at the time of the allision was that of a pilot for which he held only a state pilot's license. For the reasons discussed herein, I agree that this proceeding lacked jurisdiction over Appellant's Coast Guard license.

The initial charge sheet served by the Investigating Officer alleged that Appellant was serving as pilot under the authority of his license. On 13 September 1985, during the presentation of the Coast Guard's case, Appellant's counsel queried the Investigating Officer as to whether he claimed that Appellant's employment as pilot was required as a matter of law or as a condition of employment. The Investigating Officer replied in effect that Appellant while positioned at the helm of the MIRIAM M. DEFELICE was not only serving as pilot but also as an operator. The Investigating Officer then moved to amend the charge sheet to allege that Appellant was serving in this dual capacity. Over Appellant's objection, the Administrative Law Judge granted the motion, and the proceeding was continued to permit the Investigating Officer to present witnesses on the jurisdictional

question.

The hearing was reconvened on 20 September 1985, at which time the Investigating Officer moved to further amend the charge sheet by deleting any reference to Appellant serving as pilot. In support of this motion, the Investigating Officer explained that he had only recently noticed that Appellant's pilotage endorsement did not include the waters where the allision occurred. (Decision and Order at 5.) Over Appellant's objection, the motion was granted, and the specification amended.

In his findings of fact, the Administrative Law Judge found that Appellant was serving as operator "to the extent that he was at the helm of the vessel and exercising the necessary direction and control necessary to navigate the flotilla. . . ." (Decision and Order at 7.) He then proceeded to find jurisdiction over Appellant's license since the MIRIAM M. DEFELICE, as a towing vessel at least 26 feet in length, required a licensed operator under the provisions of 46 USC 8904, and Appellant's unlimited Master's license qualified him to act in that capacity.

In his opinion, the Administrative Law Judge states:

Clearly Respondent was directing and controlling the DeFELICE as it entered the fender system of the Buckman Bridge. This is so, even though the regular operator . . . was standing nearby and *in ultimate control*. It may well be that Respondent is to be construed as sharing the direction and control of the tug with (the regular operator), but it is this Judge's finding that Respondent had sufficient direction and control to be subject to jurisdiction under 46 CFR 5.57 and 5.101(a)(1). Decision and Order at 12. (Emphasis added.)

At issue is whether Appellant was acting as a pilot or as operator. It is clear that, if Appellant was acting as a pilot, there is no Coast Guard jurisdiction over his license. As noted above, his federal pilot's endorsement did not include the waters where the allision occurred. There is no requirement in law for a federally licensed pilot in these waters, (Record of proceeding on 20 September 1985 at 5) nor was possession of a federal pilot's license a condition of employment. (Record of proceeding on 2

October 1985 at 15.) See Appeal Decision [2429 \(ROBERTS\)](#).

(Appellant could not be found to have piloted vessel beyond scope of license, where record did not establish that federally licensed pilot was required.) Further, the Coast Guard lacks jurisdiction to proceed against Appellant's state pilot license. *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974), *Dietze v. United States*, 414 F.Supp. 1105 (E.D. La. 1976).

Appellant's presence on the MIRIAM M. DEFELICE as the direct result of an agreement between the Coast Guard Captain of the Port, the St. Johns River Bar Pilot's Association and others involved in the shipment of containers from Green Cove Springs. This agreement was the product of conferences initiated by the Captain of the Port due to concern over the several bridges encountered by towing vessels making this transit. Under it, all parties orally agreed that a St. Johns River Bar pilot would be employed on each of the tows. (Record of proceeding on 2 October 1985 at 12.) It was not material whether this *individual* possessed a federal or a state pilot's license. (Record of proceeding on 2 October 1984 at 15.)

The evidence clearly indicates that Appellant was acting as a pilot. Until the Investigating Officer discovered that Appellant's pilotage endorsement did not cover the waters in question, he considered Appellant to be acting as a pilot. (Record of proceeding on 2 August at 20.) Appellant considered himself to be aboard the MIRIAM M. DEFELICE as a pilot (Record of proceeding on 2 October 1985 at 28.), as did the regular operator of the MIRIAM M. DEFELICE. (Investigating Officer's Exhibit 4, Deposition of Wayne T. Bruce at 10.) It is also apparent that, under the agreement described above, the Captain of the Port intended that members of the St. Johns River Bar Pilot's Association aboard these towing vessels would be used as pilots rather than operators. (Record of proceeding on 2 October 1985 at 11-16.) Indeed, it appears that Appellant would not have been on board at all absent this agreement.

The statute which the Administrative Law Judge found applicable, 46 USC 8904, does not contemplate, as the Judge implies, two concurrent operators. Instead, the statute requires a towing vessel such as the MIRIAM M. DEFELICE to be operated by "an individual licensed by the Secretary . . ." The legislative history of the statute (S. Rep. No. 926, 92d Cong., 2d

Sess. (1972)) contains similar language. I find that the regular operator aboard the MIRIAM M. DEFELICE, who was in the pilothouse and was in ultimate control of the vessel, was, at the time of this incident, acting as operator within the meaning of 46 USC 8904, and that Appellant was acting as pilot. Accordingly, the Coast Guard lacked jurisdiction to proceed against his license.

CONCLUSION

The Administrative Law Judge's finding that Appellant was acting as operator of the MIRIAM M. DEFELICE is not supported by substantial evidence.

ORDER

The decision and order of the Administrative Law Judge dated 6 November 1985 at Jacksonville, florida, is VACATED, the findings are SET ASIDE, and the charge and specification are DISMISSED.

J. C. IRWIN
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 16 day of *December* 1986.

***** END OF DECISION NO. 2442 *****

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