IN THE MATTER OF LICENSE NO. 296049 AND
ALL OTHER SEAMAN'S DOCUMENTS
Issued to: John A. Stepkins, BR-233651

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1574

John A. Stepkins

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 28 March 1966, an Examiner of the United States Coast Guard at San Diego, California, suspended Appellant's seaman's documents for three months on six months' probation upon finding him guilty of violation of a statute. The specification found proved alleges that while serving as master on board the United States MV AMERICAN BOY under authority of the documents above described, on or about 19 January 1966, Appellant wrongfully sailed from San Diego, California, on a fishing voyage without a licensed mate aboard the vessel as required by Title 46 U. S. Code 224a.

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

The Investigating Officer entered in evidence stipulations made with Appellant and his counsel as to facts in the voyage of

AMERICAN BOY.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specification had been proved. The Examiner then served a written order on Appellant suspending all documents issued to him for a period of three months' probation.

The entire decision was served on 8 April 19663. Appeal was timely filed on 19 April 1966, and perfected on 1 June 1966.

FINDINGS OF FACT

From 19 January 1966, Appellant was serving as master on board the United States MV AMERICAN BOY and acting under authority of his license and document.

AMERICAN BOY was a fishing vessel of 325 gross tons. It was not subject to inspection under the laws of the United States, but it was a vessel subject to R.S. 4438a (46 U.S.C. 224a).

When the vessel sailed from San Diego, California, on 19 January 1966, Appellant was the only licensed deck officer aboard. Up to the date of AMERICAN BOY's sinking on a fishing voyage on 6 March 1966, Appellant remained the only licensed deck officer on board.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The matters urged in the very able brief supplied by Appellant may be summarized as follows:

I

The charges do not allege in the recital of facts acts which would constitute a violation of 46 U.S.C. 224a (R.S. 4438a).

II

Appellant did not "employ" anyone aboard AMERICAN BOY and therefore did not violate the statute by employing a person who was not properly licensed, to perform the duties of "mate".

III

Federal court decisions require reversal of the Examiner in this case.

IV

The specification is defective in that it contains no reference to 46 CFR 157.30-10 (a), as required by 46 CFR 137.05-20 (b).

V

When a violation of 46 U.S.C. 224a (R.S. 4438a) is established the only action that can be taken is imposition of the monetary penalty provided therein.

These points are treated in correspondingly numbered sections of the opinion.

APPEARANCE: Driscoll, Harmsen & Carpenter, of San Diego, California, By John Gerald Driscoll, Jr., Esq.

OPINION

I

It seems to me inescapable that when a statute says:

"No person shall be engaged to perform, or shall perform on board any vessel to which this section applies, the duties

of master, mate, chief engineer, or assistant engineer unless he hold a license to perform such duties..."

and also says:

"It shall be unlawful to engage or employ any person or for any person to serve as a master, mate, or engineer on any such vessel who is not licensed by the Coast Guard...,"

an allegation in a specification that a master sailed a vessel on a certain date from a certain port without a licensed mate aboard the vessel is inadequate as a statement that the statute had been violated.

Necessarily, the allegation would have to be, insofar as Appellant's case is concerned, that he "employed a person to serve as mate", or "engaged a person to perform the duties of mate", on board the vessel, who was not licensed as a mate.

While there is no doubt here that the specification is inartfully worded, it does certainly put the party on notice that he is charged with violating 46 U.S.C. 224a (R.S. 4438a). Appellant has pointed out, both in the record of hearing and on appeal, that Appellant was obviously not charged with "serving" without a license, because the specification itself alleges that he was serving as "master...under authority of his duly issued license."

As Appellant has cogently urged, the only offense against R.S. 4438a which the charges could mean was that he "engaged" or "employed" as a mate a person who was not licenses as such. He offered evidence on the record to establish that he had not "employed" any of the crew but that the owner had hired everyone.

This refinement of the issued, by argument, and by evidence offered by Appellant himself, indicates to me that he was on notice as to the nature of the fault attributed to him by the specification and under consideration by the Examiner.

In administrative proceedings such as these dealing with licenses, a fault found as a matter of fact may be other than the

fault alleged in the initial formal notice, as long as there is actual notice and the questions are litigated. *Kuhn v. Civil Aeronautics Board*, CA DC (1950), 183 F. 2nd 839. This rule is the same in proceedings before other Federal agencies, so long as the record shows presentation of evidence on the issues. *Montana Power Co. v. Federal Power Commission*, CA DC (1950), 185 F. 2nd 491, 497; *West Texas Utilities Co. v. National Labor Red. Board*, CA DC (1953), 206 F. 2nd 442, 446. The doctrine is even accepted in judicial proceedings under the Federal Rules of Civil Procedure. *Branding Iron Club v. Riggs*, CA 10 (1953), 207 F. 2nd 720, 724.

True, in the instant case the Examiner did not make an ultimate finding conforming to the facts found on the issue actually litigated. Instead he found the specification, as drawn, proved. But his subsidiary findings are such that they would support an artfully drawn specification, his opinion shows that this is what he had in mind, and the record of hearing shows that the issue was raised before him between the parties.

A formal "amendment" to the pleadings to conform to the proof, to a specific "finding" as to the ultimate facts, was not needed.

> "It is well established in admiralty that the pleadings *will be considered* as amended to conform to the proof, provided that no party is surprised or injured by such course."
> *O'Conner, Harrison & Co. v. Klingel*, CA 9 (1926), 16 F. 2nd 460. (Emphasis supplied).

In a civil action, it has been said that "...a technical pleading to conform to the facts found proven was not necessary". *Anderson V. Hershey*, CA 6 (1942), 127 F. 2nd 884, 887.

Thus it was not reversible error that the Examiner found the ultimate facts alleged proved when the ultimate statement was inadequate to establish violation of 46 U.S.C. 224a without amending the pleadings, when the record shows that the true operative facts were in issue, that the true issue was considered by the Examiner, and his specific findings and his opinion show that the charged violation of 46 U.S.C. 224 (a) was litigated and

found proved. The pleading can be considered as amended, and a technical change in the pleading was not required. *O'Conner, Harrison & Co. v. Klingel*, and *Anderson V. Hershey*, both *supra*.

II

The question then remains, does the record support the view that Appellant had engaged or employed an unlicensed person to perform the duties of mate aboard the vessel?

References abound in the transcript of the hearing, in the Examiner's dec*is*ion, and in the brief on appeal, to 46 CFR 157.30-10 (c). This regulation, issued pursuant to paragraph (9) of R.S. 4438a; 46 U.S.C. 224a, is designed "to secure the enforcement of the provisions of" R.S. 4438a. It is not a substantive requirement going beyond the limits of the statute as Appellant contends. It is a rule of evidence to aid in enforcing an act of Congress and our national commitments under an international agreement.

R.S. 4438a was enacted to bring out national law into conformity with the Officers' Competency Certificates Convention, 1936 (54 Stat. Pt. 2, 1683). By this agreement, the United States declared to all signatory nations that as to the vessels covered thereby their mariners could rely upon the equivalent competency of our mariners. the international agreement, and the national legislation, reached vessels not subject to the inspection laws of the United States. These inspection laws require a minimum number of licensed officers (46 U.S.C. 223) and permit the requirement of a greater number of officers (46 U.S.C. 222) on inspected vessels. (I note here that had the vessel in this case been subject to inspection it would have been required to have a minimum of a licensed master and two licensed mates.)

While the vessel here is not subject to inspection and is not subject to the manning requirements for inspected vessels, it is subject to the Convention and to the national law implementing the Convention. The vessel may not be specifically required to have a master; it may not be required to have a specific or a minimum number of mates. It is required to have properly licensed

officers performing such functions.

I cannot quibble here about "what are the duties to be performed?" Both the international agreement and the national law leave the term "duties of masters and mates" has some generally understandable denotations among seamen.

Thus, I can accept Appellant's contention that even while asleep he was the "master" of this vessel and that the vessel therefore had at all times the requisite licensed master under the statute. But a vessel has only one master. Indeed, it may be said, considering the traditional functions of a master, that R.S. 4438a *requires* a licensed master on board a Convention vessel even if it does not say so in terms, because I take it that the law of the sea has traditionally called for and recognized "masters" on all seagoing vessels and the Convention and the statute now require that they be licensed.

Without attempting to define the duties of a mate, I can safely say that many of them be performed under the direction of a master, many of them are performable when the master is asleep, and some must be performed when and because the master is asleep.

The meaning of 46 CFR 157.30-10 (c) is obvious. Since our international agreement binds us to provide competent officers on Convention vessels, officers performing the duties of "mates" under the conditions of this case, we must see to it that only a person properly licensed acts as mate. The regulation declares than when the length of the voyage is such that a licensed master alone cannot reasonably be expected to function as both "master" and "mate" for the entire duration of the voyage, the fact that only one licensed deck officer is found to have been aboard when the voyage ends establishes *prima facie* that some unlicensed person had been employed to perform the necessary functions of the licensed deck officer when the master was not performing them.

I need not discuss here the possible validity of a defense that says, "when I was asleep, no one performed these duties at all, and therefore I did not violate the statute."

Prima facie, under the regulation, some person or persons had performed the duties of mate on the voyage in question, and no such person was licensed as required.

We come then to the actual, concrete defense offered at the hearing,that Appellant did not "employ" anyone on this voyage. It is said that the owner "employed" the crew and Appellant merely sailed with the crew he was given. "To employ" is not an exact synonym of "to engage". No matter who "engaged" a person or persons to perform the duties of "mate" on this vessel, Appellant as master, "employed" the services of these people.

III

Appellant has referred to two court decisions which, he says, are applicable to his case, are controlling, and require reversal of the Examiner. These decisions are *Fredenburg v. Whitney*, DC Wash. (1917), 240 Fed. 819, and *Bulger v. Benson*, CA 9 (1920), 262 Fed. 929. I have consistently held in the past (See e.g. Appeal Decision 891) that the amendment to R.S. 4450, in 1936, requiring referral of evidence of criminal liability to the United States Attorney for prosecution, rendered these decisions, as they are argued in these appeals, inapplicable to these remedial proceedings. Without altering this position in the slightest I think it may not be amiss to look closely at these cases, because I perceive that they are susceptible of misconstruction by Appellants who can be misled by the apparent simplicity of digest statements and annotations.

Fredenburg v. Whitney is a decision somewhat difficult to decipher.

The only contention of the plaintiff of concern here is thus phrased by the court:

> "...and it is further contended that the license could not be suspended, as the charge made against the petitioner did not provide for suspension of license as a penalty for violation." (p. 832).

The only charge against Fredenburg had been that he had violated Article 25 of the Inland Rules (now 33 U.S.C. 210).

The defendants argued that they had authority to suspend the license under R.S. 4439 (46 U.S.C. 214), and R.S. 4450 (46 U.S.C.239).

The court declared that the authorizing statute was "clearly penal", and concluded that both the statute and the implementing regulations called for notice and opportunity for hearing. "If it was sought to suspend the license of the petitioner, he should have been notified of the charge made and afforded an opportunity to defend." (p. 8324). The decision was reached: "The license was suspended arbitrarily, without notice..."

This result is perplexing. The averments of the petitioner had set out *vertatim* the changes made by the local inspectors against him, beginning with the words "You, as a licensed officer of steam vessels are hereby *charge*d with violation of Article 25, rule IX, page 10, of The Pilot Rules...," and ending, "You are directed to appear at this office on Tuesday, August 17. 1916, at 10 a.m., to make answer to said *charge*. You may be represented by counsel if you so desire."

(I am frankly unable to understand the reference to "Rule IX". Page 10 of the Inland Rules pamphl*et* in effect at the time does contain Article 25, which was then, as it is now, the "Narrow Channel Rule". "Rule IX", on page 9 of the pamphlet was then, as it is now, part of Article 18.)

It was averred further that on 1 September 1916, the local inspectors rendered decision against Fredenburg, that they ordered a suspension of his license, and that the order was appealed to Supervising Inspector Bulger who affirmed it.

In the face of this, a serious problem arises. With a recitation of the notice stating the change, giving the place and date of hearing and advising of the right to counsel, how could the court say that there was no notice or opportunity to be heard?

The answer, I think, can be found only in the language of the

court, quoted above, that "the charge...did not provide for suspension of license." (Emphasis supplied).

The issue was raised by petitioner that Article 25 had no provision for suspension of a license. The defendants contended that a violation of a pilot rule came within the scope of R.S. 4450 as "misconduct" or "negligence". This issue was not resolved by the judge who, as we have seen, decided solely on the grounds of lack of notice. It seems then that the technical detail that the charge did not mention the possibility of suspension of license constituted a failure of notice.

The statement that R.S. 4450 is penal is, as we shall see, irrelevant. But what it led the judge to was merely the conclusion that notice and opportunity to be heard must be accorded before a suspension may be ordered. This is the only true "holding" of the decision, and it is good law today. R.S. 4450, the regulations at 46 CFR 137, and the Administrative Procedure Act (5 U.S.C. 1001, et *seq*.) all require notice and opportunity for hearing.

In *Benson v. Bulger*, D.C. W.D. Wash. (1918), 251 Fed. 757, the inspectors had charged Benson with "inattention to your duties and violation of section 4442, R.S.U.S.,...disregarding the provisions of Article 16 of the Pilot Rules..." As in *Fredenburg*'s case Benson was told when and where to appear, and was advised of his right to counsel.

A suspension of license was ordered. Benson refused to surrender his license as ordered, but appealed to Supervising Inspector Bulger. Bulger refused to entertain the appeal because the license was not surrendered. The license expired and the inspectors refused to extend or renew it.

Benson argued that the only thing he had been charged with was a violation of Article 16 and that the only penalty which could be imposed was the monetary penalty for violation of the Rules of the Road, suspension of his license being beyond the power of the board.

The charge in this case was, admittedly, inartfully worded. No one can violate R.S. 4442 (now U.S.C. 214), since all it does is

state the conditions under which a pilot's license may be issued and suspended or revoked. The court noted the contents of R.S. 4442, of R.S. 4450, and of the penalty clause for the Inland Rules. The judge referred to his language in the Fredenburg case about the "penal" nature of the law. He then pointed out that R.S. 4442 spoke of "inattention to the duties of his station", while the charge served used the expression "inattention to your duty".

He said:

> "Whether the complainant could be proceeded against under Section 4442, supra, and pilot rule 16, for the same act, by specific charges under the section and the rule, is not before the court." (p. 759).

This statement is significant, because, it must be remembered, this very issue had been raised in the Fredenburg case and had not been decided.

The judge concluded only that the inspectors had "exceeded the power conferred by law" and had acted without jurisdiction. There is no clear statement of the reasoning leading to this conclusion.

The Court of Appeals, in *Bulger v. Benson* held that:

> "The question whether or not the statute or rule is strictly penal is not of controlling importance, further than to say that it is penal in its nature, and should receive a strict construction."

The statement that the statute is penal is dictum, since the question was not controlling.

The *holding* of the Court of Appeals is that since the only violation is one of Article 16, and since no suspension of license was provided for violation of that article, but only a monetary penalty, no suspension action was authorized.

It seem obvious in this case that the decision of the Court of Appeals appears to turn on the answer to this question - "May an act which is violative of one of the Rules of the Road, for which

a monetary penalty is provided, be the basis, when properly pleaded under statute and rule, for both action to suspend a license under R.S. 4450 and for imposition of the monetary penalty, when the statute violated makes no reference to suspension of a license?" The holding of the Court of Appeals, equally obviously, appears to be, "No".

It is again recalled that while this question in *Fredenburg v. Whitney*, the district judge refrained from answering. It is again, more forcefully, recalled that the same district judge declared that in the case of *Benson v. Bulger* this issue was *not* before him.

It appears incomprehensible that a Court of Appeals, while vigorously supporting the district judge's decision and action, would actually support his action on grounds which the district judge has specifically declared not to be in issue at the trial.

Judgements of Courts of Appeals are not to be disregarded in any kind of case, very especially in matters maritime where they are most likely to go unreviewed by the Supreme Court. Yet here I have no hesitance in construing this Court of Appeals decision, never followed by any other court in this or any other form of administrative action, so as to prevent a dead hand of forty six years' decease from throttling the life of a long recognized, permitted, and authorized administrative procedure.

In such construction I could assert very simply that the Court of Appeals in 1920 was wrong in stating that when a statute provides a monetary penalty for its breach, and does not mention suspension of a license as a result, no action to suspend the license may be taken. This construction might appear presumptuous, although it is defensible.

Better here, however, it may be to say that the Court of Appeals decision should be limited to the matters actually presented on appeal from the district court. There is a well settled rule that the Supreme Court will not review issued not decided below. *Walters v. City of St. Louis, Missouri* (1954), 347 U.S. 231, 233. The rule is also applied to Court of Appeals

action, which will not be taken unless the trial judge has had opportunity to rule. *Barnard v. Wabash R. Co.*, CA 8 (1954), 208 F. 2nd 489, 494.

The rule is not absolute, but may be by-passed when manifest injustice may be perpetuated. *Hormel v. Helvering* (1941), 312 U.S. 552, 557.

There is no hint in *Bulger v. Benson* that any emergency measures were being taken to rectify the trial judge's error or omission. There is no evidence that the Court of Appeals was consciously moving to other grounds for its decision. There is evidence, on the other hand, that the Court of Appeals merely believed that it was supporting and giving effect to a ruling of the trial judge who, singly, heard all the cases in the United States reported on this particular issue.

To construe the decision thus is to limit it, as the trial judge did, to the question of failure of nice pleading.

This question I will return to in a moment. Here I must interject that *Bulger v. Benson*, as argued by Appellant, gives him no solace.

If *Bulger v. Benson* meant what is superficially says, and no action to suspend a license could be taken when the only fault alleged was a violation of a statute for which a monetary penalty was provided, without mention of suspension of a license, Appellant gains nothing. Appellant's case is otherwise. Appellant was charged with violation of R.S. 4438a. This statute has a monetary penalty attached, since it is part of Title 52, Revised Statutes (R.S. 4500; 46 U.S.C. 498), but at the same time, R.S. 4450, as amended, also provides for suspension of a license, specifically, for a violation of any provision of Title 52, Revised Statutes, or the regulations promulgated pursuant thereto.

Even if *Bulger v. Benson* meant what it appears to say, Appellant's violation of R.S. 4438a is still amenable to action under R.S. 4450 because it is an act in violation of a provision of Title 52, Revised Statutes, for which specific provision is made in R.S. 4450.

Now, to go back to *Bulger v. Benson*, I may say this, that in taking all of these related cases in their entirety I find that all of them ultimately turned on nicety of pleading. Here, I limit the expression of *Bulger v. Benson* to the bounds set by *Benson v. Bulger* and read the latter along with *Frendenburg v. Whitney*.

When these decisions speak of the "penal" nature of R.S. 4450 they are irrelevant, on the express terms of *Bulger v. Benson*.

When these decisions speak of the necessity for notice and opportunity for hearing, they are the law.

When these cases speak in terms of the niceties of common law pleading they are obsolete.

Proceedings under R.S. 4450 are clearly recognized by Congress and the courts as administrative and governed by the Administrative Procedure Act.

In 1947 and 1948, an effort was made to obtain legislation to exempt these proceedings from certain requirements of the Act. The effort failed. This clearly demonstrates that Congress saw the proceedings as within the Act. (Hearings...80th Cong.....on H.R. 2966 [and] S 1077).

The courts have consistently treated the proceedings as administrative since the passage of the Act. *In re Merchant Mariners Documents*, D.C. S.D. Cal. (1949), 91 F. Supp. 426; *Word v. United States*, D.C. S.D. Ala. (1963) 223 F. Supp. 614; *O'Kon v. Roland*, D.C. S.C. NY (1965) 247 F. Supp. 743.

The Supreme Court has recognized R.S. 4450 proceedings as agency - administrative *Hannah v. Larche* (1959), 363 U.S. 420, 485.

Niceties of pleading have been eliminated as a requirement in administrative *Aeronautics Board*, CA D.C. (1950), 183 F. 2nd 839.

Under the law today, the holdings of *Bulger v. Benson* and its companions on the matter of pleadings have no vitality.

IV

On point raised by Appellant may be quickly dealt with.

since there were many references to the regulation at 46 CFR 157.30-10 (c), Appellant urges that the charges actually allege a violation of that regulation, but that regulation is not mentioned in the specification. This he contends is error, because 46 CFR 137.05-20 (b) states that when a violation of a statute or a regulation is charged, the specification must refer to the particular statute or regulation involved.

The fact is that no one can violate 46 CFR 157.30-10 (c), because, as pointed out above, it is not a substantive provision.

The specification correctly alleges that 46 U.S.C. 224a was violated and satisfies the requirements of 46 CFR 137.05-20 (b).

V

A final argument advanced on the appeal was not raised at the hearing. It is to the effect that under the terms of a controlling opinion which I had given to a Coast Guard District Commander in 1949, proceedings under R.S. 4450 could not be instituted in a case like this. Counsel sets out in his brief that in a communication to him in 1953 I had affirmed the opinion given in 1949.

He quotes from the 1949 letter:

> "The only enforcement steps which the Coast Guard can take with respect to R.S. 4438a is to impose the statutory penalties..."

This, it is urged, shows that when a statutory penalty is available no action under R.S. 4450 may be taken, and is an endorsement of the theory of *Bulger v. Benson*, *supra*.

As pointed out above, I have never, in these proceedings, endorsed any theory of that case, but have consistently found it inapplicable.

More important, the quoted statement must be taken in context. The question submitted to me at that time was, in essence, this:

> "Does R.S. 4438a authorize Officers-in-Charge, Marine Inspection, to set minimum standards for manning of uninspected vessels subject to the statute and to the Officers' competency Certificates Convention?"

The answer was then, in 1949, and still necessarily would be, "No." The statute does not authorize a predetermination of the officers needed on board, but it is the basis for a later finding that under certain conditions the absence of licensed personnel is proof that the statute was violated. This is the basis for 46 CFR 157.30-10 (c).

The question in the instant case is not whether manning requirements may be imposed, but whether remedial action under R.S. 4450 may be taken for violation of a statute which carries with it a monetary penalty for its breach. This question was not under consideration in 1949, and the statement quoted by Counsel, taken out of context, is not appropriate in this appeal.

My answer here is implicit in what has been said above in discussing *Bulger v. Benson*, but the principles may be set down briefly:

> (1) If the charge is "Violation of a Statute" or "Violation of a Regulation", the statute must be one in Title 52, Revised Statutes, or the regulation must be one promulgated pursuant to such a statute, but there is no requirement that the party be serving under authority of his document at the time of the alleged violation;
>
> If the act alleged happens to be a violation of a statute not in Title 52, it may be charged as

"misconduct", "negligence", or "inattention to duty", as appropriate, notwithstanding that there may be a monetary penalty provided within the statutes itself; and

(3) The election to pursue one remedy provided by statute does not preclude other authorized action; when Congress has provided more than one method of dealing with conduct, whether in separate statutes (as in R.S. 4450 and, *e.g.* the Rules of the Road) or in the same statute (as in 46 U.S.C. 526a), all methods may be utilized.

CONCLUSION

I conclude that there was jurisdiction to entertain the proceedings in this case, that the statutory requirements of notice and opportunity for hearing were met, and that the charge was proved by the requisite quantum and quality of evidence.

While it is not strictly necessary, I conclude that it is appropriate to modify the findings of the Examiner so as to reflect precisely what specific act by Appellant was found proved in violation of statute.

ORDER

The ultimate findings of the Examiner are MODIFIED to findings that from 19 January 1966 to 6 March 1966 Appellant violated 46 U.S.C. 224a (R.S. 4438a) by employing to perform the duties of mate, aboard AMERICAN BOY, a person or persons not licensed to perform such duties. The findings of the Examiner, as modified, and his order, in the decision dated 8 April 1966, are AFFIRMED.

W. J. Smith
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 20th day of July 1966.

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