UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 412196
Issued to: Dana R. DILLON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2136

Dana R. DILLON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 2 September, 1977, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman's documents for two months on six months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as master of SS COVE COMMUNICATOR under authority of the license above captioned, on or about 1 May 1977, Appellant "wrongfully departed a port of the United States, to wit: New Orleans, Louisiana, to sea with less than 65 per centrum of the deck crew, exclusive of licensed officers, of said vessel holding a rating of able seaman."

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

The Investigating Officer introduced in evidence the testimony of one witness and several pertinent voyage records of COVE COMMUNICATOR.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of two months on six months' probation.

The entire decision was served on 6 September 1977. Appellant was timely filed, and perfected on 19 December 1977.

FINDINGS OF FACT

On all dates in question, Appellant was serving as master of SS COVE COMMUNICATOR and acting under authority of his captioned license while the ship was in the port of New Orleans, Louisiana.

The certificate of inspection of COVE COMMUNICATOR requires in the crew six able bodied seamen and three ordinary seamen. Shipping articles for a voyage to Egypt were opened aboard the vessel on 28 April 1977. Only thirty of the intended crew were signed aboard that day, among them four hired in the capacity of able seaman, two in the capacity of ordinary seaman, and one in the capacity of "bosun/OS." On 29 April, Friday, ashore in the office of the local agent but in the presence of a deputy shipping commissioner, two more in the capacity of able seaman were signed on the articles. Before delivery of the articles to the vessel, which had shifted meantime to the anchorage area of the port, three persons had signed aboard in the capacity of deck maintenance men.

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The boatswain aboard COVE COMMUNICATOR served as a watchstander and the man employed on this occasion was recorded on the articles as holding an unlimited able seaman's certificate.

The two able seamen who had signed the agreement on Friday, 29 April, never boarded the vessel. On the evening of 29 April one of the able seamen hired the previous day reported ill to Appellant and was authorized to "sign off" the following day, Saturday. He did not do so until a later date.

Appellant in the meantime had advised his principals in New York of difficulty in shipping a "full crew" and had instructed the New Orleans agent to obtain replacements for the ill able seaman and the two missing prospective "failures to join." When the articles were delivered to the vessel late Saturday night the agent had reported to Appellant that replacements were not available from the union hall prior to scheduled sailing.

Appellant reviewed the laws which he perceived applicable to his situation and at 0400 Sunday, 1 May, entered in the official log book a record of regrouping and rerating members of the crew. He recorded his judgment that the vessel was adequately manned for the voyage and shortly thereafter departed as scheduled from New Orleans.

The voyage took place without significant incident and on its termination at Houston, Texas, on 30 June 1977, Appellant executed a "crew shortage report."

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. It is contended that:

(1) Appellant did not willfully violate a statute, and willfulness is of the essence when violation of a statute is alleged
(2) The evidence does not establish "misconduct" as defined at 46 CFR 5.01-20
(3) The defect complained of in the specification was apparent on the face of the shipping articles for the voyage and, since this was known to the shipping commissioner, there was a condonation of the actions taken.

APPEARANCE: Fulbright and Jaworski, Houston, Texas, by James L. Walker, Esq.

OPINION

I

Before the grounds for appeal are considered, a misconception of the Administrative Law Judge must be corrected. Although the matter was not raised on appeal, since Appellant was benefitted by the ruling made, the so-called "Statement of the Case" in the written initial decision makes a point of explaining why a certain document was refused admission into evidence. The explanation may have been prompted by the fact that when the document was offered in evidence there was an objection made, and decision was reserved until study could be made of the matter. No ruling was forthcoming on the record of open proceedings and the mention in the initial decision is the only disposition made of the matter. Since the parties are entitled to know what is properly in the record before the case is submitted for initial decision, this was error. The fact that the error was "mitigated" by a ruling in Appellant's favor served only, in this case, to compound it.

Appellant had objected to the admission of a form CG-792 ("Report of Crew Shortage") on Fifth Amendment grounds. The ultimate ruling as disclosed in the initial decision was that the document was inadmissible under 46 CFR 5.20-120 which deals with admissions made by a person charged " in the course of a Coast Guard investigation." The decision says:

> "The shortage of Crew Report was received by the Coast Guard during an investigation which was being performed by one of its officers in the course of his assigned duties as Shipping Commissioner. The fact that his title and responsibilities do not include the word 'investigation' does not deny [sic] the fact that he does investigate."

While it is true that the absence of a term in a title does not preclude the titleholder from acting in a capacity characterized by the absent term, the reasoning here is circuitous. The assumption is made that the officer performing the shipping commissioner function was in fact conducting an "investigation" within the meaning of the pertinent section of the regulations.

While it is not beyond the possible that a person deputized as shipping commissioner may at some time in some manner undertake actions that could fairly come under the "ban" in the regulation, the presumption is otherwise. The normal duties of shipping commissioner are spelled out in laws (dating back to 1872) and regulations. They clearly are independent of and different from those of investigating officers under Parts 4 and 5 of title 46, Code of Federal Regulations. They are performed solely under the

authority and pursuant to the mandates of an identifiable body of statutes and are performed or required to be performed within their own allotted area irrespective of whether a matter subject to investigation under R.S. 4450 and the regulations thereunder has occurred. They were, indeed, performed initially and for many years by officers of the Federal judiciary. It would be a rare case (and it would be for the proponent to establish it against the presumption), in which such an official acted outside the scope of his normal duties such that his actions became an "investigation" within the cited section.

The report required of the master of a vessel under 46 U.S.C 222 is of the same nature as the documents required under 46. U.S.C. 564 and related statutes. If the ruling ultimately made had been correct, the shipping articles for the voyage themselves should have been excluded from consideration since they also established, prima facie, a dereliction with respect to the manning of the vessel. The shipping commissioner receiving a report under 46 U.S.C. 222 is no more conducting an "investigation" than is the official who witnesses the signing of the shipping agreement at the commencement or the termination of a voyage.

A distinction must be recognized here between reports and other documents required by law, generally, governing the shipment and discharge of seamen and the report held, in Decision on Appeal No. 1913, to be inadmissible in these proceedings. The report of marine casualty there dealt with, although conceptually severable initially, has been so assimilated by the regulations under R.S. 4450 as to be part and parcel of the investigation required in the cases of marine casualty. Other voyage records maintained are not, without more, of that class.

II

When Appellant argues that the violation of a statute alleged was not, even if proved, willful and that the matter should be dismissed because under the controlling procedural statute such an action must be willful in order to form a basis for proceeding, there are two misconceptions involved. Since both are frequently encountered a few words of disposition are in order.

First, the charge "Violation of a Statute (or Regulation)" as provided for in R.S. 4450 (46 U.S.C. 239) and as recognized in the pertinent regulation (46 CFR 5.05-20(b) is available only in cases in which the norm violated is a section of title 52, Revised Statutes, or a regulation issued thereunder. While a violation of that nature must be willful to be charged possibly as such, that charge was not in issue here for one fundamental reason, at least. The statute mentioned here in the specification is not a section of

title 52. It is not, in fact, a section of the Revised Statutes at all, in the strictest sense. Even at hearing, Appellant correctly recognized that he was charged with misconduct and not with the more narrowly applicable charge which he argues about here.

Second, without attempting to elaborate on the often misunderstood meaning of "willful" with respect to different types of normative rule, it is enough to say that "willfulness" is not a necessary element of each and every allegation of "misconduct," and no special willfulness was an element of the offense charged here.

III

On the point made by Appellant that there had been a condonation of the offense alleged, another misconception appears. This consideration will be returned to since it is pertinent to the nature of the major issue, but for now it need only be noted that in declaring that the failure to meet the percentage requirement for able seamen was obvious to the official acting as shipping commissioner and was countenanced by him, Appellant is confusing positions of seamen in the crew. He adds up the boatswain, the able seamen, the ordinary seamen, and the deck maintenance men to make the "deck crew."

If this were correct, grouping the number of able seamen initially signed aboard would amount only to fifty percent of that crew. The maintenance personnel hired as such and serving as such are not, however, as is discussed further below, part of the "deck crew," and the articles showed on their face, as correctly understood, a deck crew of nine with six able seamen included.

IV

This case was considered at hearing in a manner that reveals a misconception of the requirements of certain laws, of the precise issues raised, and of the effect of the evidence adduced.

It was plainly alleged that the misconduct attributed to Appellant was a departure of COVE COMMUNICATOR to sea from the port of New Orleans with less than a percentage required by law of able seamen in the deck crew, exclusive of licensed officers. Another offense which might have been specified under the charge of misconduct was navigating the vessel without compliance with its certificate of inspection in that the number or qualifications, or both, of the deck crew were not in accordance with the standards prescribed.

The initial decision, at five points, speaks of the conduct

under consideration in terms of "shortage" with respect to the persons required by the certificate:

(1) It says that the vessel sailed without "a full complement of duly documented able- bodied seamen as required by the vessel's 'Certificate of Inspection';"
(2) It speaks of the defense as having urged that effort had been made "to effect a full complement of six able seamen;"
(3) It mentions that Appellant "knew that he was required to have aboard not less than six able seamen;"

(4) The effort of Appellant is described as having been directed toward "obtaining the additional able seamen required to complete his deck department;" and
(5) It says that Appellant "knew that he had a crew shortage from the moment that he voluntarily released Able Seaman Albert S. Lee until the moment of departure from the port of New Orleans."

None of these observations has any direct bearing upon the question posed, which is, in abstract terms under the conditions to the relevant statute: "Given a deck crew of 'X' on departure from New Orleans, was 'y,' the number of able seamen carried. equal to or greater than sixty five percent of 'x'?"

Had Appellant been charged here with the offense of violating the certificate of inspection the consideration to be given to the matter might have been lessened. Had specification been preferred to cover both possibilities the considerations might have been easier. Even under the chosen terms for the issue stated there might be a resolution possible by recourse to the theory that, although "Question A" was the one formulated, "Question B" was raised in fact and litigated on sufficient notice so that findings are supportable on the view expressed in Kuhn v Civil Aeronautics Board, CA, D.C., 183 F. 2nd 839.

Since part of the trouble stems from the fact that a variety of statutes comes into play, each enacted in response to different needs perceived at different times, and since the term "deck crew" (or even "deck crew, exclusive of licensed officers....") is nowhere defined in the statutes, the review entails some analysis of the statutes themselves and a determination of which apply as affirmative requirements and what exceptions or exemptions may be accepted in the context.

V

The failure of the statutes to define "deck crew" probably

results from the unstated premise that the concept of "deck crew" is so ingrained in the maritime language that everyone knows what it is. This may have been true in the days of sail, or when each statute was originally enacted, and for practical purposes this may be broadly correct. Times and practices change, however, and the courts have had occasion to interpret. The existence of a "maintenance department" (more precisely here, "deck maintenance department") has been recognized as distinct from "deck crew." The Chilbar, DC ED Pa. (1935), 10 F.Supp. 926. Among the "ratings" normally considered as "maintenance" ratings, and outside the "deck crew," are "boatswain" and "deck maintenance man." The Youngstown, CA5 (1940), 112 F.2nd 963. On the other hand, the judicial eye has pierced an attempted distinction between "deck crew as required by law" and sailors carried in excess of the number required, and has perceived the need to treat all as members of "the deck crew" which must be divided into watches. El Estero, DC Tex. (1926), 14 F.2nd 349.

A practice necessarily to be followed then is to look to reality and see what in fact was, rather than attempt to spin out a solution on purely a priori reasoning. Appellant did, in this case, face reality, and his actions, as will be seen, help to disperse the theoretical difficulties that arise.

Something must be said here also with respect to the relationship of the "shipping articles" to the certificate of inspection to see how one may furnish prima facie a quide to the use of the other, although the two are the product of different laws enacted for different purposes and with different formal objects.

The certificate of inspection, authorized and required under 46 U.S.C. 222 (R.S. 4463), prescribes the numbers and qualifications of those who, in the judgment of the official charged by law, are the minimum crew required for safe navigation of the particular vessel inspected. If a vessel is subject to inspection its minimum manning requirements established by that certificate are applicable even if the voyage undertaken is not subject to a law requiring a shipping agreement. Conversely, a law requiring a shipping agreement (in this case 46 U.S.C. 564, R.S. 4511), which is a contract between master and crew, is applicable to a vessel on a certain type of voyage whether the vessel is subject to inspection or not. The shipping agreement reflects the entire crew shipped for a voyage, not merely those required to be aboard by one law or another. Among other things the articles called for in this case show also the capacity in which each seaman is engaged and give some evidence of the documentation presented by each as legal qualification for the capacity in which he is to serve. (In some cases, it should be needless to say, this evidence

may establish only that the holder is possessor of credentials authorizing "entry rating" or "staff" employment, and no more.)

The shipping agreement thus becomes a handy device for establishing prima facie compliance with the requirements of the certificate of inspection. It is good and useful evidence but it is subject to parol modification and to rebuttal.

The certificate of inspection in force for COVE COMMUNICATOR required, as is standard for a vessel of the class and service, three ordinary seamen and six able seamen. The certificate does not denominate this group of seamen as "deck crew," but the reality is that in the judgment of the administrator a deck crew of nine is seen as necessary for safe navigation. The ratio of 2:1 can be regarded as, in a sense, dictated by the sixty five percent law, but also, in a sense that both the ratio and the total number in that crew are the product of long experience in vessel operation, as the accepted standard which crystallized in the statutory edict.

As would be expected, the shipping agreement prepared for the intended voyage of COVE COMMUNICATOR provided in advance for the hiring of six able seamen and three ordinary seamen. One of the ordinary seamen was also designated as serving in the capacity of "bosun." (Of this last, more will be said.) After the articles were "opened," and indeed reflecting an effort by the local agent to obtain an adequate crew, three additional positions pertinent to this case were added to the crew to be hired. These were designated for "maintenance" personnel. Certain facts relevant to these customary designations must be noted. "Able seaman" is a specially qualified position and an individual who serves in that capacity, whether we consider the certificate of inspection requirements or the percentage law, must be the holder of a certification of his qualification. Similarly, there is a certification under law of authority to serve as ordinary seaman. On the other hand, while boatswain and deck maintenance are positions related to those of the sailors (but now commonly referred to as the "deck maintenance department"), since the capacities of boatswain and deck maintenance are not determined by statute, there are no special legal requirements to be met by the seaman and he must possess only the minimum authorization needed for a person to serve on vessels regulated by pertinent laws of the United States (here, specifically, 46 U.S.C. 672(a)).

Just as the certificate of inspections does not specifically denominate the usually required able seamen and ordinary seamen as "deck crew," so the shipping agreement does not specify a "deck crew" or a "maintenance department" but, prima facie, the signing on of crewmembers in the capacities of able seaman or ordinary seaman indicates the deck crew, and the capacities like "boatswain"

and "deck maintenance" show prima facie a maintenance department. These designations on the articles, while acceptable as presumptive, are subject to collateral amendment by evidence of, say, in-fact service aboard the vessel otherwise, or rerating or promotions formally recorded.

The rating provided for on the articles here, "bosun/OS," indicates prima facie that the person will be serving as a watchstander in the deck department. On the record of hearing this is confirmed by the unimpeached testimony of Appellant that aboard COVE COMMUNICATOR the boatswain was in fact a watchstander.

With all the crew intended to be carried signed aboard for the voyage, the articles presented, as pertinent, a deck crew of nine, with six employed in the capacity of able seaman, and, additionally, a maintenance department of three, all designated as maintenance personnel. The articles also reflect, however, in many instances, in addition to the capacities in which seamen are to serve, the qualification held by the seaman. It is a fact that the seaman employed in the "bosun/OS" capacity was a qualified, unlimited able seaman.

VI

With the failure to join of two of the seamen employed as able seamen and the release of the able seaman who was ill, the situation became, on its face, one in which there was aboard, prima facie, a deck crew of only six, four of whom (and here the "bosun/OS" must be counted because he held the unlimited able seaman certificate) were able seamen. There would have been a maintenance force of three.

Had this been the static condition ultimately presented there would have been compliance with the sixty five percent rule. Other issues might have appeared for resolution, of course. It would be immediately perceived that there was evidence of a violation of the certificate of inspection. There would be then a question of whether the actuality of the hearing authorized finding of an offense which had not, on the face of the notice, been specifically charged. There would also be possible a showing that the actual employment of the seamen signed as maintenance personnel, one or two or all, had been in the deck crew. In this event, of course, on the showing that they were not qualified as able seamen there would have been a de facto deck crew of seven, eight, or even nine, and the percentage deficiency alleged would have been established as charged.

It is scarcely necessary to note that the sailing with only four able seamen aboard would prima facie constitute a violation

of the certificate of inspection, whether the total deck crew in fact was four or forty.

Appellant's own actions in attempting to cope with the situation relieve us of the burden of resolving a query as to possible violations other than that specified. He did not leave static the condition exhibited prima facie by the shipping agreement, after the deficiencies were apparent. In the official log-book he noted the qualification of the boatswain as an able seaman, the boatswain being already a member of the deck crew and a watch-stander. He then rerated the other two ordinary seamen as "acting able seamen."

These actions, of course, did not increase the number in the "deck crew," since these seamen noted or rerated were already included in that crew. In addition, however, he rerated one of the deck maintenance personnel to the position of acting able seaman. This gave, on the face, a deck crew of seven, and it resulted in a percentage of able seamen (4:7) of less than sixty five. If this were the static position the specification, as charged, would apply; the issue would remain "percentage" under the "able seaman" rule rather than violation of a certificate of inspection.

At this point, it could be suspected that the facts are being interpreted to "save" the specification as drafted and found proved despite the misconceptions use in the assessment of Appellant's conduct. Rather than permit this, I must essay further interpretations.

The matter was not explored in the record, since even under the apparent confusion of theories only the percentage question was raised, but a further look at the realities is in order. From the actions taken by Appellant I conclude that he was making an effort to comply with the law as he understood it and I directly conclude that he utilized the other two maintenance men, who were not rerated, as watchstanders in the deck crew. There is no evidence as to this for the reason I have pointed out, but it appears that the entries in the log book reflect considerations of the pay scales of the seamen involved and available for use.

Thus, I believe that the boatswain was merely noted as holding an able seaman's certificate, with no "redesignation," since the boatswain already had a higher pay per month than an able seaman. Two ordinary seamen were "promoted," involving an increase in pay. The deck maintenance man who was rerated to able seaman also had a pay increase. There was no similar compulsion to rarate the other two deck maintenance men to "ordinary seaman," filling out the form of a nine seamen deck crew, since the pay was the same, but I infer from the effort recorded that Appellant did in fact sail with a

nine member deck crew divided into three equal watches in compliance with the watch provisions of 46 U.S.C. 673. Of this deck crew only four were able seamen, two fewer than the number needed to exceed sixty five per cent, and two fewer than the number required by the certificate of inspections.

Upon these understandings, it is evident that two offenses were prima facie established by the computations, with only the percentage matter properly placed in issue.

VIII

The defense offered requires further consideration of the two relevant statutes involved. The defense is actually an explanation recorded at the time of the sailing itself. It is an invocation of the provision of the second paragraph of 46 U.S.C. 222 (R.S. 4463).

Evaluation of the defense is itself a three step process. The first question is whether the permission for a master to sail with a "shortage" is available to him at the first port of departure on a voyage. The second is whether this authority, granted in connection with the requirements of minimum manning set by the certificate of inspection, may be utilized to excuse the percentage of able seamen deficiency under a different statute (46 U.S.C.672). Assuming an affirmative answer to these questions, there still would remain the ultimate question on the substantive merits, ------whether the conditions for exercising the discretion allowed were present.

On the two matters of application of law there appears to be no established precedent in point.

A matter of deficiency in compliance with a vessel's certificate of inspection was recently under consideration in Decision on Appeal No. 2127 There the specific issue of availability of the dispensation at the initial port of departure was left unresolved. Unlike certain more vaguely defined "voyages," as in "coasting service," this case presents no problem in fixing a precise beginning and end for the specific voyage. There is absolute clarity that New Orleans was the port in the United States which was the departure point for a foreign voyage under 46 U.S.C. 464, that the voyage ended about one month later in Houston, and that the deficiency existed on departure from New Orleans.

The one case even remotely in point, discussed briefly in Decision on Appeal No. 2127, is United States v The Science, D.C. Pa. (1863), Fed. Cas. 16239. The holding in that decision was that the permission granted to a master by the statute in effect at the

time did not allow him to make an initial departure "shorthanded." I mentioned, nevertheless, that the statute had undergone changes since that time.

It originally spoke in terms of a vessel which "leaves her port with a complement of engineers and pilots, and on her voyage is deprived....;" while the present version makes no reference to an initial departure. It applied only to passenger vessels; the current version is not so limited. It dealt only with "engineers" and "pilots;" the current text deals with the required "crew." Given the date of the old statute, the reference to "ports," and the linkage to passenger vessels, I think it fair to assume that its principal concern was for vessels in domestic commerce. Indeed, since "pilots" was a concept then exclusively associated with domestic transportation by water, I consider that the legislators were concerned primarily with inland voyage. ("Mates" were a breed apart in 1852.)

As the statute appears today, despite the continuity of legal identity since 1874 as R.S. 4463, it is in effect a different law. It consciously applies to all inspected vessels. The class includes vessels on all conceivable routes all over the world and vessels engaged in a great variety of trades or occupations. It is my opinion that the completely revised statute is open to a reading not predetermined in its conclusion by the disposition of the case of THE SCIENCE.

The statute does, not unexpectedly, pose some apparent difficulties. The provision for "shortages" speaks first of a vessel's being "deprived" of services of a "number of the crew" and, in direct connection with the "deprivation," of the "consent, fault, or collusion" of responsible persons. Then, it allows a vessel to "proceed" on the voyage. The proviso then mentions causes for "deprivation:" desertion or casualty," and requires report (only?) when one of those causes brings about a deprivation. Myriads of questions could be artfully devolved from this language, but most of the speculation would not be fruitful. It is enough to derive certain concrete conclusions directly.

"Deprived" does imply an original possession. This condition can obtain as well at the initial port of departure as elsewhere. COVE COMMUNICATOR had, for practical legal purposes, the two able seamen in its service at the moment they signed the agreement. The vessel was "deprived" of their services.

"Consent" of the master was found by the Administrative Law Judge in his comment that Appellant "knew that he had a crew shortage from the moment that he voluntarily released able seaman Albert S. Lee until the moment of departure from the port of New

Orleans." This point will be mentioned again on the merits of the case, but here it seems that undue emphasis had been placed on the "mutual consent" description of the release on the shipping agreement. Appellant did "consent" to the release, but if the seaman was in fact ill the consent was forced. Terming the separation a "release" made the sign-off process for the seaman more convenient since the suspicion of "desertion" or "failure to join" would not attach, and an attempt to characterize the separation by any other name would have apparently converted a failure of the seaman to report for sailing time into an act of misconduct. The "consent" contemplated by the statute is a collusive consent involving a willingness to violate the law.

The "desertion or casualty" condition in the statute is not, I think, intended to be specially limiting. It is fair to equate the terms "deprivation without consent, fault, or collusion" and "deprivation by desertion or casualty." As long as the absence is not of the first kind described, there is no need to inquire whether there is a conceivable cause which is not of the second kind.

"Proceed" is at the center of the question here. With the current statute severed from its original scope, it is obvious that a vessel proceeds on a voyage as well from its first port of departure as from any other subsequently entered port. Much might be said in wonderment about the "such" voyage for which the vessel must be adequately manned, in hope that enlightenment might come, but since the only antecedent for "such" is "her voyage" not much could be expected. In the absence of some more indicative language, it appears best to accept this statute at face value and hold that its effect is operative at the first port of departure as well as at later intermediate ports, noting that it may well be more difficult to meet a test of "due diligence" at that port than at others en route.

X

The last question of the law, then, is whether the percentage rule for able seamen, as a separate edict, imposes an obligation which cannot be reached by the discretion granted in R.S. 4463. There are several factors that would be mustered to support such an inflexible obligation: (1) the different sources of "safety" regulation and "seaman's welfare" legislation, one found mainly in title 52 of the Revised Statutes, the other to which the able seaman rule is directly related, being in title 53 of that codification, (2) the difference in scope in that the able seaman rule applies as well to uninspected vessel, to which R.S. 4463 does not apply, as to inspected vessels, and (3) that the able seaman rule, as a later law, supersedes, pro tanto, a conflicting earlier

law, noting especially that the same Act which produced 46 U.S.C. 672 (with no provision for deficiency), also produced 46 U.S.C. 672a, dealing with nationality of seamen, with a specific provision for deficiency.

I am not persuaded that any or all of these should be controlling influences. The allowance for deficiency in citizenship requirements has traces of ambiguity or inconsequence since it purports to allow deficiency in foreign ports while the affirmative requirement is imposed, as is the able seaman requirement, only on departure from a port of the United States. As to the unavailability of R.S. 4463 to uninspected vessels, with an apparent benefit to an inspected vessel, the distinction is illusory since the master of the uninspected vessel has, if technicalities prevail, the option to lessen the size of his deck crew in order to raise the able seaman percentage, a device not at hand for the master of the inspected vessel who will run afoul of his certificate of inspection. The historical separation of safety and welfare statutes is not cogent because of the blurring of distinctions in post-1874 legislation, notably in the immediate source of 46 U.S.C. 672 itself, which is actually more safety-qualification oriented than otherwise.

Although 46 U.S.C. 672 is the product of a later enactment I find not only that it is susceptible of being harmonized with R.S. 4463 but that it must be read so. There is no appearance of intent to set a more rigid rule in the later statute; there is convincing evidence in the very language of 46 U.S.C. 672 itself. The statement of applicability provides a specific exception for vessels subject to "section 1" of the Act of which the "able seaman rule" was section 13. Section 1 was an amendment to R.S. 4516 (46 U.S.C. 569). This section is of limited application, but it applies precisely to a vessel on a voyage like that of COVE COMMUNICATOR at the time in question. Its language closely parallels that of the 1913 amendment to r.s. 4463 (46 U.S.C. 222) relative to filling "crew shortages." Although it speaks in terms of a vessel in the course a foreign voyage, in the context in which the reference to this exception appears it can only be construed as permitting a deficiency in the able seaman requirement on departure from a port in the United States.

I hold then that by virtue of the provision of both R.S. 4463 (46 U.S.C. 222) and the excepting reference to R.S. 4516 in 46 U.S.C. 672, itself, the master's authority to sail at discretion extends to the carriage of able seamen from his first port of departure in the United States and from other United States ports from which he may depart, subject to the same limitations of exigency.

XI

There remains then an evaluation of Appellant's exercise of judgment in fact. Here, without disturbing the Administrative Law Judge's findings of established facts, I disagree with his interpretation.

I have already expressed belief that the "consent" to the discharge of the ill seaman was not necessarily consent within the meaning of the statute. Given the unrebutted testimony of Appellant, there is no reason to question the genuine appearance of unfitness of the seaman to have been carried on the voyage. Here, also, I noted that the Administrative Law Judge gives this opinion as to the status of the boatswain on this voyage:

> "The bosun, Arthur C. Campbell, had signed aboard as bosun and ordinary seaman. Respondent's contention that the bosun was also an able seaman is inconsistent with the shipping articles in which the bosun appears occupying the positions previously mentioned, namely bosun and ordinary seaman. Nowhere in the articles or the other documentary evidence does it indicate otherwise."

This has misconstrued the record. It is not merely a "contention" of Appellant that the boatswain was an able seaman. It is a fact and the shipping articles clearly reflect it. Had the boatswain, as often happens, signed on in a capacity that is prima facie a maintenance berth, additional evidence might have been needed to demonstrate that in fact he served as a member of the deck crew. The articles show, however, that he was already a member of the deck crew. The reratings resorted to by Appellant and revisions of wage scales were dictated for the most part by union-management contract considerations. It is apparent that the manning of COVE COMMUNICATOR under that rule called for able seaman's wages to be paid to six members of the deck crew, higher wages to one of the "ordinaries" who would also act as boatswain, and wages at a lower scale to two ordinary seamen, no matter what the qualifications of the individual seaman in the capacity. It is conceivable, though improbable , that nine seamen might have been dispatched for those positions, each one of whom held able seaman qualification, although two would obviously be willingly receiving lower wages than those set for able seaman. Had all the able seamen signed for the voyage reported and been aboard, the boatswain would still have been an able seaman and the vessel have carried seven instead of the required six.

The point now is that Appellant was under no statutory compulsion to replace the ill seaman with another able seaman; the sufficiency of his efforts is to be tested only as to the two able

seamen who failed to join on sailing.

Although the articles record these seaman as "failed to join" on the same date as that on which they signed aboard the notation there is clearly for wage accounting purposes. With no days of service they were entitled to no pay. From another point of view the record of the official log book as of 0400 on sailing day is also a "bookkeeping" entry. The failure was complete and irremediable at that time. But Appellant in truth was on preliminary notice when he found that they had not reported aboard on the day they signed on. There is no need to make much of the possibility that they might have reported at their convenience, knowing the scheduled sailing time of the ship. The fact is that Appellant did take steps to replace them in anticipation of the finality of the failure. The fact is that the agent did provide three available seamen for the maintenance department in the expectation that they might be needed for assignment to the deck crew.

Important relevant considerations here are several. First, the articles themselves, as prepared before the initial sign-on and as altered, show that these were additional seamen provided, not seamen carried under original design. (Appellant did, also, testify that the vessel did not normally carry a maintenance department, a fact in accord with the boatswain's standing a watch under the regular conditions of operation.)

Appellant had already indicated the need for more able seamen. It is certain that the hiring hall did not provide them but sent instead three men qualified only as ordinaries. There was no insidiously plotted advantage here since the wages of six able seamen were paid anyway; i.e. there can be no motive of shaving expenses in hiring the crew.

The Administrative Law Judge stresses that Appellant took no action other than to utilize his agent to correct the deficiencies and that "New Orleans [is] a large port with extensive shipping and an ample supply of merchant seamen." In his findings, he says:

> "The port ... is one of the largest ports in the United States, where a large amount of shipping activity takes place, and in which the major maritime unions have offices."

It is equally a matter for proper notice that masters do not recruit their crews along the waterfront, that one and only one union hall at a given port is available as a source of a particular class of seaman, that ports have regular working hours (see 46 U.S.C. 382b) and recognized "weekends," and that a hiring hall will provide available personnel if there is no work stoppage. It is

clearly deduced from the evidence here that the union was able to provide only three able seamen when the articles were opened aboard ship and that three more were signed as "stragglers" the next day. It is presumed that on notice from the agent the hall would have provided replacements for those who chose not to report. The evidence is that the shipping articles were held open at the office ashore until Saturday night, with the ship already downriver in the anchorage awaiting a scheduled early morning sailing.

Although it is not beyond imagining that there could have been proof of deliberate action to avoid obtaining the services of able seamen, what appears in this record is merely an understandable sequence of events explanatory of their absence without "fault or collusion" on the part of anyone. Appellant's reliance on the ordinary methods of recruitment of seamen was reasonable and even necessitated. Indeed, no other course for him was even suggested.

His exercise of discretion was authorized under the statute and his judgment of the adequacy of his available crew was sustained in the event.

CONCLUSION

The specification of the charge of misconduct was not proved.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 2 September 1977, is VACATED. The charges are DISMISSED.

R.H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C. this 3RD day of NOVEMBER 1978.

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