BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ORIENT SEA TRANSPORT, S. A., Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 454 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER being an appeal of a $5,000.00 civil penalty levied for an alleged oil spill under RCW 90.48.350; having come on regularly for hearing before the Pollution Control Hearings Board on the 4th day of February, 1974, at Lacey, Washington; and appellant Orient Sea Transport, S. A. appearing through its attorney, Robert H. Madden and respondent Department of Ecology appearing through its attorney, Charles W. Lean, Assistant Attorney General; and Board members present at the hearing being W. A. Gissberg (presiding officer), Mary Ellen McCaffree and Walt Woodward; and the Board having considered the sworn testimony, exhibits, records and files herein and arguments of counsel and having entered on the 20th day of March, 1974, its proposed

Findings of Fact, Conclusions of Law and Order, and the Board having served said proposed Findings, Conclusions and Order upon all parties herein by certified mail, return receipt requested and twenty days having elapsed from said service; and

The Board having received no exceptions to said proposed Findings, Conclusions and Order; and the Board being fully advised in the premises; now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed Findings of Fact, Conclusions of Law and Order, dated the 20th day of March, 1974, and incorporated by this reference herein and attached hereto as Exhibit A, are adopted and hereby entered as the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DONE at Lacey, Washington, this 12th day of April, 1974.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward

WALT WOODWARD, Chairman

W. A. Gissberg

W. A. GISSBERG, Member

Mary Ellen McCaffree

MARY ELLEN McCAFFREE, Member

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This matter, the appeal of a $5,000.00 civil penalty levied for an alleged oil spill under RCW 90.48.350, came before the Pollution Control Hearings Board (William A. Gissberg, presiding officer, and Mary Ellen McCaffree and Walt Woodward) in a formal hearing in the Board's office at Lacey, Washington on February 4, 1974.

Appellant appeared through Robert H. Madden, respondent through Charles W. Lean, Assistant Attorney General. Richard Reinertsen, Olympia court reporter, reported the proceedings.

EXHIBIT A

Witnesses were sworn and testified. Exhibits were admitted. Counsel made concluding arguments.

From testimony heard, exhibits examined and arguments considered, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

The M/T COMET, a bulk oil ship of Liberian registery owned by appellant, berthed at the U.S. Oil Refinery Company pier in Blair Waterway, Commencement Bay, Tacoma, Washington, on April 29, 1973 and began pumping oil ashore at 6:30 p.m. As is the practice at U.S. Oil, the ship was circled with a boom to contain any oil which might be spilled into the water. The pumping continued through the night. At 8:00 a.m. on April 30, 1973, oil, bubbling up from the forward starboard side of the ship, covered the water inside the protective boom. Thereafter, this chronology of events occurred:

8:30 a.m. - U.S. Oil notified U.S. Coast Guard of spill.

8:45 a.m. - U.S. Oil called Marine Oil Pickup Service (MOPS) for cleanup of spill.

9:00 a.m. - Coast Guard notified Department of Ecology of spill.

???? a.m. - Tacoma ship's agent called marine diver to scene.

9:45 a.m. - Coast Guard personnel arrived on scene.

10:00 a.m. - Department of Ecology's inspector arrived on scene.

11:00 a.m. - Diver arrived on scene but captain of COMET refused permission for diver to inspect underwater portions of ship.

11:15 a.m. - Department of Ecology water quality expert arrived on scene.

11:20 a.m. - Captain approved diver to enter water which diver did.

11:45 a.m. - Diver reported oil entering water from 8 inch hole in bottom of ship.

12:00 p.m. - Department of Ecology oil spill section head arrived on scene.

1:00 p.m. - Coast Guard, after conference with and at the request of Department of Ecology, directed Captain of COMET to cease onshore pumping and to pump oil from ruptured number six tank to another tank on ship.

1:15 p.m. - Pumping from number six tank began.

1:45 p.m. - Onshore pumping ceased.

8:00 p.m. - Three thousand gallons of oil recovered from water by MOPS.

II.

On June 1, 1973, in its Docket Number DE 73-147, respondent levied a $5,000.00 civil penalty against appellant for the negligent spilling of oil in relation to the incident described in Finding of Fact I and under the provisions of RCW 90.48.350. On July 2, 1973 appellant filed application for relief from the penalty with respondent. On August 21, 1973, respondent, having considered the application for relief, affirmed the penalty in its Notice of Disposition Upon Application for Relief from Penalty. Respondent's refusal to mitigate or rescind the penalty is the subject of this

appeal.

III.

The COMET was placed in dry dock in Singapore between January 16 and 27, 1973 and was given a visual external examination of its hull by a surveyor of Lloyd's Register of Shipping who found no wastage necessitating repairs.

IV.

The oil in the ruptured number six tank was not destined for pumping ashore at Tacoma. As the COMET became more buoyant due to removal of oil from other tanks, pressure of the oil in the number six tank increased, causing the oil to flow from the hole in the hull.

V.

Onshore pumping continued until all of the Tacoma cargo, with the exception of residual oil in the tanks, had been removed from the COMET. The pumping continued without interruption for 5 3/4 hours after the spill first was observed by both refinery and ship's personnel.

VI.

Respondent relied on the doctrine of res ipsa loquitur in relation to the hole in the bottom of the COMET, and on the continuance of onshore pumping after the spill was observed as its two grounds for negligence in this matter.

VII.

Respondent may impose (RCW 90.48.350) a civil penalty up to $20,000.00 for an intentional or negligent oil spill. Respondent has

attempted, but abandoned, efforts to compose a regulation providing standards for setting the amounts of civil penalties in oil spills; respondent found that there are too many variable factors involved in oil spills to enable it to compose a comprehensive regulation.

VIII.

Any conclusion of law hereinafter recited which should be deemed a finding of fact is hereby adopted as such.

From these findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS

I.

The doctrine of res ipsa lopuitur is properly raised in this matter but appellant has met that challenge. The COMET was dry docked and its hull inspected and no wastage found necessitating repairs only four months before the Tacoma incident. Appellant, therefore, cannot be charged successfully with negligence in this regard.

II.

It is a reasonable act of prudence, in an oil spill of this kind, immediately to cease all pumping while efforts are made to learn the cause of the spill. A corollary of this finding is that failure immediately to cease all pumping is negligence.

III.

Although personnel of both the U.S. Coast Guard and the Department of Ecology were on the scene for some three hours before the COMET's captain was ordered to cease onshore pumping, this incomprehensible lack of official action cannot excuse the captain of the COMET for

his abject failure to take any independent action whatsoever in regard to the apparent and increasing oil spill which was bubbling up around his vessel. He compounded his lack of action by at first refusing to permit a diver to inspect the COMET's hull to learn the cause of the spill. Even after the diver reported the cause of the spill, the captain took no action until finally ordered to cease onshore pumping, and then did not comply with that order until his Tacoma cargo had been discharged. Those acts of omission constitute negligence.

IV.

Appellant's contention RCW 90.48.350 is inadequate and unconstitutionally broad is not well taken. The statute is simple, direct and understandable. That it does not address every nuance of every possible kind of oil spill does not harm appellant who has the remedy, which he took, of an impartial hearing before this independent Board. The nuances of this particular oil spill have been examined by this Board to the limit of testimony and exhibits offered. Both the particularities of the alleged violation and the reasons for the charge of negligence have been thoroughly exposed and considered by this Board.

V.

Similarly, appellant's attack on the lack of respondent's standards for determining the amount of civil penalties in oil spills is not well taken. This appeal taken to this Board gave appellant the full opportunity of testing the validity of the penalties set by respondent in this matter.

VI.

The penalty levied in this matter was one-fourth the maximum allowable amount which respondent could have invoked. In view of the containment of the spill and of prompt efforts to remove the spilled oil, $5,000.00 is a reasonable and lenient amount. But in view of this Board's determination to strike and disregard one of the two reasons contended by respondent for negligence, a halving of the invoked penalty is indicated.

VII.

Any finding of fact which should be deemed a conclusion of law is hereby adopted as such.

From these conclusions, the Pollution Control Hearings Board issues this

ORDER

The appeal is denied, but Docket Number DE 73-147, Notice of Disposition Upon Application for Relief, is remanded to respondent for the imposition of the lesser civil penalty of $2,500.00.

DONE at Lacey, Washington, this 20th day of March, 1974.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward

WALT WOODWARD, Chairman

W. A. Gissberg

W. A. GISSBERG, Member

Mary Ellen McCaffree

MARY ELLEN McCAFFREE, Member