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Asserting our right "…to petition the Government for redress of grievances."
Amendment 1, U.S. Constitution, Dec. 15, 1791

MARINERS DROWN WHEN "JUSTICE CAPSIZES" THE MURRAY ROGERS CASE

By Richard A. Block, Secretary NMA

*[**References:** Our website carries a total of 18 separate reports in the #R-429 series of reports that deal with Coast Guard investigations and the Administrative Law System. **Publication History:** NMA Newsletter #65, Oct.-Nov. 2009. Mnl65.16P]*

This 1995 graduation picture of Murray Rogers was taken at completion of USCG Basic Training at Cape May, NJ.

The Coast Guard's 40-to-1 Success Rate at ALJ Hearings

In a widely read article titled ñJustice Capsized?ò in the June 24, 2007 issue Baltimore Sun, journalist Robert Little pointed out that ñOf more than 6,300 charges brought by Coast Guard investigators since 1999, when the agency restructured its judicial system to broaden rights for defendants, just 16 have been ruled ñnot proved,ò equivalent to an acquittal.ò Little went on to point out that this represented a 40-to-1 success rate.

We warn our mariners that these are shocking statistics and can ruin the life of any mariner who gets ñcrosswiseò with the Coast Guard for any reason, large or small.

Allegations Aired at Congressional Hearing

On July 31, 2007, Congressman Elijah Cummings, Chairman of the House Coast Guard and Maritime Transportation Subcommittee held a hearing on the Administrative Law system on Capitol Hill. My wife and I were in Washington at the time preparing to testify at the ñMarine Safetyò hearing several days later. I was fully aware of the facts of the ñDRESSERò case that was the subject of Robert Littleôs newspaper article. The proceedings were intensely interesting to me as a licensed mariner. While the Coast Guard investigators try to promote ñmarine safetyò with some degree of success, there is a darker side that is very disturbing. Two of our Associationôs reports, #R-315-C and #R-429-L, are particularly disturbing.

As Secretary of our Association, I attended (and continue to attend) a number of Administrative Law Judge (ALJ) hearings before a variety of ALJs including Judge Jeffie Massey, Judge Peter Fitzpatrick, and Judge Walter J. Brudzinski. I am not an attorney, but know our ñlimited tonnageò mariners through working with them in a

licensed capacity for the past half-century. I had occasion to speak at length with Judge Rosemary Denson ten years earlier when another ñscandalò broke involving a former Coast Guard Chief Administrative Law Judge. Two of the ALJs at the Congressional hearing presided over hearings I had attended. A third ALJ, who was not present, stands accused of ñ***always ruling in favor of the Coast Guard***ò in order to keep his job. Just imagine the implications of that phrase!

Congressman Cummings clearly was not pleased with what he heard. This was reflected in April 2008 in Title X of HR-2830 that proposed to transfer many of the functions of the Administrative Law system from the Coast Guard to the National Transportation Safety Board ï an independent Federal agency. Although HR-2830 passed the House of Representatives by a resounding vote of 395 to 7, the bill never became law. Later, we learned that Congress engaged the Government Accountability Office (GAO) to make further inquiries into the ALJ system and submitted a number of our records to that agency. The Coast Guardôs ñMarine Safetyò mission, that in effect governs the entire U.S. Merchant Marine, includes ñInvestigationsò and the ñALJ Systemò as major components of that mission.

Investigations

In 2008, the Department of Homeland Security, Office of the Inspector General, created a landmark report (OIG-08-51) that pointed to many failures of Coast Guard ñinvestigations.ò These failures went all the way back to 1994 and are all reported in the #R-429 series of reports on our internet website. Shortly thereafter, the same office evaluated the Coast Guardôs ñinvestigatorsò response to the COSCO BUSAN accident and pointed out that 5 of the 6 Coast Guard ñinvestigatorsò assigned to the case ***were not even minimally qualified as investigators***. Shortly after that revelation, the Department of Homeland Security, parent agency of the Coast Guard, transferred the persons who made these revelations to other areas so that they would not further embarrass the Coast Guard.

Federal District Court Bundles the DRESSER and ROGERS Cases

At the time of the Congressional Hearings, DRESSER filed a lawsuit against the Coast Guard in Federal District Court in New Orleans. In fact, ñon advice of counsel, neither Commandant Thad Allen nor Chief Administrative Law Judge Joseph Ingolia even attended the Congressional hearing. Shortly thereafter Captain Murray Rogers, a member of our Association, filed a separate lawsuit in the same Federal District Court naming many of the same people including the Commandant Thad Allen, Chief Administrative Law Judge Joseph Ingolia, and members of both of their legal staffs as defendants. ***The two cases were very different, although the plaintiffs filed separate cases against the same group of Coast Guard office holders***. Consequently, the court ñbundledò the two cases together and treated them as one. The Coast Guard was defended by an Assistant United States Attorney for the Eastern District of Louisiana. ROGERS and DRESSER paid their own attorneys.

The Rogers Case

Three years before the Congressional hearing, the Complaint ñé alleges that between June 20-22, 2004 (Captain Murray R. Rogers) while serving as Master of the M/V Bailey Ann (O/N 560994) wrongfully absented himself from the wheelhouse of the vessel and engaged an unlicensed individual to direct and control the vessel in violation of ***46 CFR §15.401***.ò

Based on the same set of factual evidence, the Coast Guard first offered to settle the offense by issuing Captain Rogers a ñLetter of Warning.ò This was later confirmed as Judge Smith would write: ñI note that a prior investigating officer, LCDR ■, testified that the Coast Guard agreed a letter of warning was an appropriate sanction in this case. However, Captain Rogers for good reasons disclosed to me, refused to accept a ñLetter of Warningò because firmly believed that he, as pilot of a towing vessel, had dealt with a complex situation that confronted him the best way he knew how to under the circumstances. It was for this reason that I immediately urged Captain Rogers to make an appointment with the Marine Safety Officeôs Commanding Officer.

Under conditions that exist in the towing industry, every towboat officer comes face to face with similar problem, is left on his own to solve them and with very little to work with including any regulatory references to cite. So, I believe our mariners would be well advised to draw upon the unfortunate results of Murrayôs experience.

At this point, letôs examine ***46 CFR §15.401***, an important regulation in this case.

Subpart C – Manning Requirements; All Vessels

46 CFR §15.401 Employment and service within restrictions of license or document.

A person may not employ or engage an individual, and an individual may not serve, in a position in which an individual is required by law or regulation to hold a license, certificate of registry, or merchant mariner's document, unless the individual holds a valid license, certificate of registry, or merchant mariner's document, as appropriate, authorizing service in the capacity in which the individual is engaged or employed and the individual serves within any restrictions placed on the license, certificate of registry, or merchant mariner's document.
[CGD 81–059, 54 FR 149, Jan. 4, 1989]

This regulation was in place, and unchanged since Jan. 4, 1989. It ***appears*** to hold ***both the "employer" (i.e., the boat owner) and the "employee***ò responsible for not ñemploying or engagingò ***unlicensed*** employees to perform a task that should be performed by a ***licensed*** mariner. We ask:

1) Why was the entire thrust of the Coast Guard punishment aimed at Captain Murray Rogers?
2) Why didnôt the Coast Guard hold the employer accountable for allowing his towing vessel to continue to sail without furnishing a second licensed officer?
3) Why has the Coast Guard allowed this case to drag on for over 5 years at tremendous expense to the taxpayers and, above all, to Captain Rogers?

Our answer to these questions is simple and straightforward: ñBecause they can!!!ò

Captain Rogers used the services of an employment agency to, for a fee, to find him a job. He accepted temporary employment as the ***Pilot*** (i.e., not Master) of the dilapidated[1] towboat M/V BAILEY ANN[2] and worked to bring it up to snuff with the limited resources available. *[[1]The vessel sank several weeks later after Captain Rogers left the vessel. [2]In our Report #R-350, Rev. 5, Issue (X) our Association formally asked Congress to examine and clarify certain specific existing statutes and international agreement regarding unlawfully charging mariners to obtain jobs.]*

Captain Rogers was a ñnew employee.ò He met the owner of the small company he worked for but knew little about the company except that it was a small company struggling to stay afloat. In my early conversations with Capt. Rogers, he showed great loyalty to his employer. During his tour of duty, the Master walked off the boat leaving him short-handed. He informed his company but they ***urged him to continue to operate the tow*** to help the company fulfill its obligations to its customers until the owner could locate a replacement. He made arrangements with the owner to send him a relief who would meet the vessel in Morgan City. In fact, the owner of the Company was waiting for him at the dock in Morgan City while the Coast Guard boarded and held the vessel mid-stream in the Atchafalaya River just below Morgan City.

The Coast Guard, using the evidence gathered at the boarding, first proposed a penalty of a ñLetter of Warningò ï but apparently never put the offer in writing. Thereafter, they upped their proposed penalty several times ï finally asking for outright suspension of his license for three months followed by a probationary period of three months, followed by a twenty-four month probationary period. In real terms, this would result in a loss of pay of approximately $36,000 and leave his license under a cloud where it could be revoked for the slightest infraction for the next two years.

Captain Rogers approached our Association for the first time in early July 2004 shortly after the boarding. I initially suggested that he accept the ñLetter of Warningò and be done with it. However, I also understood and respected some very significant reasons why he rejected the ñLetter of Warningñ and the effect it could (and ultimately did) have on his career. Based on this information and aware of his background as a former Coast Guard enlisted man, I urged him to make an appointment to discuss the matter with the Commanding Officer of the Morgan City Marine Safety Office and discuss all these issues with him.

I regret that this turned out to be ***very bad advice***. Since, as Secretary of our Association and previously as owner or manager of several boat companies both in Louisiana and New York, I never had a problem speaking or visiting any Commanding Officer or OCMI. I ***assumed*** that Captain Rogers, as a licensed towing vessel officer, would be granted an appointment. Well, I ***assumed*** incorrectly. At that time, there was a ñChange of Commandò underway in Morgan City. Apparently, neither Commanding Officer was interested in speaking with Captain Rogers ***OR*** the ñinvestigatorsò decided on their own that their Commanding Officer could not be bothered by a lowly towboat Captain who was a former Coast Guard enlisted man. In any event, Rogers was never allowed to see the top man.

[NMA Comment: The matter could and should have been settled then and there. What value is a senior

Coast Guard officer who manages more than 100 employees who refuses to step in and deal with an aggrieved member of the public. Either of these two senior officer's failure to address this "local" problem allowed it to become a larger "national" problem that subsequently was mismanaged at Headquarters level.]

[NMA Comment: If the Administrative Law process is supposed to be "remedial" in nature, it was at this point where this issue should have been remediated. I had confidence gained through dealing with both of these senior officers that either one could have handled the situation well – even if it involved a stern verbal reprimand. Since neither officer stepped up to the plate, "punishment" became the foremost consideration for the investigators. This represented an abject failure of leadership at the highest level and a staff failure as well. Unfortunately, the Coast Guard seldom admits mistakes!]

After Captain Rogers made a number of futile attempts to speak with two Commanding Officers at the Morgan City Marine Safety Office, and before he sought legal counsel, he wrote several letters to the Coast Guard District Commander as well as to members of Congress. ***These letters clearly infuriated the Coast Guard***. They literally became unglued!

The Coast Guard supervising investigator brought the case before Administrative Law Judge Jeffie J. Massey in October 2004. Several hearings were held and Judge Massey dismissed the case on March 25, 2005 ñwith prejudice.ò The reasons for dismissing the case were clearly stated in her Decision and Order issued on March 25, 2005 based upon the ***Coast Guard's failure to comply with her subpoenas.***

[NMA Comment: The case should have ended then and there when Judge Massey dismissed it. However, the Coast Guard decided to appeal Judge Massey's decision turning a very minor incident into a problem that ultimately would question the integrity of the Coast Guard's entire Administrative Law system, the Commandant, the Vice Commandant, the Chief Administrative Law Judge and their staffs and culminate in a Congressional hearing.]

The Coast Guard's Ability to Appeal an ALJ's Ruling

We will turn the clock back to 2001. In a petition our Association filed on July 16, **2001** ï long before we ever heard of Captain Murray Rogers ï we formally petitioned to Coast Guard to reconsider the provisions of 33 CFR §20.1001, a recent rulemaking that came into effect in 1999.(1) ***That new rule allowed the Coast Guard to appeal a decision made by an Administrative Law Judge***. Until then, the Coast Guard did not have the ability to go after a mariner if they failed to convince their own ALJ of the merits of their case. The effect of this regulation is to make it virtually impossible for a mariner to ever escape from the Administrative Law system and for cases to drag on endlessly until the mariner is bankrupt or broken.

Our Association first encountered the unfairness of this new rule as it applied to the ñCaptain Kenò case that we described in detail in our Report #R-315-C. Before the Coast Guard changed the rules, they could only take ñone shotò at our mariners. If the Coast Guard, with all of its overwhelming assets was unable to get its act together to present before the Administrative Law Judge (who is on their payroll) the first time, they now would be able to try and try again until they finally overwhelmed the mariner. There is no limit as to how long or how many times this process can be repeated.

The Coast Guard has all the advantages from the very beginning. They write the regulations, train and pay their ñinvestigatorsò to uncover factual evidence, prepare the case, often provide the courtroom, pay the judgesô salaries, pay the court reporter (and charge mariners hundreds of dollars for the transcript of the hearing), and open the door to all sorts of legal support ï all paid for by the taxpayers in the name of ñMarine Safety.ò However, after arming their investigators to prosecute the case, there are no provisions to pay the costs for an attorney to defend the mariner who has no idea what awaits him.

In any event, we filed our protest in July 16, **2001**. This petition, along with several others, was mishandled ï for which the Vice Commandant apologized to us in writing many months later. Then, we received a denial three years later on July 13, **2004**. This is only one of many reasons why we lack confidence in the Coast Guard ñappealsò process.(1) *[(1) For additional reasons, refer to our Report #R-436, Rev. 2.]*

The Coast Guard "Remands" the Rogers Case

The Coast Guard appealed Judge Masseyôs decision in a 32 page brief. Almost four years later, on April 30, 2008, Vice Admiral V.S. Crea issued a Vice-Commandantôs Decision on Appeal that remanded the case to a

different Administrative Law Judge for a new hearing. By this time, the decision reached by the Vice Commandant was much more about discrediting Judge Massey than it was about Captain Rogers. Judge Massey, an Administrative Law Judge with considerable ALJ experience in other Federal agencies, leveled damning criticism of the Coast Guardôs administrative law system that reached the pages of the Baltimore Sun. As a courtroom observer, I watched this story play out. Even though I have written about the system, as an American citizen and student and teacher of American history, I start out with a deep respect for the court system and the judges. Not being a lawyer, I cannot ñevaluateò a judge ï but I can read transcripts written in plain English.

The Coast Guard ALJ System Suffers From Serious Gender Issues

After careful consideration, I believe that Judge Massey seldom received the respect that her position deserved from Coast Guard officials. In response to an inquiry, on Oct. 22, 2008 I directed the Government Accountability Office auditors to two trial transcripts. ***It is impossible for our mariners to respect the ALJ system when Coast Guard officials abuse one of their own judges in public.***

I recommended that that the GAO obtain the full *transcript* of the Coast Guard hearing held in Lafayette, LA, on Aug. 26, 2005 in U.S. Coast Guard vs. Roy Paul Boudreaux, Docket # CG S&R 05-0016, CG Case #2078998. Our Association had no role in that case although both my wife and I attended the hearing in the Federal district courtroom in Lafayette, LA, since it dealt with a well-publicized fatal accident involving a towing vessel officer on the Intracoastal Waterway. Our Association did not obtain a copy of the transcript ï but two of our Directors were there in person! Judge Masseyôs decision to throw out the ROGERS case provides a similar example.

In conversations and paperwork in my files stretching over a decade, it is clear that the Coast Guardôs ALJ system has a serious ñgenderò issue with its female Administrative Law Judges. It is noteworthy that Congressman Cummings called upon the only two former female ALJs it had to appear in its hearing. ***My lasting impression from this hearing is that the ALJ system is a "good old boy" system that must prove its value to the Coast Guard by its astoundingly high conviction rate***.

While the ALJ system may do an impressive job of chasing drug abusers off the water, it appears determined to win every case no matter what it costs or how badly it tramples over our mariners. In cases like ROGERS, KINNEARY, SHINE, and DRESSER the Coast Guard has been willing to bulldoze mountains from anthills and destroy mariners who may be guilty of even the most minor infractions. ***In ROGERS, there was no accident; there was no injury***.

Almost 4½ years after the original complaint and many thousands of dollars in legal fees later, Murray Rogers appeared on ñremandò in a borrowed courtroom in Houma, Louisiana, before Judge Bruce T. Smith. The hearing, at which no fewer than 10 uniformed Coast Guard officers were in attendance, lasted for the better part of two days and produced some very interesting testimony.

Essentially, the Coast Guard alleged that Captain Rogers allowed or directed an unlicensed mariner to steer, operate, or control the M/V BAILEY ANN. However, no evidence was collected or presented that he ever violated the 12-hour rule. In his decision, Judge Smith cited a previous Commandant decision on appeal (CDOA)[(1)] that stated in part: ñIf the circumstances are such that an unlicensed crewmember can temporarily steer the vessel without any appreciable risk to its safe navigation, then the licensed operator may momentarily leave the wheelhouse (after giving appropriate instructions to the crewman) and still maintain `actual direction and control.ô Thus, where the course is straight, the visibility good, and the traffic sparse, the licensed operator might allow an unlicensed mate to take the wheel for training purposes. And where the ***proven navigational competence of the crewmember*** is high, the licensed operator might ***briefly leave the wheelhouse*** and still maintain actual control of the vessel.ò *[**Emphasis** is ours. [(1)]CDOA 2058 (Sears) (1976).]*

[NMA Comment: We point out that the "two-watch" system makes absolutely no provision for answering "calls of nature." Few towing vessels have a marine sanitation device in the pilothouse. This shortcoming also indicates the industry's and failure to recruit female towing vessel officers. We suggest that the Coast Guard address this issue in its new towing vessel inspection regulations.]

In his decision, Judge Smith stated that the Commandant had previously held that a licensed operatorôs temporary absence from the wheelhouse of a towing vessel is not, in every case, an absolute violation. The mere absence of the licensed operator might not constitute relinquishment of ñactual direction and controlò over the vessel.[(1)] *[[(1)] CDOA 2566 (Williams) (1995).]*

Taken together with a third CDOA, the precedents ñsuggest that it is incumbent upon the Coast Guard to prove

more than the mere absence of the licensed operator from the wheelhouse. The Coast Guard must prove the circumstances attendant to that absence in order to prove a violation contemplated by 46 CFR §15.401.ò

"Sailing Short"

Judge Smith correctly pointed out that ñAt no time between June 20, 2004 and June 22, 2004 or thereafter, did Murray Randall Rogers file a ñReport of Sailing Shortò with any appropriate agency per the dictates of 46 CFR §15.725.ò

46 CFR §15.725 Sailing short.

Whenever a vessel is deprived of the service of a member of its complement, and the master or person in charge is unable to find appropriate licensed or documented personnel to man the vessel, the master or person in charge may proceed on the voyage, having determined the vessel is sufficiently manned for the voyage. ***A report of sailing short must be filed in writing with the Officer in Charge, Marine Inspection (OCMI) having cognizance for inspection in the area in which the vessel is operating, or the OCMI within whose jurisdiction the voyage is completed***. The report must explain the cause of each deficiency and be submitted within twelve hours after arrival at the next port. The actions of the master or person in charge in such instances are subject to review and it must be shown the vacancy was not due to the consent, fault or collusion of the master or other individuals specified in 46 U.S. Code §8101(e). A ***civil penalty*** may be assessed against the master or person in charge for failure to submit the report.

We present this regulation, which is either unknown or simply not observed by most of our mariners, to illustrate what a Master is expected to do in similar circumstances. The Master bears the burden for making this report. Judge Smith later stated that ñé it is apparent that (Rogers) was caught in an unfortunate set of circumstances, probably occasioned by his employer. His response to the Coast Guardôs investigation appears, from admitted evidence, to have been forthright, reasonable, and cooperative.ò

Justice Delayed is Justice Denied

Keeping this case in limbo for almost 4½ years also wreaked havoc on the Coast Guard's case. The Coast Guardôs case, such as it was, was based almost entirely on the testimony of a junior marine safety investigator who boarded the M/V BAILEY ANN to make the initial investigation. The investigator made no handwritten notes of his investigation and, 4½ years later, was forced to testify almost exclusively from memory. Nor did the investigator bother to examine the vesselôs logbook to build the case to determine the number of hours the vessel had been in operation. At the hearing, he was unable to recall the vesselôs point of origin, its destination, or manning level. Nor could he recall the prevailing vessel traffic conditions, the weather, the number of barges the vessel had in tow, or even the identity of the Coastguardsmen who accompanied him on the boarding. The ten or so Coast Guard officers in attendance were unable to offer him any meaningful assistance. At the time of the boarding, the officer was relatively new and inexperienced. I have known this officer for at least the past two or three years and am confident that he is a good Coast Guard officer who, perhaps, in retrospect, either was not sufficiently prepared to execute this particular boarding or has allowed admittedly insignificant details to fade from his memory over the years. I would be terribly upset to learn that this unfortunate episode blown out of proportion would damage his career as a Coast Guard officer. During his boarding, the investigator spoke with the deckhand but never recorded that conversation nor met with both the deckhand and Captain Rogers together.

What should we expect of Coast Guard investigators? The Coast Guard does have a school that trains investigators. However, this apparently is the type of job that does not offer the type of advancements that appeal to many young Coast Guard officers. This is borne out in two longstanding government reports available on our website as Reports #R-429-A, Rev. 1 and #R-429-B, Rev. 1. More recent was testimony before the House Transportation and Infrastructure on the COSCO BUSAN accident in San Francisco where the Department of Homeland Security found that 5 out of the 6 Coast Guard investigators assigned to the case did not even meet Coast Guard minimal requirements. In our report #R-429, Report to Congress: How Coast Guard Investigations Adversely Affect Lower Level Mariners, submitted to members of Congress almost a year before Congressman Cummingsô hearing reported our Associationôs profound dissatisfaction with the investigations process. We submitted over 15 volumes of material to the Inspector Generalôs office to support our views.

The deckhand provided a written statement that read in pertinent part: ñI helped Mr. Murry steer vessel on the dates of 06-20-04 through 6-22-04, no rotation just held wheel when Mr. Murry was tired the longest at wheel was 6 to 10 hrs.ò *[sic]*

Captain Rogers understood that his ñdeckhandò previously held a towing license and demonstrated to Rogersô satisfaction that he knew how to handle the tow. However, Judge Smith correctly pointed out that the deckhandôs ñhigh navigational competence was not ***proven***.ò In any event, the Coast Guard for reasons only they know never produced that deckhand to testify at the hearing.

[NMA Comment: We suggest that towing vessel officers no longer use unlicensed deckhands but only use certificated Apprentice Mates/Steersmen who are qualified to train in the pilothouse to hold the wheel. The 2007 M/V MEL OLIVER oil spill incident clearly shows that a properly licensed mate/pilot or master must be physically present in the pilothouse whenever the vessel is underway.]

The judge noted that investigatorôs memory of his conversation with the deckhand differed in certain respects from the written version in evidence. The investigator was unable to recall what hours or days Captain Rogers allowed him to run the vessel. Captain Rogers told me that the investigator had lied under oath. At this point, Captain Rogersô attorney objected to the Coast Guardôs ñinadequate discovery response.ò The judge sustained the objection and ***discounted the investigator's entire oral testimony***. Essentially, the Coast Guard failed to prove its case with its lone eyewitness.

As an observer, I noted that the Coast Guard did not present the deckhand who could have provided many of the answers the investigator could not recall. Captain Rogers did not have the opportunity to confront the one person whose written document was the center of the whole case. As an observer, it was never clear to me why the Coast Guard did not produce this man to tell everything he remembered about this incident. It was evident that the written statement quoted above would not, by itself, prove the charges.

As previously mentioned, ***before Captain Rogers hired an attorney to defend him***, he wrote several letters to Coast Guard officials and to members of Congress in an attempt to defend his actions, and, as well in frustration because he was never allowed to speak with the Commanding Officer of the Morgan City Marine Safety Office as we urged him to do. This especially bothers me because neither of the unitôs two Commanding Officers would grant him an appointment. Whether the blame falls on these officers or on the investigators is uncertain, but this action needlessly cost both the government and Captain Rogers ***tens of thousands of dollars*** and helped to destroy his career in the marine industry.

Captain Rogersô attorney, objected to the Coast Guardôs presenting these letters and using them as ñadmissionsò of guilt. Judge Smith, however, held that through complex legal reasoning that ñé although (they) may have been made during the pendency of an investigation, neither (letter) was apparently made in direct response to an investigatorôs questioning or investigation techniques. Indeed, both appear to be entirely voluntary statements made by (Rogers) outside of the course of an investigation and to persons other than Coast Guard investigators. Hence, the exclusionary rules set forth in 33 CFR §20.1311 and 46 CFR §5.101(b) are inapplicableé .ò

[NMA Comment: Our advice to our mariners remains simple and constant: "NEVER speak with any Coast Guard investigator unless you *first* have the advice of a lawyer." This extends to writing or signing anything. There is no way that our mariners can properly apply the Coast Guard complicated regulations in 33 CFR Part 20 and 46 CFR Part 5 (among others) and have insight into the mountains of case law without the help of a good *Admiralty* lawyer." If you hold a Coast Guard license, you must plan ahead and arrange to have a lawyer before you need one. Please refer to our Report #R-342. Rev.5. License Defense Insurance; Income Protection Insurance and Civil Legal Defense.]

[NMA Comment: Unfortunately for mariners, many good lawyers will refuse to represent you at an ALJ hearing. Word of the Coast Guard's "40-to-1 success rate" was well known before Congressman Cummings' ALJ hearing on July 31, 2007. In our Report #R-429-K refer to the statement of William Hewig, Esq. in his Congressional testimony.]

ALJ hearings have become a ***circus sideshow*** where numbers of Coast Guard officers congregate in the courtroom to watch the show. It is easy to do when the courtroom is at the Marine Safety Office as Judge Massey graphically described it in her oral testimony before Congressman Cummingsô hearing on July 31, 2007. Her oral testimony before Congress about this matter appears in our Newsletter #53.

In ROGERS, the hearing was held in Houma, 35 miles away from the Marine Safety Office. My informal estimate of the dollar value of what I consider as Coast Guard officers ñwasted timeò attending this two-day

sideshow as the ñcheering sectionò held in Houma exceeded $5,000. My simple question is ñ***Don't these officials have something better to do***?ò

Wouldnôt it be less expensive for the Coast Guard to hire a trained lawyer, not a young Lieutenant, to present the Coast Guardôs case. A trained lawyer might have the discretion not to try such a minor case. Of course, by the time this case reached Judge Smith in December 2008, it had very little to do with Captain Rogers. It was now a case of national importance. If the Coast Guard was able to discredit ROGERS, this might just rescue the Commandant, the Chief ALJ, and their staff whose case (Ingolia v. DRESSER/ ROGERS/ ELSIK) had advanced to the Fifth Circuit Court of Appeals in New Orleans. Throw the book at ROGERS ï to save the Commandant! Suddenly, this case was very important and rated a full-fledged Coast Guard cheering section.

And why canôt the government pay another lawyer to help defend the mariner? It might also be ñfairò to our mariners as well ï but thatôs not how the Coast Guard wrote their rules. As we reported in our Newsletter #54, Judge Bruce T. Smith has asked several law schools to provide law students to assist mariners to prepare their cases. Our Association appreciates these actions and several of our members, who are successful attorneys in private practice applaud his efforts. It is painfully obvious that our mariners need any assistance they can get ï including good legal advice.

"Remedial in Nature"

Any punishment handed out by the Coast Guard is supposed to be ñremedialò in nature. What a crock!

In a number of cases our Association has covered in ***our Reports #R-315-C and #R-429-L*** the Coast Guard appears to have twisted the meaning of the word to an extent that is almost beyond belief. In the DRESSER, ROGERS, and SHINE cases that have dragged on for years, lawyers tried to move these cases from the Coast Guard dominated ALJ system into Federal District Court. The Coast Guard simply will not give up and keeps remanding the cases back to the ALJ system where they can drain the mariner financially as well as mentally. This has to stop!

Our mariners are working people. If the fact that ROGERS has been hanging fire for ***4½ years*** with no real evidence appears out of line, what about DRESSER? Dresser has been deprived of his license for ***11 years***. What about SHINE, a Merchant Marine Academy engineering graduate whose career and reputation were ruined forever. After reviewing over a thousand pages of ALJ transcripts, his hearing ordered by the Vice Commandant was a travesty. He has been ***deprived of his license for six years***. Our Association filed a formal complaint with the Coast Guardôs Vice Commandant citing all sorts of irregularities only to find that the Vice Commandant isnôt even a lawyer ï but has a great staff that does her thinking for her. All she had to do is sign their finished product!

Framing the Case

During the course of the hearing, Judge Smith made a statement to the effect that ñall of you know more about this case than I do.ò It was far from a statement of ignorance, but rather one of wisdom ï and, above all, it is true. The judge can only know the facts that are presented to him by both sides to any controversy. The idea that I could know more about the case than he did was intriguing. I have followed the case carefully since June or July 2004. I am not a lawyer and do not have the years of training in applying statute, regulation and previous case law to a situation like this. It is the ability to weigh all these factors that we must respect in a judge.

In reviewing Captain Rogersô letters that played an important role in determining his guilt, Judge Smith wrote: ñ***Both documents reflect a mariner who clearly did not display a dangerous, cavalier, or scofflaw attitude. Quite the contrary: (Rogers) appears to be a thoughtful, conscientious, and able mariner who almost immediately accepted personal responsibility for his actions….(he) did lawfully have a mariner's license which had never been the subject of previous disciplinary action. Nor did the Coast Guard present any evidence to suggest (that he) has been the subject of any other disciplinary action before or since the onset of this case….it appears that despite the filings of several sets of increasingly severe charges against him, he remained honest, reflective, and insightful about the real world economic conditions that forced him to "sail short" on the dates alleged***.ò

ROGERS: Decision and Order

"It is hereby ordered that all elements of the Complaint filed against respondent Murray Randall Rogers are found proved. It is further ordered that, in accordance with 46 CFR §5.19(b), the undersigned notifies Respondent that he is admonished to hereafter observe the requirements of 46 CFR §15.401. This admonition will be made a matter of official record. Please take notice that issuance of this Decision and Order serves as the partiesô right to appeal under 33 CFR Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

The penalty or sanction was the least possible and equivalent to the initial ñLetter of Warningò offer that was subsequently jacked up to the point where Judge Massey rejected it. A verbal reprimand by the Commanding Officer of MSO Morgan City for making a flawed judgment call would have achieved the same ends 4½ years earlier. It would not have cost the mariner his career.

It is still not over…

The fact that the Coast Guard is allowed to drag out our marinersô cases with continual ñremandsò is absolutely inexcusable. The ROGERS case is only the latest example. The only way to change the system is to convince Congress that change is necessary. ***Is this really the way that Congress intends to allow the Coast Guard to continue to "superintend" our mariners as part of their Marine Safety mission?*** This is an open question that attracted the attention of Congress largely through the decade-long efforts of attorney J. Mac Morgan ï a lawyer who rose through the ranks as a towboat Captain to become a ñheavy towò pilot on the western rivers before he turned to law.

The lawsuits filed against Coast Guard Commandant Thad Allen, Chief ALJ Joseph Ingolia, and members of their respective legal staffs are still being pursued in Federal District Court in New Orleans. However, instead of paying any attention whatsoever to the problems our mariners face in dealing with the Coast Guardôs version of ñJustice,ò the U.S. Department of Justice simply locks on to defending the rogue actions of a government agency no matter how indefensible they may be. It doesnôt appear as if they have any interest in mariners at all ï not only in the cases presented in the ñJustice Handbook: but in other areas such as punishing a major corporation for failing to report 44 accidents serious enough for the injured parties to hire attorneys and file lawsuits.