TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Sterling Fuels Limited v. Canada (Minister of Transport),* 2022 TATCE 13 (Review)

TATC File No.: MO-0524-37

Sector: Marine

BETWEEN:

Sterling Fuels Limited, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on August 25-26, 2021

Before: Jim Parsons, Member

Rendered: March 14, 2022

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Sterling Fuels Limited, violated subparagraph 38(1)(b)(ii) of the *Vessel Pollution and Dangerous Chemicals Regulations*. The monetary penalty is reduced to the minimum of $1,250.

The total amount of $1,250 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

[1] On September 12, 2018, the Minister of Transport (Minister) issued a Notice of Violation (Notice) to Sterling Fuels Limited (Sterling Fuels), as the authorized representative of the vessel *Sterling Energy*, pursuant to section 229 of the *Canada Shipping Act, 2001 (CSA 2001)*. Schedule A to the Notice stated:

> On or about April 25th, 2018, at or near pier 12 in Hamilton Harbour in the Province of Ontario, Chief Officer SEAN BRERETON, of the Canadian registered vessel STERLING ENERGY, Official Number: 307300, being the supervisor of a transfer operation during the unloading of oil in bulk, failed to comply with the duties of supervisors of transfer operations – vessels, contrary to Subsection 38(1) of the Vessel Pollution and Dangerous Chemicals Regulations …. [regulations]
>
> In particular, SEAN BRERETON failed to ensure the reduction of rates of flow and pressures, where required to avoid an overflow of oil into Hamilton harbor, from the marine gas oil tank of the Canadian registered vessel MV. FLORENCE SPIRIT, Official number 839979, thereby contravening subparagraph 38(1)(b)(ii) of the [regulations].
>
> Pursuant to Subsection 238(2) of the Canada Shipping Act, 2001, STERLING FUELS LIMITED, being the authorized representative of the vessel STERLING ENERGY is being proceeded against as the employer or principal of SEAN BRERETON, in respect of this violation, and is liable to pay the Administrative Monetary Penalty according to item 46 of Part 13 of the Schedule to the Administrative Monetary Penalties and Notices (CSA 2001) Regulations ….

[2] The Notice indicated a total penalty of $6,000.

[3] On October 24, 2018, McAsphalt Marine Transportation Limited, as the technical operators of the vessel *Sterling Energy*, and on behalf of owners Sterling Fuels, requested a review of this Notice.

II. ANALYSIS

A. Issue

[4] The issue to be determined is whether Sterling Fuels contravened subparagraph 38(1)(b)(ii) of the *Vessel Pollution and Dangerous Chemicals Regulations.*

[5] The three elements to prove in this case are:

- the date, time and place of the alleged contravention;
- that Mr. Sean Brereton was the supervisor of a transfer operation on the vessel; and
- that Mr. Brereton failed to ensure the transfer procedures were established with the concurrence of the supervisor of the transfer operation on board the other vessel with respect to the reduction of rates of flow and pressures, where required to avoid an overflow of oil.

B. Legal framework

[6] Paragraph 229(1)(b) of the *CSA 2001* states that if the Minister has reasonable grounds to believe that a person or a vessel has committed a violation, the Minister may issue a notice of violation.

[7] The Minister alleged that Sterling Fuels (as the authorized representative of the vessel *Sterling Energy*, and employer of the chief officer of the vessel), contravened subparagraph 38(1)(b)(ii) of the *Vessel Pollution and Dangerous Chemicals Regulations*, which states in part:

> **Duties of supervisors of transfer operations — vessels**
>
> **38(1)** The supervisor of a transfer operation on board a vessel must ensure that
>
> […]
>
> **(b)** transfer procedures are established with the concurrence of the supervisor of the transfer operation at the handling facility or on board the other vessel, as the case may be, with respect to
>
> […]
>
> **(ii)** the reduction of rates of flow and pressures, where required to avoid an overflow of the tanks,

[8] The Minister brought the charge against Sterling Fuels, pursuant to subsection 238(2) of the *CSA 2001*, which states:

> **Vicarious liability — acts of employees and agents**
>
> **238(2)** A person or vessel is liable for a violation that is committed by an employee or agent of the person or vessel acting in the course of the employee's employment or within the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.

C. Did Sterling Fuels contravene subparagraph 38(1)(b)(ii) of the *Vessel Pollution and Dangerous Chemicals Regulations*?

[9] The Minister argued that the applicant did not ensure concurrence between supervisors of the transfer procedures where the reduction of rates of flow and pressure were concerned, to prevent an overflow.

[10] The applicant argued that the Minister did not prove the absence of concurrence with respect to the reduction of rates of flow and pressure. The applicant also argued that the provision in question did not apply, as concurrence was not required in the circumstances.

[11] The Minister's representative submitted an agreed statement of facts (Exhibit M-1), setting out the following:

- At approximately 09:51 on April 25, 2018, at Pier 12, Hamilton Harbour, Ontario, the *Sterling Energy* arrived alongside the port side of the *Florence Spirit* to carry out a fuel transfer operation (paras. 1 & 2).

- *Florence Spirit* was to receive 34.04 MT (metric tonnes) of MGO[1], of which the first 25 cubic metres was to go into tank #2P to fill it to 85% capacity. The remaining MGO would be transferred to tank #C (para. 3).
- Mr. Brereton, chief officer of the *Sterling Energy* was one of the supervisors of the transfer operation. Mr. Brereton conducted a pre-transfer meeting with the supervisor of the receiving vessel, and signed Sterling Fuels' Oil Transfer Checklist (para. 4).
- Approximately 19 minutes after the commencement of the MGO transfer, an overflow of tank #2P occurred, spilling approximately 50 litres of oil on deck and a small quantity overboard into the Hamilton Harbour (para. 6).
- The overflow was caused by[2] a miscalculation by Sean Brereton of the quantity of MGO to be transferred when converting metres cubed to metric tonnes (para. 8).

[12] Exhibit 2 in Exhibit M-1[3] (Oil Transfer Checklist), was signed and dated by Mr. Brereton as the officer in charge of the fuel transfer operation on April 25, 2018.

[13] Based on the agreed statement of facts, I find that the Minister has proven the date, time and place of the alleged contravention, and that Mr. Brereton was the supervisor of a transfer operation on the vessel.

D. Was there concurrence as to the reduction of rates of flow and pressure?

[14] The Minister introduced Captain Rajeev Yadav as an expert witness. The applicant objected; however, I allowed the witness to be qualified as an expert in light of his considerable experience supervising liquid cargo and fuel transfer operations. Although he did not have experience in refueling another ship on the Great Lakes, the transfer of liquid cargo has numerous, commonly recognized and accepted operational requirements and best practices.

[15] Exhibit M-1, Exhibit 2 is the transfer checklist that was signed by Mr. Brereton as well as the other supervisor. The AM portion of the checklist with respect to the MDO does capture the maximum flow (100 but no units) and pressure (60 ↓ but no units) for the transfer of MGO, and notes a stop of MGO at 25 M3 to switch tanks; however, it does not specifically identify any reductions in transfer rates or pressures required to avoid an overflow of tanks. Further, the exhibit does not identify the time, other than AM, that the checklist was completed. The amount of time between completion of the checklist and commencement of transfer is important, as conditions may change with passing time.

[16] Further, the AM portion of the checklist is void of any comments in the Remarks column, namely item 15 which states "[h]as vessel been instructed to inform tanker of

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[1] Exhibit M-1 refers to MGO (marine gas oil), however Exhibit A-2 refers to MDO (marine diesel oil). These terms appear to be used interchangeably within the exhibits (even within the same exhibit).
[2] I note that Exhibit A-2 suggests several root causes of the overflow, in addition to the miscalculation.
[3] The applicant introduced Exhibit A-3, which is identical to the Minister's exhibit.

any changes that may affect fueling flow rate and conduit pressure?". While item 15 is initialed by the officer in charge of the delivery vessel, it is not initialed by the officer of the receiving vessel. Also, it is not clear as to who is instructing which vessel and which one is the tanker, as the tanker is not specified at the bottom of the form next to the signature.

[17] From exhibits A-1 (Picture of Refueling Computer taken by Mr. Ryan Welch [in] early August 2021) and A-3 (Oil transfer checklist dated April 25, 2018), it appears that the transferred rate was 100 TPH (tons per hour). Although important information, namely the specific unit for the flow rate, is lacking in item 19 of the AM checklist (Exhibit M-1, Exhibit 2) to confirm that the transfer rate of 100 TPH was to be used for the fuel transfer, the fact that it is noted in the PM checklist leads me to believe, on a balance of probabilities, that the transfer rate was indeed meant to be 100 TPH.

[18] The agreed statement of facts indicates that the supervisors of the transfer did meet and sign the transfer checklist, however, no testimony was provided as to what was discussed during this meeting. The applicant argued that the Minister had no evidence to prove that the discussion of rates of flow and pressures did not take place, and that there was no regulatory requirement for the transfer procedures to be written down.

[19] Notwithstanding the above, it is common, accepted industry best practice that companies establish procedures, plans, and instructions for key shipboard operations and that they be documented in writing and updated accordingly. This was corroborated by the Minister's expert.

[20] I note the spill report/summary of incident, dated April 26, 2018 (Exhibit A-2), and specifically the root causes of the incident; these included "[i]nsufficient communication about ship stop amount to all on board the [*Sterling Energy*]". Further, the fuel transfer calculations were done by hand and calculator and not checked by anyone. I find that this supports the lack of concurrence.

[21] Therefore, while there may not be evidence of what was discussed during the meeting between the supervisors, based on the documentary evidence, and on a balance of probabilities, I'm not convinced that there was concurrence. I cannot ignore the fact that there was no comment indicated on the checklist that would demonstrate that the crew had turned their minds to the reduction of rates of flow and pressures, as required by the provision in question. I note the inclusion of other handwritten notes on the checklists, specifically in Exhibit M-1, Exhibit 2, section 20. The fact that there is no such note with regard to the rates of flows and pressures indicates to me that, on a balance of probabilities, it was not discussed or concurred.

[22] Having already found that it was more likely than not that 100 TPH was the transfer rate, it can be calculated that the time to transfer the incorrectly calculated amount of approximately 29 MT (as per Exhibit A-2,) would have been approximately 17.5 minutes, and it would have taken approximately 13 minutes to transfer a correctly calculated amount of 21.55 MT. This is corroborated by the time duration from the start of operations at about 10:46 to the time of overflow at about 11:05 (Exhibit M-1,

Agreement of Facts, paras. 5 & 6). In light of the short transfer time, still no written mention was made in the Remarks column of the transfer checklist related to the reduction of flows and rates. This further supports the finding that, on a balance of probabilities, there was no concurrence of the reduction of rates of flows required to avoid an overflow.

[23] Subparagraph 38(1)(b)(ii) of the regulations provides that the supervisor of a transfer operation on board a vessel must ensure that transfer procedures are established with the concurrence of the supervisor of the transfer operation on board the other vessel regarding the reduction of rates of flow and pressures, where required to avoid an overflow of the tanks.

[24] I find that, on a balance of probabilities, the Minister has proven that the applicant (the supervisor of a transfer operation on board a vessel) did not ensure that transfer procedures were established with the concurrence of the supervisor of the transfer operation on board the other vessel regarding the reduction of rates of flow and pressures.

E. Was concurrence "required" in these circumstances?

[25] The applicant argued that subparagraph 38(1)(b)(ii) of the regulations did not apply in these circumstances, as the concurrence of supervisors on the reduction of rates of flow and pressures is necessary only *where required* to avoid an overflow of the tanks.

[26] The applicant argued the point that the receiving fuel tanks are only filled to 85% capacity and thus the normal procedure for topping off tanks does not apply, meaning no reduction of rates was necessary. While no evidence was provided as to why 85% was the maximum, it was a maximum value that was not to be exceeded.

[27] Further, the applicant's witness testified that the *Sterling Energy* has an automated fuel transfer system. The amount of fuel to be transferred is entered into the program. The system automatically reduces its rate when there is 2 MT remaining, as per the setpoints shown in Exhibit A-1. Therefore, the applicant argued that the concurrence of rates was not required, as the computer system made the calculations.

[28] Exhibit A-1, a photograph taken by the applicant's witness, chief engineer Mr. Welch, in early August 2021, identifies setpoints. Mr. Welch testified that this computerized fuel transfer system was on board the vessel at the time of the incident. The setpoints indicate: target, total flow, remain to stop, top off flow, and top up flow. Target is the amount of fuel to transfer, total flow is the max flow rate, remain to stop is the amount of fuel remaining to transfer when the total flow rate will automatically reduce, top off flow is the flow rate for the remaining amount to stopping/completion. Top up flow was not explained by the applicant's witness. No evidence was put forward to explain why there was no reduction in flow rate from the total flow to top off flow, but it is evident that there was no reduction in flow rate. Normally this rate would be reduced to ensure stopping at the calculated level or amount.

[29] The Minister argued there was no evidence put forward to show the setpoints on the transfer system at the time of the incident on April 25, 2018, and that Mr. Welch was not on board the vessel when the incident occurred.

[30] Further, the Minister's witness said this concurrence on reduction of rates and flow should always happen and that it is always required.

[31] If filling to 85% was to ensure that tanks would not overflow, then 85% should have been treated the same as 100%, and the reduction of rates of flow and pressures ought to have been established for topping off at 85%. I find that regardless of whether the tank was being filled to 85%, or whether a computer system was doing the calculations, if there was a risk of overflow, the provision requires this concurrence.

[32] Although the Minister relied specifically on subparagraph 38(1)(b)(ii) in the Notice, I note that the charging provision is under subsection 38(1) of the regulations. Paragraph 38(1)(f) states that the supervisor of a transfer operation on board a vessel must ensure that the rate of flow is reduced when the tanks are being topped off.

[33] In light of the above, I find that the concurrence of the reduction of rates and flows was required. As a result, I find that on a balance of probabilities, the Minister has established that the violation occurred. Since a vessel is liable for a violation committed by an employee in the course of their employment, I find Sterling Fuels liable for the violation as per subsection 238(2) of the *CSA 2001*.

[34] During closing arguments, the applicant raised the issue that the other vessel, the *Florence Spirit*, was not charged in this incident; however, the Minister stated that the *Florence Spirit* was charged and paid the penalty.

[35] The applicant did not raise the defence of due diligence, so this defence has not been considered.

[36] I must also note, while not relevant to my determination on this matter, my concern about the various inconsistencies and potential for error demonstrated in the checklists and throughout the transfer process. For example, Exhibit A-1 used inputs of metric tonnes while Exhibit A-3, item 20, used cubic metres, which likely added to the incorrect mathematical function noted as a root cause in Exhibit A-2. There is also evidence of the omission of initials, times, and units for maximum flow on the oil transfer checklist in Exhibit A-3.

F. Amount of monetary penalty

[37] The topic of sanction was raised during the hearing. Both parties agreed with each other that the minimum penalty was $6,000; however, both parties subsequently realized their error and emailed the Tribunal with changes correcting their earlier views on the minimum amount. The range of penalties for a violation of subsection 38(1) of the regulations, as per item 46 of Part 13 of the schedule to the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations (AMPRs)*, is from a minimum of $1,250 to a maximum of $25,000.

[38] Contrary to the Minister's view during the hearing that the minimum penalty, if the contravention were to be upheld, would be appropriate in this case, in light of the circumstances and it being a first offence, the Minister still believed that the amount of $6,000 was appropriate.

[39] The applicant argued that the penalty should reflect the minimum amount, since it was a first offence and there was no evidence of aggravating conduct by Sterling Fuels.

[40] The monetary penalty of $6,000 assessed by the Minister is in accordance with the *AMPRs.* However, in light of the applicant's submissions, namely that it was a first offence and there was no evidence of aggravating conduct by Sterling Fuels, and that cleaning and recovery was started soon after and was completed that day as confirmed by para. 7 in the Agreement of Facts, the amount of the penalty is to be reduced to the minimum of $1,250.

III. DETERMINATION

[41] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Sterling Fuels Limited, violated subparagraph 38(1)(b)(ii) of the *Vessel Pollution and Dangerous Chemicals Regulations*. The monetary penalty is reduced to the minimum of $1,250.

[42] The total amount of $1,250 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

March 14, 2022

(Original signed)

Jim Parsons

Member

Appearances

For the Minister: Martin Forget

For the Applicant: Sam Rogers