Gulf Coast Mariners Association

P. O. Box 3589
Houma, LA 70361-3589
Phone: (985) 851-2134
Fax: (985) 879-3866
www.gulfcoastmariners.org

GCMA Report #R-370-C, Revision 2 (Series)
DATE: June 5, 2006

12-HOUR RULE VIOLATIONS: THE WINKLER CASE

TABLE OF CONTENTS

Your Voice Counts..1
Captain Winkler Contacts His Congressman 1
The GCMA "Yellow Book" is Born.................................2
GCMA Testifies Before LA Senate Labor Committee ...2
Capt. Winkler Files State "Whistle Blower" Lawsuit.......2
Coast Guard Ignores GCMA "Yellow Book"....................2
Captain Winkler's Appeal...3
Louisiana Revised Statute 23:967............................ 3
Coast Guard Buries the Work-Hour Abuse Issue in an Advisory Committee 4
Reforming Vessel Logbooks is One Step Toward Ending Mariner Work-Hour Abuse..............5

YOUR VOICE COUNTS

It is a fact of life for most "lower-level" mariners that the 12-hour rule has been routinely violated by many, but not all, employers. This was the case with Captain Thomas H. Winkler, a tug Captain with years of both inland and offshore experience.

Tom was a merchant seaman employed as an inland towboat captain aboard a vessel belonging to Coastal Towing, LLC, until Coastal laid him off on or about March 30, 2000. This layoff occurred after he refused to violate a federal statute[(1)] and associated Coast Guard safety regulations[(2)] and Coast Guard national policy[(3)] that limit the maximum hours he and his co-employee could work aboard the towing vessel in any consecutive 24-hour period. *[[(1)]46 USC §8104(b). [(2)]46 CFR §§15.705 and 15.710. [(3)]A federal 12-hour workday limit now appears in G-MOC Policy letter #04-00 Rev.1. We reprinted this policy letter as GCMA Report #R-258, Revision 2, available on our internet website.]*

The straw that broke the camel's back for Tom occurred during the night and morning of March 29, 30, 2000 after he had already worked more than 20 hours. Specifically, he refused an order from Coastal's customer to push a barge back to the rig in Lake Hermitage, LA. Tom's refusal to carry out these instructions was based on safety considerations. Dimply stated, he was too tired to get underway safely and pilot the boat safely at night. He was able to document the fact that his work schedule did not leave him sufficiently rested to get underway. Nevertheless, after he refused to do so, every two hours thereafter, he was awakened, harassed, and ordered to get underway. Finally, after the rig threatened his employer with pulling the boat off the job, Tom was relieved of his duties and told to take a month off. This, accompanied by its loss of wages, was unacceptable.

CAPTAIN WINKLER CONTACTS HIS CONGRESSMAN

Tom had tried his best to do his job, to satisfy his boss, and to work safely as reflected in a detailed statement of the incident. Now, after losing his job for refusing to work beyond the legal limit, and after reporting the problem to the Coast Guard Marine Safety Office in Morgan City, LA to no avail, he sought redress of his grievance in a letter to Congressman Billy Tauzin. This letter was plain, well-written, and to the point.

THE DISTRICT COMMANDER RESPONDS TO THE CONGRESSIONAL INQUIRY BUT TAKES NO ACTION

On April 20, 2000 Representative Billy Tauzin wrote to the Eighth District Commander, Rear Admiral Paul Pluta, asking about violations of the 12-hour rule and how often they occurred. It is both reasonable and necessary to gather factual information to give an intelligent answer to as detailed and specific a letter as Captain Winkler wrote.

Admiral Pluta responded on May 11, 2000 Admiral Pluta in a letter to Congressman Tauzin saying, in part: "Recently, my staff conducted an informal phone survey of a cross section of Eighth Coast Guard District Marine Safety Offices to get a feel for the volume of 12-hour rule complaints we receive. This survey indicated that (we) have received very few complaints involving mariners being forced to work more than 12 hours. However, when we receive such a complaint, it is aggressively investigated and appropriate action taken…"

After reading these words, Captain Tom Winkler felt the same frustration many mariners feel when dealing with a system that appears to be stacked against them.

Word of Admiral Pluta's letter struck GCMA's leadership like a bolt of lightning. It galvanized both the staff and members alike as a blatant example of the Coast Guard's lack of knowledge, interest, or concern for the problems our working mariners face.

However, upon careful reflection, the leadership of GCMA thought that Admiral Pluta had been mislead by his own subordinates and their lack of knowledge.

In retrospect, there probably are relatively few instances of mariners reporting work-hour violations to the Coast Guard because their fear admitting to breaking the law could cost them their license. They also fear losing their job if they complain as well as the widespread practice of "blackballing" – that would effectively end their career on the water.

Losing a career has far greater implications than losing a job with one employer. Few mariners are willing to put their jobs, their families, and their ability to earn a living in jeopardy by reporting that they violated work-hour regulations. Many fear that the Coast Guard will use such an admission against them – so low is their opinion of the Coast Guard's interest in handling their complaint in an even-handed manner and so lacking is their confidence in bureaucratic mysteries surrounding Coast Guard "justice" that they stay as far away as possible from this agency.

Most mariners understand that these work-hour abuses existed for years and that few individuals ever have succeeded in challenging them.

THE GCMA "YELLOW BOOK" IS BORN

GCMA's course of action was to send mariners into the field and obtain signed statements from other lower-level mariners in both the towing and offshore oil industries in southeast Louisiana. These written statements detailed the "12-hour rule" violations that mariners personally witnessed or were involved in. Within two weeks, our staff collected 57 signed statements that GCMA bound in a book titled Mariners Speak Out on Violations of the 12-Hour Work Day. GCMA told each mariner completing a statement that he might be called upon to testify in Court or before a public body as to the truth and content of that statement.

GCMA TESTIFIES BEFORE LOUISIANA SENATE LABOR COMMITTEE

The first mariner testimony was presented to a committee of the Louisiana Senate in May 2000 by a panel of three licensed mariners. The testimony was cogent, credible, and truthful. However, State Senator and boat-owner Lynn Dean, showed his unbridled contempt for our mariners. He used his position on the committee to harass our mariners and attempted to discredit their testimony by repeatedly interrupting them and making loud, obstructive, and abusive comments where he should have recused himself from the hearing. However, this would not be the last time GCMA would bring the issue of abusing work-hour statutes and regulations before a public body.

CAPTAIN WINKLER FILES STATE "WHISTLE BLOWER" LAWSUIT

At this point, in an independent action, Captain Tom Winkler contacted attorneys[(1)] and filed suit against his employer in the 17th Judicial District, Parish of Lafourche, State of Louisiana under a recently-enacted Louisiana whistle blower protection law rather than under the federal whistle blower statute[(2)] that is supposed to protect working mariners. *[[(1)]Attorneys Robert E. McKnight, Jr., Murphy & McKnight, LLC, 400 Lafayette St, #150, New Orleans, LA 70130 and Russell B. Ramsey, L'Hoste & Ramsey, same address. [(2)]GCMA supports improving existing federal whistle blower legislation. To do so effectively, we must supply sufficient evidence of work-hour abuses to Congress.]*

In Lafourche Parish, some maritime employers are in the habit of treating mariners as boat trash. For years, a yellow line of anti-union signs defaced communities along Bayou Lafourche for seventy miles. Captain Winkler's lawsuit appeared dead on arrival and, in fact, was subsequently dismissed.

When Tom threatened to "appeal" his case, even his friends were openly skeptical that he could find justice in Lafourche Parish and others doubted whether he could find it anywhere in Louisiana. For months, Tom's protests were little more than a babble of forlorn hope. Nevertheless, Tom's attorneys (as well as GCMA Directors) believed the case did have merit and devoted considerable time, energy, and talents to perfect their appeal.

Months and months of legal delays took their toll on Tom's health. Simply watching his health deteriorate as he moved from job to job was heartbreaking. The psychological toll was significant as his normally ebullient spirits slipped into depression.

COAST GUARD IGNORES GCMA "YELLOW BOOK" FOR THREE YEARS

In late May, reacting to Admiral Pluta's letter, GCMA published the first edition of the "Yellow Book" titled Mariners Speak Out on Violation of the 12-Hour Work Day. The problem of work-hour abuse may not be entirely an Eighth District phenomenon, but most of our mariners live and work in this district. Consequently, the target of the book was the Eighth District Commander, Admiral Paul Pluta.

Admiral Pluta stubbornly chose not to believe what was happening to the mariners in his district although Coast Guard under 46 U.S. C. §2103 is supposed to superintend the merchant marine. His overriding concern obviously was driven by his close association with the boat owners who were abusing mariners than it was with the mariners. Not a word came from Admiral Pluta or from his officers at District Headquarters about looking into the allegations of our 57 mariners.

The most obvious purpose of the book was to convince Admiral Pluta that his information from his own officers about the lack of reported violations of the 12-hour rule was flawed and that abuse of the rule was a serious problem for not just one but for at least 57 other randomly selected lower-level mariners.

After a suitable period passed, it was clear that Admiral Pluta either had not bothered to read the Yellow Book, or that violating the 12-hour rule was not-significant. Perhaps, in his position of authority, he had no connection to or sympathy with the plight of an overwhelming majority of the lower-level mariners in his District. There was no reaction to the book; no angry correspondence; no denials; just silence.

Ignoring the Yellow Book caused our mariners considerable frustration. With no reaction from District Headquarters in New Orleans, the next step was to move up the chain of command and approach RADM North, Assistant Commandant for Marine Safety and Environmental Protection and former Commander of the Eighth Coast Guard District. Certainly, our reports of the 12-hour rule and the fatigued condition of our mariners was a safety problem that could not be ignored.

GCMA received a polite note from Admiral North on behalf of himself and a number of his staff members (who also received copies of the book) thanking us for the book. Of much more interest, however, was the fact that Admiral North set his staff members to the task of reviewing the existing statutes and regulations, and attempting to clarify them in a "Policy Letter." The result was Coast Guard Policy Letter G-MOC #4-00. Although it did not change a word of existing regulations, GCMA believed the letter clearly separated the responsibilities of the Coast Guard, the employer, and the mariner in complying with existing laws and regulations. Consequently, GCMA mailed copies of the policy letter to more than 7,500 mariners at considerable expense to our Association in mid-September 2001.

GCMA also distributed copies of our Yellow Book to the Commandant of the Coast Guard and the Secretary of Transportation. We might as well have launched them on a one-way trip to the moon! We also distributed copies to members of three federal advisory committees, the Merchant Marine Personnel Advisory Committee (MERPAC), the Towing Safety Advisory Committee (TSAC), and the National Offshore Safety Advisory Committee (NOSAC). All told, GCMA distributed more than 300 copies of the Yellow Book.

If our mariners thought that employers in the Eighth District would honor the new Coast Guard policy letter, they were dashed. Trico Marine Operators, a large offshore boat company, in a letter to "All Trico Captains" stated in pertinent part: "Very simply, the answer is that it's OK if crewmembers perform work you judge to be necessary even if it is more than twelve hours in one day." Although GCMA filed a written protest through our liaison with the Eighth District, we never even received the courtesy of a written reply and saw no evidence that the Coast Guard ever corrected the Trico letter.

CAPTAIN WINKLER'S APPEAL

On April 31, 2001, Captain Winkler's attorneys filed a reply brief on his behalf appealing the judgment rendered by the 17th Judicial District Court.

In the Appeals Court, the facts of the case would no longer be an issue. It would be a matter of which law would apply to the case – state law or federal law. The law in question was the state whistleblower statute that we cite below:

LOUISIANA REVISED STATUTE 23:967

Louisiana Revised Statute 23:967provides:

A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
  (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
  (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
  (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

B. An employee may commence a civil action in a district court where the violation occurred against any employer who engages in a practice prohibited by Subsection A of this Section. If the court finds the provisions of Subsection A of this Section have been violated, the plaintiff may recover from the employer damages, reasonable attorney fees, and court costs.

C. For the purposes of this Section, the following terms shall have the definitions ascribed below:
  (1) "Reprisal" includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such.
  (2) "Damages" include compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from reprisal.

D. If suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

The question was whether federal law or state law governed in this case. Unfortunately, federal statutes and their interpretations by the federal judiciary still fail to provide either realistic or suitable protections. However, the state whistleblower statute did offer such protections.

Judgment in Thomas H. Winkler versus Coastal Towing, LLC and T.L.C. Marine Services, Inc. was rendered on April 11, 2002 by Judges Gonzales, Kuhn, and Ciaccio in a 12-page decision whose conclusion is stated below:

"In conclusion, we find that federal maritime law does not preempt La. R.S. 23:967 in a case involving a Louisiana plaintiff, a Louisiana defendant, and facts that occurred solely in Louisiana. The application of La. R.S. 23:967 will not conflict with either specific federal maritime law or with the characteristic features of maritime law, nor would the application of La. R.S. 23:967 in this purely interstate dispute interfere with the uniformity of federal maritime law in its interstate or international relations.

"Therefore, for the foregoing reasons, the trial court judgment which granted the exception of no cause of action is **reversed**, and the case is **remanded** for further proceedings. Costs of this appeal are assessed against Coastal Towing."

Vindication

Whether the case closes with a settlement or with further court proceedings, Captain Winkler's case proved beyond a doubt that Louisiana law protects Louisiana mariners working on Louisiana waters on boats owned by Louisiana companies. The "plantation mentality" that allows boat owners to drive employees until they drop in violation of the law should be dead and buried, at least in Louisiana, when the word gets out!

COAST GUARD BURIES THE WORK-HOUR ABUSE ISSUE IN AN ADVISORY COMMITTEE

Of the three federal committees GCMA participates in, NOSAC accepted the task statement titled the "Adequacy of the 12-Hour Rule" that was later changed to "Crew Alertness in the Offshore Industry." The task was assigned to the "Prevention Through People" (PTP) subcommittee headed by Mr. Don Ray, an Executive Vice President of Transocean-Sedco-Forex. Mariners may recall that one of the pillars upon which PTP supposedly was founded in the mid-1990s was "Honor the Mariner." We can assure our readers that "Honoring the Mariners" became an empty and meaningless phrase as practiced by that advisory committee.

The task statement accepted by the PTP subcommittee was created in response to .."allegations first raised by members of the public" (meaning by GCMA in its Yellow Book) at the December 9, 1999 meeting of NOSAC and again more fully at the April 20, 2000 meeting. At those meetings, GCMA strongly asserted that provisions of Federal law and associated regulations were routinely violated by operators of offshore service vessels and towing vessels.

Since the forum of the meeting was an offshore oil industry committee, GCMA's thrust was limited to OSVs. Many of our mariners, however, worked on uninspected towing vessels and not on offshore supply vessels.

As "homework," the Coast Guard furnished members of the PTP subcommittee including GCMA President Penny Adams, with an estimated 1,000 pages of reading material on various fatigue studies with which to evaluate whether a clear basis existed for GCMA's allegations that led to the creation of the task statement.

PTP subcommittee chairman Don Ray prepared a draft report concluding the study and requested comments. GCMA provided comments in a letter dated March 20, 2002. When the subcommittee met on April 25, 2002 at Coast Guard Headquarters in Washington, GCMA members were absolutely astounded that Chairman Don Ray ignored the reports from GCMA's 57 mariners in the Yellow Book as well as our written comments. GCMA, understanding the subcommittee planned to "dump" our mariner complaints recorded in the Yellow Book sent 16 members to attend the meeting in Washington, DC including river, inland, and offshore representation… including Captain Thomas H. Winkler.

In the moments before the meeting opened, GCMA read the results of the Winkler appeal cited above that earned a loud round of applause from most attendees for Captain Winkler for standing up for his rights. However, when the PTP subcommittee meeting finally got underway, our mariners insisted that their complaints be heard and would not be silenced until their position was presented. A final compromise that was not entirely satisfactory to anyone was hammered out and was adopted by the full NOSAC committee the following day. It stated in pertinent part:

- "The PTP sub-committee was unable to determine from records furnished by the U.S. Coast Guard that violations of the "12-hour rule" routinely occur.
- "Mariners have a duty under current law to report such violations and are encouraged by the Coast Guard to do so. It was not evident from the Coast Guard records if this routinely occurs.
- "The information furnished to the subcommittee by the Coast Guard for the calendar years 1992 through 2000 shows only eight manning level violations on OSVs have been reported. Such a low number of violations does not support the allegation that violations of the 12-hour rule are widespread.
- "The GCMA has submitted a compilation of anonymous complaints[(1)] to the Coast Guard and maintain that there was no discernable action taken on any of the complaints. The Coast Guard has responded that the individuals making such claims should contact the Coast Guard directly. The GCMA members present at the meeting said they do not trust the Coast Guard to protect their confidence or to act upon their reports. *[[(1)]GCMA removed all names from the Yellow Book's letters to protect of our mariner. However, they were always available for a legitimate investigation by appropriate authorities–which was never offered.]*
- "The subcommittee recommends to NOSAC that the Coast Guard note and vigorously investigate the mariners' belief that reports are not followed up by the Coast Guard and take action as the Coast Guard deems appropriate."

The following day, when Chairman Ray's report was presented to the entire Committee, Admiral Pluta was in attendance. At that time, GCMA representatives had the opportunity to publicly discuss much of the foregoing with the Admiral. Admiral Pluta appeared to be dismayed, and we certainly believe, for good reason. GCMA pointed out that not only did other high government officials in the United States know about the treatment of "lower-level" mariners in this country but that these conditions were widely known to international bodies such as the International Maritime Organization and the International Transport Workers Federation as well. At least 300 copies of the GCMA Yellow Book already had been distributed.

For a two year period, GCMA pressed this controversy over abuse of the 12-hour rule at the semi-annual NOSAC meetings. We subsequently brought the matter up at the Towing Safety Advisory Committee (TSAC) meetings.

Although "boat companies" only represent a small part of the offshore oil industry, the misdeeds of a number of OSV and offshore tugboat owners in cutting corners with work hours and undercutting reasonable manning requirements did absorb much of NOSAC's attention.

We hoped that the message that subcommittee Chairman Don Ray decided he was no longer willing to referee the battle between GCMA and the boat companies possibly would signal that some of the major charterers of vessels in the industry would insist that contracting boat companies straighten out their act. We hoped that the boat owners would be forced to provide enough crewmembers to man the vessels they chartered before the clamor attracts more unwanted attention or the industry lost the mariners they still have. Unfortunately for our mariners, this was just a pipe dream. Nothing like this happened! What did occur was an ever-increasing crew shortage. Our mariners know when they are being abused even if the industry trade association won't admit it and the Coast Guard turns a blind eye.

REFORMING VESSEL LOGBOOKS IS ONE STEP TOWARD ENDING MARINER WORK-HOUR ABUSE

The Code of Federal Regulations provides the public with the right to petition the Coast Guard to initiate rulemaking. GCMA exercised that right starting as early as January 18, 2001 by making a bona fide attempt to make a relatively minor yet significant change in existing regulations.

GCMA believes that properly regulating vessel logbooks is one of the most basic yet significant areas in federal regulations that needs immediate improvement. We believe that no watch schedule can be enforced properly on any vessel if nobody is required to accurately track the crew's hours of work?

We ask, How can the Coast Guard properly investigate accidents without relying on comprehensive and meaningful requirements for making logbook entries? Yet this very basic request languished for more than two years at Coast Guard Headquarters.

The Coast Guard has an Investigations and Analysis Branch at Coast Guard Headquarters and Investigations Offices at individual Marine Safety Units throughout the country. However, an August 1994 Coast Guard study on accident investigations titled U.S. Coast Guard Casualty Investigation and Reporting: Analysis and Recommendations for Improvement (GCMA Report #R-429) paints a bleak picture of the quality of Coast Guard investigations.

Following its ugly battle with the NOSAC PTP Sub-Committee, GCMA promptly requested Congressional assistance in moving the matter of requiring meaningful logbooks from its stalled position within the Coast Guard bureaucracy along the lines we outlined in GCMA Report #R-291, Revision 1.

GCMA contended that existing regulations governing vessel logbooks were insufficient. We pointed out that our attempt to initiate reforms were stonewalled by the Coast Guard's Marine Safety Council. Finally, our initiative came to a halt when the Coast Guard claimed it lacked Congressional authority to require meaningful logbooks on December 2, 2002.

On September 9, 2004, the President signed into law the Coast Guard and Maritime Transportation Act of 2004 that was passed by both houses of Congress. Section 409(a) of that act amended 46 USC §8904 by adding these words: "(c) The Secretary may prescribe by regulation requirements for maximum hours of service (including recording and recordkeeping of that service) of individuals engaged on a towing vessel …"

Although the law is directed at towing vessels, we will work to seek its application to all vessels that our lower-level mariners serve aboard. Our recommendations for logbooks follow closely those that currently are required by the American Waterways Operators' Responsible Carrier Program as well as aboard most vessels manned by upper-level licensed mariners.

We believe that the towing industry, whose 5,200+ vessels will be inspected under Section 415 of the same act, will comply with work-hour regulations. However, they will do so only if they understand that Congress requires an honest record of those hours attested to by a duly licensed officer who understands the sever penalties for submitting a false report, such one contained in an official vessel logbook.
owing the terrorist attacks of last September 11th.

GCMA Editorial Note: *The logbook issue was one of GCMA's earliest projects that consumed many hours of our time and effort. View the record of our work on the internet by going to http://dms.dot.gov and then making a "simple search" for number 12581. This is the site of Coast Guard Docket #2002-12581 that shows the steps that we have taken and the correspondence recorded on this issue to date. It is beyond our understanding how the Coast Guard can claim to make an informed investigation without access to a legible, well-maintained logbook.*