In the Matter of License A-37395 and all other Licenses, Certificates and Documents
Issued to: FRANK KNUTH

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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FRANK KNUTH

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 11 January 1956, an Examiner of the United States Coast Guard at New York, New York, suspended License A-37395 issued to Frank Knuth upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as motorboat on board the American M/B FLYING D II under authority of the license above described, on or about 26 July 1955, while said vessel was navigating off Rockaway Point Channel, New York, he wrongfully rammed the M/B ELAINE B, thus imperilling the safety of the paid passengers on both vessels.

A charge of negligence was dismissed by the Examiner and is not considered herein.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice. He entered a plea of "not guilty" to

the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of the operator of ELAINE B, of othre persons including passengers aboard ELAINE B, photographs and a chart.

In defense, Appellant offered in evidence his sworn testimony, testimony of passengers aboard FLYING D II, testimony of two expert witnesses and sworn statements of two passengers of FLYING D II made previously to a Coast Guard Investigating Officer.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order suspending Appellant's License No. A-37395, and all other licenses, certificates and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of six months.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 26 July 1955, Appellant was serving as operator on board the American M/B FLYING D II and acting under authority of his License No. A-37395.

At 0800 on that date, FLYING D II, with twenty-five passengers aboard, departed its berth at Sheepshead Bay, Brooklyn, New York, ELAINE B left its nearby about ten minutes later, also with twenty-five passengers aboard. Both boats proceeded without incident to open water outside Rockaway Point and headed for fishing grounds to the south.

With both boats in waters governed by the Inland Rules, ELAINE B commenced overtaking FLYING D II. The boats were on slightly converging courses, with ELAINE B making about ten miles per hour

and FLYING D II six miles per hour. ELAINE B drew up to FLYING D II without a whistle signal.

Appellant who was personally operating FLYING D II first became aware of the presence of ELAINE B when ELAINE B's stem was about two feet forward of FLYING D II's pilothouse. At this time boats were twenty to forty feet apart. Both vessels held course and speed. They collided with the starboard bow of FLYING D II coming into contact with the port quarter of ELAINE B. Immediately prior to the collision ELAINE B's wheel was put over to the right. Shortly after the collision, is an interchange of remarks, Appellant said to the operator of ELAINE B, "Next time I'll go through your pilothouse," or words to that effect.

There were no personnel casualties as a result of the collision but minor damage occurred to ELAINE B.

The boats are similar in construction, about 45 feet in length and 14 feet in beam. The pilothouse of FLYING D II is about fifteen feet forward from the stern.

Neither boat was embarrassed in maneuvering in this situation by other vessels or by character of the water.

BASES OF APPEAL

Appellant contends that:

I the evidence and Findings of the Examiner clearly establish that the sole fault for the collision was the reckless and irresponsible action of the operator of ELAINE B and not that of Appellant;

II the charge of misconduct was not sustained by any evidence of the violation by the Appellant of any established and definite rule of action;

III the action of the Coast Guard in proceeding with the hearing while criminal charges were pending were pending substantially prejudiced the rights of the Appellant;

IV the penalty was grossly excessive.

APPEARANCES: John Irwin Dugan, Attorney for Appellant, 120 Broadway, New York K, New York.

OPINION

In view of my decision on this appeal, discussion of the latter two bases of appeal are unnecessary. The first two points of appeal will be treated in combination.

The findings of fact of the Examiner have been adopted in *toto* insofar as they are material to the issues of this case.

While the Examiner did not accept the factual propositions of the Investigating Officer, as unsupported by the evidence, he reviewed the evidence to determine whether the allegations of ultimate fact in the specification, particularly the wrongful ramming, were proved to have occurred in some other fashion. He found that they were.

The effort was made to establish the wrongful ramming by proof that Appellant changed course into the overtaking boat. The Examiner found on substantial and uncontroverted evidence that he did not so change course.

The affirmative findings which the Examiner made, and which have been substantially adopted and set forth above, are amply supported by the evidence. The remaining uncertainly of the angle of convergence and of the lateral distance between the boats at the time of Appellant's first noticing ELAINE B cannot be resolved forth on the record. Nor is it necessary to resolve the uncertainty for, within the limits set, the findings adequately account for the collision.

From these facts the Examiner made an inference of guilt. This inference is predicated upon a finding, implicit in the opinion but unexpressed, that in the time allowed Appellant between his first noticing ELAINE B and the collision, the duty devolved upon him to take avoiding action, and that with sufficient time remaining in which to act he failed to do so. Not only must it be found that he failed to do so but that the necessary mental state

then existed to convert a mere collision into a wrongful ramming. Such findings must of themselves be inferences derived and derivable from the specific facts.

But in this case they cannot be sustained, because the findings of sufficient time cannot be supported.

Irrespective of whether one-half or a full boat length be taken as the lateral distance between the boats at the critical moment of Appellant's first awareness of ELAINE B, and irrespective of the size of the angle of convergence of the two craft, no more than twelve seconds could have elapsed from that time to the collision. In fact, from the position of the boats on contact, it is probable that no more than nine seconds had elapsed.

Of prime importance is the fact that not all of the elapsed time is chargeable to Appellant for the purpose of acting. For at the initial moment of this period, FLYING D II was under a statutory duty to maintain course and speed. This positive duty could not have been dissolved, and a new duty to avoid substituted for it, so long as ELAINE B could have alone, even by so simple a device as disengaging its clutch, averted collision.

The precise moment when ELAINE B had so involved itself that it could not be extricated from impending collision without help from the overtaken vessel need not be determined. It can hardly be said to have occurred before ELAINE B's stem had drawn somewhat ahead of that of FLYING D II at about the fifth or sixth second.

The state of Appellant's mind at a time when he was clearly and properly obeying the law cannot be questioned. The issue then is simply whether in few remaining seconds before collision Appellant could be held to have performed an act of misconduct.

On the theory either that Appellant deliberately rammed the other boat or that he recklessly engaged in a course of conduct which resulted in a ramming, misconduct cannot be found in this situation. There is no doubt that a course change, such as was contemplated in the argument of the Investigating Officer, would have constituted such conduct. But a mere holding on, a carrying out of the performance of what had been a duty for a few seconds

too long, cannot he held to be deliberate or reckless conduct in this case. The words found to have been spoken by Appellant after the collision are equivocal at best and add nothing in support of the charge in the absence of sufficient time to allow some retroactive significance to the words.

A word may be said here on the significance of the maneuver to the right of the ELAINE B which was found to have occurred "immediately" prior to the collision. If the boats were already on collision courses the maneuver had no bearing upon the ultimate result and all that has been said above is applicable. If the boats were not previously on collision course the maneuver was, on this record, the sole cause of the collision. In neither case can anything detrimental to Appellant be found.

Finally, this decision gives no one leeway to disregard the safety of paying passengers or of any other person engaged in marine activity. It is easily conceivable that in a case comparable to this, the relative speeds and courses in an overtaking situation would allow a proper inference that a holding on by the overtaken boat amounted to serious misconduct. The suddenness of the development of the collision precludes such an inference here.

CONCLUSION

It is concluded that the charge of misconduct against Appellant was not proved by substantial evidence.

ORDER

The order of the Examiner dated at New York, New York, on 11 January 1956, is VACATED. The charge of misconduct and the specification are DISMISSED.

A. C. Richmond
Vice Admiral, U. S. Coast Guard
Commandant

Dated at Washington, D. C., this 1st day of May, 1956.

***** END OF DECISION NO. 883 *****

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