

In the Matter of License No. 159780 and all other Seaman Documents
Issued to: HILARY C. WHITLEY

DECISION AND FINAL ORDER
UNITED STATES COAST GUARD

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HILARY C. WHITLEY

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 17 September 1956, an Examiner of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman documents upon finding him guilty of negligence. The specification alleges that while serving as Pilot on board the American SS SPIRIT OF LIBERTY under authority of the document above described, on or about 4 February 1956, Appellant contributed to a collision between his ship and the SS WILLIAM LYKES in the Mississippi River, during conditions of fog and low visibility, by failing to stop the engines of his vessel and navigate with caution upon hearing the fog signal of the William Lykes apparently forward of the beam of the SPIRIT OF LIBERTY.

At the beginning of 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.

After the Investigating Officer made his opening statement, portions of the investigation record were stipulated in evidence. This included the testimony of the Master and Chief Engineer of the SPIRIT OF LIBERTY; also the bridge and engine room bell books. The Investigating Officer then rested.

In defense, Appellant offered in evidence his sworn testimony. Appellant indicated that he observed the WILLIAM LYKES on the radar at a distance of two miles; the LYKES was in the middle of the river; Appellant knew her exact position; the SPIRIT OF LIBERTY remained on her right side of the river as required by custom; and the collision occurred six-tenths of a mile above the Coast Guard Station.

At the conclusion of the hearing, the arguments of the Investigating Officer and Appellant's counsel were considered and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced the decision in which he concluded that the charge and specification had been proved. an order was entered suspending all documents, issued to Appellant, for a period of three months.

The decision was served on 21 September 1956. Appeal was timely filed on the same date and a supporting brief was submitted later. Successive temporary documents have been issued pending this appeal.

FINDINGS OF FACT

On 4 February 1956, Appellant was serving as Pilot on board the American SS SPIRIT OF LIBERTY, a T-2 type tanker, and acting under authority of his License No. 159780 when his ship collided with the SS WILLIAM LYKES, a C-2 type cargo vessel, in the Mississippi River Delta. The collision occurred at a point about 350 feet off the east bank of the Mississippi River and six-tenths of a mile above the Coast Guard Station (marked "Cupola" on chart). This stretch of the river is practically straight but bends slightly to the west when upbound which is in a northerly direction. The navigable portion of the river is approximately one-half mile wide in the area of the collision.

This accident happened at 0359 (bridge time) in a patchy fog

which limited visibility to between one-half and three-quarters of a mile in the immediate vicinity of the casualty. The downbound LYKES' starboard side scraped across the bow of the ascending SPIRIT OF LIBERTY (referred to hereafter as the LIBERTY). The record does not indicate that any injuries resulted.

Appellant boarded the LIBERTY at 0336 off Pilottown when the distance of visibility was one and one-half to two miles. The ship got underway up the river at 0339 showing proper lights and sounding fog signals in patchy fog. Appellant conned the ship continuously until the time of collision. The Master, Second Mate and helmsman were also on the bridge. The LIBERTY proceeded against a three-knot current with full maneuvering speed set at 80 RPM which was approximately 14 knots. One-half speed was close to 8 knots and slow speed about 4 knots. Speed was increased to full ahead at 0345, reduced to one-half at 0347 for a patch of fog and increased to full ahead again at 0348. This speed was continued until 0354.

Shortly before 0353, Appellant saw the images of two descending vessels on the radarscope at a distance of about two miles. One of them was near the west bank and the other was in the middle of the river. The latter was afterward identified as the LYKES. At 0353, the LIBERTY was abeam of the Coast Guard Station when a fog signal was heard from the LYKES for the first time. This was when the LIBERTY was two miles above Pilottown. During the fourteen minutes since getting underway, the LIBERTY had made good a speed of eight knots over the ground (eleven knots through the water) due to the effect of the three-knot adverse current. Speed was changed to one-half ahead at 0354 when the LIBERTY entered another fog patch. The LYKES was kept under observation on the radar.

At 0356, Appellant saw the masthead light, range light and green side light of the LYKES bearing about ten degrees on the port bow of the LIBERTY at a distance of between one-half and three-quarters of a mile. Appellant orders a speed change to slow ahead, sounded a one-blast whistle signal for a port to port passing, and ordered a course change from 335 to 340 degrees true at 0356. A few seconds later, Appellant ordered the engines stopped since the LYKES was not changing course to her right.

There was no answer to the LIBERTY's passing signal.

At 0358, Appellant ordered the engines full astern when he saw the LYKES going to her left across the bow of the LIBERTY. Both vessels sounded the danger signal and three-blast backing signal. The LIBERTY's speed over the ground had stopped when the starboard side of the LYKES scraped the bow of the LIBERTY at 0359 and went down her starboard side close to the shore. The anchor of the LIBERTY had been let go just before the collision occurred.

Between the time of hearing the fog signal of the LYKES at 0353 and the collision at 0359, the LIBERTY had covered a distance of six-tenths of a mile to the point of collision. Hence, she had proceeded at the rate of six knots over the ground and nine knots through the water during this six-minute period of time.

There is no evidence in the hearing record concerning the navigation of the LYKES.

Appellant has no prior disciplinary record. He has been going to sea in a licensed capacity since 1937.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that there are numerous errors in the Examiner's findings of fact and conclusions of law. The following are the three alternative arguments presented on appeal:

1. Almost simultaneously at 0356, the fog signal of the LYKES was heard for the first time, the lights of the latter vessel became visible and the engines of the LIBERTY were stopped. Consequently, the requirement to stop the engines upon hearing the fog signal of a vessel ahead, the position of which is not ascertained, was complied with.

2. When the LYKES' fog signal was first heard before she was visible, Appellant was not required to stop the engines of his ship because the position of the LYKES was "ascertained", within the meaning of the rule, by radar observation. See *The Oslofjord* (C.C.A.2, 1941), 121 F. 2d 304, where it was held that the position

of a pilot boat had been "ascertained" when it was correctly assumed by the other vessel that the pilot boat was standing by the lightship at the time the pilot boat's fog signal was first heard at least 23 minutes before the collision.

3. Even if appellant was guilty of a statutory fault, he should be exonerated because his fault did not contribute to the accident. The sole cause of the collision was the reckless navigation of the LYKES on the wrong side of the river. Appellant exerted the utmost caution as shown by the fact that his vessel was moving astern at the time of the collision. in *The Standella* (C.C.A. 2, 1939), 108 F. 2d 619, the vessel failing to stop her engines, upon hearing the fog signal of another vessel ahead, was exonerated because the presumption of contributory fault was overcome by proof that the continued presence of the other vessel on the wrong side of the channel would have made the collision unavoidable even if the engines of the exonerated vessel had been stopped at the proper time.

In conclusion, it is submitted that the charge of negligence should be dismissed.

Appearances: Messrs. Chaffe, McCall, Phillips, Burke and Hopkins of New Orleans, Louisiana by Donald A. Lindquist, Esquire, of Counsel

OPINION

My above findings of fact are based mainly on Appellant's testimony and the entries in the bridge bell book. The Examiner's findings have been modified to the extent of finding that the distance of visibility in the vicinity of the collision was one-half to three-quarters of a mile and that the order to stop the engines was given at 0356 rather than 0359 as indicated in the engine room bell book. (Apparently, the clock in the engine room was a minute faster than the bridge clock.) Appellant testified that he saw the LYKES at three-quarters of mile. The Master stated that the other ship was visible at a distance of between one-half and three-quarters of a mile. Concerning the time the engines were stopped, the bridge bell book states that the order was given at 0356. The Chief Engineer testified that the engines had been reversed when he entered the engine room at 0359 and that he did

not make the 0359 entry in the bell book. But this entry appears to have been made in the same handwriting as the next entry of full astern at 0359 (0358 bridge time) which admittedly was made by the Chief Engineer. Since the chief Engineer could not have known when the engines were stopped, the entry in the bridge bell book, giving the time of the stop order as 0356, is accepted.

The evidence also supports Appellant's claim that the LYKES became visible just before the engines were stopped at 0356. But the contention that the fog signal of the LYKES was heard for the first time at 0356 cannot be accepted. The testimony of Appellant is conflicting and somewhat confusing on this point. At first, Appellant stated that he first heard the other vessel's signal about the same time the LIBERTY's engines were stopped (R.6). But when confronted on cross-examination with the Master's testimony that he began to hear fog signals when abeam of the Coast Guard Station at 0353, Appellant definitely agreed that he heard the signals at this time (R.14). Nevertheless, the engines remained at full ahead (14 knots) until one-half ahead was ordered at 0354 when the LIBERTY entered a fog patch. It was not until three minutes after Appellant heard the fog signals that the engines were stopped at 0356 - three minutes before the collision.

The requirements of Article 16 of the Inland Rules of the Road, that a "steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over" (33 U.S.C. 192), are very strictly enforced by the courts, especially with respect to the stopping of the engines. It has been stated that since this important statutory rule of law became effective by proclamation of the President on 1 July 1897, "the command is imperative that he [the navigator] shall stop his engines when the conditions described confront him." *Lie v. San Francisco and Portland SS Co.* (1917), 243 U.S. 291. Equally strong language, as to the mandatory nature of this law, is contained in *Rules of the Nautical Road* by Farwell, rev. ed. by Prunski (1954), pages 315 and 316, in *Rules of the Road at Sea* (1920) by La Boyteaux, pages 88 to 103, and in *Griffin on Collision* (1949), pages 313 to 323. The latter work cites numerous cases, at page 317, including some wherein vessels, whose engines were stopped within a minute of hearing the first fog signal

forward of their beams, were held at least partially responsible for collisions because they did not take immediate action to stop the engines.

In the Supreme Court case cited above, the SELJA was held liable even though she reduced speed from six knots to bare steerageway of three knots eleven minutes before the collision and her engines were stopped six minutes before the collision occurred in visibility of 800 to 900 feet. The other vessel's fog signal had been heard five minutes before the change of speed by the SELJA to three knots. The court stated that it was of no avail to say that the SELJA was commencing to move backward at the instant of the accident since the disobedience of this imperative statutory rule

"continued as an effective force, operating on the movement of his vessel to the instant of collision, driving her forward steadily, even though in the last moments slowly, to the fateful point of intersection of the courses of the two ships. * * * The case is not one for the application of refinements as to what would have been good seamanship without the rule * * *. Both of the masters were palpably negligent in respects which contributed directly to cause the collision."

Appellant was guilty of this statutory violation unless the position of the LYKES was "ascertained" by radar observations when the fog signals were heard at 0353 or unless the "circumstances" were such that the vessel would have been placed in immediate danger by stopping the engines at this time. There is no provision in the law which exempted Appellant from taking action at 0353 due to the fact that his vessel did not enter a fog patch until 0354. Visibility was restricted by fog to some extent at 0353 since the LYKES was then less than two miles away, according to the radar observations, but still could not be seen from the LIBERTY.

There has not been brought to my attention any judicial authority which states that the position of a vessel has been "ascertained" by seeing on a radarscope an image which represents another vessel. It is not the function of the Coast Guard to make such an independent determination with respect to a statutory rule of navigation which has been so stringently enforced by the courts. In cases prior to those where the use of radar was involved, the

courts have held that the position of another vessel is not "ascertained" unless her course, or change of position, as well as her momentary location is known. *The El Monte* (D.C.N.Y., 1902), 114 Fed. 796; *The Providence* (D.C.R.I., 1922), 282 Fed. 658. I do not think that Appellant complied with these standards. *The Oslofjord*, *supra*, cited on appeal presented a different situation since the pilot boat was stopped. In the case under consideration, Appellant did not realize until too late that the LYKES was following a straight course, which took her across the river into the path of the LIBERTY, rather than changing course to the right in order to negotiate the slight bend in the river and maintain her position in the middle of the river. For these reasons, it is my opinion that the position of the LYKES was not "ascertained" by Appellant at 0353.

Even if it could be argued that Appellant was not compelled to stop the engines at 0353, it certainly cannot be said that he navigated with caution (Article 16) when he not only did not stop the engines but, on the contrary, continued to run them at full speed ahead for another minute and then only reduced them to one-half ahead for the next two minutes. See *Lie v. S.F. and P. Co.*, *supra*, p. 297.

With respect to the qualification to stop the engines "so far as the circumstances of the case admit," it is noted that the inability to maintain steerageway is not an adequate excuse for failing to stop the engines, *The Walter D. Noyes* (D.C. Va., 1921), 275 Fed. 690. From the facts in this case, it is evident that a temporary reduction in speed from full ahead against a three-knot current would not have caused loss of steerageway or any other immediate danger. There was no disastrous result when the engines were stopped at 0356 from a speed of only one-half ahead rather than full ahead. Hence, Appellant was not excused from compliance with the law on this account.

The remaining consideration is Appellant's contention that he should be exonerated because, if he was guilty of a statutory fault, this violation was not a contributory cause of the collision because reckless navigation of the LYKES on the wrong side of the channel was the sole cause of the accident.

Since Appellant was guilty of a statutory fault, there is a presumption that his fault contributed to the collision; and the burden is on Appellant to overcome this presumption by proving that his statutory violation could not have contributed to the collision. *The Pennsylvania* (1873), 86 U.S. 125. Although the proper criterion in these remedial proceedings is negligence rather than contributory fault (See Appeal Nos. [586](#), [728](#), [730](#), [868](#), [946](#)), I do not think that Appellant has produced evidence of such a nature as to overcome the presumption that his failure to obey Article 16 did, in fact, contribute to the collision.

Whether or not the LIBERTY had way on at the time of the collision is not controlling. *Lie v. S.F. and P. Co.*, *supra*. In *The Jessmore - Longview Victory* (C.A. 2, 1952), 196 F. 2d 689, the LONGVIEW VICTORY was held liable even though she had come to a stop in the water before the JESSMORE struck her. A much more important factor is that the LIBERTY made good a speed of about six knots over the ground, between 0353 and the collision at 0359, despite the three-knot adverse current. This calculation is based on the bridge bell book entries and Appellant's marking of the point of collision on the chart. The accuracy of Appellant's location of the point of collision was corroborated by the Master. This rate of approach to the scene of the accident indicates that Appellant's negligence contributed to the collision although the anchor was let go before the impact occurred. It is obvious from the speed made good that the full and one-half ahead engine speeds had considerable effect on the forward motion of the ship after the engines were stopped at 0356. This also tends to support the finding that the LIBERTY's progress over the ground was stopped but not for so long that she was drifting downstream at the rate of three knots with the current.

Since the LYKES was navigated on a converging course with the LIBERTY, this was a different factual situation than in *The STANDELLA*, *supra*, cited by Appellant, where one vessel could not have avoided the accident because the other one was continuously on the wrong side of the channel.

consequently, I cannot agree that the collision was due completely to the negligent navigation of the LYKES. The negligence on her part did not excuse Appellant from his duty to comply with the rules of navigation. *Yoshida Maru* (C.C.A. 9,

1927), 20 F. 2d 25.

CONCLUSION AND ORDER

For these reasons, it is my conclusion that the charge of negligence has been proved by substantial and probative evidence. Nevertheless, due to the greater fault on the part of the LYKES, the three months' suspension imposed by the order of the Examiner dated at New Orleans, Louisiana, on 17 September 1956, is hereby REMITTED.

A. C. Richmond
VICE ADMIRAL, UNITED STATES COAST GUARD
Commandant

Dated at Washington, D. C., this 22nd day of November, 1957.

***** END OF DECISION NO. 989 *****

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