

In the Matter of License No. 175273 Merchant Mariner's Document No.
BK-230804-D2 and all other Seaman Documents
Issued to: PHILIP E. THORPE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1184

PHILIP E. THORPE

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

By order dated 14 September 1959, an Examiner of the United States Coast Guard at Toledo, Ohio suspended Appellant's seaman documents upon finding him guilty of negligence.

The specification alleges that while serving as Master on board the United States SS CANADIANA under authority of the license above described, on 30 July 1958, Appellant negligently attempted a passage through the West portal of the Toledo Terminal Railroad Bridge on the Maumee River without having received an assenting signal from the bridge, such failure contributing to a collision involving Appellant's vessel and the bridge with resultant damage to property and danger to life. Two other specifications preferred against the Appellant were dismissed by the Examiner.

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 specifications.

The Investigating Officer made an opening statement and introduced in evidence the testimony of the following persons by stipulations: Captain Hjerpe, Master of the M/V FRANK TAPLIN, two crew members of the TAPLIN, and one crew member of the CANADIANA. The Investigating Officer also presented the testimony of two passengers and one crew member of the CANADIANA, the bridge operator, and a person who witnessed the accident from on shore. He also introduced several exhibits including sketches, a photograph, and a chart.

In defense, Appellant offered in evidence the testimony of three passengers on the CANADIANA. The Appellant also testified in his own behalf.

During cross-examination of a defense witness, the Investigating Officer offered in evidence the ordinance of the City of Toledo concerning passage through bridges over the Maumee River.

At the conclusion of the hearing, the Investigating Officer and Appellant's counsel presented written arguments and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced the decision in which he dismissed two specifications and concluded that the charge and remaining specification had been proved. An order was entered suspending all documents issued to Appellant for a period of one month, with a further suspension of five months on twelve months' probation.

FINDINGS OF FACT

On July 30, 1958 Appellant was serving as Master on board the United States SS CANADIANA and acting under authority of his License No. 175273 while the ship was proceeding upstream on the Maumee River at Toledo, Ohio. The CANADIANA is a passenger excursion boat about 210 feet in length and white in color which ordinarily made two trips a day between its berth in Toledo and Bob-Lo Island. At about six o'clock in the evening on the above date while it was daylight the CANADIANA was on her second return trip to Toledo with almost nine hundred passengers aboard. As she

approached the first bridge on her passage up the river the CANADIANA was astern of, but catching up with, the M/V FRANK TAPLIN. It should be noted that the CANADIANA consistently passed through this bridge at within ten minutes of the same time every day during her operating season.

When the two ships reached the vicinity of the Toledo Terminal Railroad Bridge, a horizontal swing bridge, the TAPLIN sounded her whistle to signal for the opening of the bridge. No response was received from the bridge so the TAPLIN signaled again. Again no response was received from the bridge but it was opened shortly thereafter. The TAPLIN then passed through the East draw of the bridge. The CANADIAN, which was some 600 feet behind the TAPLIN at this time, intended to pass through the West draw of the bridge. It gave the prescribed signal even though it saw the bridge was already open. This signal was given after the TAPLIN signaled and when the CANADIANA was about one-half to three-quarters of a mile from the bridge. Again, no response was received from the bridge.

The CANADIANA then proceeded at dead slow speed to approach the bridge. As it did, the bridge started to close. The CANADIANA blew the danger signal when it became aware that the bridge was starting to close. The bridge tender heard this signal and attempted to stop the bridge. The CANADIANA put her engines full astern and continued to sound the danger signal.

Despite these last minute attempts to avoid it, a collision between the bridge and the CANADIANA did occur. This happened about two minutes after the TAPLIN had cleared the draw. The CANADIANA had very little way on at the time of the impact. Considerable damage was done to the port bow of the CANADIANA but there no injuries to the passengers.

The Appellant has no prior record with the Coast Guard in 40 years of service at sea.

No regulations covering this bridge have been issued to the Secretary of the Army. But the City of Toledo has passed an ordinance, 719-55, containing regulations for this bridge. This ordinance reads in part as follows:

"1. The movable spans of all bridges over the Maumee River in the City of Toledo shall be opened for the passage of vessels during all hours of the day or night upon signal given by any vessel desiring to pass through any such bridge; namely, three (3) long blasts of a horn or whistle, such signal to be given when such vessel is at a sufficient distance from such bridge to enable it to stop if for reason such bridge cannot be opened. Upon receiving a signal from a vessel desiring to pass through the bridge, the bridge operator, if such bridge can be promptly opened, shall answer by one long and one short blast from the bridge whistle which will indicate that such vessel may proceed toward the bridge, and such vessel shall acknowledge the bridge signal by one long and one short blast of the horn or whistle.

"2. If for any reason the bridge operator will be temporarily delayed in opening such bridge, he shall blow a check signal of three (3) short blasts.

"3. If for any reason, the bridge operator cannot open such bridge in response to proper signals so to do, he shall blow a warning or danger signal from the bridge whistle of five (5) or more short blasts." Section 22-4-1.

"It shall be unlawful for any master or person in charge or in possession of any vessel navigating the harbor to approach any nearer to any of the bridges than to a point at a distance from such bridge within which such vessel can be stopped without colliding with such bridge unless he has received the approval signal of one long and one short blast." Section 22-4-2.

BASES OF APPEAL

The Appellant bases his appeal on the following eight points:

1. The Examiner should have granted the Appellant's motion to dismiss since the regulations allow the Examiner to take official notice of facts only and not of law. The ordinance of the City of Toledo introduced here contain matters of law.

2. The Examiner had no authority to take official notice of city

ordinances.

3. The decision on the motions to dismiss must be based on the record as made when the government rested at which time the Examiner had made no announcement that he was taking official notice of the Toledo ordinance.

4. The Examiner erred by allowing the ordinance to be put in evidence during the defense by use of the Great Lakes Pilot instead of by certified copy of the ordinance.

5. The Examiner erred in failing to apply the rule of strict construction to the ordinance.

6. The Examiner erred in finding as a matter of law that the ordinance applied to a situation where the bridge was open when the ship's signal was sounded.

7. Even if the ordinance was applicable and had been properly placed in evidence compliance with it is only some evidence of reasonable and prudent conduct and the Examiner's erred in finding the Appellant negligent under the facts and circumstances as they actually existed.

8. The Examiner erred in overruling Appellant's preliminary motion to dismiss the charge and specification on the basis that they failed to state a cause of action by reason of stating no authority abrogating the common law superior rights of vessels on navigable waters. The Appellant was entitled to know the authority which he was charged with violating prior to the commencement of the hearing.

Appearance: Foster, Meadows and Ballard of Detroit, Michigan,
by Raymond A. Ballard, Esquire, of Counsel.

OPINION

The issue in this case is whether the Appellant was negligent or not. Negligence as applied to this case may be defined as a failure to exercise such precautions or degree of care as a reasonably prudent Master would exercise under the same

circumstances. Where statutes, rules, or regulations are involved, they amount to clear notice of the existing standard of care require to avoid being negligent.

The main points raised by the Appellant are that negligence in this care cannot be predicated on a violation of the general standard of care since he did exercise such precautions and degree of care as a reasonably prudent Master would exercise under the same circumstances. Nor, the Appellant argues, can negligence be predicated on a failure to meet the standard of care imposed by a statute, rule, or regulation, since, in this care, the regulation relied on -- Toledo City Ordinance 719-55 -- was not applicable. Several reasons are urged as to why this ordinance is not applicable; among them, that it was not properly introduced into evidence, that it should not have been received in evidence, that it does not apply to the case of an open bridge and that it is invalid because in conflict with a law of Congress,

In my view of the case it is not necessary to decide all of the issues raised by Appellant. It is not necessary to decide, for instance, whether the ordinance is valid or not. *City of Cleveland V. McIver*, 109 F.2d 69 (1940). It is only necessary to determine to what extent it shall be looked to as a standard of care by which Appellant's actions may be measured. In this care, for several reasons, I prefer to measure Appellant's actions primarily against the standard of care provided by the Federal statutes and cases on the subject. Among these reasons are my continuing doubts about the applicability of the ordinance to the case of an open bridge despite the holding in *Northern Pac. Ry. Co. V. Duluth S. S. Co.*, 252 F. 544 (1918). I noted that in that case the accident happened at night and that the regulations read quite differently from the city ordinance in this case. Also, even if the ordinance be found technically applicable, this ambiguity weakens its usefulness as a standard of care. Another reason is my doubt about the procedure by which this ordinance was made a part of the case. The next result was that a different and higher standard of care was introduced into the hearing midway in the defense's presentation of its case.

The applicable Federal statute in this case is 33 U.S.C. 494 which concerns bridges constructed over navigated waters. It reads in part as follows:

"If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft."

This statute and the principle it embodies have been applied in many cases. Chief among them is *Clement V. Metropolitan West Side El. Ry. Co.* 123 F. 271 (1903). In this case a vessel signaled for the opening of the Metropolitan bridge over the South Branch of the Chicago River while proceeding at a speed of two to three miles an hour. The bridge was not opened nor was any warning of this given to the vessel. The vessel collided with the bridge. The court held the vessel not at fault. It said:

"A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (*City of Chicago V. Mullen*, 54 C.C.A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation,

that the bridge will not be opened (*Manistee Lumber Company V. City of Chicago* (D.C.) 44 Fed. 87; *Central Railroad Company of New Jersey V. Pennsylvania Railroad Company*, 8 C.C.A. 86, 59 Fed, 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

While this case was decided before 33 U.S.C. 494 was enacted, the case remains valid and has been cited many times since enactment of the above section. See, for example, *Munroe V. City of Chicago*, 194 Fed. 936 (1912) in which the vessel signaled three times for the bridge, received no reply and eventually collided with it when the bridge failed to open. There were no regulations requiring the bridge to signal its assent. The court said: "Without warning of any cause for delay therein, we believe that the steamer's approach was not unreasonable under the circumstances. . . ."

City of Chicago V. Transp. Co. 222 Fed. 238 (1915) was decided after the enactment of what is now 33 U.S.C. 494. There a city ordinance forbidding vessels to approach while a red ball signal was elevated was regarded, and the *Clement* case, supra, was looked to for a determination of the rights of the parties.

In *The Kard*, 38 F.2d 844 (1930) regulations had been promulgated by the Secretary of War for the particular bridge which provided for an answering signal by the bridge. Here the vessel blew for the bridge, received no answer from the bridge but saw the bridge being raised so proceeded through it. A collision ensued because the bridge had not been raised to its full height. In holding the vessel free of fault the court said:

"The Master of the *Kard*, having given the proper signal and seeing the draw rising, was justified in assuming that the bridge tender was doing his duty in raising the draw to its full height, and under the authority of the cases cited above, the bridge being an obstruction to navigation, he having no knowledge that the drawspan was not fully raised, had no duty put upon him to take a course through the draw to clear an obstruction of which he had no knowledge and which, in fact, was unlawfully existent."

In *City of Cleveland V. McIver*, supra, there were both City and War Department regulations providing that a vessel should not attempt to pass the bridge unless a red ball signal was raised. Here a vessel signaled twice for the bridge and when it did not open drifted into it. The red ball was not raised. The vessel was found not at fault. The court said:

"Upon the sounding of the bridge signals by the FLEETWOOD, its master, proceeding at slow speed, had the right to assume that the law would be obeyed unless the customary warning signal was given. It is true the red ball was not up, but if it were, it would have conveyed no information to the master of the FLEETWOOD beyond that furnished by the closed draw. . ."

Southern Transp. Co. V. City of New York, 98 F.Supp. 967 (1950) also followed the rule of the *Clement* case but here the vessel did have warning that the bridge was not going to open since its master could see vehicular traffic still flowing across the bridge. Being so warned, he no longer had the right to proceed toward the bridge. The vessel was, therefore, held at fault.

As noted in Appellant's brief there are a few cases in which the vessel has been found negligent for proceeding toward a bridge in the absence of an assenting signal from the bridge. However, these cases represent a distinct minority.

In the present case the bridge was open. Nevertheless, the Appellant blew the prescribed signal for the bridge. He did not receive an answer. He knew that the bridge frequently did not answer the signals made to it. He had no warning or other reason to believe that the bridge would not remain open for him. He knew that his ship regularly transited this area at about the same time each day and he also knew that his ship was easily visible to the bridge operator due to its size, coloring, and location in the channel. He was proceeding at dead slow speed. Considering these facts in the light of the above cases I believe that his actions were those of a reasonably prudent master under the circumstances.

Other cases leading me to this conclusion are *Wright & Cobb Lighterage Co. V. Snare & Triest Co.*, 234 Fed. 774 (1916), aff'd,

Fed. 482 (1917) where two boats approached a bridge simultaneously and the evidence did not make it clear as to whose signal the bridge was opened in response to; the colliding vessel was held not at fault in assuming that the bridge was open in response to her signal and that, as reply signals from the bridge are not customarily given, the opened bridge was an invitation to her to come through; *Oregon-Washington Bridge Co. V. The Lew Russel*, 196 F.2d 707 (1952) in which a tug arranged twelve hours in advance for the opening of the bridge but actually arrived some three hours late. The court held it immaterial that the tug did not give the prescribed signal since the bridge was opened without signal. "Having observed the raising of the lift span and its stopping, the tug pilot was entitled to assume that the bridge was ready for the tug's passage, in the absence of any circumstances to warn him of the danger." See also *The LOUISE RUGGE*, 234 Fed. 768 (1916), *aff'd.*, 239 Fed. 458 (1917).

It has not been overlooked that most of the above cases involved a situation where the bridge was closed as the vessel approached. The applicability of these cases is not lessened by the fact that in the present case the bridge was already open. The Appellant knew that it had been opened in response to the signal of the TAPLIN and could reasonably believe that if the bridge operator saw the TAPLIN he would also see the CANADIANA close astern of her. While none of the cases cited have the same fact situation as the present case, a reading of them and an analysis of the facts in those cases and in this case leads me to the conclusion that in this case the Appellant did take such precautions and exercise such degree of care as a reasonably prudent Master would exercise under the circumstances. I believe that *under the circumstances of this case*, it was reasonable for Appellant to expect the bridge operator to check both up and down the river before closing the bridge or, if it were imperative to close the bridge quickly, to sound a warning signal before doing so. Appellant was, therefore, not negligent. The conclusion that he was negligent is reversed; the charge and specification are dismissed.

ORDER

The order of the Examiner issued in Toledo, Ohio on 14 September 1959 is VACATED and SET ASIDE.

J. A. Hirshfield
Vice Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D.C., this 10th day of August, 1960.

***** END OF DECISION NO. 1184 *****

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