

In the Matter of License No. 175033 and all other Licenses
Issued to: MILTON P. TEN EYCK

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1166

MILTON P. TEN EYCK

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 17 September 1958, an Examiner of the United States Coast Guard at Cleveland, Ohio suspended License No. 175033 issued to Appellant upon finding him guilty of negligence. The two specification allege that while serving as Master on board the United States SS JOLIET under authority of the license above described, on or about 26 May 1957, while navigating on the lower St. Marys River during conditions of fog and low visibility, Appellant permitted his vessel to operate at an immoderate speed (First Specification); and Appellant contributed to a collision between his vessel and the United States SS VERONA by failing to reduce his vessel's speed to bare steerage way at once when he heard, or should have heard, the fog whistle or another vessel apparently not more than four points from dead ahead (Second Specification).

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. Counsel for Appellant moved to dismiss the charges against the Merchant Mariner's Document since the Master was acting under authority of his license. The Examiner reserved ruling on this motion. Counsel for Appellant then objected to the specifications on the grounds that they failed to specify a definite time and place of the offenses, and that specification two, in that portion reading "or should have heard", failed to allege an offense. Appellant contended Rule 15 of the Rules of the Road for the Great Lakes does not encompass this aspect of the specification. The Investigating Officer amended the specifications to include date, time and place. The Examiner overruled counsel's objection to the "or should have heard" portion of specification two. Stipulations were entered, including a portion of the investigation record. Appellant entered a plea of "not guilty" to the charge and each specification preferred against him.

After the Investigating Officer made his opening statement, testimony of the first mate and four other crew members of the JOLIET, as well as that of the Master of the VERONA, was introduced into evidence. Documentary evidence, including extracts from the JOLIET'S Bell Book, Pilothouse Logbook and Radio Log, was also introduced by the Investigating Officer.

Counsel for Appellant moved to dismiss the charge and specifications at the conclusion of the government's case. After briefs on the motion were filed, the motion was denied, but at this time the Examiner granted the motion, previously entered, to dismiss the charge against the Merchant Mariner's Document.

In defense, Appellant offered in evidence the testimony of an expert on marine propulsion, an expert on piloting in the lower Saint Marys River, and a crew member of the JOLIET. Appellant also offered photographs of the damaged vessels and extracts from the VERONA'S Bell Book as further evidence.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard 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 had been proved by proof of the two specifications. An order was entered suspending Appellant's

License No. 175033, and any and all duplicates thereof, issued to Appellant, for a period of two months and for an additional four months on twelve months' probation.

The decision was served on 18 September 1958. Appeal was timely filed on 16 October 1958.

FINDINGS OF FACT

On 26 May 1957, Appellant was serving as Master on board the United States SS JOLIET, a lake freighter, and acting under authority of his License No. 175033, when his ship and the United States SS VERONA, also a lake freighter, collided in the lower St. Marys River. The collision occurred at a point about 7000 feet north of Gaffney Point, Michigan, Slightly to westward of the down bound track (west of Pipe Island) charted on U. S. Lake Survey Chart No.61 (Exhibit 7). The navigable portion of the river is approximately 3500 feet wide in the area of the collision.

This accident occurred at 0617 local time in a dense fog which limited visibility to approximately 800 feet in the immediate vicinity of the casualty. The JOLIET's port side scraped across the bow of the ascending VERONA after the initial impact of collision. There were no personnel injuries on either vessel.

The JOLIET was abeam Sweet's Point Light at 0600 hours, down-bound from Superior, Wisconsin to Ashtabula, Ohio laden with a cargo of iron ore when the Appellant relieved Mate Norton of the conn because of fog sighted ahead. At this time Appellant broad-cast by radio a security call to alert down-river traffic of the JOLIET's presence. The engine room was alerted to stand-by for bells; however, the JOLIET continued steaming with a 1 1/2 mile per hour current, at a speed of about 10 miles per hour over the bottom. Existing visibility of less than two miles deteriorated in patches of fog to approximately 2000 feet by 0605, when the JOLIET commenced blowing regulation fog signals. At 0609, with visibility less than 1000 feet, the engine was reduced to half-speed; at 0611 and 0612 further reductions were made to slow and dead slow. The JOLIET's engine could not be stopped without loss of vacuum. Full astern was ordered at 0614. The lookout, about 0611, reported hearing another vessel's fog signal about three points off the port bow of the JOLIET.

This other vessel was the VERONA, upbound for the Detour Coal Dock, a destination requiring deviation from the charted upbound track to the eastward of Pipe Island. The VERONA intended to cross the downbound track in the vicinity of Watson Reefs, some mile and a quarter below the 0610 position of the JOLIET. Visibility at the VERONA's position was approximately 800 feet. The JOLIET and the VERONA were both equipped with radar. Each had the other revealed on her scope for several minutes proceeding the collision; however, no plots were maintained. Voice radio communications were established between the vessels at approximately 0610 when the VERONA requested a starboard to starboard passing in view of her destination, whereupon the JOLIET replied she would look out for the VERONA. Shortly thereafter, upon hearing the VERONA's fog whistle signal about three points off the port bow, the JOLIET sounded one blast. Receiving no answer, the JOLIET sounded the danger signal, to which the VERONA replied with a danger signal. This was about 0612.

Prior to this time the VERONA, stemming a 1 1/2 mile per hour current, had her engines set at half-ahead and was making about six miles per hour over the bottom. At 0612, the VERONA's engine speed was reduced to slow, but was increased to half-speed again at 0616. About 0613 the VERONA commenced changing course from 315° true to 280° true. By radio-telephone, the VERONA advised the JOLIET of this turn to port and requested the JOLIET to hold up her downbound progress. The JOLIET replied that she was backing down. The visibility remained approximately 800 feet in thickening fog. Unknown sighting the JOLIET the VERONA increased speed to full power, accentuated her turn to port and struck the JOLIET's port bow. At impact the JOLIET was nearly dead in the water, on a heading of 165° true. The VERONA's stem remained imbedded in the JOLIET's bow until the JOLIET applied full power and, scraping down the VERONA's starboard side, cleared the vessels. When parted the vessels anchored in the vicinity and notified the Coast Guard of the accident.

Subsequent testing revealed that the JOLIET could come to a stop from a speed of ten miles per hour over the bottom in between 1500 and 1600 feet.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Examiner's decision is not supported by reliable, substantial and probative evidence upon the record considered as a whole; that the Examiner's findings are contrary to the evidence; and that the Examiner's decision is contrary to law. The following exceptions to the Examiner's findings are urged:

1. The visibility at 0600 was considerably in excess of one mile, rather than one mile. (Finding 3)
2. The speed of the JOLIET at full ahead was ten miles per hour, rather than eleven and one-half. (Finding 4)
3. The JOLIET started fog signals at 0610, rather than at 0600. (Finding 5)
4. The finding that visibility closed to 500 feet some two or three minutes after the JOLIET passed Sweet's Point Light abeam, with continued poor visibility until the collision, is contrary to the evidence. (Finding 6)
5. The finding that the JOLIET's speed was in excess of eight miles per hour when engine set on half-ahead at 0610 is contrary to the evidence. (Finding 8)
6. The finding that radio-telephone communication was established between the vessels at 0610, when the VERONA purportedly requested a two-whistle side passing, and that the visibility was then 1000 feet, is contrary to the evidence. (Finding 10)
7. The finding that the JOLIET's speed was in excess of eight miles per hour at 0611, when engine set on slow ahead, and that from 0615 to 0618 the engine was set on full ahead, is contrary to the evidence. (Finding 11)
8. The VERONA's main engine was placed on half-speed ahead at 0616, omitted from Finding 12.

9. The JOLIET's heading at time of collision was a result of prolonged backing, rather than from an intentional course change to starboard. (Finding 14)

10. The visibility at the time of collision was from 700 to 900 feet rather than 500 feet. (Finding 16)

APPEARANCE: McCreary, Hinslea & Ray of Cleveland, Ohio, by
John H. Hanninen, Esquire, of Counsel.

OPINION

Many of the contentions raised by Appellant in his brief and supporting memorandum are not material to the issues raised by the nature of the proceeding under Title 46 United States Code 239(g). The sole purpose of this hearing was to determine whether the person charged, while acting under the authority of his license, was guilty of negligence. Therefore, the negligence, if any, on the part of other persons would not in any way absolve the person charged from responsibility for his own negligence. I have limited my review to those points bearing on the two specification under the charge against Appellant.

First, the visibility between 0600 and 0610 must be resolved. Appellant excepts to the Examiner's finding that the 0600 visibility was only one mile. From an examination of the record it appears that visibility deteriorated from 0600 to 0610, at which time it was reduced to about 800 feet and remained so reduced until the collision. Realizing that visibility estimates cannot be precise without reference to objects at known distances, or of familiar sizes, I have been inclined to resolve any differences in estimation in favor of Appellant. Since Appellant concedes that no speed check was made until 0609, even though the vessel was approaching a fog bank, I do not believe it necessary to dwell on visibility existing at 0600. This renders Appellant's first exception moot.

The second exception goes to the speed of the JOLIET at full

ahead in the St. Marys River on the morning of the collision. Inasmuch as the mate qualified his original statement to the effect that the JOLIET's speed was ten miles per hour at full speed without regard to current, I have found the JOLIET's speed at 0610 to be ten miles per hour over the bottom. However, I find that the JOLIET started fog signals about 0605, based on the lookout's statements that the JOLIET was sounding fog signals "for some time" before he heard the VERONA's whistle.

The finding that visibility reduced to 500 feet within two or three minutes after 0600 is challenged. Appellant's contention that the mate's testimony establishes good visibility conditions at this time is based on contradictory statements in the record. This witness, Clay Norton, located the 0610 position of the JOLIET on the chart, stated that the fog bank was a good mile and a half away when the first fog signal was sounded, then delineated an area surrounding Pipe Island, only 4000 feet down river from the 0610 position. On page 44 of the record this same witness estimated the visibility at 0610 to be about 1000 feet.

On page 45 he further qualifies his estimate by stating that the visibility did not further deteriorate, but remained at about seven, eight or nine hundred feet. Comparing these statements with the bow lookout's testimony indicates that by 0609 the visibility had reduced to less than 1000 feet. The cook's estimate of a mile and one-half visibility, purportedly existing uniformly from 0600 until the collision, is impeached by his own shipmates.

Appellant excepts to the Examiner's finding that the JOLIET made good eight and one-half miles per hour on half-ahead. I find the mate's testimony satisfactory to establish six and one-half miles per hour as the half speed of the JOLIET. This finding goes to the sufficiency of the second specification, and not the first, since the reduction of engine speed does not instantaneously reduce a vessel's speed.

The finding that voice radio communication was established at 0610 is challenged as contrary to the evidence. Suffice to say that Appellant stipulated to testimony of Alvin Edward Karson, Wheelsman of the VERONA, that there were two radio-telephone conversations, the first of which was initiated by the VERONA in requesting a two-whistle passing, to which the JOLIET replied

"We'll look out for you." It appears from the whole record that this must have been at approximately 0610.

The Examiner's findings concerning the JOLIET's speed and engine settings are overruled, I have substituted my own findings. Further, I include the half-speed setting of the VERONA at 0616 in my findings.

I am inclined to believe that prolonged backing was the predominate cause for the JOLIET's change of heading to starboard, and that, as aforesaid, the visibility existing at time of collision was about 800 feet.

This disposes of the exceptions to findings of the Examiner, and leaves us with the JOLIET underway, making a speed of ten miles per hour, with visibility of less than 1000 feet when the first speed check was initiated at 0609. I will consider the two specifications separately.

I.

SPEED DURING REDUCED VISIBILITY

One aspect of the mariner's standard of due care is restated in Great Lakes Rule 15. (33 U.S.C. 272):

"Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes go at a moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel at once reduce her speed to bare steerage way, and navigate with caution until the vessels shall have passed each other."

This rule requires a degree of prudence which can be evaluated only in the light of all the circumstances bearing on the incident. See *Commandant's Appeal Decision* No. [955](#).

One of the circumstances is the ability to back, the capability of arresting the vessel's forward progress in sufficient time to avoid a collision, if this maneuver is indicated. Early in

the history of reported American admiralty collision cases this principle was recognized. *Rhode Island*, 17 Fed. 554 (1883). Appellant apparently recognizes this principle as well, for he made a test of his vessel's backing capabilities a part of his defense.

The atmospheric density, the degree to which visibility is reduced or can be expected to reduce in the immediate future, ships individual propulsion and hull characteristics, amount of expected traffic, maneuvering room, and current underfoot are among the other circumstances which must be considered in this case.

Taking into account the relatively deep-draft of the JOLIET, the deteriorating visibility and sound transmission conditions, the possibility of cross-track traffic upbound for the Detour Coal Dock, the limited maneuvering room requiring speed rather than course adjustments to avoid potential collisions, and the current underfoot impelling additional forward momentum to a vessel with limited machinery flexibility (in its inability to stop engines without losing vacuum), it is my opinion that the JOLIET's speed was in excess of moderate before 0609 when the initial speed check was executed. Captain TEN EYCK knew, or should have known, that any traffic crossing his track might necessitate a reduction in speed to avoid collision, yet at his steaming speed this reduction could not be expeditiously accomplished.

Appellant contends that no special circumstances existed during the 0600 - 0610 interval because "* * *it is not possible to determine that an upbound ship intends to use the downbound channel until she makes the turn at Watson Reefs * * *" and "* * * prior to that time, any deviation from the upbound channel is not anticipated." The prudent mariner takes action predicated on foreseeability, not solely on a knowledge of existing facts. Inaction by the JOLIET, based on the absence of positive knowledge indicating risk of collision, is not within the degree of prudence required by Rule 15.

The purpose of the moderate speed requirement is stated in *Pennsylvania*, 19 Wall. (86 U. S.) 125, 133 (1873):

"***to guard against danger of collision, ***speed should be reduced as the risk of meeting vessels is increased."

In the instant case the risk of meeting cross-track traffic in

the vicinity of Detour Coal Dock is markedly higher than in other portions of the St. Marys River. A prudent navigator having foreseen the possibility of a meeting or crossing situation, would have reduced speed sufficiently to insure his ability to take way off the vessel, if this became necessary.

Appellant cites *The Beaver*, 253 F. 312, in support of his contention that full speed is not, per se, immoderate. The speed of the *NECANICUM*, exonerated from liability although steaming at full speed in the fog, was about that of the *JOLIET*. The circumstances surrounding the determination that the *NECANICUM* was proceeding at a moderate speed (8 1/4 knots) are distinguishable from the instant case. For one thing, the collision in *The Beaver* occurred in open water off Point Arena, California, where flexibility in maneuvering, as well as speed adjustments, was available to avoid collision. Further, intermittently, the vessels had each other visually in sight several minutes before the collision. In the instant case, however, the *JOLIET* was without maneuvering room, and visibility was such that he did not see the *VERONA* until the vessels were less than 1000 feet apart. Whether ten miles per hour happen to be full speed, or some lesser engine setting, does not appear to be of real significance. What does matter is whether ten miles per hour is a speed at which, under the circumstances, a prudent navigator would be steaming.

Appellant contends the *VERONA* "did not and could not become a factor in the *JOLIET*'s navigation until after 0610." It is my opinion that the *VERONA* presented a potential menace to the *JOLIET*'s safety even before she was detected on the radar, or in voice communication. It could reasonably have been anticipated that an upbound vessel might be in the position, and have the intentions, that the *VORONA* ultimately manifested. Accordingly, the *JOLIET*'s speed should have been materially reduced from ten miles per hour. This is emphasized by certain actions of the *JOLIET*: the broadcasting of a security call, the ordering of "stand-by the engines," and the commencement of fog signals. Captain TEN EYCK foresaw the possibility of traffic below, yet he failed to bring the *JOLIET* down to a moderate speed. This was negligence.

II.

REDUCTION TO BARB STEERAGEWAY

The speed alterations made on the JOLIET after hearing the VERONA's fog signals appear to have been consistent with good seamanship, because of the JOLIET's inability to safely stop her engines. The prolonged steaming at ten miles per hour, coupled with the current underfoot, had imparted such momentum to the JOLIET that immediate speed reduction to bare steerageway was impossible. However, the steps taken after hearing the VERONA's fog whistle seem to have been adequate, except for the excessive speed of the vessel at the time the steps were taken. It would be multiplicitious to charge Captain TEN EYCK with both excessive speed and the failure to reduce to bare steerageway immediately upon hearing a fog signal, when this failure is solely the result of excess speed before the whistle was heard. The gravamen of the offense under Specification Two is a failure to take reasonable action to comply with Rule 15, rather than a technical, absolute non-compliance. The second specification is dismissed on the basis that, after hearing the fog whistle, Captain TEN EYCK took reasonable steps to reduce his speed to bare steerageway.

CONCLUSION

It should be noted that, in this case, both Captains had everything necessary to accomplish a safe passage during low visibility. Each had the other's vessel on radar, voice communication was established, and both knew the other's intention, yet they ultimately collided. Electronic navigational aids are no more effective than the persons using them. Continuous vigilance and prudent seamanship remain essential elements in safe navigation; neither radar nor voice communication can make up for deficiencies in this respect.

Since the second specification is dismissed and because Appellant has no prior record after navigating the Great Lakes for many years, the order of the Examiner will be modified.

ORDER

The order of outright and probationary suspension is modified to provide for a suspension of one month without probation.

As so MODIFIED, the order of the Examiner dated at Cleveland, Ohio, on 17 September 1958, is AFFIRMED.

J A Hirshfield
Rear Admiral, United States Coast Guard
Acting Commandant

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

***** END OF DECISION NO. 1166 *****

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