

In the Matter of License No. 113156
Issued to: EUGENE G. BACH, JR.

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

689

EUGENE G. BACH, JR.

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.

On 27 March, 1953, an Examiner of the United States Coast Guard at New Orleans, Louisiana, suspended License No. 113156 issued to Eugene G. Bach, Jr., upon finding him guilty of negligence based upon two specifications alleging in substance that while serving as Pilot on board the American SS SEATRAN SAVANNAH under authority of the document above described, on or about 16 January, 1953, while proceeding upbound under conditions of fog and low visibility on the Mississippi River in the vicinity of Home Place Light, he neglected and failed to navigate in compliance with the Inland Pilot Rules in that he did not stop her engines and navigate with caution notwithstanding the fact that information of the proximity and approach of another vessel was available to him, thereby contributing to a collision between his vessel and the M/V EASTERN SUN (First Specification); and that, under the above conditions, he negligently navigated his vessel at an excessive speed (Second Specification). A third specification was found "not proved" by the Examiner.

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 an attorney of his own choice and he entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of John A. Cochrane, Pilot, SS ARKELDIJK; Frederick A. Johnson, Pilot, M/V EASTERN SUN; Osmund McKinney, Second Mate, and Emile S. Gowloski, Third Assistant Engineer, SS SEATRIN SAVANNAH; and Dudley E. Parker, Administrative Assistant to the Chief of the Aids to Navigation Section, Office of the Commander, Eight Coast Guard District. Also introduced in evidence were photostatic copies of the pertinent Bridge Bell Book, Engine Bell Book, Deck Log Book, and Course Recorder Graph of both the EASTERN SUN and the SEATRIN SAVANNAH; the Engine Log Book of the EASTERN SUN; and USC&GS Chart No. 1271. By agreement of counsel, the stipulated testimony was admitted to Paul T. Phillips, Master; Milton E. Chandler, Second Mate; William J. LaShure, Second Assistant Engineer; Joseph D. Starkey, Chief Engineer; James R. Wade, Wheelsman; and Douglas E. Gray, Lookout; all of the EASTERN SUN; and Sietse D. Wagenmaker, Wheelsman, SEATRIN SAVANNAH.

In defense, Appellant testified in his own behalf and submitted a letter of his Pilots' Association relative to his employment record.

Counsel for Appellant then made a motion to dismiss the First Specification and it was denied by the Examiner.

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 findings and concluded that the charge had been proved by proof of the two specifications. He then entered the order suspending Appellant's License No. 113156, and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of three months to become effective immediately.

From that order, this appeal has been taken, and the following errors in the proceedings, opinion, decision, findings of fact and conclusions of law of the Examiner are assigned:

- "1. In that the SEATRIN SAVANNAH was close to the center of the river while passing the anchoring ARKELDIJK.
- "2. In that Pilot Bach failed to show he had sighted the M/V EASTERN SUN and/or knew her course until the vessels were in the jaws of collision.
- "3. In that the SEATRIN SAVANNAH was navigating at an excessive rate of speed under the circumstances.
- "4. In that the M/V EASTERN SUN was practically stopped dead in the water at the time of the collision.
- "5. In that the SEATRIN SAVANNAH was in a dense fog while navigating to pass the anchoring ARKELDIJK.
- "6. In that the M/V EASTERN SUN first observed the lights of the SEATRIN SAVANNAH one (1) ship length (500') distant.
- "7. In that the SEATRIN SAVANNAH was required to stop in a situation of special circumstances.
- "8. In that the stipulated statement of Capt. Phillips (EASTERN SUN) can be accepted as the truth over the testimony of many witnesses presented before the Board and subject to cross examination."

Appellant has also submitted thirty-nine proposed "Findings of Fact," eight "Conclusions of Law," and a "Memorandum of Law." The latter states that the Special Circumstances Rule (33 U.S.C.A. 212)

applied in this case because the anchored ARKELDIJK created a dangerous situation; and, therefore, the safest course for the SEATRIN SAVANNAH to pursue was to proceed on her course at the same speed as when the fog signal of the EASTERN SUN was first heard at the time the SEATRIN SAVANNAH was abeam of the anchored ship. Alternatively, it is stated that Appellant exercised reasonable judgment in *extremis*.

This memorandum also cites two court decisions in each of which one of the two vessels in collision in dense fog (visibility 200 to 300 feet) was exonerated although she had not stopped her engines upon hearing the fog signals of the other vessel. It was decided in both cases that the exonerated vessel was clearly guilty of a statutory fault which raised the presumption that her fault contributed to the collision; but that this presumption was overcome by proof that the 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. A third case is cited in support of the propositions that the Special Circumstances Rule requires a departure from the other rules when danger is imminent; errors in *extremis* are excused; and faults which do not contribute to the collision may be disregarded. For these reasons, one vessel was exonerated although her engines had been put at full speed ahead when collision in dense fog (visibility 300 feet) was imminent through no contributory fault on the part of the exonerated vessel.

APPEARANCES: Hunt, Hill and Betts, of New York, New York, by
Edward R. Downing, Esquire, of Counsel.

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

FINDINGS OF FACT

On 16 January, 1953, Appellant was serving as Pilot on board the American SS SEATRIN SAVANNAH and acting under authority of his License No. 113156 while the ship was upbound on the Mississippi River below New Orleans.

On this date at 0324 SEATRIN SAVANNAH bridge time, the latter

ship, which is a 460 foot, single screw vessel, was in a collision in fog with the downbound, fully loaded, 480 foot American tanker EASTERN SUN at a point near midstream and approximately one-quarter of a mile above Home Place Light which is about two and a half miles above Harris Bayou Light and about two miles below the Port Sulphur lights. Home Place Light was temporarily on a twelve foot tower located on the West bank of the river, or the left-hand side upbound. The upstream course of this stretch of the Mississippi River curves gradually to the right for a distance of more than six miles starting about a mile above Harris Bayou Light. Consequently, the course of the river changes from a generally East-West direction to a Northwesterly direction. The midstream course from Home Place Light to the point of the collision is approximately 290 degrees true and this is about the same as the over-all course from two miles below to two miles above Home Place Light. The width of the river at the latter light is 2100 feet and it is not more than 300 feet wider at the point where the collision occurred.

Appellant was at the conn of the SAVANNAH. The Master, Second Mate and helmsman were also on the bridge; and a lookout was on the forecastle. Both the SAVANNAH and the SUN were burning the proper navigation lights and sounding regulation fog signals at all pertinent times.

The SS ARKELDIJK was proceeding up the river about a mile ahead of the SAVANNAH when light fog was encountered below Harris Bayou Light. Visibility was limited to approximately one-half to three-quarters of a mile at that time (R.97). Appellant had reduced speed from full ahead (95 RPM) to 60 RPM at 0304. Since Appellant "could see the weather making up ahead . . . around Home Place" (R.90), he slowed the ship to 40 RPM (about 5 knots through the water) at 0310; and the SAVANNAH was in dense fog at 0312 (Exhibit #6). The record contains no mention of the use of radar on the SAVANNAH or whether such equipment was on board the ship.

The pilot of the ARKELDIJK decided to anchor because Home Place Light could not be seen as a result of the dense, patchy fog (R.13, 15, 18). Accordingly, the speed of the ship was reduced and she was maneuvered towards the East bank. The ARKELDIJK sounded a three blast backing signal as she anchored about 300 feet (R.17) off the East bank just below Home Place Light (R. 109, Exhibit #10)

at 0320 (R. 91, Exhibit #1 and R. 38) and all her deck and cargo lights were turned on in addition to her anchor lights (R. 13, 98). Her heading was about 295 (R. 13, 17, 31).

Appellant anticipated the anchoring of the ARKELDIJK and he altered the course of the SAVANNAH while clearing the anchoring ship (R.97). The SAVANNAH was on course 279 degrees gyro for between two and three minutes before she changed course back to 274 degrees gyro at 0321 (Exhibit #9) after having passed abeam of the anchored ARKELDIJK (R. 13, 16) at a distance of between 600 and 700 feet (R. 16, 17). The pilot of the latter vessel could not see the SEATRAN after she had passed the bow of the ARKELDIJK (R. 27). Appellant did not see Home Place Light (R. 106, 107); but, for the first time, he heard the fog signals of the downbound EASTERN SUN when the SAVANNAH was passing the anchored vessel to starboard (R. 101). This fog signal seemed to be coming from about two points off the starboard bow of the SAVANNAH. Appellant did not make any alteration in the speed of the SAVANNAH (five knots against a current of one knot or less) and he maintained a course of 275 to 280 degrees gyro till the navigation lights of the SUN were sighted at 0322 1/2 (Exhibits #7, #8, #9).

The SUN was proceeding approximately down the middle of the river in thick fog at a speed of five knots after passing Port Sulphur (R. 38). The pilot could not see either bank of the river and he was conning the ship by radar which was set on the two mile scale. The images of the ARKELDIJK and the SAVANNAH appeared on the radar scope and fog signals from the two ships were heard coming from off the port bow of the SUN between ten and fifteen minutes before the collision. When the three blast whistle signal and the rattle of the ARKELDIJK's anchor chain were heard at 0320 1/2 SUN bridge time (which was about one-half minute faster than the SAVANNAH bridge clock), the engines of the SUN were stopped.

At 0323, the open range lights and the green side light of the SAVANNAH were sighted on the port bow. The pilot of the SUN momentarily saw the loom of the lights of the ARKELDIJK at about the same time. Immediately after sighting the lights of the SAVANNAH, the pilot of the SUN ordered emergency full astern and left full rudder; one three-blast and one four-blast whistle signals were sounded; and the port anchor was dropped. The heading of the SUN changed about ten degrees to the left to 111 degrees

gyro between the time of sighting the SAVANNAH and the collision which occurred about a minute and a half later (R. 91, Exhibits #1, #3) when the forward motion of the SUN had been reduced considerably below her prior speed of five knots.

Appellant sighted the open range lights and red side lights of the SUN off the starboard bow of the SAVANNAH at just about the same time as the lights of the SAVANNAH were seen from the SUN. Before the three-blast signal was sounded by the SUN, Appellant ordered right full rudder and full ahead as a one-blast whistle signal was sounded by the SAVANNAH. Immediately after Appellant heard the SUN's three-blast signal, he ordered full astern. The interval of time between these two engine orders was so short that both of these orders were logged as 0322 1/2 (Exhibit #8). The speed of the SAVANNAH did not decrease appreciably before the two ships collided starboard bow to starboard bow at 0324 (Exhibit #6; R. 69-70 and Exhibit #8); but the SAVANNAH changed course from 280 to 295 degrees gyro (Exhibit #9) in this minute and a half (R. 87).

The vessels passed clear, starboard to starboard, after the first impact and rebound. The SAVANNAH anchored near the East bank in the vicinity of the collision. The SUN's rudder was put hard right and her stern swung to port. While the bow of the SUN remained close to the West bank and her stern drifted downstream, the pilot of the ARKELDIJK could see the open range lights and the red side light of the SUN at a distance of approximately 1000 feet. With the assistance of the engines, the SUN rounded up to her anchor on the West bank below Home Place Light.

Since the course made good by the SAVANNAH from abeam of the ARKELDIJK to the place of the collision was about 285 degrees true (see prior finding that midstream course is approximately 290 degrees true; plot of recorded courses of SAVANNAH as per above findings, Exhibit #9, is about 285 degrees true) and since the SAVANNAH was practically in midstream when she passed the anchored vessel about three minutes before the collision, the accident occurred about 1500 feet above the ARKELDIJK and closer to the West bank than the East bank of the river.

Due to the decreasing speed of the SUN, it is evident that the closing rate of the two ships was less than 10 knots during the minute and a half between sighting each other and the collision.

Consequently, the distance of visibility was necessarily less than 1500 feet insofar as the sighting of each other's navigation lights was concerned. The fact that the lights of the anchored vessel could be seen from the SUN at a greater distance than 1500 feet indicates that such lights were powerful cargo lights. The testimony of several witnesses, including Appellant, that the navigation lights of each ship could be seen from the other vessel at a distance of one-half to three-quarters of a mile and for an estimated time of three minutes before the collision, is not substantiated by the basic facts as found from the record and set forth herein. In order to find in accordance with such estimates, it would be necessary to ignore completely numerous log entries as to the times of different pertinent events. These entries are contained in the several log books of both vessels; the entries are substantially in accord with each other except for the time differential mentioned above; and such entries represent the only times contained in the record which were recorded at the approximate time of the collision.

"The importance of the logbook entries in determining marine causes has always been recognized by courts of admiralty." *The Chicago - Silver Palm* (CCA 9, 1937), 94 F2d 754, cert. den. 304 U.S. 576.

The distance of visibility, in the vicinity of Home Place Light, which is indicated by these entries, is corroborated by other evidence from such disinterested sources as the course recorder graphs of the two ships (Exhibits #5 and #9) and the pilot of the ARKELDIJK, as well as evidence of the failure of any of the witnesses to observe Home Place Light before the collision.

OPINION

Appellant's proposed findings and conclusions have been considered and they are accepted to the extent that they are not inconsistent with the findings and conclusions contained in this decision. The main points of disagreement are concerning the time and distance the two ships were visible to each prior to the collision; the distance at which the SAVANNAH passed the ARKELDIJK; the location of the collision with respect to both Home Place Light and the middle of the river; and the propriety of Appellant's failure to stop the engines of the SAVANNAH. (Some of Appellant's proposed findings and conclusions are not material since they

pertain to alleged faults on the part of the SUN; but the purpose of this proceedings is to determine whether Appellant was negligent in his navigation of the SAVANNAH and whether any such negligent navigation on his part contributed to the collision.)

Appellant proposes that he saw the lights of the SUN within a few seconds after first hearing her fog signals when the SAVANNAH was between 200 and 300 feet abeam of the ARKELDIJK; Appellant sighted the navigation lights of the SUN at a distance of one-half mile and three minutes before the collision occurred; the SUN was navigating on the wrong side of the fairway prior to and at the time of the collision; and Appellant acted prudently by maintaining slow speed in order to retain steerageway while maneuvering to pass close aboard an anchored vessel.

I have pointed out above my reasons for concluding, on the basis of the basic or evidentiary facts as found, that: the distance of visibility was less than one-quarter of a mile; Appellant sighted the lights of the SUN about one and a half minutes after passing the anchored vessel and approximately the same length of time prior to the collision; and the collision took place on the SUN's side of the river and about one-quarter of a mile above the anchored vessel and Home Place Light. My findings of fact also contain references to mutually corroborative portions of the hearing record which support the evidentiary findings relied upon herein. Although it is conceded that the lights on the ARKELDIJK after she anchored caused the visibility from that ship to be more limited than from the SAVANNAH, it is highly unlikely, and not in accord with the record as a whole, that the difference was as great as Appellant claims it was.

Concerning the distance between the ARKELDIJK and the SAVANNAH, the Examiner who saw and heard the witnesses is the best judge as to their credibility. He chose to accept the testimony of a disinterested witness, the pilot of the anchored ship, that the distance was between 600 and 700 feet rather than to accept the testimony of Appellant and the Second Mate of the SAVANNAH that the distance was only 200 to 300 feet. I see no reason to reject this finding by the Examiner.

On the basis of the above findings and conclusions which are substantially in accord with the reasoning of the Examiner that the

SAVANNAH was on the West side of the river and that the visibility was limited to considerably less than a half mile, I reject Appellant's Assignments of Error numbers 1, 2, 3 and 8; numbers 4, 5 and 6 are accepted to the extent that the Examiner's findings have been modified herein; and number 7 alleges as error that which is not contained in the decision of the Examiner. It is noted that any of my findings of fact, which are in accord with the stipulated testimony of the Master of the SUN, are supported by evidence other than such stipulated testimony; and, in any event, Appellant cannot now object to the lack of cross-examination after entering into the stipulation at the time of the hearing. I would also like to point out that Assignments of Error numbers 2, 5 and 7 are to some extent inconsistent with Appellant's Memorandum of Law which contends, in part, that Appellant acted in *extremis* upon hearing the fog signal of the SUN (as opposed to Assignment of Error No. 2); that this case presents a situation which is similar to the two dense fog (200 to 300 feet visibility) cases which are cited (but see No. 5); and that the Special Circumstances Rule does apply *in* this case (contra No. 7).

In the light of my above findings of fact which are supported by substantial evidence, I conclude that Appellant's failure to stop the engines of the SAVANNAH when he first heard the fog signal of the SUN was not an error in *extremis*; that, at least partially as a result of such failure to stop the engines of the SAVANNAH, the latter vessel was travelling at an excessive rate of speed when the SUN was sighted about a minute and a half after her fog signal was heard by Appellant for the first time; and that, therefore, Appellant was negligent as alleged in the First and Second Specifications and his negligent conduct contributed to the collision of the two vessels. Since the SAVANNAH was on the wrong side of the river, her position is not comparable to that of the exonerated vessel in each of the two cases cited by Appellant wherein the presumption of contributory fault (arising from the statutory fault of failing to stop the vessel's engines) was held to have been overcome by the fact that the other vessel was found to have been on the wrong side of the channel and guilty of such serious negligence as to make the collision unavoidable regardless of the navigation of the exonerated vessel.

The requirement 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), is 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 S. S. Co. (1917)*, 243 U.S. 291. In that case, the rate of speed of the BEAVER was much too high in fog which limited visibility to about 900 feet at the time of the collision; but the SELJA was also found to have contributed to the collision even though her speed was reduced from six to three knots about ten minutes before the collision and her engines were stopped at least five minutes prior to the accident so that she had practically lost headway at the time of collision. Since the SELJA's engines had not been stopped immediately upon hearing the fog whistles of the BEAVER sixteen minutes before the collision took place, the court held that "the negligent failure [of the SELJA] to observe the statutory rule contributed directly to cause the collision"; and that "the case is not one for the application of refinements as to what would have been good seamanship without the rule" Hence, the conclusion was reached that the SELJA had not overcome the presumption of contributory fault which places the burden upon a ship to show that her statutory violation could not have contributed to the collision. *The Pennsylvania (1873)* 86 U.S. 125.

The textwriters also emphasize the mandatory nature of the rule. *Griffin on Collision (1949)*, p. 317, states:

"It therefore does not leave the navigation of a vessel, when a whistle is heard apparently forward of her beam, the position of which is not ascertained, to the master's judgment, but assumes that the zone of danger of collision is reached when the whistle is heard, and forbids the ship to enter such zone except after stopping its engines to ascertain the position of the oncoming ship. It defines in positive terms the master's duty in such cases."

Griffin then cites numerous cases including some wherein vessels whose engines were stopped within a minute of hearing the first fog signals forward of their beams were held at fault for not having taken immediate action to stop the engines.

Similar language is used by Farwell in his *Rules of the Road* (1944) p. 207-8:

"While there may still be some iota of discretion left to the seaman on the bridge by the landsman on the bench in regard to moderate speed, at least there is no discretion as to the primary action required by the second paragraph of Article 16, either in the law itself or in the decisions enforcing it. That action is for a steamer hearing a fog signal ahead to stop her engines, and unless such a proceeding would involve certain and immediate peril, there is no exception to the requirement."

It is not an exception to the requirement if a ship must maintain her speed in order not to lose steerageway. *The Walter D. Noyes* (D.C., Va., 1921), 275 Fed. 690; *The Providence* (D.C., R.I., 1922), 282 Fed. 658. In addition, the facts do not indicate that there was any immediate danger which prevented Appellant from complying with the rule to stop the engines of the SAVANNAH. The width of the river was ample and the SAVANNAH was well to the port of the anchored ship when Appellant heard the fog signal off the starboard bow of his vessel. On the contrary, every indication is that the collision would not have resulted if Appellant had slowed the progress of his vessel towards the West bank by stopping her engines as required. The situation became critical when the SAVANNAH continued on at the same speed of five knots for a minute and a half after she had passed the ARKELDIJK and had heard the fog signal ahead. Hence, Appellant cannot claim that his conduct constituted an error *in extremis*. The SAVANNAH was in imminent danger, when the SUN was sighted, as a result of Appellant's prior fault. Errors in *extremis* are excusable only where an emergency has been caused solely by the fault of the other vessel. Since the speed of the SAVANNAH was too great to stop her dead in the water within half the distance of visibility after sighting the SUN, Appellant was also guilty of negligently proceeding at an excessive rate of speed which

contributed to the collision. *The Chicago-Silver Palm*, supra. It is no excuse that the first order of full ahead on the engines upon sighting the SUN might have reduced the effectiveness of the subsequent full astern order since the predicament was of Appellant's own making.

The recent case of *The Jessmore-Longview Victory* (CCA 2, 1952), 196 F2d 689, is an appropriate instance of the strict enforcement of the rule to stop when a fog signal is heard. The visibility was between 1000 and 2000 feet and the LONGVIEW was proceeding at about six knots when the mate of the watch on the LONGVIEW received a report from the lookout that he thought he heard a fog whistle ahead. The mate waited until he heard the signal a minute later before he gave the order to stop the engines. Both ships were found guilty of contributory fault even though the LONGVIEW was dead in the water when the collision occurred. The fault of the LONGVIEW was based primarily upon the failure of the mate to order the engines stopped immediately upon receiving the report from the lookout. The court felt that if the LONGVIEW had stopped a minute sooner, no collision would have occurred. This was the result despite the finding that the JESSMORE could not have stopped her headway in time even if she had tried on first sighting the LONGVIEW. The duty to stop was equally as heavy upon the Appellant herein. His failure to comply with this duty was imprudent and negligent conduct.

ORDER

The Order of the Examiner dated at New Orleans, Louisiana, on 27 March, 1953, is AFFIRMED.

A. C. Richmond
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 23rd day of September, 1953.

***** END OF DECISION NO. 689 *****

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