

In the Matter of License No. 72946

Issued to: OLE LEE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

544

OLE LEE

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 24 July, 1951, an Examiner of the United States Coast Guard at Portland Oregon, suspended License No. 72946 issued to Ole Lee upon finding him guilty of negligence based upon a specification alleging in substance that while serving as pilot on board the American SS FAIRPORT under authority of the document above described, on or about 24 June, 1951, he negligently piloted his vessel so as to permit her to collide with the Spokane, Portland and Seattle Railroad bridge pier on the southwest side of the Columbia River at, or below, Vancouver, Washington.

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 selection and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer and counsel for Appellant made their opening statements. By stipulation, an abstract of the deck log of the FAIRPORT for 24 June, 1951, a statement by the Master of the FAIRPORT and statement by three members of the crew of the FAIRPORT were received in evidence.

The Investigating Officer then introduced in evidence the testimony of two pilots in these waters, one of whom was the Master of the towboat PORTLAND; and Appellant testified under oath in his own behalf.

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 specification and entered the order suspending Appellant's License No. 72946, 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 four months on eight months' probation.

From that order, this appeal has been taken, and it is urged that:

1. The record contains no substantial evidence sufficient to support a finding of negligence. Captain Jacobsen was the only one of the two witnesses produced by the Investigating Officer who did not participate in the occurrence and, therefore, it may be assumed that his testimony was unbiased and without prejudice. He stated that he would have undertaken the maneuver to drift through the open span of the bridge stern first if the ship appeared to be lined up properly after the towboat PORTLAND had failed to obey his orders to turn the ship around. This is in accord with Appellant's conduct and supports the action taken by him. The Investigating Officer's other expert witness was Captain Livingston, the Master of the PORTLAND. His testimony was inconsistent, evasive and did not tend to show any negligence on the part of Appellant. The fact that both of these witnesses were involved in prior collisions with this bridge supports the general rule of law that no inference of negligence arises from the mere fact of a casualty.
2. The Examiner erred in failing to find that "anchorage was infeasible because of the presence of crossing cable lines which might be damaged." In the reasonable judgment of Appellant and Captain Jacobsen, the choice to proceed through the open span of the bridge was a safe one; and it would have been gross negligence to select the alternative choice of anchoring, thereby probably causing serious damage to cables and pipelines.
3. The decision is fatally defective in stating that Appellant should have anchored or rung up full ahead on the engines of the FAIRPORT. The findings are most seriously defective in failing to make findings that Appellant was an experienced and competent pilot; that the FAIRPORT was properly headed for the open span of the bridge and, in Appellant's judgment based on his experience, she would clear the bridge stern first without difficulty; that the linemen had left the dock and Appellant did not consider it feasible to return to the dock; and that Appellant had reason to believe that, since he was a coastal pilot and not a member of the Columbia River Pilots' Association, the PORTLAND might fail to cooperate in any maneuver other than the one initiated by the PORTLAND, with the result that the FAIRPORT would be set down upon the bridge broadside. The actions of the PORTLAND in disobeying Appellant's orders would cause any prudent pilot to be dubious as to the cooperation he might expect in performing any maneuver other than one initiated by the PORTLAND.
4. The findings fail to support a conclusion of negligence since the sole question is whether a prudent pilot of like experience, who observed the situation as did Appellant, could be expected to exercise a higher degree of care and judgment than Appellant did. Since the test is not one of hindsight, the record and findings require that the question be answered in the negative. Appellant's action is supported by the circumstances and the testimony of Captain Jacobsen as being the exercise of reasonable and prudent judgment. He took a course which appeared to him to be safe and the only alternatives were to drag his anchors through cables and pipelines

or risk being set down broadside against the bridge due to the continued lack of cooperation by the PORTLAND which Appellant could reasonably anticipate.

5. The bias and prejudicial partiality of the Examiner is evidenced by his remarks on pages 63 and 64 of the hearing transcript wherein he indicates his belief that the sole disinterested expert witness is strongly biased in favor of Appellant. That the latter's interests were materially prejudiced is also indicated on page 114 when the Examiner felt bound to spring to the Government's defense when the officer appointed to represent the Government's interests "protesteth too much."
6. Even based on the defective findings, the unsupported conclusions and the opinion as written, in view of Appellant's prior exemplary record, the order in the case is so harsh as to constitute an abuse of the Examiner's discretion. In no event should anything other than Appellant's Columbia River pilot endorsement be affected.

APPEARANCES: Messrs. Graham and Morse of San Francisco, by Francis L. Tetreault, Esquire, of Counsel.

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

FINDINGS OF FACT

On 24 June, 1951, Appellant was serving as pilot on board the American SS FAIRPORT and acting under authority of his License No. 72946 while the ship was maneuvering on the Columbia River in the vicinity of Vancouver, Washington, and Portland, Oregon.

This portion of the Columbia River extends downstream in a northwesterly direction from Vancouver where the FAIRPORT was docked, headed upstream port side to at Terminal No. 1 which is approximately one-half mile upstream from the Spokane, Portland and Seattle Railroad Bridge. The latter is a swing bridge which passes over the quarter mile navigable width of the river between Oregon and Washington, with its swing section over the northerly or Washington side of the river. There is a horizontal clearance of 200 feet through each draw when the bridge is open. There is a cable and pipeline area extending between the bridge and a parallel line approximately 300 yards above the bridge. The dredged turning basin in the vicinity of Terminal No. 1 is about 700 feet in width.

The FAIRPORT was attempting to pass through the southerly one of the two draws with the assistance of the tow PORTLAND when the former ship struck the concrete abutment of the bridge pierhead which lies to the southwest of the pivotal point of the swing section of the bridge. The accident occurred at 0531 on 24 June, 1951. There were no personnel casualties and the FAIRPORT was not holed but she suffered an estimated \$20,000 damage to her plates.

The FAIRPORT Official No. 249072, is a C-2 type steam screw freighter of 6065 gross tons, 6,000 horsepower, 468 feet in length and a beam of 62 feet. She was partially loaded with 3,000

tons of lumber, pulp, and cargo of a general nature. Her draft was 13 feet, 5 inches forward, and 22 feet, 1 inch aft.

The towboat PORTLAND, Official No. 253590, is a stern-wheeler of 928 gross tons 1800 horsepower, 229 feet in length and a beam of 42 feet. She is one of the most powerful tows in this area of the country, having three rudders behind the stern wheel and four in front of it. The latter four rudders cause her to have considerable control while backing and, for this reason, it is customary during flood stage to make the starboard bow of the PORTLAND fast to the starboard bow of the other ship and back the latter through the open span of the bridge while the PORTLAND is headed in the direction of the bridge. In this manner, the assisted vessel is able to control its stern with her own rudder and the PORTLAND can control the bow of the other ship. Another approved method of maneuvering large ships past the bridge is for the ship to head downstream with the tug astern acting as a brake. This was the method Appellant intended to employ after having the PORTLAND pull the stern of the FAIRPORT out into the river and hold it against the current while the bow drifted downstream with the current. Appellant had never piloted a ship through this passage when the river was at flood stage.

The weather conditions were favorable at all pertinent times. It was clear with a slight breeze and visibility was good just after dawn. The water was at flood stage; the elevation of the river was about 16 feet which is one foot above the established flood stage; and a current of 3.5 knots was flowing downstream generally parallel with the course of the river. At flood stage there is usually a slight current setting across the river from east to west or northeasterly to southwesterly in the vicinity of the upstream part of the swing section of the Spokane, Portland and Seattle bridge and Appellant had knowledge of this cross current (R. 87, 110, 111). The swing span of the bridge was opened before the FAIRPORT left the dock and no other traffic impeded the maneuvering of the FAIRPORT and PORTLAND while descending the river from Vancouver to the bridge.

The FAIRPORT was scheduled to get underway for Portland, Oregon, early on the morning of 24 June, 1951. In order to reach Portland, it was necessary for her to go down the Columbia River past the Spokane, Portland and Seattle Railroad Bridge to the junction of the Willamette and Columbia Rivers and then up the Willamette River to Portland. The services of the towboat PORTLAND had been engaged to assist the FAIRPORT in negotiating the passage through the bridge.

At approximately 0505, the Portland came alongside the FAIRPORT and Appellant used a megaphone to give verbal instructions to Captain Livingston, the Master of the PORTLAND. Appellant ordered the PORTLAND to take a line from the stern of the FAIRPORT and pull her stern around so that the bow would drop down with the current and the FAIRPORT would pass through the bridge bow first with the PORTLAND astern of her. He also issued instructions that the PORTLAND should let go the lines as soon as the FAIRPORT had passed the bridge. Captain Livingston heard the orders to secure astern "very clearly" (R. 46) but he denies having heard any additional orders although he stated that there was nothing to prevent him from hearing them (R.45). After two lines about 40 feet in length had been secured to the stern of the FAIRPORT and bow of the PORTLAND, all lines except one of the headlines of the FAIRPORT were cast off the dock and

Appellant signalled the PORTLAND to commence pulling the stern of the FAIRPORT away from the dock. At 0520 when the ship was at an angle of approximately forty-five degrees to the dock, the headline was cast off and the FAIRPORT was underway. Her engines had been on standby since 0508.

Appellant was looking ahead to be certain that the bow of the FAIRPORT had cleared a log raft just below the dock before starting the engines to help swing the ship around. As a result, he did not notice that the PORTLAND had straightened out with the current and was pulling the stern of the FAIRPORT around into a position so that both vessels would drop downstream stern first with the current. Although this was in violation of his orders, Appellant did not give any visual or verbal orders to the PORTLAND when he noticed that his ship was rapidly falling off with the current. The PORTLAND continued going slow astern awaiting any further orders since Livingston was in doubt and confused as to what Appellant intended to do (R. 39). Captain Livingston had never taken a ship through the bridge in this manner (R. 32). Appellant noticed that the men who had handled the lines had left the dock and he realized that the FAIRPORT could not turn around without the assistance of the tug because of the 3.5 knot current. He also knew that there was a cable and pipeline area in this vicinity which would make it impractical to anchor. By the time Appellant had observed the situation and considered these alternative possibilities, the FAIRPORT was about 200 yards below the dock and 800 yards above the bridge. Since the ship had then straightened out with the current and was properly lined up to go through the southerly opening of the bridge, Appellant decided that the best choice was to carry out the maneuver initiated by the PORTLAND. In Appellant's judgement, this was a safe procedure to follow because he believed the ship would pass through the draw without danger of collision.

When the PORTLAND was close to the bridge, she went full astern. The two vessels were still in line and parallel with the open swing section of the bridge until the stern of the FAIRPORT was opposite the pivotal point of the swing section support. The current was running parallel to the river in the vicinity of the stern of the FAIRPORT but the cross current was sweeping across the river at the easterly end of the swing section and this current caught the bow of the FAIRPORT causing the bow to sheer to starboard. When this happened at 0529, Appellant ordered full ahead with hard left rudder and the PORTLAND stopped her engines. The FAIRPORT straightened out and her engines were stopped at 0530. But a few seconds later and after the stern had drifted downstream to the far side of the swing section, the bow suddenly sheered again to starboard due to the cross current and her stern swung to port. Appellant ordered full ahead and rudder amidships at 0530 in order to stop the ship and minimize the damages since it was apparent that the FAIRPORT would strike the concrete abutment of the bridge pierhead to the southwest of the swing section of the bridge. She was carried sideways by the current into this abutment and struck it on the starboard side of the ship abaft her bridge. The Master of the FAIRPORT signalled the PORTLAND to assist in backing the FAIRPORT off the bridge. When both vessels were clear of the bridge, the PORTLAND assisted in turning the FAIRPORT in the manner Appellant had requested that it be done when leaving the dock. The FAIRPORT proceeded to Portland without further mishap.

There is no record of any prior disciplinary action having been taken against Appellant

during his numerous years at sea which include 34 years as Master and 22 years with one company.

OPINION

After careful consideration of the entire record, I do not think that the charge of negligence is supported by the findings of fact concerning which there is little dispute.

The predominant question at issue is whether Appellant was negligent in failing to navigate the FAIRPORT so as to avoid collision or whether he committed an error of judgment which did not constitute negligence. The latter prevails when a navigator has made an error despite the exercise of reasonable and prudent judgment; and it is my opinion that Appellant was guilty of nothing more, in this case, because of all the redeeming circumstances in his favor.

The test to determine negligence is not what subsequent events proved would have been the best course of action but whether, under the surrounding circumstances at the time, Appellant failed to do what a reasonable and prudent pilot would have done if confronted with the same circumstances. Appellant was not required to exercise extraordinary diligence to avoid collision but only that degree of care which, in similar cases, would ordinarily be sufficient for the safety of life and property. Although the results proved that the decision of the Appellant was wrong, I believe it was such a mistake as might have been made by a competent and prudent navigator. Since Appellant displayed a fair exercise of discretion in choosing among alternatives and his choice proved to be wrong for the purposes of these proceedings, it was an excusable error of judgment and I cannot hold him to have been negligent.

Appellant was faced with a difficult choice to be made within a short period of time after he realized that the PORTLAND was not complying with his orders to hold the stern of the FAIRPORT against the current so that she would head downstream bow first. As alternatives to proceeding stern foremost towards the bridge opening, Appellant could have anchored or cast off the lines to the tow and headed upstream. Since he knew that there was a cable area between the FAIRPORT and the bridge, Appellant thought that this course of action would entail possible damage to the cables as well as fouling the anchor. And if he pulled away from the towboat, it would be impossible to turn the FAIRPORT around in the 700 foot wide turning basin against the 3.5 knot current without assistance. Appellant was justified in feeling somewhat dubious as to the future cooperation of the PORTLAND since she had just failed to carry out his orders. The possibility that Appellant was correct in this respect is supported by the fact that the PORTLAND was attempting to carry out a maneuver which Captain Livingston testified had never been undertaken during his three years aboard the PORTLAND. Consequently, when Appellant observed that the FAIRPORT remained properly lined up to pass through the bridge opening, he chose to carry out the maneuver initiated by the PORTLAND because in his judgment, he believed it to be the safest course to follow.

Both of the Investigating Officer's witnesses testified as expert pilots for this particular area and both of them admitted having collided with this bridge within a month of Appellant's accident. One of these two witnesses was Captain Livingston, the Master of the PORTLAND. Hence, the

only completely disinterested witness of the Investigating Officer was Captain Jacobsen and he testified, as an expert, that under the prevailing circumstances, he would have undertaken to proceed with the maneuver even though it was not his practice to take ships through the bridge in this manner.

Although the Examiner is not conclusively bound by the uncontradicted testimony of expert witnesses, such testimony should have been given greater than ordinary weight in this case. Captain Jacobsen was qualified by the Investigating Officer as a reasonable and prudent pilot in these waters and he testified, in effect, that in his opinion Appellant exercised reasonable judgment in making his choice. Even though he was better acquainted with the possible dangers involved in negotiating the passage in the manner attempted, Captain Jacobsen stated that he would have followed the same course of action as Appellant did. Captain Jacobsen had piloted ships through the bridge when the river was at flood stage but Appellant had not done it prior to this time. Hence, he was not as fully aware as Jacobsen of the dangers involved.

The chart used by Appellant (Exhibit 5) indicates that there was ample clear water in which to anchor before the FAIRPORT approached the cable area; and it seems unlikely that the PORTLAND would have refused to render further assistance to the FAIRPORT after she had moved upstream under her own power. But such cases as this must be judged from the point of view of the mariner on the bridge of the ship at the time the decision must be made in a comparatively short period of time; and he cannot maintain the status quo while weighing and evaluating the possible alternatives for an indefinite length of time.

CONCLUSION

Because of the testimony of Captain Jacobsen as well as my independent consideration of the circumstances under which Appellant was forced to reach a decision, it is my opinion that he made an error in the exercise of reasonable judgment but that he was not guilty of negligence such as is alleged in the specification.

ORDER

The order of the Examiner dated 24 July, 1951, is VACATED, SET ASIDE and REVERSED. The charge and specification proffered against Appellant are hereby DISMISSED.

REVERSED and DISMISSED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 7th day of March, 1952.