

In the Matter of License No. 180704 and Merchant Mariner's Document
No. Z-992733
Issued to PAUL ALEXANDER CHOTIN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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PAUL ALEXANDER CHOTIN

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

On 30 November, 1953, an Examiner of the United States Coast Guard at New Orleans, Louisiana, suspended License No. 40573 (later renewed as License No. 180704) and Merchant Mariner's Document No. Z-992733 issued to Appellant upon finding him guilty of negligence based upon two specifications alleging in substance that while serving as Pilot on board the American SS ESSO ALLENTOWN under authority of the license above described, on or about 1 September, 1953, at or about 2215 C.S.T., while said vessel was proceeding down the Mississippi River in the vicinity of Gartness Light, he neglected and failed to navigate his vessel in accordance with the Pilot Rules for such waters in that he began to overtake and position his vessel for passing the MV ZENITH and its tow before receiving an assenting signal from the ZENITH (First Specification); and he neglected and failed in his duty to reduce or slacken the speed of his vessel (Second Specification).

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 each specification proffered against him.

After the Examiner failed to grant counsel's motion to dismiss the charge and specifications, the Investigating Officer made his opening statement. Most of the testimony and exhibits, contained in the record of the preliminary investigation into the collision between the ESSO ALLENTOWN and the ZENITH, were stipulated in evidence.

In defense, Appellant offered in evidence the testimony of two Mississippi River pilots who testified as experts as to their general experience in meeting tug boats on the Mississippi River over a period of many years. They stated that the tugs sometimes did not answer signals, acted contrary to signals and sounded cross signals; and that the signals of other vessels often could not be heard on the tug boats because of their noisy diesel engines. One of the pilots testified that he had backed down on numerous occasions when tug boats did not answer the signal sounded by the pilot's vessel. Appellant also

testified under oath in his own behalf. Among other things, he stated that most tug boats will not answer signals and that small boats usually run in the middle of this part of the river so as to leave the deep water available for large ships.

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. 40573, and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of three months - one month outright suspension and two months suspension on twelve months probation.

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

POINT I. The specifications do not contain allegation which constitute offenses of negligence and no subsequent testimony can cure this defect.

Although Western River Pilot Rule 22(b) states that the overtaking vessel shall not "attempt to pass" until an agreement has been reached, the First Specification alleges that Appellant "began to overtake and position" his vessel; but these alleged acts are ones which must be performed prior to the act prohibited by the above Pilot Rule. The acts alleged in the First Specification are not prohibited by the Pilot Rules and such acts do not constitute negligence.

The Second Specification states that it was Appellant's "duty . . . to reduce or slacken the speed" of the ESSO. The specification does not allege an overtaking situation, the presence of another vessel, the violation of a Pilot Rule, or any other reason to indicate the basis for this alleged "duty."

POINT II. Even if the specifications were sufficient to inform Appellant of the charges against him, the Ultimate Findings of Fact do not state facts constituting negligence because such findings are in exactly the same words as the specifications (See Point I).

The specifications allege that the offense occurred at 2215 although the investigation established that the collision took place at 2222. This indicates that the Investigating Officer based his case on the theory that Appellant violated the half-mile rule by approaching within a half-mile of the other vessel without a signal agreement. But this rule does not apply to overtaking situations.

POINT III. The evidence is insufficient to sustain the charge of negligence. The cause of the collision was the ZENITH's abrupt change of course to starboard after her Master had received an incorrect reporting (of the ESSO's one-blast signal) from an incompetent lookout and the Master failed to verify the report by observing the position of the ESSO.

The record does not establish that the ESSO would have passed the ZENITH if the latter had not assented but had maintained her course as required. At most, Appellant made a mistake in

judgment as to when to slow down to avoid a passing in the absence of an assenting signal.

As a result of the consistent failure of tug boats on the Mississippi River to answer signals, it is sometimes necessary to proceed without an assenting signal. Although it might have been a violation of the strict letter of the rule to have passed the ZENITH, it would not have been as departure from the accepted standards of care under the circumstances.

POINT IV. The order of suspension is unreasonably severe under the circumstances and it should be modified to the extent of substituting an admonition or a period of probation if the findings and order are not reversed.

This case is typical of the situation where seamen are guilty of technical violation of the rules due to the common practice of tug boats not to blow or answer signals. There was plenty of room to pass the ZENITH and there was no suggestion of danger involved. It has been necessary for many other seamen to do the same thing as Appellant did in this case.

The minor nature of the collision and Appellant's perfect record for many years should also be considered.

APPEARANCES: Messrs. Terriberry, Young, Rault and Carroll of New Orleans, Louisiana, by Walter Carroll, Esquire, of counsel.

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

FINDINGS OF FACT

On 1 September, 1953, Appellant was serving as Pilot on board the American SS ESSO ALLENTOWN (operating under enrollment) and acting under authority of his License No. 40573 while the ship was downbound on the Mississippi River. At 2222 on this date, the ESSO ALLENTOWN (subsequently referred to as the ESSO) collided with a barge being towed by the downbound tug MV ZENITH in the vicinity of Gartness Light which is approximately five miles below Baton Rouge, Louisiana. The prevailing weather had no bearing on the casualty since it was a dark, clear night with good visibility and no appreciable wind. Each vessel was showing the required running lights.

At 2140 on 1 September, the tanker ESSO departed from Baton Rouge fully loaded and with a draft of 29 feet, 5 inches forward and 32 feet, 3 inches aft. Appellant was at the conn. Also on the bridge were the Master, the Third Mate and the helmsman. A lookout was stationed on the bow. At 2155, Appellant ordered full speed ahead and the ESSO continued at this speed (12 to 13 knots) until 2219 which was 3 minutes prior to the collision.

The width of the Mississippi River is about 3,000 feet in this northsouth stretch. It was necessary for the ESSO to descend the river in the deep water which extends a distance of approximately 1,000 feet out from the east bank of the river and provides a channel of 900 feet in

width for large ships. The shoals over the sand bar to the west of the deep water provided an additional channel width of 1,000 feet in which a vessel the size of the tug ZENITH and her tow could be navigated. At this point in the river, there is a gradual bend to the right (west) for descending vessels.

While the ESSO was proceeding down her right side of the deep channel, Appellant could see the downbound ZENITH pushing her tow of four barges. The ZENITH was slightly to her left of the middle of the deep channel along the east side of the river. She was making a speed of between 8 and 9 knots with her Master at the wheel and a lookout posted on deck outside the wheelhouse. The draft of the tug was 9 feet, six inches, and the deepest draft of her tow was 8 feet, six inches.

When the distance between the two vessels had closed to about one mile, the ESSO sounded a one-blast whistle signal with the intention of overtaking the ZENITH on her starboard side. Although this signal was not heard on the ZENITH, the lookout saw the ESSO astern at about the same time and reported her presence to the Master. Since it was customary for large ships to use the deep water channel, the Master of the ZENITH began to alter her course to the right sufficiently to angle across the river towards the west bank of the river.

At about 2215, when the ZENITH was approximately one-half mile ahead of the ESSO and slightly on her port bow the ESSO again sounded a one-blast whistle signal which the lookout and cook on the ZENITH thought was a two-blast signal. The lookout reported a two-blast signal to the Master and he continued angling the ZENITH across the river. At this time, the ESSO was swinging slowly to the right in order to follow the bend of the river and to overtake the ZENITH on starboard side.

Due to the noise of the ZENITH's engines, the Master of the ZENITH did not hear either of the two one-blast signals sounded by the ESSO. By the time the ZENITH answered with a two-blast signal, the vessels were about a quarter of a mile apart. When Appellant heard this two-blast signal at 2219, he ordered the engines of the ESSO stopped, the full astern, right full rudder and sounded the danger signal. The Master of the ZENITH put the rudder right full and increased the engine speed to full ahead.

At 2222, the port bow of the ESSO struck the after starboard barge of the tow and three of the barges broke adrift from the ZENITH. There were no personnel injuries on either vessel. The extent of the damage to the barge and cargo does not appear in the record]; but the estimated cost of repairs to the ESSO was \$10,000. The collision occurred approximately 1,000 feet from the east bank of the river.

Appellant has served as a pilot on the Mississippi River for 45 years without any prior record of disciplinary action.

OPINION

POINTS I AND II

I do not agree with the contention that the First Specification is incurably defective in that it fails to set forth any act of negligence in violation of Western Rivers Pilot Rule 22(b). In the first place, it seems reasonable to state that the allegations in the specification (" . . . at or about 2215 C.S.T. . . . began to overtake and position your vessel for passing the MV ZENITH . . . ") have substantially the same meaning as the words of Pilot Rule 22(b) ("attempt to pass") since the word "overtake" is commonly defined to mean "to catch up with" and the ESSO was approximately a half mile astern of the ZENITH at 2215. Therefore, the ESSO was in the process of "attempting to pass" the ZENITH when the ESSO continued to "overtake" the ZENITH from a distance of a half-mile with a speed differential of approximately 4 knots and at a time which was about 7 minutes prior to the collision.

This was an adequate allegation of negligence if there was risk of collision involved as required by Rule 22(b). The courts have generally stated that the phrase "to involve risk of collision" means that period of time after which "the necessity for precautions to prevent a collision" has begun. The Cayuga (1871), 81 U.S. 270, 277. Since Appellant indicated that he recognized the necessity for precaution when he sounded the first one-blast whistle signal while the ESSO was approximately one mile astern of the ZENITH, the necessity for precaution undoubtedly existed when the ESSO was only a half mile astern of the ZENITH. This is not based on any application of the half-mile rule as urged in Appellant's Point II. It was stated in The Aurania (D.C., N.Y., 1886), 29 Fed. 98, 108, that:

"The time when the whistles were exchanged may fairly be taken as the time recognized by both ships when precaution as respects each other was necessary or proper. This was probably from five to seven minutes before the collision, and in ample time for either to avoid the other. They were then estimated to be about half a mile apart."

At the time of 2215 alleged in the First Specification, the two factors (time prior to the collision and the distance between the vessels) were substantially the same as in The Aurania.

Even if the First Specification failed to meticulously allege an offense of negligence, there is no doubt that Appellant had actual notice of the issues involved and he was not prejudiced by any technical deficiencies in the specification. This was sufficient for the purpose of an administrative proceeding Kuhn v. C.A.B. (C.C.A., D.C., 1950), 183 F.2d 839. Since the matter herein under consideration involves questions of admiralty law, the words in the case of Lambros Seaplane Base Inc. v. The Batory et al. (D.C., N.Y., 1953), 117 F.2d 16, 1954 A.M.C. 104, are also pertinent:

"It is well established in admiralty that the pleadings will be considered as amended to conform to the proof, provided that no party is surprised or injured by such course.' O'Connor Harrison & Co. vs. Klingel, 1927 A.M.C. 83, 85, 16 F.(2) 460, 461 (9CA, 1926). See also The Roslyn, 1937 A.M.C. 1575, 93 F.(2d) 278 (2CA, 1937) and Admiralty Rule 23. there is clearly no surprise or prejudice here since the issue of negligence was extensively argued by both parties."

With respect to the Second Specification, I think that any negligence alleged therein is encompassed within the allegations of the First Specification. If Appellant had reduced the speed of the ESSO to equal that of the ZENITH, the ESSO would not have continued to overtake the ZENITH. Un other words, if the ESSO had not continued to overtake the ZENITH, Appellant would have had to reduce the speed of the ESSO. Therefore, the Second Specification is hereby dismissed.

Since I have concluded that the First Specification alleges an act of negligence, it is obvious that the Examiner's Ultimate Finding of Fact(which follows the wording of the specification) is a sufficient finding that Appellant was negligent. I addition, it is noted that the Examiner has supported his Ultimate Finding of Fact by the statement, in his Opinion, that:

"Captain Chotin was negligent by attempting to pass the MV ZENITH without receiving an assenting signal" (R.40).

POINT III

On the merits of the case, Appellant contends that the evidence does not support the charge of negligence on the part of the ESSO. Specifically, Appellant claims that the collision was caused by an abrupt change of course to starboard, by the ZENITH, which was the result of an incorrect report by the incompetent lookout on the ZENITH; and that the ESSO was justified in proceeding to overtake the ZENITH, without receiving an assenting signal from her, because of the consistent failure of tug boats on the Mississippi River to answer whistle signals.

There is no doubt that the ESSO was an overtaking vessel in relation to the ZENITH. Consequently, Western River Pilot Rule 22(b) (33 U.S.C. 347) applied. This rule states in part:

(a) Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

(b) under no circumstances shall the overtaking vessel attempt to pass until such time as they have reached a point where it can be safely done, and the overtaken vessel shall have signified her willingness by blowing the proper signal. . . . After an agreement has been reached the overtaken vessel shall in no case attempt to cross the bow or crowd upon the course of the overtaking vessel."

This wording is substantially the same as that which is contained in the Inland Rules of the Road (33 U.S.C. 203, Rule VIII; 33 U.S.C. 209).

As far as the facts are concerned, the evidence supports the findings that the ZENITH was angling towards the west bank of the river rather than that she made an abrupt change of course to starboard which caused the collision. Appellant does not question the fact that no agreement was established as required by Rule 22(b).There is a line of judicial authority holding that the duty of the overtaken vessel to maintain her course does not attach until she knows of and has assented to

the proposal of the overtaking vessel. In The Industry (C.C.A. 2, 1928), 29 F.2d 29, cert den. 279 U.S. 837, it was stated that:

"The latter overtaking vessel should therefore be obliged to hold herself in check against unexpected changes of course, and be prepared to meet them, until by the consent of the vessel ahead she gets assurance that it is convenient for her to hold on."

The words of the court in The Alcinous (C.C.A. 2, 1930), 39 F.2d 553, are closely applicable to the facts in this case:

"In coming up astern of the ARTEMIS, she was obliged to so shape her course as to guard against such maneuvers of the vessel ahead as might be reasonably expected. . . . Were the presence of the following vessel is known, navigation justifying a leading vessel in changing her course without warning refers to normal and foreseeable changes of course."

The Master of the ZENITH testified that he commenced angling towards the west bank since it was customary for large vessels to use the deep water channel extending out from the east bank. Appellant testified that small boats usually ran in the middle of this part of the river in order to leave the deep water free for large ships. Therefore, there is no doubt that the maneuver of the ZENITH, in angling across the river, was a reasonable change of course which Appellant should have anticipated.

In addition, it is noted that the prohibition against the overtaken vessel crowding the overtaking vessel, is prefaced by the words, in Rule 22(b), "after an agreement has been reached." These words are not contained in the comparable Inland Rule.

Appellant cannot be excused, for his failure to obey Rule 22(b), on the theory that it was "common practice" for tug boats on the Mississippi River to fail to answer signals and, therefore, Appellant's conduct was not a departure from the "accepted standards of care under the circumstances." The wording of the statute is perfectly clear that the overtaking vessel shall not, under any circumstances, attempt to pass until after the overtaken vessel has assented by answering with the same signal. Despite the fact that tug boats on the Mississippi River often violate the Pilot Rules by failing to answer signals, pilots on larger vessels are still bound to carry out their obligations under the Pilot Rules. It is noted that one of Appellant's witnesses stated that he had backed down his vessel on numerous occasions when tug boats did not answer the signals sounded by the witness' vessel. It is also apparent from the evidence that quite often the tug boats do not simply ignore the signals of others but do not hear them because of the noisy engines of the tug boats. This is reason for added precaution on the part of the pilot of a larger vessel.

The weight of judicial authority is overwhelming that the overtaking vessel's attempt to pass without having obtained the assent of the overtaken vessel is a fault which imposes sole, or joint, responsibility upon the overtaking vessel when there is a collision. The ESSO was clearly an overtaking vessel but Appellant did not make allowance for the possibility of a dissenting signal by the ZENITH although he was legally obligated to keep the ESSO under control and remain a safe distance astern of the ZENITH until an overtaking agreement was established. (See Headquarters

Appeal Nos. 655 and 724.) Hence, I conclude that Appellant was guilty of negligence rather than simply an error of judgment.

POINT IV

In view of Appellant's prior unblemished record and the dismissal of the Second Specification, the order of the Examiner dated at New Orleans, Louisiana, on 30 November, 1953, is modified to read as follows:

ORDER

That License No., 180704, and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, are hereby suspended for a period of three (3) months. This suspension shall not become effective provided no charge under R.S. 4450, as amended (46 U.S.C. 239), is proved against Appellant for acts committed within twelve (12) months of 30 November, 1953.

As so MODIFIED, said Order is

AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 4th day of January, 1955.