

In the Matter of License No. 181429 and all other Licenses
Issued to: JOHN J. MULLELLY

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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JOHN J. MULLELLY

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.

By order dated 28 May 1956, an Examiner of the United States Coast Guard at New Orleans, Louisiana, suspended License No. 181429 issued to Appellant upon finding him guilty of negligence. The two specifications allege, in substance, that while serving as Master on board the American SS ALCOA POLARIS under authority of the license above described, on or about 5 March 1956, while navigating on the Mississippi River during conditions of fog and low visibility, Appellant contributed to a collision between his vessel and the pilot boat UNDERWRITER by permitting his vessel to be operated at full maneuvering speed (First Specification); and by failing to cause his vessel to be stopped upon hearing the fog whistle of another vessel forward of the beam (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. Counsel for Appellant objected to the specifications on the ground that they failed to charge an offense against the Master. The Investigating Officer declined to amend the specifications and Examiner overruled counsel's objections. Appellant entered a plea of "not guilty" to the charge and each specification proffered against him.

The Investigating Officer made his opening statement. He then introduced in evidence the testimony of the pilot and three crew members of the POLARIS as well as that of the Master of the UNDERWRITER.

In defense, Appellant offered in evidence his sworn testimony. He stated that he did not know about the presence of another vessel until he saw the masthead light of the UNDERWRITER and heard her fog signal less than a minute prior to the collision. Appellant also testified that he knew the pilot intended to proceed at 60 RPM because of the strong currents in the river.

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 decision and concluded that the charge and two specifications had been proved. He then entered the order suspending Appellant's License No. 181429, and all other licenses issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of three months on probation for twelve months.

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

FINDINGS OF FACT

On 5 March 1956, Appellant was serving as Master on board the American SS ALCOA POLARIS and acting under authority of his License No. 181429 when his ship collided with the pilot boat UNDERWRITER in the Mississippi River Delta. The collision occurred at a point about 500 feet off the east bank of the Mississippi River and approximately .8 mile above the junction of the main body of the Mississippi River with South Pass, Southwest Pass and Pass a Loutre. The latter pass extends in an easterly direction from the junction. Pilottown is approximately the same distance of .8 mile above the scene of the casualty. The navigable portion of the river is approximately one-half mile wide at the point of the collision.

This accident happened at 0044 in a low-lying, patchy fog which limited visibility on the surface to about one-half mile in the immediate vicinity at the time of the casualty. The UNDERWRITER struck the starboard bow of the POLARIS. There were no injuries and the damage to the vessels was minor in nature.

The POLARIS is a cargo vessel of 6,680 gross tons and 396 feet in length. She was under articles for a foreign voyage while upbound to New Orleans via South Pass. Compulsory pilot Charles B. McChesney had boarded the ship near the sea buoy outside of South Pass at 2249 on 4 March. Thereafter, he was conning the ship continuously until the time of the collision.

The pilot boat UNDERWRITER is an uninspected vessel of 187 gross tons, 125 feet in length. She had departed from the dock at Pilottown with the intention of passing the POLARIS and proceeding down South Pass. At all pertinent times, both vessels were sounding fog signals and displaying the proper navigational lights.

The visibility was variable as the POLARIS traversed South

Pass. At times, the distance of visibility above the surface fog was more than three miles. Aids to navigation several miles away could be seen continuously. Pilot McChesney conned the ship from the pilot house and the wings of the bridge. A lookout was posted on the forecastle. The pilot's orders were relayed to the helmsman by the Third Mate on watch who also operated the engine telegraph, sounded fog signals and kept the bridge bell book. Appellant was on the bridge at all times. He kept the radarscope in the pilothouse under observation most of the time for the purpose of telling whether the pass was clear up ahead. Despite this close attention to the radar, the image of the UNDERWRITER was not seen on the scope as the two vessels approached each other. The only other person on the bridge of the ship was the helmsman.

The POLARIS proceeded with full maneuvering speed set at 60 RPM (10 knots), one-half speed at 40 RPM (7 knots) and slow speed at 20 RPM (4 knots). The pass was entered at full maneuvering speed. This was necessary because of a strong southerly current, and cross-currents which are present at the entrance to the pass as well as when leaving the pass at the junction with the Mississippi River. For this reason, the pilot considered it essential to maintain a good speed at both points regardless of weather conditions; he had been doing this for thirty years. The danger in leaving South Pass at a slow speed was that the ship would be set down to her starboard toward the bank in the direction of Pass a Loutre. The effect of the cross-current prevails for a distance of about one-half mile above the head of the passes.

Speed was occasionally reduced to one-half ahead because of thick fog in the pass. When the POLARIS reached the head of South Pass at 0037, the ship was proceeding at full maneuvering speed of about 10 knots through the water against a 3 1/2 knot current setting to the south and against the easterly cross-current into Pass a Loutre. The course steered was 342 degrees true. As the POLARIS was leaving South Pass and proceeding up the Mississippi River, the pilot saw the masthead light of the UNDERWRITER and heard her fog signals when the pilot boat departed from the Pilottown dock which was more than a mile and one-half away from the POLARIS. The pilot was able to keep the masthead light of the other vessel under only intermittent observation due to the restricted visibility. Appellant was not informed about the approaching vessel and he did not see her masthead light or hear her fog signal until less than a minute before the collision. The two vessels were about one-half mile apart at 0042 when the pilot ordered a change of speed to one-half ahead (7 knots). The masthead light of the UNDERWRITER was then under constant observation by the pilot and Third Mate. The light was bearing approximately one point on the starboard bow of the POLARIS. Shortly thereafter, the bearing had opened to about two points on

the starboard bow. But when the side lights of the UNDERWRITER became visible, it appeared that she was heading toward the POLARIS. The pilot ordered hard left rudder and stopped the engines. Appellant immediately ordered the engines full astern just at the time of impact. After ascertaining that the UNDERWRITER was afloat and not seriously damaged, the POLARIS anchored opposite Pilottown before proceeding to New Orleans.

After getting underway, the UNDERWRITER had headed across the river for a short distance at full speed before coming to course 170 degrees true, near the east bank of the river. Thereafter, she changed speed to one-half and to slow ahead. The Master knew of the presence of the POLARIS near the east bank, he heard her signals and altered course to the right for a port to port passing. When the hull of the POLARIS became visible, it appeared that she was swinging to her left so the Master of the UNDERWRITER ordered hard right rudder and stopped the engines. The collision occurred shortly afterward.

Appellant has no prior record.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant states that the pilot had 30 years experience as a bar pilot in these waters while Appellant has practically no knowledge concerning local conditions such as shifting shoals and currents. A pilot must be "intimately familiar with the local waters"; this is "particularly true of the approaches to New Orleans through the treacherous and shifting channel of the Mississippi River" Kotch v. Board of River Port Pilot Commissioners (1947), 330 U. S. 552, 557-8. "No vessel having a speed of less than nine knots shall enter South Pass from the Gulf [of Mexico] when the stage of the Mississippi River exceeds 15 feet on the Carrollton Gage at New Orleans." 33 CFR 207.200(d)(2). The river was at high stage and this regulation was applicable. The sole cause of the collision was due to the gross negligence of the Master of the UNDERWRITER in directing the course of his vessel along the east bank of the river and then attempting to cross the bow of the POLARIS.

The courts have held repeatedly that a Master should not displace a compulsory pilot until it becomes manifestly apparent that the pilot is incompetent. In the present case there is no suggestion that the pilot was incompetent.

POINT A

The specifications do not allege an offense by Appellant. The

proper charge in a case such as this is that the Master failed to displace the pilot when he was manifestly incompetent in matters of judgement related to the navigation of the vessel as distinguished from the ship's management which is the responsibility of the Master at all times.

POINT B

The individual specifications do not impute an offense to Appellant. Neither the First Specification nor the findings of the Examiner imply that the ship proceeded at an excessive speed. The Second Specification does not constitute an offense since the position of the UNDERWRITER was "ascertained," within the meaning of Article 16, from the moment she left the dock. In addition, the rule to stop the engines, so far as the circumstances admit, did not apply in this case because of the danger that the POLARIS would have been swept down Pass a Loutre by the current. The decision not to stop the engines was a reasonable exercise of discretionary judgement by the pilot.

POINT C

Neither Appellant nor the POLARIS were guilty of negligence in connection with this collision since the latter vessel could have been stopped dead in the water within one-half the distance of visibility when the UNDERWRITER was seen leaving the dock at Pilottown. This is moderate speed in fog according to the decisions of the courts.

POINT D

Appellant had no knowledge, actual or imputed, sufficient to require further action on his part. He was operating the radar in the pilothouse and did not have an opportunity to see or hear the UNDERWRITER until immediately prior to the collision. The presence of the UNDERWRITER was not indicated on the radarscope because the vessel was so close to the east bank of the river. Appellant acted immediately upon becoming aware of the presence of the other vessel.

CONCLUSION

Appellant's prior record shows that he is the finest type of officer. If there was any fault on the part of the POLARIS, it was that of the pilot. His superior knowledge of the local conditions cannot be ignored since this factor is recognized repeatedly by the courts. Hence, a Master is not fully responsible for every action of his pilot although the Master must warn the pilot of dangers not foreseen by him and relieve the pilot in cases of manifest

incompetence.

Appellant has no knowledge that this matter was referred to the Board of River Port Pilot Commissioners for the Port of New Orleans for possible action against the pilot; or that any effort was made to apply the monetary sanctions of 33 U.S.C. 158, 159 against the Master of the UNDERWRITER for violation of Article 16 (33 U.S.C. 192). This emphasizes the inequity of taking action against the license of the innocent Appellant herein. It is submitted that the Examiner's decision is contrary to the law and the evidence; the decision should be reversed and the sentence set aside.

APPEARANCE: Terriberry, Young, Rault and Carroll of New Orleans, Louisiana, by Edward S. Bagley, Esquire, of Counsel.

OPINION

To some extent, I agree with the contentions raised in this appeal. The record indicates that this was a situation where intimate, local knowledge concerning the river currents at the head of the passes was a very important factor to be considered. This was a matter with respect to which the pilot was thoroughly familiar and Appellant had very little knowledge. Of course, such local conditions do not relieve the Master of a vessel from the responsibility of complying with the Rules of the Road. The pilot has no special qualifications in this respect; and Article 16 of the Inland Rules requires a vessel, depending upon the circumstances, to go at a moderate speed in fog as well as to stop her engines when the fog signal of another vessel is heard apparently forward of the beam, if the position of the other vessel is not ascertained.

It has been held that the position of another vessel is not "ascertained" unless her course, or change of position, as well as her momentary location is known. The El Monte (D.C.N.Y., 1902), 114 Fed. 796; The Providence (D.C.R.I., 1922), 282 Fed. 658. The inability to maintain steerageway or the presence of a vessel following astern is not an adequate excuse for failing to stop the engines. See cases cited in Griffin on Collision (1949), pages 318-9. But it has been stated that it is not always necessary to stop the engines immediately if this would cause the ship to run aground. The Coast Banker (C.C.A. 9, 1942), 129 F2d 395.

The generally accepted rule with respect to what constitutes "moderate" speed in fog is that a vessel shall not proceed at a speed at which she cannot be stopped dead in the water in one-half the distance of visibility ahead of her. The Chicago - Silver Palm

(C.C.A.9, 1937), 94 F2d 754, cert. den. 304 U.S. 576.

The correct decision in this case is largely dependent upon the facts. My above findings with respect to the navigation of the POLARIS are predicated mainly upon the uncontradicted testimony of the pilot. His testimony about the treacherous nature of the river currents is bolstered by the Supreme Court case cited on appeal and, to a more limited extent, by the regulation requiring a vessel to have power for a speed of nine knots at certain stages of the tide. The Master testified that he knew the pilot intended to proceed at full maneuvering speed (10 knots) because of the strong currents in the river. There was no evidence introduced to refute the testimony of the pilot that it was the practice to maintain such speed at the head of the passes in order to prevent ships from being set down toward the bank of the direction of Pass a Loutre.

The Examiner accepted the pilot's testimony that he first saw the masthead light of the UNDERWRITER and heard her fog signals when the pilot boat left the dock at Pilottown. The testimony of the Third Mate supports the pilot's statement that the masthead light was under constant observation after it was seen on the starboard bow, at a distance of approximately one-half mile, two minutes before the collision at 0044. The Third Mate also testified that he did not hear the fog signals prior to seeing the other vessel's masthead light; and the pilot ordered one-half speed ahead at 0042. The pilot's testimony, that the bearing opened from one point on the bow at 0042 to two points a matter of seconds prior to the impact, is not contradicted (R. 43). The Third Mate was not questioned concerning the bearing of the light after 0042; and Appellant was not aware of the presence of another vessel at this time.

Based on the above comments, the contentions raised on appeal will be discussed separately.

POINT A

Although the specifications are poorly worded, they were adequate in view of the fact that Appellant had sufficient notice as to the issues and there was no element of surprise. See Appeal No. 830, page 8. If Appellant had actual or imputed knowledge of danger, he was required to exercise his paramount authority and relieve the pilot whether the danger arose through faults in navigation or management of the vessel. Appeal No. 531, page 9; Appeal No. 830, page 7 and 11.

POINT B

As to the First Specification, the issue was clearly whether

the POLARIS was proceeding at an excessive speed even though this was not specifically alleged.

Concerning the Second Specification, it is my opinion that the position of the UNDERWRITER was "ascertained," within the meaning of the rule, both when she was seen leaving the dock and while she was under constant observation after 0042. The pilot boat's approximate course was apparent to the pilot as her bearing increased from one to two points on the starboard bow. Considering the latter fact together with the authority of The Coast Banker, supra, I am inclined to agree with Appellant's contention that, under the circumstances, it was a reasonable exercise of discretion, on the part of the pilot, not to stop the engines at 0042 - the time at which Appellant presumably would have known about the other vessel if he had been in the position of the Third Mate rather than at the radar.

POINT C

Undoubtedly, the POLARIS could have been stopped in one-half the distance in Pilottown when the UNDERWRITER was seen getting underway from the dock. But this does not seem to be the proper criterion because the pilot boat could not be kept under constant observation from then until the time of collision. But considering this general rule, as to what constitutes moderate speed in fog, together with the necessity to maintain sufficient speed to overcome the effect of the currents and the pilot's knowledge concerning the usual habits of the pilot boat, it is my opinion that the speed of the POLARIS was not excessive as she proceeded at one-half maneuvering speed after 0042. It is also reasonable to assume that she could have been stopped dead in the water during the two minutes prior to the collision although there is no testimony on this specific point.

POINT D

I have indicated above that Appellant should have been on notice at approximately 0042 that there was another vessel up ahead of the POLARIS; but that, if he had had actual knowledge of this fact, he would not have been bound to supersede the pilot.

CONCLUSION

Considering all the circumstances peculiar to this particular case, I do not think that Appellant was guilty of negligence as charged. The attempt of the UNDERWRITER to cross the bow of the POLARIS was certainly the primary cause of the collision. It is very unlikely that there would have been a collision if the UNDERWRITER had held the course which she was on at 0042 and

shortly thereafter. Consequently, the conclusion that the two specifications were proved is reversed.

As a matter of collateral interest, it is noted that this incident was brought to the attention of the American Pilot's Association in accordance with agreed procedure; and that the Master of the underwriter was cited for violation of 33 U.S.C. 192.

ORDER

The change and two specifications are dismissed. The order of the Examiner dated at New Orleans, Louisiana, on 28 May 1956 is
VACATED.

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

Dated at Washington, D. C., this 8th day of May 1957.