

**In the Matter of License No. 148471 and All Other Seaman Documents
Issued to: THEODORE KULLER (MASTER)**

**DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD**

1091

THEODORE KULLER (MASTER)

In the Matter of

**License No. 148471
and All Other Seaman Documents**

Issued to: THEODORE KULLER (MASTER)

and

**License No. 216232
and all other Seaman Documents**

Issued to: CARSON B. SMITH(PILOT)

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 separate orders dated 29 May 1958, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania suspended Appellant's seamen documents upon finding them guilty of negligence. In each case, the specification alleges that while serving as Master or Pilot on board the United States SS ALABAMA under authority of the appropriate document above described, on or about 14 January 1958, while navigating in conditions of fog and low visibility in the Delaware Bay in the vicinity of Elbow of Cross Ledge Light, the Appellant failed to navigate the vessel with caution by proceeding at excessive speed and thereby contributed to a collision between the ALABAMA and the anchored Norwegian MV DALFONN.

At the hearing held in joinder, both Appellants were absent but they were represented by the same counsel of their own selection. Pleas of not guilty to the charge and specification were entered by counsel on behalf of the Appellants.

The Investigating Officer made his opening statement and introduced in evidence the testimony of the Pilot of the DALFONN as well as various documentary exhibits. No evidence was submitted by the defense except a letter of recommendation on behalf of each Appellant. Throughout the hearing, counsel argued that there was no jurisdiction to conduct the hearing because counsel had been deprived of the right to be present at the preliminary investigation on the DALFONN.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellants' counsel were heard and the parties were given an opportunity to submit proposed findings and conclusions. The Examiner rendered the decisions in which he concluded that the charge against each Appellant had been proved by proof of the specification. Orders were entered suspending all documents, issued to Appellant Kuller, for a period of six months on twelve months' probation and all documents, issued to Appellant Smith, for a period of two months outright plus six months on twelve months' probation.

FINDINGS OF FACT

On 14 January 1958, the Appellants were serving as Master and Pilot on board the United States SS ALABAMA and acting under authority of their License Nos. 148471 and 216232, respectively, when the ship collided with the anchored Norwegian MV DALFONN in the Delaware Bay on the eastern side of the channel below Elbow of Cross Ledge Light. The collision occurred at 1051 in a dense fog. The bow of the upbound ALABAMA struck the starboard quarter of the DALFONN. The cost of the repairs to both vessels was estimated at \$165,000. There were no personnel injuries on either vessel.

The DALFONN departed from Eagle Point, New Jersey early on the morning of 14 January and headed down the Delaware River seaward bound. The Pilot was at the conn. The ship was proceeding in dense fog shortly before 0700 as she approached Elbow of Cross

Ledge Light which is located at the inland end of the Miah Maull Range in the area where the Delaware River runs into the Delaware Bay. Due to the foggy condition, the Pilot decided to anchor near the east side of the 1000-foot wide channel. The DALFONN is a tanker of 16,440 gross tons. At the time, she was drawing 12 feet forward and 24 feet aft. The depth of the channel at this point is about 40 feet. The five fathom curve extends close to both edges of the channel at Elbow of Cross Ledge Light but gradually recedes to a distance of about one-half mile from the eastern edge of the channel at a point about two miles below this light.

After changing course to the Miah Maull Range course of 144 degrees true at the light, the Pilot maneuvered the DALFONN to the eastward of the channel and anchored about a mile below Elbow of Cross Ledge Light, in the red sector of the light. Soundings disclosed five fathoms of water under the stern. Since it was high water slack tide, the Pilot decided to weigh anchor and move farther away from the shoals into slightly deeper water as a precaution against stranding during the period of ebb tide. The DALFONN was moved closer to the channel, under a right rudder, until there was six fathoms under the stern before anchoring again with 45 fathoms of chain to one anchor. At this time, she was heading in a southwesterly direction. Shortly thereafter, the ship commenced to swing around on the change of tide to an east northeasterly heading which placed her athwart a part of the eastern portion of the channel at a point roughly one-half mile below Elbow of Cross Ledge Light. The dense fog continued and the wind was from the east northeast, force 5 (19-24 miles per hour). Prior to the collision, the DALFONN was sounding the proper fog signals on her bell. At least two upbound vessels passed astern of her. The position of the anchored vessel could not be precisely determined by taking bearings because of the thick fog. There were no other ships in the immediate vicinity at the time of the casualty.

The ALABAMA, operating under enrollment on a coastwise voyage, arrived at Overfalls Lightship (Delaware Bay entrance) at 0412 on 14 January. This ship is a tanker of 10,496 gross tons. Her draft was about 12 feet forward and 18 feet aft. She was carrying some cargo and water ballast. Pilot Smith was taken on board at 0443. The ship anchored at 0605 because of dense fog. She got underway at 1000 in fog which was still thick. The radar was in operation as she proceeded at full and half ahead maneuvering speeds until one minute before the collision at 1051.

The ALABAMA passed Miah Maull Light abeam at 1030 when the ship was at least 3.5 miles from the scene of the accident. Hence, her average speed between these two points was approximately 10 knots over the ground and her logbooks indicate a speed of full ahead for only 4 of these 21 minutes. Against the ebb tide, her speed through the water was somewhat greater than 10 knots. From 1041 to 1050, the logbooks show a speed of half ahead. At 1050, speed was reduced to slow ahead. The presence of the DALFONN was not observed on the radarscope prior to the collision. At 1051, the engines were ordered full astern and the bow of the ALABAMA struck the starboard quarter of the DALFONN. The speed of the ALABAMA had not been reduced appreciably below half ahead by the time of the impact.

With respect to the personnel of the DALFONN, the Coast Guard investigation of this matter was conducted informally by interrogation on board the ship. The Norwegian Consul would not permit counsel for the Appellants to on board the ship in order to be present during this phase of the investigation. Counsel had informed the Coast Guard of their desire to attend this investigation.

Neither Appellant has any prior record. Appellant Kuller has been going to sea for more than 35 years and was scheduled for retirement in 1958. Appellant Smith has been a member of the Pilots' Association for the Bay and River Delaware for about two years after serving a four year apprenticeship in this association.

BASES OF APPEAL

Point I. The Appellants were unable to prepare their defense, by adducing evidence contrary to that produced at the hearing, because they were deprived of their substantial rights to be represented by counsel and to question the witnesses at the investigation on board the DALFONN, as provided for in 46 CFR 137.07-7. They were also denied the right to examine the informal notes taken by the Investigating Officer during this investigation and later destroyed by him. For these reasons, there was no opportunity to impeach the testimony of the Pilot of the DALFONN when he testified at the hearing. Hence, there was no jurisdiction to conduct the hearing.

Point II. The decision of the Examiner is not supported by substantial evidence and is contrary to the law. The uncontradicted evidence shows that the DALFONN was almost entirely blocking the channel rather than on the eastern edge of the channel as found by the Examiner. There is not sufficient evidence on which to base the findings that the ALABAMA's average speed was 10 knots; that ten knots was "excessive;" or that her speed was close to 10 knots at the time of collision. There is no basis for the conclusion that the ALABAMA could not stop within the full distance of visibility. Title 33 U.S.C. 409 prohibited the DALFONN's anchoring in this navigable channel when she could have anchored completely outside of the channel a mile farther downstream.

Appearances: Messrs. Pyne, Brush, Smith & Michelsen of New York City, by Warner Pyne and George Garbesi, of Counsel

OPINION

POINT I

The contention that there was no jurisdiction to conduct the hearing because the Appellants were not present at that part of the investigation which took place on board the DALFONN is considered to be without merit. The hearing is an entirely separate proceeding and it cannot be invalidated by the method of conducting a preceding informal investigation

because information obtained during such an investigation cannot be introduced as evidence at a hearing except by stipulation between the person charged and the Investigating Officer. Appellants were not deprived of the right to obtain, by other means, evidence which was properly admissible at the hearing.

Counsel for Appellants was given a copy of the report of the findings of fact of the investigation which was based on the informal interrogation of all the persons involved including those on the DALFONN. The notes taken during the questioning of personnel on the DALFONN could not be turned over to counsel at the hearing because they had been destroyed by the Investigating Officer after he had completed the report of the investigation. This was not a formal investigation as contemplated by 46 CRF 136.07-7, 136.07-30 and 136.07-35 where the witnesses are placed under oath. However, it would have been advisable for the Investigating Officer to have subpoenaed the witnesses from the foreign ship to appear ashore for questioning by obvious parties in interest, provided there was time to do so after the Norwegian authorities had denied counsel' request to go on board the ship. Nevertheless, there has been no showing of material prejudice, particularly since none of the personnel of the DALFONN appeared as witnesses at the hearing. There is only the speculative suggestion that others on the ship might have disagreed with the Pilot's version which was given at the hearing; but the report of casualty signed by the Master of the DALFONN does not indicate that this is so. Also, counsel had full opportunity to produce evidence at the hearing to refute such portions of the DALFONN Pilot's testimony as was considered to be harmful to the Appellants' cause.

POINT II

The exact position where the DALFONN was anchored cannot be determined from the evidence contained in the record. The report of casualty signed by Appellant Kuller fixes the location of the accident at "Lat. 39-10-30 North, Long. 75-15-59 West" which is on, or slightly within, the eastern edge of the channel. The Examiner accepted the location in this report as the basis for his finding that the collision occurred "four-tenths of a mile south southeast of Elbow of Cross Ledge Light on the eastern edge of the channel." My above findings of fact have altered this position to Appellant's advantage by finding that the collision took place in some part of the eastern or upbound, right-hand portion of the channel. Hence, it is concluded, on the basis of the weight of the evidence, that the DALFONN was obstructing navigation in the channel to some degree but that she was not almost entirely blocking the 1000-foot wide channel as the Appellants contend. In view of the place of collision definitely specified in the report by Appellant Kuller, which location the Appellants now claim is 300 feet inside the eastern edge of the channel, it is not clear on what "uncontradicted evidence" the Appellant reach the conclusion that the DALFONN was blocking almost the entire channel. Consequently, such conclusion must be rejected.

The above findings of fact which support the Examiner's finding that the ALABAMA averaged 10 knots during the twenty-one minutes preceding the collision are based on the

entries in the logbooks of the ALABAMA which were produced in evidence. This constitutes substantial evidence to support the finding in the absence of any evidence to the contrary. There was no testimony by the Appellants or other personnel on the ALABAMA. It logically follows, from the finding as to average speed, that the speed of the ALABAMA could not have been appreciably less than this average at the time of the collision because she continued at the predominant speed of half ahead until reducing to slow ahead at 1050 and her engines were not ordered full astern until less than a minute before she struck the DALFONN at 1051. This also makes it apparent that the ALABAMA could not be stopped within the full distance of visibility since, presumably, the order of full astern was given immediately after the other ship was sighted.

The Appellants do not claim that the fog was not dense or thick at this time. Under circumstances, they could not very well question this factor and still be able to account for waiting to take avoiding action until less than one minute before the collision. Since the latter time factor is fixed in this case, the greater the distance of visibility was, the greater the speed of the ALABAMA must have been in order to travel this distance in less than a minute. If the DALFONN was sighted a half minute before the collision and the average speed of the ALABAMA during the last half minute prior to impact was 8 knots, then the distance of visibility was approximately 400 feet. Obviously, the distance of visibility cannot be judged by the range of the radar which did not make known the presence of the DALFONN. In further support of the nature of the fog, the rough deck logbook of the ALABAMA states that she anchored in "dense fog" at 0605 and got underway in "thick fog" at 1000 - less than an hour before the collision. Hence, the completed void of affirmative testimony as to the distance of visibility is not material to this decision.

On the basis of these established facts, the remaining issues are whether the 10-knot speed of the ALABAMA was excessive under the "existing circumstances and conditions" (33 U.S.C. 192) and, if so, whether the failure of the DALFONN to continue on for a mile where she could have anchored completely outside of the channel has any bearing on the degree of negligence attributed to the Appellants.

With respect to the latter issue, 33 U.S.C. 409 reads, in part, as follows:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."

It has been stated that this statute, enacted in 1899, only emphasizes the previously existing general maritime law since "it has always been held a fault to so anchor a vessel as to unnecessarily and negligently obstruct a navigable channel." The Caldy (D.C. Md., 1908), 123 Fed. 802, affirmed C.C.A. 4, 153 Fed. 837. But the command of the statute forbidding vessels to "anchor... in navigable channels" has uniformly been interpreted not to be absolute when "literal compliance with its terms would create a danger to navigation which could be avoided or reduced by violation of its terms." The Laura Maersk - Bohemian Club (1943), 320 U.S.

462. In the latter case, the LAURA MAERSK was held solely at fault for proceeding at half speed in a dense fog which limited visibility to 400 feet and striking the BOHEMIAN CLUB which was anchored so as to partially obstruct the western part of the Delaware River channel at a place where it was 1200 feet wide. There were no anchorages within five miles. The Court stated that the ship was going at an "excessive rate of speed" even though her engines were stopped three minutes before the collision and that the least dangerous course for the BOHEMIAN CLUB was to anchor on the west side of the channel when fog enveloped her.

In other cases of this nature, it has been held that it is not unlawful to anchor so as to obstruct a channel to some degree if other vessels navigated with due care can pass without danger of collision. *The John G. McCullough* (D.C. Va., 1916), 232 Fed. 637, citing cases. The same standard applies in dense fog when it reasonably appears to be safer to anchor in a channel rather than to move to the nearest anchorage grounds. *The City of Norfolk* (C.C.A. 4, 1920), 266 Fed. 641. In the case presently under consideration, the Pilot of the DALFONN testified that at least two upbound ships passed astern after she had swung around to an east northeasterly heading across the eastern part of the channel. This is some indication that vessels navigated with due care could pass safely.

No case has been found where a ship proceeding as was the ALABAMA, in dense fog, has been completely exonerated for colliding with an anchored vessel in a channel under circumstances similar to this case. See cases cited in *Griffin on Collision* (1949), sections 147, 152. The record is not clear as to just where the DALFONN was when the dense fog set in and possibly it would have been advisable for her to have proceeded farther on where she could have anchored outside of the channel. This subject is not developed in the record either. In any event, the possible mutual fault of the DALFONN is not directly in question herein. Of course, there are numerous cases where both the moving vessel and the anchored vessel have been held at fault. (See *Griffin on Collision* (1949) sec. 150). The Appellants were not excused from the duty to comply with the rules of navigation regardless of whether there was any initial fault on the part of the other vessel. *The Yoshida Maru* (C.C.A. 9, 1927), 20 F. 2d 25.

Concerning the issue of whether the speed of the ALABAMA was excessive, it has been established that she proceeded at half speed until 1050 when speed was reduced to slow ahead and the engines were not stopped or reversed until 1051 within a minute of when the accident occurred. There is a prima facie presumption of fault on the part of a moving vessel which strikes a vessel lying at anchor (*The Oregon* (1895), 158 U.S. 186) and this presumption is present even though a vessel is anchored in a channel or fairway when a competent Master believes this to be safer than to try to draw out of the fairway. *The Northern Queen* (D.C. N.Y., 1902), 117 Fed. 906; *The City of Norfolk* (C.C.A. 4, 1920), 266 Fed. 641. But even aside from this presumption against the interests of the Appellants, which they have not attempted to rebut, the evidence supports the conclusion that they were negligent in permitting the ALABAMA to proceed at a speed which was excessive under the prevailing conditions.

The courts have set out certain mechanical tests to determine whether the speed of a

ship navigating in a fog is "moderate" as required by 33 U.S.C. 192. Commandant's Appeal Decision No. 955 cites decisions referring to the usually applied tests of stopping dead in the water within one-half the distance of visibility and stopping before colliding with another vessel which is not violating the moderate speed rule. According to either of these standards, it has been shown that the speed of the ALABAMA was excessive. The above statute (33 U.S.C. 192) indicates that the controlling factor, as to whether speed is moderate, depends upon the "existing circumstances and conditions." In this case, there was a dense fog and the ALABAMA was navigating in a busy channel where there was a strong probability of meeting other vessels. The Appellants knew, or should have known, from observing the appropriate chart (Coast and Geodetic Survey No. 1218) that their ship was approaching a point where the depth of the water outside of the channel was less than thirty feet. These conditions simply added to the need to proceed with such caution that the ALABAMA could be stopped before colliding with another vessel which was sighted.

In the H.F. Dimock (C.C.A. 1, 1896), 77 Fed. 226, the ALVA ran into a dense fog in a narrow channel and anchored in the channel. She was struck by the DIMOCK which was making 5 knots through the water (7 to 8 knots over the ground) when the ALVA was sighted by the Master at a distance of about 250 feet. The DIMOCK alone was held responsible although she proceeded carefully in the narrow channel. It was stated that since the DIMOCK entered the fog before she reached the narrow channel, she had the duty to anchor unless she could run at the safe speed stated in The Nacoochee (1890), 137 U.S. 330:

"At whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate." The facts in The H.F. Dimock, supra, are not dissimilar from the situation now under consideration. See also The Laura Maersk - Bohemian Club, supra. There appears to be no reason why the ALABAMA could not have either anchored when she reached the place where the Appellants contend the DALFONN should have anchored or remained anchored rather than getting underway at 1000. The ALABAMA's own logbook states that there was "thick fog" when she weighed anchor at 1000. This should have been sufficient warning of the possible danger ahead.

CONCLUSION

It is my conclusion that both Appellants were guilty of negligence which contributed to the casualty. Appellant Smith was on board as a Pilot to conn the ship safely up the channel. Appellant Kuller was serving as a Master who is always in command of his ship. There was ample time for Appellant Kuller to realize that Appellant Smith was navigating the ship at an excessive rate of speed in the dense fog and to do something about it. Consequently, the Appellants were negligent in carrying out the responsibilities of their respective offices. The orders imposed by the Examiner are considered to be appropriate despite the possibility of contributing fault on the part of the DALFONN.

ORDER

**The order of the Examiner dated at Philadelphia, Pennsylvania, on 29 May 1958, are
AFFIRMED.**

**A.E. Richmond
Vice Admiral, United States Coast Guard
Commandant**

Dated at Washington, D.C., this 16th day of February, 1959.