

IN THE MATTER OF LICENSE NO. 288507  
Issued to: Dewey SORIANO

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1842

Dewey SORIANO

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 8 September 1969, an Examiner of the United States Coast Guard at Seattle, Washington, suspended Appellant's license for twelve months upon finding him guilty of misconduct and negligence. The specifications found proved allege that while serving as pilot on board the Liberian MV SILVER SHELTON under authority of the license above captioned, on or about 20 September 1967, Appellant failed to direct the movements of the vessel in a reasonable and prudent manner, thereby contributing to a collision between that vessel and SS FAIRLAND (NEGLIGENCE), and wrongfully caused the vessel to proceed at an immoderate speed in conditions of restricted visibility, thereby contributing to the collision (MISCONDUCT).

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charges and each specification.

The Investigating Officer introduced in evidence the testimony of several witnesses, numerous documents, and recorded testimony of several witnesses given in an earlier proceeding.

In defense, Appellant offered in evidence the testimony of several witnesses and two depositions.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charges and specifications had been proved. The Examiner then entered an order suspending Appellant's license for a period of twelve months.

The entire decision was served on 8 September 1969. Appeal was timely filed on 16 September and perfected on 30 April 1970.

FINDINGS OF FACT

On 20 September 1967, Appellant was serving as pilot on board the Liberian MV SILVER SHELTON and acting under authority of his license.

Appellant was serving aboard the vessel as the pilot required aboard all foreign vessels, and all United States registered vessels not sailing in the coastwise trade on the Pacific Coast or in trade with British Columbia, navigating in Puget Sound and waters adjacent thereto. RCWA 88.16.070.

In order to qualify for the license issued by the State of Washington for such pilotage Appellant was required to hold a license as master and first class pilot for the waters covered by the law, and was required to have such an unexpired and not "voided" Federal license to obtain renewal of his State license. RCWA 88.16.090.

On 20 September 1967, Appellant boarded SILVER SHELTON off Port Angeles, Washington, to serve as the required pilot for the entry to Tacoma in Puget Sound. Nothing untoward, pertinent to this case, occurred until the vessel was above Apple Cove Point. At the time in question Appellant was on the bridge directing the movements of the vessel. On the bridge with him were Lee Chun, Chief Mate, and the man at the wheel. Radar was operating satisfactorily. All orders given by Appellant were promptly and accurately carried out. At all times pertinent SILVER SHELTON was making about 14.5 knots, and no change in speed was made until about one minute after a collision with SS FAIRLAND, when STOP was ordered.

At about 0526 SILVER SHELTON was on 160 degrees true and about one half mile north of Apple Cove Point Light when FAIRLAND was observed on radar by Appellant and the Chief Mate. FAIRLAND was distinguishable as a large vessel from the numerous fishing vessels in the vicinity. FAIRLAND bore about 22 1/2 degrees on the starboard bow, distant about six miles.

At 0528 Apple Cove Point Light was abeam of SILVER SHELTON to starboard, distant somewhat more than a mile. The light was visible but then visibility closed in to about a mile. Very shortly after, Appellant ordered fog signals to be sounded and ordered the mate to call the master. He had the signal shifted from automatic to manual and from then on handled the signal himself. The mate did not call the master until after he had made the shift of the signal. (The master did not arrive on the bridge until after the collision.) Appellant then changed course to 185 degrees true and FAIRLAND's relative bearing changed somewhat to port.

At 0530, with SILVER SHELTON about one half mile to the south of Apple Cove Point Light, SILVER SHELTON's chief mate observed FAIRLAND again on radar, to the left of SILVER SHELTON, but with bearing not ascertained, distant four miles. This was not reported to Appellant. At 0532 Appellant commenced maneuvering to the right, coming first to 195 degrees true and then to 210 degrees true. This change was followed by hard right rudder.

At 0533 FAIRLAND was sighted two points on the port bow of SILVER SHELTON, showing a green light only, distant less than a mile. At some time later SILVER SHELTON sounded a danger signal.

At 0535 the vessels collided, the stem of FAIRLAND striking the port side of SILVER SHELTON in the way of number one hold, scraping down the port side until the vessels were clear. At 0536 SILVER SHELTON's engine was stopped.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

Appellant makes five points on his appeal.

His first point is reducible to the argument that there is no jurisdiction to proceed against Appellant's federal license because Appellant was serving on a foreign vessel under a requirement of Washington law.

His second point is that an agreement between the Commandant and the American Pilot's Association precludes assertion of jurisdiction over Appellant's federal license.

His third is that the situation between the vessels was that of meeting rather than crossing.

His fourth is that Appellant should be cleared because equipment on the other vessel was defective.

His fifth is that the Examiner's decision is "clearly erroneous." In this connection he asserts five specifics of error which will be spelled out below.

Additionally, Appellant argues that the hearing should be reopened for the taking of newly discovered evidence.

APPEARANCE: Long, Mikkelborg, Wells & Fryer, Seattle, Washington, by Jacob A. Mikkelborg, Esquire.

## OPINION

### I

In making findings of fact, I have reorganized and reordered some of the Examiner's in the interest of clarity, and have pin-pointed certain events as to time. Certain substitutions have been made also.

I quote the pertinent findings of the Examiner from his decision:

"13. That when SILVER SHELTON was approximately one-half mile north of Apple Cove Point Light on the starboard hand, Chun observed on the vessel's radar scope the pip of a large vessel, which was later determined to be FAIRLAND, ahead of SILVER SHELTON and two points on the starboard bow at a distance of approximately six miles.

"14. That at the time Chief Officer Chun first observed FAIRLAND on radar, it was not visible visually; at this time the respondent was standing before the radar also, and its scope was readily visible to him.

"15. That at 0528 hours, LZT, SILVER SHELTON passed abeam of Apple Cove Point Light on the starboard hand, slightly over one mile off, on a course of 160 degrees true. At this time fog conditions had worsened and visibility was reduced to approximately a mile; there were at this time several fishing vessels operating gill nets between SILVER SHELTON and the land mass to the west on SILVER SHELTON's Starboard hand. There were also various fishing vessels of the same nature forward of SILVER SHELTON to her port, between SILVER SHELTON's course line and Edward's Point.

"16. That at about this time, after FAIRLAND had first been observed on the radar scope, the respondent directed the Mate, Chun, to commence blowing fog signals.

"17. That the Mate complied with the respondent's order by placing the fog signals on automatic timer but the respondent directed him to place the fog signals actuating device on manual control, and the respondent then started to blowing fog signals himself, continuing this operation until the collision.

"18. That the manual control device for actuating the fog signals is located on the port wing of SILVER SHELTON's bridge.

"19. That at this time, nor at any subsequent time, the respondent gave no orders for a reduction in speed, nor did he personally take, or order any one else to take range and bearings on the approaching large target on the radar scope which was later determined to be FAIRLAND.

"20. That at all times pertinent to this casualty, the respondent gave all helm orders. At no time did he order reduction in speed.

"21. That at all times pertinent to this casualty SILVER SHELTON responded adequately to the helm orders given by the respondent.

"22. That shortly after SILVER SHELTON passed abeam of Apple Cove Point and after FAIRLAND had been first seen on the radar scope as being two points on the starboard bow, respondent ordered a course change for SILVER SHELTON from 160 degrees true to 185 degrees true; this order was given shortly before the order for the commencing of blowing fog signals.

"23. That when SILVER SHELTON and FAIRLAND were approximately a mile apart, FAIRLAND broke out of the fog a mile or less ahead of SILVER SHELTON on SILVER SHELTON's port bow. FAIRLAND was at that time displaying her green running lights.

"24. That there is considerable conflict in the testimony in this case concerning the actual visibility at the time FAIRLAND was first visually sighted, but the Examiner believes the description of "one mile or less" to be adequately substantiated by the evidence in this cause.

"25. That after the respondent gave the initial order to the helm placing SILVER SHELTON on 185 degrees true, the Chief Officer, Chun, again observed the vessel, later to be determined to be FAIRLAND, on radar at a distance of four miles off. At this time SILVER SHELTON was approximately one-half mile south of the Apple Cove Point and had travelled approximately one mile from the time FAIRLAND was first observed on radar. At this time the bearing of FAIRLAND was described as "to the starboard"; FAIRLAND was not visible by eyeball.

"26. That following this second sighting of FAIRLAND and some three minutes prior to this collision taking place, the respondent ordered vessel's helm to 195 degrees true followed by orders of 210 degrees true and finally hard starboard, always bearing SILVER SHELTON's heading to the starboard hand.

"27. That the orders given by the respondent to the helm were properly carried out at all times.

"28. That at approximately 0535 hours, LZT, the bow of FAIRLAND struck SILVER SHELTON in the way of number one hatch on the port hand and then scraped down the port side of SILVER SHELTON until the vessels were clear of each other."

My substituted findings for the period from 0526 to 0535 were made necessary by the lack of chronological order in the presentation quoted above. When collision is the source of charges brought under 46 CFR 137 it is necessary that an orderly narrative of facts be presented, as precisely as possible on the record available. When precision is not possible on the record available. When precision is not possible because of gaps in the record, or when findings that could reasonably be expected cannot be made because the evidence needed has not been produced, some explanation should be furnished. I noted here that not one finding of fact appears as to the position, course, or speed of FAIRLAND at any time except as to the possible inferences that could be drawn from the findings based on the movements of and observations from SILVER SHELTON.

The only witness aboard SILVER SHELTON whose testimony the Examiner relied on was that of Lee Chun, the Chief Mate. The testimony was not taken before the Examiner but had been taken at any investigation under 46 CFR 136 to which Appellant was a party and at which he had the right to counsel and to cross-examination. On a showing that Lee Chun was not available to appear at the hearing, the Examiner properly admitted the transcript of his testimony in evidence. This witness, it may be said, spoke with a correctness of language, an appreciation of the thrust of question asked him, a knowledge of seamanship, and a candor that amply earned the opinion of the Examiner that his testimony was entitled to great weight.

Unfortunately, this mate's testimony does not give a complete picture of the incident. These deficiencies do not appear to be due to any shortcomings of the witness but rather to the fact that his questioners at the 46 CFR 136 proceedings use his testimony solely to fill in the accounts of other witnesses. Under questioning by the investigating officer who conducted the 46 CFR 136 proceedings, the witness stated that, at a time which can be fairly reduced to certainty, he and Appellant had both viewed FAIRLAND as a radar target to starboard. The investigating officer never asked for a range or a more precise bearing, and never asked whether the witness had observed FAIRLAND on radar at any time later. An attorney present later elicited from the witness that the first radar observation placed FAIRLAND about six miles from

SILVER SHELTON because its pip had just come onto the six mile scale at which the radar was set and that the bearing was about two points on the starboard bow. Still later, it was elicited from the witness that he had once more observed the FAIRLAND pip at four miles, but no one asked him for the bearing.

The last sentence of the Examiner's finding No. 25, which declares that on the second radar observation of FAIRLAND the bearing "was described as `to the starboard'," must be rejected as unsupported by any evidence at all.

A good reason for rejecting this finding is found in a bit of testimony by the witness apparently overlooked by the Examiner and by Appellant himself. This testimony supports a finding to the contrary of the Examiner's.

When the witness first testified to his first radar observation of FAIRLAND he said that the vessel was on the starboard bow. He then said, "At the time the echo is on our starboard bow and right away we are passing Apple Cove Point and then we steering about 160 at that time. The pilot altered course, the echo, the target on our port bow." CG-Exhibit 15, page 534.

From this I can only conclude that the relative bearing of FAIRLAND, as would be expected after a twenty-five degree change to the right by SILVER SHELTON, had been seen to change from "about two points on the starboard bow" to somewhat to port. Further, I must also conclude that at the second radar observation (with no one asking the witness what the relative bearing was) of four miles distance, the bearing was still to port, especially since FAIRLAND, when sighted, was two points on the port bow.

## II

Appellant's first point on his appeal is that there is no jurisdiction to proceed against the Federal license of a pilot who is serving as a compulsory pilot aboard a registered vessel of the United States or a foreign vessel as required by State law. Rather than to attempt to discuss the multitude of statutes forming the basis of most of Appellant's argument, it is best to state certain points as to which there is no disagreement at the outset and then proceed to the true issue.

Congress long ago granted to the States the power to regulate pilots, except as Congress might otherwise provide. 46 U.S.C. 211. As of today Congress provides otherwise in only two cases. The States may not regulate pilots or pilotage on the Great Lakes. 46 U.S.C. 216-216i. The States may not regulate pilots or pilotage on inspected, machine-propelled, coastwise seagoing vessels, not

sailing on register and not on the high seas. 46 U.S.C. 364.

The Coast Guard generally may not require pilots on foreign or registered vessels. The Coast Guard may not suspend or revoke a commission, register, or license issued to a pilot by a State.

There is no doubt that the Coast Guard may act to revoke or suspend any license issued by it for acts of negligence or misconduct committed by the holder when he is serving under authority of the license. 46 U.S.C. 239.

It has consistently been held that a person is serving under authority of a license or document issued by the Coast Guard if the possession of that license or document is a condition of employment and the character of the employment is that involving the scope of the license or document issued. See Decisions on Appeal Nos. 376, 700, 1030, 1131, 1233, 1281, 1388, 1400, 1427, and 1510. This test has been used whether or not there was a specific Federal law or regulation requiring the employment of a Federally licensed or documented seaman. Included among the situations discussed, with a holding that the service was service under authority of the license or document, are these:

- 1) a licensed Federal pilot for the Hudson River on a registered vessel, at a time when neither Federal nor State law required pilotage under the conditions, when it was shown that the pilot was hired on board in reliance upon his holding a Federal license for those waters;
- 2) a licensed Federal pilot taking a foreign ship from Boston to New York via Cape Cod Canal and Long Island Sound through areas for which neither Federal nor State law required pilotage on a foreign vessel, when it appeared that his hiring was conditioned on his holding a Federal license for areas to be traversed;
- 3) service aboard a public vessel to which the inspection laws governing manning did not apply, when it was shown that the agency operating the vessel required the Federal license or document as a condition of employment.

In line with this series of decisions, the only inquiry called for here is whether Appellant was required as a condition of employment to hold the Federal license which is the matter of the proceeding and whether the employment for which he was engaged was within the scope of the Federal license which he held.

The answer is not far away. Appellant holds a Federal license

for the waters on which his negligent and wrongful [NEGLIGENCE and MISCONDUCT] actions occurred. Appellant was required by the laws of the State of Washington to hold a Federal license for pilotage in those waters before he could obtain State authorization to act as a pilot. RCWA 88.16.090. Since the requirement of the Federal license was a condition of licensing as a State pilot, it is no extension of the "condition of employment" theory expressed above, but only a logical application, to say that any time Appellant served as a compulsory pilot under the laws of Washington he was serving under authority of his Federal license. Fundamentally, it does not matter whether a State, a ship owner, or a Federal agency requires the holding of a Federal license or document. As long as the requirement is there, "service under authority" is there.

As to any question of the requirement of continuance of validity of the Federal license for renewal of the State license, the Examiner's analysis of Section 11 of the regulations of the Board of State Pilot Commissioners is dispositive. No renewal of the State license can be obtained if the Federal license had expired or been voided for any reason.

### III

Lest there be any misunderstanding, I disassociate myself from two statements made by the Examiner.

The first statement was apparently made in connection with earlier rulings of mine, cited above, to the effect that a foreign vessel in waters of the United States has a right to rely on the expertise of Federally licensed pilots for waters which the vessel traverses, when the vessel has hired that pilot even when there was no legal requirement for it to do so. I cannot leap to the conclusion stated by the Examiner:

"The mantle of the Coast Guard's authority, handed down by statutes and revisions thereof since Colonial days will have been cast aside. To insure such competency, and thus comply with the mandate, is one reason why a Federal issued license must be required of all State Pilots." (D-11).

There is no provision of Federal law that a Federally issued license must be required of all State Pilots. There is no need to examine all State laws to ascertain whether all States concerned with pilotage do required Federal licenses of the pilots to whom they issue State commissions or licenses. It may be pointed out that if a State commissions or licenses a pilot who does not hold a Federal license for the waters traversed, that pilot would be barred from piloting a vessel subject to 46 U.S.C. 364, but there

would be no harm as long as he did not attempt to do so. The only point involved in this case is that the State of Washington does require a Federal license before it will permit issuance of a State license.

For emphasis, I repeat that there is no federal requirement anywhere that a State pilot must hold a Federal license for the waters involved, as long as he is operating on waters and vessels over which the State has exclusive jurisdiction for pilotage. The test in such a case then becomes that of "condition of employment."

The second point at which I diverge from the Examiner's Opinion is where he says: "The controlling statutes here is Title 46 U.S.C. 214." (D-11).

I am not prepared to say that R.S. 4450, as amended in 1936, has superseded R.S. 4442, as amended, 46 U.S.C. 214, as to authority to suspend licenses of pilots. I say here only that 46 U.S.C. 214 is not "controlling" such as to eliminate recourse to other statutes, and that recourse to R.S. 4450, 46 U.S.C. 239, is enough to sustain jurisdiction in this case. In this connection, I must reject an assertion by Appellant (Brief, p. 19) that Bulger v. Benson, CA 9 (1920), 262 Fed 929, holds that "license proceedings against the pilot under 46 U.S.C. 214 must proceed within the limitations contained in that statute." Without concession as to what Bulger v. Benson and its related decisions stemming from judgments from the same District Court in Washington might have meant, it is quite apparent that the action in this case was brought under R.S. 4450, as amended 46 U.S.C. 239, and not under 46 U.S.C. 214, and that the amendment of R.S. 4450 in 1936 took it out of any area considered by the Court of Appeals in 1920.

For a discussion of the meaning of Bulger v. Benson, and related cases, see Decision on Appeal No. 1574.

At this point, Appellant also seeks to support his position that 46 U.S.C. 214 limits the scope of proceedings under 46 U.S.C. 239 by reference to a decision of an examiner dismissing charges under R.S. 4450 (46 U.S.C. 239). This decision achieved some notoriety by its publication at 1968 A.M.C. 1034, sub nom. In Re Edelheit's License. In this case charges were laid before the examiner alleging a violation of load line laws under a charge, "VIOLATION OF A STATUTE." The Edelheit case never came before me because it resulted in a dismissal but since Appellant has chosen to argue it as a precedent I may fairly comment upon it, subject to the principle expressed in "IV" below that individual examiners' decisions are not binding upon other examiners and are not even necessarily persuasive to others.

Some imprecise language of the examiner in the Edelheit case led to even more misleading language by the digester for American Maritime Cases such that some have believed that a master's license could not be proceeded against under R.S. 4450 for violation of the load line laws.

Among the "charges" under R.S. 4450, in addition to "Misconduct," is "Violation of a provision of Title 52, Revised Statutes." Usually the latter charge is expressed as "Violation of a Statute." Violation of any statute is misconduct within the meaning of R.S. 4450, and the only point to the special charge of "Violation of a Statute" is that the holder of the license or document who violates a provision of Title 52, Revised Statutes, need not be at the time serving under authority of his license or document to render him amenable to suspension and revocation proceedings under R.S. 4450.

The examiner in the Edelheit case correctly perceived that the load line laws were not part of Title 52, Revised Statutes, and that the laying of a specification alleging violation of a load line law under the "Violation of Statute" provisions of R.S. 4450 and 46 CFR 137 was improper.

The examiner's ensuing action in this case, however, was improper and contrary to the regulations. On his own motion he dismissed the charges. 46 CFR 137.20-65 clearly charges examiners with the duty to examine the charges and specifications for correctness in form and legal sufficiency. When errors are found, the examiner is directed to permit amendment of charges and when errors of substance are found an examiner is directed to rule that the defective charge or specification is withdrawn, without prejudice to the preparation and service of new charges.

The examiner in the Edelheit case did not comply with this regulation. If he had, the violation of the load line law could properly have been presented either by amendment of the charge or by withdrawal of the charge and service of a new one, since violation of a load line law is clearly "misconduct" authorizing action to suspend or revoke a license. It is doubly unfortunate that the examiner in the Edelheit case acted contrary to regulation and that the manner of publication of his decision leads to misunderstanding.

The ruling of an examiner in any one decision dismissing charges is obviously not binding upon me as to matters of law. His dismissal of the charges may be final agency action but his legal reasoning does not thereby become my position or bind me on any point which may later be presented to me on appeal. Thus, the Edelheit decision by a Coast Guard examiner which Appellant cites

has no legal or policy implications respecting my decision in this case.

While still on Appellant's first point, asserted lack of jurisdiction in this case, I must take cognizance of his strong reliance upon a decision of a Coast Guard examiner entered in March 1964 at Seattle, Washington, holding, in a case involving Appellant herein, that service similar to that in the instant case was not service under authority of his Federal license. This decision was reported at 1965 A.M.C 391.

The fact that this order of dismissal was by the then Chief Examiner of the Coast Guard is of no legal significance. When an examiner hears a case he hears it as "Examiner." The fact that he may have other duties allowing the title of "Chief Examiner" is irrelevant when one considers only what he did in a specific case. His decisions, although permitted to become final in the absence of appeal (and appeal is extremely unlikely in such cases since I do not now allow appeals from orders of dismissal), are not binding on his fellow ex-examiners, as the Examiner in this case correctly recognized. The fact that the ruling was reported at 1965 A.M.C. 391 gives it no extra dignity.

As did the examiner below, in effect,, I hold that the decision of the examiner reported at 1965 A.M.C. 391 was erroneous, at the first opportunity I have had so to hold. I note that in his order dismissing charges in the earlier case, that examiner said:

"A Federal pilot license in the State of Washington is not a condition of employment on an American vessel sailing under register."

This was not correct. The requirements of RCWA were the same then as they are now.

It also follows that when Appellant holds out to a State, under a State requirement, that he holds a currently valid Federal license for the waters on which the State regulates pilots, there must be authority in the Coast Guard to proceed against that license for acts committed during employment for which the holding of that license is a requirement.

V

Appellant has cited several court decisions dealing with pilotage. There is no need to examine each one in detail, because they all add up to the points of agreement set out at the outset of this opinion. One, however, is so far afield from applicability to the instant case that it is worthy of mention. Appellant says:

"In State v Ring, 122 Oregon 654, 259 Pacific 780, affirmed 276 U.S. 607, the State of Oregon affirmed a criminal conviction of a Federal licensed pilot serving on a foreign vessel holding that state laws were controlling in that area."

The Oregon law, as construed by Oregon's Supreme Court, made it an offense for anyone not authorized by the State of Oregon to pilot a vessel subject to the State's pilotage authority. Although Ring held a Federal license for the Columbia River, he did not possess an Oregon license authorizing him to pilot a foreign vessel. There is no question that the conviction for piloting a foreign vessel was proper, but there is also no question that the decision is inapposite to the instant case.

## VI

Appellant next complains that certain agreements between the Commandant and the American Pilots' Association have been breached by the Examiner's decision, that any change in the agreement would be "rule-making" under 5 U.S.C. 552, hence required to be published in the Federal Register, and that this could not be done by an examiner or even by the Commandant himself in this particular adjudication process, but could only be done by the Commandant himself in a Federal Register publication.

Appellant concedes that neither the original agreement, nor any modification of it, was ever published in the Federal Register.

I cannot agree with the Hearing Examiner's characterization of this series of agreements. When referring to these agreements, the Examiner is in error when he stated that they were 'improper and illegal', or that they 'should never have been entered into in the first place'. He should have recognized that in such agreements the Coast Guard did not surrender jurisdiction in cases involving licensed pilots.

The regulations clearly provide that the Hearing Examiner is bound by the principles and policies enunciated by the Commandant. 46 CFR 137.03-1. Since the agreements were brought to the attention of the Examiner, he should have accepted them as an expression of Coast Guard policy and should have acted accordingly.

A close reading of the agreements shows that the Coast Guard did not thereby give up to the state pilots' associations the power to act in the case of a licensed pilot amenable to its statutory authorized jurisdiction. In essence, the Coast Guard agreed that it would not take action to suspend or revoke a Federal license of a pilot who was at the time serving exclusively under authority of

a State commission. This was not a surrender of anything. A case like the instant case was not contemplated. Appellant was here serving under authority of both his Federal and his State authorizations, and the agreements in no way annual Federal jurisdiction over his Federal license nor inhibit Federal action against that license.

The summary of the agreement contains this specific statement: "State pilots are subject to federal jurisdiction in all cases when acting under authority of their federal licenses."

## VII

Appellant's third point is that the situation of the vessels was essentially that of vessels meeting end on or nearly so and not that of vessels crossing. I am far from appreciating the import of this argument.

Until the vessels came in sight of each other, when less than one mile apart, the ordinary steering and sailing rules at 33 U.S.C. 201-210 had no application. SILVER SHELTON had contact with FAIRLAND only by radar prior to that time. Whether or not it is a custom of inbound vessels and outbound vessels to keep to the right near the point of collision, Appellant offers no convincing argument that the "narrow channel" rule, which would apply even in conditions of reduced visibility, applied to the waters in question. He urges only that on the basis of radar information in reduced visibility SILVER SHELTON had a right to expect FAIRLAND to go to its right and consequently had a right to go to its right with impunity.

Since it was not established that the "narrow channel" rule applied in this case, and since the vessels were not in sight of each other at the time SILVER SHELTON commenced maneuvering in this case, it does not matter, in judging the prudence of the Appellant pilot, whether the original relative positions of the vessels showed a "head and head" meeting or a crossing situation. Of possibly greater significance in this case is the fact that Appellant does not dispute the finding that when the vessels finally broke into sight of each other FAIRLAND was showing only its green light to SILVER SHELTON.

## VIII

In this third point Appellant urges that the examiner should have found, as he did not, on the basis of his findings, that FAIRLAND was originally 22.5° on the starboard bow of SILVER SHELTON, was still on the starboard side after SILVER SHELTON, had come right 25 degrees, and that FAIRLAND must have come left in the

interval.

A good part of this argument is met by the analysis supporting the substituted Findings of Fact in this case as explained in "I" above. My findings acknowledge that from the time of SILVER SHELTON's change to the right of twenty-five degrees, FAIRLAND had moved to SILVER SHELTON's port bow, and remained there to the time of collision.

I have already mentioned the Examiner's action in making no findings as to position, course, or speed of FAIRLAND at any time in this approach and collision. The lack of findings is not a fatal error. If this were a proceeding in which the causes of collision were to be ascertained, it would be impossible to accept findings which did not include FAIRLAND's activities when such could be known, but such is not the case here. The only purpose of the record here is to ascertain whether Appellant, while serving under authority of his Federal license, committed acts such as to warrant suspension or revocation of his Federal license.

There is no burden to prove the other vessel in collision faultless. We are dealing here not with liability of vessels, as against each other, but with fault of licensed officers which may appear on either side even without rendering a vessel itself liable for the fault. See Decision on Appeal No. 1670.

Appellant's actions in this case are clearly within the area of negligence and misconduct contemplated by R.S. 4450, whatever the other vessel did.

There is no evidence that Appellant was apprized of the relative position or movement of FAIRLAND after the first radar observation at about 0526. There is no evidence that Appellant was informed by the mate of the second radar observation of FAIRLAND at a distance of four miles.

We are faced, then, with a situation in which Appellant made three course changes to the right while maneuvering with respect to another vessel in fog, known by him to be present, with no effort made by Appellant to ascertain the movements of the other vessel. These facts alone, with the visibility reduced to less than one mile, demonstrate that Appellant failed to direct the movements of his vessel in a reasonable and prudent manner in approaching a radar target.

No inference of fault on Appellant's part can be drawn from his decisions not to testify at his hearing. The fact remains, however, that Appellant, and only Appellant, could have explained his three course changes to the right based, on this record, on no

reliable information of any kind. If Appellant, by some information not disclosed on this record, had reasonably decided that the changes to the right were reasonable or necessary, only he could have explained the matter, and he chose not to do so.

I cannot agree with the Examiner that Appellant was specifically at fault in failing to plot, or to cause to be plotted, the movements of the other vessel. Much valuable information can be obtained from radar by an experienced pilot without actual plotting. Appellant's real fault, on the record presented here, was that he maneuvered in fog with respect to an unseen vessel, of whose presence he was aware, on no information at all. This is imprudent navigation.

#### IX

In Appellant's fourth point on appeal he urges that a statement made by a former President of the Puget Sound Pilots' Association shows that (while there is no established rule) about 98 percent of the inbound and outbound vessels keep well to the right in the area of the collision in this case. This statement has no more persuasive effect on appeal than it did on the Examiner at hearing. When a custom is argued in situations like this the custom can only be persuasive when it has become so recognized within the universe of its practice that it has acquired the force of law. It is thus with the "points and bends" custom on waters to which the Western Rivers Rules apply.

A custom has the sanction of judicial approval. It is a custom recognized by all users of the body of water, not just by a body or group like a pilots' association. Further, to earn recognition the custom would first have to meet approval with the 100 percent approbation and recognition of the pilots' association. Ninety-eight percent is not enough to constitute the "custom" a law. When it is considered that the proffered proof of custom speaks only for, and not even for all of, pilots of seagoing vessels in this area, and does not purport to speak for the fisherman and other vessel operators, it can be seen that the "custom" urged is not law. If it is, and my research has failed to unearth evidence which would establish the "custom" I can only say that the record and Appellant's brief do not incorporate any persuasive evidence or argument to that effect. Moreover he has presented no citations of court decisions holding that the area near Apple Point Cove is a "narrow channel" or that a "custom" is observed in the area that has established a legal "keeping to the right" requirement.

#### X

On this same point Appellant argues that the radar equipment of the outbound vessel was so defective as to constitute the sole effective cause of the collision. It must be pointed out again that in proceedings under 46 USC 239 and 46 CFR 137 we are not dealing with "effective cause" or "proximate cause" nor are we dealing with questions of civil liability. It would not matter that FAIRLAND might have been the most unseaworthy hulk ever to drift in Puget Sound. We are concerned only with the possibility of personal fault of Appellant. On the record before me, he carelessly and with utter disregard navigated his vessel in the presence of another vessel in fog for almost nine minutes without effort to ascertain the position or movements of the other vessel.

#### XI

Appellant's fifth point is that "the Examiner's finding was clearly erroneous." This point is resolved by Appellant into five specifics each of which is discussed below.

#### XII

Appellant's first specific argument under his fifth point is that the Examiner was clearly in error in his holding that 46 USC 214 controlled. As Appellant does not belabor the point in his brief but merely refers me to some other unidentified place in his brief, I do not belabor the matter either but point out that I have already discussed the matter in "III" above.

#### XIII

Appellant's second specific argument under his fifth point is that the Examiner incorrectly applied a Canadian court decision in holding that the narrow channel rule does not apply on the waters where the casualty in the instant case occurred. Whatever the holding of the Canadian decision, Appellant has made no effort to show that the narrow channel rule does apply in the waters where this collision took place. This matter has been previously discussed at "VII" above.

#### XIV

Appellant's third statement of clear error deals with the Examiner's ruling as to the "Agreement" as to action against licenses of pilots and with rule-making procedure. This has been dealt with in "VI" above.

#### XV

Appellant's fourth assertion of clear error by the Examiner is

his admission into evidence of testimony of certain witnesses taken earlier in an investigation under 46 CFR 136. Since the Examiner declared that he would limit his reliance on such testimony to that of Lee Chun, that testimony is the only record of which I need take cognizance and of which I have taken cognizance (see "I" above). My foregoing remarks apply. The testimony was properly admitted into evidence.

XVI

Appellant's last statement of "clear error" on the part of the Examiner is that he made his decision in this case after there had been published in Merchant Marine Council Proceedings a report based on the investigation of the casualty involved herein under 46 CFR 136.

When an agency has both investigative functions as to casualties or accidents and power to move against a license,, certificate, or document of a person involved in such a casualty or accident, there is no error in publishing the results of the casualty investigation before the "certificate action" is completed. Pangburn v C.A.B. CA1 (1962), 311 Fed. 2nd 349.

XVII

Appellant's brief in this case is captioned not only as an appeal from the Examiner's Decision but also as "Appeal from Order of the Examiner on Motion for Reconsideration." In this connection an unusual procedure that was followed must be noted.

The Examiner served his decision and order on Appellant on 8 September 1969. Appeal was timely filed on 16 September 1969. On 1 December 1969, Appellant addressed to the Examiner a "Motion for Reconsideration." On 22 December 1969 proceedings were held before the Examiner, with the Examiner announcing that "...the hearing... is reopened." The Examiner stated that the hearing was reopened for the purpose of determining whether the motion should be granted.

Later in the proceeding, after hearing argument, the Examiner said, "I believe I have looked on this motion as being one in the nature of a judgment N.O.V. rather than a motion to reopen for newly discovered evidence." On 16 January 1970, the Examiner entered an order denying the motion. In a letter of 21 January 1970, Appellant speaks of his action as having been a "motion" for reconsideration or to reopen under Section 137.25-1."

However, the participants may have chosen to style the motion, the regulations permit of only two actions by a party after an

examiner's decision has been entered. One is appeal; the other is a petition to reopen on the basis of newly discovered evidence. The last sentence of 46 CFR 137.25-1 reads: "If an appeal to the Commandant has been filed, the petition to reopen the hearing shall be considered by the Commandant." Since an appeal had been filed on 16 September 1969, this vision of the regulation controlled.

However, since Appellant makes his argument on appeal I shall consider it as if properly addressed as a petition to reopen on the basis of newly discovered evidence.

The first item Appellant presents is a decision of the examiner dismissing charges, identical to those in Appellant's case, brought against the pilot of FAIRLAND. Whether the examiner erred in the other case and should have found the charges proved is of no significance in the review of this appeal. It is true, as Appellant has point out, that the examiner made no findings in the other case. He dismissed merely with a statement that there was a lack of substantial evidence in the case. It may be, as Appellant urges, noting that both pilots were navigating at about the same speed in the same fog, that the decisions are irreconcilable. I obviously cannot attempt to reconcile them since the examiner's decision in the other case gives no basis for comparison, and I am under no obligation to do so. The only case before me is that of Appellant and the issue is not relative fault that only whether there is substantial evidence to support findings that Appellant failed to exercise prudence in the navigation of SILVER SHELTON and failed to proceed at moderate speed in fog. There is such evidence.

A second item offered is testimony of an expert witness which Appellant urges would prove that FAIRLAND came left, contrary to some testimony given that it went right. Appellant makes no showing that this evidence was not available to him at the time of hearing by the exercise of due diligence, but here again the matter is irrelevant. It has been pointed out that on the record of this case it must be concluded that from the time Appellant was apprized by radar observation of the presence of FAIRLAND six miles distant he made no effort to ascertain the movements of that vessel and acted in complete disregard of the presence of that vessel until it broke out of fog at a distance of less than a mile. Even if FAIRLAND at that very moment was turning left, Appellant's imprudence had placed his vessel in danger of collision.

Another item of "new evidence" is a document purporting to show that the whistle installed on SILVER SHELTON was designated for a vessel of a size from 1600 to 3000 tons, while the vessel itself was "four of five times this tonnage and size." Again, no effort is made to show that this evidence was not available at the

time of hearing by the exercise of due diligence and again the evidence is irrelevant. In fact, if the evidence were to be considered pertinent, Appellant's position would necessarily have to be that he had a right to rely on a whistle commensurate with the size of his vessel to warn others ahead of him that he was speeding in fog. This would be a classic case of "relying on his horn instead of his brakes."

Appellant asserts at this point that I was not provided with a transcript of the proceedings before the Examiner on 22 December 1969, and provides a copy thereof. Appellant is wrong. I was provided with a transcript of those proceedings even though they amounted to a nullity.

ORDER

The order of the Examiner dated at Seattle, Washington, on 8 September 1969, is AFFIRMED.

C. R. Bender  
Admiral, United States Coast Guard  
Commandant

Signed at Washington, D.C., this 11th day of June 1971.

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