

IN THE MATTER OF LICENSE NO. 312379
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: William C. KENOPKE NO. Z-97159

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1967

William C. KENOPKE

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 2 February 1971, an Examiner of the United States Coast Guard at New Orleans, La., admonished Appellant upon finding him guilty of negligence. The specification found proved alleges that while serving as master on board the SS GREEN DALE under authority of the license above captioned, on or about 29 June 1968, Appellant neglected to exercise precautions required by International Rules of the Road, Rule 29, in that he "failed to take timely evasive action although whistle signal exchanges between the SS GREEN DALE and MV NYMPHE so indicated action and thereby contributed to a collision between the SS GREEN DALE and another vessel, the MV NYMPHE.

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

The Investigating Officer introduced in evidence a report of casualty involving GREEN DALE and the testimony of one witness.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order of admonition against Appellant.

The entire decision was served on 8 February 1971. Appeal was timely filed on 2 March 1971. Although Appellant had until 2 June 1971 to add to his appeal he has not done so.

FINDINGS OF FACT

On 21 June 1968, Appellant was serving as master of SS GREEN

DALE and acting under authority of his license.

At about 2100 on that date, GREEN DALE was proceeding downstream in the Khowr-e Ma'shur River, Iran, en route to Chittagong. On the bridge of GREEN DALE were Appellant, a compulsory Iranian pilot, one Patrick B. Pierce, third mate, and an unidentified steersman.

When GREEN DALE, somewhat to the right of the axis of flow of the River, was about three or four miles from a right turn brought about by the contour of the river, NYMPHE was sighted, ascending the river, in the process of making its turn to the left into the reach where GREEN DALE was already was. NYMPHE presented to GREEN DALE its red light and range lights open wide. The bearing of NYMPHE was not ascertained but the vessel appeared to be to its own right side of the river.

The pilot of GREEN DALE sounded one blast and came right. NYMPHE sounded two blasts. Its range lights were coming into line. GREEN DALE went full ahead and again sounded one blast, coming further right. NYMPHE replied with two blasts. No change in the aspect of its lights was noted. No bearing NYMPHE was ever ascertained.

When the vessels were about 500 to 600 yards apart, GREEN DALE, now close to the shoal to its right, sounded two blasts and came hard left. At this time NYMPHE was showing both sidelights, bearing not ascertained. As GREEN DALE was coming left NYMPHE'S green light shut out. The vessels collided with the stem of NYMPHE striking the starboard side of GREEN DALE at an angle of about ninety degrees.

The United States and Greece being parties to the International Regulations for Preventing Collision at Sea, these rules applied to the conduct of the two vessels.

BASES OF APPEAL

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

Some of Appellant's arguments are irrelevant to the charges in this case although they will be discussed below because they are induced by language of the Examiner in support of his decision. The one real question to be determined here is whether Appellant, as master of GREEN DALE, should at some time have taken over the direction of the vessel from the compulsory pilot.

APPEARANCE: Jones, Walker, Waetcher, Poitevent, Carrere & Denegre,

by Frank C. Allan, Jr., Esq.

OPINION

I

I wish to reemphasize here that in a proceeding under R.S. 4450 looking to the suspension or revocation of a person's license we are not interested in civil liability of a ship in collision but in the personal fault of one who directs or permits the vessel to be directed into a collision or who violates or permits a violation of the Rules of the Road. In some cases fault of the ship must be established before fault of an individual may be found, but the two matters must be considered in order. In other cases, fault of an individual may be found whether or not there is a collision or whether or not there has been a violation of Rules of the Road. In the instant case the questions are narrowed to the utmost:

- (1) Did GREEN DALE violates the Rules of the Road?; and
- (2) Was Appellant, as master, responsible?

II

The language both of the Examiner and of Appellant relative to danger signals is irrelevant.

The danger signal is available to a vessel under the International Rules only when the vessel is a privileged vessel obliged to maintain course and speed. There is not a shred of evidence to show such a condition in this case.

Since the Examiner's findings are partially predicated upon a theory that GREEN DALE should have sounded a danger signal under Rule 28 of the International Rules (33 U.S.C. 1090) the theory must be disowned and some other rule of law must be applied if Appellant is to be held at fault.

III

Implicit in the Investigating Officer's case and in the Examiner's evaluation thereof is a misunderstanding of the difference between International Rules and the Inland Rules in a situation of this sort. In addition there are latent deficiencies in the language and the application of both sets of rules.

Under the Inland Rules (33 U.S.C. 203, Rule I), when two vessels are proceeding in opposite directions in the same channel, or series of channels, or, as in this case, a river, the courts

frequently construe the situation as a "meeting" situation despite the language of the Rule. The Rule itself is inherently defective. The third paragraph specifically limits application of the Rule to situations in which both vessels simultaneously see both sidelights of the other vessel, but the second paragraph applies when both vessels see only the green sidelight of the other vessel, while the Rule is silent as to the situation when both vessels see only the red sidelight of the other vessel. In view of the inherent flaws in the Rule I cannot quarrel with the efforts of the courts to attempt to reach a standard of action which will serve to prevent collision.

Rule 18 of the International Rules is strictly limited to situations in which both vessels simultaneously see both sidelights of the other vessel. It is not applicable to the situation when both vessels see only the red sidelight of the other vessel. Nor is it applicable to the situation on which each vessel sees only the green sidelight of the other vessel. This is eminently consistent with the International concept of sound signals of one and two blasts as accompanying course changes to right or left and not as statements of intent or proposals.

The difference between Inland Rule I and International Rule 18 in the "head and head" situation is clear. While both require both vessels to come right, the Inland rule requires a proposal to be answered in kind, whereupon the vessels maneuver. The International rule requires each vessel to come right and it must signal under Rule 28. there is no room under the International Rules to extend the application of Rule 18 to vessels in the same river, the contour of which requires changes in heading, such as is possible under the ambiguity of Rule I of 33 U.S.C. 203.

IV

It is also clear that under Rule 28 NYMPHE was required to sound a two blast signal as it turned left into the reach of the river which GREEN DALE was traversing.

It is important to recall here that there is no such thing as a "cross signal" under International Rules since action, and not intent, is involved. Thus, the first one blast of GREEN DALE meant that it was going to its right, a permissible maneuver, not that it was proposing a port to port passing. The first two blast signal of NYMPHE was not a cross-proposal to pass starboard to starboard; it was a signal that it was coming left, a maneuver dictated by the contour of the river.

The finding of the Examiner "that when the first signal--one short blast--was sounded by the SS GREEN DALE and answered [sic] by

the MV NYMPHE with two short blasts, the navigators of both vessels were put on notice that their vessels were standing into danger" must be rejected. It cannot be said that at this point Appellant was obligated to supersede his pilot, an obligation which must be established if Appellant is to be held at fault.

V

It is possible, of course, that the situation deteriorated so that Appellant should have perceived a need to supersede his pilot. This situation might have occurred when GREEN DALE came right the second time and NYMPHE announced that it was again coming left. The only evidence as to the situation at this time is that NYMPHE was still showing a red light with range lights still almost in line, as they were at the time of the first pair of signals. Since there is no evidence as to the bearing of the NYMPHE from GREEN DALE it must be concluded that the positions of the vessel relative to their respective sides of the river were that GREEN DALE was more to the right of the center than it had been while the NYMPHE was still somewhat to its own right of the center. It cannot be said that it was clearly established that Appellant should have superseded his pilot at this time.

The next ascertainable situation is that Appellant's pilot elected to come left and, accordingly, sounded a two blast signal. It is only by inference that one can arrive at the finding that NYMPHE was at this time showing both sidelights, from testimony of the sole witness that shortly after this change the green light of NYMPHE closed out. (The testimony was given only incidentally and no bearing of NYMPHE was established.)

It may be that better marshalling of the facts and direction of the witness might have established a situation in which Appellant should have personally intervened. On the evidence presented, however, it cannot be said that the decision of Appellant's pilot to come left was necessarily so wrong that Appellant should have superseded the pilot. Neither can it be said that the decision of the pilot to come left was incorrect. On the testimony of the one witness, it appears that NYMPHE made an un signaled and unexpected change to its left, without which change the vessels would have passed safely to the right of each other.

It is true that the International Rules are as defective as the Inland Rules in situations of this sort. It is also true that a person may be found at fault under Rule 29 despite the technical deficiencies of the substantive rules, but to do so a fact-predicate must be established to show that "the ordinary practice of seamen" required some special action on the part of the person directing the movements of the vessel. Absent any evidence

of the bearing of NYMPHE from GREEN DALE at any given moment it cannot be said that GREEN DALE was at fault in this case. It follows that since neither the vessel nor its pilot can be shown to have been at fault it cannot be held that Appellant was derivatively at fault for failure to supersede the pilot.

VI

Ordinarily, in a case like this, it would be desirable to remand the matter so that evidence could be obtained to allow for a better reconstruction of the facts, particularly in the area of correlation of aspect of the approaching vessel with its range and bearing. I do not think a remand is appropriate in this case.

There was ample opportunity to have examined the witness as to bearings. Since ascertainment of bearings to the extent possible is essential to establishment of facts in a collision case, and since not one question as to bearing was asked, a remand would simply reward poor fact ascertainment in the first place. Further, the sole witness who, almost a year after the collision, volunteered no testimony as to relative bearing, could not be expected at this time to furnish evidence of suitable nature to support the ultimate findings at hearing in this case.

It would be pointless to remand at this date for further hearing a case involving a collision which occurred on 29 June 1968 when the product of the original hearing was only an order of admonition against the license of a master who had no prior record.

ORDER

The order of the Examiner dated at New Orleans, La., on 2 February 1971, is VACATED. The charges are DISMISSED.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 3rd day of July 1973.

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