

IN THE MATTER OF LICENSE No. 350995 AND MERCHANT MARINER'S DOCUMENT
NO. Z-235149

Issued to: Oivind E. HERMANSEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1981

Oivind E. HERMANSEN

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 28 October 1969, an Administrative Law Judge of the United States Coast Guard at New York, New York, issued an admonition to Appellant upon finding him guilty of negligence. The specification found proved alleges that while serving as Master of M/V V. L. KEEGAN II under authority of the license above captioned, on 19 March 1968, Appellant negligently navigated his vessel on the wrong side of the channel in the East River, New York, near Hell Gate, contributing to a collision between his vessel and M/V OWLS HEAD.

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

The Investigating Officer introduced in evidence the testimony of three witnesses and certain documents.

In defense, Appellant offered in evidence the testimony of four witnesses and certain documents.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order placing an admonition in Appellant's record.

The entire decision was served on 29 October 1969. Appeal was timely filed on 26 November 1969 and perfected on June 1970.

FINDINGS OF FACT

On 19 March 1968 Appellant was serving as Master on board the KEEGAN and acting under authority of his license. The southbound KEEGAN with the Appellant at the wheel was travelling at about seven knots, 150 to 200 feet off Ward's Island Sanitation Dock, and staying to the right (westerly) side of the narrow channel in the East River near Hell Gate. At this time he observed the

foremast range light and the green light of another vessel directly ahead, which was subsequently identified as the OWLS HEAD.

Appellant immediately stopped both engines for about five seconds, gave two short blasts, and went hard left. While moving left towards the east side of the channel he observed the OWLS HEAD turning to her right and going toward the same easterly side. Appellant then sounded the danger signal followed by three blasts and put the engines full speed astern, however, the stem of the KEEGAN struck the port side of the OWLS HEAD about 50 feet from the bow. The collision was minor and occurred near the easterly side of the river.

On the evening of 19 March 1968 the sludge boat OWLS HEAD was returning from sea upbound in the East River toward the Department of Sanitation Docks on Ward Island. The OWLS HEAD was being navigated on the left side of the channel close to the westerly shoreline when the range lights of the southbound KEEGAN were observed ahead. The OWLS HEAD blew one blast, went right, at first slowing down and then increasing to full ahead moving across the channel from its westerly side to the easterly side. During all material times the weather was clear with good visibility, smooth sea, a light breeze and a flood (northbound) current of about three knots.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that a motion to dismiss made at the end of the Investigating Officer's case should have been granted since there had been no proof offered that Appellant was in fact the Master of KEEGAN at the time of collision with OWLS HEAD.

On the merits it is urged that KEEGAN's maneuvers were made in extremis and constituted no fault on Appellant's part.

APPEARANCE: Foley & Martin, New York, New York, by Richard E. Meyer, Esquire.

OPINION

I

I look first to Appellant's argument that there was no evidence to support a finding that he was the Master of KEEGAN at the time of the collision when the Investigating Officer rested his case, and that the Administrative Law Judge's failure to grant his motion to dismiss at that time remains reversible error. Two considerations are controlling.

The Master of the other vessel, OWLS HEAD, testified that after the collision the Master of KEEGAN, which had also been brought in to the New York Sanitation Department mooring after the collision, came aboard OWLS HEAD. As to this meeting, the following appears in the record of hearing when Captain Gantz, Master of OWLS HEAD was testifying:

Q. You recognize the person that came aboard the OWL'S HEAD on the

evening of 19 March as the person in this room? [N.B.: There were several persons in the room]

A. I think I do."

Q. Will you point him out?

A. Yes. (indicating)

Examiner: Captain Gantz is pointing to the Person Charged, Captain Hermansen."
R-35.

Additionally, the witness identified the person who came aboard his vessel on the night of 19 March 1968 for the purpose of identifying himself and exchanging information as "Captain Hermansen."
R-36.

Appellant argues that if he had not been present in the hearing room the direct identification could not have been made. This is a quibble. Appellant was there and was identified. Even without this the identification would be supported by the second relevant piece of testimony that a person identifying himself as Captain Hermansen had come aboard his vessel and acknowledged that he was the master of KEEGAN. This is substantial evidence that Appellant was in fact Master of the vessel. It could have been rebutted, but it was not.

Further, Appellant proceeded with an affirmative response to the Investigating Officer's case. In this he admitted that he was Master of KEEGAN at the time in question. An Administrative Law Judge's decision in an administrative hearing is based on the whole record. If a Judge erroneously denies a motion to dismiss a complaint, the party has two options:

- (1) To rest immediately and rely on the error on appeal, or.
- (2) to proceed at the peril of curing a defect.

Appellant here opted to proceed and cure any defect which he might have argued on appeal. I do not acknowledge that there was such a defect; I say only that on the whole record Appellant cannot complain.

II

Having upheld the jurisdiction in this case, and the propriety of the Judge's action in denying the motion to dismiss, I turn to the merits. Appellant urges me to find that an in extremis situation existed because on the initial sighting of each vessel by the other they were very close with an intervening promontory of land, and that the closing speed required a departure from the rules. I do not agree with Appellant in this contention: Instead I concur with the Judge in finding that the

navigation was not in extremis and therefore Appellant was negligent. I find that the primary cause of the collision was the total disregard of the Narrow Channel rule by both vessels.

Simply stated, the situation both Masters faced was one of meeting in a narrow channel with all parties bound to observe the time tested rule for the safe navigation of vessels. One of these rules which is of primary importance in the prevention of collisions is the so-called Narrow channel rule, 33 U.S.C. 210, which requires keeping to that side of the channel which lies on the starboard side of the vessel. This likewise requires a port-to-port passing unless this is not "safe and practicable" as a matter of necessity. Further, the courts have ruled that a vessel attempting to negotiate a starboard-to-starboard passing may not proceed without an agreement to do so unless the vessels are so far to starboard of each other that they will pass at a safe distance, so as to involve no risk of collision.

In this case when both vessels sighted each other they had a duty to avoid one another and take action within the rules designed to prevent collision. Appellant upon seeing the upbound vessel coming up the wrong side of the channel was admittedly concerned and somewhat worried about a safe passage. He properly stopped his engines but then departed from the rules by again going ahead and failing to stay to the right. At this time he was duty bound to stop his vessel and back if necessary until the navigational situation cleared to permit proper passage. Alternately, if appellant wanted to depart from the prescribed rules he had a duty to obtain a firm agreement. This he did not do.

Appellant attempts to show an in extremis situation by claiming closing speeds of 14-15 knots with minimal maneuvering time. However, no attempt is made to show what would have happened if the KEEGAN, proceeding at seven knots and breasting a three knot flood current, had backed full and had followed the right hand side of the channel. I believe that this would have permitted safe passage. I also find that the record lacks material facts and persuasive argument for supporting a departure from the rules.

III

Appellant also implies that since the Master of the OWLS HEAD was at fault in the navigation of his vessel that this should exonerate him from any culpability. I have often stated that in these proceedings we are not concerned with determining civil liability or whether one or another or both vessels are at fault. We are only concerned with whether or not Appellant was negligent in his operation of the KEEGAN. I find he was.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 28 October 1969, is AFFIRMED.

T.R. SARGENT

Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 27th day of July 1973.

INDEX

Collision

- In extremis

- Meeting situation

- Negligence of other vessel, materiality of

Decisions of Examiners

- Based upon whole record

Examiner's

- Decision to be based upon whole record

- Denial of motion, effect

- Curing errors of by further testimony

Motions

- To dismiss

- Options of party after denial

- Erroneous denial, curing of defect

Navigation, rules of

- Departure from not justified

River or Channel

- Meeting situation

- Narrow channel rule - compliance required unless unsafe to

- apply

