

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 36707 and MERCHANT MARINER'S DOCUMENT Z 459 66 1272  
Issued to: Donald M. BANASHAK

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2277

Donald M. BANASHAK

This appeal has been taken in accordance with Title 46 U. S. C. 239(g) and 46 CFR 5.30-1.

By order dated 28 May 1980, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's documents for two months on four months' probation upon finding him guilty of negligence. The specifications found proved allege that while serving as operator on board M/V GULF HAWK under authority of the document and license above captioned, on or about 24 February 1980, Appellant: 1) failed to navigate his vessel with due caution by directing the movement of the vessel and tow to port in a close quarters situation, thereby contributing to a collision between SS TEXAS SUN and GULF HAWK's tow; and, 2) failed properly to utilize the radar while visibility was restricted.

The hearing was held at Port Arthur, Texas, on 19 March 1980.

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

The Investigating Officer introduced in evidence two exhibits and the testimony of one witness.

Appellant offered no evidence in defense.

At the end of the hearing, the Administrative Law Judge reserved decision. He subsequently entered findings that the charge and two specifications had been proved. He then served a written order on Appellant suspending all documents issued to him for a period of two months on four months' probation.

The entire decision was served on 29 May 1980. Appeal was timely filed on 23 June 1980 and perfected on 7 November 1980.

FINDINGS OF FACT

On 24 February 1980, Appellant was serving under authority of

his license aboard M/V GULF HAWK. Employed as a mate, he was the operator on watch during the period covered by the specifications of the charge and was assisted by a Deckhand at the helm.

In the early predawn hours Gulf Hawk towed astern an empty barge of 3272 gross tons on a 300 foot hawser west bound in the Safety Fairway in the vicinity of Sabine Pass Channel. The weather was foggy, at the time of the incident visibility was about 250 feet. The radar was operating and set on the six mile scale. Respondent noticed a vessel on radar about three miles distant 10 to 15 degrees off his starboard bow. Although respondent did not plot the vessel or other contacts or make grease pencil marks on the radar screen he did look at the scope several times. No radio contact with the other vessel was attempted. Several minutes later Gulf Hawk's tow collided with the other vessel.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

1) the Administrative Law Judge improperly denied motions to dismiss the charge and specifications;

2) the Administrative Law Judge improperly found the first specification proved on the grounds that GULF HAWK allegedly was proceeding at too great a speed, in violation of the "half distance rule", and, that the GULF HAWK failed to slow her engines after hearing a fog signal from the TEXAS SUN;

3) the finding of the Administrative Law Judge that the first specification, improperly turning to port, was proved, is contrary to the evidence adduced at the hearing;

4) the 1972 COLREGS do not prohibit a vessel from turning to port in restricted visibility;

5) the Administrative Law Judge improperly found proved the second specification, failing to properly utilize the information available from radar, on the grounds that, although Appellant was observing the radar diligently and in fact ascertained the presence of an oncoming vessel, he failed to attempt to reach the oncoming vessel by radio, and he did not take any other action that would minimize or eliminate the risk of collision; and,

6) The finding of the Administrative Law Judge that the second specification, failing to properly utilize the information from radar, was proved is contrary to the evidence at the hearing.

APPEARANCE: Vinson & Elkins, Houston, Texas, by Richard A. Stanford, Esq.

OPINION

I

It is appropriate here to look first to Appellant's complaint that his motions to dismiss the specifications before hearing, on grounds of fatal deficiency, were improperly denied.

With respect to the second specification it is true that it was defective. It was alleged that Appellant failed to utilize "the information available from the radar which contributed to the collision...." It is obvious that it was never intended to assert that either the radar or the information obtainable from it contributed to the collision. An unstrained reading shows the substantive "failure" implicit was that of Appellant. So read the allegation becomes understandable. While the "information" is not set out in detail it is implied to be the kind that would be useful on avoiding collision. As notice to Appellant the allegation was sufficient.

The first specification, on the other hand, is fatally defective on its face. Its operative language merely alleges that Appellant directed his vessel to port "in a close quarters situation." There is nothing intrinsically wrong in directing a vessel to port. Even in "close quarters" such a maneuver may well be the single safest effort a vessel can make to avoid collision. The Investigating Officer's argument was that there was "rule involved, that Appellant had to know such "rules" to get his license, and therefore there was no need to state the rule in the specification.

The Investigating Officer had the germ of a correct idea. When a statement of fact contains all the elements needed to spell out an offense it is not necessary to plead the regulation or even, in most cases, to cite it in a specification. Appeal Decisions Nos. 2124 and 1661. Official notice can always be taken of the regulation to compare the elements alleged with the elements required. In the instant case the specification does not contain all the elements needed to spell out an offense, and if a comparison with some identified "rule" had been made it would still have been found wanting. See Appeal Decision No. 2055. Nevertheless, the Administrative Law Judge denied the motion, stating that the specification alleged facts and that the facts were characterized as "negligent" by the charge. This is, of course, circuitous. The motion should have been granted, or, at least, the requirement to make the statement sufficient should have

been imposed.

On the question of whether it was established under the second specification that Appellant failed to utilize properly in the information available to him from his radar, the record is quite clear. In the examination of the witness and in argument, the absence of grease-pencil markings on the radar scope or a plot anywhere and an inferable lack of plotting equipment in the wheelhouse of GULF HAWK is telling.

The weight of authority is that a failure to make a radar plot of some type in restricted visibility is negligent. The Harbor Star, 1977 A. M. C. 1168, 1190 (E. D. Pa. 1977); KoninklijkeNederlandsche Stoomboot Maalschappij v. Great Lakes Dredge and Dock Co., 1974 A. M. C. 451, 456 (S. D. N. Y. 1973); Getty Oil Co. v. Ponce De Leon, 1977 A. M. C. 711, 734, 555 F.2d 328 (2nd Cir. 1977); Orient Steam Navigation Company, Ltd., v. United States of America, 1964 A. M. C. 2163, 2171, 231 F.Supp. 469 (S. D. Cal. 1964), and Federal Insurance Co. v. Royalton, 1961 A. M. C. 1777, 1783, 194 F.Supp. 543 (E. D. Mich. 1961). The last case, Appellant cites as authority for the proposition that such failure is not negligent if the vessel or vessels are turning and therefore plotting will not yield good information. Appellant fails to point out that this case was reversed and the failure to plot radar information is mentioned disapprovingly in that opinion. 312 F.2d 671, 674-5 (6th Cir. 1963). But even if Appellant's reading were true in a case where the question is what caused the collision, it is not of concern in a case such as this where our inquiry is limited to whether the respondent acted negligently. It does not matter whether the negligence leads to a collision. The collision is merely an event which prompts the investigation into the respondent's actions.

There is, therefore, sufficient evidence on which to have predicated a finding of proved on the second specification.

At the opening of the record it appears that the Administrative Law Judge had given the person charge "a set of written instructions" "prior to the commencement of the hearing." Those "instructions," marked as an Exhibit for the Administrative Law Judge, signed only by the person charged, contain chiefly the information usually given in open hearing on the record. While the document refers to the right of the party to counsel, there is no indication of how or in whose presence the Administrative Law Judge delivered this document and obtained the signature.

After ascertaining on the record that Appellant was represented by counsel the Administrative Law Judge proceeded to obtain to the charges. In so doing, reference to the time set for

the hearing brought an aside to the effect that there had been a stipulation which had changed the time. After the pleas were entered there was some unidentified problem with some unidentified "letter," with differences of handwriting, and then the motion by counsel to dismiss the charges was denied. After the Investigating Officer made his opening statement, the Administrative Law Judge declared:

...I would like to get on the record [,counsel,] just for purpose of clarification that certain stipulations were entered into earlier this morning when we were hearing the other case and among which, of course, was the matter of the service of process. Do I now have reconfirmation from you that this stipulation entered into in the Tome case will apply to this case as well?

Counsel agreed. The "stipulation" or "stipulations" were not further explained.

At the end of the hearing, the Administrative Law Judge gave both sides the opportunity to submit proposed findings and conclusions. Two observations about proposed findings are appropriate here. One is that the customary understanding of the function of such proposals is to place an interpretation upon the evidence of record that will result in the preference of one participant's view of the facts established on the record. Indeed, since findings must be based on substantial evidence, the proposed findings must be tied to the evidence of record or they are meaningless. The other note about proposals is that their value is enhanced not so much by their acceptance or rejection but by the disclosure of their effect on the findings actually entered by the Administrative Law Judge. In the instant case it is not easy to trace a proposal through a acceptance to its reflection in the findings.

More important, however, is the fact that both the Investing Officer and counsel made proposals for findings as to the damages incurred by the other vessel in collision with GULF HAWK's tow, and Counsel made proposals as to the identification and physical characteristics of that other vessel, all of which were reflected in the "findings of fact," without a shred of evidence or stipulations upon such matters in the record of hearing.

The Investigating Officer's "[p]roposed finding" also presents something of a mystery. It begins: "[a]t a pre-hearing conference with [ALJ, I. O., and Counsel] present, the following stipulations were agreed to by all parties: ..." There follow eight propositions several of which are not clear. This proposal is labeled "ACCEPTED" by the Administrative Law Judge. While stipulations are often a time-saving and valuable method of

constructing an adequate record, it is elementary that which is stipulated must be unambiguously stated, properly identified and agreed upon, and timely entered into the record.

#### CONCLUSION

The finding of proved on specification one must be reversed because of the deficiency of notice. The finding of proved on specification two and the charge of negligence I find supported by the reliable and probative evidence in the record and it must be affirmed. The matters discussed in section III of the Opinion are not prejudicial and not, therefore, reversible errors. The remedial order I find to be well below that which could possibly be viewed as excessive and I will not disturb it.

#### ORDER

The findings of the Administrative Law Judge are hereby MODIFIED as indicated above; the ORDER entered at Houston, Texas, on 28 May 1980 is AFFIRMED.

B. L. STABILE  
Vice Admiral, U. S. Coast Guard  
VICE COMMANDANT

Signed at Washington, D. C., this 29th day of June 1982.