

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD VS.
LICENSE NO. 498 286
Issued to: Nicholas Tittonis

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2294

Nicholas Tittonis

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

By order dated 22 July 1981, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia suspended Appellant's seaman's documents for twelve months, and awarded an additional suspension of twelve months on twelve months' probation, upon finding him guilty of negligence. The specifications found proved allege that while serving as Master on board SS LASH ATLANTICO under authority of the captioned license on or about 6 May 1981, Appellant negligently failed to navigate at a safe speed, negligently failed to use all available means to determine if a risk of collision existed or a close quarters situation was developing, and negligently made a succession of small course alterations thereby contributing to the collision of SS LASH ATLANTICO and M/V HELLENIC CARRIER.

The hearing was held at Norfolk, Virginia on 27, 28, and 29 May and 29 June 1981.

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

The Investigating Officer introduced in evidence the testimony of three witnesses, two photographs, a chart, and two other documents. He also requested the Administrative Law Judge to take judicial notice of the International Regulations for Preventing Collisions at Sea, 1972, Title 33 U.S.C. foll.§1602 (hereafter cited COLREGS, 1972, Rule).

In defense, Appellant offered in evidence four charts, one photograph, a log entry, three diagrams, a safety award, and the testimony of himself and two other witnesses.

At the end of the hearing the Administrative Law Judge rendered a written decision in which he concluded that the charge and all three specifications had been proved.

He then served a written order on Appellant suspending his captioned license for a period of twelve months and awarded an additional suspension of twelve months on twelve months' probation.

The entire decision was served on 22 July 1981. Appeal was timely filed on 2 July 1981 and perfected on 21 September 1981.

FINDINGS OF FACT

On 6 May 1981 Appellant was serving as Master on board the SS LASH ATLANTICO and acting under the authority of his license while the vessel was at sea proceeding from Newport News, Virginia, to Charleston, South Carolina. LASH ATLANTICO is a containership, 820 feet in length with a beam of approximately 100 feet and measuring 60 feet from keel to main deck. The design speed of the vessel is 22 1/2 knots and at the time of the collision the vessel was making good approximately 18 knots. At 18 knots LASH ATLANTICO would take approximately 5 minutes to stop and during that time would continue traveling approximately 4000 feet. At the time of the collision the vessel was equipped with radar which was in good working condition. The vessel had taken cargo at Newport News, Virginia, and was approximately half loaded when she took departure at 0148 on 6 May 1981. As loaded just prior to the collision the vessel could make a 180° turn in approximately 3.5 minutes and a 24° turn in approximately 1 minute. Appellant, who supervised loading and had been in the wheelhouse since the vessel departed at Newport News remained there until approximately 0510 during an unremarkable voyage from Newport News to a point just south of buoy R2V. After checking the radar and observing no traffic, Appellant set the radar to the six mile range. He then notified the second mate that he was going below and ordered that he be called if any traffic was encountered. visibility at this time was approximately 2-1/2 miles. At approximately 0515, just after the second mate logged a course change to 160° true, visibility began to decrease due to patchy fog. At 0544 LASH ATLANTICO passed abeam of buoy R4A, 2-1/2 miles to starboard, continuing at a speed of 18 knots. At that time visibility was less than 1000 feet. At 0650 the second Mate observed a target on the radar approximately 8-10° off the port bow at 5.5 miles. The radar was in the relative mode on the six mile range. The second mate made a greased pencil mark indicating the position of the target on the face of the radar scope, notified respondent of the target, and put the fog signal on automatic. No other markings were made on the face of the radar scope prior to the collision and no determination of the target's course or speed was made before the collision. The Appellant immediately came to the bridge, arriving at approximately 0652. He observed the target on the radar scope, turned the cursor on and estimated that it was approximately 10° off the port bow at less than 5 miles. He then proceeded to the foghorn control located forward in the wheelhouse,

placing it on manual so he could respond when he heard a signal from the approaching target and eliminate the possibility that synchronized whistle signals from the respective vessels would blank each other out. Appellant next ordered course changes to starboard. The record reveals a dispute over the exact manner in which the course changes were ordered. In any event, a course change totalling 24° (161°-185°) was ordered by the Appellant and was accomplished in either 5° increments or 10° increments between 0653 and 0658. Appellant testified that he ordered the course change in 10° increments and the helmsman testified that the course changes were ordered in 5° increments. The resolution of this detail is not important to the resolution of the ultimate issues in this case. Seconds before 0700, HELLENIC CARRIER cut across LASH ATLANTICO's bow from port to starboard. Appellant immediately ordered hard right following the order hard right with the order stop and full astern. At 0700 LASH ATLANTICO collided with HELLENIC CARRIER when her bow struck amidship on HELLENIC CARRIER'S starboard side. The position of the collision was 36° 16' north latitude, 75° 35' west longitude, approximately 11 miles off the coast of North Carolina. No lives were lost as the result of the collision, however, both vessels were severely damaged. At the time and point of the collision there was a flood tide but no appreciable current. The sea was calm.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is argued that:(1) the Administrative Law Judge erred by improperly shifting the burden of proof to the respondent after denying respondent's motion to dismiss at the close of the investigating officer's case; (2) the Administrative Law Judge failed to properly consider and analyze the evidence in this case, which does not support a showing by substantial and reliable evidence that the respondent committed an act that a reasonable and prudent person in the same station and under the same circumstances would not commit or had failed to perform an act which a reasonable and prudent person in the same station and under the same circumstances would not fail to perform; and (3) that the two year suspension ordered by the Administrative Law Judge is excessive, harsh, and contrary to the policy and practice of the Coast Guard and should be mitigated.

APPEARANCE: Howell, Anninos, Daugherty and Brown, Norfolk, Virginia, by Henry E. Howell, Jr.

OPINION

I

Appellant asserts that the motion to dismiss the charge at the close of the government's case was improperly denied, thus erroneously shifting the burden of proof to the respondent. The answer to the second portion of the argument is that the burden of proof was not shifted to the respondent. While the burden of going forward can shift to the respondent, the burden of proof is never shifted to the respondent in these proceedings. It is always on the Investigating Officer. (See, 46 CFR 5.20-77) Decisions on Appeal 211 (DUNCAN) and 2034 (BUFFINGTON). The question which remains is whether the Government had introduced sufficient evidence of negligence when the motion to dismiss was made. The Administrative Law Judge took judicial notice of the appropriate rules of the road, listed to the testimony of the second mate Ticer and the helmsman Saltarelli and noted the documentary evidence which was introduced by the government. Based on the evidence I cannot agree that the denial of the motion to dismiss was improper. There is evidence in support of every element of the government's case. It is not error for the Judge to refuse to dismiss unless there is no evidence in support of one or more required elements of the government's case. The Administrative Law Judge did not err in denying the motion to dismiss.

II

The respondent argues as a second point that the government failed to show by reliable and substantial evidence that he committed an act that a reasonable and prudent person in the same situation and the same circumstances would not commit.

Rule 6 of the International Rules sets forth the factors determinative of a vessel's safe speed, relative to the prevailing circumstances and conditions, in order to avoid collision:

Rule 6

Safe Speed

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped with a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into account:

- (a) By all vessels;
 - (i) The state of visibility;
 - (ii) the traffic density including concentrations of fishing vessels or any other vessels;

- (iii) the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
- (iv) at night the presence of background light such as from shore lights or from back scatter of her own lights;
- (v) the state of wind, sea and current, and the proximity of navigational hazards;
- (vi) the draft in relation to the available depth of water.

- (b) Additionally, by vessels with operational radar:
- (i) the characteristics, efficiency and limitations of the radar equipment;
 - (ii) any constraints imposed by the radar ranges scale in use;
 - (iii) the effect on radar detection of the sea state, weather and other sources of interference;
 - (vi) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range;
 - (v) the number, location and movement of vessels detected by radar;
 - (vi) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.

Rule 7 concerns actions required to be taken when risk of collision exists:

Rule 7
Risk of Collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

(b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equipment systematic observation of detected objects.

(c) Assumptions shall not be made on the basis of scanty information, especially scanty radar information.

(d) In determining if risk of collision exists the following considerations shall be among those taken into account:

- (i) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change;
- (ii) such risk may sometimes exist even when an appreciable bearing change is evident, particularly when approaching a very large vessel or a tow or when approaching a vessel at close range.

Rule 8 relates to actions to be taken to avoid collision:

Rule 8

Action to Avoid Collision

(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

(b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.

(c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close quarters situation provided that it is made in good time, is substantial and does not result in another close quarters situation.

(d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

Rule 19 applies to vessels not in sight of one another when navigating in or near an area of restricted visibility and requires every vessel to proceed at a safe speed adapted to prevailing circumstances and conditions of restricted visibility:

Rule 19

Conduct of Vessels in Restricted Visibility

(a) This rule applies to vessels not in sight of one another when navigating in or near an area of restricted visibility.

(b) Every vessel shall proceed at a safe speed adapted to the prevailing circumstances and conditions of restricted visibility. A power-driven vessel shall have her engines ready for immediate maneuver.

(c) Every vessel shall have due regard to the prevailing circumstances and conditions of restricted visibility when complying with the Rules of Section 1 of this Part.

(d) A vessel which detects by radar alone the presence of another vessel shall determine if a close-quarters situation is developing and/or risk of collision exists. If so, she shall take avoiding action in ample time, provided that when such action consists of an alteration of course, so far as possible the following shall be avoided:

(i) an alteration of course to port for a vessel forward of the beam, other than for a vessel being overtaken;

(ii) an alteration of course towards a vessel abeam or abaft the beam.

(e) Except where it has been determined that a risk of collision does not exist, every vessel which hears apparently forward of her beam the fog signal of another vessel, or which cannot avoid a close-quarters situation with another vessel forward of her beam, shall reduce her speed to the minimum at which she can be kept on her course. She shall if necessary take all her way off and in any event navigate with extreme caution until danger of collision is over.

Prior to the advent of safe speed as a concept (COLREGS, 1972), the rule for proceeding in fog (restricted visibility) was to proceed at a moderate speed and be able to stop the vessel in half the distance of the visibility. Union Oil Co. v. the San Jacinto, 409 U.S. 140. The term "safe speed" now replaces the term "moderate speed" which only related to conditions of restricted visibility. The intent of the change of concept was to expand its applicability and to allow higher speeds in appropriate circumstances. "Safe" is used in the relative sense. What is a safe speed must be determined on a case by case basis after analyzing the facts according to the factors listed in the rule. There can be no general rule for such a concept because of the many variables involved in any situation. See generally, A Guide to the Collision Avoidance Rules; A. N. Cockcroft and J.N.F. Larmer, pp 41-72. Rule 6 lists factors to be used in determining what speed is safe for any given situation. The factors applicable here are:

6(a)

- (i) the state of visibility...
- (ii) the maneuverability of the vessel

(b)

- (i) the characteristics, efficiency and limitations of the radar equipment...
- (v) the number, location and movement of vessels detected by radar.

The visibility was between 800 and 1000 feet. LASH ATLANTICO was proceeding at 18 knots and would require approximately 4,000 feet to stop. The radar was operational and set on six miles. A target of unknown identity had been detected by radar and marked with a grease pencil. There were no other targets. No determination of course, speed or CPA was made for the target. LASH ATLANTICO could make a 180° turn in 3.5 minutes and 24° turn in one minute. A slow turn in 5-10° increments was started. This made any meaningful plot of the target impossible. Its location was also unknown.

Appellant elected to proceed on through the fog after rendering his radar almost useless by changing course. He maneuvered slowly and almost imperceptibly ignoring his own

vessel's maneuverability and the target vessel's location. I cannot say that the Administrative Law Judge's conclusion that LASH ATLANTICO was not proceeding at a safe speed is unreasonable. It will not be disturbed.

Rule 7, Sections (a), (b) and (c) require a person in charge to (a) determine if a risk of collision exists (b) base that determination on the proper use of equipment, and (c) not make assumptions based on scanty information, especially scanty radar information. It is well established that if a vessel carries properly functioning radar equipment and is approaching an area of known poor visibility, there is an affirmative duty to use that radar. Afran Transport Co. v. The Bergechief, 274 F.2d 469, 476 (2d Cir. 1960). Also, a failure to make a radar plot of some type in restricted visibility is negligence. The Harbor Star, 1977 A.M.C. 1168, 1190 (E.D. Pa. 1977); Koninklijk Nederlandsche 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 (2nd Cir. 1977); Orient Steam Navigation 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). This raises a presumption that a reasonably prudent Master under the same circumstances would use radar. Decisions on Appeal No. 2065 (TORRES), 2059 (LESKINEN) and 2027 (WALKER).

Appellant was in an area of poor visibility. He had knowledge of the presence of another vessel forward of his beam, but not its location, course of speed. LASH ATLANTICO's radar was in good working order and turned on. On the basis of scanty radar information and without making a plot or causing one to be made, Appellant maintained speed and initiated a series of small course changes which rendered a proper plot impossible. These facts are based on uncontradicted testimony including that of Appellant. This failure to use radar establishes the presumption. Appellant then had the burden of going forward to rebut the presumption of negligence. Decision on Appeal No. 1793 (FARIA). Appellant did not present facts tending to show that he was not negligent. His witnesses testified to their opinions that his actions were correct. The Judge is not bound by and was not persuaded by the opinions and neither am I. The presumption of negligence for not using radar was not rebutted. The Administrative Law Judge's conclusion that appellant failed to act as a reasonably prudent Master under the same circumstances would have acted is reasonable and supported by substantial and uncontradicted evidence.

III

Appellant argues further that it was improper for the judge to

reject the testimony of his expert witnesses, including second mate Ticer, who testified that they would have acted in the same fashion that the respondent did. The function of the trier of fact in these cases is to evaluate the testimony of all witnesses and other evidence presented by both sides in reaching his decision. He is entitled to accept or reject evidence which he feels is or is not competent and persuasive. The testimony of an expert witness, even though it is uncontradicted, may be disregarded after careful consideration because of its improbability or because of the interests of the witness. Decision on appeal 2030 (RIVERA).

IV

Appellant finally argues that the sanction in this case, a twelve month outright suspension and a twelve month suspension on probation for twelve months is excessive, harsh, and contrary to the policy and practice of the Coast Guard. The policy and practice of the Coast Guard is to promote, foster, and maintain the safety of life and property at sea. 14 U.S.C. 2, 88. See Decision on appeal 1106 (LABELLE). The purposes of these proceedings include remedial action 46 CFR 5.01-20, (See decision on Appeal 2167 (JONES) and the cases cited therein) and the education of merchant mariners. The judge considered Appellant's lack of a prior record, his level of experience, and the surrounding circumstances in determining a sanction appropriate to him and this incident. The judge's order also reflects his consideration of the remedial nature of the proceedings. (Decision and Order, page 31). In the absence of a clear abuse of discretion, I will not modify a Judge's order. Nothing here justifies a lesser sanction.

CONCLUSION

The Administrative Law Judge correctly denied the motion to dismiss by the respondent at the conclusion of the government's case. There was sufficient evidence of a substantial and probative nature to support the findings. The order is not excessive.

ORDER

The order of the Administrative Law Judge dated at 22 July 1981 is AFFIRMED.

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

Signed at Washington, D.C., this 29 day of Mar 1983.

