

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 500466 and MERCHANT MARINER'S DOCUMENT NO. Z-91774-D1
Issued to: EDMUND J. SABOWSKI

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2296

EDMUND J. SABOWSKI

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 September 1980, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license No. 500466 for three months, on twelve months' probation, upon finding him guilty of negligence. The specifications found proved alleged that while serving as Master on board the United States SS EXXON CHESTER under authority of the license above captioned, on or about 18 June 1979, Appellant wrongfully failed: (1) to navigate said vessel at a safe speed adapted to the prevailing conditions of visibility; (2) to take avoiding action in ample time to avoid collision; and, (3) to reduce the speed of said vessel to the minimum at which she would be kept on course, upon having heard the fog signal of another vessel apparently forward of the beam.

The hearing was held at New York City on 19 March, and continued on 20 March, 10 April, and 15 April 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 25 exhibits and the testimony of one witness.

Appellant rested his case without offering any evidence.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and three specifications had been proved. He then served a written order on Appellant suspending license No. 500466 and all other licenses issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on 2 October 1980. Appeal was timely filed on 14 October 1980 and perfected on 28 May 1981.

FINDINGS OF FACT

On 18 June 1979, Appellant was serving as Master on board the United States SS EXXON CHESTER (CHESTER) and acting under authority of his license and document while the vessel was at sea enroute from Bayway, NJ to Boston, Mass. navigating the Ambrose to Nantucket Traffic Lane, in an area of fog and restricted visibility.

Appellant is the holder of License No. 500466, Issue 6-10 issued by the U.S. Coast Guard Marine Inspection Office, New York on 22 February 1978 authorizing service as Master of steam and motor vessels of any gross tons upon Oceans, endorsed as Radar Observer. He is also the holder of Merchant Mariner's Document Z-91774-D1 issued by the same office on 19 June 1951 authorizing service in any unlicensed rating in the deck department, including able seaman, any waters, unlimited.

The CHESTER, Official No. 264445, is an inspected tankship of 17, 327 gross and 10,648 net tons, 602.2 feet in length, built in 1952. The Certificate of Inspection in effect on the day in question was issued by the U.S. Coast Guard Marine Safety Office, Norfolk, Virginia, expiration date 25 March 1981.

The MV REGAL SWORD (SWORD) is a vessel of Liberian registry of 16, 450 gross tons, built in 1961.

The CHESTER is equipped with a gyro compass, a course recorder which was set on GMT time and synchronized at the end of each watch with the bridge clock, a doppler speed log, a Sperry radar, a Sperry Collision Avoidance System (CAS) and a second radar manufactured by another company. At all relevant times, the second radar was on standby, there was no gyro error and all the other items of equipment were functioning normally.

On 18 June 1979 at 0735 the CHESTER encountered fog. The engine order telegraph was placed on standby, a lookout was posted on the bow and Appellant reported to the bridge. The vessel averaged 74.8 RPM (12.4 knots) during the 0400 to 0800 watch. At 0820 visibility improved and standard operating procedures were followed. However, at 0850 fog was again encountered and the special procedures stated above were reinstated. Fog conditions continued for the remainder of the watch and at least intermittently during the afternoon. The vessel averaged 64 RPM (10.6 knots) on the 0800 to 1200 watch and 60.8 RPM (10 knots) on the 1200 to 1600 watch.

The CHESTER, proceeding in a loaded condition at 60 RPM ahead, would come to a full stop in water some 4,280 feet after the engine was placed on full astern.

Mr. Kenefick, the Third Officer, reported to the bridge at about 1645 to relieve the Second Officer for the evening meal. At this time the vessel was navigating in the 800 yard Inbound Boston Harbor Traffic Lane to the east of the 600 yard wide Separation Zone. The Outbound Boston Harbor Traffic Lane is immediately to the west of the Separation Zone.

At the time Mr. Kenefick reported to the bridge fog conditions prevailed. Fog signals were being sounded automatically. The CHESTER was displaying proper navigation lights. Appellant was on the bridge with the Second Officer. A lookout was posted on the bow reporting to the bridge by telephone and the vessel was being steered electrically by the helmsman on a course of 333° gyro and true. The speed of the vessel at the time was eleven knots. At all relevant times the engine order telegraph was on standby engine.

At about 1650, on relieving the watch officer, Mr. Kenefick observed a number of targets on the scope of the Sperry radar and the CAS. All the targets had been acquired by the CAS. A target which later proved to be the SWORD was about nine miles distant, bearing several degrees off the port bow of the CHESTER.

Shortly after 1650 Mr. Kenefick, without consulting Appellant, ordered the course changed from 333° to 353° to avoid two small fishing vessels. These two vessels passed safely, less than a mile off the port beam of the CHESTER. At about 1659, at the direction of Appellant, Mr. Kenefick ordered the helmsman to come left and to steady on 333°.

At about 1700 the CHESTER steadied up on course 333°. The CAS showed that the SWORD was approximately five miles ahead of and bearing several degrees off the port bow of the CHESTER, on a course of 150°, making good a speed of twelve knots, with its closest point of approach (CPA) about 1/4 of a mile off the port beam of the CHESTER. A Loran fix taken at 1700 or a few minutes thereafter indicated that the CHESTER was making good a speed of approximately eleven knots.

When the SWORD was approximately three to four miles ahead of the CHESTER, the CAS indicated that she was still bearing slightly off the port bow of the CHESTER, on a course of 150°, at a speed of twelve knots, with a CPA of 1/4 of a mile off the port beam of the CHESTER. The CHESTER continued sounding fog signals automatically.

Shortly after 1705 the CAS indicated that the SWORD was approximately two to three miles ahead of the CHESTER. Her bearing, course and speed had not changed and the CPA was still 1/4 of a mile off the beam of the CHESTER. This information, furnished

by the CAS, was essentially corroborated by the plot being maintained by Mr. Kenefick on the face of the scope of the Sperry radar.

At about this time Mr. Kenefick, the bow lookout and the helmsman heard the fog signal of the SWORD off the port bow of the CHESTER. The bow lookout immediately reported the fog signal by telephone to the bridge. Appellant, who was standing on the bridge, was aware of the fog signal sounded by the SWORD. He ordered the fog signal of the CHESTER taken off the automatic mode and directed that it be sounded manually. Thereafter, either Appellant or Mr. Kenefick sounded the fog signal in response to each fog signal from the SWORD.

At about 1708, while observing the radar, Appellant ordered a course change of 20° to the right. Mr. Kenefick instructed the helmsman to steer 353° . Almost immediately, Appellant ordered the helmsman to steer 355° . This was done.

After the CHESTER steadied on course 355° T, the CAS indicated that the SWORD, bearing slightly off the port bow of the CHESTER, was about two miles distant. There was no change in its course and speed, but an increase in its CPA to $3/4$ of a mile due to the course change made by the CHESTER. The plot being maintained by Mr. Kenefick on the face of the scope of the Sperry radar confirmed this.

Shortly after a target is manually acquired, the CAS continuously displays it on the scope as a blip. A vector extends from the blip indicating the target's true course and speed and terminating in a predicated or possible area of danger (PAD). The operator is able to select the size of the PAD of one mile was being used. At all relevant times the PAD for the SWORD intersected the heading flasher of the CHESTER, indicating that the CHESTER would pass the SWORD within the PAD.

When the vessels were approximately $3/4$ of a mile apart, about two miles minutes before the collision, both the CAS and the Sperry radar aboard the CHESTER lost the SWORD in sea return. Mr. Kenefick attempted, without success, to reacquire the target by reducing the range scale and adjusting the turning controls. The SWORD was not visible at this time. At about the time the target was lost, Appellant ordered a course changed from 355° to 010° .

Shortly before the loss of the target, the CAS indicated that the SWORD was about $1-1/2$ miles ahead of and bearing approximately 10° off the port bow of the CHESTER. Its course and speed were unchanged and its CPA was approximately $3/4$ of a mile off the port beam of the CHESTER. The plot being maintained by Mr. Kenefick on

the Sperry radar confined the Cas display.

Seconds before the collision, the SWORD was sighted about one point off the CHESTER's port bow at a distance of approximately 200 feet. It was crossing the bow of the CHESTER at an estimated angle of 70°. Appellant immediately ordered left full rudder. Almost immediately, at approximately 1713 on 18 June 1979, the bow of the CHESTER struck the starboard side of the SWORD just aft of amidships. The collision occurred at 41° 28' N, 69° 22' W, on the eastern edge of the Inbound Boston Harbor Traffic Lane. At the time of the collision, the CHESTER's speed was in excess of ten knots and its heading was about 010°T.

At about 1724 the two vessel separated. Shortly thereafter the SWORD was observed to be sinking by the stern. At 1744 the No. 1 lifeboat of the CHESTER was launched. Visual contact with the SWORD was subsequently lost. At 1835 a lifeboat from the SWORD was sighted carrying all 38 persons who had been on board. The lifeboat was towed to the CHESTER. AT 1850 all persons from the lifeboat were safely aboard the CHESTER.

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 acted arbitrarily when he rejected uncontradicted evidence of the only witness without giving reasons for this rejection; (2) the Administrative Law Judge's decision is based on a misunderstanding of the meaning and intent of Rules 19(b), 19(d) and 19(e) of the 1972 COLREGS; and (3) the Administrative Law Judge erred as a matter of law in concluding that Appellant was obligated to anticipate and overcome the SWORD's alleged negligence.

APPEARANCE: Kirlin, Campbell and Keating, by Lawrence J. Bowles, Esq.

OPINION

I

Appellant's first contention on appeal is that the Administrative Law Judge acted arbitrarily when he rejected uncontradicted evidence of the only witness without giving reasons for this rejection. I disagree.

Appellant lists four points which he characterizes as uncontradicted evidence:

1. that the CHESTER's speed was safe;

2. that the CHESTER's turn to the right was proper avoiding action, taken in ample time;
3. that slowing or stopping would put the CHESTER in a potentially dangerous position which would not be wise;
4. that the collision was caused totally by the SWORD's last minute unexpected left turn.

All are, in fact, conclusions of the witness rather than observation of facts.

The Administrative Law Judge is not bound by the witnesses' opinions, but must make his own determinations based on the facts and law. It is his function to determine the credibility of witnesses and then to weigh the evidence admitted at the hearing. His decision in this matter is not subject to being reversed on appeal unless it is shown that the evidence upon which he relied is inherently incredible. Decisions on Appeal No. 2183 (FAIRALL) and 2116 (BAGGETT). On the facts alone, the test for review of an Administrative Law Judge's decision is not whether a reviewer may disagree with the Judge but whether there is substantial evidence of a reliable and probative character to support the findings. Decision on Appeal No. 1796 (GARCIA). Contrary to Appellant's contentions, the Administrative Law Judge did not reach his conclusions arbitrarily. He was extremely thorough and precise, citing to both the COLREGS and previous decisions of the Commandant. The Judge discussed at length the evidence presented and his reason for reaching his conclusions. He was not bound by the opinions of Appellant's witness and did not err in reaching his own conclusions. Since the Judge's conclusions are reasonable under the facts they will not be disturbed.

II

Appellant's second issue on appeal is that the Administrative Law Judge's decision is based on a total misunderstanding of the meaning and intent of Rules 19(b), 19(d) and 19(e). For the reasons stated below, I disagree.

Rule 19 concerns the conduct of vessels in restricted visibility. Rule 19(b) requires that a vessel proceed at a safe speed adapted to the prevailing circumstances and conditions of restricted visibility. Rule 19(d) requires a vessel which detects by radar alone the presence of another vessel to determine whether a close-quarters situation is developing and/or risk of collision exists, and if so, to take avoiding action in ample time. Rule 19(e) states,

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.

Rule 19(b)

Rule 19(b) must be read in conjunction with Rule 6, which states the factors which are to be considered in determining safe speed in all conditions of visibility. Rule 6 is divided into two sections. Section (a) presents six factors to be considered by all vessels. Section (b) presents six additional factors to be considered by vessels equipped with radar. It is clear that the drafters of this rule were aware that safe speed of a vessel equipped with radar might be different from one not so equipped. However, the first factor listed is the state of visibility, indicating that visibility should be given great importance in determining safe speed. Appellant's interpretation that the rule was intended to allow mariners with good radar information to proceed at up to full speed is in error. All the rule does is require the mariner to take into account the limitations and abilities of the radar system aboard the vessel in determining safe speed. It does not allow and is not intended to allow a vessel to proceed at full speed in fog unless safe to do so. See A.N. COCKCROFT and J.N.F. LAMEIJER, A Guide to the Collision Avoidance Rules; p.42.

However, a vessel with sophisticated operational radar may, under some circumstances, proceed at a speed in excess of that which would be considered safe for one not so equipped. The Administrative Law Judge recognized this and specifically rejected the argument of the Investigating Officer that the CHESTER's speed was unsafe even before the SWORD was detected on the radar. Therefore, up to this point in time, the Administrative Law Judge found that the CHESTER's speed was safe in accordance with Rule 19(b).

Rule 19(d)

Once the SWORD appeared on the CHESTER's radar, Rule 19(d) became operative in conjunction with 19(b). The testimony of the witness indicates that a close quarters situation existed and that there was a risk of collision. Therefore, the CHESTER was required to take avoiding action in ample time. The action initially taken by the CHESTER was to alter its course from 333° to 355°. This alteration of 22° took place when the vessels were two to three miles apart, proceeding at a combined speed of approximately 22 knots, and only after the CHESTER heard the first fog signal from

the SWORD. Yet, the SWORD had been picked up on the CHESTER's radar when it was approximately nine miles away.

The Administrative Law Judge was correct in referring to Rule 8 to determine if this alteration of course was taken in ample time. Rule 8 requires that action to avoid collision shall be early and substantial. At a combined speed of 22 knots, this maneuver took place somewhere between 5 to 8 minutes before the vessels would be met. Given the maneuverability of the CHESTER in reference to her stopping and turning ability, coupled with the fact that she knew of the presence of the SWORD and that a close quarters situation and/or risk of collision was developing well before this time, the Administrative Law Judge's finding that this alteration in course was not made in ample time was reasonable.

Rule 19(e)

Rule 19(d) applies to that situation where a vessel detects by radar alone the presence of another vessel. Therefore, even if this alteration in course by the CHESTER was taken in ample time, it was incorrect response. Once she heard the fog horn of the SWORD forward of her beam, she was required to act in accordance with the mandates of Rule 19(e). That rule states that under these circumstances, where the risk of collision had not been ruled out, the vessel "shall reduce her speed to the minimum at which she can be kept on course. She shall if necessary take all her way off and in any event navigate with extreme caution until danger of collision is over." (emphasis supplied). Here both the CAS and the Sperry radar aboard the CHESTER lost the SWORD in sea return when the vessels were approximately 3/4 of a mile apart. The SWORD was not visible, but its fog signal could be heard forward of the beam.

Risk of collision begins when two vessels have approached so near each other and upon such courses that by departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about. The Milwaukee (1871) Fed. Case. No. 9,626.

The SWORD had approached very near the CHESTER and its position and course were unknown. The risk of collision was great and I cannot disagree with the conclusion of the Administrative Law Judge that Rule 19(e) required Appellant to reduce speed to bare steerageway.

III

Appellant's last contention is that the Administrative Law Judge erred as a matter of law in concluding that Appellant was obligated to anticipate and overcome the SWORD's alleged

negligence. He relies on Union Oil Co. v. the San Jacinto, 409 U.S. 140, 93 S. Ct. 368 (1972).

The Administrative Law Judge held only that Appellant violated the provisions of the COLREGS, not that he was required to anticipate the SWORD's maneuver. As the Administrative Law Judge noted in his Opinion, Union oil is inapposite.

First, it involved the proper interpretation of the moderate speed rules of the Inland Rules of the Road. The instant case involves interpretation of the 1972 COLREGS which have eliminated the concept of moderate speed and replaced it with the concept of safe speed. The moderate speed concept was that a vessel in restricted visibility may only proceed at a speed that enables it to be stopped in half the range of visibility. The concept was only applicable in restricted visibility. The new concept, safe speed, has been neither defined nor interpreted with specificity. It is intended to be more flexible, more attuned to the variables involved, and applicable to more situations than its narrow predecessor. Determination of safe speed requires consideration of six factors under all conditions of visibility (including clear water) and consideration of six additional factors by vessels with operational radar. Safe is used in a relative sense. What speed is safe must be determined on a case by case basis after consideration of the listed factors. There can be no general rule like that for moderate speed because the rule itself requires consideration of too many variables.

Second, the Union Oil case was concerned with determination of contributory fault for assessing civil liability. The Administrative Law Judge correctly noted that these proceedings are not concerned with the alleged fault of others. The only question is whether Appellant was negligent regardless of any possible fault on the part of the vessel with which he collided. Commandant Decisions on Appeal Nos. 2091(ERNSEER), 2052(NELSON), 2012(HERRINGTON), 1968(JOHNSON), 1822(EVANS), 1510 (HILDRETH). While Appellant could not have anticipated that the other vessel would make a last minute turn to port, this does not relieve him of his negligence in disobeying the clear direction of Rule 19(e).

CONCLUSION

The Administrative Law Judge did not act arbitrarily. The Administrative Law Judge's findings and conclusions concerning the COLREGS were correct as a matter of law. His decision is supported by substantial evidence, reliable and probative in nature.

ORDER

The order of the Administrative Law Judge dated at New York,
NY on 22 September 1980, is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 20th day of march 1983.