

NTSB Order No.  
EM-64

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 9th day of November 1977.

OWEN W.SILER, Commandant, United States Coast Guard,

v.

HAROLD PAYNE, Appellant.

Docket ME-61

OPINION AND ORDER

Appellant seeks review of the Commandant's decision affirming a 1-month suspension of his vessel master's license No. 461083 for misconduct.<sup>1</sup> The findings concern appellant's service as master of the M/V MALASPINA, a passenger ferry of the Alaska Marine Highway System, while conducting that vessel's navigation in Olga Strait, near Sitka, Alaska.

In the prior action (Appeal No. 2070), the Commandant reviewed the initial decision of Administrative Law Judge Rosco H. Wilkes, issued at the conclusion of a full evidentiary hearing.<sup>2</sup> Throughout these proceedings, appellant has been represented by counsel.

The law judge found that as the MALASPINA approached the southeast entrance of Olga Strait, a narrow channel, on June 21, 1975, appellant reduced speed to 10 knots and ordered one long whistle signal to be sounded as warning to numerous pleasure fishing vessels dispersed throughout the area; that these vessels, if not already out of the channel, moved to the sides excepting the F/V FOREST, which was proceeding on the same course as MALASPINA about 400 feet ahead, and a small green motorboat, which was trolling slowly some distance ahead of the FOREST and about 100

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<sup>1</sup>The sanction was entered pursuant to 46 U.S.C. 239(g). Review of the Commandant's decision on appeal to this Board is authorized by 49 U.S.C. 1903(a)(9)(B).

<sup>2</sup>Copies of the decisions of the Commandant and the law judge are attached.

feet right of MALASPINA's projected course; that the FOREST made a port hand turn and then resumed its original heading 50 to 60 feet left of MALASPINA's projected course; that no further whistle signals or radio contact followed although the FOREST, making about 8 knots, was being overtaken by the MALASPINA; that when MALASPINA was about 100 feet astern and the vessels were on appellant courses about 100 feet part, the green boat suddenly crossed the channel<sup>3</sup> and the FOREST reacted by veering abruptly to its starboard; that despite their subsequent evasive maneuvers the FOREST was struck at or near the stern by MALASPINA; and that, in the aftermath of the collision, FOREST sank and the life of its operator, the sole occupant, was lost. The law judge concluded that appellant was guilty of misconduct, as charged, for attempting to overtake and pass the FOREST without exchanging the whistle signals required by 33 CFR 80.6 of the pilot rules for inland waters;<sup>4</sup> and that appellant, by thus failing to make his intentions known, had contributed to the collision and resultant loss of life. The dire consequences of the collision led the law judge to consider imposing a long suspension of appellant's license. However, he entered the moderate suspension of 1 month upon determining that it was a sufficient deterrent against future violations by appellant, particularly in view of his prior "unblemished record...for many thousands of passenger miles without incident all in the highest tradition of his calling and in some of the most difficult waters in the world" (I.D. 32-33).

In his brief to the Board, appellant contends that (1) the Coast Guard lacked authority to suspend him for a violation of the inland rules; (2) MALASPINA was the privileged vessel under the narrow channel rule; (3) the position of the green boat called for application of the special circumstances rule; and (4) MALASPINA was not at fault since the collision was due to an "inexplicable and radical change of course" by the FOREST. Counsel for the

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<sup>3</sup>The law judge found that the green boat had "sufficient speed to clear and did clear the two larger vessels." (I.D. 11).

<sup>4</sup>33 CFR 80.6 provides, in pertinent part, as follows: "(a) When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle as a signal of such desire, and if the vessel ahead answers with one short blast, she shall direct her course to starboard;...and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can safely be done, when said vessel ahead shall signify her willingness by blowing the proper signals..."

Commandant has submitted a reply brief.<sup>5</sup>

Upon consideration of the briefs and the entire record, the Board affirms the findings and conclusions entered by the law judge. The factual findings are supported by reliable, probative, and substantial evidence of record, and we adopt those findings as our own. Moreover, we agree that the sanction is warranted under 46 U.S.C. 239(g) for misconduct.

Appellant argues that the monetary fine prescribed in 33 U.S.C. 158 for violation of the inland rules<sup>6</sup> forecloses the Coast Guard's action against his license. He relies on Fredenber v. Whitney, 240 F. 819 (W.D. Wash. 1917), and Bulgar v. Benson, 262 F. 929 (9 Cir. 1920), where the suspension of licenses was construed as a penalty which exceeded the scope of the statute authorizing the fine. Disallowance of the suspension orders in those cases is not controlling here, particularly since it has not been shown that the statutory fine was levied against appellant. A suspension order alone "invokes only civil administrative remedies."<sup>7</sup> Its application is unaffected by the possible imposition, under other statutory authority, of a penal sanction for the same offense.<sup>8</sup> Moreover, suspension and revocation orders have been expressly

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<sup>5</sup>Previously, a motion to dismiss the appeal was filed on the Commandant's behalf based on appellant's failure to file a brief within the time prescribed in the Board's rules of practice. 46 CFR 825.20. Appellant opposed the motion and filed his brief promptly thereafter. Since there was no excessive lateness, we have determined to decide the case on the merits and hereby deny the motion.

<sup>6</sup>Including the regulations authorized thereunder, provided they are not inconsistent with the statutory rules. 33 U.S.C. 157. In this instance, the applicable pilot rule is identical to Article 18, Rule VIII of the statutory rules (33. U.S.C. 203) and presumably would subject violators to the same monetary fine.

<sup>7</sup>Cella v. U.S., 208 F. 783, 789 (7 Cir. 1953), cert. den. 347 U.S. 1016 (1954); see also, Boruski v. SEC, 340 F. 2d 991 (2 Cir. 1965).

<sup>8</sup>The principle is stated in Atlas v. Occupational Safety Commission as follows: "Now in the Twentieth Century it is too late to assert that there is anything improper in the election by Congress to impose its own sanctions--civil, criminal or both--without regard to its treatment by other components of our federalism." 518 F. 2d 990, 1010 (Cir. 1975), aff'd 51 L. Ed. 2d 464 (1977).

authorized in 46 U.S. C. 239(g) for certain statutory violations which impose criminal liability,<sup>9</sup> yet this does not change their character as remedial sanctions.

We adhere to the view that proceedings against maritime licenses are civil in nature and that neither criminal procedures nor penal sanctions are involved.<sup>10</sup> The principle is well illustrated in this case by the law judge's entry of the short suspension because he was not persuaded that a longer period "would make [appellant] a better master or prevent a recurrence any more than moderate order" (I.D. 31-32). Clearly, the purpose was to assure appellant's future compliance with the pilot rule and not to penalize this offense. Since the remedial purpose of such administrative orders is now generally recognized and upheld by the Federal courts,<sup>11</sup> we do not follow the earlier contrary precedents cited by appellant. His first contention is rejected.

Article 24 of the inland rules (33 U.S.C. 209) provides that the overtaking vessel "shall keep out the way of the overtaken vessel." Under this rule, the FOREST was the privileged vessel and MALASPINA was burdened until it had safely passed FOREST and "all risk of collision had ceased."<sup>12</sup> In his second contention, appellant argues that the opposite relationship prevailed between the vessels because of their operation in a narrow channel such as Olga Strait, relying on a 1966 amendment of Article 25 of the inland rules (33 U.S.C. 210) which provides that "In narrow channels a steam vessel of less than sixty-five feet in length shall not hamper the passage of a vessel which can navigate only inside that channel." Although FOREST was 33.5 feet in length and subject to this rule, we agree with the law judge that the amendment and its legislative history nowhere indicate that it was intended to abrogate any of the other rules of navigation. Rather,

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<sup>9</sup>The only distinction being that willful violations must be established with respect to provisions of Title 52 of the Revised Statutes. Those provisions classified as criminal are to be found at 46 U.S.C. 231, 391a, 403, 408, 410, 413, 452, 481 and 497. See appendix to 33 CFR Subpart 1.07.

<sup>10</sup>Commandant v. O'Callaghan, NTSB Order No. EM-626, adopted July 29, 1977 (pp. 5-6); Commandant v. Gillman, NTSB Order No. EM-58, adopted March 22, 1977.

<sup>11</sup>See Gillman, *Supra*, at pp. 5-6, citing Helvering v. Hardin, 425 F. 2d 1346, 1349 (Cir. 1970); and cases collected in 1 Davis, *Administrative Law Treaties* § 2.13.

<sup>12</sup>Griffin, *the American Law of Collision*, §§56, 23.

it created a new duty for small vessels to give way "in narrow waters over measurably less maneuverable...ships" (I.D. 24). Although this duty burdened the FOREST, it was satisfied by the FOREST's course correction made in the first instance. Thereafter, FOREST was "proceeding on a course parallel and port of the Malaspina...and...Malaspina could have passed the FOREST and the green runabout safely had each maintained its course and/or position" (I.D. 10-11). The record establishes that none of the vessels was in danger at this stage and that the ferry's passage was not hampered. Since the ferry was then overtaking FOREST, the requirements of Article 24 were immediately applicable. While the FOREST was required to maintain its course and speed,<sup>13</sup> the MALASPINA "assumed those risks inherent in passing, and was obliged to guard against foreseeable and normal maneuvers of the [leading vessel] as might reasonably be expected"<sup>14</sup> In this situation, it was apparent that MALASPINA was the burdened vessel and that the narrow channel rule, as amended, did not relieve it of the duty to sound a passing signal as prescribed in 33 CFR 80.6(a) and Article 18, Rule VIII of the inland rules.<sup>15</sup>

Appellant next contends that there were special circumstances (Article 27, 33 U.S.C 212) which justified a departure from the signaling rule. His claim is that one short whistle blast indicating a right hand passage of the FOREST would have been misconstrued by the green boat as meaning that the ferry would also pass on its starboard side. The overtaking situation first occurred between MALASPINA and FOREST. The green boat was further ahead and virtually stationary 100 feet right of MALASPINA's projected course. We agree with the law judge that no emergency confronted MALASPINA when its duty to signal arose (I.D. 27). The law judge accurately reflected the requirements of the inland rules in finding that appellant "should have given the passing signal. If an assent was not forthcoming he should have repeated the signal. If an assent was still not forthcoming he should have reduced speed further..." (I.D. 31). If indeed a passing signal to

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<sup>13</sup>This duty applied under Article 21 (33 U.S.C. 206). It "does not usually arise, however, until after the vessel ahead has acceded to the passing signal of the vessel astern." 15 C.J.S. Collision §58.

<sup>14</sup>Williams - McWilliams Industries Inc. v. F. and S. Boat Corp., 286 F. Supp 638, 642 (E.D. La. 1968).

<sup>15</sup>The rules "apply with equal force to all vessels on public navigable waters without regard to flag, ownership, service, size, or speed." Farwell's Rules of the Nautical Road, ch. 13, p. 219. 15 C.J.S. Collision §54.

the FOREST was rendered dangerous because of the green boat's position, the duty to keep out of the FOREST's way called upon appellant, as master of the burdened vessel, to slacken speed and, if necessary, stop or reverse.<sup>16</sup> The special circumstances rule did not apply at the initial phase of the overtaking situation. Consequently, it does not excuse appellant's failure to follow the other rules of navigation at that stage.

Finally, appellant argues that FOREST alone was responsible for the collision. There has been no determination in these proceedings as to the proximate cause of, or the degree to which appellant's fault contributed to, the casualty (I.D. 23). Nevertheless, it is apparent that opportunities for collision avoidance would have been enhanced substantially by appellant's observance of the relevant pilot rule. It was his duty to wait until passing and assent signals had been given before attempting to overtake and pass the FOREST. His failure to do so constituted misconduct since it violated the general maritime law<sup>17</sup> and, in view, must be considered a contributing cause of the ensuing casualty.<sup>18</sup>

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The orders of the Commandant and the law judge suspending appellant's license for 1 month be and they hereby are affirmed.

BAILEY, Acting Chairman, McADAMS, HOGUE and KING, Members of the Board, concurred in the above opinion and order.

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<sup>16</sup>Article 23 of the inland rules (33 U.S.C. 208).

<sup>17</sup>46 CFR 5.05-20(a)(1); I.D. 18.

<sup>18</sup>"If an overtaking vessel, without proper signals, comes so close to the overtaken vessel that a sudden change of course by the latter may bring about a collision, the fault is that of the overtaking vessel." Liner v. Crewboat Mr. Lucky, 275 F. Supp. 230, 234 (E.D. La. 1967).