

NTSB Order No.
EM-77

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 6th day of November 1979.

JOHN B. HAYES, Commandant, United States Coast Guard

vs.

EMERITO RIVERA, Appellant.

Docket ME-73

OPINION AND ORDER

Appellant is the holder of a towing vessel operator's license (No. 03544) issued by the Coast Guard. He is here appealing from the Commandant's decision affirming the suspension of his license for negligent navigation of the barge MIAMI during a docking operation in San Juan harbor, Puerto Rico, on October 1976.

The appeal to the Commandant (Appeal No. 2126) was from the initial decision of Administrative Law Judge Michael E. Hanrahan, issued at the conclusion of a full evidentiary hearing.¹ Throughout the proceedings, appellant has been represented by counsel.

The rectangular shaped barge, 400 feet in length and loaded with containerized cargo on double decks, had arrived in the outer harbor on a voyage from Jacksonville, Florida, towed by the ocean-going tug BULWARK.² Since the BULWARK'S draft was too deep for further entry, the harbor tugs PUERTO NUEVO and CABO ROJO were standing by to conduct the docking operation. The point at which the harbor tugs took over control of the barge was approximately 200 yards northeast of lighted buoy 13. The barge's towing bridle used for the sea voyage consisted of two 90-foot lengths of chain extending from each side of the bow, joined to another 90-foot chain running to the BULWARK. That end of the bridle, when released by the BULWARK, sank to the bottom and no effort was made

¹Copies of the decisions of the Commandant and the law judge are attached./

²Misidentified as the BOARDWALK in the initial decision.

to hoist the bridle onto the deck of the barge. At 1130 hours, the weather was calm and clear as the operation proceeded with the PUERTO NUEVO secured alongside the starboard bow facing the stern of the barge and the CABO ROJO facing the starboard quarter at a 90-degree angle.

According to the findings of the law judge, appellant was in command of the CABO ROJO until he boarded the barge to act as "docking master", leaving a mate in charge of that tug. In the first instance, appellant ordered the PUERTO NUEVO full ahead moving the barge stern first on a southeasterly course. That order was soon changed to slow ahead, then hard left rudder, followed by stop and reverse, in order to avoid two small fishing boats located some 300 yards beyond the buoy. Moving in a southerly direction, the barge passed within 20 feet of the buoy. The dragging bridle collided with and fouled the buoy's anchor cable and the buoy was then dragged along with the barge to its berth.

The law judge applied the rule that negligence is established prima facie when a moving vessel strikes a stationary object. He also criticized the practice of dragging the bridle because of numerous underwater obstructions in the harbor.³ Appellant's claim that evasive actions were necessitated by the fishing boats was rejected, since the law judge found that their presence should have been "observed and compensated for" by appellant before moving the barge (I.D. 14). He concluded that appellant was negligent, as charged, for failing to navigate with caution "notwithstanding the fact that the proximity of the buoy was visible to [him]" imposing a 3-month suspension of his license on 12 months' probation for this offense.⁴

In his brief on appeal, appellant contends that (1) he was not acting in a licensed capacity; (2) he was exercising good seamanship in allowing the towing bridle to drag the bottom according to local custom; and (3) the law judge erred in finding that the buoy cable was fouled before he took notice of the fishing boats. On these grounds, he seeks reversal of the prior decisions. Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, we conclude that his negligence was established by reliable, probative, and substantial evidence. In addition to our further findings herein, we adopt those of the law judge as modified by the

³As shown on the navigation chart (Exh. 4).

⁴It appears that probation was granted in view of appellant's good prior record (I.D. 16).

Commandant. Moreover, we agree that the sanction is warranted.

Appellant argues that his status as a licensed operator changed when he was on the barge, since the barge was unmanned⁵ and the assisting tugs were being operated by other licensed personnel.⁶ These factors are irrelevant to the determination, which does not depend so much on where he was stationed at any particular time as the functions that he was performing. It is clear that he was not functioning merely as a lookout to observe and report navigational information to the other operators. Both the mate on the CABO ROJO and the operator of the PUERTO NUEVO testified that they remained subject to his orders (Tr. 40), 81-2)9 Appellant testified as well that he was "in charge" of the docking operation (Tr. 92). This understanding prevailed at all times and his status was therefore unaffected by the fact that he was in a position affording the best possible visibility, which was on the barge. The statutory standard required that the towing vessels "while underway, be under the actual direction and control of a person licensed by the [Coast Guard] to operate in the particular geographic area...."⁷ Here appellant was providing all such direction and control for the tug and barge flotilla and, in so doing, we find that he was engaged in licensed activity under law.⁸

In his second contention, appellant argues that most of the submerged obstructions referred to by the law judge were not directly on or near the proposed route of the barge. We need only consider buoy 13 which was less than two barge lengths away when appellant ordered the PUERTO NUEVO to go full ahead. Regardless of local custom, he should have foreseen the danger of fouling the buoy and pulling it off station with the chain bridle dragging

⁵Based on a statement from the barge operator that the certificate of inspection contained no manning requirement (Resp.'s Exh. B).

⁶Licensed mates are authorized to operate uninspected towing vessels under 46 CFR 16-5 (d).

⁷46 U.S.C. 405(b)(2).

⁸Appellant objects that jurisdiction was based on a condition of employment in the initial decision, citing Soriano v. United States, 494 F. 2d 681 (9 Cir. 1974). That case foreclosed Coast Guard jurisdiction over a vessel pilot acting under authority of a state license, although holding a federal license as a condition of employment. The Soriano case is clearly inapposite here. Since the federal license was required by statute.

behind the barge and should have chosen a different route to avoid that eventuality. We agree with the law judge that the full ahead order "in such close proximity to Buoy 13 was an imprudent and risky action" (I.D. 14).

The finding challenged in the third contention was erroneous. If appellant first saw the fishing boats when the barge was "about 35 feet away" from the buoy as he testified (Tr. 94), the fouling must have occurred after he took such notice and not before he did so, as found by the law judge (I.D.). In correcting this error, the Commandant nevertheless found that appellant "should have been aware of the presence of the fishing boats prior to getting underway..." (C.D. 8). The record leaves no doubt that the boats were in clear view some 500 yards ahead of the projected path of the barge. Any failure to observe them at the outset was inexcusable. We therefore adopt the substituted finding of the Commandant. In sum, we find no basis for reversing the order of suspension, the purpose of which is "to insure more caution on [appellant's] part in future situations where a casualty may be avoided by observing rules of prudent seamanship."⁹

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The order of the law judge, suspending appellant's license No. 03544 for 3 months on 12 months' probation, is hereby affirmed.

KING, Chairman, DRIVER, Vice-Chairman, McADAMS and GOLDMAN Members of the Board, concurred in the above opinion and order. BURSLEY, Member, did not participate.

⁹Commandant v. Ernser, NTSB Order No. EM-67, adopted December 18 1978.