

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
License No. 477668
Issued to: Theodore Ritola

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2190

Theodore Ritola

This appeal has been taken in accordance with Title 46 United States code 239(g) and Title 46 code of Federal Regulations 5.30-1.

By order dated 14 February 1978, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended Appellant's license for one month with an additional period of six months' suspension on twelve months' probation upon finding him guilty of negligence. The three specifications found proved alleged that while serving as Third Mate on board the United States Army Corps of Engineers Dredge CHESTER HARDING, under the authority of the above captioned license, on or about 12 December 1976, Appellant failed to sound a whistle signal in reply to the whistle signal of M/V DON CARLOS; failed to execute a port passage with DON CARLOS in the absence of an agreement on a starboard passing; and failed to indicate the intent of his vessel while approaching DON CARLOS, the first two specifications further alleging that the failure cited contributed to a collision between the two vessels.

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

After the hearing, the Administrative Law Judge rendered a written opinion in which he concluded that the charge and specifications had been proved. He then entered an order suspending Appellant's license for one month with an additional six month period of suspension on twelve months' probation.

The entire decision was served on 16 February 1979. Appeal was timely filed and perfected.

FINDINGS OF FACT

Appellant, at all times material hereto, was serving as Third Mate aboard the USACOE Dredge CHESTER HARDING, under the authority of his duly issued license. HARDING is a 312 foot seagoing hopper dredge with a 64 foot beam. The vessel is high maneuverable, being equipped with twin diesel engines and twin variable pitch screws.

At 0000, 12 December 1976, Appellant assumed the watch on HARDING as Conning Officer. The vessel was engaged in dredging operations in San Francisco Bay, working the south side of the Richmond Harbor Entrance Channel. The weather was calm with two to three mile visibility in haze. The tide was flooding with a one mile per hour northerly current at HARDING's location.

At the time in question, the 664 foot automobile carrier DON CARLOS was enroute Richmond Inner Harbor, via the Entrance Channel being dredged by HARDING. CARLOS was under the control of the bay and river pilot Kenneth Allan Hulme. CARLOS was drawing 24 feet of water at the time. Both vessels were operating normally, with all navigational equipment and systems functioning correctly.

The United States Coast Guard Vessel Traffic System for San Francisco Bay monitored and recorded radio traffic the two vessels, including the time of each transmission. The conversations adduced reveal a failure of the respective conning officers to realize that divergent understandings of the navigational situation existed as between them. Appellant understood that he should leave the channel to facilitate CARLOS's passage inbound, while Hulme anticipated a port to port passage in the channel, clear of a dog-leg in the channel in the vicinity of Point Richmond. At 0106.5 HARDING indicated its intent to clear the channel. CARLOS responded that it would hold up a bit until HARDING cleared buoys

6 and 4 and noted "we'll make a one whistle, however, over." Neither officer considered the applicability of the special rule related to working dredges in Inland waters. Subsequently, CARLOS sounded one whistle which Appellant did not hear, and then questioned via radio HARDING's failure to execute a right turn. At 0111 HARDING transmitted that it was maneuvering to the south (turning left) which prompted CARLOS to back full to avert a collision. Avoidance efforts were fruitless and the vessels collided at 0112.5. The bow of CARLOS struck the starboard side, aft, of HARDING. No loss of life occurred. Impact occurred southwest of the channel proper. The channel itself is 600 feet wide, dredged to a charted depth of 35 feet.

BASES OF APPEAL

This appeal from the order of the Administrative Law Judge asserts several errors of fact and law. In essence, Appellant contends:

1. The Vessel Bridge to Bridge Radiotelephone Act obviates the need for whistle signals when agreement has been reached via radio over the conduct of two vessels.
2. The failure to sound whistle signals and execute a port passage is excusable since Appellant reasonably concluded that a crossing situation existed.
3. The Administrative Law Judge erred by failing to make a finding that the collision took place outside the Richmond Entrance Channel and that the collision would not have occurred if CARLOS had remained in the channel.

APPEARANCE: John R. Brooke, Esq. of Portland, Oregon

OPINION

I

In light of my resolution of this appeal, it is unnecessary to consider specifically the points raised by Appellant.

II

It is uncontested that HARDING, a self-propelled dredge, was underway showing the proper lights and engaged in dredging operations until shortly before the collision occurred. The DON CARLOS pilot was aware of the identity of HARDING by virtue of its lights which were properly displayed, notification by the Vessel Traffic Service, and direct radio contact with HARDING. (Deposition of Hulme, 89-90; Exhibit 6A.) The Pilot Rules for Inland Waters apply to "vessels navigating the harbors. . . of the United States. . ." 33 CFR 80.01. The Pilot Rules prescribe the manner in which vessels intending to pass dredges are to conduct themselves. 33 CFR 80.36-80.31a. The dredge normally directs the side to which passage should be made, via an exchange of whistle signals. 33 CFR 80.26(a). Provision also exists for the floating plant to leave the channel if necessary to provide a clear passage. 33 CFR 80.31. Hulme did not consider the Pilot Rules to be applicable. Deposition at 87-89. Appellant was convinced he was faced with a crossing situation. R. 96. San Francisco Bay, however, is internal waters subject to the Pilot Rules. Both navigators failed to recognize the situation facing them, thus leading to the application of rules not intended to govern the passing of their vessels.

Appellant's initial proposals could be taken as directions to DON CARLOS under 33 CFR 80.26, or notice that HARDING intended to clear the channel under 33 CFR 80.31. Even if so taken, however, Appellant was remiss in not sounding the danger signal when Hulme responded with words indicating he contemplated a port to port passage. 33 CFR 80.1. The initial misunderstanding, as shown by the transcript of radio traffic, continued to moments before the collision. Exhibit 6A-C. Appellant was also subsequently remiss in not sounding a danger signal when Hulme radioed the fact that he had sounded one whistle.

III

In light of my determination that the Pilot Rules were the proper rules of the road in this situation, it is readily apparent that the specifications number two and three are deficient. The specifications were somewhat deficient to begin with since a duty to reply to a whistle signal by another whistle signal is not absolute but arises only in a certain (here unalleged) fact

situation, while a duty to execute a "port to port" passing "in the absence of an agreement on a starboard to starboard passing" can likewise exist only in the context of an Article 18, Rule I, situation which was not fairly alleged. While such defects, not objected to, may be cured by evidence, the facts established as to the relative positions and movements of the vessels in this record do not do so. Since under the applicable rules a port to port passage was not mandated, the charge cannot be found proved on the basis of specification two. Specification three also fails, as when the proper rules are applied it can be seen that Appellant did indicate his intentions to the CARLOS, albeit by radiotelephone. The specification is therefore deficient as written, though I note, without so holding, that inclusion of a reference to failure to sound a whistle signal to convey intent could have led to a different result.

IV

Specification one charges that Appellant "failed to sound a whistle signal in reply to the whistle signal of the M/V DON CARLOS . . ." The issue litigated was not, however, as broad as it might at first seem. The evidence and arguments were directed to the question of response to the one whistle signal of CARLOS. Uncontradicted evidence is to the effect that the Appellant never heard the whistle signal. His notification was solely based on the radiotelephone advice by Hulme that the whistle has been sounded. Whether that advice alone was sufficient to raise this type of uncertainty contemplated by 33 USC (Rule III) and 33 and CFR (Rule III) and 33 CFR 80.1 and give rise to a duty to respond with an appropriate signal - the danger signal - was not litigated. On this record I can only conclude that Appellant did not receive the type of notice necessary to accord him due process with respect to specification one. The specification is therefore not sufficient to justify as a matter of law a finding of proved as charge. *Kuhn v. C.A.B.*, 183 F. 2d 83. (D.C. Cir. 1950). The evidence of the Master of HARDING shows that the danger signal was sounded by Appellant shortly before collision. R.-99. The short time interval between Hulme's transmission indicating HARDING was not executing a "one whistle," and HARDING's danger signal belies a failure to make a "timely" signal once the impending collision became obvious.

CONCLUSION

If properly charged it may well be that Appellant would have been found guilty of actionable negligence. On this record, however, the specifications are either deficient, or fail to give notice of the charge sought to be proved in a manner calculated to allow a proper marshalling of evidence in defense. In view of the burden imposed on all parties to this action, and the intervening period of time, I see no useful purpose in remanding this cause for further action.

ORDER

The order of the Administrative Law Judge dated 14 February 1979 at Seattle, Washington, is VACATED, and the charge DISMISSED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 25th day of March 1980.

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