In the Matter of License No. 152525 and Merchant Mariner's Document No. Z-352012
Issued to: WILFRED M. McDONALD

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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WILFRED M. McDONALD

This appeal has been taken in accordance with Title 46 United States 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 14 August, 1953, an Examiner of the United States Coast Guard at San Francisco, California, suspended License No. 152535 and Merchant Mariner's Document No. Z-352012 issued to Wilfred M. McDonald upon finding him guilty of negligence based upon four specifications alleging in substance that while serving as Master on board the American SS HAWAII BEAR under authority of the license above described, on about 29 April, 1953, while navigating said vessel in dangerous water, he contributed to the grounding of the vessel by depending solely upon an erroneous 0407 radar fix when altering course at 0410 (First Specification); by failing to require the timely transfer of the 0353 radar fix from U.S.C.&G.S. Chart No. 4715 to Chart No. 4226 (Second Specification); by failing to use the largest scale Coast and Geodetic Survey chart available to him (Third Specification); and by failing to confirm the 0407 and 0413 radar fixes by means of ranges to objects observed on the radar (Fourth Specification).

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by an attorney of his own selection and he entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer and counsel for Appellant made their opening statements. The Investigating Officer introduced in evidence the testimony of the Second and Third Mates and several documentary exhibits including photostatic copies of the two charts used for navigating the HAWAII BEAR while she was in the area the accident occurred.

In defense, Appellant offered in evidence the testimony of Victor Bahorich, the Superintendent of Engineering, Pacific Far East Lines, the owner of the ship. Appellant also testified under oath in his own behalf.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the four specifications. He then entered the order suspending Appellant's License No. 152535, and Merchant Mariner's Document No. Z-352012, and all other licenses, certificates of service and documents issued to this Appellant by United States Coast Guard or its predecessor authority, for a period of three months.

From that order, this appeal has been taken, and it is urged that the specifications are not supported by the evidence for the following reasons:

Third Specification. Since the 0353 fix and previous positions were plotted accurately on Chart No. 4715, the use of the latter chart until 0353, rather than using the largest scale Chart No. 4226, was a minor matter which did not have any causal connection with the accident.

First Specification. Appellant knew that the 0407 fix was inaccurate and he did not depend on it. The course change from 288° true to 211° true was not commenced until 0410

although the 0407 fix indicated that the ship was beyond the intended turning point at 0407.

Second Specification. The testimony of Appellant establishes that he transferred the 0353 fix from Chart No. 4715 No. 4226 immediately after the Second Mate plotted the 0407 fix. The testimony of the Second Mate that the 0353 fix was not on Chart No. 4226 when he "took" the 0413 position is negative in character and not in accord with the probabilities.

Fourth Specification. Appellant checked the 0413 fix by range and bearing observations of Thurston Rock while the radar was set on the six mile range scale. There was no attempt to confirm the 0407 fix since Appellant knew that it was not accurate.

Appellant also contends that the Examiner jumped to the conclusion of guilt, based upon first impressions, which led him to reject the testimony of the Appellant on numerous points; to refuse to accept the expert testimony of Mr. Bahorich that the bottom damage which he inspected could not have been caused by striking a reef because of the nature of the damage; to consider it an afterthought on the part of Appellant to testify that he believed the vessel struck a submerged, buoyant object rather than a reef or shoal; and to reject the evidence, in the form of a reconstructed course, which proved that Lima Rock would have been cleared even if the ship had been making good an assumed speed of only 14.8 knots.

APPEARANCES: Messrs. Derby, Cook, Quinby and Tweedt of San Francisco By James A. Quinby, Esquire, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 29 April, 1953, Appellant was serving as Master on board the American SS HAWAII BEAR and acting under authority of his License No. 152535 while the ship was approaching Jose Panganiban on the east of Luzon, Philippine Islands, enroute from Cebu,

Philippine Islands.

At 0419 on this date, the ship struck one or more submerged objects while in the vicinity of Lima Rock which is a sunken rock about twenty miles to the northward of the destination of the HAWAII BEAR. The cost of repairs to the ship's bottom was approximately $225,000.

The HAWAII BEAR is a steel hulled cargo vessel of 7628 gross tons and 439 feet in length. Her draft was 16 feet 10 inches forward and 23 feet 8 inches aft; there was no gyrocompass error; and it was a dark, clear night with a slight sea. The ship's radar was in use for navigational purposes but her fathometer was not in operation. No aids to navigation were sighted visually until after the accident occurred.

The coast line of Luzon extends generally in easterly and westerly directions from Jose Panganiban. In order to enter the latter port while on a westerly course on the Pacific Ocean, it is necessary to pass to the north of the Calagua Islands and then turn to a southerly course at some point beyond Lima Rock which is the most northwesterly of the many shoals, reefs and small islands in the vicinity of the Calagua Islands. The latter extend approximately 15 miles off the coast of Luzon to the northeastward from Jose Panganiban. The unobstructed waters of the Pacific extend to the westward of Lima Rock for a distance of about 20 miles.

For some time prior to 0020 on 29 April, 1953, the HAWAII BEAR was proceeding at a speed of 18 knots (79-80 R.P.M.) through the water and on course 288 degrees gyro which caused the ship to pass the Calagua Islands to port at a distance of approximately five miles. Third Mate Gluck was on watch and he obtained twelve fixes by means of radar ranges and bearings which he plotted on U. S. Coast and Geodetic Survey Chart No. 4715. There were on board two larger scale charts (U.S.C.&G.S. Chart Nos. 14223 and 4226) which reproduced this area at twice the size as shown on No. 4715. Neither one of these larger scale charts was used for plotting purposes until after the last position plotted by the Third Mate at 0353. Since the latter position indicated that the ship was to the north of the area reproduced on Chart No. 4715, it was then necessary to use Chart No. 4226.

On the basis of the radar fixes obtained by the Third Mate from 0020 until 0353 on the 30 miles range scale, the ship covered a distance of 62.7 miles during this 3 hours and 33 minutes period. Consequently, the average speed over the ground was 17.7 knots. The intermediate plots indicate that the speed fluctuated between 15 and 20 knots during this time.

Appellant was on the bridge from shortly after 0230 until after the accident at 0419. Appellant looked over the chart which was in use and checked the radar bearings by means of which the Third Mate obtained four fixes after 0230.

Second Mate Shaffer relieved the Third Mate for the 0400 to 0800 watch. At 0407, the Second Mate obtained two radar bearings and plotted them on the larger scale Chart No. 4226. After this, Appellant plotted the 0353 fix, the projected course of the ship on 288 degrees true, and a new course line of 211 degrees true. If the ship had followed these courses as laid out on the chart, she would have passed Lima Rock abeam to port at a distance of 2.5 miles while on course 288 degrees and again abeam to port at a distance of 1.7 miles after changing course to 211 degrees true. The two course lines intersected 6.5 miles from the location of the 0353 fix as originally plotted on Chart No. 4715 by the Third Mate.

The 0407 radar position as plotted was beyond the intended course line of 211 degrees. Appellant realized that the 0407 position was in error. He thought the latter plot was between one and two miles beyond the actual 0407 position of the ship. Using the 0353 position as plotted on Chart No. 4226 (although this position was erroneously advanced a half mile along the course line when transferred from Chart No. 4715 by Appellant) and an estimated speed of 18.5 knots over the ground (although the average speed on the 12 to 4 watch had been about 17.7 knots), he estimated that the ship would come around to the course of 211 degrees as laid out on the chart if the turn was commenced at 0410. This allowed for an advance in the direction of the old course of half a mile.

At 0410, Appellant ordered left rudder and steadied on course 211 degrees true. There was no change of speed and Appellant did not obtain a radar position, other than the one at 0407, subsequent to 0353 and prior to ordering the change of course 17 minutes later

when the ship was about 18 miles off the coast of Luzon.

Even if Appellant's estimate of a speed of 18.5 knots had been correct and his 0353 position had been correct, the ship would have been on a course to pass Lima Rock abeam at a distance of 1.4 miles, rather than 1.7 miles as planned, due to a miscalculation by Appellant. The ship would have travelled only slightly more than a distance of 5.2 miles (not allowing for a half mile advance after the order to change course) in 17 minutes at a speed of 18.5 knots. Calculated at a speed of 17.7 knots from where the 0353 fix was originally plotted, the ship would have passed .7 of a mile abeam of Lima Rock; and at 15 knots, the ship would have been on a course heading directly towards Lima Rock.

At 0413, the Second Mate again took two radar bearings and plotted them. This plot placed the ship slightly more than half a mile to the west of the 211 degrees course line on the chart. But even at a speed of 20 knots from the 0353 fix until turning at 0410, the ship would have advanced only to a point about .8 of a mile less than the distance necessary to place her, after changing course, on a course line of 211 degrees drawn through the 0413 position shown on the chart; and to reach the 0413 position at that time, the ship would have had to travel the distance of 1.75 miles (from the 20 knot, 0410 position) in 3 minutes - a speed of 35 knots on a straight course. Despite these factors, Appellant testified that he switched the radar to the 6 mile range to check the Second Mate's 0413 position; and he stated that he determined on Thurston Rock, to the southeast, between one and three minutes after 0413. Appellant stated that he observed Thurston Rock between the 4 and 6 mile range markers on the radar scope. The chart shows that Thurston Rock is more than 6 miles from any point where the ship could have been by 0416 when proceeding on course 211 degrees true at 20 knots or less from the 0413 position which is plotted on the photostatic copy of the chart used by Appellant.

No additional radar bearings or ranges were plotted prior to the accident. At 0419, the HAWAII BEAR struck something under the water. Her speed was not noticeably decreased but considerable damage was done to the bottom plating between the garboard and bilge strakes on both sides of the keel plates. The damage to the keel plates was comparatively minor. The damage consisted of heavy indentations and 2 to 7 feet long holes extending intermittently

from about 75 feet aft of the stem to the after end of the number four hold. There was no evidence of scoring or coral except as far as 25 feet aft of the stem due to the beaching of the ship. There was no damage to the bottom farther aft than the number four hold.

After the ship struck, Appellant ordered the engines stopped and turned on the fathometer. There was no attempt to obtain a fix until 0428 since the vessel was shipping water and Appellant was busy with the Chief Mate in connection with this. Appellant later reported that the accident occurred over a 19 fathom shoal which is 2.5 miles to the northwestward of Lima Rock and 2 miles along a course line of 211 degrees true projected from the 0413 position plotted on the chart. The 19 fathom shoal and Lima Rock are both the same distance of 2.5 miles from the course line of 288 degrees which the ship was on before changing course.

The 0428 position obtained by the Second Mate is plotted about 2 miles to the southwest of the 0419 position on the chart. At 0429, Appellant ordered the engines slow ahead and proceeded on different courses at various speeds. At 0447, Appellant obtained a fix by means of a visual bearing on Thurston Rock and the radar range to the same object. The ship was beached at Maculabo Island which is about 10 or 12 miles in a southerly direction from the scene of the accident. The ship was repaired in a dry dock at Sasebo, Japan.

Subsequently, a Coast Guard cutter took soundings over the 19 fathom shoal where Appellant claims the accident took place. The soundings showed that the depth of the water varied between 17 and 19 fathoms throughout the shoal area.

There is no record of prior disciplinary action having been taken against Appellant.

OPINION

Although the specifications are somewhat narrowly worded, the evidence produced by both parties clearly indicates that proof of the charge of negligence is dependent upon whether there is substantial evidence that Appellant proceeded into dangerous waters without knowledge of the position of his ship as the result of his

failure to exercise reasonable care under the prevailing circumstances. It has been stated that in these administrative proceedings the proof need not adhere strictly to the wording of the specification so long as there is no surprise. *Kuhn v. Civil Aeronautics Board (C.C.A., D.C. 1950)*, 183 F2d 839. There was no element of surprise as to the issues to be determined in the case.

Appellant was navigating, at night, solely by radar and without the benefit of visual bearings or the information available from the fathometer. During the 12 to 4 watch, the ship was approaching a point where the ship would have to make a turn to port in the vicinity of many unlighted obstructions to navigation. Under these circumstances, it was Appellant's duty to use reasonably safe means at his disposal for the navigation of his ship. The courts have stated that "the care to be exercised must be in proportion to the danger to be avoided. "*The John Carroll (C.C.A. 2, 1921)*, 275 Fed. 302.

The use of the larger scale charts was one way in which Appellant should have acted to comply with this requirement as to the appropriate degree of care in this situation. Instead of Chart No. 4715, Appellant should have used Char Nos. 14223 and 4226 in order to minimize the errors which result from radar navigation. This has particular application with respect to the bearing of objects obtained by radar. Therefore, I agree with the conclusion of the Examiner that the Third Specification was proved.

The course line of 288 degrees true could have been put on Chart No. 4226 shortly prior to 0330 even though the smaller scale Chart No. 4715 was in use before this time. For some unexplained reason, Appellant admittedly waited till after 0407 to plot the 0353 fix on Chart No. 4226 and then this fix was inaccurately plotted on Chart No. 4226 to the extent of half a mile. Undoubtedly this was careless, negligent navigation in all respects. And Appellant was on the bridge from shortly after 0230 in order to check and supervise the navigation of the mate who was on watch. The Second Specification was properly found proved as to the negligent failure to transfer the 0353 fix at earlier time.

Because of the error in transferring the 0353 fix and a miscalculation of the distance which the ship would have covered at an estimated speed of 18.5 knots, Appellant commenced the turn to

course 211 degrees true at a point which he thought allowed for a clearance of 1.7 miles from Lima Rock. In addition to these acts of negligence which he had ample time to avoid, it was extremely careless navigation to change course at 0410 and prior to obtaining an accurate radar fix, especially since there are 20 miles of open water to the west of Lima Rock.

Under the existing circumstances, the minimum precautions which Appellant should have taken were to make accurate calculations, as to distance, based upon the correct location of the 0353 fix and the minimum speed over the ground between fixes as indicated by the position plotted on the 12 to 4 watch. This speed was approximately 15 knots. In his own testimony, Appellant admitted that the ship had travelled at a speed which was at least this slow. In this manner Appellant could very simply have figured out that in order to be reasonably certain that the ship would not pass any closer to Lima Rock than the course line which he had laid out on the chart, the change of course should not have been commenced until 24 minutes after the 0353 fix - or 0417. At 15 knots, the ship would have proceeded 6 miles along the 288 course line since 0353. Allowing for an advance of half a mile, she would have passed Lima Rock while on the course line appearing on the chart. But due to the accumulation of errors, the turn was commenced at 0410. Contrary to Appellant's contention on appeal, the ship very definitely struck some part of Lima Rock if she was making good a speed of 15 knots or less between 0353 and 0410. The reconstructed courses at various speeds (which appear in evidence on a Chart No. 4226) lead to the contrary conclusion; but there are numerous errors in the calculations involved in reaching this satisfactory conclusion for Appellant.

Apparently, Appellant's only precaution was to ignore the 0407 position plotted by the Second Mate. This position was obviously erroneous since it indicated a speed of 30 knots between 0353 and 0407. Hence, the First Specification is found not proved and it is dismissed.

Although Appellant's prime fault was that he ordered the change of course on the basis of inaccurate dead reckoning calculations just prior to turning towards a shore where there are many shoals and reefs, his negligent navigation continued after the ship was on course 211 degrees true.

It should have been apparent to Appellant that the 0413 position was no good because it indicated a speed of 35 knots since 0410 even if the ship had proceeded at the rate of 20 knots over the ground between 0353 and 0410. The inaccuracy of the 0413 position is further established by Appellant's testimony that, not later than 0416, he checked the 0413 plot by range and bearing to Thurston Rock on the 6 mile radar range scale. Thurston Rock was not within 6 miles of the 0416 dead reckoning position on course 211 degrees from the 0413 position. Consequently, the ship was farther to the east and closer to Lima Rock than Appellant thought she was when he failed to get an accurate check on the Second Mate's 0413 position. The Fourth Specification is found proved as to the failure to take proper steps to verify the 0413 position; and it is not proved as to the 0407 position.

Since the 0413 position was not correct, the 0419 position (which Appellant contends was the location of the accident) was also inaccurate because the latter position would have required a speed of 20 knots on course 211 degrees from the impossible 0413 position. In addition, it is admitted that there was no attempt to fix the position of the ship between 0413 and 0428. This supports the indication that the claimed 0419 position is nothing more than a dead reckoning position based upon the 0413 plot.

As to the 0407 and 0413 positions, the Second Mate testified that he could not say whether one of the bearings he obtained at both times was a bearing on Samur Island or Thurston Rock, although it was thought to be the latter and plotted as such. In view of the erroneous positions in both cases and the fact that Thurston Rock and Samur Island are 10 and 300 feet above the water, respectively, the indications are that the bearings were taken on Samur Island. If they had been plotted as such, the plotted positions would have indicated that the ship was considerably farther to the east - 2 miles roughly. The Second Mate also testified that the 0407 and 0413 positions were not accurate.

All of these factors, pertaining to the admitted inability of the Second Mate to obtain a good position at 0407 or 0413, are sufficient to place considerable suspicion upon the accuracy of the 0428 position as plotted by the Second Mate. It is also

significant that the latter position is located in approximately the same relative position to the 0419 position as the latter is to the 0413 position. Hence, there is considerable doubt as to the accuracy of any of the positions shown on the chart as representing the location of the ship over a period of 18 minutes after the course change was initiated. Again, this amounted to negligent navigation on the part of the Appellant.

As shown by the fact that Appellant took a visual bearing on 10 foot Thurston Rock at 0447, it was light enough to definitely establish the ship's position within a short time after completing the turn. In view of the uncertainty of the radar positions after 0353, Appellant should have taken the precaution of obtaining a visual fix before approaching close to Lima Rock.

These proceedings are remedial in nature and the primary purpose is to protect lives and property at sea against actual and potential danger rather than to punish persons for criminal negligence or to determine who shall bear the losses of a marine casualty. Therefore, it is not necessary in this case to conclude that Appellant's negligence contributed a grounding in order to conclude that he was negligent in many respects with regard to the navigation of his ship. See Appeals No. 586, p. 8, and No. 728, p. 10. In fact, the Third Specification does not allege any causal connection between the negligence and a grounding, such as is included in the allegations of the other three specifications.

In view of the poor methods of navigation which were employed while approaching the turning point and the fact that the position of the vessel was not determined accurately from 0353 until 0447, it is my opinion that Appellant's improper navigation amounted to negligence. Except for the expert testimony of Mr. Bahorich, it would undoubtedly appear that the bottom damage to the ship was caused by striking some outlying sharp pinnacle rocks or reefs in the shoals around the main portion of Lima Rock after the ship's speed had been retarded by an adverse current between 0353 and 0410. I think that the Examiner properly rejected considerable of the Appellant's testimony by which he attempted to establish that the ship was definitely well to the west of Lima Rock when the accident occurred. Ordinarily, the Examiner who sees and hears the witnesses is the best judge as to their credibility. Nevertheless, the evidence of negligent navigation does not conclusively

establish that the ship struck Lima Rock.

Consequently, I am constrained to conclude, on the basis of Mr. Bahorich's testimony as to the nature of the damage, that there is not substantial evidence to support the allegation contained in the Second and Fourth Specifications that Appellant's negligent navigation contributed to the grounding of the ship. In fact, Mr. Bahorich's testimony is strong evidence to indicate that there was no grounding. He was not a prejudiced witness insofar as the record discloses; and his testimony as to the nature of the bottom damage was not controverted by other evidence or questioned by the Examiner. Therefore, I accept his description of the damage to the bottom as set forth above in my Findings of Fact. Because of the type of damage, Mr. Bahorich testified that he was of the opinion that the damage could not have been caused by the ship striking a reef; and this opinion is backed up 35 years of marine engineering experience by Mr. Bahorich. The reasons he gave for his opinion will be discussed briefly.

It was the expert's opinion that there would have been some evidence of coral in the punctured areas if the ship had struck a coral formation; and that either coral or rock would have caused scoring and heavy grooving in the plates between the intermittent holes which were 2 to 7 feet in length. He was also of the opinion that due to the speed of the ship and the fact that the draft aft was almost 7 feet greater than the forward draft, there would have been considerably more damage to the after end of the ship's bottom than to that part of the bottom which actually was damaged if the ship had struck one or more stationary objects. For these reasons, Mr. Bahorich reached the conclusion that the damage must have been caused by some submerged, floating object such as the hull of a ship.

I am impressed with this conclusion for the reasons stated by Mr. Bahorich whose evaluation of the damage is entitled to considerable weight in view of his many years of experience in this field of work. In addition, I take official notice of the fact that this is a flat bottomed ship. This fact precludes the probability that the ship's sideways motion could have caused her to bounce off and on coral or rock pinnacles so as to cause the intermittent punctures. Such objects would probably have caused continuous damage to the bottom plating.

CONCLUSION

The conclusive facts are that the ship was being negligently navigated, by Appellant, at undetermined positions, after 0353, in the vicinity of Lima Rock and the ship struck something which caused $225,000 damage to her bottom. The weight of the evidence does not affirmatively establish that the ship struck Lima Rock. Therefore, the allegations that the negligence contributed to a grounding are found not proved. The Third Specification is "proved." The Second and Fourth Specifications are found "proved in part" in accordance with 46 C.F.R. 137.09-65. The First Specification is "not proved." The order will be modified accordingly.

ORDER

The order of the Examiner dated at San Francisco, California, on 14 August, 1953, is hereby modified to directing an admonition against Appellant. In accordance with 46 C.F.R. 137.09-75(d), Appellant is advised that this admonition will be made a matter of official record.

As so MODIFIED, said order is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 8th day of June, 1954.

***** END OF DECISION NO. 730 *****

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