

UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF TRANSPORTATION

**UNITED STATES COAST GUARD**

UNITED STATES COAST GUARD,            )  
  Complainant,            ) CG S&R Docket No. 99-0435  
  ) PA Number: 99 001265  
vs.    )  
  )  
CONSTANTINE MARKAKIS,                )  
  Respondent.                )  
\_\_\_\_\_  )

**DECISION AND ORDER**

This matter arises out of a complaint filed by the Coast Guard pursuant to 46 USC § 7703(1)(A), (B) charging Respondent as follows:

**VIOLATION OF LAW OR REGULATIONS**

FIRST SPECIFICATION: The Coast Guard alleges that on 04 May, 1999 commencing at approximately 0703 local time, while serving as master on the M/V OGLEBAY NORTON as required by law, while the vessel was underway downbound on the Saint Marys River, the Respondent failed to immediately report a marine casualty to the Coast Guard as required by Title 46, Code of Federal Regulations, Part 4.50-1. The marine casualty involved a failure of the port controllable pitch actuator, which rendered the port propulsion shaft inoperable and reduced the maneuverability and propulsion capability of the vessel. The marine casualty occurred at approximately 0703 while the vessel was above the Poe Lock, but was not ascertained by the Coast Guard until the vessel had entered, locked through, and was in the process of departing the Poe Lock. The Coast Guard was made aware of the marine casualty at approximately 0830 when the Coast Guard Vessel Traffic Service watchstander overheard VHF radio transmissions from the M/V OGLEBAY NORTON to the lockmaster requesting assistance in departing the Poe Lock.

SECOND SPECIFICATION: The Coast Guard alleges that on 04 May, 1999 commencing at approximately 0703 local time, while serving as master on the M/V OGLEBAY

NORTON as required by law, while the vessel was underway downbound on the Saint Marys River the Respondent failed to immediately report a hazardous condition to the Coast Guard as required by Title 33, Code of Federal Regulations, Part 160.215. The hazardous condition involved the continued navigation of the vessel in restricted, confined waters after the failure of the port controllable pitch actuator, which rendered the port propulsion shaft inoperable and reduce the maneuverability and propulsion capability of the vessel. The hazardous condition occurred at approximately 0703 while the vessel was above the Poe Lock, however, the Respondent elected to enter, lock through, and attempt to depart the Poe Lock. The Coast Guard was made aware of the hazardous condition at approximately 0830 when the Coast Guard Vessel Traffic Service watchstander overheard VHF radio transmissions from the M/V OGLEBAY NORTON to the lockmaster reporting that the vessel had engine problems, was going astern in the Poe Lock, and needed assistance in departing the Poe Lock.

#### NEGLIGENCE

FIRST SPECIFICATION: The Coast Guard alleges that on 04 May, 1999 commencing at approximately 0703 local time, while serving as master of the M/V OGLEBAY NORTON as required by law, while the vessel was underway downbound on the Saint Marys River, the Respondent was negligent for failing to ascertain the complete nature of a marine casualty to the vessel's port propulsion shaft, its subsequent impact on the vessel propulsion capabilities, and the limitations on the vessel maneuvering capabilities as a result of the casualty, actions which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.

SECOND SPECIFICATION: The Coast Guard alleges that on 04 May, 1999 commencing at approximately 0703 local time while serving as master on the M/V OGLEBAY NORTON as required by law, while the vessel was underway downbound on the Saint Marys River, the Respondent was negligent for navigating the vessel in restricted, confined waters with reduced power for which the vessel was designed, which was a hazardous condition,

actions that a reasonable and prudent person of the same station, under the same circumstances would not commit.

The Coast Guard has requested that the Respondent's Masters License be suspended for 3 months followed by a 12-month probation and completion of a Coast Guard approved Bridge Resource Management training program.

Respondent admits he holds a Coast Guard License No. 721403, that he was serving as the master aboard the OGLEBAY NORTON on May 4, 1999 under the authority of that license during the times of the alleged marine casualty. Respondent, therefore, admits to the jurisdiction of the Coast Guard in this matter. Respondent, however, denies all other factual allegations.

A hearing on this matter commenced in Cleveland, Ohio on March 16, 2000 and continued to May 11 and 12, 2000 in Sault Ste Marie, Michigan.

The Coast Guard presented four live witnesses, and five depositions. Respondent presented one live witness. 47 Exhibits from the Coast Guard and Respondent were admitted into evidence.

#### FACTUAL FINDINGS

On May 3, 1999 at 0220 CDT, the OGLEBAY NORTON<sup>1</sup>, with Respondent as its Master, left Superior, Wisconsin, loaded with Taconite ore, down bound for St. Clair, Michigan.

The next morning, May 4, 1999, the OGLEBAY NORTON approached the Sault Saint Marie [SAULT] Lock system along the St. Marys River between the Upper Peninsula of the State of Michigan and Northern Ontario Canada. At about 0700 that morning, Respondent noticed at the port console the gauge for the port propeller's pitch was at 75% pitch although the controls were in neutral. And the vessel was supposedly coasting toward the lock system.<sup>2</sup> The vessel was then making way at about 4.3 knots but was increasing instead of decreasing. See, IO Exhibit 5, and Transcript 5/11/2000 at pp. 139, 141. He contacted the Assistant Chief Engineer inquiring why, and was told they needed to investigate. Concerned, he ordered the port propeller shaft de-clutched, the port engines for electrical power generation, and used the starboard engines for propulsion and maneuvering for approaching and entering the lock system.

Rather than tie up along the shore above the lock, Respondent elected to enter the Poe Lock<sup>3</sup> and tie up while preparing for the lowering in the lock. Respondent asked the Lockmaster to suspend the lowering, telling him he had a problem with his port engine, and for additional time for his engineering department to fix the problem. The

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<sup>1</sup> The M/V OGLEBAY NORTON is a 35,652 gross ton, 1000 foot ore vessel. It has four engines, two on port and two on starboard.

<sup>2</sup> Transcript, 5/11/2000 at pp 137, 220.

<sup>3</sup> The only lock in the system large enough to accommodate a 1000' ore vessel.

Lockmaster agreed. The engineering staff discovered that the port propeller Pitch Actuator Motor had failed. The staff engineers then used the time in the lock to replace the motor with another they had on hand.

After the motor was replaced, the engineering staff requested an additional 30 minutes to calibrate the motor. But, this was to be completed once outside the lock. Respondent requested the OGLEBAY NORTON depart the lock, still without the use of the vessel's port engine or propeller, and be allowed to tie up at the lower pier to finish the necessary calibration. When the lock's gates opened, the vessel began to move backwards and scraped the lock's sill. Respondent put out his line tenders, and requested assistance from the lock system's line handlers, and had the vessel's lines re-secured to prevent the vessel's further contact with the lock wall. Respondent then requested assistance in departing the lock. An additional flush of water was given by the Lockmaster, the vessel departed the Poe lock, and was requested to tie up the lower center pier because the Lockmaster feared the vessel had hit the Poe Lock wall. After the vessel departed the lock, cameras were lowered, pictures were taken and no damage to the lock wall was detected. . Transcript 5/12/2000 at p. 23. Respondent contacted the Coast Guard after departing the lock at 0850 A.M.

All this time, the Coast Guard's Vessel Traffic System Watchstander monitoring the communications at the locks overheard the discussions between the Respondent and the Lockmaster concerning the motor failure, suspension of the lowering in the lock, and need for assistance to depart the Poe Lock. The Marine Safety Office was contacted and an investigating officer was dispatched to the scene prior to Respondent's report. IO Exhibit 15.

At about 1000, the Coast Guard Investigating Officer [IO] boarded the vessel, conducted his investigation, obtained witness statements, and remained on board until approximately 1500. The IO requested Respondent prepare a written statement describing the incident. Respondent asked he be allowed to fill out a CG 2692 and give it to the IO. Respondent was told to complete both the statement, and the CG 2692, but instead he could send them to the IO. Also, during this time a dive team surveyed the vessel for any damage from contact with the lock's sill. None was found.

Respondent did not report the engine problem to the Coast Guard while in the Poe lock for about two hours.<sup>4</sup> He did, however, prepare Coast Guard a CG 2692 "Report of Marine Accident Injury or Death" and file it with the Coast Guard by facsimile transmission on May 6, 1999 at 1138.

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<sup>4</sup> The Oglebay Norton entered the Poe Lock at 0701 and departed the lock at 0850. See, IO Exhibit 22 (Vessel Lockage History screen print)

## Violation of Law or Regulation -- First Specification

The Coast Guard contends, when the port side Propeller Pitch Actuator motor failed before entering the Poe lock, and when the port shaft was de-clutched or taken off line, the vessel had a substantial loss in its maneuverability and propulsion. This constituted a marine casualty, which demanded an immediate report to the Coast Guard required by 46 CFR § 4.05-1. The Investigating Officer also says that Respondent was well within the Vessel Traffic System for the St. Marys River and had available to him all the modern tools of instant communications with the Coast Guard during its voyage to the lock system in order to make the immediate report.

Respondent seems to say that immediate report does not mean instantaneous. Before making such a report, the rule allows for him to take into consideration the vessel's safety, which he did by slowly and carefully entering the Poe Lock and tying up there to make repairs. Mooring up outside the lock's entrance was unsafe and virtually impossible given the speed at which the vessel was traveling. Nevertheless, Respondent provided a CG 2692 in a timely manner and that satisfied his obligation to make the report of the casualty. Therefore, a fair reading of the regulation together with its companion provisions shows under the circumstances confronting Respondent at the time, he fully complied with the requirements of 46 CFR § 4.05-1.

46 CFR § 4.05-1 provides in relevant part:

### **Notice of marine casualty**

- (a) Immediately after addressing the resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Marine Safety Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in -- . . . .
- (3) A loss of main propulsion, primary steering, or *any associated component or control system that reduces the maneuverability of the vessel*; (emphasis supplied)

A plain reading of this section shows, that the failure of a Propeller Pitch Actuator Motor for the port propeller shaft causing the master to take the port shaft off line constitutes a loss of an associated component affecting and reducing propulsion and maneuverability. Thus, it is a marine casualty that requires reporting to the appropriate office of the Coast Guard. Respondent agrees.

However, the question presented here is not so much whether there was a marine casualty requiring a report, but when must the casualty be reported? Stated otherwise, does the cited regulation require an almost instantaneous report as the Coast Guard claims, or can some time lapse before that report, especially to address any safety concerns?

My understanding of the Coast Guard's theory is, when the loss of the port side propulsion and maneuverability occurred, up river, at the railroad bridge, and on the approach to the lock system, the Respondent had a duty to notify the Coast Guard then and there. He was not to wait until the cause of the loss was identified, nor when repairs were later effected correcting the problem.

Respondent's expert opined Respondent did not violate the regulation because he properly first addressed the resultant safety concerns by proceeding into the Poe lock, and ascertained that the vessel was safe as the rule states. Transcript 5/11/00, at p. 45.

The Investigating Officer's reporting theory does not consider and apply the provisions of 46 CFR § 4.05-10(a) and (b). Subsection 4.05-10(a) requires that a master file a written report within 5 days of any marine casualty required to be reported, in addition to that which was to be verbally reported as required by § 4.05-1. This written report is form CG 2692, which was filed by Respondent on May 6, 1999. See IO Exhibit 5. Also see Transcript, 5/11/2000 at p. 225, lines 1-6.

Of significance, 46 CFR § 4.05-10(b) provides:

- (b) If filed without delay after the occurrence of the marine casualty, the report required by paragraph (a) of this section *suffices as the notice required by § 4.05-1(a)*. (Italics supplied).

Respondent filed form CG 2692 with the Coast Guard two days after the occurrence of the marine casualty at issue. The IO has not claimed that this time period constituted a delay. Indeed, the record shows the IO allowed some delay in the filing of the CG 2692. Transcript, 5/11/2000 at p. 224, lines 6-24.

The Commandant has held that the filing of CG 2692 within the five day time period amounts to a *per se* satisfaction of the notification requirements of 46 CFR § 4.05-1. See, Decision on Appeal 2523 (Bracken) [Absent any showing of delay, the filing of CG 2692 three days and seventeen hours after grounding not only satisfied 46 CFR § 4.05-1, but satisfied the same statutory obligation in 46 USC § 6101(b)].

Because there was no showing of delay here, I must conclude Respondent's filing of CG 2692 on May 6, 2000 fulfilled his notification obligation under 46 CFR § 4.05-1.<sup>5</sup>

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<sup>5</sup>. The IO's suggestion that reporting of a death, a fire, or a grounding can be delayed up to five days, if this interpretation were allowed, and thereby undermine the Coast Guard's ability to insure safety, is without merit. Simply put, the IO overlooks important language in the regulation and the Commandant's decision in Bracken, which incidentally, is a grounding case. Obviously, the report must be made *without delay*. Bracken teaches a determination of what constitutes "without delay" is made by reviewing the pertinent facts and circumstances. For example, the resources available to the respondent and/or intervening or extenuating factors such as weather, transportation availability, access to postal services, etc. are all considerations.

For these reasons, the First Specification is found not proved and is dismissed.

### **Violation of Law -- Second Specification**

The Coast Guard alleges that Respondent violated 33 CFR § 160.215, which provides as follows:

Whenever there is a hazardous condition either aboard a vessel or caused by a vessel or its operation, the owner, agent, master, operator, or person in charge shall *immediately* notify the nearest Coast Guard Marine Safety Office or Group Office. (Compliance with this section does not by itself discharge the duty of compliance with 46 CFR 4.05-10). (Italics added)

*Hazardous condition* means any condition that may adversely affect (1) the safety of any vessel, bridge, structure, or shore area, or (2) the environmental quality of any port, harbor, or navigable waterway of the United States. It may -- but need not -- involve collision, allision, fire, explosion, grounding, leaking, damage, injury or illness of a person aboard, or manning shortage. [33 CFR § 160.203 Definitions.]

The Coast Guard contends that the shutdown of the port propeller shaft due to the Propeller Pitch Actuator motor failure, reduced and adversely affected the OGLEBAY NORTON's maneuverability and propulsion capabilities, thus affecting its and the Sault Locks' safety, constitutes the hazardous condition contemplated in the rule.

The Investigating Officer says this hazardous condition existed as early as the vessel's morning approach to the Sault lock system in the St. Marys River. But the IO also says, the hazardous condition continued as late as the backward movement of the vessel in the Poe Lock, upon opening of the lock's gates (presumably endangering the lock's sill or wall), resulting in the vessel's inability to depart the Poe Lock under its own power. See Investigating Officer's Closing Argument at p. 4. Taken together, it is argued, this posed a threat to navigation and the marine environment. Investigating Officer's Closing Argument at p. 5.

Respondent's expert, Patrick Nelson, a Master having captained the OGELBAY NORTON, including other similar 1000 foot ore vessels, says that a 1000 foot ore vessel maneuvering and operating on only one engine is fully capable of safely navigating the approach to, into, and out of the Poe Lock. Captain Nelson also says a backward

movement of a vessel upon opening of the lock's gates is quite common,<sup>6</sup> and receiving a rush of water at its bow, even then, such a vessel is fully capable of exiting the lock under its own power on one engine. Respondent's Exhibit 40. Given this opinion on the facts, Respondent argues, there was no hazardous condition worth reporting, because neither the safety of the vessel, nor the safety of the Poe lock was ever implicated. .

In *United States Coast Guard v. Richard F. Hartlage*, NTSB Dkt No. ME-102, July 13, 1984 the National Transportation Safety Board (NTSB) confronted whether the *total* loss of propulsion constituted a hazardous condition requiring an immediate report to the Coast Guard under the regulation applicable here. The NTSB concluded that loss of propulsion alone, without sufficient evidence of the existence of conditions, which pose an inherent threat to safety or safe operations, is not a hazardous condition. The vessel in that case was being towed into port.

In a companion case, the NTSB in *United States Coast Guard v. Richard G. Fifer, II*, NTSB Docket No. ME-103, July 10, 1984, said an explanation was necessary to show the nature of the endangerment, which an inoperative electric propulsion motor might pose. A simple claim that the vessel was in a hazardous condition because of the impact of a propulsive power loss on the vessel's maneuverability alone was in the NTSB's judgment untenable. The fact the vessel's propulsion motor was inoperative had no impact on the degree of maneuverability the vessel possessed as it entered the Port of Wilmington, for its maneuverability was essentially a function, not of its own systems, but of the steering capabilities and propulsive power afforded by two tugs. The NTSB found there was no hazardous condition.

The only evidence I can find in the record addressing the question of whether the loss of the OGLEBAY NORTON's port shaft is an inherent threat to safety, or safe operations, is the Chief Lockmaster's testimony. There he expressed the Corps of Engineers concern, for the Poe Lock wall being damaged from the OGLEBAY NORTON's backward movement.<sup>7</sup> The Corps took pictures of the lock sill and wall and found no damage. See, Transcript 5/12/2000 at pp 22-23. Nothing further in the record shows any evidence<sup>8</sup> of a safety concern for the locks or the vessel, or the loss of a port propeller shaft is considered a hazardous condition.<sup>9</sup>

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<sup>6</sup> William Skidmore, the Chief Lockmaster for the Army Corps of Engineers said, "when you open the gates on the lock, all vessels drift back a little because there's a little fluctuation of the water. . . ." Transcript 5/12/00 at p. 12 lines 16-18.

<sup>7</sup> When it moved backwards in the lock, the vessel did come against the lock wall as shown by the scrapes on the vessel's rear or stern starboard quarter. See, photographs at IO Exhibits 7c and 7d. Additionally, the Investigating Officer points to a Commander of the Port Order to the M/V Burns Harbor, IO Exhibit 43, making a generalized finding of threat to safety suggesting it is persuasive authority. That order, however, gave no explanation of what endangerment there was to that vessel's or other vessels' safe navigation and the marine environment posed by the loss of the M/V Burns' starboard propeller shaft.

<sup>8</sup> The IO's argument and claim there is a hazardous condition does not make it so. He has produced no witness or other expert testimony that corroborates or confirms his belief.

<sup>9</sup> The Investigating Officer argues that Capt. Markakis essentially conceded the astern movement of his vessel in the lock was a hazardous condition. See, IO Closing Argument at p. 6 where he cites and relies upon Transcript 5/11/00 at p. 178 lines 7-19. My reading of the transcript and having heard the testimony



Taking the instruction of the NTSB, an explanation of the nature of the endangerment is necessary before a conclusion can be made that there is a hazardous condition. None has been given me in this case, and I will not speculate on one.

I must conclude there was no obligation to make an immediate report as contemplated in 33 CFR § 160.215.

I therefore find the second specification not proved and it is dismissed.

### **Negligence -- First Specification**

In this specification, the Coast Guard alleges that Respondent failed to ascertain the complete nature of the marine casualty and its subsequent impact on the OGLEBAY NORTON's maneuvering capabilities, which failure a reasonable and prudent person in the same station under the same circumstances would not fail to perform.

By this wording together with the Investigating Officer's closing arguments, I understand the allegation to mean, Respondent, unlike similarly situated masters, failed to fully understand the consequences of the failure of the port Propeller Pitch Actuator to his vessel's ability to approach, enter and then exit the Poe Lock. I further surmise the IO's argument is, that if Respondent had understood the nature of the casualty, he would have forgone entry into the Poe Lock like the Master of the M/V Edwin H. Gott delayed entry into the St Marys River when it had a "possible propulsion failure." See IO Reply Brief at p. 5.

Negligence is defined as follows:

Negligence is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform. 46 CFR § 5.29.

The Investigating Officer's theory appears to be centered on the argument, that Respondent elected to navigate the OGLEBAY NORTON, with its de-clutched port propulsion shaft, into the Poe Lock, without knowing what was wrong with the shaft, and without knowing of the calibration procedures needed to make the shaft operable. See IO Closing Argument at p. 8. In short, the IO says that Respondent made no allowance to fully ascertain the impact of an inoperable port propulsion shaft on the OGLEBAY

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in the context and tone in which it was given leaves me with no such conclusion. Respondent only expresses concern his vessel may have hit the lock sill.

NORTON's propulsion and maneuvering capability for entering and exiting the Poe Lock.

Respondent says that he made the decision to de-clutch his port propulsion shaft and continue into the Poe Lock because that was the safest and most prudent option available. See Transcript 5/11/2000 at p. 221. This decision, he says is supported by the opinions of Captain Gapczynski and Captain Nelson citing their testimony at Gapczynski Deposition p. 45, 47 and Nelson at Transcript 5/11/2000 p. 119.

Respondent is a seasoned Great Lakes Master having captained other 1000' vessels and has been the permanent Master of the OGLEBAY NORTON for 9 years. See Transcript 5/11/2000 at pp 217-219. He has made the trip into, through and out of the Sault lock system about 40 times a year for those 9 years without incident. He clearly had the skill and knowledge necessary to navigate this 1000' ore carrier through the locks those many times.

Thus, confronted with an unexpected casualty, Respondent made a prompt decision. He chose to de-clutch the port propulsion shaft because of the obvious impact on the vessel's speed entering the lock if it was not de-clutched.<sup>10</sup> He also chose to rely upon his starboard propulsion and bow and stern thrusters to maneuver into the Poe lock. He made a conscious choice.

The question is whether that choice, viewed now with hindsight, was reasonable under the circumstances. Stated otherwise, was Respondent's choice, the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit?

On one hand, the IO recommends the conduct of Captain Gapczynski, circling the M/V Edwin H Gott while ascertaining and repairing a port propulsion failure before entering the St Marys River, as the conduct of a reasonably prudent person. On the other hand, the IO condemned Captain Gapczynski's testimony, which opined Respondent's conduct was reasonable under the circumstances, as "Do as I say, not as I do". See, IO Reply Brief at p. 5.

My examination of the record does not comport with the IO's characterization that the circumstances confronting Captain Gapczynski were similar to those confronting Respondent. The differences are important.

First, the M/V Edwin H. Gott was in an open body of water, which allowed for a circling maneuver for some time. The OGLEBAY NORTON was in a rather narrow<sup>11</sup> waterway, which would not permit a 1000' vessel, the same maneuverability. Second, the M/V Edwin H. Gott was quite some distance from any lock, let alone the Poe Lock. The

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<sup>10</sup> When approaching and entering the lock, the speed of the vessel is reduced to 2 mph. See Gapczynski Deposition at p. 32. Respondent testified that he noticed the speed of the OGLEBAY NORTON increasing. Transcript 5/11/2000 at p. 220.

<sup>11</sup> The IO describes it as restricted and confined. See, Complaint, Negligence, Second Specification.

M/V OGLEBAY NORTON was within less than a statute mile from the Poe Lock. Third, the OGLEBAY NORTON was gaining speed when it should have been slowing down. Fourth, the ability of the OGLEBAY NORTON to tie up above the lock was doubtful at best according to the testimony of Respondent, Captains Gapczynski and Captain Nelson. The IO again presented no evidence to the contrary, only his argument.

Given the circumstances confronting Respondent, and the opinions of the other Masters, Respondent's conduct does not meet the definition of negligence.

Accordingly, the first specification of negligence is not proved and is therefore dismissed.

### Negligence -- Second Specification

The IO says the Respondent was negligent navigating the OGLEBAY NORTON in restricted, confined, and apparently hazardous waters with reduced power for which the vessel was designed.

Respondent contends there is no evidence from any witness, which says he was negligent as alleged. To the contrary, he points to the testimony of Captains Nelson and Gapczynski who agree the OGLEBAY NORTON could not drop its anchor just above the lock, turn around, or safely dock short of the Poe lock. See Respondent's Closing Argument at pp 19-20.

The IO seems to suggest in his closing argument that navigating on the St Marys River above the Sault locks is like navigating in hazardous waters with severe currents. He does so by citing me to Commandant Decision on Appeal 2365 (Eastman) and saying that case "bear[s] the same similarities." See IO Closing Argument at p. 15.

The evidence in the Eastman case established that Eastman chose to navigate the M/V VIKING SUN with one half of the power for which she was designed, on a waterway *known for hazardous currents*. I have neither heard, nor seen evidence, which remotely suggests the St Marys River above the Sault lock system has hazardous currents much less swift ones.

The IO goes on to argue that Respondent failed to take all steps needed to avoid danger in navigating especially when the vessel is deficient in power or ability to maneuver, without making due allowances for such peculiarities relying on Griffin on Collision, §§ 204, 211, (1949 ed.).

Absent from the record, and from the IO's closing argument is, just what was it Respondent failed to take into account? Or, stated differently, what was it that a prudent reasonable master in the same circumstances would have done that Respondent did not do? From what I am able to see in the record, Captains Nelson and Gapczynski both say they would have done nothing different. Again, the IO has presented no testimony from any witness to contradict that of Captains Nelson or Gapczynski.

Accordingly, I must find that the record on this specification is devoid of any evidence supporting the charge. I find it is not proved.

This specification is therefore, dismissed.

**Conclusion**

Having found that each of the specification in this complaint not proved, the complaint is therefore dismissed in its entirety.

Service of this Decision upon the parties serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

IT IS SO ORDERED.

Dated: October 4, 2000



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EDWIN M. BLADEN

Administrative Law Judge