

In the Matter of License No. 233467 Merchant Mariner's Document No.
Z-166543 and all other Seaman Documents
Issued to: Norman S. Winskill

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1300

Norman S. Winskill

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

By order dated 25 January 1961, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania revoked Appellant's seaman documents upon finding him guilty of negligence. The specification found proved alleges that the Appellant did, while serving as Pilot on board the USNS PRIVATE JOHN TOWLE (hereinafter the TOWLE) under authority of the license and pilotage endorsements thereon above described, on or about 11 October 1960,

***while underway outbound in the Delaware River, in the vicinity of Joe Flogger Shoals, neglect to navigate your vessel so as to remain to the right side of the fairway in a narrow channel; to wit, Cross Ledge Range, thereby contributing to a collision between your vessel and the inbound SS RIO BARIMA."

At the hearing, Appellant was represented by counsel and entered a plea of not guilty to the charge of specification. A

further specification, alleging that Appellant crossed ahead of the other vessel, was withdrawn after the taking of testimony. Upon receiving the Appellant's plea, the Examiner heard testimony and subsequently rendered his decision sustaining the specification and ordering revocation.

FINDINGS OF FACT

On 11 October 1960, Appellant was acting as pilot under authority of his Coast Guard License No. 233467, aboard the TOWLE, a Victory Ship, proceeding down the Delaware River. At approximately 2230 the TOWLE overtook and passed the SS CIUDAD DE MARICAIBO in Liston Range on that vessel's port side in the vicinity of Ship John Shoal. Thereafter the TOWLE drew ahead, eventually passed Buoy 35 some two and a quarter miles ahead and there altered heading to the right so as to eventually pass Buoy 31, some four and a quarter miles distant, "close astarboard". Buoy 35 is in Liston Range and Buoy 31 is in Cross Ledge Range. The latter dredged channel is 1200 feet wide. Appellant, in so altering heading intended to "cut the corner at Buoy 32" so that instead of following along inside the limits of Liston Range to Buoy 32 where the channel changes course to the right and becomes Cross Ledge Range, the Appellant left the range limits and cut across the inside of the angle made where the two ranges join at Buoy 32. Although this maneuver took Appellant out of the range limits, there was still sufficient water under the ship beyond Buoy 31 where he intended to re-enter the dredged channel.

After this maneuver progressed to where it was nearly accomplished, Appellant was advised of decreasing engine revolutions and at the same time observed that Buoy 31 was no longer on his starboard bow where he intended it to be, but on his port bow about a point or a point and a half. Fearful of entering shoals, Appellant decided to take immediate action to re-enter the range limits. At a point near Buoy 31, he ordered fifteen degrees left rudder which was followed by an order for full left rudder. The ship came around and entered Cross Ledge Range at an angle of 70 to 90 degrees.

Wind and weather conditions were favorable at the time, tide was the last of ebb, and Appellant cannot otherwise account for Buoy 31's change of bearing.

The SS RIO BARIMA, (a 13,000 ton 700' x 80 or 90' ore carrier) was making about 13 knots just to the right of center of Cross Ledge Range going north (upbound). Appellant first saw this vessel when he was opposite Buoy 32 and the RIO BARIMA was approximately three miles away. Appellant characterized the situation before he came left as one which would normally call for a port to port passing (R. 60).

As soon as the TOWLE was almost in the channel, proceeding at 15 or 16 knots, Appellant ordered right rudder intending to proceed down the right side of the range. While the right rudder order was outstanding, Appellant, "then seeing this fellow coming up, countermanded" such order (R. 54) "before the vessel began its swing right" (R. 60) because he knew he "could not make it" (R. 54) and decided to "head across the channel" as his "best chance of avoiding a collision" (R. 54).

Appellant blew no signal of any kind while the TOWLE was out of the channel. As soon as she entered Cross Ledge Range, Appellant blew a two-blast signal (R. 53) to which he heard no assent as none was given (R. 60). Appellant heard no signal from the RIO BARIMA (R. 53) except a danger signal when "almost across its bow" (R. 62).

The pilot of the RIO BARIMA, however, sounded the first of a series of one-blast signals, to indicated a port to port passing, when the ships were approximately a mile apart.

The RIO BARIMA after having eased to her right to make room when the TOWLE was first observed well ahead and still overtaking the CIUDAD DE MARICAIBO, began reversing when there was no answer to her signal. When the TOWLE'S range lights were observed to break and that vessel began swinging across the channel the RIO BARIMA went full astern and hard astarboard (R. 32). The RIO BARIMA had no reason to anticipate such radical action by the TOWLE especially since the CIUDAD DE MARICAIBO was immediately behind the TOWLE.

The TOWLE headed easterly across the channel in front of the oncoming RIO BARIMA. When the vessels appeared to the Appellant to have crossed safely, he ordered right rudder again in order to

resume his passage down the range. At the time, the bow of the RIO BARIMA struck the starboard quarter of the TOWLE near the easterly edge of the channel.

Appellant has no prior record.

BASES OF APPEAL

1. The Narrow Channel Rule does not apply because the dredged channel involved is 1200 feet wide.
2. Even if the Rule applies, it was neither "safe nor practicable" (conditions of the Rule) for Appellant to keep right as the TOWLE was in danger of going aground.
3. If anything, Appellant was guilty of an error in judgment and not negligence, in this emergency situation.
4. The disciplinary action taken here was too severe and should have been confined to the particular pilotage endorsement involved if based on Appellant's unfamiliarity with these waters.

APPEARANCE: Captain C. E. Lundin, U. S. N.
Admiralty Division, Navy JAG
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Washington, D. C.

OPINION

Point One

Appellant's efforts to take the case out of the Narrow Channel Rule fail because the area in question fits the judicial definition of a narrow channel.

It is not correct to state that a "narrow channel" is to be determined by reference to its width or that any significance attaches to a failure to uncover a case holding a 1200 foot wide waterway to be a narrow channel. If the latter were true we could

stop here with a reference to *The Trim*, D. C. Mass., 1939, 30 F Supp. 283 which held a 1200 foot channel to be narrow. The determination is not controlled by reference to dimensions:

"I am of opinion that it is [narrow], not because it is of any definite width, or measures any particular number of yards across, but because it is a body of water so much used and used in such a manner as to render the application of article 25 * * * both proper and necessary. It was pointed out in * * * that 'channels within rule are bodies of water navigated up and down in opposite directions.'

"It is therefore not the mere physical dimensions of a strait or passage of water that determines whether it shall be called a narrow channel or not. It is the kind or character of navigating use to which that water is put." The *Hokendauqua*, S.D.N...Y., 1919, 270 F 271.

The flow of traffic in this area 'up and down in opposite directions' is indicated by the comments of the witnesses who, frequently during the course of the hearing, spoke of their navigation at the time as being governed in part at least by what they expected the other ships in the area to do as a matter of ordinary routine as predicted from their experience as pilots on these waters. These men relied to a great extent upon a pattern for traffic which is the very basis of the judicial definition of a narrow channel. Appellant refers to such a fixed pattern at least three times in stating, when called upon to estimate the other vessel's course, that the RIO BARIMA's course would be opposite his and that the RIO BARIMA was supposed to follow "a good course on the channel" (R. 59).

Appellant attempted to conform with this pattern after re-entering the channel, when he ordered right rudder so as to go down the right side of the channel. This order was countermanded because Appellant could see that the situation allowed some possibility of escape only if he took the extraordinary action of going across the channel. His election was not free. It was not what he actually wanted. He did so, however, because it was the only course open in attempting to avoid the RIO BARIMA. Finally, Appellant gave another right rudder order when he thought he was clear of the other ship.

Thus, the waterway is "narrow" both as defined judicially and as viewed by Appellant.

Point Two

Appellant offers no acceptable excuse for his failure to keep to the right whether or not the Narrow Channel Rule applied.

Appellant argues that even if the Rule applies, it was "neither safe nor practicable" for him to keep to the right because the TOWLE was in danger of grounding before coming left.

Counsel offers no authority for the argument that the proviso of the Rule (when safe and practicable) authorizes proceeding to the wrong lane in such circumstances as this. There is no justification for a vessel, originally outside the channel because of its own confusion, to extricate itself from a personal difficulty by entering the channel and attempting to avoid a collision by crossing a 1200 foot wide channel under the bows of another ship on her right side of the channel. This was negligence whether or not the Narrow Channel Rule applied.

Point Three

Here Appellant argues that he was faced with an emergency situation and was, if anything, guilty of error in judgement, not negligence.

In support of such argument, Appellant contends that the maneuver would have succeeded if the other vessel had assented to the starboard passage, held her course, or come left. However, it is difficult to see how the Appellant could have predicted success for an operation in which so much depended upon the RIO BARIMA. It was unreasonable to expect the RIO BARIMA to implicate itself in the situation by assenting to the proposal:

"* * * the latter did not respond, and without an answer the signal can be regarded only in the nature of a request * * * and established no right against her."
Yamashita Kishen Kabushiki Kaisha et al v Mc Cormick Intercostal S.S. Co. et al. 9 Cir., 1927, 20 F2 25,

26.

Assent to a starboard passing cannot be exacted, it must be requested and granted before acted upon. When it was not obtained, it was the Appellant's duty to stop, indicate danger and stand still until an understanding was agreed upon:

"* * * *The San Simeon* was clearly at fault for undertaking a starboard passing without consent, article 18 Rule 1. [Citing cases] If she thought the Commercial Mariner too close aboard to wait, careful navigation required her to sound the alarm and back." *The San Simeon*, 2 Cir., 1933, 63 F2 798, 800.

Appellant could not have reasonably expected the RIO BARIMA to hold her course or come left. It was a port to port passing situation and the RIO BARIMA was free to alter her course to the right as she did. It was unreasonable to expect her to come left especially since such action would have put the RIO BARIMA in the path of the CIUDAD DE MARICAIBO.

The fact that Appellant's action was *in extremis* is not available as a defense because this excuse is open only to one seeking to explain his action in a predicament not of his own making:

"To be an excusable mistake in extremis * * * it must be one produced by fault or mismanagement in the other vessel. [citing cases]" *The Elizabeth Jones*, 112 U.S. 514, 526.

Point Four

Appellant's final argument complains of an observation made by the Examiner as follows:

"Pilot Winskill is 70 years old, and holds a License, 'issue 9-11.' He has no prior disciplinary record with the Coast Guard. However, in view of the erratic manner in which he navigated the TOWLE on this occasion, and his

apparent unfamiliarity with the waters in which he was navigating, it is deemed that his License should be revoked."

There is no doubt that Appellant's maneuver was erratic and negligent. However, it was improper to base the order partially on the Examiner's opinion that Appellant was unfamiliar with waters in question since he was not charged with incompetence.

CONCLUSION

As the Examiner's findings on the merits of the case are supported by the record, the conclusion that the specification was proved will be sustained. However, the order is considered to be excessive and will be modified accordingly with due consideration given to Appellant's prior unblemished record.

ORDER

The order of the Examiner dated at Philadelphia, Pennsylvania, on 25 January 1961, is modified to provide for a twelve months' suspension of Appellant's license and all pilotage endorsements thereon.

As so MODIFIED, the order of the Examiner is AFFIRMED.

E. J. ROLAND
Vice Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 2nd day of April 1962.

***** END OF DECISION NO. 1300 *****

