

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 16072  
Issued to: JACK R. HERRINGTON Z-1281327

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

2012

JACK R. HERRINGTON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 23 January 1974, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's license for three months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as operator aboard the M/V HARDHEAD under the authority of the license above captioned, on or about 20 September 1973, Appellant wrongfully failed to come to a timely passing agreement while said vessel was navigating the Gulf Intracoastal Waterway at approximately Mile 14.5, west of Harvey Locks.

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

The Investigating Officer introduced in evidence the testimony of two witnesses, a deckhand on duty aboard the M/V HARDHEAD at the time of the incident and the master of the M/V SEA ISLANDER.

In defense, Appellant offered in evidence the testimony of two Coast Guard investigating officers and his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all licenses and documents issued to Appellant for a period of three months on 12 months' probation.

The entire decision and order was served on 31 January 1974. Appeal was timely filed.

#### *FINDINGS OF FACT*

ON 20 September 1973, Appellant was serving as operator aboard the M/V HARDHEAD and acting under the authority of his license. The M/V HARDHEAD, a 55 foot diesel tugboat of 50 gross, tons, was proceeding East in the Gulf Intracoastal Waterway approaching Jones Point, pushing ahead two barges loaded with crude oil. Just prior to reaching Mile 14.5, after reaching a passing agreement by radio telephone, the tow met and passed the M/V TRADE WIND. Upon approaching a bend in the Waterway, Appellant made a radio check for westbound traffic and received no response. The tow then proceeded on into the bend at a speed of about two and a half miles per hour.

In the bend Appellant sighted the lead barge of the M/V SEA ISLANDER at a distance of about 1000 feet. Appellant immediately blew one blast on his whistle to indicate a port to port passing. No response was heard. He then sounded a danger signal and started backing the M/V HARDHEAD full astern. Due to the loaded condition of the barges his tow continued to move forward, and, after again sounding a danger signal, his lead barge collided with the lead barge of the M/V SEA ISLANDER.

The M/V SEA ISLANDER, a 71 foot diesel tugboat of 178 gross tons, was proceeding West in the Intracoastal Waterway pushing five barges ahead. After clearing the Wagoner Bridge, which is at approximately Mile 12, the operator of the M/V SEA ISLANDER, Mr. Obey Simmons, checked for Eastbound traffic by radio and received no response. Prior to entering the bend Mr. Simmons sounded a long

blast bend signal. No response was heard and the SEA ISLANDER proceeded into the bend running about half speed. When his lead barge was almost at the point of the bend the lead barge of the M/V HARDHEAD came into view. Mr. Simmons blew a danger signal and commenced backing full, however, soon thereafter the lead barge of the M/V SEA ISLANDER collided with the lead barge of the M/V HARDHEAD.

### *BASES OF APPEAL*

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends on appeal the following:

- (1) That Mr. Obey Simmons, whose testimony was introduced by the Investigating Officer was not a creditable witness.
- (2) That the Administrative Law Judge failed to consider several alleged faults of the M/V SEA ISLANDER.
- (3) That the Administrative Law Judge failed to take into consideration the facts that Appellant made a radio check prior to entering the bend and sounded a one blast passing signal as soon as the lead barge of the M/V SEA ISLANDER was sighted.
- (4) That the creditable evidence introduced by the Investigating Officer did not prove the specification and charge.

APPEARANCE: Leach, Grossel-Rossi and Paysse of New Orleans, Louisiana by Michael A. Britt, Esquire.

### *OPINION*

#### I

Appellant's first three contentions of error can easily be disposed of. First, with regard to the creditability of Mr. Obey

Simmons, it is clear that his creditability was not at issue. The Administrative Law Judge found no conflicts in the testimony of the testimony of the witnesses. To prove the charge and specification the Administrative Law Judge relied solely on the fact that Appellant failed to sound the required bend signal. This finding was supported by Appellant's own testimony. Furthermore, the testimony concerning radio checks, the relative position of the two vessels immediately prior to the collision, and whistle signals once the vessels were in sight of each other was irrelevant to the ultimate issue. Thus, even if there had been a conflict, it would not be necessary to make a determination as to creditability.

Second, any alleged faults of the M/V SEA ISLANDER, even if true, would not insulate Appellant's conduct. The issue before an Administrative Law Judge is the negligence of the person charged and the fault of others, even if proved to be a greater fault, can not be used to excuse fault on the part of the party charged. The alleged faults of others, if within the jurisdiction of the Coast Guard, is left to other proceedings.

Appellant's contention that the Administrative Law Judge failed to take into consideration the facts that Appellant made a radio check for west bound traffic before entering the bend and sounded a one blast passing signal as soon as the lead barge of the M/V SEA ISLANDER was sighted is equally without merit. The Administrative Law Judge made specific findings that Appellant had initiated a radio check and sounded the one blast passing signal. It was first noted that the use of radio telephone communications to negotiate a passing agreement does not relieve one of the duty to comply with the statutorily prescribed navigation rules. The regulations promulgated pursuant to the Vessel Bridge-to-Bridge Radio-telephone Act specifically provide that "nothing in this part relieves any person from the obligation of complying with the rules of the road and applicable pilot rules." 33 CFR 26.01(b). The Administrative Law Judge also discussed Appellant's sounding of a one blast passing signal and pointed out that this was "at most, a belated effort to work out a passing agreement." The correctness of this statement is best illustrated by the fact that, even though both tug operators commenced backing full as soon as the lead barges were sighted, collision was not averted.

I turn now to Appellant's final contention, that the creditable evidence introduced by the Investigating Officer did not prove the specification and charge. It is clear from the Administrative Law Judge's Findings and Opinion that the essential fact upon which he held the charge and specification proved was Appellant's failure to sound the required bend signal. This failure is amply proved both by Appellant's own testimony (R-90) and the testimony of Mr. Wade Montgomery, the deckhand on duty aboard the M/V HARDHEAD at the time of the incident.

The Administrative Law Judge correctly points out at some length, that the failure to sound a bend signal under the circumstances existing as the M/V HARDHEAD approached this bend, was a violation of Article 18 of the Inland Rules of the Road, Rule V., 33 U.S.C. 203. The Administrative Law Judge also discusses, with extensive citation which will not be repeated here, that the failure to sound a bend signal has resulted in the imposition of civil liabilities. However, regardless of the existence in this case of a clear statutory violation, the question arises whether this violation is subsumed within the charge and specification.

The specification, laid under a charge of negligence, is in essence that Appellant wrongfully failed to come to a timely passing agreement. The sounding of the bend signal is specifically designed to initiate a timely exchange of passing signals. Article 18 of the Inland Rules of the Road, Rule V provides, in part, that should a bend signal "be so answered by a steam vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered." Thus, the sounding of a bend signal is essential to the accomplishment of a safe passage.

There is unrebutted evidence in the record that the passing situation was one involving a bend. The record also indicates that there is no disagreement with the fact that bend signals were required. In these situations the statutory procedure for accomplishing a safe passage commences with the sounding of a bend signal then, if necessary, the sounding of the usual signals for meeting and passing. Therefore, the failure to come to a timely passing agreement includes all procedures which were not taken to execute a safe passage, the first failure being the requirement for

sounding the bend signal. As a matter of law, Appellant's failure to sound the required bend signal falls fairly within the specification as drawn and is clearly negligent, as charged.

*CONCLUSION*

I find that the findings and conclusion of the Administrative Law Judge are based on substantial evidence of a reliable and probative nature and that the order of suspension was appropriate under the attendant facts and circumstances.

*ORDER*

The order of the Administrative Law Judge dated at New Orleans, Louisiana on 23 January 1974, is AFFIRMED.

E. L. PERRY  
Vice Admiral. U. S. Coast Guard  
Vice Commandant

Signed at Washington, D. C., this 8th day of October 1974.

INDEX

Collision

negligence of other vessel, materiality of  
passing situation  
tug and tow

Contributory Fault

Navigation, Rules of

compliance with  
failure to sound bend signal  
passing agreement, failure to establish  
violation as negligence

Negligence

fault of other vessel, materiality of passing  
agreement, failure to establish sound signals,  
failure to make

Witnesses

Credibility

\*\*\*\*\* END OF DECISION NO. 2012 \*\*\*\*\*

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[Top](#)