

In the Matter of License No. 42207
Issued to: FRANK W. QUINN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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FRANK W. QUINN

This appeal comes before me by virtue of Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 24 March, 1949, Appellant appeared before an Examiner of the United States Coast Guard to answer a charge of misconduct supported by a single specification alleging that while serving as Master of the Str. J.P. MORGAN, JR. under authority of License No. 42207, he did on the morning of 23 June, 1948, while on a voyage from Duluth, Minnesota, to a lower Great Lakes port with a cargo of iron ore, navigate said vessel in violation of Rule 15 of the laws relating to the navigation of vessels (Title 33 United States Code 272) in that he failed to navigate the Str. J.P. MORGAN, JR. at a moderate speed during a period of low visibility between Devil's Island and Eagle Harbor in Lake Superior.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Appellant was represented by counsel of his own choice and pleaded "not guilty" to the charge and specification.

The Investigating Officer called the Chief Officer, First

Asst. Engineer and lookout who was on watch on the J.P. MORGAN, JR. when the incident under investigation occurred; Appellant testified in his own behalf. When the hearing was concluded, the Examiner found the charge and specification "proved" and entered an order suspending Appellant's license for a period of two years,- one year outright from 15 June, 1949, and the second year on one year's probation commencing 15 June, 1950.

From that order, dated 14 June, 1949, this appeal has been taken, and it is contended, generally, that the findings, opinion, conclusion and order of the Examiner are (1) contrary to the evidence, (2) contrary to the weight of the evidence, and (3) contrary to law.

Specifically, Appellant urges:

1. Findings of Fact Nos. 4, 5, 6, 9, 10, 14, 15 and 16 are not supported by the evidence.
 - (a) Finding of Fact No. 4: Not relevant to the issues. No verbal testimony regarding weather conditions at 12:30 a.m.
 - (b) Finding of Fact No. 5: Practically all the time the visibility was in the neighborhood of 1 1/2 to 2 miles.
 - (c) Finding of Fact No. 6: No testimony to indicate that more than one vessel was in the vicinity.
 - (d) Finding of Fact No. 9: Appellant knew that the CRETE was approaching from the MORGAN, JR.'s left and was a "burdened" vessel in a crossing situation.
 - (e) Finding of Fact No. 10: No evidence in the record that the Master heard fog signals at 6:09 a.m.
 - (f) Finding of Fact No. 14: Testimony of Captain Quinn was that he ordered the wheelsman to "left some."
 - (g) Finding of Fact No. 15: No evidence in the record that the Master heard fog signals at 6:14 a.m.
 - (h) Finding of Fact No. 16: Completely fails to take into consideration the operation of the CRETE.
2. Finding of Fact No. 13 is contrary to law since the crossing rule applies in "all weather."

3. Findings of Fact Nos. 17 and 18 are contrary to the evidence.
 - (a) Finding of Fact No. 17: Official chart of Lake Superior (ex. 1) shows that while the MORGAN, JR. was following the recommended Lake Carriers Association downbound course on Lake Superior no aids to navigation could be sighted from 3:59 a.m. until the time of collision.
 - (b) Finding of Fact No. 18: Not a scintilla of evidence to support the finding of wilful or wanton acts.
4. Certain portions of the opinion of the Examiner are not supported by the evidence and are contrary to law. (These points as excepted to are covered basically in Appellant's exceptions to the findings of fact supra.)
5. There is no evidence whatever to support the Examiner's statements referring to the needless and inexcusable shoreside pressure exerted against the Masters of ore carriers.
6. The Examiner's remarks regarding Rule 23, Great Lakes Pilot Rules have no bearing on the charge and specification and are irrelevant and immaterial.
7. Exceptions are taken to the denial of Appellant's motion made at the conclusion of the Government's case to dismiss the charge and specification, and to the denial of Appellant's motion made at the conclusion of the evidence to dismiss the charge and specification.
8. Exception is also taken to the order of the Examiner for the reason that it is not supported by the law or the evidence.

Based upon my examination of the record in this case, I hereby make the following:

FINDINGS OF FACT

At all the times hereinafter mentioned, Appellant was serving as Master of the Str. J.P. MORGAN, JR., under authority of his duly

issued License No. 42207.

On the morning of 23 June, 1948, the Str. J.P. MORGAN, JR. (hereinafter identified as MORGAN) was underway on Lake Superior on a voyage from Duluth, Minnesota, to a Lake Erie port carrying about 12,800 tons of iron ore (R. 35) proceeding on the usual downbound course recommended by the Lake Carriers Association (R. 11, 135). At 3:45 a.m. the First Mate, Richard A. Grant, assumed the bridge watch (R. 10), at which time the MORGAN was approximately 35 miles east of Devil's Island (R. 15) on a course of 078 true between Devil's Island and Eagle Harbor proceeding at a speed of 10-3/4 statute miles per hour over the ground (R. 16). At that time, the chadburn was set at "full-speed," (R. 16) and remained in that position until changed to "standby" at 6:12 a.m., and then to "full speed astern" at 6:14 a.m. At 5:48 a.m., the Mate overheard a radio-phone conversation between the Str. CRETE and the Str. J.C. WALLACE at which time, the CRETE announced that she was on a course from Jack-fish Bay, Ontario, to a point two miles off Devil's Island (R. 21-23). Several minutes later, at 5:55 a.m., the Mate overheard the CRETE tell the WALLACE that she had changed course from 248 to 180 in order to get across the downbound course (R. 23). At about 6:00 a.m., the Mate sent the lookout to call Appellant (R. 20) who was then informed that "there was a boat around some place" (R. 131). Appellant immediately proceeded to the forecastle head and shortly thereafter went to the bridge, arriving there at about 6:05 a.m. (R. 20) where he was informed of the radio-phone conversations between the CRETE and the WALLACE.

Visibility during this period was variable, ranging on occasion from 1000 feet to 2 or 2 1/4 miles, -with wisps of fog or patches of varying density; intermittent fog (R. 24-135). The MORGAN was consistently blowing the regularly prescribed fog signals for a steam vessel underway on the Great Lakes (R. 25). At 6:09 a.m., Appellant called the CRETE by radio-phone and informed the CRETE that they would meet on the "one whistle" side (R. 132). At this same time, the Mate heard the fog signal of another vessel on a bearing of approximately four points on the port bow (R. 19). At 6:12 a.m., the CRETE called the MORGAN, and stated that she could not make a "one whistle" crossing and would like "two whistles" (R. 132). Appellant immediately rang a "standby" signal to his engineroom (R. 132), this being immediately preceded by sounding the danger signal by the Mate (R. 27). At this time, the Appellant ordered the wheelsman to "left some" (R. 132) or go "hard left" to reduce the angle of contact, if collision occurred (R.

132). At 6:14 a.m., the Mate heard another fog signal on the port bow (R. 19) and because of the imminent danger by the presence of another ship in the vicinity (R. 18) Appellant rang up full speed astern on the MORGAN's engines (R. 133). At 6:17 a.m., the MORGAN collided with the CRETE,-the latter vessel having appeared out of the fog on the port side at a distance of about 1000 feet approximately one minute previously (R. 31-106). The CRETE collided with the MORGAN around the bluff of the port bow while on a course virtually at right angles to that of the MORGAN. No passing signals were ever sounded by either vessel before collision occurred (R. 19). There is testimony indicating that Appellant, although on deck from about 6:00 a.m. did not "take over the navigation of the vessel from the First Mate" until 6:12 a.m. - after the second conversation with the CRETE (R. 131).

After the collision, Appellant ordered his crew to abandon ship (R. 82) because the MORGAN had sustained such severe damage that sinking seemed inevitable (R. 137). Appellant remained on the MORGAN until danger of sinking had passed; then the crew returned and the vessel was brought into port.

PREFATORY DISCUSSION

Before stating my opinion on the merits of this case, it seems appropriate that some comment be made respecting the several major points emphasized by Appellant's brief.

Without prolonging this discussion by a history of R.S. 4450 from date of origin to the present time, it is deemed sufficient to observe that the Amendments of 1936 and 1937 (36 Stat. 1167; 49 Stat. 1381 and 50 Stat. 544) have so completely and thoroughly changed its characteristics, nature, intent and purposes that instead of being "penal" in nature (Benson v. Bulger, 251 F. 757, Aff. 262 F. 929 - 9 CCA 1920) it became "remedial"; and it has been so treated by the Secretary of Commerce during his administration of the Act as well as by the Commandant of the Coast Guard since that function was transferred to this Agency by Executive Order 9083 dated 28 February, 1942.

Correspondingly, the Act has been considered one which falls directly under the rules governing "administrative practice and procedure" rather than rules of practice and procedure applicable

to civil, criminal or quasi-criminal cases. The published regulations promulgated by the Secretary of Commerce and latterly by the Commandant of the Coast Guard have officially recognized this distinction and, insofar as practicable, have brought proceedings conducted under R.S. 4450 (46 U.S.C. 239), as amended, within the terms and provisions of the Administrative Procedure Act (5 U.S.C.1001 et seq.).

Thus, while all applicable civil constitutional rights of a person or persons involved in such (R.S. 4450) proceedings must be preserved and secured, it should be appreciated that any sanctions available to the Coast Guard in the fulfillment of its mandatory, statutory duty to protect as far as it is possible, the safety of lives and property on vessels of the American Merchant Marine, may, and will be invoked by the standards established for "administrative practice and procedure" - and no others.

It follows, therefore, that judicial rules and practice requiring meticulous precision in pleading have no application to these cases; nor is the standard of proof obtaining before a judicial forum essential to establish a charge, and specifications thereunder, presented to a Coast Guard Examiner. In the first instance, it is sufficient to charge and particularize the faults, etc. and to recite sufficient facts to inform the person or persons whose marine documents are under investigation that an adequate defense may be prepared and presented. In the second instance, it is not necessary to prove the allegations by a "preponderance of the evidence" or "beyond a reasonable doubt," but "substantial" evidence alone will support an Examiner's findings and order.

The "substantial evidence" rule has been aptly set forth in the cases of *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 F. 641, 643; *N.L.R.B. v. Union Pacific Stages*, 99 F. 2d. 153, 177; and *Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229.

In *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, supra, the court stated:

"By 'substantial evidence' is not meant that which goes beyond a mere 'scintilla' of evidence, since evidence may

go beyond a mere scintilla and not be substantial evidence. Substantial evidence must possess something of substance and relevant consequence and not consist of vague, uncertain or irrelevant matter, not carrying the quality of proof or having fitness to induce conviction. Substantial evidence is such that reasonable men may differ as to whether it establishes plaintiff's case, and if all reasonable men must conclude that it does not establish such case, then it is not substantial evidence."

In *N.L.R.B. v. Union Pacific Stages*, supra, the court stated:

"`Substantial evidence' means more than a mere scintilla. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom, and, considering them in their entirety and relation to each other, arrives at a fixed conclusion."

The Supreme Court of the United States in *Consolidated Edison Co. of N.Y. v. N.L.R.B.*, supra, stated:

"`Substantial evidence' is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Apropos this subject generally, the following comments of the United States Supreme court clearly state the distinction to be drawn between the administrative agency disposition and judicial disposition of matters presented for determination. In the case of *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 229, the Court stated:

"The companies urge that the Board received `remote hearsay' and `mere rumor'. The statute provides that `the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative

boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order." (citing cases)

In the case of *Helvering v. Mitchell*, 303 U.S. 391, 399, the Supreme Court stated:

"Remedial sanctions may be varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted * * *. Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789. Act of July 31, 1789, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions."

Further elaboration on this subject was made by the Supreme Court in the case of *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142, wherein the Court Stated:

"Administrative agencies have powers themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mold Congress has cast more recent administrative agencies, 'should not be too narrowly constrained by technical rules as to the admissibility of proof', should be free to fashion their own rules of procedure and to pursue methods capable of permitting

them to discharge their multitudinous duties * * *. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

Appellant urges that a charge of "misconduct" here is improper. The legal distinction is drawn between "misconduct" and "negligence" or "inattention to duty" or "incompetence." I recognize such distinctions, and am disposed to concede that a charge of "negligence" would have stated the case more aptly, but on this record, it is my opinion only a fine line of technical import lies between "misconduct" and "negligence" or "inattention to duty" - and here, the terms could be considered as synonymous, interchangeable or alternative without, in the least, affecting Appellant's accountability for his acts of commission or omission on the occasion under investigation. I find no sound basis for disturbing the Examiner's order on this charge, although, as stated above, I believe a more appropriate designation of any fault charged against Appellant would have been preferably stated as "negligence" or "inattention to duty."

Certainly, there is nothing in this record warranting a finding that Appellant wantonly or maliciously contributed to the collision. But "misconduct" in this case is based upon the doing of a wrongful act or the failure to perform properly a duty which Appellant was obligated to execute. A determination of this situation will resolve Appellant's immunity or fault.

OPINION

Appellant's main arguments for reversal of the Examiner's order basically include the proposition that the MORGAN was proceeding at a moderate speed in compliance with Great Lakes Rule 15, and that under the circumstances existing, Appellant was justified in reversing the MORGAN's engines while proceeding at full speed ahead.

Great Lakes Rule 15 states as follows:

"Every vessel shall, in thick weather, by reason of fog,

mist, falling snow, heavy rain storms, or other causes, go at a moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other.

"The mandate contained in this rule that vessels shall go at a moderate speed in thick weather is undoubtedly the first of all safety measures of the sea. In a very old case, the court held that:

"The requirement that steamers in a fog go at a moderate speed is not an arbitrary enactment, but a statutory recognition and application in a special case of the universal rule which requires prudence and caution under circumstances of danger." (*The Rhode Island*, (1883) 17 F. 554)

In defining "moderate speed" the United States Supreme Court has said:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she could see through the fog. This is the rule laid down by this Court in the case of *The Colorado*, 91 U.S. 692, 702, citing *The Europa*, 2 Eng. Law & Eq. 557, 564, 14 Jurist pt. I, 627, and *The Batavier*, 40 Eng. Law & Eq. 19, 25 and 9 Moore, P.C. 286."

The above definition of "moderate speed" is supported by more recent decisions:

"It was a violation of the statutory requirement of moderate speed in fog for a vessel to travel at such speed that she was unable to stop within the distance her captain could see ahead." (*The Southern Cross*, 93 F.2d 297)

"Vessel must be under control so as to stop within the distance at which another vessel can be seen." (*The Quirigua*, 17 Fed. Supp. 311)

"It is negligence for a vessel to proceed at such a speed as will not permit her to stop within the distance that she can see ahead of her." (*The Welcombe*, 19 Fed. Supp. 874)

The District Court in New York in 1904 stated:

"A steamship must be held in fault for a collision with another in a fog, notwithstanding the clear fault of the latter in running at an excessive speed, where she was likewise maintaining an excessive speed." (*In re Clyde S.S. Co.*, 134 F. 95)

The testimony of the witnesses in this case gives no positive indication as to the limit of visibility existing about the time of the collision. Variable as the visibility may have been, it is clear that the lower limit of visibility was in the vicinity of 1000 feet. The Mate consistently estimated the lower limit of the variable visibility in the vicinity of 1000 feet using such words as "1000 feet to 1500 feet, wisps of fog," "could see at least 1000 feet at the time of the collision," "least visibility 2 ship lengths." Appellant in his own testimony stated that the visibility was variable with wisps of fog, that the visibility would be 2 ship lengths and then one mile to one and one-half miles. The lookout, Young, testified that the CRETE appeared out of the fog about one minute prior to the collision. Conceding that the CRETE was making twelve miles per hour, this would place the CRETE at a distance of 1200 feet from the MORGAN when she first appeared out of the fog. In spite of the fact that visibility was at times from one and one-half to two miles, prudent and cautious navigation should have compelled the MORGAN to proceed at a speed which would have enabled her to stop within the lower limit of the visibility, namely, 1000 feet. Appellant's own testimony indicates that under somewhat similar circumstances existing at the time of this collision a later test of the reversing characteristics of the MORGAN revealed that she did *not* come to a complete stop until she had travelled a distance of 1800 feet. This clearly indicates that

the MORGAN was exceeding "moderate speed" under Great Lakes Rule 15. Appellant was on the bridge of the MORGAN at 6:05 a.m., 12 minutes before the collision. Knowing that at least one other vessel was in the vicinity, had he then reduced the speed of his vessel, this collision could and would have been averted.

There is no evidence that the Appellant personally heard the fog signals from the CRETE; however, he had been told of the signals heard by the Mate, and from his own conversation with the CRETE at 6:09 (still 8 minutes from collision), he was aware that there was a vessel in the vicinity, and at that moment prudent and cautious navigation should have led him to have reduced the speed of his vessel.

Counsel for the Appellant urge that Captain Quinn *knew* the *position* of the CRETE, but this contention is not borne out by the testimony which merely shows that Appellant knew that the CRETE was on his port side on a course of 180. Appellant only had an approximation of the bearing of the CRETE and no assured knowledge of her *distance* away.

It is further urged that an agreement was reached by radio-phone to a meeting "on the one whistle side." This is also not borne out by the testimony which merely indicates that Appellant expressed a desire for the "one whistle" meeting and the CRETE expressed the desire for a "two whistle" meeting. No agreement was ever reached, yet the MORGAN continued at the same speed. It must be pointed out that regardless of any agreement made by radio-phone, this procedure cannot be accepted as a substitute for the statutory requirements for passing signals to be made. In this case, the record is void of any reference to passing signals sounded by either vessel.

I am of the firm conviction that under the circumstances in this case, if the MORGAN had been proceeding at a "moderate speed" in compliance with Great Lakes Rule 15, and if the Appellant had timely reduced the speed of his vessel to bare steerageway upon being informed of the presence of the CRETE as required by Rule 15, the collision could have been averted.

Appellant urges that he did not assume the navigation of the MORGAN until 6:12 a.m. and that from the time he took over the

navigation of the vessel his efforts were directed to getting the way *off* the vessel in an effort to avoid the collision. I find this position taken by the Appellant to be completely untenable in view of the fact that the Appellant was on the bridge with the Mate at 6:05. As occupied as the Captain may have been at this time by other details, I cannot accept the view that the responsibility for the safe navigation of the vessel did not rest upon him as soon as he was apprised of the situation. Such a view as taken by the Appellant is contrary to the traditional concepts of vessel navigation.

Here, because of reduced visibility, Appellant could not see, but knew another vessel was on a course which crossed his own. Certainly, if he knew the opposing vessel's position, distance off and *speed* and took no preventive action until said vessel came into sight 1000 feet distant, his failure to reduce speed earlier borders upon criminality. However, this record does not develop that he had such knowledge. I am satisfied that when Appellant placed the chadburn on stand-by at 6:12 a.m. he had ample reason to anticipate navigational complications because the opposing vessel was not in sight.

Coming now to Appellant's various exceptions to the findings, conclusion, opinion and order entered by the Examiner in this case:

Under the provisions of 46 U.S.C. 239(g), I am authorized to alter or modify any finding made preliminary to my consideration of an appeal. I am also directed to "recite the findings of fact" upon which my decision is based.

There is little doubt that certain "findings" of the Examiner were not fully supported by the evidence, but I am not convinced that Appellant was substantially or irretrievably prejudiced thereby. It is believed any errors appearing in the Examiner's findings and conclusions have been corrected by the findings of fact stated herein. Therefore, so far as the Examiner's findings are inconsistent with my findings, Appellant's exceptions are sustained to Examiner's Findings Nos. 4, 5, 6, 10, 15 and 18. Appellant's exceptions to Findings Nos. 9, 13, 14 and 16 are overruled.

Appellant's exception to the conclusion of law is overruled.

Insofar as the Examiner's opinion is inconsistent with the opinion herein stated, Appellant's exceptions are sustained to items (a) through (i). Exceptions (j) and (k) are sustained without qualification. Exceptions to the Examiner's rulings (a) and (b) are overruled. Subject to that which appears hereinafter, exception to the Examiner's order is overruled.

I am fully conscious of the judicial practice to digress from the merits of a case and express opinions on subjects not at issue nor necessary to a decision thereof. But I find little justification for a Coast Guard Examiner to indulge in such practice, since his function is essentially to discover pertinent facts of the matter before him, and enter an order based upon those facts. The opinion required by Coast Guard routine contemplates fidelity in following the record, and deviation therefrom into a field of information foreign to the specific issues to be decided should be discouraged. In my opinion, the Examiner's language to which exception (j) is addressed violated this principle and served no useful purpose toward a decision of this case. I trust no repetition of this nature will occur.

The same observations may be made concerning the Examiner's remarks which are challenged by exception (k). It should be borne in mind that the Pilot Rule attacked by the Examiner is, with minor variations, based upon 33 U.S.C. 288, Act of 8 February, 1895, c. 64, sec. 1, 28 Stat. 649. Attention is specifically directed to the date of enactment.

CONCLUSION AND ORDER

There is substantial evidence to support any specification in this case.

However, based upon my appreciation of certain facts revealed by the record, of which the Examiner has taken notice, and in view of the past good record of the Appellant, I hereby direct that the order of the Examiner dated 15 June, 1949, be MODIFIED to read "That License No. 42207 and all other valid licenses, documents or certificates now held by Frank W. Quinn be, and the same are hereby suspended for a period of 12 months, the first two months outright from the date of surrender of his current temporary documents, and

the last ten months on probation." The order as MODIFIED is
AFFIRMED.

J.F. FARLEY
Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 15th day of Nov., 1949.

***** END OF DECISION NO. 381 *****

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