

In the Matter of License No. A-16 465
Issued to: LAWRENCE B. ADAMS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

417

LAWRENCE B. ADAMS

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

On 28 October, 1949, an Examiner of the United States Coast Guard at Boston, Massachusetts, suspended License A-16 465 issued to Lawrence B. Adams upon finding him guilty of "negligence" based upon two specifications alleging, in substance, that while serving under authority of the document above described, on or about 24 July, 1949 as Master of the S. S. AMERICAN VETERAN, while said vessel was proceeding into Boston Harbor in the main channel near No. 2 and 2A channel buoys, overtaking the M/B MARIE S. he failed to sound proper signals which resulted in collision with said motorboat; and at the same time and place he failed to keep or maintain or cause to be kept a proper lookout. A third specification alleging failure to go at moderate speed was dismissed.

At the hearing, Appellant was represented by counsel of his own selection and entered a plea of "not guilty" to the charge and each specification.

Thereupon, the Investigating Officer introduced certain edited excerpts of testimony given by witnesses at the preliminary investigation of the case.

In defense, Appellant offered his own testimony and the testimony of other witnesses who had appeared at the preliminary investigation.

When the hearing was concluded, having heard the argument of the Investigating Officer and counsel for Appellant, the Examiner found the charge "proved" by proof of specifications No. 1 and 2, and entered an order suspending Appellant's License No. A-16 465 for a period of six months; of which the last four months shall not be effective provided no charges under R.S. 4450, as amended, are proved against Appellant for twelve months from 28 October, 1949.

From that order, this appeal has been taken, and it is urged:

- (1) The second specification was substantially defective; in that it did not specify wherein Appellant failed to maintain a proper lookout. (Br.5)
- (2) Negligence, as used in R.S. 4450, as amended, does not have the same meaning as the term "Negligence" used in determining civil liabilities. (Br.7)
- (3) The Master is not answerable for the errors or negligence of the ship's compulsory pilot. (Br.12a)
- (4) The decision not to blow passing signals was a proper exercise of reasonable judgment. (Br.13)
- (5) The manner of maintaining a "proper lookout" is primarily addressed to the sound judgment of the Master. (Br.15)
- (6) The Examiner erred in failing to make specific findings. (Br.17)
- (7) The Order is grossly excessive. (Br.17)
- (8) The Coast Guard has not "equally" applied existing law because no action has been taken, or is contemplated, against the pilot.

APPEARANCES: Messrs. John J. Hanrahan and J. I. Dugan, of New York City, for Appellant.

Based upon my examination of the Record in this case, and for the purpose of this appeal, I shall adopt, insofar as they conform to my own views, Appellant's statement (Br. 2-4) as my

FINDINGS OF FACT

"Lawrence B. Adams is a master mariner; now over seventy years old and has been going to sea continuously since he was about fifteen. He received his master's license when 21 years old, and since 1915 has been a master of ocean-going vessels. He has served on all types of ships and in all oceans and served at sea with distinction throughout both World Wars. He has never been the subject of any charges for any reason, except for the charges growing out of the present matter.

"On July 24, 1949, Capt. Adams was master of the SS AMERICAN VETERAN which was being operated by the United States Lines Company and by whom he has been employed for the past 24 years. On that day, his vessel arrived at Boston Lighthouse on a voyage from Philadelphia to Boston and took aboard Pilot I. Bailey, a duly licensed, qualified and compulsory Boston Harbor Pilot. Pilot Bailey has served for 38 years as a Pilot on Boston Harbor, and was thoroughly acquainted with the harbor and its local customs.

"Sunday, July 24, 1949 was a clear calm day. At 1557 the SS AMERICAN VETERAN proceeded from the Lightship towards Boston Harbor via the main ship channel at a reduced speed of approximately 12 1/2 knots. Pilot Bailey was conning the ship but Capt. Adams and the ship's second mate were on the bridge together with a quartermaster at the wheel. At 1640, 2 minutes after passing Deer Island, the ship's speed was reduced further to approximately 8 knots and about the same time, Pilot Bailey and Capt. Adams first observed a small vessel, which later proved to be the MARIE S.

"The MARIE S. was a gasoline-powered excursion fishing craft, about 38 feet in length, operated by its owner, Charles E. Stevens, who was navigating the boat from her enclosed wheelhouse which afforded very limited observation. The crew consisted of an engineer and two "guest" deckhands. No lookout was posted, for vessels approaching from astern. The MARIE S. was returning homeward, towards Boston, after a day's fishing excursion, with a party of 16 persons, and was proceeding in the main ship channel,

making about 5-6 knots, on a course parallel to and about 200 feet to the port of the AMERICAN VETERAN's course. When first noticed, the MARIE S. bore off the AMERICAN VETERAN's port bow, and was one of upwards of 20 small pleasure or excursion boats navigating in the vicinity, some in and some out of the main channel, and bearing in all directions from the AMERICAN VETERAN.

"Although the AMERICAN VETERAN was slowly overtaking the MARIE S. the latter was on a course well clear to port, and in the existing conditions, Pilot Bailey, who was intimately familiar with the harbor and local customs, did not blow any whistle signals, because of the danger of creating confusion amongst the small craft. He testified that it is an established custom in Boston Harbor not to blow signals under such circumstances.

"Capt. Adams had Pilot Bailey under constant observation throughout the trip. He found nothing in Pilot Bailey's conduct which in any way indicated that he was not an experienced and competent pilot.

"As the steamship approached buoy 2A, Pilot Bailey went to the starboard wing of the bridge in order to make certain that the ship, which was hugging her extreme starboard side of the channel, did not hit the buoy as she made the required turn to starboard at that point. Capt. Adams kept the MARIE S. under observation from his position on the port wing of the bridge. The Chief Officer and carpenter were on the forecastle readying the anchor.

"When Pilot Bailey ordered right rudder to alter course at Buoy 2A, Capt. Adams stepped to the open door of the pilothouse, and observed the quartermaster swing the wheel as directed. Immediately thereafter he observed that the MARIE S. had disappeared from view and correctly surmised that she had swung to her right under the ship's bow. He, at once, rang emergency full astern on the engine, but, in spite of his prompt action, the vessels collided and the MARIE S. was cut in half about amidships. One woman passenger was killed and several received minor injuries."

No whistle signals were sounded at any time by the SS. AMERICAN VETERAN for permission to overtake and pass the MARIE S.

OPINION

In my opinion, Examiner Gould has very ably disposed of this case, and had not Appellant presented new propositions on this appeal I might safely adopt the Examiner's expressions as my own. I will, however, discuss each point now urged, in the order of presentation.

I. *The second specification was substantially defective.*

It is urged that Appellant should have been informed by the second specification, the precise manner in which the duty to keep a proper look-out was breached; that Appellant was left in a position of facing a vague and uncertain charge, which denied him an opportunity to prepare an adequate defence.

The Administrative Procedure Act, 5 U.S.C. 1004(a-3) provides that persons entitled to notice of an agency hearing "shall be timely position informed **** of the matters of fact and law asserted." And the Attorney General Manual (1947) explains this provision as follows:

"It is not required to set forth evidentiary facts or legal argument. All that is necessary is to advise the parties of the legal and factual issues involved," (P. 47).

I do not understand that the same precision and nicety of pleading is required before administrative tribunals as is necessary in proceedings before the courts. I believe a specification is sufficiently informative if the person charged is fairly well advised of the charge he has to meet; that he can identify the offense charged and prepare whatever defense he may have. From the nature of the defense presented here, it is quite apparent that Appellant was fully informed - and advised.

There is no merit to this contention; the Examiner properly overruled Appellant's objections to the second specification.

II. *Negligence as used in R.S. 4450, as amended, does note the same meaning as the term "Negligence" used in determining civil liabilities.*

It is contended that R.S. 4450 is "penal" in character, and *Bulger et al v. Benson*, 262 F. 929, 932 and *Fredenberg et al v. Whitney et al*, 240 F. 819 are cited in support of the proposition. These cases were decided in 1920 and 1917 respectively. R.S. 4450 was amended in 1936(49 Stat. 1381) and 1937(50 Stat. 544). The only reported case involving the amended statute is *In re Certificates etc. to Soto et al*, 13 F. 2, 725 (D.C. N.Y. 1947). But, in the meantime, successive Secretaries of Commerce (January 1940 - March 1942) and successive Commandants of the Coast Guard have uniformly, and without deviation in any particular, held the amendment of 1936 to R.S. 4450 converted the "penal" statute in force during 1917 and 1920 into one of a remedial character; and have correspondingly held *Bulger v. Benson* and *Fredenberg v. Whitney* no longer controlling or even persuasive on the question now presented. *A fortiori* is this true where, as here, the proceedings generally follow the requirements of the Administrative Procedure Act, *supra*.

Apart from other considerations, it is now well settled that the contemporaneous construction given by the executive department or personnel of the government charged with administration and enforcement of the law is controlling, and the judicial branch will not favor any deviation from such interpretation except for most cogent and imperative reasons.

Stuart v. Laird, 5 U.S. (1 Cranch) 298,308(1803);
The Laura, 114 U.S. 411.416 (1884);
Schell's Exectrs v. Fauche. 138 U.S.
562, 572(1890);
United States v. Alabama R.R. Co., 142 U.S. 615,
621(1891);
20 O.A.G. 399, 406(1892).

Accordingly, I hold that any ambiguity respecting the character of R.S. 4450 (46 U.S.C. 239) as it exists in amended form is conclusively settled by the decisions of the Secretaries of Commerce and my own predecessors during the period of its administration by the Department of Coast Guard from 1940 to this

date.

What constitutes "negligence" in administrative proceedings does not necessarily rest upon the standard of proof required in either a civil or a criminal case. But, I see no problem here respecting the definition of the word as applied to this situation.

Positive law *prohibits* an overtaking vessel to pass one overtaken without the latter's assent or permission. 33 U.S.C. 203, Rule VIII; 208, 209. Appellant neither sought the assent of the overtaken vessel, nor took any action to announce his presence in a situation clearly developing into one of peril. Appellant failed to keep out of the way and collided with said overtaken vessel. In my opinion, Appellant's clear violation of laws which were intended to promote safety is unquestionably "negligence" by any standard. See

Ross v. Hartman, 139 F 2d 14, (App. D.C.)
cert.den. 321 U.S. 790;
Eberhart v. Abshire, 158 F 2d, 24; (CCA. Ind.);
Baker & Co. v. Legaly, 144 F 2d. 344 (CCA.Okla.);
Armit v. Loveland, 115 F.2d.308 (CCA. Pa.);
Bushnell v. Telluride Power Co.; 145
F.2d.950(CCA.Utah);
Jackson v. Blue; 152 F.2d 67 (CCA. Va.).

III. *The Master is not answerable for the errors or negligence of the ship's compulsory pilot.*

This point has been settled, to my satisfaction, by the Examiner's opinion, and the authorities there cited.

My only comment is that the argument presented does not conform to the known facts of record. Appellant's vessel was steadily "observed to be standing into danger" by the Appellant, himself; but he took no corrective action until collision was inescapable.

IV. *The decision not to blow passing signals was a proper exercise of reasonable judgment.*

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"The statutory rules of navigation are and admit of no option or choice. If subject to the caprice or election of navigators, they would not only be of little value but worse than useless. As Judge Hughes says. (The Clara Davidson, 24 F. 763) 'If the statutory rules of navigation were only optionally binding, we should be launched upon an unbounded sea of inquiry in every collision case, without rudder or compass, and be at the mercy of all fogs and mists that would be made to envelop the plainest case, not only from conflicting evidence as to the facts, but from the hopelessly conflicting speculations and hypotheses of witnesses and experts, as to what ought to or might have been done before, during and after the event, ****'" Sec. 85, 201.

remarks

Marsden on Marine Collisions, (8 Ed. 1923)

that there is a positive duty to observe the

regulations

(for Preventing Collisions at Sea), and "departure from them is only justified by necessity. Non-observance is *prima facie* negligence, therefore, it would seem that unless it can be clearly shown that the departure from the regulation either did not in fact wholly or in part cause the collision, or was in fact right under the circumstances, non-observance will involve blame." (p.5).

See also Hughes on Admiralty (2Ed. 1920) pp. 291-295.

In *The Sunnyside*, 91 U.S. 208,210, Mr. Justice Clifford quite aptly remarked:

"Rules of navigation are adopted to save life and property; and they required to be observed, and are enforced to accomplish the same beneficent end, and not to promote collisions."

And that thought has been followed consistently ever since the rules were promulgated. I find no sound reason which justified a departure from the positive statute and long settled jurisprudence which governed the situation as it developed between 4 and 5 p. m. on a clear, calm Sunday, 24 July, 1949.

"Those rules are the law of laws in cases of collision.

They admit of no option or choice. No navigator is at

liberty to set up his discretion against them." Hughes,

J. in *The Clara Davidson*, supra. p. 765.

There is no ambiguity in the language of the 18th Article, Rule VIII (33 U.S.C. 203). The overtaking vessel *shall* sound her whistle indicating a desire to pass the vessel ahead. There is nothing permissive or optional about that word but a peremptory mandate which does not call for the exercise of "judgment" except respecting the side on which the passing is desired. That mandate is implemented and made even clearer by the statements following, culminating in the direction,

*****and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals.* (Underlineation supplied).

Article 23, (33 U.S.C. 208) again employs the mandatory "shall" when directing a burdened vessel to keep out of the way of a privileged vessel by slackening speed, stopping or reversing.

Finally, Article 24, (33 U.S.C. 209) in clear, precise terms, directs:

"Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel. (Underlineation supplied.)

I find nothing in the law or the jurisprudence relating to signals to be sounded in an overtaking situation, which gives any Master an opportunity for the exercise of "judgment". And I doubt the chaotic situation visualized by Appellant's brief will result from the Examiner's decision in this case.

But, says Appellant, the 18th Article became superseded by the 29th Article - which he calls the "Rule of Special Circumstances." However, it is now well settled that departure from the general rules of navigation is not favored by the courts, and exceptions are not to be lightly made; they are admitted with great caution, and only when imperatively, required by the special circumstances of the case to avoid immediate danger, and then only to the extent that the danger demands. 11 C.J. 1162, sec. 248, citing cases.

I find nothing in this Record to warrant holding that the Special Circumstance Rule excused Appellant's failing to sound whistle signals as he approached the MARIE S.

The comments of Rear Admiral Shephard *before* the Motor Boat Safety Conference, in New York on 12 January 1950, as reproduced in Appellant's brief (p. 15) have been noted; but I find nothing therein to justify the Master of a large steam vessel who fails to take action for avoidance of collision by announcing the presence, and approach, of his vessel before the situation became critical and collision was inevitable.

Incidentally, it may be noted that Article 18, Rule III, (33 U.S.C. 203) specifically describes a whistle signal to be sounded, if *from any cause* a vessel is in doubt respecting the course or intention of another. The First Circuit Court of Appeals in the *Ottoman*, 74 F. 316 held a vessel at fault for not promptly sounding the alarm signal when she failed to understand the intentions of an opposing vessel.

In *The James M. Thompson*, 12 F. 189, Judge Addison Brown sitting in the District Court, said:

"In navigating a narrow stream, checked with vessels on either hand, active diligence to avoid collisions and the use of all available means, including the giving of prompt signals in case of any apprehended dangers, are among the obvious and ordinary duties of navigation."
(Citing cases).

V. *The manner of maintaining a "proper lookout" is primarily addressed to the sound discretion of the Master.*

It is urged that Appellant was "exclusively engaged in acting as lookout, and thus it is beyond question that the standards were met."

Although, for some period of time Appellant had been keeping the MARIE S. under "constant observation", he did not see the collision; and he did not know when the overtaken vessel had altered its course to the right. On Appellant's own statement of fact, he addressed his attention to another subject and moved from a position where he had a clear view of the MARIE S. to another place where he could not possibly have kept the overtaken vessel under "constant observation", because the hull of his own vessel was between him and the MARIE S.

Accepting the contention as sound, it is very clear that the facts in this case do not demonstrate Appellant's efficiency or capability as a lookout on the occasion. In fact, Appellant, acting as lookout clearly violated the rule respecting "lookouts on vessels in crowded waters" announced by the Supreme Court in 1871.

"The waters near the City of New York are at all times crowded with shipping. Navigation there is not unlike the traveller threading his way through the mazes of a forest, with the difference that most of the objects to be avoided are also in motion. The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. *A moment's negligence on his part* may involve the loss of his vessel with all the property and the lives of all on board. The same consequences may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirements rises according to the power and speed of the vessel in question. *It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety*

*for other vessels. **** It is the duty of all courts charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculcated until she vindicates herself by testimony conclusive to the contrary."* (Underlineation supplied.) *The Ariadne*, 80 U.S. (13 Wall.) 475, 478, 479:

Citing:

The Louisiana v. Fisher, et al., 62 U.S. (21 How.) 1;
Chamberlain v. Ward, 62 U.S. 548, 570;
Genesee Chief, 53 U.S. (12 How.) 443, 462;

This case was followed in the Supreme Court as late as 1921 in *British Columbia Co. v. Mylroie*, 259 U.S. 1,7. There Chief Justice Taft observed:

"The injunctions with respect to the *necessity for a lookout devoting his whole attention to the situation ahead*, contained in the opinions of this court, are so many that it is hardly necessary to refer to more than one, that of the *Ariadne*, 13 Wall. 475, ****".

So, while the manner of maintaining a "proper lookout" may have been addressed to the sound discretion of this Appellant, the unfortunate results obtained in this case do not reflect favorably or creditably upon either his discretion, as Master, or his competency as lookout.

VI. *The Examiner's failure to make specific findings.*

If the Examiner erred in making individual or specific "Findings of Fact" under current regulations (46 C.F.R. 137.09-60) the error is not prejudicial or reversible. The Federal Rules of Procedure have no application here; and

the Attorney General's Manual (p.86) on the Administrative Procedure Act expressly states, respecting Sec. 8(b),:

"An agency which issues opinions in narrative and expository form may continue to do so without making separate findings of fact and conclusions of law. However, such opinions must indicate the agency's findings and conclusions on material issues of fact, law or discretion with such specificity `as to advise the parties and any reviewing court of their record and legal basis.' "

VII. *The Order is grossly excessive.*

In my opinion, the Examiner's Order in this case is startlingly lenient. I find no reason to criticise or modify the term of suspension which has been ordered.

VIII. *Equal application of the laws.*

Appellant suggests the "unfairness" of the Coast Guard which has proceeded against him, but has taken no action against the compulsory pilot.

The pilot here was acting under his state pilot's license, and therefore was amenable to discipline by the state authorities provided in 3 Massachusetts Laws Anno.Ch. 103. These authorities include the Pilot Commissioners and the Boston Marine Society, and penalties prescribed include suspension and revocation of the license in question. Until it is conclusively established that these authorities will take no disciplinary action, any steps taken in that direction by the Coast Guard would tend to multiply possible suspension orders - a procedure more inequitable than that against which Appellant now inveighs..

CONCLUSION

No good reason appears to warrant my interference in this case.

ORDER

The Order of the Examiner dated Boston, Massachusetts, on 28 October 1949 is AFFIRMED.

M. C. Richmond
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 17th day of April, 1950

***** END OF DECISION NO. 417 *****

[Top](#)