

In the Matter of License No. 15592
Issued to: W. J. AMMERMAN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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W. J. AMMERMAN

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.

On 20 March, 1950, an Examiner of the United States Coast Guard at Seattle, Washington, suspended License No. 15592 issued to W. J. Ammerman upon finding him guilty of "negligence" based upon two specifications alleging in substance that while serving as Pilot on board the American S.S. FAIRLAND, under authority of the document above described, on or about 31 December, 1949, while navigating said vessel in Elliott Bay, Seattle Harbor, Washington, he failed to sound the three blast signal required by Article 28 (33 U.S.C. 213) when his vessel's engines were going astern and he continued the forward motion of his vessel into a situation which he knew or should have known was dangerous, as required by Article 29 (33 U.S.C. 221), which resulted in a collision with a tow, the MT-6. The First specification, alleging that Appellant was negligent for having failed to sound the danger signal as required by Article 18, Rule III, when he did not know the intentions of other vessels underway in the vicinity, was dismissed on motion of Appellant's counsel due to lack of proof.

At the commencement of the hearing, it was agreed by all the parties concerned to consolidate Appellant's hearing with that of the Master of the FAIRLAND for the purpose of taking of testimony. The Master of the FAIRLAND was charged with "negligence" based on three specifications exactly similar to those proffered against Appellant. At the conclusion of the hearing, all three specifications and the charge were found "not proved" as to the Master, and the charge against him was dismissed.

Appellant was given a full explanation of the nature of the proceedings and the possible consequences. He was represented by counsel of his own selection and he entered a plea of "not guilty" to the charge and each specification. Before arraignment, a motion by counsel to dismiss the case on jurisdictional grounds was denied by the Examiner.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of Appellant (as part of the case against the Master of the FAIRLAND), the Master of the FAIRLAND, the Master of the tug SANDRA FOSS, the Captain of the barge MT-6, the First Assistant Engineer of the FAIRLAND who was on watch at the times in question, and the seaman who was the lookout on the FAIRLAND at the time of the collision. The Master of the tug MILWAUKEE testified briefly but then refused to answer further questions on the ground of self-incrimination. The Examiner temporarily excused the latter witness while he considered this problem but no decision on the matter was required since both the Investigating Officer and counsel for Appellant later agreed that they required no further testimony from the Master of the MILWAUKEE. It was stipulated that Appellant's testimony should be used in deciding his own case. The Investigating Officer then rested.

Counsel then made a motion to dismiss the specifications for lack of proof and renewed his motion for dismissal on the ground that the Coast Guard had no jurisdiction since the specifications are penal in nature and the exclusive penalty for the violations alleged is provided by 33 U.S.C. 158. It had previously been stated that Appellant and the Master of the FAIRLAND had received notice of proposed assessment of fines under 33 U.S.C. 158. The Examiner granted the motion to dismiss the first specification for lack of proof but he denied similar motions with respect to the

second and third specifications. Again, he denied the motion to dismiss on jurisdictional grounds.

Appellant offered no evidence in defense except his own prior testimony as the Investigating Officer's witness and a diagram obtained from the Master of the SANDRA FOSS on cross-examination.

After having considered the proposed findings and conclusions submitted by both parties and having heard their arguments, the Examiner found the charge "proved" by proof of the two specifications and entered an order suspending Appellant's License No. 15592, and all other valid licenses held by him, for a period of six months on twelve months probation.

On 14 April, 1950, the hearing was reopened to consider a motion by Appellant's counsel that the testimony of the Master of the MILWAUKEE, taken at the investigation, be admitted in evidence in accordance with a stipulation that was entered into between all the parties concerned at the time of the former investigation. The motion was denied by the Examiner.

From that order this appeal has been taken and it is urged that the decision is not supported by the evidence or the law and that the Examiner had no jurisdiction in this matter.

With respect to the failure to sound the backing signal, it is contended that this was not negligence because the FAIRLAND was placed in extremis through no fault on Appellant's part and he exercised his best judgment in the emergency operation of attempting to extricate his vessel from this predicament. The first in extremis situation resulted because there was no light at the after end of a tow as required by Pilot Rule for Inland Waters 80.32. The FAIRLAND was again put in extremis because a tug and tow (Barge MT-6) failed to stay clear of the privileged FAIRLAND. Since Appellant was not reasonably required to anticipate these situations, his erroneous conduct in extremis was not negligence. Appellant also claims that the sounding of the backing signal would not have aided in preventing the collision with the Barge MT-6 since the Captain of the latter observed the maneuvering of the FAIRLAND and did nothing about it.

Concerning the failure to proceed at a slower speed, it is

argued that twelve knots was a reasonable speed in this area because there were only three other vessels, with tows, in the vicinity and Appellant knew their courses and destinations; because this is the normal and safe maneuvering speed of such a vessel in inland waters under favorable weather conditions; and because the maneuver planned by Appellant was a safe and prudent one. Therefore, Appellant exercised as reasonable a degree of care and judgment as might be expected of a prudent pilot, with the same amount of experience, who had observed the situation as it appeared to Appellant rather than from a hindsight point of view. In addition, the FAIRLAND, as the privileged vessel, was required to maintain her course and speed until faced with immediate danger.

On the jurisdictional question, it is stated that Reorganization Plan No. 3 of 1946 made 46 U.S.C. 239 invalid because it nullified the appeal provision intended by Congress; that the Regulations were not observed and they do not comply with 46 U.S.C. 239, so that any proceedings under the Regulations, as well as the Regulations themselves, are ineffective; and that, since 46 U.S.C. 239 is at least penal in nature, the exclusive penalty provided by 33 U.S.C. 158 is applicable because the specific charges alleging violation of the Inland Rules prevail to the exclusion of the general charge of negligence, due to the rule of strict construction applicable to penal statutes or statutes penal in nature. For these reasons, it is contended that the action taken was in excess of the jurisdiction of the Coast Guard, in violation of 46 U.S.C. 239 and in violation of the Regulations promulgated by the Commandant of the Coast Guard.

APPEARANCES: Messrs. Jones, Birdseye and Grey of Seattle H. B. Jones, Jr., Esquire, of Counsel Messrs. Grosscup, Ambler and Stephen of Seattle Richard P. Moser, Esquire, of Counsel Messrs. Graham and Morse of San Francisco

FINDINGS OF FACT

On 31 December, 1949, Appellant was acting as Pilot, under authority of his License No. 15592, on board the American S.S. FAIRLAND. Appellant was at the conn of said vessel from the time she departed Olympia, Washington, enroute to the Nettleton Docks, Seattle, Washington, up to and including the time when she collided

with the barge MT-6, which was in tow by the tug MILWAUKEE, in Elliott Bay at 2256 on the above date. The vessel was under enrollment and therefore required a pilot who had an endorsement on his Federal license for Puget Sound waters. Appellant had such an endorsement.

The FAIRLAND is a single screw, C-2 type vessel, which at that time was partially loaded with 4,000 tons of cargo and her draft was 15 feet 7 inches forward, 23 feet 7 inches aft, with a mean draft of 19 feet 7 inches. The characteristics of this vessel's engines and her response to the helm were in all respects normal. She is capable of making 16 knots or 88 R.P.M.

At 2112 on 31 December, 1949, the FAIRLAND changed speed to full ahead of 12 knots (65 R.P.M.) which is the customary reduced full speed at which she travels in inland waters. When rounding Alki Point and at all times up to the time of collision, the weather was dark but clear and visibility was good. The wind was approximately south, force 4, and the sea was slightly choppy but not rough. The tide was flooding. At 2242 when Alki Point Light was about one-half mile abeam to starboard, the FAIRLAND changed course to 045 degrees true to enter Elliott Bay in the Port of Seattle. At this time and thereafter while proceeding on this course, there were three licensed officers on the bridge: the Master, Appellant and the Mate on watch. There was a seaman at the wheel and a lookout stationed on the forecastle head. At all times, the FAIRLAND was displaying the proper running lights.

It was Appellant's intention to navigate the vessel on this course of 045 degrees true until passing Duwamish Head Light abeam to starboard and then to round the light and come to a southeasterly course to arrive at the Nettleton Docks which are about a mile and a half southeast of Duwamish Head Light. The Master of the FAIRLAND acquiesced in this plan because he believed Appellant to be a competent pilot and at no time up to the time of collision did the Master interfere with or question Appellant's maneuvering of the ship. The Master stated that he would not have hesitated to relieve Appellant of the conn if he had felt it was necessary to do so. Appellant has sailed in Puget Sound waters, including in and around Elliott Bay, for 27 years and has held Federal and State Pilot's licenses for these waters for eight years. Hence, he is well acquainted with the maneuvering of

various tugs and their tows in this area and also familiar with their customary destinations.

To appreciate the geographical layout in this area, some additional facts obtained from the U.S. Coast and Geodetic Survey Chart No. 6449 should be mentioned.

Alki Point Light is at the extreme westerly point of West Seattle. The course from this light to Duwamish Head Light is 045 degrees true and the distance between them is 1.9 miles. Duwamish Head Light is about one-fifth of a mile north of the northernmost tip of West Seattle and there is shoal water between the light and the coast. Consequently, the coastline lies to the eastward and approximately parallel to a line between the two lights. Most of the docks in Seattle Harbor are in generally southeasterly and easterly directions from Duwamish Head Light at a distance of roughly between one and two miles. The entrance to the harbor is to eastward on Elliott Bay between Duwamish Head Light on the south and a large anchorage area on the north. The southernmost point of the anchorage area is almost exactly one mile due north of Duwamish Head Light.

After the FAIRLAND had swung around to 045 from a northerly course, she was proceeding on a course parallel to the shore which would cause her to pass Alki Point Light and Duwamish Head Light between a half and a third of a mile abeam to starboard. There was no change in the course or speed of the FAIRLAND as she proceeded between Alki Point Light and Duwamish Head Light. No whistle signals were blown by any of the vessels in the vicinity until immediately after or at the time of the collision when the FAIRLAND sounded the danger signal.

At 2243, Appellant sighted the tug MILWAUKEE, which was towing the barge MT-6 on a towline approximately 600 feet long, bearing about 35 degrees on the port bow at a distance of a little over two miles. The course of the MILWAUKEE was about 124 degrees true and she was making approximately six knots with the barge steering directly behind her. The barge MT-6 was 330 feet in length with a beam of 42 feet. She was loaded with 18 or 19 cars on her three tracks.

There is no indication in the record that the MILWAUKEE

altered her course or speed at any time up to the time of collision or that the MT-6 attempted to steer any course, other than directly astern of the MILWAUKEE, in order to avoid colliding with the FAIRLAND. The Captain of the barge testified that until he noticed the FAIRLAND slowing and swinging towards the barge he thought that the FAIRLAND would pass well ahead without any danger of collision.

At 2244, Appellant sighted the tug CATHERINE FOSS, showing regulation towing lights, about a half mile off Duwamish Head Light and heading into the harbor on a southeasterly course with a log boom of approximately 600 feet in tow. When first sighted, this tug was slightly on the port bow of the FAIRLAND at a distance of a little less than two miles and proceeding at a very slow rate of speed. The log raft was three sections in width and the after end of the starboard section overhung the middle and the port sections by 200 feet. There had been a white light, as is required by Pilot Rule 80.32, on the stern end of the starboard section of logs but this had been extinguished by the rolling of the logs in heavy weather. The aftermost light, on the tow, which was discernible by Appellant at this time, was the white light at the after end of the port section of the logs. Consequently, Appellant did not realize until a considerable time later that the tow was about 200 feet longer than it appeared to be at the time he first sighted it. Another tug, the SANDRA FOSS, was assisting the CATHERINE FOSS by standing by the starboard side of the log boom and picking up logs which came loose from the tow. This tow is referred to as the "lighted" tow.

At 2250, the engines of the FAIRLAND were placed on standby but there was no change ordered in the speed of the engines. At 2252, the FAIRLAND was almost abeam of Duwamish Head Light and, at this time, Appellant sighted the tug IRENE bearing 65 degrees on the starboard bow at a distance of about a quarter of a mile. This tug was showing lights which indicated that she was towing a submerged object. The IRENE had overtaken the lighted tow on the latter's starboard side a few minutes previously and was proceeding into the harbor on a course generally parallel to that of the lighted tow. Hence, the submerged tow was between the Duwamish Head Light and the lighted tow. At this time, the MILWAUKEE was roughly broad on the port bow of the FAIRLAND at a distance of half a mile and the lighted tow and tug were a quarter of a mile up ahead of the FAIRLAND. Since the presence of the submerged tow would interfere with the FAIRLAND turning to starboard inside of

the lighted tow, Appellant intended to round the stern of the log boom, then turn right and come up on the starboard side of the tug CATHERINE FOSS in time to prevent the course of the FAIRLAND from converging with that of the MILWAUKEE and the barge MT-6.

At 2253, the bearing of the MILWAUKEE had drawn slightly more to port and she was about 1800 feet from the FAIRLAND; the barge MT-6 was bearing about 60 degrees on the port bow of the FAIRLAND at a distance of about 2100 feet; the lighted tow was dead ahead of the FAIRLAND about 600 feet; and the submerged tow and tug IRENE were abeam to starboard, the tug being about 1500 feet away.

Between 2253 and 2254, Appellant realized that there was an unlighted portion of the log boom and that the actual end of the tow was then dead ahead of the FAIRLAND. He immediately ordered the engines slow ahead (8 knots) and the rudder hard left. Due to the lapse of time between when Appellant gave the order for the engines and when it was transmitted to, and executed in, the engine room, the time of this order is recorded as 2254 in the Engine Room Bell Book.

This action enabled the FAIRLAND to avoid the unlighted section of the log raft but caused the distance between the FAIRLAND and the MILWAUKEE to close rapidly. The distance between the MILWAUKEE and the stern of the log tow was about 1000 feet when the FAIRLAND passed astern of the tow at 2254; and the MILWAUKEE was on the port quarter of the tow. Since the FAIRLAND had commenced to swing to port under the hard left rudder, Appellant discarded his original intention to come right after passing the stern of the lighted tow because he then thought that this maneuver would be dangerous.

At 2254, Appellant ordered the engines full astern. He intended to stop the FAIRLAND to be perfectly safe and neither he nor the Master of the FAIRLAND thought there was any danger of collision until about twenty seconds before the accident took place. Again, due to the time lag, this order was recorded in the Engine Room Bell Book as of 2255.

No backing signal was ever sounded by the FAIRLAND. This backing action caused her to steady upon her heading and slow down to the extent that collision with the MILWAUKEE was avoided but the

stem of the FAIRLAND struck the starboard side of the barge MT-6 about 50 feet aft of her bow at 2256. At the time of impact the FAIRLAND was moving forward at a slow rate of speed heading about 035 degrees true. Hence, the angle at which she struck the MT-6 was approximately 90 degrees. The MT-6 sunk and most of her cargo was lost but there were no personnel casualties. The towline from the MILWAUKEE was cut before the latter vessel was in danger of being dragged under by the barge. The collision occurred about one half mile due north of Duwamish Head Light.

OPINION

The right of the Coast Guard to assume jurisdiction of these proceedings has been challenged on the several grounds stated above. It is sufficient to say that the status of the provision in section 4450 of the Revised Statute, as amended (U.S. Code, title 46, sec. 239), the relationship between the statute and the regulations set forth in C.F.R., title 46, part 137, and the relationships among such regulations, the aforementioned statute, and the Administrative Procedure Act were all carefully considered in the preparation of the regulations and the establishment of the procedures now applicable in suspension and revocation cases, and no merit has been found in the contentions of Appellant in that regard.

The Appellant was charged with "negligence" which is within the purview of U. S. Code, title 46, sec. 239, and the regulations thereunder. Appellant was fully informed that it was negligence with which he was charged. Therefore, there is no basis for his contention that the provisions of C.F.R., title 46, sec. 137.05-10(b) were not complied with in the instant proceedings, in *extremis doctrine*. Furthermore, it has been reached without consideration of whether the failure to sound the signal would be relevant in an action for damage, a matter with which the Commandant here has no concern.

The Third Specification reads:

"In that you, while so serving as above, did on or about 31 December 1949, navigate said vessel as aforesaid in a negligent manner, which resulted in a collision with a tow, the MT#6, to wit; that you continued the forward motion of your vessel into a situation which you knew or

should have known was dangerous, as required by Article 29, Navigation Laws of the United States."

The facts show that at least more than ten minutes before the collision occurred the Appellant sighted two tugs with tows on his port bow in a crossing situation. Article 19 of the Inland Rules (U. S. Code, title 33, sec. 204) provides:

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

However, there is judicial authority that, as between an unencumbered vessel and a tug encumbered by a tow, such tug has the right of way. *The Edward Chilton*, (D.C.N.Y. 1928) 27 F. (2d) 624; affirmed *per curiam* opinion (CCA 2d, 1930) 38 F. (2d) 1014; *The Westhall*, (E.D.Va. 1899)153 Fed. 1010. In *The Georgetown* (E.D.Va. 1905), 135 Fed. 854, where there was involved a passing situation between a tug encumbered by tow and an unencumbered vessel, it was stated that it was the duty of the unencumbered vessel to keep out of the way of the tug and tow. At all events, a free vessel has a considerable burden of duty to handle her speed and position so as to minimize danger when approaching an encumbered VESSEL. Her duty to exercise care is greater than when approaching another free vessel. Such is clearly the law. *The Syracuse* (1870), 76 U.S. 672, 675; *Western Transit Co. v. Davidson S.S. Co.*, (CCA 6th, 1914) 212 Fed. 696, 700, cert. den. (1914) 234 U.S. 764; *The Maine* (D. Oregon 1924) 2 F. (2d) 605, 607. The crossing situation in the instant case which involved not one but two encumbered tugs distinguishes this case from *Matson Nav. Co. v. Pope and Talbot, Inc.* (CCA 9th, 1945) 149 F. (2d) 295, which otherwise might be deemed closely in point.

Under these circumstances and in view of the legal rule, I cannot say that there was error in the Examiner's finding that the Third Specification was proved and the charge of negligence supported. That is, I cannot conclude that the Examiner was wrong in his determination that it was negligence to fail to slacken the

speed of the FAIRLAND several minutes before the Appellant became faced with the situation which necessitated an altering of his plan of entering the harbor. Whether or not the other vessels involved may also have been negligent is immaterial here.

While it is not usual for me to go outside the record prepared in cases of this nature, in view of the effort of Appellant's counsel to have a statement which Capt. A. C. Geer, Master of the tug MILWAUKEE, had previously made at an investigation of the casualty introduced into this record (which was denied by the Examiner), I have examined that statement in order to assure that Appellant be given all possible consideration in the interest of fairness and justice; but find nothing therein to warrant any different conclusion than is here stated.

The Examining Officer's order suspended Appellant's License No. 15592, and all other valid licenses held by him for a period of six months, provided, however, that the suspension would not be effective if no charge under section 4450 of the Revised Statutes, as amended (U. S. Code, title 46, sec. 239), were proved against Appellant for acts committed within twelve months of 20 March, 1950. No proof of such a charge since that date has come to the attention of the Commandant. Since one of the specifications on which the Examining Officer's Order was based has here been dismissed, it might be contended that such dismissal should find some reflection in a reduction of the sanction imposed. It is deemed that this consideration may best be met by affirming the Examining Officer's Order, and treating the probationary period as having commenced to run on 20 March, 1950. The case may, therefore, now be considered closed.

ORDER

The Examiner's action on the Third Specification and on the charge is AFFIRMED as is his Order. The Second Specification is DISMISSED, and the case is considered closed, the probationary period being treated as having expired.

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

Dated at Washington, D. C., this *12th* day of *June*, 1951.

***** END OF DECISION NO. 471 *****

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