In the Matter of License No. 56710
Issued to: JOSEPH H. NICKERSON

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

583

JOSEPH H. NICKERSON

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

On 7 February, 1952, an Examiner of the United States Coast Guard at New York City ordered the suspension of License No. 56710 issued to Joseph H. Nickerson upon finding him guilty of negligence based upon a specification alleging in substance that while serving as Master on board the American SS GEORGE UHLER under authority of the document above described, on or about 16 October, 1951, while said vessel was in the English Channel, he navigated his vessel at excessive speed during fog, as a result of which his vessel collided with the SS SAMANCO. This order was to become effective upon the completion of the voyage on which Appellant was embarked on 1 February, 1952.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by an attorney of his own selection, Appellant voluntarily elected to waive that right and act as his own counsel. He entered a plea of "not guilty" to the charge and specification

proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence entries from the official log book of the GEORGE UHLER as well as the record of the investigation which was conducted at Antwerp Belgium, on 19 October, 1951. Appellant stated that he had no objection to the introduction of this documentary evidence. The Investigating Officer then rested his case.

In defense, Appellant made an unsworn statement and then rested his case.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order suspending Appellant's License No. 56710, and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of one month.

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

POINT I. The Examiner erred in holding that the speed of the GEORGE UHLER was immoderate. The facts establish that Appellant's navigation was prudent under the existing circumstances and that the collision was caused by the improper anchorage of the SAMANCO in the fairway.

POINT II. There is no evidence of "incompetency or misconduct" authorizing the suspension of Appellant's license under Title 46 U.S.C.A. Sections 226 or 239. Violation of the International Rule concerning speed in fog (33 U.S.C. 92) does not in itself constitute grounds for suspending Appellant's license since it has been held that these suspension provisions are penal in nature and must be strictly construed (*Bulger v. Benson*, 262 Fed. 929; *Fredenburg, v. Whitney*, 240 Fed. 819); and the record discloses that

Appellant conscientiously performed his duties as Master.

POINT III. The suspension hearing was not conducted in conformance with the Coast Guard Regulations promulgated to insure a fair and impartial hearing. Since Appellant was not represented by counsel, the Examiner was required by the regulations and court decisions to protect Appellant's rights by the taking of testimony and depositions instead of receiving in evidence the record of the Antwerp investigation.

APPEARANCES: Messrs. Thacher, Proffitt, Prizer and Crawley of New York City, by John C. Crawley and Edward C. Kalaidjian, Esquires, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 16 October, 1951, Appellant was serving as Master on board the American SS GEORGE UHLER and acting under authority of his License No. 56710 while his ship was in the English Channel enroute from Hampton Roads, Virginia, to Antwerp, Belgium, fully loaded with a cargo of 9530 tons of coal.

The GEORGE UHLER, Official No. 244283, was a Liberty type steam screw freighter of 7176 gross tons, 2500 horsepower, length 422.8 feet and a beam of 57 feet. Her draft was 27 feet six inches, fore and aft, when she struck the anchored British vessel SAMANCO at 2344 on 16 October, 1951, in the English Channel and bearing about 201° true, three miles from Dungeness Lighthouse which is located on the northerly shore of the channel. The latitude and longitude of the collision was approximately 50°52' North and 0°56' East.

The last fix of the GEORGE UHLER prior to the time of the accident was obtained at 2156 when the Royal Sovereign Lightship was about one mile abeam to port. At this time, Appellant ordered a change of course to 060°true in order to pass Dungeness Point one and a half miles abeam to port; and the ship continued to make full speed ahead of approximately eleven knots (69 RPM) until 2330. It

was found from observation of the Royal Sovereign Lightship, as it fell astern, that because of fog the visibility was approximately four miles whereas the charted visibility of the lightship was eleven miles. Visibility was getting progressively worse subsequent to this time.

Due to the low visibility, Appellant had been on the bridge or in the chart room for at least four hours before obtaining the last fix at 2156 and he remained there until after the time of the collision. Third Mate Samson had been on the bridge since 1955, a helmsman was at the wheel, and an alert lookout was posted on the forecastle until a few seconds before contact with the SAMANCO.

By 2250, the fog had become so dense that Appellant considered it appropriate to commence blowing fog signals and he also gave the order to standby the engines. Course and speed remained unchanged.

The fog became so thick that at 2330 Appellant decided to anchor and he ordered Chief Mate Shelton and the Boatswain to stand by the anchor. Appellant also notified the engine room of his intention at this time and speed was changed to one-half ahead - about seven knots or 50 to 55 RPM. Appellant heard the fog signals of passing vessels but he was not able to see any of them.

At 2340, the ship entered a blanket of fog and speed was changed to slow ahead (3 to 4 knots - 30 RPM). Appellant ordered left rudder intending to turn the ship inshore of the steamer lane before anchoring. The engines were stopped at 2341 and after his ship had started to swing left, Appellant heard the bell of a ship almost dead ahead. This occurred at 2342 and Appellant immediately ordered emergency speed astern which was indicated by twice ringing full speed astern on the engine room telegraph. The three blast whistle signal was also sounded.

At 2343, lights on the SAMANCO were seen about 50 to 75 feet ahead of the GEORGE UHLER and approximately broadside to her course. The engines of the latter ship were backing full speed but she had enough way on to continue into the SAMANCO striking her approximately amidships while she was anchored in or close to the fairway which was one to one and one-half miles wide at this point. The heading of the GEORGE UHLER was about 060° true at the time of collision and the angle between her stern and the bow of the

SAMANCO was 65 to 70 degrees. The estimated damage to the GEORGE UHLER was $25,000 but she did not take any water aboard and there were no injuries.

Appellant maneuvered his ship into a position approximately parallel to that of the SAMANCO and finally anchored at 0035.

Appellant is 54 years of age and has been sailing as a Master for more than thirty years. The only record of prior disciplinary action having been taken against him was a two months' probationary suspension of his license in 1944 for unreasonable and unlawful confinement of a seaman aboard ship.

OPINION

Before deciding the case on its merits, I would like to refer briefly to the other two points raised in this appeal.

As I understand Appellant's brief, he urges that as a result of the courts' holdings in the cases of Bulger v. Benson and Fredenberg v. Whitney, something more than breach of the International Rule respecting speed in fog (Title 33 United States Code, Section 92) must be proven in order to suspend Appellant's license on the charge of negligence (Point II).

Unlike the situation in those two cases, Appellant was not simply charged with violation of a specified section of the Pilot Rules but with navigating his vessel "at excessive speed during fog." Although this wording is similar to the language of 33 U.S.C. 92 which states that vessels shall "go at a moderate speed . . . in a fog," the statutory rule is merely declaratory of the universal rule which requires prudence and caution under circumstances of danger. Since excessive speed in thick weather is negligence irrespective of the statute, this case is completely distinguished from the two cases cited by Appellant. The specification herein sets forth the specific act of negligence with which Appellant was charged; and in the Bulger case, the appeal court did not overrule the statement by the lower court that "whether the complaint could be proceeded against under section 4442, supra, and pilot rule 16, for the same act, by specific charges under the section and rule, is not before the court."

It also might be noted that since these two cases were decided, the statute (R.S. 4450) under which these hearings are conducted was radically amended in 1936 and 1937 (49 Stat. 1381; 50 Stat. 544) so as to leave no doubt that Congress intended this statute to be "remedial," rather than "penal," in nature. The only issue decided in the Bulger case was that the old statute should be strictly construed since it was "penal" in nature.

Finally, it is apparent that Appellant acted negligently if he breached a statutory rule of navigation which he was bound to know and observe.

Concerning Appellant's contention that his rights to a fair hearing were not protected since the Examiner received in evidence the record of the Antwerp investigation (Point III), it does not appear that Appellant's cause was prejudiced in any manner throughout the course of the hearing. Appellant offered no objection to the record of investigation although he was specifically informed by the Examiner of his right to do so. And at the time the investigation was conducted, Appellant was told that his license was in jeopardy and he was advised of his right to be represented by counsel. It seems likely that the testimony of seamen on his own ship would be more favorable to Appellant than that of the SAMANCO personnel; and the investigation at which the Appellant, Third Mate, Chief Engineer, Chief Mate and Third Assistant Engineer testified, was conducted three days after the collision when their testimony as to the events was more accurate than it would have been at the later date of the hearing. Consequently, it would have served no useful purpose to again take the testimony of the same witnesses at the time of the hearing. Since the Examiner fully protected Appellant's rights, I see no reason to alter the action taken simply because Appellant was not represented by counsel during the course of the hearing.

Coming to the merits of the case, Appellant claims that the navigation of his vessel was prudent and that the collision resulted because the SAMANCO was improperly anchored in the fairway (Point I).

The evidence does not disclose whether the SAMANCO was anchored in the channel or very close to it. Regardless of the initial fault of the SAMANCO, Appellant was not excused from the

duty to comply with the rules of navigation. *Yoshida Maru* (CCA 9, 1927), 20 F.2d 25. And the main principles of navigation in fog which are applicable to the circumstances in this case are that: (1) a vessel shall not proceed at a speed at which she cannot be stopped dead in the water with in one-half the distance of visibility ahead of her *The Chicago - Silver Palm (CCA 9, 1937)*, 94 F.2d 754, cert. den. 304 U.S. 576 or she must be able to stop before colliding with another vessel *The Umbria* (1897), 166 U.S. 404; *The Nacoochee* (1890), 137 U.S. 330; (2) before entering a dense fog bank which is known to be ahead, a vessel is bound to slow down so as to be complying with the moderate speed rule by the time she enters the fog bank *The City of Alexandria (D.C.S.D.N.Y., 1887)*, 31 Fed. 427; (3) there is a prima facie presumption of fault on the part of a moving vessel which strikes a vessel lying at anchor *The Oregon (1895)*, 158 U.S. 186] and this presumption is present even though a vessel is anchored in a channel or fairway when a competent Master believes this to be safer than to try to draw out of the fairway *The Northern Queen (D.C.W.D.N.Y., 1902)*, 117 Fed. 906; *The City of Norfolk (CCA 4, 1920)*, 266 Fed. 641; and (4) the defense of inevitable accident will not be sustained if a vessel is moving too fast when she strikes an anchored vessel *The Fullerton (CCA 9, 1914)*, 211 Fed. 833.

I think that all of these principles of admiralty law apply in some degree to the present case and that, taken together, they conclusively establish Appellant's negligence. He knew that the area in the vicinity of Dungeness was extremely foggy at times and he observed that the fog was becoming progressively worse as the ship approached Dungeness Lighthouse. Appellant stated that the ship entered a blanket of fog at 2340 and the highest estimate as to the visibility of the lights of the SAMANCO when they were first seen three minutes later was 75 feet. Under these circumstances, it would have been practically impossible to have kept any way on the fully loaded GEORGE UHLER and still have been able to stop her within the total distance of sighting a vessel up ahead. This was well demonstrated by what actually occurred.

Since Appellant did not overcome the presumption of fault on his part by affirmative proof that the SAMANCO was entirely to blame or by sufficient evidence that this was an inevitable

accident, he was guilty of negligence as charged.

ORDER

The order of the Examiner dated 7 February, 1952, is hereby AFFIRMED.

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

Dated at Washington, D. C., this 3rd day of September, 1952.

***** END OF DECISION NO. 583 *****

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