

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S LICENSE NO. 512 892  
ISSUED TO: Michael CALICCHIO

DECISION OF THE VICE COMMANDANT  
UNITED STATES COAST GUARD

2378

Michael CALICCHIO

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 25 October 1983, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for a period of six months remitted on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleges that Appellant while serving as Master aboard the M/V POLING BROS. NO. 7:

...while transiting out bound the CNJ Railroad Bridge in Newark Bay, NJ, did on or about 0930, 21 July 1983 negligently fail to navigate your vessel with due caution resulting in a collision between your vessel, the M/V POLING BROS. No. 7 and the Great Lakes Drill Barge No. 7 which was anchored in the East Draw of Newark Bay, NJ engaged in demolition operations.

The hearing was held in New York, New York, on 13, 16 and 26 September 1983.

At the hearing Appellant, represented by professional counsel,

entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced into evidence the testimony of five witnesses and sixteen documents.

Appellant offered into evidence his own testimony and six documents.

After the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the specification had been proved.

The Decision and Order was served on 12 November 1983. Appeal was timely filed on 18 December 1983 and perfected on 10 May 1984.

#### *FINDINGS OF FACT*

On 21 July 1983, Appellant was serving as Master and Pilot aboard the M/V POLING BROS. NO. 7 under the authority of his license.

At approximately 0900, on 21 July 1983, with Appellant at the helm, the fully laden M/V POLING BROS. NO. 7 set out from Sun Oil, New Jersey to Hastings, New York. The weather was clear, the visibility was good and the wind was from the south at 10 knots.

The M/V POLING BROS. NO. 7 had to pass through the draw of the CNJ Railway Bridge in Newark Bay. The bridge had been abandoned and was in the process of being demolished.

On 8 July 1983 the Captain of the Port of New York had established a safety zone, in the East Draw of the CNJ Railway Bridge, to be effective 1200, 11 July 1983. A "safety zone" is described in 33 CFR 165.20 as an area "... to which, for safety or environmental purposes, access is limited to authorized persons, vehicles, or vessels."

On the morning in question, Appellant was unaware that the East Draw was closed. However, Appellant had this information available to him from a variety of sources. First, Local Notice to Mariners No. 28, issued 12 July 1983, announced the creation of the

safety zone. Further, on 8 July 1983, Coast Guard personnel telephoned mariners in the area, including Appellant's employer, the Poling Brothers Co. and read the following message:

Effective 1200, 11 July 1983 the navigable channel in the West Draw of the CNJ Bridge will be open to marine traffic and the East Draw closed by order of the Captain of the Port. Newark Bay lighted buoys 4A and 4B will be relocated to mark the eastern limit of the West channel. Mariners are advised that the demolition work is continued on the piers located adjacent to the east channel.

After 11 July 1983, the Coast Guard repeated the same message over the radio as a safety broadcast.

Finally, Appellant's Chief Mate was aware that the East Draw of the CNJ Bridge was closed for demolition operations. On the morning of the incident, before Appellant came on duty, the Chief Mate used the West Draw of the Bridge on the M/V POLING BROS. NO. 7's northbound voyage to Sun Oil, N.J. However, the Chief Mate did not pass this information on to Appellant.

As Appellant approached, three vessels were working in the East Draw of the CNJ Bridge. The Great Lakes No. 7, a 505 gross ton drill boat, 135 feet in length, was anchored over the submerged remains of an old pier in the middle of the draw. The drill rig had over 2,000 pounds of explosives on board. It was displaying two red balls in a vertical line and a four square foot red flag. A second vessel, the M/V BADGER STATE, a single screw tug of 25 gross tons, assisted the drill rig by streaming anchors. A third vessel, the dumb barge DONJON, was anchored by the old central pier of the bridge.

Pursuant to the establishment of the safety zone, the channel in Newark Bay was diverted so that all vessel traffic would use the West Draw. Two buoys, 4A and 4B, marked the eastern boundary of the new channel into the West Draw.

Appellant saw the red Buoy No. 4B located to starboard of his tank vessel. He also saw the M/V BADGER STATE and the Great Lakes drill rig working in the East Draw. Appellant committed his vessel to a passage through the East Draw without altering his speed or

course.

As the M/V POLING BROS. NO. 7 approached the bridge site, Appellant initiated several security calls. Although he thought he heard a response, none of the three vessels working in the East Draw responded. No radio transmissions may be made within 1500 feet of a vessel carrying explosives, as the drill boat was.

The Operator of the M/V BADGER STATE set out to prevent the M/V POLING BROS. NO. 7 from entering the East Draw. The M/V BADGER STATE moved toward Appellant's vessel and sounded the danger signal to warn the men on the drill rig. The Great Lakes drill rig also sounded the danger signal.

Appellant, with the current on his stern, reversed his engines to avoid a collision with the M/V BADGER STATE. The M/V POLING BROS. NO. 7'S engines went astern, and the vessel began to sheer to starboard. To break the sheer, Appellant went ahead on his starboard engine.

as a result of these maneuvers, the starboard side of the M/V POLING BROS. NO. 7 struck the after port quarter of the drill rig. Neither vessel was seriously damaged and no one was seriously hurt. after the allision, the M/V POLING BROS. NO. 7 continued southerly through the East Draw of the CNJ Bridge.

#### *BASES OF APPEAL*

Appellant contends that the Administrative Law Judge erred:

1. by failing to give proper weight to the evidence concerning the prudent and professional manner in which Appellant navigated his vessel;
2. by finding that the M/V POLING BROS. NO. 7 was in a place where it had no right to be;
3. by failing to hold that the M/V BADGER STATE'S negligence was the sole and proximate cause of the collision between the drill rig and Appellant's vessel; and

4. by imposing an excessive penalty.

## OPINION

### I

Appellant asserts that the Administrative Law Judge erred by failing to give proper weight to the evidence concerning the prudent and professional manner in which Appellant navigated his vessel. I do not agree.

It is the duty of the Administrative Law Judge to evaluate the evidence and testimony presented at the hearing. The Judge's findings of fact will be upheld on appeal unless they are clearly erroneous, Appeal Decision [2108 \(ROYSE\)](#), or arbitrary and capricious, Appeal Decision [2097 \(TODD\)](#).

The Administrative Law Judge's findings of fact are supported by the record. Accordingly, they will not be disturbed.

### II

Appellant asserts that the Administrative Law Judge erred in finding that Appellant was in a place he had no right to be. I do not agree.

Appellant contends that he had every right to be in the East Draw of the CNJ Bridge and asserts that no law prohibits a vessel from operating outside of the confines of a clearly marked channel. Further, he contends that the safety zone cannot be enforced against him because he had no knowledge of the safety zone and the announcement creating it had not yet been published in the Federal Register.

Neither contention is relevant to the case at hand. The charge found proved below was one of negligence, defined in part as "...the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit..." 46 CFR 5.05-20(a)(2). The issue is whether a reasonably prudent pilot in the same circumstances as the Appellant

should have known the dangers attendant in entering the East Draw of the CNJ Bridge, and Knowing the dangers, would not have done so.

Although "there is no statutory duty to navigate within the confines of a channel...the question of whether a prudent operator must stay within the channel is decided by the prevailing facts of each situation." Appeal Decision [2057 \(SHIPP\)](#).

The record reveals that Appellant saw the red lighted buoy marking the eastern channel of the West Draw. He also saw the demolition vessels working in the East Draw of the CNJ Bridge. Appellant received no clear affirmative response to his radio calls. Still, he entered the East Draw of the CNJ Bridge without altering his speed or course. There is adequate evidence in the record to support the Administrative Law Judge's conclusion that a reasonably prudent pilot in these circumstances would not have entered the East Draw and, therefore, that a prudent navigator had no right to be there.

Appellant asserts that the "alleged safety zone" was a nullity because it was not published in the Federal Register at the time of the incident. The Administrative Law Judge dismissed the charge of Misconduct which was premised on a violation of the safety zone because he found that Appellant had no actual knowledge of such zone prior to the publication in the Federal Register.

However, this does not preclude a finding of negligence defined in part as "... the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform." 46 CFR 5.05-20(a)(2).

Appellant, as Pilot and Master, is held to a high standard of care because of the expertise he is expected to possess.

But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel.

*Atlee v. Northwestern Union Packet Co.*, 21 Wall 389, 396 (1874), quoted in, *Davidson Steamship Co. v. U.S.*, 205 U.S. 187, 194 (1907).

A pilot is deemed to know of changes in the navigability of the waters about which he holds himself out to be an expert, if the means of obtaining such information is available. See, *Alter Co. v. Federal Barge Lines*, 1976 A.M.C. 2357 (N.D. Ill. 1975), *aff'd* 544 F. 2d 522 (7th Cir. 1977); *Kommanvittelskapet Harwi v. United States*, 467 F. 2d 456, 1973 A.M.C. 383 (3d Cir. 1972); Appeal Decision [2264 \(McKNIGHT\)](#). Thus, a pilot is expected to know of changes announced in the Local Notice to Mariners and in safety broadcasts. *Catalon v. Freeport Sulphur Co., Inc.*, No. 81-3731 (E.D. La. Jan. 6, 1984).

"Absent a finding of actual knowledge, the pilot may be charged with knowledge of a local condition as a matter of law." *Bunge Corp. v. M/V FURNESS BRIDGE*, 558 F. 2d n. 6 at 798. (5th Cir. 1977). Appellant could have obtained information about the closure of the East Draw from the latest Local Notice to Mariners, from his employer, the Poling Bros. Co., and from his Chief Mate, who was on board at the time of the incident. After an absence of two weeks, Appellant's failure to acquire reasonably available information concerning the state of bouyage and other conditions of the channel through which he intended to pass supports the finding of negligence. I find no error here.

### III

Appellant asserts that the Administrative Law Judge erred in finding proved a charge of negligence because the M/V BADGER STATE's negligence was the sole and proximate cause of the allision between Appellant's vessel and the drill rig. I do not agree.

The M/V BADGEER STATE's attempt to prevent Appellant from entering the East Draw was a direct consequence of Appellant's own negligence.

[A] response set in motion by one's conduct cannot be considered as intervening since the origin is neither external nor independent and the response is merely attributable to the earlier conduct of the negligent action.

Appeal Decision [2175 \(RIVERA\)](#).

Since, as discussed above, Appellant was properly found negligent, any negligence of the M/V BADGER STATE is not a defense. Contributory negligence does not excuse the negligence of the individual charged. Appeal Decision [2319 \(PAVELEC\)](#), [2031 \(CANNON\)](#). The issue to be resolved at Appellant's hearing was whether Appellant was negligent, not whether anyone else was also at fault. Appeal Decision [2166 \(REGISTER\)](#).

In order to mitigate his own negligence, Appellant points out several deficiencies in the safety procedures of the other vessels in the draw, including their use of improper whistle signals, warning flags, and the failure of the M/V BADGER STATE to have its radio turned on. These matters were properly presented to the Administrative Law Judge at the hearing.

Since the record supports the conclusion that a reasonably prudent pilot would not have entered the East Draw on the day in question, the finding that Appellant was negligent will not be disturbed. Since contributory negligence is not a defense, the actions of the other vessels, even if negligent, are only mitigating circumstances and do not preclude the finding of negligence.

#### IV

Appellant asserts that even if he was negligent, the Administrative Law Judge imposed an excessive penalty. I do not agree.

"The order in a particular case is peculiarly within the discretion of the Administrative Law Judge and absent some special circumstance, will not be disturbed on appeal." Appeal Decision [2352 \(IAUKEA\)](#).

The Administrative Law Judge took into account Appellant's long service as a pilot and mariner and his previously unblemished record in deciding to remit the six month suspension of Appellant's license on twelve months' probation. Since Appellant's negligence in failing to ascertain dangers in the waters through which he took the M/V POLING BROS. NO. 7 is serious and could well have caused

injury or loss of life and extensive damage, and since the entire sanction is probationary, I am unable to conclude that it is excessive. I will not disturb the order here.

*CONCLUSION*

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the provisions of applicable regulations. The sanction ordered is appropriate under the circumstances.

*ORDER*

The order of the Administrative Law Judge dated 25 October 1983 is AFFIRMED.

B.L STABILE  
Vice Admiral, United States Coast Guard  
VICE COMMANDANT

Signed at Washington, D.C. this 8th day of February, 1985.

\*\*\*\*\* END OF DECISION NO. 2378 \*\*\*\*\*

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