

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 529 281
Issued to: Russell M. NYBORG

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2337

Russell M. NYBORG

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 16 February 1983, an Administrative Law Judge of the United States Coast Guard at Long Beach, California admonished Appellant. The specification found proved alleges that while serving as Pilot on board the United States SS SAN MARCOS and directing the movements of said vessel under authority of the license above captioned, on or about 12 May 1981, Appellant failed to initiate adequate and timely evasive maneuvers to avoid collision with the F/V SANDRA LINN while overtaking said vessel in the vicinity of the Bay Bridge in San Francisco Bay.

The hearing was held at San Francisco, California, on 28 July, 11,21,26 and 31 August 1981.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty.

The Investigating Officer introduced in evidence several documents and the testimony of three witnesses.

In defense, Appellant offered in evidence several documents and four witnesses.

After the end of hearing and before rendering a decision, the Administrative Law Judge retired. Another Administrative Law Judge, with Appellant's consent, rendered a written decision based on the record in which he concluded that the charge and specification had been proved.

The Decision and Other was served on 25 February 1983. Appeal was timely filed on 21 March 1983 and perfected on 7 June 1983.

FINDINGS OF FACT

On 12 May 1981, Appellant was serving as Pilot on board the United States SS SAN MARCOS and acting under authority of his license while the vessel was underway in San Francisco Bay.

The SS SAN MARCOS is a tank vessel of 17,291 gross tons, 620 feet in length, with a breadth of 82.7 feet. The F/V SANDRA LINN is a diesel propelled uninspected fishing vessel of 26 gross tons and length of 43 feet. On the evening of 12 May 1981 the weather was clear with visibility of about 6 miles.

North bound traffic from points in South San Francisco Bay to points north follows an established traffic lane and passes through the Delta-Echo span of the San Francisco Bay Bridge. The Echo pillar is just east of the Delta pillar. Both are on the southwest side of Yerba Buena Island. The distance between Delta and Echo pillars is about 800 yards.

On the evening of 12 May 1981 the SS SAN MARCOS was underway on a course of 335°T at speed of approximately 10 knots bound for the midpoint of the Delta-Echo span with Appellant at the conn. It was following the established traffic lane. The F/V SANDRA LINN was on a course of approximately 285°T at a speed of about 8 knots also bound for the Delta-Echo span. The operator was alone on board. At about 2115 the F/V SANDRA LINN was sighted on the starboard bow of the SS SAN MARCOS at a distance of approximately 400 yards and Appellant sounded the danger signal. The F/V SANDRA LINN changed course to the right coming to a course parallel to that of the SS SAN MARCOS and the traffic lane. She passed under

the Delta-Echo span with the Echo pillar close on her starboard beam.

After passing under the bridge the F/V SANDRA LINN suddenly altered course sharply to the left to about 295°T toward the path of the SS SAN MARCOS. Appellant again sounded the danger signal and ordered the rudder hard left and the engine full astern. The starboard side of the SS SAN MARCOS brushed against the port side of the F/V SANDRA LINN damaging the rigging and a radio antenna. There were no injuries. The property damage to the F/V SANDRA LINN was about \$5,000.

The Investigating Officer and Appellant stipulated that if the Coast Guard petty officer in charge of the boarding party which boarded the F/V SANDRA LINN within one hour after the collision had been called to testify, he would have testified "that he noted the apparent condition of the `skipper' of the F/V SANDRA LINN at the time of boarding as being under the influence of alcohol."

The provisions of the San Francisco Vessel Traffic Service in effect at the time required vessels over 300 gross tons to use the established traffic lanes. Smaller vessels could use them or remain clear of them. Vessels were to avoid crossing the lanes when possible and , if necessary to cross a traffic lane, do so at as close to a right angle as possible. In addition, the testimony established that it was customary for smaller vessels to give way to large vessels when they are in traffic lanes.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the finding that the SS SAN MARCOS was overtaking the F/V SANDRA LINN is not supported by the evidence. Because of the disposition of the case, this contention is not discussed.

OPINION

The Administrative Law Judge based his decision on an erroneous interpretation of Article 24 of the Inland Navigation Rules, 33 U.S.C. 209, placing an absolute burden on the overtaking

vessel to keep out of the way of the overtaken vessel. This rule, however, is not absolute and does not charge gross mismanagement in the navigation of the leading vessel, as occurred in this case, to those navigating the overtaking vessel.

In Appeal Decision [2045 \(ROWLAND\)](#) I considered a nearly identical situation in which a vessel being overtaken and passed without having signaled her assent made a sudden and unexpected maneuver into the path of the overtaking vessel resulting in a collision. In resolving the issue I stated :

"Although not forbidden from passing without assent, the overtaking vessel is charged with all the risks inherent in the passing as well as all risks arising from her own errors in navigation or judgement. When a collision results, the burden is on the overtaking vessel to excuse herself from fault. But the risk is not absolute nor the burden impossible to meet. Certainly gross mismanagement in the navigation of the leading vessel is not chargeable against the overtaking vessel. 'The law does not impose upon an overtaking vessel the obligation of anticipating improper navigation on the part of the other vessel.' *Long Island Railroad v. Killien*, 67 Fed 265 (2nd Cir., 1895). Additionally, acts of third parties or other outside agencies, such as the negligence of a third vessel, if not reasonably foreseeable are not risks assumed by the overtaking vessel. *Ocean Motorship Co. v. Hammond Lumber Co.*, 2 F.2d 772 (S.D. Cal., 1924)."

In the case at hand, Appellant observed the F/V SANDRA LINN approaching the traffic lane and sounded the danger signal. The F/V SANDRA LINN then changed course to a heading which would have permitted a safe passage and Appellant proceeded to overtake and pass her. To this point the signals and maneuvers of the vessels were consistent with the rules governing the vessel traffic lanes and the accepted custom on San Francisco Bay as testified to by both Appellant's witness and the operator of F/V SANDRA LINN. Under these circumstances Appellant was justified in supposing that the operator of the F/V SANDRA LINN was aware of the SS SAN MARCOS and that it was safe to pass. Appellant was not required to assume that the person operating the F/V SANDRA LINN would be intoxicated. fail to keep a proper lookout, and make a sudden course change into the path of the SS SAN MARCOS contrary to the vessel traffic system

and the obligation to maintain course and speed under Article 21, 33 U.S.C. 206.

In reaching this conclusion, I express no opinion regarding the propriety of Appellant sounding the danger signal rather than the passing signal as required by Article 18, 33 U.S.C. 203. This is not included in the specification under consideration and was the subject of a separate specification resolved in Appellant's favor by the Administrative Law Judge.

CONCLUSION

The Administrative Law Judge erred in holding that Appellant's duty to remain clear of the overtaken vessel was absolute. The facts of this case do not support the finding of negligence.

ORDER

The order of the Administrative Law Judge dated at Long Beach, California on 16 February 1983, is VACATED, the findings SET ASIDE and the charge DISMISSED.

J. S. GRACEY
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 6th day of January 1984.

***** END OF DECISION NO. 2337 *****

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