

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 380098
Issued to: HENRIK AGOSTINI

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2016

HENRIK AGOSTINI

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1, now 5.30-1.

By order dated 2 April 1974, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for one month on six months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as Master on board the MV CAPTAIN SAM under authority of the license above captioned, on 13 November 1972, Appellant wrongfully failed to keep his vessel on the right side of the channel in the East River, New York, near Hell Gate, thereby contributing to a collision between the MV CAPTAIN SAM and a scow in tow of the tug BRONX 4.

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

The Investigating Officer introduced in evidence the testimony of two witnesses and certain documents.

In defense, Appellant offered in evidence his own testimony, the testimony of another witness, and certain documents.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all licenses issued to Appellant, for a period of one month on six months' probation.

The entire decision and order was served on 12 April 1974. Appeal was timely filed on 1 May 1974.

FINDINGS OF FACT

On 13 November 1972, Appellant was serving as Master on board the MV CAPTAIN SAM and acting under authority of his license.

The MV CAPTAIN SAM, a small light tanker westbound in the East River with Appellant at the wheel, passed Sunken Meadow on Wards Island at a speed of approximately 10 1/2 knots. Appellant made a security call on Channel 13 announcing he was westbound in Hell Gate. Although he received no response to this call, a few seconds later he heard a security call from the Tug BRONX 4 was approaching Hell Gate eastbound. Appellant did not answer this call. Between the Penn Central Railroad Bridge and the Triborough Bridge Appellant observed the three vertical white towing lights and the green running light of the Tug BRONX 4 off Hallets Point at a distance of approximately one-half mile. Appellant reduced speed to one-half ahead and sounded a two-blast signal anticipating a starboard to starboard passing. No response to this signal was heard. Sometime thereafter the red running light of the BRONX 4 was observed. Appellant then stopped his engines and almost immediately went back full. At approximately 2200 the port bow of the MV CAPTAIN SAM struck the port side of the Scow L-96 which was in tow of the BRONX 4.

Prior to the collision the BRONX 4, with a flotilla of eight light scows towed astern in two tiers, was proceeding eastbound in the East River at half speed on a course to pass close off Hallets Point. When just off Hallets Point, but prior to turning to starboard, the master of the BRONX 4 observed the rear range light of the MV CAPTAIN SAM and sounded a one-blast signal. No response

to this signal was heard. After clearing Hallets Point and making his turn to starboard the master of the BRONX 4 observed the green running light of the MV CAPTAIN SAM and its forward range light. At this time the vessels were a few hundred yards apart. The BRONX 4 continued its turn into Pot Cove and when the green running light of the MV CAPTAIN SAM continued to be seen the danger signal was sounded. The collision between the Scow L-96 and the MV CAPTAIN SAM occurred shortly thereafter in a position just outside Pot Cove, approximately 475 yards almost due east from Hallets Point Light. The point of impact is well within the southerly portion of the channel.

At the time of the collision the weather was clear and the visibility was in excess of five miles. The current at Hell Gate had been flooding for approximately 48 minutes prior to the collision and at 2200 the strength of the current was 1.5 knots.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that the conclusion of the Administrative Law Judge that it was negligent for Appellant not to navigate on his starboard side of the channel is erroneous. He states that the evidence in this case as well as existing case law show that in Hell Gate on a flood tide it is neither safe nor practicable for vessels to keep to starboard and that local custom requires a starboard to starboard passage. He also urges that once he realized that the BRONX 4 was not following this custom Appellant took all possible steps to avoid collision.

APPEARANCE: Crowell, Rouse & Varian, of New York, New York By
William T. Foley, Jr., Esq.

OPINION

Essentially Appellant's complaint is with the Administrative Law Judge's statement at page 14 of his opinion that "on this record I decline to find the existence of a custom to pass starboard to starboard in Hell Gate..." Appellant argues and I concur that the existence of such a custom was proven. The masters

of both vessels involved testified that a starboard to starboard custom exists in Hell Gate during a flood tide. Record at pages 45-45 and 108-109. In addition the Investigating Officer in his brief concedes its existence. Nothing in the record would support a finding that this custom does not exist. However, this is of little benefit to Appellant. In raising custom as a defense Appellant must prove, not only the existence of the custom, but also that the custom applies to the facts of his particular case. This he fails to do and this failure is implicit in the decision of the Administrative Law Judge.

While both masters agreed that a starboard to starboard custom exists, their testimony contradicted each other as to whether the custom was in effect at the time of this collision. Captain Furey, master of the BRONX 4, states in effect that the custom only applied on a strong flood tide and at the time of the accident there was hardly any tide at all. Appellant merely stated that the custom exists when the current is flooding, without any reference to the strength of the flood. However, he also testified that the current in Hell Gate at the time of the collision was three to four knots while the Administrative Law Judge found that the current was less than half as strong. As discussed by the Judge, Appellant's failure to recognize the true state of the current casts considerable doubt on his expert testimony concerning application of the custom. While the evidence adduced does support the existence of the custom, it falls far short of showing the custom was applicable to the facts and circumstances of this case and the Administrative Law Judge properly declined to consider it as a defense.

Appellant attempts to shore up the evidence concerning existence and application of the custom through extensive case citation. However, the law is clear that for a custom to be accepted and enforced the existence of the custom and the necessity for it must be clearly proved as facts in every case. *Griffin, The American Law of Collision* (1949), 253 (case citations omitted). Furthermore, the cases cited by Appellant do not answer the important question of when the custom applied. Whether the custom is to be applied throughout the entire period of the flood current or only while its strength renders navigation unsafe under Article 25 has been expressly left undecided. *The Nassau*, 35 F. 2d 709 (C. A. 2, 1929). In short, it is improper to use prior

cases to prove the existence of a custom in a particular case, and even if it was proper the line of cases cited by Appellant fall short of the mark under the facts established by this record.

Essentially the Administrative Law Judge found, and I affirm, that Appellant in raising custom as a defense, failed to meet his burden of proof. The prior case law and the discussion of the Administrative Law Judge show that this burden is a difficult one to meet. There are good reasons why this is so. A custom that conflicts with the statutory rules of the read should not be accepted lightly. A high degree of proof must first establish that the custom is necessary and that the established rules do not provide for safe navigation. Second, it must be shown that the custom is known, accepted, and routinely followed by mariners using the particular waterway in question. Additionally, the terms and conditions of the custom must be proven to be the same as those existing at the time one is seeking to impose the custom on the occurrence under consideration. To attempt to meet this burden by using only the testimony of directly interested persons, as was done in this case, is inviting failure. By contrast, in the cases cited by Appellant independent expert testimony was used to develop the existence and applicability of the custom in question. The reason for my reluctance in accepting a custom that conflicts with the established navigation rules is illustrated by this very case. Two experienced masters, long familiar with the area in question, could not agree on the applicability of the custom. It is just this confusion that the established rules were designed to eliminate.

The failure of Appellant to respond to the radio security call initiated by the master of the BRONX 4 and to discuss and agree upon the manner of passing in Hell Gate was not charged by the investigating officer and it was not considered in reaching a decision in this case. However, I fully support the comments concerning this failure made by the Administrative Law Judge. It is clear that this whole incident could have been avoided had Appellant, upon hearing the security call, picked up his radio and informed the BRONX 4 of his position and intentions.

CONCLUSION

The findings of the Administrative Law Judge supported by

substantial evidence establish a situation in which it was the duty of Appellant to keep to the right hand side of the channel. Appellant, in attempting to relieve himself from this statutory duty, failed to establish that the custom of passing starboard to Hell Gate on certain stages of the flood tide was applicable to this case.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 2 April 1974, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 3rd day of March 1975.

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