

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 393933

Issue to: Charles William CHAPMAN BK-320595-C2

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2029

Charles William CHAPMAN

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 13 August 1974, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's seaman's documents for three months on six months' probation upon finding him guilty of negligence. The specifications found proved allege that while serving as an Operator on board the M/V ELLENA HICKS, under authority of the license above captioned, Appellant did, on or about 30 December 1973,

FIRST, wrongfully fail to post a proper lookout during low visibility, thereby contributing to a collision between his tow, the barge THELMA COLLINS, and the M/V NISSAN MARU, and

SECOND, wrongfully fail to sound fog signals during low visibility, thereby contributing to a collision between his tow, the barge THELMA COLLINS, and the M/V NISSAN MARU.

At the hearing, Appellant was represented by professional

counsel and entered a plea of not guilty to the charge and both specifications.

The Investigating Officer introduced in evidence the testimony of two witnesses and a certified extract of the Bridge Log Book of the M/V ELLENA HICKS.

In defense, Appellant offered in evidence the testimony of four witnesses, including himself, illustrations, navigational charts, a photostatic copy of the Bell Book of the M/V NISSAN MARU, and personal notes of Investigating Officer's witness Warren R. Aitkens.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and both specifications had been proved. He then entered an order suspending Appellant's license for a period of three months on six months' probation.

The entire decision and order was served on 16 August 1974. Appeal was timely filed on 29 August 1974.

FINDINGS OF FACT

On 30 December 1973, Appellant was serving as an Operator on board the M/V ELLENA HICKS and acting under authority of his license while the vessel was underway in the Lower Mississippi River with the barge THELMA COLLINS in tow. The M/V ELLENA HICKS is a 112.7 foot tow boat, controlled on the above date from its upper pilot house, with an eye level 48 feet above the waterline. Available to the Operator navigating from the upper pilot house were properly functioning radar equipment, bridge to bridge radio communication equipment, and sound signal equipment. The THELMA COLLINS is an ocean going barge, 420.2 feet in length.

Except as noted, times herein are according to the clocks on the M/V ELLENA HICKS, and converted to Central Daylight Time.

At 1435, 30 December 1973, the M/V ELLENA HICKS, pushing the barge THELMA COLLINS in the notch, entered Southwest Pass, Mississippi River, inbound, heading approximately north. Appellant

continuously thereafater operated and navigated the vessel and tow at an approximate speed of four knots against the current until a collision occurred between the tow and the M/V NISSAN MARU in Southwest Passage, Mississippi River, at approximately 1717, 30 December 1973.

The M/V NISSAN MARU, home port Tokyo, Japan, is a 575.09 foot cargo vessel. On 30 December 1973, it was anchored approximately four miles above Pilottown, Louisiana, in an anchorage area above Head of Passes, Mississippi River, when its pilot, Warren R. Aitkens, joined the vessel at 1600. The NISSAN MARU, piloted by Aitkens, departed outbound, heading approximately south, at approximately 1630. He continuously piloted the NISSAN MARU until it collided with the barge THELMA COLLINS.

The M/V NISSAN MARU entered Southwest Pass shortly after 1645. Running with a current of three to four knots, the ship traveled 11.5 nautical miles between 1630 and the time of the collision (1717 according to Appellant; 1724 according to Pilot Aitkens. The discrepancy reflects a difference in the clocks on the two vessels.)

During the transit of the M/V ELLENA HICKS and tow in Southwest Pass, from 1435 C.D.T. to the time of collision between the barge THELMA COLLINS and the M/V NISSAN MARU, and during the transit of the NISSAN MARU in Southwest Pass until the collision occurred, visibility was limited by fog. Visibility from the upper pilot house of the tug ranged from 0 to 600 feet during the transit. Visibility of up to 600 feet was also observed from deck level on the barge.

The mate, Russell L. Robertson, voluntarily stood lookout on the M/V ELLENA HICKS during the part of the period of transit by that vessel, moving from the upper pilot house of the towboat to the bow of the tow at approximately 1645 C.D.T. Shortly after 1700 the mate left the bow of the tow for the mess hall. No crew member of the M/V ELLENA HICKS or its tow was ordered by Appellant at any time during the above transit of Southwest Pass to stand lookout.

Appellant, while operating and navigating the vessel and tow from the upper pilot house, was the only person actually on watch

acting as lookout during the transit of Southwest Pass until the time of the said collision. Thus Appellant's performance of the duties of lookout were in addition to his performance of various other duties in connection with his watch on the bridge.

At no time during the transit of Southwest Pass by the towboat and tow did Appellant sound or cause to be sounded any fog whistle signals.

The pilot of the M/V NISSAN MARU first sighted the tug and tow on radar approximately twelve minutes before the collision at a range of approximately tow miles and visually sighted them approximately four minutes prior to the collision. The NISSAN MARU was sounding an automatic fog signal at one minute intervals during this period of time. The NISSAN MARU's engines were backing for three to four minute prior to the collision, and that vessel sounded the danger signal several times in the two or three minutes preceding the collision.

Appellant sighted the M/V NISSAN MARU on radar five to seven minutes prior to collision at a range of approximately 1 1/2 miles. Just prior to the collision Appellant visually sighted the NISSAN MARU, sounded the danger signal twice and backed down on both engines.

Although testimony indicates that each vessel attempted to communicate with the other prior to collision, no communication were received by either vessel from the other.

The collision occurred when the port side of the barge THELMA COLLINS slid down the port side of the M/V NISSAN MARU.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that Appellant's right to remain silent was violated when he was required by the Investigating Officer to complete form CG 2692, Report of Vessel Casualty of Accident, prior to moving his vessel from anchorage. Appellant also urges that the Coast Guard has failed to substantiate the charge of negligence against him. He urges that no additional lookout was necessary, that he was excused from

sounding fog signals by the special circumstance rule and that therefore, the collision was due solely to the negligent operation of the other vessel.

APPEARANCE: Jones, Walker, Waechter, Poitevent, Carrere and Denegre, New Orleans, Louisiana; Robert B. Acomb, Jr., Esq.

OPINION

I

The constitutional issue raised by Appellant is not a matter for final determination at an administrative hearing. Appeal Decision [1986 \(WATTS\)](#). Appellant cites the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966), in support of his challenge to the constitutionality of the requirement that Appellant complete a Form CG-2692, as provided in 46 C.F.R. 4.05-10. As the Commandant has previously stated, the *Miranda* rule does not apply to a remedial administrative proceeding held pursuant to R.S. 4450. Appeal Decision [1847 \(SPERLING\)](#), aff'd in *Bender v. Sperling*, 1 N.T.S.B. 2317. The *Miranda* rule prohibits the use "in criminal trials" of unlawfully obtained statements, 384 U.S. at 461. An R.S. 4450 suspension and revocation proceeding has never been held to be a criminal action. The decision in *United States v. LeBeouf Bros. Towing Co. Inc.*, 377 F. Supp. 558 (E.D. La. 1974), cited by Appellant, is inapposite to the issue herein. The issue in *LeBeouf* was the statutory construction of the Federal Water Pollution Control Act and has no bearing on this proceeding.

II

At the hearing and on appeal, Appellant has placed heavy reliance on the holding in *Chotin Transportation, Inc. v. M/V HUGH BLASKE*, 356 F. Supp. 388 (E.D. La. 1972); aff'd at 475 F. 2d 1370 (5th Cir. 1973). That opinion stated, "The court is convinced from the evidence that the best position from which to see and act as a lookout on a barge river tow *in certain circumstances as were here present* would be in the pilot house of the tow..."

(emphasis added). Unlike the present case, however, the collision in *Chotin* occurred on a clear night with visibility of several miles. The other cases cited by Appellant which would excuse the absence of a bow lookout also involve collisions during periods of good visibility. I find that under the circumstances of this case Appellant, acting as his own lookout in the pilot house, was not an adequate lookout, Appellant was negligent in not providing an additional lookout on the bow of the tow when visibility was reduced to a maximum of a few hundred yards and this negligence contributed to the occurrence of the collision.

III

Only through hindsight can Appellant determine that the pilot of the NISSAN MARU knew of the presence of the ELLENA HICKS and tow. No radio contact was made between the vessels. Appellant could not know at the time prior to the collision that the pilot was aware of the presence of the towboat. Thus Appellant's contention that the pilot of the M/V NISSAN MARU knew of the presence of the M/V ELLENA HICKS in no way excuses Appellant's failure to sound fog signals. The existence of a custom of using bridge to bridge radio communications in lieu of whistle fog signals was not proved. Furthermore the inadequacy of this practice is demonstrated by the instant case. Under these circumstances, Appellant was negligent in failing to sound whistle fog signals. This negligence contributed to the occurrence of the collision.

IV

Appellant's reliance upon Article 27 of the Inland Rules of the Road is misplaced. Departure from the rules is permissible when "necessary in order to avoid immediate danger." The purpose of Article 27 is to permit the Master to take those additional measures necessary under special circumstances without regard for the rules. I cannot accept a reading which gives a Master discretion to dispense with those precautionary measures which he feels would not aid his efforts to avoid danger. I consider Article 29, the Rule of Good Seamanship, which requires maintenance of a proper lookout, and Article 15, which specifies required sound signals in limited visibility to control this situation, not Article 27.

CONCLUSION

Appellant was negligent in that during a period of extremely limited visibility he failed to post a proper lookout or sound prescribed fog signals, thereby contributing to a collision between his tow and the M/V NISSAN MARU.

ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia, on 13 August 1974, is AFFIRMED.

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

Signed at Washington, D. C., this 31st day of July 1975.

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