UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 417352 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Richard J. DIETZE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2039

Richard J. DIETZE

This appeal had been taken in accordance with Title 46 Code of Federal Regulations 5.30-1.

By order dated 15 January 1975, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's license for three months outright upon finding him guilty of negligence. The specifications found proved allege that while serving as pilot on board M/V ANCO PRINCESS being the holder of the license above captioned, on or about 24 September 1974, Appellant, while navigating said vessel upbound on the Misissippi River and meeting a downbound vessel and tow at approximately mile 4 AHP, (1) wrongfully failed to execute a port-to-port passing in accordance with Article 18, Inland Rules of the Road, thereby contributing to the collision between said vessel and the tow of the M/V LIBBY BLACK, and (2) wrongfully failed to sound whistle signals in accordance with Article 18, Inland Rules of the Road.

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

The Investigating Officer introduced in evidence the testimony

of three witnesses and four exhibits.

In defense, Appellant offered in evidence his own sworn testimony and the testimony of one witness.

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

The entire decision and order was served on 15 January 1975. Appeal was timely filed on 19 May 1975.

FINDINGS OF FACT

The detailed findings of fact set fourth by the Administrative Law Judge at pages 4-11 of the decision and order with the exception of number 14, are affirmed and adopted. The following is a brief summary of these findings.

Appellant is the holder of a Coast Guard masters license, endorsed for first-class pilotage for various waterways in the lower Mississippi River. He was appointed under Louisiana statutes as a River Port Pilot for the Port of New Orleans in 1957, is a member of the Crescent River Port Pilots Association, and has had considerable experience in piloting vessels from Pilottown to New Orleans, Louisiana.

At 1426, 24 September 1974, Appellant boarded the M/V ANCO PRINCESS (hereinafter PRINCES), a 556 foot British flag tank vessel, at Pilottown to pilot her upriver to New Orleans. Shortly thereafter,at Approximately 1445, PRINCESS collided with the barge BARBARA VAUGHT at Mile 4 AHP, about 2 miles above Pilottown. The BARBARA VAUGHT, downbound in the Mississippi River, was being pushed by the M/V LIBBY BLACK in an integrated tug-barge configuration (hereinafter BLACK).

BLACK, having left her anchorage at approximately 1400, was proceeding downbound at about 10 statute miles per hour when her operating sighted PRINCES at Pilottown changing pilots four miles

downstream, 200 feet from the east bank of the river. at this time BLACK was at Mile 6 AHP and east of the centerline of the river, about 500 feet from the east bank. When the vessels were about a mile apart BLACK sounded a one-whistle signal for a port-to-port passing but received no answer. The operator of BLACK also made several unsuccessful attempts to raise PRINCESS by radio. When the vessels were about a quarter of a mile apart PRINCESS began to turn slowly to port across BLACK's bow. BLACK's operator sounded the danger signal and started backing full astern shortly before the collision. Feeling that a collision was inevitable and to avoid striking PRINCESS in the engineroom and to minimize damage, BLACK was swung sharply to starboard shortly before the collision.

Appellant, after boarding PRINCESS, ordered up full speed ahead. BLACK was observed ahead, however, appellant made no attempt to contact her by radio to exchange information, nor were any whistle signals sounded by PRINCESS prior to the collision. When appellant observed what he thought was a slight swing of BLACK to port, he ordered 5 degrees of port rudder. When asked by PRINCESS's second officer as to his intentions, appellant responded that he was going on the "two-blast side," but no whistle signals was ordered by appellant nor sounded by PRINCESS. PRINCESS was steadied on her new course and then, as the two vessels closed, increasing amounts of port rudder were ordered. At the time of collision PRINCESS was swinging rapidly to her port and BLACK was swinging to her starboard.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged initially that the Administrative Law Judge lacked jurisdiction. It is also contended that the charge of negligence and the specifications thereunder are not supported by the record or properly found at

APPEARANCE: Terriberry, Carroll, Yancy, and Farrell by Alfred M. Farrell, Jr. and Michael L. McAlpine

OPINION

I

Appellant was originally charged under R.S. 4442, as amended, 46 U.S.C. 214. Jurisdiction was vigorously contested throughout the course of the hearing and at its conclusion the Administrative Law Judge found that jurisdiction existed under both 46 U.S.C. 214 and R.S. 4450, as amended, 46 U.S.C. 239. Although not formally charged under the latter statute, the Judge found that the jurisdictional issue was fully litigated and thus Appellant would not be unduly prejudiced if jurisdiction was also laid under that statute. Of course, for me to affirm this case I only need to find that jurisdiction exists under either 46 U.S.C. 214 or 46 U.S.C. 239, assuming no other errors are found.

II

The core issue, with regard to jurisdiction under 46 U.S.C. 239, is whether Appellant was, at the time of the events in question, *acting under* the authority of his Federal license. 46 U.S.C. 239 authorizes the suspension or revocation of licenses issued by the Coast Guard for

> ...acts in violation of any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder...and all acts of incompetency or misconduct...committed by any licensed officer acting under *authority of his license*...(emphasis supplied)

Thus, for acts not in violation of title 52 or regulations issued thereunder, the operative phrase is "acting under authority of his license." The Coast Guard has interpreted this phrase as applying to situations where a license "is required by law or regulation or is required in fact as a condition of employment." 46 CFR 5.01-35. appellant attacks this interpretation forcefully, relying heavily on the decision in *Soriano v. U.S.A.*, 494 F. 2d 681 (1974). In that decision the Ninth Circuit struck down the so-called "condition of employment" regulation as being beyond the authority conferred by 46 U.S.C. 239. That case involved a Washington state pilot who, under Washington law, was required to hold a federal license to obtain state authorization to act as pilot in Puget Sound.

Despite Appellant being shocked, it is not a novel theory that a decision of a particular circuit court of appeals is not binding authority outside that particular circuit. Also, the government's decision not to petition the Supreme Court for certiorari in the *Soriano* case should not be construed as universal acceptance of that decision. The decision whether to petition for certiorari in a given case involved numerous considerations, including whether it may be more advantageous to address the issue another day in a different circuit to attempt obtaining a split in the circuits, thus increasing the chances of securing a writ of certiorari. However, whether *Soriano* should be followed in this case need not be decided for, on this record, I find that Appellant was not acting under the authority of his federal license even if the interpretation of 46 U.S.C. 239 set out in 46 CFR 5.01-35 is valid.

In Findings of Fact number 14, page 11 of his decision and order, the Administrative Law Judge concludes that

> Sections 1(f) and 2 of the rules of the Board of River Port Pilot Commissioners of the State of Louisiana constitute a condition of employment that river port pilots, including respondent, be licensed by the United States Coast Guard as provided therein.

Sections 1(f) and 2 of these rules state, in pertiment part, that

> Section 1 ...
> f) The petitioner must hold an unlimited license ... issued by the United States Coast Guard, endorsed as a first class pilot ..., which licenses and endorsements the petitioner must have held for a period of at least six months prior to commencement of his apprenticeship.
> Section 2. During apprenticeship, the petitioner must obtain endorsements on his United States Coast Guard Licenses ...

Under these rules a petitioner is a person making application for a commission to act as a River Port Pilot. A close examination of all of the rules promulgated by the Board of River Port Pilot Commissioners shows that the rules are divided into two parts. The first, sections 1-4 apply to petitioners and contain qualifications and procedures for obtaining a commission. The second portion of

the rules, sections 5-12, apply to persons who have been commissioned as River Port Pilots. The requirement for holding a federal license applies only to petitioners. Presumedly, once a person obtains his commission as a River Port Pilot he need not maintain his Federal license. Contrary to the situation that existed in the *Soriano* case (see Appeal Decision No. 1842), where a valid, current federal license was necessary for renewal of the state license, these rules contain no mention of federal licenses once a person becomes a state pilot. Appellant was found to have been a River Port Pilot since 1957 and certainly the rules pertaining to petitioners did not apply to him at the time in question.

For these reasons the rules issued by the Board of River Port Pilot Commissioners cannot support a findings that Appellant, while piloting the PRINCESS, was required by law or regulation or in fact as a condition of his employment to hold a federal license. Thus, under the facts developed in this case, Appellant was not acting under the authority of his federal license and jurisdiction under 46 U.S.C. 239 is lacking.

III

While the decision of the Ninth Circuit in *Soriano v. U.S.A.* need not be squarely faced in this case, I feel it necessary to provide some guidance in this area and for that reason I will briefly state my views on that case.

The opinion in *Soriano* proceeds on two different grounds. First, it states that the "condition of employment" regulation is not entitled to special deference since it was neither made contemporaneously with the enactment of the statute nor consistently followed for a long period. Second, it held that the regulation is void since it "infringes upon an area specifically reserved by Congress for 185 years for regulation by the States..." With regard to the first ground of the opinion the Court is mistaken as to the date the regulation was initially promulgated and, more importantly, the opinion fails to take into account the full history of agency interpretation of the statute.

The opinion states that "...it was not until 1965 that the

regulation challenged here, 46 CFR 137.01-35(a), was published." This is incorrect. Although part 137 (now part 5) of title 46, Code of Federal Regulations was revised and republished in 1965, section 137.01/35(a) remained unchanged. In fact, that section was first published on 5 October 1962, 27 F.R. 9863. In addition, the statutory interpretation expressed by the regulation has been consistently followed by the Coast Guard since 1941 when responsibility for the Administration of 46 U.S.C. 239 was transferred to the Coast Guard. This interpretation may be found in various Decisions on Appeal issued prior to the initial promulgation of the regulation. See Decisions on Appeal Nos. 376, 700, 1030,1131, 1233, and 1281. Although earlier agency interpretation of the statutory phrase "acting under the authority of his license" is difficult to find, the decision of the Solicitor of the Treasury in the case of *Captain Stillings*, 3 Treasury Decisions 12 (1900) is consistent with the present regulation. At that time, administration of the predecessor to 46 U.S.C. 239 (R.S. 4450) was the responsibility of the Department of the Treasury. The Stillings case held that a licensed pilot of a U.S. Army steamer, where licensed pilots were not required by law, was nevertheless, "liable to the provisions of section 4450" for acts of misbehavior, negligence, or unskillfulness. Further early support for the regulation can be found in two opinions of the Attorney General which held that an individual's license was subject to the provisions of R.S. 4450 even though in neither case was the individual pursuing acts which his license authorized him to do. *19 Op. Atty. Gen 649 (1890)* and *24 Op. Atty. Gen. 136 (1902)*.

The Ninth Circuit's citation to *In re Soriano*, 1965 AMC 391 (1964) also causes me some concern. That case, decided by a Coast Guard hearing examiner, was in direct conflict with the existing regulation and long established agency interpretation of "acting under the authority of his license." A Commandant's decision was never issued in that case since it was, and still is, my policy no to allow the government to appeal from an adverse decision of an Administrative Law Judge. The Ninth Circuit's use of this case illustrates a problem in relying on unofficial reporters. American Maritime Cases (AMC) is published under the auspices of the Maritime Law Association of the United States and the Association of Average Adjusters of the United States. It is not the official reporter of any court or administrative body, but

is merely a compilation of cases thought by its editors to be of interest to the maritime community, primarily the private admiralty bar. This may explain why none of my decisions on appeal that treat the present issue have been published in AMC, yet an opinion of a hearing examiner, which I never reviewed and which was contrary to the established Coast Guard position, was published.

The second ground of the court's opinion is that the regulation infringes "upon an area specifically reserved by Congress for 185 years for regulation by the states." While it is unquestionably correct that a state is free to regulate its local pilots without interference from the Federal Government, if the state chooses to require its pilots to hold federal licenses it is not illogical to assume that the state is willing to accept the disciplinary procedures that are a corollary to the federal license. I note that in *Soriano* the State of Washington raised no objections to Coast Guard jurisdiction.

Action against state pilots' federal licenses is not the same as the regulation of state pilots and such action can have no effect on state pilots unless, as the Ninth Circuit recognized, the state so provides by making that federal license a state requirement. To allow persons to use their federal license to fulfill a requirement in gaining and holding employment, presumedly as an indicia of their competence, and then, when faced with evidence of their incompetence or misconduct, to not be able to take appropriate action against their federal license is incongruous and contrary to the remedial nature of 46 U.S.C. 239. For these reasons I do not consider it appropriate to apply the rule in *Soriano* outside the Ninth Circuit or to cases not involving state pilots.

IV

Appellant's attack on the second basis of jurisdiction, 46 U.S.C. 214, can be briefly summarized as follows. First, he states that 46 U.S.C. 214 does not, independent of 46 U.S.C. 239, grant any authority for the suspension or revocation of licenses. It is contended that these two statutes are consecutive sections of a single Act of Congress and must be read in *pari materiae*. In support of this argument he cites, among other things, my own regulations which he states only provide for suspension and

revocation of licenses under 46 U.S.C. 239. Second, he states that if 46 U.S.C. 214 is considered a jurisdictional statute it is unconstitutional, since it is overly broad in scope and contains no nexus between the prohibited conduct and the "professional performance of the one accused." In response to these arguments I first turn to the statute itself.

46 U.S.C. 214 (R.S. 4442) authorizes the Coast Guard to license "any person claiming to be a skillful pilot of steam vessels." The reference to steam vessels, of course, now includes vessels propelled by any other mode of mechanical or electrical power, 46 U.S.C. 361 (R.S. 4399). After providing that the Coast Guard shall make diligent inquiries as to an applicant's character and merits, it continues as follows:

> . . .and, if satisfied, from personal examination of the applicant, with the proof that he offers that he possesses the requisite knowledge and skill, and is trustworthy and faithful, it shall grant him a license for the term of five years to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of title 52 of the Revised Statutes.

Similar statutes provide for the licensing of matters (46 U.S.C. 226, R.S. 4439), mates (46 U.S.C. 228, R.S. 4440), and engineers (46 U.S.C. 229, R.S. 4441). Each provision, including 46 U.S.C. 214, follows the same general pattern with the specific language directed at the particular type of license involved. Each also provides that the license may be suspended or revoked upon satisfactory evidence of certain stated grounds which may vary slightly between the four statutes to accommodate the purpose behind each. However, none of these statutes contain any words of limitation on the authority to suspend or revoke similar to the phrase "while acting under the authority of his license" which is found in 46 U.S.C. 239 and was discussed in some detail above. Thus there are five statutes that superficially seem to cover the same ground and are in need of reconciliation; one applies to all licenses and contains a limitation, and four apply to particular types of licenses and contain no limitation. However, the

historical development of these statutes provides little support for the proposition that 46 U.S.C. 239 is "the controlling revocation statute."

The Act of August 30, 1852, c. 106 (10 Stat. 61) marked an important advance in the maritime safety area, for not only did it extend the inspection requirements for steam vessels carrying passengers, but for the first time it provided for the licensing of certain officers, namely, engineers and pilots of these vessels. The Eighth Paragraph of Section 9 of this Act provided for the licensing of engineers and the Ninth Paragraph after providing for the licensing of pilots stated:

> "but the license of any such engineer or pilot may be revoked upon proof of negligence, unskillfullness, or inattention to the duties of the station;"

The Thirteenth Paragraph of Section 9 provided in part as follows:

> "The said boards of inspectors shall have power to summon before them witnesses, and to compel their attendance by the same process as in courts of law; and after reasonable time given to the alleged delinquent, at the time and place of investigation, to examine said witnesses under oath, touching the performance of their duties by engineers and pilots of any such vessel; and if it shall appear satisfactorily that any such engineer or pilot is incompetent, or that life has been placed in peril by reason of such incompetency, or by negligence or misconduct on the part of any such person, the board shall immediately suspend or revoke his license,..."

It is to be noted that the Ninth Paragraph provided that the license "may be revoked", while the Thirteenth Paragraph provided that the board "shall immediately suspend or revoked his license".

The Act of February 28, 1871, C. 100 (16 Stat. 440) represented a very comprehensive revision of the inspection laws. It repealed a number of prior laws, including the Act of August 30, 1852, extended the inspection provisions, and for the first time provided for the licensing of masters and chief mates, in addition to the licensing of pilots and engineers.

Section 18 of the said Act reads as follows:

> That whenever any person claiming to be a skillful pilot of steam-vessels shall offer himself for a license, the inspector(s) shall make diligent inquiry as to his character and merits, and if satisfied from personal examination of the applicant, with the proof that he shall offer, that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, or inattention to the duties of his station, or for intemperance, or the wilful violation of any provision of this act. And every such captain, mate, engineer, and pilot who shall receive a license as aforesaid shall, when employed upon any such vessel, place his certificate of license (which shall be framed under glass) in some conspicuous place in such vessel, where it can be seen by passengers and other at all times; and for every neglect to comply with this provision by any such captain, mate, engineer, or pilot, he shall be subject to a penalty of one hundred dollars' fine, or to the revocation of his license: Provided, that in cases where the captain or mate is also pilot of the vessel he shall not be required to hold two licenses to perform such duties, but the license shall state on its face that he is authorized to act in such double capacity.

Section 15 of this Act with respect to masters, Section 17 with respect to engineers, and Section 16 with respect to mates are similar in form to Section 18 quoted above. However, the basic qualifications for the license in each of these sections is tailored to the particular license involved and the grounds for suspension or revocation vary slightly in the four sections. It is to be noted that the authority to suspend or revoke in each section is not limited to acts committed when the holder was acting under the authority of the license. In short, Sections 15, 16, 17, and 18 of the Act of February 28, 1871, were patterned essentially on

the prior provisions of the Ninth Paragraph of Section 9 of the Act of August 30, 1852, *Supra*.

However, Section 19 of the Act of February 28, 1871 did modify the Thirteenth Paragraph of Section 9 of the Act of August 30, 1852 relative to the procedure for suspension or revocation of licenses. Section 19 reads in pertinent part as follows:

> "That the said local boards of inspectors shall investigate all acts of incompetency or misconduct committed by any such licensed officer while acting under the authority of his license, and shall have power to summon before them any witnesses within their respective districts, and compel their attendance by a similar process as in the United States circuit or district courts; and such local inspectors are hereby authorized to administer all necessary oaths to any witnesses thus summoned before them, and after reasonable notice in writing, given to the alleged delinquent, of the time and place of such investigation, the said witness shall be examined under oath touching the performance of his duties by any such licensed officer, and if the board shall be satisfied that such licensed officer is incompetent, or has been guilty of misbehavior, negligence, unskillfulness, or has endangered life, or willfully violated any provision of this act, they shall immediately suspend or revoke his license..."

It is to be observed that Section 19 marks the first appearance of the phrase "while acting under the authority of his license", as a limitation on the authority to suspend or revoke. Also noteworthy is the fact that the presence of this phrase in Section 19 is in marked contrast to its absence in Sections 15, 16, 17, and 18 where the authority to suspend or revoke is not so limited.

The Act of 1871 was repealed by the publication of the Revised Statutes of 1875. With only editorial changes, Section 15 of the 1871 Act became R.S. 4439, Section 16 became R.S. 4440, Section 17 became R.S. 4441, Section 18 became R.S. 4442, and Section 19

became R.S. 4450. With the exception of R.S. 4450, these statutes have been amended in only minor respects up to this date. The very extensive amendment of R.S. 4450 by the Act of May 27, 1936, c. 463, 84, 49 Stat. 1381 does not affect the present issue of reconciling the provisions of these five sections with respect to the suspension or revocation of licenses.

In reviewing these historical developments it can be seen that over the years Congress has had several opportunities to examine the suspension and revocation system and make any changes that it felt were necessary. Certainly when making the comprehensive amendments to R.S. 4450 in 1936, had Congress intended that statute to be the sole authority for the suspension and revocation of licenses, it would have repealed all other authority. Since it did not do so, I conclude that Congress intended to give effect to these other statutes. When attempting to reconcile varying statutory provisions they should be construed, if possible, by a fair and reasonable interpretation which gives full force and effect to each of them. *United States v. Borden Co.*, 308 U.S. 188 (1939). It should not be assumed that one or the other or related statutes is meaningless; rather, such statutes will be so construed as to give each a field of operation. Keeping these principles in mind it is not difficult to discern the Congressional scheme.

The authority to suspend or revoke licenses contained in the four licensing statutes was purposely granted unconditionally and broadly to ensure, among other things, that the holder of a license maintained the basic character and professional qualifications which he was required to establish as a condition of its issuance. Congress in these four statutes and their predecessor statutes repeatedly demonstrated concern for the good moral character of the holder. This reconciliation tends to explain why Congress in enacting the Ninth Paragraph of Section 9 of the Act of August 30, 1852 provided merely that the license could be revoked. In short, the failure to maintain the basic character and professional qualifications admitted of only one result, namely, the revocation or suspension of the license. On the other hand, the authority to suspend or revoke contained in R.S. 4450 was designed to cover the activities of the holder in discharging his duties aboard vessels committed while he was acting under the authority of that license.

In support of his contention that 46 U.S.C. 214 does not provide a separate revocation authority Appellant has cited the

cases of *Fredenberg v. Whitney*, 240 Fed. 819 (1917), *Benson v. Bulger*, 251 Fed. 756 (1918), and *Bulger v. Benson*, 262 Fed. 929 (1920). While I am thoroughly familiar with these cases I am at a loss to understand how they provide any support to Appellant's position. First, as I explained at some length in Appeal Decision No. 1574 (STEPKINS), all of those cases ultimately turned only on a nicety of pleading. Second, none of those case, in any manner, hold that 46 U.S.C. 214 is not an independent source of jurisdiction for the revocation and suspension of licenses.

Appellant also makes reference to the regulations concerning suspension and revocation of licenses in support of his position. These regulations, previously published in Part 137 of title 46 of the Code of Federal Regulations, are now found in Part 5 of the same title. Appellant contends that 46 U.S.C. 239 is the sole authority for issuing these regulations and thus they cannot apply to a proceeding instituted under 46 U.S.C. 214. He is mistaken. The statutory authority for issuing these regulations is 46 U.S.C. 375, 46 U.S.C. 416, and 14 U.S.C. 633. These three statutes provide general authority to promulgate regulations necessary to carry out the provisions of title 52 of the Revised Statutes, including R.S. 4442. It is these statutes, not 46 U.S.C. 239, that are cited in the regulations as the rulemaking authority.

Some 20 separate statutes provide authority for suspension or revocation of specific categories of licenses, certificates, or documents issued by the Coast Guard. Part 5 specifically provides that these procedures are promulgated as the vehicle for the enforcement of all 20 statutes, and not merely 46 U.S.C. 239. See 46 CFR 5.01-1(b) and (c). Furthermore, contrary to Appellant's suggestion that 46 CFR 5.02-15(a) limits the authority of the Administrative Law Judge to cases arising under 46 U.S.C. 239, I have expressly delegated to all administrative law judges the authority to suspend or revoke any license, certificate, or document issued to a person by the Coast Guard under *Any* navigation or vessel inspection law. See 46 CFR 5.01-5. The section of the regulations referred to by Appellant is not a delegation of authority but merely a definition of the term "Administrative Law Judge" and does not, in of itself, limit the authority of the judge.

In summary, a simple reading of these regulations leaves no doubt that 46 CFR Part 5 was promulgated under the authority of several separate statutes and was meant to provide a single comprehensive procedure under which the revocation and suspension authority granted by 20 separate statutes could be exercised. This single comprehensive procedure includes all necessary safeguards to meet due process requirements including notice and opportunity for a hearing. It is not required, nor would it make any sense, to have separate procedures promulgated to enforce each of 20 separate statutes.

VI

Appellant's remaining contention concerning jurisdiction under 46 U.S.C. 214 is that the statute is unconstitutional as it is overly broad in scope and contains no nexus between the prohibited conduct and the "professional performance of the one accused." In support of this proposition several cases are cited. One, *Burton v. Cascade School District*, 353 F. Supp. 254 (1973), is cited in support of the proposition that "negligence, unskillfulness, inattention to the duties of his station - to say nothing of the, or intemperance," the grounds for suspension or revocation in 46 U.S.C. 214, are terms too vague for comprehension by men of common intelligence. However, the term under attack in the *Burton* case was "immorality" rather than any of the terms actually appearing in 46 U.S.C. 214. Furthermore, the terms "negligence", "unskillfulness", and "inattention" are commonly used in defining standards of conduct and certainly have a commonly understood meaning. Her there has been no showing that Appellant had a lack of understanding or was unaware of the meaning of these terms. In fact "negligence" and "inattention to duty" are defined in the regulations at 46 CFR 5.05-20(a)(2). Recently the Supreme Court has been reluctant in declaring statutes to be overbroad or vague. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) the Court stated:

> ...facial overbreadth adjudication is an exception to our traditional rules of practice and...the overbreadth of a statute must not only be real, but substantial as well, judged in relation to statute's plainly legitimate sweep. Moreover, in *Parker v. Levy* U.S. , 94 S. Ct. 2547 (1974) the Supreme Court concluded that:

> One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

Certainly 46 U.S.C. 214 clearly applies to federally licensed pilots.

Neither *Mindel v. Civil Service Commission*, 312 F. Supp. 485 (1970), nor *Ashton v. Kentucky*, 384 U.S. 195 (1966) can be read, as contended and cited by Appellant, to hold that, *on its face*, a statute must "require a nexus between the prohibited conduct and the professional performance of the one accused." *Mindel* merely holds that there must be shown a rational nexus *in the particular case at issue* and *Ashton*, a criminal case not particularly applicable to this civil matter, involves an unconstitutionally broad *construction* of a statute. In both cases it is obvious that if the requisite nexus actually existed the ultimate results of the cases would have been different.

Thus, merely arguing in the abstract that 46 U.S.C. 214 is vague or overbroad is insufficient to sustain a finding of constitutional deficiency. And, since Appellant has not alleged or shown that there is an absence of a nexus between the charge of negligence and his professional performance as a pilot, I am of the opinion that the statute is constitutionally sound, both on its face and in its application in this case.

On the merits of this case Appellant submits that "the charge of negligence and the specifications thereunder are not supported by the record nor are they properly found at law." With regard to the first specification, failure to execute a port-to-port passing, he argues, somewhat conflictingly, that (1) the vessels were on a crossing rather than on a meeting course and PRINCES, being to starboard of BLACK, was the privileged vessel under Article 19 of the Inland Rules, and (2) it was unsafe to make a port-to-port passage and thus it was proper for vessels meeting end on or nearly so to pass starboard-to-starboard. As to the second specification, failure to sound whistle signals, he merely states that since "the course and speed of the ANCO PRINCESS should have been obvious to the LIBBY BLACK, whistle signals were unnecessary." These contentions are without merit.

Both specifications of negligence involve violations of Article 18 of the Inland Rules of the Road, 33 U.S.C. 203, and arise out of the same factual situation. Article 18, in pertinent part, provides:

> Rule I. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other.
>
> But if the course of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.
>
> The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, with her own . . .
>
> Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intentions of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less then four of the steam whistle.

Appellant does not dispute that he failed to adhere to the rule by attempting a starboard-to-starboard passage without making any agreement. He seeks to excuse this failure by first stating that the vessels were not in a meeting situation so the rule doesn't apply. This contention is completely contrary to all the evidence

in the record and is not worthy of further comment. Second, he states that a port-to-port passage was unsafe. The Administrative Law Judge, with ample support in the record, found otherwise and I have affirmed this finding. However, even it a port-to-port passage was unsafe it would have been negligent to disregard Article 18 without first making an agreement to that effect with the other vessel. See authorities cited by the Administrative Law Judge at page 27 of his Decision and Order. Finally, in stating that whistle signals were unnecessary, Appellant is arguing contrary to law and reason. The fact of the collision is compelling evidence of the need for and rationale of whistle signals.

Some portion of Appellant's brief is spent in attempting to place blame for the collision on the operator of BLACK. Assuming for the moment that such blame was justified, it would be irrelevant. As I have stated previously, the issue before an Administrative Law Judge is the negligence of the respondent, and the fault of others, even if proved to be a greater fault, can not be used to excuse fault on the part of the respondent. The alleged faults of others, it within the jurisdiction of the Coast Guard, is left to other proceedings. See Appeal Decision No. 2012 (HERRINGTON).

CONCLUSION

In light of the foregoing I find that there is sufficient evidence of a reliable and probative nature to support both specifications and the charge alleging negligence on the part of Appellant. I further find that jurisdiction was properly found and exists under 46 U.S.C. 214 (R.S. 4440).

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 15 January 1975, is AFFIRMED.

O. W. Siler
Admiral, U.S. Coast Guard

Commandant

Signed at Washington, D.C., this 8th day of October 1975.

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