UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 424898
Issued to: JACK W. ROWLAND

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2045

JACK W. ROWLAND

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

By order dated 5 September 1974, an Administrative Law Judge of the United States Coast Guard at Houston, Texas suspended Appellant's license for one (1) month outright upon finding him guilty of negligence. The specifications found proved alleges that while serving as pilot on board the SS JAMES LYKES, being the holder of the license above captioned, on or about 23 December 1973, Appellant (1) negligently attempted to overtake and pass the privileged M/V MARY FREDEMAN and tow, tank barges GDM 50 and GDM 60, without assent of M/V MARY FREDEMAN, thereby causing a collision between SS JAMES LYKES and GDM 60 in the houston Ship Channel near Shell Oil Terminal and (2) neglected to take the necessary precaution required by the ordinary practice of seamen, thereby contributing to the cause of a collision. A third specification of negligence, alleging that Appellant contributed to the cause of an oil spill into the navigable waters of the United States, was found by the Administrative Law Judge to have merged with the first two specifications since "there was no additional act of negligence by Respondent."

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification. This hearing was held in conjunction with hearings concerning related charges against the operator of the M/V MARY FREDEMAN and the master of the SS JAMES LYKES. All parties stipulated that it was not necessary for the various witnesses to testify separately at each hearing since they would give the same testimony in all three hearings and that the exhibits introduced would apply in all three cases.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and specifications had been proved. He then served order on Appellant suspending all licenses issued to Appellant, for a period of one (1) month outright.

The entire decision and order was served on 13 September 1974. Appeal was timely filed on 18 September 1974.

FINDINGS OF FACT

On 23 December 1973 Appellant was serving as a pilot on board the SS JAMES LYKES. At that time Appellant held a United States Coast Guard master's license with pilotage endorsements for the entire route of the Houston Ship Channel and was in training with the Houston Pilots as a Deputy Pilot to obtain the necessary experience for issuance of a state license. On that date he held neither a state license nor a state commission. These SS JAMES LYKES was sailing under register and not required by Federal statute to be under the control of a federally licensed pilot. However, the By-laws and Articles of Association of the Houston Pilots required that a Deputy Pilot be the holder of a United States Coast Guard license as pilot for the entire route.

Appellant boarded the SS JAMES LYKES in the early morning hours of 23 December 1973 and assumed navigational control for her inbound transit of the Houston ship Channel. He retained control throughout this transit, including all times material to the collision in question. The SS JAMES LYKES was a 567 foot general

cargo vessel with a draft forward of 18 feet 2 inches and a draft aft of 22 feet 8 inches. Her master was Captain R. L. Evans.

Prior to 0520 Appellant received information over the radiotelephone from the pilot of the USNS SHOSHONE and the operator of the Tug THOMAS SAINT PHILLIP that there was a tow ahead that would not answer whistle signals or radiotelephone calls. He was also told that this tow was acting somewhat erratically and had been involved in a near collision with the THOMAS SAINT PHILLIP. After passing Equity dock inbound, approximately 1 1/2 miles below the Shell terminal, the SS JAMES LYKES overtook a small tug and barge on the two whistle or starboard side. Appropriate whistle signals were exchanged and an overtaking agreement reached by radiotelephone. The SS JAMES LYKES was then proceeding at between 3 1/2 and 4 knots, engine orders of dead slow and slow ahead. While passing the small tug and barge the engine was increased briefly to half ahead. After clearing this tow the engines were reduced to slow ahead. At that time there were two small outbound tows, deep in the Shell bend, ahead and well to port of the SS JAMES LYKES. Appellant, by radiotelephone, had ascertained that these vessels would remain clear to port.

Appellant next sighted the two amber lights of a tug approximately 1/2 to 3/4 of a mile ahead. This tug was located slightly to starboard of the certerline of the channel and Appellant assumed a routine overtaking situation with a tug pushing a barge ahead. Appellant made several attempts to raise this tow by radiotelephone and sounded a two blast signal several times proposing to overtake the two to starboard. When no response was received, Appellant assumed that this was the tow that he had been told about earlier. At this time there was ample room for the SS JAMES LYKES to overtake and pass the tow to starboard. At approximately 0528 Appellant observed the tow swinging to port, across the bow of the SS JAMES LYKES. At this time the vessels were about 700 yards apart. Appellant stopped the engines and blew the danger signal several times. Appellant, being concerned about the developing situation ahead as well as the danger to other traffic in the channel, increased the engine to dead slow ahead to maintain steerage way. Now feeling that the safest course would be to pass the tow to port, Appellant altered his course to starboard and sounded one long blast. At approximately 0530 the engine was put full ahead momentarily to increase the swing of the bow to starboard. Less than a minute later the lead barge of the tow was

observed breaking away from the tow and swinging back to starboard across the bow of the SS JAMES LYKES. The engines of the SS JAMES LYKES were stopped and put full astern, followed by emergency full astern. At approximately 0532 the bow of the SS JAMES LYKES struck the starboard side of the lead barge. At the time of collision the SS JAMES LYKES had slight headway on.

The tow involved in this collision was made up of the Tug MARY FREDEMAN and two loaded tank barges, the GDM 50 and the GDM 60, being pushed ahead. Her operator was Earl A. Slade. On the morning of 23 December 1973, the M/V MARY FREDEMAN tow was inbound in the Houston Ship Channel headed for the Shell terminal. On several occasions during his transit of the Houston Ship Channel, Operator Slade had failed to exchange whistle signals or make passing agreements by radiotelephone with other vessels. When the tow was approximately 1/2 to 1/4 mile below Shell terminal, without making any traffic check or giving any warning, Operator Slade Commenced a maneuver called "breasting off" or "topping off" the tow for subsequent docking to discharge cargo. This maneuver is accomplished by letting go all but one line on the lead barge and putting the tow in a "S" turn. The lead barge flops back, making in effect a "U" turn, so that the two barges end up side by side. The maneuver takes approximately five minute to complete. On this occasion Operator Slade started the maneuver with a turn to port, across the bow of the SS JAMES LYKES. At the time of collision the lead barge, the GDM 60, had completed about 90/D/ of her 180/D/ turn and was at a right angle to the centerline of the channel. The bow of the SS JAMES LYKES penetrated the #4 starboard tank of the GDM 60 causing about 2000 barrels of here crude oil cargo to be spilled into the waters of the Houston Ship Channel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is initially contended that the Coast Guard is without jurisdiction in this case. On the merits of the case it is further urged that (1) the mere fact that a collision occurred does not show negligence, (2) the facts at issue are governed by the "special circumstances" rule rather than the rules covering an overtaking situation, and (3) in any event, the Inland Rules do not prohibit an overtaking vessel from passing an overtaken vessel without an assenting signal.

APPEARANCE: Appellant, pro se.

OPINION

I

Appellant was originally charged under R.S. 4450, as amended, 46 U.S.C. 239. However the original charge sheet was withdrawn by the Investigating Officer and Appellant was recharged under the provisions of R.S. 4442, as amended, 46 U.S.C. 214. At the conclusion of the hearing the Administrative Law Judge found jurisdiction under both R.S. 4442 and R.S. 4450. Although not formally charged under R.S. 4450, the Judge concluded, and I agree, that the issue of jurisdiction under R.S. 4450 was fully litigated below. In fact, in his brief on appeal Appellant does not assert that the Law Judge erred in finding a basis for jurisdiction that was not alleged in the charge sheet. Instead Appellant has attacked the merits of that jurisdictional holding. For the reasons given below I find that jurisdiction exists under both statutes.

The jurisdictional portion of Appellant's brief makes little attempt to deal with the issue of jurisdiction under R.S. 4442, that statute is not even mentioned. However, Appellant does assert, relying strongly upon *Soriano v. U.S.*, 494 F.2d 681 (9th Cir., 1974) and R.S. 4235, 46 U.S.C. 211, that *Federal* regulation of pilotage is limited to those pilots navigating vessels engaged in the coastwise trade and not under register and those vessels navigating upon the Great Lakes. While not disagreeing with Appellant's contention that Federal regulation of pilotage is limited, I note he fails to show how this principle is applicable to his case. At issue in this proceeding is Appellant's Federal pilot's license, not whether the Federal Government is entitled to regulate pilotage or pilots on vessels under register. As I recently held in Appeal Decision No. 2039 (DIETZ), R. S. 4442 provides for the suspension and revocation of Federal pilot's licenses regardless of whether the acts at issue are committed while acting under the authority of that license. Of considerable significance to my holding in *DIETZ* is my concern in

maintaining the integrity of Federal licenses. A person who fails to maintain the basic character and professional qualifications evidenced by a Federal license should not be allowed to continue to hold that license. In this regard it is important to emphasize that, despite action taken against their Federal license, nothing in the respective state laws would prevent either Appellant or Pilot Dietz from continuing to act as state pilots. Under these circumstances it is difficult to understand how state pilotage is being regulated by the instant proceeding.

Appellant's reliance on Soriano is also misplaced. First, Soriano did not involve a charge under R.S. 4442 and thus is completely inapplicable to the issue of jurisdiction under that statute. Second, that case is clearly distinguishable in that Pilot Soriano held a state license while Appellant has only a Federal license. Finally, as stated in *DIETZ*, "I do not consider it appropriate to apply the rule in *Soriano* outside the Ninth Circuit or to cases not involving state pilots," Due to my ultimate disposition of this case a complete exposition of my views with regard to this jurisdictional issue is unnecessary. With respect to jurisdiction under R.S. 4450 it is sufficient to note that the record clearly establishes that Appellant's Federal pilot's license was a condition of his employment as a Deputy Pilot.

II

As to the merits of this case, in particular the first specification, Appellant argues that negligence was not proven and that an overtaking vessel is not prohibited by the Inland Rules from passing an overtaken vessel without an assenting signal. 46 CFR 5.05-20(a) (2) defines negligence as -

the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform.

Thus, in disposing of the first specification one must ask whether a reasonably prudent pilot would have attempted to overtake the M/V MARY FREDEMAN tow in the Houston Ship Channel under the prevailing

conditions without obtaining assent. The salient facts are not in dispute. Appellant, at a distance of approximately 1/2 to 3/4 of a mile, observed a tow proceeding ahead, proposed a two whistle passing, and received no response. He now assumed this tow to be one that he had previously been informed was failing to respond to signals and had acted somewhat erratically. He dad received no warning, nor could he have foreseen, that this tow was about to commence a "breasting off" or "topping off" maneuver. Visibility was good, traffic ahead was clear, and there ample room for the passing, as this was one of the widest portions of the river. Although Appellant's initial intent was to pass the M/V MARY FREDEMAN to starboard on the two whistle side, when the vessels were about 700 yards apart the tow sheered to port, across Appellant's bow. Appellant sounded the danger signal, altered his course to starboard, and sounded a one whistle signal. His intention now was to leave the M/V MARY FREDEMAN to port. He cleared the steern of the M/V MARY FREDEMAN to port and observed the lead barge of the tow break away and swing back to starboard across his bow. This was Appellant's first notice that the M/V MARY FREDEMAN was "breasting off" or "topping off" her barges and, although he ordered full astern, he was unable to avoid collision with the barge.

It is now well established that the Inland Rules do not, of themselves, forbid an overtaking vessel to pass without assent.

Under Rule VIII, the overtaking vessel must signal; under the same rule, as interpreted by the cases discussed above, the leading vessel ought to reply. If she fails to reply at all, the statute does not in terms forbid the overtaking vessel, having given notice of her presence and intention, to pass, if it is safe to do so.

> Griffin, *The American Law of Collision* (1949), p. 169

The rule does not expressly prohibit overtaking without receipt of a reply. What it does prohibit is overtaking after a danger signal has been given is reply to a proposal . . . The rule is not intended to allow the overtaken vessel to deny an otherwise safe passing by deliberate or negligent silence. Appeal Decision No. 1993 (FRACCARO)

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 365 (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).

On this record there can be no question concerning the gross mismanagement of the M/V MARY FREDEMAN. Without any warning and apparently without even bothering to look behind her she commenced a maneuver which, in effect, blocked the entire width of the Houston Ship Channel. While "breasting off" or "topping off" a tow may not be uncommon in the Houston Ship Channel, it is obvious from the record an from common sense that this maneuver should be undertaken only after a careful assessment of other traffic and after broadcasting appropriate warnings. When Appellant first observed the N/V MARY FREDEMAN and shaped his course to pass her on his starboard side he had no reason to believe that he could not overtake her safely. Even though Appellant had received information that the M/V MARIY FREDEMAN was not answering whistle signals or the radiotelephone and had acted somewhat erratically, it is unrealistic to think that Appellant could have anticipated the M/V MARY FREDEMAN's irresponsible behavior. Thus I find that Appellant's initial attempt to overtake without receiving an assent was a reasonably prudent act and does not constitute negligence in the context of these remedial proceedings.

However, the inquiry with respect to the first specification does not end here. On these facts there was a second attempt to overtake without assent from the leading vessel. When the vessels were about 700 yards apart, the M/V MARY FREDEMAN sheered to port across the bow of the SS JAMES LYKES. Here Appellant had two options. He could reverse his engines and attempt to stop or he

could try to swing around the stern of the M/V MARY FREDEMAN and pass to port. Appellant chose the latter option. While there is some evidence that by going full astern at this point he would have avoided collision, there is also evidence that such action could have resulted in peril to the SS JAMES LYKES, other traffic behind her, and shore facilities. Additionally, every large vessel navigator that testified at this hearing stated, without rebuttal, that Appellant's choice was the wisest under the circumstances. On this record I cannot condemn Appellant's decision, made under conditions of stress caused by the gross mismanagement of the leading vessel, to attempt to overtake to port. As Appellant notes in his brief, the law requires due care and skill, not infallibility. *United Fruit Co. v. Mobile Towing & Wrecking Co.*, 177 F. Supp. 297 (S.D. Ala., 1959).

III

The second specification found proven alleges negligence in that Appellant neglect[ed "to take the necessary precautions required by the ordinary practice of seamen." This specification, on its face, is totally deficient. No operative *facts* to give Appellant notice and an opportunity to defend are alleged.

A "specification" sets forth the facts which form the basis of the "charge". The purpose of a "specification" is to enable the person charged to identify the offense so that he will be in a position to prepare his defense. Each specification, shall state:

(1) Basis for jurisdiction;

(2) Date and place of offense; and

(3) A statement of the facts constituting the offense.

46 CFR 5.05-17(b) (emphasis added)

Although this specification fails to allege any facts that constitute an offense, I have on prior occasions approved the correction of deficient specifications if the issues involved were actually litigated and there had been actual notice and an opportunity to cure surprise. *Kuhn v. Civil Aeronautics Board*,

183 F. 2d 839 (C.A.D. C., 1950). The record must be examined to determine if this specification can be corrected. The first problem is to discover the *specific* neglects under question.

The Administrative Law Judge discusses the second specification on pages 42 and 43 of his Decision and Order. The only specific neglects mentioned concern the failure to use radar.

Some precautions that he, as pilot, could have taken were to check the radar to see what the tow ahead was doing; or to ask the chief mate on the bridge to check the radar and report to the pilot what the tow was doing; or to ask the master, who was standing by, to check the radar and advise the pilot what the tow was doing, since he could not get the tow to communicate with him.

However, the record is clear that radar could not have been of any assistance. Visibility was good, the M/V MARY FREDEMAN was under constant visual observation of both the master and pilot, and, as soon as the lead barge started to break away from the tow, it was seen by Appellant and he reversed his engines. Radar could not have provided any earlier notice of the tow's maneuver. Furthermore, there is no present requirement to use radar during good visibility and a specification alleging negligence in the failure to utilize radar under conditions of good visibility should be dismissed. Appeal corrected in the manner suggested in the Decision and Order it would not allege negligence.

On the other hand, the Investigating Officer did not consider that the failure to use radar was the negligence covered in the second specification. In his closing argument he stated the following in referring to the second specification:

We've had comments about this second spec previously, about the possibility of marriage to the first specification; however, we've heard the testimony here of what happened and we've heard from several people that Captain Rowland had prior warning regarding this incident, and yet, he chose to go on ahead. He had the opportunity from 700 yards to 1,000 yards, various estimates, from the time that he stopped the vessel and the M/V MARY FREDEMAN and tow moved up or started veering over to port, he had the vessel on stop at that time, and sounded the danger signal. He had

proposed whistle signals, he had this prior warning, he continued on through. He never did take the way off his vessel. This cannot be considered an ordinary practice of seamen.

Transcript, p. 808

Thus, the Investigating Officer considered that Appellant's failure to stop once the M/V MARY FREDEMAN sheered to port as the neglect covered in this specification. However, I have already held that it was not negligent for Appellant to continue on and attempt to overtake to port with regard to the first specification. Therefore, it could not have been negligent to fail to stop under the second specification.

In any event, since the Administrative Law Judge and the Investigating Officer did not agree on the factual basis for negligence under the second specification, it would be inappropriate to attempt correction. Under these circumstances Appellant cannot be said to have had adequate notice and the specification must be dismissed.

CONCLUSION

Jurisdiction exists under both R.S. 4442, as amended, 46 U.S.C. 214 and R.S. 4450, as amended, 46 U.S.C. 239. However, Appellant's actions on the morning of 23 December 1973 in attempting to overtake the M/V MARY FREDEMAN were not proven to be negligent. The charge and underlying specifications are dismissed.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas on 5 September 1974, is VACATED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 24th day of Dec 1975.

INDEX

Charges and Specifications

Amendment to

Defective

"Failure to take precautions", deficient

Notice, failure to provide

Collision

Overtaking situation

Overtaking vessel, burden to show lack of negligence

Radar, unnecessary in good visibility

Jurisdiction
46 U.S.C. 214

Licenses

Acting under authority

Pilotage, scope of Fed. Regulation

Navigation, Rules of

Overtaking situation

Sound signals, passing without assent

Negligence

Defined

Not shown by evidence

Overtaking without permission

Radar, failure to use not negligence

Specification, failure to allege an offense

Passing Agreement

Failure to establish

***** END OF DECISION NO. 2045 *****

Top