

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 06392
Issued to: John E. Shipp, III

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2057

John E. Shipp, III

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

By order dated 10 October 1974, as amended by the supplemental order of 2 December 1974, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's license for two months outright plus three months on 12 months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as an operator on board the United States M/V J.F. LAMB under authority of the license above captioned, on or about 8 July 1974, Appellant neglected to take the necessary precautions required by the practice of seamen (Article 29, Inland Rules of the Road), to wit: navigating the tug and its laden tow outside the navigable waters of the Bayport Channel, Galveston Bay, Texas, resulting in a collision with a submerged object and subsequent sinking of the tank barge TM-10, and that Appellant negligently caused a spill of No. 6 fuel oil into the navigable waters of the United States, Bayport Channel, Galveston Bay, Texas.

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 five witnesses, as well as ten exhibits, the bulk of the latter being charts of the area, photographs and diagrams of the damaged barge and of a dredge pipe joint similar to the one with which the vessel collided.

In defense, Appellant offered in evidence five exhibits consisting of a copy of the conditions for a dredge and fill permit issued to by the Corps of Engineers, navigational charts of the area of the collision, and excerpts from the work product of the Coast Guard investigation.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then returned the subject license to the Appellant pending reduction of the decision to writing. On 10 October 1974, the Judge rendered a written decision and order suspending the license issued to Appellant, for a period of two months outright plus three months on 12 months' probation.

The entire decision and order was served on 3 December 1974. Appeal was timely filed on 27 October 1975.

FINDINGS OF FACT

On 8 July 1974, Appellant was serving as operator on board the J.F. LAMB, an uninspected towboat, which operates on the inland waters of the United States. Between 0800 and 1200 hours the vessel entered the Bayport Channel, which extends westward across Galveston Bay for a distance of approximately 2.25 miles from the point of its intersection with the Houston Ship Channel to its entry into the Texas coastline, near La Porte, Texas. During this morning operation the J.F. LAMB had four empty barges in tow. Two of the barges were left at the Celanese Chemical Plant docks, which are located inside the land cut portion of the Bayport Channel. The tug then exited the Bayport Channel, reentered the Houston Ship Channel, and traveled north to the Shell Oil Company Refinery at Deer Park, Texas, where the two remaining barges were loaded with No. 6 heating oil. Appellant was on watch at least a portion of the time during which the J.F. LAMB was transiting the Bayport

Channel and had made this voyage several times in the past. Appellant observed a dredge operating inside the land cut portion of the Bayport Channel, and was aware that dredging operations had been conducted in this vicinity in the past. The spoil pipe from the dredge extended to the northern shore of the channel, then turned east across land until entry into Galveston Bay, after which it ran submerged in a direction which was generally parallel to the northern edge of the Bayport Channel. Eventually the line discharged in a spoil area on the eastern side of the Houston Ship Channel. At various points along this route the submerged pipeline was as close as 50-100 feet from the edge of the Bayfront Channel. While the initial direction of the pipeline, as it extended from the dredge, was clearly visible from the Bayport Channel, its subsequent turn eastward, and its entry into Galveston Bay was not. Appellant operated the vessel with the impression that the dredge spoils were being deposited on land, and he was unaware of the existence of the submerged pipeline.

The pipeline was untrenched, and at its joint connections it rose to a height of four feet from the floor of Galveston Bay. The route of the pipeline was marked only by a series of small round buoys, which were black or rusty in color and were placed at intervals of 1,500 to 2,000 feet. These buoys were neither illuminative nor reflective, and were designed to mark the pipeline for purposes of repair work after than to warn mariners of hidden obstacles. Further, there were no signs, notices to mariners, or other publications, which warned of this submerged hazard.

On the aforementioned date, the most currently available navigational chart of the area, published in June of 1974, showed the Bayport Channel to be six feet deep and 100 feet wide and indicated that the length of the channel was marked on both sides by private aids to navigation. In fact, the channel had been improved to a depth of 43 feet and a width of 300 feet by the dredging operations. However, no public notice was given by the dredging company as to the dimensions of these improvements. On 8 July 1974, all of the private aids indicated on the most current chart had been removed, with the exception of three buoys positioned in close proximity to one another on the northern edge of the channel, approximately one mile west of the Houston Ship Channel. The J.F. LAMB carried "dated" charts on board which did not indicate the existence of the Bayport Channel. The dredge and pipeline were not marked as obstacles on either of these charts.

At approximately 1930 on the same date, the J.F. LAMB reentered the Bayport Channel pushing the two loaded barges ahead. The tow extended approximately 500 feet in from of the tug, and the loaded barges had an 8 1/2 foot draft. The tug and tow proceeded at an engine speed of "idle to quarter", or around two miles per hour. After having transitted approximately 2/3 of the distance to the land cut, the front tow struck one of the submerged pipe joints, rupturing the cargo holds and causing an oil spill of massive proportions. The lead barge was outside the channel when the collision occurred. At no time did any of the vessels touch ground. The onboard navigational charts showed the water depth in the area of the collision to be six feet at mean low tide. The tidal charts for Galveston Bay indicate that the tide on July 8th was at flood stage (max. of +.9) during the estimated time period of the collision. A diver from a private insurer, who made dives in the area of the collision on July 9th, 1974, determined that the actual depth of the water at the point of the collision was 11 1/2 feet (or 7 1/2 feet to the upper edge of the pipe joint). Even assuming that this measurement was taken at the peak of flood stage, the vessel had approximately three feet of clearance from the ocean floor at the time of the collision with the submerged pipe.

Appellant relied on radar surveillance, visual observation of the land cut of the channel, and past experience in navigating the tug and tow from the Houston Ship Channel to the Celanese Corporation docks, near the terminus of the Bayport Channel. Although a fathometer was on board, it was not utilized.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) The negligence findings, as supported by the material findings of fact, made by the Administrative Law Judge,

are unsupported by and contrary to the evidence received at the hearing.

- (2) The Administrative Law Judge applied erroneous legal standards to measure "Appellant's acts under the circumstances".

OPINION

The single specification upon which the finding of negligence was made is violation of Article 29 of the Inland Rules of the Road (33 U.S.C. 221). The "Inland Rules" were enacted for the purpose of providing definitive standards for navigation which would reduce the risk of *collision between vessels*, and should not be interpreted as promoting a standard for determining in which waters a vessel may safely navigate (except in relation to other vessels). These rules provide an orderly scheme whereby operators of vessels can judge and anticipate the movement, position, and activity of other vessels. *THE GOLDEN ROD*, 194 F. 515, (D.C.N.Y. 1912); *THE NEVADA* 275 F. 265, (D.C.W.Va. 1921). 33 U.S.C. 154 states that the Inland Rules are designed to prevent collisions. By this, it is meant "collisions" between vessels, not collisions with obstacles to navigation or groundings. The rules of the road were not designed as a definitive guide to the general area of negligence in the operation of a vessel, and certainly not every incident of negligence in vessel navigation is a violation of the Inland Rules.

Article 29 of the Inland Rules created no affirmative duty by the operator of a vessel. In summary, it says that compliance with the affirmative duties which are specified by the rules cannot be used to exonerate a seaman (master) from his negligence in failing to use ordinary care or prudence in the operation of a vessel. But, negligent operation of a vessel on the inland waters of the U.S. is not a violation of Article 29. The penalties provided for in 33 U.S.C. 158 and 159 cannot be utilized for purpose of "enforcing" Article 29.

Consequently, since Article 29 sets no definitive standard of care or duty, it should not be utilized as a specification in support of a charge of "negligence" in an administrative hearing

under R.S. 4450, as it does not "specify" the acts or omissions upon which the charge of negligence is based. I am aware that Article 29 frequently is used in pleading in maritime cases, and that it has been used in civil actions involving questions of liability for damages suffered by barge owners as the result of collisions with submerged obstacles. *THE SEA KING*, 265 F. 416, (D.C. Mass. 1919); *MacWilliams Bros. v. Director Gen. of R.R.*, 271 F. 931, (C.C.A.N.Y. 1921). But, liability in these cases did not evolve from violation of Article 29, as there is no "affirmative duty" in this rule to be violated. Rather, liability was decided on the basis of violation of the standard of care in navigation which was applied by the courts according to the particular facts of the case. Where administrative proceedings are brought against a merchant mariner's license or document under authority of R.S. 4450, for a charge of negligent conduct under authority of the license or document, then the party should be fully apprised, through the specifications on the charge sheet, of the particular acts or omissions which allegedly were negligent. A specification of violation of Article 29 will not, in itself, support a charge of negligence.

The following was offered as an elaboration of the single specification:

"to wit: navigating the tug and its laden tow outside the navigable waters of Bayport Channel . . . resulting in a collision with a submerged object . . . and negligently caused a spill of No. 6 fuel oil into the navigable waters of the U.S. . . ."

These factual allegations were the real issues in controversy. I find that there is sufficient evidentiary material in the record to substantiate the occurrence of both of these factual allegations. However, for the reasons specified below, neither of these facts, as a matter of law, will support a finding of negligence. The tank barge TM-10 was clearly outside the Bayport Channel when it collided with the submerged spoil pipeline, and the collision unquestionably caused an oil spill. But, operation of a vessel outside a channel is not, as a general premise, a negligent act. If it were, then exiting a channel for many necessary and permissible purposes, such as entry into an anchorage area, would also be negligent. This is obviously not the case. Further, proof

of the occurrence of an oil spill from a vessel should not be equated with negligence by the operator of that vessel. An operator may be liable for civil or criminal penalties under federal statutes for acts causing environmental degradation without any showing of negligence. R.S. 4450 hearings serve a different statutory purpose than these statutes. In the case of an oil pollution incident, it is the act or omission which led to oil spill which should be examined, not the oil spill itself. And the specification in this case does not allege an act or omission which will support a finding of negligence.

Appellant argues that "neither the *law nor prudence* requires vessels to navigate within the confines of a channel". Clearly there is no statutory duty to navigate within the confines of a channel. However, the question of whether the prudent operator must stay within the channel is decided by the prevailing facts of each situation. The precautions required in the navigation of vessels fluctuate according to the characteristics of each vessel and the water in which it is being navigated. In any event, a higher standard of care must be imposed on the operators of vessels which have the potential for causing great environmental harm, if poor navigational judgments are made. It is true, as Appellant argues, that vessels are free to traverse any of the navigable waters of the U.S. But, if an operator takes his vessel into an area which he knows, or reasonably should have known, is hazardous, and by his action creates a threat to the safety of the vessel or to the quality of the marine environment, then his actions may be negligent, and he must bear the responsibility for them. If the Appellant had been charged with navigation of a fully loaded tank barge outside the Bayport Channel in an area which he knew or reasonably should have known, was hazardous then, if proven, the specification would have supported a finding of negligence. But he was not so charge. Nevertheless, the factual findings of the Administrative Law Judge (numbered 16-18) suggest that the Appellant knew, or reasonably should have known of the existence of the submerged pipeline. I find that the evidence does not substantiate this conclusion of fact.

The charts, which were accepted into evidence as both government and defense exhibits, did not mark the spoil pipe, nor did they indicate that dredge operations were being conducted in

the area. Unrefuted testimony was submitted that, while there may have been general knowledge in the industry that dredging operations had been conducted in the past in the Bayport area, there was no appreciation of where the dredge spoils were being deposited. No signs marked the dredge line. The buoyant markers which were placed at great intervals along the pipe route were woefully inadequate as aids to navigation. These markers were barely visible during the daylight hours, much less at night. They were neither illuminative nor reflective. In fact, the only nighttime marking which could even remotely be tied to the dredge line, was a single lighted pumping station, located near the intersection of the Houston Ship Channel. However, lighted platforms and stationary barges are frequently encountered in Galveston Bay, and the sighting of such a barge would not logically place a towboat operator on notice of the possibility of the presence of submerged hazards. Unrefuted testimony was also introduced that the private company involved in the dredge operation never attempted to notify anyone of the existence of this obstacle. It is true that the Appellant had transited the channel during the daylight hours on the same day of the collision, and during this time had observed a dredge working inside the land cut portion of the channel. But, based on the location of the dredge and the direction of the pipe extending from it, it was reasonable to assume that the dredge spoils were being deposited on land. There was no visual indication, from the vantage of the towboat, that the pipeline entered the bay north of the channel, or that it "paralleled" its length at a perilously close distance. Further, it is reasonable for mariners to assume that when dredge pipelines are laid across navigable bays, they will be adequately marked. Based on these facts, I cannot accept a factual finding that the Appellant knew, or reasonably should have known, of the existence of this submerged hazard immediately outside the track of the Bayport Channel.

Similar, the act of operating outside a channel may be negligent, if it is specified that the operator knew, or should have known, that the water depth outside the channel was insufficient to bear the draft of the vessel. But, this was not the basis of the charge. Further, even if this were at part of the specified acts of negligence, the evidence indicates that the depth outside the channel which was represented on the most currently available chart at the time of the collision, was equally to or exceeded the depth shown inside the channel. Therefore, operation

outside the channel could hardly be considered imprudent. Also, testimony at the hearing showed that a grounding never occurred and that, but for the pipeline, the vessel had a three foot clearance at the point of impact.

In this regard, the conclusions of law in this case state that if Appellant had used his onboard fathometer, he could have determined the true water depth, and thereby have averted the collision. I do not accept this finding. While a fathometer is a useful navigational tool, and failure to use a fathometer may support a finding of negligence in certain cases of grounding (see COMMANDANT'S APPEAL DECISION [870](#)), its use in this case would not have prevented the collision. Without an accurate charted representation of the depth of the channel, the utility of the onboard fathometer was greatly diminished. Had the fathometer been used it would have shown the Appellant that the channel depth had been increased. But, without an accurate charted depiction of the extent of the channel improvements, an unexpected decrease in the registered depth could reasonably have been interpreted as meaning that the forward extent of the dredging project had been reached (rather than exit from the channel). Moreover, the TB-10 was a more 50-100 feet outside the channel at the point of impact. In view of the fact that the tow extended some 500 feet forward of the J.F. LAMB, where the fathometer was located, its operation would not have signaled the exit of the barge from the channel prior to the collision.

The conclusion of law was also made that use of an obsolete chart was negligent. As with failure to use a fathometer, failure to use the most currently available navigational charts may support a finding of negligence, where use of current charts would demonstratively improve the safety and accuracy of navigation. But, the facts in this case indicate that the use of the most currently available chart would have been more of a "hindrance than a help", as the inaccurate depths which are depicted on the 1974 chart could encourage mariners to seek the greater depth shown outside the Bayport Channel, at least for a portion of its length. The 1974 chart also pinpointed a great number of private aids to navigation, the majority of which had actually been removed at the time of the collision. Use of the 1974 chart might have caused a mariner to

mistake the pipeline markers (if indeed they could be seen) for those on the chart.

CONCLUSION

The remaining question in this case is whether the Appellant's overall conduct in operating the vessel prior to the collision was negligent. In my opinion, based on the evidence presented, it was. However, this negligence did not stem from operation outside the Bayport Channel. Rather, the negligence was in attempting to transit from the Houston Ship Channel to the Celanese Corporation docks, pushing loaded fuel barges with drafts in excess of the charted depths both inside and outside the channel. Further, even if by his prior experience Appellant knew that an adequate depth existed in the Bayport Channel to facilitate his tow, he was negligent in attempting to maneuver in the channel at night, with the foreknowledge that the private buoys, which marked its limits, had been removed. However, since the Appellant was not notified prior to the hearing that the above described conduct was the basis of the charge of negligence, and since the record does not indicate that he was apprised of this matter during the course of the hearing, I cannot cure the procedural deficiencies by amending the specifications at this stage. Therefore, I find that the charge of negligence has not been proven.

ORDER

The order of the Administrative Law Judge, dated at Houston, Texas, on 10 October 1974, is VACATED.

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

Signed at Washington, D.C., this 3rd day of May 1976.

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