UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 385141
Issued to: William M. TAYLOR BK-228811
and
LICENSE NO. 443060
Issued to Oscar F. Woods, Jr. Z-544550

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2096

William M. TAYLOR
and
Oscar F. Woods, Jr.

These appeals have been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By orders dated 8 May 1975, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant Taylor's license for three months and Appellant Wood's license for nine months upon findings each guilty of negligence. The specifications found proved allege that while serving as master and pilot, respectively, on board SS KEYTRADER under authority of the respective license above captioned, on or about 18 January 1974, Appellants' wrongfully initiated a starboard to starboard passing with SS BAUNE, contributing to a collision with that vessel, and failed to navigate KEYTRADER with caution, after proposing a starboard to starboard passing by whistle and radio, receiving no agreement, and failing to slow down.

At the hearing, Appellants were represented by professional counsel. Both pleaded not guilty to the charge and each specification.

At the end of the hearing, the Administrative Law Judge rendered written decisions in which he concluded that the charge and specifications had been proved. He than entered orders suspending Appellants' licenses as described above.

The decisions were served on 12 and 19 May 1975, respectively. Appeals were timely filed on 29 May 1975 and perfected on 10 June 1976.

FINDINGS OF FACT

On 18 January 1974 Appellants Taylor and Woods were serving as master and pilot, respectively, of SS KEYTRADER under authority of their licenses when the vessel was underway in the Mississippi River. KESYTRADER, O.N. 267905, was, at the time, a coastwise seagoing steam vessel not sailing on register. KEYTRADER, loaded with gasoline, jet fuel, and furnace oil, departed Norco, LA, on 17 January 1974, bound for Searsport, ME. Because of fog, the vessel was anchored at Mile 13.5 AHP, near the right descending bank, at 1959 CDT on that date. Both inbound and outbound traffic between the river and the gulf were relatively immobilized by the poor visibility.

At about 1210 on 18 January, visibility having improved to a matter of miles above a low lying surface fog, the decision to get underway was made by Appellants. By 1325, having awaited the passing of four inbound vessels, KEYTRADER was turned and headed downriver at half ahead,, about 7.5 knots,in a current of about 4 knots. Upper hulls and top hamper of vessels were visible, two radars were in operation, set on the 2 and 185 mile scales, and Channel 13 was in use on radio. both Appellants were on duty on the bridge and normal lookout and anchor detail were set. No fog signals were sounded. When upbound traffic was immediately seen ahead, speed was reduced, at 1328, to about 3,5 knots.

At about 1345, after traffic near Venice had been cleared, a speed of 7.5 was resumed and appellant Woods twice announced his position over Channel 13, asking for reply from any vessel between

Wilder Flats Light and Pilottown.

Once again Appellant Woods broadcast that KEYTRADER was downboud at Wilder Flats and received no reply. M/V TOLL FOREST, anchored above the general anchorage about 600 yards below West Point Bank Light (Mile 7.7 AHP) was passed about 300 feet off, to port. Appellants then saw, first on radar, then visually, three vessels in line ahead. the first two vessels were at anchor in the general anchorage. The third vessel downriver, SS BAUNE was observed to be underway on a heading of about 10 to 15 degrees to the right of that of the anchored vessels. At 1355 KEYTRADER came left from a heading of 132°. At 1356, with BAUNE distant about 1.25 miles and bearing about a point and a half on KEYTRADER's starboard bow, KEYTRADER sounded two blasts. No reply whistle was heard and no reply was heard to a Channel 13 call. KEYTRADER steadied on 126°, a heading taking it to its left across the flow of the river.

At about 1358, when the vessels were about 0.75 miles apart, KEYTRADER sounded a danger signal, followed immediately by a two blast signal. No answering signal was heard from BAUNE. At 1359.5 Appellant Woods ordered 20 degrees left rudder and full ahead. At 1400 Appellant Taylor ordered a general alarm and emergency full astern. He then sounded a danger signal. The steersman released the wheel, ducking, and the rudder came to amidships. Appellant Taylor ordered the men on the bow to leave their stations. The vessels collided at 1401, the stem of BAUNE entering the starboard side of KEYTRADER at an angle of about 57 degrees in way or Number 1 and Number 2 tanks.

When persons aboard BAUNE first saw KEYTRADER, BAUNE was heading 323° with KEYTRADER between three points and broad on its port bow. This was about 1359 with the vessels less than half a mile apart.

The collision occurred at about Mile 6.25 AHP.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge.

The appeal in this case urges grounds that are reducible to four categories:

(1) procedural,

(2) Actions and attitudes disqualifying of the Administrative Law Judge.

(3) Evidentiary matters not supportive of findings, and

(4) asserted errors in application of the law of collision

While there is some overlap among the first three, they can be discussed separately with an occasional cross-reference.

APPEARANCE: Phelps, Dunbar, Marks, claverie and Sims, New Orleans, LA., and Krusen, Evans, and Byurne, Philadelphia, PA; by James F. Young, John w. Sims, and J. Barbee Winston, Esqq.

OPINION

I

Appellants objected at the outset to a hearing in joinder. both Appellants and the pilot of the other vessel in the collision were charged for hearing separately, of course, with the hearings to be consolidated in one *pro*ceeding. They were so held, despite objection, and three decisions were issued by the Administrative Law Judge. All three parties appealed and the matter of the pilot of the other vessel has been severed for consideration on appeal since other factors not relevant to this case have been superadded to it. Now, both Appellants here have consolidated their briefs and as to them the matter may be discussed as "this case."

It is correctly stated by Appellants that there was confusion in the management of the hearing resulting from the decision to proceed with the three matters simultaneously in one proceeding. There is no escaping the visible signs, and it might well be that three separate proceedings would have proceed, in the ideal, better results.

The spectacle was presented at the outset of one Investigating Officer appearing in all three cases, with three different Associate Investigating Officers appearing for one case each. One of the parties charged had, for a time, no counsel. On the face of it, Appellants here might have been presumed to have had conflicting interest, due recognition being given to the functions of master and pilot as sometimes causing adversary positions. In the actual conduct of the matter, there was in fact a mist over certain procedural elements. The Investigating Officer rested his case against one of the three with the intention of using that one as a witness against the other two, and, in the ensuing argument, it developed that contrary to the Administrative Law Judge's understanding of the matter, the case against two of the parties, not just one, had been rested. In a criminal trial the turmoil would have been fatal; in an administrative hearing it was less than desirable.

Evidence adduced by one of the three in his own behalf, not to be considered in the cases of the other two, was badly handled in that a document in question was left suspended in the air, so to speak, without a ruling as to whether it had been admitted, and in that it was undeniably made the predicate of a specific finding of fact in all three decisions. Testimony given by the third person involved, in his own behalf and after the case against these Appellants had been rested, was undoubtedly used for certain findings made in the decisions given as to them.

It can be said, without reservation, that the proceedings could have been kept under better control. Further, an aspersion cast by the Administrative Law Judge, and strongly objected to by Appellants, that counsel for the parties changed tactics pro or con proceedings in joinder as the winds of the cases shifted, to secure, temporary advantage and create confusion, can be disclaimed. It is in fact irrelevant to the matter under consideration here. What matters is whether Appellants had a fair hearing on proper notice and whether, on review, errors can be eliminated so that the findings are based on substantial evidence properly admitted.

The decision to hold a single, consolidated proceedings was not of itself error. In favor of the decision was the prospect of

calling and recalling witnesses, busy men of transient occupations, in three different hearings, with the danger of their becoming, most naturally, unavailable. Whether better arrangements could have been made to obviate the difficulties and what barriers to such arrangements might have been presented need not be considered. On this appeal, that is water over the dam. The single hearing was held and, on review of the record, it is apparent that attention to certain details which may have been overlooked in the unfortunate confusion leaves a case discernible on the merits and bottomed on properly admitted evidence. Since errors pointed out can be corrected they are not fatal, and reversal on the grounds of dispersible confusion, which has been dispersed, is not required.

II

It is alleged that prospects of a charge of employment induced the Administrative Law Judge to insist upon simultaneous hearings and, later, as the prospect became more immediate, denied him the time to give proper consideration to the record, resulting in almost identical findings in all cases and identical opinions in the case of Appellants.

There is absolutely no support for the former conclusion. The hearing was spread over a considerable period of time. That prospects of a future departure from an agency would move an administrative law judge to insist unreasonably on hearing three cases in one proceedings is no more a direct inference than is the probability that in such a position he would seek to recuse himself entirely or to avoid difficult tasks by insisting on *seriatim* hearing which would allow him to put cases over until his departure.

While it is true that the previously transcribed testimony finally put into evidence had not been read when the last hearing session was held and that the decisions were issued fairly won after the Appellants had testified, the evidence was examined and weighed and promptness of decision, in an area where decisions issued in open hearing without delay are desirable, is far from a fault. When the appellate process provides for a review of error, which can occur in any hearing, there is no need to resort to the desperate remedy of reversal. Most important, these matters are not the product of a disqualifying personal bias or prejudice. In

all, the hearing process is fair and open and there has been no denial of a specific right of either Appellant.

The evidence allegedly ill-considered, as specified by Appellants, was of the sort which, while in the record, should have been ignored in deciding as to Appellants. In the case of the testimony of the pilot of the other vessel which proved, after analysis of the record, to have been cognizable only in his own case and not against Appellants, the error is cured by elimination of findings based only upon it. There is ample evidence otherwise in the record on which sufficient findings as to the position, course and speed of BAUNE can be and are based.

Most critically, Appellants attack a finding that TROLL FOREST was anchored about 0.2 nautical miles from the right descending bank when KEYTRADER passed between that vessel and the bank. (It is argued that this was a finding crucial to a theory of the Administrative Law Judge that KEYTRADER should have passed on the midriver side of the vessel. This would presumably, somehow, have left it easier to pass BAUNE starboard to starboard without a change of course. Some mystification seems involved here.) The 0.2 mile finding is predicated upon evidence which was not properly handled at the hearing (as to whether it was "admitted") and which was, in any event, introduced by the third person at hearing solely on his own behalf and not accountable as part of the record of Appellants' case.

It has not been considered for the findings made in this decision. some comment is appropriate, however, because of the significance which Appellants ascribe to it.

With TROLL FOREST anchored at 0.2 nautical miles from the right descending bank, with KEYTRADER passing inside, and the subsequent collision occurring just off the left descending bank, there would be no possibility of towing a shadow of doubt over the absolute impossibility of there being a starboard-to-starboard passing situation. With KEYTRADER that far over, every deep draft vessel below it in the river would have had to be to its left. Appellants, of course, do not want this.

In complaining of the Administrative Law Judge's disposition

of the cardinal element here, after pointing out that the 0.2 nautical mile figure "is based on the unverified memorandum of Towing. . . which, if admissible at all, is not proper evidence as to [Appellants]," they say:

> "The finding as to the width of the river where the TROLL FOREST was positioned is obviously wrong. In fact the river is only about 3,000 feet wide at that point and not about three-quarters of a statute mile in width (3,60 feet) as stated by Judge Blythe. therefore, even if it be assumed that the TROLL FOREST was .2 nautical miles from the wet bank, considering the width of the river of about 3,000 feet, she would have been only about 300 feet from the center line of the river. The TROLL FOREST was thus approximately in midriver as judged by respondent Woods."

If this conclusion is matched with one that the collision did not occur about 500 feet from the left descending bank, but further off, Appellants feel that the theory of the Administrative Law Judge is destroyed and that a starboard-to-starboard passing was demanded by the fact situation. Incidentally, beyond this, Appellants attribute to the Administrative Law Judge the suggestion that "The relative positions of the KEYTRADER and BAUNE were such that when the KEYTRADER was abeam the anchored TROLL FOREST, the BAUNE was on the port side of the KEYTRADER, and remained there until several seconds before impact." While it appears inevitable that, even given a location of the collision as espoused by appellants, at some time about or prior to KEYTRADER's passing TROLL FOREST, BAUNE must have been on its port bow, in acceptance of the imprecision of observations frequently found after collision in experience pilots and navigators, consideration of the cloudy evidence may be curtailed. From the point at which verifiable findings may be made, there can be no question but that when KEYTRADER's movements become significant with respect to BAUNE, BAUNE was, on a heading of about 330°, about 1,25 miles from KEYTRADER, then on a heading of 132°t. BAUNE was about a point and a half on KEYTRADER's starboard bow.

The point is that a sufficient reconstruction of the collision can be made without reference to the distance of either ship from either bank or to the precise location of TROLL FOREST, from the

fact of collision and the recorded maneuvers of the vessels to establish the situation.

In the way of use of evidence Appellants make a point that has been attended to on review. "In discussing the conduct of respondents Woods and Taylor, Judge Blythe places emphasis on the fact that the KESYTRADER had a fair current." It is recognized that when concern is only with the relative movement of two ships in the same body of water the speed over the bottom as affected by current is irrelevant.

In sum then, disallowing without cavil the findings of the Administrative Law Judge based, as asserted, on evidence not properly to be considered in the case of Appellants, recognizing that participants in collision do not record or recollect with absolute precision the attendant circumstances, and weighing the usable evidence as the strong probabilities appear to a reasonable man, there is substantial evidence in this voluminous record to support the ultimate findings made.

In asserting that the initial decision is based upon an incorrect application of the law of collision, appellants rely upon selected statements from decisions in a few court decisions. consideration of the decisions leads to the understanding that they would be misapplied in this case.

Since the acknowledged facts include two-blast signals from KEYTRADER, it is essential that Appellants be found to have been in a starboard-to-starboard situation to avoid imputation of fault. The statutory rules here, obviously, have required extensive examination and construction by the courts. the only specific rules that could conceivably apply to the vessels in this case are those for vessels meeting or crossing. The theory on which the charges were preferred and on which the case was heard is that the situation was one of meeting; the reference to "starboard to starboard" in the first specification announces this.

For vessels meeting the rule as stated is simple: vessels meeting end on or nearly so must go right while vessels meeting otherwise must pass to the sides determined at the inception of the situation. The meaning of "end on, or nearly so" has been defined

in the statute. the case is limited to one in which, if appearance in darkness is considered, both sidelights of each vessel are visible at the same time from the other vessel. Since this precise pair of aspects can occur only when vessels are on the same trackline on reciprocal headings (*i.e.*, relatively rarely), the courts have had much to say on the question.

One interpretation developed covers the case in which vessels are maneuvering in the same channel. In *U.S. v. Soya Atlantic*, CA4 (1964) 213 F2nd 732, both vessels were in the well defined channel for deep draft vessels in a part of Chesapeake Bay. Because the "line" bent, necessarily, to accommodate the draft and was so marked, it is obvious that when vessels came in sight of each other, with one inbound and the other outbound, they would not be, by the statutory definition, "end on," but would to an observer above with no information as to a channel through the expanse of water appear to be vessels crossing. Common sense dictates that the crossing rule cannot apply since it would fix the relative obligations of the vessels in a ridiculous fashion. At the same time, the situation arises so often it would be unreasonable to abandon the matter to "special circumstance." The court reasoned that the prospective and unmistakably understandable movements of the vessels would bring them, close in, to "end on" or clearly "port to port." Pertinently to the instant case Appellants cite a decision derivative from this one, *The ERNA ELIZABETH* (D.C. DS N.Y.) 1968 A.M.C. 2598, as controlling in the KEYTRADER-BAUNE collision.

In that case the court was dealing with a collision between a ship moving east through Kill van Kull, N.Y., harbor, to sea, and another bound from the Quarantine Anchorage through Kill van Kull. The court found, contrary to the contention of AMOCO DELAWARE that the vessels on first sighting were crossing with itself burdened, that the vessels were on concentrically curving courses with ERNA ELIZABETH on the inside curve. From this it was concluded that the vessels were in a meeting situation with the tracks sufficiently separated so that the meeting was not end on but one that called for no change in intended tracks. On the facts found, the Court of Appeals affirmed a starboard to starboard meeting. *Albatross Tanker Corp. v. The SS AMOCO DELAWARE*, CA2, 1969, 415 F.2nd 692.

For some reason, the lower court decision is not reported in

the Federal Supplement, only in A.M.C. The Federal Reporter report of the Court of appeals does not examine the evidentiary facts. The district court's opinion is open to criticism in that it assumes that the destinations of the vessels are apparent and that the necessary heading charges (curving courses) are controlled in the same manner as conformity to a channel controls. Not all vessels leaving Kill, van Kull from the west intend to go right through the Narrows, and not all vessels proceedings north from Quarantine intend to turn left into Kill van Kull. The "point," if it may be called that, is a broad junction for vessels moving in a variety of directions with a variety of intentions. Apart from the doubtful elements of this decision, the case is still clearly distinguishable form this one.

Nothing in the reach of the river in which these vessels were navigating dictated anticipation of movements controlled by some conformity to external demands. If the situation was such as to call for a starboard to starboard meeting it must have done so clearly and unequivocally. Both vessels must be to the right of each other at the outset and must be on headings that will clearly permit them to pass without changing course. (It must be assumed that appellants have no wish to be judged under the crossing vessels rule.) It is clear from the recorded tracks of the vessels that they were not each to the right of the other at the inception. Even Appellants' own descriptions, which attempt an explanation to place sole fault on BAUNE, required that KEYTRADER initially have been on BAUNE's left. Since the situation was not one that clearly required a starboard to starboard meeting the attempt and the persistence to force one were a violation of the rules.

Collaterally, it is noted that KEYTRADER was angling across the axis of the river. Appellants acknowledge that "KEYTRADER effected a gradual crossing of the river on a steady heading." Brief - p. 20. Since there was no question as to the possible application of the "points and bends" custom, the recognition by the district court in *Compania de Navagacion Cristobal v Navagacion, S.A. v The LISA R*, D.C. LA (1953) 112 F.Supp. 1501, that vessels in such situations are to expect others to cross the river has no bearing on the case, and it is further unnecessary to inquire into whether the existence of the anchorage area rendered the narrow channel rule applicable to the remainder of the

navigable body.

Another collateral consideration is found in the understanding of Appellants as revealed by whistle signals. While KEYTRADER was coming left from 132° to 126°, it gave a two blast proposal, with an attempt to confirm this on channel 13. Despite the contention at hearing that until the last moment change to the right of BAUNE a starboard to starboard passing was clearly in progress, KEYTRADER sounded a danger signal, with the vessels still three quarters of a mile apart, three minutes before collision, and insisted again on a starboard to starboard passing with another two blast signal. Not only must it be concluded from this that appellants were in doubt that a passing to the right of each other was being accomplished,but also that the doubt could have been created only by an obvious necessity for BAUNE to alter course to its left to enable the starboard to starboard passage.

Of no relevance to the disposition of this case is the citing by appellants of ten decisions by the Supreme Court denouncing the failure of a vessels to have a lookout when another vessel is in the vicinity. Although certain testimony is properly excluded from consideration here, the finding as to the failure of BAUNE to become aware of the presence of KEYTRADER in timely fashion has been included in the findings in this case as a concession. Not only does the application of the doctrine of statutory fault to one vessel in collision not exonerate an erring pilot of the other vessel in proceedings under R.S. 4450 (and Appellants cite decisions to establish that in one circuit, at least, failure to have a lookout is not given the "statutory fault" status, although it is a fault) [see Decision on Appeal No. 1670, but it is clear that even in a case in which the "major-minor fault" rule might formerly have determined liability in a collision that fact would not have absolved the pilot of the "minor fault" vessel of a violation of rules of the road.

CONCLUSIONS

There is substantial evidence that the situation in which KEYTRADER and BAUNE were approaching each other did not meet the requirement for a starboard-to-starboard meeting and passing and that KEYTRADER was a operated by Appellants improperly in proposing a meeting contrary to the rules, and without caution in insisting

upon that meeting in the absence of an agreement.

ORDER

The orders of the Administrative Law Judge dated at New Orleans, Louisiana, on 8 May 1975, are AFFIRMED.

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

Signed at Washington, D. C., this 28th day of Feb. 1977.

***** END OF DECISION NO 2096. *****

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