U N I T E D S T A T E S O F A M E R IC A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
vs.	:	DECISION OF THE
LICENSE NO. 691784, AND MERCHANT MARINER'S DOCUMENT NO. (REDACTED)	:	VICE COMMANDANT ON APPEAL
Issued to Peter Trentacosta	:	NO. 2600

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated October 13, 1995, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's license based upon finding proved one specification of negligence. The specification alleged that on February 10, 1994, while operating the M/V EDWIN N BISSO (hereinafter BISSO) on the Lower Mississippi River during conditions of restricted visibility, Appellant failed to navigate with due caution by not obtaining or properly using information available from radar observations to determine if risk of collision existed, thereby contributing to a collision with a passenger ferry. The Administrative Law Judge dismissed one other specification of misconduct upon finding that it was not proved.

The hearing was held on July 5, 1994. Appellant entered a response denying the charge and specification.

The Coast Guard Investigating Officer and Appellant introduced into evidence stipulated testimony of six witnesses from a prior administrative hearing involving the master of the ferry involved in this collision. The Coast Guard introduced no other testimony or exhibits into evidence. In defense, Appellant introduced into evidence his own testimony and the testimony of two witnesses. Appellant also introduced six exhibits into evidence. Both parties submitted proposed findings and conclusions of law.

The Administrative Law Judge issued a written Decision and Order (D&O) on October 13, 1995. It concluded that the charge of negligence and the supporting specification were proved. The Administrative Law Judge suspended Appellant's license and document for a period of three months, remitted after twelve months probation.

The D&O was served on Appellant on October 27, 1995. Appellant filed a timely notice of appeal on November 16, 1995 and perfected it on December 19, 1995.

APPEARANCES: Mr. Andre Mouledoux, Attorney at Law, 1650 Pan-American Life Center, 601 Poydras Street, New Orleans, Louisiana 70115 and Mr. Roger Wheaton, Attorney at Law, 2775 Pan-American Life Center, 601 Poydras Street, New Orleans, Louisiana 70115.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the captioned license while serving as the operator of the BISSO, a 100-foot, 199 gross ton towing vessel. *See* Respondent (R.) Exhibit B.

On February 10, 1994, Appellant got the BISSO underway at approximately 0550, down-bound on the Mississippi River at mile 101.9. [Transcript (TR) at 54]. As the BISSO traveled down the river, fog became increasingly dense. [TR at 55]. When Appellant could not navigate by sight because of the fog, he reduced speed to 'slow ahead', posted a lookout, sounded the appropriate sound signal, and began to navigate by radar. [TR at 56]. The BISSO had two identical radars mounted on either side of the helm. *See* R. Exhibit D. These radars were inspected by a radar expert after the collision and found to be in excellent operating condition. [TR at 47, *see also* R. Exhibit D]. Appellant navigated using only one radar, leaving the other radar in 'standby' at all relevant times. [TR at 59]. The radar showed vessels anchored in a designated anchorage. [TR at 59]. As Appellant neared the area of the Chalmette-Algiers ferry crossing, the radar displayed a common 'false return' from a high-power, overhead electric line. [TR at 60]. Appellant monitored the radar only on the three-quarter mile scale at all relevant times. [TR at 63-64].

At approximately 0700, the BISSO collided with the Ferry ST JOHN at mile 89 above Head of Passes. *See* R. Exhibit B. Appellant, learning of the ferry's presence from the lookout, did not know that the ferry was underway on the river until seconds before the collision. [TR at 61]. The ferry was not sounding fog signals. [D&O at 15]. The collision caused $35,000 in damages to the BISSO, $30,000 in damages to the Ferry ST JOHN and injuries to ferry passengers. *See* R. Exhibit B.

Weather conditions consisted of dense fog, negligible wind and four knot current.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The Administrative Law Judge erred in finding Appellant negligent in not utilizing the second radar.

2. The Administrative Law Judge improperly disregarded uncontradicted expert testimony showing the existence of a thermal inversion layer that temporarily rendered Appellant's radar unreliable and useless.

3. Use of the second radar would not have aided in assessing risk of collision because this thermal inversion layer also rendered the second radar useless.

OPINION

I

The Administrative Law Judge found Appellant negligent because Appellant did not utilize a second radar while navigating in restricted visibility. [D&O at 35]. I find no law or precedent on which to base this finding. I find that the Coast Guard did not meet its burden of proving Appellant negligent for failing to use the second radar. I hereby reverse the Administrative Law Judge's Decision and Order dated October 13, 1995.

A

The specification supporting the charge of negligence asserts that Appellant failed "to navigate with due caution by not obtaining or properly using radar information available...from radar observations to determine if risk of collision existed." This specification is based on Rule 7(b) of the Inland Navigation Rules, which states "[p]roper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic scanning observation of detected objects." 33 U.S.C. § 2007. Additionally, Rule 7(c) states that "assumptions shall not be made on the basis of scanty information, especially scanty radar information." Id.

The Administrative Law Judge cites Orient Steam Navigation Co. v. U.S., 231 F. Supp. 469 (S.D. CA. 1964), as guiding authority in his Decision and Order. In Orient Steam, the aircraft carrier KEARSAGE and a freight vessel collided. The court found that the freight vessel was negligent

because the vessel did not utilize a state-of-the-art radar that was capable of automatically supplying the course and speed of other vessels. Instead, the freight ship relied on information from a less-sophisticated, relative-motion radar.

The court in Orient Steam held that the freight ship was negligent in not using the superior radar. Orient Steam is distinguishable from this case because the two radars onboard the BISSO were identical. If the Administrative Law Judge had determined that better, or different, information would have been available if Appellant had used the second radar in addition to the one he was using, then Orient Steam would be persuasive authority. Because neither radar on the BISSO was superior or more technologically advanced than the other was, it is my opinion that Orient Steam is not persuasive authority.

Though the court in Orient Steam states that "it is well established that a vessel carrying radar equipment must make proper use of that equipment when in an area of restricted visibility," the court does not explain either what constitutes "proper use" or whether using only one of two identical radars would suffice. The district court, in declaring this generalization, cites two cases that are equally inapplicable here. These cases, Afran Transport Co. v. The Bergechief, 274 F.2d 469 (2d Cir. 1960), and U.S. v. The Australia Star, 172 F.2d 472 (2d Cir. 1949), involve vessel collisions in which one vessel was found negligent because *no* available radar equipment had been utilized prior to the collision. Clearly, the failure to use radar in restricted visibility constitutes negligence. *See* Cheng Sheng Fishery Co. v. U.S., 1996 AMC 1313 (S.D.N.Y. 1996); In re G & G Shipping Co. of Anguilla, 767 F. Supp. 398 (D.P.R. 1991); In re Potomac Transport, Inc., 741 F. Supp. 395 (S.D.N.Y. 1989); Getty Oil Co. v. SS Ponce De Leon, 409 F. Supp. 909 (S. D.N.Y. 1976); In re B.F.T. No. Two Corp., 433 F. Supp. 854 (E.D.PA. 1977); Turecamo Maritime, Inc. v. Weeks Dredge No. 516, 872 F. Supp. 1215 (S.D.N.Y. 1994). These cases, however, do not dictate that a vessel must use *all* available radars in restricted visibility, much less all radars with identical capabilities.

The Administrative Law Judge, quoting Orient Steam, states that "[t]he courts are in complete agreement with the rule that prudent navigation requires those in charge of a vessel to take advantage of all safety devices at hand." In making this broad statement, the court in Orient Steam again cites The Australia Star. Because the circumstances in Orient Steam and The Australia Star are distinguishable from this case, this general statement does not dictate that an operator must use two or more identical radars when navigating in restricted visibility. In fact, the decision seems to stand for the proposition that, if a vessel has more than one radar set aboard, it must use each of them in restricted visibility conditions. I do not read any of the cited cases to so state.

I do agree that a prudent vessel operator must take advantage of safety devices onboard, but the cases involving an operator’s use of radar preceding a collision imply that use of the most

technologically advanced of two radars would have been an adequate defense against a claim of negligence. For instance, the court in In re Potomac Transport Inc., 741 F. Supp. 395, 406, states that it "need not tarry long on the question of BAANI's fault regarding failure to use *either* of its two operational radars..." (emphasis supplied). In Elenson v. SS Fortaleza, 1992 AMC 1447, 1464 (S.D.N.Y. 1991), a vessel was found negligent for failing to use long-range scanning on a radar, but the court did not consider the issue of negligence through failing to use an available and fully operational second radar. Also, in Cheng Sheng Fishery Co. v. U.S.,1996 AMC 1313, 1318 (S.D.N.Y. 1996), the court stated that a vessel was negligent in failing to use either of its two operational radars. I have found no case that holds a vessel negligent for failure to use all radars at its disposal.

B

The Administrative Law Judge made no credibility finding regarding Appellant's testimony that he continuously and without distraction monitored the radar prior to the collision. The Coast Guard submitted no evidence to refute this testimony and did not question Appellant on the veracity of these statements. The Administrative Law Judge accepted Appellant's statements that he did, at all times, sound the appropriate sound signals. [D&O at 45]. The collision itself, without more, is insufficient to prove that Appellant did not properly monitor his radar scope.

Additionally, there was no evidence produced by the Coast Guard regarding a failure on the part of the Appellant to obtain or properly use information available from radar observations to determine if risk of collision existed. The Coast Guard did not present expert testimony that would indicate that the custom of the prudent vessels in the area of the collision is to always operate two radars in restricted visibility. As one court stated, "negligence will not attach to the navigator of a ship unless he or she makes a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances of the incident." In re Slobodna Plovidba, 688 F. Supp. 1226, 1234 (W.D.Mich. 1988). The Coast Guard failed to submit any evidence showing that a prudent mariner would navigate through the area of the collision during restricted visibility in a manner differently than the Appellant did.

C

Inland Navigation Rule 7(a) states that a "vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists." 33 U.S.C. §2007 (a). My decision in no way detracts from Rule 7. I am merely holding that, in this circumstance, the Coast Guard did not prove that Appellant was required to use each of two identical radars in these circumstances. Because the case law does not support the Administrative Law Judge's decision, and because the Coast Guard presented no evidence showing that a prudent mariner in Appellant's circumstance would have monitored each of two identical radars in these

circumstances, the Coast Guard did not prove by substantial and reliable evidence that the Appellant's action under the circumstances was a breach of a standard of care established by either custom or statute.

Additionally, it should be noted that Appellant's uninspected vessel is not required to have any radar. See 46 C.F.R. Subchapter C, Uninspected Vessels. Obviously, even though the vessel is not required to have a radar, Appellant was required to use the radar provided prudently (as dictated by Rule 7(a) and (b)). See Afran Transport Co. v. The Bergechief, 274 F.2d 469 (2d Cir. 1960), see also U.S. v. The Australia Star, 172 F.2d 472 (2d Cir. 1949). However, because no case holds that a vessel is required to use all radars with which the vessel is equipped, and because the Coast Guard did not show that the prudent mariner in Appellant's circumstance would have used both radars, I hold that it would be unfair, under these narrow circumstances, to find the Appellant culpable for operating a well-equipped vessel.

II

Because I have reversed the Decision and Order, I will not address Appellant's second or third bases for appeal.

CONCLUSION

The Administrative Law Judge's finding that Appellant was negligent in failing to utilize each of two identical radars in restricted visibility is not supported by law. Because this is the only basis for the Decision and Order, and because the Coast Guard did not prove that Appellant was negligent for any other reason such as failure to utilize long-range scanning as required by law, I find that Appellant was not negligent under the circumstances of this case based on the evidence in the record.

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ORDER

The order of the Administrative Law Judge dated October 13, 1995 is VACATED, the findings are SET ASIDE and the charge and specification are DISMISSED.

R. D. HERR
Vice Admiral, U. S. C oast Guard
Vice Commandant

Signed at Washington, D.C., this 31st day of March , 1998.