UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. R48898
and DOCUMENT No. (REDACTED)
Issued to: Louis E. LOUVIERE

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2412

Louis E. LOUVIERE

This appeal has been taken in accordance with 46 U.S.C. 7702(b) and 46 CFR 5.30-1.

By order dated 23 January 1984, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman's license and document for a period of two months plus an additional three months on six months' probation upon finding proved a charge of negligence and a charge of misconduct. The specifications supporting these two charges allege that Appellant, while serving as operator of the M/V EDGAR BROWN, JR., under the authority of the captioned documents, on or about 24 November 1983, negligently navigated the vessel at approximately Mile 285 of the Gulf Intracoastal Waterway, thereby contributing to a collision between his vessel and the T/B AMOCO VIRGINIA; and that, on the same date, he wrongfully failed to arrange a proper meeting situation with the M/V AMOCO ATLANTA at approximately Mile 285 of the Gulf Intracoastal Waterway.

The hearing was held at Port Arthur, Texas, on 22 December 1983.

At the hearing Appellant was represented by professional counsel and entered pleas of not guilty to both charges and specifications.

The Investigating Officer introduced in evidence the testimony

of three witnesses and three exhibits.

In defense, Appellant offered in evidence his own testimony and six exhibits.

Following the hearing, the Administrative Law Judge rendered a written Decision and Order in which he concluded that both charges and specifications had been proved and in which he suspended Appellant's license and document outright for a period of two months plus an additional three months on six months' probation.

The Decision and Order was served on 24 January 1984. Appeal was timely filed on 8 February and perfected on 30 April 1985.

FINDINGS OF FACT

At all relevant times on 24 November 1983, Appellant was serving as Operator aboard the M/V EDGAR BROWN, JR. under the authority of his license. The M/V EDGAR BROWN, JR. and its tow, consisting of the T/B S-2022, were traveling in a generally westerly direction on the Gulf Intracoastal Waterway, under the actual direction and control of Appellant. The weather was clear, with approximately three miles' visibility. The wind was northerly, at approximately 12 to 20 miles per hour.

Coming in the opposite direction, traveling in a generally easterly direction on the Gulf Intracoastal Waterway was the M/V AMOCO ATLANTA and its tow, the T/B AMOCO VIRGINIA. Also heading generally easterly, approximately one-quarter mile ahead of the M/V AMOCO ATLANTA, was the M/V T. CLAUDE DEVALL and its tow, which consisted of three lightly loaded barges.

The operator of the M/V T. CLAUDE DEVALL was in radio-telephone communication with Appellant, and requested a starboard to starboard passage because he was concerned that the northerly wind might drive the DEVALL'S tow into the bank. Appellant agreed, and they passed without incident. Subsequent to this maneuver, the M/V EDGAR BROWN, JR. remained on the southern side of the channel.

The operator of the M/V AMOCO ATLANTA attempted, without success, to raise the EDGAR BROWN, JR. via radio as the two vessels approached each other. The AMOCO ATLANTA then attempted to establish a port-to-port by whistle and light signals. This effort was also unsuccessful. Having established no passing agreement with the EDGAR BROWN, JR., the AMOCO ATLANTA sounded a danger

signal. Appellant remained on the southern side of the channel, and the bow of the T/B S-2022 collided with the bow of the T/B AMOCO VIRGINIA.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant advances the following grounds for appeal:

1. Appellant excepts to the finding that he was negligent by reason of violating Rule 14 of the Inland Navigation Rules; and
2. The Administrative Law Judge erred in applying the Pennsylvania Rule.

APPEARANCE: Louis H. Beard. Esq., Wells, Peyton, Beard, Greenberg, Hunt and Crawford, 624 Petroleum Building, P. O. Box 3708, Beaumont, TX 77704.

OPINION

Appellant urges that there were special circumstances which called for a starboard to starboard passing. This contention is without merit.

At the hearing, the Administrative Law Judge found that a meeting situation existed, and that Appellant's vessel was required, as provided in Rule 14 of the Inland Navigation Rules, 33 U.S.C.2014, to come to the right and pass the AMOCO ATLANTA's flotilla on the AMOCO ATLANTA's port side.

At the time of this occurrence, Rule 14 provided that:

> (a) When two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each shall pass on the port side of the other.
>
> (b) Such a situation shall be deemed to exist when a vessel sees the other ahead or nearly ahead and by night she could see the masthead lights of the other in a line or nearly in a line or both sidelights and by day she observes the corresponding aspect of the other vessel.
>
> (c) When a vessel is in any doubt as to whether such a situation exists she shall assume that it does exist and act accordingly.

APPELLANT cites *Griffin on Collision*, p. 73, Section 30, which recites the following:

> (3) Special Circumstances. If the conditions of navigation in a particular case make a port to port passing unsafe, it is proper for vessels meeting end on or nearly so, *after appropriate exchange of signals*, to pass starboard to starboard. (Emphasis added.) (Citations omitted.)

Appellant urges the following special circumstances:

(1) *The* AMOCO ATLANTA was behind the T. CLAUDE DEVALL and could have followed behind the DEVALL on the north half of the channel.

(2) The DEVALL and the EDGAR BROWN safely passed starboard to starboard.

(3) The range lights in this area of the channel caused the AMOCO ATLANTA to be on a collision course with the EDGAR BROWN.

(4) For the EDGAR BROWN to return to the north half of the channel would have required a radical course change, while the AMOCO ATLANTA could have positioned herself for a starboard to starboard passing with a minimal course change.

(5) The operator of the AMOCO ATLANTA had a "great amount" of time available after learning of the starboard to starboard passing of the DEVALL and the EDGAR BROWN.

(6) The operator of the AMOCO ATLANTA was confused.

Appellant's contentions do not assist him. The AMOCO ATLANTA had not agreed to a starboard to starboard passing. The record shows that the operator of the AMOCO ATLANTA consistently tried without success to establish a port to port passing. As Chief Justice Fuller Writing for the Supreme Court stated in The *Victory*, 168 U.S. 410 at 426 (1897) (as quoted in *Griffin on Collision*, at 89:

> Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if

> temporarily crowded out of her course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger.

There is no substantial evidence in the record to indicate that Appellant was unable to bring his vessel back to the northern side of the channel to permit a port to port passing, nor is there any valid excuse for undertaking a starboard to starboard passing absent an agreement with the AMOCO ATLANTA.

II

Appellant contends that the Pennsylvania Rule is no longer valid since the Supreme Court's adoption of the "comparative fault" rule in *United States v Reliable Transfer*, 421, U.S. 397 (1975). Appellant misapplies the Court's holding.

In *Reliable Transfer*, the Supreme Court was concerned with the equitable distribution of damages following a maritime collision.*See Southern Pacific Transport Co. v. The Tug Capt. Vick*, 443 F.Supp. 722 (E.D. La. 1977), also cited by Appellant. The issue in Coast Guard suspension and revocation proceedings, however, is not the comparative fault of the parties for the distribution of damages, but the negligence of the person charged. Appeal Decisions 2380 (HALL), 2175 (RIVERA), 2096 (TAYLOR) and WOODS), and 1670 (MILLER). To the extent that the Pennsylvania Rule may be used to prove allegations contained in a specification, it continues to have validity in these proceedings.

The Pennsylvania Rule provides a presumption concerning cause. If a vessel collides with another vessel following a violation of the statutory navigation rules, the causal connection between the violation and the collision is presumed unless the vessel guilty of the statutory fault establishes that the violation of the law in no respect contributed to the collision. The Pennsylvania, 86 U.S 125 (1873); Appeal Decisions 2386 (LOUVIERE), 2358 (BUISSET) and 866 (MAPP). *See also J. Griffin*, *Griffin on Collision*, 200-203. It is not necessary to allege that a collision occurred, since, as noted above, the issue is negligence.

It is not improper to allege and prove the consequence of a negligent act. The consequence, such as a collision, though unnecessary to support a decision finding negligence, may be an aggravating factor, or the lack thereof may be a mitigating factor,

and hence it may be proved whether or not it is alleged. Appeal Decision 2129 (RENFRO). Consequences of a negligent act, such as an allision with a fixed object, may also be alleged to establish a presumption. *See, e.g., HALL, supra* and cases cited therein.

Here, Appellant was charged with neglignece which contributed to a collision. Although application of the Pennsylvania Rule was not necessary to establish *negligence*, the Administrative Law Judge properly applied the Pennsylvania Rule to establish the causal link between Appellant's negligence and the resulting collision - a matter in aggravation.

III

Although not specifically raised by Appellant, one further matter should be addressed.

The negligence specification upon which the hearing proceeded alleged only that Appellant was negligent in the navigation of his vessel, thereby contributing to a collision. It did not allege that he was on the wrong side of the channel or that he violated a statutory navigation rule. As discussed in Appeal Decisions 2358 (BUISSET), 2386 (LOUVIERE), and 2396 (McDOWELL), such a specification is inadequate to enable the person charged to identify the offense so he will be in a position to prepare his defense as required by 46 CFR 5.05-17(b). A negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts. See also Appeal Decisions 2277 (BANASHAK) and 2174 (TINGLEY), *aff'd sub nom., Commandant v. Tingley* NTSB Order EM-86 (1981).

However, deficiencies in the pleading in Administrative proceedings can be cured where the record clearly shows that there was no prejudice. "(T)here may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." *Kuhn v. Civil Aeronautics Board*, 183 F. 2d 839, 841 (D.C. Cir. 1950). Here, Appellant raised no objection and all issues were fully litigated. It is clear from the record that Appellant and his counsel were aware of the government's case and were prepared to defend against it. Appellant does not now complain about the adequacy of the specification.

Since there has been no prejudice to Appellant, and he did not complain of the adequacy of the negligence specification, it need

not be set aside. *See LOUVIERE, supra*.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 23 January 1984 is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D. C., this *18th* day of *October*, 1985.

***** END OF DECISION NO. 2412 *****

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