IN THE MATTERS OF LICENSE NO. 266812
Issued to: Harry H. CANNELL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1570

LICENSE NO. 266812
Issued to: Harry H. CANNELL
and

LICENSE NO. 253155
Issued to: Leonard SINDA

These appeals have been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By orders dated 27 May 1965, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania, suspended Appellant Cannell's license for two months on six months' probation, and entered an admonition against Appellant Sinda upon finding them guilty of negligence and inattention to duty respectively. The specifications found proved against Appellant Cannell allege that while serving as pilot on board the United States SS TEXACO WISCONSIN under authority of the license above described, on or about 7 August 1964, Appellant negligently failed to sound a danger signal when his first two blast signal was not responded to by the approaching SS STEEL MAKER, thereby contributing to a collision with that vessel, and maneuvered the vessel for a port to port passing in a situation which dictated a starboard to starboard

passing.

The specification found proved against Appellant Sinda alleged that while serving as Master of TEXACO WISCONSIN under authority of his license he permitted the vessel to be navigated in a negligent manner by the pilot, thereby contributing to the collision.

At the hearing, Appellants were represented by professional counsel. Appellants entered pleas of not guilty to the charges and each specification.

A record of testimony taken during an investigation into the collision was introduced into evidence by stipulation.

In defense, both Appellants testified and introduced statements of additional witnesses.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charges and all specifications had been proved. The Examiner then entered orders as indicated above.

The complete decisions were served on 9 June 1965. Appeals were timely filed on 7 August 1965 and were perfected on 24 November 1965.

FINDINGS OF FACT

On 7 August 1965, Appellants were serving as pilot and master, respectively, aboard the United States SS TEXACO WISCONSIN and acting under authority of their licenses.

On 7 August 1965, TEXACO WISCONSIN was moored port side to at her berth at a Texaco installation across the Delaware River from Philadelphia. The vessel's heading was 276°t, paralleling the West Horseshoe Range. The face of the berth is about 400 feet from the southerly edge of the marked channel, which is 800 feet wide at that point.

TEXACO WISCONSIN is 632 feet long and has a beam of 94 feet.

STEEL MAKER, a cargo vessel of 468.5 feet in length, with a

beam of 69.6 feet, was inbound on the Delaware River bound for Philadelphia.

At the material time, visibility was good, the wind was negligible, and there was a flood current of about two knots.

The significant times (Zones + 4) and actions follow in chronological order:

c 1035 TEXACO WISCONSIN begins to unmoor, taking in all lines except a quarter spring, and heaving around on the starboard anchor.

1043.5 TEXACO WISCONSIN goes slow ahead.

1045 TEXACO WISCONSIN's engine is stopped and the last line is taken in. Engine is put at half ahead.

1046 STEEL MAKER, rounding into West Horseshoe Range sees TEXACO WISCONSIN at her berth. TEXACO WISCONSIN is going slow ahead on the anchor.

1047 TEXACO WISCONSIN sights STEEL MAKER about a mile and a half distant.

1048 TEXACO WISCONSIN goes half ahead.
(About this time, STEEL MAKER sees TEXACO WISCONSIN at "a slight angle" to her berth).

1048.5 TEXACO WISCONSIN goes slow ahead

1049 TEXACO WISCONSIN's anchor is aweigh.
STEEL MAKER is proceeding on a course conforming to the channel, somewhat to the right of the centerline of the channel. TEXACO WISCONSIN sounds a two blast signal.

1050 Having received no reply to the two blast signal, TEXACO WISCONSIN sounds one blast.

1050.5 TEXACO WISCONSIN goes ahead full on right rudder and, hearing no reply to the one blast signal, repeats the

single blast.

1051 STEEL MAKER sees TEXACO WISCONSIN less than half a mile away, and sounds two blasts for starboard to starboard. TEXACO WISCONSIN immediately sounds a danger signal. STEEL MAKER comes hard left. TEXACO WISCONSIN drops both anchors and backs full.

1053 Collision, at or near the northerly edge of the channel, TEXACO WISCONSIN's bow striking the starboard side of STEEL MAKER.

There is evidence that no one aboard STEEL MAKER heard any whistle signal from TEXACO WISCONSIN until the danger signal. There is evidence also that an early effort by TEXACO WISCONSIN to communicate with STEEL MAKER by voice radio was unsuccessful, possibly because the radio of STEEL MAKER's state pilot was on a radiator within the wheelhouse.

BASES OF APPEAL

It is contended that the gross fault of STEEL MAKER is coming left in what was obviously a port to port situation was the sole cause of the collision, and that the failure of TEXACO WISCONSIN to sound a danger signal after the two blast signal was not a fault because STEEL MAKER would not have heard it anyway.

APPEARANCE: Krusen Evans and Byrne, of Philadelphia, Pennsylvania, by James F. Young, Esquire

OPINION

I

The findings of the Examiner in this case leave something to be desired. In the first place, the only formal "Findings" are of the ultimate facts, couched generally in the language of the specifications. To discover what happened, one must go to the Examiner's Opinion, the fourth paragraph of which begins "The following are the facts. . . "

The "facts of the case" belong in the "Findings." One of the functions of the "Opinion" is to explain how possibly conflicting testimony was resolved in arriving at the findings made.

II

No finding was made as to the headings of the two vessels at the moment of impact, and no finding was made as to the position of TEXACO WISCONSIN at the time of STEEL MAKER's two blast signal.

A finding was made that STEEL MAKER had come left about forty degrees before impact. This would give it a heading of about 050°t at the time. This appears to be almost precisely verified by the course recorder trace. The evidence of TEXACO WISCONSIN's course recorder would appear to give a heading of about 315°t at impact.

On the question of TEXACO WISCONSIN's position in the channel at 1051 hinges a judgement as to the propriety of STEEL MAKER's proposal and action.

If the assumption is made that STEEL MAKER's two blast signal was appropriate, TEXACO WISCONSIN must have been seen in an aspect which called for a starboard to starboard passing. The master of STEEL MAKER testified that 1051 he saw TEXACO WISCONSIN on his starboard hand just entering the channel. The pilot aboard STEEL MAKER testified that, a few seconds before he blew two blasts, he saw "just a little water between the tanker and the docks."

If credence is given to this assumption and to these statements in evidence, one would have to conclude that TEXACO WISCONSIN, with engine backing full and both anchors down managed to come about thirty to thirty five degrees right and cross the channel to the collision point in two minutes. This I find it difficult to accept.

III

Appellants have referred me to a decision of the Canadian Court of Exchequer, *Hemsefjell v. Guard Mavoline*, 1958 AMC 2529, dealing with a fact situation similar to the instant case. There, GUARD MAVOLINE unmoored from the north side of the river,

intending to go east. HEMSEFJELL, inbound, was proceeding west. With GUARD MAVOLINE angling across the channel ahead of her, HEMSEFJELL came hard left into collision at or beyond the south edge of the channel. HEMSEFJELL was held solely at fault.

The principal apparent difference between the cases is that HEMSEFJELL admitted seeing only the red running light of GUARD MAVOLINE, while STEEL MAKER's witnesses testified, as mentioned above, to a clear starboard to starboard passing situation.

However, as indicated in my opinion in Part II, I am convinced that this is not the aspect of TEXACO WISCONSIN that was seen from STEEL MAKER. By 1051 TEXACO WISCONSIN had been swinging right from about 275°t to about 295°t for about five minutes. Even if she were just about to enter the channel, the probability is that her aspect would show her port side only. If it is true, as I am convinced it is, that she had in fact proceeded well into the channel any other aspect would be impossible.

IV

The effect of the left turn of STEEL MAKER must be considered in determining whether negligence within the meaning of R.S. 4450 can be ascribed to Appellant Cannell in his maneuvers *subsequent* to sounding his first one blast signal.

A rough computation, insofar as can be made on the material available shows that, with the vessels on the headings I believe most probable at the time of collision, if the point of impact was at the northern edge of the channel. TEXACO WISCONSIN's stern was almost to the centerline of the channel. If the point of impact was a hundred feet south of that edge, there was almost three hundred feet of water between her stern and the south edge of the channel. When it is recalled that TEXACO WISCONSIN had been backing with anchors down for two minutes,it seems obvious that her stern would have moved farther so much earlier, without backing and the use of anchors, that an easy port to port passing would have been accomplished had STEEL MAKER merely held on.

In other words, I believe that at the moment Appellants elected to go for a port to port passing, absent other

considerations, the situation was such that it was reasonable and prudent to believe that if STEEL MAKER did not change course or speed, a safe crossing to the far side of the channel could be accomplished.

On this record, the proximate cause of collision seems to have been the left turn of STEEL MAKER, and without it no collision would have occurred.

V

It must be asked now whether it was a fault for TEXACO WISCONSIN not to have sounded a danger signal when no reply was heard to the two blast proposal. Rule III, 33 U.S.C. 203, is clear that when there is doubt as to the course or intention of another vessel a danger signal must be sounded.

In *The Victory and The Plymothian*, 168 U.S. 410, the "Statement of the Case" contains this, "The Plymothian thereupon blew a passing signal of one whistle . . . and a minute later repeated it without hearing any reply from the Victory. The vessels were over a mile apart at this time with a bend of the channel between them." (at 414). In the "Opinion of the Court" (at 421), we read:

> "We ought to add that, in the case before us, even if the steamers had been so far on the starboard side of each other as to justify the pilots in considering that they were not meeting 'head and head,' or nearly so, there was no pretense of an agreement to go starboard to starboard under Inspectors' Rule I; *nor was this a case for the application of Rule III*." (emphasis supplied).

Later (at 427), the Court said:

> "The Plymothian was entitled to rely on her repeated single blast to correct the error of the Victory . . . '

The Felix Taussig, CA 9 (1935), 5 F. 2nd 612, relied upon

this case and *The Three Brothers*, CA 2 (1909), 170 Fed. 48, to hold that when a proposal is unanswered, as a precautionary act the vessel "ought to have repeated" the signal.

In *General Seafoods Corporation v. J. S. Packard D. Co.*, CA 1 (1941), 120 F. 2nd 117, is found this language.

> "The evidence is clear that the Trim did not comply with this rule. [Rule III] . . . The trial judge found, on disputed testimony, that the Trim signalled for a port to port passing but got no reply, and the captain of the Trim testified that after giving that signal he was still at a loss to know what the Exeter intended to do . . . and in spite of the statutory rule requiring the *immediate* blowing of the danger signal, the Trim . . . blew no such signal until the Exeter was only 200 feet away . . . "

While it is not specifically stated here that it was the fact alone that no reply was received which brought Rule III into operation (there was evidence of erratic operation of the other vessel, as well), at least it is not suggested that the proposal should have been repeated.

In *Socomy Vacuum Transportation Company v. Gypsum Packet Co.*, CA 2 (1946), 153 F.2nd 773, after noting that it was doubtful that the court should consider an assignment of error that a repetition of an unanswered proposal was a violation of Rule III, (since the matter was not raised at trial) Judge L. Hand stated:

> "Nevertheless we shall assume for argument that, because of the 'Gypsum Prince's' not replying to the first signal, Ingram failed to understand her intention; indeed, it must be owned that it is extremely difficult to explain his second blast on any other assumption. If so, he should not have repeated it, but should have blown four or more short blasts the danger signal." (at 777).

In *The Electric No. 21*, D.C. E.D. Pa. (1947), 73 F. Supp. 781, citing no authority, held that an unanswered signal must be repeated until some signal comes from the other vessel. (This decision, however, seems poorly reasoned. The question of Rule III

was not raised, and the court's apparent requirement was that *each* vessel continue to blow its proposal--with each hearing no answer--until an answer should be heard. But this could be the route to collision. Sometime, certainly, a danger signal *must* be initiated.)

In *James McWilliams Blue Line v. Towing Line*, CA 2 (1948), 168 F.2nd 720, the *dictum* of the *Socomy Vacuum* case is promoted to a holding by the Second Circuit:

> "As we said in *Socomy-Vacuum Transportation Co., v. Gypsum Packet Co.*, to repeat an invitation for a passing on a crossing inevitably presupposes that the inviting vessel is 'in doubt' as to the 'intention' of the other. . ." (per L. Hand, J.)

It is noted that the court took express notice of the Ninth Circuit's *The Felix Taussig* and rejected it. The court said: "It relied on *The Victory* (which incidentally concerned a collision before the Inland Rules had been passed) and our decision in The *Three Brothers* [170 F. 48]; but in both cases the repeated blasts were bend signals, not passing signals at all."

It is difficult to see why this opinion characterized the signals in *The Victory* as "bend" signals. The Supreme Court referred to them as "passing signals" and the "Statement of Facts" in the report shows that while there was a bend between the vessels they were in sight of each other across the bend for a distance of more than a mile. It is possible that a clue to the court's opinion that *The Victory* was not controlling lies in the elliptical statement that the "Victory" collision had occurred "before the Inland Rules" had been passed. The rules were not yet statutory, but there was an Inspectors' Rule III. This rule contained a phrase, "Whether from signals being given or answered erroneously," which did not survive enactment into statute. It may be that the Supreme Court was considered by the Second Circuit to have read the old Rule III as prescribing different conditions from the wording of the statute.

In any event, the doctrine calling for an immediate danger signal when a proposal is unanswered is followed. *Tank Barge Hygrade v. the Gatco New Jersey*, CA 3 (1957), 250 F. 2nd 485; *Mistich v. MIV Letha C. Edwards*, D.C.E.D. La (1963), 219 F. Supp. 22; *Esso Standard Oil Company v. Oil Screw Tug Maluco I*, CA 4 (1964), 332 F. 2nd 211.

I do not construe *Patrick v. The Florence*, D.C.E.D. Pa. (1958), 167 F. Supp. 906, reversed on damages only in *Chester Blast Furnace, Inc. v. The Florence*, CA 3 (1959), 270 F. 2nd 846, nor *A.H. Bull Steamship Company v. The Exanthia*, CA 2 (1956), 234 F. 2nd 650, as being in derogation of this rule.

On the totality of these cases, the law today forbids repetition of a proposal when the first signal is not answered.

These cases have all dealt with repeating signals. If it is a fault to repeat a signal, it would appear *a fortiori* to be a fault to change a signal without having interposed a danger signal. In *Det Forenede Dampschifs Selsakab, A/S v. The Excalibur*, D.C.E.D. N.Y. N1952), 112 F. Supp. 205, there was a proposal for a starboard to starboard passing. When no reply was heard a port to port signal was blown. The District Court found fault with this and suggested that the initial proposal "could" have been repeated. The Court of Appeals (same name, CA 2 (1953), 216 F. 2nd 84) said:

> ". . . the signals from the Columbia were not heard. Accordingly, in compliance with Article 18, Rule III, 33 U.S.C.A. 203, the Excalibur should have immediately sounded the danger signal of not less than four short and rapid blasts; but she did not. This was a serious delinquency. . ."

This decision is specifically controlling in the instant case.

Appellant Cannell's explanation of the situation in this case fully confirms the applicability of Rule III. He said:

> ". . . I didn't receive any answer to my two blasts, so,

> it appeared that the pilot either didn't hear my two-blast signal, or did not wish to pass starboard to starboard." (R-77)

The next question then is whether this fault, as alleged in the first specification in Appellant Cannell's case, contributed to the collision.

There is no need to speculate that a four blast signal at 1050 *might* have been heard by STEEL MAKER. The facts found proved are that STEEL MAKER did not hear the two blasts, and did not hear the two one blasts. Since STEEL MAKER heard nothing and still came left full into a collision which would not have occurred had it proceeded without change, the record, I believe, establishes that the failure of TEXACO WISCONSIN did not in fact contribute to the collision.

This of course does not exonerate Appellants from the fault of failure to sound the signal. The failure is a violation of the Rules of the Road whether a collision occurs or not.

CONCLUSION

On the facts found above, and subject to the remarks in the Opinion herein, I conclude that there is insufficient evidence to establish that there was a situation dictating a starboard to starboard passing when TEXACO WISCONSIN maneuvered first for a port to port passing with STEEL MAKER. Consequently, I conclude that the second specification of negligence lodged against Appellant Cannell should be dismissed.

I conclude, in the same fashion, that while there was fault in the failure of TEXACO WISCONSIN to sound a danger signal when its first proposal to STEEL MAKER went unanswered, the record fails to establish anything contributory to the collision in this failure. It follows that the findings as to "contribution" in the first specification affecting Appellant Cannell, and in the single specification affecting Appellant Sinda, must be set aside.

Because of this, it is appropriate that the order affecting Appellant Cannell be modified. No modification is appropriate for

Appellant Sinda because the Examiner has already given a minimum order, and fault is still found.

ORDER

The findings of the Examiner as to the second specification in the case of Appellant Cannell are SET ASIDE, and that specification is DISMISSED.

The findings of the Examiner as to the first specification in the case of Appellant Cannell and as to the single specification in the case of Appellant Sinda, are MODIFIED, so as to delete therefrom the phrases alleging that the faults contributed to a collision with STEEL MAKER. As MODIFIED, the findings are AFFIRMED.

The order of the Examiner as to Appellant Cannell is MODIFIED, such that Appellant Cannell is ADMONISHED as a matter of record.

The orders of the Examiner entered at Philadelphia, Pa., on 27 May 1965 as MODIFIED in the case of Appellant Cannell, are AFFIRMED.

W. J. SMITH
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 19th day of July 1966.

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      ***** END OF DECISION NO. 1570 *****

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