In the Matter of Merchant Mariner's Document No. Z-748260 and all other Licenses, Certificates and Documents
Issued to: FRANCISCO JIRAU

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

944

FRANCISCO JIRAU

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 9 July 1956, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-748260 issued to Francisco Jirau upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a bellboy on board the American SS AMERICA under authority of the document above described, on or about 26 February, 1956, while said vessel was at sea, he wrongfully molested Mrs. Matsuyo Trinklein, a passenger, by attempting to caress her while in her stateroom.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening

statement and introduced in evidence the testimony of three crew members on the AMERICA. At a later date, the Investigating Officer introduced in evidence, without objection, the deposition of Mrs. Matsuyo Trinklein which was taken by interrogatories and cross-interrogatories at Denver, Colorado.

In defense, Appellant offered in evidence his sworn testimony. He admitted taking a menu and then two bottles of Coca-Cola to Mr. Trinklein's stateroom on the evening of 26 February 1956; he claimed that the stateroom door swung closed due to the roll of the ship; and he denied having attempted to kiss Mrs. Trinklein or even having touched her in any manner.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-748260 and all other licenses, certificates and documents issued to Appellant by the United States Coast Guard or its predecessor authority.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 26 February 1956, Appellant was serving as a bellboy on board the American SS AMERICA and acting under authority of his Merchant Mariner's Document No. Z-748260 while the ship was at sea.

At approximately 2000 on this date, Appellant answered the room service bell when Mrs. Trinklein, a passenger, pressed it because one of her two young children was ill and the ship's doctor had told her to remain in her stateroom for meals. Appellant brought the menu for the evening meal, talked with Mrs. Trinklein in a friendly manner and took her order. A stewardess brought part of the meal before Appellant returned with two bottles of Coca-Cola and two small "shot" glasses containing liquid. Appellant offered Mrs. Trinklein one of the small glasses but she declined it. Appellant insisted as he gradually closed the stateroom door. Mrs. Trinklein protested against the closing of the door but before she

realized what was happening, Appellant hugged her and tried to kiss her. Mrs. Trinklein shoved Appellant away and he left the stateroom.

In about thirty minutes, Appellant returned and invited Mrs. Trinklein to a Bingo party that evening. when she refused, Appellant departed the Coca-Cola bottles and the "shot" glasses.

About 1000 the next morning, Mrs. Trinklein told her bedroom steward about the incident after he asked her why she looked so worried. The matter was then properly reported and Mrs. Trinklein identified Appellant as the member of the crew who had molested her on the preceding evening.

Appellant has no prior record.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that:

POINT A. Since the specification alleges an attempt to caress Mrs. Trinklein, her deposition relating to the completed act should not have been admitted in evidence because this proceeding is criminal in nature and the specification must be strictly construed.

POINT B. The Government failed to prove a prima facie case because the deposition is contradictory and evasive. Mrs. Trinklein did not report the alleged hugging at the time but merely mentioned it later to her bedroom steward; her deposition taken in Japanese indicates that the bedroom steward might not have been able to understand Mrs. Trinklein. Appellant was deprived of his right of cross-examination by the failure of Mrs. Trinklein to appear at the hearing to testify.

POINT C. Appellant was not properly identified by Mrs. Trinklein.

POINT D. The order of revocation is unjust in view of the flimsy evidence offered, the questionable be nature of the alleged

molestation and the silence maintained by Mrs. Trinklein after the alleged incident.

In conclusion, Appellant requests that the Commandant reverse the findings of the Examiner, place Appellant on probation, or remand the case in order that Appellant may confront Mrs. Trinklein in Denver, Colorado, and cross-examine her.

APPEARANCE: Martin Gallin, Esquire, of New York City, of Counsel.

OPINION

These proceedings conducted under the authority of R.S. 4450, as amended (46 U.S.C. 239), have been consistently considered to be remedial rather than criminal in nature. This position is fortified by the above statute itself which provides for the referral of any evidence of criminal liability to the Department of Justice; and by the Administrative Procedure Act section 7(c), which states that the degree of proof required in these administrative proceedings is substantial evidence rather than proof beyond a reasonable doubt as in criminal actions. See Commandant's Appeal No. 830.

Similarly, it has been stated that in such administrative proceedings the proof need not adhere strictly to the working of the specification so long as there has been actual notice and litigation of the issued and there is no surprise. *Kuhn v. Civil Aeronautice Board* (C.A., D.C., 1950), 183 F2d 839. There was no element of surprise with respect to the proof of the consummated offense of caressing Mrs. Trinklein. Appellant was questioned along these lines and his counsel states that he had no objection to Mrs. Trinklein's deposition being offered in evidence although he knew it contained statements that she had been hugged by Appellant. In addition, it is noted that the words "attempting to caress her" were added to the specification upon the insistence of counsel for Appellant that the specification upon the insistence of counsel for Appellant that the specification was originally to indefinite. It is readily conceivable that the work "attempting" was inserted with the intention of conveying the idea that Appellant's advances were repulsed.

Mrs. Trinklein's deposition constitutes substantial evidence in support of the findings and the allegations in the specification. Since Appellant admitted that he was in Mrs. Trinklein's stateroom on the evening of 26 February 1956, there is on question concerning his identification as the person involved. The only issue pertains to what happened in the stateroom. The Examiner rejected the testimony of Appellant in favor of the version presented by Mrs. Trinklein in her deposition. There were no other persons present except that the two small children of Mrs. Trinklein. The statements contained in this deposition are not contradictory or evasive and there is nothing in the record to indicate any reason or motive for Mrs. Trinklein to fabricate such a story. There is no evidence that she encouraged Appellant to make advances toward her. The delay in reporting the matter does not reflect upon Mrs. Trinlkein's credibility. It has been held that five months is not too late for a ship's passenger to complain about a much more serious abuse of her person by a crew member. *Panama Mail S.S. Co. v. Vargas* (C.C.A. 9, 1929), 33 F2d 894. It is apparent from Appellant's testimony that Mrs. Trinklein could intelligibly relate her experience to the bedroom steward in the English language. Appellant testified that she had no trouble reading the menu and that he took her order. Hence, there is no reason why the deposition should not have been considered as adequate to make out a prima facie case against Appellant.

Appellant now wants the opportunity to personally confront and cross-examine Mrs. Trinklein. Appellant was permitted full opportunity to submit cross-interrogatories for Mrs. Trinklein to answer. Again, it is noted that Appellant did not object earlier to the obtaining of this deposition or placing it in evidence. Unfortunately, it is seldom possible to get corroborating testimony on either side in cases of this nature. Nevertheless, the proof may rest entirely upon the deposition of the offended party when there is no good reason for questioning the authenticity of the statements contained in the deposition which has been obtained as a matter of necessity after the passenger has departed from the ship. This appears to be such a case. See also Commandant Appeal Nos. 722, 737, 905 and 920. Hence, it would serve no useful purpose to remand this case in order to permit Appellant to personally, or by counsel, cross-examine Mrs. Trinklein in Colorado.

As stated by the Examiner, such an invasion of the privacy of a passenger is a serious matter and deserves the most severe censure. See Commandant's Appeal No. 905 citing decisions of the courts to this effect. Hence, the order of revocation will be sustained.

ORDER

The order of the Examiner dated at New York, New York, on 9 July 1956, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 8th day of January, 1957.

***** END OF DECISION NO. 944 *****

Top