

In the Matter of Merchant Mariner's Document No. Z-408254-D1 and
all other Seaman Documents
Issued to: ANTONIO R. DE SOUZA

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

991

ANTONIO R. DE SOUZA

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

By order dated 8 October 1956, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman documents upon finding him guilty of misconduct. Six specifications allege that while serving as a wiper on board the American SS MORMACREED under authority of the document above described, between 31 May and 16 July 1956, Appellant assaulted a member of the crew and then assaulted the same seaman, Carlos G. Bravo, with a deadly weapon; Appellant was wrongfully absent from the ship and his duties on two occasions; Appellant twice failed to join his ship.

Appellant was served with the charge and specifications on 13 August 1956 at which time he was directed to appear at a hearing commencing on 22 August 1956. At the time of such service by the Investigating Officer, 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. Since Appellant was not present or represented by counsel on 22 August 1956, the hearing

was conducted in absentia in accordance with 46 CFR 137.09-5(f). The Examiner entered pleas of not guilty to the charge and each specification on behalf of Appellant as provided for in 46 CFR 137.09-35.

The Investigating Officer then made his opening statement. On 22 August and subsequent dates to which the hearing was adjourned, the Investigating Officer introduced in evidence the testimony of three witnesses to the two assault incidents and documentary exhibits consisting largely of certified copies of entries in the ship's Official Logbook.

The hearing was concluded on 3 October 1956 except for the rendering of the Examiner's decision. Appellant had not put in an appearance or contacted either the Examiner or Investigating Officer.

At the conclusion of the hearing, the Examiner announced the decision in which he concluded that the charge and six specification had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served on 23 October 1956. Appeal was timely filed by letter dated 5 November 1956 and supplemented with a brief filed by counsel in June 1957.

FINDINGS OF FACT

Between 17 May and 16 July 1956, Appellant was serving as a wiper on the American SS MORMACREED and acting under authority of his Merchant Mariner's Document No. Z-408254-D1 while the ship was on a foreign voyage.

On 31 May 1956, the ship was at Recife, Brazil. About 0730, oiler Carlos G. Bravo entered the crew's messhall to speak with his union delegate. Appellant was sitting at a nearby table in a somewhat intoxicated condition. He verbally abused Bravo and then jumped on him. Several blows were exchanged before the two seamen were separated. Bravo went to the room of oiler Van Driessche to call him for the next watch.

Appellant followed Bravo to the oiler's room. Appellant entered the room with an opened 4-inch blade pocket knife in his hand as he approached Bravo. The latter backed away and picked up a wastepaper basket which he used to push Appellant into the passageway. Both seamen fell to the deck and Appellant dropped the knife. Bravo got up and ran away. He had received a superficial cut on the abdomen from Appellant's knife. Van Driessche attempted to get the knife but Appellant recovered it. Van Driessche called the ship's officers who stopped Appellant as he again approached Bravo on deck with the knife.

Appellant failed to turn to as required at 0800 on 31 May. He went ashore without permission and returned on board about midday under the influence of intoxicants.

On 5 June 1956, appellant failed to join his vessel upon her departure from Rio do Janeiro, Brazil. Appellant rejoined the ship at Santos, Brazil, on 8 June 1956.

While the ship was at Bahia, Brazil, on 15 July 1956, Appellant failed to perform his assigned duties and was absent from the ship without permission.

On 16 July 1956, Appellant failed to join his ship upon her departure from Fortaleza, Brazil.

Appellant's prior record includes a revocation in 1946 for assault with a dangerous weapon (a new document was issued in 1947), two admonitions in 1953 for absence without leave and a suspension in 1953 for absence, failure to stand watch and refusal to obey a lawful command.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Counsel contends that Appellant should be given an opportunity to submit his defense and cross-examine the witnesses against him; the logbook entry concerning the assault is highly prejudicial; the testimony of the witnesses is conflicting; the testimony does not support the specification; a prima facie case was not proved; and the order of revocation is too drastic.

It is stated that an attached affidavit explains the reason for Appellant's failure to appear at the hearing. Counsel requests that the case be remanded.

APPEARANCE ON APPEAL: Jerome Golenbock, Esquire, of New York City, by Donald S. Sherwood, of Counsel.

OPINION

The brief on appeal states that an attached affidavit contains the reasons for Appellant's failure to appear at the hearing. No such affidavit was received and there is no indication in the record or the original notice of appeal, filed by counsel two weeks after the service of the Examiner's decision, as to why Appellant was not present. He was properly served and directed to appear at the hearing ten days before the hearing was convened. Two attempts were made by mail to notify Appellant of adjournments. Yet, nothing was heard by him. Under these circumstances, Appellant waived his right to present his defense and cross-examine the opposing witnesses.

As to the merits of the case, the testimony of the three witnesses completely supports the two specifications alleging assaults upon Carlos Bravo. The latter's testimony concerning the messhall incident is substantially corroborated by the testimony of the union delegate with who Bravo had been talking. With respect to the more serious incident in oiler Van Driessche's room, Bravo's version is supported by Van Driessche who was an eyewitness. Although there are slight discrepancies in the testimony as to minor details, Bravo's account is corroborated by the other two witnesses as to all material facts.

The logbook entry pertaining to the assaults would not alone have been sufficient to make out a prima facie case because the entry did not comply with the requirements of 46 U.S.C. 702. Nevertheless, it was admissible in evidence as an exception to the hearsay rule under 28 U.S.C. 1732 because it was a record made in the regular course of business. *Lopoczyk v. Chester A. Poling, Inc.* (C.C.A. 2, 1945), 152 F2d 457. In any event, this logbook entry was merely corroborative of the testimony which conclusively

proved a prima facie case against Appellant.

Appellant does not question the proof of the other four specification which are supported by entries in the ship's Official Logbook.

As to the severity of the order, this is the second time Appellant's documents have been revoked for assaulting a crew member with a dangerous or deadly weapon. This is such a serious offense of shipboard violence that few seamen have new documents issued to them after one offense of this nature. Appellant's dangerously aggressive attitude is indicated by his pursuit of Bravo - first to the oiler's room and then out on deck, brandishing the knife on both occasions. An order of revocation is the only appropriate one in view of the statutory duty of the Coast Guard to protect lives and property on United States merchant vessels.

ORDER

The order of the Examiner dated at New York, New York, on 8 October 1956 is AFFIRMED.

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

Dated at Washington, D. C., this 22 day of November, 1957.

***** END OF DECISION NO. 991 *****

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