

In the Matter of Certificate of Service No. E-76199
Issued to: THOMAS GROVES

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

361

THOMAS GROVES

In the Matter of
Certificate of Service No. E-76199
Issued to: THOMAS GROVES
Certificate of Service No. E-543797
Issued to: MORDECIA LOVE

This appeal comes before me in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 15, 16 and 30 March, 1949, Appellants appeared before an Examiner of the United States Coast Guard at New York City to answer charges of "misconduct" supported by identical specifications alleging that while Appellants were serving as bed room porters on board the American SS MARINE CARP, under authority of Certificates of Service Nos. E-76199 and E-543797, respectively, they did, on or about 27 July, 1947, while the ship was at Piraeus, Greece:

"First Specification: * * * willfully and without authority destroy certain property of one George Stefanondakis, to wit, furniture and window-panes.

Second Specification: * * * assault and batter with consequent injury, one George Benetatos. Third Specification: * * * Maltreat certain state employees and civil servants of the Greek Government, namely, Emm. Houlakis, police officer; Alex. Kassafis, policeman; Soterios Polychronopoulos, port guard; and Antonios Damis, port guard, while they were in the execution of their official duties. Fourth Specification: * * * fail to join SS MARINE CARP at Piraeus, Greece."

At the hearing, Appellants were represented by counsel who agreed that it should be a joint hearing on which a separate decision, with respect to the certificate of each Appellant, would be based. Appellants were duly informed as to the nature of the proceedings, the rights to which they were entitled and the possible outcomes of the hearing. After the specifications had been read to Appellants, each of the latter pleaded "not guilty" to all of the specifications and the charge.

Following the Investigating Officer's opening statement, Appellants' counsel delivered an opening statement which culminated with a motion to dismiss the charges on the ground that jurisdiction had not been properly established since the incidents alleged in the specifications had occurred while Appellants were ashore on leave and not aboard the ship. Hence, counsel contended that the Appellants were not acting under authority of their certificates at the time of the alleged offenses and R.S. 4450, as amended, was not intended to apply to such cases as this because the alleged acts had no relation to safety or discipline at sea. Counsel argued that this assumption of jurisdiction is not analogous to a seaman's right to qualify for maintenance and cure while on shore leave since the latter right is based on the public policy to encourage men to go to sea by protecting them against being left stranded and penniless far from home.

After protracted discussion of the jurisdictional question, as well the propriety of this proceeding in view of Coast Guard policy, the Examiner denied the motion although he rejected the comparison with the maintenance and cure theory as being a defective argument. He upheld the jurisdiction on the ground that a member of the crew is permitted to go ashore in foreign countries by virtue of his license or certificate and to that extent he

continues to act in the service of the ship under authority of his license or certificate.

The Investigating Officer offered in evidence a copy of an entry in the official Log Book of the MARINE CARP. Counsel objected to this on the grounds that it was hearsay, it did not comply with the statutory requirements of 46 United States Code 702, and it was not admissible under 28 United States Code 1732 (formerly 28 U.S.C. 695) as an entry made in the regular course of business. The Examiner overruled counsel's objection and received it in evidence as a record made in the regular course of business.

The Investigating Officer then offered in evidence, as a consular report, a certified copy of an Operations Memorandum of the American Embassy at Athens, dated January 22, 1948, and enclosures which included a record of the Greek court conviction of Appellants. Counsel objected to this evidence stating that it was not an official consular document within the meaning of 28 United States Code 1740 (formerly 28 U.S.C. 677) because the consul had no personal cognizance of its contents. He also objected because it was hearsay and Appellants had not been given an opportunity to cross-examine the prosecutions witnesses appearing at the trial in Greece. After hearing counsel's argument that the report was not admissible because it was not based on a personal investigation conducted by the consul but is a mass of documents made by others and merely gathered together by the Department of State, the Examiner overruled the objection and admitted the report as an official consular document in accordance with 28 United States Code 1740.

After the Investigating Officer had rested his case, counsel moved to dismiss the charge and specifications on the grounds that no competent evidence had been produced; the Coast Guard had no jurisdiction in the matter; the proceeding was not in accord with Coast Guard policy; the consular report is merely proof of violation of Greek law; and there is no evidence that Appellants were notified as to the time when shore leave was to expire. The Examiner denied all of the motions to dismiss. He ruled that the evidence established a prima facie case, that jurisdiction had properly been assumed and that the consular report is competent evidence as to the allegation in the specifications as well as being proof of the violation of the laws of Greece.

There was only one witness, other than the Appellants, who appeared to testify in behalf of the persons charged. Both Appellants gave testimony under oath.

In his closing argument, counsel cited several cases in support of his argument that the log entry admitted in evidence was not a record made in the regular course of business and, therefore, it had been improperly received in evidence. After both parties had completed their arguments, the Examiner found the fourth specification and the charge "proved" as to both Appellants and the third specification "proved in part" with respect to Appellant Love. Thereupon, the Examiner entered two separate orders, each of which suspended the respective Appellant's certificate of service, and all other valid licenses and certificates of service held by him, for a period of three months on twelve months' probation.

On appeal, the following points have been raised:

1. There was no competent evidence to sustain a finding that any of the specifications were proved as against the Accused.
2. R.S. 4450, as amended, does not give the Coast Guard jurisdiction over misconduct cases of this type, which occur on shore
3. The Coast Guard should not assume jurisdiction over cases of this type as a matter of policy.
4. So much of the charge as was found proved was against the weight of the evidence.
5. Particularly in the case of Thomas Groves, since the first three specifications were found not proved, the fourth specification should have been dismissed, because the man's failure to rejoin the ship was due to a case of mistaken identity, and was not a matter over which he had any control.
6. The Examiner accepted improper and incompetent testimony in support of the charges over objection made on behalf of the Accused.

Appellant Groves has been going to sea for eighteen years and there is no record of any prior disciplinary action having been taken against him. Appellant Love has been a merchant seaman for

six years. His certificate of service was suspended for two months in 1945 for unlawful possession of government property while serving aboard the SS NATHAN TOWSON.

FINDINGS OF FACT

On or about 27 July, 1947, Appellants were in the service of the American SS MARINE CARP, as members of the crew in the capacity of bed room porters, under authority of Certificates of Service Nos. E-76199 and E-543797, while the ship was at Piraeus, Greece.

On this date, shore leave for members of the crew of the SS MARINE CARP expired at 1600 and the sailing time was set for 1700. Appellants and several other crew members of the MARINE CARP were at the Miaouli Bar on Miaouli Street in Piraeus, Greece. A disturbance started in the bar followed by a similar outbreak on the dock near the ship a short time later. Five negroes, including Appellants, were arrested by the police but two of these men were released on the same day. The ship got underway at 2040 leaving Appellants at Piraeus to await trial. The trial was held on 31 July, 1947.

Appellants were tried before the Court of Common Pleas of Piraeus. They were charged with theft, damaging property, unpremeditated injuries, disturbance of the public order and the use of injurious language against other persons on 27 July, 1947. Proceedings were instituted by the Plaintiffs George Stefanondalsis and George Benetatos for pecuniary and "moral" compensation. The Defendants (Appellants) stated at the beginning of the trial that their witnesses had not been summoned to testify. The prosecution witnesses were interrogated under oath and the sworn statements of nine absent witnesses were read. A reliable interpreter translated this testimony, the sworn statements and all the other parts of the trial for the Defendants' benefit. The Defendants testified and denied the acts charged.

Defendants were found guilty of all the charges except theft and each of them was sentenced to four months imprisonment but were granted the privilege of buying off the penalty at the rate of 6000 drachmas (\$1.20) per day. In addition to this \$144, they were required to pay each Plaintiff 9000 drachmas (\$1.80) and

Plaintiffs' attorney 30,000 drachmas (\$6.00) plus other charges.

A United States Coast Guard Officer who was attached to the American Embassy at Athens, Greece, attended the trial, accompanied by an interpreter, at the request of the Officer-in-Charge of the Consular section of the American Embassy at Athens. This officer reported that the Defendants were represented by counsel of their own choice and were given a fair and just trial.

Defendants took advantage of the opportunity to pay a fine rather than to be in prison for four months. After they were released by the Greek authorities, they were furnished board and lodging by the ship's agents for approximately a month while awaiting the return of the MARINE CARP to Piraeus. During this latter period of time, neither of the Appellants made any protest to a consular officer about the trial.

At the Greek trial on 31 July, 1947, the following facts were established in connection with the incidents which took place on 27 July, 1947.

Appellants were drinking at the Miaouli Bar until approximately 1630. At that time, one of them requested the owner to give him some brandy on credit. Upon the refusal of the proprietor to cooperate, a fight was started by one or more of the Appellants. Other negro crew members of the MARINE CARP assisted the Appellants in destroying property in the bar, fighting with other customers and using abusive language directed at Greeks and Greece.

Appellants then departed from the Miaouli Bar which was only a short distance from the dock near the Customs House. Since the MARINE CARP was lying about 200 feet offshore in the vicinity of the Customs House, there were a considerable number of boats present which were used to transport the crew and passengers between the dock and the ship. When Appellants and other fellow crew members arrived at the Customs House dock at approximately 1700, fighting started between the crew members and the port guards at the Customs House. Appellants were involved in this fracas as well as in the previous one at the bar. Some of the guards and boatmen were injured and furniture and other property was demolished. There was a great amount of confusion for about ten

minutes and, consequently, the extent of Appellants' participation in the disturbance cannot be accurately ascertained. But the evidence strongly indicates that they were attempting to inflict injuries on the port guards and at least one of the boatmen at the dock. It is not clear whether they boarded a boat to return to the ship before engaging in the fight and later returned to the dock or whether they participated in the brawl and then attempted unsuccessfully to force one of the boatmen to take them to the ship. Which, if either, occurred is immaterial although the evidence indicates that at some point, shortly before their arrest, Appellants boarded one of the boats to return to the ship and beat the boatman when he failed to follow their orders. During the course of the battle, Appellant Love attacked one of the port guards, Antonios Damis, injuring him and tearing some of his clothing off.

When the excitement ashore was brought to the attention of approximately one hundred negro crew members aboard the MARINE CARP, some of them tried to get in boats in order to go ashore. The port officers ordered the boats away from the gangway so as to prevent this. Several of the crew then swam ashore to join in the fighting. The MARINE CARP was ready to proceed to sea at 1706 but the crew refused to carry out the officers' orders concerning getting underway, and the negro crew members attacked the port guards who were aboard the ship and had ordered the boats to clear the ship's sides.

Soon after the rioting broke out, one of the port guards summoned the police and, at approximately the time the police arrived on the scene, another one of the port guards fired two or three shots in the air.

The combination of these two factors caused the demonstration on the dock to be quickly brought to an end as the police arrested the two Appellants and three other negro crew members of the MARINE CARP.

The crew on the MARINE CARP still refused to sail the vessel and requested that an effort be made to have the five men released and returned to the ship. At 1745, a representative of the ship's agent and three crew members went to police headquarters and were able to obtain the release of two of the men. At 1945, all the

crew members except Appellants and one other man were back aboard the ship and the Master gave orders to stand by to get underway. At 2040 the MARINE CARP proceeded on its voyage without either Appellant aboard.

OPINION

The Appellants' predominant arguments on appeal are that the Examiner had no jurisdiction to entertain this proceeding and that the log entry and consular report were improperly received in evidence. Repeated objections and motions to dismiss the specifications on these grounds were consistently rejected by the Examiner.

As to the question of the jurisdiction of the Coast Guard to take disciplinary action against merchant seamen while they are on shore leave, (Point 2) the contention of Appellants is that 46 U.S.C. 239 was not intended to apply when seamen were in such a status. But the case of *Aguilar v. Standard Oil Co. of New Jersey (1943)*, 318 U.S. 724, definitely contradicts this view. In this case, the Supreme Court sustained the right of a seaman to recover for injuries incurred while he was on shore leave and returning to his ship. Mr. Justice Rutledge there said, in answer to the argument that the sailor was at the time of his injury following his personal bent:

"To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. *The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business.*

(underscoring supplied) Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seamen than for the landsmen, therefore, 'the superfluous is the

necessary - - - to make life livable' and to get work done.

In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."(underscoring supplied)

The jurisdiction in this proceeding is based on the same theory as is the right of seamen to maintenance and cure as set out in the *Aguilar* case. A seaman must be in the status of "acting under authority of his license or certificate," at the time of the alleged "misconduct", in order to be subject to proceedings under 46 U.S.C. 239. The employment relationship and the status of being "in the service of the ship" are what the license or certificate authorizes. Hence, if they have the status of being in the service of the ship, they are acting under authority of their license or certificate. The test is not the place where the alleged "misconduct" occurred, it is the seaman's status or relationship to the service of the ship at the time the "misconduct" occurs. Thus, in holding that a seaman is entitled to maintenance and cure for injuries sustained while on shore leave, the Supreme Court necessarily held, in the *Aguilar* case, that while on shore leave the seaman continued to have a distinct status in relation to his ship, the status of being in its service. It is, therefore, logical to attach to that status not only the beneficial incident of the right to maintenance and cure but also the incident of amenability to discipline. A status which carries with it beneficial incidents carries with it corresponding obligations and responsibilities when the reasons creating the status are the same in both cases; i.e. the necessity for granting shore leave. Accordingly, the "misconduct" of certificated personnel while on shore leave from the vessel on which they are legally authorized to serve only if they are holders of a license or certificate may be the basis for disciplinary proceedings under 46 U.S.C. 239. This is not pertinent to the offense of "failure to join" since, clearly, this was a breach of the contract committed while acting under the authority of their certificates.

Although it is true that it is the policy of the Coast Guard to exercise restraint in instituting disciplinary proceedings for

acts committed by seamen on shore leave (Point 3), such proceedings are considered to be appropriate when the alleged offense is related to the discipline or safety on board the ship. Offenses which threaten the safety and efficiency of ships engaged in maritime commerce are the underlying basis for 46 U.S.C. 239. When a seaman's behavior ashore may result in incapacitating him for his duties to the vessel, it is the policy of the Coast Guard to subject the seaman to disciplinary action. There is a definite maritime interest, and not merely the general public interest, in maintaining good order and discipline on the part of seamen ashore as well as when on board ships.

As a result of engaging in such behavior as has been found herein that Appellants participated in, the safety and efficiency of the ship either was, or may have been, impaired by a delay in sailing, a resultant crew shortage or a partially inefficient crew. In addition, discipline aboard the ship was certainly disrupted when the crew refused to obey orders to prepare to get underway, abused the Greek port officials on board the vessel and some members of the crew jumped from the ship and swam ashore. And this was all provoked by the fighting, on the dock, in which Appellants were involved, and which they precipitated. Consequently, this proceeding is in conformance with Coast Guard policy which, in turn, is based primarily on the specific public policies related to maritime commerce. This brings out the relationship of such proceedings as this to the maintenance and cure theory propounded in the Aguilar case, on the policy, as well as the jurisdictional, level.

Appellants also argue that the consular report and the log entry should not have been received in evidence (Point 6) and that these two items are not competent to sustain a finding that any of the specifications were "proved" (Point 1) since such a finding was against the weight of the evidence (Point 4).

With respect to the admissibility of the consular report in evidence, it is my opinion that the Examiner properly allowed it to become part of the record. As was pointed out at the hearing, there is a statutory provision (28 U.S.C. 1740) which permits such reports to be received as evidence in court trials despite their hearsay nature. I am in accord with the reasons (R. 74, 75) given by the Examiner for his ruling concerning the admissibility of the

consular report under consideration. All of the material in the report need not be based on the personal knowledge of the consul; documents appended to the report are admissible so that the report may be intelligently evaluated; the report is not conclusive but may be rebutted by competent evidence; and the weight to be given the contents of the [repor????] [??pendent] upon the discretion of the Examiner if the report [satis????] other necessary requirements. The translation of the record of Appellants' trial in Greece is more than merely proof of a violation of Greek laws. It is evidence of such behavior as was above mentioned as being considered to be "misconduct" within the scope of 46 U.S.C. 239. In view of the *Hilton v. Guyot* case (159 U.S. 113) to which reference is made in the Examiner's decision and the fact that a United States Coast Guard officer who personally attended the trial found that Appellants had been given a fair and just trial, I do not feel that the Greek trial record should be ruled out for the reason that Appellants were not afforded the opportunity to cross-examine the witnesses appearing against them. Nor does it appear that Appellants themselves were subjected to cross-examination.

I also agree with the Examiner's reasoning (R. 75, 76) in connection with the admissibility of the log entry in evidence. It is certainly admissible under 28 U.S.C. 1732 as a record made in the regular course of business. In addition to the fact that entries for "failure to join" are required by statute (46 U.S.C. 702), it has been a maritime custom of long standing to record everything concerning the activities of a ship by means of entries in the log books. Entries required by law must surely be records made in the regular course of business even though they do not fully comply with the mandatory statute which requires that they be made. Such non-compliance affects the weight but not the admissibility in evidence. To satisfy 28 U.S.C. 1732 it must be an entry made as a matter of routine to record events for the systematic conduct of the business as a business. It is a matter of fundamental routine to make log entries on ships of all important events. If not in conformity with 46 U.S.C. 702; it is not sufficient evidence to establish a prima facie case but it is admissible under 28 U.S.C. 1732 and, when supported by other evidence, it is sufficient for revocation or suspension of merchant seamens' certificates.

Since the consular report together with the log entry contain

the reliable and substantial evidence necessary to present a prima facie case against Appellants, it need only be considered whether Appellants offered evidence which rebutted this prima facie evidence. It is only necessary that there be "reliable, probative and substantial evidence" (46 C.F.R. 137.21-5), and not proof "beyond a reasonable doubt," to support the decision of the Examiner.

The evidence presented against Appellants shows that they were participating in a fight and committing other violations of the law of the land where their ship was. In addition, practically all of the witnesses at the Greek trial testified that these activities took place after 1600 on 27 July, 1947, and Appellants had been ordered to be on board the ship by 1600.

The only evidence introduced at the hearing to rebut the above findings was the testimony of the two Appellants and one other witness who was aboard the ship. Due to the absence of the latter witness from the scene of the incidents alleged and the apparent inconsistencies in his testimony, it is my opinion that his testimony should not be given any persuasive consideration.

As regards Appellant Love, there is evidence in the record of the Greek trial that Love attacked Antonis Damis. Despite the confusion at the dock, more than one witness testified positively to the truth of such an attack by Love. Although Love testified at the hearing that he was innocent of the offense, his story then was not consistent with his statement at the trial in Greece.

At the latter time, he testified as to certain specific things he had done at the time in question and then added, "I was drunk and remember nothing." In view of the above, the Examiner correctly concluded that there was substantial evidence to find Love guilty of having maltreated Antonis Damis. Since this wrongful act was one of the reasons for Love's failure to join the ship, the finding of "proved" as to the fourth specification is also sustained.

With respect to Appellant Groves, his testimony can be given little weight because of the numerous discrepancies between his testimony at the Greek trial and at the hearing. At the trial, he stated that he was on the way to the ship in a rowboat when the fight started and that he was arrested when the boat returned to

the dock under orders from the police. At the hearing, he testified that he was just leaving the dock when the police arrested him. At the trial, Groves stated he went to the Miaouli Bar with some of his shipmates; but, at the hearing, he testified that he had been sent ashore to get the crew back aboard the ship. The amount of money Groves claimed he lost increased from \$150 at the trial to \$500 at the time of the hearing. As was previously mentioned, there was no complaint made regarding the conduct of the trial at the time.

For these reason, I feel that the attempt to refute the prima facie case against Groves was not successful and the finding of guilty of "failure to join without reasonable cause" must stand despite the fact that the other three specifications were found to be "not proved". It was not necessary for the Examiner to find that Groves had destroyed specific property or assaulted specific persons in order to justify his conclusion that it was through Groves own misconduct that he was detained by the police and thereby missed the ship. The charges which were found proved against Groves at the Greek trial were broader than the offenses alleged in the specifications herein. Consequently, it is evident that Groves was found guilty at the trial of acts of misconduct in addition to these alleged in the first three specifications.

Besides the above basis for misconduct, there is reliable evidence that the cause of Appellants' failure to join the ship arose at a time when they should have been aboard the vessel. The fighting started well after 1600 and according to Appellant Groves' own testimony they had orders to return to the ship before 1600. During this unauthorized absence, they were apprehended by the police. Whether they were arrested justly or not makes no difference, since anything happening to them after the time they were due back was their own responsibility so far as it concerned their presence on board the ship in time to sail.

CONCLUSION and ORDER

For the above reasons, the Orders dated 12 April, 1949, should be, and they are, **AFFIRMED** with respect to each Appellant.

J. F. FARLEY
Admiral, United States Coast Guard

Commandant

Dated at Washington, D. C. this 12th day of October, 1949.

***** END OF DECISION NO. 361 *****

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