

In the Matter of Merchant Mariner's Document No: Z-177556-D1  
Issued to: LOUIS O. HALE

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

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LOUIS O. HALE

This appeal comes before me by virtue of Title 46 United States Code 239(g) and 46 Code of Federal Regulations Sec. 137.11-1.

On 5 June, 1950, an Examiner of the United States Coast Guard at New York City, suspended Merchant Mariner's Document No. Z-177556-D1 issued to Louis O. Hale upon finding him guilty of "misconduct" based upon a specification alleging in substance, that while serving as a wiper on board the American S. S. CAPE SAN DIEGO, under authority of the document above described, on or about 18 June, 1947, while the ship was at Calcutta, India, he assaulted the ship's Purser while the latter was engaged in ship's business. Three other specifications were found "not proved" and dismissed by the Examiner on motion of counsel for Appellant.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. He was represented by counsel of his own selection and he entered a plea of "not guilty" to the charge and each specification.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence certified copies of log

entries, a consular report, the deposition of the Purser and the testimony of messman Castillo who had been a witness to the altercation between the Purser and Appellant. At the time of its introduction, there was no objection raised to any of the documentary evidence. Later, part of the deposition was objected to on the ground that it contained hearsay evidence but this objection was overruled by the Examiner.

Counsel for Appellant then moved to strike the entire consular report from the record on the ground that it is pure hearsay and deprives Appellant of his fundamental right to cross-examination. The Examiner denied the motion stating that this report is within the purview of the statute making Consular Reports admissible in evidence. A motion was then made to strike the log entries from the record on the ground that they did not comply with the statutory requirements. This motion was denied since the entries are admissible as records made in the regular course of business. It was at this point that the Examiner granted counsel's motions to dismiss the other three specifications because the only evidence to support them were the log entries which failed to make out a prima facie case since they did not conform with the statutory requirements of 46 U.S.C. 702. A motion to dismiss the remaining specification on the ground that no prima facie case had been made out was denied by the Examiner.

At this time, counsel for Appellant made his opening statement on behalf of Appellant. Counsel stated that proof would be submitted to show that Appellant had been illy treated as part of a plan "to beat Mr. Hale down" because he was a member of the C.I.O. National Maritime Union which was a minority union on the ship. It was said that all the other crew members except Castillo and Appellant belonged to the Seaman's International Union.

In defense, Appellant testified under oath in his own behalf and also offered in evidence a deposition by Castillo in order to impeach the credibility of Castillo's previous testimony at the hearing.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel, the Examiner found the charge "proved" by proof of the specification and entered an order suspending Merchant Mariner's Document No. Z-177556-D1,

and all other documents issued to Appellant, for a period of twelve months; four months outright suspension and eight months suspension on twelve months probation.

From that order, this appeal has been taken, and it is urged that the finding of guilt of the specification of assault and battery should be reversed because such a finding is not supported by proper evidence for the following reasons:

Point 1: The deposition of the Purser contains only hearsay evidence to the effect that Appellant attacked the Purser. The Purser admits he could not remember who or what hit him and says he was told by Castillo that Appellant struck him from behind. Castillo's testimony does not corroborate this part of the Purser's deposition. In his own deposition, Castillo states that the Purser was the instigator of the fight and that the Purser received his injuries when he slipped and fell against a tree during the fight.

Point 2: The log entry was not executed in the manner required by 46 U.S.C. 701-702 since it was not read to Appellant, he was not given a copy of it, no reply of Appellant was noted nor was he even given an opportunity to reply to it. Also, the entry is hearsay since not made by anyone having personal knowledge of the incident.

Point 3. The consular report is based on hearsay and the admission of this report completely destroyed the right of the person charged to be confronted with and cross-examine witnesses who testified against him.

It is further submitted that in the absence of credible proper evidence against the person charged, the testimony of Appellant supported by the deposition of Castillo, should have been believed and the charge dismissed. And, in any event, it is contended the order by the Examiner was unduly severe because Appellant has already been severely punished by imprisonment overseas and

confinement aboard the vessel.

APPEARANCES: Mr. William L. Standard of New York City Mr.  
Malcolm B. Rosow, Esquire, of Counsel, for  
Appellant.

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

*FINDINGS OF FACT*

On a voyage extending from the first part of April, 1947, to  
the early part of August, 1947, Appellant was serving first as  
assistant electrician and later as a wiper on board the American S.  
S. CAPE SAN DIEGO, under authority of his Merchant Mariner's  
Document No. Z-177556-D1.

About 1 May, 1947, Appellant slipped on a ladder and hurt his  
back. On 11 June, 1947, Appellant was demoted from his position of  
assistant electrician since he was not performing his duties  
satisfactorily.

After several previous attempts to obtain medical attention  
for his back, Appellant was admitted to the Presidency General  
Hospital at Calcutta, India, on 11 June, 1947, while the Cape San  
Diego was in that port. Appellant was assisted by the American  
Consul in securing admission to the hospital but he remained there  
only two days before being discharged upon his own request because  
he did not approve of the treatment he was given in the hospital.  
After this, Appellant twice again requested that he be examined and  
hospitalized.

On 17 June, 1947, he went to the above hospital with the  
Purser of the ship and a crew messman. The latter was also to be  
examined for possible need of hospitalization. Both Appellant and  
the messman, Castillo, were examined but neither of the two men  
were hospitalized. When the three men left the hospital, Appellant  
and the Purser were walking side by side and engaged in a heated  
conversation. The Purser was angry because he believed Appellant  
was faking about his injury. Appellant was irritated because he  
had failed to again be admitted to the hospital as a patient.  
Castillo was about eight or ten feet behind the other two men. As

they neared the hospital gate, Castillo saw Appellant and the Purser begin to exchange blows. The ground was slippery and, in less than a minute, the Purser slipped and the two men fell to the ground in a clinch. The Purser hit his head on a tree trunk or root and Castillo separated the two men. Both Appellant and Castillo assisted the Purser in getting to his feet. There was blood on the Purser's face and he was nearly unconscious. The Purser's glasses had come off during the struggle and Appellant handed them to Castillo. The latter assisted the Purser back to the hospital and Appellant walked away towards the office of the American Consul.

As shown by the hospital medical report, the Purser received a concussion which resulted in amnesia for a period prior to the accident, a fracture of the left lower jaw with considerable soft tissue swelling and loosening of the last molar tooth, and traumatic perforation of his right ear drum which resulted in partial deafness. The Purser stated in his deposition that he lost two molar teeth and that about seventy per cent of the hearing in his right ear has since returned. He also said that the amnesia condition made it impossible for him to remember the events which occurred at the time of the fight.

Upon arriving at the American Consulate General's office, Appellant told a Consular Officer that "after he (Appellant), Castillo and the Purser had left the hospital, Hale (Appellant) remarked that he wished to go uptown to get a pair of trousers dry-cleaned, to which he stated that the Purser replied: 'You are too cocky, you son of a b .'. Hale says that thereafter he removed the Purser's glasses and struck him two or three times in the face." (Consular Report dated 23 July, 1947; Investigating Officer's Exhibit #3). This is when the exchange of blows occurred.

In the meanwhile, the Master of the ship had been informed of the incident and proceeded to the Consul's office. The Master, Consular Officer and Appellant went to the hospital where they found the Purser under examination and still incoherent as a result of the injuries. When the Master told Appellant that he would be confined to the ship, Appellant became violently argumentative and the Master decided to turn Appellant over to the local police authorities. Appellant was arrested at the hospital and charged

with "voluntarily causing grievous hurt." He was put in jail on 17 June, 1947, and remained there until the Cape San Diego left Calcutta on 5 July, 1947. On the latter date, the charge against Appellant was withdrawn to permit his return to the United States. During this two-week period, Appellant's trial was continually postponed.

Appellant was confined aboard the ship from 5 July to 19 July, 1947. On the latter date, he talked with the Master and agreed to create no further disturbance if permitted to return to his regular duties as wiper. The Master agreed and Appellant's conduct for the remainder of the trip was satisfactory.

Appellant has been going to sea since 1939. He is thirty-three years old and married. In 1943, his document was suspended for two months on six months probation for assault and for failing to perform his duties. Appellant was admonished twice in 1944 for participation in a disorderly brawl and for being absent over leave. He was admonished again in 1946 for refusal to turn to. There is no record of any disciplinary action having been taken against Appellant for acts which transpired subsequent to the date of the alleged offense which constitutes the basis for this proceeding.

#### *OPINION*

The relevant and material statements of the American Consul at Calcutta, India, which statements are contained in the consular report, were properly admissible in evidence. 28 U.S.C. 1740.

Appellant testified in his own behalf. The Examiner saw him and heard him. I do not consider it proper to impose my opinion, based upon consideration of a "cold" record, over that of the person who is best qualified to weigh the evidence based upon his determination of the credibility of the witnesses.

I have noted and carefully considered each point presented by this appeal. It is my opinion that there is substantial, reliable and probative evidence in this Record to support the Examiner's action.

Concerning Appellant's objection to the consular report, it is

true that the statements of the American Consul are not conclusive. But the statement made by Appellant to the Consular Officer immediately after the fight was an admission against Appellant's interest and, therefore, not affected by the hearsay rule. The hearsay rule does not apply to statements made by a party to an action which are against his own interest and which tend to establish any material fact in the case. Consequently, the statement by Appellant that he struck the Purser "two or three times in the face," without physical provocation, was an admission of fact and admissible in evidence for this reason as well as because it was contained in the consular report. It follows that such evidence has probative value since it was an admission of conduct which, if accepted as true, is proof of one element necessary to establish the truth of the offense alleged in the specification, i.e., that Appellant did, in fact, attack the Purser. And this evidence is reliable because the statutory provision, providing for the admission of consular reports in evidence, was enacted because such evidence is generally of a reliable nature.

The tests of credibility applicable to other forms of evidence apply to admissions and the Examiner specifically stated in his opinion that he was greatly impressed by the manner in which the consular report was written. The Examiner stated that he considered Castillo to be a "very unsatisfactory" witness due to his lapse of memory; and Appellant's credibility was diluted because of his self-interest. *Rosenberg v. Baum* (1946), 153 F 2d 10. Consequently, the Examiner in the exercise of sound judgment placed greater reliance on the consular report than on the testimony of either of these two men who were the only witnesses to testify at the hearing. The propriety of accepting this admission as the truth, as opposed to Appellant's later testimony to the contrary, was enhanced by the fact that the testimony was taken nearly three years subsequent to the time of the incident. Courts do not look with favor upon memory testimony given many years after the events occur. *Fraser v. Williams* (1945), 61 F. Supp. 763. The truth is often honestly distorted even within the period of a few days.

Concerning the hearsay evidence contained in the consular report, it is worthy of note that the Supreme Court has held that hearsay evidence has some probative value. *Diaz v. United States*

(1912), 223 U.S. 442. And the statutory provision, concerning the admissibility of consular reports in evidence, was enacted because such evidence is usually reliable even though it is often of a hearsay nature. The Attorney General of the United States, in his Manual on the Administrative Procedure Act (1947), states that the requirements of "reliable, probative and substantial evidence" are a restatement of the present law as set out in the case of *Consolidated Edison Co. et al v. N.L.R.B.*, 305 U.S. 197, which was decided prior to the effective date of the Administrative Procedure Act. The gist of the opinion in the latter case, on this point, is that the admission of matters incompetent in judicial proceedings will not invalidate an administrative order but uncorroborated hearsay or rumor does not constitute substantial evidence except when supported by other evidence.

Cases decided subsequent to the effective date of the Administrative Procedure Act continue to hold that administrative agencies are not limited by the rigid rules of evidence which govern trials at common law. *Federal Trade Commission v. Cement Institute* (1948), 333 U.S. 683, 705; *Willapoint Oysters, Inc. V. Ewing* (C.C.A.9. 1949), 174 F. 2d 676, 690, cert. denied 338 U.S. 860; *United States v. Watkins* (1947), 73 F. Supp. 216, 224; *Hackney Bros. Body Co. v. New York Central R. Co.* (1949), 85 F. Supp. 465, 467. The following is quoted from the *Willapoint Oysters* case (supra) and the words quoted within this excerpt are from the *Consolidated Edison* case (supra):

"The degrees of *probative* force and *reliability* of *hearsay* evidence are infinite in variation, and its use by administrative bodies, ex necessitate, must in part be governed by the relative unavailability of other and better evidence. However, since 'substantial evidence' includes more than 'uncorroborated hearsay' and 'more than a mere scintilla,' the findings, to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla. Founded upon these requirements, the test whether evidence is substantial, is whether, in the individual case before the court, there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

It is my opinion that, taking into consideration that above standard, there is substantial evidence to support the essential findings and conclusions which are based primarily on Appellant's own admissions contained in the consular report and the uncontradicted portions of his testimony. There are some conflicts in the evidence but it is generally agreed that the Purser did direct some derogatory language toward Appellant; that there was a fight or scuffle between the two men; that they both fell to the ground and the Purser hit his head; and that the Purser was seriously injured. These facts are established by the testimony of Castillo and Appellant, some portions of the Purser's deposition which are not hearsay and the consular report of the American Consul at Calcutta, India.

The Purser certainly received the injuries either as a result of the blows struck by Appellant, when the Purser fell and hit his head, or from a combination of the two forces. Acknowledging the contention that the Purser slipped on the wet ground, the most logical inference is that he would not have fallen except for the impetus of the blows delivered by Appellant.

I accept Appellant's admission against interest as proof of the fact that he initiated the physical combat. Although some reprisal may have been justified by the Purser's verbal assault upon Appellant, it is not reasonable to say that he was entitled to inflict such serious injuries as to require hospitalization. Regardless of the amount of damage intended, the seriousness of the offense must be judged by the results produced. Consequently, it makes no difference whether the Purser was actually injured when Appellant hit him or when the Purser fell to the ground as a result of the blows. The injuries to the Purser resulted either directly or indirectly from the blows delivered by Appellant.

The Examiner stated that he had given "great weight" to the consular report in arriving at his decision and he made specific reference to that part of the report wherein it is related that Appellant said he had struck the Purser in the face after the latter called him a "S.O.B." This, together with the undenied evidence as to the resultant damage to the Purser arising out of the same incident, formed a sufficient basis in evidence to make the findings essential to arrive at the conclusion that the specification alleging assault and battery was "proved." This

conclusion is further supported by a letter, from one of the doctors at the hospital in Calcutta, which is contained in the consular report. This letter states that Appellant's general attitude was "truculent and bellicose" and that he had threatened to hit the Purser while they were "in the admission room of the hospital." Whatever tends to make a story substantially more probable corroborates it. *Associated General Contractors of America v. Cardillo (1939)*, 106 F. 2d 327

In his testimony, Castillo did not testify that Appellant was not the aggressor or that the Purser was the instigator of the fight. He stated that he saw the two men exchanging blows but he refused to say that he knew which man struck the first blow. He did say that the Purser had his hands up and was trying to get out of the gate, which indicates that he was on the defensive. Castillo also testified that the Purser hit his head when he fell but he did not state that this was what caused his injuries. As mentioned above, the latter is immaterial since it has been found that the fall was motivated mainly by Appellant's acts.

#### CONCLUSION

Since evidence is considered to be reliable and probative if it is carefully weighed and evaluated in the light of the credibility of the witnesses and the other common sense rules of probity and reliability which prevail in courts of law and equity, I feel that these requirements have been met with respect to the evidence considered and that there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Willapoint case (supra, p.9). Hence, there is substantial evidence to support this decision. It is agreed that the hearsay portion of the Purser's deposition and the log entry must be given little or no weight in reaching this decision. In view of the seriousness of the injuries inflicted, the order imposed is not considered to be excessive despite the previous punishment meted out to Appellant as a result of his conduct. It appears that he brought incarceration on himself more because of his continued belligerent attitude rather than because of the specific incident at issue in this proceeding.

#### ORDER

The Order of the Examiner dated 5 June, 1950, should be, and it is, AFFIRMED. In accordance with existing policy, the suspension ordered shall commence to run upon the surrender of the temporary license which has been issued to Appellant.

Merlin O'Neill  
Vice Admiral, United States Coast Guard  
Commandant

Dated at Washington, D.C., this 30th day of November, 1950.

\*\*\*\*\* END OF DECISION NO. 467 \*\*\*\*\*

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