

In the Matter of Certificate of Service No: E-735709  
Issued to: CRUZ D. GARCIA

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

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CRUZ D. GARCIA

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 2 August, 1950, an Examiner of the United States Coast Guard at New York City suspended Certificate of Service No. E-735709 issued to Cruz D. Garcia upon finding him guilty of "misconduct" based upon a specification alleging in substance, that while serving as messman on board the American S.S. PRESIDENT VAN BUREN, under authority of the document above described, on or about 25 May, 1950, he wrongfully attempted to strike the Second Assistant Engineer, L.C. Fields, with a butcher steel while said vessel was in Hong Kong. A second specification, alleging that on this same date Appellant engaged in a riot aboard the vessel, was considered to be comprehended within the first specification and therefore, it was dismissed by the Examiner.

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 the testimony of six engineering officers who had been members of the crew of the PRESIDENT VAN BUREN at the time in question. The Investigating Officer then rested his case.

In defense, Appellant made his opening statement before offering in evidence the testimony of the Master and four members of the crew.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant, the Examiner found the charge "proved" by proof of the first specification and entered an order suspending Certificate of Service No. E-735709, and all other valid documents issued to Appellant by the U.S. Coast Guard or its predecessor authority, for a period of six months.

On 20 October, 1950, the Examiner denied Appellant's motion to reopen the hearing to afford Appellant the opportunity to testify in his own behalf.

From that order, this appeal has been taken, and it is urged that the decision is not supported by the evidence in that Appellant had nothing to do with the start or finish of the fight and argument; he did not get involved in the fight; he had no intention of striking the Second Assistant Engineer; the entire situation was due to the intoxication of one of the engineers; Appellant wanted to stop the fight and prevent anyone from using the butcher's steel; and the matter was blown up far beyond its proper proportions at the hearing which is evident from the fact that there had been apologies and the officers and unlicensed personnel considered this matter a closed incident. It is also claimed that the order imposed is too harsh and that the Examiner erred in not granting the motion to reopen the hearing in order to admit Appellant's testimony in evidence. Predicated upon the foregoing, it is submitted the charges should be dismissed, the suspension should be made probationary or the hearing should be reopened.

APPEARANCES: Patrolman Irv. Dvorin of the National Cooks and Stewards Union, of Counsel.  
William L. Standard, Esq., of New York City, by  
Abraham Weisberg, Esquire, on the brief.

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

*FINDINGS OF FACT*

On 25 May, 1950, Appellant was serving in the capacity of a messman, under authority of his Certificate of Service No. E-735709, on board the American S.S. PRESIDENT VAN BUREN while said vessel was in the port of Hong Kong.

At approximately 1720 on this date, during the course of the evening meal, a fight broke out between one of the Junior Third Assistant Engineers and one of the messmen who was serving the meal. This developed into a general riot between the steward's department and the engineering officers in the saloon. There was fighting in the passageway as well as in the saloon.

During the course of this scuffle, the Second Assistant Engineer took hold of Appellant and held him against the bulkhead with both of his hands against Appellant's throat. This action was taken to prevent Appellant from kicking at the Third Assistant Engineer or to otherwise engage in the fight. Since Appellant was struggling to get free, the effect of this hold was that Appellant was necessarily choked to some extent. When the Chief Steward saw Appellant's predicament, he pushed the Second Assistant Engineer with such force as to break his hold on Appellant. The Second Assistant weighed about 200 pounds and Appellant approximately 125 pounds.

Appellant then obtained the butcher's steel which is customarily kept in the adjoining pantry. The butcher's steel is an implement which is ordinarily used to sharpen knives. This particular one was about fourteen inches long and five-eighths of an inch in diameter. Appellant approached the Second Assistant Engineer with this instrument in his right hand while the Second Assistant Engineer's back was facing Appellant. When Appellant was about eighteen inches from the engineering officer, he was holding the butcher's steel over his head in a striking position. Just then, the Chief Engineer, who was standing behind the Second Assistant, saw Appellant and took the butcher's steel away from him. Appellant did not attempt to regain possession of the

instrument or to take any other retaliatory action against the Second Assistant. The latter did not know anything at all about this conduct of Appellant's until he was told about it by the Chief Engineer at some later time.

There is no record of any prior disciplinary action having been taken against Appellant by the United States Coast Guard.

#### OPINION

I find no merit in Appellant's contention that the hearing should be reopened in order to admit Appellant's testimony in evidence. Appellant was represented by counsel at the hearing and he had every opportunity to make his defense at that time. Nevertheless, he did not choose to testify and the application to reopen the hearing was made after the Examiner's decision had been handed down. In *Sisto v. C.A.B.* (1949), 179 F. 2d 47, the court refused to remand the case to let Sisto put in his defense after he had stood mute. In effect, the court stated that if he had a defense he should have put it in at the time before the hearing examiner. It is my belief that this is equally applicable to this case. This is not a situation where it is necessary to receive further evidence in order to supply the basis for findings, on material points, which have been omitted from the record, or where there is new evidence which was not available for presentation at the time of the hearing. If such conditions had been present, it would have been proper for the Examiner to have reopened the hearing. But the discretion to do this should be narrowly limited, particularly when the Examiner has rendered his decision in the case.

Appellant raises several points on which he bases his contention that the decision is not supported by the evidence. Many of these arguments are immaterial to the point at issue herein which is whether Appellant attempted to strike the Second Assistant Engineer with the butcher's steel. Appellant claims that he had no such intention but that he wanted to prevent the use of the butcher's steel and stop the fighting. In his sworn affidavit in the application to reopen the hearing, Appellant states that whatever he did after being choked was done in an attempt to defend himself. It is stated in the brief on appeal that Appellant "never at any time raised the butcher's steel, but held it in his hand \*

\* \* " .

The Examiner accepted the testimony of the Chief Engineer that Appellant held the butcher's steel in an upraised position close enough to the Second Assistant to have hit him if the Chief Engineer had not intervened and taken the weapon away from Appellant. The Examiner is the best judge as to the credibility of the witnesses and I am not in a position to alter his findings so long as they are based on substantial evidence. The Chief Engineer's testimony is considered to be of a high caliber since he showed himself to be a disinterested witness.

Appellant's claim that he was acting in self-defense is not convincing under the circumstances. He obtained possession of the butcher's steel only after he had been released by the Second Assistant Engineer. He had to retreat to the pantry in order to get this instrument. He then approached the Second Assistant Engineer with it grasped in his hand. Certainly, the most logical way for him to have avoided the presence of the Second Assistant Engineer would have been to have continued to retreat from the scene of the fighting rather than to have voluntarily approached it for a second time. It does not seem reasonable to claim that he wanted to prevent all use of the butcher's steel in the face of the statement that he had it to defend himself. If he had raised it against the Second Assistant Engineer when the latter was choking him, then the situation would have been entirely different and probably justified since the engineer was a much larger man than Appellant. But it is perfectly clear from the evidence that Appellant had completely escaped from the Second Assistant and was not in any danger. This is especially true regarding the Second Assistant since he had his back turned to Appellant.

#### *CONCLUSION*

Considering the serious injury which might have been inflicted by the butcher's steel if the Chief Engineer had not arrested Appellant's attempt to strike the Second Assistant Engineer, I do not feel that the order imposed is, in any manner, excessive or harsh.

#### *ORDER*

The Order of the Examiner dated 2 August, 1950, should be, and it is, AFFIRMED.

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

Dated at Washington, D.C., this 9th day of January, 1951.

\*\*\*\*\* END OF DECISION NO. 479 \*\*\*\*\*

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