

In the Matter of Merchant Mariner's Document No: Z-61800  
Issued to: JOSE HERNANDEZ

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

480

JOSE HERNANDEZ

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 24 July, 1950, an Examiner of the United States Coast Guard at New York City revoked Merchant Mariner's Document No. Z-61800 issued to Jose Hernandez upon finding him guilty of "misconduct" based upon three specifications alleging in substance, that while serving as assistant crew's cook on board the American S.S. ARGENTINA, under authority of the document above described, on or about 21 and 22 December, 1949, he was twice wrongfully in quarters assigned to passengers and he wrongfully disobeyed a lawful order of the Junior Officer on watch.

On 4 May, 1950, Appellant was served with a copy of the charge and specification by the Investigating Officer. Appellant acknowledged receipt of this by signing the reverse side of the copy contained in the record. At this time, the Investigating Officer fully explained the proceedings to Appellant. Since Appellant does not understand the English language very well, the Investigating Officer took the precaution of going through this routine a second time with an interpreter. The copy of the charge

and specification form in the record states that the hearing was to be commenced on 17 June, 1950, at 1400. But on 4 May, 1950, Appellant was informed by the Investigating Officer that the hearing date was 13 June, 1950. The Investigating Officer testified that he inadvertently wrote down the date as "17" instead of "13" on the charge and specification form.

Both the Investigating Officer and Appellant were still under the impression that the hearing was set for Tuesday, 13 June, 1950, when they discussed the matter on 8 June, 1950. Appellant visited the Investigating Officer on this latter date to tell him that Appellant expected to depart on a voyage, which he did on this same date. Consequently when the Investigating Officer finally realized his mistake on 12 June, he was unable to contact Appellant to tell him that the hearing was actually scheduled for June 17th instead of the 13th. Appellant did not put in an appearance on either the 13th or 17th because he was on a voyage which terminated on 21 June, 1950.

Apparently through an agreement with the Examiner, the hearing was convened on 19 June, 1950, at which time most of the above information was disclosed by the Investigating Officer's testimony. The Examiner stated that the proceeding would be conducted in absentia in accordance with 46 CFR 137 09-5(f) since Investigating Officer was still unable to contact Appellant. The date for the hearing had originally been intended to have been set for 13 June because the only witness the Junior Officer of the watch mentioned in the third specification - was on a ship which was due in New York on 12 June.

The Examiner stated that he was satisfied that Appellant's constitutional and statutory rights had been adequately protected and a plea of "not guilty" to the charge and each of the specifications was entered for Appellant by the Examiner.

Upon the request of the Investigating Officer, the Examiner then adjourned the hearing until 1400 on 24 July, 1950, since the Investigating Officer's only witness was again at sea and would not return to New York until this date. The Examiner instructed the Investigating Officer to make further attempts to get in touch with Appellant and inform him to be present.

On 24 July, 1950, the hearing was reconvened at 1430 Appellant was not present. After the Investigating Officer's witness had testified concerning the allegations contained in the three specifications, the Examiner called the Investigating Officer to testify under oath. The Investigating Officer testified that he had received a telephone call on 23 June, 1950, from a man who professed to be representing Appellant and this man wanted to know what the outcome of the hearing had been. The Investigating Officer said that he told the man the hearing would be completed on 24 July, 1950, at 1400 and Appellant was to be there. Appellant then talked with the Investigating Officer on the telephone and was given the same information and Appellant repeated the date and time back to the Investigating Officer. Appellant was also advised that the hearing would proceed whether or not he appeared.

This testimony by the Investigating Officer is contradicted by a letter attached to the appeal brief as Exhibit A. It is stated in the brief that this letter is an explanatory letter submitted by Appellant but the letter is not signed. It contains Appellant's name typed at the end of it. This letter states that "I, Jose Hernandez" had a friend call up the Coast Guard office about 23 June and that his friend was told that Appellant would get a hearing notification by mail as to the date of the hearing and that this letter of notification would be addressed to Appellant at the Seaman's Institute. The Investigating Officer testified that Appellant had not given him this address.

At the conclusion of the hearing, the Examiner found the charge and three specifications "proved" and entered an order revoking Merchant Mariner's Document No. Z-61800 and all other licenses, documents and certificates issued to Appellant by the U.S. Coast Guard or its predecessor authority.

It has been ascertained from Headquarters records that Appellant shipped on a foreign voyage on 23 June, 1950 - the date of the controversial telephone call - and was not discharged until 13 September, 1950. Having eventually received the Examiner's decision which was mailed to him at the Seaman's Institute, 25 South Street, New York City, Appellant appeared at the Coast Guard office in New York City on 9 October, 1950, and surrendered his Merchant Mariner's Document No. Z-61800. A notice of appeal had

been submitted in behalf of Appellant on 4 October, 1950, by Leon Luria who, allegedly, is a physician licensed to practice in the City and State of New York.

Subsequently, an appeal brief was submitted by the Workers' Defense League of New York on behalf of Appellant. It is urged that Appellant should be given an opportunity to be heard in his defense, particularly because of the severity of the order imposed. It is also stated that 17 June was an "unlikely" day on which to schedule the hearing because the Coast Guard offices are closed on Saturdays; that the hearing held on 19 June was improper since Appellant did not have any notice about this date; and that a great deal of confusion existed with respect to the continuance of the hearing until 24 July. It is finally contended that since the Investigating Officer relied on a telephone conversation (on 23 June) with a man whose knowledge of English is limited, the doubt should be resolved in favor of Appellant in a matter so important as this.

In addition to the Exhibit A above mentioned, there is an Exhibit B appended to the appeal brief. This is an unsigned letter alleged to be the sworn statement of Leon Luria, M.D. The letter states that Luria has known Appellant for twelve years and that he has found Appellant to be of good moral character and free from improper sexual or criminal propensities.

Appellant states in a letter dated 17 November, 1950, that he is financially embarrassed because he cannot obtain other employment after having spent twenty-five years at sea.

#### OPINION

In view of the disposition to be made of this case, it is not necessary to make any findings of fact on the merits.

It seems to me that through the combined efforts of all concerned, the "record" became completely confused due to the accumulation of errors after the initial mistake which was made by the Investigating Officer. Certainly, the old maxim, "A rolling stone gathers no moss," is not applicable to this situation.

The Investigating Officer admittedly erred in telling

Appellant that the hearing would be on Tuesday, 13 June, and then dating the charge and specification forms Saturday, 17 June. This error was not corrected when Appellant again saw the Investigating Officer on 8 June. Undoubtedly, a valid hearing could not have been conducted on 13 June, in Appellant's absence, since the printed form states that the hearing was to be on 17 June. Possibly, Appellant could be found at fault for not appearing on 17 June but this is doubtful since he had been verbally informed that the hearing would commence on 13 June. It is also doubtful that the Investigating Officer's only witness would have been present on 17 June since he left on another voyage on that date. But this speculation is immaterial since the hearing was not convened on either one of these dates but on a date about which Appellant had received absolutely no notice.

On 19 June, 1950, the hearing was opened and the Examiner immediately quoted 46 CFR 137.09-5 which states that the person charged must be "duly served with notice of a hearing" before proceeding "in absentia." In the next four pages of testimony, the Investigating Officer did not once state, imply, or indicate that he had notified Appellant in any manner that the hearing would be on this date. He did state that he had made numerous unsuccessful attempts to contact Appellant. On the basis of these "diligent efforts" by the Investigating Officer but only a few minutes after he had himself quoted the above words of the pertinent regulations, the Examiner decided that there was "no reason why this hearing cannot proceed in absentia." And the Investigating Officer made no attempt to correct this error even though he had just testified that he had not proceeded with the case on 13 June because Appellant "had the right to follow the date on the charge" which was 17 June. Why both the Investigating Officer and Examiner did not consider this latter statement equally applicable to 19 June is not appreciated.

In addition to this defect in the proceedings of 19 June, it does not appear that it was ever established on this date that Appellant was a crew member of the ARGENTINA on 21 and 22 December, 1949. To the question on page 2, "And was he the assistant crew cook on board the U.S. Flag Vessel, the S.S. ARGENTINA for a voyage covering the date 21 December, 1949?", there is no reply in the Headquarters' transcript. If the answer was, "Yes", what about 22 December, 1949? Also on page 2, the question, "And did you

ascertain whether or not he was a crew member of the ship for a voyage covering the dates (21 and 22 December, 1949) mentioned?." was answered, "Yes, sir." But was it ascertained that he was, or that he was not, a crew member? In short, the witness "ascertained" the man's status, but does not describe it.

For these reasons, it is believed that it would be improper to consider any part of the 19 June proceedings as part of the official record in this case.

Concerning the proceedings conducted on 24 July, 1950, much of what has been said above, with respect to notice, is pertinent. Title 46 CFR 137.09-5 (as quoted by the Examiner in the presence of the Investigating Officer on 19 June, 1950) states that "all facts concerning the issuance and service of summons" shall be placed in the record by the Examiner. In addition to this, 46 CFR 137.05-15 specifically requires that the person charged shall be served a copy of the charge and specifications and a notice of the time and place of hearing by personal services or by registered mail. Obviously, such regulations have been promulgated in order to avoid any confusion as to the adequacy of notice. This case clearly shows why such basic requirements must be complied with in these proceedings.

There is prolonged testimony by the Investigating Officer about a telephone conversation with an unidentified person and with someone the Investigating Officer said was the Appellant because "I recognized his voice since I had talked to him at this office on at least two, if not three, occasions." But there are no "facts concerning the issuance and service of summons" in the record because no summons for this date was ever served on Appellant.

In his letter (Exhibit A), Appellant does not say that he talked with the Investigating Officer but that he had a friend call up for him. This gives rise to speculation as to how certain the Investigating Officer could be that he actually did speak with Appellant on the telephone on 23 June. He had not talked with Appellant for more than two weeks; he had talked with Appellant a total of only two or three times; and these prior conversations had not been over the telephone but in person. Presumably, Appellant speaks broken English since his understanding of the language is limited. If so, his voice probably sounds much the same as many other Puerto Ricans with the same handicap. Hence, It seems

perfectly conceivable that the Investigating Officer might have made an honest mistake when he testified that he had talked with Appellant on the telephone on 23 June, 1950.

It is not my intention to condone the conduct exhibited by Appellant. His actions appear, at different times, to have been both indifferent and suspicious. The record indicates that he would have been at sea even if the hearing had been properly held on 13, 17 or 19 June, or on 24 July. If it could be positively established that Appellant had received adequate notice, his appeal on this ground would be of no avail. Once the hearing has been properly convened and the person charged has been given an opportunity to appear and testify, he will have forfeited this right if he is not present at the designated time and place. A thorough consideration of the record makes it seem quite possible that Appellant's continued absence and the difficulty of contacting him was due to something more than the coincidence of "a series of errors and unfortunate events." However, in view of Appellant's many years at sea, I am disposed to resolve all these doubts in his favor so that he may be given an opportunity to be confronted with the charges against him and be heard in his defense.

*ORDER*

I hereby direct that the decision and order of the Examiner dated 24 July, 1950, be VACATED, SET ASIDE and REVERSED, and that the case be REMANDED with instructions to conduct these proceedings de novo, and not inconsistent herewith.

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

Dated at Washington, D.C., this 22nd day of December, 1950.

\*\*\*\*\* END OF DECISION NO. 480 \*\*\*\*\*

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