

In the Matter of Merchant Mariner's Document No. Z-936642 and All
Other Licenses, Certificates and Documents
Issued to: SANTOS BRENES

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

836

SANTOS BRENES

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

By order dated 10 January 1955, an Examiner of the United States Coast Guard at New York, New York, suspended Merchant Mariner's Document No. Z-936642 issued to Santos Brenes upon finding him guilty of misconduct based upon two specifications alleging in substance that while serving as a tourist class waiter on board the American SS INDEPENDENCE under authority of the document above described, on or about 3 September 1954, at about 1400, while said vessel was in the port of Genoa, Italy, he wrongfully violated the privacy of Mrs. Rose Marie Doyle, a passenger, by entering her cabin and closing the door behind him; and after entering her cabin, he made improper advances toward Mrs. Dole by asking her if she did not intend to kiss him good-by.

At the hearing, 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. Appellant was represented by an attorney of his own selection and he entered a plea of "not

guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence a certified extract from the Shipping articles of the INDEPENDENCE and a certified copy of an entry in her Official Logbook. A statement signed "Rose Marie Doyle" was received for identification after counsel for Appellant objected to the introduction in evidence of this statement on the ground that there was no proof as to the authenticity of the signature. The Investigating Officer then requested a continuation pending the return of Mrs. Doyle on the INDEPENDENCE.

On 9 December 1954, Mrs. Doyle testified. She identified the statement received for identification as her writing and the statement was placed in evidence. Although Appellant was not present, Mrs. Doyle identified a picture of him.

In defense, Appellant offered in evidence the testimony of a character witness, the testimony of Appellant's working partner in the ship's dining room and Appellant's sworn testimony. Appellant denied the allegations and stated that Mrs. Doyle became angry and argued with Appellant when he requested her to come earlier and eat her meals on time. Appellant's working partner corroborated Appellant's testimony concerning his arguments with Mrs. Doyle. The working partner also testified that Appellant was in the dining room from 1200 to 1430 on 3 September 1954.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the two specifications. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-936642 and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of twelve months - three months outright suspension and nine months suspension on eighteen months probation from the termination of the outright suspension.

From that order, this appeal has been taken, and it is urged that the Investigating Officer did not sustain the burden of proof as required by 46 CFR 137.09-50(a); the decision is not supported

by reliable, probative and substantial evidence as required by 46 CFR 137.21-5; the findings of fact are contrary to the evidence; the decision is contrary to the weight of the credible evidence and contrary to law; and the order of suspension is severe, harsh and unreasonable.

Appellant claims that the above contentions are supported by the following: Appellant has been going to sea since 1947 without having trouble; Mrs. Doyle testified that Appellant's attitude was "very nice" prior to the alleged incident; there was no complaint from the other women who were served meals by Appellant and they complimented him; the fact that Mrs. Doyle did not make an outcry but wrote a statement about Appellant's "frightening" conduct shows that this statement was due to her angry resentment after Appellant had spoken to her about being late for meals and that Mrs. Doyle did not suffer mental anguish; Mrs. Doyle gave her statement to the First Officer but did not make an oral report to him; the testimony of Mrs. Doyle was not reliable because it was motivated by her resentment against Appellant; his denial of the alleged incident is corroborated by a disinterested witness whose unimpeached testimony *must* be accepted as true under well established rules of evidence; and the action of the Examiner is partially predicated upon possible damage liability of the shipowner which is not an issue in this case.

In conclusion, it is respectfully requested that the decision be reversed and the charge and specifications dismissed.

APPEARANCES: Mr. Emanuel Friedman of New York City by Thomas J. Portela, Esquire, of Counsel.

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

FINDINGS OF FACT

On 3 September 1954, Appellant was serving as a tourist class waiter on board the American SS INDEPENDENCE and acting under authority of his Merchant Mariner's Document No. Z-936642 while the ship was in the port of Genoa, Italy.

Appellant was the waiter at the dining room table to which Mrs. Doyle was assigned. The normal passenger-waiter relationship prevailed between Mrs. Doyle and Appellant except that there was some friction as a result of her being late for meals on more than one occasion.

On 3 September 1954, the ship arrived at Genoa, Italy, where Mrs. Doyle planned to disembark. Mrs. Doyle ate her midday meal and returned to her room between 1400 and 1430 to complete her packing. she left the door to the room ajar. Several minutes later, Appellant entered Mrs. Doyle's room and closed the door behind him. Appellant was not authorized to be in this passenger area and he had not received an invitation from Mrs. Doyle to visit her room. Appellant asked Mrs. Doyle if she was going to kiss him good-bye. Mrs. Doyle told Appellant that she kissed only her husband and she told Appellant to get out of the room. Appellant left the room promptly without touching Mrs. Doyle or making other advances toward her.

After Appellant left her room, Mrs. Doyle wrote a brief statement to the Staff Captain about the incident and signed her name to it. Mrs. Doyle accidentally met the First Officer and gave the statement to him to deliver to the Staff Captain. At this time, Mrs. Doyle also made an oral complain about Appellant to the First Officer. Since Mrs. Doyle left the ship shortly thereafter, she did not confront Appellant with this accusation.

OPINION

Contrary to Appellant's contentions, there is reliable, probative, and substantial evidence to support the decision of the Examiner. Mrs. Doyle's testimony and statement constitute such evidence since the Examiner, as the trier of the facts who saw and heard the witnesses, stated in his decision that he was convinced that Mrs. Doyle was telling the truth with respect to the events which happened on 3 September 1954. The material findings of fact are in conformance with this statement by the Examiner. Consistently, the Examiner rejected Appellant's denials to the allegation. It is appropriate to adopt the words used by the Second Circuit Court of Appeals in a case of conflicting testimony:

"We have again and again said that the question presented

in cases such as this is one of fact that the trial judge is preeminently fitted to decide and that we will not reverse his decision in the absence of a clear showing of error." *Kilgust v. United States* (C.C.A. 2, 1951), 191 F2d 69.

Appellant is also incorrect in contending that his denial of the alleged incident is corroborated by a disinterested witness, Appellant's working partner, whose unimpeached testimony must be accepted as true under well established rules of evidence. There is no rule that the testimony of witnesses must be accepted if they are not contradicted and if their credibility is not impeached, although it is true that expressions may be found in the books that there is such a rule. *Purcell v. Waterman S. S. Corp.* (C.C.A. 2, 1955), 221 F2d 953. There are decision in the federal courts which directly hold that corroborated and uncontradicted testimony may be rejected. *Lee Sing Far v. United States* (C.C.A. 9, 1899), 94 Fed. 834; *Reiss v. Reardon* (C.C.A. 8, 1927), 18 F2d 200; *Wigmore on Evidence*, 3d Ed., sec. 2034. In any event, Appellant's testimony was contradicted by Mrs. Doyle; and the incident could have occurred after 1430 even if the testimony of Appellant's working partner is accepted that Appellant was in the dining room from 1200 to 1430 on the date in question.

The other points raised on appeal do not convince me that the Examiner's determination as to the credibility of the witnesses were erroneous. Appellant's prior good service record is in his favor but it is not sufficient to overcome the affirmative evidence against him in this case. The claim that Mrs. Doyle wrote the statement and testified against Appellant as a show of resentment is purely conjectural. Since Appellant immediately left Mrs. Doyle's room when she ordered him to get out, there is no reason why her failure to make an outcry should be construed against her. Appellant's presence in unauthorized passenger's spaces was not justified regardless of whether he caused Mrs. Doyle to suffer mental anguish. As indicated in the findings of fact, the record is contrary to the contention that Mrs. Doyle did not make an oral report of the incident to the First Officer when she gave him the written statement concerning the incident.

As pointed out by the Examiner, passengers on vessels are entitled to protection against the invasion of their privacy as

well as protection against all personal rudeness from those in charge of the vessel. *Chamberlain v. Chandler* (1823), Fed. Case. No. 2575; *Nieto v. Clark* (1858), Fed. Cas. No. 10,262. Since these obligations to passengers are based on their contract with the shipowner, the latter's employees are also bound by these standards. A claim for damages against the shipowner for the misconduct of an employee is simply another possible result of such misconduct. there is no reason to assume that the order was greater because of the shipowner's possible liability in a suit for damages.

In view of the fact that the molestation of a passenger is usually grounds for revocation of a seaman's document, it is considered that the order of suspension imposed is lenient rather than severe and unreasonable as Appellant urges.

ORDER

The order of the Examiner dated at New York, New York, on 10 January 1955 is AFFIRMED.

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

Dated at Washington, D. C., this 18th day of October, 1955.

***** END OF DECISION NO. 836 *****

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