

In the Matter of License No. 199824

Issued to: JOHN F. TATE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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JOHN F. TATE

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 6, 10 and 13 May, 2 and 14 June, 1949, Appellant appeared before an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania, to answer a charge of "misconduct" supported by a specification alleging that while Appellant was serving as Chief Engineer on board the American SS GRENVILLE M. DODGE, under authority of License No. 199824, he did, on or about 8 August, 1947, fail to join said vessel prior to her departure from Baltimore, Maryland, the result of which delayed the sailing of said vessel from 2130 on 7 August, 1947, to 0300 on 8 August, 1947.

At the hearing, Appellant was duly informed as to the nature of the proceeding, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the specification. The Investigating Officer then made his opening statement and Appellant's counsel waived his right to submit an opening statement in behalf of the person charged.

The Investigating Officer rested his case after he had introduced in evidence two documents and the testimony of four witnesses - the Master, Chief Mate, Port Engineer and Operating Manager of the shipping company. At this point, counsel's motion to dismiss was denied by the Examiner.

Appellant then testified under oath in his own behalf. The motion to dismiss was renewed and a motion was made to strike out that part of the specification which reads "the result of which delayed the sailing of said vessel from 2130 hours on 7 August, 1947, to 0300 hours on 8 August, 1947." The former motion was again denied but the motion to strike was granted and the specification was thus amended. The Examiner stated that the inference to be read into the specification was that Appellant failed to join "without reasonable cause." Appellant rested his case after having then introduced in evidence the testimony of the First Assistant Engineer and five documentary exhibits.

After both parties had completed their arguments and had been afforded an opportunity to submit proposed findings and conclusions, the Examiner found the specification "proved as amended" and the charge "proved." On the basis of his findings and conclusions, the Examiner entered an order suspending Appellant's License No. 199824, and all other valid licenses, certificates of service, or documents held by him, for a period of three months on twelve months probation.

On appeal, Appellant contends that the Examiner failed to make certain material findings of fact proposed by Appellant; that mere failure to join the vessel without more cannot constitute an act of misconduct; that the applicable statute is Title 46 United States Code 240 and the offense must be proved beyond a reasonable doubt since this statute is penal in nature; and that the facts show the offense was not proved beyond a reasonable doubt.

In mitigation, Appellant submitted the information that he served in the United States Navy during the First World War from 1917 to 1919 and was honorably discharged. He obtained his first merchant mariner's license in 1920 and has remained an active seaman up to the present time. The records corroborate Appellant's statement that there has been no prior disciplinary action taken against him by the Coast Guard or its predecessor authority during this entire period.

FINDINGS OF FACT

On 6 August, 1947, and on all dates thereafter mentioned herein, Appellant was in the service of the American SS GRENVILLE M. DODGE, acting under authority of his duly issued license in the capacity of Chief Engineer, while the ship was in the port of Baltimore, Maryland, at an anchorage. The ship's cargo was completely on board at this time.

Appellant signed on as Chief Engineer of the SS GRENVILLE M. DODGE on 6 August, 1947, having been paid off for the previous voyage on the same day. He stayed ashore at the Emerson Hotel in Baltimore on the night of the 6th. The next morning he called the ship's agent and was informed that the ship was scheduled to sail at 1400 on that day, 7 August, 1947. Appellant arrived aboard the ship at approximately 1230 on the 7th. Including transportation to the anchorage by launch, it took about an hour to go from the hotel to the ship.

The notice that the ship was scheduled to sail at 1400 on 7 August, 1947, had been posted at the gangway of the ship by 0900 on the 7th. Shortly thereafter, the Master went ashore to clear the vessel for sailing and to get additional crew members signed on the articles for the voyage. He was accompanied by the ship's agent, Harrison, who was the Operating Manager of the shipping company. A new chief mate had come on board at 0800 on the 7th and he was in charge of the ship after the Master departed. He remained on board constantly up to the time the Master returned at approximately 0030 on 8 August, 1947. The Master did not leave any instructions with the chief mate as to getting the engines ready to get underway.

Appellant remained on board from about 1230 until 1730. Between 1300 and 1500, the Purser returned to the ship for the Master, and upon returning ashore, reported to the Master that he was unable to locate the chief engineer on board the ship, and a launch sent to the ship by the agent,

Harrison, at about 1700, reported back to Harrison that Appellant was not on board.

Upon receiving word from the Master to do so, the chief mate changed the sailing notice from 1400 to 1700 sometime in the afternoon. At no time during the afternoon did Appellant prepare the engines for getting underway, nor did he receive any instructions from the chief mate to do so. Members of the crew were leaving and returning to the ship throughout the afternoon since there were no regular meals being served on board. For this reason, Appellant left the ship at 1730 to go ashore for dinner. He was reimbursed by the shipping company for three meals on the 7th. The chief mate saw Appellant before he left the ship and told him that the ship was scheduled to leave when the Master got a full crew on board. The second assistant engineer went ashore with Appellant.

In the meantime, the ship's agent, Harrison, and Yates, the Port Engineer, had been trying to reach Appellant by telephone at the Emerson Hotel. When he reached the hotel, Appellant received a message that Yates had called him at 1234. Appellant tried to contact Yates but he had checked out of the hotel. Appellant had gone to his hotel room before eating and was still there when the first assistant engineer and the second mate come to his room shortly after 1900. They had left the ship a little while after Appellant and had intended boarding a train for Philadelphia since they did not think the ship would leave until the next day. But, at the railroad station, they phoned the ship's agent and were told that the ship would sail that night. They had come to impart this information to Appellant. At about the same time, Appellant also received this information over the telephone from Harrison.

Anticipating some complications because of Appellant's reported absence from the ship, prior to his conversation with Appellant, Harrison had called New York and suggested that a "stand-by" chief engineer be sent to Baltimore in case Appellant could not be located by sailing time. Although Appellant had been reported not to be on board the ship, he actually had been there. Appellant, the first assistant engineer and second mate, and a woman companion of the Appellant then returned to the ship by launch. The Appellant had not eaten his dinner while ashore.

The launch reached the ship at about 2030. The Master was still ashore and had sent no further word about the sailing time or any instructions to prepare to get underway. The 1700 sailing notice had been canceled. Appellant remained aboard until 2230. Still no word had been received aboard from the Master or the ship's agent except the message from the ship's agent to Appellant. When he was leaving in the launch at 2230, Appellant was again informed by the chief mate that the ship would sail when the Master returned aboard and a full crew had been signed on the articles for the voyage. Appellant left all his gear and his license aboard the ship. He also left his telephone number and address with the first assistant engineer. The Port Engineer, Yates, had gone aboard about 2100 looking for Appellant because they were anxious for the ship to sail but he had been unable to locate Appellant. The signing on of the crew had been completed by 2100 on 7 August as well as clearance of the ship through the Customs office. After Appellant had eaten his dinner, he returned to the hotel at shortly after midnight and remained there the rest of the night. There were no scheduled launch trips to the ship after midnight but there were usually launches for hire at the landing. No one from the ship attempted to communicate with Appellant during the night.

At approximately 0030 on 8 August, 1947, the Master returned on board the ship and gave the first assistant engineer instructions to get ready to sail. The latter told the Master that the chief engineer and the second assistant engineer were ashore but had been on board on the 7th. The Master did not inquire as to where Appellant could be contacted and said he had another chief engineer. The "stand-by" chief engineer arrived on board about 0130 and prepared the engines for getting underway. The Master sent the ship's agent a message as to the sailing time after the former had come aboard the ship. The vessel got under way at 0302 on 8 August, 1947. This Appellant was not on board when the ship sailed. Another unlicensed member of the crew who had missed the ship at Baltimore joined the vessel at the pilot station at Cape Henry about 1715 on 8 August, 1947. Since Appellant did not appear at Cape Henry, the "stand-by" chief engineer was signed on as his relief, and other vacancies were made up by promoting various members of the crew.

At 0600 on the morning of 8 August, 1947, Appellant called the Coast Guard and the launch service and was told that the ship had sailed at about 0300 that morning. At 0830, he was informed that it would not be possible to get a train to Norfolk in time to catch the ship at Cape Henry. He did not contact any of the bus lines. Appellant called the ship's agent at approximately 0900 to verify the information that the ship had sailed without him.

OPINION

Appellant urges in his appeal that the Examiner failed to make certain findings of fact "which are material in appraising the circumstances that gave rise to the charge from which Appellant now seeks relief." In accordance with Title 46 Code of Federal Regulations 137.11-10, I have altered the Examiner's findings so that my findings of fact agree substantially with Appellant's findings Nos. 4(a), 4(h), 4(i) and 4(j) contained in his brief on appeal. Since the weight of these findings is not considered to be sufficient to affect the order imposed, the failure of the Examiner to make such findings is not reversible error. The remainder of the findings set out by Appellant pertain to the lack of knowledge that Appellant was on board the ship and the consequent ordering of a new chief engineer to Baltimore. (Nos. 4(b), 4(c), 4(d), 4(e), 4(f) and 4(g). As more

fully stated hereinafter, it is my opinion that these findings are not material to the conclusion arrived at by the Examiner.

Appellant's contention, that mere failure to join is not "misconduct" but that there must be a wrongful intention and not a mere error of judgment as in this case, is not at all convincing. Appellant committed something more than a "mere error of judgment" when he left the ship at 2230 and failed to return or make any attempt to return to the ship that night. As pointed out by the Examiner, Appellant's failure to be aboard the vessel when she sailed was a breach of his contract with the Master of the ship and this breach of a legal duty was "misconduct."

Appellant also urges that the applicable statute in this case is Title 46 United States Code, section 240, and that the offense alleged must be proved beyond a reasonable doubt because this statute is penal in nature. Clearly, the specification is not worded in such a way as to indicate that Appellant is charged with such an offense as is contemplated by 46 United States Code 240. And there is no reference to the latter statute contained in the specification. The offense alleged is "misconduct" within the purview of Title 46 United States Code 239; and, in such proceedings, it is required that the findings and conclusions be supported by substantial evidence (Administrative Procedure Act, section 7(c); 46 Code of Federal Regulations 137.21-5) - not by proof beyond a reasonable doubt. To be substantial, the evidence need not point entirely in one direction but must be evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact that is sought to be sustained even though the evidence permits two or more possible inferences. Baltimore and Ohio Railroad Co. v. Postom (C.C.A., D.C., 1949), 177 F. 2d 53.

It is my opinion that there is substantial evidence present on which to base the finding that Appellant failed to join the ship without reasonable cause. Appellant has offered numerous circumstances in support of his position that he had reasonable cause to believe the ship would not sail until the following morning and hence that he was justified in not returning to the ship the night it sailed. Appellant states that there was considerable confusion as to the sailing time; the chief mate had received no word from the Master as to the sailing time or about getting the engines ready to get underway; members of the crew were absent and others were constantly leaving and returning to the ship; and the first assistant engineer and second mate had intended to go to Philadelphia because they thought the sailing would be postponed until a later time on 8 August, 1947. He further contends that if the ship's agent had not been misinformed about Appellant's presence on board the ship, the "stand-by" chief engineer would not have been sent to Baltimore and the Master would have contacted Appellant at the hotel and told him that the ship was sailing that night. But opposed to this, it is not controverted that Appellant had contracted to serve on the ship when he signed the Articles for the voyage; that he was being paid to be on board and perform his duties; that there had been two definite sailing notices stating the ship would leave on the seventh; that the ship's agent told him the ship was sailing that night; and that he was not on board when the vessel actually got underway at 0302 on 8 August, 1947.

Since Appellant was employed in a position of high responsibility, it is evident he was required to exercise more than the average degree of care to see that he was on board the ship to

render the services called for by his contract. Appellant signed the articles on 6 August, 1947, and was being paid thereafter to take charge of the engineering department aboard the ship. It was his responsibility to make all preparations with respect to getting the engines ready to get underway on orders from the Master. In this position of responsibility, Appellant should have taken no chances that he would not be able to carry out his contractual obligations. Considering the ample indications Appellant had that the ship would sail that night, it is obvious that Appellant was extremely lax in acting as he did. Such an irresponsible attitude was certainly something more than an error of judgment. Even though Appellant's address was known to some of the officers aboard the ship and he could have been contacted by the Master, that does not in any way justify Appellant's leaving the ship on the sailing date. As mentioned by the Examiner, there was never any notice that the ship would not sail sometime that night. And it is not the Master's responsibility to round up the crew after they have signed the articles for a voyage. It was Appellant's sole responsibility to be present at all times his services as chief engineer might be required. Since he did not properly fulfill this function and missed the ship as a result, he was guilty of having failed to join without reasonable cause.

CONCLUSION AND ORDER

For these reasons, the order of the Examiner dated at Philadelphia, Pennsylvania, on 14 June, 1949, should be, and it is, AFFIRMED.

MERLIN O'NEILL
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 27th day of January, 1950.