

In the Matter of License No. 66508 and Merchant Mariner's Document
No. Z-96756
Issued to: GLENN W. NICELEY

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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GLENN W. NICELEY

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 28 May, 1954, an Examiner of the United States Coast Guard at Portland, Oregon, revoked License No. 66508 and Merchant Mariner's Document No. Z-96756 issued to Glenn W. Niceley upon finding him guilty of misconduct based upon two specifications alleging in substance that while serving as Junior Third Mate on board the American SS IRAN VICTORY under authority of the license above described, on or about 24 February, 1953, while said vessel was at sea, he wrongfully assaulted and battered a fellow officer with a dangerous weapon (a knife); and he wrongfully created a disturbance by engaging in a fight on board said vessel.

At the hearing, Appellant was given a full explanation of the nature of the proceedings 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 and counsel for Appellant made their opening statements. The Investigating Officer and counsel for Appellant made their opening statements. The Investigating Officer introduced in evidence a consular report and the testimony of the Second Mate who was allegedly assaulted and battered by the Appellant. Subsequently, the deposition of the Chief Mate was taken and admitted in evidence without objection. The Investigating Officer then rested his case. No evidence was offered by the defense.

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 revoking Appellant's Licenses No. 66508, Merchant Mariner's Document No. Z-96756, and all other licenses and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that:

EXCEPTION NO. 1. The evidence in the record does not support the charge. The Second

Mate was a larger and younger man than Appellant; and the Second Mate started the altercation by calling Appellant a name. The Second Mate was the aggressor and Appellant only resorted to the use of a knife in self-defense. Therefore, this was not an unproved assault and battery with a dangerous weapon. The wounds received by the Second Mate were only superficial.

EXCEPTION NO. 2. The revocation order is excessive since it prevents Appellant from going to sea in any capacity. This was Appellant's first offense after spending many years at sea.

EXCEPTION NO. 3. Since Title 46 U.S.C. 701 prescribes a specific penalty for assaulting an officer, the latter is the exclusive remedy and the Examiner had no authority to impose an additional or different penalty than the one provided for in the statute. Fredenberg v. Whitney (D.C.Wash. 1917), 240 Fed. 819; Benson v. Bulger (D.C.Wash., 1918), 251 Fed 757; Bulger v. Benson (C.C.CA.9, 1920), 262 Fed. 929.

APPEARANCES: Messrs. Tanner and Carney of Portland, Oregon by Richard R. Carney, Esquire, of Counsel.

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

FINDINGS OF FACT

On 24 February, 1953, Appellant was serving as Junior Third Mate on board the American SS IRAN VICTORY and acting under authority of his License No. 66508 while the ship was at sea proceeding towards Okinawa.

On 24 February, the Second Mate was standing the 1600 to 2000 watch when Appellant arrived on the bridge, at approximately 1955, to relieve the Second Mate who was in the chart room completing his star sight calculations. Appellant sat on the settee in the chart room and waited for the Second Mate to give him the necessary information. Prior hard feelings had been exhibited between the two men and an argument developed after an exchange of words and the Second Mate called Appellant an insulting name. Appellant got up from the settee and there was an exchange of blows. The Second Mate was 28 years old and weighed about 185 pounds. Appellant was 54 years of age and weighed about 140 to 150 pounds.

During the course of the fight, Appellant produced a switchblade knife with a blade approximately six inches long. The Second Mate did not have any weapon in his possession and he backed away until he was against the starboard bulkhead which was on the opposite side of the chart room from the only two exits. As the Second Mate attempted to ward off Appellant by kicking him, Appellant slashed at the Second Mate with the knife in his right hand.

The Chief Mate heard the commotion and went to the chart room. The Second Mate was backed against the starboard bulkhead and he was bleeding. Appellant dropped the knife and went out to the wheelhouse when ordered to do so by the Chief Mate who then took the Second Mate to the ship's hospital. It was found that Appellant had inflicted four wounds on the Second Mate with

the knife: two cuts on the left side of his abdomen, one cut on his left thigh and one cut on his left calf. As a result of these wounds, the Second Mate was hospitalized at Okinawa for a period of three weeks. Appellant was not injured in the fight.

Appellant's prior record consists of a two months outright suspension in 1946 for striking a Chinaman with a pistol and being unfit for duty due to intoxication while Appellant was serving as the Master of a ship.

OPINION

The above findings are based on the testimony of the Second Mate which is corroborated in every material respect by the deposition of the Chief Mate. The facts leave no doubt that this was a very serious offense and well deserved the order of revocation which was imposed by the Examiner. Appellant cannot claim that he acted in self-defense since he originally approached the Second Mate after getting up from the settee; and Appellant later failed to retreat when he took out the switchblade knife. On the contrary, Appellant advanced and continued to slash at the Second Mate until he was cut four times. Probably, the resulting injuries would have been even more serious if the Chief Mate had not arrived on the scene when he did. Under these circumstances, I do not think that the difference in the size and age of the two men had any material significance. In addition to the seriousness of an assault and battery with such an extremely dangerous weapon, this was a gross breach of discipline, committed by a ship's officer, which was further aggravated by the fact that the Second Mate was the officer on watch. I agree completely with the Examiner that the only suitable order was revocation of Appellant's license and document.

There are numerous distinctions between the cases cited by Appellant in his Exception No. 3 and the case presently under consideration. In the first place, Appellant was not charged with a violation of Title 46 U.S.C. 701 but with two specifications containing allegations of fact which constitute "misconduct" within the purview of R.S. 4450, as amended (46 U.S.C. 239). It has been the constant interpretation by the Commandant of the Coast Guard that whatever may have been the situation prior to 1936, the amendments to R.S. 4450 in that year eliminated any possible application of the cases cited by Appellant to these administrative, remedial proceedings conducted under R.S. 4450, as amended (46 U.S.C. 239).

ORDER

The order of the Examiner dated at Portland, Oregon, on 28 May, 1954, is **AFFIRMED**.

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

Dated at Washington, D. C., this 4th day of January, 1955.