

In the Matter of Merchant Mariner's Document No. Z-1003775 and all
Issued to: JOSE FRANCISCO MONTOYA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1152

JOSE FRANCISCO MONTOYA

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

By order dated 23 April 1959, an Examiner of the United States Coast Guard at New York, New York suspended Appellant's seaman documents upon finding him guilty of misconduct. The specification alleges that while serving as a bellboy on board the United states SS SANTA PAULA under authority of the document above described, on or about 13 March 1959, appellant wrongfully struck the Second Steward while the ship was at sea.

At the hearing, Appellant was represented by counsel of his own choice. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence a certified copy of an entry in the ship's Official Logbook which states that, on 13 March 1959, Appellant struck the second Steward three times, causing him to fall to the deck. This entry was signed by the Master and Chief Steward. Under it is the statement that the entry was read to Appellant and his reply was, "I have nothing to say." Then appears the statement that Appellant was fined two days' pay (\$16.55) for this offense. The Master's signature then appears a second time. This was the only evidence presented by the Investigating Officer.

There was no evidence offered in defense except an excerpt from the Shipping Articles showing that Appellant signed off by mutual consent on 19 March 1959. After considering the evidence, the Examiner concluded that the charge and specification had been proved. An order was entered suspending all documents, issued to Appellant, for a period of three months on twelve months' probation.

FINDINGS OF FACT

On 13 March 1959, Appellant was serving as a bellboy on board the United States SS SANTA PAULA and acting under authority of his Merchant Mariner's Document No. Z-1003775 while the ship was at sea.

On this date, Appellant struck the Second Steward three times, causing him to fall to the deck. This incident was entered in the ship's Official Logbook as an offense committed by Appellant and he was fined two days' wages.

Appellant remained on the ship until 19 March 1959 when he signed off by mutual consent at New York City.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner's decision was not based on sufficient, substantial, conclusive or probative evidence. The presumption of Appellant's innocence was not overcome by the log entry. The Examiner erroneously construed Appellant's answer to the logging and his silence at the hearing as evidence of guilt.

Appellant was denied his right to due process of law when he was not confronted with witnesses and permitted to cross-examine them. The victim of the alleged assault was available in New York City to testify at the time of the hearing. Title 46 CFR 137.09-50 states that witnesses shall identify the person charged and may be cross-examined.

For these reasons, it is respectfully requested that the decision of the Examiner be reversed.

APPEARANCE: Zwerling and Zwerling of New York City by Sidney Zwerling, Esquire, of Counsel.

OPINION

Although it would have been preferable to have obtained the testimony of the Second Steward if he were available, the log entry is sufficient to make out a prima case of the offense alleged. The entry is admissible in evidence, as an exception to the hearsay rule, as a record made in the regular course of business within the meaning of 28 U.S.C. 1732. Hence, it was not mandatory that witnesses appear at the hearing. It is my opinion that Appellant was not denied due process of law in this respect.

The Examiner did not construe Appellant's answer to the logbook entry or his silence at the hearing as evidence of guilt. The Examiner simply mentioned what appeared in the logbook and reached the conclusion from this that it was reasonable to infer that Appellant's conduct had been wrongful as alleged in the specification. I agree with the Examiner that this is the most logical conclusion to reach particularly in the absence of any attempt to rebut this prima facie evidence. Hence, the log entry constitutes substantial evidence to overcome the initial presumption of innocence in Appellant's favor. If Appellant, in turn, had offered evidence in rebuttal which the Examiner

accepted as the truth, the logbook entry would no longer have represented substantial evidence to prove the alleged offense. Appellant's failure to submit evidence to be considered in his defense does not lead to the conclusion that the Examiner construed Appellant's silence as evidence of guilt.

Since there was no evidence of aggravating circumstances and this was Appellant's first offense, the Examiner imposed an order of suspension on probation. This lenient order will be sustained.

ORDER

The order of the Examiner dated at New York, New York, on 23 April 1959, is AFFIRMED.

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

Dated at Washington, D. C., this 15th day of March 1960.