

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1173981 AND  
ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Elmer MITCHELL

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1897

Elmer MITCHELL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 18 September 1970, an Examiner of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's seaman's documents for three months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as steward on board SS AMERICAN PACKER under authority of the document above captioned, Appellant:

- (1) on 23 December 1969, at Cat Lai, RVN, wrongfully threatened the 3rd mate, James Brady, with bodily harm;
- (2) on 29 December 1969, at Cat Lai, RVN, wrongfully refused to obey a direct order of the master to "do the BR'S WORK;" AND
- (3) on 30 December 1969, at Cat Lai, RVN, wrongfully refused to obey a direct order of the master

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of AMERICAN PACKER.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications had been proved. The Examiner then served a written order on Appellant suspending all documents issued to him, for a period of three months on twelve months' probation.

The entire decision was served on 18 September 1970. Appeal

was timely filed on 30 September 1970. Although Appellant had until 16 April 1971 to do so he has not added to his initial notice of appeal.

#### FINDINGS OF FACT

On all dates in question, Appellant was serving as steward on board SS AMERICAN PACKER and acting under authority of his document. Because of the disposition to be made of this case, no further findings are appropriate.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the decision and order are contrary to law and contrary to the overwhelming weight of the evidence.

APPEARANCE : Abraham E. Freedman, New York, New York, by Ned R. Phillips, Esq.

#### OPINION

##### I

Incidental to review of this appeal, one thing may appropriately be said, albeit obiter. The sole proof of specification two was a log book entry which read:

"12/24/69 CAT LAI R.V.N. upon boarding vessel this morning 3rd mate James Brady notified me and presented a formal complaint that approx. 1800 12/23/69 while third mate Brady was on watch he threatened with bodily harm by the Ch. Steward Elmer Mitchell by stating that Mitchell will beat the shit out of 3rd mate Brady if he ever caught him by himself. . ."

Assuming that this log entry had been made in substantial compliance with 46 U.S.C. 702 and would have the force and effect given to it by 46 CFR 137.20-107, it would be prima facie evidence of the fact recited therein, that the third mate had complained that Appellant had threatened him. Since the fact of the threat was not spelled out in the log entry, only the report that a threat had been made, I do not see that the log book entry proved anything against Appellant. A lesson may be drawn from this, that until masters make proper log entries investigating officers should beware of predicating their entire cases-in-chief on log entries alone when close examination of the records would show deficiencies in the documentary evidence. If the documents themselves do not support the specifications there is no point in preferring charges

in the first place unless it is worthwhile to seek corroborating evidence by way of witness testimony.

## II

The great error here is perceived in Investigating Officer's Exhibit 2." This is a certified copy of an official log book entry in the voyage records of AMERICAN PACKER. A marginal entry is dated 29 December 1969 and declares that a Coast Guard officer at Saigon, RVN, had issued a warning to Appellant concerning his reported activities on pages "25 and 29" of this official log book. What was on page 25 I have no way of knowing, since the page, or a copy thereof, was not submitted in evidence. The entry on page 29 deals with the alleged threat to the third mate on 23 December 1969. Issuance of a warning by a Coast Guard officer under 46 CFR 137.05-15(a), item (6) has a legal effect. The person who accepts such a warning is protected, absent fraud or like conditions, from service of charges. Appellant here was issued such a warning on 29 December 1969. Under the terms of the Coast Guard officer's notation in the log the subject matter which led to the warning could not be brought to hearing absent a showing of fraud or deceit or some similar evasion on appellant's part such as to negate the circumstances under which the "warning" was considered appropriate.

No such conditions appear in the record in this case. Appellant should not have been charged with the alleged threat to the third mate.

## III

In his opinion, the Examiner says:

"On the 29th of December 1969, while the vessel was at Cat Lai, the Master complained to the Chief Steward about the way the officer's quarters were being cleaned, and ordered the Chief Steward to assume the bedroom steward's work himself. The Chief Steward did not obey this order, however, he did assign other members of his department to the duty of cleaning the officers' quarters. On the same day, the master and the Chief Steward appeared before a Coast Guard Investigating Officer, and the Coast Guard Investigating Officer warned the Chief Steward about obeying the orders of the Master."

Although this statement is made in an "opinion", it is couched in terms of findings of fact and I accept it as such. Since the officer who gave the warning gave it for two alleged offenses, one of which was beyond peradventure of a doubt the alleged threat to

the third mate, and the other of which, as found by the Examiner, was the first "refusal" to obey an order from the master, it can be seen that the only alleged offense for which Appellant could be brought to hearing was the "refusal" to obey orders on 30 December 1969.

It must be assumed that on 30 December 1969 Appellant, although his entire period of prior service had been void of disciplinary activity under R.S. 4450, had a "warning" on his record under 46 CFR 137.05-15 (a), item (6). The question then remains whether the alleged offense of 30 December 1969 should have been brought to hearing in view of the fact that he had a "prior record" consisting of a warning given to him the day before. It is easy to see that one who contumaciously persists in a course of misconduct on the very next day after leniency has been granted him by the issuance of a warning in place of referral for hearing should be accorded a hearing on his new offense.

Some of the background of the "misconduct" must be explored.

There is ample evidence that the stewards department of the vessel was short handed at Cat Lai. It appears that a cook, a messman, and a bedroom steward were lacking, and that Appellant was performing his own duties, those of the cook, and, at least in part, those of the messman. On complaint of the third mate, with whom Appellant had had difficulties on 23 December 1969, that his room was not being properly tended, the master ordered Appellant to perform the BR functions for the officers' rooms.

On the first occasion, concerning which Appellant was warned by the Investigating Officer, Appellant did not perform the work himself but saw to it that it was done by another member of his department. The log entry for the only date left in question, 3/ December 1969, reads in part as follows:

"...approx. 0830 I again gave the Ch. Steward Elmer Mitchell a direct order to resume the B/Rs duties as he has since 12/16/69. The Chief Steward refused-for continuous misconduct and disobedience to a direct order Elmer Mitchell is hereby logged..."

As I read this, Appellant had been performing BR duties from 16 December through 28 December 1969. Nothing in the voyage records indicates other than he did this voluntarily, without specific order from the master. I cannot read this as saying that Appellant refused to obey orders "as he has since 12/16/69," especially since there is no record of orders or disobedience thereto until the entry relative to the events of 29 December 1969. This view is reinforced by the very entry for 29 December 1969 itself, which

recites that about 1130 on that date Appellant advised the master that he would not do BR's work and that the master then called a meeting at which he gave a direct order to perform the BR's work.

A significant element in both of these log entries, although the first is no longer important in this case with respect to the alleged offense of 29 December 1969 because that matter was covered by the Investigating Officer's warning, is that there is no statement that the work was not done, only that Appellant did not do it. The theory of the case then is not that Appellant failed to perform a duty traditionally and reasonably known to be a duty incumbent upon him by virtue of the job for which he had signed articles, but that (within the scope of the allegations and the proof offered) he had seen to it that the work was done but that since he had not done it himself he was in violation of a lawful order.

Another considerable factor here is that the master refers to "continuous misconduct" in the log entry for 30 December 1969. The articles show that Appellant was discharged from the vessel on that very date, at Saigon, R.V.N., for "misconduct."

The language of the log entry is strongly reminiscent of the language in items "Fourth" and "Fifth" of 46 U.S.C. 701 which speak of "wilful disobedience...at sea" and "continued willful disobedience..at sea," and confer authority on the master in such situations to impose drastic punishments on board ship. I have no doubt that the disobedience of an order on two consecutive dates in port to perform the duties of a person whose duties a seaman had not agreed to perform when he signed articles is not the kind of disobedience contemplated in 46 U.S.C. 701. I add here, to avoid misunderstanding, that 46 U.S.C. 701 does not preclude other authorized disciplinary action for offenses at sea; the items under consideration merely describe the emergency powers given a master while at sea. Moreover, my holding does not mean that disciplinary action for disobedience of a lawful order in port is precluded because the offense is not covered by this section; it is still "misconduct" under R.S. 4450.

I have emphasized the echo of the language of 46 U.S.C. 701 in the language of the log entry for 30 December 1969 only to point out that the echo should not create an inflamed attitude toward Appellant. The "continuous disobedience" recorded here, leading up to Appellant's discharge from an American vessel in a foreign port on grounds of "misconduct," was:

- (1) announcing that a "duty" independently undertaken on 16 December 1969 to perform the duties of another person, would no longer be performed, and

- (2) declaring on the very next day after a meeting at which a "direct order" was given, that he would not perform the duties of the other person.

It is hard for me to accept such an activity as "disobedience of orders" which would justify discharge for misconduct within a period of two days from the first act of disobedience. I will also note here that there is uncontradicted testimony that Appellant, after being discharged for misconduct was forced to pay his own way home and that the vessel was sold the day after Appellant left it. (It must be recalled that the steward's crew was already decimated.)

There is something here which should induce a long sniff into actual facts, although the record seems clear that no investigation was made into this case beyond a cursory (and not even complete) reading of log entries.

Of the order allegedly disobeyed on 30 December 1969, the Examiner said, "I am at somewhat of a loss to understand why the master would give the Respondent, who as Steward was head of that department, orders to do the work of a bedroom steward." The Examiner, nevertheless, held that the order was a lawful order and that its disobedience merited remedial action.

Hard cases make bad law. I am unwilling to hold that the order in this case was a lawful order, for fear that some misconstruction might eventually be placed on my interpretation of what a "lawful" order is, but at the same time I am unwilling to set aside the Examiner's holding as to the "lawful" quality of the order in the circumstances of the case on the grounds that the order was not lawful. I do not wish to generate "bad law" in a decision on a matter essentially so questionable and trivial.

Since the record reduces itself to one specification, involving one questionable order on one day I find the matter to be within the de minimis doctrine. What is left on appeal for ultimate decision in the case of a person who had no prior record, is so insignificant that a decision which might have wide implications for the future on cases involving disobedience of orders is not appropriate.

#### ORDER

The order of the Examiner dated at Jacksonville, Florida on 18 September 1970, is VACATED. The charges are DISMISSED.

C. R. BENDER  
Admiral, U. S. Coast Guard

Commandant

Signed at Washington, D. C., this 13th day of November 1972.

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