

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT NO. Z-128-28-5482-D2  
AND LICENSE NO. R 25828  
ISSUED TO: ROBERT JOHNSON

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

2056

ROBERT JOHNSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 7 August 1975, an Administrative Law Judge of the United States Coast Guard at San Francisco suspended Appellant's seaman documents for 3 months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Radio Officer on board the United States SS PACIFIC BEAR under authority of the document and license above captioned, on or about 22 November 1974, Appellant disobeyed a lawful order of the Master to check for radio traffic from Nagasaki, Japan.

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

The Investigating Officer introduced in evidence the testimony of the ship's master and a consultant to the ship's owner, the ship's log and other documents.

In defense, Appellant offered in evidence his own testimony plus documentary and character evidence.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents, issued to Appellant, for a period of 3 months on 12 months' probation.

The entire decision and order was served on 11 August 1975. Appeal was timely filed on 26 August 1975.

FINDINGS OF FACT

On 22 November 1974, Appellant was serving as a radio officer on board the United States SS PACIFIC BEAR and acting under authority of his license and document while the ship was at sea. On 22 November 1974 the SS PACIFIC BEAR departed Pusan, Korea for Kobe, Japan. On the same day, Captain Paul Jones, then serving as Master, spoke with the Appellant and asked if the ship's

agents in Kobe had replied to messages sent earlier. When the Appellant responded that no replies had been forthcoming the Master suggested that the Appellant check Nagasaki Radio. On direct examination the Master stated that this suggestion to Appellant was more of a request than an order. The Appellant did not monitor Nagasaki Radio, but continued to monitor Choshi and Kobe Radios.

While Appellant's misconduct is alleged to have occurred on 22 November 1974, no entry was made in the log until 5 December 1976 when the ship arrived in San Pedro, California.

### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the "order" was not an order of the kind which is actionable under the statute, that it was regarded by both the Master and Appellant as a suggestion, that the "offense" was not charged against Appellant until 10 (sic) days later, and that it was "proven" by use of evidence "that was not even remotely reliable."

APPEARANCE: Jay A. Darwin, Esq. Counsel.

### OPINION

#### I

The Administrative Law Judge based his decision on three sources, (1) the testimony of Mr. Nations, consultant to Pacific Far East Lines, owner of the ship, (2) the testimony of Captain Jones, the ship's master, and (3) the ship's log.

I fail to understand the purpose for which Mr. Nations was called to testify. The only issue involved in this case is whether or not the Appellant failed to obey a lawful order given by the Master. Mr. Nations had no direct knowledge of the communication between the Master and Appellant. Whether or not it was "common practice" to check for radio traffic from Nagasaki or whether Appellant could have done so is not relevant to the specification as alleged. Nor was Mr Nations' expertise required to point out that the radio log did not show that Appellant had checked for traffic from Nagasaki, since Appellant did not contest that element of the specification.

Moreover, with respect to Mr. Nations' credibility as a witness, it must be noted that he had been personally involved in a labor dispute with the Appellant on at least one prior occasion, and that hostile communications had passed between them. Mr. Nations' hostility and bias against the Appellant cannot be disregarded, and his credibility as a witness is diminished as a result. Therefore, the Judge erred in crediting Mr. Nations' testimony as he did.

The testimony of the Master should be given primary consideration in determining whether or not the four elements of the offense were satisfied (1) was a lawful order issued, (2) did the

Appellant have knowledge of the order, (3) did he have a duty to obey the order, and (4) did he fail to obey it). An examination of the record discloses that even the Master himself was uncertain as to whether or not he had given an order. On direct examination the Master stated that his comment to Appellant was more of a request than an order. When asked, also on direct, if he thought the Appellant would carry out the request he replied, "Yeah, more or less." (R-137) If the Master could not be certain that what he said should have been construed as an order I cannot see imposing upon the Appellant a higher level of understanding. It seems to me that a sufficient degree of specificity and certainty on the part of the individual who claims to have given the order is required before elements one and two of the offense can properly be satisfied. (See Decision on Appeal No. 1883).

## II

In addition to the testimony of the two witnesses against Appellant, the Administrative Law Judge relied upon an entry made in the ship's log some thirteen (13) days after the alleged incident occurred. 46 USC 702 provides that "(U)pon the commission of any of the offenses enumerated in §701...an entry thereof shall be made in the official log book, on the day on which the offense was committed ...." (emphasis added). Section 702 provides, further, that "the offender...shall, before (the) next arrival at any port, or, if (the vessel) is at the time in port, before her departure therefrom, be furnished with a copy of such entry..." The evident purpose of the protections afforded by this section is to prevent prosecutions for breaches of discipline except in those cases where the Master deems the matter of sufficient importance while the circumstances are fresh in his memory and before there is any temptation to make use of the incident for some other purpose. (See U.S. v. Brown, D.C. Or. 1876, Fed. Cas. No. 14,672.) The fact that the Master did not see fit to enter the alleged incident into the log until the ship arrived in San Pedro, California, some 13 days subsequent, raises a question in my mind as to the true reason for which the entry was made. Not only does this failure to comply with the protections afforded by §702 render the entry highly suspect, but when coupled with the Master's testimony on the stand that he could not state with certainty that what he had said to Appellant would be construed as an order, I cannot conclude that the charge is supported by substantial evidence of a reliable and probative character as required by 46 C.F.R. 5.20-95(b).

The Investigating Officer has the burden of proof to establish the misconduct alleged, and he must do so by means of substantial evidence. I hold in this instance that this burden was not met, and that the charge against Appellant must therefore be dismissed.

## CONCLUSION

I conclude that substantial evidence does not exist to support a finding that a lawful order identifiable as such was given by the Master. Therefore, the Appellant did not fail to obey a lawful order as alleged by the specification and is not guilty of misconduct as charged.

## ORDER

The findings of the Administrative Law Judge are Set Aside, the order of the Administrative

Law Judge dated at San Francisco on 7 August 1975 is Vacated, and the charge and specification are dismissed.

O. W. SILER  
Admiral, U. S. Coast Guard  
Commandant

Signed at Washington, D.C., this    day of    1976.

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