

NTSB Order No.
EM-3

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the National Transportation Safety Board
at its office in Washington, D. C.,
on the 8th day of January, 1969.

WILLARD J. SMITH, Commandant of the United States Coast Guard

vs.

JUAN ANGEL RODRIGUEZ

Docket ME-1

OPINION AND ORDER

The appellant, Juan A. Rodriguez, a steward employed aboard the SS UNITED STATES, has appealed to the Board from the action of the Commandant, revoking his merchant mariner's documents.¹ The action of the Commandant is taken in an opinion, affirming the initial decision of Examiner Martin J. Norris, dated April 28, 1967, entered after a full evidentiary hearing. At the hearing and throughout these proceedings, appellant has been represented by counsel.

It is undisputed that on August 27, 1966, the appellant was serving as a bedroom steward aboard the SS UNITED STATES while the ship was at sea. At about 5:30 p.m. on that date, a complaint was made by passenger that her eleven-year-old daughter, Danielle Coppin, had been molested in a service locker by a man wearing a steward's uniform. Danielle gave a description of the man to

¹Section 5(b) (2) of the Department of Transportation Act [80 Stat. 935, 49 U.S.C. 1654(b) (2)] provides that it shall be the duty of the National Transportation Safety Board to review on appeal the suspension, amendment, modification, revocation, or denial of any certificate or license issued by the Secretary of the Department of Transportation. Pursuant to Section 5(m) of the Act [49 U.S.C. 1654(m)], the Board has delegated to the Commandant of the United States Coast Guard its review authority under Section 5(b) (2) of the Act regarding Coast Guard matters, except those cases involving orders of revocation [14 CFR Part 400]. The rules of procedure for appealing to the Board decisions of the Commandant, revoking seamen's documents, are set forth in 14 CFR Part 425.

officers on the ship, re-enacted for their benefit the manner in which the man had taken her from where he had accosted her to the locker, and later, about 7:30 p.m., unhesitatingly identified the appellant, from among 6 crewmembers, as the man who had molested her. The appellant was disgraced and reassigned to duties outside the passenger area. He was made to surrender his keys, among which was an unauthorized master key which open the locker into which Danielle stated she had been taken and molested.

As a result of an investigation by the Coast Guard, the appellant was charged with misconduct in accordance with 46 U.S.C. 672 and the applicable regulations thereunder, namely 46 CFR §137.05-5 and §137.05-20(a)(1).² The appellant also was charged with unauthorized possession of a master key and being in an unauthorized area of the ship without permission.

At a hearing held in Brussels, Belgium, Miss Coppin testified that the appellant had taken her to a small unlocked room which smelled of ammonia, pushed her inside, rubbed his hand between her legs and started to touch her shorts, but when she protested had let her go. On cross examination, she identified appellant as the man who molested her from among 10 photographs submitted to her for inspection by appellant's counsel. The appellant, by way of defense, offered his testimony and that of 5 crewmembers, to the effect that the appellant was present elsewhere at various times before, during and after the time that the molestation was alleged

²§137.03-5 Offenses for which revocation of licenses or documents is sought. (a) The Coast Guard will initiate administrative action seeking the revocation of licenses, certificates or documents held by persons who have been involved in acts of such serious nature that permitting such persons to sail under their licenses, certificates and documents would be clearly a threat to the safety of life or property. (b) These offenses, which are deemed to affect safety of life at sea, the welfare of seamen or the protection of property aboard ship, are***(4) Molestation of passengers.***.

§137.05-20 Types of charges. (a) In lieu of or supplementary to the charges described in paragraphs (b) and (c) of this section, the charges may be: (1) Misconduct. "Misconduct" is a human behavior which violates some formal, duly established rule, such as the common law the general maritime law, a ship's regulation or order, or shipping articles. In the absence of such a rule, "misconduct" is human behavior which a reasonable person would consider to constitute a failure to conform to the standard of conduct which is required in the light of all the existing facts and circumstances.

to have occurred. From the evidence of record, the examiner found that the "critical period" when the molestation took place was between 5:00 and 5:15 p.m. Only one of appellant's witnesses testified with respect to this time period.

During the course of the hearings, the examiner refused to admit into the record the written statement of a witness for the appellant, made by the witness prior to his testifying before the examiner. In rejecting the written statement, the examiner, inter alia, stated that the statement was self-serving, that no purpose would be served by admitting it into the record since it is not used to discredit the witness, and that he was not questioned about whether he had made such a statement. Again, counsel for the appellant urged that the transcript of the hearing held in Brussels, which contained Miss Coppin's key testimony, inaccurately reproduced her testimony but "he reserved objections to the testimony submitted, not as to the substance, but there might be things as to form." Despite this reservation, at a later point in the hearing, counsel moved to strike the testimony because the examiner allegedly had engaged in improper ex-parte discussion concerning it with counsel for the Coast Guard. The examiner stated that the conversation he held with counsel for the Coast Guard was a direct result of an off-the-record discussion held at a previous hearing, in which counsel for the appellant had participated, and which dealt with the content of the testimony at the Brussels hearing. Moreover, he stated that it had resulted when counsel for the Coast Guard had requested the examiner to furnish him with a transcript of the Brussels hearing, which he refused to do, and in which the question was raised whether Miss Coppin had testified that the appellant had "unzipped her shorts" or merely touched them. The examiner, in his findings, found that Miss Coppin had testified, as the transcript stated, that he had touched her shorts.

Because counsel for the appellant questioned the accuracy of the transcript of the Brussels hearing, the examiner put into the record a tape made of the proceeding and a transcript thereof, as well as a letter explaining his reasons for employing a tape recorder. By way of summary, these demonstrate that it was used because the hearing was held out of the United States and in a foreign country where the possibility existed that the court reporter might not be as experienced as a domestic reporter. However, the transcript of the particular proceeding and the transcript of the tape do not contain material differences, although the tape transcript indicates that Miss Coppin testified that the appellant had "unzipped her shorts."

On the basis of the document evidence and oral testimony by the Coast Guard and, in particular, Miss Coppin's testimony, the

examiner found that the charges against appellant had been proven. He did not believe appellant or his witnesses' testimony with respect to appellant's whereabouts at the critical time.

On appeal, the Commandant found that the record supported the examiner's findings and affirmed the examiner's order revoking appellant's merchant marine documents. In addition, the Commandant stated that appellant's possession of the unauthorized master key was sufficient justification for a "permanent banishment" of appellant from the Merchant Marine.

On appeal to the Board, appellant relies on the brief he filed before the Commandant. Counsel for the commandant had not filed a brief.

Upon consideration of appellant's brief and of the entire record, we conclude that appellant has been guilty of the misconduct charged, and that the molestation of an eleven-year-old girl, under the circumstances of this case, warrants the sanction here imposed. To the extent not modified herein, we adopt the Commandant's and examiner's findings as our own.

In support of his appeal, appellant alleges the examiner committed prejudicial procedural and substantive legal error. These arguments are disposed of by the Commandant in his opinion and, as indicated, we adopt as our own the reasons advanced by the Commandant for rejecting them. Nonetheless, several of appellant's allegations require additional comment.

The appellant urges procedural error by the examiner because of (1) his refusal to admit into evidence the statement made and signed by witness who testified at the hearing; (2) his denial to appellant of a copy of the tape made by the tape recorder utilized at the Brussels hearing; (3) his holding and ex-parte discussion concerning Miss Coppin's testimony at Brussels with counsel for the Coast Guard; and (4) his relying upon the transcript of the hearing held at Brussels, as made by a Belgium stenographer, because the transcript is full of inaccuracies.

In our view, these allegations of procedural error are without substance. To begin with, the examiner correctly pointed out that the statement made by a witness who testified for the appellant before the examiner, which counsel for the appellant offered into evidence, could serve no purpose. In this, the examiner was correct because it was, at best, cumulative evidence. See 5 U.S.C. 566(d). Moreover, there is no allegation that the statement contained any matter which the witnesses' direct testimony before the examiner did not contain. Consequently, its exclusion could in no way be prejudicial to the appellant.

Again, although counsel for the appellant complains that the transcript of the Brussels hearing was inaccurate, his argument does not reach or attack the essential portions of Miss Coppin's testimony as to how the appellant had molested her. Therefore, the errors complained of are inconsequential and in no way prejudiced appellant's case. Again, though there is an ex-parte communication from the court stenographer to counsel for the appellant in which she asserts that she thinks it is inaccurate, she in no way states in what respects it is inaccurate. Therefore, her statement can be given little or no weight. Under these circumstances, we find no substance to appellant's claim concerning the transcript.

Moreover, although counsel for the appellant insists that he should have been given a copy of the tape, the fact is that he was offered an opportunity to listen to it, and since he was present at the hearing at Brussels he could have determined whether the transcript of the tape was accurate, but he declined to do so. Under these circumstances, he cannot now complain that he was not given a copy of the tape.

Appellant's last allegation of procedural error is that the examiner held an ex-parte discussion with counsel for the Coast Guard outside the hearing room concerning the case, and that such a discussion was improper. However, as previously indicated, the record demonstrates that his discussion came as a result of a colloquy between counsel for the appellant, counsel for the Coast Guard, and the examiner, concerning the nature of Miss Coppin's testimony at the Brussels hearing at which counsel for the Coast Guard was not present. Following the hearing, counsel for the Coast Guard called the examiner who refused to give counsel for the Coast Guard the transcript of the hearing outside the presence of counsel for the appellant but nonetheless discussed with him whether the transcript reflected that Miss Coppin had testified that the appellant had "unzipped her shorts." In view of her detailed testimony of molestation, whether appellant touched her shorts or "unzipped" them is of little or no consequence and, therefore, the examiner committed no error in refusing the transcript to counsel for the Coast Guard or in giving him his recollection of what the transcript might contain, with the caveat that the transcript would be controlling on what the witness had said.

In sum, appellant's complaints of procedural error are without foundation. The appellant's contentions of substantive error relate to the examiner's finding that Miss Coppin's testimony was credible and his refusal to accept the testimony of appellant, and his witnesses, insofar as it purported to show that he was not the person who molested Miss Coppin. We believe that the record

contains sufficient evidence to support the examiner's determination as to the credibility of witnesses appearing before him. On the basis of the record, the findings made below are, in our view, supported by reliable, probative and substantial evidence.

In view of our disposition of this matter, there is no necessity that we comment on whether the additional charges of being present in an unauthorized area of the ship and having unauthorized possession of a master key also warrant revocation of appellant's seaman's documents.

ACCORDINGLY, IT IS ORDERED THAT: The decision of the Commandant be and is hereby affirmed.

O'CONNELL, Chairman, and LAUREL, REED, THAYER and McADAMS, Members of the Board, concurred in the above opinion and order.

(SEAL)