

NTSB Order No.
EM-16

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

Adopted by the NATIONAL TRANSPORTATION BOARD
at its office in Washington, D. C.,
on the 19th day of May 1971.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

FRANKLIN JUNIOR PABLO

Docket ME-17

OPINION AND ORDER

The appellant, Franklin Junior Pablo, is seeking review of the Commandant's decision affirming on appeal (Appeal No. 1800) the initial decision of Coast Guard Examiner Daniel H. Grace, wherein the examiner ordered the revocation of the appellant's seaman's documents for the misconduct aboard ship.¹ A hearing in absentia on the misconduct charge was held at Mobile, Alabama, on October 29, 1969, authorized by the examiner when the appellant failed to appear pursuant to notice served upon him in Mobile on October 24, 1969.²

The Coast Guard presented evidence which included certified extracts from the shipping articles of the SS NORTHERN STAR, showing inter alia, appellant's service as an ordinary seaman (MMD No. Z-1173309-D1) aboard from July 14, 1969 to October 24, 1969; certified copies of official logbook entries concerning appellant's acts of misconduct on September 11 and 28, 1969; and testimony by the master of the NORTHERN STAR. In his initial decision, the examiner found that the Coast Guard's allegations of misconduct, as

¹Copies of the decisions of the examiner and the Commandant are attached hereto.

²46 CFR section 137.20-25(a) of the Coast Guard's hearing regulations provides that: "In any case in which the person charged, after being duly served with the original of the notice of the time and place of the hearing and the charges and specifications, fails to appear at the time and place specified for the hearing, a notation to that effect shall be made in the record and the hearing may then be conducted 'in absentia'."

set forth in five specifications in the hearing notice, were proved. These involved appellant's refusal to obey lawful orders of the second mate to participate in a fire and boat drill on September 11, and to stand watch on September 28, 1969, thereafter, on the latter date, assault and battery on the master, use of profane and threatening language toward him, and creating a disturbance by "brandishing" a fire axe in a dangerous manner. Although it was disclosed by the investigating officer that appellant had no record of prior offenses with the Coast Guard, the examiner nonetheless ordered revocation.

In support of this appeal, appellant contends, though counsel, that all available witnesses known to the Coast Guard were not called to testify, and his own failure to attend should be excused because he was without sufficient funds to prepare his defense or maintain his temporary residence in Mobile awaiting the hearing. Before the Commandant, the same excuse for appellant's non-appearance was joined with his petition for a new hearing at Portsmouth, Virginia, since he would have counsel and witnesses available in that locality. The Commandant rejected the excuse and held that by failing to appear, appellant had forfeited his right to present evidence.

We agree with the Commandant that appellant's excuse is not acceptable, in view of evidence that he was served with notice in Mobile on the day of his discharge from the NORTHERN STAR. Since the payoff of seamen at the time of discharge is required by law (46 U.S.C. 596, 641) it is highly unlikely, barring unusual circumstances, that appellant was without sufficient funds to maintain himself temporarily in Mobile. Yet appellant offers no explanation whatsoever in this regard. Moreover, he does not claim to have made any attempt to communicate his purported financial distress to the examiner or the local Coast Guard office by mail or telephone at any time prior to the hearing.³ Whatever appellant's

³The investigating officer stated on the record that at the time he served the hearing notice, appellant expressed a desire to have the case transferred to his home port of Norfolk, but that he had advised appellant of the requirement to appear before the examiner at Mobile at the time and place specified and had also given him the examiner's telephone number and mailing address. The officer also stated that nothing had been heard from the appellant since the time of service. While such statements do not appear to have been taken under oath as would be proper, so that a record would be made of "all the facts concerning the issuance and service of the notice . . .," as required by 46 CFR section 137.20-25(b), no issue is raised as to their inadequacy in any respect or that he attempted to

real financial condition might have been at the time of service, we find that he has made no satisfactory showing that he was thereby compelled to disregard the notice, nor did he make the slightest effort to comply with its terms. In absence of a valid excuse for his total lack of compliance, appellant deprived himself of the opportunities then available to seek a change of venue and to be heard in his own defense. Consequently, we find he is not entitled to a second hearing.

We also find that a prima facie case of appellant's misconduct was established by substantial evidence of a probative and reliable character. In our view, however, upon consideration of the whole record, the sanction is excessive.

The decisions of the examiner and the Commandant do not inform us concerning the standard for differentiating among sanctions, applied by them in this case. Their findings are susceptible of interpretation that appellant's offenses, which were acts of insubordination and violence, were of such serious nature that, under Coast Guard regulations, they "are deemed to affect safety of life at sea, [and] the welfare of seamen...."⁴ A continuing pattern of insubordination would also be an important factor to be considered in assessing the validity of the revocation action, but we are not satisfied that the proof adduced in this case established a pattern indicative of his future conduct. Nor are we persuaded that appellant's violent behavior was so serious as to warrant revocation.

In one instance, we find that the aspect of violence in an offense, consisting of the allegation that appellant was "brandishing" a fire axe in a dangerous manner, was not proved. The evidence merely demonstrates that the master and chief mate saw appellant with a fire axe in his hand, ordered him to give it up, and forcibly took it from him when he refused to do so. While the offense of wrongfully creating a shipboard disturbance was made out, there is no proof in this instance of violent conduct on appellant's part, as the findings of the examiner and Commandant seem to imply.

The incident involving appellant's assault and battery upon the master is described in the master's testimony as follows:

"Actually I was in a position where he couldn't have really a

communicate his whereabouts to Coast Guard authorities before leaving Mobile.

⁴46 CFR section 137.03-5.

good swing at my face and when he struck me he really didn't hit me. It was a preliminary action in order to try to set me in a position where he could hit me. Fortunately I saw this happening and I pushed him away and in the meantime a number of other crewmembers hearing all the commotion arrived and grabbed him before he had an opportunity to get near me again. however, he was threatening to strike me, both verbally and coming at me physically. Seeing the man was emotionally wrought I figured there was no sense in having him on deck as there'd just be trouble so I ordered him to go to his forecandle. He refused this order also and broke away from the men who were holding him and went aft to the gangway." (Tr., p. 12.)

The master testified further that in his experience persons exhibiting such emotional reactions were "quite often" encountered, and that he was neither put in fear nor at any time endangered by appellant.

We find that appellant's offenses of laying hands on the master with a show of violence, as well as his outburst of threats and profanity, constitute extremely serious breaches of shipboard discipline. In mitigation, however, no harmful consequences resulted therefrom and no showing is disclosed by the record that his recalcitrance formed a continuing pattern.

Appellant's serious offenses occurred on only one occasion, September 28, 1969, and were attributed by the master to his highly agitated state of mind precipitated by feelings that he was discriminated against by the second mate. While the master gave no credence to the claimed discrimination, his testimony plainly indicates to us that appellant's emotional misconduct is not an uncommon occurrence among ordinary seamen.

As a matter of degree, we do not find that appellant's violent behavior in this case reflects such a propensity for violence that he would pose a future threat to the safety of other persons aboard ship. Nor do we find that his misconduct on the date in question reflects a persistent attitude of insubordination, particularly in view of his prior record of commendatory service. While we agree that substantial disciplinary sanction, other than revocation, is warranted based on the offenses in this case, the record shows that appellant surrendered his seaman's documents in December 1969, upon service of the examiner's initial decision. We believe sufficient time has elapsed for disciplinary purposes, particularly in view of Coast Guard regulations, which provide that upon revocation for these offenses appellant would be entitled to make application for

the issuance of a new document after 1 year.⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied insofar as the request for a new hearing is concerned and granted insofar as modification of the Commandant's order is provided herein;

2. The revocation order of the Commandant be and it hereby is modified to provide for a retroactive suspension of appellant's seaman's documents; and

3. The retroactive suspension, starting on December 12, 1969, shall terminate as of the issuance date of this order.

LAUREL, McADAMS, THAYER, and BURGESS, Member of the Board, concurred in the above opinion and order. REED, Chairman, filed the attached dissent.

REED, Chairman, DISSENTING:

I deem revocation to be the appropriate sanction under the circumstances of this case and considering the severity of the offenses involved herein, I would affirm the Commandant's decision.

(SEAL)

⁵46 CFR section 137.13-1.