

NTSB Order No.
EM-35

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 5th day of June 1974.

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

vs.

ARTHUR D. NEILSON, Appellant.

Docket ME-41

OPINION AND ORDER

The appellant, Arthur D. Neilson, has appealed from the Commandant's decision affirming the revocation of his merchant mariner's document (No. Z-706956) and all other seaman's documents for misconduct aboard ship.¹ At the time in question, appellant was serving as a second steward aboard the SS SANTA MERCEDES, a merchant vessel of the United States.

Appellant's prior appeal to the Commandant (Appeal No. 1908) was taken from the initial decision of Administrative Law Judge Albert Frevola,² issued at the conclusion of a hearing held before him in New York City. Throughout his hearing and subsequent appeal to the Commandant, appellant elected to proceed without counsel.

The law judge found that, on November 21, 1970, appellant molested a 15-year-old passenger on the vessel, one Robert G. Clark, during a voyage at sea "by applying an electric vibrator to his person, while engaging him in conversation about sexual matters." Concluding that appellant's offense was "most serious," the law judge entered the order of revocation.

¹The Commandant's decision was issued pursuant to 46 U.S.C. 239(g). This appeal therefrom is authorized by 46 U.S.C. 1654(b)(2) under the applicable regulations of the Board set forth in 14 CFR 425.

²Copies of the decisions of the Commandant and the law judge (then acting as "hearing examiner") are attached hereto. See 5 CFR 930, 37 Fed. Reg. 16787, August 19, 1972

The findings are predicated on unrefuted testimony from the complaining witness as to "what transpired in his meeting with the [appellant]." Corroborating testimony that he had made "timely complaints" thereof was given by his mother and their traveling companion aboard the vessel, Mr. Kai Larson, and by the master of the SANTA MERCEDES.

The master testified at the hearing and was cross-examined by appellant. The other witnesses were deposed by direct and cross-interrogatories at Long Beach, California. Appellant absented himself from the next scheduled session of the hearing, but sent a telegram to the law judge stating "... unable to be in New York please make your own decision regards verdict." The law judge thereafter mailed copies of the depositions to appellant's address in Pennsylvania. By accompanying letter he also advised appellant to appear at a stated time, date, and place "in order that you may fully protect your rights at the hearing," and cautioned that the hearing would proceed whether or not he appeared. At that session, the depositions were admitted into evidence and the hearing was concluded by the law judge in appellant's continuing absence.

In his brief on appeal, appellant disregards the contentions previously raised by him before the Commandant. Now acting through counsel,³ he contends that the law judge committed reversible error by not advising him of the Coast Guard regulation permitting cross-examination at the depositions instead of filing cross-interrogatories.⁴ He also asserts that the deposed witnesses failed to give "independent testimony" because they were not segregated as required.⁵ Counsel for the Commandant has filed a reply brief contending, inter alia, that appellant was advised

³Approximately 8 months elapsed before the filing of appellant's notice of appeal from the Commandant's decision. The appeal was accepted despite its untimeliness in view of the assertion by his counsel, who averred that he was retained only 1 day prior thereto, that "grave errors [were] made during the hearing."

⁴46 CFR 137.20-140(h) provides that: "In the event one party files interrogatories, the other party, in lieu of filing cross-interrogatories, may attend the taking of the depositions and cross-examine the witnesses."

⁵46 CFR 137.20-60 provides, in pertinent part as follows: "§ 139.20-60 Witnesses excluded from hearing room.

(a) All witnesses shall be excluded from the hearing room prior to the taking of their testimony. ..."

adequately of his rights to cross-examination; that the master's testimony, standing unrefuted despite cross-examination, "was in itself a sufficient basis for the Judge's ruling;" and that since the complaining witness "was the first to be deposed ... his testimony was, thus, not tainted" by lack of segregation.⁶

Upon consideration of the parties' briefs and the entire record, we find that appellant's procedural contentions are not sustained. We conclude that the findings of the law judge are supported by reliable, probative, and substantial evidence. His findings are adopted herein as modified. Our assessment of the gravity of the offense based thereon, however, warrants reduction of the sanction heretofore imposed.

The record discloses that appellant ignored notice of his hearing, duly served upon him, until the third session. Proceeding in his absence, the Coast Guard investigating officer had already applied for depositions to be taken, based on written interrogatories, of witnesses living in California.

In the process of explaining the nature of the proceeding to appellant and his rights therein, the law judge advised him of the "right to cross-examine any witness which the investigating officer calls to testify against you." Following that, appellant was also advised that witnesses required to travel more than 100 miles to the situs of the hearing would testify by deposition "in the form of written interrogatories or oral open examination ... where the witness is located" (Tr. 19). Appellant neither sought clarification of these instructions (Tr. 20) nor gave the slightest indication at any time thereafter of asserting the right, of which he was then notified in unmistakable terms, to cross-examine the deposition witnesses.

Appellant's contention is directed to the law judge's subsequent statement to him, after ruling on his objections to the direct interrogatories, as follows:

"Now you have the right to put cross-interrogatories. In other words, this would be in effect your cross-examination, you see." (Tr. 32.)

This cannot be interpreted as negating the previous advice of the law judge. He was not required to pose the alternative of cross-examination for a second time. Rather, once made aware of that opportunity, it was incumbent on appellant to assert it. If

⁶The objection of appellant's counsel to a late filing of the reply brief, on February 1, 1974, is rejected.

appellant was somehow dissuaded from doing so by this statement of the law judge, the record gives no such indication. Accordingly, we hold that the instructions on appellant's rights to cross-examination did not constitute reversible error.

Appellant further claims that his difficulty with the statement of the law judge is manifested by his response thereto. This was, in effect, an objection that he should be required to formulate cross-interrogatories (Tr. 33)). We perceive no essential unfairness in that procedure. No actual prejudice resulting therefrom has been shown, and appellant abandoned his opportunities at the hearing to assert prejudicial effects, if any, or offer additional cross-interrogatories after reviewing the depositions. The objection is unfounded, therefore and affords him no basis for challenging the deposition procedure. The nonsegregation of witnesses therein diminishes the probative value of certain testimony. However, to the extent that weight was assigned by the law judge in error, it is rendered harmless by our exclusive reliance on the testimony of the complaining witness, as corroborated by the master.

The master testified that he received the complaint that appellant "made a pass at a 15 year old kid" from Mr. Larson at about 10:30 p.m., of the evening in question (Tr. 50), and promptly interviewed the complaining witness and his mother. The boy was "trembling and looked very upset," and his mother was "very agitated [and] angry." She "reported in substance that Mr. Larson had just told [him], namely that the boy had been assaulted in [appellant's] room" (Tr. 51). The boy then gave an account of the incident, which was that he was invited to go to appellant's cabin at about 9:00 p.m. to be shown how to develop photographs and that "after getting in there [appellant] ... showed him the buzzer and asked him a number of questions relating to sexual matters, and applied the buzzer to the boy's head" (Tr. 52-53).

The complaining witness testified that appellant's conversation with him contained references to whether he was "non-conformist or conformist"; to appellant's going with another boy "to one of the places where they play half-sex [saying] he had fun then": to whether the witness liked girls and "ever had sex with another girl"; and concerning the vibrator, "insisting that [the witness] try it [saying] that a previous boy that was on there really enjoyed it." These references are sufficient to connote abnormal sexual motivation on appellant's part. The fact that he thus accosted the complaining witness is fully corroborated by the master, and nothing was brought out by appellant's cross-interrogatories to the former or cross-examination of the latter to impeach their credibility or establish mitigating circumstances. In our view, this evidence sustains the findings

that appellant engaged in an improper and suggestive conversation with a minor concerning sexual matters and that this constituted molestation.⁷ The offense is particularly reprehensible in view of appellant's former status as a seaman serving on passenger vessels.

However, because of insufficiency of proof, we do not find that use of the vibrator was established as serious molestation. Although the complaining witness testified that appellant "started putting it on`" him and that he, out of fear, decided to "try it," he did not specify where the vibrator was placed on his body.⁸ No proof was adduced by way of corroboration from the other deponents. Not being segregated, their testimony was confined to the generalities that he told "the full story" to his mother and "everything he testified to" to Mr. Larson.. The only direct evidence in point is provided by the master. However, we are not satisfied that application of "the buzzer to the boy's head" was an act of molestation. Rather, it is construed as evidence confirming the conversational offense.

In assessing sanction, appellant's long record of commendable prior service, noted in the initial decision, and our modification of the findings herein are considered as factors in mitigation. We also note that on appeal to the Commandant, appellant conceded that he had degraded himself in this matter and would seek to redeem himself. Counsel for the Commandant has advised that appellant surrendered his seaman's document on September 5, 1973. With due regard for the abnormal sexual motivation demonstrated by his offense, we are nonetheless persuaded, under all the circumstances of the case, that the length of appellant's sanction to date is sufficient for disciplinary and rehabilitative purposes.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied except insofar as modification of the Commandant's order is provided for 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

⁷See People v. Carskaddon (1959), 170 Cal.. App. 2d 45, 338 P. 2d 201, and authorities cited therein.

⁸This lack of specificity also appears in the charge wherein it was alleged that the vibrator was applied "to his person." There are obviously many parts of the person that might be so touched without constituting a revocable offense.

3. The retroactive suspension, starting on September 5, 1973, shall terminate as of the date of service appearing on the face of this order.

REED, Chairman, McADAMS, and BURGESS, Members of the Board, concurred in the above opinion and order. THAYER, Member, dissenting. HALEY, Member, was absent, not voting.

(SEAL)

L. M. Thayer, Member, DISSENTING:

In my view, the revocation order should be affirmed, since I find appellant's offense both grievous and unmitigated by the circumstances of the case, his prior clear record, or other factors.