

NTSB Order No.
EM-68

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 18th day of April 1978.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

SIMONNE ANDREE DESVAUX, Appellant.

Docket ME-62

OPINION AND ORDER

Appellant seeks review of the Commandant's decision affirming a 1-month suspension plus 4 months on 15 months' probation of her merchant mariner's document (NO. Z-095-30-7458) for misconduct¹ aboard ship. The Commandant's decision affirmed the order of Administrative Law Judge Albert S. Frevola² who found violations

¹The sanction was entered pursuant to 46 U.S.A 239(g). Review of the Commandant's decision on appeal to this Board is authorized by 49 U.S.C. §1903(a)(9)(B).

All charges leveled herein are, we understand, brought under 46 CFR §5.05-20 (formerly 46 CFR §137.04-20, as recodified, (39 F.R. 33322; published September 17, 1974)), regulations promulgated under the authority of 46 U.S.C. §239 (inter alia), Insofar as is applicable herein, §5.05-20 reads as follows:

"§5.05-20 Types of charges.

(a) General. 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."

²Copies of the decisions of the Commandant and the law judge are attached.

with respect to five specifications, four of which the law judge amended to conform the pleading with the proof.³ As amended by the law judge, the specifications found proved allege that, while serving as rooms messman, and, subsequently, crew messman, on board the S.S. YOUNG AMERICA, appellant: (1) and (2) On 27 July 1974, wrongfully showed disrespect to the master of the vessel (Captain John P. Aastrand) by means of letters addressed to him;⁴ (3) On 31 July 1974, in the port of Genoa, Italy, wrongfully addressed the chief officer (Alfred Brown) with profane and disrespectful language;⁵ (4) On 28 July 1974, acted in a disrespectful manner to the radio officer (Theodore Micker) through words and gestures; and (5) On 31 July 1974, assaulted and battered the radio officer (Mr. Micker) by striking him with her hands.⁶

In her brief on appeal, appellant, who has been represented by counsel throughout the proceedings, contends, *inter alia*, that (1) the first two specifications are not supported by substantial evidence and the law judge wrongfully and erroneously modified them; (2) specification 3 is not supported by substantial evidence; (3) specifications 4 and 5 are not supported by any evidence at all but are, in fact, contradicted by the statement of an Italian police officer obtained after the hearing. The brief goes on to describe the background and circumstances under which appellant found herself aboard the YOUNG AMERICA and points out some of the circumstances that would militate against acceptance of the testimony that was found credible by the law judge in preference to that of appellant. Among these circumstances, appellant contends that (1) two persons, one officer and one crewmember, interfered with her work performance and submitted reports on her work that were unjustified and served to provoke her into actions not intended; (2) she was overworked on the vessel and was asked to perform more work than possible in a work day with no overtime

³The law judge amended four of the specifications as indicated hereinafter citing as authority Decision of the Commandant No. 1811, issued August 20, 1970, citing Kuhn v. Civil Aeronautics Board, 183 F. 2d 839 (CADC 1950). See also 46 CFR §5.20-65(b).

⁴Specifications 1 and 2 were amended by the law judge by substituting the words "showed disrespect to" for the original term "threaten."

⁵Specification 3 was amended at the hearing with respect to date and place. The original charge read "28 July 1974" and "Port of Naples."

⁶Specification 5 was amended by the law judge by the substitution of the word "hands" for the word "fists."

authorized: (3) she is a female seaman, foreign born, with difficulty in the English language, and she did not mean to convey disrespect but merely to be helpful in her writings to the master: (4) the YOUNG AMERICA, under the supervision of Captain Aastrand, had an inordinate amount of trouble retaining female seamen.

Finally, appellant requests that the initial decision be vacated and set aside. She further requests oral argument before the full Board.

Counsel for the Commandant has not submitted a reply brief.

Upon consideration of appellant's brief and of the entire record, the Board concludes that, with the exception of the finding of disrespect in specifications 1 and 2, as those specifications were amended by the law judge, the opinion of the law judge and of the Commandant should be reversed. Our decision is based on our review of the circumstances surrounding the events constituting all five specifications, of the de minimis nature of the actions that constitute specifications 3, 4, and 5, and of our evaluation of the evidence submitted to support specifications 3, 4, and 5.

Prior to addressing appellant's contentions, brief background is appropriate.

Appellant, a woman 49 years of age (born September 11, 1928), had, prior to 1972, served for many years as a waitress and children's nurse and in other capacities aboard luxury liners such as the Grace Lines. In 1971, after the passenger liner on which she had served was withdrawn from service, appellant secured employment aboard the SS YOUNG AMERICA, a freight ship, as a rooms messman, or officers' and passengers' bedroom steward. She served under two masters, Captain Sturdevant and Captain Aastrand, the latter being master of the vessel at the times when charges were filed against her in February 1972, February 1974, and, again, in July 1974; these latter charges being the subject of the instant proceeding. Subject to agreement between the Union and the steamship lines, appellant was the sole rooms messman aboard the vessel. Her duties included the daily cleaning of six passenger rooms (often occupied by twelve passengers), two lounges (one for officers, one for passengers), nineteen officers' rooms and , apparently, bathrooms for each, and a variety of other rooms and cubicles such as the master's office, the sea cabin aft of the bridge and the radio room. At the hearing, Captain Aastrand stated that appellant accomplished her work and that she was a satisfactory worker.

The first two specifications, as amended allege that appellant wrongfully showed disrespect to the master of the vessel by means

of letters addressed to him, copies of which are contained in the record (Coast Guard Exhibits 6 and 7). The first letter was, at some time, placed in the master's uniform cap, atop a bureau in his bedroom, the second letter was placed in a locker in the master's office. The first letter stated, in part: "If you do want a reinstatement with the Company do not dismiss me again or rerate me or cause any problems with overtime, etc., which will force me to meet Union and Company representative and complain." The letter went on to make a number of suggestions. "Company and Union is expecting a dismissal, give them a surprise." "Write to your supervisors, apologize..." "You are a very emotional man." "If they propose you a transfer, take it. You have lost the prestige necessary to a Master." The second letter appears to be the carrying out of the "threat" that appeared in the first letter. It stated, in part: "I am keeping my word...I wrote to Union and lawyers." "You have a fine friend with Micker... he has always instigated you against me, I know all about you get reinstated and dismiss me again." "I also know your home problem with your wife not wanting you around the home, in a sense I am for her your are a very instable man."

Appellant contends that the first two specifications are not supported by the substantial evidence and the law judge wrongfully and erroneously modified them. We do not agree. The law judge made a finding, based on his review of the exhibits and the testimony, that the offenses were properly logged in substantial compliance with the provisions of 46 U.S.C. §702⁷ and constituted prima facie evidence of the offenses therein stated. Although there is some dispute as to when the first letter was actually received by Captain Aastrand, we believe that there can be no dispute that the letters were written by appellant, that they were delivered to and received by the master, and that they are disrespectful. We have carefully reviewed all arguments set forth by appellant concerning her language barrier, the unwholesome atmosphere of confidentiality between her and the master that may have engendered the writing of the letters, and appellant's ostensible motive of aiding the master by giving him good advice. We do not find enough merit in any of the arguments set forth to justify the letter writing but find that there is reason for a finding of disrespect. Finally, we do not find merit in the contention that the law judge wrongfully amended the first two specifications but find that the principle applied in Kuhn v. C.A.B. cited supra, is applicable to the instant proceeding. Appellant cannot plead surprise or lack of notice in the law judge's amendment. The matter of the letters having been written

⁷As noted hereinafter, we point out that the logging may not have been coincident with receipt of the offending letters.

by appellant and delivered by her to the master has been effectively litigated on the record.

The matter of the master's appraisal of the letters as a threat does not alter the character of the letters in any way, and their content, on its face, does constitute disrespect. Accordingly, it is our view that the matter was litigated and appellant was given the benefit of a finding of lesser charge, reducing the word "threat" to "disrespect." The letters indicate that the master had, as a result of some prior incident, been placed on some form of probation. The first letter indicated that, were the master to dismiss or otherwise discipline appellant, she would some how instigate the Union and management (Mediterranean Steamship lines) against him. It is our view that the letters written by appellant and delivered to the master do constitute disrespect.⁸

⁸The master's perception of the letters as a threat to the safety of his wife and daughters was found by the law judge to be unreasonable. We agree that it was not only unreasonable but completely unfounded. We do not find that specifications 1 and 2 require the we depend on the credibility of the perceptions of the master but, rather, agree with the law judge that there are no disputed material facts concerning those two specifications. We have the hard evidence, that is, the letters themselves and no one disputes that they were written by appellant and delivered by her to the master.

In the interest of justice, we are compelled to make note of note of another occasion when the master had a mistaken perception. When asked why he lingered in the bedroom area while appellant was performing the homely tasks that were required therein, he stated that he was afraid she would steal. We find this a mistaken perception. There is not one shred of evidence to substantiate such a suspicion. Moreover, appellant continued to have access to the passenger rooms despite the captain's suspicion. We believe that appellant is entitled to have the record set straight in this regard. It is our considered opinion that the captain did not have any reason to believe that appellant would steal. Appellant has a clear record in this regar, so crucial to her position of trust with the keys to officers' and passengers' rooms. Our attention to this matter is not to be misconstrued. We in no way adopt the contention that the master was inviting familiarity by remaining below stairs. He had every right to do so and we do not regard his action as provocation for the disrespectful letters that followed; however, his overall credibility is placed in question by these two "mistaken perceptions." It is our view that he in no wise lingered in bedroom because he feared thievery. Moreover, his continued

As a result of the charges constituting specifications 1 and 2, on July 31, 1974,⁹ appellant was discharged in a foreign port (Genona, Italy) for misconduct, by the master who accomplished the discharge at the United States Consulate as required by regulation.¹⁰ We are not asked to review the reasonableness of the discharge in a foreign port; hence we do not do so.

The third and fifth specifications both occurred on July 31, 1974, the day appellant was discharged in a foreign port for misconduct. The law judge cites a number of Commandant's Appeal Decisions to support the proposition that jurisdiction continues over the acts of a seaman, under certain circumstances, despite the fact that his services had been terminated.¹¹ The criteria set forth in Decision No. 864 (Dickinson), for ascertaining whether a seaman was still "in the service of the ship" and "acting under the authority of his document" are these: (1) Whether the seaman was paid for working on the day the incidents occurred (July 31, 1974); and (2) whether there is there is a direct causal connection between appellant's employment status under his license and his

occupancy of that room during its cleaning when he should have been tending to the business of the operation of the ship does cause us to question his good judgment in the use of his time. In any event, it apparently placed the cleaning woman in some state of wonderment as to why he lingered in the bedroom at midday; hence her later letter writing may have been the result of some confusion as to just what her role was. We do note that there is no suggestion on the record of indiscretion, however.

⁹The Commandant's decision erroneously notes that the discharge in Genoa, Italy, took place July 30, 1974. Since the date of the discharge has a bearing on the specifications (3 and 5) occurring subsequent to the discharge, this appears to us to be an error worthy of notice.

¹⁰46 U.S.C. §682. See also 22 U.S.C. §82.16(b) for the responsibilities of the consular officer in the discharge of a seaman. Justification for such a discharge on the basis of the two letters is not apparent.

¹¹The law judge cites Commandant's Decisions Nos. 1233 (McMurray); 491 (anonymous); and 864 (Dickinson).

presence on the ship. A subsequent case, No. 1233 (McMurray) held that appellant was guilty of assault after he had been discharged even though the assault took place in an area a considerable distance away from the ship. The rationale for the holding was that he had been paid for the day on which the assault took place.

While we find the McMurray and Dickinson cases relevant, they are not dispositive since no evidence was introduced to show that appellant in the instant proceeding was paid for working on July 31, 1974. It is our view, however, that her presence on the ship after the discharge to gather together her belongings was for her benefit, and, as a result, would require that she comply with the scheme of authority while she was aboard the vessel. Accordingly, we conclude that appellant was "in the service of the ship" and "acting under the authority of her document" while she was aboard the vessel on July 31, 1974, to retrieve her belongings and was subject to Coast Guard jurisdiction when she engaged in the actions constituting specifications 3 and 5.

Turning now to the third specification, we find that the only witness to the incident was the complaining witness, Chief Officer Alfred Brown. When approached by Chief Officer Brown, who now claims he was directed by the Master to acquire appellant's date of birth and document "Z" number, even before the officer stated his business to appellant, she said, "You stay out of my way. You're a no-good bastard." At the time of the incident, appellant was in an extremely agitated state of mind, having been recently dismissed from the vessel on the basis of the two letters, and had returned to the vessel to retrieve her gear prior to making arrangements for some kind of lodging since she would not be returning to the vessel. She had clearly already been dismissed and probably did not understand that she was still subject to the ship's command owing to the fact that she was no longer able to make it her home and she had no other.

The testimony at the hearing gave details of two events that had occurred that, in our view, constitute mitigation for the vituperative language addressed to the first officer. Mr. Brown testified that on the night when appellant was logged (Coast Guard Exhibits 2 and 3) for the two notes that are the subject of specifications 1 and 2, he went to her room to order that she appear on deck at the logging and for the purpose of signing the log. As we have pointed out, although not proven, it appears that at least one of the subject notes had been in the possession of the master for some days prior to the logging.¹² Accordingly, there is

¹²Appellant reflected this fact in her comment on the log. She stated that the note had not been delivered on the day of the

some question whether Mr. Brown had the right to order appellant to a logging of an event that was neither recent nor previously considered enough to warrant immediate action. Appellant had retired to her room after a full day of bedroom-bathroom chores and other cleaning and was probably exhausted. She had taken off her clothes and refused to answer the door when Mr. Brown knocked. We do not know how he acquired the entrance to her room; however, he testified that he did enter, that he found appellant improperly attired for the reception of visitors, and as a result, he pulled the door to a closed position.¹³ Her later derogatory remark may have been a reference to that occasion as well as vituperation as a result of her discharge in a foreign port.

Our second reason for dismissing the charge of disrespect to Mr. Brown centers on the fact that the incident occurred after appellant had surrendered her document Z-card to the U.S. Consulate at the time of her discharge. As a result, it appears that Mr. Brown's explanation for approaching her to acquire her Z-number and birth date lacks validity.

The fourth and fifth specifications are dismissed as de minimis in view of the circumstances surrounding them. The fourth specification, that respondent did wrongfully act in a disrespectful manner towards the radio electronics officer, Theodore Micker, by words and gestures, was found proved by the law judge based upon the testimony of Mr. Micker, the log entry (Coast Guard Exhibit No. 4) and by the testimony of John Sullivan, second cook and baker, who verified that harsh words were spoken by appellant. The incident occurred on July 28, 1974, and consisted of appellant's thumbing her nose at Mr. Micker (a gesture not seen by Mr. Sullivan or any other witness), and insulting him. We note that appellant's bad feelings toward Mr. Micker were of long standing and her testified at the hearing that he had reported appellant for shortcomings in her work "many, many times." It appears that appellant and Mr. Micker had been involved in a series of incidents and, despite the fact that Captain Aastrand testified that he found appellant's work aboard ship satisfactory, Mr. Micker had over the years offered a great number of criticisms of that

logging.

¹³The record is replete with a veritable myriad of unproven allegations. It was not established with finality that Mr. Brown accomplished entry to the woman's room by means of a key. If he did so, he deserves the epithet she later gave him. In any event, the occasion of the logging would not appear to warrant an intrusion into appellant's sanctuary.

work.

Although not proven, appellant testified at the hearing that she had once reported Mr. Micker for an act of thievery involving a box of cookies.¹⁴ In any event, it is established that the radio man was an officer aboard the vessel and, therefore, entitled to civil behavior on the part of members of the crew. The record reveals, however, that his behavior in going into the galley of the ship during the lunch hour on the day after appellant had been rebated from officer's and passengers' rooms messman to kitchen worker, a regrating that he had been at least indirectly instrumental in obtaining, was behavior unbecoming an officer in view of the fact that he was well aware that his presence in that area would cause appellant to be humiliated and might very well result in a loss of control. In short, his presence in the galley, an area restricted to kitchen workers, appears to have been calculated to inflame and to stimulate a confrontation, and, as such, was the kind of act that can only be described as provocative under the circumstances. As a result of the fact that Mr. Micker provoked the incident together with the fact that nose thumbing is somewhat *de minimis*, especially when performed without witnesses, it is our view that specification 4 should be dismissed.

Finally, with respect to the fifth specification, assault and battery¹⁵ On the radio officer (Mr. Micker), the law judge made a credibility finding in favor of the testimony of Mr. micker. It is well established that credibility findings of a law judge, who observes the demeanor and listens to the testimony of the witnesses at the hearing, are not to be upset unless error is clearly shown.¹⁶ This is not to say, however, that the Board does not have the clear responsibility for reviewing the evidence upon which the law judge based his decision. In this case, the law judge based his decision on the testimony of Mr. Micker. The episode was not logged. The law judge did not find anything in the testimony of appellant that would cause him to doubt Mr. Micker's testimony. At a later date, April 21, 1975, appellant's counsel secured an affidavit from the Italian port guard who witnessed at least a portion of the

¹⁴The theft of a box of cookies could, if it had been blamed on appellant, been the end of her career.

¹⁵For a discussion of assault and battery, see 6A C.J.S. Assault and Battery §71.

¹⁶For a discussion of the credibility findings of the hearing examiner see Davis, Administrative Law, §10.04.

incident.¹⁷ Apparently in response to a leading question on the part of appellant's counsel, the guard stated: "I make it known herein that present at the time of the dispute were various members of the ship's crew." In contrast, Mr. Micker testified that, at the time of the alleged assault, no other members of the crew were present (Tr. pg. 124). Mr. Micker also testified that the incident had been reported to the master by the Italian port captain who, he states, did not witness the incident but heard about it from the Italian watchman. This seems highly unlikely in view of the later affidavit. He also testified that he made a written report which was not produced in evidence. The law judge also made the rather incredible finding that Mr. Micker "betrayed no animus against respondent." We cannot comprehend how the law judge could have reached such a finding in the light of Mr. Micker's testimony and the entire record. It is our understanding that "animus" connotes "ill will." We believe it is clear from the record that Mr. Micker bore a great deal of ill will towards appellant, that his constant complaints were intended to get her dismissed from the vessel, and that his interest in reporting her went far beyond his interest in getting his bathroom cleaned.

In view of the foregoing, it is evident that the record does not unequivocally support the credibility finding of the law judge. The Board has pointed out on a prior occasion¹⁸ that a credibility finding based solely upon a preference for the testimony of an officer over that of a seaman is not acceptable. We also find that there is a lack of evidence of any sort that the complaining witness in specification 5 suffered bodily harm nor even that he was placed in apprehension of receiving bodily harm.¹⁹ We point out that it has been our experience in reviewing Coast Guard decisions that the master of a vessel is inclined to overlook a certain amount of hostile expression and even physical contact between seamen so long as it has not involved bodily injury.²⁰ Although the instant circumstances can be distinguished since one party to the

¹⁷See letter of Guisepppe Tolice attached to the appeal breif addressed to the Commandant.

¹⁸Commandant v. Martinez, 1 N.T.S.B. 2270 (1971), see page 2272.

¹⁹Bodily harm is not a necessary finding for the establishment of the tort of battery at common law but is introduced with respect to the issue of the extent of damages. An unwanted touching is considered a battery.

²⁰See, for example, Commandant v. Bozeman, 1 N.T.S.B. 2279 (1971), page 2281.

hostility is an officer, we find that the circumstances as found in the record warrant mitigation. As a result, we view the slapping, if it did occur, as another form of insult rather than a battery.

A generalized contention was made that certain officers aboard the vessel were determined to obtain appellant's dismissal from the vessel. Captain Aastrand testified that appellant's work load aboard the vessel was set, not by him, but by agreement between the Union and the management. As a result, the Captain indicated that he did not plan to interfere with the agreement. He also indicated that appellant's work was "satisfactory" (Tr. 63). Despite that fact, he accepted continual complaints from Mr. Micker concerning appellant's work. Mr. Micker testified that he had reported appellant "many, many times." One of his reports concerning appellant's failure to broom out his radio shack was one of the elements in a 1972 dismissal. He also complained about her method of cleaning his bathroom floor. He wanted it dry broomed before she wet mopped. Appellant testified that he objected because she failed to wash down the walls of his room.²¹ The ship employed a chief steward who presumably supervised the housekeeping. It appears that it would have been a simple matter for Mr. Micker to go to the chief steward, outline his needs with respect to wall washing, and the chief steward, knowing the overall housekeeping needs of the ship, would arrange to have the wall washing done if he believed it was warranted. Instead, Mr. Micker registered his complaints first with appellant herself and she, in turn, showered him with verbal abuse. It would appear that the master's policy of inaction in dealing with the problem of permitting appellant to continue to perform what appears to us to be an inordinate amount of work every day while, at the same time, being subjected to constant criticism, showed a lack of concern for the well being of at least one member of the crew.

With respect to appellant's request for oral argument, the Board has granted such requests when the need therefor appears. Here, however, the need for oral argument has not been shown since appellant's brief does not disclose any unique issue necessary for proper disposition of the matter.

²¹A simple mathematical calculation of dividing the 8-hour day into the number of rooms to be cleaned would show that appellant could only devote 15 minutes maximum to each officer room. It is abundantly apparent that the demands being made by Mr. Micker were impossible to meet within the frame work of the appellant's entire daily work requirements. Apparently, he felt that she should devote an inordinate amount of time in his rooms to the detriment of his fellow officers and the passengers.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is granted with respect to specifications 3, 4 and 5, and denied with respect to specifications 1 and 2:

2. The findings of the Commandant and the Administrative Law Judge are hereby reversed with respect to specifications 3, 4 and 5 and hereby affirmed with respect to specifications 1 and 2; and

3. The sanction of a 1-month suspension plus 4 months on 15 months' probation be and it hereby is vacated and set aside.

KING, Chairman, McADAMS, HOGUE, and DRIVER, Members of the Board, concurred in the above opinion and order.