

NTSB Order No.  
EM-97

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 24th day of July 1982.

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

HUGH M. MALANAPHY, Appellant.

Docket No. ME-89

OPINION AND ORDER

The appellant herein challenges a decision by the Commandant affirming an order suspending, on a charge of misconduct, his mariner's license and document (License No. 525 288; Merchant Mariner's Document Z-534 14 4967) for 2 months on eight months' probation.<sup>1</sup> The probationary suspension was originally imposed by Administrative Law Judge Roscoe H. Wilkes, following an evidentiary hearing, in a decision and order entered on July 14, 1980.<sup>2</sup> The single specification advanced in support of the charge alleged that appellant, while acting as Chief Mate aboard the M/V WALLA WALLA on May 10, 1980, "did wrongfully fail to respond promptly to a passenger's timely summons for help, thereby being unavailable to avert an assault which subsequently occurred, resulting in injury to a crewmember." On this appeal the appellant argues, among other things, that the Coast Guard did not prove a breach of any standard of care on which a charge of misconduct could be properly predicated.

The incident which led to the charge of misconduct against appellant occurred during a routine Winslow-Seattle ferry boat operation in Puget Sound, Washington. For reasons that are not explained in the record it appears that a verbal altercation developed between two female passengers and a female cashier in the

---

<sup>1</sup>The decision appealed was entered by the Coast Guard Vice Commandant, acting by delegation, on June 10, 1981.

<sup>2</sup>Copies of the decisions of the law judge and vice Commandant are attached.

ship's dining area.<sup>3</sup> Some time later the two passengers threw some items of food at the cashier who was then seated, eating her own breakfast, with another passenger in a booth. This third passenger, herself a former employee of the ship's food concessionaire and an acquaintance of the cashier, decided to ask one of the ship's mates to do something with respect to the conduct of the two food-throwing passengers. She thus went to the second-mate's office, where the appellant and the second mate were then located, and stated, according to the law judge, "Would one of you come; some girls are throwing food in the dining room" (Decision and Order at 8).<sup>4</sup> Neither the second mate nor the appellant perceived any urgency in the request, and when the appellant attempted to question the passenger about the nature of the problem, she walked away without answering. According to the passenger, within some 10 seconds after she had returned to the dining room, the two other passengers who had been throwing food assaulted the cashier.<sup>5</sup> See Tr. at 112, 135.

Much of the questioning of witnesses at the hearing involved an effort to ascertain the interval of time that may have elapsed between the advice to appellant of the food-throwing and his appearance in the dining room. The law judge, without discussing the evidence on the matter, found that the interval was between 2 and 5 minutes. Other testimony, including that of the appellant and the second mate, a witness called by the Coast Guard, suggested that appellant responded within thirty second or even within as little as 15 seconds.

We find it unnecessary to attempt to determine exactly how long it took the appellant to investigate the request for help, for

---

<sup>3</sup>The passengers, or at least one of them, and the cashier were apparently former schoolmates and knew each other. According to the cashier, the verbal abuse visited on her by the two passengers was unprovoked.

<sup>4</sup>The law judge apparently did not credit this passenger's testimony that she also advised appellant to the effect that "I think there's going to be trouble." Appellant testified that she made no such statement. See tr. at 195, 199.

<sup>5</sup>The cashier testified that only one of the two passengers actually participated in the assault, which the cashier described as follow: "The first thing she did was she slapped me and she dug her fingernails into my arm. She kicked me in the stomach and groin area, and she pulled my hair, and also scratched my face and split my lip." Tr. at 37. The other passenger, according to the cashier, just stood by and watched.

it seems clear that the Coast Guard could maintain that appellant was guilty of misconduct whether the delay in responding to the passenger's report was 2 minutes or 15 seconds, since in either event he would not have arrived in time to, in the language of the specification, "avert" the assault. Nevertheless, we cannot endorse the Coast Guard's position.

While the matter was inadequately developed at the hearing we will assume, without deciding, that under the general maritime law the appellant had a duty, unrelated to the navigation of the vessel, with respect to the personal safety of either passengers or other crewmembers. However, we perceive no reasonable basis for finding any violation of such a duty here. Appellant was not, after all, advised of any condition which, on its face, implicated safety in any direct way. On the contrary, he was simply presented with advice which he appears to have initially understood, quite reasonably in our view, to mean that some "kids" were acting up in the dining area. Moreover, apart from the fact that the content of this advice did not suggest imminent danger or peril to anyone, the testimony is that while the passenger appeared to expect that either the second mate or appellant would look into the matter right away, the report itself was delivered in a calm, "almost detached" manner. Tr. at 76. In light of these factors, the Coast Guard's view that appellant was guilty of misconduct because he did not immediately investigate a casual report of food throwing cannot be upheld. Objectively considered, the appellant reacted in a manner appropriate to the circumstances of which he was reasonably aware. The flaw in the Coast Guard's view that appellant should have responded immediately lies in its apparent assumption that the should have have construed the advice that "girls were throwing food" as a "report of a developing danger" (Reply Brief at 5).<sup>6</sup> We find no basis for concluding that his failure to do so constituted a departure from any applicable standard of conduct.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is granted; and
2. The decision of the Commandant in Appeal No. 2257 is reversed.

---

<sup>6</sup>In this connection we would observe that the passenger's failure to elaborate on her report of food throwing or to stay to answer appellant's questions would, in our judgment, be more likely to confirm appellant's apparent perception of answer appellant's questions would, in our judgment, unruly kids than to convey a sense of imminent "serious violent crime", as the Coast Guard appears to argue on brief. See Reply at 9.

BURNETT, Chairman, GOLDMAN, Vice Chairman, McADAMS and BURSLEY, Members of the Board, concurred in the above opinion and order.