

NTSB Order No.  
EM-110

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 29th day of June, 1984

JAMES S GRACEY, Commandant, United States Coast Guard,

v.

STEPHEN J. MINTZ, Appellant.

Docket ME-101

OPINION AND ORDER

The appellant, pro se, challenges an October 7, 1983 decision of the Vice Commandant (Appeal No. 2328) affirming a July 21, 1981 order issued by Administrative Law Judge H.J. Gardner following an evidentiary hearing on a charge of misconduct that had been filed against the seaman by a Coast Guard Investigating Officer.<sup>1</sup> By that order the law judge sustained the charge and suspended appellant's merchant mariner's document (No. Z-714 745) for 2 months outright and for another 3 months on 9 months' probation. On appeal, the appellant contends, among numerous other things, that the evidence produced by the Coast Guard was insufficient to establish the charge of misconduct and that the Coast Guard's denial of appellant's request for subpoenas for two witnesses deprived him of his right to present relevant evidence in his defense. We agree on the latter point, at least, and will, therefore, reverse the suspension order.<sup>2</sup>

The charge of misconduct was predicated on two specifications involving appellant's employment aboard the SS PRESIDENT MCKINLEY as an Officer's Bedroom Steward in May, 1981 when the vessel was docked in Naha, Okinawa. They alleged, in relevant part, that appellant, on May 4, "did wrongfully disobey a direct order from the Chief Steward, to wit: that [he was] not to take the afternoon off but [was] to complete [his] task of correcting deficiencies at [his] work station" and that he, on the same date, "wrongfully fail

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<sup>1</sup>Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

<sup>2</sup>The Coast Guard has filed a reply brief opposing the appeal.

[ed] to perform [his] assigned duties by absenting [himself] from [his] duty station without permission at 1300."

At the hearing the Coast Guard submitted as its only evidence on the charge of misconduct certified copies of pages from the vessel's official logbook.<sup>3</sup> Those pages contained entries, subscribed by the master, the chief officer, and the chief steward, recounting, in some greater detail, the circumstances on which the specifications in this proceeding were subsequently based.<sup>4</sup> The Coast Guard did not call as witnesses either the chief steward, whose direct order appellant had assertedly disobeyed, or the master, whose prior inspection report had identified the work station "deficiencies" the appellant was assertedly told to correct instead of taking shore leave. The appellant, whose request before the hearing that the master and chief steward be subpoenaed to testify had been refused, chose to put on no evidence at the hearing to counter the log entries.

The Coast Guard asserts that the logbook entries are prima facie evidence of the facts recited in them and that they therefore

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<sup>3</sup>The relevant portions of the May 5, 1981 log entry read as follows:

"Mr. Mintz, during the course of the voyage a master's inspection report was issued stating certain deficiencies in your work station. This report was issued 20 April 1981. In addition to this the Steward made a round of inspection with you on 1 May 1981 and pointed out to you personally these and other deficiencies. Sufficient time was allowed for you to begin correcting these items.

"On the morning of 4 May 1981, in Naha, Okinawa, you approached the Steward and asked him for the afternoon off. The Steward declined this request for time off because of the work remaining to be done to correct deficiencies on the two above mentioned inspection reports. At 1300 hrs. on 4 May 1981 you failed to turn to at your assigned duty station in direct violation of the steward's order. You were in fact absent without leave from your assigned duties after being told specifically that you could not have the time off."

Investigating Officer's Exh. 2A.

<sup>4</sup>As a result of the May 5, 1981 log entry the appellant was fined one half of one day's pay (\$18.71) and discharged from employment on the vessel when it returned to the United States.

provide sufficient support for the charges of misconduct in the absence of evidence to rebut them. See 46 CFR 5.20-107. The appellant maintains, in effect, that his denial of all charges in his logged "reply" to the entries concerning the performance of his duties either satisfied or eliminated any obligation to go forward with rebuttal evidence.<sup>5</sup> We find it unnecessary to decide whether appellant's reply, which directly challenged the truth of the accusation subscribed by the master and chief steward, either shifted the burden of going forward with other evidence back to the Coast Guard or precluded the necessity for a rebuttal, for we have concluded that the appellant was prejudiced when he was denied the opportunity to cross examine the master and the chief steward.<sup>6</sup>

In his decision the Commandant concludes that the subpoenas the appellant requested the Investigating Officer to issue for the attendance of the master and chief steward at the hearing should have been issued. Decision at 7. Nevertheless, he asserts that the appellant was not prejudiced by the refusal to issue the subpoenas because the specification the Commandant believes these witnesses would have testified about, namely, the first, was dismissed. The Commandant's assertion is erroneous. In the first place, the testimony of the master and chief steward was unquestionably relevant to both specification if for no other reason than that the misconduct charge was predicated exclusively on their log entries. In the second place, the assertion that the first specification was dismissed is simply inaccurate. While the law judge considered the first specification as the more serious, he thought the two specifications were largely duplicative in that the direct order in the first essentially required appellant to do what he was obligated to do, that is, be present at his duty station. Accordingly, he ruled that they should be deemed merged and that the first would be treated as a circumstance in aggravation of the second (tr. at 24): "The first Specification is not dismissed, it is merely merged with the Second Specification because it is duplicitous and constitutes the facts alleged in the First Specification. It, in effect, constitutes aggravating circumstances surrounding the offense in the second Specification,

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<sup>5</sup>Appellants's "reply", included in the vessel log exhibit the Coast Guard sponsored, was as follows (I.O. Exh. 2B): "The charges against me are pretextual and discriminatory if not completely erroneous, and are to be considered under protest."

<sup>6</sup>We would point out, nevertheless, that it is not clear to us why the Coast Guard believes that accusations written in a log are entitled to more weight than an immediately following written denial.

which is the wrongful failure to perform." The testimony of the master and chief steward, which the Commandant agrees (Decision at 8) would have been relevant to the first specification, was no less relevant after the merger of the specifications. The appellant was, consequently, prejudiced by the denial of his right to subpoena relevant evidence. The remedy for that denial, as the Commandant acknowledges (*id.*), is reversal.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal is granted, and
2. The order of the law judge imposing a suspension of appellant's merchant mariner's document is reversed.

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