

In the Matter of Merchant Mariner's Document No. Z-57574-D2 And All
Other Licenses, Certificates and Documents
Issued to: JOHN ERNEST KING

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

835

JOHN ERNEST KING

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 13 July 1955, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania, suspended Merchant Mariner's Document No. Z-57574-D2 issued to John Ernest King upon finding him guilty of misconduct based upon two specifications alleging in substance that while serving as a wiper on board the American SS PAN CONNECTICUT under authority of the document above described on or about 25 March 1955, while said vessel was in the port of Texas City, Texas, he assaulted and battered another wiper, Benito Olozaga, by beating him; and he assaulted and battered the First Assistant Engineer, Vernon R. Oman, by pushing him.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by an attorney of his own selection and he entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of First Assistant Engineer Oman, wiper Olozaga and Chief Cook Jones.

In defense, Appellant offered in evidence his sworn testimony and the testimony of a character witness. The latter stated that Appellant was a very peaceful person.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel, the Examiner announced his findings and concluded that the charge had been proved by proof of the specifications. He then entered the order suspending Appellant's Merchant Document No. Z-57574-D2, and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of twenty-four months - twelve months outright suspension and twelve months on twenty-four months probation from the termination of the outright suspension.

From that order, this appeal has been taken, and it is urged that the evidence does not warrant a finding of guilty as to either specification in view of the inconsistencies in the testimony as to who started the fight between the two wipers and the three different versions as to what Appellant did when he approached the First Assistant Engineer from the rear. It is contended that Appellant grabbed the First Assistant's arm to remonstrate with him after he had fired Appellant; Appellant struck back in self-defense after Olozaga started beating Appellant; the First Assistant testified that he was pushed from the back by Appellant and Olozaga was not in a position to see this; but Olozaga testified that he saw Appellant use his fists to strike the First Assistant on the back three times. It is respectfully submitted that the contradictions in the testimony of Olozaga and the First Assistant establish a deep-seated prejudice against Appellant; and that their incredible testimony should not prevail over the forthright testimony of the Appellant which is worthy of belief.

APPEARANCES: Morris Passon, Esquire, of Philadelphia,
Pennsylvania, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 25 March 1955, Appellant was serving as a wiper on board the American SS PAN CONNECTICUT and acting under authority of his Merchant Mariner's Document No. Z-57574-D2 while the ship was in the port of Texas City, Texas.

Shortly before 0830 on 25 March 1955, Appellant returned to the ship and went to his quarters. Appellant had been drinking intoxicants after having been warned about this by the First Assistant Engineer some two weeks earlier. The First Assistant entered Appellant's room, told Appellant not to turn to and that he was discharged from service on the ship. Appellant was unsteady on his feet at this time. The First Assistant left Appellant's room and walked down the passageway towards wiper Olozaga who was sweeping the passageway. Appellant followed the First Assistant, overtook him before he reached Olozaga and pushed the First Assistant on the back with both hands. As the First Assistant continued on his way to the engine room, he told Olozaga to take Appellant to his room.

Appellant and Olozaga then had a brief argument before they started fighting with their fists. Appellant struck the first blows but Olozaga retaliated and knocked down Appellant with one blow. When Appellant got up, there was an exchange of blows between the two seamen. Olozaga was getting the worst of it, so he departed and reported the incident to the First Assistant in the engine room.

The Master and First Assistant went to Appellant's room where he was found packing his gear. Appellant was taken ashore by the police authorities and required to post a \$20 bond after Olozaga filed a complaint against Appellant. (The record does not disclose whether Appellant was tried or the bond forfeited.)

Appellant's prior record consists of a suspension in 1951 for the assault and battery of a Chief Engineer and a fireman.

OPINION

My above findings of fact are in accord with the findings of the Examiner in all material respects and these findings are supported by substantial evidence contained in the record. Contrary testimony by Appellant was rejected by the Examiner who, as the trier of the facts who heard and observed the witnesses, was in a better position to judge their credibility. The Examiner stated that he did not believe Appellant's testimony that he took hold of the First Assistant's arm to attract his attention and that it was Olozaga who struck the first blow in the fight.

The testimony of the Investigating Officer's three witnesses is substantially consistent. The testimony of the First Assistant and Olozaga as well as that of Appellant indicates that Olozaga saw Appellant come up behind the First Assistant and push or punch him on the back. It is not material, to proof of the specification, in which of these two categories the battery is classified. The slight divergence in the testimony is understandable since both witnesses were at a disadvantage with respect to observing exactly how Appellant's hands contacted the First Assistant's back. The latter could feel Appellant's hands but could not see them while looking in the direction in which he was walking. Olozaga could not see Appellant's hands at the moment of contact because the First Assistant was between Olozaga and Appellant. But both of these witnesses testified positively that Appellant committed a battery upon the First Assistant from the rear.

Olozaga further testified that Appellant struck the first two blows in their fight which occurred shortly after Appellant battered the First Assistant. This testimony is corroborated by the testimony of the Chief Cook who repeatedly stated that he thought Appellant hit Olozaga first. Although this version has been adopted by the Examiner and in my findings of fact, it would not necessarily follow that the specification would be dismissed if it had been found that Olozaga used reasonable and necessary force to comply with the First Assistant's order to take Appellant to his room when it was obvious Appellant was not in a cooperative mood.

These circumstances definitely establish that Appellant was the aggressor throughout this incident or incidents and that there was no element of self-defense involved on his part. the absence of unfair prejudice against Appellant is indicated by the failure of the First Assistant or Olozaga to criticize Appellant when

questioned about his work on the ship. In fact, the First Assistant praised Appellant's ability as a worker. In view of the serious infraction of discipline committed by Appellant when he abused one of the ship's officers and Appellant's prior record of a similar offense, the suspension ordered will not be modified.

ORDER

The order of the Examiner dated at Philadelphia, Pennsylvania, on 13 July 1955 is AFFIRMED.

J. A. Hirshfreed
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 14th day of October, 1955.

***** END OF DECISION NO. 835 *****

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