

In the Matter of Certificate of Service No. A-123214
Issued to: FRED BANKS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

355

FRED BANKS

This appeal comes before me by virtue of Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 3 February, 1949, Appellant was subpoenaed to appear at a hearing to be held before an Examiner of the United States Coast Guard at New York, New York, on 15 February, 1949. Appellant stated that he would not appear at any hearing unless the Master and Chief Mate were produced to testify against him but he did not want them subpoenaed as his own witnesses. Appellant did not put in an appearance, at the designated place, on 15 February, 1949, or at any time thereafter. The Examiner waited two days for the Appellant to show up and then the hearing was held "in absentia" on 17 and 28 February, 1949. The Master of the ship testified on the latter date. Appellant was charged with "misconduct". The first specification alleges that while Appellant was serving as boatswain on board the American SS SHELL BAR, under authority of Certificate of Service No. A-123214, he used abusive and threatening language towards the Master and Third Mate of said vessel on or about 19 February, 1947. The second specification alleges that, while serving as above and on the same date, Appellant incited the crew against law and order by his language and actions.

Since Appellant did not attend the hearing, the Examiner entered a plea of "not guilty", on behalf of Appellant, to each of the two specifications. The Investigating Officer introduced certified copies of the official log of the SS SHELL BAR in evidence; and the Master of the ship on 19 February, 1949, added his testimony to the other evidence. At the conclusion of the hearing, the Examiner found both the specifications and the charge "proved". He, thereupon entered an order revoking Appellant's Certificate of Service A-123214 and all other valid certificates of service, licenses or merchant mariner's documents, which had been issued to him.

On appeal, Appellant contends that he is absolutely innocent of the charges placed against him and he firmly believes that, if he had the chance to appear at a hearing directed against his certificate of service, he would be cleared of these charges.

Appellant's certificate had been suspended in May, 1945 for one month on six months' probation for failure to join while serving aboard the American SS EDGAR E. CLARK.

FINDINGS OF FACT

On or about 19 February, 1947, Appellant was serving as a member of the crew in the capacity of boatswain on board the American SS SHELL BAR, under authority of Certificate of Service No. A-123214, while the ship was at Port of Spain, Trinidad. On this date at about 0800, Appellant awakened the Master of said ship and entered his quarters without permission. Appellant had been drinking but not to such an extent that he was not responsible for his actions. Using very crude and mutinous language, the Appellant told the Master that he (the Appellant) would henceforth assume complete control of the deck department and run it as he saw fit. He threatened to cause bodily harm to any of the officers who attempted to interfere with his complete domination of the deck department. He even attempted to prohibit the Master and Mates from walking on deck at any time. After much vile language concerning the same subject, he finally left after the Master had ordered him below several times.

About 1030, the Appellant approached the Third Mate, who was on watch, and belligerently informed him that he would be beaten if

he interfered with the deck work or went on deck. At the suggestion of the Third Mate, the two men went to see the Master about it and Appellant continued threatening any and all who dared to interfere with his rule of the deck department.

At some time during this same morning, the Appellant called a meeting of the deck force and repeated to them what he had told the Captain and the Mates.

The Master believed that these actions of Appellant were inciting the crew to refuse to perform their proper duties, so he contacted the police and had Appellant removed from the ship. On 20 February, 1949, Appellant signed off by mutual consent and never returned to the ship after having been taken into custody by the police.

OPINION

It is evident that Appellant was attempting to incite other members of the crew to disobey the lawful orders of the Master and other officers on the ship. The seriousness of this offense stems from the fact that such a course of action might logically have culminated in open rebellion and mutiny aboard the SHELL BAR. Appellant's words and actions on 19 February, 1947 clearly indicate that it was his intention to usurp the Master's command of the ship. The threat to the lawful authority and discipline of the ship was increased by Appellant's rating as boatswain which put him in direct charge of the ship's entire deck force. It is the policy of the Coast Guard that such aggravated acts of misconduct as this should be punished by revocation.

Title 46 Code of Federal Regulations 137.09-5(f) states that in "in absentia" proceedings, it is not necessary to introduce formally into the record all evidence bearing on the guilt of the person charged but it is necessary that prima facie evidence of guilt be established. The certified copy of the official log of the SS SHELL BAR, which is marked Investigating Officer Exhibit "B", is prima facie evidence of Appellant's guilt so far as the first specification is concerned. The courts have held that a prima facie case is established by such evidence when the statute (46 U.S.C. 702) is fully complied with. Since Appellant did not return to the ship; it was not necessary to furnish him a copy of

the log entry and record his reply in order to meet the statutory requirements.

The direct testimony of the Master of the ship is sufficient to establish a prima facie case with respect to both the first and the second specifications. As Appellant was not present to rebut any part of the evidence, I conclude that there was ample basis for the order of revocation which has been entered.

The Investigating Officer's Exhibits "C", "D", "F", and "G" would not have been sufficient in themselves to establish a prima facie case because they do not show that the official log entry was signed by the Master as required by 46 U.S.C. 702; but they are admissible in evidence as records made in the regular course of business since such defects in a log entry may be shown to affect its weight but not its admissibility (28 U.S.C. 695). Hence, they may be used to corroborate the other evidence.

Three certified copies of log entries which are not marked as Exhibits and also Exhibits "A" and "E" (all of which are attached to the record) are not properly a part of the record because there was no attempt made to introduce them in evidence. Whether they were given weight by the Examiner, in determining his findings and conclusions, is not important since there is sufficient evidence in the record to sustain his conclusions and order.

The Examiner's decision, including findings of fact and conclusions as well as the reasons therefor (46 C.F.R. 137.09-65), was not delivered to the Appellant, with the order, as is required by 46 C.F.R. 137.09-80. But, since the purpose of this requirement is to inform the person charged as to other or additional facts they might offer by way of rehearing or reconsideration of decisions and since the specifications are explicit enough to inform Appellant of the acts of which he is accused, there is no prejudicial error involved.

My opinion has dealt at great length with the admissibility and weight to be given the evidence in this case in order to make it perfectly clear that there is no merit to Appellant's contention on appeal that he is absolutely innocent.

Obviously, there is substantial evidence to indicate that he is

guilty as was found by the Examiner. Appellant was afforded more than a reasonable opportunity to appear at the hearing and subpoena others to appear in order to rebut the prima facie case established by the evidence submitted. Since Appellant chose to forego his right to be heard and since the requirements as to the type and degree of proof necessary have been satisfied, the order must be sustained.

CONCLUSION and ORDER

The order of the Examiner dated 28 February, 1949, should be, and it is AFFIRMED.

J.F. FARLEY
Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 21st day of July, 1949.

***** END OF DECISION NO. 355 *****

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