

In the Matter of Merchant Mariner's Document No. Z-448496
Issued to: DAVID C. BENEVEDES

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

435

DAVID C. BENEVEDES

In the Matter of

Merchant Mariner's Document No. Z-448496
Issued to: DAVID C. BENEVEDES

Merchant Mariner's Document No. Z-420604-D1
Issued to: SOLOMON BISHAW

Certificate of Service No. E-504036 (Z-458582)
Issued to: PAUL D. CALDWELL

Certificate of Service No. E-250341 (Z-184453)
Issued to: ERNEST DE LIMA

Merchant Mariner's Document No. Z-186682
Issued to: JIM DIMITRATOS

Merchant Mariner's Document No. Z-667644
Issued to: MASAYOSHI KOBAYASHI

Merchant Mariner's Document No. Z-370420-D1

Issued to: MANUEL W. MEDEIROS

Merchant Mariner's Document No. Z-801133

Issued to: ARCHIBALD L. NEEDHAM

Certificate of Service No. E-404509 (Z-419077)

Issued to: ELIJAH E. PAPKE

Certificate of Service No. E-85395 (Z-109786)

Issued to: RICHARD SUN SUNG KIM

Merchant Mariner's Document No. Z-453205

Issued to: JOHN L. THOMPSON

Certificate of Service No. E-346759 (Z-193874)

Issued to: DREXEL L. WILLIAMS

DECISION AND FINAL ORDER OF THE COMMANDANT
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The twelve above named Appellants have taken this appeal in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 5 January, 1950, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellants' documents and certificates upon finding each of them guilty of "misconduct" based upon three specifications alleging offenses committed while serving on board the American SS PRESIDENT WILSON, under authority of their respective Merchant Mariner's Documents and Certificates of Service as above described. Seven of the Appellants (De Lima, Kobayashi, Medeiros, Needham, Papke, Kim and Thompson) were serving in the capacity of ordinary seamen; three of them (Dimitratos, Benevedes and Bishaw) as able seamen, and two of them (Caldwell and Williams) as deck maintenance men. The specific allegations contained in the specifications addressed by name to each Appellant are as follows:

"First Specification: In that you, while serving as

(ordinary seaman, able seaman, deck maintenance man) on board a merchant vessel of the United States, the SS PRESIDENT WILSON, under authority of your duly issued (Merchant Mariner's Document, Certificate of Service), did, on or about 11:55 P.M., 17 August, 1949, while said vessel was in the port of Honolulu, T. H., combine, conspire or confederate with other members of the crew to disobey the lawful order of the Master to turn to and sail the said vessel from the port of Honolulu.

"Second Specification: In that you, while serving as above, did, on or about 11:55 P.M., 17 August, 1949, while said vessel was in the port of Honolulu, T. H., disobey a lawful command of the Master, to turn to and sail the said vessel from the port of Honolulu.

"Third Specification: In that you, while serving as above, did on or about 12:30 A.M., 18 August, 1949, while said vessel was in the port of Honolulu, T. H., absent yourself from your vessel without leave from proper authority."

Another hearing, based upon identical specifications as herein, was conducted by a different Examiner at approximately the same time. This other hearing involved twenty-two other members of the deck department of the PRESIDENT WILSON. Such action as was taken in that case is contained in a separate decision.

The hearing from which this appeal resulted was commenced on 13 September, 1949, and continued on various dates thereafter through 5 January, 1950, at which time the Examiner rendered his decision and served each Appellant with a copy thereof.

At the commencement of the hearing, Appellants were given a full explanation of the nature of the proceedings, the rights to which they were entitled and the possible results of the hearing. Appellants were voluntarily and jointly represented by the same counsel of their own selection. Counsel waived the reading of the specifications and entered a plea of "not guilty" to the charge and each specification for every one of the twelve Appellants. Counsel's motion against the joinder of all twelve cases was denied by the Examiner.

After the first and second specifications were amended to appear in the above form by the addition of the words "to turn to and sail the said vessel from the port of Honolulu," counsel's motion to continue the hearing, in order to permit preparation of the defense in accordance with the amended specifications, was denied by the Examiner in the absence of the showing of any surprise. It was stated that counsel had attended the investigation held prior to this hearing and thus he was adequately informed as to the incidents upon which the specifications were based. The Examiner also ruled that counsel had been given adequate time and information to develop his case.

Motions were made by counsel for the severance of the hearing as to certain of the Appellants on the ground that they each had separate and independent defenses. The Examiner denied these motions stating that the possibility of separate defenses was not a sufficient reason for severance since the basic interests of the twelve seamen were the same and individual defenses would not be antagonistic to any general defense presented on behalf of any or all of the twelve Appellants.

The Investigating Officer then made his opening statement and Appellant's counsel made an opening statement on behalf of Medeiros and Kim, reserving the right to make an opening statement on behalf of the other ten Appellants. In this first opening statement, counsel presented two defenses: the unseaworthiness of the vessel and the reliance of Appellants upon an agreement entered into prior to the time of the Master's order.

The testimony of various witnesses, including that of the Master and Chief Officer of the PRESIDENT WILSON, was introduced in evidence by the Investigating Officer. When the Investigating Officer rested his case, the hearing was adjourned to await the return of depositions to be taken in Honolulu which had been requested by counsel.

Over objection by counsel, the Examiner reconvened the hearing at Honolulu on 26 September, 1949, for the purpose of taking the testimony of those persons whose depositions counsel for the persons charged had requested. This included the testimony of the manager and attorney of the American President Lines in Honolulu, the business agent for the Sailors Union of the Pacific in

Honolulu, and the Shipping Commissioner for the port of Honolulu. When the hearing was reconvened in San Francisco, this testimony was read into the record to preclude any prejudice to Appellants since they had not been present when the testimony was taken in Honolulu. Objections were again raised by counsel and overruled by the Examiner.

In defense, counsel made an opening statement on behalf of the other ten seamen and offered in evidence the testimony of Appellant Kim. After recalling the Master for further cross-examination and introducing the testimony of a seaman (under charges in the companion hearing), which had been taken during the investigation, Appellants rested their case.

Several rebuttal witnesses were then called by the Investigating Officer and counsel. Documentary exhibits, in addition to those which had been received in evidence during the course of testimony, were offered in evidence by the respective parties.

Both parties were informed of their right to submit proposed findings and conclusions before oral arguments were presented by counsel for Appellants and the Investigating Officer. Proposed findings and conclusions were subsequently submitted by counsel in writing and ruled on by the Examiner before the rendering of his decision.

After the completion of argument on 13 October, 1949, the hearing was adjourned awaiting the decision of the Examiner but it was reopened on 30 November to receive additional evidence presented by Appellants.

On 5 January, 1950, the hearing was reconvened for the purpose of handing down the decision. At this time, counsel filed an affidavit in the nature of a motion to disqualify the Examiner due to an intervening decision which had been rendered by a Federal court pertaining to the failure of Appellants herein to surrender their certificates and documents to the Examiner at an earlier date. Counsel claimed that this court action removed the Examiner from the status of a neutral party and, therefore, he was not in a position to render a fair and impartial decision. The Examiner denied the motion on the ground that the court issue had nothing to

do with the merits of this case. He then found the charge "proved" by proof of the three specifications as to each one of the twelve Appellants and entered an order suspending their respective certificates and documents for a period commencing on 5 January, 1950, and ending one year from the date, or dates, on which the documents and certificates were deposited with the Examiner, exclusive of any time during which Appellants possessed outstanding temporary certificates or documents.

Upon the issuance of this order, eleven of the twelve Appellants surrendered their certificates and documents to the Examiner and were issued temporary documents pending the outcome of their appeals. Appellant De Lima refused to deposit his certificate with the Examiner since he questions the authority of the Examiner to require the surrender of documents pending the determination of the case on appeal.

FINDINGS OF FACT

On 7 and 8 July, 1949, Appellants signed the shipping articles of the SS PRESIDENT WILSON, Official Number 255039, a passenger-freight vessel of 15,359.84 gross tons which was owned and operated by the American President Lines, Limited, of San Francisco, California. The articles, dated 6 July, 1949, covered a foreign voyage from the Port of San Francisco, California, to Manila, Republic of the Philippines, via Los Angeles, California, and Honolulu, Territory of Hawaii, and such other ports as the Master might direct, and back to a final port of discharge on the Pacific Coast of the United States, for a period of time not to exceed nine months. Appellants served under authority of their documents or certificates in their respective capacities of deck maintenance men, able seamen and ordinary seamen throughout the voyage until the PRESIDENT WILSON returned to San Francisco on 23 August, 1949. The ship was manned and equipped in accordance with its Certificate of Inspection, dated 30 March, 1949.

The PRESIDENT WILSON moored alongside Pier 8 in Honolulu Harbor at 0728 on 16 August, 1949, after having completed the Manila leg of her voyage. Upon arrival at Honolulu, the Master posted sailing notices at all the passenger and crew gangways stating that the time of departure would be 1800 on 16 August,

1949. The vessel was secured for sea with a pilot aboard and tugs standing by prior to the latter time. Aboard the PRESIDENT WILSON were 3,135 bags of United States mail, 1102 tons of cargo, 527 passengers and the crew of approximately 338. There were slightly more than 200 persons in the Steward's Department; about 60 in the Engine Department; 18 in the Staff Department and exactly 54 in the Deck Department, including 8 officers; 1 cadet and 3 radiomen. The latter twelve crew members were the only ones in the Deck Department who were not charged (in either this or the companion hearing) with the offenses alleged in the above three specifications, except for three quartermasters, four able or ordinary seamen, and one night watchman.

Orders had been given to let go and most of the lines had been taken in when a telephone message was received on the bridge stating that trouble had developed in the crew's quarters. The Chief Officer ordered Bishaw, Benevedes, Dimitratos and Papke to go aft with him to quell the disturbance.

The trouble had commenced shortly before 1800, when Medeiros and Kim were standing in a passageway near the crew's gangway. One of the negro members of the Steward's Department, who was returning aboard, engaged in an altercation with Medeiros and struck him on the head with a bottle of whiskey. Medeiros was cut on the side of his head above the ear and was momentarily stunned by the blow. But he recovered quickly and chased the man who had assaulted him. In the meanwhile, the deck men at the after mooring stations received word of the commotion and left their stations.

The center of the ensuing fights was in and near the steward's messhall. When the Chief Officer reached the scene, Medeiros was acting like a raving maniac and threatening to "get the nigger" who had hit him. A general free-for-all resulted between the members of the Deck Department and the Steward's Department. Since he was unable to pacify the men, the Chief Officer called the Master and was joined by him. The Master then ordered the Chief Officer to call the police and about ten or twelve policemen later arrived on the scene.

Due to the complete confusion during the fight, the testimony of eye witnesses is very contradictory as to exactly what took place but the following facts are established by substantial

evidence: members of both departments were using large galley knives with which to attack and defend themselves against men in the other department; Medeiros was extremely belligerent even towards the Master and Chief Officer; at least two men, Medeiros and Kim, used a fire axe during part of the fight; the Deck Department members were generally on the offensive and three of them had Faison, a member of the Steward's Department, backed into a corner and were slashing at him with knives while threatening to kill him; members of the Steward's Department retreated in fear; the four Appellants who were ordered by the Chief Officer to help quell the riot at first assisted the Chief Officer, but later they joined with the other members of the Deck Department; two men in the Deck Department, Kim and Thompson, received knife wounds, while there is no evidence that any of the men in the Steward's Department were injured; and the riot finally came to an end at about the time Medeiros was disarmed of a fire axe by the Master and Chief Officer, collapsed, and was taken to the ship's hospital to have his head bandaged.

I accept the details of the fight which are set forth in the Examiner's Findings as being supported by substantial evidence to the extent that they support my above findings. I do not consider it essential for the determination of this appeal to make any additional findings as to the specific details of the fight between the members of the two departments.

Among those who arrived on the scene, at about this time, was Christiansen, the Honolulu agent for the Sailors' Union of the Pacific to which the members of the Deck Department belonged, Coast Guard officers, and the Honolulu Police officers who conducted an investigation of the fight.

After peace had been restored, a meeting of the Deck Department was held and it was decided that the members of the Deck Department would refuse to sail the ship unless three unnamed members of the Steward's Department, who had used knives in the fight, were removed from the vessel. This decision was reported to the Master by Bishaw, the union delegate of the Deck Department, after the Master and the Chief Officer had returned to the ship from the police station at about 2400 on this same date. When informed of this, the Master dismissed the pilot and the tugboats which had been standing by ever since the fight occurred.

In the meantime, the police had taken statements from some of the members of the Deck and Steward's Departments at the police station. After questioning, all of these men were released and they returned to the ship under no further obligation to the local authorities.

On the morning of 17 August, 1949, several members of the Deck Department swore out complaints against three members of the Steward's Department - Hayes, Holloway and Faison. These three men were arrested and released on bail on the afternoon of the 17th. During the day of the 17th, Bishaw told the Chief Officer that these were the three men with whom the deck force refused to sail. In turn, members of the Steward's Department swore out complaints against Medeiros, Kim, Needham and Thompson, who were arrested at about 2000 on the 17th and released on bail the same evening. These seven men were to stand trial at 0900 on the 18th. Three other members of the Steward's Department were subpoenaed to appear as witnesses at the same time. They were served the subpoena at 1710 on the 17th.

At 0630, on 17 August, 1949, the departure time was set for 1600 on that day, sailing notices were posted, and sea watches were maintained throughout the 17th. The sailing time was later changed to 1800 but the vessel was ready to sail on five minutes' notice at all times after the meeting on the afternoon of the 17th until after the meeting aboard the vessel on the evening of the 17th.

At about 1400 on 17 August, 1949, a meeting arranged by Campbell, the manager for the American President Lines in Honolulu, was held in the office of Commander T. K. Whitelaw, U. S. Coast Guard, who was serving as Shipping Commissioner for the port of Honolulu. This meeting was attended by the above two named men and also by Christiansen, Bishaw, Eskovitz (Honolulu agent for the Marine Cooks and Stewards Union), Collins (attorney for American President Lines), Orel A. Pierson (Master of the PRESIDENT WILSON), and Lieutenant, junior grade, Meekins, U. S. Coast Guard Merchant Marine Investigating Officer at Honolulu. The purpose of this meeting was to reach some settlement, mutually agreeable to the Deck and Steward's Departments, whereby the PRESIDENT WILSON would be enabled to depart from Honolulu.

It was finally agreed that approximately twenty unnamed men in

the two departments who had engaged in the fighting would be replaced, afforded transportation back to the United States at the expense of the company, and paid off for the voyage upon their return to San Francisco. All parties agreed to this arrangement with the reservation on the part of Christiansen that he would have to obtain confirmation from Harry Lundeberg, an executive officer of the Sailors' Union of the Pacific in San Francisco. Such confirmation was later received by Christiansen when he telephoned San Francisco. Appellants packed their gear and left the vessel without further authority after having been informed by Christiansen of this agreement. Neither at this time nor later did any replacements come on board. The members of the Deck Department had consistently maintained their position that they would not sail the ship so long as Hayes, Holloway and Faison remained on board.

At about 1730 on the 17th, the members of the Steward's Department met and refused to accept the terms of the agreement which had been entered into on their behalf by Eskovitz. They would not even agree to leave behind the three men with whom the men in the Deck Department refused to sail. Eskovitz conveyed this information to Campbell, who, in turn, told Christiansen about it at the time he conveyed to Campbell final approval of the agreement by Lundeberg. At this time, Christiansen again stated that the Deck Department would not sail with the three Steward's Department men aboard. Therefore, immediate plans to get underway had to be delayed.

On the evening of 17 August, 1949, a meeting was held on board the PRESIDENT WILSON beginning at about 2130. All 42 unlicensed members of the Deck Department were ordered by the Master to attend this meeting and a list of the ship's personnel was checked to ascertain that these 42 men were all present before the meeting was commenced. Also present were Eskovitz and the Steward's Department delegate, Christiansen, the Chief Engineer and the Engineering Department delegate, the Chief Steward, the Chief Officer, Commander Whitelaw, Lieutenant (j.g.) Meekins, and Captain Pierson. Meekins checked the crew list to be sure that all the deck men were mustered and present. When assured of this, he repeatedly told the men that no subsequent agreement could relieve them of their commitment under the shipping articles to obey the lawful commands of the Master and the Master was going to order them to sail the ship but that he first wanted to acquaint them with the law pertaining to the authority of the Master aboard his ship. Meekins

then read the provisions of 18 United States Code 2192 and 2193 which provide penalties for members of a crew revolting or inciting others to disobey the lawful orders of the Master of a vessel of the United States.

The Engineering and Steward's Departments delegates reported that all members of their respective departments were on board and ready to sail. When the Deck Department was called upon, Christiansen acted as their spokesman and stated that all members of the Deck Department were on board and they were ready to sail on the one condition that the three members of the Steward's Department previously named would be removed from the ship. The members of the Deck Department were then told that they would be given thirty minutes to talk it over among themselves and decide what to do before the Master gave his order. All hands except the members of the Deck Department and Christiansen then left the meeting.

The Master and others returned in about a half hour but the Deck Department men were still talking and arguing. The Master waited outside for another thirty minutes until the sound of the voices had subsided. During this time, no one left the scene of the meeting except Christiansen who again called Lundeberg. Finally, the Master reentered the messhall and at 2355 ordered "that all members of the unlicensed Deck Department turn to and sail this vessel from the Port of Honolulu at 2355 this date." This order was read to the Deck Department members by the Master and he then handed the original of the written order to Bishaw, the union delegate of the Deck Department.

Either before or after the reading of the order, or at both times, several individuals voiced their objections to sailing because of the pending court action scheduled for the following morning or due to fear of being knifed by one of the members of the Steward's Department. But the sole condition given, upon which the Deck Department as a whole would agree to sail, was the removal of the three men. The Master stated that he would pay off any man under court process but that he would not pay off the entire Deck Department. Immediately before or after the order was delivered orally and in writing, the members of the Deck Department shouted, "We quit."

Shortly thereafter all except 10 of the 42 unlicensed members of the Deck Department, including all of the Appellants herein, went ashore without authority and, excepting Longum, they did not return aboard the vessel with any intention of performing their duties until after the three Steward's Department men had left the ship on the morning of 19 August, 1949, for the remainder of the voyage. When it became apparent that his order would not be obeyed, the Master dismissed the pilot and the tugboats which had been standing by to assist the PRESIDENT WILSON in getting underway.

None of the seamen who left the vessel made any attempt to see the Master about signing off the articles despite the fact that the Master had expressed his willingness to release those men who were required to appear in court the following morning.

At about 0700 on the 18th, the Master was requested to appear before the Court at 1000 on that morning. At this time, all of the cases involving the crew of the PRESIDENT WILSON were dismissed on motion of the prosecutor after Captain Pierson had given his assurance to the Court that "appropriate charges will be brought against the men now charged here before the U. S. Coast Guard." The Court took this action in order to expedite the sailing of the vessel.

When the members of the Deck Department still refused to return aboard until their condition was met, the Steward's Department held a meeting on the night of 18 August, 1949, at which time they agreed to the removal of Hayes, Holloway and Faison.

On the morning of 19 August, 1949, the members of the Deck Department assembled on the dock at about 0930 and came aboard as soon as they saw the three members of the Steward's Department leave the ship with their gear.

At approximately 1000 on 19 August, 1949, the PRESIDENT WILSON got underway from Honolulu enroute to San Francisco, California, where the voyage was terminated.

ASSIGNMENTS OF ERROR

In this appeal, Appellants have presented numerous assignments

of error and arguments urging that the order of the Examiner is materially defective. For convenience of discussion, these contentions are set forth in the following seven groups:

I. The Examiner was personally biased and otherwise disqualified.

(Assignment of Error #1)

II. The Examiner interfered with the right of the persons charged "to present his case or defense" and failed to conduct the hearing "in an impartial manner."

(Argument)

The Examiner's interference with the right of the persons charged to present their defense was contrary to the provisions of section 7 of the Administrative Procedure Act. *(Assignment of Error #2)*

III. The order which the persons charged are accused of disobeying was not a lawful order because the agreement made in Commander Whitelaw's office was a contract upon the terms of which the persons charged had a legal right to rely. *(Argument)*

The Examiner's finding that the meeting in Commander Whitelaw's office and the agreement that resulted therefrom was not a "bargaining agreement between the respective unions and the American President Lines" is not supported by the record.

(Assignment of Error #7)

The agreement made in Commander Whitelaw's office was acceptable to the Deck Department and the persons charged were justified in leaving the vessel pursuant to that agreement. *(Assignment of Error #8)*

IV. The order which the persons charged are accused of disobeying was not a lawful order since the persons charged should not have been required to commit a crime nor to assist the Master in the commission of a crime.

(Argument)

The Examiner found contrary to the evidence that the Master of the ship was willing "at all times in issue to sign off any and all persons who were charged in the

territorial courts." (*Assignment of Error #9*)

The Examiner concluded from the findings made by him that the specifications set forth in the charges and each of them had been proved and that the charges had been proved. (*Assignment of Error #11*)

- V. The order which the persons charged are accused of disobeying was not a lawful order because the ship was unseaworthy by reason of there being among the crew at the time the order was given men who were known by the Master to be dangerous to the safety of the officers and crew. (*Argument*)

The fight in the messroom was caused by Robert Hayes, a member of the Steward Department. (*Assignment of Error #3*)

The evidence contradicts the Examiner's finding that Bishaw, Benevedes, Dimitratos and Papke participated in the riot in the stewards' messroom. (*Assignment of Error #4*)

The Examiner's finding to the effect that all of the persons charged participated in the riot in an effort to harm Faison is not supported by the record.

(*Assignment of Error #5*)

The Examiner failed and refused to adopt specific findings of fact which were requested by Williams, De Lima, Caldwell and Kobayashi. (*Assignment of Error #10*)

- VI. The Examiner failed to distinguish between the offense of making a revolt and the offense of disobedience of a lawful command or order. (*Argument*)

The Examiner's finding that a meeting of the Deck Department was held at 7:30 on August 16, 1949, which meeting constituted a conspiracy, is erroneous and is not supported by competent admissible evidence.

(*Assignment of Error #6*)

- VII. Section 239 of Title 46 U.S.C.A. is unconstitutional when construed and applied to justify the Examiner's decision suspending the licenses of the persons charged for their conduct as shown by the evidence in this case.

(*Argument*)

"Misconduct" and "Incompetency" have certain legal meanings and if given a broader meaning under 46 U.S.C.A. 239, then the statute is unconstitutional for lack of definiteness. (*Argument*)

APPEARANCES: Messrs. Kneland C. Tanner of Portland, Oregon, and Albert Michelson of San Francisco, of Counsel.

OPINION

Appellants charge that Examiner Edwards was prejudiced because of his former affiliation with the National Maritime Union; and that the Examiner should have disqualified himself in accordance with the motion by affidavit submitted by counsel at the hearing prior to the Examiner's decision. The affidavit asserted the belief that the Examiner was biased and prejudiced because of his "unfair rulings made throughout the hearing which deprived the persons charged of a fair hearing" and also because the Examiner contested with the persons charged in a collateral court action on 28 October, 1949, maliciously making counsel "a party in said proceedings for the sole purpose of depriving the persons charged of one of their counsel - - -." Several instances from the hearing record are pointed out as examples of the Examiner's failure to permit counsel the right to unlimited cross-examination of the Master of the ship. The court proceeding mentioned in the affidavit was an unsuccessful attempt to require the persons charged to surrender their certificates and documents to the Examiner prior to the rendering of his decision.

It may or may not be significant that the accusations of communistic leanings, based on the Examiner's former affiliation with the National Maritime Union (CIO) prior to 1943, were first voiced during the hearing by Harry Lundeberg, the official of the Sailors' Union of the Pacific (AFL) who was contacted several times by the S.U.P. representative in Honolulu when the trouble in question herein arose. At any rate, it does not appear that the objections were timely since they were not raised until after the Examiner had read his opinion and imposed the order. Nor is it supported by affidavit or documents to substantiate the accusations. In addition, it is sufficient to state that all Coast Guard Examiners are verified to be men with honest, democratic,

American philosophies before they are even considered for such positions of integrity.

With respect to the intervening Federal court decision which was handed down before the Examiner's decision in this case, it is pointed out that Examiner Edwards' participation in the proceedings against the persons charged and their counsel was purely nominal. This course of action was determined upon by the Coast Guard independently of the Examiner in order to test the validity of its regulation requiring the production of documents during the course of the hearing. As a matter of fact, Examiner Edwards agreed with the recommendation against joining counsel as a respondent and a motion was made to withdraw the action against counsel immediately upon the commencement of the court proceedings. This is contrary to counsel's present contention that the Examiner attempted to deprive Appellants of the services of their attorney. Since the issue involved in the court proceedings had nothing to do with the merits of this case and the Examiner did not actively participate in the court action, he remained in a neutral position throughout the hearing. Therefore, the Examiner was not incapacitated from rendering a perfectly fair and impartial decision.

The additional charge of bias and prejudice, based upon "unfair rulings" including the deprivation of the right of cross-examination of the Master, is not supported by a thorough perusal of the entire record. Despite isolated incidents of adverse rulings against Appellants (which are equaled by rulings unfavorable to the Investigating Officer), I am completely convinced that the Examiner was eminently fair and impartial, to all parties concerned, in his conduct of the hearing. Despite several unwarranted remarks directed against the Examiner and the Coast Guard, the Examiner took great care to give Appellants every opportunity to fully present their case. Under the prevailing circumstances, the Examiner should be commended, rather than censured, for the manner in which he presided.

II

Appellants also contend that the Examiner deprived them of the right provided for in section 7(c) of the Administrative Procedure Act to present their case or defense in an orderly manner. Over the objections of counsel, the Examiner read into the record the

testimony of those persons whose depositions had been taken at Honolulu at the request of the persons charged. By taking this action, Appellants say, the Examiner also failed to comply with section 7(a) of the Administrative Procedure Act which requires that the presiding officer shall conduct the hearing in an impartial manner; and this provision precludes the Examiner from introducing evidence for either party or upon his own motion. Therefore, Appellants claim they were denied "due process," as guaranteed by the Constitution of the United States, since the Examiner deprived them of a fair hearing by using this testimony in arriving at his decision.

It does not appear that there was prejudicial error in making this testimony a part of the official transcript of the record. The record discloses that the Examiner did not read this testimony into the transcript as part of Appellants' case. The Examiner took this action in accordance with section 7(b) of the Administrative Procedure Act which states that the presiding officer shall have authority to take depositions, or cause them to be taken, "whenever the ends of justice would be served thereby." The requirement that the proceedings be conducted "in an impartial manner" is not intended to relieve a hearing officer from the duty of attempting to obtain all necessary evidence for the making of a complete record (Attorney General's Manual on the Administrative Procedures Act, p. 73).

The Coast Guard regulations, that the Examiner shall "conduct the hearing in such a manner as to bring out all the relevant and material facts, and insure the accused a fair and impartial hearing" (46 C.F.R. 137.09-5(a)) and that the Examiner shall have authority "on his own motion * * * [to require]* * * the production of any relevant * * * evidence" (C.F.R. 137.09-5(b)), are in furtherance of the standard set out by the statute. The Examiner stated that it was his purpose to make a more nearly complete record by the inclusion of this relevant testimony which was introduced into evidence on his own motion.

By his presence at the taking of the testimony in Honolulu, the Examiner was better able to judge the credibility of the witnesses who were to be called by counsel for the persons charged and, consequently, the weight to be given their testimony in arriving at his decision. Hence, the convening of the hearing at

Honolulu was in conformance with the requirement that such action must be "consistent with the rights of the person charged to a fair and impartial hearing" (46 C.F.R. 137.09-5(d)).

Regardless of the fact that there was substantial compliance with the Administrative Procedure Act and the Coast Guard regulations in this respect, the failure to consider the testimony taken at Honolulu would not alter the decision in this case. This statement is amplified, *infra*, in connection with the meeting held by the members of the Deck Department on the evening of 16 August, 1949.

III

Reliance is placed upon the agreement which was arrived at in Commander Whitelaw's office on the afternoon of 17 August, 1949, and Appellants claim that the subsequent order given by the Master was not a lawful order because it was in conflict with the agreement which was a binding contract upon which the persons charged had the legal right to rely and abandon the ship when the Master violated the agreement.

There are numerous flaws in this argument:

1. This was not a collective bargaining agreement voluntarily entered into by the company since it was negotiated with the constantly present threat that the ship would not sail at all until some agreement was reached.
2. It was an invalid agreement in violation of section 60 of the "Agreement between Sailors' Union of the Pacific and Steamship Companies" (Defense Exhibit 3) which reads in part as follows:
"It is agreed and reaffirmed that in the event of a dispute there shall be no stoppage of work during the voyage and that crew members shall continue to work as and when directed. All disputes occurring during the voyage shall be referred to Seattle for settlement upon the conclusion of the voyage in conformity with this agreement." (page 57 of

Agreement)

3. The members of the Deck Department neither saw to it that their part of the agreement was carried out nor did they comply with the terms of the underlying contractual agreement contained in the shipping articles which stated that the crew agreed "to be obedient to the lawful commands of the said Master."

4. Unconditional approval of this agreement by the Sailors' Union of the Pacific was not communicated to the company's representative, Campbell, until after the Steward's Department had made known their repudiation of the agreement to Campbell. This was precisely stated by counsel in his oral argument (page 5). Therefore, there was never any meeting of the minds as contended.

But the outstanding point is the importance which the courts attach to the binding effect of the shipping articles. In *Ress v. United States* (C.C.A. 4, 1938), 95 F.2d 784, 792, the court quoted the Chairman of the United States Maritime Commission as saying, in 1937:

"Shippers and travelers realize that disorderly vessels are likely to be unsafe vessels. Safety at sea is based upon order and discipline as much as, if not more than, the quality of equipment. * * * *
Seamen must recognize that the nature of their calling, which gives them a unique status under the law, also imposes upon them obligations not common to shore occupation."

This case then goes on to state:

"When articles are signed by a crew for a voyage, all bargaining, individual or collective, is ended for the duration of the voyage. A contract is made, binding both owner and seaman, that is lawful, if the articles comply with the statutes, and should be lived up to scrupulously."

(Underlining supplied.)

In view of the above, it is immaterial whether it was ever determined which individuals it was contemplated should be replaced in accordance with the agreement. And the fact remains that despite the willingness of the Master to receive replacements in accordance with the terms of the agreement and the ability of the S.U.P. to furnish such replacements, no replacements were made at any time for any of the members of the Deck Department either before or after they had left the ship. It was the individual responsibility of each seaman to be certain that he had been replaced and relieved of the duties which he had become obligated to carry out when he signed the shipping articles for this voyage. The Appellants, who had left the vessel after the meeting in Commander Whitelaw's office, indicated their recognition of their continuing obligations under the shipping articles by returning aboard for the meeting on the evening of the 17th. They surely had actual knowledge that they had not been replaced under the terms of the agreement.

The breach of contract which entitled the seamen to abandon the ship in the case of *The Mount Everest* (C.C.A. 5, 1927), 17 F.2d 478, which is cited by Appellants, is not an analogous situation because the contract referred to therein was the shipping articles.

IV.

Appellants urge that the Master's order was unlawful for the additional reason that by obeying his order, the four members of the Deck Department under court process would be required to commit the crime of contempt of court by assisting the Master in violating "Revised Laws Hawaii 1945, Sec. 10713, Secreting Prisoners on Board." It is contended that the Master did not agree "to sign off any and all of the persons who were charged in the Territorial Courts" as found by the Examiner.

There is no direct evidence that the Master intended to violate any of the laws of Hawaii or compel any of the seamen to do so. Despite testimony to the contrary, there is substantial evidence in the record that the Master would have paid off any of the members of the crew who were under order of the Honolulu court

to put in an appearance on the 18th. The Master's order was lawfully directed towards the Deck Department as a whole and to each individual in that department. None of the four men in the Deck Department, who were under bail, approached the Master in a peaceful manner after the order had been given and requested that he be paid off so that he could remain and stand trial.

The insincerity of this argument is shown by the blanket condition of the entire Deck Department that they would not sail with the three Steward's Department seamen who were under court process. Certainly they were not motivated in making this demand by the fact that they did not want to help the Master in forcing these three men to commit a crime. If this were so, they would have had at least equal solicitude for the four seamen of their own department who were also due in court the next morning. If they were so intent upon seeing that justice was done and that no laws were violated, the obviously simple expedient would have been to have replaced the four men in the Deck Department in accordance with the agreement arranged on the afternoon of the 17th. There is not a single shred of evidence that the Master at any time indicated that he would have objected to following this procedure.

It would be ridiculous to state that the entire crew of a large vessel is justified in disobeying the Master's order simply because one man among the crew might have a legitimate reason for not complying with the order. And that is basically what Appellants are here contending. The references to cases of illegal voyages do not have the slightest application to the present case.

V.

This brings us to the important question as to whether the vessel was unseaworthy or whether the members of the Deck Department had "reasonable cause" to believe that she was unseaworthy. Appellants claim that the ship was made unseaworthy by members of the Steward's Department who had used knives while attacking Deck Department seamen and, therefore, the order of the Master to sail when these knife wielders were still aboard was not a lawful command. Certain findings of the Examiner, in connection with the fight, are stated to be contrary to the evidence and exception is taken to the Examiner's failure to adopt the findings requested by Appellants Williams, De Lima, Caldwell and Kobayashi.

Appellants also charge that the vessel was unseaworthy because of the food served aboard on a few occasions and the Master's admission that Medeiros was a dangerous man to have on board.

The primary claim of unseaworthiness is based upon the same factor as the condition on which the members of the Deck Department would sail the vessel - the presence of Hayes, Faison and Holloway as members of the crew. This is evident from the fact that the deck department seamen returned to the ship and were willing to sail as soon as these three members of the Steward's Department were removed from the vessel. Until this time, they had consistently refused to sail with these three men aboard.

Hayes is the man accused by the deck seamen of having hit Medeiros on the head with a bottle of whiskey. The Examiner found that Faison had cut both Kim and Thompson while defending himself. Testimony was received that fifteen stitches were required to mend the gash on Kim's arm and that Thompson's finger was almost cut off. A complaint alleging assault with a knife was sworn out against Holloway by three members of the Deck Department although it does not appear that any of these three seamen received any knife wounds during the course of the fight. Appellants state that they were afraid to go to sea with the knife wielders in the Steward's Department. Presumably, their fears were based upon the knife wounds received by Kim and Thompson. It is not clear why the refusal to sail was extended to include Hayes and Holloway if both of the seamen had been cut by Faison.

In any event, the evidence is undisputed that Medeiros, Kim and Thompson were injured by members of the Steward's Department. It is not necessary to determine which members of the Steward's Department were the responsible parties because I do not believe that Appellants were justified in refusing to sail with Hayes, Faison and Holloway, even if they were the men who had inflicted the injuries.

The evidence is conflicting as to what occurred during the fight between the members of the Deck and Steward's Departments on 16 August, 1949. I have made certain findings, supra, which are based upon a review of the entire record and which agree with the findings of the Examiner that the members of the Deck Department were the aggressors throughout the fight. The proposition of

Appellants, as to the unseaworthiness of the vessel, must be considered in the light of these findings.

The owner of a vessel is obligated to provide a "seaworthy" ship. This implies that the vessel must not only be staunch and sound, but that she be properly manned. "Seaworthiness" is a relative term, the precise meaning of the word varying with the circumstances under which it is applied. Some of these different situations would be its application with respect to discharge, desertion, revolt, mutiny, and recovery of damages.

A crew is bound by the articles to stand by the ship and obey the Master until the voyage is completed, unless the ship is unseaworthy or the crew, acting in good faith, has reasonable cause to believe that the vessel is unseaworthy. If seamen really believe, upon reasonable grounds, that a vessel is unseaworthy, they are not bound to go to sea in her although it may turn out on further investigation that she was in fact seaworthy. *U. S. v. Givings (D.C. Mass., 1844)*, Fed. Cas. No. 15,212; *Hamilton v. U. S. (C.C.A. Va., 1920)*, 268 Fed. 15, cert, den. 254 U.S. 645. The latter case goes on to state:

"But the presumption is in favor of seaworthiness, since the owners and officers ordinarily would not venture the risk of property or life in an unseaworthy ship, and from their superior ability and skill their judgment is entitled to much greater weight than that of the crew (citing cases). The importance of obedience and discipline on a ship, to the end that it may proceed on its voyage, imposes on the crew, after they have commenced the voyage, the duty to use reasonable means to ascertain the actual condition of the vessel, including a resurvey, if that be practicable, before refusal to serve for unseaworthiness. (Citing cases.)"

It was held in *The C. F. Sargent (D. C. Wash., 1899)*, 95 Fed. 179, that seamen cannot lawfully abandon a ship even though they entertain reasonable doubt as to her seaworthiness; but they are required to make a reasonable effort to have the facts as to seaworthiness investigated before leaving the service of the ship.

It has also been stated that seamen may leave an obviously unseaworthy vessel without complying with the statutory provisions relating to the holding of a survey. *The Heroe (D.C. Del., 1884)*, 21 Fed. 525. In any case, it is apparent that the better practice, if not the compulsory one when practicable, is for the seamen to demand an investigation or survey.

The only investigation conducted for the purpose of finding out what took place during the fight was by the Honolulu police. Several members of both the Deck and Steward's Departments were taken to the police station and questioned. The fact that all of these seamen were released after questioning certainly indicates that the police were unable to reach any conclusions as to where the fault lay or who the guilty parties were. Consequently, it appears that the members of the Deck Department took matters in their own hands and decided that regardless of the results of any investigation or survey they would refuse to sail so long as Hayes, Faison and Holloway continued to remain on board. A message to this effect was delivered to the Master late on the night of the 16th or shortly after midnight of that day. If seamen deliberately take the risk of their own opinion of the law, in the face of the warning of others, they must suffer the consequences if proven to be wrong. *Hamilton v. U. S., supra.*

Appellants had every opportunity to request that a thorough investigation be made to determine the merits of their contention that they were in constant danger due to the dangerous character of some of the men in the Steward's Department. But they preferred to adopt the unswerving attitude that since two deck seamen had received knife wounds, they were all in danger of being knifed without warning or provocation. A diligent search has failed to disclose any case which states that a crew is justified in abandoning the vessel or disobeying the order of the Master on the basis of the contention that the ship is unseaworthy under similar circumstances as existed on board the PRESIDENT WILSON. No such case has been brought to my attention by Appellants even though the burden of proving the ship unseaworthy or that they had reasonable grounds for believing her so, rests upon them.

A ship must be properly manned with a competent crew in order to be seaworthy. That was the point brought out in *Texas Co. v. NLRB (C.C.A.9, 1941)*, 120 F. 2d 186, in which it was stated that a drunkard was incompetent and, therefore, rendered the ship

unseaworthy. This rule also applies when seamen cannot understand the language spoken by the officers, some of the crew is sick with fever, the complement of the ship is not filled, and numerous other situations where the ships are numerically undermanned or the seamen are not competent to carry out their duties. But there has been no question raised here as to the ability of the members of the Steward's Department to perform their duties aboard ship.

A seaman is entitled to his discharge or he may abandon his ship without being charged with desertion if he has been cruelly treated or severely beaten by the Master or one of the officers. And it has been said that a crew may resist the Master without being guilty of mutiny if the maltreatment is of a serious character and there is a reasonable conviction that continued service on the vessel will result in loss of life, limb or other grave bodily harm to the crew. *U. S. v. Reid (D.C. Del., 1913)*, 210 Fed. 486. The cruel and oppressive treatment contemplated by these cases were abuses of a much more serious nature than that which we are considering here.

The conduct of the mate in *The Rolph (C.C.A.9, 1924)*, 299 Fed. 52, cert. den. 266 U.S. 614, went far beyond two cut seamen to supply the basis for the court to declare the ship to be unseaworthy. The mate continually administered severe beatings upon different members of the crew to such an extent that one man was practically blinded as a result of one of the beatings given to him. It is my opinion that no comparable circumstances are present here. The men in the Deck Department were the aggressors and were injured when they attacked the men in the Steward's Department. Such being the facts as found, I do not feel that Appellants can prevail in their contention that these men in the Steward's Department caused the ship to be unseaworthy.

To constitute the "reasonable cause" to believe that the ship is unseaworthy, it is necessary that the crew must have reason to fear that their lives will be in danger or that they will suffer grave bodily harm. It is not sufficient that this fear exists if there is no justification for it. *The Havenside (D.C.N.Y., 1926)*, 14 F. 2d 851. The circumstances do not justify any such fear nor do the facts indicate that such fear actually existed. Despite constant friction between the members of the two departments, there had not been any knifings or outbreaks during

the voyage such as was precipitated when Medeiros was hit with the whiskey bottle. The voyage had been in progress for more than a month when this incident occurred and it was known that the voyage would end in less than a week after the vessel departed from Honolulu. Considering the short duration of the remainder of the voyage and slight contact between the men of the two departments in the performance of their duties aboard ship, it is not plausible that such a fear of three men was injected into every one of the Appellants. The fact that the Steward's Department personnel outnumbered that of the Deck Department by approximately four-to-one seems to have no significance since the claim of unseaworthiness and the refusal to sail was based upon the presence on board of only three members of the Steward's Department.

The Examiner adequately disposed of the proposed findings submitted on behalf of Williams, De Lima, Caldwell and Kobayashi. Concerning the behaviour of Bishaw, Benevedes, Dimitratos and Papke when they were ordered to assist the Chief Officer in stopping the riot, the testimony of the Chief Officer is sufficient to substantiate my finding that these four Appellants at first assisted the Chief Officer and then joined in the attack against the members of the Steward's Department. The Chief Officer testified that the men, who had been helping him, left him and followed Medeiros to the stewards' messhall.

The two subsidiary attacks upon the seaworthiness of the vessel, because of the food and the Master's admission that Medeiros was a dangerous man, bear no weight whatsoever. The ship's surgeon stated in his report that there had been no gastro-intestinal disorders during the voyage. None of the Appellants offered any objection to sailing with Medeiros.

Since the order of the Master to turn to and sail the vessel was not unlawful in any respect, Appellants were guilty of misconduct for having disobeyed this order and for subsequently leaving the ship without proper authority. Hence, the second and third specifications were proved.

VI.

The remaining problem is whether Appellants conspired and combined to disobey the lawful order of the Master. Appellants

contend that there could not have been an unlawful coming together at the time set out in the first specification because the men were ordered by the Master, at the request of the Coast Guard, to come together on the evening of 17 August, 1949. Since the evidence did not support the specification, the Examiner found Appellants guilty of a conspiracy to make a revolt which originated on 16 August, 1949. This was done for the additional reason that the latter offense does not require a specific order but there could be no conspiracy to disobey an order, as alleged in the specification, until some order had been given. It is further urged that Appellants were only prepared to defend against the lesser offense which was alleged in the specification; and that the Examiner's findings concerning the meeting of the Deck Department on 16 August, 1949, were in error since supported only by evidence contained in the Honolulu depositions. In addition, Kim and Thompson could not have attended any such meeting on the 16th because they were in the hospital suffering from knife wounds.

To constitute a conspiracy there must be unity of design and purpose since a conspiracy has been commonly defined as a combination or agreement of two or more persons, by concerted action, to accomplish an unlawful purpose or a lawful purpose by unlawful means. The conspiracy is different from the offense which is the object of the conspiracy and is a separate offense in itself. The offense of conspiracy becomes complete when the agreement is made and there need be no evidence of a formal agreement or other type of meeting between the parties. Circumstantial evidence as to the mutual understanding and unity of purpose is competent as proof and is usually the only available evidence of the conspiracy. See *12 Corpus Juris* 633-4 and cases cited therein. An overt act is required only when conspiracy is charged under a statute which specifies that such an act is necessary. At common law, no overt act is necessary to constitute the offense of conspiracy. The purpose of the statutory requirement that an overt act be shown is to permit an abandonment of the conspiracy to avoid the penalty imposed by the statute. Such acts may also serve to supply evidence from which to infer the existence and object of the conspiracy. *United States v. Grand Trunk Ry. Co. (D.C.N.Y., 1915)*, 225 Fed. 283. Since there is no charge of a statutory offense of conspiracy in the first specification, the latter purpose is the sole function of the evidence pertaining to overt acts.

It is conclusively borne out by the record that the real reason for the refusal of the members of the Deck Department to obey the order of the Master to sail the vessel was due to the presence of the three members of the Steward's Department. There was concerted and unified action taken by the members of the Deck Department, for this purpose, commencing on the evening of 16 August, 1949. This is based on other testimony than that which was taken at Honolulu. Both the Master and the Chief Officer testified that Bishaw reported to the Master, late on the night of 16 August, 1949, that the members of the Deck Department had held a meeting and had decided not to sail until certain members of the Steward's Department were removed from the ship. Until this word was received by the Master, the standing order was that all hands should be ready to perform their duties with respect to getting underway. Although this order was not withdrawn and sea watches were maintained on the 17th, the Master gave up immediate hope of sailing when the decision of the Deck Department was made known to him and he then dismissed the pilot and tugs which had been standing by continuously. The futility of the Master having reiterated his order to sail under these circumstances, and at that time of night, is obvious.

Appellants are charged with conspiring at a specific time, 11:55 P.M. on 17 August, 1949, to disobey the order of the Master to turn to and sail the PRESIDENT WILSON from the port of Honolulu. And it is pointed out that this specific order was directed towards the members of the Deck Department at the time alleged in the specification. But even in a criminal indictment, proof of the conspiracy is not limited to the time and place alleged. The court used these words in *Pearlman v. United States* (C.C.A.9, 1927), 20 F.2d 113:

"But in any event accuracy of allegation as to time or place is not of the essence of the offense in charging conspiracy. Nor in a case where the date is alleged is it necessary to prove it as laid. It is sufficient if the conspiracy is shown to have been in existence prior to the commission of an overt act charged. *Bradford v. United States* (C.C.A.) 152 F. 617 [cert. den. 206 U.S. 563 (1907)]; *Pope v. United States* (C.C.A.) 289 F. 312; *Baker v. United States* (C.C.A.) 285 F. 15."

And in *Hood v. United States (C.C.A.8, 1927)*, 23 F.2d 472;

"The indictment does say that `said conspiracy was continually in existence between the dates of November 1, 1925, and January, 5, 1926; but this does not confine the prosecution to events transpiring between these dates, provided the activities of the defendants, for an antecedent period reasonably proximate, shed light upon and tend to establish the conspiracy as laid. The testimony tends convincingly to show that these identical conspiracies existed and were in active operation long prior to the dates charged in the indictment. (Citing cases)."

It has also been held that the allegations as to the existence of the conspiracy need not be limited to the time when the movement was initiated; and it is a continuous action so that allegations of a conspiracy at the time of the commission of any overt act, in furtherance of the conspiracy, is a sufficient indictment upon which to find the parties guilty of the formation at that time. *Hyde and Schneider v. United States (1912)*, 225 U.S. 347; *Brown v. Elliott (1912)*, 225 U.S. 392. A more recent decision states, upon the authority of the latter two cases, that "a conspiracy thus continued is in effect renewed during each day of its continuance." *United States v. Borden Company (1939)*, 308 U.S. 188.

On the basis of the above law, it is clear that the specification is adequate if the conspiracy is proven to have existed on, or before, the time alleged in the specification. Consequently, Appellants are guilty of the charge alleged if there is proof that they either conspired prior to the 17th to disobey the standing order of the Master or conspired at the time of the meeting on the evening of the 17th to disobey the specific order given by the Master at that time. It would also be sufficient to show that Appellants conspired to disobey any such anticipated order by the Master. This is so because of the greater latitude permitted in the construction of specifications in these remedial administrative proceedings as opposed to the strict construction of indictments required in criminal trials. And the pleadings in administrative proceedings cannot be later challenged when there

has been actual notice and litigation of the issues. *Kuhn v. C.A.B. (C.C.A., D.C., 1950)*, 183 F.2d 839. There is no question that one of the issues actually litigated was whether the members of the Deck Department refused to sail both before and after the Master issued his verbal and written order on the evening of the 17th.

Whether there was sufficient evidence upon which to find Appellants guilty of the charge of revolting and usurping the command of the Master is immaterial since the specification in question charges a conspiracy to disobey the lawful order of the Master. As pointed out above, the testimony of the Master and Chief Officer is sufficient to show that some members of the Deck Department determined, by concerted agreement, to refuse to sail or obey any further orders to sail until three members of the Steward's Department left the ship. It is not established that Appellants participated in the formation of this conspiracy on the 16th. But subsequent events bear out that they joined in the common design, on or before the evening of the 17th, and aided in executing the objective of the conspiracy until the Master acceded to their improper request on the morning of 19 August, 1949. Continuously from the evening of the 16th until the morning of the 19th, members of the Deck Department refused to obey the Master. This conspiracy was not begun at the time of the meeting which was held on the evening of the 17th, so it does not exonerate Appellants to say that this meeting was called at the request of the Coast Guard. But, at the time of this meeting if not before, all the Appellants became acquainted with the purpose of the conspiracy and assisted in executing it by leaving the vessel shortly after the Master had given the order to turn to and sail the ship from the port of Honolulu. "A person coming into a conspiracy after its formation is deemed in law a party to all acts done by any of the other parties, either before or after, in furtherance of the common design." *12 Corpus Juris* 579. Therefore, the fact that Kim and Thompson were definitely not present when the conspiracy was initiated on the 16th does not free them from guilt since they were present at the meeting on the evening of the 17th and left the vessel thereafter. The same is applicable with respect to any other Appellants who did not participate in the original action taken at the meeting on the 16th.

The overt act of the mass departure of the Appellants from the vessel after the meeting is clearly evidence which justifies the inference that they joined in the conspiracy. The coming together at the request of the Coast Guard was incidental to the formation of the preexisting conspiracy and only served as evidence to prove that every Appellant concurred in the plan to refuse to sail with the three Steward's Department men aboard rather than that he might have been acting independently, for some other reason, in refusing to obey the Master. That this was the real reason for Appellants' disobedience is borne out by the facts that the conspiracy was originated before any members of the crew were arrested by the Honolulu police on the 17th and before the agreement was reached in Commander Whitelaw's office on the afternoon of the 17th; and also by the fact that the Appellants remained ashore until the three men were removed from the ship approximately twenty-four hours after all crew members had been released by the police. It is not material whether Appellants, or any of them, said, "We quit," before or after the Master issued his order on the 17th. Appellants were still aboard the ship when the order was given and, therefore, they were bound by the articles to obey the lawful order of the Master. There was no desertion by any of the Appellants and subsequent events show that there was never any intent to desert the vessel.

There is no doubt that since the order of the Master was a lawful one, the objective sought to be accomplished by the refusal to obey his order was unlawful. The shipping articles constituted the "contract of employment" by which the ship and crew were bound. *Rees v. United States*, supra. And it is equally true that a combination to procure an employee to quit in violation of the contract of service is unlawful (*Arthur v. Oakes* (C.C.A.7, 1894), 63 Fed. 310), as well as that a combination by employees to strike in breach of their contracts of employment is an unlawful conspiracy. *Barnes and Co. v. Berry* (C.C. Ohio, 1907), 156 Fed. 72.

For these reasons, the first specification is supported by the evidence and Appellants are guilty of having conspired to disobey the lawful order of the Master.

VII.

Appellants claim that since 46 U.S.C. 239 is a penal statute and must be strictly construed, "misconduct" must be construed in the usual legal sense as meaning something more than an error of judgment; and if it is given a broader interpretation under 46 U.S.C. 239, then the meaning is too vague and indefinite to inform seamen as to when they are guilty of "misconduct." Consequently, 46 U.S.C. 239 would be unconstitutional if there were no ascertainable standard of guilt. It is contended that if an error of judgment is not "misconduct," then Appellants are not guilty of the offenses charged since the exercise of their discretion in deciding to obey the Honolulu court order and abide by the agreement made in Whitelaw's office rather than to obey the order of the Master was nothing more than an error of judgment even if the choice was wrong.

The provisions of 46 U.S.C. 239 have been construed by the Coast Guard, and its predecessor authority, as being remedial, rather than penal, since the amendments to R.S. 4450 in 1936 and 1937. It is now well settled that the construction given by the executive departments charged with the administration and enforcement of the law is controlling, and the judicial branch will not favor any deviation from such interpretation except for the most cogent and imperative reasons. The present construction has never been overruled by the courts. Therefore, the strict construction required of penal statutes is not applicable to 46 U.S.C. 239.

In any event, it is my opinion that Appellants committed something more than an error of judgment by acting as they did. As stated previously, the failure of Appellants to return aboard until the morning of the 19th when the three Steward's Department seamen were removed is ample to show that the true reason for their refusal to obey the Master was the presence of these three men and not an attempt to uphold justice by complying with the court order or carrying out the terms of the so-called bargaining agreement. Hence, the only choice that was made was with full knowledge of the circumstances and the law repeated warnings that they were bound by the shipping articles to obey the lawful commands of the Master, and after the Master had given a final order in the presence of every one of the Appellants. To say that this was simply an error of judgment or a proper exercise of discretion is comparable to stating that a person cannot be found guilty of "misconduct" under 46 U.S.C. 239 unless he admits that he willfully and intentionally did that which he knew positively was wrong.

In *Screws v. United States* (1945), 325 U.S. 91, it was held that an ascertainable standard of guilt, as to whether a person "willfully" deprived another of a right which had been made specific by court decisions interpreting the Constitution and laws of the United States, could be gleaned from the court decisions as to what constituted due process even though the decisions are not reducible to specific rules but turn on the facts of a particular case. The decisions were sufficiently specific, the court said, to satisfy the requirements for criminal statutes. The construction to be given the word "misconduct," in this remedial proceeding, is certainly broader than that required of criminal statutes. And according to the decisions of the courts, Appellants were guilty of fault beyond an error of judgment. Hence, this contention will not prevail.

CONCLUSION

The first, second, and third specifications were properly found "proved" by the Examiner on the basis of the substantial evidence contained in the record.

Upon my review of the record, in view of the delays which have occurred, I am of the opinion that substantial justice will be served by entering final orders modified to read as follows:

ORDER

The Certificates of Service and Merchant Mariner's Documents, enumerated and identified herein, be, and the same are, suspended for a period of twelve (12) months. The suspension ordered shall not be effective provided no charge under R.S. 4450, as amended (46 U.S.C. 239), is proved against the holder thereof for acts committed within twenty-four (24) months of 5 January, 1950.

As so MODIFIED, said Orders of the Examiner, dated at San Francisco, California, 5 January, 1950, are AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 1st day of August, 1951.

***** END OF DECISION NO. 435 *****

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