

IN THE MATTER OF Merchant Mariner's Document No: Z-161182-D1
Issued to: ALONZO SIMMONS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

466

ALONZO SIMMONS

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

On 8 June, 1950, an Examiner of the United States Coast Guard at New York City revoked Merchant Mariner's Document No. Z-161182-D1 issued to Alonzo Simmons upon finding him guilty of "misconduct" based upon a specification alleging in substance, that while serving as an A.B. seaman on board the American S. S. HARRIET TUBMAN, under authority of the document above described, on or about 8 May, 1949, while said vessel was at a foreign port, he assaulted and injured a fellow crew member, Martin Lopez, with a dangerous weapon, a fire axe.

The hearing was originally convened on 17 February, 1950. Appellant was given an explanation of the nature of the proceedings and advised of his right to be represented by counsel. The Investigating Officer informed the Examiner that Appellant had retained counsel but he was not able to appear on this date. By mutual agreement, the hearing was adjourned until 7 March, 1950, to permit Appellant to complete a coastwise voyage and to allow the Investigating Officer and counsel time to prepare interrogatories

and cross-interrogatories to obtain the depositions of absent witnesses. Appellant was issued a temporary certificate which was valid until 8 March, 1950.

Neither Appellant nor his counsel made their appearance on 7 March, 1950. Subsequent to this time, the Investigating Officer delivered his prepared interrogatories to counsel's office and received a letter from counsel dated 11 April, 1950, stating that he did not desire to propound any cross-interrogatories. After the interrogatories had been sent out by the Examiner and one deposition received in return, the Investigating Officer contacted counsel's office and was informed that 31 May, 1950, would be a satisfactory date on which to resume the hearing. The Investigating Officer also sent a letter dated 24 May, 1950, to Appellant in order to confirm the agreed hearing date but no reply to this letter was received.

On 31 May, 1950, Appellant and counsel again failed to appear at the designated time and place. After preliminary discussions, the hearing was conducted "in absentia" in accordance with Title 46 Code of Federal Regulations 137.09-5(f). The Examiner entered a plea of "not guilty" to the charge and specification. The Investigating Officer then introduced in evidence the testimony of the Personnel Manager of the POLARUS Steamship Company of New York City in order to establish the jurisdictional fact that Appellant was serving under authority of his document on the S. S. HARRIET TUBMAN at the time of the commission of the alleged offense. The hearing was then adjourned until 2 June, 1950, in order to ascertain the reason for the continued absence of Appellant and counsel.

On 31 May, 1950, the Investigating Officer informed counsel by registered mail that the hearing had been adjourned until 2 June, 1950. Appellant failed to appear on 2 June, 1950, but telephoned the Investigating Officer on this date and they agreed that the date should be changed to 7 June, 1950. Again, counsel did not put in an appearance and the Investigating Officer was unable to contact him to inform him that the hearing would be conducted "in absentia".

On 8 June, 1950, the hearing was reconvened and proceeded "in absentia". After the Investigating Officer had completed his

opening statement, he submitted documentary evidence in the form of the deposition of the person allegedly injured by Appellant and certified copies of entries in the official log of the HARRIET TUBMAN.

At the conclusion of the hearing, the Examiner found the charge "proved" by proof of the specification and entered an order revoking Merchant Mariner's Document No. Z-161182-D1 and all other documents, certificates and licenses issued to Appellant by the United States Coast Guard or its predecessor authority. The order was served on Appellant at Jacksonville, Florida, on 19 June, 1950. For the purpose of his appeal, Appellant retained different counsel.

From that order, this appeal has been taken, and it is urged that the order is excessive and the hearing should be reopened to permit Appellant to present his defense. It is claimed that Appellant acted in self-defense but he was prevented from establishing this because his former counsel was disinterested and did not properly represent Appellant who was in Florida with insufficient funds to get to New York and was awaiting instructions from his attorney.

APPEARANCES: Mr. William L. Standard of New York City Louis R. Harolds, of Counsel presently appearing for Appellant.

FINDINGS OF FACT

On 8 May, 1949, Appellant was serving as a member of the crew in the capacity of an A.B. seamen on board the American S. S. HARRIET TUBMAN, under authority of his Merchant Mariner's Document No. Z-161182-D1, while the ship was in the port of Davao, Philippine Islands.

At approximately 0230 on this date, Appellant and Lopez engaged in a heated argument in the messroom aboard the HARRIET TUBMAN. Abusive language was exchanged but no blows were struck at this time. Then Appellant left the messroom and returned in about three or four minutes carrying one of the ship's fire axes over his shoulder. He went towards Lopez with the axe and Lopez stumbled over a high coaming as he backed away. When this occurred,

Appellant swung the axe and hit Lopez in the head. The Chief Mate finally restored order before Appellant caused any more damage with the fire axe. Lopez was taken ashore on a stretcher to the Public Hospital at Davao and was hospitalized for about three or four weeks. Appellant was taken ashore in custody of the police and later paid off in accordance with the instructions of the United States Consul.

Appellant's document was suspended for one month on six months probation in 1945 for failure to join.

OPINION

After consideration of the points advanced by Appellant in this appeal, I am of the opinion that the action taken by the Examiner was perfectly correct in all respects and that Appellant's arguments are without merit.

The record clearly shows that Appellant was represented by counsel of his choice and that the Examiner was extremely lenient in repeatedly continuing the hearing, due to the absence of Appellant and counsel, even though counsel was consistently notified as to the time and place of the hearing. Only when it began to seem as though this process would continue interminably did the Examiner finally conduct the hearing "in absentia." Finding that the Investigating Officer had made out a prima facie case of assault with a fire axe, the Examiner revoked Appellant's document. Considering the seriousness of such an offense and the circumstances surrounding Appellant's failure to appear at the hearing, I find no reason to disagree with that decision.

The evidence indicates that there is little likelihood that Appellant would be successful in exonerating himself on the ground of self-defense but, regardless of his chances, he has sacrificed his own rights by his failure to come forward with his defense at the proper time. In the case of *N.L.R.B. v. Fournier* (C.A. 2d, June 1, 1950) it was held that leave to adduce additional evidence will be granted only on a showing of "reasonable grounds" for failure to produce the evidence at the hearing. The case goes on to say that no such showing had been made where the employer had written the trial examiner that he was not appearing because he did not have the time and money to travel back and forth to the place

of hearing. In this case, a similar situation is presented since Appellant contends that he had insufficient funds to travel from Florida to New York. In addition, there is no reason advanced as to why this condition, if it existed, was not communicated to the Examiner in New York.

Appellant attempts to lay the entire blame on the disinterest of his former counsel. It seems that Appellant himself disclosed as great a degree of disinterest up to the time that he received the order revoking his document. Appellant appeared before the Examiner on the original date of the hearing. He agreed and understood perfectly that the hearing was to be resumed in New York on 7 March, 1950, but yet he did not make an appearance at that time or at any time until after his document had been revoked on 8 June, 1950, three months later. Since there has been no showing of "reasonable grounds" advanced for the long period of inactivity on the part of Appellant and since the offense committed caused serious personal injury and endangered life, the order of the Examiner was neither improperly made during Appellant's absence nor was it unduly harsh and, therefore, it must be sustained.

ORDER

The Order of the Examiner dated 8 June, 1950, should be, and it is, AFFIRMED.

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

Dated at Washington, D.C., this 24th day of October, 1950.

***** END OF DECISION NO. 466 *****

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