In the Matter of Merchant Mariner's Document No. Z-66712-D2
Issued to: RAFAEL HENRIQUEZ

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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RAFAEL HENRIQUEZ

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

On 11 September, 1952, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-66712-D2 issued to Rafael Henriquez upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a porter on board the American SS CONSTITUTION under authority of the document above described, on or about 20 July, 1952, while said vessel was in the port of Genoa, Italy, he molested a female passenger, Ruth Wagner.

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 counsel of his own choice, Dr. Leon Luria, M.D. Appellant entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening

statement. At this time, Appellant's wife was permitted to testify as to Appellant's good character. The Investigating Officer then introduced in evidence the testimony of the Tourist Class Steward and the Chief Steward of the CONSTITUTION. The Investigating Officer also placed in evidence a certified copy of an entry in the official logbook, and a certified copy of a statement which was attached to this log entry and signed by Ruth Wagner as well as by her roommate on the voyage, Ella Wolf. The Investigating Officer then rested his case.

Counsel's motion to dismiss on the ground that the specification was "unsupported and uncorroborated" was denied by the Examiner.

In defense, Appellant testified under oath in his own behalf and also submitted several character references as well as a list of his discharges from various vessels over a period of 15 years. Appellant admitted that he saw Ruth Wagner standing outside of the doorway to her room on 20 July, 1952, but he denied having touched or bothered her at any time.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-67712-D2 and all other licenses and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that

POINT I. "the log and statement, not having been received in evidence, should have been disregarded by the Examiner and should be disregarded by the Commandant upon this appeal." The entry in the official logbook and the attached statement by Miss Wagner were not properly identified and they were considered by the Examiner as "records made in the regular course of business" (2, U.S.C. 1732). The Examiner did not rule on counsel's objection and simply stated that copies of the documents would be substituted rather than ruling on their

admissibility.

POINT II. "Hearsay evidence was admitted to the gross prejudice of the person charged."
The material evidence is entirely hearsay. The two stewards testified to statements made by Miss Wagner. This violated 46 C.F.R. 137.09-50 and 137.21-5. The statement signed by Miss Wagner is hearsay since Appellant knew nothing about it until after she had disembarked. Section 7(c) of the Administrative Procedure Act requires that findings be supported by substantial evidence in order to "eliminate the wholesale use of hearsay." *Pittsburgh Steamship Co. V. N.L.R.B. (C.C.A 6, 1950)*, 180 Fed 731, 733, aff. 340 U.S. 498 (1951).

POINT III. "The person charged was deprived of his constitutional right of confronting his accuser . . . [and] his right to cross examine his accuser."
Miss Wagner never made any factual statement in the presence of Appellant. The two testifying stewards concluded immediately that Appellant was guilty and thus caused him to be deprived of his fundamental right to face Miss Wagner and question her before she disembarked from the ship.

POINT IV. "The evidence fails to sustain the charge."
The testimony of the two stewards was inconsistent and self-contradictory, and contained opinions and conclusions which were not supported by the statement signed by Miss Wagner. As a result, Appellant was found guilty of intending a much more serious offense against Miss Wagner than the factual evidence discloses was ever contemplated by him.
POINTS V, VI. Appellant's prior record and reputation is exemplary. He failed to present a good appearance because of his limited command of the English language. The order of the Examiner should be reversed; or, in the alternative, the order should be modified so as to return Appellant's document to him.

APPEARANCES: Barney Gorman, Esquire, of New York City, of Counsel.

Based upon my examination of the record submitted, I hereby

make the following

FINDINGS OF FACT

On 20 July, 1952, Appellant was serving as a porter on board the American SS CONSTITUTION and acting under authority of his Merchant Mariner's Document No. Z-66712-D2 while the ship was approaching the port of Genoa, Italy.

During the passage from New York to Genoa, Ruth Wagner and Ella Wolf were Tourist Class passengers on board the Constitution. They occupied a stateroom on "B" deck in a vicinity where Appellant was assigned cleaning duties. The two young ladies (approximately 20 to 25 years old) were German exchange students returning home to Germany from the United States.

At some time between the hours of 1000 and 1100 on 20 July, 1952, Appellant was working near the door to the above mentioned stateroom. As Ruth Wagner was leaving the room, Appellant pushed her back into the room. Miss Wagner shoved him away and shut the door. Shortly thereafter, she went with her roommate to see the Tourist Class Steward and complained about the conduct of one of the ship's porters. The Steward ordered the three porters (including Appellant) who worked in the same area, to enter his office one at a time while the two ladies were in the office. Appellant entered the office after Miss Wagner had failed to recognize either of the other two porters and they had departed. Appellant was then identified by Miss Wagner as the person who had molested her at the stateroom doorway. She pointed towards Appellant and said he was the man. Appellant was not told the purpose of this identification and he did not say anything when he was pointed out by Miss Wagner. The Tourist Class Steward ordered Appellant to leave the office and return to work.

At about 1130, the Tourist Class Steward took Miss Wagner and Miss Wolf to the office of the Chief Steward. Miss Wagner made a statement concerning Appellant's conduct (substantially as set out above) and both of the young ladies signed the statement after it was put in writing by the Chief Steward. Appellant was not present at this time and the two ladies debarked at Genoa about an hour after their meeting with the Chief Steward, The latter issued orders to assign Appellant to a duty station which was not in the

passengers' areas. The Chief Steward did not see Appellant till the next day at a hearing in the Master's office.

The Chief Steward had submitted to the Master the statement signed by the two passengers as well as a report of the incident by the Chief Steward. While the ship was at Naples on the following day, Appellant was informed of the charges against him when the Master read to him the signed statement and the report by the Chief Steward. The Master questioned Appellant about the incident and he denied the accusations. His answer to the logging of the matter was that he had been asked a question about baggage and he had advised "them" to see the Bedroom Steward. (Similar testimony was given by Appellant at the hearing.)

Appellant is 49 years of age. There is no record of previous disciplinary action having been taken against him. He had been going to sea regularly for 12 years prior to the completion of the above voyage.

OPINION

POINT I.

The authenticity of the copy of the log entry and the copy of the attached statement signed by Ruth Wagner is sufficiently established, for the propose of these proceedings, by the certification of each copy by a Coast Guard Officer. The original of the statement by Miss Wager was identified by the Chief Steward who had seen Miss Wagner sign the statement.

The log entry and the statement were properly considered by the Examiner. Strict compliance with the formal rules of evidence is not required in administrative proceedings. Therefore, the statement by the Examiner that copies of these documents would be substituted was sufficient to inform counsel that his object was overruled and the documents received in evidence. Appellant's contentions on this point are overly technical.

A ship's logbook entry is an entry made in the regular course of business and if the entrant is unavailable to appear as a witness, the entry is admissible as an exception to the hearsay

rule on the principle of necessity and in accordance with 28 U.S.C. 1732. *Wigmore on Evidence*, 3d Edition, secs. 1641(2), 1404, 1521. The Master of the ship signed the log entry stating that the statement was attached to the logbook. In effect, the statement became an entry in the logbook and was equally admissible in evidence. Regardless of the definite hearsay nature of the regular log entry signed by the Master, the statement is a well qualified exception to the hearsay rule because of the fact that Miss Wagner had departed from the ship at Genoa to return to her home in Germany. Thus, her absence from the jurisdiction was for an indefinite length of time.

POINT II.

As stated above, the statement signed by Miss Wagner was not hearsay evidence within the meaning of that exclusionary rule. And my findings of fact limit the molestation by Appellant to the extent related in Miss Wagner's statement and to the date alleged in the specification.

This statement is corroborated by the testimony of the Tourist Class Steward that Miss Wagner promptly complained to him about the conduct of a porter and that she then made an adequate identification of Appellant.

The signed statement is also partially corroborated by Appellant's own testimony. He stated that he saw Miss Wagner standing by the door to her room at some time between 1000 and 1100 while he was working with another member of the crew named "Estralla"; and that Miss Wagner asked Appellant something about getting her baggage. Thus, Appellant had the opportunity to commit the offense alleged.

It is also significant that the record does not disclose that Appellant made any attempt to obtain the testimony of the man he was working with near Miss Wagner's room., In connection with this, I take official notice from the Shipping Articles of the CONSTITUTION, which are on file at Coast Guard Headquarters, that there was not a porter by the name of Estralla signed on the articles for the voyage in question but there was a porter named Estrada and his address was given as 73 East 106th Street, New York City.

POINT III.

Appellant contends that he was denied his constitutional right to be confronted by his accuser. There is no constitutional right to confrontation, as such, except in criminal trials and this is an administrative hearing. Nevertheless, it is important to note that the main purpose of confrontation is to secure for the person charged the opportunity of cross-examination; and that the secondary advantage is not for the person charged but for the trier of the facts so that he may observe the demeanor of the witness. Although the latter is highly desirable, the requirement cases when it cannot be obtained. Thus, the opportunity to cross-examine is the factor which must usually be present in order to satisfy the constitutional right of confrontation; and the hearsay rule is the basis for the requirement of cross-examination. Just as there are limitations on the constitutional right of freedom of speech, the constitutional right of confrontation is limited by the exceptions to the hearsay rule. *Wigmore on Evidence*, 3d Edition, sec. 1397.

As stated above, the signed statement was an exception to the hearsay rule. The two basic principles which pertain to exceptions to the hearsay rule are the necessity to accept certain evidence untested by cross examination if evidence of the same value is not otherwise available, and the circumstantial probability of trustworthiness of the untested evidence. *The Spica (C.C.A.2, 1923)*, 289 Fed 436, 443; *Wigmore on Evidence*, 3d Edition, secs. 1420-22. The necessity factor was complied with because of the unavailability of Miss Wagner to testify as a witness. The probability of the trustworthiness of the statement is supported by the absence of any apparent motive to falsify on the part of Miss Wagner and the considerable embarrassment involved in making such a complaint to the stewards on board a ship.

It would have been preferable to have afforded Appellant an opportunity to cross-examine Miss Wagner but since her statement meets the safeguards required to protect against hearsay evidence, it is not within the category of hearsay evidence.

POINT IV.

The Examiner's findings have been modified herein so as to remove any findings or implications based upon those portions of the testimony of the two stewards which was hearsay or conflicting with the testimony of each other.

POINTS V, VI.

Despite Appellant's prior clear record, the order of revocation will be sustained. The facts as found proved show that Appellant used physical force against the person of Miss Wagner while she was a passenger on board a ship of the United States Merchant Marine. It was stated more than a century ago that the contractual obligation to female passengers is one of peculiar responsibility and delicacy; and the contract includes an implied stipulation against immodesty of approach, disregard of feelings, and every interference with the passenger's person. *Chamberlain v. Chandler*, Fed.Cas. 2575, decided in 1823. It is a privilege to be able to work on American merchant vessels and Appellant has forfeited this privilege.

ORDER

The order of the Examiner dated at new York, New York, on 11 September, 1952, is AFFIRMED.

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

Dated at Washington, D. C., this 31st day of December, 1953.

***** END OF DECISION NO. 718 *****

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