UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1179983
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: JAMES WALLACE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2001

JAMES WALLACE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 12 September 1973, an Administrative Law Judge of the United States Coast Guard at San Francisco, California revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Fireman/Watertender on board the United States SS SAN JUAN authority of the document above captioned, on or about 13 December 1972, Appellant wrongfully possessed marijuana and heroin while the vessel was in the port of Kobe, Japan.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence shipping articles for the voyage in question, entries from the official log book and a Japanese Judgment of Conviction and Sentencing.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then entered an order revoking all documents issued to Appellant.

The entire decision was served on 14 September 1973. Appeal was untimely filed on 2 November 1973, but has been accepted. A brief in support of appeal was received on 11 April 1974.

FINDINGS OF FACT

On 13 December 1972, Appellant was arrested while serving under authority of his merchant mariner document on board SS SAN JUAN by Kobe customs officials for the unlawful possession of a quantity of marijuana and heroin. He was removed from the vessel to the Kobe Water Police Station and there charged with violations of Japanese law. On 25 January 1973, he was tried and convicted of the offense under Japanese procedure and sentenced by the Kobe District Court to two year's imprisonment at forced labor with the execution of the sentence suspended for a period of five years. Appellant was released from custody and flown back to the United States a few days later.

BASES OF APPEAL

This appeal is taken from the order imposed by the Administrative Law Judge. It is contended that "The showing by the Appellant that a viable defense might have been presented and of a denial of due process were each sufficient to shift the burden to the Coast Guard to show that the Japanese legal system afforded criminal defendants the essential elements of due process, as known in our courts."

APPEARANCE: DeNike and Hickman of San Francisco, California, by Howard J. DeNike, Esq.

OPINION

I

This appeal is premised on the theory that there was no substantial evidence before the Administrative Law Judge upon which he could rest his findings and conclusions because the foreign judgment which was the sole evidence introduced to prove the charge did not establish a *prima facie* case against Appellant. This contention is bottomed almost entirely upon Appellant's interpretation of the decision of the National Transportation Safety Board in the case of *Bender v. Dazey*, NTSB, EM-11 (1970). As he reads this decision, the *prima facie* case established by a foreign judgment is defeated when a respondent comes forward with any evidence collaterally attacking the judgment on grounds that the individual was not afforded due process in the foreign court. Once he has come forward with evidence, it is asserted, the burden of proving due process shifts to the Coast Guard. Appellant cites many Supreme Court decisions relating to various elements of due process as that term is understood in American jurisprudence. Because of the disposition I make of the underlying issue in this case, I do not find it necessary to discuss these cases or the nature of due process actually afforded Appellant in the Japanese court.

II

The basic issue here, as I see it, is the extent to which a reviewing body may upset the findings of fact made by the trier of fact. It is well established law that findings should be set aside only when they are found not to be based on substantial evidence or to have been arrived at arbitrarily or capriciously. Substantial evidence is more than a mere scintilla; it is such relevant evidence as a reasonable mind might accept as adequate to support a finding. *Edinson Co.* v. *Labor Board*, 305 U.S. 197 (1938). Questions of weight to be afforded evidence in arriving at what is substantial evidence are for the determination of the trier of fact. The test in reviewing the decision is whether a reasonable man could have come to the same findings on the evidence before the trier of fact, not whether the reviewer would have agreed with the conclusion reached. If there was relevant evidence before the Administrative Law Judge upon which he could have found that Appellant was guilty of misconduct charged, then his determination must be upheld on review even though the reviewer might have concluded otherwise.

III

Applying the foregoing principles to the case at hand, the issue is whether the Administrative Law Judge had before him substantial evidence that Appellant was guilty of misconduct as charged. The question of weight to be afforded the competing evidence available was for him to determine. In this circumstance, the evidence before the Administrative Law Judge consisted of the properly authenticated translation of records of the Kobe District Court showing that the Appellant was in possession of marijuana and heroin on 13 December 1972 in violation of Japanese law. Certainly, this evidence was more than a mere scintilla and could have been accepted by a reasonable mind as adequate to support the findings. See my discussion of the relevant authorities on this point in Appeal Decision nos. 1769 and 1901. The only other evidence before the judge was the testimony of Appellant concerning his treatment before trial by the Japanese authorities and his assertion that he was denied due process by the Japanese court. This evidence, if credited by the Administrative Law Judge, would go to the weight to be afforded the evidence of the Japanese conviction; that is, the Administrative Law Judge could have determined that the weight and credibility of Appellant's evidence was so strong as to undermine the reliability of the foreign conviction. Had this been the case, the Administrative Law Judge would have been without substantial and reliable evidence upon which his findings could have been based; hence, a finding that the charge was proved would have been arbitrary and capricious. In fact, however, the judge chose not to accept Appellant's testimony as sufficiently reliable so as to discredit the inherent reliability of an authenticated foreign judgment. See *Hilton v. Guyot,* 159 U.S. 113 (1859). In either circumstance, the decision was one for the trier of fact to make. His decision cannot be upset unless it was arrived at arbitrarily or capriciously. Nothing in the record convinces me that the evidence relied upon by the Administrative Law Judge was inherently unreliable or that his determination of the weight to be assigned the evidence before him was arrived at arbitrarily or capriciously. I find there to be substantial evidence of a reliable and probative nature that Appellant was wrongfully in possession of marijuana and heroin on 13 December 1972 as charged. This is misconduct within the terms of R.S. 4450.

IV

Although I do not consider it necessary for the disposition of this case, I believe that in view of the consideration given by all herein concerned with the decisions of the National Transportation Safety Board in *Dazey* and in *Bender v. Milly*, NTSB, ME-30 (1973), some discussion of these holdings is warranted. As I read the *Dazey* case, the determination of the NTSB rested upon its interpretation of the peculiar facts in that case. The Board was swayed by the testimony of the Appellant in that case that he was denied due process and was, therefore, unable to present a valid defense which he claimed existed to the Japanese charge. In other words, the NTSB upheld the collateral attack on the foreign judgment and found there to have been no other substantial evidence upon which to base the findings of the Administrative Law Judge. In the subsequent decision, *Milly*, the NTSB held the collateral attack on the foreign judgment to have been deficient where the Appellant offered only testimony that he was coerced into pleading guilty to the Fiji charge and was otherwise denied due process, but no evidence as to a possible defense he may have been able to assert in the Fiji court. It is noteworthy that in the present case Mr. Wallace offered no evidence of any defense to the Japanese charge or other evidence leading to a conclusion that there had been a miscarriage of justice by his conviction. Putting the two cases together, I am forced to conclude that *Dazey* did not upset the principles upon which the use of foreign judgments in domestic proceedings are based. The decision must be considered an aberration and limited to its facts. The state of the law has not been altered by either *Dazey* or *Milly*. In my view, that state is that a properly authenticated copy of a foreign judgment is admissible in domestic judicial or administrative proceedings as an exception to the hearsay rule since it is an official record made in the regular course of business of the court. As a matter of comity among nations a foreign judgment rendered by a court having jurisdiction of the cause of action and of the parties which is based upon regular proceedings of that jurisdiction is *prima facie* evidence of the facts in the case. *Ritchie v. McMullen*, 159 U.S. 235 (1895); *Ingenohl v. Olsen & Co.*, 273 U.S. 541 (1926); *Harrison v. Triplex Gold Mines, Ltd.*, 33 F.2nd 667 (1st Cir. 1929). Such a judgment is only subject to

impeachment when special grounds have been shown.*Hilton v. Guyot*, supra. Among the grounds for impeachment are the lack of jurisdiction of the parties, lack of jurisdiction of the cause, or fraud in the procurement as distinguished from fraud in the underlying transaction, but it is not grounds that the judgment was erroneous. *Harrison v. Triplex Gold Mines, Ltd*. Nor is it sufficient that the methods of procedure in force in the foreign court with reference to the conduct of the trial, the admissibility of evidence, or the examination of witnesses would be contrary to domestic law. *Hilton v. Guyot*. Thus, in R.S. 4450 proceedings a properly admitted foreign judgment constitutes substantial evidence upon which the trier of fact may ground his decision unless he is convinced by other competing evidence that there were irregularities in jurisdiction or fraud in the procurement such as to have denied the respondent due process of law in the foreign court. The fact that a respondent may have had a defense which was either not accepted by the foreign court or which he was unable to offer because of other irregularities may be considered in weighing the sufficiency of the collateral attack, but it is not necessarily conclusive on the issue. If the judge finds that such due process was denied, then the evidence provided by the conviction becomes inherently unreliable and may not be the sole basis of the proof. The quantum of evidence offered to make the collateral attack matters not. The determination of the attack's success or failure is a determination made on the weight of the available evidence by the trier of fact. The decision reached by the trier of fact will not be upset absent a showing that it was reached arbitrarily or capriciously.

CONCLUSION

The Administrative Law Judge properly admitted the evidence of the Japanese conviction for possession of marijuana and heroin and properly considered the evidence offered in the attack against the judgment. His findings were not based on inherently unreliable evidence and I do not find his conclusions to have been reached arbitrarily or capriciously. His finding that the charge of misconduct was proved is affirmed. The order of revocation is appropriate in this case.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California on 12 September 1973, is AFFIRMED.

O. W. SILER
ADMIRAL, UNITED STATED COAST GUARD

COMMANDANT

Signed at Washington, D. C., this 14th day of June 1974.

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