UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT [REDACTED]
Issued to: Simonne Andree DESVAUX

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2051

Simonne Andree DESVAUX

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 13 February 1975, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for one month outright plus four months on fifteen months' probation upon finding her guilty of misconduct. The specifications found proved allege that while serving as rooms messman and crew messman on board SS YOUNG AMERICA under authority of the document above captioned, Appellant:

(1) and (2) on 27 July 1974 wrongfully showed disrespect to the Master of the vessel by means of letters addressed to him;

(3) on 31 July 1974 wrongfully addressed the Chief Officer with profane and disrespectful language;

(4) on 28 July 1974, acted in a disrespectful manner to the Radio Officer through words and gestures; and

(5) on 31 July 1974, assaulted and battered the radio officer

by striking him with her hands.

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

The Investigating Officer introduced in evidence the testimony of several witnesses and certain voyage records of the vessel.

In defense, Appellant offered in evidence her own testimony and five documents.

At the end of the hearing, the Judge rendered a decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of one month outright plus four months on fifteen months' probation.

The entire decision was served on 28 February 1975. Appeal was timely filed, and perfected on 4 December 1975.

FINDINGS OF FACT

On 27 July 1974, Appellant was serving aboard SS YOUNG AMERICA under authority of her Merchant Mariner's Document in the capacity of rooms messman. Among her duties was the maintenance of officer's rooms, including the Master's. At about 1100 on that date, the Master found in his uniform cap, atop a bureau in his bedroom, a note addressed to him and signed "Simonne." Appellant had previously written the note and placed it where it was found. Among other things the note, highly personal in matter, declared that the Master was "very unstable man." About 1430 on that date, while the vessel was at sea, the Master found another, similar note, also written and placed by Appellant, in the bottom of a locker in his office. This note declared that the Master was "a very emotional man" and advised him to accept command of a different vessel, since his prestige among the crew had been lost.

After recording this conduct in the official log book (Appellant made no comment to the log entry relative to the earlier found note but declared that the statement was false as to the other one), the Master rerated Appellant to crew messman, a position which did not involve entry to officers' or passengers'

rooms.

At about 1155 on 28 July 1974, one Micker, radio officer, entered the galley to speak to the cook about the meal he had just had. Appellant entered the galley, thumbed her nose at Micker and told him, in the presence of two cooks, that he did not belong in the galley and that he was so "no good" that his wife did not want him. Micker made no reply and left the scene.

At about 1400, 30 July 1974, at Genoa, Italy, Appellant accompanied the Master to the U.S. consulate where she was discharged from the articles for misconduct. Later that day, the port Captain advised Alfred Brown, chief mate of the vessel, that the Master, who was still ashore, needed Appellant's z-number and birthdate. While the two were conversing, Appellant passed by and the mate approached her to obtain the needed information. Before he could speak Appellant told him to stay away from her and directed an epithet to him involving the legitimacy of his birth.

At about 1830 on that date, having packed all her belongings for departure from the ship, Appellant went to the room of one Gomez, deck utility, and showed him the notes she had previously written to the Master. About two hours later, Appellant was standing near her luggage on the outside passageway along the deckhouse when the Radio Officer, Micker, who had just returned to the vessel, walked along the passageway. Appellant struck at him, spat at him several times, and hit him about the arms with her hands. Appellant was following Micker down the passageway, continuing to strike his arms as he backed away. Micker was able finally to elude Appellant and get up to another deck.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that he had no authority to amend the first two specifications in the course of hearing, that he should have recognized that the conduct dealt with in these actions was merely a result of poor judgement, and that he failed to give weight to the bias exhibited against Appellant as a woman.

APPEARANCE: Bernard Rolnick, Esq., New York, New York.

OPINION

I

With respect to the first and second specifications, Appellant asserts that they should have been dismissed because a threat was not established and because the Administrative Law Judge, on his own motion, changed the allegation from one of "threat" to one of "disrespectful language."

Appellant presents a somewhat distorted view of what was done. The original first and second specifications read: ". . . [Appellant] did wrongfully threaten the Master by means of a letter addressed to him. . . " After hearing the evidence adduced by the Investigating Officer, the Administrative Law Jude, ruling on a motion to dismiss the two for lack of proof, declared that while evidence of threatening language was not apparent the record supported a finding of the use of disrespectful language, actions amounting to misconduct in the relationship of Master and messman. Appellant characterizes this thus:

> "The thrust of the Judge's modification of the specification was to change the charge from assault to discourtesy."

Now it is true that the Master, in recording these matters in the Official Log Book, had spoken of "assaults" upon his character. Exaggerated metaphorical language may be tolerated in lay usage. The fact is that the specifications as drawn did not indulge in the metaphor but characterized the language as threatening, quality that language may have. A basis for preferral of these allegations can be seen in the theory that the letters could be read as threatening the Master's job security or domestic well-being (not threatening bodily harm- a different matter entirely), but the Administrative Law Judge did not accept the language as constituting a true "threat" even to security and well-being.

"Assault," as Appellant must be understood to use the term, in the legal sense, was never in issue here. The Administrative Law Judge's action was well founded under the holding of *Kuhn* v *Civil Aeronautics Board*, CA D.C. (1950), 183 F. 2nd 839 (cited in the initial decision). Further, the amendment conformed the allegation to the proof established in litigation and was completed

in absolutely timely fashion, giving ample notice to Appellant of the ultimate issue to be resolved. Appellant had full opportunity to obtain any witnesses needed, including recall of witnesses who had already testified, if that course had appeared desirable. The notice was timely and proper and the whole record supports the findings made with substantial evidence.

II

Appellant claims that the conduct involved in the episodes of the two letters displayed only poor judgement, not misconduct, and urges that under the holding of *Rechany* v *Roland*, D.C. S.D. N.Y. (1964), 235 F. Supp. 79, an error in judgement does not amount to misconduct. Assuming that the case was rightly decided, there is a great distinction between the two situations.

In the Rechany case, when a finding had been made that the entry by a ship's staff officer, at an early morning hour, into the room of a female passenger when he heard noises through the door, to which he had come to solicit the passenger's presence at a party, was not made for duty purposes alone (social purposes *vis-a-vis* assisting a passenger in possible trouble), the court held that the duty of an officer to assist a passenger overrode any initial personal purpose in the visit and excused the poor judgement shown in entering the room uninvited, the allegedly wrongful act being a part of the justifiable performance of a duty. Appellant here had no duty from which might flow the addressing of written personal derogatory statements to the master. The contents of the missives were disrespectful and a poor judgement displayed in causing their delivery has no cloak of purported duty to cover it. Also, it does not follow, as Appellant would have it, that generally respectful or even neutral address orally most occasions proves that no disrespect was intended on the writings which on their face exhibited it.

III

Appellant complains generally that the Administrative Law Judge failed consistently to give due credence to Appellant's own testimony and refused to accept the argument that prejudice against her as a woman was the cause of her difficulties.

On the latter point, I am referred to a statement in Appellant's testimony as establishing that "the vessel appears to have had an inordinate problem with female seamen." The testimony urged as supportive of this conclusion tends to show that four women crewmembers had been "discharged" from the vessel. The first one mentioned is Appellant herself, allegedly discharged in 1972. The significance of this is considerably diminished by the fact that she was accepted back aboard the vessel at a later time. Two of the "discharged" persons were, in Appellant's words on the record, "relief girls." In the common parlance, a "relief" is a person employed for one voyage, or even a lesser period, to fill in for a permanent incumbent of a position. The failure to reemploy a "relief" is to be expected from the very nature of the job. The fourth person, one specifically named by Appellant in her testimony, I note from official records of service, served aboard YOUNG AMERICA on thirteen voyages, coastwise and foreign both, between January 1972 and September 1973. While there was a break in service between February and June 1973, the total number of voyages, including the rehiring shown in June 1973, dissipates the effect of any presumed general bias as urged by appellant.

Appellant provides no sufficient reason why her credibility should necessarily have been accepted over that of each of several others testifying from different points of view about a variety of occasions.

IV

Appellant petitioned, after the appeal had been filed in this case, to reopen the hearing for presentation of "newly discovered evidence." Looking immediately to the material provided it is seen that it is proffered as, and is urged to be, testimony contradictory to that of the witness Micker as to the episode in the fifth specification, the striking by Appellant of the radio operator. What is presented is a statement of a local guard in Genoa, at the berth of YOUNG AMERICA at the time in question, in the form of a letter addressed to Appellant's Counsel. The latter is dated 21 April 1975.

What Appellant sees as helpful in this letter is the statement, ". . . the stewardess did not touch the radio operator at all nor did I see her make any obscene gestures towards him. . . " From a competent witness with proper scope of observation this

could be evidence to be weighed against that in the record supportive of the specification. Unfortunately for Appellant, however, other statements by guard disclose the incompetency of his potential testimony. The "clerk's office" to which he refers is on the pier, and the telephone which he was called upon to use was in the clerk's office. He was in the office when he heard the heated argument and came out to see the stewardess "abusing the radio operator." (Appellant has taken pains to point out that the Italian for "to abuse" is better translated as "to inveigh against," "to rail at," or "to revile" - making it clear that the "abuse" referred to was verbal.) The words quoted above from the statement, relative to "touching" of the radio officer, are placed after the guard's coming out of the office to see the altercation and are preceded by the words, "in the short time that I was present during the discussion because I re-entered the office immediately. . ."

The guard may well have heard what he said he did, but he was in no position to see, and does not claim to have seen, what happened between Appellant and Micker when they went down the passageway alongside the deck house on board the ship to the point where Micker was able to escape through a door. The guard's testimony would not only not controvert that of Micker; it would not even bear upon the episode in question.

V

The petition fails not only in the substance of the testimony proffered but also in the timeliness of the request. The petition submitted on 20 May 1975 to the Administrative Law Judge who had presided at the hearing, which had ended with issuance of a decision on 13 February 1975 (although the record of the testimony had been closed on 29 October 1974) spoke only of a "letter which we received from Signor. . ., dated 21 April 1975." No offer is made of explanation of how the letter came to be addressed to Counsel, of what might have prompted it, or of why such information had not been available before. That the letter did not emerge out of nothing is shown by the fact that the guard declares in his statement, "The vessel was in Genoa and not in Naples." This is not spoken by a volunteer but is obviously a correction to a misguided question of some sort.

In the absence of explanation, and on the face of the record,

Appellant was the one person to whom the existence of the watchman could have been known and to whom it might have had significance. The knowledge of Appellant obviously preexisted the time of hearing and the attempt to use it months after the record was closed is clearly untimely.

I conclude here, apart from the merits of the case, that there was no basis for a petition to reopen both because of the failure to fulfill the conditions of 35 CFR 5.21-1 and also because the evidence proffered was, as a matter of law, insufficiently relevant and material to have been given weight on the whole record.

CONCLUSION

There was no error in the proceedings and the petition to reopen was not appropriate within the regulation at 46 CFR

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 13 February 1975, is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 19th day of March 1976.

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