

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: JAY S. SILVERMAN MMD No (Redacted)

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2273

JAY S. SILVERMAN

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

By order dated 10 July, 1980, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's United States Coast Guard Merchant Mariner's Document No. [REDACTED]-D3 for six months outright plus an additional period of six months on twelve months' probation, upon finding him guilty of two specifications of misconduct, assault and battery and disobedience of a lawful order. The specifications found proved alleged that while serving as Fireman/Watertender onboard SS JOHN LYKES, under authority of the captioned document Appellant did, on or about 18 February 1980, assault and battery the Second Assistant Engineer, and on or about 11 February 1980 did fail to obey a lawful order of the Second Assistant Engineer by changing fuel oil strainers in the engine room without permission. A second specification of failure to obey an order was found not proved.

The hearing was held at San Francisco, California, in seven sessions between 5 May 1980 and 3 July 1980.

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

The Investigating Officer offered documentary evidence and the testimony of the witnesses. The Appellant offered documentary evidence and his own testimony.

Before the close of the hearing the Administrative Law Judge made oral findings of fact, conclusions of law, rendered a decision and entered an order which he reduced to writing and served on respondent. After the close of the hearing the judge served on respondent's counsel on 11 July 1980 a decision and amended order which had the effect of delaying the date on which the supervision would begin to run.

FINDINGS OF FACT

On board the SS JOHN LYKES changing from one fuel oil strainer to another, a part of the strainer cleaning operation, was somewhat difficult. Because of the high fuel oil pressure failure to properly shift strainers would result in severe leakage. On about 2 February 1980 Appellant had difficulty with this procedure. The Second Assistant Engineer, Mr. Anderson, who also served as watch engineer on the same watch as Appellant, ordered Appellant not to change the fuel oil strainer unless he, the Second, were present. On approximately 11 February 1980 the Second, when looking for Appellant, found him in the process of cleaning the fuel oil strainer, holding two five gallon buckets of fuel oil and having flooded the area. The Second told Appellant to move out of the way and proceeded to complete the change to the other strainer and insert the locking device.

On 18 February 1980 while the vessel was moored to a buoy in the Port of Shanghai, China, the Master made arrangements for Appellant to be taken ashore to see a physician because he had been acting strangely. The Master and Chief Mate discussed the arrangements with Appellant in the fireroom adjoining the engineroom, attempting to persuade him to see the physician. The Second Assistant Engineer, who was on watch, listened to this exchange. During the discussion the Second suggested that Appellant just go to the physician as requested and get it over

with. The Second left the group and walked back to the engineroom. The master and the chief mate soon left. In a walkway about 2 1/2 feet wide, the Second was in a group of three men on the side closest to Appellant's position. Appellant suddenly began to scream "[y]ou guys are out to get me!" He ran the 10 to 15 yards to the Second's position and struck the Second in the shoulder. The Second grabbed Appellant by the neck. Appellant grabbed the Second's finger and wrenched it causing dislocation of a joint. One of the other men got Appellant away from the Second and the Second sent Appellant out of the engineroom.

The judge rendered an oral decision on the record, in open hearing, and delivered a written order at the conclusion of the hearing on 3 July 1980. *Inter alia* the order called for outright suspension of Appellant's documents beginning 2 May 1980. Appellant refused to surrender his document. On 10 July 1980 the judge issued his Decision and Order. The order was in essentially the same form as on 3 July 1980 except that referenced to 2 May 1980 as the starting date for suspension was omitted. Counsel's law firm receipted for the Decision and Order on 11 July 1980.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative law Judge. It is contended that :

- (1) there is no evidence that Mr. Anderson was the Second Assistant Engineer on 11 February 1980,
- (2) there is no evidence to connect Appellant with the change of fuel oil strainers on 11 February 1980, and
- (3) *Animus furandi* was lacking when Appellant struck Mr. Anderson on 18 February 1980.

APPEARANCE: Hall, Henry, Oliver & McReavy by John E. Droeger of San Francisco, CA.

OPINION

I

Appellant's attack on the lack of evidence to support a finding that Mr. Anderson was the Second Assistant Engineer at the time of the order to refrain from changing the fuel oil strainer is not well founded.

For the judge to make his finding it was necessary for the record to contain substantial evidence that Anderson was in a position of authority over Appellant, that is, the finding may not have been arbitrary and capricious. The record is replete with references to the superior subordinate relation of Anderson to the Appellant. To mention only four: (1) Mr. Anderson's testimony at page 38 of the transcript that he was an engineer and that he and Appellant were on the four to eight watch. The extract of Shipping Articles, CG exhibit 2, shows that Appellant signed on as the fireman/watertender. At page 47 Anderson stated he was the engineer in charge of the watch. (2) At page 44 Anderson stated that on 18 February Appellant asked Anderson if he could leave the engineroom for a few minutes; (3) Mr. Taylor stated at page 132 of the transcript that Mr. Anderson was the Second Assistant Engineer. (4) Appellant stated at page 197 of the transcript that "I've sailed with many engineers and Mr. Anderson is the best second I've ever sailed with." Also at page 198, "...what had happened was from the time I boarded to that day, we were very close. He went out of his way to be helpful, humorous and to be a friend and more than just a person of authority that had the responsibility of the entire power plant."

It appears without question that Mr. Anderson was in a position to be able to issue to Appellant a lawful order regarding changing the fuel oil strainers and certainly the finding in this regard was not arbitrary or capricious.

II

Appellant's point that there is no evidence to connect Appellant to the changing of the fuel oil strainers on 11 February 1980 is without merit. Mr. Anderson, the engineer in charge of the watch testified at page 43 that:

"...I seen Mr. Silverman's legs by the strainer so I immediately went back there. Mr. Silverman was in the process

of cleaning the strainer. He had two five gallon buckets of fuel oil."..."I told him to step out of the way. I immediately threw the strainer over, put the locking device on it and told him to get out of the way and clean up the mess, which he done..."

This un rebutted testimony more than meets the test of substantial evidence on which to rest a finding of proved.

III

Appellant's contention that *animus furandi* is an essential element of a battery and was not present when he struck the Second Assistant Engineer is unfounded. *Animus furandi* is an intent to steal. If by this point counsel wished to raise and issue of intent to injure, the contention is without merit. An intent to injure is not an element of assault. See Appeal Decision [1447](#). It is also not an element of a battery. The National Transportation Safety Board has said in Order EM-19, 1 NTSB 2279: "A battery may encompass any unauthorized touching of another." Testimony of Mr. Anderson and others established that Appellant shouted "[y]ou guys are out to get me" as he ran to Mr. Anderson and struck him hard and wrenched Mr. Anderson's finger with enough force to dislocate a joint. He was pulled away from Mr. Anderson by others is sufficient to sustain the assault and battery finding of proved.

IV

Although not raised on appeal I note that the Order in open hearing dated 3 July 1980 set forth 2 May 1980 as the date on which the period of suspension was to begin running. The Decision and Order dated 10 July 1980 gives no date on which suspension is to begin running. This would cause it to begin on the effective date which is the date of service, 11 July 1980. The stated reason for this change in the order is that Appellant said he would not surrender his document. Under either order the suspension could begin before surrender of the document. This points up the need to follow the regulations, 46 CFR 5.20-170(e)(2), in drafting orders. That provision recommends that the order state that outright suspension begins to run on surrender of the documents. To allow the judge to increase the period of suspension here based on

post-hearing events cannot stand. Such misconduct must be the subject of a separate R.S. 4450 proceeding for violation of a regulation issued under Title 52 of the Revised Statutes, 46 CFR 5.20-170(e).

V

Because of Appellant's unusual behavior both at the hearing and at the time of the charge offense the Judge made a finding of competence to understand the nature and possible consequence of the proceedings below and to cooperate with his attorney in his defense. By implication the judges also found him legally responsible for his actions at the time of the charged offenses. After careful review of the entire record I concur that Appellant was shown by substantial evidence to have been competent and responsible at all material times. See Appeal Decision [1677](#).

CONCLUSION

Bases on the foregoing, the order dated 10 July 1980 must be modified to begin the running of outright suspension on 2 May 1980.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 10 July 1980 is MODIFIED to begin the period of suspension of 2 May 1980 and as modified is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 8th day of April 1982.

***** END OF DECISION NO. 2273 *****

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