IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-10291
AND LICENSE NO. 357207
Issued to: William E. GOLDEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1862

William E. GOLDEN.

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 13 November 1970, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's license for one month outright plus five months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a junior chief mate on board SS ACHILLES under authority of the license above captioned, Appellant:

(1) On or about 4 April 1970, at Drift River, Alaska,... disobeyed a lawful order of the master by not providing a hog and sag report;

(2) on or about 6 April 1970, at sea continued to disobey the lawful order of the master by refusing to turn to and perform his assigned duties; and

(3) on or about 6, 7, 8, 9, and 10 April 1970 failed to

perform his assigned duties.

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

The Investigating Officer introduced in evidence voyage records of ACHILLES and the testimony of one witness.

In defense, Appellant offered in evidence voyage records of ACHILLES and the testimony of two witnesses.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all licenses issued to Appellant for a period of one month plus five months on twelve months' probation.

The entire decision was served on 13 November 1970. Appellant was timely filed. Appeal was perfected on 25 March 1971.

FINDINGS OF FACT

Because of the ultimate disposition to be made of this case, no findings of fact are required.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The bases of appeal are discussed below and are rejected. Disposition of the case is made on grounds of error discovered on my own motion.

APPEARANCE: Jennings, Gartland & Title, San Francisco, California, by Eugene L. Gartland, Esq.

OPINION

I

A preliminary question raised by Appellant must be answered first. He argues that he was shipped in violation of law and hence is not amenable to action to suspended his license under R.S. 4450. *The* violation of law involved in Appellant's shipment was that the shipping agreement was not entered in accordance with R.S. 4520 (46 U.S.C. 574), the statute applicable to the voyage in question. Under R.S. 4523 (46 U.S.C. 578) argues Appellant, his shipment was void and hence he is not amenable to suspension and revocation action under R.S. 4450, as amended (46 U.S.C. 239).

Appellant's premise is correct; his conclusion is not. Jurisdiction over misconduct under R.S. 4450 does not depend upon the existence of a shipping agreement made pursuant to law. It depends on whether a seaman is serving "under authority" of his seaman's papers.

A seaman's remedy for a void shipment is to leave the vessel at any time, but one who enters the service of a vessel voluntarily is bound to perform duties, and obey orders as long as he remains aboard. The *Occidental*, D. C. Wash., (1900), 101 F. 997.

In this connection, Appellant injected some confusion into the record, while attacking the charge of "Misconduct," by arguing that the use of "Misconduct" was a ruse to charge what actually a "Violation of a Statute." The Examiner correctly held that there was jurisdiction under R.S. 4450 for misconduct, but was induced to rule that R.S. 4449 (46 U.S.C. 240) did not apply to the instant case because the shipment was void.

I need not enter here,, as I recently refused to do in Decision on Appeal No. 1842, upon the question of how far the 1936 amendment to R.S. 4450 may have supplanted other earlier enacted sections of Title 52 of the Revised Statutes dealing with suspension of seamen's licenses. On its face, R.S. 4449 applies not only to cases in which an officer has "signed articles" but also to a case in which an officer is "employed on any vessel as authorized by the terms of his certificate of license." I agree with the Examiner that the disobedience of orders alleged in this case was not required to be charged as a violation of a section of Title 52, Revised Statutes but was properly charged as "Misconduct." I cannot agree that it could not have been charged

as a violation of a section of Title 52.

II

Appellant's principal attack on appeal is on the use of the word "Misconduct" as a "charge." He cites *Soglin* v *Kauffman*, D.C., W.D. Wisc. (1968), 295 Fed. Supp. 978, affirmed at CA 7 (1969), 418 F. 2nd 163, as holding "misconduct" unconstitutionally vague as a test for expulsion of students from a State University. The term used by the court, however, is "misconduct, without more."

One obvious distention can be made here. While the controlling Act of Congress, R.S. 4450 (46 U.S.C. 239), sets out "misconduct as grounds for suspension or revocation of seamen's licenses or certificates, my regulations at 46 CFR 137.05-20(a) and 46 CFR 137.20-165, as well as a host of prior decisions on appeal have declared what "misconduct" is. If Appellant wishes to complain about my definitions and interpretations he is free to do so, but this is not the forum in which he will obtain his desired remedy.

It would be so obviously unwarranted for me to find unconstitutional the very Act of Congress which authorizes me to act that the matter is unthinkable for consideration on this appeal.

III

After rejecting the two bases of appeal dealt with above, I turn to consideration of a most bewildering record.

At the outset of the hearing, since the Investigating Officer obviously was lacking several documents that he might have wanted, Appellant's Counsel stipulated that Appellant was serving, on the dates in question, on "coastwise articles," conceding jurisdiction. This shorthand term commonly used to refer to a shipping agreement required to be signed between master and crew under 46 U.S.C. 574 (for voyages between non-adjacent States on the same coast) in which the presence of a shipping commissioner is not required, is most imprecise. An examination of this and other such shorthand

terms popular in the industry and in the enforcement agency need not, and could not, be made within the confines of this decision.

After introducing the master of ACHILLES as a witness, the Investigating Officer begins by saying to the master, "I would like to show you...your copy of the official log entry of the tanker ACHILLES on this particular voyage, and call your attention to certain entries you made there..." What "your copy of the official log entry" may be I do not know, but the master immediately identified whatever was presented to him as "the Official Log of this particular voyage." R-21, 22. The document was not marked for identification and was not offered in evidence.

Neither the log nor specific entries therein were offered in evidence at that time.

At R-46 the Investigating Officer offered log entries in evidence. The record contains the notation here:

"WHEREUPON, the documents above-referenced to were duly marked as COAST GUARD EXHIBIT #1, in evidence."

Unaccountably, at R-54, when the Investigating Officer's witness, the master, had been excused and the Investigating Officer, after announcing that he had no further witnesses, is asked whether he rests his case, the Investigating Officer invites the Examiner's attention to certain pages of the log book, "inasmuch as the log book has been admitted for identification." Thereupon, although the pertinent pages of the log had never been marked for identification, the Investigating Officer proposed to substitute certified copies of the log entries for the original so as to return the original book to its "proper custodian." At this point, the Examiner announces, although he has not been asked to admit anything into evidence, only to give attention to something presumably in evidence already (referred to as something admitted for identification only), and to permit substitution of certified copies so that the original document may be returned to its proper custodian, "Coast Guard Exhibit No. 1 is received into evidence."

The record dutifully reflects:

"WHEREUPON, the documents above-referenced to were received in evidence as COAST GUARD EXHIBIT #1."

I may add that the Table of Exhibits shows Exhibit 1 as being admitted at R-55, but not at R-46. Record management of this kind cannot be tolerated in administrative proceedings which are subject to judicial review.

At R-104, when Appellant had withdrawn from his stipulation that he had been employed aboard the vessel on "coastwise articles" because of knowledge which had come to him after the opening of the hearing, Appellant referred to a document described as "a certified...true copy" of something provided to him by the Investigating Officer. After some colloquy in which the Investigating Officer objects to reference to the document because the document had not been admitted into evidence, and the Examiner assumes that it is not in evidence because the earlier stipulation would have rendered such a document unnecessary, Counsel cogently argued that the document had great probative value since it had been certified to as an extract from the Shipping Articles of ACHILLES by a Coast Guard officer at Honolulu, Hawaii. The document itself is marked as admitted for identification and in evidence on 19 May 1970. The transcript nowhere reflects that this document was ever placed before the Examiner for identification nor that it was ever received in evidence as Exhibit B. The table of contents of Exhibits, significantly, includes an Exhibit B but does not purport to show at what point in the record it was identified or admitted into evidence.

I must note here that a grave discrepancy exists between Appellant's Exhibit B and Exhibit #1. The certification of the log entries, apparently supported by a later actual sighting of the log, indicates that the book was purportedly for a voyage beginning at Martinez, California, on 17 March 1970. The certification of the entry in the articles would tend to prove that Appellant signed on for a voyage on 2 February 1970 while the voyage actually began at San Francisco on 17 March 1970.

The Shipping Articles themselves were produced later and on their face, in the voyage description, provide for a voyage from San Francisco commencing 17 March 1970. While the Shipping Articles will be returned to later, it is clear that there is a discrepancy between the Articles (and hence, in the extract made therefrom) and the Official Log Book (and, hence, the copies made

from it) as to the place of origin of the voyage, Martinez or San Francisco.

This discrepenacy could be glossed over on the theory that Martinez and San Francisco are both places in "The Bay Area." It is disturbing, however, that no one noted the discrepancy and sought an explanation.

V

This leads me to a consideration of the "articles" themselves. The Examiner holds the articles void because they are indefinite, because they were not for a specified time, and because the master had not signed them.

Appellant's Exhibit B, a certified extract of shipping articles showed that Appellant had signed had signed on at Portland, Oregon, on 2 February 1970 for a voyage to commence on 17 March 1970 at San Francisco. When Appellant's Exhibit D (the articles) was entered in evidence, it was conclusively established that Appellant signed articles at Portland, Oregon, on 2 February 1970, for a voyage which did not purport to begin until 17 March 1970 at San Francisco.

The Examiner found that the articles were invalid because the master had not signed them, while the articles produced at the hearing and placed in evidence were in fact signed by the master, purportedly as of 17 March 1970. (While I doubt that the fact that 46 U.S.C. 574 does not require the master to sign the agreement first might have somehow validated the agreement as of 17 March 1970 at San Francisco, I need not explore the problem.) Appellant presented these articles in evidence on 26 May 1970. They were received in evidence. R-125. At this time Counsel asserted that the articles had not been signed by the master. The Examiner noted that the articles were in fact signed by the master. Counsel asserted that the signature had been placed on the articles within the last week. (It must be recalled that the master testified in this case on 28 April 1970.) Counsel stated his desire to call the Investigating Officer as a witness in support of his assertion. The Investigating Officer objected that he was not finished with the witness on the stand. The Examiner directed that cross-examination proceed, because the articles on their face

appeared to be "articles." When the witness had been excused (R-132), Counsel offered to testify under oath that eight days earlier, about 18 May 1970, he had examined the articles in the Coast Guard Marine Inspection Office and had found no signature of the master on the articles. The Investigating Officer stipulated that a material alteration to the document had in fact occurred after Counsel had first seen it and that the master had come into his office to announce his departure on leave and his whereabouts if he should be needed in the future. The Investigating Officer said, "He noticed the Articles on my desk and that he had not signed them, which he did." R-133.

Appellant's claim at hearing that the evidence had been tampered with, although not pressed on appeal, cannot be overlooked. If I assume the most benign attitude, that the alteration of the articles which were already in the custody of the Investigating Officer was made without his knowledge or consent, I cannot escape the conclusion that there was a duty placed upon him immediately to explain what had occurred instead of resisting explanation on the grounds that he had further cross-examination to put to the witness. I need not speculate on the adverse inferences that might be drawn. It may as well be spelled out now, in connection with the activities in this case, that tampering with evidence should never be permitted or tolerated by an investigating officer and that if such tampering occurs without the knowledge or consent of the investigating officer, that officer should be the first person to come forward with explanation of the tampering and should not try to delay explanation, as was done here.

Whatever the merits of this case and whatever fault Appellant may have committed, I am reluctant to affirm as proved any charge of MISCONDUCT against Appellant when the record is so defective as is found in this case.

VI

There is evidence in this case that the handling of the shipping agreement accords with the general practice of "coastwise" vessels. If this is so many masters of vessels subject to 46 U.S.C. 574 are in violation of the requirement that a shipping agreement be signed before a voyage begins. It is obvious that a person

cannot sign an agreement in Portland for a voyage from San Francisco and that a person cannot sign at sea an agreement for a future voyage from a certain port when it is not even known when, if ever, the vessel will be at that port of departure.

There is little question that 46 U.S.S. 574 is an archaic law and attempts to modernize this and other laws governing the employment of seamen are underway. Until the law is changed, however, it is binding and a failure to comply may carry troublesome consequences in addition to penalties.

VII

There is much confusion in the testimony in this record on the matter of when or where Appellant was "fired" on the voyage in question. I will not try to sort the testimony in a fact-finding process. There is one matter in the record, however, that must be discussed to dispel what may be a widespread belief about the relationship of "labor-management contracts " or "union agreements" to shipping agreements required by law. It was argued that the union agreement covering Appellant's service provided that the terms of that agreement would be considered part of any shipping agreement signed by a member of that union, and thus became part of the shipping agreement. This argument must be flatly rejected.

A union agreement may be incorporated by reference into a shipping agreement to the extent that the union agreement is not in conflict with Federal law or in abrogation of any provision of Federal law. If it is to be incorporated, common sense dictates that a copy of the agreement must be attached in a timely fashion to each and every set of articles to which the agreement is to apply.

As has been noted, both documentary evidence and the testimony of the master were introduced to support the specifications of misconduct. The Examiner does not discuss the matter of assignment of weight to the evidence in this case; he says only that there is evidence to support his findings. Appellant's own testimony, if accepted as true, would tend to prove a discharge (albeit wrongful) at Homer, Alaska, reinforcing his right to leave the vessel because of the nullity of the articles. If Appellant was "fired" at Homer but was refused money by the master, so that he could make his way

home, an injustice was done him. I recognize that 46 U.S.C. 578,in authorizing the seaman to leave the service of a ship at any time in the event of a void shipment gives him the right "to recover the highest rate of wages...or the sum agreed to be given him..." I cannot construe this to mean that a master can argue that the wage provision of this section cannot apply when the "sum agreed" is in a void contract, since the law was designed to protect seamen, not to lead them into illusory benefits. Strictly construed, the section gives the seaman the right only "to recover" but I do not think that this can put the seaman in the position of facing obligated service or destitute abandonment. Moreover, under 46 U.S.C. 597, which deals with interim payments and not wages on discharge, the seamen has a right to some money.

I reaffirm the principle invoked by the Examiner, that a seaman who elects voluntary not to leave the service of a vessel from which he is entitled to depart under 46 U.S.C. 578 is obligated to fulfill his duties so long as he remains aboard. Appellant's testimony here raises serious doubt that his continued service from Homer to Honolulu was voluntary because of the denial of payment of money. I do not here express a statement of controlling principle intended to be binding in other cases; but I do believe that the matter raised here was worthy of more attention than it was given at hearing.

The documentary evidence from the official log book accepted by the Examiner is mentioned, but not discussed, in his opinion. There is no doubt that the log entries were not made in substantial compliance with 46 U.S.C. 702. The record made as to events of 4 and 6 April 1970 does not even purport to have been made in compliance with the law. An entry dated 9 April 1970 purports to cover events to as late as 1700 on 10 April 1970. The only entry signed by witnesses is one dated 10 April 1970 and consists only of the record that the other entries were read to Appellant, who made no reply.

Not only do I find that the log book entries in this case do no substantially comply with 46 U.S.C. 702, I find that they were not entries made in the regular course of business under 28 U.S.C. An entry made on 9 April 1970 purporting to cover events of 6 April through 9 April 1970 cannot be considered to be an entry made in the regular course of business especially in view of the fact that

the 9 April entry purports to cover events up to 1700 on 10 April 1970. I must view all of the log entries received in evidence as of the type-- late after-thoughts, patently untrue on their face,-- from which seamen were intended to be protected. I hold that no weight can be assigned to this documentary evidence.

This leaves us only the oral testimony of the master as potential grounds for a finding of misconduct on the part of Appellant. The Investigating Officer never sought to rehabilitate the credibility of the master who took it upon himself to falsify a written record-- the shipping articles--after they were already in the legal custody of another person. I am constrained to hold here that the credibility of the master is so undermined in this case that his testimony does not have the quality nor amounts to the quantity of evidence needed to support findings adverse to the Appellant.

ORDER

The order of the Examiner dated at San Francisco, California, on 13 November 1970, is VACATED. The charges are DISMISSED.

C.R. BENDER
Vice Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 23rd day of November 1971.

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