IN THE MATTER OF LICENSE NO. 331448 MERCHANT MARINER'S DOCUMENT
AND ALL OTHER SEAMAN's DOCUMENTS BK-262258
Issued to: Lawrence RAZZI

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1865

Lawrence RAZZI

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 26 May 1970, an Examiner of the United States Coast Guard at New York, N.Y., suspended Appellant's seaman's documents for four months outright plus two months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a third assistant engineer on board SS BIENVILLE under authority of the document and license above described, on or about 9 April 1970, Appellant wrongfully absented himself from the engine room and his duties from about 2000 to 2400 when the vessel was at Genoa, Italy, and that he wrongfully failed to join the vessel on 10 April 1970 at Genoa, Italy.

At the hearing, Appellant did not appear. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduce in evidence voyage records of BIENVILLE.

There was no defense.

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 documents issued to Appellant for a period of four months outright plus two months on twelve months' probation.

The entire decision was served on 3 June 1970. Appeal was timely filed on 3 June 1970. Although Appellant had until 8 September 1970 to add to his original statement of appeal he has not done so.

FINDING OF FACT

On all dates in question, Appellant was serving as third assistant engineer on board SS BIENVILLE and acting under authority of his license and document. On 10 April 1970, Appellant wrongfully failed to join the vessel at Genoa, Italy.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that Appellant had good reason for being away from the ship at 2000 on 9 April 1970; as could be *pro*ved by testimony of the first assistant engineer.

APPEARANCE: Appellant, pro se.

OPINION

1

It must be immediately noted that Appellant does not attack the findings as to his failure to join on 10 April 1970 but, on his appeal, urges only an excuse for failure to perform duties on the night of 9 April 1970. In the ordinary case this approach would merit no consideration, since what Appellant says is that if he had

available the testimony of the first assistant engineer of BIENVILLE he would be able to prove that he had been properly relieved by the first assistant as 2000 on 9 April 1970 so that he could go ashore to pick up some items he had purchased.

This evidence is such that if presented to an examiner at hearing it might easily be overcome by testimony of the chief engineer that he had not authorized Appellant to change duty hours, and the record intimates that such testimony might have been obtainable. Speculation is not required however. Appellant was provided "his day in court." He had the opportunity to appear for hearing and obtain the testimony of any witness he desired. He chose not to appear for hearing, and forfeited his privilege of presenting his side of the matter.

I have recently pointed out that evidence on the record before an examiner cannot be attached for the first time on appeal by a statement that something else was the truth. Decision on Appeal No. 1752. The forum in which to present evidence is the hearing before the examiner. When a person fails to appear on notice and later asserts he had evidence which would have helped his cause he is not only too late, he has not even stated grounds for appeal such as to call for a Decision on Appeal. This case can be closed, except that on reviewing the record I perceive elements that justify either a review on my own motion under 46 CFR 137.35 with a subsequent decision, or consideration under section 137.30-3(b) as presenting a novel question with resultant decision announced.

II

The only evidence against appellant in this case consisted of voyage records of BIENVILLE. An official log book entry, properly made with respect to a person who has failed to join the vessel, was received into evidence. This entry appears at the top of page 21 of the official log of BIENVILLE and establishes the failure to join on 10 April 1970. It was signed by the master and witnessed by the chief mate. It was made as of 0818 on 10 April, recording a sailing at 0600 that date. Procedures with reference to Appellant, called for by statute, were obviously inappropriate since Appellant was not aboard the vessel.

Immediately below this entry appears an entry not related to Appellant, made as of 0545 on 10 April 1970.

A third entry, at the bottom of the page, records Appellant's failure to perform duties on the night of 9 April 1970. Witnessed by the chief engineer, and reciting that the failure to read the entry to Appellant was because of his failure to return to the vessel at all, the entry purports to have been made at 2000 on 9 April 1970.

Apart from the fact that the entry deals with an offense committed before the failure to join on 10 April and before the events recorded in the second entry on the page, an event unrelated to Appellant, the dating of this log entry has obviously been tampered with. The original entry read "4-10-70 2000 Genoa-Italy." Over "10" is superimposed "9." There is no need here to resort to the thinking in *The Silver Palm*, CA, 9 (1938), 94 F. 2nd 754 Cert. Den. 304 U.S. 576 that alterations in a log (although not in that case an official log book) raise presumptions against the log-keeper. The change here is so apparent and places the entry in such light that it is obvious that the entry is inherently false as to its making.

In the instant case I must conclude that the log entry made as to Appellant's failure to perform duties on 9 April 1970 was not only not an entry made in accordance with the statutes relative to official log book entries such as to make it *prima facie* evidence "of the facts therein recited" (46 CFR 137.20-107), but was not even a record made in the regular course of business such as to make it admissible in evidence, as an exception to the "hearsay" rule.

If the matter of this log entry had been incorporated into the entry relative to the failure to join there would be no difficulty in accepting the entire combined entry as in substantial compliance with the statute since, although the absence from duty ended at 2400 on 9 April 1970 and hence was chargeable as a separate offense from the failure to join on the morning of 10 April 1970, it is apparent that a continuing absence would have been set forth. A recording of failure to stand the latter half of an eight hour watch ending at midnight would reasonably be entered on the following morning.

A statement of the chief engineer was attached to the log entry which dealt with the failure to stand the watch. (I need not reach here the question of whether attachments to logs in the way of statements of witnesses should be incorporated by reference in the log entry itself if it is intended that they be accepted as part of or supporting the log entry.) I seems that the "2000" time of the log entry is keyed to the chief engineer's statement that, having given certain orders to Appellant, he searched for him at 2000 and could not find him.

But it is clear from this that if the original dating of the log entry was actually intended to show a making at 2000 on 10 April 1970 the alteration of "10" to "9" made the coincidence of the "2000" time a pure accident. It appears more likely, however, that the entry was not made at 2000 on 10 April because of the key to the chief engineer's 2000 search on the night of 9 April.

The entry was obviously, on its face, not made at 2000 on 9 April (as the alteration might seem to imply) because the entry covers as absence from watch duty extending to midnight. It is clear on its face that it was made on 10 April 1970, and that it was not made at the time of the "failure to join" entry else it would have been included in it. (The fact that the intervening entry between the two records as event that occurred before the failure to join occurred but after abandonment of the watch was allegedly noted further undermines the validity of these records).

As I have stated above, proper handling of this matter by the master would have resulted in a valid log entry completely acceptable under 46 CFR 137.20-107 as prima facie evidence of the facts recited therein. The separation of the entries under the circumstances described and the tampering with the date of the second entry prevent its achieving the force of an entry made in substantial compliance with 46 U.S. 702. These flaws, together with the fact that the time of making the second entry cannot be ascertained, coupled with the insertion of another entry, between the two entries relative to Appellant lead one to believe that the second entry is not established as a record made in the regular course of business so as to be admissible in evidence under 28 U.S.C. 1732 as an exception to the "hearsay rule." Findings based on this evidence are based "on hearsay alone" and cannot be supported.

It is emphasized that I am not saying here that hearsay is not admissible in these proceedings. It is, and an examiner should admit it, unless it is clearly repetitive, redundant, or irrelevant, because hearsay may well corroborate substantial evidence so as to give it greater weight than might otherwise have been accorded it. We are not concerned with the dangers of hearsay in jury trials. We are not even bound here by the very liberal rules in a civil trial before a judge along, although in such a trial a judge is rarely reversed on a question of admissibility of evidence. Our examiners may hear anything they will, subject to the condition that they control the record so as to prevent needless delay, cluttering, undue repetition, and redundancy, and as along as there is substantial evidence to support their findings of fact when the record is complete.

CONCLUSION

The substantive allegations of the first specification's allegations are not proved. The jurisdictional allegations of the first specification are proved. My findings transfer the jurisdictional findings of the Examiner from the first specification to the second and my order will be framed from the view that the second specification already incorporates the jurisdictional allegations of the first specification by reference.

Since I intend to dismiss the allegations of substantive misconduct in the first specification because of evidentiary defects, it is appropriate to review the Examiner's order to see whether a lessening is appropriate.

Appellant is a licensed officer. After being warned in 1963 for creating a disturbance aboard PIONEER STAR, he was twice placed on probation, in 1966 and 1968, for acts of misconduct. With this recency of misconduct and the leniency previously granted by examiners, I find that the order of the Examiner in the instant case is appropriate even though only the failure to join is found proved. No modification of the order is needed.

ORDER

The findings of the Examiner as to the first specification, except as to the jurisdictional statements of service under authority of license and document, are set aside and the substantive allegation of that specification is DISMISSED. The findings of the Examiner as to the allegations of the second specification, including the jurisdictional statement incorporated from the first specification and as to the charge, are AFFIRMED.

The order of the Examiner, dated at New York, N.Y., on 26 May 1970, is AFFIRMED.

C. R. BENDER
Admiral, U. S. COAST GUARD
COMMANDANT

Signed at Washington, D. C., this 13th day of January 1972.

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