IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-669 819
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Richard L. FULTON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1732

Richard L. FULTON

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 20 May 1968, an Examiner of the United States Coast Guard at Seattle, Washington suspended Appellant's seaman's documents for four months on eight months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as chief steward on board SS PHILIPPINE MAIL under authority of the document above captioned on or about 1 March 1968, Appellant participated in loading on board the vessel, at Seattle, Washington, eleven television sets which were not manifested.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of PHILIPPINE MAIL and the testimony of the purser of the vessel.

In defense, Appellant offered in evidence an unsworn statement R-23, 24.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of four months on eight months' probation.

The entire decision was served on 29 May 1968. Appeal was timely filed on 19 June 1968. Although Appellant asked for a transcript of proceeding which was delivered him on 2 July 1968, no further perfection of appeal has been made.

FINDINGS OF FACT

On 1 March 1968 Appellant was serving as chief steward on board SS PHILIPPINE MAIL and acting under authority of his document while the ship was in the port of Seattle, Washington.

On that date Appellant participated with two other members of the crew in loading on board the vessel several television sets which were not declared on the manifest, for which no loading permit had been issued, and for the carriage of which no contract had been made nor freight paid.

Of 44 sets, eleven were found beneath soiled linen bags in the linen locker. Eighteen were found covered with a canvas sling in the starboard after capstan room locker. Fifteen were found in the steward's sundry store room locker under a cotton spread and rugs.

Appellant admitted ownership of the eleven sets in the linen locker.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that:

"(1) That there are no grounds for the charges of 'misconduct'

as the actions taken for which the charge was issued was one which was checked out with the Customs Officer in charge of Pier 28. Who said in reference to taking items out of the country, they were not concerned with what we took out, but with what we brought into the country.

(2) The U. S. Customs have publicly admitted the fact that their attitude in reference to taking commodities out of the country, had not, in the past years, been clarified to the public, nor to the Custom Officer, and were not readily available.

(3) That the handling of the facts of this particular case by the Master of the vessel, S. S. Philippine Mail of American Mail Line, Ltd., 1010 Washington Building, Seattle, Washington, was contrary to U.S. Coast Guard regulations. This log was secreted from the men involved, due I believe to the fact, that the wording used was false and exaggerated. Yet this was admitted into evidence against us, tho supposedly given no credence.

(4) That American Mail Line Officials were cognizant of the fact that these television sets were aboard this vessel two weeks before we sailed, yet they issued no information concerning them, nor did they have the U.S. Customs informed, or, if they did, the U.S. Customs did nothing."

APPEARANCE: Appellant, *pro se.*

OPINION

I

The specification upon which hearing was had in this matter originally contained the words "for the purpose of sale in a foreign country.

The Examiner's "Ultimate" finding is:

"That on March 1, 1968, the Person Charged did wrongfully participate in loading on board the SS PHILIPPINE MAIL

> eleven television sets, unmanifested, for the purpose of sale in a foreign country, while the said vessel lay in the domestic port of Seattle, Washington."

However, his "Conclusion" was, "that portion of the specification alleging that the merchandise was on board 'for the purpose of sale in a foreign country' is not proved."

This discrepancy between the findings and the conclusion must be resolved (in light of the Examiner's "Opinion" in this case, and of his "Findings" in two companion cases heard in joinder with this one) by a modification of the findings to eliminate the words eliminated by the "Conclusion."

II

Appellant's first point on appeal is considered to be without merit. His unsworn statement given before the Examiner asserts that he asked a Customs official whether taking personal property out of the country required any sort of papers. He stated that he was told "No." He admitted that he did not specify the number of television sets he intended to carry.

This statement is of no probative value and does not support the first point on the appeal.

III

The second point urged on appeal has no support in the record and does not involve a matter of which, on appeal, official notice may be taken.

IV

Because Appellant's third point requires some discussion, I will return to it later, but will proceed immediately to the fourth point. This point is disposed of with the observation that it finds no support in the record.

V

Appellant's third point raises several questions as to the conduct and disposition of this case at the hearing level. It is based upon a statement of the Examiner made upon the admission into evidence of a record in the Official Log Book of PHILIPPINE MAIL. The Examiner said:

> "What has been marked as Coast Guard Exhibit 2 will become part of the evidence in this cause. This Exhibit is an entry made in the official log and is considered in the law as made in the normal course of the ship's business. It, therefore, is an entry in the log which is admissible and it is admitted and will be admitted in evidence. Now, whether or not this entry is going to be given any weight as far as proof of this Charge is concerned, is determined by whether or not this entry is made in accordance with Title 46, U.S. Code, Section 702, which requires that the entry be made a certain time after the offense alleged, that the entry shows that the entry was - the seaman involved was given an opportunity to reply to it and what his reply was and that he was provided a copy of it. Now, I would think, just looking at this briefly, that this does not, apparently, comply with, even substantially, with Title 46, U.S. Code, Section 702. Therefore, the weight which I would give to it would be little or nothing, and nothing probably, but it is admissible in evidence and will become part of the evidence in this cause." R-11,12.

It seems obvious that this statement led Appellant to believe that no weight would be given to this log entry at all. Several factors must be evaluated here.

One is that the log entry contains a statement that Appellant acknowledged ownership of the eleven sets found in the linen locker. It also contains a statement that Appellant said he intended to sell the sets at Pusan, Korea. It may be inferred that the Examiner gave no weight whatsoever to the log entry because he specifically found no intent by Appellant to sell the sets in foreign port..But then, the question arises, how did the Examiner find that Appellant was associated with eleven sets, not eight, and not forty four?

An answer might be that in Appellant's declaration of items in his possession on arrival at Pusan, Korea, he acknowledged possession of eleven television sets. Exhibit 3. This same exhibit shows that he acknowledged possession of twelve television sets on arrival at Yokohoma, the last port before Pusan.

It might be said that the Examiner felt that the Appellant's declaration allowed him to find "eleven," because "eleven" appeared in the specification, but not "twelve" because the specification as alleged asserted only "eleven."

If this was the Examiner's rationale he has shed no light on it in the opinion of his decision. For purposes of this Decision, it may be held that the "declaration" of eleven television sets may be considered sufficient evidence of the number of sets brought aboard. But the import of the entry in the Official Log Book must still be considered.

IV

The Examiner in this case apparently found lack of "substantial compliance" with 46 U.S. C. 702 in the making of the Official Log Book entry. (No reference was made to substantial compliance with 46 U.S.C. 202.) I say this, because the Examiner's statements were made only on record in open hearing as "probabilities" and no resolution was made in his decision.

The statement of the Examiner, as construed by Appellant, was wrong. If an Official Log Book entry is made in substantial compliance with the applicable statutes it constitutes *prima facie* evidence of the facts of the offense therein recited. The fact that a log book entry may be found to be not in "substantial compliance" with statutes does not render it inadmissible in evidence.

If an examiner believes that a log entry is not in "substantial compliance" with the statutes, it is his prerogative, under present regulations, so to find. But it was never the intent of any earlier Decision on Appeal to imply that evidence which was "admissible," even if not establishing a *prima facie* case,

should be given no weight whatsoever.

To refuse to give any weight whatsoever to admissible evidence because it does not establish a *prima facie* case is an arbitrary and capricious action. A reasoned rejection of evidence by an examiner may be acceptable. It is one thing for an examiner to hold that a *prima facie* case has not been established by the documentary evidence; it is another thing for one to say that the admissible evidence is of no value at all.

Here, although it appears in some respects that the Examiner gave no weight to one piece of admissible evidence, it is apparent that he gave great weight to unsworn statements of Appellant to support an opinion that Appellant had in fact communicated with some Customs official who had told him that there was no problem in taking personal goods out of the country, and to lead to a conclusion that Appellant's offense was merely "technical."

VII

Much was made on the record of hearing that the "good faith" of Appellant and the other seamen involved was demonstrated by the fact that they "declared" the sets before arrival at Yokohoma. The Examiner adverted to this exhibition of good faith in his opinion.

The itinerary of the vessel, and its dates, are not spelled out in the record. But since the seizure of the television sets was, according to the log entry, made on 10 March 1968, when the ship was at 150° 02 W., only about a quarter or a third of the run from Seattle to Yokohoma, and since it is evident that the discovery of the unauthorized cargo was made before a declaration had been filed by Appellant, the "good faith" established by the declaration appears suspect.

Although on this appeal, under present regulations, the dismissal by the Examiner as to the words "for the purpose of sale in a foreign country" will not be disturbed, it can scarcely be believed that Appellant took aboard eleven such sets, in their original packages (as some evidence indicates), for the purpose of transporting them to Yokohoma, Pusan, Inchon, and Kobe, and then back to Seattle. This view is reinforced by the Examiner's opinion that there was a violation of 19 U.S.C. 1453, even though he

thought it was only "technical." 19 U.S.C. 1453 deals with "merchandise." "Merchandise" is something to be bought and sold. There is no need to speculate that the merchandise was intended to be sold after the vessel returned to Seattle. On Appellant's own declaration, one set left the ship at Yokohoma.

Thus, I cannot adopt the Examiner's view that the offense was merely "technical." Either the property was in the nature of personal effects of Appellant, subject to declaration but not to manifest on loading, or it was merchandise. If it were the former, the violation would not have been committed at all; and the charges would be dismissed. Since the property was " "merchandise," the violation is not considered as merely "technical" but is also considered as a fraud upon the owner of the ship which was being used to carry cargo without payment of freight.

CONCLUSION

Although my opinion differs from that of the Examiner, his ultimate conclusion of law is affirmable. His ultimate finding of fact must be modified, as set out in Section I of this "Opinion," and has been modified in my "FINDINGS OF FACT" above.

ORDER

The order of the Examiner dated at Seattle, Washington on 20 May 1968, is AFFIRMED.

P. E. TRIMBLE
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D. C. this 28th day of October 1968.

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