

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-10629D1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Fidel GIL

1741

Fidel GIL

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 7 June 1968, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for 4 months plus 4 months on 12 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as an oiler on board SS MORMACLAND under authority of the document above captioned, Appellant:

- (1) on or about 22 April 1968 wrongfully failed to perform assigned duties at Rio de Janeiro, Brazil;
- (2) on or about 25 April 1968, wrongfully failed to perform duties at Santos, Brazil;
- (3) on or about 26 April 1968, wrongfully failed to perform duties at Santos, Brazil;
- (4) on or about 28 April 1968 wrongfully failed to perform duties at Santos, Brazil;
- (5) on or about 1 May 1968 wrongfully failed to perform duties at Santos, Brazil;

- (6) on or about 7 May 1968 refused to obey a direct order of the third assistant engineer to leave the engine room while the ship was at Buenos Aires, Argentina;
- (7) on or about 7 May 1968, "did...see [sic] unfit to perform...by reason of intoxication ...at Buenos Aires, Argentina, [in view of the evidence and the Examiner's findings this is construed as a typographical error];
- (8) on or about 8 May 1968 wrongfully failed to perform duties at Buenos Aires, Argentina;
- (9) on or about 13 May 1968 wrongfully failed to perform duties at Paraguna, Brazil; and
- (10) on or about 3 June 1968, deserted from the vessel at Baltimore, Maryland.

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

The Investigating Officer introduced in evidence voyage records of MORMACLAND.

There was no defense.

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

The entire decision was served on 21 July 1968. Appeal was timely filed on 6 August 1968. No material to supplement the original notice of appeal has been furnished.

FINDINGS OF FACT

On all dates in question, Appellant was serving as an oiler on

board SS MORMACLAND and acting under authority of his document.

On 22 April 1968 at Rio de Janeiro, Brazil, and on 25, 26, and 28 April and on 1 May 1968, at Santos, Brazil, Appellant failed to perform duties.

On 7 May 1968, at Buenos Aires, Argentina, Appellant failed to obey an order of the third assistant engineer to leave the engineroom, and failed to perform duties because of intoxication.

On 8 May 1968 at Buenos Aires, Argentina, and on 13 May 1968 at Paraguna, Brazil, Appellant failed to perform duties.

On 3 June 1968, Appellant deserted the vessel at Baltimore, Maryland.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that Appellant was somehow misled by having appear for the hearing, and that the Examiner's finding that Appellant removed his clothes from the vessel on his departure at Baltimore on 3 June 1968 is erroneous in that Appellant actually removed his property from the vessel at New York on 6 June 1968.

APPEARANCE: Appellant, pro se.

OPINION

I

Appellant's first basis of appeal seems to be that he was denied due process because he was advised upon service of the notice of hearing that he did not have to appear *in person* at the hearing. However, Appellant offers nothing to indicate that the outcome of the hearing would have been different had he appeared in person.

As a matter of fact, there is evidence, taken in connection with the service of the notice of hearing, that Appellant was told

two or three times, after his own inquiry, that he did not have to appear in person for the hearing, but that he had been told emphatically that if he did not appear the hearing would proceed in his absence. Since Appellant's affidavit on appeal does not challenge this evidence in the record, it is apparent that there is no reason to question the Examiner's authority to proceed in *absentia* under 46 CFR 137.20-25.

If the Investigating Officer had advised the Appellant other than he did he would have been wrong. Appellant did not have to appear for the hearing, but, as he was informed, if he did not appear he forfeited the advantages of appearance and his right to be heard.

In this case, Appellant signed, in addition to the usual form, a statement phrased in these words: "I understand if I fail to appear that the hearing will proceed in my absence."

Appellant's first ground for appeal is therefore rejected.

II

Appellant's second ground for appeal is that he did not remove his gear from the vessel at Baltimore on 3 June 1968, as alleged, but did remove it when he was signed off on 6 June 1968, and thus he cannot be found to have deserted the vessel on 3 June 1968, as alleged in the tenth specification.

The record does not show when or where the voyage ended or when or where Appellant "signed off" the articles. But it does show by substantial evidence that the voyage for which Appellant was employed was still in progress on 3 June 1968, that the vessel departed Baltimore, Maryland, en route to New York on that date, and that Appellant had departed the ship at Baltimore prior to sailing, removing all his personal effects from the vessel.

Removal from the ship or leaving of personal effects on board is not conclusive evidence as to anything. It is evidence to be evaluated by an Examiner, as to intent to leave the vessel permanently or not. Here the Examiner has accepted the evidence of removal of effects and has found it indicative of an intent not to return. Since the evidence was admissible and was sufficiently

probative, there is no reason to reverse the Examiner's findings of fact.

It may be added that Appellant's attempted confutation of the evidence, even if by affidavit, does not, on appeal after failure to appear for hearing, add merit to his case. If Appellant wished to dispute the validity of the evidence the time was at the hearing of which he was given adequate notice, not on appeal.

ORDER

The order of the Examiner dated at New York, N. Y., on 7 June 1968, is AFFIRMED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 6th day of December 1968.

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