IN THE MATTER OF LICENSE NO. 331631 MERCHANT MARINER'S DOCUMENT NO. Z-20279 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Richard W. HARRISON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1579

Richard W. HARRISON

This appeal has been taken in accordance with Title 46 United States Code 269(g) and Title 46 code of Federal Regulations 137.30-1.

By order dated 11 February 1966, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for twelve months outright upon finding him guilty of misconduct. The specifications found proved allege that while serving as chief mate and third mate on board the United States SS GEORGE S. LONG under authority of the document and license above described, Appellant

1) on or about 31 December 1965 and 2 January 1966, wrongfully failed to perform duties because of intoxication; and

2) on or about 17 December 1965, did "wrongfully take and allow to be given away with intent to deprive the owner certain ship's property."

At the hearing, appellant did not appear. The Examiner

entered plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence certain documents.

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

The entire decision was served on 28 February 1966. Appeal was timely filed on 10 March 1966 and perfected on 23 May 1966.

FINDINGS OF FACT

From 19 November 1965 through 24 January 1966, Appellant was serving as a deck officer on board the United States SS GEORGE S. LONG and acting under authority of his license.

Because of the nature of the action to be taken in this case no findings beyond the jurisdictional affirmation are made.

The charge and specifications are set forth here *verbatim*:

"CHARGE MISCONDUCT

"FIRST SPECIFICATION: In that you, while serv*in*g as Chief Mate-Third Mate on board a merchant vessel of the United States, the SS GEORGE S. LONG, under authority of your duly issued license/Merchant Mariner's Document did on or about 31 december 1965 while said vessel was in Pusan, Korea, wrongfully fail to stand your 1600-2400 watch due to intoxication and on or about 1-1-66 due to intox wrongfully fail to turn to while undocking from Pusan.

"SECOND SPECIFICATION: In that you, while serving as the above did on or about 1, 2 January 1966 while said vessel was at sea wrongfully fail to stand the 0800-1200; 2000-2400 watches by

reason of intoxication.

"THIRD SPECIFICATION: In that you while serving as the above did on or about 19 December 1965 while said vessel was intent to deprive the owner certain ship property to wit: 194 gallons of paint, and 500 feet of 5/8" wire."

Although properly served with notice Appellant failed to appear for hearing. The Examiner entered a plea of "not guilty" to the charge and all specifications and the hearing proceeded in *absentia.*

The Investigating Officer offered certain documents in evidence.

The Examiner entered an oral decision in which he found that the charge and specifications one and two were proved. As to the third specification he said, "The evidence is sufficient to prove the third specification in part, to the extent set forth in the ultimate findings of fact."

The only ultimate finding of fact dealing with the third specification reads:

> "3. Richard w. Harrison by reason of intoxication and excessive drinking was unable to properly perform his duties on 19 and 31 December 1965, and further by reason of his lack of supervision 194 gallons of ship's paint and 500 feet of 5/8" wire was wrongfully removed from the vessel."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Because of my disposition of this case it is unnecessary to spell out the arguments ably presented.

APPEARANCE: Jennings, Gartland and Tilly, San Francisco, California, by Eugene L. Gartland, Esquire

OPINION

I

Niceties of pleading are not of the essence of administrative proceedings, but slovenliness in preparation of charges should be avoided.

In this case, Appellant was charged with a blanket allegation, incorporated into all three specifications, stating that he was serving as "Chief Mate Third Mate:" Obviously he was not so serving at any given time.

The first two specifications could well have been phrased as a single allegation that on 31 December 1965 and 1 January 1966 Appellant had failed to perform his duties by reason of intoxication. If a distinction is perceived among the faults alleged, more specifications might have been framed based upon the facts.

"Due to intox" is a poor shorthand form.

The third specification contains an especially inartful statement, "take and allow to be given away with intent to deprive the owner certain ship's property . . ." This statement may have helped mislead the Examiner into the error mentioned below. It certainly is difficult to reconcile as coexisting the acts of "taking" and "allowing to be given away." The question is also left open as to what the owner was to be deprived of by the taking and allowing.

Not one of these faults would invalidate the proceedings upon a proper record, but both persons charged and examiners, if not especially the reviewer, are entitled to better expression of the specifications.

II

The Examiner's conclusion as to the third specification is that it was proved "to the extent set forth in the ultimate findings of fact."

This is insufficient.

The ultimate finding was that Appellant was intoxicated on 19 December 1965 (not charged), and that "by reason of his lack of supervision" property was removed from the ship.

One may derive from this that the specification was found not proved to the extent that it alleges a wrongful "taking" but was proved to the extent that it alleged a wrongful "allowing" of property to be taken.

As the offense was alleged against Appellant it smacks of larceny or condonation of larceny. What the Examiner has apparently found is intoxication while on duty such that larceny was not properly prevented by a ship's officer. Not "allow" is not "to fail to prevent.")

This is not what Appellant was charged with and the matter was not litigated since Appellant did not appear for the hearing. This case clearly is outside the scope of *Kuhn v. Civil Aeronautics Board* CA D.C. (1950) 183 Fed. 2nd 839.

Appellant was here found guilty of an offense not charged, of which he had no notice, and of which there was no litigation.

III

All the evidence in this case was documentary. The first document produced at the hearing was the shipping articles. The Examiner read certain relevant entries into the record. This was not in itself error, but a firmer record is preserved when a written extract is provided as an exhibit.

The first documentary exhibit admitted into evidence comprised three entries in the ship's official log book. These are numbered 1, 1A, and 1B. It appears that the log book was physically present before the Examiner. Reference was made to pages 18, 20, and 22. The Examiner stated:

"The official log book will be received in

> evidence. All pages called to the attention of the record may be duplicated by photocopy and certified." (R-4).

Then, the Investigating Officer produced what he declared to be copies of pages 18 and 22. The Examiner stated that these documents could be substituted for the originals, and that the third page could be duplicated later.

Exhibits 1 and 1A, as appended to the record are forms which, and of this I take official notice from the common practice of many steamship companies, are provided by the company to the master for record purposes. The title of the form is "Record of Official Log Book Entry."

> The directions appear on the form:
>
> "Original to Official Log Book Duplicate to Seaman Triplicate to U.S. Coast Guard Quadruplicate deck department files."

Such a document, if physically and unmistakably made part of the log book by some reliable method of attachment, may well constitute an "entry" in the log. On the other had, it may be that the actual entry in the log, hand written by the master himself, may omit certain elements, like the directions quoted above, from the form, or may have other matter not included on the form.

In this case I have no way of knowing whether the forms are accurate reproductions of the actual log entry. They are not certified to be such, and they purport, on the face, to be secondary records of entries in the log book.

It is, of course, not necessary that a copy of an entry be a "photocopy." Any method of reproduction, even a typewriting, may be used provided that, after proper comparison and certification, there may be assurance that what the reader sees is what is in the log book. There is no such assurance here.

IV

Exhibit 1B is a properly certified copy of a log entry. All

it establishes is that a "hearing" was held in the master's cabin to inquire into the loss of certain ship's property.

Exhibit 2 is a record made by the master, on company stationery, of the "hearing." The master records that inventories of stores and written statements of certain witnesses were available to him and that he questioned Appellant about the losses. Appellant denied culpability or involvement. A reference to his "condition" at the time might be construed as an admission of intoxication.

Attached to this record of "hearing" are copies of statements of witnesses and of inventories. One of the statements, that of the second mate, was sworn to at a later date before the Investigating Officer.

As if to explain his care in obtaining an oath to this statement, the Investigating Officer stated:

> "However, the only statement sworn to before me as being the truth was Mr. Namenson, the 2nd Mate, who has pertinent evidence, an eye witness account of the day in question. The only reason he is not present at this time is that due to the lapse of time between the time of pay-off and this hearing, Mr. Namenson wanted to go to Miami, and he not being particularly involved personally with the theft, or not being charged, I could see no reason in holding Mr. Namenson up almost a full work week for the purpose of attending this hearing." (R-6).

No reason is given for the delay between the service of charges, on a Monday and the hearing, on the following Friday, but as an explanation for the non-production of a key witness this is highly unsatisfactory.

The evidence which was received by the Examiner in lieu of testimony of witnesses, documents which are not part of the official Log Book and which, while not identified in any way by any competent witnesses, do not even purport to be records kept in the regular course of business, is pure hearsay. As such it cannot be the sole predicate for findings of fact.

CONCLUSION

On the record submitted for review on appeal there is no reliable, probative, substantial evidence to establish a *prima facie* case of any of the specifications. However, the Official Log Book does exist and its contents can be properly demonstrated. There are methods by which the testimony of witnesses can be obtained.

Were the charges in this case of lesser gravity my dissatisfaction with the entire handling of this proceeding might prompt a dismissal of the charges. But the character of Appellant as a licensed master and the interests of safety at sea dictate that the Investigating Officer and the Examiner be afforded the opportunity to compile a proper record and arrive at proper findings based upon competent evidence.

ORDER

The order of the Examiner dated at San Francisco, California, on 11 February 1966, is VACATED. The findings are SET ASIDE. The charges are REMANDED to the Examiner for rehearing.

W.J. SMITH
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 26th day of August 1966.

INDEX

Charges and specifications
    defective
    modified by findings, without notice

Decisions of Examiners
    based on hearsay alone, improperly

Evidence
    hearsay alone insufficient

Findings of fact
    basis for

Hearsay evidence
    substantiated evidence, lack of

In absentia proceedings
    modification of charges by findings inappropriate

Log entries
    copies, requirements for

Prima facie case
    failure to establish

Remand
    appropriateness of

Witnesses
    failure to call

***** END OF DECISION NO. 1579 *****

Top