IN THE MATTER OF LICENSE NO. 317856, MERCHANT MARINER'S DOCUMENT NO. Z-148219-D1, AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Joseph M. MAHER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1641

Joseph M. MAHER

This unusual case if before me under two aspects. There is a petition to reopen under 46 CFR 137.25-1. There is also an appeal taken under the basic statute and 46 CFR 137.30-1. Both matters are disposed of in this decision.

By order dated 2 March 1966, an Examiner of the united States Coast Guard at New Orleans, La., suspended Appellant's seaman's documents for three months, upon finding him guilty of misconduct. The specification found proved alleges that while serving as a third assistant engineer on board the United States SS STEEL NAVIGATOR under authority of the document and license above described, on or about 3 through 8 January 1966, Appellant wrongfully failed to perform his regularly assigned duties.

Appellant failed to appear at the hearing. The Examiner entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of STEEL NAVIGATOR and the testimony of the vessel's Chief Engineer.

There was no defense.

At the end of the hearing, the Examiner rendered a written 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 three months.

The entire decision was served on 29 April 1966. Appeal was timely filed on 12 May 1966.

FINDINGS OF FACT

On the dates in question, Appellant was serving as a third assistant engineer on board the United States SS STEEL NAVIGATOR and acting under authority of his license and document while the ship was in the port of Calcutta, India. On these dates he failed to perform his assigned duties without authority.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that there was no showing that no one else was available to stand the watches, and therefore there was no misconduct.

OPINION

I

The only matters necessarily to be considered *in* this action are procedural.

Appellant was served with charges on 15 February 1966, at New Orleans, La., for hearing to be held on 16 February 1966 in that city. When Appellant did not appear, the hearing proceeded in *absentia* on 16 and 17 February 1966.

The Exam*in*er entered his decision on 2 March 1966, and, because of Appellant's absence, forwarded the original to Coast

Guard Headquarters for future service.

It appears that one Paul C. Matthews, Esq., of New York, represented himself, by letter of 25 April 1966, to be authorized to accept service of the decision for Appellant. The Examiner sent a duplicate original to Mr. Matthews on 26 april 1966.

I am not sure that the Examiner acted with propriety in undertaking to deal with a third party as attorney with no authorization from Appellant; however, Appellant's subsequent conduct has removed any possibility of error.

Mr. Matthews then filed a notice of appeal, sent directly to me by letter of 11 May 1966. This letter intimated that Appellant had thought that his hearing was to have been held in New York instead of New Orleans. No action was instituted on this appeal because Appellant did not comply with the order.

The record is barren of any other action by Appellant, such as inquiry at New York about his hearing, between 15 February 1966, and 9 September 1966, when he appeared at New York accompanied by Ned R. Phillips, Esq., at which time he was personally served with a duplicate original of the decision. On advice of counsel, Appellant refused to surrender his license and document in compliance with the order.

Counsel Phillips then wrote asking that Appellant be permitted to deposit his license and document at New York, with an examiner at New York being authorized to issue temporary documents. Accompanying this were a notice dated 12 September 1966 to the effect that Pressman & Scribner had supplanted Paul C. Matthews as counsel of record, and a petition to reopen the hearing.

On 26 September 1966, counsel was advised that the documents should be deposited in New York, with any application for temporaries to be addressed to the Examiner of record.

On 28 September 1966, Appellant deposited his license at New York, together with a receipt showing application for a duplicate USMMD.

II

The notice of 12 September 1966 by Appellant's then-acknowledged counsel ratifies the standing of Paul C. Matthews, Esq., at the time he undertook to accept service of the decision for Appellant, and validates the appeal filed by him.

III

Insofar as the appeal intimated that Appellant had misunderstood the nature of the proceedings at New Orleans and had mistakenly believed that his hearing was to have been held at New York it is similar to the grounds for reopening urged by present counsel of record.

It is most significant that the only action taken by or on behalf of Appellant between the date of service of charges, 15 February 1966, and 9 September 19668 was a voluntary offer to accept service of the decision addressed to the Examiner at New Orleans. This belies any later claim that Appellant believed that the hearing was to have been held at New York and that it would not be held in *absentia* at New Orleans.

Further, no special consideration for Appellant is indicated in view of his display of contempt for the proceedings. After due notice to his counsel in April 1966 of the contents of the Examiner's order, he took no steps to comply until 9 September 1966. Even then, in the presence of his new counsel he refused to comply with the order.

The difficulties in this case have been caused by Appellant and his own failure to exhibit good faith in his dealings with Coast Guard official.

IV

On a petition to reopen, Appellant cannot argue that there is "newly discovered evidence" when he failed to appear for hearing on due notice.

V

On the merits of the case Appellant argues that there was no evidence to show that there was not an engineer available to stand watches which he missed, and that there was thus no misconduct established. This contention has no merit whatsoever.

The record is clear that without authority he failed to stand his assigned watches. This is misconduct.

If the record also showed that his failure left the ship without a watch this would be an aggravating circumstance. Absence of aggravating circumstances does not negative the basic misconduct.

CONCLUSIONS

I conclude that there is no merit to Appellant's petition to reopen the hearing and that the petition must be denied.

I conclude also that the case is properly before me on appeal and that the matter raised on appeal give no reason to disturb the findings or order of the Examiner.

ORDER

Appellant's petition to reopen os DENIED.

The order of the Examiner dated at New Orleans, Louisiana, on 2 March 1966, is AFFIRMED.

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

Signed at Washington, D. C., this 5th day of July 1967.

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***** END OF DECISION NO. 1641 *****

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