In the Matter of Merchant Mariner's Document No. Z-20966
Issued to: ANIBAL VIRNET

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

349

ANIBAL VIRNET

In The Matter of
Merchant Mariner's Document No. Z-20966
Issued to: ANIBAL VIRNET
Merchant Mariner's Document No. Z-669069
Issued to: CLARENCE DEANE MILLER
Merchant Mariner's Document No. Z-630431-D1
Issued to: JOHN HENRY WHEATLEY
Certificate of Service No. E-61599
Issued to: MANCEL S. HAWKINS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

349

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 30 and 31 March, 1949, each of the above-named Appellants appeared before an Examiner of the United States Coast Guard at Seattle, Washington, to answer a charge of "misconduct" supported

by the following specification:

> "In that you, while serving (in the stated individual capacity) on board a merchant vessel of the United States, the MV LUCIDOR, under authority of your duly issued Merchant Mariner's Document (or Certificate, as applicable) did, on or about 25 January, 1949, unlawfully delay the sailing of said vessel from a domestic port by reason of failure to report aboard in accordance with posted sailing orders, such being contrary to 46 U.S.C. 701."

At the hearing, Appellants were given a full explanation of the nature of the proceedings and the possible consequences. They were represented by counsel of their own choice. All four of the Appellants pleaded "not guilty" to the specification and charge. After receiving testimony and documentary evidence and when the Investigating Officer and Appellants' counsel had completed their closing arguments, the Examiner found the specification and charge "proved" as to each Appellant.

He then entered an order suspending Merchant Mariner's Documents Nos. Z-20966, Z-669069, Z-630431-D1, Certificate of Service No. E-61599, and all other valid licenses, certificates of service or merchant mariner's documents held by any of the Appellants, for a period of three months with six months' probation from 31 March, 1949.

From that Order, this appeal has been taken and Appellants contend in their joint appeal that:

1. The Examiner was without jurisdiction to make the order because the charge and specification define the offense specified in 46 U.S.C. 701 (Second). This statute sets forth the penalty for its violation and no other penalty can be imposed for committing this offense because it is a penal statute and must be strictly construed.
2. This proceeding violates the prohibition against "double jeopardy" contained in the Fifth Amendment to the Constitution of the United States since the Appellants had already been punished by being logged for two days pay for the same offense.

3. The evidence does not support the findings as to the charge and specification in that the sailing of the MV LUCIDOR was not delayed by any act of the Appellants and their acts were not "willful".
4. This proceeding is the result of a labor dispute between the union and operators of the vessel. It is the policy of the Coast Guard not to interfere in such cases. And it is also the policy not to institute hearings where no formal complaint, in such cases, is in evidence.

There is no record of any previous disciplinary action having been taken against any of the Appellants by the Coast Guard.

FINDINGS OF FACT

On or about 24 and 25 January, 1949, each Appellant was serving as a member of the crew in the stewards' department on board the American MV LUCIDOR, under authority of their respective documents or certificates of service, while the ship was at Seattle, Washington.

By the afternoon of 24 January, 1949, there was posted at the gangway of the vessel a notice in writing on a blackboard that the vessel was scheduled to sail for Whittier, Alaska, at midnight of that day. At 6:00 P.M. on that day, all of the Appellants, having concluded their regular duties for that day, left the ship. Admittedly, they saw the sailing notice and understood it to mean that they should be back aboard before 2400. They had no duties to perform for the balance of that day and except for appearance on board before midnight, none until 6:00 A.M. on 25 January, 1949. (R. 59). There is no dispute that the Appellants did not return to the ship until between 5:30 and 6:00 A.M. on 25 January, 1949.

It is admitted that the Appellants did not return to the vessel prior to midnight, due to orders received from their union. Such orders were issued because of a disagreement concerning wages said to be owed the Appellants for services performed on the preceding trip of the LUCIDOR. Meetings with regard to this pay dispute were being held by the Appellants' union and the operator of the vessel on the evening of 24 January, 1949 (R. 51).

After the Appellants had returned to the ship, they assumed

their full duties and performed these duties well and capably for the full voyage. (R.36).

At 10:30 A.M. on 25 January, 1949, all of the Appellants were logged by the Master of the vessel and fined two days' pay for failure to report aboard at the posted sailing time.(P. 4, 25, 26, 38, 39).

Although originally scheduled to get underway at midnight of the 24th of January, 1949, the LUCIDOR did not actually sail until approximately 2:00 P.M. January, 25th. The Master of the ship, Oscar Peterson, testified that the vessel was ready to leave at the originally scheduled time, but did not do so because these four men from the stewards' department were not on board, (R. 34); that the presence of these men was essential to the manning requirements for the voyage. (R.34,37). The Master testified he did not know why the sailing was so delayed after these Appellants returned on board; that something stopped the sailing, but he did not know the cause, or from whence the order came. (R. 41).

Opposed to this, there is some evidence from the persons charged that the ship was not ready to sail at midnight of the 24th. The Chief Mate's leg book indicates that work was being performed on board the vessel until 6:00 A.M. on 25 January, 1949, (R. 37); and there is testimony stating that longshoremen were leaving the ship when the Appellants returned aboard at approximately 6:00 A.M. (R.51). This is explained by the Master (R. 37,38) as work of rigging a catwalk over deck cargo, which is usually handled by the crew after a vessel is under way, but when in port such detail is performed by stevedores. (R. 38).

OPINION

The first point made in the appeal is not a novel one in cases of this character. It may be disposed of by observing that the cases upon which Appellants rely were decided prior to the Amendment of 1936 which completely overhauled and revised the procedure with respect to investigations of marine casualties and disciplinary action under R.S. 4450 (46 U.S.C. 239). The Coast Guard and its predecessor authority have consistently held that the statute as amended in 1936 is remedial and not penal in nature.

This position is fortified by the statute itself which provides for the referral of any evidence of criminal liability to the Department of Justice for action by that Department, thus recognizing and providing for the separability of penal from remedial or administrative functions. Moreover, the regulations adopted pursuant to Congressional mandate, provide that they should be liberally construed to insure just, speedy and inexpensive determination of the issues presented.

Even if it be conceded that the specification in the case here on appeal is inartistically drawn (to include reference to 46 U.S.C. 701), it may be noted that the statute cited carries no penalty, monetary or otherwise, for unlawfully delaying the sailing of a vessel because its seamen fail to return in time to make a scheduled departure.

With respect to the second point of the appeal, no violation of the Fifth Amendment is, or can be, present in this case. The Fifth Amendment to the Constitution is addressed to the exposure of an individual to peril of "life or limb" twice for the same offense. No such peril is present here; the most serious result possible to flow from this proceeding is revocation of a document which permits a seaman to sail on American merchant vessels -- a document which, under the law authorizing its issuance is

> "subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title." (46 U.S.C. 672h)

No good purpose will be served by multiplying the judicial authorities which have defined "double jeopardy" or further distinguishing administrative proceeding from those cases in which the doctrine would be properly applied. In Helvering v. Mitchell, 303 U. S. 391, it was said:

> "Remedial sanctions may be of varying types. One of which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted." Citing cases involving (a)

> deportation of aliens, and (b) disbarment.

Again, at p. 404, the Court stated:

> "*** in civil enforcement of a remedial sanction there can be no double jeopardy."

Passing over the third point for the moment, and considering the fourth point stressed in the appeal, I note considerable discussion in the record was addressed to Navigation and Vessel Inspection Circular No. 67 relative to the discontinuance of routine boarding. Counsel also objected to the refusal of the Investigating Officer or Examiner to disclose the source of the complaint. These two objections, are without merit in that the circular referred to merely discontinued a former policy of regular routine boarding on arrival of a vessel due to lack of personnel and because of slack shipping conditions.

Although these instructions contemplate that offenses of a miner character, including failures to join in domestic ports, are to be ignored, it was not intended to operate as bar to proceedings under R.S. 4450 where members of a whole department absent themselves without leave resulting in a delay of sailing of the vessel. Whether such absence was due to a wage dispute between the union and operators of the vessel is immaterial. In the *Algic* case, 95 F (2d) 784, 792, the Court said:

> "When articles are signed by a crew for a voyage, all bargaining, individual or collective, is ended for the duration of the voyage. A contract is made, binding upon both owner and seaman, that is lawful if the articles comply with the statutes and should be lived up to scrupulously."

The Examiner in the case before me observed:

> "It is the opinion of this Examiner that, having once signed the Shipping Articles, the seamen's primary duty under normal circumstances, rests with his ship. To fail in that duty makes him

> responsible under the laws for his seaman's documents."

With that statement, in the light of well established judicial authority, I am in hearty accord.

Referring, now, to the third ground of appeal, I am not satisfied that the absence of Appellants resulted in a delay in the sailing of the vessel has been adequately proved. It is true that the Master testified the vessel would have sailed at midnight had the Appellants been on board, but this testimony is weakened by the fact that he could not explain why the vessel did not actually sail until about 2:00 P.M. on the following day, some eight hours after the Appellants had returned to the vessel. In response to the question as to the existence of any reason why the vessel could not have sailed when the Appellants came aboard, the Master replied: "No, something stopped it - where it came from, I don't know."

In the absence of an explanation as to what that "something" was, who was responsible for it, and when it developed, - and of all persons the Master should be familiar with these details - the record leaves much to be desired in establishing that the "something", in order to prove the specification sufficiently, did not occur before midnight. An attempt to develop the time situation was unsuccessful on cross-examination of the Master because of unresponsive answers and objections to questions which were sustained. No effort was made by redirect examination of the Master to bring out why the vessel did not sail until 2:00 P.M. on 25 January, 1949. Were it not for the factors brought out in the following paragraph, I would be inclined to remand this case to the Examiner for continuance of the proceedings by the taking of further testimony and other evidence to establish whether the impediment which prevented the vessel's sailing until 2:00 P.M., 25 January, 1949, occurred before midnight on 24 January, 1949, or after that time.

All of the Appellants were logged by the Master of the vessel and fined two days' pay for failure to report aboard at the posted sailing time. In view of all the circumstances disclosed by the record, I am of the opinion that this action represents an adequate deterrent for the Appellants' conduct without the necessity of further proceedings under R.S. 4450. In reaching this conclusion,

I am also influenced by the fact that all of the Appellants otherwise have good records in the merchant marine, and by the favorable comment by the Master regarding their services on board his vessel after they reported on 25 January, 1949. Accordingly, by my following order, I am directing these proceedings against all of the Appellants to be dismissed. However, I wish to emphasize that this action is being taken on the above mentioned grounds alone, and not because of any of the points raised in Appellants brief.

ORDER

The order of the Coast Guard Examiner dated Seattle, Washington, on 31 March, 1949, is vacated and set aside. The case is remanded to said Examiner with instructions to dismiss the charge and specification lodged against each Appellant arising from the incidents herein discussed.

MERLIN O'NEILL
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D.C., this 29th day of September, 1949.

***** END OF DECISION NO. 349 *****

Top