

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

15 JAN 1945

CM ETO 5607

UNITED STATES

v.

Second Lieutenant WILLIAM H.
BASKIN (O-533408), Company M,
117th Infantry

30TH INFANTRY DIVISION

Trial by GCM, convened at Alsdorf,
Germany, 22 October 1944. Sentence:
Dismissal, total forfeitures and con-
finement at hard labor for two years.
Eastern Branch, United States Discip-
linary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 64th Article of War.

Specification: In that Second Lieutenant William H. Baskin, Company "M", 117th Infantry, having received a lawful command from Lieutenant Colonel Samuel T. McDowell, his superior officer, to go forward to the Regimental Command Post, did, one mile west of St. Barthelmy, France, on or about the 8th day of August 1944, willfully disobey the same.

5607

(248)

CHARGE II: Violation of the 75th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that * * * did, one mile east of L'Epine L'Orbiere, France, on or about the 16th day of August 1944, by his neglect endanger the safety of his platoon, which it was his duty to defend, in that he left his platoon without issuing any orders and failed to return until the following day.

He pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I, except the word "willfully", of the excepted word not guilty, not guilty of Charge I, but guilty of a violation of the 96th Article of War, not guilty of Specification 1 of Charge II, guilty of Specification 2 of Charge II, and Charge II. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 30th Infantry Division, approved the sentence but reduced the period of confinement at hard labor to two years and forwarded the record of trial for action under Article of War 48.

The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the finding of guilty of Specification 2 of Charge II as involved a finding that accused did at the time and place alleged by his neglect endanger the safety of his platoon, which it was his duty to defend, in that he left his platoon without issuing any orders and failed to return until the following day, in violation of Article of War 96. The confirming authority also confirmed the sentence, notwithstanding its gross inadequacy as punishment for an officer convicted of such shameful and serious misconduct, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. a. Evidence for the prosecution under the Specification of Charge I:

On 8 August 1944 in the vicinity of Le Vallee (near St. Barthelmy), France (R8), the 117th Infantry was in contact with the enemy with "one company on the line with the First Battalion" and two companies deployed to make contact with a unit of its left (R7).

5607

(Accused testified that the unit on the left was the 39th Infantry (R24)). Accused had been appointed liaison officer between the 117th and 39th Infantry and "did a good job with reference to the information he brought". One evening, after he had returned from this duty, Lieutenant Colonel Samuel T. McDowell, 3rd Battalion, 117th Infantry, "directed Captain Phillips to notify Lt. Baskin he was wanted at the Regiment" and "heard Captain Phillips give Lt. Baskin the order to report there". McDowell learned accused did not go to the Regiment when "Major Hill, Regimental S-3 called and said Lt. Baskin had not been there". McDowell then found that accused was at Company M's command post, called Captain Thomas, commander of Company M, told him Lt. Baskin was to report to the Regiment immediately (R6,7) and

"told him to tell Baskin that it was an order for him to report to the Regiment. Captain Thomas called back in a few minutes and said there was mortar fire and Lt Baskin said he could not get back to the Regiment. I replied that it was a direct order and he would go to the Regiment at that time" (R7-8).

He did not give accused the order himself but "heard Captain Phillips give him the order to report to the Regiment in my presence" (R8). Part of the foregoing hearsay testimony, to which there was no objection, was affirmed by Captain William H. Thomas, Jr. (R8), who testified,

"Colonel McDowell, called me on the telephone and told me to have Lt Baskin report to the Regimental C.P. I turned around and told him Lt Colonel McDowell said for him to report to the Regimental C.P." (R9).

Accused did not say anything at that time but

"later on outside, he said the artillery was coming down so bad, he thought it would be impossible to get to the Regimental C.P.".

From Company M's command post to the Regimental command post it was about a mile and a half over a hard surface road on which "it was quite easy for a vehicle to travel" (R9). At Company M's command post, "not more than two or three shells * * * fell during the night" (R10).

b. Evidence for the prosecution under Specification 2, Charge II:

On 16 August 1944 (R13) about one mile east of L'Epine L'Orbiere, France (R14), First Lieutenant Michael Barron, 117th Infantry, platoon leader of Company M's mortar platoon (R10-11)

5607

CONFIDENTIAL

(250)

turned over the platoon to accused and went forward with Lieutenant Wagoner "on a reconnaissance and located" position for the mortar platoon. He then sent back a guide to "tell Lt Baskin to bring the platoon up", told the guide where the gun positions were to be put and

"also told him to tell Lt Baskin what I had told him and to get the mortar platoon dug in and lined up until we could give them the firing orders" (R13).

He did not see accused again until the next day or the day after that (R14). When the guide returned with the platoon with accused in charge, the guide, according to the platoon sergeant, Technical Sergeant James M. Barnett,

"gave us the gun position and we got them in place and Lt. Baskin left immediately and I did not see him again" (R18).

He gave no orders and did not say where he was going (R18,19).

Lieutenant Barron discovered accused was not with the platoon when "some of the section wanted mail censored and they came around wanting to know where he was" (R14). On the same day, First Lieutenant Albert J. Herman, platoon leader of the second platoon of Company M, was with his unit which was in a defensive position attached to Company I (R19-20). He saw accused at Company I's command post and had a conversation with him that

"ran something like this - I knew that it did not make any difference with me but it seemed funny to me that he was not with his own section. I asked him about it and he made a few evasive answers and I felt it was none of my business, so I did not press the matter further" (R20).

Accused was there for a period of three or four days,

"Just hanging around the C.P. It was a defensive situation and the C.P. was established there and he was living with us all that time" (R21).

Company I was not then engaged with the enemy (R21).

4. a. Evidence for defense under Specification of Charge I:

After being advised of his rights (R21-22), accused testified that

5607

CONFIDENTIAL

(251)

"Colonel McDowell called me and I reported to him and he asked me to act as liaison officer between the Battalion and the unit on our left - the 39th Combat team, which was about 2,000 yards away. I was furnished a jeep and driver from the section to use in this work. The evening I was accused of disobeying the order, I returned about dusk from across the valley where the 39th was with the situation for my battalion. I had my map on which I had used my own private code, so that if it was captured, it would be more difficult for them to read. From my map I could put it on any other situation map. I returned to Colonel McDowell about dusk and explained my map to him and gave the situation, which was static and contained no new information, to him. I showed him the situation of the 39th Infantry Combat team--by battalions and companies. After this I left and was informed by the Captain that I was to report to Regiment. I was not informed that I was a carrier or liaison officer from the Regiment but rather that I was to work from the Battalion to the unit across the valley. Captain Phillips told me he wanted me to give the information to S-3 at the Regiment. By that time it was dark - about 10:30. My jeep and driver had returned to the motor pool and the driver was tired as he had worked all day, so rather than get him up, I called Major Hill at the Regiment by telephone. I could not get him by telephone - a direct line to him, so I gave the report to the switchboard operator for S-3, by saying the situation was the same" (R22-23).

He understood he was directed to get the information to "S-3". While there was mention of very heavy artillery fire on the road, that was not the reason he did not go "down there".

"There was no heavy artillery fire that night. My driver and jeep were in the motor pool and he had been working hard that day and it was much simpler to just call the negative report to S-3 than waking him up. Also the enemy had the high ground between us and the Regiment and could observe us and as the wire ran right to the Regiment, it seemed best to call" (R23).

follows: Cross-examined, accused gave answers to questions as

CONFIDENTIAL

5607

(252)

- "Q. When you came to the C.P., Captain Phillips told you to go to Major Hill with the information. You testified that you tried to telephone.
- A. I estimated the situation and decided it would be better to telephone the report in.
- Q. Did Major Phillips tell you to go there?
- A. Not in that way.
- Q. If he did not tell you to go there, why did you have to make an estimate?
- A. I merely telephoned because I figured it was the most logical thing to do.
- Q. After telephoning did you go to M Company's C.P.?
- A. Yes, sir.
- Q. Did Captain Thomas tell you to go to the Regiment?
- A. I don't remember Captain Thomas' part in this.
- Q. What?
- A. I remember his testimony but I don't remember the part he played in the action.
- Q. When you went to M Company's C.P., you did not get a telephone call from Colonel McDowell to go to the Regiment?
- A. I can't recall when I went back to the C.P." (R25).

The following questions by the court and accused's answers are relevant:

- "Q. Concerning the Specification for Charge I, you said your instructions were to get the information to Major Hill, S-3?
- A. Yes.
- Q. How many times did you call before you gave the information to the telephone operator?
- A. I don't know - I couldn't get him, so I gave the switchboard operator the message for Major Hill.
- Q. Did you check later to see if he got it?
- A. No sir. The next morning he said he wanted to see me though.
- Q. What did he say?
- A. He did not mention receiving the message" (R27).

5607

b. Evidence for defense under Specification 2 of ChargeII:

Accused testified that

"We had come through the battle around St. Clair the previous evening. We moved back about 1,000 yards to spend the night. The next afternoon after lunch, Wagoner and the other section leader came in with the information of the reconnaissance, route, gun placements and direction of fire. He did not take me with him on the reconnaissance and did not tell the situation to me. He was never talkative with me and never spoke with me about the situation. I did not know the situation except that the unit was pinched out and was moving up in a defensive position. I assembled the platoon and with Norton as a guide, led them down the road through several fields to a sunken trail and then Norton lost his direction. I stopped the platoon and told Norton to make a reconnaissance. He did and got his bearing and led us to the field to put the guns in. Norton told the section sergeants where the platoon leader stated he wanted each section located. The section sergeants placed their guns and the men dug in in the section areas assigned to them. I watched them. We were not given any firing orders then. I saw that all guns were laid in the proper directions and dug circular holes for firing in any direction---rather saw that the holes were dug. The mortars were dug in and the men dug in along the hedge rows and covered their holes. They camouflaged the mortars with straw that was in the weat field we were in" (R23-24).

On cross-examination, accused was asked if he went to Company I "to get the situation". Accused answered, "Yes sir" and, asked why he stayed over at this company, stated

"I received the situation from I Company's Commander and I was told by him that we were pinched out and were in a defensive position and it would probably turn in to a rest period, which it did. When he told me the situation, the C.P. house was about 200 yards from the mortar area" (R25).

Company I was in a house and

"Lt Herman was in a barn which adjoined the house and I asked if I could sleep there and he said sure. I had no blankets and he did" (R26).

5607

CONFIDENTIAL

(254)

There were answers by accused to questions of the court as follows:

- "Q. When you took your platoon in the mortar position on the 16th, were you the only officer with the platoon?
A. Yes sir.
- Q. Was it your understanding that the platoon was under your command?
A. No, under the platoon leader's command. I wasn't there when he took them over. I saw him come in though.
- Q. Did you let him or anyone else know where you had gone?
A. He called for me and said he had some mail for me to censor. He did not mention anything about his firing plan (R27).

5. With reference to the prosecution's evidence under the Specification of Charge I, considerable hearsay evidence was received, without objection, as to Lieutenant Colonel McDowell's telephone conversation regarding his order that accused report to the regimental command post. Defense counsel should have objected to this evidence. However, disregarding this hearsay evidence in its entirety, since it was clearly shown by the testimony of Thomas, accused's company commander, that the order was transmitted by him to accused and accused's own testimony indicated that he received such order, no substantial right of accused was thereby injuriously affected.

6. The evidence for the prosecution under the Specification of Charge I did not clearly establish that accused failed to obey the alleged order. No motion was made by the defense for a finding of not guilty of this Specification when the prosecution rested, but the testimony of accused showed clearly that he did receive the order and never complied with it. As accused's rights to testify in his own behalf or to remain silent were fully explained to him by the court, no substantial right of accused was injuriously affected by the failure of the defense to make a motion for a finding of not guilty. It was apparent that the order was one to be obeyed immediately and the statement of accused, described in Thomas' testimony, made "later on outside" when he

"said the artillery was coming down so bad, he thought it would be impossible to get to the Regimental C.P."

disclosed at least an unpardonable and unwarranted delay in carrying out the order. The court could properly have called for additional evidence had accused elected to remain silent (MCM, 1928, par.75, pp.58-59).

5607

CONFIDENTIAL

7. When Captains Thomas and Abbes were respectively called to testify as prosecution witnesses, the defense announced in each instance that it was taken by surprise and did not know that the witnesses would appear (R8,15). Neither officer's name is included among prosecution's witnesses on the charge sheet. Defense counsel did not object to testimony of either witness or ask for continuance but stated he "would like it to go in the record" that each was a "surprise witness". As the testimony of Captain Abbes concerned only the allegations in Specification 1 of Charge II of which accused was found not guilty, the Board of Review is of the opinion that no substantial right of accused was injuriously affected by the fact that his name did not appear in the charge sheet. In regard to the status of Captain Thomas as a "surprise witness" to the defense, the evidence for the prosecution shows that he was the company commander of accused, that he transmitted to accused the order from Lieutenant Colonel McDowell while accused was at the company command post, that accused thereafter reported to Captain Thomas that "the artillery was coming down so bad, he thought it would be impossible to get to the Regimental C.P." Thomas' part in transmitting the order of Colonel McDowell to accused was so positively shown by the prosecution's evidence that accused's failure to remember "Captain Thomas' part in this" is not convincing. Upon all the evidence it is not considered that the defense was unprepared for Thomas' testimony or that it was properly entitled to describe him as a "surprise witness". In the opinion of the Board of Review, no substantial right of accused was thereby injuriously affected.

8. With reference to Charge I and Specification, in order to sustain a conviction of the offense of willful disobedience of the lawful command of a superior officer in violation of the 64th Article of War the burden is upon the prosecution to prove the following elements:

- "(a) That the accused received a certain command from a certain officer as alleged;
- (b) that such officer was the accused's superior officer; and (c) that accused willfully disobeyed such command" (MCM, 1928, par.134b, p.149).

It is immaterial that the order was not given to accused by McDowell personally. A showing that the order emanated from him was sufficient (Winthrop's Military Law and Precedents, Reprint - p.574; MCM, 1928, par.134b, p.149). It was within the province of the court to find him guilty as it did, only of the lesser included offense of failing to obey the order in violation of Article of War 96. The record is legally sufficient to support the findings of guilty under the Specification as amended in violation of the 96th Article of War.

5607

CONFIDENTIAL

(256)

9. With reference to the approved findings of guilty under Charg II, Specification 2, in violation of Article of War 96, the evidence showed clearly that accused left his platoon, which it was his duty to defend, without issuing any orders and failed to return under the circumstances alleged. The gravamen of his offense was leaving the platoon without issuing necessary orders operative during his absence, regardless of whether he left with or without proper authorization. The presence of the enemy in the vicinity was indicated and the safety of the platoon and the morale of its members were jeopardized by such conduct. It was a disorder and neglect prejudicial to good order and military discipline under the 96th Article of War (Winthrop's Military Law and Precedents - Reprint - 1920, p.726). Where an offense is necessarily included in the phraseology of a specification under Article of War 75, a conviction under the 96th Article of War or other appropriate article is proper (CM ETO 2212, Coldiron and cases therein cited; CM ETO 5114, Acers). The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty under Article of War 96.

10. The charge sheet shows that accused is 20 years eleven months of age and was commissioned a second lieutenant 23 November 1943, at Fort Benning, Georgia. No prior service is shown.

11. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence.

12. Dismissal is authorized, with total forfeitures and confinement at hard labor, upon conviction of a violation of Article of War 96. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

R. A. [unclear]

Judge Advocate

[unclear]

Judge Advocate

Edward L. [unclear]

Judge Advocate

5607

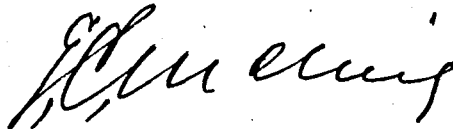
CONFIDENTIAL

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. **15 JAN 1945** TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant WILLIAM H. BASKIN (O-533408), Company M, 117th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as approved, and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5607. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5607).



E. C. McNEILL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 23, ETO, 21 Jan 1945)