

U.S. Department
of Transportation

**United States
Coast Guard**



COMMANDANT
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16731
July 2, 2001

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV97006786
[REDACTED]
M/V [REDACTED]
\$100.00

Dear [REDACTED]:

The Commander, Coast Guard Pacific Area, Alameda, California, has forwarded the file in Civil Penalty Case MV97006786, which includes your appeal on behalf of the operator of the M/V [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$100.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC § 2302(a)	Operating a vessel in a negligent manner that endangers life, limb or property of a person.	\$100.00

The violation is alleged to have occurred on December 23, 1996, when the 776 foot Liberian-flagged container ship, M/V [REDACTED], allided with Buoy No. 4 at the mouth of the Alameda Estuary, while enroute to the Oakland Inner Harbor approach channel. At the time of the allision, Captain [REDACTED], a San Francisco bar pilot, licensed by the State of California, was directing the navigation of the vessel.

On appeal, you deny the violation and argue that there was a lack of substantial evidence supporting the Hearing Officer's decision that Captain [REDACTED] was negligent in the operation of the M/V [REDACTED]. You also assert that the "USCG. . .has no subject matter jurisdiction even to consider disciplining a State-licensed pilot on a foreign vessel on California territorial waters. . .[and that] they are estopped [from]. . .consider[ing] a case after the IRC has acted." Next, you contend that "whether one calls the controlling principle double jeopardy or collateral estoppel," the Coast Guard is precluded from acting against Captain [REDACTED] where the State has already acted. Finally, you assert that 46 USC §2302(a) does not apply to Captain [REDACTED] because he is not considered an "operator" under the statute. Your appeal is denied for the reasons described below.

July 2, 2001

Before I begin discussing the substantive issues of the case, I believe that a brief recitation of the facts is in order. On December 23, 1996, Captain [REDACTED] boarded the M/V [REDACTED] at the offshore pilot station prior to bringing the vessel into the Port of Oakland, California. At all relevant times, the weather was partly cloudy, there was a full moon, and the wind was blowing WSW at approximately 5 to 10 knots. The vessel's bridge communications were good and all equipment was fully functional. Captain [REDACTED] was provided the ship's particulars, including its maneuvering and engine characteristics. The voyage occurred during maximum flood current, when tides were unusually strong. During the transit, Blossom Rock Buoy was passed close to port because of the strong flood current felt abeam, which was causing the ship to be set sideways. He next reduced speed to dead slow ahead, though it appears the vessel's speed was not significantly reduced as he passed under the Bay Bridge. After passing the Bay Bridge E Tower, Captain [REDACTED] felt the vessel noticeably being set to starboard. He adjusted course to favor the north side of the channel to offset the current and planned to pass 50 to 75 feet off Buoys 1 and 1B in the Bar Channel. When the vessel was abeam Buoy 1B, an order for slow ahead was given and hard right on the rudder. Because of the strong current passing down the east side of Treasure Island, probably caused by recent rain, the vessel continued to be set to starboard, eventually alliding with Buoy 4. The buoy slid down the starboard side of the vessel while the engines were stopped. Although dragged off-station, it remained afloat and lighted.

Since jurisdictional issues may obviate review of substantive issues, I will first address your contention that the Coast Guard does not have subject matter jurisdiction to assess an administrative civil penalty against a pilot licensed by the State of California while he is serving as a compulsory pilot on a foreign vessel on state waters. You argue that, since 1789, the states have had exclusive jurisdiction over pilots and pilotage on state waters (with two exceptions, not relative to this case). This exclusivity is currently embodied in 46 USC §8501(a) and was the premise of the 1974 case *Soriano v. United States*, 494 F.2d 681, 1974 AMC 283. Arguing against a case relied upon by the Coast Guard holding that state pilots are subject to Coast Guard jurisdiction for the purposes of civil penalty assessment, you claim that *Williams v. Department of Transportation*, 781 F. 2d 1573 (11th Cir. 1986) "fails to avert the specific language of preemption in 46 USC 8501(d), 8502, 8503, and 9306." You conclude that under 46 USC §8501(a), a preclusion of the state's exclusive rights must be specifically stated in the statute and that, as a consequence, "*Williams* is incorrect to hold otherwise." I disagree with your jurisdictional analysis for the reasons that follow.

While *Soriano* clearly places limits on the Coast Guard's authority to regulate State-licensed pilots, I am not persuaded that either 46 USC §8501 or *Soriano* restrict the Coast Guard's civil penalty action in this matter. Rather, I see *Williams* as providing strong support for the Coast Guard position. *Soriano* and the other cases that you cite in your brief all pertain to the Coast Guard's authority to suspend/revoke merchant mariner licenses, including those held by pilots, under the authority of 46 USC §239 (now 46 USC §7703). Under this section, the Commandant was authorized to establish rules and regulations regulating mariner licenses for certain acts committed while the mariner was "acting under authority of their federal license." The federal regulation at issue in *Soriano* defined this term broadly to include situations where the federal license was required as a condition of employment. The *Soriano* court held that this particular Coast Guard regulation was invalid because it exceeded the authority provided by the statute.

July 2, 2001

Williams, however, makes clear that State-licensed pilots are **not** totally exempt from Coast Guard regulation, even for acts committed outside the parameters of their federal license.

In *Williams*, a State-licensed pilot sought to enjoin the Coast Guard from issuing a letter of warning following administrative civil penalty action that alleged negligent operation of a vessel under 46 USC § 1461(d), the predecessor statute to 46 USC §2302(a). At the time, Captain Williams was not operating under the authority of his federal license. The Court of Appeals for the Eleventh Circuit ruled in favor of the Coast Guard and allowed the assessment of the penalty. Addressing the very issue you raise on behalf of Captain [REDACTED], the Court ruled that 46 USC §211 (the predecessor to 46 USC §8501) did not grant states the exclusive power to regulate pilots, but merely allowed state regulation until Congress provided otherwise. After examining 46 USC §1461(d), the Court found Congressional intent that pilots were at all times to be included within the ambit of the prohibition. In a footnote, the Court specifically found that Congress had clarified this area when 46 USC §211 was recodified as 46 USC §8501(a). Section 8501(a) begins with the clause “except as otherwise provided in this subtitle.” According to the Eleventh Circuit, since 46 USC §2302(a) is within “this subtitle”, Congress specifically provided the Coast Guard with the authority to take civil penalty action against pilots for negligence, regardless of what license they were operating under at the time. Thus, I find *Williams* controlling and will uphold the Coast Guard’s jurisdiction to bring this civil penalty action against Captain [REDACTED].

Next, I address your contention that the administrative penalty proceedings against Captain [REDACTED] should be barred under the doctrines of collateral estoppel and double jeopardy. You contend that because the California Board of Pilot Commissioners has already acted in this matter and found that no pilot error had occurred, the Coast Guard is estopped from disciplining Captain [REDACTED] for the same actions. You contend that the State Board is the virtual representative of the Coast Guard and that, therefore, they are “estopped to consider a case after the IRC has acted and to make any findings or conclusion contrary to those of the IRC.” I disagree with your contentions and find that the Hearing Officer was correct to conclude that we are dealing with two distinct sovereigns and that, as a consequence, neither double jeopardy nor collateral estoppel can attach. The waters of the Oakland Inner Harbor approach channel are subject to concurrent state and Federal jurisdiction. As a result, the Coast Guard has jurisdiction to assess a civil penalty against Captain [REDACTED] without regard to any action by the State of California, particularly one that is against the license issued to the captain. Further, a federal prosecution of the same conduct, subsequent to state prosecution, does not offend the double jeopardy clause. The dual sovereignty possessed by the state and the federal government over matters involving pilots allows the exercise of concurrent jurisdiction by both entities. Accordingly, the doctrine of dual sovereignty holds that the double jeopardy clause “does not apply to suits by separate sovereigns, even if both are criminal suits for the same offense.” *United States v. A Parcel of Land, Etc.*, 884 F.2d 41, 43 (1st Cir. 1989). I should note, however, that the facts of this case do not rise to the level of criminal action.

You attempt to bolster your collateral estoppel and double jeopardy arguments by citing *U.S. v. ITT Rayonier, Inc.*, 627 F. 2d 996 (9th Cir. 1980). That case is distinguishable from the present situation. In *Rayonier*, the EPA authorized Washington State to issue permits under the FWPCA. In its permit, the EPA noted that some standards set in the permit could be modified to

reflect the final regulation promulgated by the EPA. Soon thereafter, ITT Rayonier failed to comply with the new EPA standards and Washington State and the EPA filed suits alleging the same transgressions. In *Rayonier*, the court noted that “if the EPA is dissatisfied with state enforcement efforts or the lack thereof, it can revoke permit-issuing authority or bring an independent action in federal court.” *Id.* at 1002. The court noted that, because the “state court entered a final judgment on [the] identical issue” raised by the EPA in Federal court, the subsequent action would be barred. In *Rayonier*, the court focused on the similarity of the positions taken by Washington State and the EPA and noted that “[i]t is undisputed that DOE maintained the same position as the EPA before the state hearings boards and state courts.” *Id.* at 1003. In the instant case, the State and the Coast Guard have not maintained the same position. The IRC concluded that the evidence did not allow for a finding of negligence, whereas, the Coast Guard has always maintained that it does. Further, in *Rayonier*, the DOE and EPA were found to be in privity because both were enforcing the same permit. Here, California was taking action involving the state license held by Captain [REDACTED] while the Coast Guard was assessing a civil monetary penalty. Thus, I find that the Coast Guard and California were not in privity and that neither double jeopardy nor collateral estoppel applies to the present situation.

Having now addressed the procedural issues of the case, I will discuss your assertions concerning 46 USC §2302(a). You assert that 46 USC §2302(a) cannot be applied to Captain [REDACTED] because a State pilot is not a “person operating a vessel” for the purposes of 46 USC §2302(a). You contend that California’s “own ‘pervasive’ scheme in the California Harbors and Navigation Code to regulate and discipline pilots serving on the waters of the Bays of San Francisco, San Pablo and Suisun on foreign and U.S. flag vessels, should give the Coast Guard pause to contend that these State statutes are preempted by 2302(a).” You further note that “[t]he absence of a regulation similar to 33 CFR 95.015(b) for 2302(a). . . shows that 2302(a) was not meant to include a pilot, whether Federal or State.” Your contention is misplaced. There is no question that the pilot, while acting in that capacity, is in direct control of the vessel’s navigation and supersedes the master in that respect until the time that the master, asserting his overall authority, relieves the pilot of his duties and authority. The pilot is the master *pro hoc vice* charged with the safety of the vessel and cargo and the lives of those onboard. There is a substantial volume of case law supporting this position. See, e.g., *Cooley v. Board or Wardens*, 12 HOW (US) 299 (1891); *Ralli v. Troop*, 157 U.S. 386, (1894); *Union Shipping v. U.S.*, 127 F.2d 771, 775 (2d Cir. 1942); *Barbey Packing v. The Stavros*, 169 F. Supp 987, 901 (D. Ore. 1959); *U.S. v. SS President Van Buren*, 490 F.2d 504, 506 (9th Cir. 1973). While I realize that the word “pilot” is not specifically mentioned in 46 USC §2302, I notice that the word “operator” is. There is no doubt that Captain [REDACTED] was operating the M/V [REDACTED] at the time of the allision, (a point also made clear in the *Williams* case), and was, therefore, subject to the dictates of 46 USC §2302(a).

Finally, you contend that the allision was not due to negligence on Captain [REDACTED]’s part. Captain [REDACTED] is charged, under 46 USC §2302(a), with negligently operating the M/V [REDACTED] on the night of December 23, 1996. As used in 46 USC §2302, negligence is the failure to use that care which a reasonable and prudent person would exercise under similar circumstances. It is the operator’s breach of that standard of reasonable care that results in the endangerment of life, limb, or property of a person and which constitutes a violation of 46 USC

§2302. In addition, maritime law holds pilots, like Captain [REDACTED], to a higher standard of care than ordinary mariners because they assert that they are aware of the area's topography, are familiar with any dangers in that area, and are competent to avoid those dangers and successfully navigate vessels through complex situations. See Parks, The Law of Tug, Tow, and Pilotage (2nd Edition, pp. 1022-1026). Further, there is a well-settled legal principle that a presumption of negligence arises when a vessel allides with a fixed object because under normal conditions and absent extraordinary factors, vessels under prudent navigation do not allide with stationary objects. *The Louisiana*, 70 U.S. 164, 173, 18 L. Ed. 85 (1866); *The Oregon*, 158 U.S. 186, 192-93, 39 L. Ed. 943, 15 S. Ct. 804 (1895); *Sehimeyer v. Romeo Co.*, 117 F.2d 996, 997 (9th Cir. 1941). The presumption stems from the well-established principle of admiralty law that a vessel that is properly managed and controlled does not normally allide with a stationary object. The presumption "has the effect of a prima facie case, placing the burden on the operator of the vessel to rebut the inference of negligent navigation." *United States v. Merchant Mariner's Document No. 438-78-4714, Decision of the Vice Commandant No. 2288*, p. 7 (1983). Once the Coast Guard's case establishes facts sufficient to invoke the presumption of negligence, the burden of going forward with sufficient evidence to negate the presumption shifts to the alleged violator. *Weyerhaeuser Company v. Atropos Island*, 777 F.2d 1344, 1348 (9th Cir. 1985). The operator must then refute the strong presumption by demonstrating that he acted as reasonable care required.

I find that the Hearing Officer was correct to conclude that Captain [REDACTED] was negligent in his operation of the M/V [REDACTED] on the night of December 23, 1996. The record clearly shows that Captain [REDACTED], as the pilot of the M/V [REDACTED], was in control of the vessel's navigation from the time he boarded the vessel until it docked in Oakland, at berth 68. As the pilot of the vessel, Captain [REDACTED] had the responsibility to ensure his complete knowledge of the vessel's maneuvering characteristics and any peculiarities or abnormal circumstances that could affect the vessel's safe navigation. I note that Captain [REDACTED] discussed the specifics of the voyage with the master, reviewed the Pilot Card, and computed the tides and currents. A pilot also has the duty to thoroughly know the area in which he is navigating, to anticipate current effects, and to set the vessel's speed with due consideration for the prevailing conditions. There is no doubt that Captain [REDACTED] was an experienced mariner with great familiarity with the area. As you note, the Coast Guard's case is predicated upon the presumption of negligence resulting from the allision with buoy number 4. Once the presumption is invoked, it is the responsibility of the respondent to go forward and produce more than cursory evidence on the presumptive matter. In Captain [REDACTED]'s defense, you assert that Captain [REDACTED] made "adequate precautions" to ensure that the vessel overcame the strong current and avoided hitting buoys 1 and 1B when they were only 50-75 feet away, and add that because the "current was almost at maximum flood tide 'augmented by significant runoff from the rivers,'" he was unable to avoid contact with Buoy 4. I do not regard the current flowing down the east side of Treasure Island as such an unusual or unexpected event that it would rebut the presumption. Increased current caused by rainfall is something which any experienced pilot should take into account. You further assert that "had the engine been providing the previously requested dead slow ahead, the kick to slow ahead and hard right rudder that Captain [REDACTED] ordered would have allowed 'a safe, controlled turn into the Inner Harbor Channel' and avoided Buoy 4." Initially, there is absolutely no evidence to indicate that mechanical problems with the vessel lead to the engine's delayed

July 2, 2001

reaction time. Captain [REDACTED] was, at all times, issuing commands that were being obeyed. This is borne out by the vessel's Bell Log. It was Captain [REDACTED] who determined the speed at which the vessel moved forward. His responsibility, as the vessel pilot, was to be aware of the engine's reaction time, as well as the effect that the current would have on the vessel's course. The evidence clearly shows that Captain [REDACTED] issued speed commands (e.g. to speed up or slow down) in too quick a succession for the vessel to appropriately respond. He, and he alone, was the person in charge of navigating the vessel into the channel. In Enclosure 7 to the Coast Guard's investigative file, I note that at no time did Captain [REDACTED] mention the engine's slow response. This document notes that "[h]e did not follow the plotted course prior to the Bay Bridge" and that "[t]he current was so strong that the ship was sideways." Based on the foregoing, I find that this incident was the direct consequence of the commands and actions of Captain [REDACTED] as he proceeded towards the Oakland Inner Harbor channel.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that Captain [REDACTED] is the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the penalty of \$100.00 rather than the \$1100.00 maximum permitted by statute appropriate in light of the seriousness of the violations.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$100.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost

of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

//S//

RE: CIVIL PENALTY

16731
July 2, 2001

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, U.S. Coast Guard Hearing Office
Commander, Finance Center