

U.S. Department
of Transportation

**United States
Coast Guard**



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16593

August 1, 2002

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

RE: MV01001070
[REDACTED]
[REDACTED]
\$2,200.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV01001070, which includes your appeal on behalf of the operators of the [REDACTED] ([REDACTED]) Railroad Bridge located on the St. John's River, near Jacksonville, Florida. The appeal is from the action of the Hearing Officer in assessing a \$2,200.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 117.9	Caused an unreasonable delay in the opening of a draw after signals required by paragraph 117.15 were given.	\$1,100.00
33 CFR 117.5	Failure to open drawbridge(s) promptly and fully when request to open is given in accordance with 33 CFR Part 117 Subpart A.	\$1,100.00
33 CFR 117	Failure to properly use and/or operate a drawbridge crossing the navigable waters of the United States.	WARNING

The incidents underlying the violation are alleged to have occurred on January 1, 2001, March 15, 2001, and March 20, 2001, when the [REDACTED] Railroad Drawbridge failed to open immediately upon request, failed to open fully upon request and was left in the down position without a bridgetender on sight.

On appeal, you contest the Hearing Officer's determination that a violation occurred on March 20, 2001.¹ You contend that, when the Hearing Officer "concluded that not only is [REDACTED] in request that the Hearing Officer's decision be "overturn[ed]" because the "bridge tender lowered and opened the draw in strict compliance with applicable federal regulations." Although you conceded that the bridge was closed on March 17, 2001 for "approximately 48 minutes from 11:45 a.m. to 12:33 p.m. due to a 'traffic jam' north of the bridge" you assert that "[t]here is no evidence that the draw was closed when a train was not in the block." You note that the Hearing Officer incorrectly concluded that [REDACTED] did not dispute the fact that there was a delay and assert that, although the drawbridge did not open immediately upon request, there was "no delay, unreasonable or otherwise" because "[t]he regulations do not prohibit the closing of the bridge to allow multiple trains to cross, but only prohibit 'unreasonable delay' in re-opening the bridge once all trains have cleared the bridge." You further assert that, in reaching his decision, the Hearing Officer "erroneously interpret[ed] the note following 33 CFR 117.9" and contend that, in so doing, the Hearing Officer "fail[ed] to acknowledge that the Note mirrors the regulatory requirements that the draw remain down while the track circuit is occupied." You further note that, even if the Hearing Officer is correct to conclude that the note is not legally binding, "there is no regulatory definition of 'unreasonable delay.'" You conclude that "[t]he regulations and clarifying Note establish a built-in safety feature to prevent a train from attempting to cross a drawbridge that is in the open position" and contend that, under the Hearing Officer's interpretation of the regulation, "the bridge tender could have the discretion to open a drawbridge when a train is attempting to cross, resulting in the train's derailment into the St. John's River." Finally, you assert that the Hearing Officer was incorrect to note that a violation of 33 CFR 117.15(d)(2) occurred because "'full and fair notice' of the charge" was not given. Your appeal is granted, in part, and denied, in part, for the reasons described below.

Before I begin, I believe a brief recitation of the background of the case is in order. This case was initiated following the Coast Guard's receipt of two letters of complaint concerning the operation of the [REDACTED] Railroad Drawbridge. The first letter, from Captain [REDACTED], Master of the vessel [REDACTED], concerns an incident that is alleged to have occurred on March 17, 2001. In his letter, Captain [REDACTED] indicated that the M/V [REDACTED] was delayed at the [REDACTED] Railroad Drawbridge for approximately 90 minutes while several trains successively crossed the bridge. The second letter, from [REDACTED], CEO of [REDACTED], concerns an incident that occurred at the drawbridge on April 6, 2001. In his letter, [REDACTED] indicated that one of the company's for-hire vessels, the M/V [REDACTED], was delayed for approximately 30 minutes while several trains crossed the bridge.

¹ Although the first paragraph of your letter of appeal dated November 20, 2001, indicates that you "appeal the decision in this case relating to events on March 17, 2001," the remainder of the correspondence refers to the incident that occurred on March 20, 2001. Since the record contains no mention of a violation occurring on March 17, 2001, I will assume that your appeal deals with the violation that occurred on March 20, 2001.

As a preliminary matter, I want to address some confusion over whether or not the Coast Guard intended to include the April 6, 2001 incident in support of the single allegation listed in case file MV01001281. On the one hand, the Charge Sheet quite clearly mentions the April 6, 2001 incident involving the [REDACTED] along with the March 17, 2001 incident involving the [REDACTED]. However, there is other credible evidence indicating that the incident involving the [REDACTED] took place on April 5, 2001 and is the subject of a separate case file, MV01001357. I will accept your contention that this incident was incorrectly charged twice and that case file MV01001357 contains the details regarding the [REDACTED]. Even if it was the Coast Guard's intention to include the [REDACTED] as part of this case, the evidence involving this particular incident is woefully insufficient to prove a violation of 33 CFR 117.9. If the charge is to be sustained, it must be based solely on the March 17, 2001 incident. I further note that your initial written statement, dated August 3, 2001, incorporated by reference in your notice of appeal, dated November 20, 2001, referred to several other violations not in issue in the instant case. In deciding this case, I have limited myself to the facts surrounding the March 17, 2001 incident. The other information is irrelevant to the merits of this case and was not considered in reaching my decision.

I will begin by addressing the standard of proof applicable to Coast Guard civil penalty procedures. As indicated in prior correspondence contained within the case file, the procedures governing the Coast Guard's civil penalty process are set forth at 33 CFR Subpart 1.07. Specifically, 33 CFR 1.07-65 states that any decision to assess a civil penalty must be based upon substantial evidence in the record. If the Hearing Officer does not find substantial evidence supporting the alleged violation or some other violation of which the party had full and fair notice, the case must be dismissed and returned to the appropriate District Commander. While the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*, does not specifically address the appropriate standard of proof in administrative adjudicative proceedings, both case law and administrative practice clearly show that the standard of proof in such proceedings is a preponderance of the evidence standard. Under this test, Coast Guard Hearing Officers must be convinced that their conclusion is supported by the weight or majority of the evidence. *See, Steadman v. SEC*, 450 U.S. 91 (1981). Therefore, to sustain the Hearing Officer's decision, I must also find that the allegation has been proven by a preponderance of the evidence.

33 CFR 117.5 makes clear that "[e]xcept where otherwise required by this subpart, drawbridges shall open promptly and fully for the passage of vessels when a request to open is given." Special operating requirements for the St. John's River are contained at 33 CFR 117.325. 33 CFR 117.325(c) notes that "[t]he draw remains down for a period of eight minutes or while the approach track circuit is occupied." Therefore, the regulations generally require that the bridge be opened on demand unless the approach track circuit is occupied. In addition, 33 CFR 117.9 makes clear that any delay in opening shall not be unreasonable. Reading these two provisions together, if it can be shown that the delay was reasonable, then there can be no violation of 33 CFR 117.9. Indeed, 33 CFR 117.9 provides an example of what would normally constitute a reasonable delay—trains in a block where the draw is incapable of being opened to navigation until the train has passed or someone has unlocked the drawbridge controls. However, as further explained below, this does not give the bridge owner carte blanche to occupy the block and, thus, unreasonably delay the flow of maritime traffic. Therefore, it must be determined if the instant delays were reasonable.

As I have already stated, you acknowledge that the drawbridge was closed for approximately 48 minutes from 11:45 a.m. to 12:33 p.m. on March 17, 2001, while the M/V [REDACTED] awaited passage. Although there is conflicting evidence in the record as to the exact length of time that the drawbridge was closed, I will accept your contention that the closure was for 48 minutes, rather than the 90 minutes alleged by Captain [REDACTED] since that time period is supported by the bridge's logs.

The courts have determined that the "burden of proof rests on the owner of a drawbridge to excuse his failure to open the draw promptly on request." *See, Donovan v. New York Cent. R. Co.*, 16 F.2d 611 (D.C.N.Y. 1926); *Clement v. Metropolitan West Side El. R. Co.*, 123 F. 271, 59 C.C. A. 289 (Ill. 1930). It is well settled that navigation rights take precedence over the rights of surface traffic. *Erie L. R. Co. v. Timpany*, 495 F. 2d 830, 833 (2d. Cir. 1974). Courts have consistently held that a bridge spanning a navigable waterway is an obstruction to navigation tolerated only because of necessity and convenience to commerce on land. *St. Louis-San Francisco R. Co. v. Motor Vessel D. Mark*, 243 F. Supp. 689, 692 (S.D. Ala. 1965). I do not believe that you have sufficiently met your burden in proving that the delay in opening the drawbridge on March 17, 2001, was reasonable.

In essence, your primary defense to this allegation is that when a train is in the block, there is no obligation for the bridge owner to open the bridge to maritime traffic. Rather, any delay in opening is, per se, reasonable. I do not read the regulations that literally. Although the regulations indicate that a delay should be excused because a train is in the block, this should not end the inquiry. I believe it is also incumbent for the bridge owner to demonstrate the reasonableness of placing trains in the block in order to avoid liability after a signal has been given. Except in general terms, that has not been done in this case. Mr. [REDACTED] requested an opening, there was no observable activity on the bridge for long periods of time, no response to his calls on channel 9 were acknowledged, and numerous vessels were left waiting. Other than stating that a train was in the block at all times, no justification was provided for the March 17, 2001 incident. If I were to simply accept your argument that a defense is made out by proving a train was in the block, bridge owners would be excused when trains are in the block for inordinate periods of time regardless of the reason. I am not willing to read the regulations that broadly. In addition, the regulation for this particular bridge discusses the procedure for lowering the bridge when a train approaches. In my view, approaching a bridge contemplates crossing the bridge or leaving the block within a reasonable time. As stated above, it is the bridge owner's obligation to show that he did not unreasonably delay the opening. Instead, there is evidence of delays between the time the bridge was lowered and the time a train crossed the bridge. Trains also remained parked in the block as they awaited clearance to enter the [REDACTED] yard north of the bridge. There is also evidence that the bridge has remained in the closed position to accommodate several trains before reopening. Taken together, there is substantial, un rebutted evidence of unreasonable delay. I believe your interpretation of the regulations would subvert the superior navigational rights that the courts have long afforded vessels in situations involving drawbridges. Although it may be more economical for a drawbridge to remain closed while all nearby trains cross, the regulations make clear that the draw must be opened following receipt of a signal from a vessel. Furthermore, the specific regulations concerning the drawbridge in question make no mention of multiple train crossings during one closure of the drawbridge but instead mention only the crossing of a singular train.

Since a train may be stopped before it enters the block, successive train crossings, as in the instant case, would result in an unreasonable delay.

Since I have determined that a violation occurred, I will now determine whether the penalty assessed by the Hearing Officer is appropriate under the circumstance of this case. I do not believe that it is. First, I note that Coast Guard's file of the incident indicates that [REDACTED] has no violation history. Although your response of August 3, 2001, mentions other violation cases pending against [REDACTED], the record contains no evidence as to the disposition of those cases. Therefore, for the purposes of imposing a monetary civil penalty in this case, I must consider [REDACTED] to have no violation history. Furthermore, as I have previously noted, there is simply not enough evidence in the record to support the imposition of a civil monetary penalty for the incident alleged to have occurred on April 6, 2001. It appears the Hearing Officer considered this incident when he assessed the \$1,100.00 penalty. Therefore, I will mitigate the penalty assessed by the Hearing Officer to \$500.00.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$500.00** 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//

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