



16780

January 28, 2009

[REDACTED]  
Attn: [REDACTED]  
[REDACTED]  
[REDACTED]

RE: Case No. 2164954  
[REDACTED].  
[REDACTED]  
\$21,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2164954, which includes your appeal on behalf of [REDACTED], as owner/operator of the following barges: T/B [REDACTED] 423, T/B [REDACTED] 472, T/B [REDACTED] 491, T/B [REDACTED] 494, T/B [REDACTED] 506, T/B [REDACTED] 310 and T/B [REDACTED] 309.<sup>1</sup> The appeal is from the action of the Hearing Officer in assessing a \$31,000.00 penalty for the following violations:

| <u>LAW/REGULATION</u>  | <u>NATURE OF VIOLATION</u>   | <u>ASSESSED PENALTY</u> |
|--|--|-------------------------|
| 46 CFR 31.10-17(a)<br>(<1600GT)<br><b>Charge 4</b><br>[REDACTED] 423 | Failure to conduct annual or periodic inspection of a tank vessel less than 1600 GT. | Warning                 |
| 46 CFR 31.10-17(a)<br>(<1600GT)<br><b>Charge 5</b><br>[REDACTED] 472 | Failure to conduct annual or periodic inspection of a tank vessel less than 1600 GT. | \$3,000.00              |
| 46 CFR 31.10-17(a)<br>(<1600GT)<br><b>Charge 6</b><br>[REDACTED] 491 | Failure to conduct annual or periodic inspection of a tank vessel less than 1600 GT. | \$1,000.00              |
| 46 CFR 31.10-17(a)<br>(<1600GT)<br><b>Charge 7</b><br>[REDACTED] 494 | Failure to conduct annual or periodic inspection of a tank vessel less than 1600 GT. | \$3,000.00              |
| 46 CFR 31.10-17(a)<br>(>1600GT)                                      | Failure to conduct annual or periodic inspection of a tank                           | \$15,000.00             |

<sup>1</sup> When the case was initiated, penalties were also sought against three additional barges (T/B [REDACTED] 304, T/B [REDACTED] 303 & T/B [REDACTED] 332). However, charges against these barges were dismissed via the Hearing Officer's Final Letter of Decision.

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|                                    |  |            |
|------------------------------------|--|------------|
| <b>Charge 8</b><br>[REDACTED] 506  | vessel greater than 1600 GT.   |            |
| 46 CFR 31.10-17(a)<br>(<1600GT)    | Failure to conduct annual or periodic inspection of a tank vessel less than 1600 GT. | \$4,000.00 |
| <b>Charge 9</b><br>[REDACTED] 310  |  |            |
| 46 CFR 31.10-17(a)<br>(<1600GT)    | Failure to conduct annual or periodic inspection of a tank vessel less than 1600 GT. | \$5,000.00 |
| <b>Charge 10</b><br>[REDACTED] 309 |  |            |

The violations first came to the attention of the Coast Guard after a Coast Guard Marine Inspector attended the [REDACTED] Barge [REDACTED] 310 on February 5, 2004, and determined that the barge's inspection was approximately two years overdue. A subsequent review of Coast Guard records concerning [REDACTED] revealed that 9 of the company's other barges had overdue inspections. As a result, the instant civil penalty case was initiated.

On appeal, although you do not expressly address the violations at issue, you assert that you "do not feel that the proposed fines are in line with the alleged violations" and imply that you are appealing as a mere formality so that you can take the matter to "Federal Court" to see that "justice is done." At the same time, you assert that the Coast Guard has "harassed" [REDACTED] via its initiation of the instant civil penalty case and insist that "[t]hese fines are not only outrageous, but also completely unfounded." Finally, you note, as you did before the Hearing Officer, that "[t]here have been several occasions that the paperwork on...[your]...vessels have been taken by the USCG, or improperly signed and or not entered into the computer" and assert that any such errors were "done maliciously." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address the violations at issue, I will generally address the Coast Guard's civil penalty program. The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded due process during informal adjudicative proceedings. The procedures in 33 CFR 1.07 have been sanctioned by Congress and upheld in the Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

I will now address the violations at issue. The record shows that after the February 5, 2004, inspection that gave rise to the case at hand, the Officer in Charge, Marine Inspections, Coast Guard Marine Safety Office, Chicago, sent you a letter dated February 17, 2004, that informed you both of the relevant inspection violations and the consequences of a subsequent failure to achieve compliance with the applicable inspection regulations. The record further shows that

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Mr. [REDACTED], [REDACTED] Operations Manager, responded to that notification via a letter dated February 24, 2004. In that letter, although [REDACTED] Operations Manager did not expressly deny any of the alleged violations, he did inform the Coast Guard that [REDACTED] planned to “drop the Great Lakes routing” and apply for a new Certificate of Inspection (hereinafter “COI”) for the T/B [REDACTED] 307, T/B [REDACTED] 308, and the T/B [REDACTED] 321. In addition, the Operations Manager indicated that the T/B [REDACTED] 303, T/B [REDACTED] 332, T/B [REDACTED] 472 and the T/B [REDACTED] 494 had been laid up for varying lengths of time. Finally, the Operations Manager states that inspections would be conducted “ASAP,” for the T/B 423, T/B 491 and the T/B 506. Subsequently, as a result of the fact that the alleged inspection violations occurred, the Coast Guard commenced the instant civil penalty proceeding against Egan Marine.

The record shows that the Hearing Officer issued her Preliminary Assessment Letter in the matter on December 9, 2004. A review of that letter shows that, in accordance with the applicable procedural regulations, at 33 CFR Part 1.07, the Hearing Officer informed [REDACTED] of the alleged violations, the maximum penalties available for the violations, the amount of the preliminarily assessed penalties, and that the company would have 30 days within which to either request a hearing, provide written evidence in lieu of a hearing or to pay the preliminarily assessed penalty. The record shows that [REDACTED] properly responded to the Hearing Officer’s Preliminary Assessment letter and that, in response to [REDACTED] request, an extension of time was granted to allow Egan the opportunity to formulate a response and thereafter, several time extensions were granted as the Coast Guard Hearing Office attempted to facilitate [REDACTED] availability to attend an in-person hearing in the matter.

In response to assertions raised along with your request for a hearing, the Hearing Officer sent a letter, dated November 29, 2005, to the Coast Guard unit responsible for initiating the violation case seeking clarification of several issues. In her letter, the Hearing Officer specifically sought information regarding your allegations that there had been occasions when one of [REDACTED] barge’s was inspected and its COI updated, but such information was not updated within the appropriate Coast Guard data bases. At the same time, the Hearing Officer requested copies of amended COIs for [REDACTED] vessels. While the Coast Guard replied to the Hearing Officer’s request, the record shows that the reply did not garner the information that the Hearing Officer was seeking. Moreover, a careful review of the MSO’s reply shows that other than re-asserting the MSO’s belief that [REDACTED] “missed the 2003 annual inspection cycle,” the MSO’s Senior Investigating Officer refused to provide the Hearing Officer with copies of the amended COIs based upon his belief that “the burden is placed upon the owner/operator to ensure the COI is endorsed...[and]...[i]t is not the Coast Guard’s responsibility to prove that re-inspections were completed.”

The record shows that the hearing in the matter was held on March 14, 2006. At the hearing, Egan noted that its relationship with the Coast Guard deteriorated significantly in the years immediately prior to the hearing and asserted that the Coast Guard had taken intentional steps to cause harm to the company. The company noted that achieving compliance had become increasingly difficult and added that a transitioning of the barges to “type 2 hulls” had caused the Coast Guard “paperwork problems” that lead the Coast Guard to believe that inspections were overdue when they were not. In addition to addressing the specific violations, the company

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made a point to note that it no longer felt that it could address the problems with the Coast Guard and insisted that only a federal court would afford the company the appropriate relief.

The Hearing Officer issued her Final Letter of Decision in the matter on September 19, 2006. A careful review of that decision shows not only that the Hearing Officer carefully considered all of the issues that [REDACTED] raised at the hearing, but also that she carefully considered each of the alleged violations. In Coast Guard civil penalty cases, it is the Hearing Officer's responsibility to decide the reliability and credibility of the evidence presented and to resolve any conflicts presented in the evidence. As such, the Hearing Officer's decision will be upheld as long as it is based on substantial evidence in the record.

After a thorough review of the record, it is evident that one of the key issues both presented on appeal and raised before the Hearing Officer is whether the Coast Guard's records—and evidence presented—with regard to your company's inspection and re-inspection schedule is accurate. As the Hearing Officer noted in her Final Letter of Decision, you specifically assert that "on several occasions" when the company had an inspection done, "the COI was signed aboard the barge, yet the Coast Guard computer was not updated." Moreover, you have asserted that in March 2002, when changes were made to your vessel's hulls, "amended COIs were issued to some of your barges but the previous signatures [reflecting prior inspections] were not reflected." In her Final Letter of Decision, the Hearing Officer addressed your assertions in this regard as follows:

Coast Guard computer records are supposed to contain records of each encounter between an inspector and a Coast Guard vessel. It is easy to imagine that on occasion, an inspector will neglect to enter an encounter into the record. However, this is most likely exceptional and most likely confined to certain individuals. In other words, the absence of an annual inspection in the record more likely than not means that no annual inspection was conducted. Other evidence can change this assessment. In your letter of February 11, 2005, you claim that on several occasions, no entry was made in the record after an inspection was conducted. You offer no hint of what year these occasions occurred. The evidence in the case file, notably including the COIs you presented, do not offer any examples of such problems. Every reinspection noted on a COI you presented...either has a counterpart in the record as reflected in exhibit CG-02...or occurred on or after February 25, 2004. Since exhibit CG-02 was apparently produced between February 5, 2004 and the February 17, 2004 letter...it is not expected to show later inspections.

\* \* \*

In the absence of any evidence of computer entry problems during 2003 and 2004, I am led to the conclusion that failure to make proper entries may have occurred in the past, but by turnover of personnel or improved procedures or a combination of these, it is more likely than not that such problems do not affect the present case.

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There is one other record anomaly that does deserve comment. For [REDACTED] 304, you presented a COI dated March 19, 2002...while the Coast Guard's evidence included a COI dated September 10, 2001...and information apparently obtained from computer records...that a COI was issued April 5, 2002. When the Coast Guard's exhibits were produced from Coast Guard files, it may be that there was no file copy of the March 19, 2002 COI, or it was misplaced. Explanation of the third date presented is more conjectural. Actual issuance of the March 19, 2002 COI may have been delayed until April 5, 2002 and this issuance may be reflected in the computer record. This is too much speculation. The three-pronged anomaly in the case presented by the Coast Guard on [REDACTED] 304, which is unexplained, strains credulity and cannot be overlooked.

As a consequence of her findings in this regard, and her ultimate conclusion that the evidence presented was "confusing at best," the Hearing Officer dismissed the charges concerning the T/B [REDACTED] 304. In addition, the Hearing Officer dismissed the charges against the [REDACTED] 303 and [REDACTED] 332 after finding that the record indicated that incorrect violations were likely alleged in those cases. Finally, the Hearing Officer assessed a warning with regard to the charge relating to the [REDACTED] 423 because you provided evidence to show that the barge was lost during a catastrophic casualty.

In her final letter of decision, the Hearing Officer assessed monetary penalties for the charges against the T/Bs [REDACTED] 472, [REDACTED] 491, [REDACTED] 494, [REDACTED] 506, [REDACTED] 310, and the [REDACTED] 309. With regard to the charges against the [REDACTED] 472, [REDACTED] 491 and the [REDACTED] 494, the Hearing Officer found the violations proved after stating that "the evidence does not appear defective for this charge, you didn't object in exhibit CG-05 [REDACTED]'s initial letter to the Coast Guard indicating a desire to correct the violations, dated February 24, 2004, and you have not presented a defense." In assessing penalties for the violations regarding the [REDACTED] 472 and the [REDACTED] 506, the Hearing Officer expressly found, after carefully reviewing the evidence presented including copies of the relevant COIs, that "this would not be a situation where the amended COI could have replaced a COI showing a timely inspection, leaving the attending inspector in the dark about the earlier inspection." The Hearing Officer found the violation proved with regard to the [REDACTED] 310, the barge that "set the investigation...[in the case]...in motion," that the record contained substantial evidence to support a conclusion that a violation occurred, irrespective of your unsupported assertion that the barge had been laid up "for a time." Finally, with regard to the charge against the [REDACTED] 309, although the Hearing Officer noting your assertion that "when the inspection was completed in Chicago, the COI was not immediately returned and was never signed to show the annual inspection," and acknowledging that "[d]ocuments you presented...support this," the Hearing Officer found the violation proved because the evidence you provided showed that the undocumented inspection would have occurred after the mandatory annual inspection was due.

After a thorough review of the record, I do not find that the Hearing Officer was either arbitrary or capricious in finding the violations proved. The record shows that the Hearing Officer went to great lengths to bring forth all evidence relevant to this proceeding. Indeed, she afforded both

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you and the Coast Guard the opportunity to supplement the record with additional documentation to specifically address concerns regarding improperly recorded inspections and improper data control on the part of the Coast Guard. In the end, the Hearing Officer only assessed penalties in instances when the record did not “appear defective” for the particular charges. Although I do not find that the Hearing Officer erred in so concluding I will, nonetheless, mitigate the \$15,000.00 penalty assessed by the Hearing Officer with regard to the T/B [REDACTED] 506 to \$5,000.00. I am doing so because the record shows that the Coast Guard unit responsible for initiating the charge with regard to the [REDACTED] 506 sought an initial penalty of \$5,000.00.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violations occurred and that [REDACTED]. is the responsible party. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. However, I find a penalty of \$21,000.00, rather than the \$31,000.00 assessed by the Hearing Officer to be appropriate under the circumstances of the case.

Payment of **\$21,000.00** 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. Payment should be directed to:

U.S. Coast Guard - Civil Penalties  
P.O. Box 70945  
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.0% 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.

In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 1.07, this decision constitutes final agency action.

Sincerely,

//s//

DAVID J. KANTOR

Deputy Chief,

Office of Maritime and International Law

By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office  
Commanding Officer, Coast Guard Finance Center