



16592
April 19 2007

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

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$7,500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case [REDACTED], which includes your appeal on behalf of [REDACTED](hereinafter "[REDACTED]"), as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$7,500.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 160.105	Failure to comply with an order pertaining to the control of vessel or facility operations.	\$7,500.00

The incident underlying the violation is alleged to have occurred on or about September 24th and 25th, 2004. The Coast Guard alleges that [REDACTED] Maritime failed to comply with Captain of the Port (hereinafter "COTP") Order 132-04 which directed the immediate removal of the [REDACTED] from the Port of Jacksonville in anticipation of the approach of Hurricane Jeanne. Rather than leaving port as ordered, the [REDACTED] remained in the Port of Jacksonville, in violation of the COTP Order.

On appeal, you contest the violation and assert that neither [REDACTED] nor the master of the tug towing [REDACTED], erred in refusing to follow the Order. To that end, you contend that the COTP Order created a dangerous situation which prevented the master of the vessel from exercising his "best ability to protect lives, equipment and the environment." You further assert that the Hearing Officer assessed "an unwarranted fine" in this case because he "completely misinterpreted what was presented in...[your]...response letter." In particular, you contend that the Hearing Officer misinterpreted your statement that following the Order and departing a safe berth could have physically endangered both the barge and its tug. In addition, you note that at

the time the Order was issued, “there were no other berths available that were as safe as the berth the vessels were moored in” and add that the COTP Order, which required the separation of the barge from its tow, was not consistent with customary practices which dictate that unmanned oil barges remain connected to their tugs during severe winds. In that regard you note that “[w]hile in port the MARLIN [the GULFSTREAM’s tug] could have separated from the GULFSTREAM, although this would not be either a preferred practice or good seamanship.” You further assert that [REDACTED] Maritime, with its vast experience operating vessels in similar conditions, was better placed than the Coast Guard to determine the safest course of action for its vessel. Indeed, in that vein you assert that “[REDACTED], having operated ATB’s now for fifteen years, is better qualified than anyone who has never been involved in the operation of ATB’s in determining what conditions may present risks that might endanger the vessel, lives, cargo, and environment, such as those that could be encountered under hurricane conditions at sea.” You further argue that you “believe that the Jacksonville [Coast Guard] office over stepped their instructions set down by the agreement established between the American Waterways Operators and the Commandant’s office as related to actions to be taken for hurricanes.” You conclude by stating that “[t]here should be no fine assigned to this incident, where an unmanned, non-self propelled vessel is ordered to sea, without a means of getting there, and where the only tug within the port that is safely capable of towing...[the barge]...has been given permission by the Coast Guard to stay safely moored. Your appeal is denied for the reasons discussed below.

Before I begin addressing your appeal, I will address the facts leading up to the violation. The record shows that on September 13, 2004, Tropical Storm Jeanne formed over the Leeward and Virgin Islands in the Caribbean Sea. The center of the storm moved over the southeastern section of Puerto Rico on September 15, 2004. Jeanne strengthened into a hurricane as it progressed across Puerto Rico and the Mona Passage. Shortly thereafter, on September 17, 2004, Jeanne moved into the waters north of Hispanola, weakened, and loitered for approximately 5 days. Jeanne once again strengthened into a Category 1 hurricane on September 20, 2004. On September 21, 2004, the barge GULFSTREAM departed the North Carolina State Docks enroute Jacksonville, Florida. On the same day, Jeanne strengthened into a Category 2 hurricane. Due to the uncertain track of the storm and its close proximity to the Florida coast, Marine Safety Office Jacksonville maintained a constant watch on the storm. On September 22, 2004, at approximately 2045, the barge GULFSTREAM entered the Port of Jacksonville while Jeanne was continuing to strengthen. The barge GULFSTREAM proceeded to her berth at the Blount Island Terminal to conduct cargo operations and offload product. On September 24, 2004, offload was completed and the COTP issued Order 132-04 directing the barge GULFSTREAM to seek a port of safe refuge. The COTP determined that the size of the barge GULFSTREAM, coupled with its proximity to a navigational channel that is used by significant commercial traffic, posed an unreasonable risk to the safety of the port should it break free from its moorings during the storm and sink in the channel. The barge GULFSTREAM did not leave the berth and remained in place while Jeanne made landfall on September 25, 2004, near Stuart, Florida. The GULFSTREAM did not suffer any damage during the hurricane.

I will now address the violation. The record shows that, on September 24, 2004, the COTP of Jacksonville, Florida issued COTP 132-04 to the master, owner agent or person in charge of the GULFSTREAM. COTP 132-04 made clear that “[d]ue to the size and strength of approaching

Hurricane Jeanne, the BARGE GULFSTREAM is ordered to seek a harbor or safe refuge immediately upon the setting of Hurricane Condition Yankee.” The Order further stated that the “vessel will not be permitted to remain in the Port of Jacksonville, and any request to remain in port will be denied.” In addition, the Order made clear that the vessel’s owner/operator should “take all necessary steps to depart the Port of Jacksonville in a manner and time that does not put the vessel and the port at risk.” Finally, the Order stated that if any party felt “aggrieved by this decision, you may make an appeal to the Commander, Seventh Coast Guard District...in writing, within 30 days of receipt of this order.” The record shows that although [REDACTED] received the Order on the day it was issued, the [REDACTED] failed to leave the Port of Jacksonville.

In relevant part, 33 CFR 160.105 makes clear that “[e]ach person who has notice of the terms of an order...must comply with that order.” Both before the hearing officer and now, on appeal, you argue, in effect, that [REDACTED] did not err in refusing to comply with the COTP Order. As the COTP Order made clear, Coast Guard regulations provide a process through which to contest a COTP Order. In this case, that Process would have involved a written appeal, filed within 30 days of the issuance of the Order, to the Commander, Seventh Coast Guard District. The record shows that [REDACTED] made no such appeal. Therefore, the key issue presented within this case is whether [REDACTED] violated a COTP Order. Since, the record shows that COTP Order 132-04 was properly issued to and received by [REDACTED]—a copy of COTP Order 132-04 was received and signed for by the Master of the tug towing the [REDACTED] on September 25, 2004 at 12:30—the evidence presented clearly shows that the violation occurred. As such, the Hearing Officer did not err in finding the violation proved. As such, the sole issue now remaining is whether the penalty assessed by the Hearing Officer is appropriate under the circumstances of the case.

It is indisputable that the COTP of Jacksonville had the authority to issue COTP order 132-04, directing the barge GULFSTREAM to seek a port of safe refuge in the face of an impending hurricane. *See* 33 U.S.C. Chapter 25 and 33 CFR Part 160. The Order was issued to ensure the safety and security of the Port of Jacksonville. It is also clear from the factual timeline in this case that the barge GULFSTREAM got underway from North Carolina to transit to Florida while hurricane Jeanne had already intensified to a Category 2 hurricane near Puerto Rico and the Mona Passage. Although you have asserted that the Jacksonville Port Authority (hereinafter “JPA”) assured you that the barge GULFSTREAM would be able to stay in the port during the passage of Hurricane Jeanne, you have neither provided documentation supporting that assertion, nor have you shown that the JPA envisioned allowing the barge GULFSTREAM to remain moored at the Blount Island Terminal during the onset of the storm. Other than your assertion that the JPA assured [REDACTED] that the barge GULFSTREAM would be able to remain in port, you have not provided any other evidence suggesting that you investigated other potential safe havens prior to departing North Carolina, as required by [REDACTED]’s heavy weather plan. Moreover, a review of [REDACTED]’s heavy weather plan shows that it requires coordination with the COTP of the intended destination in situations such as this. The record shows that, though required by [REDACTED]’s heavy weather plan, such coordination with the COTP never occurred. As a result, I find that the Hearing Officer was correct to note that “[h]owever well intended...[[REDACTED]’s]...efforts might have been, they are not allowed to substitute their judgment and their assessment for that offered by the COTP.” Given

[REDACTED]'s obvious disregard of the COTP's order, I find the penalty assessed by the Hearing Officer to be appropriate under the circumstances of the case.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that [REDACTED] is the responsible party. The Hearing Officer's decision that the violation occurred was neither arbitrary nor capricious and is hereby affirmed. The record shows that the Hearing Officer mitigated the recommended penalty of \$10,000.00 to \$7,500.00, rather than the maximum penalty of \$32,500.00. For the reasons discussed above, I will not mitigate the penalty any further.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$7,500.00** 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 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% 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, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center