

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
U.S. Coast Guard

2100 2nd St. SW Stop 7581
Washington, DC 20593-7581
Staff Symbol: CG-54122
Phone: (202) 372-1535
FAX: (202) 372-1991

16637/1
April 16, 2010

Captain Dan Gallagher
President, Lakes' Pilots' Association
P.O. Box 610902
Port Huron, MI 48061-0902

Captain Don Willecke
President, Western Great Lakes' Pilots' Association
P.O. Box 248
Superior, WI 54880-0248

Dear Captains Gallagher and Willecke:

Attached is the Director's Decision and Order resolving the dispute between the Lakes' Pilots' Association and the Western Great Lakes' Pilots' Association concerning whether District 3 is legally bound to use pilot "dispatch" and vessel notification services provided by the Lakes' Pilots' Association at Port Huron, Michigan. The Decision and Order also addresses whether the Lakes' Pilots' Association is required to provide pilot boat service to Western Great Lakes' Pilots' at Port Huron.

This Decision and Order takes effect immediately. Rights of appeal, and the appropriate procedures, are contained at the bottom of the attached Decision and Order.

This letter and the attached Decision and Order are being sent by e-mail and you will shortly receive the signed versions of this letter and the attachment by regular mail. The effective date, and the dates related to perfecting an appeal, begins to run as of the date of the e-mail delivery of these documents.

Sincerely,

A handwritten signature in cursive script that reads "Paul M. Wasserman".

Paul M. Wasserman
Director, Great Lakes Pilotage
Marine Transportation System Division
Office of Waterways Management
United States Coast Guard

By direction

Cc: Captain Roger Paulus, President, St. Lawrence Seaway Pilots' Association
Robert Lemire, CEO, Canadian Great Lakes Pilotage Authority
Captain Ivan Lantz, Shipping Federation of Canada
David Grieve, Fednav
Stuart Theis, Executive Director, United States Great Lakes Shipping Association

Decision and Order

Introduction

This Decision and Order involves a dispute between the Lakes' Pilots' Association (District 2) and the Western Great Lakes' Pilots' Association (District 3) concerning whether District 3 is legally bound to use pilot "dispatch" and vessel notification services provided by District 2 at Port Huron, Michigan. Also addressed in this Decision and Order is whether District 2 is required to continue to provide reliable and timely pilot boat service to District 3 pilots at Port Huron. After a full review of the record, consisting of documents and records submitted by the parties and two letters received from District 2's legal representative, and after surveying the applicable law and regulations, this office concludes that District 3 is not legally bound to use the "dispatch" or vessel notification services of District 2. Furthermore, District 2 must continue to provide District 3 pilots with timely and reasonably priced pilot boat service.

Facts

The factual and legal record¹ in support of each association's position is lengthy, but the underlying facts as presented by the parties are not in dispute. For many years, District 3 used the services of the District 2 dispatchers to obtain telephone notifications of up bound vessel arrivals so that its pilots could meet the District 2 pilot boat at Port Huron and ensure timely pilot exchanges on vessels headed above Port Huron. For each telephone call, District 2 charged District 3 \$60 during the 2008 season and charged District 3 \$140 in 2009, an increase of 133% over the prior season. District 3 refused to pay the charge and sought an alternative method for obtaining this information. District 3 notified industry that commencing with the 2010 season all vessels requesting pilotage service in District 3 will be required to provide notice of arrival directly to the District 3 dispatch office.

District 2 insists that District 3 is legally bound to use its services, which it describes, incorrectly, as dispatch. The situation has escalated over the past several days and there has been some concern by industry that District 2 may refuse pilot boat service to District 3 pilots if District 3 persists in requiring vessels to report to their dispatch office. Refusal of pilot boat service to District 3 pilots could create significant vessel delays. As a consequence, it is reported that some industry members have chosen not to comply with District 3's request to receive these notifications directly and have continued to provide the information to District 2. District 2 continues to charge District 3 for these vessel arrival notifications.

Discussion

- I. Is District 3 legally bound to use pilot "dispatch" and vessel notification services provided by District 2 at Port Huron, Michigan?**

a. Coast Guard Letters Alleged to be in Support of District 2's Claims

In correspondence to the Coast Guard, District 2 relies upon numerous arguments in support of its claim that District 3 is obligated to use the District 2 dispatch service. It proffers a letter, dated August 17, 1967, from the Coast Guard to Captain Anthony F. Rico, president of a predecessor District 3 association, concerning the by-passing of dispatch stations and the application of the then effective Joint (D2/D3) Interpool Working Rules. This letter is unpersuasive, in part, because the working rules at issue in that letter have long ago been superseded, and the issue of by-passing dispatch stations, which is the subject of the proffered letter, is not the subject of the current dispute. This letter today merely stands for the proposition that where a district association is legally required to use the dispatch service of another association it must comply with the dispatch rules and procedures of that association. This holding only has meaning if it had been found that District 3 was bound to accept dispatch from District 2 at Port Huron.

District 2 proffers a second letter, also from the Coast Guard, dated March 20, 1969, and also addressed to the predecessor District 3 association. By this letter, the then Director of Great Lakes Pilotage approved a proposal by the predecessor District 3 association to provide dispatch service on Lakes Michigan and Huron. The letter authorized the then existing District 3 association to “establish and maintain a pilot dispatching office at the Port of Chicago and service the undesignated waters of Lakes Michigan, Huron and Superior and the designated waters of District 3” subject to the exception that the District 3 association would “make the necessary working arrangements with [District 2] to provide dispatching at Port Huron.”

The Director's approval, however, had limitations. First, the agreement was exclusively between the Director and the predecessor District 3 association. The evidence suggests that the current District 3 association never formally adopted, or was even aware of, the terms of the agreement with the Director, but merely continued to operate using the arrangements existing when it took over responsibility for the district in the 1990s. District 2 was not a signatory to the arrangement and the approval letter gave no rights of enforcement to District 2, nor did it provide District 2 with a remedy.

The Director's approval letter was not couched in terms of an Order but was consensual in nature and by its terms could be modified with the Director's consent. It is also clear on its face that the agreement applied only during the 1969 season and that the Coast Guard retained the right to modify the agreement and to determine “if future operations [were] to continue the same as during 1969” or whether “alternative arrangements [should be made] to provide for a better operating plan.” The terms of the arrangement were never incorporated into the pilotage regulations. In addition, either by the terms of the letter, or by the discretionary authority held by the Director over dispatch under the current regulations, 46 CFR 320 (d) (5), modification of the current arrangement is well within the Coast Guard's authority. The proffered letter is of no binding effect and does not defeat the authority of the current Director to ensure reliable, efficient and safe pilotage.

b. Memorandums of Arrangements (MOA) Between Canada and the United States

Most importantly, since the Director's 1969 letter was written, one very significant and dispositive event occurred that nullifies the language of the Director's letter requiring the then District 3 Association to make arrangements with District 2 for dispatch services at Port Huron.

Effective May 1, 1961, the US and Canada entered into an MOA specifying dispatch responsibilities on the Lakes. It was agreed that the US pilots' association at Port Huron would provide pilot dispatch services, as follows:

Port Huron – United States: Eastbound from the Lake Huron Lightship to Port Weller; to and from United States and Canadian ports on Lake Erie, across Lake Huron to Detour Light and Lake Michigan.

On April 27, 1968, the MOA was amended deleting the specific pilot dispatch assignments and substituting the following: "The Secretary and the Minister will establish or cause to be established under their control in the United States and Canada, respectively, organizations and facilities for the dispatching of pilots and related services, including pilot boats." This change only broadened the Director's authority to assign dispatch areas and did not appear to modify the existing arrangements between the pilot associations. Accordingly, in March of 1969 the then Director clearly had the authority to approve the predecessor District 3 plan for the provision of dispatch, and authorizing District 2 to dispatch pilots to ports on Lakes Huron and Michigan.

However, subsequent amendment of the MOA has removed this authority. Under the MOA currently in effect and dated 1977 (as amended) the District 2 association is authorized to dispatch vessels down bound from Port Huron and not up bound into Lake Huron or Lake Michigan as previously authorized. The District 3 association has been given exclusive authority to dispatch pilots in District 3. Accordingly, the language referred to in the previous Director's letter has been superseded by the revised MOA, which is implemented through regulation.

46 CFR 401.710 provides that as a condition of maintaining a certification to operate a pilotage pool, a pool must "comply with the terms of any agreement for services by registered pilots on the Great Lakes between an appropriate agency of Canada and the Secretary, his designee, or the Director." More specifically, the pool must "coordinate on a reciprocal basis its pool operations with pool operations of the Canadian Government, under the Memorandum of Arrangements, Great Lakes Pilotage . . ." Based upon the foregoing, today it is a violation of the pilotage regulations for District 2 to provide pilot dispatch services to up bound vessels from Port Huron. See also, 46 CFR 401.320 (d) (6).

c. Captain Gallagher's Letter of April 2, 2010.

Upon this determination, the remaining points put forth by District 2 on the matter must fail. Captain Gallagher's letter of April 2, 2010, addressed to this office, claims that District 3's notice to agents to provide its dispatch office with direct notification of vessel arrivals for purposes of dispatch is in violation of 46 CFR 401.320. That section states that "pilotage services will be provided on a first-come, first-serve basis to vessels giving proper notice of arrival time or pilotage service requirements, to the pilotage station¹ . . ." Captain Gallagher asserts that Port Huron is the appropriate "pilot station." Based upon the foregoing analysis, Captain Gallagher's assertion is incorrect. The proper "pilot station" for both up bound and down bound vessels in the upper lakes is the District 3 office according to the current MOA, which states that dispatch in District 3 will be provided by the Western Great Lakes Pilots' Association – the association currently holding the certificate of registration to perform pilot services in District 3.

d. Arguments of the District 2 Counsel – The Working Rules

District 2's legal counsel argues that up bound dispatch at Port Huron into District 3 is the exclusive "regulatory" responsibility of the District 2 pilot association. Counsel cites the MOA as authority for the proposition that "[District 2 has] sole dispatching authority of all Canadian and American pilots in the dispatch area." As previously discussed, this is an incorrect assertion. The clear language of the MOA provides that District 2 is responsible for down bound dispatch from Port Huron and the Canadians are responsible for up-bound dispatch. While the dispatch is shared by Canada and the US in District 2, and the District 2 association dispatches some up-bound vessels after reaching US ports within the District, it is clear from the current MOA that this authority applies only within District 2 and that District 3 has exclusive dispatch authority for all up and down bound vessels within its District. Substantial dictum follows counsel's assertions concerning the obligations that exist under District 2's work rules but since District 2's work rules have no application to dispatch in District 3, it is unnecessary to address them.

Counsel states that "the U.S. dispatch rules promulgated by the Pilotage Office through Working Rules for both WGLPA (District 3)² and LPA (District 2) confirm this exclusive responsibility and authority." That statement is inaccurate. A review of District 2's working rules makes clear that those rules apply only to District 2 registered pilots. *See*, Working Rules and Dispatching Procedures of Lakes Pilots' Association, rule A-1. That rule states, "within the meaning of these rules a pilot shall mean any U.S. District No. 2 pilot." Those rules make no mention of pilots from other associations entering its district nor does it purport to establish any rules for out of district pilots, except as briefly mentioned later in this opinion related to use of pilot boats. And, the District 2 rules

¹ The pilotage station is the place from which pilot dispatch is performed. In this case the reference is to the pilotage office (station) at Port Huron. See also, 46 CFR 710 (c) which refers to the "pilot dispatch station." It appears the difference is merely typographical and no change in meaning was intended.

² Although unclear, it appears that counsel for District 2 refers to an outdated set of Working Rules and Dispatch Procedures for the Western Great Lakes Pilots' Association. The February 24, 2001, rules were amended on September 25, 2009.

make no mention of an “exclusive responsibility and authority” to dispatch District 3 pilots.

District 3’s working rules also apply only to its members. *See*, Working Rules and Dispatch Procedures, Western Great Lakes Pilots’ Association, rule A-1-2, 24 February 2001 (as amended 25 September 2009). Section A-2 of the Working Rules states: “Unless otherwise stated in these Rules, these Working Rules and Dispatch Procedures shall apply equitably to all United States Pilots serving in District No. 3, and to all dispatching personnel of the Association.” The only reference to pilots who are not association members relates to Canadian pilots working within District 3, which is irrelevant to the issue at hand. The Work Rules make no reference to the District 2 office in Port Huron as a dispatch office and clearly states at Rule C-6 that “a pilot, upon completion of an assignment, shall promptly report to the WGLPA (District 3) dispatcher on Duty.” Working Rule C-7 states that “no pilot shall depart from his area of assignment until he receives instructions from the dispatcher.” Rule C-10 states that “pilots shall be assigned only by the dispatcher.” Given the language contained in Rule A-2, this can only have reference to the District 3 dispatcher. The District 3 rules are silent respecting dispatch or vessel notification requirements between the two Districts.

Counsel for District 2 states further that pursuant to LPA’s (District 2) working rules all pilots arriving in its dispatch area come under its dispatch authority. The flaw in this argument is that District 2 has no up bound dispatch authority in waters serviced by District 3, as previously noted. District 3 pilots arrive and disembark at the Port Huron pilot boat station because it is a recognized change point and the southern boundary of District 3. Once at Port Huron, the District 3 pilots await dispatch orders to vessels that are up bound within District 3 waters. These dispatch orders are required to be provided by the District 3 dispatcher. Accordingly, District 3 pilots never come within the dispatch authority of District 2.

e. Arguments of the District 2 Counsel – Dispatch Service

Counsel argues that the charges for District 2’s services to District 3 are exclusively for dispatch service. This is incorrect. District 3 maintains and controls the tour de rolls for all areas of District 3, issues dispatch orders to its pilots and controls the movement of its pilots throughout the District. Despite counsel’s assertions to the contrary, the only service actually provided to District 3 is vessel arrival notifications, which consist of making a single telephone call to either the District 3 dispatch office or the District 3 pilot in Port Huron who is awaiting an up bound vessel. As so aptly pointed out by the District 2 association President, Captain Gallagher, in his letter to the District 3 President, Captain Don Willecke, dated February 2, 2010, it is the responsibility of the vessel to provide these notifications, not the responsibility of the Districts. 46 CFR 401.320(d) (1) provides that “pilotage service will be provided . . . to vessels giving proper notice of arrival time or pilotage service requirements . . .” This notice is to be made to the cognizant dispatch office. In the case of vessels seeking a District 3 pilot, the District 3 dispatch office is where the notification is to be made.

II. Pilot Boat Service

a. Is District 2 Required to Continue Providing District 3 pilots with Pilot Boat Service?

Remaining is the issue of the provision of pilot boat service at Port Huron to District 3 pilots either disembarking a down bound vessel or boarding an up bound vessel at Port Huron. It is here, in connection with this matter, where the District 2 work rules have limited application. Although pilot boat services have not been the subject of the current dispute, issues involving rights of use and operation need to be clarified. The current MOA specifically provides that District 2 will provide pilot boat service at Port Huron. That provision is binding upon District 2 by 46 CFR 401.320. That section states that a “pool (District 2) will coordinate on a reciprocal basis its pool operations . . . pursuant to the provisions of the United States-Canada Memorandum of Arrangements, Great Lakes Pilotage, or any other arrangements established by the United States and Canadian Governments.” Similarly, 46 CFR 401.710 provides that as a condition of maintaining a certification to operate a pilotage pool, a pool must “comply with the terms of any agreement for services by registered pilots on the Great Lakes between an appropriate agency of Canada and the Secretary, his designee, or the Director.”

Accordingly, District 2 is required to continue providing reliable and timely pilot boat service to District 3 pilots. Fees charged for this service will be reasonable and will bear a direct relationship to the cost of pilot boat operations. This is consistent with 46 CFR 401.320 (d) (5) which provides the Director of Pilotage with the authority to prescribe rules governing the operation of and costs which may be charged in connection with the pools.

46 CFR 401.340 provides that: “United States . . . registered pilots utilizing the facilities and dispatch services of any authorized pool shall comply with its working rules . . . except to the extent inconsistent with the dispatch orders of the Director under 401.720.” While the District 3 pilots are not being dispatched by District 2 and, accordingly, are not subject to the District 2 dispatch rules and procedures, they are using the facilities to the limited extent that they use the District 2 pilot boat. Accordingly, to the limited extent that District 3 pilots utilize the District 2 pilot boat, District 2 may require compliance with those of its working rules that are reasonable and have direct application to the use of those boats.

b. Determining Proper Pilot Boat Fees

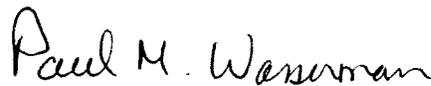
Finally, District 3 has pointed out that fees charged by District 2 for the use of the pilot boat have risen substantially between 2007 and 2009. According to District 3, the cost of pilot boat service has climbed from \$190 per one-way run in 2007 to \$359.75 in 2009. The cost for 2010 has not been announced. The current fee charged the Canadian Great Lakes Pilotage Authority by District 2 for the same service is only \$135. It appears that District 2 is charging District 3 well over twice the amount it charges the Canadians for

the same service. The discrepancy between these charges is a matter of significant concern. Accordingly, District 2 will be required to account for its pilot boat fees.

III. Director's Orders

Based upon the foregoing, it is determined that dispatch of District 3 pilots within the confines of District 3 has been and remains the exclusive responsibility of the District 3 pilots' association. Accordingly, it is ordered that District 2 immediately cease and desist from engaging in the provision of pilot dispatch services to District 3 pilots. However, as a matter of courtesy, and in furtherance of the tradition of cooperation between associations, District 2 is strongly encouraged to provide vessel notifications to District 3 at no charge. For years, District 3 has provided District 2 three notifications for every ship headed down bound for District 2 and it has done so at no charge to District 2. It is expected this tradition of cooperation for the benefit of all will continue. If not, the pilotage office will look closer into the matter of required notifications between associations. Further, it is ordered that District 2 continue to provide reliable and timely pilot boat service to District 3 pilots at Port Huron. For the reasons stated above, it is ordered that the District 2 pilots' association provide the Great Lakes Pilotage Office a detailed financial justification for the pilot boat fee charged District 3 within twenty (20) days of the date of this Decision and Order. The justification will be reviewed and a separate opinion will be issued concerning an appropriate fee. This order is made in accordance with 46 CFR 401.320 subsections (d) (4) and (5).

In accordance to 46 C.F.R. § 1.03-15 you have a right to appeal this decision to CG-5, which is currently Rear Admiral Brian Salerno. Such an appeal must be submitted in writing and received by this authority within 30 days of you receiving this letter. Upon written request and for good cause, the 30 day time limit may be extended by CG-5. Failure to submit a formal appeal in accordance with the procedures and time limits contained in this subpart results in the decision becoming final agency action.



Paul M. Wasserman
Director, Great Lakes Pilotage
Marine Transportation System Division
Office of Waterways Management
United States Coast Guard

By direction

Dated: April 16, 2010

ⁱ The record consists of the following documents:

District 2 Correspondence

- E-mail from Lakes Pilots Association (LPA) to Stu Theis, Executive Director, US Great Lakes Shipping Association, forwarded to USCG and dated 4/7/10 with attachments
- Fax from LPA dated 4/5/10 with attachments
- LPA Letter dated 4/2/10 with attachments
- LPA Letter to Western Great Lakes Pilots Association (WGLPA) and forwarded to USCG by WGLPA dated 2/2/10

District 2 Attorney's Correspondence

- Letter from Kelly, Whipple, Zick & Keyes dated 11/2/09
- Letter from Kelly, Whipple, Zick & Keyes dated 8/10/09

District 3 Correspondence

- WGLPA E-mail dated 4/7/10 with attachment
- WGLPA E-mail dated 4/7/10 with attachment
- WGLPA E-mail dated 4/7/10 with attachments
- WGLPA E-mail dated 4/6/10
- WGLPA E-mail dated 4/6/10
- WGLPA E-mail dated 4/5/10 with attachment
- WGLPA E-mail dated 4/5/10
- WGLPA E-mail dated 3/23/10 with attachment
- WGLPA E-mail dated 9/1/09 with attachment
- WGLPA E-mail dated 8/13/09 with attachment
- WGLPA E-mail dated 7/10/09 with attachments

Industry Correspondence

- E-mail from Stu Theis dated 4/6/10 with attachment
- E-mail from Stu Theis dated 4/2/10 with attachment

USCG Outgoing Correspondence

- E-mail to LPA dated 4/2/10
- E-mail to WGLPA dated 12/15/09
- E-mail to LPA, WGLPA dated 10/21/09 with attachment
- E-mail to LPA, WGLPA dated 10/6/09
- E-mail to LPA, WGLPA dated 9/3/09