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United States Coast Guard

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MAY 24 2011

Mr. Mark Ruge, Attorney at Law
K&L Gates LLP
1601 K Street, NW
Washington, D.C. 20006

Dear Mr. Ruge:

This letter serves as my final determination concerning several categories of overbilling practices by your client for pilotage services provided during the 2006 and 2007 shipping seasons. In making these determinations, I have carefully considered all of the available evidence and relevant legal authorities. I have also carefully considered all of the factual, legal, and policy arguments that you made on behalf of your client, both those that you have submitted in writing, as well as those you presented during various meetings and telephone conversations with me and my staff. You may appeal this decision to the Director of Marine Transportation Systems Management (Commandant (CG-55)) in writing, within 30 days of the date of this letter.

On February 3, 2009, I sent a letter where I advised you of my initial determination on matters concerning the several categories of overbilling practices by your client the Lakes Pilots Association, Inc. (LPA), for pilotage services provided during the 2006 and 2007 shipping seasons. That letter and its enclosures are included as enclosure (1). Following that letter, we had another meeting and several follow up phone calls to try to work with you and your client in resolving this matter. The "discussion" sections of my Feb 3, 2009 letter remain unchanged. However, I have amended my decisions concerning the "Overcharges of West of Southeast Shoal" and "Misapplication of Surcharges" based on our conversations and your subsequent submissions.

For ease of reference, I have dealt with the matters at issue in the same order that I addressed them in enclosure (1). Please refer to enclosure (1) for the discussion sections, as they remain unchanged. Finally, as I understand that you are not representing LPA on the issue of dispatch fees, I will communicate directly with the LPA on that matter.

Decisions

(1) Overcharges West of Southeast Shoal

My staff has reviewed your original submissions and resubmissions of the source forms and discussed with Mr. Dan Gallagher of the LPA, the various explanations and clarifications of source-form entries. My determination remains that LPA must repay industry in all cases where the documentary record establishes a case of double billing of vessels temporarily delayed. I have determined that the total amount the LPA must repay the industry on this specific excessive billing

practice for the 2006 and 2007 seasons is $44,558. This has been revised down from the original calculated amount of $56,377.00 based on the subsequent documentation that you have submitted. See enclosure (2) for the calculations and rationale for this revision.

(2) Misapplication of Surcharges

My initial determination (see enclosure (1)) was that the LPA must reimburse industry for the improper surcharges that were levied for the cost of operating the *Huron Maid* during the 2006 and 2007 shipping seasons. This determination was based on the final rule, which became effective May 3, 2006, in which the Coast Guard specifically advised the LPA that collecting surcharges for operating the *Huron Maid* was no longer permitted (71 Fed. Reg. 16507). Based on our subsequent discussions and the documentation you submitted, I acknowledge that it is possible that the surcharges were not to offset the costs of the *Huron Maid*, but were instead to purchase computers to aid in providing more efficient pilotage service. Therefore, due to the possible confusion that may have existed over this point, the decision on this matter made in enclosure (1) is reversed, and LPA is not required to repay industry for this specific billing. However, moving forward from the 2006 and 2007 shipping seasons, I wish to clarify that <u>all</u> surcharges are prohibited. Any surcharges made during subsequent shipping seasons shall be deemed inappropriate and full industry reimbursement will be required.

(3) **Inappropriate Over-carriage Charges at Port Colborne**

In balancing the equities of LPA, industry, and the Coast Guard, and in the interest of resolving this matter, my decision remains that LPA must repay industry $114,776.50. As I explained in my February 3, 2009 letter, pilot change points are to be understood as geographic areas, and not specific geographic points. However, in reaching my decision in this matter, I have taken into account the possible confusion that may have existed regarding the applicable pilot change point during the 2006 and 2007 seasons, as well as LPA's representation that they will no longer charge for over-carriage in such circumstances. Moving forward, I am satisfied that any confusion that may have existed as to the applicable pilot change point has since been resolved with the amendment of 46 C.F.R. § 401.450 specifically naming "Port Colborne" as the pilot change point. Please see enclosure (1) for a complete discussion of this issue.

(4) Overcharging for Double Pilots in the Port of Lorain

My decision in this matter remains unchanged. There was a failure to comply with the regulatory requirement of 46 C.F.R. § 425 to obtain the Director's authorization in every case before using two pilots in the Port of Lorain. In the future, requests for the use of double pilots must be in writing and approved by the Director beforehand. However, I recognize that it is difficult to determine from the record whether the use of a second pilot in a particular instance was done with the support of the shipping company and whether, under the circumstances, the use of a second pilot was necessary. Therefore, as I explained in enclosure (1), before requiring the refund of any charges for double pilots, I am requiring a shipping company to first demonstrate: (1) that it had objected to having to use a second pilot at the time; and (2) that, under the circumstances, the use of the second pilot was not necessary. The procedures in 46 C.F.R. § 401.431 for disputed charges shall apply.

(5) Inappropriate Charging of Transportation Fees

My decision on this matter remains unchanged. On many occasions in 2006 and 2007, the LPA and its pilots inappropriately billed industry for transportation fees. Such billing is inappropriate because the Coast Guard already considers such transportation expenses and factors them into the rate structure. I understand that the LPA has now eliminated this practice and has agreed not to repeat it in the future. However, Coast Guard staff experts have calculated, and I agree, that an accurate determination of the total amount the LPA billed industry for this specific practice for the 2006 and 2007 seasons is $78,585.

In our discussions following my Feb 03, 2009 letter, you claimed that other pilot associations, particularly the St. Lawrence Seaway Pilots Association (District 1), were charging similar transportation costs as the LPA (District 2) and that it would be unfair to penalize only one association. First, I note that LPA is not being "penalized" by having to refund money that it was never entitled to in the first place. Accordingly, LPA must repay industry the $78,585 that was inappropriately charged. Secondly, my staff will conduct a separate inquiry into the allegation that District 1 has also charged for transportation fees and, if substantiated, I will require reimbursement to industry for any inappropriate charges in this matter.

Summary

Based on the discussion above, the total amount that I have determined that the LPA must repay industry is $237,919.50. Enclosures (1) and (2) detail the basis for calculating this amount. Detailed documentation to support these figures is available in the three volumes the Coast Guard prepared and turned over to you and your clients in May 2007, as well as in the notes and calculations on the documentation (source forms with explanations) you recently provided to the Coast Guard. LPA will need to arrange to repay industry for the overcharges discussed in this letter following standard accounting procedures. I will notify the affected members of industry as to these decisions for their awareness. Finally, as we have previously discussed, I would also request that LPA provide the Coast Guard with written assurances that the practices the Coast Guard has identified as improper, be discontinued.

Sincerely,

RAJIV KHANDPUR
Chief, Office of Marine Transportation System (CG-552)
U.S. Coast Guard
By direction

Enclosure:
(1) February 03, 2009 letter addressed to Mr. Mark Ruge, Attorney at Law with enclosures
(2) 2007 Overcharges West of Southeast Shoal (revised table)