

U.S. Department
of Transportation

United States
Coast Guard



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16600
July 27, 2001

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

RE: MV00001622
[REDACTED]
[REDACTED]
T/B [REDACTED] (renamed
[REDACTED])
\$24,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00001622, which includes your appeal as owner of the T/B [REDACTED] (renamed [REDACTED]). The appeal is from the action of the Hearing Officer in assessing a \$24,000.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 5103(a)	Operation of a vessel without an assigned loadline.	\$1000.00
33 CFR 151.19	Failure to have on board a valid International Oil Pollution Prevention Certificate (IOPP).	\$1000.00
46 CFR 31.01-1	Operation of a tank vessel without ensuring that a biennial/annual inspection was conducted.	\$1000.00
33 CFR 160.105	Failure to comply with an order pertaining to the control of a vessel or facility operations.	\$20,000.00
33 USC 2716(a)	Failure to establish and maintain evidence of financial responsibility.	\$1000.00

The violations resulted from three Captain of the Port Orders issued to the T/B [REDACTED] between April 16, 2000 and May 1, 2000. During that time, the vessel was moored near Watson Island in the Port of Miami.

On appeal, you do not deny the violations but seek mitigation of all penalties assessed. You contend that the company's financial position and the significant difficulty encountered in moving the vessel render the Coast Guard's penalties "highly punitive and unjust." Your appeal is denied for the reasons described below.

As a preliminary matter, I believe a brief recitation of the facts is in order. On April 17, 2000, MSO Miami received notice that the T/B [REDACTED] would arrive in U.S. waters from the port of Nassau, Bahamas, on April 18, 2000, with the T/B [REDACTED] and the T/B [REDACTED] in tow. On April 18, 2000, the Coast Guard informed [REDACTED] (hereinafter [REDACTED]), the owner of both the T/B [REDACTED] and the T/B [REDACTED], that the T/B [REDACTED] was denied entry to U.S. waters because it did not have any of the documents required by the Coast Guard. The Coast Guard issued COTP Order 00-226 to the T/B [REDACTED] prohibiting the vessel from entering U.S. waters without the appropriate documentation. No violations have resulted from failure to comply with this order because it was later determined that [REDACTED] received notice of the order at the same time that the vessel entered U.S. waters.

On April 19, 2000, the Coast Guard determined that the T/B [REDACTED] was moored at Watson Island under the I-395 Bridge, outboard of the half-sunken deck barge [REDACTED]. The [REDACTED] did not have properly designed and installed mooring fixtures and was not suited to serve as a mooring location for the T/B [REDACTED]. Therefore, the Coast Guard issued COTP Order 00-227 to [REDACTED], ordering the corporation to immediately move the barge to a suitable location. On May 11, 2000, the vessel was moved to Dodge Island. In the interim, on April 20, 2000, [REDACTED] attempted to use their tug, the T/B [REDACTED] to move the T/B [REDACTED]. At that time, the Coast Guard boarded the T/B [REDACTED] and found 17 alleged violations, including a master with an expired license and a crew of foreign citizens with no U.S. merchant mariner's documents.

On May 1, 2000, Coast Guard CWO [REDACTED] boarded the vessel after determining that it was not being appropriately supervised. During the boarding, CWO [REDACTED] found approximately 32 inches of oily water residue in vessel's stern void. On May 2, 2000, the Coast Guard issued COTP Order 00-228, ordering [REDACTED] to remove all of the oily water waste from the vessel by 1600 on May 3, 2000. On May 2, 2000, [REDACTED] requested an extension of time to allow them to comply with COTP 00-228. The Coast Guard denied this extension of time and instructed [REDACTED] to obtain a gas-freed certificate for the vessel by May 8, 2000. The oily water was successfully pumped from the T/B [REDACTED] on May 4, 2000 and the vessel was certified gas free on May 5, 2000.

I will now address the merits of your appeal, beginning with your contentions regarding the alleged violation of 33 CFR 160.105. 33 CFR 160.105 makes clear that "[e]ach person who has notice of the terms of an order. . . must comply with that order." In COTP Order No. 00-227, dated April 19, 2000, the Coast Guard clearly stated that the "[REDACTED] is ordered to be moved **immediately** to a suitable location." (*emphasis added*) The record clearly indicates that the vessel was not moved until May 11, 2000, 23 days after the issuance of COTP Order 00-227. While you do not deny the violation, you seek mitigation of the \$24,000 penalty assessed by the Hearing Officer. You assert that "[t]here are a lot of factors that went into the lateness in moving the barge." You note that your initial plans to move the barge to a suitable dock were "thwarted by weather and tides" and add that it was "virtually impossible" to find dock space available for a barge the size of the [REDACTED]. You further contend that the process was hastened because the Coast Guard "decided to place another CO[T]P on the barge demanding

that the stern rake be pumped dry and a gas free certificate be obtained prior to any movement of the barge.”

The record indicates that you first contacted the Coast Guard regarding movement of the T/B [REDACTED] on April 19, 2000 at approximately 1623 hours. At that time, you informed the Coast Guard that the T/B [REDACTED] would be moved at the next high tide, which tide tables indicate was to be at 1933 hours. On April 20, you informed the Coast Guard that the vessel was not moved because you “missed the high tide as the [REDACTED] could not move close enough to the barge.” The record further shows that the T/B [REDACTED] is also owned by [REDACTED]. The Coast Guard determined that the T/B [REDACTED] was not allowed to assist in moving the T/B [REDACTED] because it, too, failed to comply with Coast Guard regulations. Of the 17 violations that were noted aboard the T/B [REDACTED], the most serious was that the Master did not have a valid U.S. license. Thus, at the same time, two [REDACTED] vessels are alleged to have committed serious violations of the laws of the United States, which could have negatively affected the navigable waters of the United States.

You contend that, over the course of the 23 days prior to the movement of the vessel, you made several attempts to move the vessel but were “thwarted” by either unavailability of dock space, lack of Coast Guard approval of dock space, or the initiation of further Coast Guard requirements. You also seem to believe that the sunken barge [REDACTED] was, at one time, [REDACTED] dock space for the [REDACTED]. You indicate that the [REDACTED] had previously been moored in this location and that “there was never a problem with the [REDACTED] being at this location.” There is no evidence that [REDACTED] ever had permission to place the barge at the location in question. Therefore, I agree with MSO Miami’s conclusion that “the ‘acceptability’ of this location was a conclusion on you part and not based on any dockage agreement or contract between the property owner and yourself.”

You have presented a bill for tug fees to support your argument that you made a good faith effort to move the vessel. You have also submitted several invoices representing payment of fees for the pumping of the oily water that was the subject of COTP Order No. 00-228. You contend that when the Coast Guard “decided to place” this COTP Order on the vessel, it added to the difficulty and time that it took to move the vessel, therefore hindering compliance with COTP Order No. 00-227. I do not find this argument persuasive. COTP Order No. 00-228 was issued on May 1, 2000, nearly two weeks after the issuance of COTP Order No. 00-227. If you had immediately moved the vessel, as required by COTP Order No. 00-227, the issuance of COTP Order No. 00-228 would not have had an impact on the vessel’s movement and would not have further complicated the situation. Furthermore, while you contend that you were “refused dockage at every dock on the Miami river and all marinas,” you present no evidence, other than the fact that you did not move the vessel, to support this contention. It is the Hearing Officer’s responsibility to decide the reliability and credibility of evidence and to resolve conflicts in evidence. In the absence of clear evidence to the contrary, I will not overturn his decision.

You further contend that the “inability of the company to move the barge due to the COP[T] order and further the failure of the USCG to complete the report in order to commence the process of final fine determination is the reason why the company is now faced with a bill for dockage services.” I do not see the fees incurred for dockage to be appropriate reasons to mitigate the penalty. If you had moored the vessel in an appropriate location, rather than attaching it to a half-sunken barge, you would, undoubtedly, have incurred dockage fees. The fact that you were compelled to remain docked for so long is the result of your inability to bring the vessel into compliance with Coast Guard regulations. For these reasons, I agree with the Hearing Officer’s assessment of the situation in issue and will not mitigate the penalty any further.

The remaining violations concern the documentation of the vessel. Because you do not deny that the vessel did not have a load line certificate (in violation of 46 USC 5103(a)), International Oil Pollution Prevention Certificate (in violation of 33 CFR 151.19), certificate of annual inspection (in violation of 46 CFR 31.01-1), or a COFR certificate (in violation of 33 USC 2716(a)), I find the violations proved. To mitigate these penalties, you submit evidence of [REDACTED]'s present financial instability. You note that the company has recently been forced to move its facilities, resulting in significant financial hardship and add that over the course of the past two years, [REDACTED] has suffered greatly due to the embezzlement of company funds and the excessive amounts of money owned to the company by the embezzling party. You also submit evidence that the Company is a small business entity with insufficient assets to support the payment of the Coast Guard's penalty. You contend that you are a "reformed company" that "has no further desire to be in the marine business, own a barge or further manage maritime equipment," and conclude that the assessed penalty is "highly punitive and unjust." You base all of your contentions on the fact that the barge has "traveled without cargo at all times since purchase" and that "[t]here was no intent to run afoul of any law or operate in any bad manner." While I agree with you that the financial future of [REDACTED] is uncertain, your arguments seeking further mitigation of the assessed penalties fail to consider the severity of the violations in issue. Although the record indicates that you did obtain all of the required certificates for the vessel, it cannot be forgotten that the vessel was initially operated without those certificates. I find the vessel's initial lack of a COFR Certificate to be particularly troubling. The record clearly indicates that there were approximately 8,000 gallons of oily water aboard the vessel at the relevant time. Given the financial condition of the company, it is doubtful that, absent the appropriate pollution insurance, [REDACTED] would have been able to afford the cost of cleanup if a large spill of that oily water had occurred. MSO Miami suggested that the penalty assessed for the "document" violations should be \$15,000.00. The record indicates that the Hearing Officer considered [REDACTED]'s assertions, including the financial position of the company, when he mitigated that penalty to \$4000.00. I see no abuse of discretion on the part of the Hearing Officer and will not mitigate the penalty further. The financial condition of [REDACTED] does not alleviate the fact that the violations occurred.

Finally, I will address your concerns regarding the Coast Guard's civil penalty procedures. You assert that the Coast Guard's civil penalty procedures "clearly did not fall under the rights to a 'speedy trial'" and contend that the Coast Guard's "failure to move the civil penalty proceedings to swift conclusion resulted in significant extraordinary costs to the company." The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental 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 proved. Coast Guard Hearing Officers are obligated to be mindful of national goals underlying the Congressional intent and are governed by the procedural rules set forth at 33 CFR 1.07.

The Coast Guard's civil penalty procedures are designed to ensure that parties are afforded maximum due process during informal adjudicative proceedings. By balancing procedural fairness and legislative intent, the civil penalty process plays an important and essential role in furthering national maritime safety and environmental goals. There is no set time applicable to the conclusion of civil penalty cases. The time involved in the issuance of preliminary letters of notice, for example, depends solely upon the time that it takes for the relevant Marine Safety Office to conclude their investigation. In the instant case, the violation occurred in April/May 2000. Because only a little over one year has passed since the violations occurred, I do not find the time involved in the disposition of this matter to be excessive.

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. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the penalty of

RE: CIVIL PENALTY

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\$24,000.00 rather than the \$51,500.00 preliminarily assessed to be appropriate in light of the seriousness of the violations.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action.

Sincerely,

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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