



16592  
17 June 2008

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

RE: Case No. 2201377  
[REDACTED]  
[REDACTED]  
[REDACTED]  
Mile 403.1, Upper Mississippi River  
\$2,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2201377 which includes your appeal on behalf of [REDACTED][REDACTED] (hereinafter "[REDACTED]") as owner/operator of the [REDACTED], on the Upper Mississippi River at mile 403.1 (hereinafter "Bridge"). The appeal is from the action of the Hearing Officer in assessing a \$2,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 C.F.R. § 117.5	Failure to open promptly and/or fully for passage of vessels when request to open was given in accordance with this subpart.	\$2,000.00

The incident underlying the violation is alleged to have occurred on June 2<sup>nd</sup>, 2004. On that date, the Coast Guard alleges that [REDACTED] failed to promptly open the Bridge after a request to open the Bridge was properly given by the [REDACTED].

On appeal, you deny the violation. To that end, you assert that the Hearing Officer's finding that [REDACTED] unreasonably delayed the opening of the drawbridge is not supported by substantial evidence in the record and that the Hearing Officer erred in finding the violation proved "given the mechanical difficulties experienced by the train that prevented the train from clearing the drawbridge so that it could be opened for river traffic." In that regard, although you do not deny that the [REDACTED] was delayed at the bridge, you assert that a train's

mechanical failure on the bridge, experienced prior to receipt of the vessel's request to open, does not constitute an unreasonable delay under the applicable regulations. Your appeal is denied for the reasons set forth below.

In order to fully understand the context of this appeal, I believe it necessary to discuss the facts surrounding the violation. Throughout the course of these proceedings, the Coast Guard has alleged that the [REDACTED] signaled the bridge tender at 2230 that she was transiting and would require an opening in approximately 30 minutes (2300). The bridgetender immediately acknowledged the signal; however, the Bridge could not be immediately opened because a westbound coal train occupied the tracks on the bridge. After the train was stopped on the bridge, it apparently malfunctioned and "lost its air" which rendered it unable to proceed. The problem was subsequently remedied and the bridge was opened at 2344. As a result, the [REDACTED] was delayed approximately 44 minutes. The Coast Guard alleged that this delay constituted a violation of 33 C.F.R. § 117.5.

The Hearing Officer sent you a preliminary assessment letter on February 1<sup>st</sup>, 2005, which included a copy of the entire case file related to the incident. In order to gather additional information and more fully prepare, you requested a 30 day extension for your response. The Hearing Officer granted your request and, as a consequence, on April 11, 2005, you submitted a written response to the Hearing Officer. In your response, although you neither admitted nor denied the factual allegations contained within the case file, you asserted that the delayed opening of the bridge was not unreasonable. In addition, you stated:

Even if there was technically a violation of 33 C.F.R. § 117.5, [REDACTED] respectfully submits that a civil penalty of less than the maximum amount is dictated by the circumstances of this case. The train was occupying the bridge at the time the bridge tender received the call from [REDACTED]. Notwithstanding that fact, it would have cleared the bridge but for the mechanical difficulties experienced by the train.

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There will be, however, from time to time instances such as this case where unexpected mechanical difficulties arise while the train is on the bridge which have resulted in a delay to river traffic. [REDACTED] respectfully submits, however, that in instances such as this case imposition of the maximum penalty is inappropriate and the Hearing Officer should exercise his discretion to impose a civil penalty in a lesser amount commensurate with the circumstances of the case. [REDACTED] respectfully submits that should the Hearing Officer determine to impose a civil penalty, that the appropriate amount of the civil penalty is \$2,000.00.

The record shows that the Hearing Officer did not find your assertions, in this regard, persuasive. In addressing the violation in her Final Letter of Decision, the Hearing Officer, upon noting that "[i]t is undisputed that the train stopped on the bridge before it had mechanical difficulties...to allow another train to pass," found that "when a train is voluntarily stopped on a bridge, rather than before the bridge, its later mechanical difficulty that prevents it from vacating the bridge provides no excuse" for a failure to open the bridge upon request. After finding the violation

proved based on that rationale, the Hearing Officer mitigated the initially assessed penalty by more than 50% due to the following conclusions:

As to the penalty amount, you point out that the Coast Guard's reference to 'previous history of violations' is supported by only three instances, none of which shows a finding. This point is well taken. I was aware when I first looked at the file that the three listed cases were evidently not final, and I did not consider them. On further inquiry to the database, I discovered that two of them were dropped and the other has not yet been sent forward. To remove any possible taint of the unsupported reference to previous history, I am assessing a reduce penalty of \$2000.

On appeal, you contend that 33 CFR 117.5 must be read in conjunction with 33 CFR 117.9 which states: "No person shall unreasonably delay the opening of a draw after the signals required by [33 CFR] §117.15 have been given." In addition, you aver that the mechanical difficulties experienced by the train vitiate the responsibility of [REDACTED] to open the bridge promptly; therefore, the delayed opening was not unreasonable and, thus, not a violation of 33 CFR §§ 117.5 and 117.9. Moreover, you contend that the bridge log indicates the [REDACTED] signaled for an opening at 2255 with a 30 minute estimated time of arrival, a fact which you contend reduces the delay to approximately 14 minutes, a fact which you contend proves that the delay was not unreasonable.

33 C.F.R. § 117.5 makes clear, in relevant part, that "[e]xcept where otherwise required by this subpart, drawbridges shall open promptly and fully for the passage of vessels when a request to open is given." With no applicable special operating requirements for the drawbridge in issue, pursuant to Coast Guard regulation, that bridge is required to be opened on demand. Although this provision plainly states that drawbridges shall be promptly and fully opened upon a proper request, 33 C.F.R. § 117.9 indicates that any delay in opening shall not be unreasonable. Reading these two provisions together, if it can be shown that the delay was reasonable, then there can be no violation of 33 C.F.R. § 117.5. Thus, it must be determined if the delay caused to the [REDACTED] was reasonable or not.

The courts have determined that the "burden of proof rests on the owner of a drawbridge to excuse his failure to open the draw promptly on request." *See, Donovan v. New York Cent. R. Co.*, 16 F.2d 611 (D.C.N.Y. 1926); *Clement v. Metropolitan West Side El. R. Co.*, 123 F. 271, 59 C.C. A. 289 (Ill. 1930). It is well settled that navigation rights take precedence over the rights of surface traffic. *Erie L. R. Co. v. Timpany*, 495 F. 2d 830, 833 (2d. Cir. 1974). Courts have consistently held that a bridge spanning a navigable waterway is an obstruction to navigation tolerated only because of necessity and convenience to commerce on land. *St. Louis-San Francisco R. Co. v. Motor Vessel D. Mark*, 243 F. Supp. 689, 692 (S.D. Ala. 1965). I do not believe that you have sufficiently met your burden in proving that the delay in opening the drawbridge on June 2, 2004, was reasonable.

It is clear from the record that the train was stopped on the Bridge in order to allow another train to pass *before* it had mechanical difficulties. You have acknowledged that from time to time, trains will experience mechanical difficulties that will prevent them from being moved off a

bridge in an expeditious manner. With that fact in mind, it is difficult to understand why [REDACTED] would continue to stop trains on the Bridge instead of before the Bridge. Perhaps there is only a single track on either side of the bridge, but the case file contains no evidence on this point. As you have acknowledged, trains have occasionally broken down from time to time on the Bridge after the train has stopped on it. In this case, [REDACTED] choose to stop a train on the Bridge rather than before it. The subsequent inability of the train to leave the bridge in order to allow for a properly signaled opening is no excuse. Moreover, a careful review of the record shows that you have not provided specific evidence as to why the relevant train "lost its air." Under such circumstances, I do not find that the Hearing Officer erred in finding that the delay in opening this Bridge was not reasonable. As a result, I find that the Hearing Officer's conclusion that the delay was unreasonable was supported by substantial evidence in the record.

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 was neither arbitrary nor capricious and is hereby affirmed. I find the \$2,000.00 penalty assessed by the Hearing Officer, rather than the \$5,000.00 initially assessed to be appropriate in light of the circumstances of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 1.07, this decision constitutes final agency action. Payment of **\$2,000.00** 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. 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, U.S. Coast Guard Hearing Office  
Commander, Finance Center