



16460
June 1, 2001

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

RE: MV00000395
[REDACTED]
T/B [REDACTED]
\$1500.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00000395, which includes your appeal on behalf of [REDACTED], as owner of the T/B [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$1500.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR §35.30-10	Open cargo tank hatches, ullage holes or Butterworth plates not supervised or fitted with proper flame screens	\$500.00
33 CFR §155.310	Inadequate cargo oil discharge containment.	\$1000.00

The violations were observed on January 24, 2000, when Coast Guard Pollution Prevention personnel conducted a cargo transfer monitor between [REDACTED] and the T/B [REDACTED], in Port Newark, NJ while the vessel loaded both #2 and #6 fuel oil.

On appeal, you deny a violation of 46 CFR 35.30-10 and contend that, although the hatches were open and flame screens were not installed, they were being properly supervised in accordance with the mandates of the regulation. You further assert that "[t]here was no one hurt and there was no pollution" and there was also "no potential for injury or pollution." You conclude that you "are being charged with a violation of a safety rule where there was no safety problem" and that, as a consequence, the imposition of the penalties is "unfair and unjust." You contend that 46 CFR §35.30-10 is vague, stating: "there is no commonly accepted standard for what constitutes supervision. . . among Coast Guard personnel" and you conclude that the charge should be dismissed. You admit to a violation of 46 CFR 155.310, but, again, assert that the imposition of the penalty would be "unfair and unjust." While you admit that there was no spill pan in place as required by the regulation, you state that "[n]ot having containment under the manifold did not in any way increase the chance of an accident or oil spill" and note that "[n]owhere does the Coast Guard dispute this

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statement.” You conclude that the fines imposed for the aforementioned violations “serve no useful purpose.” Your appeal is denied for the reasons described below.

As a preliminary matter, I will discuss your contention that imposition of civil penalties where no actual harm or threat of harm has occurred is “unfair and unjust.” While it is not the Coast Guard’s intent to punish vessel owners and operators, one of its key roles is to ensure compliance with all marine safety and environmental protection laws. Compliance would be severely compromised if civil penalties were only assessed in situations where people were injured or a discharge occurred. The lack of harm or threat of harm does not serve as a defense to these allegations. Simply put, compliance with the regulations helps prevent disastrous physical and environmental harm. Although the T/B [REDACTED] did not cause any harm, its lack of compliance made it more likely that something disastrous *could* happen. Thus, enforcement of the regulation is meant to prevent the harm that inevitably results when vessels do not comply with the regulations. The Supreme Court emphasized this point when it noted, “all civil penalties have some deterrent effect.” *Hudson v. United States*, 522 US 93, 102 (1997). It is this deterrent effect that prevents catastrophes and ensures safety on the navigable waters of the United States. Contrary to your assertion, it is both fair and just to assess civil penalties when a violation occurs even though no harm or threat of harm is present.

Having just addressed your concerns regarding “fairness,” I will now address your contentions regarding the alleged violation of 33 CFR 155.310. The record shows that you admit that there “was no containment under the manifold” as required by 33 CFR 155.310. The record also shows that the Hearing Officer considered your quick action in correcting the violation and mitigated the penalty accordingly. As a consequence, I find the violation proved and the penalty appropriate.

Finally, I will discuss your arguments concerning the alleged violation of 46 CFR 35.30-10. The regulation states that “[n]o cargo tank hatches, ullage holes, or Butterworth plates shall be opened or shall remain open without flame screens, except under the supervision of the senior members of the crew on duty, unless the tank opened is gas free.” The record clearly shows that the cargo tank hatches were open and that they were not gas free. Therefore, the only issue present with respect to the alleged violation is whether the hatches were being properly “supervised.” You contend that the definition of the word “supervision” is vague and that “there is no universal or commonly affected definition” of the word within the Coast Guard’s regulations. It is not within the scope of this administrative proceeding to determine constitutional issues regarding vagueness. The record shows that in his rebuttal to your initial comments regarding the case, Coast Guard Master Chief [REDACTED] stated that he “personally observed the person in charge move out of sight and certainly out of reaction time distance from those open cargo hatches” during the Coast Guard’s boarding. You do not disagree that the person in charge had moved out of sight of the operation but, instead, contend that the regulation does not require the supervisor to be “in sight of every facet of the operation.” You further assert that the Investigating Officer’s characterization of the person in charge’s actions as being “out of reaction time” is “meaningless” and beyond the mandates of the statutory language. I am not persuaded by your arguments. The record shows that the Hearing Officer carefully reviewed the record and determined that when the person in charge lost sight of the openings, those openings were no longer “being supervised.” The record indicates that several cargo hatches were open, all absent the required flame screens. The primary purpose of the regulation in issue is to provide for the safety of both the vessel and her crew. It cannot be argued that open or partially opened cargo tank hatches are not a source of fires and explosions. The fact that several of these hatches were open at the same time, without the necessary protective devices, calls for a

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heightened amount of supervision to prevent the harm previously discussed. Thus, I agree with the Hearing Officer that walking away from the open hatches does not represent proper supervision under 46 CFR 35.30-10 and find the violation proved.

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 \$1500.00 rather than the \$3000.00 preliminarily assessed or \$66,000.00 maximum permitted by statute 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. Payment of **\$1500.00** 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 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5% 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,

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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