



16593
November 27, 2002

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

RE: MV00004513
[REDACTED]
[REDACTED]
[REDACTED]
\$500.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00004513, which includes your appeal on behalf of [REDACTED] ([REDACTED]), operators of the [REDACTED], located at [REDACTED] on the Missouri River. The appeal is from the action of the Hearing Officer in assessing a \$1,100.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 117.9	Caused an unreasonable delay in the opening of a draw after signals required by paragraph 117.15 were given.	\$1,100.00

The violation was observed on November 21, 2000,¹ when the M/V [REDACTED] was delayed at the [REDACTED] when the drawbridge failed to open upon request.

On appeal, you contend that "...the evidentiary record lacks the substantial evidence needed to support a violation as required by 33 CFR 117-65(a)."² To that end, you contend that the Hearing Officer based his decision, at least in part, on the irrelevant issue of the vessel's alleged inability to contact the dispatcher on the day of the incident. You further assert that the alleged delay in opening

¹ Although virtually all of the evidence in the file indicates that the violation occurred on November 21, 2000, the Coast Guard report of the incident and the Marine Violation Charge Sheet indicate that it occurred on November 12, 2000. Because the Hearing Officer correctly noted that the violation occurred on "21NOV00" in its Preliminary Letter of Assessment, I believe the error is harmless and this decision will conclude that the violation occurred on November 21, 2000.

² After a thorough review of your assertion, I believe that you are actually referring to 33 CFR 1.07-65(a), which states, "[a]ny decision to assess a penalty is based upon substantial evidence in the record" and I will assume the same during my review of this case.

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the bridge has been incorrectly calculated from 8:30 a.m. when the vessel contacted the drawtender to indicate that it would need the bridge in approximately forty-five minutes. You assert that the vessel's initial contact with the bridge was not a proper signal to open the bridge as required by section 117.159(a) and conclude that "[b]ecause the vessel was not requesting an opening, there was no 'proper signal' for purposes of fixing 8:30 a.m. as the commencement of the delay." Finally, you contend that the "Report of Delay at Drawbridge...clearly reflects that the drawtender immediately advised the vessel that there was a mechanical/electrical problem with opening the bridge." You assert that this issue was properly raised before the Hearing Officer "yet the Hearing Officer failed to make a finding of fact or conclusion of law on this issue." Noting that the delay was from "9:10 a.m. to 10:05 a.m. and that the bridge was unlocked at 10:10 a.m." and that "there is no evidence in the file to contradict the existence of mechanical/electrical problems with opening the bridge," you assert that "there is no basis on which to conclude that an unreasonable delay occurred during the period of time the mechanical problems existed with the bridge." You conclude that "the case file confirms that mechanical and electrical problems were the cause of a substantial part of the delay." Your appeal is granted, in part, and denied in part, for the reasons described below.

I will begin by addressing the standard of proof applicable to Coast Guard civil penalty proceedings. As indicated in prior correspondence contained within the case file, the procedures governing the informal adjudicative process used by the Coast Guard are set forth in 33 CFR 1.07. 33 CFR 1.07-65 states that any decision to assess a civil penalty must be based upon substantial evidence in the record. Conversely, if the Hearing Officer does not find substantial evidence supporting the alleged violation or some other violation of which the party had full and fair notice, the case must be dismissed and returned to the appropriate District Commander. While the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*, does not specifically address the appropriate standard of proof in administrative adjudicative proceedings, both case law and administrative practice clearly show that the standard of proof in such proceedings is a preponderance of the evidence standard. Under this test, Coast Guard Hearing Officers must be convinced that the weight or majority of the evidence supports their conclusion. *See Steadman v. SEC*, 450 U.S. 91 (1981). For purposes of this review, I will provide a *de novo* review, meaning that I may substitute my judgment for that of the Hearing Officer. Thus, for me to sustain the Hearing Officer's decision, I, too, must believe that the weight or preponderance of the evidence supports my disposition of this case. With this in mind, I first examine the Coast Guard's evidence.

The Coast Guard provided the following evidence to support the violation: 1) a one-page Report of Delay at Drawbridge; 2) the initial notification of the violation sent to [REDACTED] from [REDACTED]; 3) a Coast Guard report of the violation, including a summary of the violation and information concerning [REDACTED]'s violation history; 4) a Marine Violation Charge Sheet; 5) the Hearing Officer's Preliminary Assessment Letter; 6) the Hearing Officer's Final Letter of Assessment; and 7) Rebuttal Comments submitted by the Bridge Administrator. The "Report of Delay at Drawbridge" was filed by the operators of the M/V [REDACTED] on the day of the incident and received by the 8th Coast Guard District, Bridge Branch on the same day. The report indicates that the vessel "signalled (sic) for opening bridge" at 8:30 by radio and that 8:30" was the "Time Drawtender acknowledged signal." However, the report also indicates that the vessel was "unable to get dispatcher." The report indicates that the delay began at "8:30," that at "10:10...[the vessel] was given notification of opening," and that the draw actually opened at "10:35." In the "Remarks" section, the report indicates that the "tender indicated problems (mechanical/electrical) with opening [the] bridge." The Coast Guard report of the incident seems to merely reiterate the

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information contained in the M/V [REDACTED]'s Report of Delay. To that end, the Coast Guard report indicates that on November 21, 2000, the "M/V [REDACTED] was delayed at the bridge from 8:30 a.m. to 10:35 a.m. due to the span not opening on demand." The report goes on to conclude, "[t]he cause of the delay was an inability to get the dispatcher to respond and mechanical/electrical problems with the operating mechanism of the bridge." While the report correctly indicates the responsible party, the only other evidence contained therein is an extensive list of other delays reported at the drawbridge and a statement written by the bridge administrator indicating that the instant case is a "willful violation." The Hearing Officer's Final Letter of Assessment makes clear that his decision to assess the maximum civil penalty in this case was based largely upon the "undisputed allegation that the dispatcher was not available" and due to [REDACTED]'s "extensive history" of violations.

I have also carefully reviewed your responses both to the Hearing Officer's Preliminary Letter of Assessment and to his final decision. Your main assertion is that the record "lacks the substantial evidence needed to support a violation." In response to the Hearing Officer's conclusion that the dispatcher was unavailable at 8:30 a.m. you note that "a review [of] the Report of Delay at Drawbridge completed by the [REDACTED] states on its face that a radio signal to the drawtender (not the dispatcher) was given at 8:30 a.m. and acknowledged by the drawtender at 8:30 a.m. who advised that there were 'mechanical/electrical' problems with opening the bridge." However, as indicated in your letter of September 4, 2001, it was only after the bridge was cleared of all trains at 9:10 a.m. that the drawtender became aware of the electrical problem. Thus, contrary to the Report of Delay, the drawtender would not have been able to advise the M/V [REDACTED] until at least 9:10 a.m. You further note that "[t]he job of the dispatcher is separate and distinct from the job of the drawtender" and add that "33 CFR 117.15(a) requires the vessel to signal the drawtender." You assert that "the vessel did contact the drawtender and the drawtender promptly responded in accordance with federal regulations." You add that "[a]ny issue with respect to contacting the [REDACTED] dispatcher is irrelevant and has nothing to do with either proving or disproving a violation in this case." You also note that, when the vessel contacted the drawtender "the vessel did not request an opening *per se* but simply indicated that it would need the bridge in approximately forty-five (45) minutes." You conclude that the notification given by the M/V [REDACTED] at 8:30 a.m. did not mark the commencement of the delay because "the vessel was not requesting an opening...[and]...there was no 'proper signal' **for purposes of fixing 8:30 a.m. as the commencement of the delay.**" You lastly contend that, under the facts of this case, the delay was not "unreasonable." You note that the drawtender correctly informed the M/V [REDACTED] that it could not open the bridge because of a mechanical/electrical problem and assert that "the duration of the electrical problem was from 9:10 a.m. to 10:05 a.m. and the bridge was unlocked at 10:10 a.m." You conclude that, because the delay was the result of a mechanical problem, "there is no basis on which to conclude that an 'unreasonable delay' occurred."

33 CFR 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." Special operating requirements for the Missouri River are contained at 33 CFR 117.411. Those requirements, dealing with operation of the drawbridge from December 16 through the last day of February, do not apply to the instant case. Therefore, pursuant to Coast Guard regulation, the 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 CFR 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 CFR 117.9. Indeed, 33 CFR 117.9

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provides an example of what would constitute a reasonable delay—trains in a block where the draw is incapable of being opened to navigation until the train has passed or someone has unlocked the drawbridge controls. Thus, it must be determined if the delay of the M/V [REDACTED] was reasonable.

There is conflicting evidence in the record as to when the delay actually began at the drawbridge. As I have already noted, the Report of Delay at Drawbridge and the Coast Guard report of the incident both indicate that the delay began at 8:30 a.m., when the M/V [REDACTED] was unable to reach the Dispatcher. A careful reading of the Report of Delay, however, indicates that the Drawtender acknowledged the vessel's signal at 8:30 a.m. Based upon this evidence, I believe that although the vessel was unable to reach the dispatcher, it did in fact make contact with the drawtender. The rebuttal comments filed by the Bridge Administrator indicate the following:

the [REDACTED] has a drawtender assigned, but the drawtender does not control the bridge opening until he is given permission by the 'dispatcher'. The dispatcher controls the authorization to open the bridge, the drawtender only operates the bridge. In essence, the drawtender is a puppet of the 'dispatcher'.

As you noted in your letter of appeal, the regulations do not specifically contemplate the responsibilities of the dispatcher. 33 CFR 117.15 states, in relevant part, that the "operator of the vessel requesting a drawbridge to open shall signal the **drawtender** and the **drawtender** shall acknowledge that signal." The record makes clear that the drawtender acknowledged the call of the M/V [REDACTED] within seconds. Therefore, a violation of 33 CFR 117.15 did not occur because the vessel's call was properly acknowledged. Even if the Bridge Administration's view of the [REDACTED]'s drawtender is correct, the relevant regulations simply do not allow for a violation where the drawtender is available but the dispatcher is not.

Although the Coast Guard's file and the Report of Delay indicate that the delay began at 8:30 a.m., I do not believe that it did. You contend that the vessel's initial contact with the bridge was not a request to open, but rather, an attempt to ensure that the bridge would be ready and open when the vessel arrived approximately 45 minutes later. Both the Report of Delay and the Rebuttal comments filed by the Bridge Administration support your assertion. First, the Report of Delay indicates that the "[l]ocation of vessel at time of contact" was mile 374.0 on the Missouri River, nearly 8 miles from the drawbridge. Furthermore, the Bridge Administrator's rebuttal comments indicated that "[t]here is an accepted practice on the waterways and especially in the vicinity of Kansas City bridges, for vessels to contact the bridge early to request an opening." The Administrator further noted, however, that even in circumstances where a vessel makes an advance notice for the bridge opening, as in this case, "a delay occurs before the vessel arrives at the bridge [and that] the bridge should be open so the vessel can continue its course and speed." I disagree with this assertion. While I believe that the facts of this case indicate that a proper signal was given and answered, the delay did not commence until the vessel approached the bridge and was unable to proceed. Therefore, under the facts of the instant case, I will accept your contention that the delay began when the vessel arrived at the bridge, approximately forty-five minutes later.

Even though I acknowledge that the Coast Guard overstated the length of the delay, I do not believe that that overstatement negates the fact that a delay occurred. 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

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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 was reasonable. While I have no reason to doubt that mechanical/electrical problems effected the operation of the bridge on the day of the incident, I cannot conclude that those problems were, in fact, a reasonable means for impeding the flow of navigation on the river. As the Bridge Administer noted, 33 CFR 117.35(b) makes clear that “[w]hen the draw is rendered inoperative because of damage to the structure or when vital, unscheduled repair or maintenance work shall be performed without delay, the drawbridge owner shall immediately notify the District Commander and give the reasons why the draw is or should be rendered inoperative and the expected time of completion of the repair or maintenance work.” The Record indicates that [REDACTED] made no such report of the incident. Absent such a report, I cannot conclude that any resultant delays were reasonable.

Since I have determined that a violation occurred, the only issue remaining is whether the penalty assessed by the Hearing Officer is appropriate. I do not believe that it is. First, I note that the Program Manager’s comments indicate that this is a “willful violation in that [the] bridge owner failed to take prompt action to repair a problem and ran trains while [the] vessel had to wait.” There is simply no evidence in the file to support this assertion. Neither you nor the Coast Guard have explained the exact nature of the mechanical problem in issue. As I have previously noted, it is evident that the Coast Guard’s report of this incident is based solely upon the Report of Delay. Absent a report of the mechanical problem, I cannot determine whether it was “fixed” in a reasonable amount of time. Likewise, there is no evidence in the file, other than the bridge administrator’s statement, to indicate that trains were crossing the bridge during the delay. Therefore, I see no aggravating factors to necessitate the imposition of a maximum penalty.

In addition, the Hearing Officer’s Final Decision indicates that the amount of the penalty was based largely upon [REDACTED]’s “extensive history” of violations. The violation history contained in the Coast Guard Report indicates that the [REDACTED] was involved in 14 incidents between May 17, 1994 and the date of the violation in issue. Of those 14 incidents, only two resulted in the imposition of monetary civil penalties and of those two penalties, only one was recent enough to be relevant (the first violation listed occurred in 1994, six years before the violation in issue). Given that Hearing Officers are to consider only violations where final agency action has occurred and those violations that are contemporaneous enough to be relevant, I do not believe that the violation history contained in the case file is so “extensive” as to necessitate the imposition of the maximum civil penalty. Therefore, I will mitigate the penalty assessed by the Hearing Officer to \$500.00.

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 a penalty of \$500.00 rather than the \$1,100.00 assessed by the Hearing Officer to be appropriate in light of the seriousness of the violation.

RE: CIVIL PENALTY MV00004513

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In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$500.00** 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 3% 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 (GC-HO)
Commander, Finance Center (OGR)