

U.S. Department
of Transportation

United States
Coast Guard



COMMANDANT
U. S. Coast Guard

2100 Second Street, SW
Washington, DC 20593-0001
Staff Symbol: G-LMI
Phone: (202) 267-1527
FAX: (202) 267-4496

16731

November 14, 2002

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

RE: MV99005423
[REDACTED].
M/V [REDACTED]
\$10,000.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV99005423, which includes your appeal on behalf of the owners of the M/V [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$15,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 160.111	Failure to comply with an order to anchor or operate a vessel in the manner directed.	\$15,000.00

The violation occurred on September 14, 1999, when the M/V [REDACTED] failed to leave the Port of Miami by noon as instructed by Captain of the Port Order 99-410.

On appeal, you seek mitigation of what you call the "harsh first time alleged violation." You contend that there was "substantial confusion that led up to the issuance of this fine" and assert that the "unequivocal truth" of the matter is that you were verbally told that the vessel could remain in port. You further contend that the first notice that the Coast Guard sent you was a "clerical error" in that it cited the M/V [REDACTED] for not having a valid CCSS Certificate and assert that this error was corrected when the Coast Guard sent you COTP #99-410, which was unsigned. You conclude that the "facts and circumstances in this case do not justify this severe fine when there exists substantial doubt about clear notification with an unbiased hearing process" and add that the record contains "biased unsubstantiated and exaggerated statements

that have been perpetuated throughout this review process.” Your appeal is granted, in part, and denied, in part, for the reasons described below.

Before I begin, I believe a brief recitation of the facts is in order. On September 12, 1999, the Captain of the Port of Miami issued a Broadcast Notice to Mariners, setting a 48-hour alert for the onset of Hurricane Floyd. In that notice, the Captain of the Port of Miami issued a “Commercial Port Hurricane Readiness Alert” under the anticipation that Hurricane Floyd would make landfall within 48 hours. The notice instructed “all oceangoing commercial vessels and oceangoing barges greater than 200 gross tons...[to]...make plans for departing the port at least 24 hours prior to the storm landfall.” The record further indicates that, on September 13, 1999, you forwarded a “Request to Remain in Port” to Marine Safety Office Miami for the M/V [REDACTED]. Shortly thereafter, Petty Officer [REDACTED] established contact with you regarding your request to remain in port. While the specifics of that call are somewhat in dispute, later that afternoon, your request to remain in port was clearly denied and what has been called a “preformatted, Caribbean Cargo Ship Safety Code COTP Order” under number 99-042 was forwarded to you. The COTP Order made clear that the M/V [REDACTED] was “to depart the territorial waters of the United States no later than 12:00 a.m. 14 Sep 99.” Following the issuance of the COTP Order, Marine Safety Office personnel made contact with you and issued a verbal order to depart because of the impending weather conditions. On September 14, 1999, COTP Order number 99-410 was issued to the M/V [REDACTED], documenting the Coast Guard’s verbal notice to depart the port and stating that the vessel “must depart the waters of South Florida no later than 24 hours prior to the arrival of sustained gale force winds.” Hurricane Floyd impacted the City of Miami at approximately 8:00 p.m. on September 14, 1999. The M/V [REDACTED] remained in port during the duration of the storm.

As a preliminary matter, I note that the Marine Violation Charge Sheet contained within the file cites the M/V [REDACTED] for a violation of 33 CFR 160.111. It appears that both the Marine Safety Office and the Hearing Officer incorrectly cited 33 CFR 160.111 instead of 33 CFR 160.105 as the citation for the violations listed above. However, since the correct nature of the violation was described throughout the civil penalty proceedings, I believe that you have been adequately apprised of the issues. Therefore, I find this error to be harmless.

I will now address the violation in issue. 33 CFR 160.105 makes clear that “[e]ach person who has notice of the terms of an order issued under this subpart must comply with that order.” Pursuant to 33 CFR 160.111(c), the Captain of the Port may order a vessel to depart a port when he “has determined that such order is justified in the interests of safety by reason of weather, visibility, sea conditions, temporary port congestion, other temporary hazardous circumstances, or the condition of the vessel.” It cannot be argued that, in the instant case, the Captain of the Port was well within his regulatory authority in instructing all large vessels to exit the port before the onset of Hurricane Floyd. Therefore, the only issue remaining is whether you had sufficient notice of the Captain of the Port Order in issue. I believe that you did.

As has been discussed above, the record indicates that you made a request to stay in port following the issuance of the Coast Guard’s Broadcast Notice to Mariners and that that request was denied. As such, you obviously had notice of this requirement. On September 14, 1999, Captain of the Port Order number 99-410 was issued which ordered the M/V [REDACTED] to

depart the Port of Miami by 12:00 a.m. on September 14, 1999. This written, signed order was preceded by a verbal order that was conveyed to you on September 13, 1999. The record clearly evidences that the vessel did not leave port by the required time. The vessel's failure to depart the port, regardless of the reason, constitutes a violation of 33 CFR 160.105.

In your letter dated December 15, 2000, you asserted several grounds for mitigation of the penalty assessed by the Hearing Officer. In addition to contending that "[t]he owners and crew had no intention or preconceived plan to violate any laws or regulations," you contend that "[t]he problems occurred because of a lack of understanding of the port order, miscommunications between the U.S.C.G., the vessel port agents, [REDACTED] and the inherent problem that exists in the early warning and preparation of departures for vessels on the Miami River during a possible hurricane arrival." To that end, you contend that Petty Officer [REDACTED] informed you that the vessel could stay in port. You further note that, later, in the afternoon hours of September 13, 1999, the Captain of the Port instructed you that the vessel should depart. At that time, you contacted several tug companies and learned that none would be available to assist the vessel in its departure. You further contend that you "called the local pilot which stated that they were shutting down at 2000 hrs and U.S. Customs marine unit office which apparently shut down at 1500 hrs with the M/V [REDACTED]'s original registration locked inside and without the ability to get clearance to another port."

I have reviewed the record thoroughly and fail to see any evidence of miscommunication that would necessitate a mitigation of the assessed penalty. The record indicates that the M/V [REDACTED] is 1762 gross tons. The Coast Guard's Broadcast Notice to Mariners, issued on September 12, 1999, made clear that "commercial vessels and oceangoing barges greater than 200 gross tons are to make plans for departing the port at least 24 hours prior to storm landfall." As has been discussed above, on the following day, you made a formal request for the vessel to stay in port. Although your request was denied, you contend that confusion arose because Petty Officer [REDACTED] told you that you would be allowed to stay in port. The record, however, does not support your assertion. Petty Officer [REDACTED]'s signed statement indicates that while he did not tell you that the vessel could remain in port, he instructed you that the vessel should not get underway without a Captain on board and that further instruction would be coming from Marine Safety Office Miami. Further instruction did come later that afternoon which clearly indicated your duty to get the M/V [REDACTED] out of the port. I believe that, under the circumstances of this case, steps should have been taken to assist the vessel in departing the port immediately after the issuance of the Coast Guard's Broadcast Notice to Mariners. Since such steps were not taken and because the vessel did not leave the port as instructed, I find the violation proved.

While I find sufficient evidence within the case file supporting the violation, I am troubled by some of the aggravating evidence that is included within the file. First, there are two references that the operator of the M/V [REDACTED] expressed the opinion that it would be better business practice to violate the COTP Order than to hire tugs to depart the port. If true, this would constitute highly damaging evidence worthy of a substantial penalty. However, there is no indication when the comment was made, who made it, or who heard it. Without this factual underpinning, I am reluctant to use it as aggravating evidence. Second, it is alleged that the operator was negligent in allowing the master to go on an extended vacation outside Florida

while the storm was approaching. While it may be intimated that the master was allowed to leave after it was a fair certainty that the hurricane would hit South Florida, such intimation does not rise to the level of substantial evidence. There is no evidence as to exactly when the master left. While you certainly had an obligation to find a substitute master, I cannot find that you were negligent based simply on the fact that the master was on vacation when the hurricane struck South Florida. Since the Hearing Officer may have unduly relied upon this evidence, I will reassess the penalty. Having thoroughly reviewed the case file, I believe \$10,000.00 is an appropriate penalty. While I am discounting some of the aggravating evidence, I believe your failure to depart presented significant risk factors for the port.

I will conclude by discussing Captain of the Port Order number 99-042. There is much discussion in the record concerning this COTP Order and its mention of the CCSS rules. However, it is apparent that this COTP did not result in the violation in issue. Indeed, the narrative section of the Marine Violation Charge Sheet for the instant case makes clear, in relevant part, that “[t]he subject vessel was issued COTP Order #99-410 to depart and failed to depart as directed.” Therefore, the M/V [REDACTED] could have been charged with a violation of this COTP as well, resulting in the possibility of an additional \$27,500 civil penalty. Since the M/V [REDACTED] was not charged with this violation, I will take no further action with respect to it.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and that the M/V [REDACTED] is the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. However, for the reasons noted above, I will reduce the penalty to \$10,000.00

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$10,000.00** 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 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

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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, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center