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MAR 07 2007

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

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
DISMISSED

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED] which includes your appeal on behalf of [REDACTED][REDACTED] ([REDACTED]) as owner/operator of the [REDACTED], on the Missouri River (hereinafter "Bridge"). The appeal is from the action of the Hearing Officer in assessing a \$22,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 USC 525(b)	Failure to comply with the conditions of the permit authorizing the construction of or alteration to a bridge crossing navigable waters.	\$22,000.00

The incident underlying the violation is alleged to have occurred during a twenty-day period between September 15, 2004, and October 5, 2004. During that time, the Coast Guard alleges that [REDACTED] failed to comply with the conditions of the permit authorizing the construction and alteration of the Bridge. Specifically, the Coast Guard claims that during maintenance operations on the Bridge, the navigational height of the bridge was altered without proper notification and/or approval from the Coast Guard.

On appeal, you deny the violation and assert that the Coast Guard has failed to show that [REDACTED] actually violated its bridge permit. Upon a thorough review of the record, I find your assertions to be persuasive and your appeal is granted for the reasons discussed below.

In order to fully understand the contours of this appeal, I believe it necessary to discuss the facts surrounding the violation and the procedural progression of the case. On September 15, 2004, [REDACTED] sent a letter to the Coast Guard's Bridge Branch in St. Louis, Missouri, requesting permission to perform urgent repairs to the Bridge. In the letter, [REDACTED] informed the Coast Guard that selected beams would be changed out and that scaffolding would be used to facilitate the changes that would hang as far as five feet below the base of the Bridge. In reply, the Coast Guard sent [REDACTED] a letter dated September 22, 2004, that alleged that [REDACTED] had already commenced work on the Bridge and that directed [REDACTED] to discontinue all work until the Coast Guard reviewed the appropriate plans and approved the maintenance activities that would reduce the navigational clearances of the Bridge. The Coast Guard letter also informed [REDACTED] that:

Due to your failure to notify the Coast Guard and obtain approval to perform this work, the [REDACTED] Railway is in violation of 33 U.S.C. 525(b), and subject to civil penalties in each instance of up to \$5,000 per day. The civil penalty process has been initiated and the number of days the work goes unapproved will be a factor in determining the penalty amount potentially assessed against your organization.

On September 28, 2004, [REDACTED] faxed a four page document to the Coast Guard with maintenance and repair information along with diagrams indicating the location of the scaffolding hanging below the Bridge. In addition, the document indicated a start date of September 16, 2004, and an expected completion date of November 12, 2004. On September 30, 2004, the Coast Guard sent [REDACTED] a letter requesting additional information concerning repairs to the Bridge including the nature and sequence of work, impact on drawspan operations, and detailed drawings depicting the location and dimensions of the scaffolding. On October 4, 2004, [REDACTED] faxed an eight page document to the Coast Guard with more details on the project including a statement that the scaffolding platforms would hang thirty-three inches below the bridge vice the five feet mentioned earlier. In addition, [REDACTED] projected a new completion date of December 2, 2004. On October 8, 2004, the Coast Guard sent a letter to [REDACTED], declaring that the work on the Bridge could be performed as routine maintenance and that, as a result, a Coast Guard permit was not required. At the same time, the Coast Guard approved the work and attached conditions including requiring that the free flow of navigation not be unreasonably interfered with during the repairs.

On January 26, 2005, a Coast Guard Civil Penalty Hearing Officer (hereinafter "Hearing Officer") sent a Preliminary Assessment Letter to [REDACTED] indicating that she had received a report alleging a violation of 33 U.S.C. § 525(b). In that letter, the Hearing Officer informed [REDACTED] that the maximum penalty that could be assessed for the violation was \$1,100.00 per day¹ and that the violation apparently persisted for a period of twenty days. As a consequence, the Hearing Officer assessed a preliminary penalty of \$22,000.00 for the

¹ The Hearing Officer erred in concluding that the maximum penalty per day was \$1,100.00. According to 33 U.S.C. § 533 (which was amended by Public Law 108-293, effective August 9, 2004), which sets the penalty amount for a violation under 33 U.S.C. § 525, the maximum civil penalty per day for a violation occurring in 2004 is \$5,000.00 per day.

violation². On February 24, 2005, you replied to the Hearing Officer's initial letter. Via that correspondence, you entered an appearance on behalf of [REDACTED], requested a hearing in the matter, and asked for a complete copy of the civil penalty case file. On March 3, 2005, the Hearing Officer sent you a letter stating that you had received the entire case file (which the Hearing Officer confirmed by a telephone call) and requested that you specify the issues that you believed were in dispute. After negotiating with the Hearing Officer³ on May 23, 2005, you determined that a hearing may not be needed and requested a twenty day extension of time in order to decide how to proceed. The record indicates there was a miscommunication between you and the Hearing Officer, and, that as a result, the Hearing Officer afforded you until September 19, 2005, to reply to the Coast Guard's allegations.

On September 20, 2005, you sent a letter to the Hearing Officer stating:

I have reviewed the correspondence as well as the Enforcement Summary submitted by the United States Coast Guard in relation to the above case. I have also reviewed 33 U.S.C. § 525(b), the statute under which the civil penalty action was initiated. I do not find any specific language in 33 U.S.C. § 525(b) which provides for the authority to fine my client for failing to obtain a permit for routine maintenance of the subject bridge. I am, quite frankly, at a loss to see how 33 U.S.C. § 525 applies to the facts at hand. I have found no federal law or regulation requiring Coast Guard approval for routine maintenance.

Moreover, on October 5, 2004, Roger K. Wiebusch, Bridge Administrator for the United States Coast Guard, wrote my client indicating that the work to be performed was routine maintenance and a Coast Guard bridge permit was not required. A copy of the letter from Mr. Wiebusch is enclosed. As such, given the fact that your agency seems to have admitted that no permit was required, I'm likewise at a loss to see why civil penalties are being sought as a result of this matter.

In addition, you requested that the civil penalty case against [REDACTED] be dropped. Thereafter, the Hearing Officer sent a letter to Mr. Wiebusch and requested a copy of the bridge permit that [REDACTED] allegedly violated. In response, Mr. Wiebusch sent the permit along with a letter to the Hearing Officer dated December 5, 2005, stating:

This response clarifies how 33 U.S.C. 525(b) applies to the violation in question and answers the attorney's letter dated September 20, 2005. The bridge permit documents the approval of the location and plans for construction of the bridge. It contains the condition that the bridge has 40.5 feet vertical clearance above standard low water at Kansas City. The installation of scaffolding below the superstructure violated the permit condition since the vertical clearance was reduced by five feet. The bridge owner did not seek approval for the

² Assuming the violation occurred over a period of twenty days, the total maximum penalty available would be \$100,000.00.

³ It appears from the record that the case was reassigned to a new Hearing Officer due to staffing issues.

encroachment of the channel which is implied by 33 U.S.C. § 525(b) that the change to the clearance must be approved.

The Hearing Officer afforded you an opportunity to respond to Mr. Wiebusch's memorandum. In your response, you stated:

First, I would note that I have seen no evidence produced by the Coast Guard that the scaffolding in question was lower than the 40.5 feet of vertical clearance construction requirement. If the Coast Guard took such measurements, they have not been provided to me. Moreover, even assuming the scaffolding temporarily reduced that vertical clearance, I would reiterate the position taken in my September 20, 2005 letter that a permit for installation of the scaffolding was not required because it was in furtherance of routine maintenance of the bridge. Neither the 1915 bridge permit nor 33 U.S.C. 525 require permits for routine maintenance. Likewise, I have been unable to find any specific federal law or regulation requiring such a permit if vertical clearances are reduced on a temporary basis for the purpose of routine maintenance.

Once again, you requested that the case be dismissed. In her Final Assessment Letter, the Hearing Officer assessed a penalty of \$22,000.00⁴ and stated:

As noted in the beginning of this letter, the charge is that [REDACTED] failed to comply with the conditions of the permit. The original file alleged that maintenance work was performed without proper Coast Guard approval. This was somewhat confusing. In response to your letter of September 20, 2005, which I passed on to the Coast Guard office that initiated the case, the Coast Guard's memo of December 5, 2005 clarified that a 40.5-ft. vertical clearance was a condition of the permit and it was this condition that was violated.

As noted above, there is evidence that the vertical clearance was encroached upon, at least to the extent of 33 inches. Based on this undisputed evidence, I find that the violation occurred.

You appealed the Hearing Officer's decision, and in response, Mr. Wiebusch sent a letter to the Hearing Officer contesting your appeal:

The [REDACTED][REDACTED] is a legally permitted bridge which is required to provide a vertical clearance of 56.0 feet above the Kansas City gage⁵. The permitted vertical clearance must be maintained at all times unless a deviation

⁴ The Hearing Officer did not discuss how this penalty amount was calculated. It appears from the record that the Hearing Officer relied on the penalty amount calculated by the first Hearing Officer assigned to the case. As noted in Footnote 1, this calculation was in error.

⁵ This clearance requirement is different from the requirement indicated in the complaint and the bridge permit of 40.5 feet above standard low water at Kansas City.

from the permitted clearance or a permit amendment has been reviewed and clearances different from those permitted have been approved by the Coast Guard.

The diagram submitted by the railroad clearly showed the scaffolding hanging below low steel of the bridge as they said it would, in one of the navigation spans.

It is imperative for the safety of navigation that permitted clearances be maintained and any deviations be reviewed and approved in advance by the Coast Guard...If the installation of scaffolding, safety nets and tarps below low steel on a bridge are not viewed as restrictions to the permitted clearances of bridges that require approval, then the permitted clearances have no meaning. Mariners depend upon the Coast Guard to ensure bridge clearances are maintained as legally required in the permit, bridges are permitted to ensure a safe clearance is provided. Temporary encroachments into navigational requirements are and must be treated like proposed permanent encroachments and require agency review and approval.

The railroad violated the permit condition by not maintaining the required vertical clearance of the bridge.

As it is dispositive of this case, I will only address the issue of whether the permitted clearance of the Bridge was actually violated. The Coast Guard charged [REDACTED] under 33 U.S.C. § 525(b) with encroaching on the permitted vertical clearance of the Bridge. 33 U.S.C. § 525 is entitled "Construction and operation of bridges" and reads as follows:

(b) Approval of plans

The location and plans for such bridges shall be approved by the Secretary of Transportation before construction is commenced, and, in approving the location and plans of any bridge, the Secretary may impose any specific conditions relating to the maintenance and operation of the structure which the Secretary may deem necessary in the interest of public navigation, and the conditions so imposed shall have the force of law...

It is undisputed in the record that the Bridge was properly approved and constructed. In addition, it is clear that the permit requires the Bridge to be maintained with a vertical clearance of "about" 40.5 feet above standard low water at Kansas City.⁶ This vertical clearance requirement is the specific condition relating to the maintenance of the Bridge that was imposed by the Secretary in the permit, which is central to this case.

There is no doubt that [REDACTED] erected scaffolding on the Bridge that hung at least thirty-three (33) inches below the Bridge (and perhaps up to five feet below the Bridge). However,

⁶ See Permit of 30 June 1915.

there is absolutely no evidence in the record to indicate that the scaffolding actually encroached on the *permitted* vertical clearance. It is not enough to say that the *actual* vertical clearance of the bridge was infringed upon. The accusation under 33 U.S.C. § 525(b), as Mr. Wiebusch accurately describes, is that [REDACTED] actually encroached on the *permitted* clearance of the bridge. The bridge may in fact actually be above the *permitted* clearance (which is a minimum clearance) and the scaffolding may not actually impede the *permitted* clearance. Further complicating this analysis is the statement in paragraph B.1 of the Enforcement Summary that the vertical clearance of the bridge is 56 feet. If that is the case, scaffolding that hangs 5 feet below the superstructure still leaves a vertical clearance of 51 feet. If the Weather Bureau gauge at the bridge is different than standard low water, that difference is unexplained in the file. If in fact the *permitted* clearance and actual clearance of this Bridge are identical, the Coast Guard failed to provide any evidence to prove this point. As you noted, if the Coast Guard took measurements and determined that the actual *permitted* clearance was violated, that evidence is neither mentioned nor contained in the case file.

The Coast Guard never alleged, or specified, that [REDACTED] violated any rules or regulations that have been proscribed under 33 U.S.C. § 525(b). In addition, [REDACTED] was neither charged with unreasonably obstructing the free navigation of the Missouri River nor with violating any valid Coast Guard order. *See* 33 U.S.C. §§ 494-495. The Hearing Officer and the Coast Guard were correct to conclude that the actual vertical clearance of the Bridge was affected in this case, however, no evidence is contained in the record to sustain a finding that the actual *permitted* clearance was encroached upon. *See* 33 C.F.R. § 1.07-65. Therefore, I find that there is not substantial evidence in the record to support the Hearing Officer's determination that the violations occurred. As a result, for the reasons discussed above, the violation and associated monetary penalty is dismissed.

In accordance with the regulations governing civil penalty proceedings, 33 C.F.R. § 1.07, this decision constitutes final agency action.

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