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FEB 22 2008

REDACTED  
One Metropolitan Square, Suite 2300  
211 North Broadway  
St. Louis, MO 63102  
REDACTED

RE: Case No. REDACTED  
REDACTED  
REDACTED  
Hannibal Railroad Drawbridge, Mile  
366.1, Missouri River  
\$5,000.00

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 (hereinafter "REDACTED") as owner/operator of the Hannibal Railroad Drawbridge, (hereinafter "Bridge"), at mile 366.1, on the Missouri River. The appeal is from the action of the Hearing Officer in assessing a \$5,000.00 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.	\$5,000.00

The incident underlying the violation is alleged to have occurred on August 18, 2004, when the M/V REDACTED allegedly experienced an unreasonable delay (of nearly 4 hours) at REDACTED Hannibal Railroad Drawbridge, located at mile 366.1 on the Missouri River.

On appeal, you do not deny that the violation occurred. Rather, you contend that the \$5,000.00 monetary penalty assessed by the Hearing Officer is "excessive, unreasonable, and inherently unfair given the circumstances of the case." To that end, you note that the Coast Guard and Maritime Transportation Act of 2004—which increased the maximum penalty available for the alleged violation from \$1,100.00 to \$5,000.00—was passed "only nine days prior to the alleged violation" and contend, as a result, that "the imposition of the maximum \$5,000 penalty in this case is excessive and unreasonable for the reason that notice of the increase in the maximum civil penalty to \$5,000 was not published in the Federal Register until September 24, 2004, well

after the alleged violation.” [emphasis omitted] You further assert that “[i]n the absence of notice published in the Federal Register prior to the date of the alleged violation, the imposition of the maximum \$5,000 penalty is excessive and unreasonable.” At the same time, you contend that “[c]ivil penalties are penal in nature and fair notice is required of what the law intends to do if certain conduct occurs” and insist that “[f]air notice includes a reasonable warning of the penalty amounts as well as the prohibited conduct.” You conclude that “since notice of the increased penalty was not published in the Federal Register until after the alleged violation, REDACTED had no reasonable warning that the Coast Guard would seek \$5,000 rather than \$1,100.” Your appeal is denied for the reasons discussed below.

I will begin by addressing what I believe is a key misconception in your appeal argument. As is noted above, on appeal, you assert that “civil penalties are penal in nature” and insist that “fair notice is required of what the law intends to do if certain conduct occurs.” While the latter portion of your statement correctly reiterates a fundamental notion of proper jurisprudence, the former portion of your statement is simply incorrect. That is because the Coast Guard's civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved.

I will now address the alleged violation of 33 CFR 117.9. As I have already stated, the record shows that you do not deny that the violation occurred. Therefore, after a thorough review of the evidence contained in the case file, including the “Report of Delay at Drawbridge,” I find substantial evidence in the case file to support the Hearing Officer’s conclusion that the violation occurred and that REDACTED, as the operator of the drawbridge, is an appropriate party to be charged with the violation. As such, the key issue to be considered here is whether, the \$5000 penalty assessed by the Hearing Officer is appropriate given REDACTED assertion that it could not have been aware that the maximum penalty available for the alleged violation had been raised from \$1,100 to \$5,000 because the notice of the increase of the maximum penalty available for the alleged violation was not published in the Federal Register until after the alleged violation at issue in this case occurred.

I will first address your contentions with regard to REDACTED notification of the increase of the penalty amount. As you note in your appeal, the Coast Guard and Maritime Transportation Act of 2004, which amended the General Bridge Act by increasing the maximum penalty available for violations of the Act, was enacted on August 9, 2004, a mere 9 days before the conduct at issue in this proceeding occurred. Moreover, as you further note, the Coast Guard published a Notice entitled “Statutory Monetary Civil Penalty Increase for Bridge Violations” on September 24, 2004, more than one month after the alleged violation occurred. You conclude that “[s]ince notice of the increase in the maximum civil penalty from \$1,100 to \$5,000 was not published in the Federal Register until September 24, 2004, more than one month after the alleged violation, it is unreasonable and inherently unfair to impose a civil penalty of \$5,000 in this proceeding.” After a thorough review of the record, I do not find your assertion, in this regard, persuasive.

First and foremost, a careful review of the record shows that on appeal, you do not deny either that the violation occurred or that REDACTED was unaware of the type of conduct that

constituted a violation of the applicable regulation. Instead, you assert that the penalty should be mitigated solely because REDACTED was not aware that the maximum penalty available for the violation had been increased. At the same time, you assert, without any legal support, that “[i]n the absence of notice published in the Federal Register **prior to** the date of the alleged violation, the imposition of the maximum \$5,000 penalty is excessive and unreasonable.” (your emphasis) While the Coast Guard did, in fact, publish a Notice in the Federal Register announcing the increase in the maximum penalties available for so-called “Bridge Violations,” that notice was not legally required to effectuate the change in penalty amount. Indeed a careful review of the notice, itself, shows that it made clear that the Coast Guard and Maritime Transportation Act of 2004 “took effect immediately upon signature.” *See* Statutory Monetary Civil Penalty Increase for Bridge Violations, 69 Fed. Reg. 57,336-02 (Sept. 24, 2004). Accordingly, your assertions with respect to knowledge of the maximum penalty available are without merit.

In the interest of fairness, however, I will review the record to determine whether the Hearing Officer erred in assessing the maximum penalty in this case. A careful review of the record shows that while the matter was pending before the Hearing Officer, you argued that although a delay occurred at the Bridge, it should not be viewed as “unreasonable” because the train that caused the delay was neither owned nor operated by REDACTED. The record shows that the Hearing Officer addressed your assertion, in this regard, in his General Notification Letter dated February 28, 2006. In that letter, the Hearing Officer stated as follows:

I disagree with your contention that REDACTED is not responsible because some other REDACTED stopped on the bridge. REDACTED as the owner of the bridge is responsible for the operation of the bridge regardless of who happens to be crossing the bridge at any given time. If REDACTED wants to argue that there is some potential third party responsibility claim that might be asserted against some other company, it would be the responsibility of REDACTED to assert such a claim. Any such claim would not affect the case that I must decide as to who is responsible for the violation if I decide that there was in fact a violation. In other words, if I decide that there was an unreasonable delay, the fact that some other company had stopped its train on the bridge would not change the fact that REDACTED is the responsible party. I would of course consider all pertinent facts that might relate to mitigation and/or extenuation.

I do not find that the Hearing Officer erred in so stating and, while your assertions with regard to the operation of the train that caused the delay may be viewed as argument in mitigation, I believe that the record contains—irrespective of such argument—substantial evidence to support the penalty assessed by the Hearing Officer. First, given the fact that you do not deny that the violation occurred, the only logical inference stemming from your appeal assertion is that REDACTED would (at least) have taken steps to either mitigate or avoid the violation if it had been aware that the maximum penalty available had been increased. Such an assertion is not consistent with the remedial purpose of the Coast Guard’s civil penalty program. Moreover, a review of the record shows not only that REDACTED has an extensive history of violation of the Coast Guard’s Drawbridge Operation Regulations, at 33 CFR Part 117, but also that the Company has, on numerous occasions, paid monetary penalties for the same conduct as is at issue in this proceeding. This violation history, when viewed in light of the instant appellate

argument, shows that prior violations at the lesser amount have had little remedial effect on the company's operation. Therefore, I find that the Hearing Officer did not err in assessing the maximum penalty available in this case.

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 decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$5,000.00 penalty assessed by the Hearing Officer to be appropriate under the circumstances of the case.

Payment of **\$5,000.00** 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. Payment should be directed 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.

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

Sincerely,

/Kantor/

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