

### **Menkes v. United States Department of Homeland Security United States Court of Appeals, District of Columbia Circuit 637 F.3d 319 (Decided March 8, 2011)**

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## THE UNITED STATES COAST GUARD IS AFFORDED LATITUDE IN ASSIGNING PILOTAGE SERVICES IN THE GREAT LAKES

**The United States Court of Appeals, D.C. Circuit affirmed the lower court’s judgment holding that the Coast Guard’s interpretation of “voluntary association” under the Administrative Procedure Act was reasonable, consistent with previous policy, and did not deny Appellant due process in refusing to renew his independent pilotage privileges in the Great Lakes**

Menkes v. United States Department of Homeland Security  
United States Court of Appeals, District of Columbia Circuit  
637 F.3d 319  
(Decided March 8, 2011)

Appellant, Richard J. Menkes (“Menkes”), an independent ship pilot in the Great Lakes, brought an action against the United States Department of Homeland Security, the Coast Guard, and the Assistant Commandant of the Coast Guard seeking an order reinstating his status as a contracted independent pilot able to work future navigation seasons. Menkes was formerly a member of the St. Lawrence Seaway Pilots’ Association (“SLSPA”) designated by the Coast Guard to provide pilotage service on the St. Lawrence River and Lake Ontario. Menkes voluntarily resigned from SLSPA in 2000 and requested the Coast Guard dispatch him as an unaffiliated, independent pilot on the St. Lawrence River. In March 2001, the Coast Guard elected to retain Menkes’ service on the grounds that the SLSPA was unable to offer adequate assurances that enough pilots would be available to meet the Coast Guard’s needs. In late 2003, the Coast Guard received assurance that the SLSPA would provide enough pilots for service, and determined that Menkes’ appointment would “naturally expire” at the end of the 2003 navigation season.<sup>1</sup>

Menkes brought suit alleging the Coast Guard had violated the Administrative Procedure Act (“APA”),<sup>2</sup> as well as his First Amendment association rights, and his Fifth Amendment due process rights. On Menkes’ APA claim, he argued that the Coast Guard misinterpreted the term “voluntary association” under 46 U.S.C. § 9304. The Court affirmed the lower court’s ruling for the Coast Guard, applying *Chevron* test.<sup>3</sup>

Menkes failed to offer compelling evidence to suggest the Coast Guard had acted impermissibly or in bad faith. Furthermore, the Coast Guard argued, and the Court agreed, that the APA was created with a public policy interest in keeping pilots in associations such as the SLSPA, for safety and continuity reasons.<sup>4</sup> The Coast Guard relied on the SLSPA to provide dependable pilotage service, and has a strong incentive to rely on associated pilots rather than independent pilots like Menkes. The Court noted that Menkes left the SLSPA because of monetary concern<sup>5</sup> and concluded that the organization would be unlikely to be able to offer the much needed service to the St. Lawrence and Great Lake regions if all members were able to continue receiving pilotage duty without having stakes in the organization. Menkes was never forbidden from rejoining SLSPA, which would have allowed him continued pilotage on the St. Lawrence.

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<sup>1</sup> Menkes v. U.S. Dep’t of Homeland Sec., 637 F.3d 319, 321–22 (D.C. Cir. 2011).

<sup>2</sup> See Administrative Procedural Act, 5 U.S.C. §§ 500 *et seq* (2006).

<sup>3</sup> See *Menkes*, 637 F.3d at 330 (citing *Chevron v. NRDC*, 467 U.S. 837, 834–44 (1984) (holding that the Court must accept that agency’s decision as controlling “unless [the agency’s decision is] arbitrary, capricious, or manifestly contrary to the statute.”)).

<sup>4</sup> See *Menkes*, 637 F.3d at 334.

<sup>5</sup> *Menkes*, 637 F.3d at 324 (“In order to become a member of the SLSPA, a pilot must be recommended by the voting members of the SLSPA and purchase one share (worth approximately \$60,000) of Seaway Pilots Inc.”).

The Court affirmed the holding that Menkes had no Fifth Amendment claim, reasoning that “a person cannot have a protected entitlement ‘if government officials may grant or deny [the benefit] in their discretion.’”<sup>6</sup> The Court cited 46 C.F.R. § 401.720(b) which permits the Coast Guard to order an unaffiliated, independent pilot to provide pilotage service in a circumstances where the designated association could not do so. This order is at the Coast Guard’s discretion. The Court concluded that while Menkes benefitted from SLSPA’s inability to provide adequate pilotage, “that, by itself, did not create a constitutionally protected right to continued dispatch . . . .”<sup>7</sup>

Finally, the Court held that Menkes could not sue the Coast Guard on a First Amendment association claim because of issue preclusion. Menkes had already sued the SLSPA for an identical First Amendment claim. The Court noted that “issue preclusion does not require mutuality of parties,”<sup>8</sup> and therefore, Menkes had no case against the Coast Guard for the same cause of action for which he previously sued the SLSPA.

The Court affirmed the holding that Menkes had no First or Fifth Amendment claims, that there was both a state interest in utilizing the voluntary association of pilots in favor of independent contractors, and that there was no compelling evidence that the Coast Guard had acted in bad faith in failing to renew Menkes’ independent pilotage.

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**DISTRICT COURT LACKED FEDERAL ADMIRALTY JURISDICTION TO ISSUE AND  
VACATE RULE B MARITIME ATTACHMENT TO SHIPMENT OF CORN**

**The District Court for the Eastern District of Louisiana lacked admiralty jurisdiction to confer  
and subsequently vacate an attachment to a shipment of corn, where demurrage and detention  
claims were not severable from the underlying claim of breach of contract**

Alphamate Commodity GmbH v. CHS Europe SA  
United States Court of Appeals, Fifth Circuit  
627 F.3d 183  
(Decided November 9th 2010)

Alphamate Commodity (“Alphamate”), a German international grain merchant, entered into three contracts with Animal Feed Libya (“AFL”), a Libyan company, for the purchase of grain from Europe. AFL did not secure and issue satisfactory letters of credit pursuant to the contracts, which led to a failure to complete the purchases. Alphamate claimed approximately \$8 Million in damages from the breach, including \$3 million for demurrage and \$1 million for unpaid detention.

In addition to arbitrating these claims with the Grain and Feed Trade Association (“GAFTA”) in London, Alphamate sought a Rule B maritime attachment against a shipment of corn, which was sold to AFL by CHS, Inc. (“CHS”), aboard the M/V GOLDEN STAR, berthed in Louisiana. At the time the attachment was pending in district court, AFL had not paid CHS for the corn, nor had CHS received a bill of lading.

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<sup>6</sup> *Id.* at 338 (citing *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 756 (2005)).

<sup>7</sup> *Id.*

<sup>8</sup> *Menkes*, 637 F.3d at 334 (citing *Gov’t of Rwanda v. Johnson*, 409 F.3d 368, 374 (D.C. Cir. 2005)).