CLAIM SUMMARY / DETERMINATION FORM

Date:	4/7/2009
Claim Number:	P05005-135
Claimant:	Star Reefers UK Limited
Type of Claimant:	Corporate (US)
Type of Claim :	Loss of Profits and Earning Capacity (Vessel Delay)
Claim Manager:	[redacted]
Amount Requested	$233,494.00

I. FACTS:

***A. Oil Pollution Incident*:**

On 26 November 2004, the Cypriot-flagged tank vessel ATHOS I struck a submerged anchor as it approached the CITGO Asphalt Refining Company terminal at Paulsboro, New Jersey. The anchor punctured the hull and caused the release of Venezuelan crude oil into the Delaware River. The FOSC issued a Notice of Federal Interest designating the vessel's owner, Frescati Shipping Company Limited, as the Responsible Party (RP). After it paid for costs exceeding its limit of liability, the RP denied all claims under the Oil Pollution Act of 1990 (OPA). As a result, the NPFC advertised for claims relating to the oil spill and claimants do not have to submit claims to the RP prior to submitting them to the National Pollution Funds Center (NPFC).

During the oil spill, on 28 November 2004, the M/V SOUTHAMPTON STAR arrived at the Delaware River Sea Buoy on schedule to Penn Terminal in Philadelphia with its cargo of bananas and plantains. The Coast Guard FOSC granted permission to the SOUTHAMPTON STAR to proceed to Penn Terminal to discharge its perishable cargo.[1] On the way to Penn Terminal, the SOUTHAMPTON STAR navigated through the oil spill area and its hull sides were contaminated.

On 30 November, at approximately 0800, the SOUTHAMPTON STAR completed offloading and its representatives requested that the FOSC inspect it so it could depart Philadelphia. At 1630, on 30 November 2004, the FOSC found residual oil on the SOUTHAMPTON STAR's hull sides.

Because of the oil spill, there were other vessels in port waiting to be decontaminated and there were too few cleaning crews qualified or available to decontaminate vessels that needed this service. This further delayed vessels from departing Philadelphia. Representatives of the SOUTHAMPTON STAR arranged for its vessel to be decontaminated but the SOUTHAMPTON STAR had to wait more than four days before it could be decontaminated.[2]

B. Claim Detail:

Star Reefers presented its claim to the NPFC on 31 May 2007 alleging lost profits directly caused by the vessel delay of the SOUTHAMPTON STAR during the ATHOS oil spill incident. Star Reefers seeks compensation for lost profits in the sum certain of $233,494.00.[3]

---

[1] Vessel Log
[2] See CG Vessel decontamination list and Vessel Port Log
[3] See email outlining revised sum certain dated 10 December 2007

The claimant outlined three components of lost profits as a direct consequence of the T/V Athos I oil spill:

1. Increased port costs while the SOUTHAMPTON STAR remained in port pending decontamination of its oiled hull sides: $10,408.00
2. Increased costs to charter hire M/V ATLAS MOUNTAINS: $61,249.00
3. Increased costs of two vessels under charter but only one freight revenue: $161,837.00

C. Contractual Relationships:

Clio Marine, Inc. the owner of the SOUTHAMPTON STAR chartered its vessel to Star Reefers for a period extended by the December 22, 2003 Addendum No. 8 to the charter party dated 16th December 1999.[4] The rate of hire under this addendum was 61.5 cents per cubic foot per 30 days. The maximum cubic capacity of the vessel is 485,000 cu. ft.[5] This translates to a maximum daily hire rate of $9,942.50.

Star Reefers UK Limited (Star Reefers) is the claimant and long-term time charterer of the M/V SOUTHAMPTON STAR (SOUTHAMPTON STAR). As permitted, under its long-term **time** charter, Star Reefers entered into a **voyage** charter that earned the claimant a consistent stream of revenue based on the timely voyages of the SOUTHAMPTON STAR. Revenue was the same amount for each voyage and was agreed upon in the terms of the voyage contract.

Altex Chartered Inc. (Altex) is the **voyage** charterer of the SOUTHAMPTON STAR and its charter party with Star Reefers committed the SOUTHAMPTON STAR to a continuous 14-day round-trip schedule[6] delivering bananas and plantains from specific load-ports in South and Central America to a buyer in Philadelphia. The freight rate to be paid to Star Reefers is $206,000 per voyage.

Banacol owns and operates banana and plantain farms in Central and South America for sale in North America. Altex served as Banacol's charterer contracting vessel transport for Banacol's product from Banacol's load-ports in Turbo and Santa Marta Columbia, and Moin, Costa Rica to buyers in Philadelphia.

D. Claimant's Documentation:

The claimant provided documentation and summaries in support of their claim including the following applicable documents:

- SOUTHAMPTON STAR's port log;
- **Time charter** between Clio Marine and Star Reefers dated December 16, 1999 and reflecting Clio and Star Reefers as of December 22, 2003;
- **Voyage charter** party agreement between Star Reefers and Altex Chartered, Inc., Contract of Affreightment dated 11 November 2003. Its most relevant clauses follow below.

[4] See Charter Party Addendum No 8 Date: 22 December 2003. NOTE: Charter party between Clio Marine and Star Reefers is a charter transferred from previous owners (R Navigation S.A.) and previous charterer (Albion Reefers Limited).
[5] See Addendum No. 1 to charter party dated December 1999.
[6] See Altex Rider to Contract of Affreightment Clauses 20 and 21

- **Clauses 20 – 24[7]:** specifies that the charterer will maintain its vessel on a 14-day round-trip voyage no more than with specific load ports and one discharge port. Vessel is to perform 26 consecutive voyages beginning 1st week of January 2004. Laytime for loading and discharging will be totally 4.2 days, including Sundays and holidays.
    - **Clause 26[8]:** Freight is payable at the rate of USD 206,000 lump sum per voyage; freight to be paid one week after completion of loading
    - **Clause 36[9]:** In the event of a vessel's inability to perform the contracted schedule, due to loss, breakdown or crew strike in excess of 48 hours, Owners will substitute the vessel and will endeavor to do so within the scheduled time. If Owners are unable to find a replacement vessel, then Charterer can indicate such substitute vessel.
- Voyage Account Dry or financial summaries for ten voyages under the Altex charter. Eight voyages by the SOUTHAMPTON STAR precede the ATHOS oil spill incident - two others are same voyage with similar vessels. The financial summaries provide a record of a continuous series of voyages with dates, revenues, and costs.
- Automated corporate accounting system print out for Voyage 1001 which shows the charge and the account charged for the hire of the M/V ATLAS MOUNTAINS voyage with charter hire costs totaling $211,040 as well as other costs.[10]
- Voyage charter of the M/V ATLAS MOUNTAINS, documenting the spot charter of this vessel.
- Claimant presented a spreadsheet of its voyage financial summaries showing claimant's direct costs associated with chartering two vessels but earning only one voyage revenue.

II. APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90.

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil”.

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

Compensable damage types are natural resource damages, damage to real or personal property, loss of subsistence use of natural resources, lost government revenues, lost profits or impairment of earning capacity, and increased costs of public services. See 33 U.S.C. 2702(b)(2).

[7] See Altex Rider to Contract of Affreightment Clauses 20-25, which specify the schedule between Banacol load-ports and delivery to Philadelphia and speeds and route for chartered vessel.
[8] See Altex Rider to Contract of Affreightment Clause 26 which shows fixed revenue under contract
[9] See Altex Rider to Contract of Affreightment Clause 36
[10] Claimant’s voyage account #1001 shows a loss of $61,249, which is likely a result of rounding.

The provisions of 33 CFR 136.231-136.235 provide the details for claims for profits and earning capacity. To substantiate a claim for lost profits, a claimant is required to establish the following:

a. That real or personal property or natural resources have been injured, destroyed, or lost.
b. That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
c. The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
d. Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established. 33 CFR 136.233 (a) – (d)

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.
Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident.

III. ANALYSIS & DETERMINATION:

Background

Star Reefers operated the SOUTHAMPTON STAR under a typical time charter. Under a time charter, the time charterer pays operational costs such as bunkers, stevedores and port charges, while the vessel owner pays fixed costs or vessel maintenance, crew and insurance. As the time charterer, Star Reefers can direct the vessel to load and discharge cargo at its port of choice, and carry whatever cargo it chooses subject to the terms of the charter party. Under this charter, Star reefers must pay Clio Marine $.50/cubic foot every 30 days for 485,000 cubic feet of cargo capacity unless delayed by "Owners" actions. (See Time Charter)

Under its time charter with Clio Marine, Star Reefers was authorized to sub-charter the vessel to a voyage charterer for one or more voyages. Star Reefers sub-chartered the vessel to Altex as discussed previously. The M/V SOUTHAMPTON STAR's voyage charter with Altex required it to maintain a regular two-week round trip between Philadelphia, Pennsylvania; Turbo, Columbia; and Moin, Costa Rica.[11]. These clauses in Altex's voyage charter with Star Reefers specifically require Star Reefers to run its voyage charter on 14-day round-trips to specific load-ports. Under this charter schedule, the SOUTHAMPTON STAR is continuously utilized and is not available for any alternative hire.

Additionally, the Altex voyage charter Clause 36 requires that, if Star Reefers' vessel is delayed more than 48 hours while making its round-trip voyage, Star Reefers will provide another vessel to arrive on schedule at Banacol's load port. The rigid time schedule was necessary because of Altex's contractual agreement with Banacol to subcharter vessels to carry Banacol's fruit to the U.S. - bananas and plantains are climate sensitive so Altex hires refrigerated vessels (reefers) to transport Banacol's bananas and plantains. Banacol cuts its fruit just before the vessel arrives at Banacol's load-port. Cutting and packing just before the vessel arrives assures that the fruit will not spoil during shipment. Requiring a strict voyage charter schedule assures minimum spoilage.

Analysis

To receive payment from the Fund for lost profits a claimant must prove that it lost profits and that those lost profits resulted from the oil spill. For example, decreased revenue and/or increased expenses caused by the oil spill that reduce the profits the claimant would have otherwise earned would be compensable as lost profits damages from the Fund.

For this claim, it is perhaps easier to address the asserted loss of profits more directly based upon the facts then as presented by the claimant, who has claimed damages based on two separate voyages.

It is clear from the evidence that the SOUTHAMPTON STAR was allowed to enter the Delaware Bay and deliver it's cargo of perishables on 28 November 2004 and completed unloading their cargo on 30 November, thus completing the pickup and delivery associated with the voyage. Unfortunately, as the evidence including the ship's log entries and the FOSC reports demonstrate, the SOUTHAMPTON STAR was not allowed to leave Philadelphia until the evening of 4 December because of oil response activities.[12] This delay was well in excess of the 48-hour clause within the Banacol contract and left Star Reefers no choice, but to contract for another vessel to make the next pick-up and delivery of perishables.

To meet contractual commitments, M.V. ATLAS MOUNTAINS was chartered on 4 December 2004 to commence loading of cargo in Moin Bay, Costa Rica on 5 December and Turbo, Colombia on 8 December and completing delivery in Philadelphia on 17 December. 13 Unfortunately, having to spot charter another vessel to complete this voyage resulted in a direct increase in expenses of $211, 039.90 against the fixed revenue stream. The documentation demonstrates that the SOUTHAMPTON STAR expenses continued during the voyage of the ATLAS MOUNTAINS.

The claimant argues that it lost the profits of $161,837 that it otherwise expected to earn on the impacted voyage. It also claims that it lost additional profits of $61,249 because the voyage was actually operated at a net loss, instead of merely reduced earnings, due to the cost of chartering the ATLAS MOUNTAINS. In analyzing the claimant's calculation of its total damages, the NPFC notes that there is some fluctuation in the profits for the ten voyages used to in calculating its expected profits for the voyage. Specifically, if instead of using the ten-voyage average of

[11] See Altex Voyage Charter, Rider to part 1, dated 11 November 2003, Clauses 20 through 25)
[12] See CG Decon. List and Vessel Port Log
[13] See Atlas Mountains voyage account #1001

profits per voyage, the claimant had used the SOUTHAMPTON STAR's profit for the immediately preceding voyage, the damages would be valued at $151,430[14] plus the loss of the ATLAS MOUNTAINS' voyage of $61,249, or a combined damage of $212,679. This valuation is very close to the value of the spot charter cost of $211,039.90, which was directly attributable to the oil caused delay of the SOUTHAMPTON STAR.

The claimant also argues that it incurred increased expenses of $10,408 for the SOUTHAMPTON STAR while the vessel remained in port. However, the claimant has failed to meet its burden of proving that these expenses were lost profits that resulted from the oil spill. The claimant would have been operating the vessel continuously regardless of the oil spill and it is unclear whether the claimed expenses cost are increased expenses due to the oil spill or were instead just a fraction of the regular stream of expenses required as part of the next trip to South America.

Conclusion

In considering all evidence provided, the NPFC finds that an OPA event did in fact delay and ultimately disrupt the voyage of the claimant's vessel. The claimant has demonstrated that they had a direct loss of profit resulting from having to contract on the spot market a second vessel to complete the contracted delivery of product. The spot charter cost $211,039.90 and the claimant has demonstrated that this increased expense was not mitigated in any of its business processes. The increased port costs, however, are not supported by the documentation provided. The NPFC therefore offers the claimant $211,039.90.

<u>DETERMINED AMOUNT:</u>

Increased Port Costs……………………………………………….…………....-0-
Increased Voyage costs (Extra spot charter)…………………………<u>$211,039.90</u>
Total………………………………………………………………………...$211,039.90

Claim Supervisor: [redacted]

Date of Supervisor's Review:

Supervisor Action:

Supervisor is Comments:

[14] Voyage 1034 from voyage summary sheets.