

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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Arlington VA 20598-7100
Staff Symbol: Ca
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NPFCCCLAIMSINFO@uscg.mil

5890
December 06, 2012

Sent Via E-mail: [REDACTED]@frvf-law.com

RE: N08057-0089

Fowler Rodriguez Valdes-Fauli
Attn: Michael Harowski
400 Poydras Street, 30th Floor
New Orleans, LA 70130

Dear Mr. Harowski:

The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$26,323.44 is compensable for OPA claim number N08057-0089. This reconsideration determination is based on an analysis of information submitted. All costs that are not determined as compensable are considered denied. Disposition of this reconsideration constitutes final agency action.

If you accept this determination, please sign the enclosed Acceptance / Release Agreement where indicated and return to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If we do not receive the signed original Acceptance / Release Agreement within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Contractor Registration record prior to payment. If you do not, you may register free of charge at www.SAM.gov. If the determination is accepted, your payment will be mailed within 30 days of receipt of the Release Agreement.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at 1-800-280-7118.

Sincerely,

[REDACTED]
Chief, Claims Adjudication Division
U.S. Coast Guard

Enclosures: Claim Summary / Determination
Acceptance / Release Agreement

CLAIM SUMMARY / DETERMINATION

Claim Number: N08057-0089
Claimant: Liana Carrier, Ltd
Type of Claimant: Corporation
Type of Claim: Loss of Profits and Earnings
Claim Manager: Felita Jackson
Amount Requested: \$78,185.83

I. Facts

M/V Dominator

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States (the incident). Approximately 282,828 gallons of oil¹ were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the river to vessel traffic and later, when reopened, managed traffic.

II. Responsible Party

American Commercial Lines LLC (ACL), the Responsible Party (RP), owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act.

III. The Claimant and the Claim

On August 5, 2010, the law firm of Fowler Rodriguez Valdes-Fauli presented a claim to the NPFC on behalf its client, Liana Carrier, Ltd. ("Claimant"), charterer of the *M/V Dominator* (the vessel). Claimant asserted that it suffered a loss of profits and impairment of earning capacity in the amount of \$60,986.52 due to a 1.428 days (34.272 hours) delay caused by the incident and the subsequent closure of the River. Claimant asserts that it incurred \$49,980.00 in additional hire payments; \$8,459.52 in additional fuel costs; additional pilot fees in the amount of \$1,839.00; and \$708.00 in launch services. However, on September 5, 2012 the Claimant informed the NPFC that the new sum certain is \$61,180.27 due to a redaction error on the Port Ship Service Invoice Number 0408291.² It was explained that \$395.00 is the correct reimbursable portion of the invoice for pilot transportation, and that the prorated fuel surcharge is \$98.75. Then, on November 21, 2012, the Claimant requested reconsideration of the claim to include two tug assistance invoices totaling \$17,005.56 that had not been submitted in their original claim submission. Therefore, the sum certain for this claim has changed from \$61,180.27 to \$78,185.83.

The Claimant asserts it was operating the *M/V Dominator* under a North American Grain Charter Party 1973 at the time of the incident. The *M/V Dominator* was chartered to them from Zenith Shipping Incorporated (Zenith Shipping), owner of the vessel, under a time charter party dated May 14, 2008. Under the terms of the charter claimant agreed to let the vessel for a time charter period minimum five months/maximum seven months. Then, on July 8, 2008, the

¹ See House Subcommittee Hearing on DM 932 Oil Spill, dated September 15, 2008.

² See e-mail to Felita Jackson from Michael Harowski, dated September 5, 2012.

Claimant entered into a voyage charter with Archer Daniels Midland Shipping Company (ADM) to carry 20,000 metric tons of wheat from New Orleans to Caldera, Costa Rica under an agreed freight rate of \$62.00 per metric ton (MT), less a 5% commission.

On July 26, 2008, the vessel had finished loading cargo at ADM facility in Destrehan, Louisiana and was ready to depart at 6:30 am when it was ordered by the United States Coast Guard (Coast Guard) by a Captain of the Port (COTP) order to relocate to the Kenner Bend Anchorage (Kenner Bend). *M/V Dominator* had to remain at Kenner Bend from July 26, 2008 at 6:30 am until 7:47 am on July 27, 2008. And at that time on July 27, 2008, the Coast Guard ordered the vessel to again relocate to the Ostrica Anchorage (Ostrica) for decontamination of the vessel's hull. The Coast Guard cleared the *M/V Dominator* to leave Ostrica on July 27, 2008 at 4:58 pm that evening. The Claimant alleges that profits were lost when the vessel was delayed on the Mississippi River for a total of 1.428 days, from July 26, 2008 at 0630 to July 27, 2008 at 1658.

IV. Applicable Law

“In addition to the requirements of Subparts A and B of this part, a claimant must 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)

The amount of compensation is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident; all income from alternative employment or business undertaken; potential income from alternative employment or business not undertaken, but reasonably available; any saved overhead or normal business expenses not incurred as a result of the incident; and state, local, and Federal tax savings. 33 CFR 136.235 (a) – (e)

V. Claimant's Request for Reconsideration

On November 21, 2012, the Claimant requested reconsideration of the NPFC's initial determination based on new cost documentation identified regarding tug assistance required at Kenner Bend Anchorage (Kenner Bend).

VI. NPFC's Analysis of the Reconsideration

The NPFC reviewed the claim *de novo*, including information submitted with the initial claim submission and the cost documentation to support the Claimant's Request for Reconsideration.

A. Vessel Delay Hire Payments

Claimant did not provide any new evidence to contest the NPFC's initial determination findings regarding its claimed delay hire payments in the amount of \$49,980.00 (1.428 days delayed x \$35,000.00). Therefore, the NPFC again denies this portion of the claim upon reconsideration.

B. Additional Tug Services

Upon reconsideration, Claimant submitted two invoices for tug services³ Claimant explained the tug assistance services invoices by Crescent Towing and Salvage Company, Incorporated (Crescent) were for the movement of the vessel with regards to Kenner Bend that were not included in the original claim submission to the NPFC. In his November 30, 2012 e-mail, Michael Harowski confirmed that the Claimant submitted these costs and invoices in its original claim to the RP dated March 23, 2009.⁴ In that e-mail, Mr. Harowski explained the two invoices, #197321 in the amount of \$11,337.04 and #197336 in the amount of \$5,668.52, were presented to the RP and that the RP has neither paid nor settled the claim. The NPFC recognizes that these invoices are of the same type of costs left unpaid by the RP in Claimants original submission to them. Mr. Harowski went on to explain that these invoices could not be located at the time the Claimant submitted their claim to the NPFC, and were therefore left out of the claim. He added that the invoices were discovered by Liana Carrier, during a detailed file review, upon receipt of the NPFC's September 26, 2012 claim determination. And therefore, were submitted for reconsideration.

In the original claim submission, and in Mr. Harowski's November 21, 2012 letter, the Claimant asserts that the *M/V Dominator* had to leave the ADM facility at Destrehan and shift to Kenner Bend due to the oil spill. On July 26, 2008, the vessel required tug assistance from Crescent to shift to Kenner Bend. The Port Log - Statement of Facts documented Crescent's tugs *Point Clear* and *Jackie B* assisting the vessel.⁵ Crescent Invoice #197321, dated July 29, 2008, noted the tugs "assisting vessel into anchorage area" and lists the location of the anchorage as "Kenner Bend 115.1E."⁶ Crescent billed the Claimant \$11, 337.04 for their shifting services of July 26, 2008.

On July 27, 2008 the Coast Guard instructed the *M/V Dominator* to proceed to Ostrica for decontamination. The Claimant used Crescent's services for sailing to Ostrica. Crescent Invoice #197336 noted the tug *Port Allen* was used to undock, turn, and head the vessel down river from Kenner Bend.⁷ The Claimant was billed \$5,668.52 for those services. Page two to the Port Log - Statement of Facts also documents, that at that point, all other tugs needed by the vessel during the oil spill delay for anchoring and turning were supplied and paid for by the federal government.

³ See Letter from Michael Harowski, Fowler Rodriguez to NPFC Director, dated November 21, 2012.

⁴ See e-mail from Michael Harowski to Felita Jackson, NPFC, dated November 30, 2012.

⁵ Intermare Agency Services, Inc. Port Log-Statement of Facts *M/V Dominator*, page 2.

⁶ Crescent Towing & Salvage Co. Inc. Invoice #197321 to *M/V Dominator* and/or owners, dated July 29, 2008.

⁷ Crescent Towing & Salvage Co. Inc. Invoice #197336 to *M/V Dominator* and/or owners, dated July 29, 2008.

The NPFC finds the two additional invoices provided on reconsideration for tug services totaling \$17,005.56 compensable because the Coast Guard required the vessel to go to anchorage during the oil spill incident, instead of proceeding out the river as scheduled.

C. Bunker, Pilotage and Launch Services

The NPFC finds the costs approved in our initial determination for bunkers in the amount of \$6,577.13, Pilotage totaling \$1,839.00 and launch services totaling \$901.75 approved again under reconsideration.

VI. Summary:

On reconsideration, the new evidence submitted by the Claimant regarding tug expenses does demonstrate that the oil spill resulted in increased tug assistance charges in the amount of \$17,005.56. The new costs presented are of the same caliber as the increased expenses of \$9,317.88 (\$6,577.13 for bunker costs; \$1,839.00 for pilotage; and \$901.75 for launch services) offered in NPFC's initial determination. Therefore, the NPFC finds \$26,323.44 for increased expenses payable under reconsideration of this claim.

DETERMINED AMOUNT: \$26,323.44

Claim Supervisor:  Thomas B. Morrison

Date of Supervisor's review: 12/6/12

Supervisor Action: Other Allowed

Supervisor's Comments:

ACCEPTANCE / RELEASE AGREEMENT

Claim Number: N08057-0089	Claimant Name: Liana Carrier, Ltd
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I, the undersigned, ACCEPT this settlement offer of \$26,323.44 as full and final compensation for damages arising from the specific claim number identified above. With my signature, I also acknowledge that I accept as final agency action all costs submitted with subject claim that were denied in the determination and for which I received no compensation.

This settlement represents full and final release and satisfaction of the amounts paid from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990 for this claim. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the amounts paid for which I have been compensated under this claim. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from and associated with those amounts paid for which I am compensated for with this settlement offer. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for amounts paid which is the subject of this claim against the Oil Spill Liability Trust Fund (Fund).

This settlement is not an admission of liability by any party.

With my signature, I acknowledge that I accept as final agency action all amounts paid for this claim and amounts denied in the determination for which I received no compensation.

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for those amounts paid for which the Fund has provided compensation, by providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

_____	_____
Title of Person Signing	Date of Signature
_____	_____
Printed Name of Claimant or Authorized Representative	Signature

_____	_____
Title of Witness	Date of Signature
_____	_____
Printed Name of Witness	Signature

_____	_____	_____
*DUNS/EIN/SSN	Bank Routing Number	Bank Account Number
*Required for Payment		