

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 06/11/10
Claim Number	: N08057-027
Claimant	: M/G Transport Services, LLC
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: ██████████
Amount Requested	: \$20,343.75

### **I. Facts**

#### ***M/V Captain Whitey***

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.

### **II. Responsible Party**

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

### **III. Claimant**

M/G Transport Services, LLC (herein known as M/G Transport) is a United States based company that owns open and closed hopper barges capable of carrying dry bulk cargoes up and down the rivers of the United States.

### **IV. Claim Description**

M/G Transport seeks \$20,343.75 in alleged lost profits as a direct consequence of the barge 932 oil spill on July 23, 2008. In their claim submission to the NPFCA, the claimant states that the M/V Captain Whitey was operating under a fully found charter agreement solely dedicated to the transport of cargo exclusively under the direction of M/G Transport. Because of this incident and subsequent Coast Guard ordered closure of the Mississippi River, the claimant alleges the M/V Captain Whitey was delayed from July 23, 2008 at 11:30 am until July 27, 2008 at 8:00 pm.<sup>1</sup> Vessel logs submitted with the claim provide the same delayed dates and times.<sup>2</sup> The claimant provided an invoice from Western Rivers Boat Mgt, Inc., the owner of the boat in this charter. This invoice required payment in the amount of \$4,500.00 a day for seven days, totaling \$31,500.00.<sup>3</sup> The \$4,500.00 per day amount is found in the charter agreement provided by the claimant. M/G Transport made full payment on this invoice on August 18, 2008.<sup>4</sup>

The Claimant, M/G Transport, submitted the claim to the RP on September 29, 2008 as indicated on the Optional OSLTF Claim Form signed by the claimant on May 18, 2009. The RP responded by sending a letter to the Claimant on December 12, 2008 requesting a copy of the contract between Western River Boat Mgt., Inc. and M/G Transport Services, LLC.<sup>5</sup>

<sup>1</sup> See, claimant letter dated May 18, 2009.

<sup>2</sup> See, WRBMI daily logs, M/V Captain Whitey.

<sup>3</sup> See, Western Rivers Boat Mgt, Inc. invoice no. 0019554-IN dated July 21, 2008.

<sup>4</sup> See, copy of claimant check number 51766.

<sup>5</sup> See, Worley Catastrophe Response letter dated December 12, 2008.

The Claimant submitted their claim to the NPFC on May 18, 2009. The NPFC acknowledged receipt of this claim and notified the RP via letter dated May 27, 2009.<sup>6</sup>

The NPFC requested additional information from the claimant on June 15, 2009.<sup>7</sup>

On June 26, 2009, the RP responded to the NPFC's notification letter by providing a justification for not paying the claim. Their response noted that "...absent a showing that the UTV CAPTAIN WHITNEY was oiled, and thereby delayed for cleaning, recovery is not available."<sup>8</sup> Additionally, "...the hire payments represent fixed costs and do not equate to either lost profits or reduced revenues. MG Transport has not offered any evidence that it incurred increased marginal costs or lost revenues as a result of the delay to the UTV CAPT. WHITNEY".<sup>9</sup> The RP went on to state that ACL commenced a declaratory judgment action in the United States District Court for the Eastern District of Louisiana against M/G Transport. The court later dismissed the declaratory action stating "...that judicial economy is best served by letting the administrative process run its course prior to premature action by the Court."<sup>10</sup>

On July 7, 2009, M/G Transport requested the NPFC place this claim in abeyance until further notice.<sup>11</sup> The NPFC answered this request by granting a six month abeyance. We also requested that at the termination of the abeyance the claimant notify us as to whether this claim would be withdrawn or the additional information we requested would be provided.<sup>12</sup> At the end of the six month abeyance, the claimant requested an additional ninety day abeyance, due to continued work with the RP, which would now extend the abeyance period to April 7, 2010.<sup>13</sup> The NPFC granted this extension via phone, recording the comments into our Claims Processing System (CPS) database. On April 19, 2010, the claimant provided a letter to the NPFC stating they would provide the additional supporting documentation (requested by us on June 15, 2009) as soon as possible.<sup>14</sup> The NPFC responded by email, granting the claimant thirty days to provide the information requested.<sup>15</sup> On May 25, 2010, the NPFC emailed the claimant, notifying them that the additional information needed to adjudicate this claim was due on May 19, 2010 and had not been received. We also stated that we would move forward with adjudicating this claim.<sup>16</sup>

## **V. APPLICABLE LAW**

Claims may be presented first to the Fund if the President or his delegated representative has advertised or notified claimants that the Fund is accepting claims resulting from an oil discharge. 33 U.S.C. §2713(b)(1)(A).

The uses of the OSLTF are described at 33 U.S.C. §2712. It provides in relevant part that:

“(a) Uses generally

The Fund shall be available to the President for –

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<sup>6</sup> See, NPFC letter to American Commercial Lines dated May 27, 2009.

<sup>7</sup> See, NPFC email to claimant dated June 15, 2009.

<sup>8</sup> See, Nicoletti Hornig & Sweeney letter dated June 26, 2009, page 3, para. 1.

<sup>9</sup> See, Nicoletti Hornig & Sweeney letter dated June 26, 2009, page 2, para. 4.

<sup>10</sup> See, Unites States District Court Eastern District of Louisiana; American Commercial Lines, LLC vs. Shell Trading U.S. Company, Et Al. Civil Action Nos. 09-3392, 09-3457, 09-3657, 09-4161; Section “B” (4).

<sup>11</sup> See, M/G Transport Services, LLC letter dated July 7, 2009.

<sup>12</sup> See, NPFC letter dated July 21, 2009.

<sup>13</sup> See, claimant letter dated January 7, 2010.

<sup>14</sup> See, claimant letter dated April 19, 2010.

<sup>15</sup> See, NPFC email dated April 19, 2010.

<sup>16</sup> See, NPFC email dated May 25, 2010.

(4) [T]he payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages; . . .

(b) Defense to liability for Fund

The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of the claimant.”

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §2701(5).

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 U.S.C. §2712(h)(2).

In any case in which the President has paid an amount from the OSLTF for any removal costs or damages specified under 33 U.S.C. §2712(a), no other claim may be paid from the Fund for the same removal costs or damages. 33 U.S.C. §2712(i).

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 U.S.C. §2713(e). Those regulations are found at 33 CFR Part 136.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Further, a claim presented to the Fund should include, as applicable:

“[T]he reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney’s fees or other administrative costs associated with preparation of the claim.” 33 CFR 136.105(e)(8).

With regard to claims for loss profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR Part 136, are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, et seq.

Pursuant to the provisions of 33 CFR 136.231, claims for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

“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)

If a third party claimant or an RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF. But the compensable amount is limited to the actual net reduction or loss of earnings and 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).

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

## **VI. DETERMINATION**

The barge 932 oil spill disrupted shipping in and out of the Mississippi River. The NPFC reviewed the Coast Guard SITREP-POL's which clearly state that vessels were delayed from 7/23/2008 until well after 7/28/2008. POLREP eight, issued on 7/28/2008, stated the safety zone from mile marker 97 through mile marker 60 would be maintained for the indefinite future to ensure integrity of boom systems and safety of pollution response workers.

As mentioned above, the claimant seeks \$20,343.75 for alleged loss of profits incurred when the tug they hired under charter was delayed from July 23, 2008 at 11:30 am to July 27, 2008 at 2000 which equals four days, 8.5 hours (104.5 hours) due to the DM 932 oil spill.

Documentation submitted with the claim included the following:

1. Coast Guard Sitrep-Pol Nine.
2. Worley Catastrophe letters dated December 12, 2009.
3. Copy of invoice 0019554-IN from Western Rivers Boat MGT, Inc. for charges related to the charter agreement from 7/21/08 – 7/27/08.
4. Fully found charter between M/G Transport Services, Inc (Charterer) and Western Rivers Boat Mgmt. Inc. (Owner).
5. Copy of the WRBMI Daily Logs from July 21, 2008 through July 27, 2008.
6. Claimant's proof of payment totaling \$31,500.00 to Western Rivers Boat Mgt., Inc.

The NPFC does not find this claim compensable for the following reasons:

**1. No additional information provided**

After initial review of this claim, the NPFC requested additional information on June 15, 2009. The claimant has failed to provide any of the information requested, which includes an unidentifiable error in the sum certain submitted with the claim and a clarification as to the chartered tugs name (Whitey vs. Whitney).

**2. No loss of profits proven**

The claimant failed to prove how they lost profits (revenue minus expenses). The fully found charter entered into on April 1, 2008, provides that M/G Transport had to pay \$4,500.00 every day after delivery of the vessel and continuing thereafter for one year. The charter states that the owner, Western Rivers Boat Mgmt., Inc., would not be responsible for any loss or delay.

Since the fully found charter hire costs represent fixed costs, they do not equate to either lost profits or increased costs. MG Transport has not offered any evidence that it incurred increased costs or lost profits as a result of the delay to the M/V Captain Whitey.

Additionally, no monthly profit/loss statements were provided as requested so a comparison over several months and years could be investigated to determine if a loss could be shown. Nor were daily revenue records for July and August 2007 and 2008 provided as requested.

**VII. SUMMARY**

The Claimant failed to demonstrate a loss of profits. The NPFC cooperated fully with the claimant, by granting nine months of abeyance plus over sixty days to provide the additional information requested by us to properly adjudicate this claim.

Based on the above, I recommend that M/G Transport Services, LLC be offered **0.00** as full compensation for the alleged damages it suffered when its barges were allegedly delayed as a result of the barge 932 oil spill.

**VIII. DETERMINED AMOUNT: \$0.00**

Claim Supervisor: Thomas S. Morrison

Date of Supervisor's Review:

Supervisor Action:

Supervisor's Comments: