

## 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:** [REDACTED]  
**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 oil<sup>1</sup> 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.<sup>2</sup> 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

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

<sup>2</sup> See e-mail to [REDACTED] from [REDACTED] 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 services<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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."<sup>6</sup> 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.<sup>7</sup> 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.

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

<sup>4</sup> See e-mail from [REDACTED] to [REDACTED] NPFC, dated November 30, 2012.

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

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

<sup>7</sup> 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

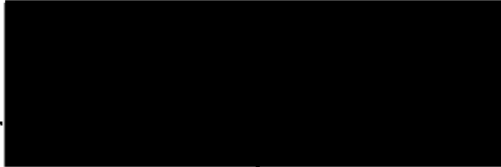
The NPFC finds the costs approved in our initial determination for bunkers in the amount of \$6,577.13, Pilotage totaling \$1,839.00 and launch services totaling \$901.75 approved again under reconsideration.

**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



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

Supervisor Action: Other Allowed

Supervisor's Comments: