

CLAIM SUMMARY / DETERMINATION

Claim Number: N08057-0090
Claimant: DOWA Line American Co, Ltd
Type of Claimant: U.S. Corporate
Type of Claim: Loss of Profits and Earnings
Claim Manager: [REDACTED]
Amount Requested: \$102,813.48 [REDACTED]

I. Facts

On the morning of July 23, 2008 at approximately 0130 the tank barge DM 932, an unmanned, non-self propelled, double hull, steel tank barge, bearing official number 546058, sank as a result of a collision with TINTOMARA and discharged approximately 282,828 gallons of oil into the Mississippi River, a navigable waterway of the United States. The Federal On-Scene Coordinator (FOSC) initially closed the River to vessel traffic and later managed traffic when the River re-opened, for the duration of the response.

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. The Claim and the Claimant

On or about August 17, 2010 Murphy, Rogers, Sloss & Gambel (Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) via the National Pollution Funds Center (NPFC) for DOWA Line America Co. Ltd. (DOWA) on behalf of Felicidad Lines Corporation (Felicidad).¹ Claimant asserts that Felicidad was the owner of the M/V BALSA (BALSA/Vessel) at the time of the incident and that it incurred a loss of profits and earning capacity and additional bunkering expenses totaling \$102,813.48 due to a discharge of oil into the Mississippi River on July 23, 2008 and subsequent closure of the River.² Claimant asserted that the M/V BALSA's 7.54-day delay resulted in \$90,811.76 in loss of profits and additional bunkering expenses in the amount of \$12,001.72.

IV. Initial Denial & Request for Reconsideration

On or about February 27, 2013, the NPFC issued a denial letter to DOWA Lines America (DOWA) via their Counsel, Murphy, Rogers, Sloss & Gambel for failure to demonstrate

¹ Letter from Counsel to NPFC dated August 17, 2010

² Letter from Counsel to NPFC dated 17 August 2010, page 2

DOWA's entitlement to submit a claim to the Fund on behalf of Felicidad, failure to provide sufficient evidence to determine who is the proper claimant before the Fund; failure to establish that a loss of profits was suffered on a daily net revenue theory of reimbursement in the amount of \$90,811.76 and failure to establish that the incurred storage fees were due to the incident.³ That determination is hereby incorporated by reference.

On or about April 25, 2013, the Claimant filed for reconsideration of the NPFC's decision.⁴

V. Reconsideration

Claimant's Arguments

On reconsideration, the Claimant submitted as *Exhibit "A"* an "unsworn declaration" from the President and Director of Felicidad Lines Corporation. The unsworn declaration asserts that (a) Felicidad Corporation was the registered owner of the M/V Balsa 58 (or vessel) at the time of the incident; (b) DOWA Line America Co., Ltd was appointed by Felicidad to serve as the Operating Agent of the M/V Balsa 58 on July 23, 2008; (c) Felicidad was the Registered Owner of the vessel at all relevant times, is the appropriate claimant/party to receive any settlement funds from the NPFC; and (d) that Felicidad, as the Registered Owner of the vessel is the party that suffered the economic losses/damages as a result of the July 23, 2008 oil spill incident and subsequent closure of the River.⁵

The Claimant argues that the Charter Party previously provided to the NPFC is the governing document for this vessel's voyage and the economic losses can be calculated based on the demurrage provisions of the Charter Party.

The Claimant argues that the NPFC misconstrues the terms of the charter party for two reasons. First, Claimant states that if the vessel is prevented from entering the commercial limits of the loading port because of the order of any competent official body or authority, the time spent waiting at a place outside the commercial limits of the port or off the port should not count as laytime against the Charterer.⁶ Additionally, the Claimant states that "any periods of restriction issued by a port or other official for all vessels in the port due to obstructions or stoppages beyond the control of the Charterers/Owners should not be counted as laytime."^{7 / 8}

Under its interpretation of the terms of the Charter Party, the Claimant asserts that it was not entitled to claim the 7.54 days as laytime because Balsa was not an "arrived ship"; therefore, it is not entitled to seek reimbursement of alleged loss of profits due to the delay time from the Charterer.⁹ The Claimant argues that the vessel was not able to mitigate its

³ See NPFC's letter dated 27 February 2013

⁴ See, reconsideration letter from Counsel to the NPFC, dated 25 April 2013

⁵ *Exhibit A*, to the letter dated 25 April 2013

⁶ This also includes times when there is physically no space at the port. Charter Party, clause 17 (b)

⁷ See, reconsideration letter from Counsel to the NPFC dated 25 April 2013, page 2

⁸ Charter Party Clause 17 (b) also addresses a vessel's "readiness to load" once inside the commercial limits of the loading port and the vessel's failure to pass inspections and states that "any delay in commencing loading directly attributable to its failure to pass initial inspections shall not count as laytime or time on demurrage."

⁹ See reconsideration letter from Counsel to the NPFC, dated 25 April 2013, page 2

losses because it was restricted from movement by the U.S. Coast Guard. Thus Claimant seeks reimbursement of its alleged loss of profits due to the 7.54-day delay from the Fund, quantifying its alleged loss by using the demurrage rate (\$13,000 per day) provided in the charter party.¹⁰

Finally, the Claimant argues that although the Vessel was working continuously from July 4 to September 10, 2008 without any idle days, and did not lose any charters or business due to the 7.54-day delay, the owners still incurred economic losses arising out of the July 23, 2008 spill and it is entitled to reimbursement from the Fund.¹¹

The Claimant included "*Exhibit B*" in its reconsideration package to support its position for payment of this claim. This exhibit includes an account statement to Seacor Commodities (Charterer) reflecting that it received its freight rate for the voyage (\$410,459.85), and the vessel's logs from July 22, 2008 through August 12, 2008 that includes its used laytime calculations due to Felicidad from Seacor.

NPFC Analysis

In its initial denial of the claim the NPFC stated that one of the grounds for denial of the claim was the Claimant's failure to establish that Felicidad was entitled to reimbursement when it was not a party to the charter party. The NPFC stated that if the Claimant sought reconsideration it must provide evidence establishing which party suffered a loss of profits and establish that it had all rights to the claim.

Claimant asserts that Felicidad, as owner of the vessel, suffered the loss of profits. Evidence submitted by the Claimant, in addition to evidence that the NPFC located during independent research, supports the claim that Felicidad was the owner of the M/V Balsa¹² on the date of the oil pollution incident, July 23, 2008. In support of its right to present this claim on behalf of Felicidad and in an attempt to explain away some of the confusion regarding the relationship between DOWA and Felicidad, Claimant submitted an "Unsworn Declaration" as *Exhibit A* to the request for reconsideration.¹³ The document purports to show that DOWA and Felicidad were in an agency relationship where DOWA was acting as the "operating agent" on behalf of Felicidad on the date of the incident. On reconsideration the Claimant asserted an "agency" relationship but did not provide the underlying agreement that established that relationship.¹⁴

Based on the discussion above, the NPFC has determined that the evidence submitted is sufficient to show that Felicidad was the owner of the vessel on the day of the incident; however it was not a party to the Charter Party.¹⁵ This is an important fact because the Claimant is arguing for reimbursement to Felicidad based on the terms of the Charter Party and it does not appear that Felicidad has any rights under the charter party. The Claimant

¹⁰ See Charter Party dated 18 July 2008, clause 17(e), page 8 and clause 19, page 9

¹¹ See, reconsideration letter from Counsel to NPFC dated April 25, 2013, page 3

¹² See, Equasis Ship Search dated July 29, 2008

¹³ See, *Exhibit A*, "Unsworn Declaration Under Penalty of Perjury of Mamoru Futakoshi", dated April 24, 2013

¹⁴ See, reconsideration letter from Counsel to NPFC dated April 25, 2013

¹⁵ See, Charter Party dated 18 July 2008, page 1. The charter party was executed five days prior to the incident.

asserts that DOWA is the operating agent on behalf of Felicidad, presumably saying that as an operating agent it can receive any reimbursement from the Fund on behalf of Felicidad.

OPA provides that any payment by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant to recover from the responsible party. 33 U.S.C. § 2712(f). Since it is unclear who in this claim has the rights, the acceptance and release form will require that both Felicidad and DOWA execute the document to ensure that both parties relinquish all rights to the United States Government in order that the NPFC may seek recovery of the costs paid from the responsible party.

Alleged Loss of Profits

In its initial claim submission the Claimant sought reimbursement of economic losses in the amount of \$90,811.76. This was based on line items in the Charter Party/Freight Base, the summary document for the impacted voyage, S007.¹⁶ It reflects that Claimant received its freight rate of \$410,460, that the vessel incurred total expenses of \$200,034, thus realizing a profit of \$210,426. The Claimant calculated the actual daily net revenue to be \$8,413 by dividing this profit by the 25.01-day voyage. The summary sheet also estimated that the daily net revenue would have been \$12,044 if the voyage had been 17.47 days (deducting out the 7.54-day delay). Thus the Claimant argued that the economic losses were \$12,044 x 7.54-day delay.¹⁷

On reconsideration, the Claimant changes its theory of reimbursement and now argues that the terms of the Charter Party govern the outcome of this dispute, thus its alleged economic loss should be based on the demurrage rate in the charter party. It argues that since the 7.54-day delay cannot be charged as laytime against the Charterer, it is entitled to reimbursement of the 7.54-day delay time from the Fund. Clause 17(b) of the Charter Party provides that the demurrage rate is \$13,000 per day; therefore, the economic losses¹⁸ can be calculated based on the demurrage provision of the Charter Party.^{19 20}

In its initial denial the NPFC explained that simply quantifying a loss of profit by multiplying the daily rate provided in a charter party by the delay time does not establish in fact a loss of profit or economic loss. Claimant has not established that it suffered a loss of profits. The Nicolaou Maria, 143 F.2d 406, 407 (C.A. 5 1944) (The burden of establishing that profits were lost is on the owner of the vessel.) Claimant concedes that the vessel was working continuously from July 4, 2008 through September 10, 2008 and did not lose any charters or business due to the delays caused by the incident, yet it argues that the Owners still incurred an economic loss because of the 7.54-day delay. Detention alone does not necessarily entitle

¹⁶ Claimant failed to provide the support documentation for this summary notwithstanding that the NPFC requested that it be provided in reconsideration documentation.

¹⁷ The NPFC questions why the Claimant sought \$12,044 per day when its daily net revenue was apparently \$8,413. Using this theory of reimbursement the Claimant should only have suffered a daily net revenue loss of \$3,631 per day.

¹⁸ The Claimant states in several instances that it suffered "economic loss." It is unclear to the NPFC if Claimant is seeking economic loss under an economic loss doctrine or is using that term interchangeably with "loss of profits." Either way the Claimant has the burden to establish that it suffered a loss of profits in fact.

¹⁹ See Counsel's reconsideration letter to the NPFC dated April 25, 2013.

²⁰ This would total \$98,020 instead of \$90,811.76; however Claimant did not amend its sum certain.

an owner to demurrage. The Nicolaou Maria, 143 F. 2d at 407. A demurrage rate may be used to quantify a loss of profits but a vessel owner must first establish that the vessel in fact lost profits. Asiatic Oil Ltd. S.A. v. Apex Oil Co., 804 F. 2d 773,782 (C.A. 1 Puerto Rico) (It is appropriate to require a vessel owner to prove that damages actually have been suffered... To enforce a contract without proof of actual damages would be inequitable, permitting the vessel owner to enrich himself at the expense of others).

Because the Claimant has failed to provide evidence to support a finding that it lost profits as a result of this oil pollution incident, in the amount of \$90,811.76, or pursuant to the demurrage rate in the charter party, \$98,020, this portion of the claim is denied.

Increased Bunkers

The initial claim submission sought reimbursement of increased bunker expenses in the amount of \$12,001.72. This included storage fees. The NPFC denied the storage fees on the grounds that Claimant had not established that these fees were incurred due to the incident. Upon reconsideration, Claimant does not attempt to provide additional evidence to support the storage costs which raised the unit price of the bunkers. In fact, in their cover letter requesting reconsideration of the NPFC's initial denial they state they are providing evidence on reconsideration "to ensure that Felicidad receives the \$11,892.12 in bunker expenses".²¹

No additional evidence was provided to evidence paying more bunker costs than already offered by the NPFC on the initial determination. Therefore, the NPFC finds \$11,892.12 in bunkers compensable.

VI. Conclusion

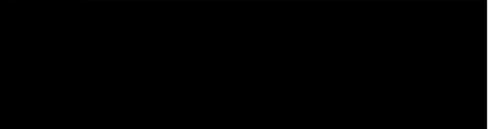
The NPFC has reviewed all evidence submitted on reconsideration. Claimant has failed to provide sufficient evidence to support a finding that it lost profits as a result of the oil pollution incident. Therefore, the claim for loss of profits is hereby denied.

The documentation submitted does support a finding that the Claimant did incur increased bunkers in the amount of \$11,892.12. This amount is compensable.

Evidence in the administrative record establishes that Felicidad was the Owner of the M/V BALSALSA at the time of the oil spill incident; however since Felicidad is not a party to the charter party it is not clear how it has any rights under the charter party. Claimant asserts that DOWA is the operating agent for Felicidad but provides no persuasive evidence to support this assertion. Because it is unclear who has the rights that the United States Government will acquire if the Claimant accepts the \$11,892.12 offered, the NPFC will require that both Felicidad and DOWA execute the acceptance and release form.

²¹ See, reconsideration letter from Counsel to the NPFC dated April 25, 2013. The evidence the Claimant is referring to is evidence regarding ownership of the M/V BALSALSA 58 to include a "unsworn declaration" from the President of Felicidad and a computer generated document from Equasis showing that Felicidad was the owner of the vessel on the date of the incident.

AMOUNT: \$11,892.12

Claim Supervisor 

Date of Supervisor's review: 7/30/2013

Supervisor Action: *Approved.*

Supervisor's Comments: