

CLAIM SUMMARY / DETERMINATION ON RECONSIDERATION

Claim Number:	N08057-0097
Claimant:	Vulica Shipping Co Ltd
Type of Claimant:	Corporate
Type of Claim:	Loss of Profits and Earnings
Claim Manager:	[REDACTED]
Amount Requested:	\$197,860.28

Incident

On July 23, 2008, at approximately 0130, the tank barge DM 932, sank as a result of a collision with M/T 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) and the Unified Command (UC) initially closed the river to vessel traffic to conduct removal operations and later managed and restricted vessel traffic when the River reopened until cleanup was complete.

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.

Claimant

The initial claim was presented to the Oil Spill Liability Trust Fund (OSLTF or the Fund) on May 3, 2011 by Mr. [REDACTED] of Nordisk Legal Services on behalf of the owners of the MV H A SKLENAR,¹ Vulica Shipping Co Ltd and its vessel manager, Wilhelmsen Ship Management Ltd. (Vulica or Claimants). Claimants seek compensation for alleged lost profits and extra expenses incurred due to the delay and contamination of the H A SKLENAR after the incident and subsequent closure of the Mississippi River.

Claimants state that the river closure prevented their vessel from sailing as scheduled. They also allege that due to the river closure their vessel was moved to AMA Anchorage (AMA) after it completed discharging cargo at 05:30 on July 23. It anchored at AMA at 06:36, and then waited until the river re-opened. Claimants admit that the vessel was also restricted by the Coast Guard for a radar problem until 17:02 on July 23. The vessel left AMA on July 27 at 00:54 and arrived downriver at the Boothville Anchorage at 07:36 for oil decontamination. It was cleaned of oil and released to sail at 15:18 on July 27.

Initial Claim

In the original claim, Claimants argued that their vessel was delayed by the oil spill for a total of three days and fifteen hours. Based on this delay, Claimants argued that they have a loss of earnings for the delay period. Claimants requested lost earnings totaling \$334,468.00.² This amount is based on the alleged loss of revenue due to the vessel allegedly losing a full voyage carrying limestone in September 2008.³ Claimant also sought reimbursement for loss of profits based on demurrage and time charter equivalent theories.

¹ The vessel was employed under a Contract of Affreightment (COA) with Vulcan Materials. The COA provides that Vulica will be the exclusive transporter of Vulcan's construction grade crushed limestone aggregates from a quarry site in Mexico to ports in the U.S. The HA SKLENAR was to be made exclusively available to Vulcan unless pre-approved by Vulcan to allow it to engage in other cargo carriage, so long as it did not interfere with Vulica meeting its obligations to Vulcan.

² Claim amount amended by email received at NPFC on 13 August 2012.

³ In September 2008, Vulica entered the vessel into a time charter commitment to load grain destined for Djibouti. See Nordisk letter dated 11 June 2012.

Claimants also sought reimbursement of expenses incurred totaling \$30,965.28. Claimants alleged that they incurred extra expenses for tug service, agent fees, pilotage, launch hire, bunker fuel, and communications due to the oil spill. The final claim total amount was \$365,433.28.

Claimants presented the claim to the RP in accordance with 33 U.S.C. § 2713(a).⁴ To date, the RP has not paid the claim.

Claim on Reconsideration

In its determination issued on November 1, 2012, the NPFC initially denied the Claimants' vessel delay loss of profits claim on the grounds that Claimants had not proven the loss of profits merely based on providing calculations of demurrage or time charter equivalent, and failure to prove that a voyage was lost. The NPFC offered \$1,156.28 for increased port expenses incurred due to the oil spill, which resulted in lost profits.

In the request for reconsideration dated 31 December 2012, Claimants have amended their claimed amount to \$197,860.28 for loss of profits due to the vessel delay and extra expenses. Claimants withdrew the demurrage basis for compensation but argue that the time charter equivalent calculation or a loss of voyage calculation establish a loss of profits.

DETERMINATION OF LOSS ON RECONSIDERATION:

The NPFC reviewed all documentation submitted by Claimant.

Findings of Fact:

- A. In accordance with 33 U.S.C. § 2712(h)(2) and 33CFR § 136.101(a)(1) the claim was submitted within the three year statute of limitations for loss of profits under OPA.
- B. In accordance with 33 CFR § 136.103(a) the claimant presented its claim to the Responsible Party.
- C. In accordance with 33 CFR 136.105(e)(10) copies of written communications and substance of verbal communications, between claimant and Responsible Party with the date claim was presented and the date that the claim was denied have been provided.
- D. In accordance with 33 CFR § 136.105(b) claimant demanded a sum certain.
- E. In accordance with 33 CFR § 136.105(e)(12), claimant certified no suit has been filed in court for the claimed loss of profits.
- F. In accordance with 33 CFR § 136.111(a)(2) claimant asserts that the oil spill delay is not an insured peril and it has not submitted a claim to its insurer.

Vessel Delay Analysis

Claimants allege that their vessel was detained twice by the oil spill. One detention was at St. Rose allegedly from 23 July 2008 at 17:02 through 27 July at 00:54, while the Mississippi River was closed. Claimants state that the vessel completed discharging cargo at St. Rose at 05:30, but due to the river closure it was moved to the AMA Anchorage, where she waited until the river re-opened and was able to navigate downriver to Boothville for hull cleaning. Though the vessel completed unloading cargo at 05:30 on July 23, Claimants admit that the vessel was restricted by the USCG due to a radar problem on July 23 until 17:02 when the restriction was lifted. Claimants excluded this period in their calculation of lost time. Thus, the delay time due to the spill began at 17:02 on July 23. The second detention was while the vessel was anchored for decontamination at Boothville allegedly starting on 27 July from 07:36 and continuing through 15:18 the same day. Claimants allege that the total time lost is therefore 3 days 15 hours or 3.625 days.

⁴ Letter to Worley Catastrophe Response, LLC from Nordisk Legal Services, Dated December 1, 2008 – Worley Claim #080000339

The NPFC has reviewed the Claimants' records including the vessel's deck log and the Statement of Facts provided by NSA Agencies, Inc. The NPFC agrees that the vessel was delayed by the oil spill for 3 days 15 hours as alleged.

Claimed Loss of Earnings Due to Delay

Claimants set forth two alternative valuations for their claimed loss of profits due to the delay of the vessel. They apply a time charter equivalent method resulting in a valuation of \$102,420.53, and a lost voyage method resulting in a valuation of \$173,331.30.

Claimants' vessel, the H A SKLENAR, was employed under a Contract of Affreightment (COA) with Vulcan Materials. The COA provides that Vulica will be the exclusive transporter of Vulcan's construction grade crushed limestone aggregates from a quarry site in Mexico to ports in the U.S. Under the COA, Vulcan is to try to distribute cargo on a *pro rata* basis throughout the year.⁵ Vulica is paid "freight" for each voyage.⁶ Freight is based on vessel cost plus actual fuel cost; thus, under the terms of the COA Vulcan pays the fuel costs. The vessel cost as a component of freight is adjusted annually.⁷ Therefore, according to the COA, Claimants did not lose any freight/revenue on the delayed voyage.

Under OPA, a claimant seeking reimbursement of loss of profits or impairment of earning capacity may be reimbursed if the loss resulted from the injury to, destruction of, or loss of property or natural resources caused by the discharge of oil into the navigable waters of the U.S. In this case the oil spill resulted in injury to natural resources, specifically to the Mississippi River, and injury to the Claimants' property, specifically the H A SKLENAR, when it was delayed and contaminated by the oil spill. The claims regulations associated with OPA provide that a claimant has the burden of establishing that he suffered a loss of profits and then quantifying that loss. 33 CFR 136.105(a) and 33 CFR 136.235. A loss of profits may be established by objective means, i.e., income tax returns, financial statements, comparable figures for profits or earnings for the same or similar activities outside of the area affected by the incident. 33 CFR 136.233(a)-(d).

Time Charter Equivalent

Because NPFC agreed that Claimants had proven that the vessel was delayed as Claimants allege, they argue in their reconsideration request that Time Charter Equivalent (TCE) is an appropriate measure of their claimed loss. In their initial claim they assert that the TCE for this voyage was \$34,093.14 per day (without including the 3.625-day delay period). They acknowledge on reconsideration that the TCE is \$17,051.51 per day when the detention period is treated as part of the voyage. Claimants "considered it sensible to provide evidence of the vessel's earning potential as it was on the voyage immediately preceding the detention period (without factoring in the actual detention period)."

In its Request for Reconsideration Claimants presented a spread sheet that included the TCE for the "H.A.SKLENAR Cost by Month by Port" for January – December 2008,⁸ arguing that this spread sheet provided comparable data for similar voyages. Based on the spread sheet Claimants assert that the time charter equivalent average for three normal voyages is \$28,253.94. They argue that the resulting value for 3.625 days of delay is \$102,420.53 for the detention period. However, this spread sheet only provides the voyage number, tonnage of freight, total days, net days and the t/c for the vessel's voyages in 2008. The gross revenue, all costs and expenses of each of the voyages are redacted; therefore, it is not known if the TCE for each of the

⁵ Contract of Affreightment, p.15

⁶ Contract of Affreightment, p.15

⁷ Contract of Affreightment, p.16

⁸ Request for Reconsideration dated 31 December 2012, Exhibit 1.

compared voyages was based on net days or total days and whether or which expenses were consistently included in the voyage expenses component of the calculation. Additionally, no documentation was provided to support the revenues and costs in the spread sheet. Thus, the NPFC finds the Claimants' evidence provided for time charter equivalent calculations does not establish a loss of profits in fact or a quantification of a loss of profits.

Lost Voyage

In the Request for Reconsideration Claimants reiterate their argument that the H A SKLENAR lost a voyage carrying limestone cargo for Vulcan that it would have been able to make had the spill not delayed their vessel. As evidence, Claimants provided deck logs, vessel schedules, comparable voyage information, vessel cost and revenue data, and a plausible explanation how the vessel lost a voyage.

Based on the new evidence and arguments, the NPFC agrees that the vessel could have engaged another voyage carrying limestone prior to starting the grain charter from Corpus Christi, TX to Djibouti, had the vessel not been delayed by the oil spill in the Mississippi River. The delay shortened the window available to the vessel for performing another limestone cargo voyage and had the vessel attempted to squeeze the additional voyage into the schedule after it was delayed by the oil spill, Claimants would have lost the grain charter because the vessel would not have reached Corpus Christi within the laycan of the Charter Party. Therefore, the NPFC agrees that Claimants lost profits from the lost voyage. Any profit it would have made on the additional voyage after deducting any offsetting income and saved expenses it received by not taking the voyage would be a compensable loss of profit under OPA. However, the NPFC disagrees with the Claimants' valuation/calculations. The Claimants base their calculations on certain assumptions and time schedules. The NPFC's attached spreadsheet details the differing calculations and explanations of the NPFC's findings on certain variables that affect the calculations. The important differences that affected the resulting calculations are summarized below.

1. Claimants base voyage times on net days rather than total days. When determining whether the vessel had sufficient time to squeeze out an additional voyage, Claimants should have used total days to calculate the average days per voyage. The NPFC did this and arrived at 8.649 average voyage days rather than 7.754 as Claimants allege.
2. Claimants base the arrival in Corpus Christi on the end-of-sea-passage, whereas the NPFC finds that the vessel has not arrived until it is ready for delivery. Therefore, the NPFC applied the time of the Notice of Readiness as the end of the voyage to Corpus Christi. This resulted in about 2.2 days of transit from St. Rose rather than the 1.9 calculated by the Claimants.
3. The two changes above carried through the calculations of time and caused further adjustments, which resulted in the NPFC's final valuation of loss of profit on the missed voyage.

The NPFC's final conclusion as detailed in the spreadsheet is that the Claimants lost \$95,051.42 in profits that they would have earned had the vessel engaged in the additional limestone cargo voyage. This is the amount the NPFC finds to be compensable and will be included in the offer because the documentation and valuation represent the most likely value of the Claimants' loss.

Claimed Extra Expenses

Claimants seek extra expenses allegedly incurred because of the oil spill, which they argue caused them lost/reduced profits. In the reconsideration request, Claimants withdrew some of the costs originally claimed, leaving only three costs claimed. Claimants raised the claimed amounts of two of the costs. Specifically, Claimants seek alleged extra expenses of 1) \$10,263.44 for tug services at AMA Anchorage, 2) \$1,800.00 for launch hire at AMA Anchorage (raised from \$1,691), and 3) \$12,465.54 for pilots' charges (raised from

\$8,409.84) at both AMA and Boothville. The amended total claimed "extra" expenses total \$24,528.98. Claimants allege that these charges are due to the oil spill or the river closure due to the oil spill.

1) Tug Services

Claimants seek \$10,263.44 for the use of two tugs to assist in "unanchoring" the H A SKLENAR from the AMA Anchorage so it could head downriver to Boothville.⁹

The NPFC finds that these charges must be denied for several reasons. For the two tugs assisting the vessel getting under way at the AMA Anchorage, Claimants would have incurred these expenses regardless of the spill since the CG restricted the vessel at AMA Anchorage after it completed discharging its cargo around 0530 until 1702 on July 23 due to the radar problem.¹⁰ Claimants argue in their reconsideration request that the oil spill caused these charges. Claimants argue they could have completed the radar repairs at the berth had the spill and river closure not occurred. As attempted support, Claimants provided a statement from T. Parker Host, port agents, stating that the Master of the vessel decided to depart Vulcan St. Rose so the vessel wouldn't be blocked from departing by other vessels once it was cleared from the CG Captain of the Port order. The NPFC fails to see how these costs were incurred due to the oil spill and river closure. The vessel was held due to the radar problem and the Master's decision was the reason for the charges related to anchoring at AMA.

Thus, these expenses are not solely due to the oil spill. Therefore, the NPFC finds that the claimed "extra" tug expenses must be denied.

2) Launch hire

Claimants seek \$1,800.00 for launch services to get the New Orleans Branch River Association pilot on and off the vessel at the AMA Anchorage and to get the NSA agent on and off the vessel there as well. Claimants have not demonstrated how these expenses were solely due to the spill and/or river closure. The documents provided were an invoice and the T. Parker Host statement explaining that anchoring at AMA was due to the spill.

The NPFC reviewed the Claimants' documentation and has again determined that these costs are not due to the oil spill. The launch services provided were at the AMA Anchorage where the vessel had to go because it had a radar problem for which the CG put it on restriction. This means that the vessel would have had to go to the anchorage until its radar problem was fixed and the CG lifted the restriction anyway. The T. Parker Host statement does not conflict with NPFC's finding, as it was the Master's decision to anchor at AMA rather than be blocked in by other vessels. The evidence shows that Claimants would have incurred these expenses had the spill not occurred. Therefore, the NPFC must deny these charges.

3) Pilot Charges

Claimants seek \$12,465.54 for pilot charges from the New Orleans Baton Rouge Pilots Association (NOBRA) and Crescent River Port Pilots Association (CRP). Claimants provided invoices and pilot tickets for the transit from Vulcan St. Rose to the AMA Anchorage, from the AMA Anchorage to the Boothville Anchorage and from Boothville to Pilot Town. The first invoice includes \$5,642.87 in costs undocking and moving the vessel to AMA. The second invoice includes \$6,822.67 in costs for getting a pilot to the vessel at the AMA Anchorage and run through getting the pilot off the vessel at Boothville.

⁹ Wilhelmssen Ship Management post-cargo-discharge vessel movement summary


¹⁰ Nordisk Legal Services letter dated 1 December 2008


The final invoice¹¹ includes \$1,587.17 for the costs of getting the pilot to the vessel in Boothville and run until the pilot gets off at Pilot Town and obtains transport to Venice, LA. Claimants seek all the itemized costs on the CRP invoices and some of the costs on the NOBRA invoice. They did not distinguish the normal costs associated with a downriver transit from those solely associated with the spill incident.

The Fund does not compensate claimants for costs that they would incur even if a spill incident had not occurred. The costs incurred at the AMA Anchorage would have been incurred by the Claimants whether or not the spill occurred since the vessel was first held due to a radar problem as previously discussed. Those costs are not caused by the oil spill and are not reimbursable. Once the radar problem detention ended, under normal circumstances Claimants' vessel would have transited nonstop downriver from the AMA Anchorage out to sea. Costs associated with the pilot's services on the downriver transit are not caused by the oil spill and are not compensable because the costs associated with the downriver transit from AMA Anchorage to Pilot Town would have been incurred by the vessel regardless of the oil spill. It had to get downriver and out to sea no matter what. These costs cannot be reimbursed by the Fund.

The costs incurred because of the stop at Boothville for hull-cleaning would not have been incurred had the vessel continued on its normal downriver transit to the Gulf of Mexico. The costs paid by the Claimants for pilot services for the Boothville stop are compensable. Since the Claimants did not specify which of the pilot fees were for Boothville, the NPFC must identify them. It appears that the only costs on the CRP invoice #216094 related to the Boothville stop are two transportation charges and a boat service charge for getting the first pilot off the vessel once it arrived at Boothville. These compensable charges total \$599.64. It appears that the only costs on the CRP invoice #216109 related to the Boothville stop are transportation and boat service charges for getting the second pilot onto the vessel when it was ready to leave Boothville. These compensable charges total \$556.64. The total compensable CRP costs that are additional expenses to the Claimants, which reduced the profits on the voyage, are \$1,156.28.

The NPFC finds that the Claimants are entitled to compensation for the loss of profits resulting from the oil-spill incident. The amount for the loss of profits due to lost revenue from a missed voyage is \$95,051.42 and the amount for loss of profits due to additional expenses on the delayed voyage is \$1,156.28. The total compensable amount is \$96,207.70.

AMOUNT: \$96,207.70 

Claim Supervisor: 

Date of Supervisor's review: 3/28/13

Supervisor Action: *Approved*

Supervisor's Comments:

¹¹ The amount of this invoice was inadvertently omitted in the reconsideration request. The NPFC included it since it contains some of the pilotage costs that are compensable in this claim.