

CLAIM SUMMARY / DETERMINATION FORM

Date : 9/23/2009
Claim Number : N08057-004
Claimant : Galborg USA LLC c/o Galborg Pte Ltd
Type of Claimant : Corporate (US)
Type of Claim : Loss of Profits and Earning Capacity
Claim Manager : [REDACTED]
Amount Requested : \$68,045.48

I. Facts

M/V Aalborg

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

Galborg Pte Ltd is a Singapore based company with an agent in the USA (Galborg USA LLC) that time charters the M/V Aalborg to carry break bulk cargo between South Africa and U.S. Gulf ports.

IV. Claim Description

Galborg Pte Ltd seeks \$68,045.48 in alleged lost profits as a direct consequence of the barge 932 oil spill on July 23, 2008. On this date, Galborg Pte Ltd was operating the M/V Aalborg under a time charter contract with [REDACTED] the vessels owner. At the time of the incident, the vessel was loading cargo at CII Chalmette on the Mississippi River, mile marker 90, and cargo loading was complete on July 24, 2008. The claimant states that profits were lost when the M/V Aalborg was delayed at the CII Chalmette facility for 3.100694 days (July 24, 2008 at 2200 - July 28, 2008 at 0025) and at the Boothville anchorage decontamination site for 0.333333 days (July 28, 2008 at 0600 -1400). The claimant states that the first delay was caused by the Captain of the Port-ordered safety zone enforced from mile marker 99 to mile marker 70. The vessel was unable to move from the facility, located at mile marker 90, after it finished loading and was ready to depart. Claimant states the second time delay occurred when the vessel had to anchor at Boothville anchorage for Coast Guard ordered decontamination prior to continuing out to sea¹. $3.100694 \text{ days} + 0.333333 \text{ days} = 3.434027$ claimed total days delayed. Monetarily, the claimant seeks lost profits in the form of unrecouped expenses including \$51,510.41 in vessel time delay, \$101.61 in additional charterer's communication, victualling and representation expenses, \$14,454.43 in additional bunkers and \$1,979.03 in additional pilotage costs. Overall the claimant asserts that the oil spill caused the claimant to pay extra expenses it would not have paid had it not been delayed in port; thus, the expenses amount to additional expenses which, in turn, reduced net profit to the time charterer.

¹ See Sector New Orleans Decontamination Spreadsheet

The Claimant, Galborg Pte, Ltd, submitted the claim to the RP on August 27, 2008 as indicated on the Optional OSLTF Claim Form received by the NPFC on December 29, 2008. The RP sent a letter to the Claimant on April 29, 2009, stating that their claim had been denied for the reasons set forth in the declaratory judgment.² The RP then notified the NPFC that a declaratory judgment action had been filed in the United States District Court for the Eastern District of Louisiana against Galborg Pte, Ltd.³ The claimant chose not to respond or file a counter claim and the court dismissed all actions without prejudice on September 2, 2009.⁴

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 –

(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.

² See [REDACTED] letter to Galborg Pte Ltd dated April 29, 2009.

³ See [REDACTED] letter to the NPFC dated June 15, 2009.

⁴ See United States District Court, Eastern District of Louisiana letter dated September 2, 2009.

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 POLREPS 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 per the Port Log / Statement of Facts signed by the Master, the M/V Aalborg was ready to depart the Chalmette CII terminal located at mile marker 90, after completing a loading of Petcoke and containers at 2200 on 7/24/2008. However, the vessel was required by the Captain of the Port order to remain tied up in the contaminated safety zone until 2350 on 7/27/2008. The Maritime Transportation System Recovery Unit (MTSRU) was coordinating vessel movements during the oil spill based on immediate facility operational impact and potential future economic impact⁵. They released the M/V Aalborg from the Chalmette CII terminal at 2350, 7/27/2008 and required them to proceed to Boothville and anchor there for decontamination, before being allowed to proceed to sea⁶. The M/V Aalborg was listed as a decontaminated vessel on a spreadsheet provided by Coast Guard Sector New Orleans, Louisiana. This spreadsheet shows the M/V Aalborg being cleared on July 28, 2008.⁷

A. As mentioned above, the claimant seeks \$68,045.48 for additional charter hire time delay, communication, victualling and representation expenses, bunkering and pilotage costs. These costs are discussed below.

1. Additional Charter Hire Time Delay

A. **Claim:** Claimant states they incurred 3.434027 days of total additional time in the Mississippi River due to closure of the river by Captain of the Port order and the subsequent requirement to decontaminate the vessel at Boothville anchorage. Claimant's time charter agreement rate of hire cost is \$15,000.00 a day.⁸ The daily charter rate of \$15,000.00 x 3.434027 = \$51,510.41.

B. **Documentation:** Claimant provided Port Log / Statement of Facts that were signed by the Master of the M/V Aalborg and the CII Chalmette facility. These logs show that the vessel completed loading, surveyors completed their surveys and the Mates signed the cargo receipts on July 24, 2008 at 2200. At this point the vessel would have been ready to depart had the spill not occurred. Instead, the vessel was delayed until July 27, 2008 at 2350, when a Pilot arrived onboard and two tugs arrived alongside the vessel. On July 28, 2008 at 0025 the vessel departed the CII Chalmette facility en route to the Boothville anchorage for decontamination as per Coast Guard orders. The vessel arrived at Boothville anchorage on July 28, 2008 at 0600 and weighed anchor at 1400, the same day after decontamination was complete. Claimant also provided Charter Hire Statements from July 12, 2008 through July 27, 2008 and July 27, 2008 through August 11, 2008. These statements show payment has been made at the \$15000.00 day rate without any withholding for the delays.

Upon request, additional coastal charter schedules and ships logs were provided to document the vessels movements after the oil spill occurred.

⁵ See POLREP 7 paragraph 3.E.4

⁶ See POLREP 9 paragraph 2.c

⁷ See Sector New Orleans Decontamination Spreadsheet

⁸ See Claimant Time Charter para. 10

C. NPFC Findings: The NPFC finds that the first vessel time delay did start on July 24, 2008 at 2200. That delay ended when the Pilot arrived onboard the vessel and the two tugs arrived alongside on July 27, 2008 at 2350. The reason for this is that the Pilot and tugs are a normal requirement on the Mississippi River when preparing to get a vessel underway. These activities would have occurred whether or not the oil spill occurred; therefore they are not included as delay time in this case. The delay from July 24, 2008 at 2200 until July 27, 2008 at 2350 equals 3.0763889 days. The NPFC finds that the second delay time of 0.333333 is accurate because, according to the Port Log / Statement of Facts, the vessel was in the decontamination process from July 28, 2008 0600 through July 28, 2008 1400, at which point the Aalborg weighed anchor to continue on their coastal schedule.⁹ So, the total delay time is actually 3.4097219 days. This reduced delay time provides the following equation: $3.0763889 + 0.333333 = 3.4097219$ days multiplied by the \$15000.00 a day charter rate = \$51,145.83.

The NPFC does not find the charter hire time delay compensable. This is due to several factors. First, the claimant failed to show any loss of profits after the delay period. While reviewing the coastal schedule and Master/ship's logs after the oil spill, the Aalborg continued to meet all port calls published on the original schedule before the spill occurred. Several other vessel delays were noted during the Aalborg's voyage from Africa throughout the United States ports and back to Africa due to weather, port delays and vessel maintenance, with no reduction in business when compared to the initial coastal schedule provided. Second, the claimant failed to show "additional charter hire paid" as stated in their claim. While contracted under the time charter agreement, the claimant paid \$15,000.00 a day no matter what the status of the vessel. There were no "additional" payments made for being delayed. Third, the vessel scheduled a layby period in Durban, Africa for the purpose of upgrading one of its cargo holds after the oil spill took place. This ten day period (October 2-10, 2008) was not on the original schedule published by the charterer before the spill. This ten day period, along with the other non oil related delays noted on the post oil spill schedule, prove the vessel is not required to follow a strict schedule.

2. Additional Charterer's Communication, Victualling & Representation Expenses

A. Claim: Claimant states they incurred 3.434027 days of total additional charter communication, victualling and representative expenses due to the closure of the river by Captain of the Port order and subsequent requirement to decontaminate the vessel at Boothville anchorage. Claimant states they are required to pay the owners \$29.589041 a day for all communications, victualling and representation expenses. The daily additional expenses rate of $\$29.589041 \times 3.43027 = \101.61 .

B. Documentation: Claimant provided Port Log / Statement of Facts that were signed by the Master of the M/V Aalborg and the CII Chalmette facility. These logs show that the vessel completed loading, surveyors completed their surveys and the Mates signed the cargo receipts on July 24, 2008 at 2200. On July 27, 2008 at 2350 the Pilot arrived onboard and two tugs arrived alongside the vessel. On July 28, 2008 at 0025 the vessel departed the CII Chalmette facility enroute Boothville anchorage for decontamination as per Coast Guard orders. The vessel arrived at Boothville anchorage on July 28, 2008 at 0600 and weighed anchor at 1400 the same day after decontamination was complete. Claimant also provided Charter Hire Statements from

⁹ See Claimant Port Log / Statement of Facts page 3

July 12, 2008 through July 27, 2008 and July 27, 2008 through August 11, 2008. These statements show payment has been made at the 29.589041 day rate.

C. NPFC Findings: As stated above in the NPFC's findings under Additional Charter Hire Time Delay, the NPFC finds the total days delayed in New Orleans were 3.4097219. This figure multiplied by the \$29.589041 charterer's communications, victualling and representation expense day rate = \$100.89.

The NPFC does not find this cost compensable. As noted in the Charter Hire Statement¹⁰, the charterer pays \$29.589041 a day, no matter what status the vessel is in. This does not equate to an "additional cost" as represented in the claim. There were no documented additional payments made by the claimant under this heading.

3. Additional Bunkering Costs

A. Claim: Claimant states that they incurred 3.434027 extra days of bunker fuel costs due to the closure of the river by Captain of the Port order and subsequent requirement to decontaminate the vessel at Boothville anchorage. All bunkers are paid for by the claimant according to the agreed upon Time Charter in place with the vessels owner¹¹. Total extra bunkers consumed due to both delays were 11.45 metric tons at a cost of \$14,454.43 as detailed below.

B. Documentation: Claimant provided Port Log / Statement of Facts that were signed by the Master of the M/V Aalborg and the CII Chalmette facility. They also provided a Bowin bunkering receipt dated July 11, 2008, which provides bunker costs per metric ton (pmt). The table below shows the additional bunker consumption as per the claimants Port Log / Statement of Facts and costs per the Bowin bunkering receipt:

Chalmette CII Terminal	IFO	MDO
24 Jul 08 2200	1311.75	59.10
28 Jul 08 0025	1311.70	48.20
Consumed	0.05	10.90
Boothville Anchorage	IFO	MDO
28 Jul 08 0600	1311.70	41.60
28 Jul 08 1400	1311.70	41.10
Consumed	0.00	0.50
Total Additional Bunkers	0.05	11.40
Unit Price PMT	693.00	1255.00
Delivery Charge PMT	9.85	9.85
Total Cost PMT	702.85	1264.85

¹⁰ See Charter Hire Statement dated 10 JUL 2008

¹¹ See Claimant Time Charter clause 7

Total Cost of Additional Bunkers Consumed PMT	\$35.14	\$14,419.29
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C. **NPFC Findings:** As previously stated, the NPFC reduced the time delay in Chalmette to 3.0763889 days. The Boothville anchorage time delay of 0.333333 was found to be accurate per the Port Log / Statement of Facts. The NPFC recalculation of the bunker consumption is as follows:

Chalmette CII Terminal	IFO	MDO
24 Jul 08 2200	1311.75	59.10
27 Jul 08 2350	See Calculation Below	See Calculation Below
NPFC found time delay x bunkers consumed = ____ / Claimants claimed time delay = fuel consumed	$3.0763889 \times .05 = 0.1538$ $0.1538 / 3.100694 = .0496$	$3.0763889 \times 10.90 = 33.5326$ $33.5326 / 3.100694 = 10.8145$
Consumed	0.05	10.81
Boothville Anchorage	IFO	MDO
28 Jul 08 0600	1311.70	41.60
28 Jul 08 1400	1311.70	41.10
Consumed	0.00	0.50
Total Additional Bunkers Consumed Due to the Delays	0.05	11.31
Unit Price PMT	693.00	1255.00
Delivery Charge PMT	9.85	9.85
Total Cost PMT	702.85	1264.85
Total Cost of Additional Bunkers Consumed PMT	\$35.14	\$14,305.45

The NPFC finds the total extra bunkers consumed due to both delays were .05 IFO metric tons and 11.31 MDO metric tons for a total of 11.36 metric tons. Total IFO metric ton consumption cost was \$35.14 and total MDO metric ton consumption cost was \$14,305.45. The NPFC finds the total compensable additional bunker costs to be \$14,340.59. This increased consumption was clearly caused by the oil spill response and river closure.

4. Additional Pilotage Costs

A. **Claim:** Claimant states there were additional Crescent River Port Pilots' Association charges because the vessel had to stop at Boothville anchorage for decontamination. They request reimbursement for the boat launch service and car transportation costs incurred to take the Pilot off the M/V Aalborg and return him to New Orleans, while the vessel awaited decontamination at Boothville anchorage. The round trip boat launch cost from Venice to Boothville anchorage was \$373.64. The car transportation cost from Venice, Louisiana to New Orleans was \$183.00. The combined total of this trip was \$556.64. Claimant also requests reimbursement of pilotage costs from Boothville anchorage to Pilot Town, including boat launch, car transportation service and extra zone charges totaling \$1,422.39. Total extra pilotage costs due to the vessel delay are claimed at \$1979.03.

B. **Documentation:** Claimant provided a Crescent River Port Pilots' Association invoice totaling \$4,692.04. This invoice provides total costs incurred for the vessel being piloted from Chalmette to Boothville anchorage. They also provided another Crescent River Port Pilots' Association invoice that provides costs incurred for the vessel's pilotage from Boothville anchorage to Pilot Town totaling \$1,422.39.

C. **NPFC Findings:** The NPFC contacted Mr. [REDACTED] who is in charge of operations at the Crescent River Port Pilots' Association to better understand how pilot costs are billed. According to Mr. [REDACTED], the pilotage fee from Chalmette to Boothville anchorage is the same fee as would have been applied if the vessel had continued down to Pilot Town uninterrupted, therefore this fee stays the same. The dead weight tonnage fees also remain fixed. The only charges that change regarding the vessel delay at Boothville are the transportation, boat service and zone charges. Mr. [REDACTED] stated that no transportation (except Chalmette) or boat launch fees would apply if the vessel continued uninterrupted to Pilot Town. The claimant was charged for ten (10) zones (eight from Chalmette to Boothville and an additional two zones from Boothville to Pilot Town), since they stopped at Boothville and then started from Boothville to Pilot Town. If the vessel had sailed uninterrupted from Chalmette to Pilot Town, only nine (9) zone charges would have applied.

The NPFC finds that the charges paid by the claimant that it would not have paid if the oil spill had not occurred are extra expenses caused by the spill which reduced the claimant's profit. The NPFC finds all pilotage costs incurred from Boothville to Pilot Town, which total \$1,422.39, are compensable with the exception of one extra zone charge (for a total of nine). $\$1,422.39 - \134.63 (one zone charge) = $\$1287.76$. Additionally, the Venice transportation and Boothville boat service fees in the amount of \$556.64 are compensable. $\$1287.76 + \$556.64 = \$1844.40$ total compensable pilotage costs.

VII. SUMMARY

The Claimant failed to demonstrate additional charter hire or communication, victualling & representation expenses. However, additional bunkering and pilotage costs were extra expenses incurred while the Aalborg was delayed in New Orleans due to the barge 932 oil spill.

Based on the above, I recommend that Galborg USA LLC be offered \$14,340.59 in additional bunkers and \$1,844.40 in additional pilotage costs as full compensation for the

damages it suffered when its chartered vessel, M/V Aalborg, was delayed as a result of the barge 932 oil spill.

VIII. DETERMINED AMOUNT: \$16,184.99

Claim Supervisor: [REDACTED]

Date of Supervisor's Review: 9/23/09

Supervisor Action: Offer Aalborg

Supervisor's Comments: