

CLAIM SUMMARY / DETERMINATION

Date:	10/13/2009
Claim Number:	P05005-149
Claimant:	Hamburg Sud North America, Inc. / M/V CAP SAN LORENZO
Type of Claimant:	Corporate (Foreign)
Type of Claim:	Loss of Profits and Earning Capacity (Vessel Delay)
Claim Manager:	██████████
Amount Requested	\$52,527.97

I. FACTS:

Oil Spill Incident:

On 26 November 2004, the Cypriot-flagged tank vessel ATHOS I struck a submerged object as it approached the CITGO Asphalt Refining Company in West Deptford, New Jersey, discharging 265,000 gallons of Venezuelan crude oil into the Delaware River, a navigable waterway of the U.S.

On 26 November 2004, the Federal on Scene Coordinator (FOSC) issued a Notice of Federal Interest designating the vessel's owner, Frescati Shipping Company Limited, as the Responsible Party. The NPFC issued its letter of designation 29 November 2004. Subsequently, the Responsible Party denied all third party claims.

Background:

The following statements are as alleged by the claimant in the letter from their attorney dated November 15, 2007 and received by the NPFC on November 20, 2007. Dates or times were not given by the attorney for all the events described below and the claimant did not present documentation that supports this information.

The M/V CAP SAN LORENZO was discharging cargo at the Packer Avenue Marine Terminal, Port of Philadelphia, on Friday, November 26, 2004.

The CAP SAN LORENZO completed off-loading its cargo and was ready to depart the Port of Philadelphia (*no date or time given*). However, the Coast Guard inspected the CAP SAN LORENZO (*no date or time given*) and determined that the vessel needed to be decontaminated before it could depart Philadelphia.

The vessel remained at its berth at Packer Avenue Marine Terminal for two days (*no date or time given*) waiting for the Coast Guard contractor to decontaminate its hull sides.

On December 2, the Coast Guard's decontamination contractor arrived to decontaminate the CAP SAN LORENZO's hull sides¹. The Coast Guard cleared the vessel for departure after decontamination; however, the ship's Master informed the Coast Guard that residual oil remained on its hull side (*there is no documentation submitted by the claimant that supports this statement*). Although, the Master protested, the Coast Guard cleared the vessel to depart Philadelphia (*no date or time provided*).

¹ Date taken from invoice # US121307 Coast to Coast Marine Services of Philadelphia, PA contracted by M/V CAP SAN LORENZO December 2, 2004, see NPFC companion claim file for removal costs P05005-148

The attorney writes that the CAP SAN LORENZO sailed on to the Wando Marine Terminal in Charleston, South Carolina (*no date or time given*) where it hired Moran Environmental Recovery, LLC, (of Atlantic Beach, FL) to remove the remaining ATHOS spill oil from its hull.

Claimant:

The claimant, Hamburg Sud North America, Inc. (Hamburg Sud) is the long-term time charterer of the M/V CAP SAN LORENZO. Hamburg Sud is a foreign-owned company represented by attorney [REDACTED] of Rawle & Henderson, LLP of Philadelphia. [REDACTED] has a stateside office at 465 South Street in Morristown, NJ 07960.

Claim:

On November 20, 2007, the NPFC received [REDACTED] claims for removal costs, loss of subsistence use and lost profits. Removal costs were separated from the two alleged damage claims of subsistence and lost profits. On April 23, 2008, the NPFC compensated [REDACTED] \$49,462.64 for removal costs. Determination issued and accepted under separate correspondence.

The NPFC determined that the alleged "subsistence" claim made up of pilot fees, towing services and customs fees appeared to be increased port costs. NPFC's claim acknowledgement letter dated January 28, 2008, explained to attorney Seitz that Hamburg Sud's subsistence claim seems to be a lost profits claim, and that we would include these invoices in this lost profits claim.

The claimant seeks compensation for alleged damages of \$38,252.64 as costs of "off-hire," and alleged additional port costs of \$14,275.33. (Clmt's ltr 11/15/2007, Page 3, paragraph 6 & 7). The claimant attorney does not explain how he calculated the cost of the off-hire and the invoices for pilot fees and towing charges do not clearly relate the activity to the oil spill.

Combined sum certain for lost profits is \$52,527.97.

Claimant's evidence:

Documents submitted by the claimant (taken from claimant counsel letter 11/15/04):

- a. M/V CAP SAN LORENZO Charter Party agreement (*clmt is long term charterer of vessel*)
- b. M/V CAP SAN LORENZO General arrangement (*container cargo layout*)
- c. M/V CAP SAN LORENZO description (*vessel type, flag, capacity, year made*)
- d. US COAST GUARD PRESS RELEASE, November 27, 2004 (*oil spill announcement*)
- e. Letter from attorney [REDACTED] dated March 10, 2005 to attorney [REDACTED] of the Rawle + Henderson (*re: claims for damages specified under OPA are not subject of admiralty complaint*)
- f. Moran Towing invoices (*dates 11/30/04 & 12/1/04*)
- g. Pilot's Association invoices (*dates 11/27/04, 11/30/04, 12/01/04*)
- h. Vessel Custom Clearance form copies (*dates:11/29/04, 12/03/04*)
- i. General Marine Agency's invoices (*re: vessel and dated 12/9/04*)

II. APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90.

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

Compensable damage types are natural resource damages, damage to real or personal property, loss of subsistence use of natural resources, lost government revenues, lost profits or impairment of earning capacity, and increased costs of public services. See 33 U.S.C. 2702(b)(2).

The provisions of 33 CFR 136.231-136.235 provide the details for claims for profits and earning capacity. To substantiate a claim for lost profits, a claimant is required to 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)

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident.

III. DETERMINATION OF LOSS:

A. Overview:

1. The incident involved the discharge of “oil” as defined in OPA 90, 33 USC § 2701 (23), to navigable waters.
2. In accordance with 33 CFR § 136.105(e) (12), the claimant has noted no suit has been filed in court for the claimed costs. (see claim submission dated 11/15/2007)
3. In accordance with 33 CFR § 103(a), presentation to the RP has been satisfied.
4. The claim submission was within the three-year statute of limitations.
5. The NPFC acknowledged the claim submission and wrote the claimant's attorney that the Oil Pollution Act of 1990 requires that the claimant bear the burden of proving its claim (see blue tab #1).
6. The NPFC reviewed documentation submitted by the claimant. We found no evidence to support the claimant's off-hire costs, and a lack of evidence relating the increased port costs to the ATHOS oil spill (see claimant's evidence list above).
7. The NPFC specifically requested the claimant to submit a vessel port log in an email to Kevin McGee of the Rawle + Henderson law firm on January 30, 2008 (see blue tab #2 in file)

B. Determined Amount:

The claim for lost profits has two components as previously stated; which are alleged off-hire lost profits and alleged additional port costs. Each will be handled in turn below.

1. Off-hire lost profit claim:

The claimant, Hamburg Sud, alleges lost profits of \$38,252.64 because the CAP SAN LORENZO was off-hire; however, the claimant does not explain how the off-hire occurred and how it relates to the oil spill, nor does the claimant provide any documentation supporting this allegation.

In a letter dated January 28, 2007, in an email January 30, 2008 and a letter dated April 28, 2008 the NPFC requested supporting documentation from the claimant's attorney.

We did not receive the information we requested from the claimant. Without documentation of the time that the vessel was off-hire, and communications and accounting between the owner and charterer, the NPFC cannot make a determination on the off-hire lost profits

The NPFC needs an explanation and documentation that the vessel was off-hire, (e.g. communications of off-hire status, specific accounting showing claimant was charged for off-hire and a draft or check or some such transaction showing the claimant incurred the cost at the end of the voyage).

Finding on off-hire portion of claim:

The NPFC finds that the operators of the CAP SAN LORENZO have not shown that the vessel was off-hire, or how the off-hire relates to its lost profits. We find the claimant failed to meet its burden of proving this portion of the claim.

2. Increased port costs:

The claimant alleges that it incurred increased port costs of \$14,462.64. These invoices entail pilot fees, U.S. Customs fees, and tug fees. However, claimant does not sufficiently identify or explain how these fees relate to the ATHOS oil spill.

NPFC reviewed all the invoices and found that some invoices were compensated under the previously paid removal cost claim (see NPFC claim P05005-148)

Claimant invoices with NPFC reviewed as follows:

- Invoice 1001450, 11/27/2004: Pilot Association for Bay and Delaware River for service (1/2 In) NOT COMPENSABLE – because *insufficient information relating this to the oil spill* \$4,269.33
- U.S. Customs boarding inspection Philadelphia 11/29/2004 1200 hours (*fees are for two clearances, see below total fee, but claimant would have paid one custom fee*) NOT COMPENSABLE – *because, it's unclear that the invoices are related to the oil spill*
- Invoice 04-4785, 11/30/2004: The Docking Pilots Association, LLC of Warminster, PA (fee directing vessel from Packer to stream and two hours of standby service) - NOT COMPENSABLE *because not shown how related to spill* \$1,340.00
- U.S. Customs boarding "Cleared" Philadelphia 12/02/2004 1430 hours (Fee invoice 1027 reference 200-13-11/04 by General Marine Agencies, Inc.) NOT COMPENSABLE *Note: see above not clear why this fee is charged without explanation* \$ 825.00
- Invoice 78875, date 12/01/2004 Moran Towing of Pennsylvania service fees for undocking and fuel surcharge from Packer Ave berth to stream off Packer Ave. NOT COMPENSABLE *because, it is not evident that this service was oil spill related, such as, vessel cleaning.* \$2,739.00
- Invoice 78861 date 11/30/2004 Moran Towing of Pennsylvania service fee for two tugs, undocking, fuel surcharge and waiting for USCG detention (*4 hours @ \$375/hr*) to shift vessel but NOT COMPENSABLE *because claimant did not show how resulted from the oil spill*) \$3,326.00
- Invoice 04-4800 date 12/01/2004 The Docking Pilots Association, LLC of Warminster, PA for (*shifting from 4 & 5 Packer to 1 & 2 Packer*) – NOT COMPENSABLE *because the claimant has not shown how this cost resulted from the oil spill.* \$1,040.00
- Invoice 1001246 date 12/01/2004 Pilots Association for Bay and Delaware River to *turn vessel around at Packer Marine Terminal.* - NOT COMPENSABLE *because claimant has not shown how the cost resulted from the oil spill.* \$ 500.00

The NPFC added the above alleged invoices and our total was: \$13,029.35.

Findings on increased port costs:

The NPFC's calculation above differs from the claimant's alleged cost of \$14,275.33 in its claim submission because, the NPFC used invoices for services provided only in Philadelphia (see list

above). Also, we did not consider removal costs since these were already determined and settled under the removal claim in separate correspondence.

The NPFC requested supporting documentation from the claimant's attorney in prior correspondence so that we could see the claimant's costs in a relation to the oil spill. We did not receive the information we requested from the claimant.

Therefore, it is not clear that the above invoices are increased port costs or that they are directly related to the ATHOS I oil spill. Without the vessel's port log or a statement of facts to show that these activities relate to the ATHOS I oil spill, the NPFC cannot compensate these costs.

Recommendation:

The NPFC finds that claimant failed to meet its burden of proving that the vessel was off-hire because of the oil spill and failed to demonstrate how it incurred lost profits of \$38,252.64 because of being off-hire due to the spill. The NPFC cannot determine if the claimant's invoices that we calculated at \$13,029.35 relate to the ATHOS oil spill incident. We find that the claimant failed to document its claim with supporting evidence and, thus failed to meet its burden of proving the claim. The claim must be denied.

AMOUNT: \$0

Claim Supervisor: [REDACTED]

Date of Supervisor review:

Supervisor Action:

Supervisor Comments: