

CLAIM SUMMARY / DETERMINATION FORM

Date : 7/01/2010
Claim Number : N08057-023
Claimant : Express Marine Inc
Type of Claimant : Corporate (US)
Type of Claim : Loss of Profits and Earning Capacity (Reconsideration)
Claim Manager : **Robert Rioux**
Amount Requested : \$201,369.83

BACKGROUND:

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.

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, CLAIM and PRIOR DETERMINATION:

Claimant:

Express Marine Inc. has a fleet of tugs and barges which transport dry bulk and liquid cargoes along the Atlantic and Gulf Coasts, Caribbean and associated bays, harbors and rivers. They are the registered owners and operators of the U.S. Flagged vessels Baltimore and EMI 1850.

Claim:

The Claimant submitted the original claimed amount of \$142,679.88 to the RP through Worley Catastrophe Response, LLC on March 4, 2009 as indicated on Claimant's original submission letter received by the NPFC on May 12, 2009.¹ The RP issued a letter to the Claimant on April 29, 2009, stating their claim had been denied for the reasons set forth in the declaratory judgment complaint filed in the Eastern District of Louisiana on April 28, 2009 (Claimant's Exhibit D). The declaratory judgment was stayed and administratively closed until further orders of the court on September 2, 2009 by Judge **Ivan L. R. Lemelle**, United States District Judge of the United States District Court, Eastern District of Louisiana.² The RP's appeal was dismissed by the court on November 24, 2009.³

By letter dated May 19, 2009, the NPFC notified the RP that the Claimant presented the original claim totaling \$142,679.88 to the Fund.⁴ The Claimant provided evidence to the NPFC that presentment of their amended claim was made to the RP in the amount of \$201,369.83 on May 20, 2010.

¹ See, Palmer Biezup & Henderson LLP letter to the NPFC dated May 6, 2009, number 4, claim status.

² See, United States District Court, Eastern District of Louisiana, Case 2:09-cv-03392-ILRL-KWR, document 70, dated September 2, 2009.

³ See, United States District Court, Eastern District of Louisiana, Case 2:09-cv-03392-ILRL-KWR, document 78, filed November 30, 2009.

⁴ See, NPFC letter to the RP dated May 19, 2009.

A. Original Claim Submission

1. The law firm of Palmer Biezup & Henderson LLP, representing Express Marine Inc., submitted a Loss of Profits and Earning Capacity claim for damages resulting from the July 23, 2008 oil discharge in the Mississippi River from barge 932. The claim was received at the National Pollution Funds Center (NPFC) on May 12, 2009 in the amount of **\$142,679.88**. The Claimant valued their loss by stating they were delayed on two separate occasions totaling 167.76 hours x \$675.00 per hour allowed in the contract of affreightment (COA), which equals \$113,238.00. They also requested 20 percent in administrative expenses (\$22,647.60) and 5 percent (\$6,794.28) in interest.⁵
2. Supporting documents provided included the following:
 - a. Claimant's letter to the RP dated March 4, 2009 demanding payment of its damages (Exhibit A).
 - b. Contract of affreightment (COA) (Exhibit A, attachment 1).
 - c. Email from Progress Energy Regulated Fuels (PEF) claiming Force Majeure (Exhibit A, attachment 2).
 - d. Email from PEF stating force majeure time periods (Exhibit A, attachment 3).
 - e. Trip load/unload records (Exhibit A, attachment 6).
 - f. Notice of Readiness (NOR)/Notice of Completion records (Exhibit A, attachment 7).
 - g. Worley Catastrophe Response request for additional information letter dated March 18, 2009 (Exhibit B).
 - h. Claimant's response letter to the RP dated April 13, 2009 (Exhibit C).
 - i. RP legal representative's letter to the Claimant dated April 29 2009 stating their claim is denied (Exhibit D).

B. Amended Sum Certain With New Delay Valuation

1. While responding to a National Pollution Funds Center (NPFC) request for additional information, the Claimant amended their claim to **\$201,369.83**.⁶ The Claimant re-valued their loss by stating that according to the cash flow spreadsheet provided, on average the tug Baltimore and barge EMI 1850 loaded at IMT on the Mississippi River every seven days and the invoiced amount for each trip averaged \$162,133.52. The Claimant then stated that considering the 167.76 hours (6.9 days) delayed as alleged in the first presentment of the claim, the loss was now amended to \$159,817.33 in damages ($\$162,133.52 / 7 = \$23,161.93$ and $6.9 \times \$23,161.93 = \$159,817.33$). The Claimant also sought 20% (\$31,963.46) in administrative expenses related to the delay and 5% (\$9,589.04 total) as interest on both the delay (\$7990.87) and administrative expenses (\$1,598.17).
2. Supporting documents provided included the Claimant's letter to the NPFC dated September 4, 2009 with attached Cash Flow Spreadsheet.

Under the legal analysis section of the Claimant's original submission letter to the NPFC dated May 6, 2009, the Claimant stated they were not submitting any corporate financial statements as

⁵ See, Palmer Biezup & Henderson LLP letter to the NPFC dated May 6, 2009.

⁶ See, Palmer Biezup & Henderson LLP letter to the NPFC dated September 4, 2009, page 6 & 7.

they were irrelevant to the evaluation or the payment of the claim. The NPFC did not agree with this statement. Under the claims regulations associated with OPA (the Claims Regulations), the law requires comparative figures of financial documents that can support claimed damages which result in an actual loss be presented to the NPFC.

NPFC's Original Determination:

The NPFC determined that the Claimant did not submit sufficient evidence, information and documentation to demonstrate a loss of profits or earning capacity, which could be directly attributed to the DM 932 oil spill. Additionally, there was no documentation to support the alleged administrative costs. Finally, we denied the request for interest, because that amount was not a loss of profit cost or damage compensable under OPA.

APPLICABLE LAW:

All claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714 (a) of this title. 33 U.S.C. §2713(a).

If a claim is presented in accordance with subsection (a) of this section and

- (1) each person to whom the claim is presented denies all liability for the claim, or
 - (2) the claim is not settled by any person by payment within 90 days after the date upon which
- (A) the claim was presented, or
 - (B) advertising was begun pursuant to section 2714 (b) of this title, whichever is later,

the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 U.S.C. §2713(c).

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; . . .

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. (the Claims Regulations)

Under 33 CFR Part 136, Subpart B, 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).

In addition to providing information and documentation outlined in Subparts A and B, claimants must provide additional information for specific claims, including lost profits and impairment of earning capacity claims, as described in Subpart C. The specific requirements for loss of profits and earning capacity claims are found at Subpart C, 33 CFR 136.231, et seq.

“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* (emphasis added). 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).

REQUEST FOR RECONSIDERATION:

On April 26, 2010, the Claimant provided an official written request for reconsideration of the NPFC’s initial determination that the claimant failed to provide evidence demonstrating that its alleged losses were caused by the oil pollution incident. The Claimant requested and the NPFC granted a thirty day extension for filing the documents on reconsideration. The NPFC received and accepted all supporting documentation for the claimant’s request for reconsideration that were attached to its cover letter, dated May 25, 2010.

DETERMINATION ON RECONSIDERATION:

The Claimant submitted a request for reconsideration by letter dated April 26, 2010. No supporting documentation was provided at this time. The letter states that they will provide this documentation by May 26, 2010, which constituted an extension granted by the NPFC.

On May 4, 2010, the NPFC issued a request for additional information to the Claimant to ensure that we could fairly and reasonably adjudicate their claim.⁷ Again, as required by the Claims Regulations, we asked, among other things, that the Claimant prove that an actual net reduction or loss of earnings was suffered due to the oil spill event.

The NPFC received the Claimant's letter dated May 25, 2010, acknowledging our May 4, 2010 request for additional information and providing some of that information as part of the supporting documentation provided in this reconsideration request.

The newly submitted documentation includes:

1. An affidavit from the Vice President of Express Marine (Exhibit A).
2. Invoices supporting the invoiced amounts on the new cash flow summary spreadsheet (Exhibit 1).
3. Demurrage invoices dated September 15, 2009 and September 30, 2009. (Exhibit 2).
4. Updated Cash Flow spreadsheet (Exhibit 3).

Claimant's Claimed Damages Based on the Contract of Affreightment

1. In the Claimant's letter dated April 26, 2010, they state, "It has always been our position that we have provided clear evidence of lost income due to the spill and that our method of calculating lost income based on the delay penalty found in the contract of affreightment is sound, reasonable and uncomplicated."⁸ Also, the Claimant states, "The "Demurrage" compensates a vessel owner "for freight it has lost because the vessel was not free when the parties agreed it would be." Shipping Corp. of India v. Sun Oil Co., 569 F.Supp. 1248, 1255 (E.D. Pa. 1983).⁹

2. In the Claimant's letter dated May 25, 2010, they maintain that it has always been their position that Express Marine is entitled to delay damages in the amount of \$113,238.00 based on the contract of affreightment.¹⁰

The NPFC agrees that demurrage is intended to compensate the owner for freight it has lost because the vessel was not free when the parties agreed it would be. However, the mere stipulation of a liquidated sum for demurrage does not obviate the need to show actual damages. Trans-Asiatic Oil Ltd., S.A. v. Apex Oil. Co., 804 F.2d 773, 782 (1st Cir. 1986). To enforce the contract without proof of actual damages would be inequitable, permitting enrichment. Once actual damages have been proven, the demurrage rate is applicable unless that rate is so excessive that it constitutes a penalty. Id.

⁷ See, NPFC letter dated May 4, 2010.

⁸ See, Palmer Biezup & Henderson LLP letter to the NPFC dated April 26, 2010, page 7, last paragraph.

⁹ See, Palmer Biezup & Henderson LLP letter to the NPFC dated April 26, 2010, page 6, para. 2.

¹⁰ See, Palmer Biezup & Henderson LLP letter dated May 25, 2010, para.3.

In addition, the NPFC finds that the Claimant is not entitled to this demurrage payment because the contract of affreightment is clear that when a force majeure event is declared by either party, both parties are excused from their obligations related to the force majeure. During the DM 932 spill incident, the Shipper declared a force majeure event, which the Vice President of Express Marine has recognized does not entitle them to a demurrage payment.¹¹ Thus, in this case a demurrage payment is not required.¹² Additionally, under the Claims Regulations and as noted above, the amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered, which need to be proven by the Claimant.

3. In the affidavit provided by Mr. **James**, Vice President of Express Marine, he confirms that during the oil spill incident, the Shipper supplied the required minimum 15,000 ST's of Dry Bulk Fuel (DBF) to the Claimant during the two delayed voyages as required in the COA. He also confirms that the Shipper met its obligation to provide a minimum 850,000 ST of DBF for the year of the incident, which is also a requirement of the COA. The NPFC requested this information, because we wanted to ensure that the Shipper met all of its obligations regarding tonnage of DBF provided to the Claimant under the contract of affreightment, even though several delays took place both during and outside the oil spill incident. The affidavit reflects that all requirements in the contract of affreightment were met during the oil spill incident.

Claimant's Claimed Damages Based on the Cash Flow Spreadsheet

1. The NPFC requested source documents for the cash flow statement provided in the original claim. The Claimant submitted invoices with cargo quantity and amount per ton redacted along with an amended cash flow statement with their reconsideration letter dated May 25, 2010 (Claimant's Exhibit 3). Mr. **James**' affidavit notes that errors were submitted with the original cash flow statement. The amended statement provides additional revenue of \$41,630.76 in the third (oil spill) quarter and \$27,195.90 in the fourth quarter. The second quarter remained the same.

Based on the cash flow spreadsheet, the NPFC finds the two voyages conducted during the oil spill event and subsequent delays produced an average of \$175,544.82 per trip, which is \$234.71 less than the overall third quarter average of \$175,779.53, but much higher than the next highest (fourth) quarter average of \$168,857.44. We find the amended cash flow spreadsheet does not prove loss of profits or earning capacity. First, the spreadsheet and accompanying invoices provide only revenues, not the costs involved in each voyage. Therefore, profits are not properly identified or analyzed. Second, there were two less trips in the third quarter than in the fourth quarter, but they cannot be directly attributed to the oil spill incident. This is due to the fact that trip # 8936 and 8972, which occurred well after the oil spill incident, took a combined 36 days to complete, which is well over the 21 days that trips 8886 and 8912 took during the oil spill delays. Third, the second quarter shows one more trip than the fourth quarter, yet provides \$39,780.11 less in revenue. Therefore, there is no proof of loss of profit and earning capacity utilizing this method.

2. The NPFC requested proof that the Claimant moved less tonnage during the oil spill incident than the previous year (2007) and the year after (2009). Source documents were also requested. The affidavit provided in the reconsideration letter states that in the comparable quarter in 2009, the Crystal River Plant was closed for maintenance and was paid demurrage, so this would not be a reasonable comparison. The Claimant failed to provide the previous year's tonnage

¹¹ See, affidavit from **Kenneth James**, Vice President of Express Marine, Inc., para. 5.

¹² See, Affreightment Contract between Progress Fuels Corporation and EMI-PA, Inc., page 10-11, para. 24.

comparison (2007), or any other year that could be used for comparison. Without providing these comparisons, the Claimant failed to show an alleged loss.

Claimant's Claimed Damages Based on Financial Documents

During review of the Claimant's original and reconsideration claim submissions, we requested the Claimant provide the amount of 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. The only document provided has been the cash flow spreadsheet with matching invoices, which only shows revenue earned. In the original claim submission, the Claimant stated, "We are not submitting any corporate financial statements."¹³ With the claim under reconsideration, Mr. **James** affidavit states that "tax returns covering the entire operating profile of Express Marine over a period of years would not show any trends with regard to a six to seven day delay of the subject unit. The most accurate and reliable records that show comparable periods of revenue are the cash flow statement and supporting invoices that have been submitted..."¹⁴ Also required under the Claims Regulations, the NPFC requested comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident. Mr. **James** affidavit states that "...Express Marine does not have what would be considered earnings from the same or similar activities outside of the area affected by the incident. The unit is considered a stand-alone business unit and none of our other operations are the same or similar."¹⁵

The NPFC has tried to provide the Claimant every avenue to prove their damages under OPA. Both during the original and reconsideration claim submissions, we have requested what OPA law requires to prove damages. No financial documents have been submitted that show loss of profits.

The NPFC finds the Claimant has not provided clear evidence of lost *profits* from these delays. The cash flow spreadsheet provided has four above average delay periods in the third quarter. During these four delays, two of which occurred during the spill incident, income level was not reduced. The Claimant has not provided the NPFC with a clear understanding as to the loss amount. As required by the Claims Regulations, the amount of compensation allowable is limited to the **actual** net reduction or loss of earnings or profits suffered, which need to be proven by the Claimant.

Final Method of Valuing Claimed Damages By Averaging Over the Three Quarters Presented

The Claimant's May 25, 2010 letter provides one final way to value its revenue loss, by taking the average revenue per day (\$21,904.58) averaged out over the three quarters presented x 6.139 delay days = \$134,472.22 alleged revenue loss.¹⁶

The NPFC finds this valuation of the alleged revenue loss does not include expenses or financials to show the actual loss. Therefore, proof of damages under the Claims Regulations has not been shown.

¹³ See, Palmer Biezup & Henderson LLP letter dated May 6, 2009, page 4, under Legal Analysis.

¹⁴ See, affidavit from **Kenneth James**, Vice President of Express Marine, Inc., para. 9.

¹⁵ See, affidavit from **Kenneth James**, Vice President of Express Marine, Inc., para. 10.

¹⁶ See, Palmer Biezup & Henderson LLP letter dated May 25, 2010, para 4.

Administrative Costs and Interest Claim

The Claimant requests that the administrative costs and interest portion of this claim also be reconsidered if any of the claim is granted.¹⁷ If the NPFC did find any of the damages payable, the Claimant has failed to provide any evidence to support the administrative costs allegedly incurred. Actual administrative costs would have to be presented. A percentage based valuation is not an acceptable methodology for determining uncompensated costs under the Claims Regulations, and therefore they would be denied. In addition, interest payments would be denied because it is not a loss of profit cost or damage compensable under OPA.

Mitigation of Damages and Saved Expenses:

In the Claimant's response letter to the NPFC dated September 4, 2009, they provide that there was no other location to load coal except in New Orleans during the spill period and that under the contract extension agreement, Express Marine was required to provide transportation services on an exclusive multi-year basis and did not have the right to seek alternative employment for the vessels, nor did it have the right to redirect the vessels to alternative ports.

The Claimant failed to provide any evidence of saved overhead or normal business expenses not incurred as a result of the two delays, which is a requirement of OPA under 33 CFR 136.235 (d).

Summary:

The Claimant failed to prove its damages and has not met its burden of providing all evidence, information and documentation deemed necessary by the Director, NPFC, to support its claim of lost profits directly attributed to the barge 932 oil spill, as required in 33 CFR 136.205(a).

Based on the above, I recommend that Express Marine, Inc. be offered **\$0.00** as full compensation for the alleged damages it suffered when its vessels, the tug Baltimore and barge EMI 1850, were delayed as a result of the barge 932 oil spill.

DETERMINED AMOUNT: 0.00

Claim Supervisor: **Thomas Morrison**

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments:

¹⁷ See, Palmer Biezup & Henderson LLP letter dated April 26, 2010, page 9.