

CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/15/2010
Claim Number	: N08057-038
Claimant	: United Maritime Group, LLC
Type of Claimant	: Corporate (US)
Type of Claim	: Removal Costs
Claim Manager	: ██████████
Amount Requested	: \$169,842.03

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision with the M/T TINTOMARA 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 (OPA).

III. The Claimant and the Claim

United Maritime Group, LLC (UMG) (Claimant) owns a riverside terminal approximately 44 miles downstream from the source of the tank barge DM 932's discharge of oil. Claimant submitted a claim in the amount of \$1,415,293.03, representing \$1,184,032.00 in lost profits and earning capacity and \$231,261.03 for uncompensated removal costs for itself and its subsidiaries: (1) U.S. United Barge Line, LLC (and its wholly owned subsidiary, U.S. United Inland Services, LLC); (2) United Bulk Terminal, LLC and (3) U.S. United Ocean Services, LLC, resulting from the discharge of oil from the tank barge DM 932.

The UMG Group is located along three miles of riverfront at Mile Post 55. United Bulk Terminal (UBT) is the nation's largest dry bulk, full-service blending and storage and transfer terminal located in Davant, LA, servicing both import and export customers. It handles petroleum coke, phosphate, grain and other various bulk commodities. It provides coal fuel to a large number of electrical generating facilities in the southeastern United States. United Barge Line (UBT), a marine inland transportation company operates a fleet of line haul vessels and barges, providing transportation services on the Mississippi, Illinois and Ohio Rivers and, through its subsidiary, United Inland Services, provides fleeting and shift tug services to UBT. United Ocean Services (UOS) is UMG's U.S.-flag ocean going fleet transporting dry bulk commodities internationally and domestically between all U.S. deep-water ports and other parts of the world.

As a result of the discharge of oil from the tank barge DM 932, the terminal, its fleeting areas, barges and vessels were contaminated with floating oil sludge that migrated down river. The Captain of the Port New Orleans (COTP) closed the Lower Mississippi River from Mile Marker 97 from July 23 -28, 2008.

Claimant submitted its claim to the RP on December 1, 2008. The RP failed to act on the claim within the 90-day statutory time frame; however, it formally denied the claim on May 28, 2009. Claimant submitted its claim to the NPFC on June 25, 2009. The NPFC sent the Responsible Party (RP) notification letter, dated July 23, 2009, to Ms. [REDACTED], ACL – General Counsel and Mr. [REDACTED] of Nicoletti, Hornig & Sweeney, ACL – External Counsel, advising RP that Claimant submitted its claim to the NPFC for adjudication.¹

On July 10, 2009, the NPFC notified Claimant that it was dividing the claim into two claims: lost profits and uncompensated removal costs, N08057-037 and N08057-038, respectively. This Claim Summary/Determination adjudicates the claim for uncompensated removal costs only. After initial review, the NPFC Claims Manager determined that \$61,419 submitted as uncompensated removal costs will be more appropriately adjudicated as lost profits damages. This \$61,419 was added to Claimant’s lost profits claim and will be adjudicated as part of N08057-037. Thus, the sum certain for this removal cost claim is \$169,842.03.

As a result of the incident, Claimant hired SWS First Response (SWS) to provide response services to clean vessels and piers at its riverside terminal under a verbal contract. Claimant researched several cleanup contractors and their rates, seeking to ensure that SWS’ estimate for cleanup was fair and reasonable. E-mail traffic dated July 28, 2008, reflects that ACL was aware of Claimant’s negotiations with SWS and provided Claimant with a point of contact for Claimant’s contractors. Based on this e-mail, the Claimant understood that ACL would pay the removal costs bill directly to SWS.² However, ACL did not pay the bill directly, so UMG paid SWS and presented the claim to ACL. Subsequently, Claimant submitted its claim to the NPFC for reimbursement of uncompensated removal costs associated with response services received from July 28, 2008 through August 8, 2008.

IV. The Audits

The invoices that are the subject of this claim, #58123 in the amount of \$109,403.12, and #58446, in the amount of \$57,300.91, were presented to ACL on or about December 1, 2008. Claimant also submitted an invoice for expenses for two UMG officers who mobilized to Claimant’s terminal to oversee and coordinate removal activities. ACL acknowledged receipt of the invoices because they are included in the ACL’s audit. (See Enclosure 1 - ACL audit spreadsheets).

The ACL representatives audited the Claimant’s submission of invoices from SWS. The NPFC found that ACL auditors focused on whether the costs were properly supported in accordance with their standards, whether the rates were reasonable according to their standards and whether the costs were operationally reasonable and necessary according to their standards.

¹ See, NPFC letter to ACL dated July 23, 2009.

² See, Supplemental letter from Claimant’s attorney dated September 17, 2009.

V. Applicable Law

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 of OPA 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 (NCP) and uncompensated damages. Removal costs are defined as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.” 33 USC § 2701(31).

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. In addition, under 33 CFR Part 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR § 136.203, “a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC [Federal On-Scene Coordinator] to be consistent with the National Contingency Plan or were directed by the FOSC.”

Under 33 CFR § 136.205, “the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC.” (Emphasis added).

DETERMINATION OF LOSS:

A. Overview:

1. The FOSC coordination has been established under the Federal Project and SWS’s statement of same in Daily Report Logs.
2. The incident involved the discharge and continuing substantial threat of the discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit is in court for the claimed uncompensated removal costs.³

³ On or about May 26, 2009, ACL filed a Complaint for Declaratory Judgment against numerous defendants that had filed claims with its claims administrator, Worley Catastrophe Response LLC. The action was filed in the U.S. District Court for the Eastern District of Louisiana. Named Defendants included United Maritime Group LLC, United Ocean Services, LLC, United Barge Line LLC and United Bulk Terminal LLC. By filing the complaint Plaintiff ACL denied all claims associated with the tank barge DM 932 incident. Plaintiff sought judgment declaring it was not liable to all defendants. The District Court ordered stay of the declaratory action until defendants had exhausted their administrative remedies, namely presentment of claims to the Plaintiff and, if not settled within 90

4. The claim was submitted on time.
5. Presentment of costs to the RP was made by the Claimant, UMG, prior to the submission of the claim. The NPFC also made presentment of costs to the RP and the RP has provided a complete copy of their Audit of the SWS response costs presented.
6. The NPFC Claims Manager thoroughly reviewed all documentation submitted with the claim and determined that the majority of all removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205 with the exception of denied costs itemized in the attached Summary spreadsheets: (See, ACL audit which incorporates NPFC audit).

B. Analysis:

SWS Invoices

The Claimant, UMG, stated that all costs itemized in the SWS invoices are for uncompensated removal costs incurred by the Claimant for this incident for the time period of July 28, 2008 through August 8, 2008, when SWS worked to clean vessels and piers at UMG's terminal. The Claimant represents that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

The Claims Manager reviewed the actual cost invoices, daily reports and proof of payment records to verify that the Claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR Part 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC to be consistent with the NCP, or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

Two months after Claimant submitted its claim to the NPFC, on September 1, 2009, ACL's attorney submitted a letter to the NPFC outlining ACL's objections to the payment of the removal costs claim. ACL argues that the costs for both invoices were not reasonable because the costs were higher than Oil Mop, Inc., a cleanup contractor hired by ACL to conduct removal actions for cleanup of the discharge from the tank barge DM 932. For instance, for Invoice 58123, submitted to the NPFC in the amount of \$109,403.12, ACL argues that a reasonable costs for services performed would be \$80,048.07. As to Invoice 58446, submitted to the NPFC in the amount of \$57,300.41, ACL argues that reasonable costs are only \$40,909.06.

On March 18, 2010, Mr. ████████ of Maritime Alliance Group, Inc. (MAGI), which is part of the ACL audit team, provided the NPFC with its audit of the SWS invoices that are the subject of this claim. The NPFC Claims Manager verified that the response activities performed by SWS were generally confirmed in the ACL Financial Audit. As detailed in the enclosed spreadsheets, the NPFC reviewed the detailed comments in the Financial Audit performed by ACL's auditor. ACL auditors cited several reasons for denying or reducing certain SWS costs. First, the auditors

days, submission of their claims to the NPFC. Subsequently, ACL appealed this decision and, on November 24, 2009, voluntarily dismissed its appeal. Thus, at the time that this claim was adjudicated there was no action in court for the claimed uncompensated removal costs.

cited a rate reduction agreement as a basis for reducing some costs. However, SWS was not under contract with ACL for the cleanup; therefore, any rate reduction agreement does not apply to SWS. Second, the auditors reduced some rates to equal rates charged by Oil Mop, Inc., whose rates were mid-range rates and who had a contract with ACL to conduct removal activities. Again, SWS was not under contract to ACL; therefore, the Oil Mop rates are not applicable. Finally, ACL's auditors questioned billing periods for straight-time and overtime stating that the first eight hours of any shift is straight-time and overtime doesn't start until that period is surpassed. SWS had a published rate sheet (dated January 1, 2007) addressing how hours and time are allocated between straight-time and overtime. After reviewing the SWS rate sheet and the SWS invoices, the Claims Manager determined that SWS followed its rate sheet for most labor, materials and equipment costs.

Despite the various amounts denied by ACL's auditors for several reasons, the NPFC approved most of those costs. ACL had more than one opportunity to review, approve or disapprove the SWS removal costs. First, Claimant believed that ACL would directly pay the SWS invoices upon receipt. At that time ACL could have negotiated the costs. Second, when ACL did not pay the costs directly, the Claimant submitted the removal costs to ACL four months after the tank barge DM 932 incident. ACL had access to these invoices nearly six months before the Claimant submitted the claim to the NPFC. ACL had ample time to negotiate and settle the costs with the Claimant. Not until the Claimant submitted its claim to the NPFC for reimbursement did ACL object to the costs.

Further, upon its own analysis the Claims Manager determined that the SWS costs were reasonable for two reasons. First, under the circumstances – the spill was large and the Claimant felt urgency in getting its vessels, facility and piers cleaned as quickly as possible to minimize its lost profits – SWS was available to provide the needed services quickly. Claimant researched several cleanup contractors to ensure that SWS costs were reasonable. Second, because the services and materials/equipment listed on the daily sheets were provided pursuant to a verbal contract between UMG and SWS with specified rates, NPFC finds that UMG satisfied its burden of showing that the amounts claimed were reasonable and necessary. As a result, NPFC finds that these costs are eligible for payment under OPA. (See enclosure 1, ACL audit spreadsheets with NPFC supplementation for details).

While the NPFC allowed most of the invoiced charges denied in the ACL Financial Audit, the Claims Manager reduced or denied some costs on the basis that the Claimant failed to justify a rate or to justify the expense. The main reduction was in per diem rates. SWS charged \$170 per person per day even though its rate sheet allows \$125 per day. SWS explained that it raised the per diem because hotel rooms alone were \$125 per day and SWS added \$45 to account for meals and stress relief (liquids). NPFC finds that an increase in per diem is reasonable, but not to the extent SWS charged (especially given the ambiguousness of "stress relief (liquids)." Therefore, the NPFC has allowed per diem to be paid according to the GSA government rate for the area and time period, which was \$158 per day. Other than per diem, the other denials were for expenses that could not be readily connected to the oil spill response.

The total allowed amount of compensable removal costs invoiced by SWS and paid by UMG is \$164,978.35.

UMG Personnel Expenses

Due to a miscalculation, UMG claimed \$3,138.00, but submitted evidence of personnel expenses in the amount of \$3,258.05. The NPFC adjudicated the documented amount instead of the claimed amount. The expenses related to travel and housing for ██████████, UMG's Director of Compliance and Safety, and ██████████, UMG's Director of Risk Management and Safety, to be on-site from July 28, 2008 through August 2, 2008. The Claims Manager requested a detailed explanation and justification for their services during the removal actions. Claimant asserts that the spill and shutdown of the river affected nearly all aspects of UMG's business and operations. According to the records provided by the Claimant, UMG facilities included more than 60 barges and tugs used for river transport and large piers, at least three of which could simultaneously accommodate ocean-going vessels. The spill contaminated most of its barges.⁴ It disrupted the availability of UBL's empty barges that made up northbound tows. The Mississippi River was not impacted in these northbound routes; thus, it was important to decontaminate these barges as quickly as possible. The constant moving of barges maintained the positioning of vessels, Claimant's logistics patterns and coal delivery schedules.

In order to reduce the interruption of vessel movement and mitigate lost revenues, UMG mobilized a variety of internal and external resources, including Mr. ██████████ and Mr. ██████████ who both understood the impact of the spill on UMG's logistics pattern. They were charged with ensuring compliance with laws, regulations, and risk management practices. Their assignment included the following responsibilities:

1. Expediting the cleaning of barges for turnaround to northbound tows;
2. Coordinating the efforts of the various cleaning contractors and company vessels with regard to vessel priority in the cleaning queue and placement of barges in the fleet;
3. Ensuring that the site safety plan was implemented and monitored for effectiveness;
4. Coordinating with the Coast Guard regarding cleaning and inspection of barges; and
5. Tracking expenses related to the clean-up efforts.

In its September 1, 2009, letter to the NPFC ACL argues that these expenses were not necessary because two other UMG personnel, ██████████ and ██████████, were reviewing SWS activities. Further, ACL argues that SWS, like other OSROs, was performing to the satisfaction of the U.S. Coast Guard under guidelines jointly established by the Coast Guard and the LA Department of Environmental Quality. .

The NPFC disagrees with ACL and finds that the presence of Mr. ██████████ and Mr. ██████████ were necessary and reasonable under the circumstances. Their responsibilities were not duplicative of Mr. ██████████ and Mr. ██████████ because they were also coordinating the priority of decontaminating the barges and vessels for turnaround to northbound tows where the Mississippi River was not

⁴ Invoices submitted to the NPFC reflect that SWS decontaminated 62 barges and tugs at the UMG facility between July 28, 2008, and August 1, 2008.

closed. Also, the records reflect that they were not on scene during the entire SWS cleanup period, July 23-August 8, 2008. The Claims Manager reviewed the costs and found most of them to be supported and within reason, with the exception of one meal expense that appeared to be a duplicate expense amounting to \$4.42. Therefore, \$3,253.63 for travel-related expenses is compensable to the claimant.

AMOUNT: \$168,231.98

RECOMMENDATION:

The NPFC determines that the OSLTF will pay **\$168,231.98** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-038. All costs claimed are for charges paid by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: