CLAIM SUMMARY / DETERMINATION FORM

Date	:	5/24/2010
Claim Number	:	N08057-042
Claimant	:	Thoresen Shipping Singapore Pte. Ltd.
Type of Claimant	:	Corporate
Type of Claim	:	Loss of Profits and Earning Capacity
Claim Manager	:	[redacted]
Amount Requested	:	$226,266.42

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision in the vicinity of mile marker 98.2 and discharged oil into the Mississippi River, a navigable waterway and natural resource of the United States. Approximately 282,828 gallons oil[1] were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the river to vessel traffic and later, when reopened, managed traffic.

II. Responsible Party

American Commercial Lines LLC (ACL), the Responsible Party (RP), owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act.

III. The Claimant and the Claim

TBS Adjusting, Inc. (TBS) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, Thoresen Shipping Singapore Pte. Ltd (Thoresen). At the time of the collision, The M/V Thor Wave, had been chartered by Thorsen to meet its commitments to provide vessels for product movement under a time charter agreement to M/S Welspun.[2] When the spill occurred, the Thor Wave was conducting discharge (offload) operations at the Alabo Street Wharf in New Orleans, LA (Mississippi River Mile Marker 94.1). Due to the likelihood of vessels getting oiled in the immediate spill area, the USCG closed the river, which directly affected the operations of this and other vessels several times. Therefore, Thoresen is claiming a direct increased expense without offset of loss totaling $210,618.20.

Thoresen determined the idle time ordered by the USCG totaled 8.1007 days (See “Analysis” for a breakdown of times). During this time, the Thor Wave consumed an additional 14 metric tons of IFO fuel and 4.13 metric tons of MGO fuel, fuel that would not have been consumed if not for the oil spill. The total cost claimed for these additional bunkers consumed is $15,648.22.

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[1] See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008
[2] See Port Logs, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

When combining Thoresen's additional bunker costs and increased expense without mitigation or offset claim, the total claim for loss of profits due to the oil spill is $226,266.42. TBS did present these costs for the claimant to the RP's representatives Worley Catastrophe Response (Worley); however, all costs were denied by the RP.[3]

IV. APPLICABLE LAW

In general, claims for the removal costs or damages must first be presented to the RP per 33 USC 2713(a). If the RP denies the claim or does not settle the claim within ninety days, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 USC 2713(c)

The uses of the OSTLF are described at 33 USC 2712(a). It provides in relevant part that:

"The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to consistent with the National Contingency Plan or uncompensated damages."

Damages include damages for loss of profits or earnings capacity as a result of loss or destruction or real or personal property or natural resources. 33 USC 2702(b)(2)(E). Damages are further defined to include the costs of assessing the damages. 33 USC 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 USC 2712 (h)(2)

In any case in which the president has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages. 33 USC 2712 (i)

Congress directed the President to promulgate regulations "for the presentation, filing, processing, settlement, and adjudication of claims…" 33 USC 2713 (e) Those regulations are found at 33 CFR part 136.

Under 33 CFR 136.105(a) & 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:

> "the 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

[3] See Letter from Nicoletti, Hornig & Sweeney to Mr. [redacted], TBS Adjusting, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

or other administrative costs associated with the 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 the loss of profits or impairment of earning capacity due to injury to, destruction or, or loss or 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 & B or 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 or 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, comparable 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 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 the 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, and 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)

V. DETERMINATION OF LOSS:

A. Overview:

1. The incident involved the discharge and continuing substantial threat of discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.

2. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.[4]
3. The claim was submitted on time.
4. The claimant seeks $226,266.42 in loss of profits, as a consequence of the M/V Thor Wave's additional time and fuel.
5. The claimant asserts that, if not for the oil spill, the voyage would not have resulted in additional time and fuel.
6. Presentment of costs to the RP was made by TBS, representatives for Thoresen, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded denying responsibility for these costs.
7. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant to document what took place at the time of the incident.

B. Causation:

The Barge DM 932 oil spill did in fact release significant amounts of oil into and causing damage and injury to the Mississippi River, a natural resource of the United States. The resulting damage, injury and removal response disrupted shipping in and out of the Mississippi River.[5] At the time of the spill, there were many large vessels in the area that were oiled due to the DM 932 oil spill. The Thor Wave had to stay in port inside the dirty zone awaiting clearance, resuming discharge operations intermittently from July 23, 2008 until the vessel was cleared by the USCG to depart on August 5, 2008.[6]

The Claimant provided a record of the incident by submitting Voyage Documents and "Statement of Facts," which clearly demonstrates that the Mississippi River had closed and vessel traffic was redirected during the oil removal efforts.[7] Additionally, the USCG provided POLREPS to substantiate that the Mississippi River was either closed to vessel traffic or open to limited traffic during the response period.

C. Vessel Delay Time:

Thoresen is claiming that the oil spill directly caused them loss of profits because the Thor Wave was sitting idle and the voyage was increased by 8.1007 days. The Thor Wave was delayed as follows:

From 7/23/2008 @ 09:30 hours until 7/29/2008 @ 07:00 hours
From 7/30/2008 @ 10:30 hours until 7/31/2008 @ 07:15 hours
From 8/01/2008 @ 00:01 hours until 8/02/2008 @ 07:00 hours

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[4] See US Court of Appeals for the Fifth District, Voluntary Dismissal of Appeal, dated 11/30/2009
[5] Polreps 1-18; documenting river closures and traffic management through 8 August 2008
[6] The hull of the M/V Thor Wave had been oiled and therefore necessitated the removal of the oil. See Port Logs, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009
[7] See Claim submission forms, submitted by TBS Adjusting to the NPFC on 7/01/2009

From 8/05/2008 @ 17:30 hours until 8/05/2008 @ 18:40 hours

The total stoppage time: 8 days, 2 hours and 25 minutes, or approximately 8.1007 days.[8]

Per the terms of the time charter agreement between Thoresen and Thor Wave Shipping Co., Ltd (Thor Wave), Thor Wave charged a charter hire rate of $26,000.00 a day for the 8.1007 days they were detained due to the oil spill. $26,000.00 x 8.1007 = $210,618.20 in loss of revenue due to the oil spill.[9]

D. Increased Bunkers

The documented delay resulted in an increase in the consumption of bunkers. In their claim submission, TBS correctly shows the breakdown of the amount of bunkers consumed during the idle periods:[10]

Times and Dates:	IFO	MGO
09:30 on 7/23/2008 through	355.06	55.53
07:00 on 7/29/2008	-346.06	-52.03
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	9 mt	3.5 mt
10:30 on 7/30/2008 through	344.56	51.13
07:15 on 7/31/2008	-341.56	-50.80
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	3 mt	.33 mt
00:01 on 8/01/2008 through	339.14	50.20
07:00 on 8/02/2008	-337.14	-50.20
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Total:	14 mt	4.13 mt

The top number represents the amount of oil (in tons) that were read at the time of each stoppage, subtracting the amount of oil read at the time that the Thor Wave resumed discharging operations to find the difference.

At a cost of $736.00/mt for the IFO, the additional bunkers consumed amount to $10,304.00 ($736.00/mt x 14 mt = $10,304.00).[11]

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[8] See Port Logs, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

[9] See Charter between Thoresen Shipping Singapore Ptd. Ltd. and Thor Wave Shipping Co., Ltd., submitted by TBS Adjusting to the NPFC on 1/14/2010

[10] See Voyage Logs, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

[11] See TRANS-TEC fuel invoice, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

At a cost of $1294.00/mt for the MGO, the additional bunkers consumed amount to $5,344.22 ($1294.00 x 4.13 mt = $5,344.22).[12]

The grand total for the claimed loss of profits from extra bunkers consumed is $15,648.22.

E. Analysis:

TBS submitted a claim—with requested addendums-- that was well-documented and easy to understand. They were able to demonstrate that Thoresen was indeed negatively impacted and delayed by the DM 932 oil spill.

The long-term contract between Thoresen and Welspun demonstrated that Thoresen was to bear the costs of delivery, while Welspun would pay for freight carried when received. The contract also called for Welspun to pay demurrage of $40,000 per day for extra days or delays it caused in the planned voyage,[13] though Thoresen could not collect this demurrage from Welspun. Thor Wave, on the other hand, did continue to charge Thoresen the daily hire rate of $26,000.00 for the 8.1007 days, as was agreed in the charter agreement between Thor Wave and Thoresen.[14] Because Thoresen continued to halt discharging operations per USCG orders, they continued to pay hire for time they were not able to work. While this would not affect the bottom line of a time charter that is contracted out over a longer period, for one voyage (as is the case here), it most certainly did cut in to Thoresen's bottom line and, therefore, their profits for this voyage.

Additionally, Thoresen does prove through documentation provided the NPFC that they did incur $15,648.22 of increased bunker consumption as a direct result of the oil spill. These added bunker costs (as explained in sub-point D above) are valid and are compensable.

Thoresen's net profits for the June 2008 voyage amounted to a negative $105,839.95.[15] Had they not continued to pay both hire in the amount of $210,618.20 and additional bunkers in the amount of $15,648.22 for the 8.1007 days of delay, Thoresen would have turned a profit of $120,426.47, which is consistent with their average profits made with the M/V Thor Wave.

F. Determination:

The NPFC hereby determines that the OSLTF will pay **$226,266.42** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # N08057-042. All costs claimed are for charges paid for by the Claimant for damages as that term is defined in OPA and, are compensable damages, payable by the OSLTF as presented by the Claimant.

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[12] See TRANS-TEC fuel invoice, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

[13] See voyage charter between Thoresen and Welspun, submitted with the claim by TBS Adjusting to the NPFC on 6/30/2009

[14] See time charter between Thor Wave and Thoresen, in the supplemental documents submitted by TBS Adjusting to the NPFC on 1/14/2010

[15] See "Voyage Results," in the supplemental documents submitted by TBS Adjusting to the NPFC on 1/14/2010

VI. DETERMINED AMOUNT: $226,266.42

Claim Supervisor: [redacted]

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: