

CLAIM SUMMARY / DETERMINATION FORM

Date	: 10/12/2010
Claim Number	: N08057-080
Claimant	: Mabanft, Inc.
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: ██████████
Amount Requested	: \$81,312.63

I. Facts

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

The claimant is the charterer and operator of the M/V TRADER and her tow, consisting of three tank barges chartered from Kirby Inland Marine, under a one-year time charter that began on January 1, 2008. The claimant engages in the transport of clean petroleum products between various facilities along the Gulf Coast Intracoastal Waterway and the Mississippi River south of Baton Rouge, Louisiana.

IV. Claim Description

The claimant seeks payment for charter hire paid to Kirby under the charter for the time the vessel tow was delayed by the oil spill and oil spill response. The claimant presented its claim to the RP prior to presenting it to the Oil Spill Liability Trust Fund. (See claimant's correspondence in exhibits 8 and 9 evidencing the presentation to Worley Catastrophe Response, the claims administrator for ACL). The claimant states that it submitted its claim to the RP on October 1, 2009. After receiving no resolution within 90 days, the claimant submitted its claim to the NPFC on May 12, 1010.

V. 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.

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 of 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

River Closure

The barge 932 oil spill disrupted shipping in and out of the Mississippi River. The NPFC reviewed the Coast Guard situation report-pollution (SITREP-POL) reports, which clearly state that vessels were delayed from 7/23/2008 until well after 7/28/2008. SITREP-POL Eight, stated the Mississippi was closed from mile marker 98 to the sea buoy.¹ SITREP-POL Nine identified a safety zone from mile marker 98 through mile marker 11 in place and that all clean tows

¹ See, MST1 [REDACTED] email dated July 28, 2008 with inserted SITREP-POL Eight, para. 1.H.

outside the safety zone would be given permission to transit after notifying the Vessel Traffic Service.² On August 10, 2008, Coast Guard Sector New Orleans issued SITREP-POL Twenty, still maintaining a safety zone from mile marker 97 through mile marker 40.³

Claimant's Allegations

The claimant alleges that it sustained damages in the form of lost profits and loss of earning capacity for a cumulative delay of seven days, one hour and fifteen minutes following the oil spill. Via claimant's Exhibit 6 entitled, "Statement of Claim of Mabanaf, Inc. for Delay and Expenses of M/V TRADER and KIRBY Barges," claimant alleges four separate delays totaling 7.99 days. According to the claimant, the four delays were as follow:

- | | |
|---|--------------|
| 1. 0630 on 23 July 2008 to 1400 on 23 July 2008 | = 0.313 days |
| 2. 0435 on 24 July 2008 to 1535 on 29 July 2008 | = 5.458 days |
| 3. 0800 on 30 July 2008 to 1200 on 31 July 2008 | = 1.167 days |
| 4. 1045 on 1 August 2008 to 1200 on 2 August 2008 | = 1.052 days |

The claimant provided evidence that its vessels had to be cleaned twice because they were oiled twice during the incident. (See the Vessel Decontamination Log for the DM932 Incident Response and a CG spreadsheet of decontaminated vessels and Mabanaf's own Daily Inland Traffic Report, Kirby vessel Trip Logs, and the Kirby Inland Division "Traffic by Boat Report.").

The claimant states that the vessel restrictions imposed and the required hull decontaminations following the spill prevented the vessel tow from proceeding on its intended voyage, thereby depriving the claimant of profit and earning capacity during the delays. The claimant argues that the daily hire amount it paid to Kirby for the charter during the delay periods represents a loss of profits. The asserted loss is calculated using the claimed daily charter hire rate of \$10,176.80 for a total of \$81,343.16.

NPFC's Analysis

The NPFC must deny the claim for loss of profits and impairment of earning capacity.

Delays

The NPFC finds that the claimant's tow was delayed. The SITREP-POL statements show that the Coast Guard restricted traffic on the river. There is Coast Guard documentation showing decontamination of vessels in the tow. (See the Vessel Decontamination Log for the DM932 Incident Response and a CG spreadsheet of decontaminated vessels). The NPFC verified delays during a review of claimant's documentation (i.e. Mabanaf's own Daily Inland Traffic Report, Kirby vessel Trip Logs, Kirby Inland Division "Traffic by Boat Report," and Murphy Oil email correspondence with dock schedule updates). However, the NPFC finds that the cumulative delay is slightly different than that calculated by claimant. The NPFC found that the delay on 23

² See, MST1 [REDACTED] email dated July 29, 2008 with inserted SITREP-POL Nine, para. 2.M.

³ See, MSTC [REDACTED] email dated August 12, 2008 with inserted SITREP-POL Twenty, para. 1.H.

July actually ended at 1330, when the trip logs stated “Finished Waiting on River Condit[ons]” and/or “Reconnected Crossover Hose,” rather than 1400 as alleged. We were unable to determine how the claimant arrived at 1400 for the end of the first delay. Aside from the one discrepancy, the NPFC verified the other delays as alleged by the claimant. This results in a total determined delay of 7.9688 days.

Burden to Show Loss and Causation Not Met

In a letter dated September 10, 2010, Claimant explains that it is entitled to reimbursement for lost profits because there is a “reasonable certainty” that the delays resulted in lost profits. Claimant cites 1 Robert L. Dunn, RECOVERY OF DAMAGES FOR LOST PROFITS, which states that if the fact of damages is proven with “reasonable certainty,” the plaintiff is entitled to recover the value of his contract as measured by the value of his profits. Dunn notes, and Claimant acknowledges, that case law recognizes that while the reasonable certainty test is a flexible one, “at a minimum, opinions or estimates of lost profits must be based on objective facts, figures or data from which the amount of lost profits can be ascertained.” *Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.*, 131 S.W. 3d 203 (Tex. App. 2004).

The NPFC agrees with, and the OPA regulations comport with, this theory. The regulations require financial reports or income tax returns – objective facts or figures - to evidence a reasonable certainty of the fact of damages. Once the fact of damages is established, there are several methodologies that may be used to quantify the damage, including the demurrage provided in the applicable charter. Demurrage - loss of profits resulting from the loss of use of a vessel - has traditionally been an item of damages in admiralty. *Skou v. United States*, 478 F.2d 343, 345 (5th Cir. 1973) However, courts sitting in admiralty agree with the requirement that damages must first be established. The mere stipulation of a liquidated sum for demurrage in a charter agreement does not obviate the need to show actual damages. *Trans-Asiatic Oil Ltd. S.A. v Apex Oil Co.*, 804 F. 2d 773, 782 (P.R. 1986).

Referring to the requirement to prove damages, the claimant has not met its burden of showing reduced profits, increased expenses, or even a change in either one due to the spill. The claimant demonstrated that the oil was purchased at a price fixed by contract prior to the spill. (See 7/14/08 oil purchase agreement). The claimant then stated that the cargo was transferred to a shore side tank for later distribution from the tank in smaller consignments into a number of vessels, so there are no documents to show resale of the product (i.e. no evidence of sale price). (See 10/5/10 Alan Davis email). Based on claimant’s statement, it appears that the operation is of an inventory-stock-piling type where profits and expenses are not directly related to individual voyages. Therefore, the claimant has not shown that it had fixed revenue for the cargo in the voyage at issue.

The vessel tow operated under a one-year time charter. The claimant states that the vessel tow operates constantly to shift cargo as needed between ports on the lower Mississippi River, but does not operate on a pre-determined or fixed schedule. The charter hire was payable under the charter over the year of the charter whether the vessel was delayed by an oil spill or not, unless the vessel was taken off hire. Therefore, the claimant has not shown that it paid hire that it

would not have paid had the oil spill not occurred. This means that the claimant has not shown the alleged increase in transportation expenses resulting from the spill.

Though the claimant argues that it had a fixed sale price and a fixed purchase price, and the transportation costs increased, thereby resulting in a net loss of profit on the voyage, the claimant has not demonstrated an actual net loss of profit. The claimant may have increased incidental expenses directly resulting from the oil spill delays, but it has not presented those costs nor has it provided the details or supporting documentation of those potential increased expenses. Since the claimant has not proven a reduction in revenue or an increase in expenses, it has not demonstrated a loss of profit.

Conclusion

To be compensated, a claimant must demonstrate by a preponderance of evidence that it sustained lost profits before we can quantify them. Because the claimant has not shown the fact of damages in the form of lost profits, it has not met its burden of proving that the oil spill caused it to lose profits. The claim must be denied.

VII. AMOUNT: \$0.00

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: