

CLAIM SUMMARY / DETERMINATION FORM

Date	: 1/18/2011
Claim Number	: N08057-014
Claimant	: Dampskibsselskapet "Norden" A/S
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$241,340.45

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. Approximately 282,828 gallons of oil¹ 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

On March 16, 2009, Nordisk Legal Services (Nordisk) presented a claim to the NPFC for its client, Dampskibsselskapet "Norden" A/S ("Claimant"), owner of the M/V TMS Maria (the vessel). Claimant asserted that it suffered a loss of profits and impairment of earning capacity in the amount of \$446,573.04 due to the discharge of oil into the Mississippi River on July 23, 2008 and the subsequent closure of the River. The vessel was delayed for 4.46 days and incurred additional tug and bunker expenses resulting from the delay.

The Claimant amended the claim's sum certain and the theory for reimbursement several times during the NPFC's review and adjudication process. The sum certain was initially increased to \$497,366.70. On April 30, 2010, the sum certain was decreased to \$190,093.45. On July 20, 2010, the sum certain was again amended to \$241,340.45, the current sum certain before the NPFC and the amount being adjudicated in this determination.

At the time of the discharge, the vessel was chartered to Agropecuaria El Xurco S.A., Costa Rica (Agropecuaria or the charterer) under a voyage charter pursuant to a Baltimore Berth Grain charter party. Under the terms of the charter party, Claimant would provide the vessel for two voyages, to haul two shipments of bulk grain from the Mississippi River to Caldera, Costa Rica. The first voyage was completed without incident and is not involved in this claim.

Under the terms of the charter party, the vessel would be provided to the charterer for the second shipment at the Mississippi River load port before July 31, 2008. At the time of the incident, July 23, 2008, the vessel was at Southwest Pass (SWP) on transit to the berth at ADM:AMA.

¹ See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008

Anchorage (Mississippi River Mile Marker (MM) 116.7). Notice of Readiness (NOR) was tendered at 1730 hrs on July 23, 2008; however, the Mississippi River was closed and the vessel sat idle at Fairway Anchorage in SWP (MM 0.0) until 1845 on July 27, 2008, when the River was re-opened to traffic. The vessel transited up river, arriving at the ADM berth at 0645 hrs on July 28, 2008, and commenced loading grain at 2245 hrs on July 28, 2008. Loading was completed at 1255 hrs on July 30, 2008. The vessel sailed from the ADM berth at 1435 hrs on July 30, 2008, but was delayed again at AMA Anchorage until 2335 hrs until the Mississippi River re-opened to traffic. The vessel arrived at Caldera, Costa Rica 0645 hrs on August 7, 2008, and issued its Notice of Readiness at the same time. The vessel berthed at 1830 hrs on August 8, 2008, and commenced discharging its cargo at 2100 hrs on August 8, 2008. The discharging was complete at 1410 hrs on August 12, 2008.

IV. APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that the responsible party for a vessel or facility from which oil is discharged is liable for the removal costs and damages resulting from such incident. 33 U.S.C. § 2702(a).

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).

“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.” 33 U.S.C. § 2712(a)(4).

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 USC § 2713 (e). The regulations are found at 33 CFR Part 136.

In general, claims for the removal costs or damages must first be presented to the responsible party (RP). 33 USC § 2713(a). If the claim is not settled by any person by payment within 90 days after the date on which the claim is presented, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 USC § 2713(c).

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).

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.

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 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 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)

The amount of compensation is limited to the actual net reduction or loss of earnings or 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. FINDINGS OF FACT

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. Real or personal property or natural resources have been injured, destroyed, or lost; specifically oil was released into and injured the Mississippi River, a natural resource of the United States.
3. In accordance with 33 CFR § 136.105(e)(12), the claimant certified no suit has been filed in court for the claimed uncompensated damages.
4. The claim was submitted within three 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.
5. Nordisk Legal Services presented the claim to the responsible party and the claim was not settled by any person by payment within 90 days. The NPFC notified the RP that Nordisk presented its claim to the OSLTF.
6. 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.

VI. CLAIMANT'S ANALYSIS OF ITS CLAIM:

Claimant asserts that the vessel was delayed on the Mississippi River for 4.46 days and the total loss of profits resulting from the delay is \$241,340.45. This sum includes \$138,548.00² (demurrage that Claimant believes it would have been owed if the vessel had arrived at the discharge port earlier) and \$87,870.50 (the value of despatch Claimant believes would have avoided if the vessel arrived earlier and waited longer for its berth).

Claimant relies on the demurrage and despatch rates in the charter party, \$67,000 per day and \$33,300 per day, respectively, to quantify the loss of profits. Other pertinent clauses in the charter party provide that the load rate on the Mississippi River was four weather working days,

² The Claimant used an incorrect demurrage amount, which resulted in a mathematical error. Claimed amount for this demurrage should be \$121,940.00.

Saturday, Sunday and holidays included. The discharge rate was 8,000 metric tons (MTs) per weather working day, Saturday PM, Sundays and holidays excluded even if used.

Claimant is also seeking reimbursement of \$14,921.95 in additional tug charges and bunker costs incurred because of the delay.

Claimant provided a record of the incident and the vessel's events by submitting Port Logs/Statement of Facts, which demonstrate that the Mississippi River had closed and vessel traffic was redirected during the oil removal efforts.³ 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.

A. Demurrage and Despatch at the Discharge Port⁴

Claimant alleges that it incurred a loss of profits due to the 4.46-day delay only at the discharge port, Caldera, Costa Rica. According to the Port Logs/Statement of Facts the M/V TMS Maria arrived from New Orleans into the discharge port at Caldera on August 7, 2008 at 0645 hrs and issued the Notice of Readiness at that time. The berth was congested and the vessel could not berth until 1830 on August 8. It began discharging its cargo at 2100 on August 8. Based on the cargo tonnage, the laytime allowed for discharge was 4.690 days. The cargo was discharged in 2.067 days. Claimant argues that if the M/V TMS Maria had not been delayed 4.46 days on the Mississippi River it would have arrived at Caldera and issued its Notice of Readiness at 0801 on August 3, 2008. Thus, Claimant argues, without the delay Claimant would not owe despatch to the charterer, but the charterer would have owed demurrage to the Claimant.⁵

Claimant quantifies the loss of profits as follows:

1. Demurrage:

If the vessel had not been delayed 4.46 days, the claimant estimates that it would have arrived at port in Caldera on August 3, 2008 at 0645 and still waited for an available berth on August 8, 2008. Estimating that the Notice of Readiness would have been issued at 0645 on August 3, and the discharge of the cargo would have been completed in 2.067 days, the claimant argues that the total time for discharge at Caldera owed by the charterer would have been approximately 6.51 days (4.46-day delay plus 2.067 days). Claimant then deducts the allowed laytime, 4.690 days, from the 6.51-day total delay and identifies this 1.82-day difference as demurrage. Multiplying the 1.82 days times the demurrage rate, \$ 67,000/day, equals \$121,940.00. (Claimant erroneously calculates the amount of demurrage to be \$138,548.00 based on \$76,000/day demurrage.)

2. Despatch:

Claimant argues that due to the delay, the M/V TMS Maria did not arrive in port at Caldera until 0645 Hours on August 7, 2008; the Notice of Readiness was posted at 0801 hrs instead of 4.46 days earlier.⁶ The discharge was completed in 2.067 days; the charterer saved 2.623 days of

³ See Port Logs and Statement of Facts, submitted with the claim by Chaffe for [REDACTED] on 2/17/2010.

⁴ The terms "despatch" and "dispatch" are used synonymously in this determination.

⁵ See Scan San Jose, dated 8/06/2008, Statement of Facts and explanation letter dated 8/26/2010 written by [REDACTED].

[REDACTED], submitted to the NPFC via email by Nordisk for Norden on 8/26/2010.

⁶ See Norden Laytime Calculation/Statement of Facts, submitted to the NPFC via email by Nordisk for Norden on 4/30/2010.

laytime; thus Claimant owed Agropecuaria \$87,870.50 in despatch (33,500.00 multiplied by 2.623 days).

Combining both the despatch and demurrage totals, Claimant's claimed loss of profits due to the oil spill equals **\$209,810.50**.

3. *Additional Tugs*

Claimant is claiming additional tugs in the amount of **\$14,921.95**. They have broken down these costs as follows:⁷

<u>Date</u>	<u>Description</u>	<u>Total</u>
7/30/2008	Turn/Anchor @ AMA Anchorage <i>Tug Jefferson</i>	\$3395.00
	30,053 GRT; Charge of 31 X \$26.00	\$806.00
	Turn/Anchor @ AMA Anchorage <i>Tug Ascension</i>	\$3395.00
	30,053 GRT; Charge of 31 X \$26.00	\$806.00
	Subtotal:	\$8042.00
	Less 40% Discount:	- \$3360.80
	Total:	\$5041.20
7/30/2008	Sailing @ AMA Anchorage <i>Tug Jefferson</i>	\$3395.00
	30,053 GRT; Charge of 31 X \$26.00	\$806.00
	Sailing @ AMA Anchorage <i>Tug St. James</i>	\$3395.00
	30,053 GRT; Charge of 31 X \$26.00	\$806.00
	Subtotal:	\$8042.00
	Less 40% Discount:	- \$3360.80
	Total:	\$5041.20
7/30/2008	Fuel Surcharge, 48% X \$10,082.40	\$4839.55
	Invoice Total:	\$14,921.95

VII. NPFC ANALYSIS of the CLAIM:

As noted above Nordisk originally presented its claim to the OSLTF on March 16, 2009, asserting that the vessel was delayed by the tank barge DM 932 oil spill and the incident resulted in a loss of profits in the amount of \$446,573.04. Claimant amended its claim and its theory for reimbursement several times during the NPFC's adjudication process. The NPFC analysis that follows is based on the Claimant's current theory, i.e., its vessel was delayed 4.46 days, which resulted in 1.82 days on demurrage that would have been paid by charterers and 2.623 days of

⁷ See Moran New Orleans Invoice, submitted with the claim by Nordisk for Norden to the NPFC on 3/16/2009.

despatch that the Claimant paid to the charterer because charterer only used 2.067 days of the allotted discharge laytime.

Claimant theory for reimbursement focuses only on the vessel's activities and times at Caldera, Costa Rica. It does not allege there was a loss of profits due to the delay in loading the cargo at the ADM berth on the Mississippi River. According to the Port Logs/Statement of Facts the loading of the cargo was completed at ADM within the four-day laytime provided in the charter party.⁸

The claimant argues that had there been no delay on the Mississippi River, it would have been entitled to demurrage and would not have had to pay Agropecuaria despatch. Claimant claims that without the delay the vessel would have arrived at the discharge port 4.46 days earlier - August 3, 2004. This earlier (and hypothetical) arrival time assumes that all events, conditions and time frames from the time the vessel left the load port in the Mississippi River would have been identical to the events, conditions and time frames that occurred between the time the vessel actually left the ADM berth and arrived at Caldera. This would include identical weather, wind and sea conditions, passage to and through the Panama Canal, document review and fumigation at the Canal and no changes in the vessel's condition. Claimant relies, in part, on his statement reflecting that another vessel, the M/V Dominator, was at the berth on August 3rd and even if the TMS Maria had arrived on the 3rd it would have had to wait until the Dominator finished discharging and the berth became available on August 8, 2004.

Thus, Claimant speculates that without the 4.46-day delay the vessel would have issued its Notice of Readiness and waited on an available berth until August 8, when the Dominator pulled away from the berth. This 4.46-day delay would have been accorded to the allowable discharge laytime in the charter party and the claimant would have been owed demurrage by the charterer.

This argument fails for two reasons. First, the events and times estimated to occur without the delay are speculative. There is no evidence in the record, nor would it be possible to establish that the actual events and time periods for a voyage leaving the Mississippi River after a 4.46-day delay would be identical to a voyage between those two ports and berths without a delay.

Claimant offers an alternative calculation of its claim.⁹ Claimant speculates that if the vessel had arrived at 0801 hrs on August 3, 2008 and if it been allowed to berth before the M/V Dominator at 1600 hrs on August 5, 2008, the alternative delay time would have been 2.332 days. As it took 2.067 days to discharge at port, the total amount of time Claimant would have taken at Caldera would have been 4.399 days. The charter party provided that the discharge laytime was 4.690 days. In this alternate calculation demurrage would not be considered. The despatch calculation, however, would remain the same.

This alternate calculation supports the NPFC argument that the identical voyage events and time frames proposed by the Claimant are speculative and too far removed from the delay on the Mississippi River; there are numerous possible variables that could have occurred to affect the actual arrival time at Caldera without a delay.

⁸ See Lines 33-37 and Rider Clause 16 in the Baltimore Berth Grain Charter Party between Norden and Agropecuaria, dated 3/27/2008; submitted with the claim by Nordisk for Norden to the NPFC on 3/16/2009.

⁹ See letter from Mr. Nordisk, to Ms. NPFC, dated 9/29/2010, and received via email on 9/29/2010.

Further, the claimant's division of loss of profits based on demurrage rates and despatch rates are suspect. Claimant adds the 4.46-day delay to the actual 2.067 days used to discharge the cargo at Caldera, which totals 6.51 days. Assumedly, Claimant argues that this 6.51 days of time is owed to the Claimant's account. In order to quantify its damages Claimant identifies a portion of this 6.51-day delay based on the demurrage rate (6.51 days minus 4.690 (allotted discharge laytime = 1.82 days)) or \$121,940.00. The other portion of the damages is the laytime not used (2.623 days) quantified at the despatch rate or \$87,870.50. The remaining laytime, 2.623 days, is used to quantify the additional loss as despatch that was owed to the charterer or Agropecuria.

The claimant bears the burden of providing all evidence, information and documentation deemed necessary to support the claim. The claims regulations require that a claimant establish a loss of profits or impairment of earning capacity by income tax returns, financial statements or other similar documents. In this case, the claimant asserts that it suffered a loss of profits or impairment of earning capacity resulting from the 4.46 days of delay, or \$209,810.50. However, the claimant acknowledges that the voyage from the Mississippi River to Caldera, Costa Rica, was completed and it received the charter rate for the voyage. The claimant has not established that it suffered an actual loss of profits resulting from the delay in the Mississippi River, such as the loss of a subsequent charter or voyage.

In order to recover for damages a claimant must evidence that it in fact suffered damages. If damages in fact are proven with reasonable certainty the claimant is entitled to recover damages. Estimates of lost profits must be based on objective facts, figures or dates 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 OPA regulations require such objective facts or figures, i.e., income tax returns or financial reports. Demurrage – loss of profits resulting from the loss of use of a vessel – has traditionally been an item of damages in admiralty. Once the fact of damages is established, the demurrage rate may be used to quantify the damage. *Skow 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 Col.*, 804 F. 2d 773, 782 (P.R. 1986)

The claimant asserts and provides evidence and documentation that it incurred additional expenses caused by the delays at SW Pass. This included \$10,082.40 in tug costs on July 30, 2008, and additional bunker costs on July 30, 2008 in the amount of \$4,839.55. These expenses total **\$14,921.95**, and are compensable under OPA.

Determination:

The NPFC hereby determines that the OSLTF will pay **\$14,921.95** as full compensation for the damage costs incurred by the claimant and submitted to the NPFC under claim # N08057-014. 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. The NPFC denies \$226,418.50 in claimed damages.

VIII. DETERMINED AMOUNT: \$14,921.95

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: