

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/15/2011
Claim Number	: N08057-058
Claimant	: Motiva Enterprises LLC
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$126,558.00

I. Facts

In the early morning hours of July 23, 2008, at approximately 0130, the tank barge DM 932, an unmanned, non-self propelled, double hull, steel tank barge, bearing official number 546058, sank as a result of a collision with M/T TINTOMARA and discharged approximately 282,828 gallons of oil into the Mississippi River, a navigable waterway of the United States. The FOSC Unified Command (FOSC/UC) initially closed the river to vessel traffic to conduct removal actions and later managed and restricted vessel traffic when the river reopened until cleanup was complete.

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, Motiva Enterprises LLC, presented this claim to the National Pollution Funds Center (NPFC) seeking reimbursement of a loss of profits suffered when a vessel it was chartering was delayed due to the closure of the Mississippi River subsequent to the discharge of oil from the DM 932. Motiva provides shipping services to Shell Trading (US) Company (STUSCO) under a Service Level Agreement.¹ In this case, STUSCO executed a voyage charter with Trafigura Beheer B.V. for the M/T CHEMTRANS PETRI to transport fuel oil from Rotterdam to the Motiva Refinery in Convent, Louisiana.² Under the terms of the charter party, STUSCO was allowed 72 hours laytime (Sundays and holidays included). The daily rate for the vessel was \$40,000 USD. The Claimant subsequently reimbursed STUSCO for the charter costs and presented its claim to the NPFC.

The voyage began in Rotterdam on or about the July 5, 2008 for STUSCO to load its cargo of fuel to be transited to the Motiva Refinery. The M/T CHEMTRANS PETRI arrived at the Mississippi River 1000 on July 24, 2008, and issued its Notice of Readiness (NOR) at that time however, the River was closed to vessel traffic. The vessel arrived at Motiva Refinery at Convent at 2054 on July 28, 2008.

¹ Service Level Agreement between Shell Trading (US) Company and Motiva Enterprises LLC

² Voyage Charter

IV. Claim Description

The Claimant asserts that the M/T CHEMTRANS PETRI was delayed from 1000 on July 24, 2008 to 2054 on July 28, 2008 (3.204 days) due to the river closure. Claimant reimbursed STUSCO loss of profits in the amount of \$126,558.00 based on a 3.204-day delay (3.204 days x \$40,000 less a 1.25% address commission credit from the vessel owner).

Claimant presented its claim to the responsible party (RP) in accordance with 33 U.S.C. § 2713(a). The RP acknowledged presentation of this claim by issuing its determination to the Claimant. On September 30, 2009, the claimant submitted its claim to the NPFC, identified as Claim #N08057-058.

V. Applicable Law

The Oil Pollution Act of 1990 provides that each responsible party for a vessel or facility from which oil is discharged, or which poses a threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive zone is liable for removal costs and damages. 33 U.S.C. § 2702(a).

Damage include damages equal to the loss of profits or impairment of earning capacity, due to the injury, destruction of, or loss of real property, personal property or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

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 Fund shall be available to the President for the payment of uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages. U.S.C. § 2712(a)(4).

With certain exceptions 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 the claim was presented, 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).

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).

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.

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:

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)

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

In this case the claimant provided evidence that the M/T CHEMTRANS PETRI arrived at Southwest Pass and tendered its Notice of Readiness (NOR) at 1000 hours on July 24, 2008 and remained at anchor until 2054 hours on July 27, 2008 at which time the vessel weighed anchor and resumed its voyage to Convent.³ Under the terms of the charter party, the charterer, STUSCO, was given credit for a six-hour NOR allowance from the vessel owner. Thus demurrage time related to the incident and the river closure began at 1600 on July 24, 2008 and continued to 2054 on July 27, 2008. (See the Coast Guard's deep draft cleared vessel spreadsheet and Lay time Calculation, pages 1 and 2).

³ Claimant's exhibit C, invoice for demurrage dated 28 August 2008.

NPFC's Analysis

The NPFC finds the entire \$126,558.00 in claimed demurrage to be compensable under OPA based on the evidence presented by the Claimant. This was a voyage charter where the charterer pays for each day it charters the vessel. Thus, STUSCO incurred a 3.204 day delay due to the incident, and paid, an additional 3.204 days at the \$40,000.00 daily rate to the vessel owner.

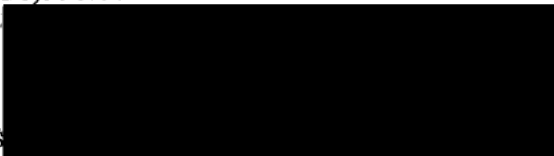
Motiva provided the Trafigura Beheer B.V. invoice for the claimed demurrage, Tanker Time Sheets, the Voyage Charter, and the Service Level Agreement between Shell & Motiva. Pursuant to the voyage charter provisions STUSCO was obligated to pay for each day it chartered the vessel and the charterers pay demurrage at the rate of \$40,000.00 a day. The Trafigura Beheer B.V. invoice provides the evidence that Motiva's voyage was 6.5250000 days of demurrage and according to the Laytime Calculation⁴ for this voyage, the voyage was set to commence at Rotterdam with a NOR of July 5, 2008 at 10:30 a.m. and to discharge at Convent on July 24, 2008 with a NOR of 10:00 a.m. Claimant wasn't able to begin off-loading its cargo until July 28, 2008 and completed the offload on July 30, 2008.⁵

Also, claimant provided a wire transfer and screen shots from within the Shell Trading (US) Co. internal system to show that the Claimant reimbursed STUSCO for charter costs.

Conclusion

Claimant incurred increased daily charter costs that resulted in a loss of profits and provided evidence that these costs were incurred and paid. The \$126,558.00 claimed by the Claimant is payable from the OSLTF.

AMOUNT: \$126,558.00

Claim Supervisor 

Date of Supervisor's review: 3/17/11

Supervisor Action: OFFICE APPROVED

Supervisor's Comments:

⁴ Laytime Calculation Sheet

⁵ Inchcape S.O.F. Report