

SUMMARY/ DETERMINATION

Date	: 3/21/2011
Claim Number	: N08057-059
Claimant	: CV Scheepvaartonderneming Slotergracht
Type of Claimant	: Corporate (Foreign)
Type of Claim	: Loss of Profits and Earning Capacity/ Vessel Delay
Claim Manager	: [REDACTED]
Amount Requested	: \$41,970.88

I. Incident

On July 23, 2008, the tank barge DM-932 collided with another vessel discharging 9,983 barrels of No. 6 fuel oil into the Mississippi River, a navigable waterway of the United States.¹ As a result of the oil spill the Mississippi River was closed from July 23, 2008, to July 28, 2008, then open for restricted vessel traffic until August 8, 2008. . The U.S. Coast Guard, Captain of the Port (COTP) of New Orleans, acting as the Federal On-Scene Coordinator (FOSC) established a Safety Zone to protect the lives of oil spill responders as they contained and cleaned up the oil spill.² The Safety Zone extended from Mile Marker 98 in New Orleans, downriver to Mile Marker 1, at Southwest Pass Sea Buoy.³

II. Responsible Party

American Commercial Lines, LLC (ACL) owned the tank barge DM-932 at the time of the oil spill incident and was designated as the Responsible Party (RP) for the oil spill, under the Oil Pollution Act of 1990.⁴

III. Claimant:

The claimant is CV Scheepvaartonderneming Slotergracht of Amsterdam, Netherlands, which owns the M/V SLOTERGRACHT (owner or claimant).⁵ Spliethoff Bevrachtingskantoor of Amsterdam, Netherlands, is authorized by the Owners to act as their managing agent.

At the time of the incident, the vessel was not sailing under a time or voyage charter but a service contract or liner agreement.⁶ Before each voyage Spliethoff contracts with shippers for various cargoes to be transported and the owner invoices the shipper for the agreed-upon freight rate and issues bills of lading. The carriage of the cargo is subject to the terms and conditions of the bill of lading. Spliethoff earns a booking commission of 2.5% on the freight.⁷

¹ See POLREPs #1 to #7, (7/23/08 - 7/27/08) in Part 5 of the NPFC Admin Record

² See USCG POLREPS #7, Part 5 of claim Administrative Record

³ See USCG POLREPS #7, #8 & #9 Part 5 of claim Administrative Record

⁴ See POLREP #7 (paragraph D) in Part 5 of the NPFC Admin Record

⁵ See claim letter to NPFC, 10/05/09. Received at NPFC 10/19/10

⁶ See claimant email 11/17/09 describing no charter party, claimant invoices via Bill of Lading

⁷ See claimant's email 3/3/11 explaining Spliethoff acting on behalf of the owner

IV. Claim:

On October 19, 2009, Spliethoff presented a claim to the NPFC in compensation from the Oil Spill Liability Trust Fund (Fund) alleging increased operational costs (running costs and capital costs) and port charges. Spliethoff initially sought \$40,296.28 in compensation for loss of profits due to the oil spill and resulting delays on the Mississippi River.⁸

On January 5, 2011, the claimant submitted additional documentation for fuel burned during the oil spill delay and revised its sum certain to \$41,970.88.⁹

IV. Claim Background & RP's Position on the Claim:

On December 22, 2008, Spliethoff presented its claim to the RP seeking \$77,919.56 by calculating the vessel's net daily earning capacity (net daily revenue) of \$22,634 (time charter equivalent). The claimant argued that the additional three days, 4 hours and 10 minutes (3.1736-days) on the voyage cost it a loss of net revenue.¹⁰ The alleged cost of the vessel delay is in addition to increased port charges for towing, piloting and fuel costs.

After the RP sought a declaratory judgment in U.S. District Court for the Eastern District of New Orleans it denied Spliethoff's claim on June 26, 2009. ACL subsequently made a token offer of settlement to the Claimant that Claimant did not accept. On October 19, 2009, Claimant submitted its claim to the Oil Spill Liability Trust Fund, which is administered by the NPFC.¹¹

Claimant and the RP continued to attempt to settle the claim. In a letter dated March 2, 2010 the RP denied the alleged lost revenue but calculated \$5,758.05 for additional pilot and towing fees for the claimant to move its vessel for decontamination on August 2, 2008.¹² The claimant did not accept the RP's calculation of its claim and continued with the NPFC.

V. APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA 90) provides that each responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of 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).

Damages 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).

⁸ See claim letter to NPFC 10/05/09 pg. 3

⁹ See email from claimant to NPFC 1/5/2011w/ recalculated bunkers/ revised sum certain \$41,970.88

¹⁰ See claimant's letter to the RP dated 12/22/08 (Attachment A) alleging delay times and extra cost

¹¹ See Order & Reasons by same court dated 9/02/09 consolidating all Motions to Dismiss on condition all counterclaims are withdrawn without prejudice to allow the administrative process to run its course

¹² See Nicoletti letter dated March 2, 2010, to the attention of [REDACTED] in Part 3 of file/ Administrative Record

Congress directed the President to promulgate regulations "for the presentment, filing, processing, settlement, and adjudication of claims ..." 33 U.S.C. § 2713(e). The 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. 33 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 designated as the source. 33 U.S.C. § 2713(a).

If a claim is presented in accordance with 33 U.S.C. § 2713(a) and the claim is not settled by any person by payment within 90 days after the date on which the claim was presented, the claimant may elect to commence an action in court against the responsible party or present the claim to the Fund. 33 U.S.C. § 2713(c).

Damage claims must be presented 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. 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) & 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 of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

The proof requirements follow: "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 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, 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 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)

VI. DETERMINATION OF LOSS:

A. Findings of Fact:

1. In accordance with 33 U.S.C. § 2712(h)(2) and 33CFR § 136.101(a)(1) the claim was submitted within the three year statute of limitations for loss of profits under OPA.¹³
2. In accordance with 33 CFR § 136.103(a) the claimant presented its claim to the Responsible Party.¹⁴
3. In accordance with 33 CFR 136.105(e)(10) copies of written communications and substance of verbal communications, between the claimant and Responsible Party with the date claim was presented and the date that the claim was denied have been provided.¹⁵
4. In accordance with 33 CFR § 136.105(b) the claimant's sum certain is \$41,740.51.¹⁶
5. In accordance with 33 CFR § 136.105(e)(12), the claimant certified no suit has been filed in court for the claimed loss of profits.¹⁷
6. In accordance with 33 CFR § 136.111(a)(2) the claimant asserts that the oil spill delay is not an insured peril and it has not submitted a claim to its insurer.¹⁸
7. Claimant asserts that it mitigated its vessel delays during the oil spill incident by resuming its voyage as soon as possible after it was decontaminated.¹⁹

B. Claimant's Argument:

Vessel delay:

Claimant's Vessel Log and Statement of Facts, show that the M/V SLOTERGRACHT arrived at the Mississippi River pilot's station on July 25, 2008.²⁰ After arriving the claimant tendered its Notice of Readiness (NOR) to Associated Terminals located on the Mississippi River, near Mile Marker 92. Associated Terminals of La Chalmette, LA was in the established USCG Safety

¹³ See initial claim letter to NPFC dated 10/05/09, received 10/19/09

¹⁴ See copy of letter dated 12/22/08 to Worley, claimant Attachment A

¹⁵ See claimant's Attachments A-H and RP letter to NPFC dated 3/02/10

¹⁶ See email dated 9/17/10 from claimant to NPFC with copy of receipt and its revising sum certain

¹⁷ See claimant's submission letter to NPFC dated 10/05/09, Page-4, #7

¹⁸ See claimant's submission letter to NPFC dated 10/05/09, Page 4, #8

¹⁹ See claimant submission letter to NPFC 10/05/09 (Pg. 5, Part 11)

²⁰ See claimant attachment F, Vessel Log date 07/ 25/08 to 08/02/08 in the Admin Record

Zone²¹ and the vessel waited at anchorage for permission to proceed upriver.²² The vessel arrived at its berth at the Alabo Street Wharf in La Chalmette, LA on July 28, 2008, at 0440 hours.²³ The vessel was oiled as a result of the spill and deviated to anchorage for hull decontamination, which occurred on August 2, 2008.

The claimant alleges that the vessel delay increased voyage operating costs and seeks \$31,538.23 in lost profits.²⁴ Claimant states that it anticipated completing this voyage in 42.7 days but, due to the oil spill, the voyage took 3.1736 additional operating days to complete. The claimant argues that the additional voyage days increased its voyage costs, thereby reducing its net revenue or voyage earnings.²⁵ Claimant explained that its operating costs for the vessel are "running costs" and "capital costs."²⁶ Running costs are crew, maintenance, repairs, ship's needs (including lubricating oil), insurance and other costs. Capital costs are the vessel's down payment and financing.

To support its calculation of vessel costs the claimant submitted a copy of the M/V SLOTERGRACHT's 2008 annual accounting statement prepared by KPMG (written in Dutch).²⁷ Claimant took the vessel's *annual* running and capital costs and divided by 365-days to find the vessel's *daily* operational costs of \$9,937.68.²⁸ Claimant multiplied the daily costs by the number of delay days for a total operational cost of \$31,538.23,²⁹ (3.1736 x \$9,937.68 = 31,538.23).³⁰

Increased Port Costs:

The vessel was contaminated by the oil spill. The FOSC required the vessel to be decontaminated. Claimant presented additional port costs related to moving the vessel from the dock at the claimant's last delivery in New Orleans (Arabi Terminal) to General Anchorage for decontamination. The claimant provided copies of receipts and two debit notes paid by claimant on its port account as evidence of increased port costs.³¹

Extra pilot service invoice 8/2/2008	\$1,364.57
Extra tug service invoice 8/2/2008 ³²	\$4,393.48
Unidentified additional port costs ³³	<u>\$3,000.00</u>

²¹ See claimant attachment A, NOR dated 07/30/08 signed by Captain. Accepted by Norton Lilly & Map of Safety Zone Part 5 in the Admin Record

²² See Attachment A, email from Norton Lilly to Spliethoff, Associated Terminals and others

²³ See Attachment F, Vessel Log indicating vessel's arrival at terminal claimant Attachment A

²⁴ See claimant's initial claim submission to NPFC dated 10/5/09

²⁵ Ibid

²⁶ See claimant's email to NPFC on 11/17/09 with breakdown of operating costs

²⁷ See email from claimant dated 11/17/09 to NPFC Pg. 2. Attached copy of KPMG annual report

²⁸ See email from claimant dated 11/17/09 to NPFC with attached KPMG report pages 7 and 8

²⁹ See claim letter from claimant to NPFC dated 10/05/09 & Attachment A, letter to RP dated 11/22/08

³⁰ See email from claimant attorney dated 11/17/09 to NPFC explaining calculation of costs.

³¹ See claimant letter to NPFC date 10/05/09 page 5 listing documents attached to submission letter.

³² See claimant's letter to NPFC dated 10.5/09 page 6 describing Attachment I

³³ NPFC claims manager was unable to identify these costs, but the claimant seeks them, referring to debit notes in claimant's Attachment I.

Subtotal of claimed port costs

\$8,758.05

Increased Bunkers:

To support its spill delay time the claimant submitted a Statement of Facts. The vessel's Chief Engineer provided a calculation of spent bunkers as well.

Claimant asserts that the vessel used only MDO fuel during the spill delay³⁴ and alleges the 3.176-day delay increased the vessel's fuel consumption on this voyage by 5.302 metric tons.³⁵ To support its allegation the claimant's Chief Engineer (CE) submitted documentation showing dates and times and amount of liters consumed during the spill delay.³⁶

Claimant submitted a receipt showing that it paid \$882.00 per metric ton for MDO fuel purchased before the voyage.³⁷ The CE determined that 5,928 liters were consumed during the spill delay. However, to convert 5,928 liters to metric tons the claimant needed to provide the specific gravity of the MDO. On January 5, 2011 the CE provided his calculation of MDO in liters at 15Celsius (50F) (5,928ltrs x 0.8945(sg) = 5302.MT). 5.302 metric tons multiplied by \$882 per ton is \$4,674.63 (5.302MT @ \$882 = \$4,674.63).³⁸ Claimant seeks \$4,674.63 for reimbursement for MDO burned during the oil spill delay.

C. NPFC's Analysis of the Claim:

Vessel Delay

The Claimant alleges that the vessel delay increased its voyage costs, stating that it anticipated completing the voyage in 42.7 days but, due to the oil spill, the voyage took 3.176 additional days. These three additional days increased its operating costs, running costs (crew, maintenance, repairs, and ship's needs, and insurance) and capital costs (down payment, mortgage and financing).

Under OPA, a claimant seeking lost profits can only be reimbursed the demonstrated net reduction to its profits that resulted from the injury to, destruction of, or loss of property or natural resources caused by the discharge of oil into the navigable waters of the U.S., i.e., the claimant must either show that it incurred more expenses without offsetting revenues, or suffered a reduction in revenues without an offsetting decrease in expenses, thereby reducing its net profit. In this case claimant asserts the three-day delay increased its operational and capital cost. However, these continuing operational and capital costs have to be paid whether or not the vessel is delayed by weather, mechanical failure or an oil spill. These costs were not affected by the oil spill incident and delay. The claimant assumed these costs to operate the vessel whether the oil spill occurred or not.

³⁴ See claimant email dated 7/19/10 to NPFC

³⁵ See initial claim letter dated 10/19/09, pg. 3.

³⁶ See email 7/19/10 with attached

³⁷ See email dated 07/19/10 from claimant's atty to NPFC with attached receipt for fuel & CE's.

³⁸ See email from claimant's attorney to [REDACTED] of the NPFC with supplemental documents claimant submitted to the NPFC on 12/03/09

Claimant argues that the carriage or freight is agreed upon before a voyage and the freight rate factors in the cost of running and purchasing the vessel.³⁹ Additionally, the record shows that the claimant earned the agreed upon revenue for the voyage.⁴⁰ A review of the claimant's Vessel Log and port agents' Statement of Facts after the oil spill incident shows that the vessel remained on schedule and did not incur demurrage or penalties because of the oil spill. Nor did it provide evidence that it lost a potential contract for additional cargo due to the delay.

Additional Port Costs

The claims manager reviewed the invoices submitted under each attachment and found the following:

Invoice 216364 dated 8/2/2008 for piloting from (next page)
Arabi Terminal to General Anchorage for hull cleaning
Crescent River Pilots.....\$ 967.30

Invoice 1167 dated 8/6/08 from Belle Chase Marine Transportation
Service: launch service for pilots\$ 816.00

Invoice 54392, Bisso Towboat service
Arabi Terminal to General Anchorage for hull cleaning
Invoice 53492, dated 2/12/2008 for.....\$4,393.48

The evidence demonstrates that the vessel movements during this period were due to the requirement to decontaminate the vessel. Claimant has demonstrated that the pilotage, launch service and towboat service costs detailed in the invoices are a direct result of the oil spill injury and closure to the river and are evidence that the claimant incurred increased port costs on August 2, 2008 to decontaminate the vessel because of the oil. These additional costs increased claimant's port costs and reduced claimant's profits. So, these costs are compensable under OPA.

The remaining balance of \$3,000.00 purportedly evidenced in the two Debit Notes represents unidentified port costs. Because the claims manager cannot determine if these costs represent costs incurred because of the discharge of oil into the river or oiling of the claimant's property, they are denied.

The claimant should be paid OPA-compensable costs:.....\$6,176.78

Increased Bunkers

Claimant asserts that the vessel used only MDO fuel during the spill delay⁴¹ and alleges the delay increased the vessel's fuel consumption on this voyage by 5.302 metric tons.⁴² To support its

³⁹ See email from claimant to NPFC dated 1/5/11

⁴⁰ See claimant's initial submission letter to NPFC 10/5/10 Attachment E. Ops-Calc Sheet shows gross revenue

allegation the claimant's Chief Engineer (CE) submitted documentation showing dates and times and amount of liters consumed during the spill delay.⁴³

Claimant submitted a receipt prior to the voyage showing that it paid \$882.00 per metric ton for MDO fuel purchased before the voyage.⁴⁴ The claims manager finds 5,928 liters MDO were consumed during the spill delay. Because liters are a volume and metric ton is a weight the claimant needed to submit the temperature of the MDO to find its specific gravity. The density of the MDO is necessary to convert liters to metric tons. On January 5, 2011 the CE submitted his calculation of liters at 15 Celcius for specific gravity of 0.8945 ($5,928 \text{ ltrs} \times .8945(\text{sg}) = 5.302 \text{ MT}$). Metric tons consumed multiplied by the cost per ton is \$4,674.63 ($5.302 \text{ MT} @ \$882 = \$4,674.63$).⁴⁵

The NPFC finds that the claimant's evidence supports increased costs for bunkers during the delay and the calculations are reasonable. Therefore, the full cost for the increased expense for bunkers burned as a result of the delay caused by the oil spill incident are compensable in the amount of \$4,674.63.

IV. DETERMINATION:

Having reviewed the evidence reflects that the SLOTERGRACHT was delayed by the oil spill incident and contaminated by oil.

The NPFC hereby determines that the OSLTF will pay \$10,851.41 ($\$6,176.78 + \$4,674.63 = \$10,851.41$) as full compensation for increased expenses for the claim. The remaining claimed lost profits and increased costs are denied because the claimant has failed to demonstrate that it suffered a loss of profits or impairment of earning capacity.

VI. DETERMINED AMOUNT: \$10,851.41

Claim Supervisor:

Date of Supervisor's Review: 3/22/11

Supervisor Action: OFFER APPROVED

Supervisor Comments: