

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/2/2011
Claim Number	: N08057-072
Claimant	: Hanjin Shipping Co. Ltd.
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$172,710.55

FACTS: A. Oil Pollution Incident:

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 and later managed traffic when the river reopened, for the duration of the response.

## II. RESPONSIBLE PARTY

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

## III. The Claimant and the Claim

On February 25, 2010 Hanjin Shipping Co., Ltd. (Hanjin), the operator of the M/V Prince Rupert (Prince Rupert) through Royston, Rayzor, Vickery & Williams (Royston Rayzor), LLP presented this claim to the NPFCA. In its claim, Hanjin, states that the oil-spill incident caused delays to its vessel's schedule. The claimant alleges that this in turn caused it to incur additional expenses that it would not have otherwise incurred which "damaged Hanjin's shipping interests". Specifically, Hanjin alleges it "suffered damages to its profits and earning capacity."

Hanjin chartered the Prince Rupert through a contract with Pacific Basin IHC Limited<sup>1</sup> (Pacific Basin) that provided for a single voyage having a "duration (of) about 20-25 days."<sup>2</sup> At the time of the oil-spill incident, the Prince Rupert was sub-chartered by Cenex Harvest States (CHS) for a single voyage to transport approximately 25,000 metric tons<sup>3</sup> of wheat, corn and soybean meal.<sup>4</sup> On the day of the incident, July 23, 2008, the Prince Rupert was loading cargo at CHS Myrtle Grove, mile marker (MM) 61.5, which is downriver from the location of the DM 932 oil-spill incident.<sup>5</sup> The shipping agent advised claimant to take protective measures and deploy sorbent boom, which was then procured and deployed.<sup>6</sup> By July 25, 2009 the vessel had been

<sup>1</sup> Claimant's Exhibit C; Pacific Basin IHC Limited, Hong Kong, is the disponent owner of the Prince Rupert.

<sup>2</sup> *Ibid.* Line 30.

<sup>3</sup> Charter Party dated 15 Feb 2008; North American Grain Charterparty 1973 between Hanjin Shipping Co. Ltd.(Owner) and CHS, Inc. (Charterer).

<sup>4</sup> Claimant's Exhibit N; K&C Shipping Inc.'s Port Log / Statement of Facts – 21 – 26 July 2008.

<sup>5</sup> *Ibid.*

<sup>6</sup> Claimant's Exhibit B; Vince Barber (K&C Shipping) email dated 23July2008.

oiled and was selected for cleaning. On July 26<sup>th</sup> it was directed to move to anchorage to clean the hull. For this movement, the vessel required additional tug and pilotage services which cost \$9,581.44. The additional hire time amounted to \$153,923.61. While delayed by the oil-spill incident, claimant also alleges that it incurred expenses in the sum of \$4,978.30 for additional bunkers and \$4,223.00 to prevent further oiling. When combined, Hanjin's full claim for loss of profits and earning capacity is \$172,710.55.

Once cleaned on July 26, 2008, the Prince Rupert was cleared to sail to sea and proceed to its final destination in Corinto, Nicaragua.<sup>7</sup>

#### **IV. Claim**

As stated above, when claimant presented claim, it sought reimbursement of \$172,710.55 for lost profits and earning capacity. The costs relate to the delays its vessel, the M/V Prince Rupert experienced as a result of the ACL oil spill. On December 6, 2010, the NPFC initially determined that the claimant was entitled to \$18,782.74 as proven losses.

The initial adjudication and offer found that the additional hire claimed \$153,923.61 was not compensable, as the actual time the vessel was chartered had not exceeded the time stipulated in the contract (charter); between 20-25 days without guarantee.

#### **APPLICABLE LAW:**

“Oil” means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.9601) and which is subject to the provisions of that Act (42 U.S.C. 9601 et seq.). 33 U.S.C. 2701 (23)

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, 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). Damages are further defined to include the costs of assessing the damages. 33 U.S.C. 2701(5).

The uses of the OSTLF are described at 33 U.S.C. § 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 be consistent with the National Contingency Plan or uncompensated damages.”

In any case in which the president has paid an amount from the Fund 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)

---

<sup>7</sup> **Corinto** is a town of 17000 (1995 population) on the northwest Pacific coast of Nicaragua in the province of Chinandega; www.Wikipedia.com.

In general, claims for removal costs or damages must first be presented to the RP per 33 U.S.C. 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 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)

Each claim must include at least the following, as applicable:

- (12) A statement by the claimant that no action has been commenced in court against the responsible party or guarantor of the source designated under – 136.305 or, if any action has been commenced, a statement identifying the claimant’s attorney and the attorney’s address and phone number, the civil action number, and the court in which the action is pending. 33 CFR § 105(e)(12)

Each claim must be in writing for a sum certain for compensation for each category of uncompensated damages or removal costs (as described in Subpart C of this part) resulting from an incident. If at any time during the pendency of a claim against the Fund the claimant receives any compensation for the claimed amounts, the claimant shall immediately amend the claim. 33 CFR § 136.105(b)

Under 33 CFR 136.105(a), 136.105(e)(6) & 136.105(e)(13), 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 or other administrative costs associated with the preparation of the claim.” 33 CFR 136.105(e)(8).”

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 of, or loss of real or personal property or natural resources may be presented to the Fund by a claimant sustaining the loss or impairment. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income.

“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, 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)

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.* 233 & 235.

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)

### **DETERMINATION OF LOSS:**

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. 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. 33 U.S.C. § 2703(B).
3. The claimant seeks \$172,710.55 in loss of profits, as a consequence of the M/V Prince Rupert incurring additional time, fuel, and expenses. 33 CFR § 136.105(b).
4. Presentment of costs to the RP was made prior<sup>8</sup> to the submission of the claim. Also, the NPFC notified<sup>9</sup> the RP of costs for which the RP responded by denying responsibility for these costs. 33 U.S.C. § 2713(a).
5. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified that there is no suit in court for the claimed uncompensated removal costs and damages.
6. The claimant asserts that if not for the oil-spill incident the voyage would not have resulted in the claimed additional time, fuel and expenses. 33 CFR § 136.231(a).
7. The claim was submitted on time. 33 CFR § 136.101(a)(1)(i).
8. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant and other sources to corroborate what took place at the time of the incident. 33 CFR § 136.105(e)(13).

Basis for the Claim:

<sup>8</sup> Worley Co letter to Hanjin Shipping dated 12 Dec 2008 confirming claim receipt.

<sup>9</sup> NPFC letter dated 9 Mar 2010 to ACL and ACL’s counsel.

Shipping was disrupted in and out of the Mississippi River, a natural resource of the U.S., due to the DM-932 oil-spill incident.<sup>10</sup> At the time of this incident, there were many vessels in the area that were delayed, including the Prince Rupert.

The claimant provided a record of the incident by submitting voyage documents which demonstrate that the Mississippi River was closed and vessel traffic was redirected during the oil-spill incident response and removal actions. Additionally, USCG issued POLREPS, (1-20) substantiate that the Mississippi River was either closed or open to restricted vessel traffic during the response period.

## ANALYSIS & DETERMINATION

On December 29, 2010, claimant requested reconsideration of the NPFC's initial determination. The NPFC's adjudication on reconsideration covers the entire claim.

On reconsideration, claimant argued on its behalf that NPFC's position is not correct when it concluded that claimant would have had to pay for hire charges even if there had not been an oil spill. In support of this position, claimant provided evidence from the vessel's owner that supports this contention.<sup>11</sup>

Given that claimant, upon reconsideration has met its burden of proving that, if the vessel had been returned earlier than 20 days, claimant would not have been required to pay for the portion of the time over the time the vessel was used, which was directly attributed to the oil spill incident, the NPFC adjudicates as follows:

### **A. *Additional Hire Charges:***

Hanjin Shipping demonstrated that it chartered the Prince Rupert from Pacific Basin IHC LTD for a trip that was to last 20-25 days with a daily hire rate of \$62,000.00. Due to the oil-spill incident, its vessel was affected for a period of 2.482639 days (Start: 7/24/2008 @ 00:15 – End: 7/26/2008 @ 11:50 hours), which are valued by claimant at \$153,923.61. With the documentation<sup>12</sup> provided by claimant, the NPFC confirmed that the Prince Rupert was delayed due to the oil-spill incident for a period that totaled 59 hours and 35 minutes. When this time is converted to days, it equals 2.482639 days and matches claimant's calculation of time lost.

It is clear to the NPFC, from the charter presented, documentation provided by the claimant and the independent research conducted by the Claims manager, that the DM 932 oil-spill incident impacted the Prince Rupert and caused Hanjin Shipping to incur additional expenses that it otherwise would not have incurred. However, simply because a vessel is delayed does not always amount to a loss of profit compensable under the OPA. In accordance with the contract, with Pacific Basin, Hanjin Shipping paid a fixed daily rate per day pro rata and when it settled the contract for the voyage, it paid \$1,196,920.55. This amount reflected the Hire Statement (1<sup>st</sup>)<sup>13</sup> bottom line.

<sup>10</sup> SITREP-POLs 1-20; documenting river closures and traffic management through 10 August 2008.

<sup>11</sup> Pacific Basin's Letter – dated 15 December 2010.

<sup>12</sup> Claimant's Exhibit N; K&C Shipping Inc.'s Port Log / Statement of Facts – 21 – 26 July 2008.

<sup>13</sup> Hanjin Shipping Hire Statement (Final) to Pacific Basin IHC Limited - dated 13<sup>th</sup> April 2009.

As a result of this voyage, Hanjin Shipping received \$1,668,166.50,<sup>14</sup> which reflects the full amount that Hanjin Shipping billed to CHS.<sup>15</sup> The contract stipulated that the charterer (Hanjin Shipping) cover the vessel's fuel costs during the vessel hire which are demonstrated by the Hire Statement (Final), dated 19 April 2009, and shows total fuel costs of \$717,094.50. Upon review of the contract governing this voyage, it does not provide for who was to bear the burden of additional costs. The claimant has demonstrated that it did not receive any additional revenues other than what it was due for delivering grain cargo from CHS, Myrtle Grove LA to Corinto, Nicaragua.

Based on the above and the Port Log / Statement of Facts,<sup>16</sup> the period of delay is summarized as follows:

- Start - 0015 on 24 July 2008<sup>17</sup> (completed the loading process when the Mate's Receipt was signed).
- End - 1150 on 26 July 2008<sup>18</sup> (time noted is after USCG deems it clean and clears it for sailing)
  - o Time Delayed: 59 hours and 35 minutes = 59.58333 hours = 2.482639 days

Given the delay of 2.482639 days at the contract hire rate of \$62,000.00 per day, the NPFC concludes that the claimant incurred \$153,923.61 in additional expenses that were not compensated by Hanjin's customer; CHS, and which are deemed OPA compensable costs.

- **Determined Amount:** \$153,923.61

#### **B. Increased Bunkers**

Claimant's asserts that during the period of delay it also incurred additional bunker expenses that it otherwise would not have incurred but for the oil-spill incident. To quantify this additional expense claimant presented contract Clause #86, which stipulates the price per metric ton for IFO and MDO. The actual rate of consumption of fuel was found when reviewing Clause #28:

- In port & Idle: About 2.3MT 380 CST + about 0.2 MT MDO
- Working 24 Hours: About 5.0 MT 380 CST + 0.2 MT MDO

For the Additional Hire, the NPFC established that the total time delayed was 2.482639 days. Using this fact, NPFC calculated the fuel consumed by multiplying the respective rate by the time delayed, which yields the following:

IFO: 2.3MT/day x 2.482639 days = 5.710 MT  
 MDO: 0.2MT/day x 2.482639 days = 0.497 MT

To determine the value of the fuel consumed, the NPFC multiplies each by its respective cost factor<sup>19</sup> to arrive at:

<sup>14</sup> T.Benson (CHS) Letter to Hanjin Shipping of 20 May 2010.

<sup>15</sup> Hanjin Shipping Invoice to CHS dated 21 August 2008.

<sup>16</sup> Claimant's Exhibit N – K&C Shipping Inc – Port Log / Statement of Facts – 21 – 26 July 2008

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

IFO: 5.710 MT x \$750.00/MT = \$4,282.50  
 MDO: 0.497 MT x \$1,400.00/MT = \$695.80

The calculations above are in keeping with claimant's assertion, though for rounding errors, they produce a slightly different result. Given this, the NFPC concludes that the additional fuel expenses would not have been incurred, but for the oil-spill incident.

- **Determined Amount:** \$4,282.50 + \$695.80 = \$4,978.30

### **C. Additional Tug Expense for Hull Cleaning**

As claimant explains and the NPFC accepts, due to the disruptions in vessel traffic caused by the DM 932 oil-spill incident, the Prince Rupert incurred two additional tug service fees totaling \$9,581.44 that it would not have incurred but for the oil-spill incident.

By reviewing claimant's Exhibit N – Port Log / Statement of Facts, two set of entries are found that relate to the claimed tug expenses to shift the Prince Rupert in and out of anchorage for hull cleaning. On Friday the 25<sup>th</sup> at 1445 the Prince Rupert shifted to anchorage, incurring the first expense. Again, on the 26<sup>th</sup> at 0035 another pilot and tug were in attendance to shift the vessel to be cleaned. In the process of adjudicating this portion of the claim, the NFPC reviewed these charges against invoices and confirmed that these expenses are compensable costs under the OPA. These costs breakdown as follows:

- Bisso Towboat<sup>20</sup> - Tug Allison S
 

▪ 07/25/2008 – Start: 15:50 / End: 16:05	\$4,790.72
▪ 07/26/2008 – Start: 00:50 / End: 01:00	<u>\$4,790.72</u>
	\$9,581.44

The NFPC concludes that these expenses<sup>21</sup> would not have been incurred but for the oil-spill incident.

- **Determined Amount:** \$9,581.44.

### **D. Additional Expense to Prevent Further Oiling**

As claimant, explains on 23 July 2008 Hanjin was advised of the oil-spill incident by K&C Shipping, the shipping agent, to take preventive steps and deploy boom to protect the hull of the Prince Rupert. Based on this advice, Hanjin procured sorbent boom, which was delivered and deployed around the vessel on 25 July 2008. Taking this preventive step caused Prince Rupert to also require the services of an individual that would advise and guide its actions to deploy boom while it was at anchor. The claimed expenses are found in the claimant's Exhibit Q and also provided in an email<sup>22</sup> to the claims manager reflecting the following amounts:

---

<sup>19</sup> Rider Clause #86

<sup>20</sup> Email - [REDACTED] to [REDACTED] of 20 April 2010 @ 4:30PM

<sup>21</sup> Claimant's Exhibit P; Bisso Towboat

<sup>22</sup> Email - [REDACTED] to [REDACTED] of 20 April 2010 @ 4:49PM

Sorbent Boom Cost	\$1,188.00 <sup>23</sup>
Delivery to vessel:	\$2,220.00 <sup>24</sup>
Service Fee:	\$ 500.00 <sup>25</sup>
Overtime Voucher:	<u>\$ 315.00<sup>26</sup></u>
	\$4,223.00

As the claimant explains and the NPFC accepts, \$2,220.00 was the cost to deliver boom to the vessel, the cost of the boom was \$1,188 and the agent charged its standard service fee of \$500.00 as well as an overtime charge of \$315.00 to coordinate with the authorities. The charges presented by claimant are deemed reasonable by the NPFC as they are to prevent further oiling of the vessel and would not have been incurred but for the oil-spill incident. For these reasons they are deemed OPA compensable costs

- **Determined Amount:** \$4,223.00

#### **E. Analysis:**

If a third party claimant or RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF and 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)

Upon reviewing claimant's submission, NPFC was able to ascertain that the oil-spill incident affected Hanjin Shipping by causing additional expenses that it would otherwise would not have incurred. Since Hanjin Shipping had a firm-fixed-price contract by which it was obligated to deliver its cargo on a pre-arranged price, no provisions existed within the contract that would have allowed Hanjin Shipping to pass on to its client (CHS) the extra expenses it incurred. Since it couldn't pass the additional expenses, these expenses adversely affected Hanjin Shipping's bottom line; profits.

#### **F. Determination:**

Upon reconsideration we see that the revenue received was in fact the amount due in accordance with the contract. However, the claimant incurred additional expenses, determined as \$172,706.35 by the NPFC, which consequently reduced Hanjin Shipping's profit for this voyage. It is those increased expenses, summarized below, that are in fact compensable, as the claimant was unable to mitigate them.

<sup>23</sup> Claimant's Exhibit Q; World Supply Inc.

<sup>24</sup> *Ibid.* Belle Chase Marine Transportation

<sup>25</sup> *Ibid.* K&C Shipping, Inc. – dated 24 July 2008

<sup>26</sup> *Ibid.* – Period covering 24-26 July 2008



Item	Item Description	Claimed Amount	Determined Amount	Denied Amount
A	Additional Hire	\$153,923.61	\$153,923.61	\$0.00
B	Additional Fuel Bunkers	\$4,982.50	\$4,978.30	\$4.20 <sup>27</sup>
C	Additional Tugs	\$9,581.44	\$9,581.44	\$0.00
D	Additional Expense to Prevent Further Oiling	\$4,223.00	\$4,223.00	\$0.00
Totals		\$172,710.55	\$172,706.35	\$4.20

The NPFC hereby determines that the OSLTF will pay \$172,706.35 in increased expenses that were not offset or mitigated by the fixed revenue that the claimant received from its customer, CHS. These increased expenses paid by the claimant are in fact lost profit damages which were submitted to the NPFC under claim # N08057-072 and are compensable and payable by the OSLTF.

**AMOUNT: \$172,706.35**

<p>Claim Supervisor: <span style="background-color: black; color: black;">[REDACTED]</span></p> <p>Date of Supervisor's Review:</p> <p>Supervisor Action: <span style="margin-left: 100px;">Approved</span></p> <p>Supervisor's Comments:</p>
---

<sup>27</sup> Is attributed to claimant's rounding error in the fuel calculation.