

CLAIM SUMMARY / DETERMINATION FORM

Date	: 02/03/2011
Claim Number	: N08057-074
Claimant	: Atlas Trading & Shipping, Ltd.
Type of Claimant	: Foreign
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$138,207.55

**FACTS:**

**I. 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, measuring 195 feet in length and 35 feet in breadth, 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 oil were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command (FOSC/UC), initially closed the river to vessel traffic and later, when reopened, managed traffic for the duration of the response.

**II. Responsible Party**

American Commercial Lines LLC (ACL) owned the DM 932 barge at the time of the incident and is a responsible party (RP) under the Oil Pollution Act. On 24 July 2008 the NPFC designated ACL as responsible party (RP), which it denied on 28 July.

**III. The Claimant and the Claim**

**Claimant:**

Chaffe McCall L.L.P. presented a claim to the NPFC for its client, Atlas Trading and Shipping, Inc. (Atlas Shipping) on March 10, 2010, in the amount of \$138,207.55, asserting that Atlas Shipping suffered a loss of profits because of delays in the Mississippi River resulting from the incident. Specifically, Claimant alleged that the ZUNI PRINCESS, a vessel chartered by Atlas Shipping, was delayed for 2 days, 18 hours and 30 minutes (2.7706 days), or \$133,254.75 in additional charter hire expense, \$4,841.97 for additional bunkers consumed during the delay and maneuvers, and incurred additional cable and entertainment (CVE) expenses in the amount of \$110.83.

Atlas Shipping chartered the ZUNI PRINCESS from TBS North America Liner, Ltd (TBS North America) for a "one time charter trip ... duration about 25 days without guarantee." The daily hire rate was \$50,000. The charter party also provided that the Claimant shall pay \$1,200 per month or pro-rata for cable/entertainment. The charter party did not specify that the vessel could be returned early without risk of breach or penalty nor did the Claimant submit information stating that the vessel could be returned early without penalty. According to the ship logs, the vessel was delivered to Atlas Shipping on 17 July 2008 and redelivered to TBS North America on 12 August 2008, for a total hire of 25.186806 days. The Atlas Trading & Shipping Final Hire Statement for the ZUNI PRINCESS reflects that TBS was credited with \$1,259,340.28 (\$50,000 x 25.186806 days) for hire and \$1,007.47 for CVE (25.186806 days x \$40). Atlas Shipping submitted invoices evidencing that it incurred \$4,841.97 in additional bunker costs.

On or about December 7, 2010, the NPFC issued its determination that Claimant was entitled to reimbursement in the amount of \$14,189.74 for its increased bunkers in the amount of \$4,841.97, additional CVE expenses in the amount of \$ 7.47 (0.186806 days x \$40) and additional hire time in the amount of \$9,340.30 (\$50,000 x 0.186806).

### **Claim on Reconsideration:**

Claimant requested reconsideration of the offer on January 27, 2011, on the grounds that TBS North America would not have charged Atlas Shipping for a minimum of 25 days as stated in the charter party but that it would only have charged Claimant with the actual days the vessel was on hire. Claimant submitted two letters in support of this argument. In a letter dated January 18, 2011, Barry P. Leff, Risk Manager for TBS Shipping Services Inc., stated, "The above charter party language was not intended to create a firm minimum duration for the ZUNI PRINCESS charter. On the contrary, had Atlas redelivered the ZUNI PRINCESS after only 22 days (i.e. three days before the estimate provided in the charter party), TBS would not have brought a claim against Atlas for charter hire through the 25<sup>th</sup> day and would only have charged Atlas for the pro rata time the vessel was on charter according to the rate specified in the charter party (\$50,000.day)."<sup>1</sup> A second letter from Avalon Shipbroking (Pty) Ltd. dated 12 January 2011 stated that "there was no guaranteed minimum duration and that there was no obligation on Atlas to pay hire to the Owners for a minimum of 25 days."<sup>2</sup>

### **APPLICABLE LAW:**

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

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.

The Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders 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 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. Reconsideration may be requested only once for each claim denied. The written decision is final. 33 CFR 136.115(d).

### **DETERMINATION OF LOSS:**

#### **ANALYSIS & DETERMINATION**

On 20 January 2011, claimant timely requested reconsideration of the NPFC's initial determination issued on 7 December 2010. The NPFC's adjudication on reconsideration reviews the entire claim and incorporates by reference its initial determination. In its request for

<sup>1</sup> TBS Shipping Services Inc. letter dated 18 January 2011.

<sup>2</sup> Avalon Shipbroking (Pty) Ltd letter dated 12 January 2011.

reconsideration, claimant argued that the NPFC “incorrectly interprets (and in fact misquotes) the charter party in effect....and, as a result, reaches an incorrect conclusion as to the damages suffered by Atlas as a result of the delay.” Claimant argues that it was not required to pay the “about 25 days without guarantee” as provided in the charter party and could have redelivered the vessel to TBS early without risk of breach or penalty. To support its request for reconsideration Claimant submitted a letter from the Risk Manager at TBS Shipping and a letter from the ship broker that negotiated the charter between TBS and the Claimant. Both letters state that the vessel could have been redelivered at 22 days and that early redelivery would not have resulted in a breach of the charter nor would Claimant be liable for a penalty. Claimant met its burden of evidencing that the 2.7708 day delay caused by the incident resulted in a loss of profits of \$138,207.55. This includes \$133,254.75 in additional hire. Additionally, the \$4,841.97 for additional bunker costs referenced in the initial determination is payable. Because Claimant provided evidence that the ZUNI Princess could have been redelivered on the 22<sup>nd</sup> day, the \$110.83 for additional CVE charges initially requested in the original claim is also payable from the OSLTF.

***Determination – Summary on Reconsideration:***

Item	Item Description	Claimed Amount	Determined Amount	Denied Amount
A	Additional Hire	\$133,254.75	\$133,254.75	\$0.00
B	Additional Fuel Bunkers	\$4,841.97	\$4,841.97	\$0.00
C	CVE	\$110.83	\$110.83	\$0.00
Totals		\$138,207.55	\$138,207.55	\$0.00

**AMOUNT: \$138,207.55**

Claim Supervisor:		
Date of Supervisor’s Review:	22 March 2011	
Supervisor Action:	Approved.	
Supervisor’s Comments:		