

CLAIM SUMMARY / DETERMINATION FORM

Date	: 11/1/2011
Claim Number	: N08057-013
Claimant	: Dampskibsselskapet "Norden" A/S
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$194,878.91

I. Facts

M/V Nord Whale

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 (the incident). 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 Nord Whale* (the vessel). Claimant asserted that it suffered a loss of profits and impairment of earning capacity in the amount of \$180,203.01 due to a 4.003-day delay caused by the incident and the subsequent closure of the River. Claimant asserts that it incurred additional tug expenses in the amount of \$14,644.90. The sum certain for this claim is \$194,878.91.²

Norden asserts that it was operating the *M/V Nord Whale* under a North American Grain Charterparty 1973 voyage charter with Archer Daniels Midland Shipping Company (ADM).³ According to documents in the file, but conflicting with the submitted charter party, the vessel was chartered to ADM to carry 43,798.136 tons of grain from New Orleans (U.S. Gulf ports) to Santa Marta, Colombia and Barranquilla, Colombia, under an agreed freight rate of \$38.00 per metric ton (MT), less a 5% commission.⁴

¹ See House Subcommittee Hearing on DM 932 Oil Spill, dated September 15, 2008.

² Claimant miscalculated the sum certain. It is \$194,847.91.

³ The charter party submitted with the claim is dated January 8, 2008, and the charterer is Archer Daniels Midland Shipping; however, the vessel delivery date to the charterer is January 2008 and the two discharge ports are in the Dominican Republic. The dates and the discharge ports on this charter party conflict with other facts presented by the claimant.

⁴ The submitted charter party provides that the freight rate is \$46.75 per metric ton.

At the time of the incident, the vessel had completed loading cargo at ADM and began transiting the passage down river towards the first discharge port to Santa Marta when it arrived and anchored at AMA anchorage on July 24, 2008 because of the river closure. The Claimant alleges that profits were lost when the M/V Nord Whale was delayed on the Mississippi River for a total of 4.036 days, (July 24, 2008 at 0220 - July 27, 2008 at 2042), and at the Boothville Anchorage decontamination site on July 28, 2008 (at 0422 -1005). The Claimant states that the first delay was caused by the Captain of the Port-ordered enforced safety zone. Claimant asserts the second time delay occurred when the vessel was required to anchor at the Boothville anchorage for Coast Guard ordered decontamination, prior to continuing out to sea.

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 U.S.C. § 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 be 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 U.S.C. §2713(e). Those 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 U.S.C. §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 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).

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.

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)

The amount of compensation is limited to the actual net reduction or loss of earnings or 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)

V. Findings of Facts

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 has 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 the Claim

Claimant provided a record of the incident and the vessel’s events by submitting the Intermare Agency Services, Incorporated’s Port Log – Statement of Facts of the *M/V Nord Whale* to demonstrate that the Mississippi River was closed due to the incident and that vessel traffic was redirected during the oil removal response.⁵ The Statement of Facts also details the Notices of Readiness, time periods for loading cargo at ADM and for discharging cargo at Santa Marta and Barranquilla ports in Colombia.

Claimant calculated its loss of profits by using a time charter equivalent⁶ methodology. As the vessel owner, the Claimant alleges it suffered a loss of \$180,203.01, based on calculating the freight income (\$1,702,248.00) *minus* freight income commission, despatch,⁷ bunker expenses, and port expenses (\$705,576.04) and then *dividing* that figure (\$996,671.96) by the number of voyage days (26.1429) (assumedly from the day the vessel was delivered to the charterer to the

⁵ See Intermare Agency Services, Inc. Port Log-Statement of Facts Danish – *M/V Nord Whale* pages 2-3.

⁶ See Dampskibsselskapet “Norden” A/S OSLTF Claim Form received 03/16/09, item 9.

⁷ Claimant asserts that the despatch loss of \$219,641.25, which is part of the deducted expenses, is based on the daily despatch rate of \$37,500 multiplied by the 2.5160 days saved in New Orleans and the 3.3411 days at the two discharge ports, Santa Marta and Barranquilla, Columbia.

day the vessel was redelivered to the Claimant.⁸ This number (\$38,124.00) represents the earnings per day for the voyage.

Claimant then calculated the time charter equivalent for an imaginary voyage without the 4.003-day delay. Again the freight income (\$1,702,248.00) minus the expenses (\$705,576.04) and dividing that figure (\$996,671.96) by the number of voyage days that excluded the 4.003 day delay (22.1399). This number (\$45,017.00) represents the earnings per day if there was no delay. Claimant multiplied the difference in these daily earnings (\$6,893.00) by the number of actual voyage days (26.1429) to arrive at the alleged loss of profits of \$180,203.01.

Claimant submitted invoices totaling \$14,644.90 for additional tug costs incurred because of the incident. Claimant notes in its April 23, 2009 correspondence to the NPFC that the additional costs, as noted in the Port Log-Statement of Facts, stem from the tug activity on July 24, 2008 at 0220 when Tugs *Commander* and *St. James* take the *M/V Nord Whale* to 'deep draft anchorage' to await re opening of the river; and from the activity on July 27, 2008 at 2015 when the same tugs take the *M/V Nord Whale* from the lay-by anchorage when the river re-opened.⁹

The following is the cost breakdown for the tugs on **July 24, 2008**¹⁰:

Tug *Commander*: Anchor at AMA Anchorage-116 in Zone 1 = \$3,395.00

27,989 GRT Charge of 28 x \$26.00 = \$728.00

Tug *St. James*: Anchor at AMA Anchorage-116 in Zone 1 = \$3,395.00

27,989 GRT Charge of 28 x \$26.00 = \$728.00

Subtotal: \$8,246.00 - Less 40% Discount: -\$3,298.40 = \$4,947.60

Fuel Surcharge: 48% x \$4,947.60 = \$2,374.85

\$4,947.60 + \$2,374.85 = **Total: \$7,322.45**

The following is the cost breakdown for the tugs on **July 27, 2008**¹¹:

Tug *Commander*: Sailing at AMA Anchorage-116 in Zone 1 = \$3,395.00

27,989 GRT Charge of 28 x \$26.00 = \$728.00

Tug *St. James*: Sailing at AMA Anchorage-116 in Zone 1 = \$3,395.00

27,989 GRT Charge of 28 x \$26.00 = \$728.00

Subtotal: \$8,246.00 - Less 40% Discount: -\$3,298.40 = \$4,947.60

Fuel Surcharge: 48% x \$4,947.60 = \$2,374.85

\$4,947.60 + \$2,374.85 = **Total: \$7,322.45**

Total Additional Costs: \$14,644.90

VII. NPFC Analysis of the Claim:

Nordisk submitted the claim, on Norden's behalf, to the OSLTF on March 16, 2009, alleging that the *M/V Nord Whale* was delayed by the incident and that the incident resulted in a loss of profits

⁸ The NPFC cannot verify the 26.1429 days because neither the applicable charter party nor a complete copy of the Ship's Logs was submitted with the claim.

⁹ See 03/02/09 letter from [REDACTED] Nordisk Legal Services, to [REDACTED] Worley Catastrophe Response, LLC.

¹⁰ See Moran New Orleans Duplicate Invoice # 216145 to Norden A/S, dated 07/30/08.

¹¹ See Moran New Orleans Duplicate Invoice # 216156 to Norden A/S, dated 07/30/08.

in the amount of \$194,878.91. This includes an alleged \$180,203.01 in lost revenue due to the delay on the River that increased its voyage time by 4.003 days. The NPFC reviewed the ship's logs and determined that the loss period is slightly less than asserted by the Claimant.

According to the Intermare Agency Services, Inc. Port Log – Statement of Facts, the vessel loading at the ADM terminal was completed on July 23, 2008 at 2350, approximately 12 hours after the incident occurred. The loading process was not affected or delayed by the incident. The vessel began transiting down river at approximately 0220 on July 24, 2008, and arrived and anchored at AMA Anchorage at 0300 on that day. The vessel remained at AMA Anchorage from 0300 on July 24, 2008 until 2042 on July 27, 2008 when it departed AMA Anchorage. The vessel arrived and anchored at Boothville Anchorage at 0422 on July 28 and awaited a U.S. Coast Guard hull inspection. It departed Boothville Anchorage at 0908 on July 28, 2008. Based on the port log the NPFC determines the delay time to be 3.937 days.

Delay time due to the oil spill and response alone does not establish a loss of profits or earnings claim under OPA. Claimant initially argued for using a time charter equivalent (TCE) to calculate its alleged loss of profits. TCE is a measure of the average daily revenue performance of a vessel on a per voyage basis. TCEs are typically used to measure and manage fleet revenues and to compare the results between geographic regions and their competitors. Claimant's utilization of this methodology does not establish a loss of profits under OPA. In the case of this voyage, the *M/V Nord Whale* received all of the revenues anticipated and contracted for, as acknowledged by the claimant and demonstrated that no follow on engagement (revenue) was lost. Fixed costs/expenses of the vessel owner continued as they would regardless of voyage.

Even if TCE was an appropriate methodology there are at least two issues with the method as utilized by the Claimant in this case. First, Claimant only considers certain expenses, i.e., the commission, despatch, bunkers and port expenses. An actual and true picture of an average daily revenue would include fixed expenses, i.e., insurance, maintenance and mortgage costs. Without all the expenses, both fixed and varied, Claimant's calculated true average daily revenue is not reflected. Additionally, Claimant applies the difference between the actual daily revenue to the imaginary daily revenue to the entire voyage period of 26.1429 days, rather than to the delay period of 4.003 days. This appears to inflate the alleged lost revenue because it applies the difference to the entire voyage.

Second, in order to successfully use a TCE to calculate lost profits under OPA the Claimant would have to compare this voyage with other similar voyages, i.e., travelling from the Mississippi River to the same two discharge ports.¹² In this case Claimant compared the delayed voyage to an imaginary voyage, i.e., one where there would have been no 4.033 day delay. A comparison of similar voyages, voyage times and expenses might, under certain circumstances, establish that the 4.003-day delay resulted in a loss of profits.

In summary, the Claimant provided no evidence of an OPA-compensable loss of profits. The October 3, 2008 invoice to ADM reflects that the Claimant was credited its freight revenue, \$1,702,248.01 as provided under the terms of some agreement or charter party. Claimant provided no comparable revenue records for the vessel under similar voyages nor did it provide evidence that the Claimant lost a subsequent charter for the *M/V Nord Whale* because the vessel was delayed the 4.033 days and could not meet the vessel delivery date that resulted in a loss of profits.

¹² See Claims Regulations at 33 CFR 136.233(c).

In what appears to be a secondary argument for establishing a loss of profits, the Claimant focuses on demurrage and despatch payments in which, it appears the Claimant is asserting that the delay in the Mississippi River actually caused the charterer to load and unload the cargo in less time than allowed for causing the owners to have to credit the charterers. In fact, the Claimant argues that had the vessel not been delayed by the oil spill the Charterers would have used more than the allowed time for onload and discharge and the Charterer would have owed the owners.¹³ No argument or explanation trying to link or demonstrate how the delay would have caused either of these assertions is in fact provided by the Claimant. Claimant argues that it paid despatch totaling \$219,641.25 to the charterer due to the incident. It is unclear whether Claimant submitted the documents reflecting the Charterer's saved time to support the despatch expenses in its TCE calculation or whether Claimant is offering an alternate theory of reimbursement for lost profits. The NPFC explains the flaws in the TCE approach to calculating lost profits under OPA above.

If the despatch information is provided to support an alternate theory for reimbursement it too fails. Claimant argues that the charterer saved \$219,641.25 in despatch because of the delays on the River and if the *M/V Nord Whale* had not been delayed it would have earned demurrage from the charterer rather than the Claimant owing despatch to the charterer. The lay time allowed for loading and discharging cargo and the daily demurrage and despatch rates are determined between the owner and the charterer and provided in an agreement or charter party.

Claimant argues that the loading of the cargo at ADM on the Mississippi River was completed in 1.4840 days, saving 2.5160 days in lay time at the load port and saving a total of 3.3411 days of lay time at the discharge ports, Santa Marta and Barranquilla, saved time totaled 3.3411 days. Thus, Claimant argues, it owed the charterer \$219,641.25 in despatch for 5.8571 saved days.

There is no evidence in the record reflecting that the despatch owed to the charterer resulted from the delay on the Mississippi River. The cargo loading at ADM on the River was completed on July 24, 2008, about 12 hours after the incident occurred. There is no evidence that the loading process was affected, delayed or accelerated by the incident. The vessel's first effect from the incident was when it anchored at AMA Anchorage on July 24, 2008. Nor is there evidence in the file that the saved time for discharging cargo at the two Colombia ports was due to the delay on the Mississippi River. Claimant seems to say that if the vessel had arrived at the Santa Marta and Barranquilla ports four days earlier it would not have paid despatch but would have been owed demurrage because of conditions at the port or berth. This is speculation because one would have to assume that all other factors and events would remain the same as the delayed voyage, i.e., same weather and sea conditions, vessel speed, no mechanical problems or delays.

The Claimant failed to prove its loss of profits or impairment of earning capacity damages. As discussed above it has not established that the alleged 4.003 day delay resulted in a loss of profits.

The Claimant has provided documentation that demonstrates that due to the oil spill and the river closure for response purposes that once it cleared its loading berth, it had to anchor and required tugs to both assist in the anchoring and to turn the vessel when they weighed anchor.¹⁴ The documentation provided by Intermare Agency (port agent) also shows that because the Coast Guard required the vessel to anchor again at Boothville for an inspection for oil on the hull, \$3,391.62 in additional pilot charges were incurred and paid by the Claimant.¹⁵ The

¹³ This assumes that the contract which was actually in place (and not provided) reads similarly to the charter that was provided with this claim which was for a different voyage.

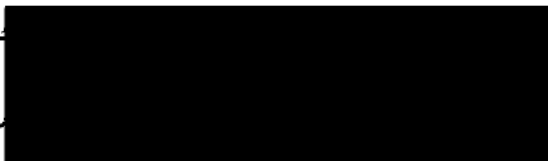
¹⁴ Intermare Agency Services Port Log Statement of facts *M/V Nord Whale*.

¹⁵ Intermare Agency Disbursement Account Summary voyage # 6917 for NORDWHALE.

documentation for the additional tug services supports an increased expense of \$14,644.90.¹⁶ The Oil Spill Liability Trust Fund is available to pay *uncompensated* (emphasis added) removal costs and damages. In this case Claimant provided invoices that evidence that additional costs resulted from the incident and additionally provided documentation from Internare that \$146K was wire transferred to them to cover these and other port expenses.

The Claimant has failed to show loss of profits or earnings through either Time Charter Equivalency (TCE) or through demurrage/dispatch differential. However, the evidence provided does demonstrate that the oil spill resulted in increased expenses in the amount of \$18,036.52 resulted from the oil spill and directly reduced the Claimant's profit for the subject voyage.

VIII. Determined

Claim Supervisor: 

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments:

¹⁶ Moran New Orleans invoices 216145& 21656 both for Nord Whale.