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In the Matter of the Arbitration between NORDEN A/S, As Claimant/Disponent Owner of the MV GERTRUD SALAMON
- and - INTEGRITY COAL SALES, As Respondent/Charterer, Under an Americanized Welsh Coal Form (Amended
1979) Charter Party, dated December 17, 2007

No. **4036**

June 12, 2009

PANEL: Mr. John F. Ring; Mr. Klaus C. J. Mordhorst; Austin L. Dooley, Ph.D., Chair

COUNSEL:

Attorney for Claimant
FREEHILL HOGAN & MAHAR, LLP
Michael E. Unger, Esq.
Manuel A. Molina, Esq.

Attorney for Respondent
FLAVIN & O'BRIEN
Mark C. Flavin, Esq.

DECISION: Decision and Final Award

INTRODUCTION

This arbitration arose out of a voyage charter party between Norden A/S (Norden), as Claimant and Disponent Owner of the M/V GERTRUD SALAMON and Integrity Coal Sales (Integrity), as Respondent and Charterer. The proforma charter party was on the amended 1979 Americanized Welsh Coal form.

THE CLAIMS

Disponent Owner asserts a lost profits claim for \$ 889,812.86 (Owner's Exhibits P and T, Paludin-Muller Tr 535), plus interest, costs, and attorneys' fees as a result of an alleged wrongful cancellation of the charter by Integrity on January 15, 2008. Charterer rejects Owner's claim in whole and in turn seeks recovery of its attorney's fees, costs and expenses and an award against Norden for the panel's fees in total.

BACKGROUND

Integrity, a coal trading company with offices in the United States, had sold a cargo of a particular blend of steam coal to Sempra, an energy trading concern in the U.K. This cargo was to be shipped to the Humber International Terminal (HIT) at the DRAX Power Station at Immingham, United Kingdom. The parties had a long term prior relationship.

Integrity was to assemble and blend the cargo to specification at its assigned location at the CNX Terminal, Baltimore. There the coal was stored in piles designated for specific users of the terminal. There were five piles for Integrity's cargoes, two for steam coal and three for metallurgical or coking coal. Piles # 54 and # 54A were used for Integrity's steam coal cargoes. The piles were restocked as cargo was loaded onto vessels and space would open up for the next cargo to be railed forward for storage in the designated piles

On December 17, 2007, Integrity fixed with Norden a "vessel to be named" (TBN) based on an amended Americanized Welsh Coal Charter form (amended 1979) for a voyage carrying 63,000 to 70,000 metric tons (MT) coal minimum/maximum (min/max), from Baltimore to Immingham or Rotterdam, with laydays and cancellation (lay/can) February 1 / 15, 2008. The freight rate was \$ 41.00 per MT on a Free In/Out Trimmed (FIOT) basis for Rotterdam and \$ 42.00 per MT FIOT for Immingham.

The agreement was recapitulated in a fixture-recap, dated December 18, 2007 and sent to Norden's representative in its Annapolis office by Charterer's broker Lalemant (USA) Inc. That recap described the cargo as "63-70,000 MT

Min/Max coal..." to be shipped from "...1 SB Baltimore/1 SB HIT Immingham or Rotterdam..." (Owner's exhibit A). Norden promptly acknowledged the recap as in accordance with the parties' negotiations.

On January 3, 2008 the CNX Marine Terminal in Baltimore reported a structural deficiency in Pier 2 of the Terminal, resulting in the suspension of all cargo operations from that terminal. On January 4, 2008 Integrity was informed by CNX of that fact and later that week was informed that repairs would take up to four weeks and accordingly CNX had declared Force Majeure on January 3, 2008 at 2130 hours. During the shutdown, terminal personnel up-dated the users and others in weekly teleconference briefings on the progress of the repairs. Normal operations finally resumed on February 1, 2008, very much in line with the initial estimates.

At the time of CNX's declaration of the Force Majeure, Integrity had most of a cargo of steam coal on the ground in piles # 54 and # 54A, with some part of it still in rail cars on its way to Baltimore. That cargo had been sold to Constellation Energy Commodities Group, Inc. and contracted to be shipped in early January on the M/V Northern Friendship giving an ETA Baltimore of January 8. With that schedule obviously no longer workable, Integrity and the owners of the Northern Friendship mutually agreed to defer the shipment into February 21/1 March and to redirect the ship to other business.

The cargo in piles # 54 and # 54A on January 4 was later shipped to Hanseatic Coal & Coke for discharge in Wedel, Germany and was lifted on February 8 on the M/V Eastern Power. It was the first Integrity cargo to move after the reopening of the CNX terminal.

As a further consequence of CNX's Force Majeure declaration, Integrity also had to work out its contractual obligations with SEMPRA for the DRAX cargo with delivery at Immingham during the end of February arrival window. After first offering the cargo to be shipped to Rotterdam instead, the parties eventually agreed to postpone that cargo into early April to the HIT Terminal at Immingham at a discounted price. That meant the cargo would not be loaded until some time mid March.

While these discussions were being held, Integrity, on January 15, 2008, via broker channels, declared Force Majeure on Norden and cancelled the Norden TBN charter party of December 17, 2007. Integrity explained that the coal presently at their stockpiles in Baltimore could not be lifted due to CNX's Force Majeure and that therefore the coal to be blended to DRAX's specifications and intended to be lifted by the Norden TBN could not be railed to their stockpile in time for the agreed laydays (Owner's Exhibits C and N). Norden, on January 16, rejected Integrity's Force Majeure notification (Owner's exhibit N).

Thereafter, Integrity, through its broker Lalemant, proposed for Norden to carry a cargo of coal to Wedel, Germany instead of the intended lifting to Immingham or Rotterdam. Norden responded on January 18 with an offer based on a financial result equivalent to what it would have generated under the Immingham voyage (Owner's Exhibit O). Integrity countered at a rate that was \$ 3.50 less than the original rate, but still above the then current market level, the market having substantially declined since the December 17 fixture. Norden declined and further communications regarding this cargo ceased.

On January 23, 2008 Norden reiterated its rejection of Integrity's Force Majeure notification. Integrity remained inflexible and on January 24 advised Norden to feel free to pursue its claim (Owner's Exhibit N).

Having rejected the cancellation, Owner fixed the M/V Gertrud Salomon on Jan 28, 2008 and nominated her to Integrity as the performing vessel under the Norden TBN Charter of 12/17/07 with an estimated time of arrival (ETA) Baltimore of February 10, 2008.

On January 28 Integrity maintained its position that the Norden fixture was cancelled due to the Force Majeure and on January 29, 2008 fixed the M/V Eastern Power to load the Wedel cargo at CNX Terminal with laydays of Feb 3/12. The vessel loaded between February 8 and 10 and sailed thereafter.

On January 30, Norden then fixed the M/V Gertrud Salomon in mitigation. The vessel was fixed to Arcelor-Mittal for a coal cargo from Norfolk to Dunkirk at a rate of \$ 26.00 per MT. Norden also notified Integrity of its claim for damages, which it estimated to be \$ 1,008,404.57 (subsequently reduced to \$ 889,812.86), comprising the lost profit under the Integrity charter and the loss incurred under the mitigation Arcelor-Mittal charter.

On March 12, 2008 Norden filed a Rule B injunction with the United States District Court District of Maryland for \$ 1,358,537.64. Eventually, however, Integrity placed the sum of \$ 1,200,000 into an interest bearing Escrow Account, pending the outcome of this arbitration.

PROCEEDINGS:

The arbitration clause provides for arbitration in New York before three commercial shipping men and incorporates the "NYSMA small claims procedure for any dispute below USD 50,000."

Arbitration was commenced by Norden with the appointment of Mr. Ring on February 15, 2008 and Mr. Mordhorst by Integrity on March 5, 2008. Dr. Dooley accepted the chair appointment offered by Messers. Ring and Mordhorst on March 20, 2008. A schedule was set and six hearings were held in Manhattan during which four witnesses testified,

numerous exhibits were received into evidence from both parties and post-hearing submissions and reply-briefs were exchanged and received by the panel.

ARGUMENTS:

Owner raises the following issues to be determined by the panel:

- . If the "fixture recap" of December 18, 2007 as prepared by Integrity's broker, stipulates "one safe berth, Baltimore", then the temporary shutdown experienced by the CNX Marine Terminal from January 4 to January 31, 2008 becomes immaterial to this arbitration and the repudiation of the charter by Integrity. Integrity, therefore, had no right whatsoever to declare the charter null and void on January 15 and was obligated to make coal available to the Norden vessel at the Chesapeake Pier Terminal or any other available berth within the port of Baltimore within the charter's laycan period.
- . If on the other hand the load port description of the Pro-Forma charter "CNX Marine Terminal, Baltimore, Maryland" prevails, must it follow that the Norden charter was for a "stemmed" cargo?
- . If the cargo was a "stemmed" cargo, the panel would be required to determine whether Integrity met its burden of proving that the conditions explicitly set forth in Clause 4 of the pro-forma charter existed at the time Norden's performing vessel would have been ready to load at the CNX marine terminal.
- . If the conditions of Clause 4 were met, did Integrity meet its burden of proving that it attempted to comply with its contractual duties to Norden, despite the occurrence of the event that Integrity claims constituted Force Majeure?

Charterer contends as follows:

- . The only straightforward issue to be decided by the panel concerns the question of whether the cargo to be loaded onto the Norden TBN was a "stemmed" cargo and, therefore, the CNX Force Majeure prevented Integrity from loading that cargo within the agreed laydays.
- . The stipulation of "one safe berth Baltimore" in the fixture-recap was an admitted erroneous oversight by the broker preparing it, as the parties all along had been under the understanding that the loading berth would be the CNX Terminal in Baltimore and that the cargo was to be shipped to the HIT Terminal at Immingham.
- . Norden failed to diligently mitigate its damages when it refused to accept Integrity's offer of the Wedel cargo, at the same time reserving its rights to assert a claim later, should it have suffered damages as a result.
- . Integrity at all times acted in good faith and was not obliged to take extraordinary steps to maintain the Norden charter.

The relevant sections of the Fixture Recap (Dec. 18, 2007) and the Charter Party clauses (Pro-forma dated July 25, 2007) relevant to the disputes here are excerpted as follows:

Fixture Recap:

63-70,000 MT Min/Max coal
 1 SB Baltimore/1 SB HIT Immingham or Rotterdam
 1-15 Feb
 USD 41.00 PMT FIOST bss Rdam
 USD 42.00 PMT FIOST bss I'ham basis 13.5 M AD
 Owise as per Navios/Integrity Amwelsh 79 C/P dated 25 July 2007 with logical amendments

Charter Party:

Cls. 1. ...proceed to CNX Marine Terminal, Baltimore, Maryland; and there load ... a full and complete cargo of coal in bulk, stowage factor about 42 cubic feet per metric ton ...
 Cls. 4. ... In the event of any stoppage or stoppages, arising from any of these causes continuing for the period of six running days from the time of the vessel's being ready to load, this Charter shall become null and void; ...

DISCUSSION AND DECISION:

The threshold issue in this arbitration hinges on which version of the load port description prevails; the **1 SB Baltimore** as stipulated in the Fixture Recap, as Norden insists, or the **CNX Marine Terminal, Baltimore, Maryland** as per the referenced Pro-Forma charter party, as Integrity argues.

Integrity contends that from the outset of their negotiations the parties understood that this cargo was specifically intended for delivery to the HIT Terminal at Immingham, UK. They argued that it involved a special grade of coal for the use at the DRAX Power Station, which could only be blended to specification at Integrity's steam coal piles (# 54 and # 54A) at the CNX Marine Terminal. It was, therefore, a stemmed cargo.

Once the CNX Terminal suffered a structural failure at its loading berth, suspending all loading operations for the better part of the month of January, there was no way for Integrity to rail in the types of coal necessary for the special blend required at Immingham. This was further complicated by the fact that another grade of coal occupied the two coal piles at CNX, which had to be cleared out before the Immingham cargo could be railed into place. With all loading and shipping suspended, Integrity saw no alternative but to declare Force Majeure on Norden and declare the charter null and void. After renegotiating its sales contract with Sempra for later laydays, Integrity argued that it made a good faith effort to mitigate its situation with Norden by proposing for Norden to load the Wedel cargo, which was on the ground at CNX Marine Terminal, but at a rate more consistent with the drastically reduced freight rate level at that time. Norden refused to discount its freight rate and further negotiations ceased.

Norden declined the Force Majeure declaration, fixed and nominated the Gertrud Salamon to Integrity on January 28, 2008 in accordance with the December 17, 2007 charter party.

It is Norden's position that it fixed a non-specific cargo of coal to be loaded at one safe berth at the port of Baltimore for either Immingham or Rotterdam at separate agreed freight rates. The temporary structural deficiencies at the CNX Terminal, therefore, should not have prevented Integrity from loading coal, any coal, at any other suitable berth within Baltimore. Its vessel, the Gertrud Salamon, was ready and able to load such cargo within the agreed laydays, at which time the CNX Terminal was up and running normally, having had by then at least one ship already loaded and dispatched.

Norden contends that Integrity was not entitled to declare Force Majeure on January 15 for a vessel with laydays February 1/15 and the CNX Terminal expecting to resume normal loading operations by February 1. With no other solution to be expected from Integrity, Norden fixed the Gertrud Salamon to Arcelor-Mittal for a coal cargo from Norfolk to Dunkirk with laydays of February 5/20 at the rate of \$ 26.00 per MT in mitigation of its damages.

Having carefully reviewed the witnesses' testimony and the substantial evidence submitted by the parties during the course of the six hearings, we find unanimously, being fully cognizant of the broker's admission that he committed an error, but one which was not reconciled until very much later after the CNX incident had already occurred, that the "one safe berth Baltimore" provision of the fixture recap prevails. The fixture recap is the clearest representation of the parties' intentions at the time of the negotiations and outweighs the alternative language of the pro-forma charter party. If Integrity really had meant this to be a contract for a stemmed cargo of a specific grade and from a defined load berth to a defined discharge berth, all it had to do was to include those specifics in its fixture confirmation. As it failed to do so, it is now saddled with the consequences. The "coal" cargo was thus not a "stemmed" cargo.

Having found as above, the arguments raised with respect to Charterer's Clause 4 obligations become mute.

With respect to Integrity's argument that Norden should have accepted or further negotiated the alternative cargo to Wedel, we agree that once it was clear that the Immingham cargo would not be available it might have been more prudent for Norden to work out a better financial result and reserve its right to damages, but we find that it did not have an obligation to do so. Given the circumstances of the market and the timing, we find Norden's efforts in mitigating its damages sufficiently effective. We are also satisfied with the calculation of those damages and rule that Norden's claim succeeds.

INTEREST:

Interest on the funds deposited in the Escrow Account is awarded and shall continue to accrue at the rate established by the parties to the Escrow Account until final release and full payment to Norden has been made in accordance with this Final Award.

ATTORNEYS' FEES AND COSTS

The SMA Rules authorize the panel to award an allowance toward attorneys' fees and expenses. Both parties have requested an award of such costs. The panel has considered the value of the claims and counterclaims asserted by the parties and the circumstances of the case. Based on our analysis of those criteria, the panel concludes that Owner is entitled to an allowance of \$ 94,266.00 towards its attorneys' fees and costs incurred through the date of this award.

ARBITRATORS' FEES AND EXPENSES:

The Arbitrators' fees are to be settled as enumerated in Appendix A, which by this reference becomes part of this Final Award. The fees are the joint and several obligation of the parties.

THE AWARD

Having found as above, we direct Integrity to pay Owner the sum of \$ 998,103.26, in the first instance by applying the funds of the Escrow Account, together with the accumulated interest on the lost profit amount awarded, within 30 days of the date of this award.

We have arrived at this amount as follows:


Lost profit on voyage	\$ 889,812.86
Attorneys' Fees and Costs	\$ 94,266.00
Arbitrators' Fees and Expenses paid for Charterer	\$ 14,024.40
Total Due Owner	\$ 998,103.26

This Final Award may be enforced by a court of competent jurisdiction.

New York, New York

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