

# SHIP MANAGEMENT

I N T E R N A T I O N A L



## Give a little whistle

Industry slams pollution  
dash for cash



# Rewarding *the* reprobates?

Helen Jauregui reports on how US whistleblower rewards are compromising environmental compliance

Marking back to schoolday times when telling tales could gain you a reputation as a snitch, you would think seafarers face a difficult choice when witnessing MARPOL violations onboard – do they turn ‘whistleblower’ and report the violation to the authorities, or do they remain silent, perhaps for fear of losing their reputation or even their job? But this vision of the seafarer wrestling with, or at least shadowboxing in the direction of, their moral (and contractual) duties to ensure environmental compliance, could be dangerously rose tinted.


In the US, whistleblowers who report violations of the Act to Prevent Pollution from Ships (APPS) – such as illegal discharges of sludge and oily bilge water – to the US Coast Guard, can be entitled to a ‘bounty’ provision as a reward for reporting these legal breaches. Such rewards can be significant, as APPS stipulates that, at the discretion of the federal district court in question, a sum of up to half the amount of the fine paid for an APPS violation can be paid to the individual who provides information leading to such a conviction.

This award system is designed to support whistleblowers who report shipboard failures to comply with APPS, but as US-based maritime lawyers have confirmed, a number of high-profile cases have surfaced where, perversely, the whistleblower was complicit in the pollution process and/or failed to report it over a number of months to their employer, superintendent, manning agency, the Master and/or other port state control authorities – preferring to wait until the vessel visited a US port, where the possibility of a bounty beckoned.

Jeanne Grasso, Partner at law firm Blank Rome in Washington, DC, confirmed that such bounty awards were designed with good intentions, with the purpose to “encourage the disclosure of violations that would otherwise be very hard for the US Government to detect,” particularly where a company is not listening to employee reports of regulatory violations, choosing to operate in a non-compliant manner and refusing to correct problems.

Where there are serious shipboard violations which a shipping company is aware of but refuses to fix, Ms Grasso said whistleblowers may play an important role in





bringing such firms to justice and so, a monetary reward may be justified. "Unfortunately, what it has morphed into is that when whistleblowers are not bringing problems forward to their company, they are not giving their employer the opportunity to fix these problems, which is the intent and purpose of the International Safety Management (ISM) Code - to hold shoreside management accountable for shipboard operations."

In a high-profile case defended by MARPOL specialist George Chalos of Chalos & Co International Law Firm, Italian owner Giuseppe Bottiglieri Shipping has requested a

\$500,000 bounty for five whistleblower crew mates, to be denied, as the owner claims the seafarers' conduct undermined environmental compliance onboard the bulker *Bottiglieri Challenger*. In a motion to the court requesting the award, it was claimed by the government without support that these seafarers 'fear retaliation not just by their employer, but by manning agencies and other shipping companies with which they may seek future employment' and so, the motion states, a monetary award, as provided by APPS would be a fitting reward for the crewmembers, in 'taking those risks' and will also provide an incentive 'for other crewmembers to come forward and report illegal conduct on vessels in the future'.

Conversely, Giuseppe Bottiglieri Shipping argued that the seafarers did not follow company procedures for compliance, failing to tell the vessel's Master and the company's designated person ashore about so-called 'magic pipe' activity onboard.

As the vessel had visited a Brazilian port soon before reaching the Port of Mobile, Alabama, but the seafarers did not report the violation until reaching the US, Giuseppe Bottiglieri Shipping maintains that the whistleblowers were incentivised towards non-compliance by the potential for a significant monetary award through the APPS system and so, purposefully failed to report violations until reaching US waters.

Commenting generally on the failure of seafarers to report shipboard violations until they reach the US, Jeanne Grasso said: "When we defend companies in MARPOL cases, we develop timelines which recognise when the whistleblower got onboard, when the pollution or non-compliance was identified and how many times it happened, what the whistleblower did to gather

information, how many port calls there were, how many superintendent visits, and whether they told anyone about it.

"In several cases, the improper discharges were identified months before the ship ever got to the US - commonly, the pollution would continue during that period and the whistleblower wouldn't report it shoreside or to the Master, then it would be reported to the Coast Guard when the ship came to the US. It is common following these reports, that the whistleblower asks about a reward soon after, so it is very clear that they know about the prospect of a reward. That is the problem."

Ms Grasso added that before asking for a reward, she believes the Department of Justice should look at the facts which underlie the report and consider, on a case-by-case basis, whether an award is appropriate: "If the company failed to fix ongoing problems, I have no issue with an award - it's just in cases where the company has no reason to be aware of the problem or no opportunity to fix the problem because it's never been identified to them and the whistleblower allows the pollution to go on without telling anyone - this has become endemic."

Mr Chalos agreed that although the APPS system for whistleblower awards was designed with good intentions, this has been abused in recent times: "I don't think there's anything systemically wrong with the law, as it is written. I am in favour of whistleblower awards but my gripe is the application of the law to the many good owners who are victimised by opportunistic and on occasions, disgruntled rogue employees. If whistleblowers are complicit in the pollution, they should be punished too."

Orders to pollute are said to often come, directly or indirectly, from the Chief Engineer, but Mr Chalos said seafarers



“ If whistleblowers are complicit in the pollution, they should be punished too  
George M. Chalos, Owner, Chalos and Co. ”

asset in shipping, are not property and the government shouldn't treat them like property and force them to get off the ship and stay in a hotel - they are human beings.”

Another interesting facet to the Bottiglieri case is the claim that the whistleblower award was initially granted with no opportunity for Mr Chalos's client to contest this in court. The judge has since vacated the order granting the award and offered an opportunity for Giuseppe Bottiglieri Shipping to put forward a brief. Shortly after receiving the company's objection, the judge simply reinstated her order directing that a \$500,000 bounty be paid to the whistleblowers without any analysis by the court.

Though there is a common misperception that the ship owner must pay any fine, historically, there have only been a few prosecutions of ship owners (unless they are also the operating party, as in the case of Giuseppe Bottiglieri Shipping) - fines are in fact nearly always paid by the third party ship manager/ship operator.

But there are exceptions to this rule. “The government looks at culpability and often, the ship owner is merely a passive party who contracts with a technical manager and so, the owner is not typically brought into the case. We are not really seeing it yet, but the government has said it would like to look at owners more because, it has argued, the third party technical manager is truly an agent of the owner and so, the owner should be culpable as well,” Ms Grasso said.

In the case of Ms Grasso's client, technical management firm Efploia Shipping, which operated the *Aquarosa*, on behalf of Danish owner Aquarosa Shipping, (a subsidiary of Falcon Rederi) - both the owner and the technical manager ended up paying a fine after a whistleblower reported the overboard discharge of oily bilge water using the ship's general service pump, in addition to the dumping overboard of oily rags in plastic bags. This illegal dumping was not recorded in the ship's record books, which in itself is a MARPOL violation.

Efploia Shipping is currently contesting the award of a bounty to the Third Assistant Engineer of *Aquarosa* on the grounds that this whistleblower's conduct, as Efploia has

argued in court, was ‘contrary to public policy and compromised, rather than furthered, environmental compliance’. The court has also asked the government to provide documentation on what standards it uses to request an award.

To enable a vessel to continue operating after a MARPOL investigation begins, shipping companies must usually agree to post a considerable bond before the vessel will be granted clearance to depart the US port. Efploia Shipping and Falcon were required to post a security bond of \$2million, in addition to paying living expenses and full wages for the nine crewmembers who were removed from the vessel (while these seafarers remained in the US for months).

In such cases, the posting of a bond is designed to cover any potential fine, but according to Ms Grasso, payment is not an admission of culpability on the technical manager/owner's side, as they must pay this in order to get their ship operating again as soon as possible: “Most companies we've dealt with have wanted to minimise costs - they want to quickly negotiate and get the security agreement in place, get their ship trading again, and try to resolve the case as expeditiously as possible.”

Of course, it could be argued that if an individual holds a financial incentive to turn their Chief Engineer or shipping company in, it might be assumed that their testimony could be tainted or that they could be an accomplice, but according to New York-based lawyer and maritime blogger Clay Maitland, federal prosecutors don't appear to care, so long as the whistle is blown: “It doesn't seem right to me that a person who participated in the actual pollution process as

should observe what is commonly stipulated in their employment contract - that they should refuse illegal orders and to report the situation to the Captain and Designated Person Ashore without delay.

Although whistleblowers often allege the Chief Engineer or Second Engineer ordered or bullied their subordinates into allowing shipboard violations, Mr Chalos said this should lead the court to question why the seven or so lower ranking officers did not stand up to their superiors and refuse to allow such violations to occur: “The strength is in the numbers. If the crew say ‘no we're not doing this’ and then get fired or they can't find future employment because they stood up for what's right - those seafarers should be eligible for an award. But the application of this law is perverse because it encourages opportunistic, low wage workers to do bad acts, with no repercussions because they may get a big bag of cash at the end of it if they're lucky enough for their ship to call into a US port.

“Ultimately, anyone who is complicit in these bad acts and in following illegal orders should be held accountable. Crews should be more affirmative in refusing illegal orders for fear of punishment. But for those who are involved and take photographs and videos and some who even stage the whole thing and then wait for, say, eight months until they come to the US to cash in on the reward programme - how does that help solve the problem after there is eight months' worth of pollution in international waters?”

In the Bottiglieri case, Mr Chalos confirmed the company has also taken the US Coast Guard to court to challenge the government's authority in its decision to remove seafarers from the *Bottiglieri Challenger* to a hotel and force the company to fund their own prosecution and waive various substantive defences. Mr Chalos said: “Seafarers, who are the number one

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Clay Maitland, Maritime Lawyer and blogger ”





well as the fraudulent log book entry in the oil record book should profit from that. But unfortunately that is the state of play."

Mr Maitland added that such MARPOL violations tend to occur over a long period of time, up to a year in serious cases. "Shipping companies are now contesting these cases, claiming they are being held liable for what was in fact a conspiracy," he said. "There's nothing to stop the entire engine room staff from splitting the reward among themselves. My experience is that the US government doesn't like to prosecute unless there is a flagrant breaking of the law but unfortunately there are grey areas where whistleblowers are out to make money and this taints the whole process by which evidence is gathered."

Claiming it would be naïve to believe that, in all cases, white collar company representatives are not aware of shipboard violations, Mr Maitland added: "If you have a ship that has repeatedly violated MARPOL because oily water and slops are being dumped overboard, surely people in the executive suite of the company must be aware of the fact that they're not seeing bills for the removal of these slops into onshore tank reception facilities? For every one of these whistleblowers, there's someone being prosecuted too and it's not the Chief Executive Officer, it's usually another member of the crew such as the Chief

“Rewarding whistleblowers who allow pollution to continue over months encourages more of this behaviour”

Jeanne Grasso,  
Partner, Blank Rome

Engineer, but my question is, did this really stop with the Chief Engineer?

"We need to protect the seafarer from criminalisation based on political grandstanding, as it's very popular to throw someone into jail and make an example of them - even if they are eventually acquitted. But if a seafarer does commit a crime then that's not criminalisation, it's a crime. Dumping oil at sea, magic pipe pollution - any such activity is a crime and should be subject to prosecution."

But do maritime lawyers expect to see more cases in future when shipping companies challenge bounties for whistleblowers? Jeanne Grasso concluded: "I think companies will continue to challenge such cases, but they have to challenge on principal grounds because once the fine is paid the fine is paid - there's not going to be



any more paid out, it's just the matter of whether or not a portion of that fine is going to a whistleblower. By rewarding whistleblowers who allow pollution to continue over a number of months while they collect information, you are simply encouraging more of this behaviour and this does not further compliance with international conventions." ■



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