

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

**Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry
Company, Limited, and Various Underwriters (United States) v. Germany
(Sabotage Cases)**

30 March 1931

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of holding Germany responsible for the fire, but of thinking that her agents must have been the cause, even though the proof is lacking.

Done at Hamburg October 16, 1930.

Roland W. BOYDEN
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

[Extract from the Minutes of the Meeting of the Commission held on January 9, 1931]

The American Commissioner instructed the Joint Secretaries to record in the minutes of this meeting (the first held since October 20, 1930) that the Commission had rendered its decision dismissing the claims of the United States of America on behalf of the Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters, Docket Nos. 8103, 8117, et al., against Germany, which had been finally submitted by the American and German Agents on September 30, 1930, after oral arguments at The Hague, that the said decision, dated at Hamburg, October 16, 1930, and signed by the Umpire, the American Commissioner, and the German Commissioner had been, by prearrangement of the National Commissioners, simultaneously communicated on November 13, 1930, in duplicate originals to the Government of the United States and the Government of Germany, and had been made public by the two Governments, at Washington and Berlin respectively, on November 14, 1930, and that a third signed copy had been filed in the records of the Commission on November 15, 1930.

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN
CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS
UNDERWRITERS (UNITED STATES) *v.* GERMANY

(*Sabotage Cases, March 30, 1931, pp. 995-997.*)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT, NEW EVIDENCE, FINAL DATE FOR FURTHER PETITIONS. — IRREGULAR RENDERING OF DECISION: DELIBERATIONS, ROLE OF UMPIRE, COMMISSION'S PRACTICE. Requests filed January 12 and 22, 1931, for rehearing after final judgment of October 16, 1930. *Held* that final judgment not irregularly rendered because of Umpire's participation in National Commissioners' deliberations and in opinion of Commission: usual practice in important cases since Commission's foundation. Reference made to decision of April 21, 1930, in Philadelphia-Girard National Bank case, p. 69 *supra*, with regard to new evidence in sabotage cases to be submitted in future supplementary petitions for rehearing. Final date set for submission of any further matter.

EVIDENCE, PROCEDURE: AFFIRMATIVE PROOF, PRIMA FACIE CASE, PRESUMPTIONS, WITNESSES, SUBPOENA, OATH, ORAL TESTIMONY. — JURISDICTION: EXTENSION BY (MUNICIPAL) STATUTE. *Held* that (1) Treaty of Berlin requires

affirmative proof (as distinguished from *prima facie* case or presumption from refusal or destruction of documents) that damages were result of act of Germany or agents, (2) Commission may not subpoena witnesses, administer oaths, and take oral testimony: Agreement of August 10, 1922, does not authorize Commission to do so, and Act of Congress of July 3, 1930, applicable to international commissions, cannot extend Commission's jurisdiction. *Cross-reference:* A.J.I.L., Vol. 27 (1933), pp. 339-341.

Bibliography: Witenberg, Vol. III, pp. 10-11; Woolsey, A.J.I.L., Vol. 34 (1940), pp. 24-27; Annual Digest, 1931-32, pp. 421, 425-426, 427.

Decision on Petitions for Rehearing

Petitions for a rehearing have been filed by the American Agent in the so-called Black Tom Case on January 12, 1931, and in the so-called Kingsland Case on January 22, 1931. No new evidence is filed with these petitions. Although the rules of this Commission, conforming to the practice of international commissions, make no provision for a rehearing in any case in which a final decree has been entered, these petitions have been carefully considered by the Commission.

The briefs previously filed in behalf of the United States and the detailed argument of its Agent at The Hague in September, 1930, were marked by ability and thoroughness to which was added the force of his sincere conviction. It is therefore not surprising that the present petitions for rehearing bring out no new argument. We have studied them carefully to see if we have misinterpreted or misunderstood anything or failed to consider or to give due weight to any of the considerations now urged as a basis for rehearing. We are satisfied that we had a clear understanding of the Agent's position with respect to every point now presented and that every one of these facts or arguments was given careful consideration by us.

The terms of the Treaty of Berlin determine the financial obligations of Germany so far as this Commission is concerned. Both Governments and the Commission from the outset have recognized that in order to hold Germany liable for damages incurred during the period of neutrality this Treaty requires affirmative proof that such damages were the result of an act of the Imperial German Government or of its agents. The previous decisions of the Commission invariably have been based on this requirement. In the instant cases our conclusions were that the evidence did not convince us that the damages were the result of such acts. The substance of the petitions is that our conclusions were wrong. They may be, as we make no claim to infallibility, but they were and are our conclusions and nothing in the present petitions impairs our confidence in their correctness.

We think it futile to criticize the Agent's criticisms of our judgment, even of our good faith. One of his criticisms, however, which involves a jurisdictional question, calls for comment.

This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the deliberations of the National Commissioners and in the opinion of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned.

These petitions for rehearing are dismissed.

A new jurisdictional question is raised in these petitions by the requests that subpoenas be issued by the Commission for the purpose of taking the oral testimony of certain witnesses. This suggestion is contrary to the unbroken practice of the Commission. The Agreement of August 10, 1922, between Germany and the United States, which established this Commission and is the foundation of its jurisdiction, does not authorize it to issue subpoenas for witnesses or to administer oaths and take the oral testimony of witnesses. The requests that subpoenas be now issued by the Commission for the purpose of taking oral testimony are based upon an Act of Congress approved July 3, 1930, having general application to international commissions, which the American Agent contends applies to this Commission and authorizes it to take this procedure. The Commission is of the opinion that the jurisdiction conferred upon it by the two Governments in their Agreement of August 10, 1922, cannot be extended by this later statute of the United States. Even if it had authority, the Commission would not change its practice at this stage of these cases, when the evidence has been formally closed, the arguments made, and the decisions rendered.

Accordingly, the requests in these petitions that the Commission issue subpoenas for the oral examination of witnesses are also denied.

In these petitions the American Agent states that he is collecting new evidence the submission of which will be the subject of supplementary petitions. Apart from the objection above noted to the taking of oral testimony, the Commission has pointed out in its decision denying the petition for rehearing filed by the American Agent in the Philadelphia-Girard National Bank case a number of objections to the submission of new evidence by either party as a basis for reopening or reconsidering decisions rendered in cases finally submitted. Some of these objections involve serious jurisdictional questions. The questions to be presented in the proposed supplementary petitions, however, are not dealt with by the Commission in this order, which deals only with the present petitions for rehearing on the basis of the evidence filed at the time these cases were submitted for decision.

Each of the two Governments has expressed a desire that the Commission wind up its labors as soon as practicable. All but a very few of the cases having been decided and there being only a comparatively small amount of work remaining to be done, it is necessary to set a final date by which each Agent should tender any further matter he may intend to ask the Commission to consider. That date is fixed as May 1, 1931.

Done at Washington March 30, 1931.

ROLAND W. BOYDEN
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner
