

# **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)**

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

(*Sabotage Cases*, December 3, 1932, pp. 1004-1029; *Certificate of Disagreement by the two National Commissioners*, November 28, 1932, pp. 999-1004; *Separate Opinion on the Kingsland Case by the American Commissioner*, December 2, 1932, pp. 1029-1036.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT, NEW EVIDENCE. — EVIDENCE: WITNESSES, AFFIDAVITS, CROSS-EXAMINATION; EXPERT OPINIONS ON AUTHENTICITY OF LETTERS AND DOCUMENT, VALUE OF EXPERT OPINIONS IN GENERAL; DIARY, CHECKBOOKS. — JURISDICTION: REHEARING. Request filed July 1, 1931, for rehearing after final judgment of October 16, 1930. Analysis of new evidence (see *supra*). Held that expert evidence is often and at best only an aid to judgment, but far from an infallible guide. Unnecessary, in view of negative result of analysis, to decide on Commission's jurisdiction to reopen claim, despite opposition from national Commissioner, once it has been formally passed upon and decided. (Decision subsequently set aside: see decision of June 3, 1936, p. 222 *infra*.)

*Cross-reference:* A.J.I.L., Vol. 27 (1933), pp. 345-364.

*Bibliography:* Witenberg, Vol. III, pp. 12-16; Woolsey, A.J.I.L., Vol. 33 (1939), p. 739, and Vol. 34 (1940), p. 29; Annual Digest, 1931-32, p. 425.

*Certificate of Disagreement by the two National Commissioners  
on Supplemental Petition for Rehearing*

A supplemental petition for a rehearing, based on newly-submitted evidence, was filed on July 1, 1931, by the American Agent in the so-called Black Tom and Kingsland cases, asking the Commission to reopen and reconsider its decision of October 16, 1930, dismissing those claims.

This supplemental petition was preceded by petitions for a rehearing filed respectively on January 12 and January 22, 1931, which were based on the grounds that the Commission, in rendering its original decision, "committed manifest errors in its findings of fact on the evidence submitted and in failing to apply important established principles of law and the rules of the Commission", and also made the point "that the decision was irregularly rendered because the Umpire participated in the deliberations of the national Commissioners and in the opinion of the Commission".

On March 30, 1931, the Commission, in its decision on the questions raised by those petitions, overruled the objections to the participation by the Umpire in the deliberations and decision of the Commission, and dismissed, for reasons stated, the petitions in so far as they were based on the evidence contained in the record at the time the cases were submitted at the conclusion of the oral argument at The Hague. The Commission reserved, however, for later decision the question of reopening and reconsidering its original decision on new evidence which the American Agent had already announced he intended to submit by supplemental petition.

The question thus reserved is now presented by the pending supplemental petition, on which the present proceedings come before the Commission. In these circumstances the only questions now to be dealt with are those raised by the submission of new evidence, and the Commission, accordingly, will

not re-examine the findings of fact made in its original decision of October 16, 1930, unless the Commission decides that it has jurisdiction to reopen these cases and the new evidence now submitted requires reversal or modification of such findings of fact.

The Commission has already heard, at its session held in Boston on July 30—August 1, 1931, oral argument by both Agents on some of the issues involved. No decision was rendered at that time because the German Agent was authorized to submit some additional information in regard to his contention that certain documentary evidence presented by the American Agent was not authentic. In consequence much additional evidence has been submitted on both sides since the Boston meeting. For a considerable time during that period the Commission was without an Umpire, but on April 8, 1932, when the Commission was again fully organized, it held a meeting in Washington and entered an order fixing definite time limits for the submission of any further evidence by either Agent. This order was amended, in agreement with both Agents, at a meeting held in Washington on November 1, 1932, and, as amended, required that the submission of evidence on both sides be finally closed on November 15, 1932, and fixed November 21, 1932, and succeeding days for oral argument on both sides, and the final submission of these cases at the close of such argument.

In order to make the record complete, mention must be made of a motion presented by the American Agent on February 5, 1932, for the production by subpoena of the Commission of certain witnesses for oral examination. The Commission had already dismissed, in its decision of March 30, 1931, a similar motion by the American Agent, on the ground of lack of authority to subpoena witnesses without the consent of both Governments. The new motion, renewing this request, was opposed by the German Agent on behalf of his Government and, accordingly, the matter was referred, at the suggestion of the Commission, to the two Governments for direct action between themselves if they wished to confer the proposed authority on the Commission. Such authority has not been conferred by the two Governments, and accordingly, this new motion has not been and cannot be considered by the Commission.

The foregoing brief review of the proceedings hitherto taken since the decision of October 16, 1930, brings the history of these cases down to the recent session which closed on November 25, 1932, when all the pending questions presented by this supplemental petition and the accompanying evidence were finally submitted.

A preliminary objection to the reconsideration by the Commission of its original decision has been raised by the German Agent on the jurisdictional ground that the Commission is without authority to admit the further evidence now offered for consideration by the Agent of the United States, or to grant a rehearing on the basis of such evidence, or any other evidence, after these claims had been dismissed by the Commission in its decision of October 16, 1930.

The Commission has taken note of this objection, but did not feel called upon to make a ruling on its validity at the outset. In all similar cases, including the proceedings on the original petitions for rehearing in these cases filed in January, 1931, the Commission has invariably taken the position that, as stated in its decision of March 30, 1931, "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 Commission has, accordingly, followed in the present proceedings the precedent thus established.

Coming now to the issues raised by the newly-submitted evidence, it must be noted, before discussing this evidence, that, as stated in the Commission's decision on the former petitions for rehearing.

"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."

It must also be noted that the Commission in its original decision of October 16, 1930, stated that "The Commission does not need direct proof but on the evidence as submitted we could hold Germany responsible if, but only if, we are reasonably convinced that the fires occurred in some way through the acts of certain German agents." In that decision the Commission also stated that in view of the background established in these cases, which showed authorized sabotage activities in the United States by a group of German agents, "inferences against Germany were rendered easier than they otherwise would be", which means, in application to the present proceedings, that if the two men who are now presented by the claimants as responsible for the Kingsland and Black Tom fires respectively, namely, Theodore Wozniak and Michael Kristoff, are shown to have been German agents, or employed by German agents, at the time of those fires, the Commission might feel justified in inferring, unless such inferences were prohibited by other evidence, that Germany was responsible under the Treaty of Berlin for those fires and liable for the resulting damages.

The new evidence now submitted by the American Agent is intended to establish such agency on the part of Wozniak and Kristoff.

As to the Kingsland case, the Commission in its original decision found as a fact that "despite Herrmann's confession the evidence in the Kingsland case has convinced us that Wozniak did not set the Kingsland fire", and the Commission held as its final conclusion, from all the evidence, "that the fire was not caused by any German agent" and, accordingly, that "Germany cannot be held responsible for it".

In reaching its conclusion the Commission found, among other facts, that another employee of the Agency of Canadian Car and Foundry Company, Limited, named Rodriguez, who also was alleged to be a German agent acting in cooperation with Wozniak in starting the fire, and to whom it was alleged that \$500 was paid as compensation by Herrmann after the fire, "was not at the Kingsland plant at all on the day of the fire". The Commission also found that the description of the starting of the fire, as presented in the evidence, did not justify the belief that it was started by one of the incendiary pencils alleged to have been furnished to Wozniak and Rodriguez for that purpose, and, further, the Commission disbelieved that Wozniak was in Mexico after the fire, where the evidence submitted by the claimants represented that he had gone and consorted with admitted German agents.

As to the Black Tom case, the Commission was unable to find definitely, from the evidence filed prior to its original decision, just how or by what agency that fire started.

As a result of its examination of the record, the Commission found that there was "a good deal of evidence which tends to implicate Kristoff". This

evidence related to his conduct on the night of the fire, his false alibi, his association and trips with a man whose name the Commission described as "kaleidoscopic" but, for convenience, called Grantnor, as it appeared in the record with many variations of that spelling, and it was attempted in the claimants' evidence to identify this man with a man named Hinsch, an admitted German agent. The record also contained some alleged admissions by Kristoff reported by a private detective named Kassman, employed by the Lehigh Valley Railroad Company.

The Commission examined had analyzed at some length all of the evidence and reached the conclusion, stated in its decision, that "We cannot be sure that Kristoff did not set fire to Black Tom or take some part in so doing. We cannot be sure that Graentsor, or Grantnor, or Graentnor was not Hinsch, and that Hinsch did not employ Kristoff and others who are unknown. But it will sufficiently appear from the foregoing that, as we have said, the evidence falls far short of enabling us to reach the point, not merely of holding Germany responsible for the fire, but of thinking that her agents must have been the cause, even though the proof is lacking."

The new evidence now submitted on behalf of the claimants is addressed to all of these points in each of these cases, and is intended to show that the Commission was wrong in its findings and conclusions.

The American Commissioner and the German Commissioner have been unable to agree upon the decision of the questions presented in these cases as aforesaid, and their respective opinions having been stated to the Umpire they accordingly certify the above mentioned cases and all the questions arising under the supplemental petition therein to the Umpire of the Commission for decision, except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to re-examine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate.

Done at Washington November 28. 1932.

Chandler P. ANDERSON  
*American Commissioner*

W. KIESSELBACH  
*German Commissioner*

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*Decision of the Commission  
rendered by the Umpire, Honorable Owen J. Roberts*

These cases are before the Umpire for decision on a certificate of the two National Commissioners, certifying their disagreement.

The certificate of the Commissioners briefly describes the pleadings and the purpose of the new evidence submitted. It is unnecessary to repeat what is there set out. I proceed, therefore, without preliminary discussion to deal with the cases in the situation in which I find them. I have had the aid of the transcripts of the very full arguments made before the Commission at The Hague and at Boston and of full and satisfactory briefs filed in connection with the various arguments, especially the present one. I have examined large portions of the evidence filed prior to the decision of October 16, 1930, with the object of comparing it with the new evidence in order to appraise the new evidence and its effect in connection with the old.

*Kingsland*

Much new evidence has been submitted for the claimants tending to exclude the theory of industrial accident. It goes far to negative the belief that the fire occurred as a result of sparking of machines, undue friction, or disarrangement of electrical apparatus. The Commission is asked to draw from these proofs the conclusion that Wozniak intentionally caused the conflagration. The antithesis is between an accidental fire and an incendiary fire set by a German agent. Nothing offered has changed or elaborated the account originally given and steadfastly adhered to by Wozniak. While there is now much contradiction of the alleged improper functioning of the machinery (not testified to by Wozniak, but by others), there is some additional corroboration of Wozniak's story. What was meant in the former opinion by "industrial accident" was one arising from any cause, whether or not accurately ascertainable, other than the purposeful act of an incendiary. While the new evidence makes more difficult the inference that the fire was due to one of the causes suggested by Germany, it does not render easier the conclusion that it was intentionally kindled by Wozniak.

In the original record Herrmann detailed the instructions he claimed to have given Wozniak. He says he told Wozniak to break the point of the incendiary pencil and set it upright in a coat-pocket or elsewhere and that it would burst into flame within approximately 30 minutes. It is now suggested, as a deduction from expert testimony submitted, that if the pencil were laid on its side in the shellcase and crushed a flame would immediately be generated. But there is no evidence that Wozniak knew this or was told that the pencil could be so used. The new evidence as to conditions in the plant and the happenings just before the conflagration, when added to the old, does not warrant a finding that the fire was due to the intentional act of Wozniak.

In the decision of the Commission of October 16, 1930, it was found that there was no sufficient proof that Wozniak was a German agent or in the pay of German agents. New evidence has been produced which is said to require a reversal of this finding. It may best be considered in relation to the state of the case as it stood prior to the Commission's decision.

Then it was claimed that Hinsch, a German agent, had introduced Wozniak to Herrmann, another German agent, who had given Wozniak incendiary pencils and instructed him in the use of them; that Herrmann doubted Wozniak's ability and requested that another man be added to the force of incendiaries, whereupon Hinsch produced a man named Rodriguez, who worked at the next bench to that of Wozniak; that after the fire Rodriguez got into touch with Herrmann and was paid \$500; that Wozniak disappeared and never claimed any pay but was ultimately taken or went to Mexico, where during the summer of 1917, under the name of Karowski or similar name, he consorted with German agents and was known as a German agent.

This version of the transaction depended for its validity in the first place on Herrmann's testimony, which was disbelieved by the Commission, and secondly on that of some six witnesses who said they had either seen or heard of Wozniak in Mexico, under the name Karowski, or Karowsky or Karnowski, and knew him to be a German agent. The Commission disbelieved this testimony. In April, 1929, Wozniak came forward and gave testimony in affidavit form; and was examined and rigorously cross-examined in July, 1930, and gave what the Commission thought a truthful account of the fire and his subsequent conduct. His statements were carefully investigated by the Agents of both countries, and not only by his testimony but by corroborative evidence obtained by the Agents the following facts are indisputably established. After the fire

he submitted to an examination by the officials of the Agency of Canadian Car and Foundry Company, and also reported the nature and circumstances of the accident to Russian officials; he held himself available for further questioning. From the time of the fire to July 23, 1917, he was in New York City, using his own name, boarding where he had previously been known, and part of the time a patient and a watchman in a hospital.

He says that about August 1 he went to Tupper Lake, N.Y., and worked as a lumberman, returning to New York City sometime about October, 1917. This the American Agent disputes. Contemporaneous records are lacking, and testimony other than that of Wozniak is unsatisfactory as to this period. It is certain, however, that sometime after January 1, 1916, and before December 31, 1921, Wozniak did work at Tupper Lake during a portion of a summer. From contemporaneous records and his own testimony it is clear that this was not in 1916. By the weight of the evidence his employment as lumberman was not in the summer of 1918, 1919, 1920, or 1921. If he was not in Tupper Lake in the summer of 1917 my judgment is that he was never there. Yet it is conceded by the American Agent that it is possible he did do summer work there at some time during the period of years mentioned.

For reasons which will sufficiently appear from its original opinion the Commission definitely found that Wozniak was not in Mexico in the summer of 1917. Some of the affidavits to that effect presented by the claimants were wholly unsatisfactory in character, and others, while made by persons of the utmost probity, were proved obviously wrong by contemporaneous records. Wozniak was in New York, living with his friends the Perrys and working in Schall's restaurant, early in November, 1917; and from that date forward his whereabouts are accounted for, not alone by his testimony but by undisputed proofs. There is no evidence, except that which the Commission disbelieved on the former hearing, that Wozniak ever used any other than his own name or that, as claimants assert, he purposely disappeared or that claimants could not at any time prior to April, 1929, have located him.

With this background, I come to consider the new evidence. This falls under three categories: (1) certain affidavits intended to prove that Wozniak was in fact a German agent; (2) certain letters alleged to have been written by him from St. Louis, Mo., and Mexico City in August and September, 1917, and testimony as to the writing of three other letters by him from Mexico in the summer of that year and as to his taking the name Karowski; (3) the so-called Herrmann message, which will subsequently be described and discussed. I shall consider these items in the order stated.

1. The affidavit of Capitula is to the effect that in July or August, 1929, Wozniak endeavored to persuade the affiant that he knew Wozniak in Tupper Lake in "1917 and 1918"; and that the affiant refused so to state and informed Wozniak that the affiant had been in Tupper Lake in 1920 and 1921. The effect of this deposition is purely negative. The evidence amounts to no more than that the affiant could not say that he had seen Wozniak in Tupper Lake at any time. The witness does, however, add that Wozniak told him he had been in Mexico in "1917 and 1918." We know nothing of the witness Capitula; his affidavit is barely a page long, lacks any collateral support; it attributes to Wozniak statements which he certainly would never have made as to the year 1918. The witness adds the somewhat surprising information that Wozniak told him he had been "brought back" from Mexico. Is the inference to be drawn that German agents brought him back?

The affidavit of one Nolan is produced, dated February 6, 1931, in which he says that he knew Wozniak in 1916 and 1917 as a man "used by different German Agents"; that the witness saw Wozniak at Meyer's Hotel, Hoboken,

in company with Captain Hinsch. It contains an account of an incredible conversation said to have taken place between Hinsch and Wozniak overheard by the affiant. This witness was presumably always available to the claimants, and it is not clear why his testimony, if favorable, could not have been obtained long before the case was originally submitted. I do not regard this evidence seriously. The same may be said of the affidavit of one King, offered in support of that of Nolan.

An additional affidavit by one Palmer was filed. He was in the employ of the British Secret Service during the war and had, prior to the earlier hearing, given evidence apparently quite irrelevant to any issue then or now in the case. And, surprising to relate, he says not a word therein as to the matters to which he now testifies. I must assume that he was thoroughly examined on the former occasion. He now offers a most circumstantial account as to Wozniak and various German agents' activities. He explains that these matters are not disclosed by contemporaneous British Secret Service reports because the custom was to condense them and exclude hearsay; yet the very reports to which he refers do contain hearsay information and on much less important matters than those of which, at this late day, he speaks solely from memory. No explanation is offered for his failure to disclose such vitally relevant details on his former appearance as a witness.

One Clucas now furnishes an affidavit in addition to the one he gave originally. He greatly elaborates what he previously said and adds new matter which he says he previously withheld as he thought that the claimants had adequate information on the subjects about which he was interrogated, and so did not need his testimony. His explanations do not satisfy me of his candor.

These affidavits are all made with the purpose of attributing to Wozniak the character and designation of a German agent. They are not persuasive, not only for the reasons mentioned, but because I find that, save for the summer of 1917, as to which I shall speak in a moment, Wozniak, though open to surveillance and for a part of the time under actual surveillance, has not in a single instance subsequent to the fire been found in the company of anyone who might by the remotest stretch of the imagination be found to be a German agent.

2. The new evidence indicates that in May, 1931, a Ukrainian named Baran went to Mr. Peto, vice president of the Agency of Canadian Car and Foundry Company, and exhibited to him three letters, addressed to Baran, written and signed by Wozniak dated respectively St. Louis August 10, 1917, and Mexico City August 28 and September 16, 1917. In connection with the production and examination of these letters the claimants paid Baran \$2,500, and procured assent to a condition named by him that the American Agent should give assurance that Wozniak would not be prosecuted for perjury. The American Agent insisted upon an expert examination of the letters before he would accept them as evidence. The claimants consequently had them examined and satisfied themselves and the American Agent that they were in Wozniak's handwriting. Expert opinion indicated also that they were old and had probably been written when they bore date. The letters were submitted to the Commission. If genuine they establish that Wozniak was consorting with Germans in Mexico in the summer of 1917 and destroy his testimony to the effect that he was then in Tupper Lake. If they are not manufactured evidence the Commission was wrong in disbelieving the witnesses offered at the earlier hearing and in finding that Wozniak did not go to Mexico.

In my opinion the letters are not authentic. I should arrive at this conclusion without the aid of expert testimony. But my finding is enforced by what I deem convincing expert opinions that they were prepared for the purpose of the case.



They purport to have been written at a time when war had been declared between the United States and Germany, and two of them must have been sent across the border, which was then under strict guard; one of them stated that the Germans did not want Wozniak to write to anyone; two enjoin secrecy on the addressee; one refers to "my Germans", another to the "damned Germans", — strange expressions to be used by a German agent consorting with his fellows and seeking to conceal his whereabouts after fleeing the scene of his crime! They are written in Ukrainian, but one of them contains the name Karowsky written in Roman letters and suggests that Baran write to Wozniak by that name, to the general delivery address in Mexico City. Most noteworthy is the fact that in one Wozniak says that he will soon be back in New York near to "King". This is the sort of admission that Wozniak, above all men, in my judgment, would not naturally or normally have made. The references to Karowski and the Germans and to "King" too well piece out the claimants' theory of the case.

I am persuaded from photostats and photographs submitted that when Baran first showed the letters to the claimants they were not in the condition in which they now are. The various photostats prove that subsequent to such exhibition Baran cut a piece out of one of them. After this fact was noticed, the explanation was offered that he did this so that he could have the paper analyzed in an effort to prove the age of the letters because he had heard some discussion between the interested parties as to their authenticity. But Baran, by supposition, had had the letters since 1917; he needed no confirmation of their age. Moreover, photostats of the letters were attached to the affidavit of Baran identifying them, and the photostat of that of August 28, 1917, fails to show certain distinctive stains which are now quite apparent not only on the letter but on all later photostats and photographs of it. The conclusion is irresistible that either Baran or someone else tampered with this letter, in an effort to give it the appearance of age, after it was first shown to claimants and before it was delivered to them by Baran to be used as evidence. These stains are relied upon by claimants' experts as evidence of the age of the letters.

Certain foldings of two of the letters (those of August 10, 1917, and September 16, 1917) are totally inconsistent with the claim that these were written on the dates they bear and separately mailed from the places they bear date.

Baran, who produced the documents, is an intimate friend of Wozniak. The record before the Commission at the previous hearing discloses that he was repeatedly in touch with Wozniak. His identity was fully disclosed prior to July 30, 1930, by Wozniak's testimony. From the cross-examination for the claimants it is evident that they knew of this relationship at that time. It is incredible that Baran was not interviewed between the summer of 1930 and May, 1931, when he appeared and offered the letters. If he had such letters, that fact could have been long before ascertained.

The expert evidence and my own inspection convince me that the letters show all the characteristics of artificially aged documents and that the explanation offered by claimants' experts of accidental staining is not credible.

The letter of August 28, 1917, was written upon a watermarked paper sold by Kiperman, a merchant of Warsaw. As early as June, 1931, the claimants had observed the watermark and had procured a transmitted-light photograph which showed it with great clearness and definition of detail. During the summer and autumn of 1931 they made investigations in Poland, and in France where a dandy-roll for the production of such a watermark had been manufactured, to ascertain the date of the manufacture of the paper. The investigation was not exhaustive, and made at best but a *prima facie* case for a date of the watermarked paper earlier than 1926. Kiperman's unsworn statement

went no farther than that he had for many years sold paper with a similar watermark; it is quite indefinite as to when such paper was manufactured. Much detailed evidence submitted by the German Agent demonstrates that the watermarked paper in question was not manufactured prior to 1926. Some confusion has been created, due to the fact that two manufacturers made paper for Kiperman with dandy-rolls procured from different makers, but non-expert inspection demonstrates to my satisfaction that the watermark in question is that made by the Mirkow factory from a dandy-roll made in Paris. The paper made by the use of that dandy-roll was delivered to Kiperman not earlier than 1926. The expert testimony supports my own independent conclusion on this point. The watermark, therefore, strongly corroborates the other matters which make against the authenticity of the documents.

In June, 1932, there was filed an affidavit by one Golka, of Scranton, Pa., dated December 9, 1931, in which he states that he received a letter from Wozniak in Mexico in 1917. At the same time two affidavits by one Panas and his wife of about the same date were filed, in which they recount the receipt of two letters from Wozniak postmarked in Mexico. Supporting affidavits state that the names of these witnesses were obtained in Europe by Mr. McLain, one of the attorneys for claimants, and that Mr. McCloy, another attorney for claimants, secured the same names by independent investigation in this country. But the record contains references to both of these persons. In the cross-examination of Wozniak he was questioned and testified at length with respect to them. It appears from his affidavit and oral testimony that he worked under Golka in Scranton before going to New York in 1916, that during the same period he lived in the house of Panas in Scranton and that Panas was a witness to his marriage. It is somewhat difficult, therefore, to understand the necessity for all this investigation to disclose these two persons, who perhaps are as close to Wozniak and know him as well as Baran and who would be the natural persons to whom he and Baran would turn for statements in support of the Baran letters. Let it be here noted that, though unquestionably Wozniak wrote the Baran letters, he has testified that he was not in Mexico in 1917, has not vouched for the letters, and is not to be prosecuted for perjury. If the affidavits of Golka and Panas had been submitted independently, not merely as corroboration of the fraudulent Baran letters, I might, perhaps, give greater credence to the evidence of Wozniak's friends. These affidavits contain erroneous statements of fact; and, moreover, both recite that Wozniak was anxious to have his letters from Mexico destroyed. In one case he is said so to have requested in the letter; in another case to have visited the addressee, obtained the letters, and destroyed them in the presence of his friends. The reason Golka says he gave was that he wished to conceal whence he was writing. These are remarkable statements, when contrasted with the facts as to the fraudulent letters produced by Baran, which contain no such request but in fact give the name and address in Mexico to which letters may be sent to Wozniak. If he were so anxious that his correspondence be destroyed, I can not understand why he did not make a similar and effective request of his friend Baran, if the Baran letters were genuine and the Golka and Panas affidavits exhibit his true attitude.

Some of the witnesses who, prior to the decision of October 16, 1930, testified to Wozniak's presence in Mexico in 1917 identified a photograph of him as that of a man they knew as Karowski. Others stated they knew of the presence of a German agent known as Kurowski, Karnowski, etc., without identifying Wozniak as the one who bore that name. In the new evidence there is a certificate by a police official in Poland to the effect that bordering on Wozniak's old home in Rawa Russka there is a forest in which Wozniak once worked,

called the "Karowski" forest; that in *Poland* it is common to take a name additional to the surname, and to derive it from one's surroundings; that it is therefore *probable* that Wozniak did this, in which case he might have called himself Wozniak-Karowski or Karowski-Wozniak. This evidence is pressed upon me as confirmatory of the testimony that Wozniak was in Mexico under the *alias* of Karowski. But it rises no higher than proof that such a thing is neither improbable nor impossible.

On the other hand, testimony produced by Germany tends to prove that in the tongue used in Rawa Russka the forest in question was, prior to Polish domination at least, called "Kariw" (thus its derivative would be "Kariſki" or "Karivsky"); that an intimate friend never knew of Wozniak's living in Kariw or working in the forest in question and never heard him use or anyone else call him or his family Karowsky or any similar name. This state of the proofs does not give me any real light upon the question of Wozniak's presence in Mexico.

I am of opinion the matters above discussed are insufficient, when taken with the proofs offered before the final hearing, to alter the finding that there is no credible evidence that Wozniak was a German agent, was connected and consorted with German agents, or that he was in Mexico in 1917.

3. If the so-called Herrmann message is authentic, that document alone would compel a finding contrary to that I have just stated so far as concerns Wozniak's being a German agent. Since, however, that message applies equally to Kingsland and to Black Tom, I may postpone discussion of it until after I have considered the other new evidence relating to Black Tom.

#### *Black Tom*

With respect to this catastrophe the decision of October 16, 1930, held that while not satisfied that Kristoff did not have a part in causing the fire and explosions, neither was the Commission convinced that he did have such part or that he was a German agent or an employee of German agents. The opinion states that the Black Tom Terminal was a shining mark for the activities of agents of destruction and that Hinsch might well have desired its destruction; but the only matter from which the Commission thought it might infer a connection between Kristoff and Hinsch was the former's story of a journey made by him with a man named Graentnor (or some similar name) early in 1916 and the promise of a large payment from this person. The Commission was unable from the record to identify Hinsch with Graentnor which it felt it must do in order to hold that Kristoff acted for Germany in causing the explosion.

The new evidence offered in the endeavor to clarify the situation and to induce an affirmative finding falls into two classes: (1) the 1916 diary and certain checkbooks of Hilken; (2) the Herrmann message.

1. It is said that the entries in the diary are consistent with Hinsch's having been absent from Baltimore on a trip with Kristoff in the spring of 1916. In the earlier arguments it was contended that, as Kristoff claimed to have made a trip at the time in question with a man he called Graentsor and as Fesmire testified that Hinsch had once told him about having made a trip west, the Commission should conclude that Hinsch was Graentnor. Hinsch, on the other hand, testified that he had never been west of Gettysburg and never made such a trip as the one described and had never visited some of the cities mentioned by Kristoff. In this state of the record the Commission refused to draw the conclusion suggested. In the light of these facts, I find merely that the entries in Hilken's diary are not inconsistent with Hinsch's having made the

trip but they add nothing affirmative to the evidence as contained in the record before and are insufficient to induce the affirmative finding asked by the claimants.

With respect to Hilken's checkbook it is urged that this now makes certain what has heretofore been a matter of dispute, namely, that in August, 1916, shortly after the Black Tom explosion, Hilken paid \$2,000 to Hinsch; that this fact destroys Hinsch's testimony that no such payment was made and casts discredit on the whole of his evidence. The check stub shows that on August 10, 1916, Hilken drew \$2,000 in cash; on the stub is noted "Capt H — Lewis, etc."

Herrmann used the alias Lewis. It is undoubted that about August 6 or 7 Hilken, Hinsch, and Herrmann went to New London to inspect the harbor preparatory to making it a merchant-submarine base. I think that if Hilken was in New York on August 10 he was on his return trip from New London. The new harbor project undoubtedly required disbursements of money. Hinsch states that he did not get \$2,000 at this time and that the only explanation he can give of the entry on the check stub is that part of the money may have been used for the expenses of the trip to New London, but he concedes that these would not require anything like \$2,000. This testimony is said to brand him as untruthful. I can not adopt this view. The use to which the money was to be put still must be derived by the claimants from Hilken's testimony, heretofore given, contradicted as it is by Hinsch. I am asked to conclude that as Kristoff said that he was to go to the Hotel McAlpin and meet Graentnor about August 10 to receive a payment of a large sum of money this entry connects Hinsch and Kristoff's travelling-companion Graentnor. But here again we are taken into the realm of conjecture. Kristoff, moreover, said he did not receive any money, and there is nothing else, unless the check stub be evidence of the fact, to show that he did. I find that the diary entries and the check stubs do not warrant the inferences I am asked to draw from them.

#### *The Herrmann Message*

2. On July 1, 1931, there was filed with the Commission a Blue Book magazine of the January, 1917, issue, containing upon four printed pages lines of writing running crosswise of the print. This, we are told, is a code message forwarded by Fred Herrmann in Mexico to Paul Hilken in Baltimore in April 1917: names being referred to by numbers in the script, the numbers referring to other pages of the magazine where the names were indicated by pin pricks through printed letters in the text. The writing fluid is said to be lemon-juice made visible by the application of heat. As decoded by Hilken the message reads:

Have seen Eckhardt he is suspicious of me Can't convince him I come from Maguerre and Nadolny Have told him all reference Hinsch and I Deutschland, Jersey City Terminal, Kingsland, Savannah, and Tony's Lab. he doubts me on account of my bum German Confirm to him thru your channels all O.K. and my mission here I have no funds Eckhardt claims he is short of money send ly [by] bearer U.S. 25000.— Have you heard from Willie Have wired Hildegard but no answer Be careful of her and connections Where are Hinsch and Carl Ahrendt Tell Hinsch to come here I expect to go north but he can locate me thru Eckhardt I dont trust Carl Ahrendt, Kristoff, Wolfgang and that Hoboken bunch If cornered they might get us in Dutch with authorities See that Hinsch brings with him all who might implicate us tell him Siegel is with me. Where is Carl D. he worries me remember past experience Has Hinsch seen Wozniak Tell him to fix that up. If you have any difficulties see Phil Wirth Nat Arts Club Tell

Hinsch his plan O. K. Am in close touch with major and influential Mexicans Can obtain old cruiser for 50000 West Coast What will you do now with America in the war Are you coming here or going to South America Advise you drop every thing and leave the States Regards to Hoppenberg Sei nicht dum mach doch wieder bumm bumm bumm. Most important send funds Bearer will relate experiences and details Greetings.

A glance through this translation will indicate that, without reference to any other evidence, it is conclusive proof to any reasonable man that (a) Herrmann and Hilken knew the Kingsland fire and the Black Tom explosion were the work of German agents and (b) that Hinsch, Hilken, and Herrmann, undoubted agents, were privy thereto, and (in the light of the record before the Commission) (c) that Kristoff and Wozniak were active participants in these events. As the American Agent has well said, I may utterly disregard all the new evidence produced and still, if I deem this message genuine, hold Germany responsible in both of the cases.

The authenticity of the message is sharply challenged. A narrow and very difficult issue of fact, upon which alone these cases now turn, is thus raised, which challenges and has had my careful and painstaking study in an effort to reach a right solution. As in the case of the Wozniak letters, the elements which affect the problem of authenticity fall into three general classes: (1) the testimony concerning the document, (2) the conditions known to exist when the message is claimed to have been transmitted, and (3) expert testimony with regard to the probable date of the writing.

(1) The magazine was produced by Paul Hilken, who, in an affidavit of May 8, 1931, states that he discovered it recently in his old home in Baltimore. The document comes, therefore, from a source which the former opinion of the Commission entirely discredited. Hilken, though an American citizen, is a former German agent. His attitude at first was that of loyalty to Germany. In December, 1928, he changed his position and testified at great length on behalf of the claimants. He then produced, upon request, diaries for 1915 and 1917 and part of 1916 and other documents which were made a part of his deposition. He then expressed his willingness to search for other contemporaneous documents and indicated that they would be found either in his desk or at this former home in Baltimore. The record leaves no doubt that the American Agent and his counsel for a period of two years prior to the production of the magazine had urged Hilken to search out further data in substantiation of his testimony. Notwithstanding this he did not do so, and the Commission made its finding of October 16, 1930, branding him unworthy of belief. Thereafter counsel to the American Agent renewed his request and apparently hoped that Hilken might find further documents to reestablish him in the eyes of the Commission. Nothing came of this until April 26, 1931, on or about which date, we are told, Hilken brought the Blue Book to Mr. Peto, vice president of the Agency of Canadian Car and Foundry Company, and not, be it noted, to the American Agent or his counsel who had requested further data. Mr. Peto advised the American Agent of the existence of the document. Not until long after the German Agent had attacked the authenticity of the message was further testimony of Hilken filed as to the time and manner of the discovery of the magazine.

In an affidavit made November 15, 1932, Hilken states that on Christmas Day, 1930, he made a search of the attic of his old home in Baltimore and unearthed the magazine at the bottom of a wooden box in a closet under the eaves, and at the same time discovered a large amount of correspondence bearing on his wartime activities. Apparently none of this other matter was

delivered to the claimants with the magazine, but was filed with a later affidavit of Hilken dated June 29, 1931. Along with Hilken's affidavit of November 15, 1932, were filed affidavits bearing date November 12 and 15, by Mrs. Hilken, Hilken's daughter, and Elizabeth Braun. Mrs. Hilken states "she knows" that on Christmas Day, 1930, Hilken found the magazine, though did not tell her of the message, but did inform her daughter as to it. She does not say that she ever saw the document. The daughter simply underwrites her mother's deposition; fails to state that she ever saw the document; and simply narrates by proxy of her mother's affidavit what her father told her. Elizabeth Braun, who is in no way identified to the Commission, — about whom we know nothing except for her name and address, that she is an old friend of the Hilkens, and that she entertained Hilken the Sunday following Christmas, 1930, — says that Hilken told her of the finding of an important message and described it; she does not say that she saw it. All of these witnesses seem to have communicated the contents of their affidavits to the claimants during early or late 1931, but their testimony was not submitted to the Commission until November 15, 1932.

Hilken, in his deposition of November 15, 1932, and not before, gives as his reason for not promptly producing the message on its discovery, that he feared publicity as he knew that certain articles were being prepared on the sabotage cases to appear in the Liberty magazine; also that he was being urged by von Rintelen, then in this country, not to give any further evidence for the United States. It is quite evident that Hilken had fully determined to aid the claimants as early as December, 1928. I do not believe that his attitude in that respect had undergone any change. The von Rintelen advice is in my judgment a belated excuse. Equally unsatisfactory is the suggestion as to avoidance of publicity. It is quite evident that Hilken could promptly have confidentially exhibited or delivered the magazine to the American Agent or his counsel, and that his confidence would have been respected.

As respects the production of the message, I find that it comes from a source which the Commission has held unworthy of belief, and under circumstances which at least cause me to hesitate to give full faith and credit to the account of its discovery.

In addition to Hilken's several depositions, there is a substantial amount of other testimony to be considered. Raoul Gerdt, a young man who associated with Fred Herrmann in New York in 1916-1917 and who, while not a German agent, was an employee of Herrmann and did various errands and services for him, accompanied the latter from the United States to Mexico in February, 1917. Gerdt separated from Herrmann in 1917 and returned to his mother's home in Colombia, South America. About January, 1929, the claimants located him there and submitted a questionnaire or series of interrogatories to him, which he answered in writing. Amongst other things, he was interrogated as to whether he knew Hinsch and Hilken. In his answers he said that he had met them in Baltimore in the spring of 1917 when he delivered the message or order with which he had been dispatched by Herrmann who was then in Mexico. His testimony convinces me that he knew neither of them prior to the Baltimore meeting. He said that he carried two messages, one for Hoppenberg (of the Eastern Forwarding Company in New York) and another to be delivered to Hilken in case he should not find Hoppenberg; that these were written in lemon-juice in a book of poetry. When his testimony was given and filed apparently the parties, and certainly the Commission, attached no importance to the message, which seemed to be of a date insignificant in respect of the issues in these cases.

In 1930, after Fred Herrmann had decided to give evidence in support of the claims and to return from Chile for that purpose, he remarked during the

course of his evidence that he had sent "a couple of letters" from Mexico to Hilken in Baltimore. Nothing further transpired in this connection until the production by Hilken of the Blue Book magazine on April 26, 1931. Thereupon Herrmann testified that he recognized it as "the message" which he had sent by the hands of Gerdtz to Hilken in April, 1917. We need only note in passing the Commission's former finding that Herrmann is a liar not presumptive but proved.

A German named Siegel was interned in Russia at the outbreak of the war. He escaped through Siberia and may have crossed the Pacific and been in the United States for some time. He was then apparently unknown to Herrmann. He made his way to Cuba, and when Herrmann and Gerdtz, after leaving the United States, stopped at Havana and thence took passage for Mexico they made his acquaintance, and he accompanied them into Mexico and remained with them. Siegel had not theretofore been a German agent but professed his desire to do something for Germany and volunteered to cooperate with Herrmann. Herrmann offered him employment in behalf of Germany. Siegel was present when a secret message was written by Herrmann to be dispatched by Gerdtz. It seems that Herrmann prepared a draft of a message and had Siegel read it to him while he wrote it in invisible fluid. After the war Siegel returned to Europe and is now engaged in a mercantile business in Estonia.

It will be noted that the Herrmann message contains the phrase "Siegel is with me". In March, 1932, the claimants sent Herrmann, who was cooperating with them, to Europe to obtain a statement from Siegel. Although an American lawyer for the claimants, Mr. McLain, accompanied Herrmann to Tallinn for this purpose, neither Mr. McLain's presence nor his identity was disclosed to Siegel, and the negotiations were left entirely to Herrmann. There is no question that Herrmann failed to make a full and frank disclosure of the situation in which Siegel's testimony was desired. So much both he and McLain admit. How much Herrmann concealed and what he actually told Siegel is a matter of serious dispute between him and Siegel. That he purported to refresh Siegel's memory as to details I think there is no doubt.

As a result of the interviews, Siegel prepared in his own hand a statement in which he said that he had been shown a Blue Book magazine; that he recognized the volume as similar to that in which the message of 1917 had been written; had been shown a photostat of the alleged secret message as developed; that he dictated the same to Herrmann and that Herrmann dispatched it by the hands of Gerdtz.

Siegel was subsequently examined on behalf of Germany and then gave a sworn statement in which he says that he thought the paper which he had written was merely to be used in negotiation by the German Foreign Office; that he understood that Herrmann was still in the German service, was being paid by the German Foreign Office, and that it would help Herrmann if he made the statement as he did; that he relied largely upon Herrmann for details and that as a matter of fact he does not carry the details in his memory at the present time.

Finally, upon November 15, 1932, an affidavit of date October 28, 1932, by one van Emmerik was filed. In this the witness states that Gerdtz arrived in New York City in April, 1917, as Gerdtz says in his testimony, on the day after the death of Hoppenberg; that Gerdtz inquired for Hoppenberg and on learning that he was dead stated that he would now have to find Hilken; that Gerdtz was dressed in a raincoat and was carrying a magazine which he said contained a message for Hoppenberg. The implication is that the magazine was open and exposed to the elements. The witness says he, Gerdtz, and one Weber had a meal together in a restaurant in New York, where Gerdtz

laid the magazine on the table and a waiter picked it up and tore the cover (the front cover is now missing), and that Weber got greatly excited about the incident and insisted on checking the magazine.

With respect to what happened in Baltimore the claimants' evidence is to this effect: Gerdtz who had arrived by devious ways in order to avoid surveillance says he found that Hilken's home was then being inspected by special investigators and was sent away for a time until that inspection should be completed; he returned and met Hilken; Hilken went alone to the cellar and developed the message. Hilken says that upon reading the message he made a translation of it by the use of the code and took this to New London and showed it to Hinsch, that Hinsch returned to Baltimore with him, and there they discussed the situation with Gerdtz. All agree that this conference between these three took place. In the upshot, Gerdtz was given about \$1,000 and was told that Hinsch would bring additional money when he went to Mexico, and Gerdtz was sent back to Herrmann. Hinsch did, in May, 1917, go to Mexico carrying some \$24,000.

The German evidence in contradiction to this testimony is that of Hinsch, who says that a secret message was sent by Herrmann to Hilken, that he was summoned to Baltimore by Hilken to consider the matter, that there he met Gerdtz, and that he and Hilken questioned Gerdtz and learned from him about the situation in Mexico and that it was determined that Gerdtz should be given a comparatively small sum and that Hinsch would take further funds to Mexico later when he went. Hinsch says that the message was in a bound book in stiff covers, was written in a secret ink which was then known to German agents, was developed by bathing in a known solution, and was on but a single page which was the fly-leaf from the front or back of the book and contained no print. He says that the message was of but two or three sentences, — as well as he can now remember, somewhat to the following effect: "The bearer of this message is Raoul Gerdtz who carries a personal message to you. You can trust him in full." And then followed the request that Hilken give Gerdtz a considerable sum (the witness thinks it was twenty or twenty-five thousand dollars) and also a statement that Gerdtz would verbally report about everything else.

(2) As to the circumstances and the internal evidence: It is to be borne in mind that the conceded purpose of the message was to obtain funds. So far as I am advised it had no other. It is further to be noted that at the time of its dispatch the United States had entered the war; most of the secret agents of Germany had left the country and were known in many instances to have fled to Mexico; the border was being watched for secret correspondence; the situation was so tense that Hilken was under actual surveillance and his home was being searched. Again, the missive was written in lemon-juice, a medium well-known and for many years used for secret messages, was in a code which could be discovered and the text read by any agent of the United States or of the Allies in perhaps an hour after its capture, contained a sentence in German which would have been indicative of its origin and destination. The document comprises 254 words. Those that have to do with the request for money amount to only 20. All the remainder are wholly irrelevant to the purpose in hand. The names of 21 separate persons and places appear; all but two admittedly names of alleged German agents, asserted by the claimants in these cases to be such, or of places where acts of sabotage are said by the claimants to have been committed by German agents.

The two persons on whom principal reliance is placed for the identification and substantiation of the message are Herrmann and Hilken, who in the spring of 1931 unquestionably were thoroughly familiar with all of the facts and data



developed before the Commission. The record contains a cablegram from von Eckhardt, German Minister to Mexico, to the German Foreign Office stating that he distrusted Herrmann and requesting confirmation of Herrmann's capacity and personality. This fact is referred to at the opening of the Herrmann message and is made the occasion, wholly unnecessarily, for the recital of the substance of the argument made by Herrmann to convince von Eckhardt. In this narration Marguerre and Nadolny, Hinsch and Herrmann are mentioned, as are the Deutschland, the Jersey City Terminal (obviously Black Tom), Kingsland, Savannah (where acts of sabotage against horses and mules are shown by claimants' evidence to have been committed), and Tony's Lab. (the name of Anton Dilger's laboratory for producing toxic germs, all as explained in other evidence in the record). It was surely unnecessary after having said Eckhardt distrusted him to append a biography and history of German agents and sabotage activities in the United States as detailed to von Eckhardt.

The message names Kristoff, but Herrmann has testified he did not know any such person and did not recognize his photograph. It names Wozniak, and tells Hilken to tell Hinsch to see Wozniak and "fix that up"; this comports with Herrmann's previous testimony that Wozniak failed to show up and claim his reward after the Kingsland fire. It refers to Hildegard. We find that long before the message was produced there was evidence before the Commission that Hildegard Jacobson had received a telegram from Herrmann in Mexico, endeavored to reply and failed to get through to him. It goes on to inquire what Hilken will do, now that America is in the war, inquires if he were coming to Mexico or going to South America, advises him to leave the United States and to get all German agents out of the United States. It mentions "Carl D." and says that from past experience the writer does not trust him; this refers to an incident long before exposed in the record, namely, that during 1916 Hilken became distrustful of Carl Dilger and sent him to Germany in 1916 carrying a secret written request to the German authorities to detain him there, but that Dilger, supposing the message to contain military secrets, became alarmed and threw the message into the sea, thus defeating Hilken's purpose.

There are other references equally significant to one familiar with the evidence and the arguments based thereon, previously submitted to the Commission. But enough has been said to show in how extraordinary a manner this document dovetails with all the important and disputed points of claimants' case and how pat all these references are, not to the request for funds but to the claimants' points of proof, — this aside from the absurdity of sending this unnecessary information into an enemy country to a suspected spy then under surveillance.

I come now to a new fact which is of importance. When the Blue Book was filed with the Commission the last page of reading matter had been torn out. Apparently Hilken took no note of this fact, nor did Herrmann. Apparently the American Agent failed to note the condition. So far as we can determine, this excision of the last page was not discovered until the summer of 1932. When Herrmann and Hilken were originally examined respecting what the magazine had contained, they definitely gave the impression that there was but one message. Hilken, in the affidavit originally filed with the Blue Book, definitely states that the code in which the message was written was one which he knew and which had been prearranged between him and Herrmann for their communications. After the discovery of the missing page, Hilken testified that it contained an additional message which gave the key to the code and that he accordingly destroyed it immediately; but, remarkable to relate, he retained the main message, which he had made legible, in his files and went so far, as above stated, as to make a fair copy of it which he carried

to New London to show Hinsch. Siegel does not mention any second message. It is difficult from the testimony to draw any conclusion as to whether there was an additional message and what it in fact contained if it ever existed.

Another matter of note is that the January, 1917, Blue Book, when filed with the Commission, concededly bore certain marks in lead pencil opposite some of the titles of the stories on the index pages. These apparently went unnoticed by Hilken or Herrmann or the American Agent. Some time after the submission of the magazine the German Agent observed them. He subsequently bought a number of other issues of the Blue Book for other months of the year 1917 to be used for comparison and for the use of his expert. These he procured from Abraham's Book Store in New York. They contained similar marks. In several of them were found bills which indicated that the magazines had been delivered by a newsdealer in Brooklyn to a house at 756 Madison Street in Brooklyn. Further investigation developed that one Qualters lived in that house and had in 1930 sold a large number of Blue Book, Red Book, and Adventure magazines to Abraham's Book Store and had received a check for \$12 in payment therefor.

The evidence, in my judgment, is entirely conclusive that Qualters did make such a sale, but it is not clear that he sold complete sets of all three magazines covering the years from 1911 to 1929 as he states. Subsequently both Agents purchased at Abraham's Book Store numerous magazines of the kinds mentioned. Sixteen of all those purchased contained horizontal marks and cross-marks on the index pages; some 53 of them contained only horizontal marks. The German Agent seeks to prove by the Qualters' testimony that these marks were made by Horace Qualters and John Qualters, his brother, when and as they read the articles marked. He seeks also to account for the absence of marks during a certain period by the fact that Horace was absent during the war and was not reading the magazines currently. Qualters identifies the horizontal marks in the January issue as so like his that he believes he made them.

It appears that sometime prior to April 30, 1931, two persons purchased January, 1917, Blue Books at Abraham's Book Store. One of them is now identified as Mr. Traynor, who bought a copy on April 29, 1931, for the claimants, in order to obtain a magazine to compare with the one produced by Hilken. This copy contains no marks whatever on the index pages. The other was bought by someone who cannot be identified, whose description is most vague, the time of whose appearance at the store cannot be definitely fixed, but who, according to the testimony, did not ask for the issue of any particular month but merely for a Blue Book of 1917 and was handed a January number only because the store had two copies of that issue and could better afford to sell one of the copies for that month than to break the set by taking one of another month. Meyers and Abraham, of the bookstore, who had to do with the sales in question, do not identify Hilken or Herrmann as the purchaser of the January, 1917, Blue Book. There is no specific evidence that Herrmann, Hilken, or any agent employed by them or either of them purchased the January, 1917, number of the magazine at the Abraham Book Store.

Expert evidence which is not effectively challenged is to the effect that the marks as exhibited in the 1917 Blue Books and in that containing the message were not made in the order and in the manner described by the two Qualters brothers. The German Agent, however, insists that the markings found on the table of contents of the magazine containing the Herrmann message are so similar to the markings in the other magazines, some of which indubitably and concededly come from the lot purchased by the bookstore from Horace Qualters, that I may draw the conclusion that the January, 1917, magazine

containing the message came from Qualters. He further animadverts upon the tardy explanations of Hilken that German agents were in the habit of using marks as keys to their codes, and of Herrmann that he believes he made the marks in the table of contents in the magazine in connection with the message to Hilken but cannot at this time determine their significance.

If I were to draw the conclusion the German Agent desires, this would end the controversy with respect to the authenticity of the message. While the evidence arouses suspicion, I can not find in it alone enough to reach a certain conclusion. It does, however, add to the doubts which all the other facts and circumstances recited have raised concerning the document.

(3) It remains to consider whether these doubts can be resolved by recourse to the expert testimony. This consists of about one thousand pages. The questions submitted to the experts are in my belief novel. They involve at the foundation certain known qualities of ink and paper. But as one reads the testimony on both sides one is impressed with the fact that the experts themselves had to resort to experiments with lemon-juice writing on new and old paper in order to reach their conclusions. Many of the opinions of the experts on the one side are countered by diametrically opposite results stated by those on the other. I agree with the arguments of both Agents that certain of the experiments and tests which they criticize are not beyond fair criticism and fail to carry conviction. I entertain no doubt that all the experts retained by both litigants were inspired by a desire to do their honest best with a very difficult problem. Both sets of experts evidently believe in the soundness of their conclusions, for they challenge the Commission to make certain experiments and examinations for itself, and it is hardly conceivable that they would do so unless they felt that the results of such experimentation by laymen would justify their confidence. My experience in this behalf has, however, been most unsatisfactory and has only tended to confirm the feeling that on the expert evidence alone my judgment would be left in balance as to the authenticity of the document. Expert evidence is often an aid in determining questions of the sort here presented; but is it far from an infallible guide, as witness the fact that several of the experts for the claimants convinced themselves of the authenticity of the Wozniak letters. This comment does not by any means apply to all of the experts who testify about the Herrmann message, and it is not to be taken as indicating that I have the slightest doubt that all of the expert's opinions are honestly entertained. It is mentioned merely as an illustration of the fact above stated, that, at best, expert evidence can usually be only an aid to judgment, and not always in and of itself so conclusive as to carry conviction.

I need only add in summary that the most careful study and consideration of the expert evidence with respect to the Blue Book message convinces me that upon that evidence alone I should not be justified in affirming the authenticity of the document. I am therefore compelled to revert to the other evidence.

As has been indicated, the testimony offered on both sides with respect to the message, to say the least, raises grave doubts with regard to it. The sources from which it comes, the circumstances of its production, the evidence as to the time and circumstances in which it was written, and the silent but persuasive intrinsic evidence which is drawn from its contents, make impossible an affirmative conclusion in favor of the claimants and against Germany. The claimants have the burden to establish, by a fair preponderance of evidence, that this document was written and sent at the time claimed. With every disposition to avoid technicality, to be liberal as to the interpretation and effect of evidence, and to regard the great difficulties under which the claimants have labored in the production of their proofs, I yet find myself unable to

overcome the natural doubts and misgivings which cluster about this document. I am not, therefore, prepared to make a finding that this is the missive which Herrmann dispatched to Hilken in 1917.

It results from what has been said that with respect to the Black Tom explosion the new proof, when taken in connection with the old, fails to support any finding that Kristoff was a German agent or the employee of any German agent or agents; and fails also to justify a finding that Hinsch is the same person as Graentnor.

As respects the Kingsland case, the evidence does not, in my judgment, justify a finding that Wozniak was a German agent or employed by any German agent; does not justify a finding that excludes accident and affirms incendiarism. It leaves me still of the opinion that Wozniak was not in Mexico in the summer of 1917. There is therefore no sufficient basis for a finding against Germany.

It must be borne in mind that whatever may be the belief of any Member of the Commission with respect to Germany's general attitude and the motives or purposes of its agents, or with respect to the equities of the claimants, or that Germany is disentitled to favorable consideration by reason of her general policy as to American-made munitions and supplies for the Allies, this tribunal sits as a court with the obligation to ignore any such considerations and, however liberally construing rules of evidence, is still bound to act only upon proof which reasonably leads to the conclusions upon which liability is consequent.

A matter upon which the Commissioners disagree is that of the jurisdiction of the Commission ever under any circumstances or for any reason to reopen a claim made under the international agreement of August 10, 1922, which created the Commission, once that claim has been formally passed upon and decided. The German Commissioner's position is that while the two Commissioners by mutual agreement may reopen in such a situation they may not do so where, as here, one of the Commissioners opposes the reopening. The German Commissioner does so oppose in this case.

The conclusions I have expressed make it unnecessary to pass upon the question just stated. Equally unnecessary is it, in view of the foregoing, to discuss whether the evidence offered, or some of it, falls within the class of evidence properly denominated after-discovered.

As it is my opinion that if the new evidence were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission's opinion of October 16, 1930, the findings then made and the conclusions then reached would not be reversed or materially modified, the question as to our jurisdiction need not be answered.

The supplemental petition for rehearing is dismissed.

Done at Washington December 3, 1932.

Owen J. ROBERTS  
*Umpire*

Concurring:  
W. KIESSELBACH  
*German Commissioner*

Dec. 3, 1932.

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*December 2, 1932**Separate Opinion on the Kingsland Case by the American Commissioner*

As to the Kingsland Case, I agree with the finding of the Commission that the three so-called Wozniak letters are manufactured evidence fabricated after the dates when they purport to have been written, and have no value as evidence for the purposes for which they were produced. Nevertheless, I draw from the production of these letters certain conclusions which have an important bearing on some of the other evidence in this case.

Wozniak's authorship of these letters, although not admitted by him so far as the record discloses, can be taken as established for the purposes of this case. They are admittedly in his handwriting and they came to the American Agent through his closest friend, one Ivan Baran, who refused to surrender them until he had received an assurance from the American Agent granting Wozniak immunity from prosecution for incendiarism or perjury.

This whole transaction shows a degree of cleverness and subtlety on the part of Wozniak which was not suspected by the Commission at the time of its original decision. Considering that these letters were so skillfully fabricated that they deceived several of the American Agent's most experienced and trusted experts as to their date of production, judged by physical condition and appearance, and also deceived the American Agent and his counsel as to their trustworthiness, judged by their textual contents, and considering also that the claimants paid \$2,500 for them without Wozniak himself having vouched for their authenticity, while Wozniak at the same time obtained an assurance of immunity from prosecution on account of their bearing on the Kingsland fire or perjury charges, it is evident that the Commission's earlier estimate of Wozniak's mentality, as described in its original decision, must be revised. The Commission then said of Wozniak, "He is in a way smart, though naive, and thinks he is smarter than he really is." He has now demonstrated that he is really smarter than the Commission thought he was, and also that he is even less trustworthy and more formidable and mercenary as a witness than the Commission then assumed him to be. It follows from this conclusion that Wozniak's testimony before the Commission, at the time of the original decision, was given more weight than was justified. In fact, Wozniak has disclosed by his present performance that he is thoroughly untrustworthy as a witness.

The Commission's original finding that Wozniak was not in Mexico at the time he was alleged by other witnesses to have been there in association with German agents rests wholly on Wozniak's own statements. So, also, his alibi story that he was at Tupper Lake, New York, at the time he was reported by other witnesses to have been in Mexico, cannot be accepted if his own statements about it are not accepted. The Commission accepted his statements on these points in reliance upon his assumed credibility. If, however, his credibility is now destroyed by the newly submitted evidence, both of these points are open for reexamination, and the examination should be unprejudiced by the earlier findings of the Commission.

In the original decision, the question of whether or not Wozniak was in Mexico was really a minor issue and immaterial for the decision of the case, in view of the facts found by the Commission as to the cause of the Kingsland fire. In the present proceedings, however, the question whether or not Wozniak was in Mexico in 1917 is one of the essential issues in its bearing upon his status

as a German agent, the decision of which may determine the validity of the claim.

In its earlier decision the Commission adopted the theory that the Kingsland fire was the result of an accident, and was not purposely set by Wozniak, so that whether or not he was a German agent was unimportant. In that decision the Commission stated, "Despite Herrmann's confession, the evidence in the Kingsland case has convinced us that Wozniak did not set the Kingsland fire", and expressed the opinion that the fire was caused by sparks from the machine which held the shell Wozniak was cleaning, in other words, that the fire was an industrial accident. The basis of this finding was Wozniak's own story taken in connection with the evidence embodied in the so-called Johnson report.

The new evidence submitted in the present proceeding shows that this Johnson report, like the Wozniak letters, was fabricated and must now be rejected. It was put into the record by the German Agent only shortly before the Hague argument, too late to be investigated by the American Agent before the Commission's decision, and both the German Agent and the Commission unwittingly relied upon its authenticity. By a curious coincidence, that report, like one of the Wozniak letters, was written on paper which, by its watermark, was proved not to have been manufactured until after the date on which it purported to have been written.

This report being spurious, and Wozniak himself having been discredited, there is nothing in the record, as the case now stands, to support a finding that the Kingsland fire was the result of an industrial accident. On the contrary, voluminous affidavits and reports have now been submitted negating the possibility of an industrial accident. Accordingly, the question of whether or not Wozniak was a German agent or employed by a German agent at the time the fire started at his work bench becomes a decisive question in this case. Its importance appears from the statement in the Commission's original decision that, in view of the background established in the sabotage cases which showed authorized sabotage activities in the United States by an organized group of German agents, "inferences against Germany were rendered easier than they otherwise would be", which means, in application to the present case, that if Wozniak is shown to have been a German agent at the time of the Kingsland fire, the Commission would be justified in inferring that Germany was responsible, under the Treaty of Berlin, for that fire unless such inference was prohibited by other evidence. The Commission's theory in the earlier decision that this fire was the result of an industrial accident precluded any such inference because in that situation it was immaterial whether or not Wozniak was a German agent, but, inasmuch as now the fire is no longer regarded as an industrial accident, the inference above indicated can be drawn if it be shown that Wozniak was a German agent. The national Commissioners are in agreement on this point, as stated in their certificate of disagreement.

It is evident from the foregoing brief analysis of the situation that in examining the new evidence we may proceed on the basis that Wozniak's testimony and the Johnson report are wholly discredited, and that the findings of the Commission based on that evidence may be disregarded.

There is much new evidence now before the Commission which is intended to show that Wozniak was a German agent at the time of the Kingsland fire, not only by reason of new facts presented but also by giving a new meaning and value to some of the old evidence on that point which was discredited in the original decision.

Some of the new facts presented to establish Wozniak's presence in Mexico in 1917 are embodied in the affidavits of Sylvester Golka (December 9, 1931)

and Peter Panas and his wife (November 14, 1931). Exhibits 929, 930-1, 930-2.

Golka and Panas and his wife were old friends of Wozniak, and were on intimate terms with him in 1917. They are highly reputable and trustworthy people. They set forth in their affidavits, with some convincing detail, the receipt by them of three letters in all, written by Wozniak to them from Mexico in the Summer of 1917. The only ground on which it has been sought to discredit their receipt of these letters is that in the letter to Golka he requested that it be destroyed upon receipt, which was done, and that later he followed up the letters to Panas and destroyed them himself. It is argued that it was wholly inconsistent that he should be so anxious to have those letters destroyed and at the same time should have made no such request in his letters written contemporaneously to Baran, especially in view of the fact that the Golka and Panas letters were clearly innocent in character, whereas the Baran letters were distinctly incriminating, taken in connection with other facts in the record. This argument obviously is based on a false premise, because having admitted that the Baran letters are forgeries, they cannot be accepted as a basis for discrediting this other evidence. Naturally they did not contain a request that they be destroyed because that would have been inconsistent with the purpose for which they were forged, which was to be produced in this case to prove that Wozniak was in Mexico in 1917. There is nothing in the record which throws any discredit upon these Golka and Panas affidavits, and there is no reason why they should not be believed. They stand, therefore, as credible evidence that Wozniak was in Mexico in 1917, and his desire to have his letters destroyed shows that he wished to conceal his presence in Mexico at the time they were written. It will be noted that by these spurious letters fabricated by Wozniak, he in effect represents himself to have been in Mexico in 1917, and makes himself out a perjurer when he swore to the contrary in his previous testimony.

An item in the new evidence, which gives new meaning and value to some of the old evidence, is the report of the police official in Poland. Exhibit No. 936. This report is to the effect that in the neighborhood of Wozniak's old home in Rawa Russka there was a forest in which Wozniak once worked, known as the "Karow" forest, and that it was customary in Poland to add to the family name a second name either as a prefix or suffix, descriptive of the person's occupation or place of residence. He says, accordingly, that Wozniak, as a workman in this forest, would have been known as Karowsky-Wozniak, or Wozniak-Karowsky perhaps the added name might have been Karifsky instead of Karowsky. This, however, is an unimportant detail. The old evidence, to which this new evidence gives new value, is found in the affidavits of several witnesses who identified Wozniak as a man known as Karowsky, or Karnowsky, or a phonetically similar name, in the Summer of 1917, as an associate of admitted German agents in Mexico. In its original decision the Commission mistrusted this attempted identification largely because there was at that time nothing in the record to show that Wozniak had ever used such a name as Karowsky. In view of this new evidence, however, the name sounding like "Karowsky" no longer appears out of a clear sky and without any connection with Wozniak. Consequently, the earlier affidavits, identifying Wozniak as the man known by such a name, who was the associate of German agents in Mexico, are entitled to be regarded as seriously important evidence.

Furthermore, the explanation about Wozniak's earlier occupation as a lumberman in the Karow forest has the further value, in connection with his Tupper Lake story, of showing that even if he had never been to Tupper Lake, he knew enough about the life and work in a lumber camp to enable him to

invent the rather meager details which he gives in his affidavit about his life there. The information in his affidavit about the wages and terms of employment, and the distance of the camp from the railroad station, and the name of the camp, could have been obtained without going to the camp at all. Most of it was obtainable from the Lumber Company's employment agency in New York, and would be contained in the usual employment application form supplied to applicants. With this information, supplemented by his early experiences in lumber camps, he was clever enough, as a fabricator, to make an affidavit sufficiently accurate in detail to persuade the American Agent that, as he conceded in oral argument, it was certainly possible that Wozniak had been at Tupper Lake at some time before his trip there as a witness in 1929.

Wozniak's status as a German agent is further supported by new evidence in the affidavits of the witnesses Capitula (Exh. No. 902), Nolan (Exh. No. 890), King (Exh. No. 891), Palmer (Exh. No. 896 (a)), and Clucas (Exh. Nos. 822 and 895). This testimony leaves much to be desired, but, if Wozniak's own testimony in conflict with it be disregarded for the reasons above stated, it stands undisputed, and, taken together with the above mentioned Golka and Panas affidavits and the earlier affidavits identifying Wozniak as the German agent known as Karowsky in Mexico in 1917, a *prima facie* case, at least, has been made establishing that Wozniak actually was a German agent at the time of the Kingsland fire.

With Wozniak's status as a German agent established, it is not necessary to prove that he purposely or actually started the fire, because, for the reasons already stated, the Commission, in these circumstances, is justified in drawing the inference that Wozniak was responsible for it, even though proof is lacking as to exactly how it was done.

It may be noted on this point, however, that the Commission is not bound to accept either Wozniak's statement of how it was started or Herrmann's explanation of what his instructions to Wozniak were about the use of incendiary pencils, because in the present view of the value of the testimony of these witnesses, the Commission is at liberty to disregard everything they have said on this subject, and, so far as the record shows, the real truth as to how this fire was started has never been disclosed.

We do know, however, from thoroughly dependable testimony, that, as found in our original decision, the Imperial German Government had authorized the destruction of ammunition plants in the United States during the period of our neutrality, and that an organization of German sabotage agents had been established for that purpose and had been supplied with funds and implements to be used in sabotage activities. We also know, as a settled fact in this case, that the Kingsland fire started at Wozniak's work bench, and we now find that a *prima facie* case has been made against Wozniak as a German agent himself at that time. The purpose, the opportunity, the means, and the agent were all there.

In view of these considerations and conclusions, the Commission is justified in holding that on the record, as it stands, the German Government must be held responsible, under the terms of the Treaty of Berlin, for the damages resulting to the claimants by reason of the Kingsland fire.

Chandler P. ANDERSON

Note: The so-called Herrmann secret message, embodied in the Blue Book Magazine for January, 1917 (Exhibit No. 904), if accepted as authentic, would conclusively prove the liability of Germany in both the Kingsland and the Black Tom cases. Inasmuch, however, as the authenticity of that message is questioned, no reference has been made to it in reaching the conclusions



stated in the foregoing opinion, which demonstrates that Germany should be held liable in the Kingsland case independently of that evidence, and even if its authenticity should not be accepted.

As appears from the Certificate of Disagreement by the National Commissioners referring both of these cases to the Umpire for decision, the American Commissioner disagreed in the Black Tom case as well as in the Kingsland case.

C. P. A.

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KATHARINE M. DRIER (UNITED STATES)  
v. GERMANY

(*July 29, 1935, pp. 1075-1080; Certificate of Disagreement by the National Commissioners, June 18, 1935, pp. 1037-1074.*)

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WAR: PROPERTY IN ENEMY COUNTRY, COMPULSORY SEQUESTRATION, UNAUTHORIZED SALE. — DAMAGE, DAMAGES: FAIR VALUE, MANIFEST ERROR IN REACHING AMOUNT OF DAMAGES. — PROCEDURE: CONFIRMATION BY COMMISSION OF AGREEMENT BETWEEN AGENTS; FINALITY OF AWARD: VALUE OF RESERVATION BY CLAIMANT, OF NEGOTIATIONS AFTER AWARD; ADDITIONAL AWARDS; REHEARING AFTER FINAL JUDGMENT, INJUSTICE, ERROR IN FACT; TIMELINESS OF PETITION: ADEQUATE REASONS FOR DELAY. — EVIDENCE: DISCRETIONARY APPRAISAL OF UNCHALLENGED EXPERT EVIDENCE. Compulsory sequestration of country estate in Germany belonging to claimant, an American national. Sale of estate by claimant's attorney, allegedly unauthorised, in November 1919. Consummation of sale on May 10, 1920, after consent of compulsory administrator. Claim presented to Commission for difference between sale price and fair value as of 1919. Award entered on January 14, 1925, for amount jointly recommended by Agents in agreed statement filed with Commission. Award not final: under reservation agreed upon between claimant and Agents, she applied for additional award when recovery denied in Germany against attorney and purchaser. Additional award on April 5, 1929, for amount deemed insufficient by claimant, but accepted beforehand on account of her destitute condition, with reservation, however, of all possible remedies before Commission or through diplomatic channels for further compensation. Execution of both awards under War Claims Settlement Act of 1928. Request for third award filed on November 18, 1932, on ground that (1) claimant deprived of rights under Treaty of Berlin, (2) awards conflicted with Commission's previous rulings, and (3) contained manifest error in determination of measure of damage. Negotiations, between date of request and date of German answer thereto, between parties to arrive at compromise for supplementary amount. *Held* that petition timely, if well founded in fact and law (adequate reasons for delay), but should be dismissed since Commission without power to redress (a) alleged injustice, or (b) errors of fact, particularly when involving opinion as to value (no obligation to award full amount shown by expert evidence, even if unchallenged, no abuse of discretion in appraising evidence, no manifest error in reaching amount of award), and (c) not bound by second reservation (statement by claimant that he accepts award under protest and will apply further to Commission is without legal force) or negotiations for compromise (not on record, extrajudicial).