

**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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To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.

Done at Washington December 15, 1933.

Owen J. ROBERTS
Umpire

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

(*Sabotage Cases, November 9, 1934, pp. 1155-1158; Certificate of Disagreement, September 29, 1934, pp. 1128-1155.*)

PROCEDURE: MOTION TO ORDER BILL OF PARTICULARS CONCERNING FILED EVIDENCE. — EVIDENCE: FILING, RELEVANCY, MOMENT FOR DISCUSSION. Motion of German Agent filed June 13, 1934, for ruling that American Agent, who filed evidence in support of request for rehearing (see headnote preceding previous decision, p. 160 *supra*), by brief, bill of particulars, or otherwise substantiate charges of a general nature contained in request. Motion overruled: (1) filed evidence in itself defines and limits allegations, (2) inappropriate, not helpful, and unfair to demand discussion of evidence by American Agent prior to German Agent's filing of evidence, (3) under Agreement of August 10, 1922, Commission must receive any writing either sovereign party may tender and may not, as court in civil law procedure, rule out evidence for irrelevancy, (4) decision of December 15, 1933 (see p. 160 *supra*), defining character of evidence which Commission will receive, enables German Agent to determine whether or not to offer evidence in rebuttal.

Cross-reference: Witenberg. Vol. III, pp. 25-27 (French text).

Bibliography: Witenberg. Vol. III, pp. 25-27.

Certificate of Disagreement

A Motion by the German Agent filed June 13, 1934, has now been submitted to the Commission asking for an order that the American Agent file a brief, a bill of particulars, or some other written statement substantiating the contentions advanced in his petition for a rehearing, wherein specific allegations be listed and specific evidence filed by him in support of his petition for reopening the Sabotage Cases be cited.

The Motion under consideration relates to the charges made by the American Agent in his petition for a rehearing in the Sabotage cases filed by him on May, 4, 1933. This petition averred (1) "That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants", (2) "That there are certain witnesses within the territorial jurisdiction of the United States", some of whom are specifically named in the petition, "who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully", (3) That evidence can be produced "to show that the Commission has been misled by the German evidence", (4) "That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims."

On June 13, 1934, the German Agent filed an Answer to the American Agent's petition of May 4, 1933. This Answer denied "that witnesses for Germany in affidavits filed by Germany furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants".

This Answer also alleged that "the German Agent is at a loss to make a more detailed rebuttal since the allegations of the petition as quoted above are vague and general, and do not cite which specific witnesses are to be charged with fraud, collusion, etc., and which parts of their testimony are false and mislead the Commission. For the same reasons the German Agent is not in a position to determine at this time whether or not he will file evidence in rebuttal of the testimony, reports and other material presented by the American Agent in support of the petition." This Answer further indicates that the reason for filing the motion for a bill of particulars is to set out more fully these criticisms of the petition.

Evidence in support of the American Agent's petition was filed during the period September 15, 1933, to February 15, 1934, on which last mentioned date the American Agent gave notice that he had filed all the supporting evidence that he desired to present in that proceeding, pending the filing by the German Agent of rebuttal evidence, if any.

This petition presented a jurisdictional question as to the right of the Commission to reconsider its original decision dismissing these cases, which the two Governments desired to have decided before examining the evidence offered either with respect to its admissibility or its bearing on the merits of the claims.

The National Commissioners disagreed on this jurisdictional question and the decision was, accordingly, rendered by the Umpire.

The Umpire held in his decision, rendered on December 15, 1933:

"1. I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions. It is said on behalf of Germany that this has never been done except where the two Agents agreed that such course under the circumstances was proper. And the argument is drawn from this fact that the

Commission is without power to take such action of its own motion or in the face of opposition by either Agent. I cannot follow this argument.

* * * * *

"* * * The first petition for reopening and rehearing filed in these cases by the American Agent was based on grounds such as are above described. I have no doubt that the Commission had power to consider that petition and to deal with the case in the light of the matters it brought forward."

The decision then continues:

"2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as after-discovered evidence. I am of opinion that the Commission has no such power.

* * * * *

"It is suggested in the petition for reopening that the United States was unable to obtain the evidence from certain witnesses without the power to compel their testimony. This fact was as obvious in the autumn of 1930 as it is today. The German Government availed itself of its ordinance of June 28, 1923, which permitted the summoning of witnesses, placing them under oath, examining them before a court, and rendering them liable to penalty for fals swearing. No reason is apparent why a similar statute could not at any time have been adopted in the United States. The best evidence that it could is that when the American Agent and the Department of State requested the passage of such a law it was promptly enacted and has been availed of in obtaining evidence now proffered (Act of June 7, 1933). The lack of an instrument which would have been ready to hand if requested can not excuse the failure to obtain the testimony thereby obtainable.

"The Agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, obtain a hearing and decision thereon, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made."

In conclusion the decision holds:

"3. The petition now under consideration presents, in the main, a situation different from either of those above discussed. Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

"The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

"I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by

the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.”

Turning back now to the question presented by the German Agent’s Motion, hereinabove mentioned, filed June 13th, for “ a bill of particulars ”, etc., this motion has now been submitted for the decision of the Commission, accompanied by a “ Reply of the American Agent ”, etc., filed June 23, 1934, and also by a “ Memorandum filed by the German Agent on July 26, 1934, relative to the Reply of the American Agent ”, and a “ Reply to the German Agent’s Memorandum ” filed by the American Agent on August 6, 1934. The national Commissioners are in disagreement as to the action to be taken by the Commission on this Motion, their respective opinions being as follows:

Opinion of the American Commissioner

It appears from the foregoing statement of the present status of the pending proceedings that the only question now presented for decision by the Commission is the action to be taken on the German Agents’ Motion for a bill of particulars, and that the Commission is not called upon to take any action on the pending petition for rehearing, which has not yet been submitted for its decision. Neither is the Commission called upon at this time to determine what evidence submitted by the American Agent is to be considered. The American Agent has not been heard upon that question. It is not presented at this time. It can only be presented and considered when the petition and supporting evidence is submitted to the Commission for action.

In discussing the issues presented by this Motion, the German Agent relies on the Umpire’s decision of December 15, 1933, as having the effect of eliminating from consideration all evidence offered by the American Agent which comes within the application of two of the three classes of evidence dealt with by the Umpire. He couples his Motion with his Answer to the petition, and in the Answer he takes the position that “ under the decision of the Umpire of December 15, 1933, which rules that no after-discovered evidence and consequently no allegations based on such evidence can be the basis for a re-hearing ”, he will refrain from a discussion of allegations based on such evidence because it has become immaterial.

In taking this position as to the effect of the Umpire’s decision the German Agent is entirely within his rights but in the opinion of the American Commissioner he has completely misinterpreted the meaning of the Umpire’s decision. The Umpire has held that newly discovered evidence is not admissible merely for the purpose of changing the record on which the original decision was made. But in the same decision the Umpire has also held that new evidence challenging the truth and good faith of evidence upon which the Commission relied in making its original decision was not only admissible but must be considered on a petition for a rehearing. The Umpire made his position on that point clear when he said in his decision of December 3, 1932, with reference to the Blue Book Magazine message:

“ If the so-called Herrmann message is authentic, that document alone would compel a contrary finding to that I have just stated so far as concerns Wozniak’s being a German agent.” (Decs. and Ops. of Com., p. 1013.)^a

^a Note by the Secretariat, this volume, p. 113.

Again, the Umpire said in that decision, with reference to the Herrmann message, that:

“As the American Agent has well said, I may utterly disregard all the new evidence produced and still, if I deem this [Herrmann] message genuine hold Germany responsible in both of these cases.” (Id., p. 1016.)^b

Reading the Umpire's decision of December 15, 1933, in the light of these statements in his decision of December 3, 1932, it is evident that he regarded as admissible any new evidence which proved fraud, perjury, collusion, or suppression of facts in the original record.

While the Commission by the Umpire in its decision of December 15, 1933, held that this Commission did not have the power to reopen a decision merely on after-discovered evidence, this does not mean that the Commission cannot and will not receive and consider after-discovered evidence for the purpose of determining whether any evidence upon which the Commission relied in its decision of October 16, 1930, was of a false and perjurious character, or whether any such evidence established the fact that the Commission in the decision of October 16, 1930, was in fact misled to the detriment of claimants on whose behalf the United States is presenting these claims by the character of the evidence filed at that time by the German Agent. This is particularly true where the so-called after-discovered evidence conclusively shows the falsity and misrepresentation inherent in certain of the essential defense evidence filed prior to The Hague decision.

The German Agent also takes the position in his Answer that “that part of the petition which deals with the American Agent's endeavors to compel testimony under oath has become immaterial since the Act of June 7, 1933, was passed and the German Agent, therefore, refrains from commenting thereon”.

The only comment on this point that the American Commissioner feels called upon to make at this time is to point out that during all the period under consideration there was a law of the Congress of the United States (Act of July 3, 1930, 46 Stat. 1005) in force which authorized the compulsory examination of witnesses in the United States by this Commission, and notwithstanding repeated requests by the American Agent to have the Commission take action under this law such action by the Commission was prevented by the obstructive attitude of the German Government. As was pointed out in the Certificate of Disagreement of the two National Commissioners of November 28, 1932 (Decs. and Ops. of Com., p. 1000),^c these requests of the American Agent were supplemented by the suggestion of the Commission itself to the two Governments that they confer the requisite authority on the Commission to take advantage of the right granted by the Act of July 3, 1930.

The German Agent concludes, therefore, that in view of the limitations imposed by the Umpire's decision upon the evidence to be considered, the contention to be dealt with concerns only “that part of the petition of May 4, 1933, in which the American Agent alleges that ‘witnesses for Germany, in affidavits filed by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants’”.

It is the evidence filed in support of this allegation to which the German Agent addresses this Motion for a bill of particulars.

He says: “This allegation is very vague and unsubstantial, no specific statement or part of a statement being identified that, in the opinion of the

^b Note by the Secretariat, this volume, p. 115.

^c Note by the Secretariat, this volume, p. 105.

American Agent, is to be held untrue and misled the Commission; nor is there any indication as to which German witnesses are to be charged with fraud, perjury, collusion, etc.”

It will be noted that under the German Agent's interpretation of the effect of the Umpire's decision, the scope of the discussion is reduced to a consideration of the new evidence bearing upon the question of whether any evidence on which the Commission relied in rendering its original decision was false, fraudulent, incomplete or collusive, thereby misleading the Commission and unfairly prejudicing the cases of the claimants.

The German Agent asserts in his Motion that “ This material contains a tremendous number of assertions, many of them being in conflict with each other, or with statements made in testimony previously submitted by the American Agent. For this reason and inasmuch as it is anything but self-explanatory, it leads to unclear, inconsistent, or contradictory conclusions; in some instances it is not possible at all for the German Agent to arrive with certainty at a conclusion which might be drawn from particular pieces of material.”

The American Agent in reply points out that issues to be considered are issues of fact and have already been sharply defined.

He says further: “ Both sides know what they are and the task of the German Agent, in so far as the new evidence is concerned, is merely to examine it, determine in what respect, taken in connection with prior evidence in the case, it discredits positions taken and proof offered by the defence at The Hague submission. This is ordinarily a task which counsel in any litigation are expected to perform for themselves.”

The American Agent adds: “ The real question is whether they [the defense] should be supplied by the American Agent with a brief analysing the significance of the new evidence in advance of introducing their own rebuttal evidence.”

The German Agent says at page 4 of his Motion: “ Sometimes the result of the examination by the German Agent [of the evidence supporting the petition for rehearing] would show that an affidavit of a German witness is in accordance with one part of the new evidence, whereas it is contradicted by another part of it. In such case he would have to consider steps on his part with regard to both alternatives to the question of counter-evidence.”

The American Agent's comment on this statement is that “ This dilemma, the answer to which the German Agent says involves a tremendous undertaking on his part, is brought about by the prior positions taken by his witnesses. This is a situation for which the American Agent is in no sense responsible, and which offers no basis for the relief asked for by the German Agent.” He says further that he does not feel called upon to explain or elect what part of the testimony of the German witnesses he intends to rely on. On the contrary he says, “ The American Agent intends to rely upon the entire body of evidence submitted in support of the petition for a rehearing.”

In view of the foregoing considerations, and taking into consideration also the very specific information which the American Agent has set out in his petition giving the names of four witnesses whose evidence is challenged and six listed categories of alleged facts, the truth of which he seeks to establish by the new evidence, the American Commissioner is of the opinion that the task of the German Agent is much less difficult and complex than he represents it to be.

Furthermore, the German Agent has already had several months since the new evidence was filed in which to study all of it, and twice as much time to study the greater part of it, and was personally present at the examination of

one of the most important witnesses. He evidently has already given it a very careful examination, as appears from some of the allegations in his Motion papers.

However, even accepting the German Agent's own estimation of his difficulties, it does not appear to the American Commissioner that he is entitled to call upon the American Agent to assist him in formulating his defence. Such procedure would be most unfair to the American Agent, and, in the opinion of the American Commissioner, would result in protracting rather than expediting the progress of this litigation. The method of procedure sought by the German Agent would require the American Agent to submit a brief on an incomplete record, leaving the German Agent free to file rebuttal evidence later which would not merely call for a new brief by the American Agent, but at the same time would protract and delay the decision of these cases.

The objections to the proposed plan demonstrate why it has never been adopted as a recognized rule of procedure.

These points have been fully argued by the American Agent in his reply and Memorandum in opposition to the Motion, and the American Commissioner fully concurs in the views therein set forth.

Furthermore, the only question which the German Agent is called upon to decide now is whether or not he desires to submit any evidence in rebuttal and that is a question which he must decide for himself without calling upon either the American Agent or the Commission to help him in making his decision. As already pointed out, the petition itself is not yet before the Commission for action.

For these reasons, as well as for the additional reasons advanced by the American Agent in opposition to this Motion, the American Commissioner concurs in the conclusions set forth in the American Agent's Reply, which are briefly: (1) the demand for a bill of particulars is inappropriate in the present situation; (2) the rules of the Commission do not require the American Agent to file a brief on the new evidence before the record is complete; (3) to require the American Agent to file a brief dealing with an incomplete record would delay rather than expedite the orderly progress of this case, and the briefs of both Agents should be filed simultaneously before the petition itself is submitted for decision and should deal both with the admissibility of the new evidence and its value on the merits of the issues involved. The American Commissioner, accordingly, holds that the Motion should be denied.

Chandler P. ANDERSON
American Commissioner

August 23, 1934.

Opinion of the German Commissioner

I. The Umpire's Decision of December 15th, 1934 [1933], has defined the *thema probandum* of the discussion.

The *thema probandum* at present is not the old one discussed at the Hague and Washington on September 18th, 1930 and November 21, 1932: "Did German Agents cause the destruction of Black Tom and Kingsland?" but the *thema probandum* is now: "Did witnesses as defined by the December Decision commit fraud etc., as defined by the Decision and was the Commission misled by such fraud?"

A new *thema probandum* means a fresh case. (When I say "a fresh case", it is not meant to exclude the possibility of framing the fresh case partly by

reference to certain pieces of the old file; how far such procedure may be permissible shall be dealt with later.)

II. The Umpire's Decision contains a twofold ruling which governs the fresh case: a positive and negative one. The Decision rules positively what allegations the fresh case must contain and negatively what allegations it is not allowed to contain.

The American Commissioner has ventilated both sides and he has begun with the negative one. I shall do the same. He has handled the subject in an abstract way: he does not dwell on any specific evidence, asking whether it is admissible or not, but he explains generally what consequences ought to be drawn from the Umpire's ruling and what its right interpretation is. Only in one place the American Commissioner mentions a particular piece of evidence (the Herrmann message). Again I shall follow his example, speaking generally about the same things and mentioning regarding the different pieces of evidence only the Herrmann message, in order to answer what has been said about it.

III. The Umpire's ruling sets up three categories: palpable error, new evidence, fraud. The first category is no longer of interest here. The second category is barred to the Claimants: it is not permissible for them to introduce allegations which would fall under this category. They are restricted to the third category; they are allowed to rely on fraud, suppression, collusion.

To avoid any misunderstanding in this connection, one point should be stressed at the very outset: When the Umpire speaks of fraud, suppression, collusion, he does not mean anything which was already at the Hague or at Washington brought before the Commission and fully and fairly argued before it. Fraud, *already discussed*, does not open the door to a reconsideration of any case. No party may claim more than a fair and exhaustive hearing; this granted it does not matter whether the subject-matter thus exhaustively and fairly dealt with, was an allegation of fraud or any other allegation. *All* reasons possibly adduced to justify a reconsideration on account of fraud (including the reasoning in the Umpire's Decision) does not apply to and does not cover the case of an allegation of fraud, previously made and previously dealt with under all the guarantees of the Law. (Of course, if a *further* fraud is alleged, *different* from the one already discussed, but preventing the trial of the old fraud-allegation from being a full and fair one, this new allegation, not yet discussed, may, if the other conditions are there, possibly lead to a reopening.)

I think, I could express the view expounded here in terms of Anglo-Saxon Jurisprudence and support it from it. But purposively I have chosen general terms.

IV. If fraud still undiscussed is alleged, the next restriction flows from the Umpire's Decision when he states, he admits such fraud, *as misled the Commission*. Thus the Umpire asks for causality between fraud and decision. (I think it is merely a slip of the pen, when the American Commissioner on p. 9 [p. 1133, this print]^d says "or whether", where the appropriate words would be "supposing that".) This means: The claimants may rely only on fraud, which led to statements, that are *necessary elements of the Decision*. If this question is to be answered in the negative, then the allegation of fraud is inadmissible. Particular attention must be paid to cases in which statements are supported *not only* by evidence allegedly tainted with fraud, but by *other* evidence too; in such cases an examination becomes necessary whether the evidence not tainted with fraud would be sufficient by itself to support the

^d Note by the Secretariat, this volume, p. 194.

corresponding statement. If yes, again the allegation of fraud would be of no avail.

V. Hitherto undiscussed fraud, leading to statements which are necessary elements of the Decision and are not supported by sufficient other evidence may be alleged under the Umpire's ruling. The question arises: which *evidence* is admissible to prove it? The American Commissioner discusses whether *new* evidence may be adduced in this connection. He says that while it is true that the Umpire bars new evidence (second category), this principle would not apply, if the new evidence is bearing on fraud (third category). The American Commissioner disapproves of the German Agent's view to the contrary, as he states it. I agree with the American Commissioner. From a formal standpoint one may say that such evidence comes within the second category as well as within the third. But I have no doubt that a sound interpretation of the Umpire's ruling must place it in the third category. If the German Agent holds a different view, then I disagree with him.

VI. Whereas consequently no further doubts may prevail about the admissibility of *new* evidence, I want to emphasize that I entirely disagree with the American Agent about the extent of admissibility of the *previous* evidence. If I understand his Briefs aright, he has decided not to sift in any way the old evidence notwithstanding the restricted *thema probandum*. In spite of the fact that the Umpire has rejected a whole category of allegations and has limited the American case to a much narrower *thema probandum*, the American Agent has not eliminated one shred of his evidence, although mostly collected *before* the Umpire's ruling. And evidently he does not want to do so at any time in the future.

Indicative of the American Agent's view-point is perhaps his Brief, dated August 4th, 1934, where in a sweeping way he says (here and in other places) "we have to determine *from a review of the whole record*, whether, * * * the award requires a reversal "; (italics mine).

His argument simply and sweepingly seems to be that he may use *any* previous evidence to corroborate the new one, without taking the trouble of any discrimination.

That is just the thing which is barred by the Umpire's ruling. We have *not* to go on inflating the record indefinitely, but we have to confine ourselves to the *fresh case*, as I expressed it in the beginning of this Opinion. And evidence to be tendered has to relate to the fresh case and not to the old one.

I do not deny on principle that within certain limits previous evidence may be combined with admissible new evidence to corroborate it; but I deny absolutely that this means an authorization for the American Agent to go on with his case just as he did before the oral argument, just as if there were no judgments with force of *res judicata* and no December Decision of the Umpire in existence.

The practical conclusion to which I come is: Old evidence to be relied upon by the American Agent (and with new evidence, of course, it is the same), is only admissible in so far as it has a real bearing on the present *thema probandum*. And the American Agent must show that it has. And the only way to show this is to sift it and to indicate what evidence belongs to the individual allegations that constitute the fresh case. These individual allegations are dealt with in the second part of my Opinion. There I shall refer back to the present argument in so far as *evidence* is concerned.

VII. Having said all I want to say about the negative bearing of the Umpire's ruling, I could stop here, but for the fact that the American Commissioner mentions the "Herrmann message" and infers from the Umpire's pertinent

remarks in the Washington-Decision that the Umpire shares his opinion as to a certain interpretation of the Umpire's (later) December-Decision.

I have to reply:

In the Washington-Decision the Umpire states that the Herrmann message, if genuine, would prove both the Black Tom and the Kingsland case. He states this and nothing more. He makes no statement, neither directly nor by inference — about the admissibility of the Herrmann message, be it on account of fraud or on any other account. And logically he *could* not make any statement about the admissibility; for perusal of the records shows that throughout the Washington Debates by general agreement the question of the *admissibility* of the fresh American allegations was held in abeyance and was only assumed *for arguments' sake*. This alone would dispose of any conclusions based on the Herrmann message. But aside from this the argument drawn from the message is not sound for a second reason. In the Washington Debates the Herrmann message was not considered in the light of its proving any fraud of German witnesses, but simply in the light of its proving the American case. Strongest doubts must prevail whether it then was not simply after-discussed evidence brought against the Hague-Decision and should have been rejected on that ground. But a decision of that point may be dispensed with. For instead of being rejected, it was fully and fairly discussed, which furnishes an independent reason, to consider it as being no longer of importance.

VIII. I now advert to the second part of this Opinion. Having examined negatively, what the fresh case, called for by the Umpire's ruling, must not contain, it now becomes necessary to state positively, what it must contain. I think it must specify three things:

"A. Which are the Witnesses whose testimony is assailed as coming within the scope of the Umpire's ruling of December 15, 1933?"

"B. Which are the assertions or actions of the Witnesses mentioned under A, that are assailed as being fraudulent, suppressive, collusive in the sense of the Umpire's said ruling?"

"C. How is it shown that the Commission was misled by the allegations mentioned sub B, viz. that the Hague and the Washington Judgments *rest* on these allegations, those latter having been accepted and believed by the Commission?"

I think, this is a true paraphrase of the contents of the Umpire's ruling and it is quite clear that the claimants having obtained a ruling, which in a *general* and *abstract* form admits part of their case, are now under a duty to submit the individual and concrete allegations such as constitute a juridical case correctly framed. And before such a juridical case correctly framed, at this new stage of the procedure is laid before him, the German Agent is neither obligated nor even able to answer fully and exhaustively, in particular to define his attitude as to rebuttal evidence.

IX. The Claimants have not *expressly* and *explicitly* answered the questions as outlined above. They *refer* the German Agent (and the Commission) to their "petition for rehearing" (anterior in date to the Umpire's ruling) and to the evidence itself they have filed (mostly likewise anterior in date to the Umpire's ruling).

Their allegation is that in the case as it was fought before the Umpire's December Decision all issues were so sharply defined and the matter so thoroughly discussed that now the German Agent (and the Commission) cannot be in doubt which parts of the record and of the evidence are still upheld by the Claimants and considered as relevant by them, in particular if coupled with the contents of their "petition for rehearing".

I do not deny that, generally speaking, in many instances a fresh case in the sense in which I use this term throughout this Opinion, may be framed by reference. But I hold that in any case two conditions must be strictly complied with:

(a) The allegations and evidence referred to must be easily discernible from the rest;

(b) They must be clear and unambiguous in themselves.

The Question arises: Have these conditions been met in the present circumstances? I think, the answer must be: No.

(a) From the very outset it would be surprising if the allegations and evidence pertinent to the fresh case, as outlined in the Umpire's December Decision, were clearly discernible from the rest in the present situation. We are faced with a law suit of quite unusual dimensions; an enormous record was collected, lengthy hearings were held; two judgments were rendered; the Umpire's December Decision placed the whole matter on a different ground, ruling out anything which did not come within the scope of a new framed and clear-cut theme. But, as I already pointed out in a different connection, the American Agent has been going on with the case exactly as he did before; the Umpire has eliminated in his Decision a well-defined part of the case, the American Agent has eliminated nothing of his evidence, just as if the Umpire's ruling as to the elimination were meaningless and negligible. What he refers to, is a petition which wholly, and evidence which mostly, are previous to the Umpire's ruling and which, of course, made not and could not make the discrimination which the Umpire stated to be vital. How could it be expected that such discrimination could be made *subsequently* with any degree of certainty by the German Agent and by the Commission the American Agent remaining inactive?

I think, some instances may illustrate, whether it is possible or not to state whether evidence submitted by the American Agent really comes within the scope of the Umpire's Decision.

(1) The American Agent has filed as Exhibit 977 Annex R. an affidavit of Mr. Arnold setting forth that the check for \$2,500.00 handed over to Baran for the Wozniak letters was collected on June 27, 1931. No German witness or expert has, so far as I can see, ever questioned this payment or made a statement on this point. Where is the connection with the case as it stands today?

(2) In Exhibit 977 Annex L, one James W. Kusiw testified that in June 1931 Baran requested him to examine a piece of paper cut from one of the Wozniak letters in order to ascertain its age. The result was that from the nature of the paper no inferences could be drawn.

Kusiw confirms allegations which the American Agent had advanced in Washington (Page 254, Printed Oral Argument) which had never been questioned by the German Agent and which were accepted as common ground in the Umpire's Decision (Page 1010).^c

(3) Mr. Paul Koenig has given a statement of several hundred pages (Exhibit 985). The main aim of his examination evidently had been to establish his connection with Burns and Scott, two watchmen employed on the Black Tom Terminal in 1916. No statement of German witnesses concerning this point has ever been before the Commission so that it cannot be seen what meaning shall be attributed to it in a proceeding restricted to the issue of fraud, collusion, etc., of German witnesses. And further: Koenig emphatically *denies* having ever known the two watchman and sets forth that persons with

^c Note by the Secretariat, this volume, p. 111.

similar names appearing on his lists were not identical with them. Does the American Agent *rely on* that? (He states he relies on the "whole record".) Does he agree with it? If yes, why does he bring evidence on things that are common ground? If no, why does he submit evidence by which he refutes himself?

(4) The Koenig statement and in a similar way the Kristoff reports filed by the American Agent as Exhibit 983 Annex A, (binder containing detective reports covering shadowing of Kristoff and his acquaintances in 1917 and later years), give raise to an additional remark: Both of them are of considerable length embracing together about 1000 pages. It is natural that statements which might be construed to have a bearing on the issue of fraud, etc. (if any) would only appear in comparatively small parts of this evidence and be scattered all over it. It is natural that the Commission, to which it was presented, must be put into a position to deal with it. I, therefore, think that the Commission has a right to be provided with an explanation of the meaning of such evidence so as to know under what aspect it has to be read. Such comment has to be given as soon as the evidence is filed and certainly cannot be made dependent upon a preceding action on the part of the German Agent.

(5) American Exhibit 988, Annexes C, D, and E, contains an affidavit made by one Thomas Tholsfsen stating the following facts:

In the night of the Black Tom disaster he received a telephone call by one Hans Johannsen, master of the barge "Johnson 17" urging him to send a tug in order to remove the said barge out of the danger-zone. As further annexes the American Agent submits a death-certificate concerning Johannsen and a document telling us where he is buried.

What German witnesses did say anything relied on at the Hague or at Washington, which had the slightest connection with that telephone call or with Johannsen's burial ground? In what respect did German witnesses commit fraud, collusion, suppression, as far as these points are concerned?

(b) As a further condition to be complied with before a party may be allowed to state its case by mere reference to certain allegations and evidence I mentioned above that the allegations and evidence referred to must be clear and unambiguous and not contradictory in themselves. The first practical consequence seems to be that the Claimants must state their own version of their case. I notice that the claimants and the American Commissioner *admit* that witnesses which the Claimants wish to bring within the scope of the Umpire's Decision (whether rightly or wrongly, I do not want to examine now) made different statements with respect to the same events, statements that undoubtedly are wholly incompatible with each other. Partly such inconsistent statements are made by the same person, contradicting himself flatly; partly they are made by several persons without there being any indication from the Claimants which is the witness they believe in this situation.

Again I quote some instances as an illustration.

1) Relations between Wozniak and Herrmann

In his subpoena examination, 1933, Wozniak stated that he did not remember having seen Herrmann in 1916 or 1917, thus adhering practically to his previous testimony that he did not know Herrmann. In the affidavit executed before the Department of Justice on January 12, 1934, he modified this statement in so far as he admits the possibility that a boy whom he met with Captain Hinsch several times in 1916 may have been identical with Herrmann.

None of these statements is compatible with the basic allegations advanced by the American Agent in the previous stage of the proceedings that Wozniak

was introduced to Herrmann by Captain Hinsch in New York, that thereupon Herrmann met Wozniak several times in New York and provided him with incendiary pencils with instructions for their use as well as with money, a theory prominently based on Herrmann's sworn statement given in 1930.

What is the American theory at present?

2) *Wozniak in Mexico*

The American Agent's fundamental theory that Wozniak had been employed as a German Agent had been prominently based on the assertion that he had stayed in Mexico in the summer of 1917, consorting there with admitted German agents.

In his subpoena examination Wozniak has first refused to answer the question as to his whereabouts during that period, pleading that he might make himself liable to penalty for perjury by reason of his previous testimony for Germany. When the examination went on he gave up this attitude, alleging that he did not remember whether he had been in Mexico and that his failure to make a positive statement on this point had nothing to do with the question whether he might become subject to criminal prosecution. In his affidavit executed on January 12, 1934, he again changed his attitude and stated clearly and unambiguously that he never was in Mexico, but had been working at Tupper Lake during the respective period.

Has his testimony been submitted to show that he lies or that he tells the truth? And if he lies *or* if he tells the truth, *when* did he do it, considering the variety of his statements?

3) *Origin of the Kingsland Fire*

In the subpoena examination Wozniak testified that the fire was of incendiary origin and had been brought about by the ignition of a phosphorous rag handed over to him by a German agent ("Mike") and which he had used unconsciously and unaware of what was going on. This story is in absolute conflict with the fundamental theory pleaded by claimants hitherto that Wozniak started the fire, acting deliberately and consciously as a German Agent under instructions from Captain Hinsch and Herrmann by using an incendiary pencil; and it is a further conflict that two witnesses whose testimony is contained in the new evidence (Thorne and Baran) still make statements in support of the theory that Wozniak started the fire by an incendiary pencil.

Same questions as to (b):

4) *Wozniak-letters*

Considerable part of the new evidence consists of testimony given by Wozniak and Baran, both confirming the genuineness of these documents.

Again, my question: will the American Agent, by producing this testimony prove that it is true or that it is false? Or, if his only end is to elucidate things in a general way and for general reasons, must not he tell us so? For if he relies constantly "on the whole record" up to now he tells us exactly the contrary. And more particularly in such a case: must not he tell *at once* the German Agent, because the German Agent's decisions as to rebuttal evidence are thoroughly different in the one case and in the other?

I summarize:

Does it mean "assisting the German Agent in his defense" when in cases like the quoted ones the American Agent is invited to be unambiguous? Is he entitled (as the American Commissioner thinks he is) to blame the *witnesses*

in question for the contradiction and its consequences and to plead that the German Agent must face the necessity to evidence at the same time two things that exclude each other or else make up his mind, which of the statements he wants to assail and which not? I cannot share this view. Must not *any* Claimant state his case first and give a full and clear version of the facts on which he relies, tendering evidence subsequently and only when he is contradicted? If that evidence is self-contradictory is not he obligated to *choose* which version he will adopt, risking otherwise to be looked upon as having made no statement at all? And I think the same holds good, if his task has become the showing up of hostile witnesses as fraudulent. No claimant can cope with that task without defining his attitude regarding the truth of their statements which implies in the case of contradictory statements and self-contracting [sic] witnesses a clear indication of his own stand.

X. The result to which I come is this :

The fresh case which is necessitated by the Umpire's new *thema probandum* cannot be established by mere reference to a previous petition and to evidence, as the American Agent tries to do.

Directions should be issued to the American Agent inviting him to file a Brief dealing with the three vital questions, outlined above, which for convenience's sake, I repeat:

"A. Which are the Witnesses whose testimony is assailed as coming within the scope of the Umpire's ruling of December 15, 1933?"

"B. Which are the assertions or actions of the Witnesses mentioned under A, that are assailed as being fraudulent, suppressive, collusive in the sense of the Umpire's said ruling?"

"C. How is it shown that the Commission was misled by the allegations mentioned sub B, viz. that the Hague and the Washington Judgments *rest* on these allegations, those latter having been accepted and believed by the Commission?"

And from the statements in the first part of my Opinion, appearing under VI, it follows that I suggest a *further* ruling:

"D. What is the individual and specific evidence, new or old, adduced to support the individual and specific allegations submitted according to A and B?"

XI. Practically this suggestion of mine means that I grant the German Agent's Motion in a special form. The three vital questions set up by me verbally in his writs and the "bill of particulars" for which he asks, in its essence is not much different from the "fresh case", as I use the term throughout this Opinion.

At the same time my suggestion means that I deny the American Agent's plea that the German Agent should be directed to define his attitude as to future rebuttal evidence *first*: the gist of my Opinion is that the German Agent is *unable* to answer the case now brought against him, before the case is really and not only in words restricted to the new *thema probandum*, before the individual and particularized allegations that support this case are set out clearly and before these allegations are free from self-contradiction and ambiguity, and before the pertinent evidence is singled out.

XII. From my last statement it will be gathered that and why I disagree with the individual grounds relied on by the American Commissioner in his support of the American Agent's plea: he says the Rules of the Commission do not oblige the American Agent to file a Brief now, I think the Umpire's December Decision does; he says the German Agent had ample time to define his attitude; I think, he was unable to do it, a reason against which mere time is of no avail, and the argument may be that the *American* Agent had ample time

to frame *his* case correctly. The American Commissioner fears that the case may be protracted by granting the German Agent's Motion, I see the only means to speed it up in forcing the discussion back to the real *thema probandum* and in cutting out and eliminating what is not strictly pertinent to that theme.

The American Commissioner would not like the Claimants to file a Brief on an incompleting record; to my mind it is not a matter of incompleting record, but of an overcompleting record and an insufficiently stated case.

XIII. The American Commissioner concludes his Opinion with several suggestions which reach beyond a mere decision on the German Agent's Motion. I have no objection to this in so far as procedure is concerned; my idea is that in any case of a deadlock between the Agents this Commission should deal autonomously and exhaustively with the case and take all steps which in the Commission's opinion are appropriate. But on the merits of the said suggestions, I differ from the American Commissioner. Whether, for instance, the two Agents should be directed, to file a future Brief *simultaneously* should not be decided now, but only after the next American Brief, which forms the subject-matter of this Opinion, is known.

This may be of minor importance; but of great importance is a further suggestion which I find expressly stated in the American Agent's Brief of August 4th, 1934, *but* which evidently is approved of and endorsed by the American Commissioner. He proposes that when the Commission comes to discuss the petition for rehearing itself, the admissibility of the new evidence and the merits of the issues involved should be dealt with simultaneously.

I have no doubt that the admissibility should be discussed first and separately.

This is not the first time that the Commission is faced with that question. When the American side would not acquiesce in the Hague Judgment and sought for a reopening, the German side opposed this in the first line on a plea of inadmissibility. The substantiation then was different from now and is superseded now by the Umpire's December Decision. But the juridical point is exactly the same there and here. The Commission then did what is suggested now by the American Agent: Admissibility and merits were treated simultaneously at the same hearing. And as a result I find in the Umpire's December Decision the remark: "It would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing."

And I think the strongest reasons militate for that conclusion.

In the Umpire's December Decision I find on p. 68 (Report of American Commissioner, December 30, 1933; U. S. Government Printing Office, 1934) [p. 1120, this print] † a statement which reads:

"Orderly procedure would have required that these issues (fraud, collusion, suppression) be decided by the Umpire *before* the filing of the tendered evidence *since the right to tender such evidence is involved in this Decision.*"

Thus the Umpire says: His ruling determines the *right to tender evidence* and he draws the inference that in "orderly procedure" first and above all the Claimants have to show their *right to tender evidence* and the scope of that right. (By the way I notice that this disposes of the American Commissioner's point that it would not be fair to grant the German Agent an opportunity to make up his mind as to rebuttal evidence in a later stage of the proceedings. The American Agent has first to show that he is entitled to bring evidence and to what extent. This distinguishes him from the German Agent who holds two judgments with force of *res judicata* and quite naturally is not on

† *Note by the Secretariat*, this volume, p. 185.

the same level as his adversary.) But the main point is that to the Umpire's mind, in a Reopening case the discussion of the right to tender evidence and the filing of the evidence itself mean different stages of the procedure and that the first stage has to be considered first.

Only subsidiarily I should like to add: Practical reasons would lead to the same result. To plead a case of such volume as the instant one on its *merits* means an enormous burden; of course, it must be borne if that is indispensable. But it is not indispensable as long as a limitation of the pleadings to the much less entangled question of admissibility offers a chance to do without it.

Dr. Victor L. F. H. HUECKING
German Commissioner

September 13, 1934.

Supplemental Memorandum by the American Commissioner

To facilitate the discussion and permit a full presentation of the points of difference between the two national Commissioners, they have exchanged copies of their respective Opinions before presenting their Certificate of Disagreement to the Umpire.

The American Commissioner finds on reading the German Commissioner's opinion that he and the German Commissioner have dealt with the German Agent's Motion on a fundamentally different basis. The American Commissioner has limited his discussion to the single question raised by the German Agent's Motion, namely, whether or not the American Agent should be required at this stage of the proceedings to file "a brief, bill of particulars or some other written statement substantiating the contentions advanced in his [the American Agent's] petition for a rehearing." This is the only question presented by the pending Motion of the German Agent.

The German Commissioner, on the other hand, has assumed that the pending Motion involves the question of the admissibility of the new evidence offered, and, accordingly, has undertaken to examine in considerable detail the character of the new evidence with reference to its admissibility under the Umpire's decision of December 15, 1933.

It seems to the American Commissioner that the question of the admissibility of the new evidence is quite outside of the scope of the present proceeding. That question is one which must be dealt with by the Commission when the record is complete and the cases are finally submitted.

The German Commissioner does not refer to the request of the German Agent for a bill of particulars but is of the opinion that the American Agent should be invited to file a brief dealing with certain questions which he states and which he deems vital.

The Umpire in his opinion of December, 1933, stated, after calling attention to the difference between the procedure before this Commission and the proceedings before a Court, as follows:

"Article VI, second paragraph (referring to the agreement between the two governments) provides:

"The Commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective governments in support of or in answer to any claim." * * *

"The Commission has, from its inception, been sensible of its lack of power to compel the closing of the record and the final submission of any case. * * * The clause quoted from Article VI compels the reception of any written statement or document presented by either party."

Thus under the agreement between the two Governments, the Commission is obligated, as the Umpire has held, at the proper time (that is, in this case when the petition for rehearing and all evidence offered by the respective governments has been filed) to pass upon the admissibility and weight to be given to all the evidence offered by either government but it cannot do so until the claim, or in this instance, the petition of the American Agent, and the answer of the German Agent, together with the supporting evidence offered by the respective governments, has been filed. It is powerless, as the Umpire has held, to compel the closing of the case and must wait to consider and pass upon the evidence until the case is finally presented to the Commission.

The decision of the Umpire of December 15, 1933, was rendered upon a certificate of disagreement between the National Commissioners regarding the power of the Commission to reopen these cases upon the pending petition. Prior to that decision, as stated by the German Commissioner, a large part of the evidence had been tendered by the United States to sustain the allegations of the petition. The Umpire refrained from examining the evidence at that time and from expressing any opinion on its adequacy, "postponing", as stated by the Umpire, "for the consideration of the Commission the probative value of the evidence tendered".

The Commission has not at this time considered or passed upon the probative value of the evidence tendered and consequently there has been no opportunity for the National Commissioners to agree or disagree thereon, and no disagreement thereon has been certified to the Umpire.

In accordance with the concluding statement of the Umpire in his opinion the Commission should reopen these cases and "consider the evidence tendered by the American Agent and, dependent upon its finding from that evidence and any *that may be offered in reply on behalf of Germany*, either confirm the decisions heretofore made or alter them as justice and right may demand" (*italics mine*).

When that has been done if there should be a disagreement between the National Commissioners upon the probative value or the adequacy of the evidence tendered, such disagreement would then be certified to the Umpire.

It may be noted in this connection that the procedure before the Commission differs from court proceedings in that the only opportunity afforded, under the agreement, to either government to object to the admissibility of evidence is when the case is finally submitted to the Commission.

Also the American Agent must be given a hearing on that question before decision. The record at the present time is admittedly incomplete, pending the submission of rebuttal evidence, if any, by the German Agent, as noted in the opinion of the Umpire of December 15, 1933, and any further evidence in reply called for by the rebuttal evidence.

Moreover, the Commission has not yet been called upon to examine the new evidence already submitted. The pending Motion of the German Agent does not involve an examination of this evidence by the Commission and this Motion can and should be decided without an examination of the admissibility or probative value of evidence which is incomplete and not a final record of the claimant's case.

The American Commissioner, accordingly, refrains from discussing now the questions raised by the German Commissioner as to the admissibility of any of the new evidence which he considers is entirely outside of the issues raised in the present proceedings. He regards the discussion of that question as premature and inadmissible at this time, although one to be dealt with by the Commission at a later stage of the proceedings.

Furthermore, the American Commissioner sees in the German Commissioner's opinion convincing evidence that if the German Agent adopts the views

expressed in the German Commissioner's Opinion he will have little difficulty in deciding now whether or not he wishes to offer any evidence in rebuttal, and, if so, on what points.

The situation, as I see it, briefly stated, is:

(a) If the German Agent is of the opinion that no admissible evidence has been offered on behalf of the United States to sustain the charges of fraud, collusion, perjury or suppression of evidence, then he is at liberty to rest his case. The Commission will then fix, by rule, the time and order in which briefs may be filed.

(b) If, on the other hand, the German Agent is of the opinion that there is evidence supporting the charges, or some of them, he is at liberty to file such evidence as he deems proper and should do so, as noted by the Umpire in the concluding paragraph of his opinion of December 15, 1933, in order that this proceeding may be progressed to a final determination.

The American Commissioner, accordingly, has nothing further to add to his original opinion.

Chandler P. ANDERSON
American Commissioner

September 25, 1934.

Supplemental Memorandum by the German Commissioner

I. When I assume — as I do indeed — that the pending Motion involves the question of admissibility, I think, I am borne out by the American Commissioner himself, whose Opinion, first part, is devoted to that question, and very properly, too. The pending Motion asks for a bill of particulars. I grant it (see XI, p. 27 [p. 1147, this print] § of my Opinion, which is perhaps not fully appreciated by the American Commissioner when he says, I do not refer to the request of the German Agent for a bill of particulars). And in granting it, I have, of course, to define *what* particulars that bill ought to contain. I define this by formulating (in consonance with the German Agent's Motion) four questions, which this bill should answer. I think it is a misunderstanding, when the American Commissioner says, that I suggest the American Agent should file "a" brief "dealing with certain questions". I suggest that he should file *the* bill of particulars asked for; and I suggest that it should deal with *the* questions as put by the German Agent.

But the framing of these questions *means an implicit decision on the admissibility*. In my opinion, nothing is pertinent to the present case but these questions and no evidence is admissible but which lies within their scope. This I have tried to show in my Opinion. I do not think it indispensable that the Umpire should give a ruling on admissibility beyond the implicit ruling, which I would find in an order acceding to my suggestion that the bill of particulars should be framed in the way indicated by the proposed questions.

II. I could stop here, but for some views I find expressed in the American Commissioner's Supplemental Memorandum. The American Commissioner holds that this Commission would be *forbidden* to make a decision on admissibility now.

(a) The first ground alleged for this seems to be, "we are only concerned with the German Agent's Motion". I have already said that in my opinion this Motion *involves* the issue of admissibility. But I feel obliged to contradict the argument on principle, too. If there is a deadlock — as in the instant

§ *Note by the Secretariat*, this volume, p. 203.

case — the Commission's task is to overcome it by *appropriate directions*, but they are not bound to remain within the scope of an individual brief or motion.

(b) Nor is the question of admissibility in any way privileged, so that it by necessity could be treated only in a final hearing.

First of all: When the question of admissibility appears as a preliminary or previous question to any direction to be given or any individual point to be decided, it goes without saying that this Commission will pass upon it. That applies to the present situation.

But even if that question is to be decided as such, I cannot concur with the American Commissioner's statement that it must be reserved to the final hearing. He thinks he may infer this from the fact that this Commission is bound to accept any evidence and cannot compel the close of the procedure. The conclusion is erroneous. This rule does in no way prevent that in one case you have separate stages; it then applies to both stages *separately* the second stage becoming superfluous if its application in the first stage and the decision in the first stage leads to a final solution. The instant reopening case is just a case in point.

And there is a second argument: We have a *special ruling* in this case in the form of the December Decision. Supposing the American Agent had a right to file *any* evidence, he had it up to The Hague and perhaps to the Washington-Decision. Since then, we have the December-Decision, just dealing with this question and *limiting* his right. He has lost his former right as far as it extended to evidence which the Umpire has expressly declared to be inadmissible. I again refer to the Umpire's words (p. 68) [p. 1120, this print],^h "*the right to tender evidence is involved*" in his decision and for this reason orderly procedure would even have required that such decision should be rendered "*before* the filing of the tendered evidence" (italics mine).

III. The American Commissioner protests that no examination should take place *now* of the *probative* value of the evidence submitted. I agree with him and throughout my Opinion have strictly adhered to that principle. I only want to stress the point that an examination of the question: "does that evidence without a bill of particulars enable the opposing party to see what allegations it is meant to support or is it self-contradictory without such bill and is the *thema probandum* ambiguous without such bill?" is a different thing. And this examination cannot be dispensed with, for the decision on the German Agent's Motion hinges on these very points.

Dr. Victor L. F. H. HUECKING
German Commissioner

September 29, 1934.

The National Commissioners, having disagreed as aforesaid, hereby certify to the Umpire for decision the questions raised by the pending Motion of the German Agent.

Done at Washington September 29, 1934.

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

^h *Note by the Secretariat*, this volume, p. 185.

Opinion of the Umpire upon Certificate of Disagreement by the National Commissioners

Under date October 4, 1934, the National Commissioners transmitted to me as Umpire a certificate of disagreement respecting the action to be taken by the Commission on the motion of the German Agent now pending in the above cases and requested that I render a decision thereon.

I file herewith the certificate of disagreement and the separate opinions and supplemental opinions of the Commissioners, which have been prepared with the greatest care and have aided me in reaching my conclusion.

The status is as follows: May 4, 1933, the American Agent filed a petition for rehearing. He began, September 15, 1933, to file evidence in support of it. A jurisdictional question having arisen on which the National Commissioners were in disagreement, the Umpire rendered the decision of the Commission December 15, 1933, to the effect that the allegations of fraud and collusion contained in the petition, if supported by satisfactory proof, would be sufficient to warrant a rehearing of the cases. February 15, 1934, the American Agent completed the filing of evidence deemed by him to substantiate the charges made in the petition. June 13, 1934, the German Agent filed an answer denying the allegations of the petition, and the same day presented a motion for a ruling that the American Agent "should file a brief, bill of particulars or some other written statement substantiating the contentions advanced in his petition for a rehearing". The National Commissioners disagree as to the action proper to be taken on this motion. The German Commissioner would grant it; the American Commissioner would deny it.

1. The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer. It is true that charges contained in the petition are general in their nature. If the German Agent had desired that before the American Agent began to file his proofs in support of these allegations they should be elaborated and made more specific, he might then have filed a motion to that effect and might well have contended that, in order to draft his answer to the charges, he needed additional information. In view of the trial practice of the Commission, I am not clear what action would have been taken upon such a motion. My understanding is that strictness of pleading has not been required in the cases presented to the Commission, but be that as it may, no motion for a bill of particulars or for an elaboration of the charges contained in the petition was made. Meantime, the American Agent filed evidence which he deemed tended to support the charges. The filing of all of the evidence which the American Agent desired to file was, as above stated, completed February 15, 1934. This was prior to the filing of the answer of the German Agent. That evidence, in and of itself, must necessarily define and limit the allegations of fraud and collusion embodied in the American Agent's petition.

The proper office of a bill of particulars is to enable a respondent to ascertain exactly what it is he is required to meet by his evidence. What has been done in the present case, namely, the submission by the moving party of all the proofs in support of his petition before the responding party is required to offer any proof, certainly renders unnecessary any particularization in the matter of formulation of the charges on which the petitioner relies.

2. If the German Agent's motion be considered a demand that the American Agent file a brief analyzing and discussing the evidence on which he relies prior to the German Agent's filing any evidence he may desire to offer, it seems obvious that the request ought not be granted. The office of briefs in matters coming before the Commission has always been, and necessarily must be, to aid the Commission in reaching a proper conclusion upon the whole body of the

proof offered by both sides. It would not only be inappropriate but probably not be helpful to demand that one side file a brief discussing the evidence before it is known what the evidence of the other side may be. Moreover, it would be, it seems to me, unfair to require the American Agent to make his argument in advance of presentation of proofs in opposition.

3. In support of his motion, the German Agent asserts that the evidence offered by the American Agent is of large volume; that it deals to a great extent with matters which the German Agent thinks have been rendered irrelevant by the Commission's decision of December 15, 1933; that the German Agent is unnecessarily handicapped and confused by the admixture of that which may be relevant and that which may not; and that therefore the American Agent ought to be required now to specify on which of the evidence heretofore filed he intends to rely. No doubt such a specification on the part of the American Agent would not only be helpful to his adversary but in the end would be an aid to the Commission in deciding upon the motion. The question is, however, whether the Commission can or ought to impose such a requirement upon the moving party. The agreement under which the Commission is organized is silent as to the method of procedure which should be followed in a matter of this sort. The parties to the controversy are sovereigns. The agreement requires the Commission to receive any writing either party may tender. The practice of the Commission has not been in accordance with civil law procedure in ordinary municipal tribunals. If it had been, the issues would have been nicely defined in formal pleadings, and the evidence as offered would have been tested as to its relevancy by the issues made up on the pleadings. Evidence as tendered would then have been admitted or ruled out of the cause, and when the time arrived for decision the Commission would have had before it only that body of evidence which had been formally admitted and would of course ignore that which had been by its rulings excluded from the record. The Commission has always been of the view that the terms of the agreement under which it sat prevented preliminary rulings upon the relevancy of evidence. The result has been that whatever was offered on behalf of either sovereign was accepted and filed, and when the time arrived for a decision the relevancy of each item of evidence had to be determined as part of the process of arriving at a conclusion. This method of procedure necessarily puts a somewhat heavier burden upon the Agents and upon the members of the Commission than if a strict method of pleading and ruling upon evidence under the pleadings had been adopted. I do not think that the Commission either can or ought now to alter the method which has been pursued throughout its work from the beginning.

4. The German Agent urges, and the German Commissioner holds, that the present proceeding differs so far in its character from the ordinary trial of a claim presented for compensation under the terms of the international agreement that a different rule should here apply. The suggestion is that, in view of the Commission's decision of December 15, 1933, the Commission shall, by some sort of order, define the character of evidence which it will receive and consider in support of the motion. It seems to me that the decision of December 15, 1933, has already done this insofar as it is necessary so to do. If items of evidence presented by the American Agent are irrelevant to the issue upon which the granting of a rehearing depends, as outlined in the Commission's decision of December 15, 1933, then obviously such evidence requires no rebuttal on the part of Germany. If evidence presented by the American Agent clearly falls within the category outlined in the Commission's decision, the German Agent is free to meet it by counter proof. If an item of

evidence be of doubtful relevancy, the German Agent will have to determine whether as a matter of policy he will rebut it or take his chance that it will be ruled irrelevant by the Commission when it comes to formulate its final conclusion upon the motion. In these respects the German Agent stands in no different position from that which he has occupied with respect to proofs offered in support of sundry claims for reparation. The practice has been, as I understand it, for the American Agent to file a claim petition and, in support of that petition, to tender such evidence as he thought relevant, and for the German Agent, in response, to tender such evidence as he thought important, disregarding evidence offered by the American Agent which he thought of no probative value in the premises. That, it seems to me, is quite analogous to the present situation.

CONCLUSION

From what has been above said, I conclude and decide that the motion of the German Agent should be overruled.

Owen J. ROBERTS

Umpire

[Handed down, November 9, 1934.]

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

(Sabotage Cases, July 29, 1935, pp. 1173-1175; Certificate of Disagreement by the National Commissioners, pp. 1159-1173.)

PROCEDURE: MOTION TO JOIN PRELIMINARY QUESTION (REOPENING) TO MERITS; REHEARING; OLD AND NEW EVIDENCE. Motion of American Agent filed May 2, 1935, for order that Commission does not desire submission of claims until able to decide both on rehearing and merits. Motion overruled: in the absence of agreement to that effect between parties, preliminary question (whether Commission was misled by fraud and case should be reopened) will be determined separately; if determined in favour of claimants, conclusions reached in Commission's decision of October 16, 1930 (see p. 84 *supra*), will be re-examined in light of old and new evidence.

Cross-reference: Witenberg, Vol. III, pp. 28-30 (French text).

Bibliography: Witenberg. Vol. III, pp. 28-30; Woolsey, A.J.I.L., Vol. 35 (1941), pp. 282-283.

Certificate of Disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree as to the action to be taken on the questions presented by the Motion filed by the American Agent on May 2, 1935, with reference to the procedure to be followed by the Commission at its next hearing on the sabotage cases:

Opinion of Mr. Anderson, the American Commissioner

This Motion calls upon the Commission to determine whether the next hearing shall be merely of a preliminary nature for the consideration of the