

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)**

3 June 1936

VOLUME VIII pp. 222-225



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

The first step is the determination whether the claimant's assertions as to fraud, *et cetera*, are made out. To ascertain this the evidence in support of those assertions must be examined. Necessarily, such examination will include a reference to evidence in the record prior to the Commission's decision on the merits. Such reference will be necessary for comparison between the old evidence and the new, and to show the bearing and meaning of the proofs tendered upon the issue of fraud and collusion. On this preliminary matter, namely, whether the case shall be opened and a rehearing had upon the merits, it will not be necessary to argue the cases on the merits. If the claimants prevail upon that preliminary question, the former decisions will be laid aside and the merits reexamined in the light of all the evidence, including that tendered on the issue of fraud and collusion. If they fail, reconsideration of the Commission's decisions on the merits of the claims will be unnecessary and indeed improper. The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing.

It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con such a procedure. Nevertheless, I suppose that if the parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits.

It is earnestly urged that the Agents agree at once to limit the time for rebuttal by the United States of the proofs offered by Germany in opposition to the petition for rehearing, and confer with the Commission as to the fixing of a time for argument and for the filing of briefs on that issue.

I attach hereto the certificate of disagreement by the National Commissioners, together with their separate opinions and supplemental opinions attached thereto.

Done at Washington July 29th, 1935.

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*, June 3, 1936, pp. 1175-1177.)

PROCEDURE: REHEARING, SETTING ASIDE OF PREVIOUS DECISION, UNFOUNDED
SUSPICION. REINSTATEMENT OF CASE INTO PREVIOUS POSITION, REOPENING.
Setting aside of Commission's decision of December 3, 1932 (see p. 104
supra), according to which new evidence so far submitted by claimants
could not lead to reversal or material modification of decision of October 16,
1930 (see p. 84 *supra*): no sufficient ground for suspicion expressed by the
then German Commissioner before case was argued that claimants withheld

from Commission unfavourable expert report. Cases reinstated into position before 1932 decision, but not reopened as far as 1930 decision is concerned.

Bibliography: Witenberg, Vol. III, pp. 31-32; Woolsey, A.J.I.L., Vol. 33 (1939), p. 739, Vol. 34 (1940), p. 34, and Vol. 35 (1941), pp. 283-284.

Decision of the Commission

Reference is made to the decision of this Commission dated December 3d. 1932, in which the Umpire held that

“if the new evidence” (submitted to him at the time in order to impugn the decision of this Commission rendered at the Hague under the date of October 16th 1930) “were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission’s Opinion of October 16th 1930, the findings then made and the conclusions then reached would not be reversed or materially modified”.

Against this Decision and the Decision rendered at the Hague October 16, 1930, the petition for a rehearing now under consideration is directed. Its allegations are, *inter alia*, that before the case was pleaded at Washington the then German Commissioner brought it to the knowledge of the Commission that according to information received by him Claimants had obtained a report from one of their experts the contents of which were adverse to the genuineness of the main documents on which they relied but were withholding such report from the Commission. As to the actual happenings the Umpire has stated during the argument of these cases:

“I have known Mr. Albert S. Osborn for many years. When I was in practice I retained him in connection with several problems arising with respect to documents whose authenticity was contested. At some time he referred me to Mr. Elbridge W. Stein as a competent expert in similar matters. Mr. Stein, at that time, had an office in the Bulletin Building, Philadelphia. On one or more occasions I consulted him.

“Just before the date set for hearing in the sabotage cases (probably some time in November 1932), Mr. Stein attempted to get into communication with me by telephone. He wished an interview with me concerning the sabotage cases in which I knew he was a witness for the claimants. I refused to allow him to communicate with me.

“During the meetings of the Commission preliminary to the hearing, Dr. Kiesselbach advised Mr. Anderson and me that the claimants had suppressed an expert report adverse to the authenticity of the Wozniak letters and the Herrmann message. I cannot say that Dr. Kiesselbach specifically stated the source of his information.

“The communication naturally disturbed me but I knew of no action that the Commission or I, as Umpire, could take in the premises and so stated.

“My impression that there had been some such suppression was strengthened by Mr. Osborn’s statement, in one of his affidavits, that it was remarkable that no opinion by Mr. Stein, a competent expert in such matters, had been submitted as to the age of the documents but only an opinion as to handwriting, a matter that was uncontested.

“In the oral argument the German Agent made no reference to this matter and as the American Agent did not refer to it the impression remained that there had been a withholding of a report which might have shed light on the question argued before the Commission.”

In addition this Commission states through its Members present at the time that there can be no doubt as to the entire good faith of the then German Commissioner when he made this communication. The Umpire and the American Commissioner hold, that Claimants have shown, that there was no suf-

ficient ground for suspicion, and that for this reason Claimants are entitled to a reconsideration. The German Commissioner, whilst doubting that Claimants were actually wronged (especially as in his view mere suspicions never can be a basic element of juridical findings) takes the stand, that in international arbitration it is of equal importance that justice *be done* and that *appearances show clearly* to everybody's conviction that justice *was done*. He does not think that the second requirement was satisfactorily complied with in the present case, and for this reason, he accedes to the conclusion of the other members of this Commission. It is therefore decided, that the Decision of this Commission rendered at Washington on the third of December 1932 be set aside. This decision reinstates the cases into the position they were before the Washington Decision was given. It has no bearing on the Decision rendered at the Hague and does not reopen the cases as far as that decision is concerned. Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. Both parties are entitled to file evidence (and to exchange briefs) as well in the proceedings in which a ruling for a reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted. Evidence filed and briefs submitted in the proceedings, in which a reopening is sought, must remain within the limitations set by the Commission's Decision dated December 15, 1933.

Done at Washington, June 3, 1936.

Owen J. ROBERTS

Umpire

Chandler P. ANDERSON

American Commissioner

Dr. Victor L. F. H. HUECKING

German Commissioner

NOTE

[At an informal meeting of the Commission held June 17, 1936, the Commission granted Motion of the German Agent dated June 16, 1936, asking for a postponement of further proceedings for the reason that invitation had been received by the Department of State, Washington, D.C., from the German Government suggesting that representatives of the United States meet with representatives of Germany with a view to negotiating a compromise settlement of the sabotage claims.

In accordance with this invitation, negotiations were had in July, 1936, in Munich, Germany, between the duly authorized representatives of the two Governments. As the result of these negotiations, a compromise settlement of the sabotage claims and the Drier claim, being all claims then pending before the Commission, was reached. The formal papers usual for carrying out settlements of this character were, however, not signed by the German Agent. Protests against carrying out the settlement were likewise filed with the Department of State on behalf of certain American nationals holding awards of the Commission and on behalf of certain German nationals holding awards of the War Claims Arbitrator.

In view of the fact that the German Agent did not sign the usual formal papers, Motions were filed with the Commission by the American Agent for

awards in accordance with the Agreement reached at Munich in July, 1936. The American Agent likewise filed with the Commission the several protests received on behalf of American nationals and on behalf of German nationals.

The questions involved in these Motions and protests were discussed in briefs filed with the Commission, and were the subject of oral arguments before the Commission at the meeting held July, 7 1937, at which meeting the following rulings thereon by the Commission were announced by the Umpire:]

"The Commission has considered the motion with care and has also considered all of the points made in the briefs and oral argument. Without reiterating its reasons, it is of the opinion that the motion must be dismissed, unanimously of that opinion.

"With regard to the protests by certain German nationals, those protests the Commission feels, in large part, fall as a result of its decision. The same thing is true of the protests by certain awardholders.

"With regard to the applications filed by certain claimants, either German nationals or holders of claims under certain arbitral awards, and with regard to the applications of certain American awardholders to permit them to intervene in the proceedings, the Commission unanimously denies those applications." (Minutes of meeting, July 7, 1937, p. 1658.)

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

(*Sabotage Cases, June 15, 1939, pp. 310-312; a Certificate of Disagreement and Opinion of the American Commissioner, June 15, 1939, pp. 1-310.*)

JURISDICTION: EFFECT ON — OF WITHDRAWAL OF MEMBER FROM COMMISSION AND FAILURE TO FILL VACANCY. — PROCEDURE: UNANIMITY, DELIBERATIONS, ROLE OF UMPIRE. — INTERPRETATION OF TREATIES: PRACTICE, PURPOSE, BENEFITS RECEIVED, MUNICIPAL DECISIONS, TEXT WRITERS. Withdrawal of German Commissioner from Commission on March 1, 1939, after submission of cases to Commission on January 27, 1939, followed by conferences of Umpire and Commissioners with a view to the decision of the issues presented until February 28, 1939. Failure of German Government to fill vacancy (see Agreement of August 10, 1922, art. II). *Held* that Commission not *functus officio* and, acting through Umpire and American Commissioner, has power to proceed with cases and decide whether fraud proved sufficient to set aside decision of October 16, 1930 (see p. 84 *supra*), and whether claimants proved their cases: (1) under Agreement *supra*, art. II and VI, and its Rules of Procedure, unanimity not required, and concurrence of only two members necessary for decision (practice ever since Commission's creation), (2) both before and after special rules of procedure for sabotage cases were adopted, Umpire participated in deliberations and opinions of Commission (reference made to decision of March 30, 1931, p. 101 *supra*), (3) after submission of case to Commission, retirement of one National Commissioner cannot prevent decision by remaining members of

^a Henceforth, references to page numbers are to *Opinions and Decisions on the Sabotage Claims Handed Down June 15, 1939, and October 30, 1939, and Appendix*. (Washington, Government Printing Office, *s.d.*). Comp. Vol. VII, p. 3.