REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Waterman A. Taft et al. (United States) v. Germany

31 August 1926

VOLUME VIII pp. 3-6

NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

Decisions, Part Two

WATERMAN A. TAFT *ET AL.*
(UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 801-806.)

EVIDENCE: CIRCUMSTANTIAL EVIDENCE, REBUTTAL THROUGH DIARIES OF GERMAN SUBMARINES. — WAR: "SINKING WITHOUT TRACE". Loss of American vessel after departure on April 5, 1918, from New York to Campana, Argentina. *Held* that there is no evidence that vessel was destroyed through act of war. Evidence: see *supra*; alleged German practice of "sinking without trace" *held* not to deprive submarine diaries of evidential value: practice not established.

PARKER, *Umpire,* rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

The claimants on whose behalf it is put forward are and have been on all dates material herein American nationals. A recovery is sought against Germany for the value of the *Avon*, an iron sailing vessel of 1,573 gross tons, of American registry, which sailed from New York April 5, 1918, in charge of an experienced master with a crew of 19, carrying a cargo of about 2,000 tons of kerosene in tins and bound for Campana, Argentina. Diligent inquiries to discover any one who had seen or heard of the *Avon* since she got well under way out of New York have been barren of results. She was without auxiliary power; she had no wireless apparatus, which would have enabled her to send out distress signals in the event of fire or other disaster.

The claimants' effort is to establish by affirmative evidence a strong probability that the *Avon* was destroyed by a German submarine operating in the vicinity of the Azores or of the Cape Verde Islands. To that end, they have satisfactorily proven (1) that the *Avon*, although 34 years old, was staunch, well-found, and seaworthy, (2) that she was navigated by a competent and experienced master and manned by a capable and adequate crew, and (3) from reliable records, painstakingly compiled from reports of ships which were at the material times in waters contiguous to the course the *Avon* would almost certainly have taken, that on such course she would have encountered no storms or heavy winds. It is agreed that on this course the *Avon* could have encountered no minefields planted by either group of belligerents. This course has been carefully plotted in connection with the known operations of certain German submarines off the west coast of Africa and in the vicinity of the Azores, the Canary Islands, and the Cape Verde Islands, and also off the east coast of the United States, and it is urged that one of these submarines could have encountered the *Avon*, whose route lay through the western portion of the "barred zone" around both the Azores and the Cape Verde Islands, and that as these submarines were in those waters for the purpose of destroying enemy shipping the conclusion is justified that the *Avon* encountered and was destroyed by one of them. While this evidence is far from conclusive, it is under the

circumstances the best evidence within the claimants' reach and is entitled to be considered and weighed as tending to establish their contention.

In litigation between marine insurers and war-risk insurers where the facts were somewhat similar to the case here presented, the English courts have held (1) that notwithstanding the absence of evidence of unseaworthiness or unusual storms there was a presumption, even in time of war, that the loss was due to an ordinary marine peril, yet (2) that while the marine insurer must rebut this presumption it could do so by circumstantial evidence tending to establish that the loss was only consistent with some sudden overwhelming catastrophe not reasonably attributable to the ordinary perils of the sea and that the course of the missing vessel exposed her to the perils of war.[1] These cases, however, were all decided during the war at a time when reports from enemy sources of enemy action were not available and in the absence of all testimony from such sources negativing the conclusions drawn by the courts of destruction through enemy action.

To rebut the conclusions which the claimants would draw from the circumstantial evidence put forward by them, the German Agent has established by affirmative evidence that the only instruments of war which Germany or her allies at any time had in the waters off the west coast of Africa, in the vicinities of the barred zones around the Azores and the Cape Verde Islands, and off the east coast of the United States were seven transformed commercial submarine cruisers, designated U-151 to -157 inclusive. A full disclosure has been made to the Commission by the German Agent of the activities of each of these cruisers covering the period in which, according to the claimants' contention, the *Avon* might have encountered German submarines; and it is clearly established that only three of them were anywhere near the course asserted by claimants as that laid by the *Avon*. These three were designated U-151, U-153, and U-154 respectively. The war diaries of the first two have been produced accounting for their every movement, day by day and hour by hour, with the name of every ship sighted or encountered and the result of each encounter. Not only is the *Avon* not mentioned but it is affirmatively shown that neither of these cruisers could have encountered the *Avon* if she sailed a course approximating that laid down for her by the claimants.

The German cruiser U-154 was sunk off the southwest coast of Portugal by a torpedo from a British submarine on May 11, 1918. Her war diary cannot be produced by the German Agent because it was lost with her. However, it affirmatively appears from the war diary of the U-153 and from other sources that the two cruisers U-153 and U-154 were closely cooperating and were in daily contact during the entire time when, according to the claimants' contention, the *Avon* might have been encountered and sunk. The war diary of the U-153 reflects with considerable detail the daily activities of the U-154 during all of this period. The commanders of the two submersibles visited each other on their respective ships and together formulated plans and exchanged information and experiences. The war diary of the commander of the U-153 affirmatively establishes the fact that the U-154 not only did not report having sighted any ship fitting the description of the *Avon* but that she could not have

---

[1] The British and Burmese Steam Navigation Company (Limited) and others *v.* The Liverpool and London War Risks Insurance Association and The British and Foreign Marine Insurance Company (Limited), K. B. Div., December 11, 1917, 34 L. T. R. 140; The Euterpe Steamship Company (Limited) *v.* The North of England Protecting and Indemnity Association (Limited), K. B. Div., July 25, 1917, 33 L. T. R. 540; Macbeth and Co. (Limited) *v.* King, K. B. Div., June 6, 1916, 32 L. T. R. 581.

encountered the *Avon* if the latter followed anything approximating the course laid for her by the claimants.

By these full disclosures, coupled with the statement made by the German Agent that the German Government has no information whatsoever concerning the *Avon* or of the destruction of any ship fitting her description during the period when she was probably lost, the circumstantial evidence relied upon by the claimants to establish destruction by a German submarine has been fully met and rebutted.

The claimants very earnestly contend that the war diaries of the German submarine cruisers, purporting accurately to reflect the contemporaneous record of their activities, are not entitled to credit in view of the alleged practice of German commanders to "sink without trace" —that is, not only to sink without warning, but wilfully to destroy not only vessels and their cargoes but their entire crews in such manner as to leave no physical trace or human witnesses and to make no record thereof. The German Government, through the German Agent, emphatically denies that such a practice was ever authorized or countenanced or ever in fact obtained. The claimants' counsel rely on the Luxburg letters and produce no other evidence to support this allegation. Not only does this record fail to establish this allegation but the evidence strongly indicates that had one of her submarines encountered and sunk the *Avon*, a vessel of one of her enemies, Germany would have been quick to advertise the fact rather than to suppress it. During this period of the war Germany was not only at great pains to make accurate records of all belligerent vessels destroyed by her but through her powerful wireless station at Nauen and otherwise to advertise to her own and her allied forces and to the world her successes in prosecuting her unrestricted submarine warfare, and far from understating she had every incentive for enlarging on the tonnage sunk.

The extensive record filed herein contains data and information with respect to the activities of the German submarine cruisers here dealt with assembled from all available sources by the Navy Department of the United States. These records in the main confirm those submitted by the German Agent. After referring to the movements of the only three German submarines which were anywhere near the Azores or the Cape Verde Islands on the dates material to the loss of the *Avon*, the United States Navy Department, over the signature of the Secretary of the Navy, referring to the loss of the *Avon* wrote, "it will be seen from the submarines' positions shown that there was little, if any, likelihood of this ship [the *Avon*] encountering any of the three German submarines whose positions are plotted."

In February, 1919, the claimants collected $102,500, the aggregate amount of all marine insurance, on the hull of the *Avon*, for "disbursements (only)" and for "disbursements and/or ship owner's liability". In connection with these payments, it assigned to the extent of $22,500 its interest in war-risk insurance written by one of the marine insurance companies, this being the amount of the marine insurance paid by this particular insurer. The total amount of war-risk insurance on the *Avon* was $150,000. The statement is made under oath by a representative of the claimants that in making these settlements with the marine insurance companies the "rights to sue later for the war risk insurance were reserved", that is, to the extent of $127,500, the amount remaining after deducting $22,500 war-risk insurance assigned. This transaction is explained by the statement "It was a question of taking $102,500 cash or suing to get $150,000 under the war risk policies." It is also explained that the marine insurers were anxious to retain the goodwill and the business of the claimants which influenced them in making settlements. No effort has been made by the claimants to enforce from the war-risk insurers the payment

of any amount. If the *Avon* was sunk by a German submarine or by other act of war, the claimants were not entitled to receive the $102,500 which they have received from marine insurers but were entitled to the full payment of $150,000 from the war-risk insurers. While the Umpire's conclusion has been reached independently of these transactions, still the insurance settlements made, as well as those which have not been made, are significant as in some measure reflecting the conclusions of the interested parties in weighing the probabilities of the cause of the loss of the *Avon* in the absence of positive evidence of such cause.

The record indicates that all available evidence tending however remotely to establish the loss of the *Avon* through an act of war has been diligently assembled and presented by able counsel. Weighing the evidence as a whole the Umpire finds that the claimants have failed to discharge the burden resting upon them to prove that the *Avon* was lost through an act of war.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of Waterman A. Taft and others, claimants herein.

Done at Washington August 31, 1926.

Edwin B. PARKER
Umpire.

ROBERT DAVIE TRUDGETT

(UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 818-822; Certificate of Disagreement by the National Commissioners, May 14, 1926, pp. 806-818.)

DAMAGES: PERSONAL INJURIES, PERSONAL PROPERTY TAKEN AND NOT RETURNED, LOST EARNINGS. — WAR: TREATMENT OF PRISONERS OF WAR, RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN, MEANING OF " CRUELTY, VIOLENCE, MALTREATMENT ". Claim for personal injuries (temporarily impaired health through confinement) suffered by American captain of captured and sunk vessel from June 16, 1917, when taken aboard German auxiliary cruiser, until February 25, 1918, when landed at Kiel, Germany, and for loss of personal property. *Held* that Commission not concerned with legality or illegality under general international law of claimant's capture, confinement and detention: Germany liable under Treaty of Berlin, claimant's seizure and imprisonment being acts of " violence " (Part VIII, Section I, Annex I, para. 2, Treaty of Versailles, carried into Treaty of Berlin). *Held* also that Germany not liable for loss of claimant's earnings. Damages allowed for personal injuries, personal property.

Certificate of Disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree as to the liability of Germany in the claim of Robert Davie Trudgett, Docket No. 4890, for damages on account of his treatment by German authorities while held as a prisoner, and also as to the value of personal property taken from him during his imprisonment, their respective Opinions being as follows: