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The May Case (Guatemala, United States)

16 November 1900

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THE MAY CASE

PARTIES: Guatemala, United States of America

**COMPROMIS: Protocol of 23 February 1900; Supplemental
Protocol of 10 May 1900**

**ARBITRATOR: G. F. Birt Jenner, British Minister Resident and
Consul General**

AWARD: 16 November 1900

Contractual claims—Jurisdiction of Arbitrator—Limits of—Contract—Rescission
—Value of verbal agreement of—State responsibility—Breach of contractual obligations—Compensation—Loss of profit—Actual damages—Interests.

Réclamations de caractère contractuel — Compétence de l'Arbitre — Contrat —
Résiliation — Valeur d'un accord verbal de résiliation — Responsabilité de l'Etat —
Manquement aux obligations contractuelles — Indemnisation — Manque à
gagner — *Damnum datum* — Intérêts.

SYLLABUS

On the 5th of April 1898, R. May, an American citizen, entered into contracts with the Guatemalan Government, by which he was to operate the Guatemala Northern Railroad for the period of one year, and was to receive, as compensation for his services, a given sum of money per month. On the 16th of the same month, he took over the railroad, and he performed his obligations under the contracts until the 20th of October of the same year, when he was, as alleged, forcibly dispossessed by the Guatemalan Government of the railroad property. He claimed an indemnity for a debt alleged to be due to him by that Government, and for various damages alleged to have been caused him as a result of the said dispossession. The Government of Guatemala, for his part, claimed that R. May was indebted to it both on account of said contracts and of damages caused by his alleged unlawful acts or those of his agents or employees acting by his authority.

By a Protocol signed at Washington on 23 February 1900, the Governments of Guatemala and the United States referred the controversy to the decision of G. F. Birt Jenner, British Minister Resident and Consul General, who handed down his award on 16 November 1900.

PROTOCOL OF AN AGREEMENT BETWEEN THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA AND THE ENVOY EXTRAORDINARY AND MINISTER PLENIPOTENTIARY OF THE REPUBLIC OF GUATEMALA FOR SUBMISSION TO AN ARBITRATOR OF THE CLAIM OF ROBERT H. MAY AGAINST THE REPUBLIC OF GUATEMALA AND THE CLAIM OF THE REPUBLIC OF GUATEMALA AGAINST SAID MAY, SIGNED ON 23 FEBRUARY 1900 ¹

The United States of America and the Republic of Guatemala, through their representatives, John Hay, Secretary of State of the United States of America, and Antonio Lazo Arriaga, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Guatemala, have agreed upon and signed the following protocol.

Whereas, the United States of America, on behalf of Robert H. May, has claimed indemnity from the Government of Guatemala for a debt alleged to be due him from that Government under certain contracts between him and that Government in connection with the Guatemala Northern Railroad and for damages alleged to have been caused him by that Government, its civil or military authorities in connection therewith; and the Government of Guatemala denies any liability therefor; and

Whereas, the Government of Guatemala has claimed that said May is indebted to it both on account of said contracts and of damages caused by his alleged unlawful acts or those of his agents or employees acting by his authority; and said May, to secure his faithful performance of said contract, has delivered to said Government a promissory note, signed by certain third parties for \$40,120.79; and the Government of the United States denies any liability on May's part to said Government of Guatemala on account of said claims;

It is therefore agreed between the two Governments, with the consent of said May and of his attorney of record:

I

That the questions of law and fact brought in issue between the two Governments in respect of their claims shall be referred to the decision of Mr. George Francis Birt Jenner Her Britannic Majesty's Minister Resident and Consul General to the Republics of Guatemala, Honduras, Nicaragua, Costa-Rica and Salvador, whose award shall be final and conclusive.

II

That within thirty days from the date of the signing of this protocol, each party shall furnish to the other and to the arbitrator a copy of the memorial

¹ *Papers relating to the Foreign Relations of the United States*, 1900, p. 656; William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers*, vol. I, p. 871.

on which its own claim is based; and within ninety days after such signing each Government shall furnish to the other and to the arbitrator copies of all the documents, papers, accounts, official correspondence and other evidence on file at their respective Foreign Offices relating to these claims, and of all affidavits of their respective witnesses relating thereto: Provided, that said arbitrator may request either Government to furnish such additional proof as he may deem necessary in the interests of justice, and each Government agrees to comply with said request as far as possible; but he shall not for such purpose delay his decision.

III

That each Government by its counsel, and said May by his attorney, may severally submit to said arbitrator an argument in writing touching the questions involved within sixty days from the date limited for the submission of the evidence; but the arbitrator shall not for such purpose nor in any event delay his decision beyond four months from the date of the submission to him of the evidence aforesaid.

IV

It shall be the duty of said arbitrator to decide both cases upon such evidence as may have been filed before him and solely upon the issues of law and fact presented by the claim and counterclaim and upon the consideration of said entire controversy, he shall render an award in favor of the party entitled thereto; which shall not exceed the amount claimed by said party as shown by the evidence, and interest thereon from the time said sums were due until the date of the award, and said award shall bear six per cent interest from said date until paid.

V

The award shall be payable in American gold, and in case said award shall be against said May, said Government of Guatemala may retain the aforesaid note as security and collect it for the payment of said award, which said May agrees to pay within six months from the date of the award, the Government of the United States being in nowise responsible for the payment thereof. In case said award shall be against said Government of Guatemala, then said Government shall surrender to May said note. Said Government shall pay the indemnity awarded against it by the arbitrator, if any, as soon as the Legislative Assembly of Guatemala shall authorize the payment; but the time thus allowed shall in no case exceed six months from the day the decision is rendered, unless an extension of the time of its payment should be granted by the Government of the United States.

VI

Reasonable compensation to the arbitrator for all his services and expenses, is to be paid in equal moieties by the said Governments.

VII

This protocol shall be submitted for approval and ratification on the part of Guatemala, to its Legislative Assembly. When so approved and ratified the Government of Guatemala will promptly notify the Government of the United States thereof. Unless so approved and ratified and said notice given by April 1, 1900, this protocol shall be deemed null and void.

Done in duplicate in English and Spanish at Washington this 23d day of February, 1900.

JOHN HAY

ANTO. LAZO ARRIAGA

SUPPLEMENTAL PROTOCOL TO THE AGREEMENT OF
FEBRUARY 23, 1900, BETWEEN THE SECRETARY OF STATE
OF THE UNITED STATES AND THE ENVOY EXTRAORDINARY
AND MINISTER PLENIPOTENTIARY OF THE REPUBLIC OF
GUATEMALA, SUBMITTING TO ARBITRATION THE CLAIM
OF ROBERT H. MAY AGAINST GUATEMALA AND THE CLAIM
OF GUATEMALA AGAINST SAID MAY, SIGNED AT WASHING-
TON MAY 10, 1900¹

Whereas, a protocol was signed at Washington, February 23, 1900, between the Secretary of State of the United States and the Envoy Extraordinary and Minister Plenipotentiary of the Republic of Guatemala for submission to an arbitrator of certain issues involved in the claim and counterclaim of Robert H. May and Guatemala, as specified in said protocol; and

Whereas, it is stipulated in Article II of said protocol as follows, to wit:

“That within thirty days from the date of the signing of this protocol, each party shall furnish to the other and to the arbitrator a copy of the memorial on which its own claim is based; and within ninety days after such signing each Government shall furnish to the other and to the arbitrator copies of all the documents, papers, accounts, official correspondence and other evidence on file at their respective Foreign Offices relating to these claims, and of all affidavits of their respective witnesses relating thereto: Provided, that said arbitrator may request either Government to furnish such additional proof as he may deem necessary in the interests of justice, and each Government agrees to comply with said request as far as possible; but he shall not for such purpose delay his decision”; and

Whereas, it is stipulated by Article III, of said protocol as follows, to wit:

“That each Government by its counsel, and said May by his attorney, may severally submit to said arbitrator an argument in writing touching the questions involved within sixty days from the date limited for the submission of the evidence; but the arbitrator shall not for such purpose nor in any event delay his decision beyond four months from the date of the submission to him of the evidence aforesaid”;

Whereas, it is stipulated by Article IV of said protocol, as follows, to wit:

“It shall be the duty of said arbitrator to decide both cases upon such evidence as may have been filed before him and solely upon the issues of law and fact presented by claim and counterclaim and upon the consideration of said entire controversy, he shall render an award in favor of the party entitled thereto; which shall not exceed the amount claimed by said

¹ *Papers relating to the Foreign Relations of the United States, 1900*, p. 658; William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers*, vol. I, p. 873; H. La Fontaine, *Pasicrisie internationale*, 1902, p. 615.

party as shown by the evidence, and interest thereon from the time said sums were due until the date of the award, and said award shall bear six per cent. interest from said date until paid."

It is agreed between the two Governments that said Article II be, and the same is hereby, amended to read as follows, to wit:—

"That within ninety days from the date of the signing of the original protocol each party shall have furnished to the arbitrator and to the other a copy of the memorial on which its own claim is based; and within one hundred and fifty days after such signing each Government shall furnish to the arbitrator and to the other copies of all the documents, papers, accounts, official correspondence and other evidence on file at their respective Foreign Offices relating to these claims, and of all affidavits of their respective witnesses relating thereto: Provided, that said arbitrator may request either Government to furnish such additional proof as he may deem necessary in the interests of justice, and each Government agrees to comply with said request as far as possible."

It is agreed that said Article III be, and it is hereby, amended to read as follows, to wit:

"That each Government by its counsel, and said May by his attorney, may severally submit to said arbitrator an argument in writing touching the questions involved within ninety days from the date limited for the submission of the evidence; but the arbitrator shall not for such purpose nor in any event delay his decision beyond six months from the date of the submission to him of the evidence aforesaid."

It is agreed that said Article IV be, and it is hereby, amended to read as follows:

"It shall be the duty of said arbitrator to decide both cases upon such evidence as may have been filed before him and solely upon the issues of law and fact presented by the claim and counterclaim and upon the consideration of said entire controversy, he shall render an award in favor of the party entitled thereto; which shall not exceed the amount claimed by said party and interest at the rate of six per cent per annum thereon from the time said sums were due until the date of the award, and said award shall bear six per cent interest per annum from said date until paid."

Done in duplicate in English and Spanish at Washington this 10th day of May, 1900.

JOHN HAY
ANTO. LAZO ARRIAGA

AWARD OF THE ARBITRATOR ELECTED BY THE GOVERNMENTS OF GUATEMALA AND THE UNITED STATES TO CONSIDER THE CLAIM OF ROBERT H. MAY AGAINST GUATEMALA, AND THE CLAIM OF GUATEMALA AGAINST SAID MAY, IN THE MATTER OF THE NORTHERN RAILROAD OF GUATEMALA, GIVEN ON 16 NOVEMBER 1900 ¹

I fully appreciate the honor of being elected by the Governments of Guatemala and the United States to arbitrate in the matter of the differences that have arisen between the former Government and Mr. Robert H. May, an American citizen, in connection with a contract for working the Northern Railroad of Guatemala.

I think it advisable to begin with a brief statement of facts, admitted by both parties to the controversy.

HISTORICAL SUMMARY

On the 5th of April, 1898, the contract was signed in due form, and on the 16th of the same month Mr. May took over the railroad. As compensation for his services Mr. May was to receive in legal silver currency \$35,000 a month, payable during the first ten days of the month following that in which they were earned. A further sum of \$2,000 was to be paid to Mr. May for painting the Puerto Barrios station, and under a subsequent contract, dated July 16, 1898, May was to furnish and lay 5,000 wooden sleepers, for which he was to receive \$2 apiece.

All differences arising under the contract were to be settled by arbitration.

Up to the 20th of September, 1898, the work of the railroad was carried on to the complete satisfaction of the Government, but May had much difficulty in meeting the expenses of the railroad, owing to the failure of the Government to pay the considerable balance due to him on account of the subsidies and sleepers and extraordinary work executed in accordance with the last paragraph of article 1 of the contract of April 5, 1898.

On the 19th of September the Government paid May \$20,000 on account of upward of \$150,000 then claimed by him.

On the 21st of September the Government received notice that the operations of the railroad had been suspended, and on the 23d instant, in the course of an interview with the President at which Mr. Hunter, the American minister, was present, Mr. May agreed to the rescission of his contract on certain conditions. No minutes were taken of those conditions, but they were discussed at a subsequent meeting on the 30th of September at the ministry of Fomento, between Mr. May, acting on his own behalf, and Mr. Tible, the chief of the administrative department of the Northern Railroad, Mr. Amerlinck, the directing engineer of the railroad, and Mr.

¹ *Papers relating to the Foreign Relations of the United States*, 1900, p. 659.

Roberts, who was to replace Mr. May as contractor on the part of the Government. No record was kept of the agreement arrived at on that occasion. It is, however, admitted that Mr. May agreed to deliver up the railroad to Mr. Roberts when certain conditions were complied with, among which was the immediate payment of a sufficient sum of money to cover the wages of labor. On the 6th of October a sufficient sum of money was given to Mr. May to pay the wages due to the 31st of August, and on the 16th of October a further sum toward the September wages, but no arrangement was arrived at as to the taking of the inventory, settling the amount of the balance due to Mr. May, or fixing the date of the surrender of the railroad.

A vain attempt was made by the United States minister to arrange matters by means of arbitration, the Government desiring to restrict the scope of the arbitration in a manner Mr. May would not agree to.

On the 19th of October orders were given by the Government that Mr. Roberts should be placed in possession of the railroad, and the same day circulars were issued to be posted in the most prominent part of each station on the railroad, stating that Mr. May had nothing more to do with the railroad, and that all his employees were to recognize Mr. Roberts as the contractor.

On the 20th instant, Colonel Rivas, the jefe politico, who is also the comandante de armas of Zacapa, sent a written order to Mr. May to give up the railroad, and on Mr. May refusing, Colonel Rivas, who was on the spot, caused a fresh-written order in more peremptory terms and threatening other proceedings to be delivered to Mr. May. There was a considerable military force close at hand at the time and Mr. May offered no further resistance, but entered a formal protest, left his headquarters at Gualan, and proceeded at once to Guatemala City. He made no formal surrender of the railroad; no complete inventory was taken, and no arrangement was arrived at as to the mode of settling May's accounts.

Until February 23, 1900, when an agreement was arrived at between the Government of the United States and that of Guatemala to submit the question to arbitration, Mr. May was unable to come to any arrangement as to the final settlement of his accounts.

On the 26th of November, 1898, he was offered the sum of \$31,374.33 as a partial settlement of the Government debt to him, in \$100 bills of the Occidente Bank, which at that moment were depreciated; he refused to receive them, but offered to take bills of any other bank, which were not given to him; but on January 10, 1899, Mr. Fuqua, his power of attorney, received the sum of \$10,000 on account of the amount previously decreed as a partial settlement.

Since then no final settlement of accounts has been arrived at, but a counterclaim against Mr. May has been brought forward purporting to show that May is heavily indebted to the Government of Guatemala.

THE EVIDENCE

I have given careful attention to all the evidence filed before me by the United States and Guatemalan Governments, and have based my award upon facts I find recorded in it.

In so doing I have considered it my duty to set aside an opinion advanced by the Guatemalan advocate. Under the head of evidence (chapter 5 of his brief), Don Jorge Muñoz contends that the question at issue concerns a Guatemalan contract, affecting real property situated in Guatemala, and

he therefore maintains that as the evidence submitted by the claimant does not comply with the rules of the Guatemalan law the Government advocate is entitled to "deny its value and authenticity."

The protocol that guides me as to the procedure I am to follow says (article 4):

It shall be the duty of said arbitrator to decide both cases upon such evidence as may have been filed before him and solely upon the issues of law and fact presented by the claim and counterclaim and upon the consideration of said entire controversy.

I read the above sentence to mean that I am not authorized to question the authenticity of the evidence filed before me by either Government, but that it is my duty to weigh the issues of law and fact presented by the claim and counterclaim, and to decide the entire controversy accordingly.

To begin with, I wish to state that I regret the insertion in the evidence of the Guatemalan Government of a series of accusations against Mr. May and his staff, that are entirely unsupported by trustworthy evidence.

It would be an offense to the Guatemalan Government to admit, as several witnesses allege, that Mr. May was allowed to indulge unpunished a fancy for killing negroes. Neither should depositions have been inserted to the effect that Mr. May repeatedly threatened to blow up the railroad bridges, and that, too, side by side with an affirmation that Mr. May's sole object was to induce the United States Government to present a claim against the Guatemalan Government.

In my opinion such senseless accusations as the foregoing can only have the effect of casting doubt upon the credibility of the whole body of evidence that includes them.

With regard to the allegations concerning smuggling, although the evidence that supports them is nearly as inconclusive, there was at least some object in presenting it for consideration, as the contract (article 12) contains clauses concerning that offense.

But smuggling is a criminal offense, and I consider that in taking upon himself to decide questions within the province of criminal jurisdiction the arbitrator would be exceeding his functions.

In my opinion he would not be justified in considering an accusation of smuggling, in its effect upon a contract, unless it were accompanied by full proof of a conviction in a criminal court.

The utmost that can be proved against Mr. May is that his employees allowed some members of the general public to buy a few articles admitted free of duty under his contract.

The contract of April 16, 1898 (article 22), allows the contractor to import, free of duty, articles necessary for the use of the railroad. The last sentence of the same article runs literally as follows:

He may, moreover, import monthly the following merchandise in quantities hereafter expressed, which shall be considered as the maximum.

It is plain from the foregoing that the maximum fixed for the importations free of duty of common provisions and articles of clothing, etc., such as workmen usually purchase, is intended to assign a liberal limit to Mr. May's importations free of duty. If, owing to a sudden increase in the number of workmen, he should require more provisions, he would have to pay duty on them; and, similarly, he would be at liberty to dispose of any excess in the manner he deemed advisable.

The exemption from customs duties of such articles is indeed a portion of the subsidy allowed. The profits to be derived from that limited exception, whether confined to his own workmen or obtained in exceptional circumstances from the general public, are duly taken into consideration when the contract is tendered for, and in the other contracts for the construction of the Northern Railroad similar and greater exemptions are granted.

Although the accusations against Mr. May do not properly come within the scope of the arbitration, as they are not among the "issues of law and fact presented by the claim and counterclaim," and could therefore have no weight in the decision of the case, I have deemed it my duty to deal with them, as it might otherwise be supposed, if the evidence were published, that the arbitrator had to some extent been influenced by those accusations.

I propose to give my own view of the facts of the case in the order in which they presented themselves, dealing first with the strike on the railroad, secondly with the proposed rescission of the contract, and thirdly with May's ejection.

THE STRIKE

The first point to be considered is the origin of the strike which the Government of Guatemala contend was the result of a deliberate plan concerted by Mr. May, principally with the object of bringing a heavy claim for damages against that Government. In support of their view, they put forward the declaration of a great number of witnesses, not one of whom can have had the least knowledge of Mr. May's motives. The only substantial proof of their assertion is a circular issued by Mr. Jekyll, who was in charge of the Northern Railroad during Mr. May's temporary absence at Guatemala City. That circular runs as follows:

To all employees.—On account of the Government having failed to comply with their contract made with R. H. May, I am compelled to suspend the operation of the Guatemala Northern Railroad from this date.

(Signed) A. B. JEKYL, Superintendent

Gualan, September 21, 1898.

At first sight, the above circular has the appearance of an important piece of evidence in favor of the Government view of the causes of the strike. It fails to specify the immediate reason for suspending the operations of the road, which was the existence of the strike, and leaves room for the inference that such suspension was the deliberate act of Mr. A. B. Jekyll, Mr. May's representative, who desired to force the Government to pay the large debt they owed to Mr. May.

By the light of Mr. A. B. Jekyll's evidence (p. 144 of the May evidence, confirmed by the report of the directing engineer of October 10, 1898—May's evidence, p. 168) it is easy to see that such was not the intention of the circular. When that circular was issued the strike was already in full swing. Every one of the engine drivers and firemen had struck work, and without their services it was quite impossible to run engines over the road.

Mr. Jekyll wished to protect Mr. May's credit with the men to whom he had repeatedly promised payment as soon as he received the necessary funds from the Government. He was, moreover, anxious to save the needless expense of keeping on full pay a number of men who could render no services as long as the traffic of the road was suspended by the engine drivers' strike.

My personal knowledge of the facts has been appealed to by the Government, and it is therefore my duty to say that to my certain knowledge a

large number of the employees of the Northern Railroad had been at work under Mr. Sylvanus Miller and Señor Camacho, Mr. May's immediate predecessors in the work of the railroad, and that to this day a sum of more than \$60,000 is owing to those men by the estates of the deceased contractors. In both cases the default of the Government is the reason alleged for the failure to pay those wages.

The elements of a strike were therefore present in great abundance, and such a strike had a very fair chance of success, owing to the impossibility of finding in this country a sufficient number of competent engine drivers and firemen to replace those who had struck. As a matter of fact, the judgment of the men was not at fault, and the money to pay their wages was found by the Government. Ever since the middle of August, the pay car not having run for that month and for July, Mr. May was aware that the mechanics, especially those who had suffered under previous administrators, had determined to strike. He warned the Government of the danger, and at the same time did everything he could to make the men take patience. He used his own money and credit and kept matters going until the strike became imminent in September, when three months' pay was owing. As a contractor under Mr. Sylvanus Miller, Mr. May established a general reputation for honesty and punctuality. In contrast to the \$60,000 worth of wages due by Sylvanus Miller and Camacho, I must say that of the \$14,000 worth of pay checks I hold on deposit for money due to British subjects employed under those contractors not one is on Mr. May's account. The credit acquired by Mr. May's former record, and the regular payment of wages for April, May, and June, was so great that his pay checks passed current as money all along the railroad for some time after regular payments ceased.

When matters had reached such a pitch that although the Government owed May some \$150,000 he was not certain of being able to recover a sufficient sum to meet the payment of his checks on demand, he could not, as an honest man, continue to make free use of them.

When the pressure began to be felt by the American mechanics who, in their own country had had full experience of the value of strikes, it was perfectly natural that they should take that means of obtaining justice.

That the strike was not to the advantage of May must be clear to anyone who has seen that gentleman's accounts. He knew that a strike would greatly exasperate the Guatemalan Government and would probably end in his having to give up the railway. He was earning a net profit of nearly \$20,000 a month, and there is every reason to suppose that he might have continued to earn it until the present day.

Why should he have wished to abandon a lucrative undertaking on the off chance of inducing the American Government to support a claim for damages which he could only hope to establish at great expense and with great difficulty?

The Government directing engineer and inspecting engineer both thought that the strike was spontaneous on the part of the mechanics.

Mr. Amerlinck, the directing engineer, says, in his report dated October 10, 1898 (May's evidence, p. 168), that "up to the 20th of September the trains ran regularly and the number of employees required by the contract were maintained on the work. On the 21st of September the trains from the north and south only reached Gualan, where the engineers and firemen left their engines and declared a strike on account of the long delay in the payment of their salaries. As the operation was impossible without those elements, Mr. May suspended all work on the line. In fact, the construction

train could not continue to run without engineers, and without a train service the railway could not be supplied with provisions.”

The important report from which the aforesaid passage is quoted does not appear in the Government evidence, but its authenticity is not questioned in the Government brief.

In regard to the strike, it is supported by Mr. Pennypacker's monthly official report of October 1, 1898, which speaks of the mechanics having gone out on strike, and by his declaration of the same month stating that Mr. Jekyll's circular was not posted at Zacapa until September 24, and that he did not see it himself until the same date.

Finally, there are some 70 depositions on oath that bear out Mr. May's statement that he could not stop the strike for want of money to pay the strikers' claims, and all those depositions proceed from persons on the spot, well acquainted with what was going on.

RESCISSION

The agreement for the rescission of the contract alleged to have been arrived at between the President of Guatemala and Mr. May has now to be considered.

Were it not that both parties to the suit admit the existence of such an agreement the whole question at issue might have been decided upon the basis that the Government had broken the principal contract by their admitted failure to comply with the stipulations of articles 15 and 16, which provide for the payment by the Government to Mr. May of a monthly subsidy of \$35,000 during the first ten days of the month following that in which the subsidy was earned.

The first point that strikes me is, that the rescission agreement was not put into writing and duly witnessed in accordance with article 1372 of the Guatemalan civil code of 1886, that says that all contracts for values exceeding \$500 must rest upon a notarial or private document.

It is very evident that the neglect of the essential formality of putting the agreement into writing has been the principal cause of the serious misunderstandings that have arisen between Mr. May and the Government of Guatemala.

Not only was no formal deed drawn up when Mr. May arranged the matter with the President, but a week later, when the question of the rescission of the contract in its effects upon the surrender of the railroad was made the subject of a conference between Mr. May on his own behalf and Señor Tible, the head of the Northern Railroad department in the ministry of public works, Mr. Amerlinck, the directing engineer of the Northern Railroad, and Mr. Martin Roberts, who was chosen to succeed Mr. May as the contractor on behalf of the Government, no written statement whatever was drawn up and signed by the aforesaid gentlemen.

On neither occasion were any minutes made of the subjects under discussion, and there is, therefore, nothing to rely upon but the subsequent declarations made from memory by each one of the persons who talked over the matter of the agreement.

All those statements are essentially different, but they all agree that some settlement was to be arrived at as to what was due to Mr. May before he surrendered the line.

The nearest approach to anything like a business statement of the terms of that compromise, as understood by the Guatemalan Government, is to be found in a letter addressed by the President to the minister of public works

on the 23d of September, the very day on which Mr. May had his interview with His Excellency in the presence of the American minister.

That letter was inclosure 1 in an official note from the minister of foreign affairs to Dr. Hunter, dated November 5, 1898, and is to be found in translation at page 867 of the May evidence.

It runs as follows, literally translated :

THE PRESIDENT OF THE REPUBLIC OF GUATEMALA,
Guatemala, September 23, 1898

THE MINISTER OF PUBLIC WORKS.

SIR: For your information and consequent action, I have to inform you that I have this day, in the presence of the United States minister, Mr. Hunter, in view of the demands of Mr. May, agreed with the latter gentleman on the following points:

(1) The contract for the maintenance and working of the Northern Railroad, concluded with him, is to be rescinded, the subsidies due to the end of August being paid in the regular manner; and,

(2) As regards the extra work performed on that line by the gentleman in question, after the same has been recognized and duly valued, the Government will, if it be proper, issue a decree declaring the credit correct and ordering its payment, as is the case with other national accounts.

As the aforesaid gentleman has advanced the statement that without the punctual payment of the subsidies he can not continue to carry out his contract, and, as on the other hand, owing to the strike of his employees, provoked by him, the communications both in the interior and with the exterior, as well as the passenger traffic with the Atlantic side, are interrupted, I have thought it necessary and prudent to propose the arrangement above referred to, which was then accepted, as I have already said, in the presence of the minister of the United States.

It is therefore a matter of urgency that everything agreed upon should be immediately and exactly carried out by your department.

(Signed) ESTRADA C.

It will be observed that His Excellency's letter contains not a word concerning the surrender of the railroad, and that paragraph 1 would appear to imply that May had agreed on the 23d of September to rescind his contract on payment of the subsidy to the end of August alone, although his management of the railroad gave complete satisfaction until the 21st of September, as appears from the Government memorial.

That was not the President's meaning, as is proved by the payment of \$17,000 on account of the September wages and the subsequent recognition of all duly audited claims until the 21st of that month.

From the President's letter it is therefore plain that no agreement was arrived at between His Excellency and Mr. May as to the date of the surrender of the railway, and that there was room for at least one serious misunderstanding as to the terms of the rescission.

With due respect to the President, I can not therefore accept His Excellency's letter as a document establishing an agreement by common consent for the rescission of the contract.

The Government brief appeals to the evidence of the United States minister; but Dr. Hunter did not at the time understand enough Spanish to be certain of what passed between Mr. May and the President, and his testimony must be set aside as merely hearsay evidence.

On Mr. May's behalf I will quote his formal declaration before a Guatemalan judge on the 27th of October, 1898:

To the fifth question Mr. May replied that His Excellency, the President of the Republic, had proposed to him the rescission of his contract, because the Government could not continue to pay the subsidy at the stated terms, to which May replied that he would rescind the contract, but for that purpose the Government must give him a sufficient sum to pay his creditors and workmen, and, moreover, the balance due to him must be established, as well as the manner and time of payment.

I am fully aware that May's declaration is only evidence of his views, but his statement is clear and concise and covers the whole ground, and the demands it records, besides being fair and accurate, are also such as would have been made by any business man situated as May was at the time of his interview with the President.

The conclusions I arrive at on this point are, firstly, that there never was such a rescission of the contract as could be enforced at law, and, secondly, assuming that the parties arrived at some agreement as to the rescission of the contract, such agreement, even if we treat the President's letter as authoritative, to this day has not been carried out by the Guatemalan Government.

Mr. May's accounts have not yet been finally audited, as will fully appear when I come to the examination of those accounts. For the present it will be sufficient to refer to the Government "acuerdo" of November 3, 1898, granting \$31,374.33 on account of May's credit. Since the date of that decree no further statement of the balance to Mr. May's credit has been offered to him, but successive Government counterclaims have been advanced against him.

EJECTION

There is little possibility of dispute about the ejection of Mr. May from his post as contractor for the working of the Northern Railroad.

Mr. May was called upon to give up the road to the new contractor, Mr. Roberts, and he refused to do so on the ground that the terms of the verbal contract rescinding the original contract had not been complied with. No legal action for May's eviction could follow, as the alleged contract of rescission had not been put into writing in accordance with the law (article 1372 of the code of 1886), and the parties did not agree as to the conditions of such contract of rescission; the Government therefore gave orders that Mr. Roberts, the new contractor, should be put into possession of the Northern Railroad. Orders were consequently issued on the 19th of October that circulars should be posted up at every station in the following terms:

Mr. Robert H. May has no rights of any kind in connection with the administration of the Northern Railroad.

Mr. Martin Roberts is the contractor for the operation of the constructed portion of the Northern Railroad, and all employees of every class will recognize him as such.

The above circular alone is sufficient proof that the Executive Government deprived Mr. May of the administration of the Northern Railroad without any judicial process and by the sole exercise of their executive authority.

But on the 20th of October Colonel Rivas, who is at once the political chief and the commander of arms of the department of Zacapa, in which the headquarters of the railroad at Gualan are situated, entered the principal

office of the railroad and personally delivered the following letter addressed to Mr. May:

Immediately, and without any sort of delay, disoccupy the principal office and the other dependencies and annexes of the national enterprise of the Northern Railroad; that enterprise will be taken over by Don Martin Roberts, contractor for the above-mentioned line.

I expect you to comply immediately with what I have stated without rendering necessary other proceedings.

(Signed) F. RIVAS.

The aforesaid letter contains a most peremptory order to "disoccupy" the offices of the railroad. It declares that May is stripped of his rights as contractor, being replaced by Martin Roberts, and it conveys a palpable threat of other proceedings.

Although it is said that Colonel Rivas acted in his civil capacity as political chief, and not in his military capacity as commander of arms, it is not denied that a large body of soldiers was within call, and that at a moment's notice Colonel Rivas could resume his military attributions and order the soldiers to evict May by force. May therefore went in fear of his own life and that of his companions, and, like a law-abiding citizen, surrendered to the authorities before physical violence was used. If the Government contend that physical violence would not have been used, why were not the soldiers withdrawn before May was threatened by the military commandant with other proceedings? The presence of the soldiers had never been really required, and their presence at such a moment, if a peaceable agreement was contemplated, was certainly quite uncalled for.

Can it be contended that if May had resisted the executive order of ejection and physical violence had consequently been used, and, as a matter of course, resisted, he, May, would have been in a better position legally to bring a claim for damages against the Guatemalan Government?

An executive order unsupported by any judicial decision is in itself force, with or without physical violence, and can only lawfully be resisted by such a protest as was entered by May before he surrendered to Colonel Rivas.

The Government advocate is really eloquent when he defends the action of the executive on the ground that May's proceedings had rendered the situation quite insupportable; that the interruption of the traffic had caused the greatest injuries to the country, and that the dignity of the Government did not permit them to suffer further defiance at the hands of May.

The three following facts must, however, be borne in mind:

1. The suspension of the traffic had ceased on the payment by the Government of what was required for wages; the line was running to the general satisfaction, and the country was suffering no injury on the 20th of October, when May was forcibly expelled.

2. Whatever injury the country may have suffered previously was due to the failure of the Government to fulfill its contract with May for the payment of stipulated subsidies. If the Government can appeal to straitened circumstances constituting "fuerza mayor,"¹ surely a contractor to whom \$150,000 is due is better justified in making such an appeal.

3. The Government, without sacrifice of dignity, could have agreed with May to rescind the contract by means of arbitration or with two

¹ "Fuerza Mayor," nearly equivalent to the act of God. It implies an irresistible pressure, whether of man or of nature, that makes the action it applies to an impossibility.

months' notice, May having offered to accept that solution, although the contract stipulates that he is to hold the railroad for one year save only in case of the continuance of its construction by the Government or May's failure to fulfill his contract, when the Government may give two months' notice.

ACCOUNTS

Before I enter upon a detailed analysis of the accounts, it is necessary that I should call attention to the singular view the Government memories and briefs take of the balance due to Mr. May.

The Government counterclaim of March 21, 1900, speaks of the Government debt to May as \$31,374.33, of which \$10,000 has been paid.

The briefs of the Government advocate and of the commission of lawyers presented together on October 20, 1900, present the same statement in different forms.

The Government advocate says, at page 117, that *none of May's extra accounts excepting Nos. 3 to 17 have been audited*, owing to May or his representative refusing to discuss them.

At page 93 he inserts a dispatch from Dr. Hunter to Mr. May, dated May 16, 1899, which Señor Muñoz speaks of as a most valuable proof. It states (page 93 of the brief) that Dr. Hunter had received a note from the minister of fomento stating that *all May's accounts had been audited* and that the books of the Department were ready for examination by Mr. May or his representative.

Nevertheless, the aforesaid advocate, Don Jorge Muñoz, repeats the assertion that \$31,374.33, minus \$10,000 already paid, is the balance in May's favor.

The legal statement of the Guatemalan Government says, page 31, that the final balance in May's favor is \$31,374.33.

In his report of October 31, 1898, sent to Dr. Hunter, Mr. Amerlinck, the directing engineer, acknowledges a balance in May's favor of \$76,657.78, without the subsidy and extra accounts for October.

In a previous report, dated October 10, 1898, the same gentleman acknowledges a balance of \$83,341.28 on exactly the same items. The difference is in the extraordinary accounts, stated by Mr. Amerlinck, October 10, as \$41,761.95, and reduced in his account of October 31, 1898, to \$35,078.45 in accordance with a scheme that is signed by the under secretary of state for fomento, and dated November 4, 1898, which shows that accounts 19, 20, 22, 23, 25, 29, 36, 49, 50, 54, 56, 57, 58, and 59 have been disallowed.

Moreover, the "acuerdo" (resolution) signed by His Excellency the President, dated November 3, 1898, says expressly that the \$31,374.33 are to be paid to May on account of what will be found due to him when the remaining claims are liquidated.

Señor Tible's report of December 1, 1898, shows that the balance of \$31,374.33 was arrived at by ignoring the existence of accounts Nos. 1 and 2, \$1,249.25; accounts Nos. 18 to 36 and 38 to 55, \$45,598.39; and further masonry and other extra works, accounts not received, \$6,974.59; total, \$85,196.56. Consequently Mr. Tible's report admitted not \$31,374.33, but a possible \$85,196.56.

I do not feel qualified to give the preference to any one of the foregoing statements of the Government debt to Mr. May, and I shall therefore have

to rely upon my own scrutiny of the accounts in order to find out what is the real balance of May's account up to the date of his ejection from the railroad on October 20, 1898.

The reductions made by the Government in dealing with Mr. May's claim touch the following items:

First. The extra accounts.

Second. The subsidy for the month beginning September 21, when the strike suspended operations, and ending October 20 with May's ejection.

EXTRA ACCOUNTS

I have before me Señor Tible's analysis of extra accounts 3 to 17, stating in detail the reasons for cutting down those accounts from \$10,469.79 to \$5,800.

The first objection is that those accounts include the expenses of two locomotives held at the disposal of the Government at Puerto Barrios and Zacapa to convey troops when required.

Señor Tible finds that objection upon the last sentence in article 4 of the contract, which runs as follows:

May will place at the disposal of the Government the *special* trains which they need, and ask for, through the directing engineer, without any compensation being due to him for those services.

Señor Tible has overlooked the first part of the article, which says plainly that such *special* trains as the Government may require *for the inspection of the line* are to be supplied by May, and the sentence he alludes to is inserted to show that they are to be supplied gratuitously. It can not mean that the Government may use gratuitously as many trains as they please for transporting troops, etc., for if it did the whole rolling stock might be kept in motion for Government service and the regular work and profit to the railway entirely suppressed.

If the Government, for state reasons, should require to monopolize the railway service, they are, of course, entitled to do so on compensating the contractor for expenses and losses consequently incurred.

The second objection is that May claims for repairing an engine that ran over a bull. This fact is denied by May and not proved by Tible.

The third objection is that owing to the damage to the line May was effecting a saving in the regular trains and ought not to charge for extra working trains owing to that reduction in expenditure. This objection may at once be set aside, as the contract contains no provision on the subject.

The fourth objection is that May has charged 15 per cent on the actual cost of the work performed. A similar charge was presumably made by Mr. May's predecessors and successor, although perhaps not in as open a manner. It is the customary charge in the United States and Spanish America for costs of administration, supervision, wear and tear of tools, and other extras that can not be specified in each account.

Every extraordinary expense must necessarily bear a share of the general expenditure that is only calculated in the contract to cover ordinary expenses.

From Señor Tible's analysis of extra accounts 3 to 17 may fairly be inferred the manner in which the other forced accounts would have been dealt with. As I have already said, I do not consider that the deductions made by Señor Tible are justified.

As to Mr. Tible's hint that perhaps the extra accounts were for ordinary work that should have been performed without extra charge, I must point out:

1. That Mr. Pennypacker, the Government inspecting engineer, whose duty it was to follow the works day by day, signed and approved all the 59 force accounts up to October 17, with the exception of account No. 37, which does not appear in May's general account. When called upon by the Government to report as to the nature of the works carried out, Mr. Pennypacker replied, on the 16th of December, 1898, that the accounts were undoubtedly for extraordinary work in accordance with the contract of April 5.

Up to September 21, when the strike took place, all the work done had the previous sanction of a superior authority, and as late as October 3 Mr. Amerlinck, the Government directing engineer, signed an order to May as contractor for the repairs required by bridge 185.

That the work was extraordinary work is proved by overwhelming evidence, including the reports of the inspecting and directing engineers, concerning the immense damage done to the line by the extraordinary floods of the rainy season of 1898.

An objection is also raised by Señor Tible to an account, dated September 30, for repairing a portion of the masonry of bridge 153, carried away by floods in 1897-1898, on the ground that he knows nothing of this charge.

As the account is approved by the inspecting engineer, it should be placed on the same footing as the force accounts.

As the extra accounts Nos. 1 to 36 and Nos. 38 to 59 and the masonry account of September 30, 1898, all bear the approval of the inspecting engineer and are supported by other evidence, as already stated, and as the Government evidence gives no satisfactory reason for their rejection, I must allow the whole charge for extraordinary work as set down in May's account.

SUBSIDY

The next objection raised is to the charge for the subsidy for the whole month of September and for the first twenty days of October. Señor Tible says that he has no authority to recognize any charge for subsidy after the 21st of September, and strikes out the amount charged from that date to October 20.

The Government memorials and briefs argue:

1. That during the time of the suspension of the road on account of the strike no subsidy should be paid.

2. That the rescission of the contract having been agreed to by May, on September 23, his further tenure of the road was illegal, and the Government can not be called upon to pay subsidy after September 21, when the strike began.

In reply to these contentions:

1. There is nothing in the contract to justify the view of the Government that the contractor should not be paid for the time, during which the railway is prevented from running by a strike of the artisans employed on it, or in other words by "fuerza mayor."

I know of no such clause in other railway contracts and I do not believe that any contractor would accept such a condition. Even if it could be proved, as has not been done, that May started or connived at the strike, the fault would lie with the Government, who, according to their own advocate's

brief (p. 70), had ample warning that the men would strike work if they were not paid, and when May's funds came to an end he could not pay them unless the Government paid him.

2. I have already given my reasons for believing that May's tenure of the road until October 20 was perfectly legal, and the fourteen orders sent to him or to his staff by Government officials between September 27 and October 17 recognize the legality of his tenure.

I therefore can not do otherwise than allow Mr. May the full amount of subsidy claimed for the period between September 21 and October 20.

The Government positively assert that May is responsible for the payment of the staff of the railway up to October 20. They have not paid the wages from October 1 to 20, and the unpaid wages are spoken of as a debt of some \$40,000 left unpaid by May. In reality, the amount due for wages is under \$14,000, and the claimants all hold May's pay checks.

As the other items of Mr. May's credit are recognized by the Government, and as the Government statement of the debit side of his account agrees with Mr. May's, Mr. May is entitled to the whole of the credit balance claimed by him, viz, \$127,793.94 silver or \$46,470.52 gold.¹

To the balance in favor of Mr. May in his account current with the Government must be added the differences in his favor between the inventory when Mr. May took over the Northern Railroad and the inventory when he was ejected.

According to Mr. Amerlinck's report of January 11, 1899, when Mr. May received the railroad, the inventory taken showed a valuation of \$335,737.12. The inventory sent to me by the Government advocate, at my request, on the 18th of October, 1900, was submitted to one practiced accountant and checked independently by another, with the result that it showed a valuation of \$353,950.17, or an excess in favor of Mr. May of \$18,213.05 silver or \$6,622.93 gold.

The Government counterclaim 1, debiting May with \$4,907 gold for deficiencies in the inventory, is evidently based on some error.

We have now to Mr. May's credit—

	<i>Gold</i>
Balance of account current	\$46,470.52
Difference in inventory	6,622.93
	<hr/>
Total	53,093.45

To the aforesaid amount must be added the sum of \$8,816 silver or \$3,205.82 gold, as stated in Mr. Amerlinck's report of January 11, 1899, for explosives made over to the Izabal authorities by order of the Government at the time of the August troubles, such explosives having formed part of the valuation of the inventory when he took over the railroad. With this addition, the sum to Mr. May's credit is now \$53,093.45 plus \$3,205.82 gold; total, \$56,299.27.

The Guatemalan Government inventory contains no mention of the Puerto Barrios commissaries, disallowed in the report from the ministry of Fomento dated March 26, 1900. It also fails to include any allowance for wood for fuel purposes, but it includes track commissaries, coal, drugs, and stationery.

¹ Throughout this claim the exchange fixed in the Government evidence of 175 per cent premium, *i.e.*, \$2.75 currency, equal to \$1 American gold, will be taken as the standard.

The report of March 26 admits that 208 cords of wood, valued at \$1,248, should be placed to May's credit. May's claim for the Puerto Barrios commissaries is \$7,059.86, a charge supported by various depositions in his evidence. The mere fact of his having undervalued the wood left on hand, which he estimates at \$1,058.56, proves that his calculations are framed with a view to fairness. On this ground, because I have always found Mr. May's calculations moderate, and because the only evidence adduced by the Government in favor of a smaller amount of stores says nothing of the Puerto Barrios commissaries which were used by Mr. Roberts, I allow Mr. May \$7,059.86 for Puerto Barrios commissaries and \$1,058.56 for wood; total, \$8,118.42 silver or \$2,952.15 gold. Add this to allowance \$56,299.27 gold, making \$59,251.42 gold.

The last item of Mr. May's claim for expenses connected with his tenure of the Northern Railroad is for \$900 silver which he will now have to pay for removing his railway outfit to the port of embarkation, and which he would not have had to pay if he had been allowed to remain in possession of the railroad during the whole of the period fixed by his contract, or if he had left the railroad in any other legal manner with due notice. In either of the aforesaid cases May would have been entitled to use the railroad to remove his outfit from Zacapa, where it has been lying since his ejection at a considerable expense for rent; but now he will have to pay to whomsoever may hold the railroad a sum estimated at \$900 silver or \$327.27 gold, a moderate claim, estimated upon the actual freight charges, which I allow.

May's total claim at the time of his dispossession is, therefore, \$59,251.42 gold plus \$327.27 gold; total, \$59,578.69.

From the foregoing sum must be deducted \$10,000 silver or \$3,636.36 gold, received by Mr. Fuqua on account of his principal's credit on the 13th of January, 1899.

The committee of eminent lawyers who have drawn up a legal opinion to accompany the Guatemalan Government brief have asserted, at page 31 of that opinion, that according to the mercantile law, by giving a receipt for \$10,000 on account of the sum of \$31,374.33 decreed by the Government on November 3, 1898, in part payment of Mr. May's balance, Mr. Fuqua has recognized for Mr. May the sum of \$31,374.33 as the final balance due to Mr. May. I therefore think it well to state that I do not admit that the acceptance of a sum on account of what is decreed as a partial payment of a debt can convert such partial payment of a debt into its final discharge.

We have now \$59,578.69 gold less \$10,000 silver, or \$3,636.36 gold, making \$55,942.33 gold left in favor of Mr. May.

A further deduction of \$1,800 silver or \$654.54 gold must now be made for unpaid customs duties which form Government counterclaim No. 14 and are said to amount to \$1,363.63 gold.

The above counterclaim is for customs duties on articles introduced by Mr. May during the whole time of his tenure of the railroad, and not merely for goods imported after the 21st of September, 1898, as the Government counterclaim says. It is for merchandise not specifically included in the free list of the contract. In spite of Mr. May's repeated applications, no detailed account of this claim had ever been delivered to him. The first detailed statement issued by the custom-house was one I asked for and received from the Government advocate on the 18th of October, 1900.

The original claim as stated in the Government counterclaim was for \$1,363.63 gold, the only vouchers being three bills drawn upon Mr. May by the administrator of the Puerto Barrios custom-house for the silver equivalent of that gold amount.

The claim, when I had received it, had been raised by the Guatemalan central custom-house to \$7,242.06 silver or \$2,633.48 gold as the result of a fresh revision.

I have been carefully through the account with the assistance of experts having the contract before them, and I have come to the conclusion that the utmost that Mr. May can be held to have imported in the way of goods outside his contract, although intended for the use of the railroad and its staff, leaves him with a debt of only \$1,800 silver after adding over 10 per cent to cover possible small discrepancies.

With regard to this debt, Don Jorge Muñoz, the Government advocate, says that Mr. May ought to have been tried on a charge of fraud against the fiscal revenues.

I do not see how Mr. May could be defrauding the revenues by failing to pay immediately a small sum for customs duties when the Government owed him a large sum for subsidies. The law with regard to prompt payment of duties was not enforced at Puerto Barrios, but May expressed his willingness to settle as soon as an account was delivered to his agent. That he was right in asking for a detailed statement is proved by the divergences noted above. Moreover, May actually paid \$4,000 duties for goods lying in Puerto Barrios custom-house belonging to merchants and bought by him for the use of the railroad, but although they were all articles included in the free list, as shown by a certificate of the inspecting engineer, he has never been able to recover the sum disbursed.

With a further deduction of \$654.54 gold, the equivalent of the \$1,800 silver for customs dues, Mr. May's credit at the date of his ejection from the Northern Railroad amounts to \$55,942.33 minus \$654.54 gold, making a total of \$55,287.79.

To this must be added, in accordance with article 4 of the protocol of agreement, 6 per cent for interest up to the 16th of November, the date of the signature of the award, or interest at 6 per cent per annum for two years and one month from October 20, 1898, to November 16, 1900.

GOVERNMENT COUNTERCLAIMS

I now come to the Government counterclaims, which are twenty in number.

Counterclaim No. 1 for \$4,909.57 gold is for the difference in the value of the inventory as received by Mr. May and as taken by the Government after May's dispossession. The claim has already been shown to have been based on an erroneous calculation, as the inventory sent to me by the Government shows a considerable excess of value in favor of May. The amount claimed was \$4,909.57 gold.

Counterclaims 2 to 11, both inclusive, for not cleaning the right of way, for placing round instead of square sleepers, for not placing other sleepers, for not painting engines, cars, bridges, and stations, for injury to the fore-going for want of paint; for loss caused by using bad fuel, amounting together to \$25,364.41 gold, need not here be discussed separately.

1. Because they are all the subject of exceptions at the end of the inventory signed April 16, 1898.

2. Because up to the 20th of September, 1898, "things went on regularly and the best understanding existed between the two contracting parties."

It is plain, therefore, that May did everything that was required of him to keep the line in good working order, placing the necessary sleepers in proper shape, doing what was needed in the way of painting, and not

damaging the rolling material by the use of bad fuel. The Government inspecting engineer was constantly, and the directing engineer frequently, on the line, and their reports show that everything was in order. May's obligation was confined to doing the work when it became necessary "in the judgment of the director of works and in accordance with his indications."

3. Because there is no evidence to show that at the time when May was dispossessed his attention was called to any breaches of his contract.

The inventory of the road was not taken until long after his dispossession, and he, therefore, had no opportunity of pointing out that the exceptions taken in the new inventory practically referred to the same damages as were the subjects of exceptions when he took over the road.

May could have proved by overwhelming evidence that the round sleepers found on the road had not been placed by him, and that he had placed all the sleepers required by his contract.

4. Because May was not allowed to complete his contract, which was broken off at the close of the rainy season, during which it is nearly useless to cut down brushwood or to paint objects exposed to the constant damp of the atmosphere.

In the course of the following six dry months he could, to the best advantage, have cleared the right of way and painted the cars, bridges, and stations, in so far as those operations were not to be performed at the expense of the Government, as was the case with those included in the exceptions of his inventory. There is nothing in the contract that binds May to do any particular work at any particular time before the close of that contract. He was to keep the road in good working order, choosing his own time for improvements.

5. Because, until the 5th of December, 1898, not one of the charges I am dealing with was brought against May, and it is evident that, if they had been known to the Government before that time, counterclaims would have been entered to meet Mr. May's constant applications for the payment of what was due to him. As to the painting charge, it appears for the first time in Mr. Amerlinck's report of January 11. How were \$10,000 paid to Mr. May on the 13th of January on account of the balance in his favor, unless the counterclaims in Mr. Amerlinck's reports of December 5 and January 11 were then regarded as absolutely undeserving of consideration.

No attention is due to charges made under a contract after the holder of the contract has been dispossessed of the property he enjoyed in virtue of its provisions, and thus deprived of the opportunity of effectively rebutting those charges.

Counterclaim 12 is for \$15,000 silver, or \$5,454.54 gold, for amounts not received by the Northern Railroad on account of the suspension of the traffic ordered by the contractor and his agents. I do not clearly understand the meaning of this charge.

Does it refer to the net profits that the contractor was to have made upon the freight and passenger traffic during the eighteen days they were suspended, owing to the strike?

Does it mean that May should have run the railroad not only without a subsidy, but entirely out of his own moneys, giving up to the Government all that he received and paying the working expenses himself?

Whatever it may mean, as I have decided that May held legal possession of the railroad until the 20th of October, or twelve days after the conclusion of the strike on October 8, and was entitled under his contract to the traffic

receipts of the railroad, I can not do otherwise than disallow this item.

Counterclaim 13, \$909.09, for expenses involved in the conveyance of the mails during the same eighteen days. This is also an item I can not account for.

I have evidence before me of the most indisputable character that in accordance with the contract, article 8, the foreign mails, inward and outward, were not delayed by the strike.

Counterclaim 14, \$1,363.63, for fiscal dues not paid. (See page 26, where \$654.54 are allowed to Government.)

Counterclaim 15, \$545.45, is for the emoluments of the notary and witnesses who drew up the inventory after Mr. May's dispossession. As Mr. May took no part in the aforesaid operation, he can not be expected to pay for it.

Counterclaims 16, 17, 18, 19, and 20 are all for damages due on account of the strike. The Government suffered no damages, as the mails, telegraphic services, and special trains required by the Government officials were not interrupted. The damages suffered by private individuals must have been very small during the eighteen days' suspension due to the strike, which was "fuerza mayor" provided for in the contract under article 7, and no account of damages suffered by any special individual is put in.

Moreover, as public order is not shown to have been disturbed and as the Government witnesses repeatedly state that there was no want of men to carry on the work when Mr. May was gone, I can not see any grounds for the foregoing counterclaims.

At all events, as I have decided that May was illegally dispossessed of the railway, the last five counterclaims can scarcely require discussion, but must be disallowed, together with all the Government claims against Mr. May, excepting No. 14 for fiscal duties.

LOSS OF PROFITS

Having dealt with the Government debt to Mr. May at the time of his dispossession of the Northern Railroad and the counterclaims of the Guatemalan Government for the alleged nonfulfillment of certain clauses in the contract, for customs duties, and for a difference in the value of the inventory, and for damages caused by the strike on that railroad, I will now consider whether and what damages are due to Mr. May.

The contract itself indicates the first damage suffered by Mr. May for which he is entitled to compensation.

In the words of the Government counterclaim, a contract existed between the Government of Guatemala and Mr. May for the maintenance and working of the Northern Railroad, from its signature until the 21st of September, 1898, that contract has been carried out with the most absolute conformity and agreement of both parties and without giving rise to reproaches, complaints, or claims on the part of either of them.

Unfortunately, the Government's circumstances were such that they were unable to pay the subsidies with regularity, but May always showed consideration and readiness to wait until affairs were improved.

Under these circumstances and "when things went on in the best order" May, following out a well-concerted plan, under pretense of a strike, suspended work on the railroad with the view of bringing a claim against Guatemala.

It will be seen from the foregoing passages, all of which, except the assumption as to the strike, are quite in accordance with the truth, that

May's work as railroad manager gave complete satisfaction and that the profit he earned was not due to neglect of the railroad, but was rather the result of a close attention to business, combined with the necessary acquisitions of a railroad manager.

I have declared elsewhere that the evidence shows no legal and no moral reason for expelling May from his post. Whatever may have been the motives that actuated the Government, they afford no justification for May's ejection without compensation.

If, for imperative reasons of state, the railroad had been withdrawn from May before he had completed the term fixed by his contract, he would have been entitled to all the profit to be derived from the railroad until the completion of the term.

I hold in my hand a certificate from the minister of foreign affairs dated July 20, 1900, to the effect that at the time of the ejection the Government had no intention of selling the railroad, which is equivalent to saying that they had no intention to make arrangements with other parties for continuing the work of construction.

As is evident from the foregoing extract from the Government counterclaim, no case of noncompliance with the contract can be alleged against Mr. May before the strike, and that strike having been the result of a default of the Government, it can not be alleged against Mr. May as a case of default on his part.

The conditions under which, according to article 29 of the contract, the Government could give Mr. May two months' notice did not exist. Mr. May was, therefore, entitled to carry on his contract for one year from the date of taking over the railroad, or from the 16th of April, 1898, and to receive the profits he would in due course have earned under the contract during the year ending April 16, 1899.

As Mr. May was ejected on the 20th of October, 1898, he is entitled to the profits he would have earned during the five months and twenty-six days between that date and the 16th of April, 1899.

The amount of profits earned during Mr. May's six months' tenure of the railroad is shown by the extract from his books legally certified by the bookkeeper, Mr. Francis, and the auditor, Mr. Fuqua, to be \$116,968.67, or an average net monthly profit of \$19,494.67. Taking that sum as the measure of Mr. May's profits for the remainder on his terms, we find that he would have earned \$114,369.26 silver or \$41,588.83 gold; in other words, that the value of the property his contract entitled him to enjoy, and of which he was illegally deprived, was the above sum.

It must be remembered that the six months during which Mr. May realized an average profit of \$19,494.76 were the six months of an extraordinary severe rainy season, and that being the first six months of his tenure of the railroad, he had necessarily to incur higher working expenses than he need have incurred during the subsequent six months.

During the remaining six months most of his working expenses would have been very considerably reduced, but as a competent railroad manager, he would doubtless have taken advantage of the dry season to carry out such improvements as could not, with advantage, be attended to during the wet season, and to make such preparations as he deemed necessary to meet the ensuing wet season.

I therefore consider that I am dealing fairly by both parties in taking the average net monthly profits earned by Mr. May during the wet season of 1898-99 as the measure of his profits for the whole year.

That the above rate is not excessive is shown by the testimony of Messrs.

Greely and Watson, the former of whom was auditor and the latter general superintendent of the railroad under Mr. Roberts. Their evidence is to be found at pages 175 and 180 of the May evidence, and has not been disputed by the Government, in whose hands it lay for three months before the Government advocate put in his brief.

If I were to judge by counterclaim No. 12, for \$15,000 silver claimed apparently as the net profit of the traffic of the railroad during the seventeen days between September 21 and October 8, when traffic was partially suspended owing to the strike, I should have to set the total profits of the contract, including the subsidy, a long way above the amount stated in Mr. May's books.

A letter dated January 29, 1900, and addressed by Señor Lopez Andrade, then directing engineer of the Northern Railroad, to the minister of fomento, deals with the traffic returns as follows:

SIR: In reply to your communication of the 16th instant, I have the honor to report that the amount that the enterprise of the Northern Railroad failed to receive during the time when the traffic was interrupted in consequence of the suspension of the operations resolved upon by Mr. May, should be calculated at \$15,000, for which purpose must be taken into consideration the large quantity of merchandise in store, according to the report made by Don Enrique Gonzales before the "Jefatura política" Izabal, herewith inclosed, which merchandise should have been transported precisely during that period. We must take into account not only the freight for merchandise, but also the passenger traffic interrupted as a result of the strike.

With special consideration,

(Signed) J. T. LOPEZ ANDRADE
The Directing Engineer

In view of all the circumstances of the case and with due consideration of the evidence of both parties, I allow Mr. May the sum of \$114,369.26 silver or \$41,583.83 gold for loss of profits.

DAMAGES

I can not pretend to lay down the law concerning damages in clearer words than those of the advocate of the Guatemalan Government, who uses the following language in the counterclaim:

"The law of Guatemala, says Don Jorge Muñoz (to which the claimant is subject in this case), establishes, like those of all civilized nations of the earth, that contracts produce reciprocal rights and obligations between the contracting parties and have the force of law in regard to those parties; that whoever concludes a contract is bound not only to fulfill it, but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the nonfulfillment or infringement by default or fraud of the party concerned, and that such compensation includes both the damage suffered and the profits lost. *Damnum emergens et lucrum cessans.*"

In the previous pages I have dealt with the "*lucrum cessans*," and I will proceed to consider the "*damnum emergens*."

It has taken Mr. May just over two years to obtain a settlement of his claim against the Guatemalan Government. He has had to undertake journey upon journey to bring the matter before the United States Government, and to induce them to intervene in his favor; he has had to engage, at heavy rates, the services of eminent lawyers, whose reputation would insure

a hearing from overworked officials, and whose opinions, based upon the stern logic of facts, would have weight with the legal advisers of his Government. Many of the leading witnesses were scattered over the face of the world, and May has had to undergo the expenses of reaching them. Owing to the unremitting attention exacted by the prosecution of his claim, he has been entirely debarred from seeking remunerative work, and his credit, which, on the showing of this Government, was so excellent as to cause his pay checks to be received as cash by all his neighbors, is nearly, if not entirely, suspended until the decision of the arbitrator be known.

For all these and for other causes, which it would take too long to enumerate, I hold that Mr. May is entitled to substantial damages from the Government of Guatemala, who are legally responsible for the two years' delay in the settlement of their debt to him.

When it appeared that the terms of the agreement for the rescission were not understood in the same sense by the two parties to that agreement, and that consequently no agreement existed, it was open to the Guatemalan Government—

1. To continue May's possession of the road. Work had been resumed and the traffic was being carried on with perfect regularity and with the assent of the Government officials, and the payment of wages to all the staff had reestablished the credit of the road, as is proved by the Government evidence, that shows that when Roberts took charge of the line there was a surplus of labor on hand.

2. To proceed to arbitration under the contract or to rescind the contract by means of a fresh agreement with Mr. May to terminate it on a two months' notice as he proposed.

For the sake of conciliation, Mr. May had agreed to the limited and not too favorable arbitration proposed by the United States minister, but the modifications of that proposal, insisted upon by that Government, made the terms so ruinous to Mr. May, that on due consideration he refused to accept them. Even after the ejection, it is my opinion that if the Guatemalan Government had offered to pay to May the \$127,000 and odd dollars he was entitled to claim, he would have abstained from entering a claim for loss of profit and damages. It is, therefore, plainly due to the action of the Guatemalan Government that Mr. May has been led to advance and able to establish a claim for loss of profits and damages.

On the other hand, there are certain considerations that in no way detract from Mr. May's credit, that I think must in fairness be taken into account in assessing the amount of damages to be awarded to him.

Mr. May came to Guatemala as far back as 1884, and was constantly employed on the Northern Railroad from the year 1892. The knowledge of the road he acquired, first as acting manager for a few months and then as subcontractor until 1898 was very complete and accurate. Mr. May was well acquainted with the straitened circumstances of the present Government and was still waiting to receive a large sum of money coming to him from the Miller estate, which could not be wound up until the Government had paid what it owed to the late S. Miller. Nevertheless he apparently felt certain that with his knowledge of the road; his recognized integrity and business faculties; and, above all, the implicit confidence reposed in him by all who had worked under him he would be able to give a thoroughly good service of the road in exchange for a good profit.

He was convinced, it would seem, that in view of the importance of the Northern Railroad to the country, the Government, satisfied with his management, would pay him with sufficient regularity to enable him to carry

on the line. Unfortunately, revolutionary movements broke out, the Government fell into arrears, and May's credit being exhausted, the strike took place.

As I have already stated, there is nothing in May's connection with the Northern Railroad that is the least to his discredit. What I have just said is merely intended to show there was clearly a speculative element in his acceptance of the contract. Consequently, I hold that the damages awarded should be confined to what may be considered a sufficient amount to cover May's actual expenses and losses.

I do not admit that May's credit has suffered irreparable injury; I rather believe that, with the publication of this award and the payment of his debts in the United States and this country, it will acquire fresh strength.

I can not see that there is any real humiliation suffered by a man who, unaided, has to succumb to the whole power of the government of a country; but it is plain that Mr. May must have suffered much mortification and an anxiety approaching to despair when he found himself called upon to face the great difficulties of his situation.

Upon consideration of the entire controversy, I decide that May is entitled to damages for expenses incurred and losses suffered to the extent of \$40,000 gold, which sum I award him.

On the foregoing grounds the arbitrator decides:

1. That the contract of April 5, 1898, and other contracts arising out of it, between the Government of Guatemala and Mr. R. H. May, for the working and maintenance of the Northern Railroad are rescinded.

2. That the Government of Guatemala will pay to Mr. Robert H. May the sum of \$55,287.79 gold for subsidies earned, works executed, and expenses incurred under the aforesaid contract.

3. That in accordance with article 4 of the amended protocol of agreement the Government of Guatemala will pay to Mr. R. H. May the amount of \$6,874.11 gold for interest at 6 per cent on the foregoing sum from the 21st of October, 1898, to the 16th of November, 1900, being two years and twenty-six days.

4. That the Government of Guatemala will pay to Mr. R. H. May the sum of \$41,588.83 gold, being the estimated amount of the profits he would have earned if he had been allowed to carry on the contract of April 5, 1898, until the conclusion of the term fixed by that instrument.

5. That the Government of Guatemala will pay Mr. Robert H. May the sum of \$40,000 gold by way of indemnity for expenses incurred, two years' time lost, suspension of credit, and grave anxiety of mind.

6. In accordance with article 5 of the protocol of agreement of February 23, 1900, the Government of Guatemala will pay the total sum of \$143,750.73 gold specified under the foregoing headings within six months from the date of the present award, unless the term be prolonged by the United States Government, together with interest at the rate of 6 per cent from the date of the award until the payment of the entire sum.

7. The Government of Guatemala will forthwith return to Mr. R. H. May the bond for \$40,120.79 deposited by him with the Government of Guatemala by way of security for his compliance with the award of the arbitrator.

Guatemala, November 16, 1900

G. JENNER