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W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company (U.S.A.) v. United Mexican States

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W. C. GREENSTREET, RECEIVER OF THE BURROWES RAPID TRANSIT COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 10, 1929, concurring opinion by American Commissioner, April 10, 1929. Pages 199-208.)

CORPORATE CLAIMS.—NATIONALITY, PROOF OF.—EFFECT OF CONFLICTING INSOLVENCY PROCEEDINGS UPON RIGHT TO CLAIM. Claim was filed by a receiver of a Delaware corporation appointed under the laws of Texas while bankruptcy proceedings in Mexico against such corporation were pending. *Held,* (i) while it is doubtful whether the Texan receiver is the proper party claimant, claim may be considered by tribunal since it was presented and espoused by the United States Government, (ii) nationality of receiver or of creditors of corporation need not be established, and (iii) pendency of Mexican bankruptcy proceedings does not *per se* preclude tribunal from exercising jurisdiction.

CONTRACT CLAIMS. Claim for hauling services under contract with National Railways of Mexico *disallowed* on ground such services were to be free of charge under the terms of the contract. Claim for undue delays by National Railways of Mexico in performing repair services under contract *disallowed* on ground it was not shown such delays were unreasonable under the unsettled conditions prevailing.

Cross-references: Annual Digest, 1929-1930, pp. 187, 452.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of $92,179.68, United States currency, is made against the United Mexican States by the United States of America on behalf of W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company, an American corporation. The claim is made up of two items, namely $52,800.00 for services alleged to have been rendered by the Burrowes Rapid Transit Company to the National Railways of Mexico in 1921, when the said Railways were operated by the Mexican Government, and $39,379.68 for loss alleged to have been suffered by the Burrowes Rapid Transit Company from wilfull and negligent failure of the National Railways of Mexico to fulfill certain contractual obligations.

The Burrowes Rapid Transit Company was organized and incorporated under the laws of Delaware, United States of America, in January, 1921, for the prime purpose of carrying on the business of "the rapid receiving, handling, shipping, forwarding and transporting of goods, wares, merchandise and all classes of freight and express over the railroads of the Republic of Mexico and elsewhere". It established various offices in Mexico as well as in the United States. In the United States its main office was in Laredo, Texas. On September 1, 1921, the company was decreed in a state of receivership by the District Court of the 49th Judicial District of Texas, and W. C. Greenstreet was appointed Receiver. Sixteen days later the company was declared bankrupt by the Civil Court of First Instance at Monterrey, Mexico.

The respondent Government contends that the claim should be dismissed, as the American nationality neither of W. C. Greenstreet nor of the creditors of the insolvent company has been established. The Commission is, however,

of the opinion that the question as to whether the claim presented in this case comes within its jurisdiction does not depend on the nationality of Greenstreet or of the creditors, Greenstreet being only a representative of the insolvent corporation, and the nationality of the creditors being just as immaterial as is that of the stockholders in case of a solvent company.

The respondent Government further contends that Greenstreet has no standing before this Commission, as, according to American law, his authority as a Receiver appointed by a Texas court is limited to the State of Texas. However, even if it be considered as doubtful whether, according to American law, Greenstreet has the authority to dispose of the present claim on behalf of the Burrowes Rapid Transit Company, which, from a legal point of view must be considered as still existing as a going concern in the State of Delaware, where it is incorporated, the Commission is of the opinion that from the point of view of international law the claim, as having been espoused and presented by the Government of the United States, is duly presented.

It is further argued by the respondent Government that the claim should be dismissed because of the bankruptcy proceedings that have been instituted against the Burrowes Rapid Transit Company at Monterrey, Mexico, and which are still pending. This argument would have been well founded, if the Mexican trustee in bankruptcy had tried to enforce the claim by bringing it before the Mexican courts. If that had been done, and even if the claim had been disallowed by the Mexican courts, no claim could have been made before this Commission, unless predicated upon a denial of justice. But no steps with a view to bringing the claim before a Mexican court have been taken by the Mexican trustee in bankruptcy. In view hereof, and in view of Article V of the Convention of September 8, 1923, between the United States and Mexico, the Commission is of the opinion that the present claim cannot properly be dismissed on the ground here mentioned.

With regard to the merits of the claim the following appears from the record:

Owing to a scarcity of rolling stock as well as of motive power a great congestion of unmoved freight had developed in Mexico during the year 1921 and the years immediately preceding. This led to a practice, on the part of the National Railways of Mexico, of concluding what were termed private freight contracts, according to which private companies were permitted to operate transportation business on the lines of the National Railways of Mexico by means of engines and other rolling stock to be imported into Mexico by the companies. Among the companies undertaking this kind of business was the Burrowes Rapid Transit Company.

The Burrowes Rapid Transit Company put its first engine into service in Mexico on February 19, 1921. In the course of the following months a number of other engines were put into service by the company. At first there was no written contract, but on April 13, 1921, a contract in writing was made. This contract was signed by F. Perez, the General Director of the National Railways of Mexico, on behalf of the National Railways of Mexico and connecting lines under Government control, and by a duly authorized attorney on behalf of E. S. Burrowes. The latter was President of the Burrowes Rapid Transit Company, but there was nothing in the contract to indicate that it was made by or on behalf of that company. That the signature of E. S. Burrowes was attached to the contract on behalf of the Burrowes Rapid Transit Company, was not indicated. Referring to this

fact, the respondent Government contends that no contractual relations have ever existed between the National Railways of Mexico and the Burrowes Rapid Transit Company. There is, however, ample evidence to show that the transportation business really was carried on by the Burrowes Rapid Transit Company, and that this fact was perfectly well known to representatives of the National Railways of Mexico. It must therefore be assumed that the contract entered into was intended to be a contract between the National Railways of Mexico and the Burrowes Rapid Transit Company.

According to the contract the National Railways of Mexico undertook (1) to furnish, free of cost, crews for the trains of the Burrowes Rapid Transit Company, certain overtime only to be paid for by the company, (2) to provide, free of charge, fuel, water, grease, lubricants and light fixtures for the service of the trains or to reimburse the charges incurred on account of the purchase of said articles, (3) to provide, free of charge, the services of the round houses to the locomotives, and (4) to give to engines and cars minor repairs, the company to pay only for overtime in certain cases and for replacements of parts to be made in the shops of the Railways. The Burrowes Rapid Transit Company undertook to pay to the National Railways of Mexico freight and other expenses for all shipments in accordance with the prevailing Mexican tariffs. When the company was unable to make up a train with 85% of the total capacity tonnage of the engine on a $1^1/_2$% grade, a five hours, notice in writing should be given to the Railways prior to the departure of the train and the Railways should then have the right to complete the train with loaded or empty cars.

In the prosecution of its business the Burrowes Rapid Transit Company required private shippers to pay an extra charge in addition to the amount to be paid by the company to the National Railways of Mexico. This extra charge was at the rate of $200.00 or more per car on shipments other than oil between Tampico and Monterrey or points north of Monterrey, with a minimum of $2,000.00 per train, and double those amounts on oil shipments.

The services alleged to have been rendered to the National Railways of Mexico by the Burrowes Rapid Transit Company and the amounts claimed in consideration of these services are as follows:

Hauling from Tampico to Monterrey or to the boundary line of the United States during the period from May to August, 1921, 19 trains and parts of trains containing a total of 211 empty cars at $200 each	$42,200
Hauling on March 26 and May 10, 1921, from Tampico to Monterrey five cars loaded with miscellaneous freight at $200 each	1,000
Hauling on various dates on or after March 1, 1921, from Tampico to Monterrey 14 cars of oil at $400 each	5,600
Hauling on June 13 and June 14, 1921, from Tampico to Monterrey two trains of oil at $2,000 each	4,000
Total	52,800

Except for a few cars, there is evidence to show, and it is admitted by the respondent Government, that the alleged services have been actually rendered. The question is whether they should be paid for. The respondent Government points to the provision in the contract according to which the Railways should have the right to complete, with empty and loaded cars, every train containing less than 85% of the total capacity tonnage of the

engine on a $1^1{}_2\%$ grade, and, referring to a memorandum by the Chief Dispatcher of trains of the Railways at Monterrey, alleges that all the services rendered by the Burrowes Rapid Transit Company to the Railways have been pursuant to this provision. Counsel for the claimant argued that it was not the duty of the Burrowes Rapid Transit Company under the said provision of the contract to haul the cars of the Railways free of charge, but as the contract gives the Railways the right to have cars hauled without mentioning any payment to be made therefor, the Commission is of the opinion that the contract can only be construed to mean that the right to have cars hauled, together with other rights under the contract, was stipulated by the Railways in consideration of the rights accorded the Burrowes Rapid Transit Company. Counsel for the claimant further argues that the hauling of the cars of the Railways took place although freight of private shippers was available, and only on the order and demand of the officials of the Railways, and with the expectation that the services rendered would be paid for. Affidavits to this effect of the general traffic manager of the Burrowes Rapid Transit Company, of the manager and one of the employees of the Merchants Transfer & Storage Company, S. A. of Tampico, Mexico, which company had close business relations with the Burrowes Rapid Transit Company, and of one other person, have been submitted. On the other hand, the Chief Dispatcher of the Railways declares that the Burrowes Rapid Transit Company generally operated carrying freight to Tampico, but that there was not much return freight in that port. The Commission is of the opinion that it is not sufficiently proven that the Burrowes Rapid Transit Company has been ordered to haul cars in cases where no obligation so to do existed under the contract. In view of the period of time during which the hauling was done, the total number of cars hauled—211 empty and 27 loaded cars—would not seem exceedingly great. The large amount claimed is arrived at by charging for the hauling of an empty car the same extra charge as charged by the Burrowes Rapid Transit Company on shipments. Some correspondence had between the Burrowes Rapid Transit Company and the Merchants Transfer & Storage Company shows that in a number of cases the former company had agreed to haul cars for the Railways, and there is nothing in the correspondence to indicate that the company had the right to assume that the hauling would be paid for, it appearing on the contrary that at a certain time the company made an offer to the Railways to haul empty cars from Tampico to the border of the United States at a rate of $50 per car, and that this offer was not accepted by the Railways. Finally, great weight must be attached to the fact, invoked by the respondent Government, that at no time during its business operations in Mexico did the Burrowes Rapid Transit Company present any claims for services rendered or any bill covering such services to the National Railways of Mexico, so that the Railways had no reason to secure evidence to show in detail that the services rendered were within the obligations of the company under the contract.

With regard to the second item of the present claim it is alleged that the locomotives of the Burrowes Rapid Transit Company lost 484 days, counted as for one locomotive, or more than 25% of all the time they were in Mexico, through various delays on the part of the Railways in fulfilling their duties of providing Round House service, including minor repairs, as well as furnishing crews and supplies, and the fact of these delays is, save for a few of them, admitted by the respondent Government. It is

further alleged that 70 locomotive-days would be a reasonable allowance of time for the services in question, and that, consequently, Mexico should be held responsible for a loss of 414 locomotive-days at a rate of $95.12 a day, which, according to the accounts of the Burrowes Rapid Transit Company, was the average earning power of a locomotive per day. The Commission is of the opinion that there is not sufficient evidence to establish that the delays were due to such failure on the part of the Railways in fulfilling their duties as to make Mexico responsible. The Burrowes Rapid Transit Company could not reasonably expect, when entering into the contract, that repairs could be completed within such time as would be possible in countries where conditions are more settled than they were in Mexico at the time. From the above mentioned correspondence between the Burrowes Rapid Transit Company and the Merchants Transfer & Storage Company it also appears that the locomotives of the former company became "dead" more often than those of other companies, a fact which the general traffic manager of the company declares to be a mystery to him, and that the same general traffic manager, in a letter, dated May 17, 1921, expresses as his opinion that in case of presenting claims for delays "we will have to prove that the railroad company are holding our trains and delaying them, more than they are their own trains, which would be very hard to do, as I and everybody knows that their own trains suffer the same delays as those to which we are subjected, they of course being the losers in all cases." Finally, in this connection again great weight must be attached to the fact, that during their business operations in Mexico the Burrowes Rapid Transit Company never presented any claim for delays to the Railways, nor made any complaint when the delays occurred, so that the Railways have had no reason to secure evidence to show in detail what were the circumstances that led to each of the various delays that actually took place.

Nielsen, Commissioner:

I concur in the dismissal of the case, but not entirely in all the conclusions stated in the Presiding Commissioner's opinion.

I think that the claim should properly have been filed in the name of the Burrowes Rapid Transit Company, an American corporation. I do not believe that a receivership in Texas made it improper to file a claim in behalf of the corporation, which was created under the laws of the State of Delaware. There is involved in this question something more than a mere unimportant technicality. The status of claimants designated as the persons entitled to receive any pecuniary award that may be rendered is of course in every case an important matter. Greenstreet's appointment as Receiver by a local Texas court evidently conferred on him authority merely to take action to conserve assets of the company in Texas. I do not think it can be properly said that in that capacity he can be considered as standing in the shoes of the company, or as being in charge, under direction of a State court, of all the affairs of the Delaware corporation. A general receiver would have proper standing as a claimant. However, since evidently the company's affairs were substantially all transacted in Texas after operations in Mexico were abandoned, and in view of the control which the Government of the United States would have over any award rendered in the case, I do not believe that the Commission would be justified in dismissing the claim on the ground that it was not filed in a proper name.

Some issues raised in behalf of Mexico are not touched upon in the Presiding Commissioner's opinion, and it is my view that the interpretation of the contract upon which reliance is placed in this case, is the only important and difficult issue raised.

That the proceedings before the court at Monterrey which gave rise to the *Venable* claim, Docket No. 603, can in no way debar the United States from presenting the instant claim is, I think, very clear in the light of the nature of those proceedings as revealed by the opinions written in the *Venable* case. The contention that the real party in interest in the instant case is Venable who, through a disguise, is claiming once more what has already been granted by the Commission, is without foundation. The *Venable* case and the instant case are based on different and entirely unrelated facts. The *Venable* claim grew out of certain judicial proceedings in Monterrey; the instant case is based on an allegation of breach of contract.

I do not agree with the positive conclusion "that the contract can only be construed to mean that the right to have cars hauled, together with other rights under the contract, was stipulated by the Railways in consideration of the rights accorded the Burrowes Rapid Transit Company." In fact it seems to me to be a very plausible view that under the provisions of Article IX of the contract between the company and the Railways, the latter did not enjoy the very extensive privilege of having loaded or unloaded cars hauled for nothing. The company agreed to make up a "required tonnage" of 85% of the total capacity tonnage which the engines could drag. It was privileged under the contract to make certain charges on this required tonnage of 85% capacity. Sub-paragraph (c) of Article IX further provides that when the company "is unable to make up the required tonnage" notice should be given, and if a train did not make up the 85% tonnage the Railways might "complete the 85% tonnage". Nothing in the contract states that any portion of the required 85% tonnage shall be carried free.

However, I think that the provisions of the contract and the action taken by the contracting parties with reference thereto leave too much doubt to justify a pecuniary award in the light of the general principles which have governed the Commission's action in making such awards. The Commission is not concerned with a suit on a contract. It seems to me that in dealing with a case of this kind the Commission must be guided by the same general principles by which it is governed in other cases in determining whether or not authorities of a government can properly be charged with wrongful conduct.

It appears to me to be pertinent to consider the action of the parties to the contract which is touched upon in the opinion written by the Presiding Commissioner. It is not shown that the company treated tonnage carried in behalf of the Railways in the manner in which it dealt with other tonnage offered by private shippers. The company does not appear to have collected or attempted to collect accounts from the Railways as was done with respect to other tonnage hauled. There is no record of demands for freight charges or of presentation of accounts. To be sure, it is conceivable that difficult and delicate questions entered into the relations of the parties to the contract. But when the company has accepted tonnage from the Railways without asking compensation, it is difficult for the Commission to say that the hauling of such tonnage resulted in a breach of the contract, or that a breach was forced by the Railways.

An alternative claim which seems to have been presented in behalf of the claimant was based on a *quantum meruit* for services rendered, but such a claim was predicated only on an assumption that the Commission might find that the contract invoked in this case was a personal contract of Burrowes made with the Railways.

An item of the claim grows out of delays in making repairs and in furnishing supplies. Delays doubtless occurred, but it seems to be impossible to determine or to prescribe standards of efficiency by which negligence may be measured in the numerous instances asserted, and damages may be awarded for such negligence according to such standards. This item, therefore, in my opinion, presents too much uncertainty to be the basis of a pecuniary award.

The claim is well supported by convincing evidence which clarifies the facts and it was very forcefully presented in oral argument, but the language of the contract between the company and the Railways reveals uncertainties. These uncertainties, I think it may be said, are accentuated by the business relations of the parties which the Commission can not now reconstruct.

Decision

The claim of the United States of America on behalf of W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company, is disallowed.

F. M. SMITH (U.S.A.) *v.* UNITED MEXICAN STATES

(April 10, 1929. Pages 208-210.)

FAILURE TO PROTECT. Although disorders had previously taken place at mine where two American subjects were murdered, since no request for protection was made and authorities took prompt measures of protection after the murders, *held*, responsibility of respondent Government not established.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY. Delays in efforts to apprehend murderer of American subject, murder having taken place in a sparsely settled territory *held* not sufficient to establish a denial of justice.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

At about five o'clock in the afternoon of September 24, 1921, George D. Kislingbury, who was employed as master mechanic at the Dolores mine, Chihuahua, Mexico, and Harry G. Smith, who was employed as superintendent of the milling plant at the mine, were working on some filters at the mine, together with two assistants. They were approached by a laborer, Eulalio Quezada, who asked Kislingbury for an increase in wages. Kislingbury refused his request. Quezada then drew his pistol and shot first Kislingbury, and then Smith. Both of them died instantly.