

## THE MARK GRAY CASE

BAINBRIDGE, *Commissioner* (for the Commission):

The United States presents the claim of J. S. Emery & Co., managing owners of the American schooner *Mark Gray*, against the Republic of Venezuela in the sum of \$ 1,537.50, and interest amounting to \$ 338.25.

The *Mark Gray*, W. A. Sawyer, master, was chartered on October 15, 1895, by Messrs. Kunhardt & Co., to carry a cargo of railroad material from New York to Maracaibo, Venezuela. The charterers agreed to pay all vessel's port charges at Maracaibo, including pilotage, lighterage, consul's fees, inter-preter's fees, etc., and towage over the bar, and demurrage, beyond the lay days for loading and discharging cargo, at the rate of \$ 30 per day for every day's detention by default of the charterers.

The schooner arrived at Maracaibo on December 11, 1895, finished discharging her cargo on the 28th, and could have left port two days later had she been able to obtain towage; but in the absence of any towboat in the port the vessel was delayed at Maracaibo until February 17, 1896, when she finally got to sea by resorting to the unusual custom of sailing over the bar. When Captain Sawyer, after discharging cargo, inquired of the consignees and the towing agents for a tug, he was informed that the towboat was away in the service of the Government and that no definite information could be given as to when she would return.

On January 18, 1896, the captain wrote to Mr. A. Boncayolo, the charterers' agent at Maracaibo, as follows:

SIR: I beg to call your attention to the fact that for several days past the schooner *Mark Gray*, under my command, has been ready for sea but has been unable to leave for lack of towage. I must appeal to you as consignee of said vessel in this port and as agent of the charterers, Messrs. Kunhardt & Co., of New York, to furnish me with towage as provided for in my charter party. The agreement respecting towage in the charter party is as binding as that providing for the payment of freight or any other consideration specified in that document and the charterers of the vessel are not to be considered as having complied with their obligations until said vessel shall have been towed over the bar. I beg to call your attention, as charterers' agent, to these facts, protesting at the same time against the injury to the vessel's interests caused by this delay.

W. A. SAWYER

*Master American Schooner Mark Gray*

On January 27, 1896, Captain Sawyer made formal protest before the United States consul at Maracaibo —

against the charterers, Messrs. Kunhardt & Co., of New York, against the contractor for towage at Maracaibo, against the Government of Venezuela, and against all and every person and persons whom it may or doth concern, and against all and every accident, matter, and thing, had and met with as aforesaid, whereby and by reason whereof, the said schooner, or her interests, shall appear to have suffered or sustained damage or injury.

It appears from the record that the Venezuelan Government had granted a monopoly of the business of towing vessels across the bar at Maracaibo, and that the grantee of the privilege used in that business but one tugboat, which, at the time its services were required by the *Mark Gray*, was employed in the service of the Government itself.

The learned counsel for the United States urges on behalf of the claimants, that the Venezuelan Government has made itself directly responsible for the demurrage and loss in this case, by granting the towage monopoly and then preventing the towage company from rendering the service by taking for the Government's own use the single tugboat operated by the company.

But the right of the Government of Venezuela to grant the franchise in question, by virtue of its proprietary interest in and exclusive jurisdiction over its territorial waters, is indisputable. And it is difficult to perceive wherein the Government, by making the grant, assumed any liability for the acts or omissions of the grantee. If such liability arises from the terms of the grant, that fact does not appear in evidence before the Commission. The protest of Captain Sawyer states:

That according to the agreement made by the contractor for towage with the Government of Venezuela, the said contractor is bound to keep tugs constantly ready for service at the Maracaibo bar.

A showing that the contractor did not keep tugs constantly at the bar is rather proof of his failure to observe his agreement with the Government than of the Government's liability to those who may have suffered from such failure, which is the claim made here.

Nor does the fact that the Government was employing in its service the only tugboat used by the contractor for towage fix a liability upon Venezuela for losses sustained by those who were unable, because of its employment by the Government, to secure the service of the tug. That circumstance may, indeed, have occasioned a loss to the claimants; but if so, it was not injuriously brought about by any violation of their legal rights and is *damnum absque injuria*.

The claim must be disallowed.

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