

GANS STEAMSHIP LINE (UNITED STATES)
v. GERMANY

(August 13, 1926. pp. 737-741.)

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

From the record it appears that the Steamship *Themis* was built in Great Britain and completed in 1911. She was owned by a Norwegian corporation, of which Wilhelm Wilhelmsen appears to have been the principal executive and is sometimes treated as owner. She had a deadweight capacity of 12,500 tons. While she was under construction in 1910 her owners entered into two charter-parties which were obviously complementary and taken together covered a period of nine years. The first of these was entered into on March 21, 1910, with the Nova Scotia Steel & Coal Company, Ltd., (hereinafter called the Nova Scotia company) for nine consecutive summer seasons beginning with 1911 at a charter hire of £2,031.5 per calendar month. The second was entered into three days later with the Gans Steamship Line, claimant herein, for nine consecutive winter seasons commencing with the season 1911-1912 for a charter hire of £1,562.10 per calendar month (at the rate of 2s. 6d. per deadweight ton). In practice the two charters with their overlap provided for the use of the steamer throughout the year, giving the owner only a sufficient margin for the westbound voyage to make delivery to the Gans Steamship Line (hereinafter called claimant) within the time stipulated for in its charter. The president of the claimant points out that the Nova Scotia company intended to use the *Themis* in the transportation of steel and coal on the St. Lawrence River; that navigation on that river was closed for three winter months and hence the Nova Scotia company could not use the steamer during those months and (to quote his language) "It was not easy to find a charterer who would take a vessel for the winter season, for so many years, and the owners therefore had to make the charter for the winter seasons attractive, to compensate the charterer for the risks involved in so long a commitment."

For the reasons pointed out in Administrative Decision No. VII-A the charter hire stipulated to be paid by these two complementary charter-parties entered into for a period of nine consecutive years was at a much lower rate than short-term time or voyage rates. The hire under the Gans charter, which was made for a fraction of each year to give the ship employment during that time when it could not be used by the Nova Scotia company, was naturally substantially lower than the average charter hire for the year. The peculiar terms of this Gans charter must be taken into account in determining its value and the claimant's interest in the vessel at the time of her loss.

During the summer season of 1915 the Nova Scotia company subchartered the *Themis* to Barber & Company, Inc., for a term of eight months at a stipulated charter hire of £7,680 per month. Barber & Company, Inc., detained the *Themis* to such an extent that delivery could not be made to the claimant by the owner in accordance with the terms of the Gans charter and as a result the claimant lost the use of the *Themis* for the winter season 1915-1916 (see *The Themis*, 244 Federal Reporter 545 (1917), and 275 *ibidem* 254 (1921)). Omitting from the computation the season of 1915-1916, it appears from the record that during the period elapsing between the first delivery of the *Themis* to claimant, on March 20, 1912, and the date of her sinking the claimant had the possession and use of the ship on an average of 94 days per year.

Because of the increase in operating costs due to war conditions the charter hire paid by the claimant was substantially less than such of the costs of operation as were, under the charter, borne by the owner. For the season 1916-1917 the claimant voluntarily increased the charter hire to the extent of one shilling per deadweight ton per month and in the early part of 1917, in order to compose a controversy, made to the owner an additional lump-sum payment of \$25,000. Whether or not the charter hire paid by the Nova Scotia company was increased is not disclosed by the record.

On October 12, 1917, the *Themis*, while operated under the charter of the Nova Scotia company upon a voyage from India to Marseilles, was sunk by an act of war. Liability for her loss to the extent that her value was impressed with American nationality is admitted by the German Agent, who also admits that the Gans charter constituted an encumbrance on the *Themis* within the meaning of Administrative Decision No. VII. It is for the Umpire to determine the extent of that encumbrance and the value of the claimant's interest in the *Themis* on the date of her loss.

Stress is laid by the claimant on the fact that the *Themis* was a Norwegian ship. But Norwegian shipping suffered greater proportionate losses than those of any other nation, belligerent or neutral. The record in this and other cases before the Commission indicates that the claimant had used and was proposing to use the *Themis* in European trade. In February, 1917, she was loaded by claimant with a cargo of acid phosphate for Rotterdam, which use was protested by the owner on the ground that Rotterdam was an unsafe port. The protest was expressed by the Nordisk Skibsrederforening in a cable of February 25, 1917, thus: "Steamer *Themis* London war insurance Rotterdam to-day ten per cent via Halifax which best proof unsafe ports". At the time of the loss of the *Themis* the submarine campaign was being intensively prosecuted and the losses were extremely heavy. The risk that the *Themis* would be destroyed before completing the Gans charter term was great.

Under that charter the claimant was entitled to the *Themis* at the time of her loss for three winter seasons of say 94 days each. The average going charter rates at that time, while high, were lower than they had been several months earlier and were declining. What they would be during the following three

winter seasons no one could foresee. As one of the experts for claimant in this case, testifying in another case before the Commission, said, the high prices paid for tonnage "were due entirely to the war emergency and no buyer would pay them for future delivery". For the same reason no one at that time on a falling market would have made a three-year charter commitment at the charter rates then current. Another of claimant's experts in this case, testifying in another case, points out that "because of the uncertainty as to the duration of the War, the future commitment of a vessel for a considerable period of time made a tremendous difference in her market value for sale. * * * When her freedom of employment was postponed for a matter of six or eight months, *the risk of the termination of the War* immediately became a serious factor." It is evident from the testimony of this expert that he considered that on the conclusion of the war the price of tonnage and charter hire would in all probability substantially decline. The same risk of the termination of the war which depressed the selling value of a ship which was not available for use for "six or eight months" would depress the value of a charter to run for a longer period than six or eight months.

There is much testimony in the record with respect to the profits which claimant would have made under its charter had the *Themis* not been lost. For the reasons heretofore pointed out by the Commission this does not furnish a proper measure of Germany's liability and can be looked to only incidentally in measuring the value of claimant's interest in the ship. It is interesting to note in passing that the United States Circuit Court of Appeals in the case hereinbefore cited to which this claimant was a party, involving a partial breach of this same charter of the *Themis*, held that "To estimate the profits it [Gans Steamship Line] would have earned had it received and used the steamer involves speculation to a degree, which as the Commissioner and the court below found, makes such a measure entirely unsatisfactory."

But that claimant's charter was a valuable one constituting an encumbrance on the ship there can be no doubt. Taking into account all of the risks of loss in arriving at the probable duration of the charter, and also taking into account the uncertainties as to the duration of the war and the probable effect on charter hire of its termination, in arriving at the then value of the charter with its three unexpired winter seasons, and taking into account all of the other factors enumerated in Administrative Decision No. VII-A and applying the principles announced therein and in Administrative Decision No. VII, the Umpire finds that the claimant had an interest in the *Themis* at the time she was destroyed of the value of \$467,000.00.

The American and German Agents have agreed that during all of the material times there existed a German stockholding interest in the Gans Steamship Line and that 20% of the claim here presented shall for the purposes of this case be treated as impressed with German nationality while the remaining 80% shall be treated as impressed with American nationality. An award limited to the American interest in this claim, as defined by that agreement, will be entered in favor of the United States of America on behalf of the Gans Steamship Line for the use and benefit of such American interest.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Gans Steamship Line, for the use and benefit of the American interest therein, the sum of three hundred seventy-three thousand six hundred dollars (\$373,600.00)

with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire
