GULF EXPORT COMPANY (UNITED STATES) v. GERMANY

(August 13, 1926, pp. 725-730.)

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

It is put forward to recover the value of claimant's alleged interest as charterer in two Norwegian steamships, the *Asbjorn* and the *Farmand*, destroyed by German submarines.

The claim is based on three "net charter parties" entered into by H. Baars & Company, an American corporation, and by it assigned at advanced rates to the claimant, Gulf Export Company, also an American corporation. These corporations were officered, managed, and controlled by members of the Baars family who owned practically all of the stock in both. The books of both were kept in the same office and by the same bookkeeper. It is apparent that the three charters in question were entered into by H. Baars & Company with a view to their immediate reassignment and transfer to the claimant herein, as was done. The intercorporate book transactions between the two companies are therefore not material either in determining the value, if any, of the claimant's interest in the vessels lost or for any other purpose in connection with this claim. The charters will be treated as if originally entered into by the Gulf Export Company as charterer in name as well as in fact.

The *Asbjorn* charter was executed January 22, 1917, between V. Muller, of Copenhagen, as owner and claimant as charterer. Under it the ship, about 5,150 deadweight tons, of Norwegian ownership and registry, was to load with "lawful merchandise" at one or two ports in the Gulf of Mexico "and being so loaded shall therewith proceed, as ordered when signing bills of lading, to a safe port in the Continent between Bordeaux and Havre, both inclusive, (Rouen excluded) * * * in consideration whereof the vessel shall be paid freight" of 210 shillings per ton of 2,240 pounds, "Freight prepaid on signing Bills of lading without discount, and not returnable". At the time this contract was executed the *Asbjorn* was at Havre, France, and it was stipulated that she should sail "in ballast Havre to Gulf, subject permission British authorities, otherwise taking coal cargo then leaving in ballast". The claimant's explanation of this clause is that notwithstanding the *Asbjorn* was a Norwegian vessel the British Government authorities "required that vessels proceeding from allied

ports to the United States, and which otherwise would have sailed in ballast for loading ports in the United States, should carry some intermediate cargo for the benefit of the allied cause"; that as the *Asbjorn* was at Havre she "was ordered to carry a cargo of coal for allied interests from Barry, England, to Lisbon". As pointed out in Administrative Decision No. VII-A, this clause was incorporated in the charter by the Norwegian owner in pursuance of the "bunker pressure" arrangement devised by Great Britain, made possible by Norway's needs for British coal, the purpose being not only to prevent neutral trade with enemy countries but to drive neutral shipping into British trade and to insure that ships bunkering in Great Britain should return with a cargo to a British or Allied port. It is apparent from this charter that while the ship was Norwegian-owned and registered in Norway it was, by virtue of the agreement made between Great Britain, France, and Italy on the one part and the Norwegian steamship owners on the other, indirectly under the control of the British Government. The *Asbjorn* left Barry Dock on March 8, 1917, for Lisbon with 4,500 tons of coal and was sunk by a German submarine off Ushant Light March 10.

The *Farmand*, about 2,200 deadweight tons, also of Norwegian registry and ownership, was chartered by its owner on May 22, 1916, by time charter in the usual form, to Romariz, Abranches and Pistachini, a Portuguese firm, at the rate of $30,000 per calendar month for a term of 12 calendar months. This Portuguese firm, as time-chartered owners, through its agent, Jose Da Silva Barreira, subchartered the *Farmand* to claimant under a "net charter party" dated January 1, 1917, similar in terms to the charter of the *Asbjorn* above-described, for a voyage from a United States Gulf port to a safeport on the Continent between Bordeaux and Havre both inclusive, Rouen excluded. The claimant agreed "to pay freight at the rate of" 180 shillings British sterling "per ton" of 2,240 pounds on the steamer's deadweight cargo capacity. It was further stipulated that "in addition to the freight, as above," charterer "agrees to pay the amount of five thousand dollars * * * toward the war-risk insurance on the steamer, payable on completion of loading".

On January 6, 1917, Barreira, as agent of the time-chartered owner, and the claimant executed a second "net charter-party" similar to the first covering a voyage of the *Farmand* from a United States Gulf port to a safe port on the Continent between Bordeaux and Havre, Rouen excluded, which was to be undertaken after the completion of the first voyage, subject, however, to the owner's allowing the time charterer an extension of time necessary to make this trip. The ship was lost before reaching her loading port for her first voyage, and apparently no attempt was made to procure from the owner the extension which was a condition to the second charter becoming effective. The freight rate stipulated was 200 shillings per long ton on the steamer's deadweight cargo capacity and in addition thereto the claimant agreed to pay $5,000 toward war-risk insurance premiums.

Both of the *Farmand* charters contained provisions with respect to procurement of the permission of the British authorities and the taking of intermediate coal cargoes similar to that contained in the *Asbjorn* charter. On March 27, 1917, the *Farmand* left Cardiff, Wales, for Lisbon with a cargo of coal and on March 31 was destroyed by a German submarine.

The original time charter from the owner of the *Farmand*, through which the Gulf Export Company claims, provided that "Charterers have no right to send the steamer on a voyage which has not been definitively approved of by the Directors of the Norwegian war insurance. * * * Owners have the right to cancel this charter in case the Norwegian war insurance withdraw insurance." All three of the claimant's charters under examination provided

that the charter was entered into subject to the approval of the Norwegian War Risk Insurance Association. There is no direct evidence that such approval was ever obtained, and the German Agent asserts that consequently the claimant has failed to establish the existence of valid and binding charters. Obviously these were important conditions stipulated for the protection and benefit, not only of the owners, but of the Norwegian insurance association and the British Government as well From the history of that period it appears that the losses of Norwegian shipping had been particularly heavy during the last four months of 1916 and that during September and October alone these losses amounted to approximately five per cent of the whole Norwegian steam fleet at the outbreak of the war. The Norwegian shipowners were compelled by law to belong to the Norwegian War Risk Insurance Association, which was called upon to pay such heavy losses and faced so large a deficit that there was danger of the Norwegian ships being withdrawn from Allied trade. In this emergency Great Britain, for herself and for France and Italy as well, arranged for the underwriting of reinsurance on Norwegian tonnage engaged in Allied trade to the end that the Allies might hold and control that tonnage. This arrangement with modifications continued in effect until early in 1919 (see preliminary statement presented to British Parliament of "Government War Risk Insurance Schemes," Command Paper No. 98, and Fayle's "Seaborne Trade," volume II, page 358, etc.). At the time claimant's three charters were entered into the Norwegian War Risk Insurance Association, and through it the British Government, had a very vital interest in scrutinizing and approving or disapproving all charters on Norwegian bottoms. The clauses in these charters, therefore, making them subject to the approval of the Norwegian War Risk Insurance Association, far from being more formal than real, were important conditions precedent to the effectiveness of the charters. The explanation of the claimant on which it seeks to base a presumption that the approval of the Norwegian underwriters association had been procured is more ingenious than convincing. The thoroughness with which this claim has been prepared strongly suggests that if direct evidence of approval existed no resort would have been had to presumptions. In view of the disposition which will be made of this case, however, the point need not be further considered.

The owners of both these ships and the Portuguese time-chartered owner of the *Farmand* had no freight of their own to transport and no facilities for supplying cargoes. Their business was to furnish ships to those in position to supply cargoes of their own or to assemble the goods of others for shipment. It was necessary for these owners in the ordinary conduct of their business to take timely measures in advance of sailing to provide through charters for the employment of their vessels. This they had done. While the charters were entered into in January, it was then evident to both parties that even if no obstacles were encountered in procuring the necessary approvals the ships would probably not be ready for loading thereunder before sometime in April, and the rates were fixed in the light of that knowledge. According to the testimony of the claimant's officials, no time was lost by either ship after the respective charters were entered into in proceeding toward the United States for loading by complying first with the requirements of the British Government with respect to taking and discharging the intermediate coal cargoes. It appears from this testimony that the movements of both ships were promptly made in pursuance of their purpose to fulfill the terms of net charters entered into for prompt rather than deferred performance in accordance with established practices and only for the customary and necessary time in advance of that fixed for loading. Both ships were (according to the claimant's contention) en route to fulfill what was to them current net charters entered into in the regular

course of their business at current rates. Before the time arrived when they could be delivered for loading in the usual course of shipping practice the charters were terminated through the destruction of the ships. In what way did these charters constitute encumbrances on these ships? The evidence before the Commission indicates that the freight stipulated to be paid by the claimant was in each case fully equal to or perhaps a little in advance of the average net charter rates in effect during January, 1917; that there was no very material change in these rates between January and March; and that the stipulated freight was equal to that in effect in March when the ships were destroyed.

It follows that under the principles announced by this Commission in Administrative Decisions No. VII and No. VII-A the claimant had no such interest in the *Asbjorn* or in the *Farmand* at the times they were destroyed as to render Germany pecuniarily liable under the terms of the Treaty of Berlin.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the Gulf Export Company, claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire