

ARTHUR ELLT HUNGERFORD
(UNITED STATES) *v.* GERMANY

(*August 13. 1926. pp. 766-772.*)

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

It is put forward by the United States on behalf of Arthur Ellt Hungerford, an American national, who was one of a group of 57 men recruited by the Young Men's Christian Association for service with the American Expeditionary Forces in Europe. The claimant was the leader of and in charge of this party which sailed from New York April 13, 1918, on the British merchant vessel *Oronsa* "en route to England, and from thence to the active war regions of France" (American brief, page 1). On April 28 the *Oronsa* was torpedoed and sunk in the Irish Channel by a German submarine. The claimant and his entire party escaped in small boats without sustaining personal injuries. They, however, lost their personal belongings for the value of which claims are made against Germany aggregating approximately \$50,000. This particular case is put forward for the value of claimant's personal belongings, fixed at \$1,529.96, including uniforms and equipment adapted for use in service with the A. E. F.

The question here presented for decision is: At the time of the sinking of the *Oronsa* were the members of the group to which claimant belonged "civilians" or members of the "civilian population" of America as those terms are used in the Treaty of Berlin? Applying the principles announced by this Commission in its decision in the Christian Damson case (Docket No. 4259, Decisions and Opinions, pages 258-265^a) to the facts as disclosed by this record, the Umpire decides that they were not. It was there held:

" * * * The true test in determining what nationals of each power belong to this class [civilians] is to be found in the object and purpose of their pursuits

^a *Note by the Secretariat*, this volume, pp. 195-199 *supra*.

and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them. * * * By reading the reparation provisions as a whole, it is clear that the terms 'civilian population' and 'civilian' describe a class common to all of the Allied and Associated Powers and that Germany's liability under the Treaty attaches only where claims are put forward by such a power for damages suffered by such of its nationals as fall within the general class described. If the activities of such nationals were at the time aimed at the direct furtherance of a military operation against Germany or her allies, then they can not be held to have been 'civilians' or a part of the 'civilian population' of their respective nations within the meaning of the Treaty. The line of demarcation between the 'civilian population' and the military within the meaning of the Treaty is not an arbitrary line drawn by the statutory enactments of the nation, each nation drawing it in a different place, but a natural line determined by the occupation, at the time of the injury or damage complained of, of the individual national of each and all of the Allied and Associated Powers without reference to the particular nation to which he may have happened to belong."

What are the facts disclosed by this record with respect to the claimant's status and the object and purpose of his journey to the zone of active war operations in France, and upon what pursuits and activities had he then entered of which this journey was the first step? The answer is found in the official publications of the Y. M. C. A. detailing the war work of that organization, particularly in "Service with Fighting Men" in two volumes (1922) and "Summary of World War Work of the American Y. M. C. A." (1920), hereinafter referred to as "Summary". The conclusions summarized in the following fourteen paragraphs are taken mainly from those publications:¹

(1) An order issued by the President of the United States on April 26, 1917, recited that "official recognition is hereby given the Young Men's Christian Association as a valuable adjunct and asset to the service". This was published in General Order No. 57 of the War Department for the information and guidance of the Army ("Service with Fighting Men," volume II, page 489).

(2) The Secretary of War of the United States wrote: "Whether or not an exemption from military service shall automatically be made in favor of any such young men [members of the Y. M. C. A. engaged as such in war work] cannot now be determined, but, pending their actual call to the colors, this Department will recognize their service *as directly in aid of the men in our own Army*" (quoted under the caption "Militarizing the Y. M. C. A." in "Service with Fighting Men," volume II, at page 498).

(3) The Commander-in-Chief of the American Expeditionary Forces wrote: "In view of the *military importance* of the Y. M. C. A. with the A. E. F. and with the other Allied Armies, I believe that your personnel should continue for the present in the service of the Y. M. C. A. unless they are specifically called by the Government *for military duty of another kind*" ("Service with Fighting Men," volume II, page 503).

(4) "A contributing cause to America's triumph in the World War was the high morale of the troops—the unconquerable spirit of the American soldier. It was to assist in maintaining this spirit to the highest pitch, *to help render the men 'fit to fight'* that the Y. M. C. A. threw itself into the struggle" (Summary, page 119).

(5) "* * * In two years the Y. M. C. A. created an organization for entertaining and amusing the Army which ultimately became recognized *as being as indispensable to the social welfare in modern scientific warfare* as were the departments which fed and clothed them to their material welfare" (Summary, page 125).

¹ Italics added.

(6) "A *specific military function* was assigned to the Y. M. C. A. Its duty was to assist in maintaining and promoting morale. * * *

"War is a grim business and until the War had been won *military efficiency was the sole consideration*. As a mere purveyor of comforts and luxuries, no organization could have been granted a share of the inadequate transportation for its supplies and workers. Because Y. M. C. A. welfare work and other activities grappled effectively with intangible foes that reduced the fighting efficiency of soldiers, and that cannot be reached by military regulations and penalties, its service was welcomed by the American and Allied Governments and commanders *as contributing directly to victory*" (Summary, pages v-vi).

(7) The Y. M. C. A. organization in America formed "a Committee on the A E F" to deal with overseas activities ("Service with Fighting Men," volume I, chapter XIII, "Militarizing the Y. M. C. A.", at page 222).

(8) Under the provisions of section 125 of the American National Defense Act the members of the Y. M. C. A. were prohibited from wearing the uniform of the Army while on duty in the United States. However, those members of the Y. M. C. A. serving with the American Expeditionary Forces in France were *required* by general orders to "wear the regulation United States Army uniform with U. S. Army buttons".

(9) The Adjutant General of the American Expeditionary Forces in referring to "Y. M. C. A. Agents in the Zone of the Armies" wrote: "They should thoroughly understand that they are now considered as *militarized* and are, consequently, *subject to all the rules, regulations and orders which apply to soldiers in the zone of the armies*". The Commander-in-Chief of the American Expeditionary Forces wrote: "I have the honor to call your attention to the fact that these organizations *are now militarized and are under the control and supervision of the American military authorities*" ("Service with Fighting Men", volume II, pages 498 and 499).

(10) "The overseas organization was under a dual supervision. Its authority, gradually defined as experience accumulated, was drawn from the National War Work Council upon whom rested the ultimate responsibility. *As a part of the A. E. F., it was under the direct control of the Commander-in-Chief* * * * * The Commander, through the General Staff, concerned himself with the prescription of regulations designed to 'gear in' *the Y. M. C. A. organization as a part of the military machine*. * * * As a militarized organization, the Association was obliged to secure military sanction for every activity not specifically provided for in the General Orders related to its work" ("Service with Fighting Men," volume I, pages 448, 449, and 457).

(11) In dealing with the Army educational program of the Y. M. C. A., Professor Stokes, its organizer, wrote: "It must stand the acid test of whether or not it will *improve the military efficiency and fighting edge of the individual soldier*" (Summary, page 152).

(12) The members of the Y. M. C. A. serving with the A. E. F. were "persons accompanying or serving with the armies of the United States in the field" in time of war within the meaning of the 2nd Article of War. As such they were "amenable to trial by court-martial for offenses committed while so serving" (Letter of the Judge Advocate General of the United States Army dated February 1, 1919).

(13) Transportation of men and materials to the theater of war is an inseparable part of military operations. Members of the Y. M. C. A. en route to the war zone on the western front began their service with the A. E. F. at the port of embarkation in the United States (See Opinions of Judge Advocate General of the United States Army, 1918, volume II, pages 243-244).

(14) The members of the Y. M. C. A. were authorized to purchase supplies from the Quartermaster Department of the Army; their personnel as well as their property was carried on the French railways and charged against the A. E. F., and they enjoyed many other privileges ordinarily extended only to members of the military organization.

From the foregoing it is apparent that the members of the Y. M. C. A. who served on the western front were, in the language of the Commander-in-Chief of the A. E. F., "militarized and * * * under the control and supervision of the American military authorities". Or, to use the language of their own spokesman, they were "a part of the military machine". They rendered military service of a high order. The mere fact that they were not formally inducted into the Army or were not in the pay of the Government of the United States is immaterial so far as concerns the question here presented. They had voluntarily segregated themselves from "the civilian population" as that term is used in the Treaty of Berlin. They had deliberately exposed themselves and their personal belongings to the risks of war which began at the port of embarkation. The provisions of the Treaty of Berlin obligating Germany to make compensation for damages to "civilians" or to "civilian victims" or to the "civilian population" were manifestly intended to apply to the passive victims of warfare, not to those who entered the war zone, subjected themselves to risks to which members of the civilian population generally were immune, and participated in military activities, whether as combatants or noncombatants.

The particular claimant in this case with pardonable pride testifies:

" * * * During the six months I was in France I was along at least two-thirds of the Western front and saw active service with ten or twelve American Divisions. I was gassed at Chéry near the Vesle River and was wounded in an air raid at Fère-en-Tardenois."

The "Summary of World War Work of the American Y. M. C. A." contains an honor roll of 92 members of that organization who died overseas, 11 of whom died of wounds received in action, and a longer list of those "wounded or gassed under fire". There can be no doubt but that members of the Y. M. C. A. serving with the A. E. F., including the claimant and his 56 associates, were engaged in activities aimed at the direct furtherance of military operations against Germany or her allies and hence under the rule announced in the Damson case "they can not be held to have been 'civilians' or a part of the 'civilian population'" of the United States "within the meaning of the Treaty" of Berlin. The claimant entered upon his service with the American Expeditionary Forces when he embarked in New York en route to the war zone. The personal equipment, uniforms, and personal effects which he had with him were especially adapted for use in and were intended for service with the American Expeditionary Forces. He exposed not only his own person but this property to the risks of war—risks to which the general "civilian population" were not exposed. The loss of claimant's property is not one for which Germany is obligated to compensate under the Treaty of Berlin.

Applying the rules announced in the Damson case and other decisions of this Commission to the facts as disclosed by the record herein, 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 claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire