

UNIVERSAL STEAMSHIP COMPANY
(UNITED STATES) v. GERMANY

(February 2, 1927. pp. 871-877.)

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners. It is put forward on behalf of the Universal Steamship Company, an American corporation, and is impressed with American nationality. A recovery is sought against Germany for the value, less insurance collected, of the wooden sailing bark *Brown Brothers*, which cleared from the port of Brunswick, Georgia, on October 25, 1916, bound for Troon, Scotland, laden with a cargo of sawn pine sleepers. She had a deadweight carrying capacity of 1,450 tons, was constructed in 1875 but completely overhauled in 1916. On December 16, 1916, in latitude 41° 13' N., longitude 43° 11' W. she was spoken by the westbound steamship *Thorvald Halvorsen*, the master of which, testifying from her log, states in substance that at the request of the master of the *Brown Brothers* he prepared to take on board from the *Brown Brothers* a shipwrecked crew which, however, declined to be transferred. Whereupon the *Thorvald Halvorsen* proceeded to New York, arriving there on December 24. At that time the *Brown Brothers* appeared "in good shape and reported all well". Neither the bark, any member of her crew, nor any member of the shipwrecked crew which she carried has since been heard from.

The bark carried with British insurers both war-risk and marine insurance. The loss appears to have been promptly and thoroughly investigated by an impartial adjuster whose report, dated July 16, 1917, is in the record. It recites his authority to compromise the claim "by directing that both sets of

Underwriters shall contribute to the loss" notwithstanding which he finds that "the probability of this vessel being lost by a War Risk is not sufficiently great to justify me in saying that I cannot come to a conclusion as to how she was lost". After reviewing the evidence submitted this adjuster concludes that the bark "succumbed to the bad weather" and decides "that the claim must be borne wholly by the Underwriters on the Marine Risk Policy".

This finding of the insurance adjuster is not binding on anyone save the parties to the adjustment, but the evidence assembled and submitted following the loss and at a time when the claimant was not asserting any demand against Germany may be looked to in determining the cause of the loss. The claimant points out that it was not interested in which group of insurers paid the loss and contends that the adjuster failed to take cognizance of the activities of the German raiders which might have encountered and destroyed the vessel.

It is sought by circumstantial evidence to prove that the German raider *Seeadler* could and probably did encounter and destroy the missing vessel. Starting with the known location of the *Brown Brothers*, when she was last spoken by the *Thorvald Halvorsen* on December 16, which was 1,985 miles from Brunswick, Georgia, from whence she sailed, and 2,080 miles from the Troon headland, her destination, claimant has caused an experienced master-mariner and marine surveyor to plot the probable course the vessel would have taken had she completed her voyage. This witness testifies that had her progress not been interrupted she would probably have reached her destination on January 8 or 9, 1917. It is clearly established that the *Seeadler* passed the Shetland Islands southbound on December 25, 1916, and that on January 9, 1917, she captured and sank by bombs the British coal steamer *Gladys Royle* at latitude 35° N. longitude 25° W. It is argued that between December 25 and January 9 "the course of these two vessels could have converged" and the *Brown Brothers* have been destroyed by the *Seeadler*.

The German Agent has produced the war diary of the cruise of the *Seeadler* covering the period from December 16, 1916, to January 9, 1917, inclusive, purporting to give a complete and detailed account of her activities during that period. The accuracy and completeness of this diary is vouched for by the German Admiralty and Count Felix Luckner, commander of the *Seeadler*, and no mention is made in it of sighting the *Brown Brothers* or any bark answering her description. On the contrary, it affirmatively appears that the *Seeadler* did not engage any vessel prior to January 9, 1917, when she sank the *Gladys Royle*. This testimony is supplemented by the affidavit of Count Luckner, who states unequivocally that the *Seeadler* did not sink the *Brown Brothers* and he knows nothing of the latter's fate. The reports assembled from all available sources and on file in the Historical Section of the United States Navy Department corroborate this testimony. On this record the Umpire finds that the *Brown Brothers* was not destroyed by the German cruiser *Seeadler*.

But the claimant contends that if the missing vessel was not destroyed by the *Seeadler* then she was destroyed by the German raider *Moewe*, which was operating in waters contiguous to those in which the *Brown Brothers* was last spoken. In support of this contention there are offered the *ex parte* affidavits of four members of the crew of the armed English merchant ship *Georgic*, captured and sunk by the *Moewe* on December 10, 1916. The principal cargo of the *Georgic* was 1,200 horses destined to France in charge of a number of attendants. The crew and all of these attendants were transferred to the *Moewe*. On December 13 they, with other prisoners, 469 in all, were transferred to the *Yarrowdale*, which latter vessel with her valuable cargo of munitions, including machine guns, automobiles, and the like, was captured by the *Moewe* on December 11 and with all of the *Moewe's* prisoners started for Germany on

December 14.¹ One of the four affiants mentioned, passing under an assumed name, states that he was then serving as a "seaman". His own mother writes disparagingly of him. Another of these affiants states that he was serving "in the capacity of horseman". Elsewhere he is decribed as a "cook". Neither the vocation nor anything concerning the other two is disclosed. The meager statements signed by the three last mentioned, evidently emanating from the same source with essentially the same phraseology although purporting to have been taken separately, are not convincing.

They recite in effect that while confined as prisoners on the *Yarrowdale* they saw a bark with the words "Brown Brothers" and with the American flag and U.S.A. painted on her side in the course of the *Moewe* and one of them recites that "from an open port while imprisoned on board the S/S 'Yarrowdale'" he saw "the mast of the 'Brown Brothers' after she had been torpedoed". The *ex parte* affidavit of the "seaman" is quite full. He states that "during the period of *six days subsequent* to my transfer to the *Yarrowdale*, I recall distinctly hearing cannon firing nearby on several occasions * * *. On December 22nd from the fiddly I saw the *Moewe* cruising on the port side of the *Yarrowdale*. I recall that on one of the occasions when the firing was heard, namely, on December 23rd, the engines of the *Yarrowdale* had been silenced and there was considerable commotion on deck; * * * there was firing, and two or three hours later I distinguished clearly *from the steps of the fiddly* the wreckage of bark or barkentine rig, three masts being visible, the masts being tilted at an angle of approximately 80 degrees, *the hull of the vessel being submerged.*" This man, had he been in a position of vantage on the steps of the fiddly of the *Yarrowdale*, had a more expansive view and a better opportunity to have witnessed a naval engagement, had there been one, than the others through "an open port" of the *Yarrowdale* on which all four of them were held prisoners. Yet this affiant who goes into considerable detail does not pretend to have seen the name "Brown Brothers" and the American flag and U.S.A. painted on the side of the bark, the hull of which he states was submerged. He does, however, identify the date as December 23. He does state that on the previous day he saw the *Moewe* cruising on the port side of the *Yarrowdale*. He does state that *six days subsequent* to his transfer to the *Yarrowdale* he heard cannon fire and thereafter witnessed the wreck described. Can these statements be true?

A photostatic copy of the war diary of the *Moewe*, a contemporaneous record of all of her activities, covering a period from December 10, 1916, the date upon which the *Georgic* was captured and destroyed, to January 10, 1917, one day after the *Brown Brothers* should have reached her destination according to the testimony of claimant's experts, has been produced by the German Agent. It gives in detail an account of the *Moewe's* activities not only from day to day but from hour to hour. It sets out in detail the capture of the *Yarrowdale*, the discovery that she had a supply of coal for 30 days and carried a valuable cargo resulting in a decision to transfer all of the *Moewe's* prisoners to her and send her to Germany. It details the plan for carrying this decision into effect, the fact that the heavy sea rendered it impossible to transfer the prisoners until the morning of December 13, and that because the sea was then still heavy it required about two hours to make the transfer of all of the *Moewe's* prisoners, consisting of seven captains, 68 ship officers, and 104 members of neutral and

¹ See 3rd volume of Diplomatic Correspondence between the United States and Belligerent Governments Relating to Neutral Rights and Commerce (Special Supplement to XI American Journal of International Law), pages 236 to 241 inclusive: also Fayle's "Seaborne Trade", Volume III, page 29.

290 of enemy crews, a total of 469. It details the complement of the German prize crew put in charge of the *Yarrowdale* and lists the provisions for 21 days. At 6.05 p.m. on December 13 the *Yarrowdale* was detached from the *Moewe* and the latter never saw her again. On December 14 the *Yarrowdale* started for Germany laying a course to the far north to elude British patrols, following a route just south of Iceland and the territorial waters of Norway through Danish and Swedish waters, and, favored by the long nights and stormy weather, arrived at Swinemünde, Germany, on December 31. This is confirmed in every detail by information assembled by the Navy Department of the United States from British and other sources. On February 5, 1917, two American nationals, seamen on the *Yarrowdale*, appeared before the American Consul General at London and made an affidavit of the capture and movements of the *Yarrowdale* which confirms in every detail the records of the German Admiralty submitted by the German Agent. A copy of this affidavit transmitted by the American Consul General to the Secretary of State February 6, 1917, is found in the 3rd volume of the diplomatic correspondence referred to above at pages 240-241.

After dismissing the *Yarrowdale* on December 13 the *Moewe* next day laid a course to the south. Her activities for the following month are well known to the British Admiralty and to the United States Navy, whose records corroborate her war diary produced by the German Agent. On December 18 the *Moewe* sank the British Steamship *Dramatist* at approximately latitude 33° 2' N. longitude 37° 29.2' W. On December 26 the *Moewe* sank the French Bark *Nantes* in latitude 12° 37' longitude 34° 0' W.

When the *Brown Brothers* eastbound was last spoken (hour not given), December 16, 1916, she was in latitude 41° 13' N. longitude 43° 11' W. At midnight of December 15 - 16 the *Moewe* was in latitude 39° 27.3' N. longitude 39° 24' W. and at noon December 16 the *Moewe's* position was latitude 38° 42.8' N. longitude 39° 17.3' W. Presumably the *Brown Brothers* continued on her eastern course, but, no matter what course she took, as it is known that the *Moewe* continued on her southern course their paths could not have crossed.

The claimant's witness fixes the date of the alleged sinking of the *Brown Brothers* by the *Moewe* "off the Azores" as December 23. At noon on December 23 the *Moewe's* position was latitude 14° 56.2' N. longitude 40° 1.8' W. or approximately 1,380 miles south of her position at noon December 13, on which latter date the *Yarrowdale* separated from her and next day began steaming north with all possible speed by the route just south of the coast of Iceland. It is estimated by the Historical Section of the United States Navy Department that on December 23 the *Moewe* and the *Yarrowdale* were approximately 3,100 miles apart.

There were 465 other prisoners on the *Yarrowdale*; seven of them were ship captains and 68 other ship officers. A large percentage of the officers were British. Eighty-seven of the prisoners were American citizens. Both Great Britain and the United States have been diligent in assembling all procurable information concerning the activities of the *Moewe* and the vessels destroyed by her. Yet so far as disclosed by this record and the data assembled by the Historical Section of the United States Navy Department none of the other prisoners on the *Yarrowdale*, including the seven ship captains and the 68 ship officers, has ever reported witnessing the naval engagement described in the four affidavits offered by the claimant. No mention is made of it by the two American seamen whose affidavits were taken before the American Consul General at London on February, 5, 1917, although had they acquired knowledge while prisoners on the *Yarrowdale* of the destruction of an American vessel, or any other vessel for that matter, by the *Moewe* or any other German

raider, this fact would almost certainly have been developed by the American Consul General. That the four affiants whose statements are offered by the claimant were prisoners on the *Yarrowdale* there can be no doubt.

On the record presented it is equally clear, and the Umpire finds, that they did not see the *Moewe* destroy the bark *Brown Brothers* on December 23 or on any other day.

Applying the principles announced in Docket No. 6552. *Waterman A. Taft et al.*, claimants (Decisions and Opinions, pages 801-806),^a and other decisions of this Commission, and weighing as a whole the record presented, the Umpire finds that the claimant has failed to discharge the burden resting upon it to prove that the *Brown Brothers* was lost through an act of war.

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 Universal Steamship Company, claimant herein.

Done at Washington February 2, 1927.

Edwin B. PARKER
Umpire
