

MEXICO/U.S.A. (GENERAL CLAIMS COMMISSION)

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MELCZER MINING COMPANY (U.S.A.) *v.* UNITED MEXICAN
STATES

(April 30, 1929. Pages 228-234.)

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of the Melczer Mining Company, an American corporation, in the sum of \$395,883.00, said to be the value of property some of which was stolen by Mexican private citizens and some of which was seized by Mexican authorities. The substance of the allegations in the Memorial is as follows:

Between January 22, 1900 and May 29, 1903, the claimant acquired title to a group of mining properties known as the Copete Mines which are located about thirty-five miles east of the town of Carbo, Sonora, Mexico. To carry out the plan of exploiting the mines, which were considered to be valuable elaborate preparations were made involving the expenditure of large sums of money. Buildings, smelters, necessary outhouses and sheds were constructed, tracks were laid and a water pipe line and a pumping equipment were installed to bring water from the San Miguel river over a mountainous stretch of territory which was approximately four and one-half miles in length and which in places rose to a height of eighteen hundred feet. These improvements cost the claimant in excess of \$375,684.00.

The mines were ready for operation and in good condition during the early part of 1912. The necessary equipment, machinery and supplies were on hand, and an extensive amount of underground work had been completed. Dr. Francis C. Nicholas was in charge of operations under a general power of attorney to act as the claimant's representative. About the end of January 1913, Mexican marauders in the neighborhood of the Copete mines began a series of lootings. Complaint was at once made to Manuel L. Canes, Commissary of Police, and protection was requested. The civil and judicial authorities refused to recognize the claimant's local representative because of a technical deficiency said to exist in the power of attorney issued to him. As a result of the public knowledge that the claimant was unable to resort to court action for redress and protection, the thefts and lootings increased. Detailed statements regarding these matters are set forth in the Memorial, and charges are made against both police and military authorities.

There was not sufficient water on or near the claimant's plant to operate the company's equipment, and this fact necessitated the construction of a pipe line from the San Miguel river about four and one-half miles distant from the plant. The intervening territory was mountainous, and high pressure pumping machinery was required to force the water through the three or four inch pipes. The installation of this expensive system costing \$176,283.25 was absolutely necessary for the operation of the plant. On

December 31, 1917, while the claimant's representative was in the United States on business he received word from Franco Tapia, the claimant's foreman in charge, that Manuel Cubillas, who was under contract with the then Governor of the State of Sonora, was about to remove claimant's pipe line which had been commandeered by the State Government, and that Cubillas had come to make arrangements for its removal. The Chief of Police of Horcasitas had been informed to the same effect and had been instructed to furnish an armed guard of soldiers or police to prevent any interference with the work. Despite protests, the work of tearing up the pipe line and dismantling of the heavy pumping machinery began about February 18, under the protection of a group of fifty soldiers acting under orders from the Government. The pumping plant, machinery, and water system were completely dismantled and removed.

The value of this pipe line is estimated at \$176,283.00. The remainder of the principal sum claimed is made up of items said to represent values of property lost as a result of lootings and illegal seizures.

In behalf of Mexico contentions were originally advanced to the effect that the Melczer Mining Company had no standing as a claimant. With respect to this point it was argued, first, that it had not been proven that the company was still in existence, even though it was shown that it had been chartered in the State of West Virginia on December 29, 1899; secondly, that it had not been shown that the company continued to have a right to do business in Mexico, even though that privilege might at some time have been granted; and thirdly, that the evidence in the case should have revealed a statement showing that the United States had been given authority to file the claim in behalf of the company. These contentions appear to have been largely abandoned in oral argument in the light of additional evidence filed by the United States subsequent to the filing of the Mexican Answer and the Mexican brief.

It was further contended in behalf of Mexico that the evidence submitted by the United States was insufficient to establish charges of lack of protection and of implication of Mexican authorities in the looting of the company's properties. Insufficiency of evidence was also asserted with respect to proof of the value of property alleged to have been lost through lootings and of the property said to have been confiscated.

The evidence produced by both Agencies is of a very unsatisfactory character. The record is such that it is impossible for the Commission to form any definite conclusions with respect to important issues of fact raised by the allegations in the Memorial and in the Answer. Numerous affidavits produced by the United States are wanting in specific information both as regards complaints against Mexican authorities and as regards losses said to have been sustained by the claimant. The Mexican Government produced nothing but copies of three brief communications written by Mexican officials in 1919, disclosing that the mine of the claimant company had been abandoned, and copies of two notes addressed by the American Chargé d'Affaires at Mexico City to the Mexican Foreign Office requesting protection for the company's property.

The existence of the Melczer Mining Company as a corporation under the laws of the State of West Virginia must be regarded as free from doubt. A copy of the certificate of incorporation accompanies the Memorial. There is evidence of the payment of the State corporation tax. The record contains a certificate from the Secretary of State of the State of West Virginia under date of July 22, 1927, that the company is "in good standing with the State

of West Virginia.” It seems to be clear that over a long period of time little or no practical operations have been carried on by the company in Mexico. This fact, however, clearly did not result in the cancellation of the company’s charter. The failure to do business did not operate as a dissolution of the corporation. See *Law v. Rich et al.*, decided by the Supreme Court of Appeals of West Virginia, 47 W. Va. 634. A claim can of course be presented in behalf of a corporation which is not doing business. Such a claim may be a valuable asset.

There is nothing in the record to show that the claimant company has been deprived of the right to carry on operations in Mexico. There is evidence of the payment of Mexican taxes. There is a copy of a communication addressed by the Mexican Foreign Office to the American Embassy at Mexico City in which it is stated that the company exists at a place near Rayón and possesses a mine which has been abandoned for a considerable period of time. There is a copy of a communication addressed to the company under date of March 1, 1928, in which information required by Mexican mining law is requested.

With respect to the argument that the record should contain some evidence that the claimant has invoked the assistance of the United States, it may be said that the Commission has repeatedly rendered awards in cases containing no evidence of this character. There can be no doubt that in international law and practice and under the terms of the Convention of September 8, 1923, either Government has a right to press claims before the Commission on proper proof of nationality. It may be assumed that it would be very unusual for a government to press a claim in the absence of any desire on the part of the claimant. There is a recorded precedent in which the claimant undertook to withdraw a case presented by Great Britain to an international tribunal, which held, however, that the claimant had no power to do so so long as the government espoused the claim. The tribunal in its opinion said that Great Britain derived its “authority to present” a claim not from the claimant or its representatives “but from the principles of international law” and presented the claim “not as the agent” of the claimant “subject to having its authority revoked, but as a sovereign, legally authorized and morally bound to assert and maintain the interests of those subject to its authority”, and that how and when it should move to assert those interests was, so far as other States and the tribunal were concerned, “a matter exclusively for the determination of that sovereign.” *Cayuga Indians case, American and British Claims Arbitration under the Special Agreement of August 18, 1910, American Agent’s Report*, pp. 272-273.

The evidence produced by the United States in support of allegations with respect to looting, lack of protection, complaints against police authorities and military authorities, and the altercations which it appears Dr. Nicholas had with Mexican officials is too vague to be the basis of any pecuniary award. Looting probably did, as stated by counsel for Mexico, occur, but no definite conclusions can be reached with regard to the absence of protection. The difficulties which Dr. Nicholas is said to have had regarding a power of attorney and the particular use which it was desired to make of that power are not explained. No copy of the power is produced.

Even though justification for these several complaints of depredations and lack of protection had been conclusively established, the Commission would still be confronted by a lack of proper evidence to substantiate allegations with respect to the value of property said to have been stolen or

otherwise unlawfully seized. Numerous affidavits accompany the Memorial. Some of them contain conflicting as well as unexplained figures. In some of them there are general references to books, but there is no production of books or specific references to books. There is no specific reference to ledgers or to accounts. There are no certified statements from any books. There are assertions that some books could not be removed from Mexico because of prohibitions of Mexican law, and that books were destroyed during the progress of the looting. But there is no specific information as to what books were destroyed or which books are unavailable or what particular books were relied upon in formulating the statements purported to be based upon things revealed by books which are available. Some photographs are filed with the Memorial for the purpose of showing improvements erected on the premises of the company. These photographs would have been more useful had they been accompanied by authentications showing when and by whom they were taken. Doubtless very considerable sums of money were spent with a view to conducting extensive operations. The photographs contribute a little something towards showing that fact. But they are of slight value in forming a concise estimate of the amount of money put into the improvements.

The items of the claim with respect to alleged lootings and unlawful seizure of property must therefore be rejected because of the absence of convincing evidence both as to the occurrences on which these items of claims are predicated and as to the value of the property said to have been appropriated.

There is the same if not more uncertainty with respect to the value of the pipe line which it is alleged was seized by the authorities of the State of Sonora. However, the Commission in considering whether the item of the claim predicated on the seizure of this specific property should be dismissed for want of evidence is confronted by a situation somewhat different from that existing with respect to other properties for which indemnity is claimed. It is unnecessary to cite legal authority in support of the statement that an alien is entitled to compensation for confiscated property. As was stated in the opinion in the *Costello* case, Docket No. 3182,¹ the mere fact that evidence produced by the respondent Government is meagre, can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant Government. But it is not denied that this property was taken, and indeed it may be considered that the seizure is admitted. In these circumstances it may be taken for granted that Mexico could have furnished evidence with respect to the amount and value of the property taken. And it may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto which is made in the Memorial. However, even though this assumption be justified, the Commission would not be warranted in awarding the amount claimed for the pipe line. The evidence produced by the United States is altogether too uncertain. Varying estimates such as \$146,200.79, \$176,000.00 and \$200,000.00 are given with respect to the value of this property. There is considerable force in the argument advanced by counsel for Mexico in refuting the estimate submitted by the United States, but unquestionably he carries his argument too far when he asserts that the value of the property of the company is that of a scrap of old iron in Sonora. The claimant is entitled to indemnity for the injury

¹ See page 496.

which it has sustained. The measure of damages is the value of the property seized. The difficulties confronting the Commission in estimating that value have already been pointed out. The claimant Government has produced extremely unsatisfactory evidence, and the respondent Government, whose authorities are in possession of the property, have submitted no evidence. Counsel for the United States admitted in oral argument that account should be taken of depreciation. Such depreciation during a period of about eighteen years undoubtedly would be very considerable. The Commission considers that it is justified in awarding an indemnity of \$15,000.00 with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.

Decision

The United Mexican States shall pay to the United States of America on behalf of the Melczer Mining Company the sum of \$15,000.00 (fifteen thousand dollars) with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.
