

EMIL FRENKEL (UNITED STATES) *v.* AUSTRIA

(May 11, 1929. Pages 111-115.)

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This claim is put forward on behalf of Emil Frenkel as a naturalized citizen of the United States, hereinafter referred to as claimant. The facts, as disclosed by the record, are as follows:

(1) In the year 1864 the Government of the former Austrian Empire, to encourage the construction of a railroad from Lemberg to Czernowitz, guaranteed to the company building it a net annual income of 1,500,000 florins, Austrian silver currency.

(2) In the year 1867 the Government of the former Austrian Empire, to encourage the construction of a railroad from Czernowitz to Suczawa, guaranteed to the company building it a net annual income of 700,000 florins, Austrian silver currency.

(3) Both of these lines were constructed and operated by the Lemberg-Czernowitz-Jassy Railway Company, an Austrian corporation. The amounts for which the Government of the former Austrian Empire was obligated under

these guarantees were in substance subsidies varying from year to year according to the earnings of the railway company, but repayable by it out of surplus and in the event of liquidation from the proceeds of the railway company's assets after satisfying all other claims.

(4) In 1868 the Romanian Government entered into similar agreements with the Lemberg-Czernowitz-Jassy Railway Company to encourage the building of branch lines in Romania, guaranteeing to the railway company an annual net income of 3,865,173.86 francs.

(5) The Lemberg-Czernowitz-Jassy Railway Company from time to time issued founders' or guaranteed shares of its stock. The claimant owns 751 of such shares, of which 483 are of the second issue, of November 1, 1868, and 268 are of the fourth issue. The second issue, of November 1, 1868, carries a clause reading:

"Bearing 7 % interest secured by the guaranty of a net revenue granted to the Company by the Austrian and Romanian Governments."

Provision was also made for the amortization and redemption of these shares "within the time of the concessions according to the plans approved by the Governments." Claimant also owns four *Genuss-Scheine* (use and share certificates) of the railway company which relate to extra dividends for 1918-1921.

(6) In 1894 through a law enacted by the Government of the former Austrian Empire, formally assented to by the general assembly of stockholders of the Lemberg-Czernowitz-Jassy Railway Company, it was provided that the Austrian Government's guaranties of a yearly net income of 1,500,000 florins and 700,000 florins respectively should be superseded with a fixed obligation of the Government to pay annually 2,200,000 florins to the railway company.

(7) All payments stipulated to be made under the readjustment of 1894 and which fell due prior to the Armistice of November, 1918, were promptly met by the Government of the former Austrian Empire. The Romanian Government made no corresponding payments due by it subsequent to October 13, 1916.

(8) Due in part at least to the default of the Romanian Government, the railway company was not in funds to declare and pay dividends on its founders' or guaranteed shares on May 1, 1918, and subsequent thereto, although the Austrian Government had on January 15, 1918, paid to the railway company the amount due by it with respect to the Lemberg-Czernowitz line and on October 15, 1918, paid to the railway company the amount due by it with respect to the Czernowitz-Suczawa line. The failure of the railway company to declare and pay dividends on its founders' shares on May 1, 1918, was not attributable to any default on the part of the Austrian Government.

(9) The payments falling due subsequent to the Armistice of November, 1918, were not made by Austria because the railway lines in question lie wholly outside the territory of the present Republic of Austria, partly within the territory of Romania and partly within the territory of Poland.

(10) Article 203 of the Treaty of St. Germain provides for the apportionment among the Successor States of the secured debts of the former Austrian Empire. The Reparation Commission, acting in pursuance of the authority conferred upon it by that Treaty, has as of July 1, 1919, apportioned the obligations of the former Austrian Empire to the Lemberg-Czernowitz-Jassy Railway Company between Poland and Romania.

The claimant has received no dividends on his founders' or guaranteed shares of stock in the Lemberg-Czernowitz-Jassy Railway Company since January 15, 1917, and now seeks to recover from Austria dividends which he alleges should have been paid between May 1, 1918, and November 11, 1921,

inclusive. He also alleges that the failure of the Government of the former Austrian Empire to meet its payments to the railway company prevented the latter from carrying out the plan to amortize the shares by annual drawings thereby impairing the value of the claimant's shares, to his damage the amount of which he seeks to recover.

Unless the claim asserted falls within some provision of the Treaty of Vienna obligating Austria to pay it, the claimant is not entitled to an award before this Commission. He is not seeking to establish an indebtedness owing him by an Austrian national, because the Lemberg-Czernowitz-Jassy Railway Company is not now a national of the Republic of Austria and perhaps was not an Austrian national on July 2, 1921, or upon the coming into effect of the Treaty of Vienna. But the claimant contends that as a stockholder of the railway company he is entitled to recover from Austria the dividends which he would have received from the railway company had Austria met her obligations to it.

In the stipulation entered into between the Agent of the United States and the Agent of Austria in the submission of this case, the claimant's position is stated thus:

"It is the contention of the claimant that if the Austrian Government had paid to the aforesaid railway company the annual payment, that said railway company could have paid the coupons calling for payment of semi-annual dividends maturing on his bonds, and redemption of the original capital investment, and that by reason of the failure and neglect of the Austrian Government to pay said annual payment, he is entitled to recover from said Austrian Government the amount of the unpaid dividends belonging to him, which he alleges became payable between May 1, 1918, and November 11, 1921, inclusive."

In the brief filed by claimant's counsel and adopted by the Agent of the United States, there is put forward this proposition:

"The failure to pay the guaranteed income as provided by law and stated on the face of the shares is a debt owed by the Austrian Government to the claimant herein and gives the claimant a standing before this Commission."

The question presented is: do the unpaid dividends on claimant's stock which accrued May 1, 1918, to November 11, 1921, inclusive, constitute debts owing claimant by Austria within the meaning of the Treaty of Vienna? The Commissioner holds that they do not.

The obligation of the Government of the former Austrian Empire was to pay the Lemberg-Czernowitz-Jassy Railway Company definite amounts at stated intervals. That Government first guaranteed to the railway company certain net revenues and by the readjustment of 1894 that guaranty was converted into a fixed obligation to pay a stipulated amount, but that Government never at any time itself agreed to pay or guaranteed the payment of dividends in any amount to the railway company's shareholders. The railway company had obligated itself to declare and to pay to holders of its founders' shares stipulated dividends, but the Government of the former Austrian Empire was not a party to this undertaking and there was no privity of contract between that Government and such shareholders. The railway company from other sources of income might have been in a position to declare and pay dividends notwithstanding a default by the Government of the former Austrian Empire. On the other hand, it appears from this record that, notwithstanding that Government met its obligations and paid throughout the year 1918 the stipulated amounts which it had agreed to pay, nevertheless the railway company was unable to declare and to pay the dividends due throughout that year. This default by the railway company was not attributable to the Government of the former Austrian Empire, which had not then defaulted. The failure of Austria

and Romania or of either of them to meet their contract obligations to the railway company doubtless did affect the ability of the latter to declare and pay dividends, but such failure would not give to the claimant and others similarly situated a direct cause of action against those Governments for debts. It follows that there is no debt owing to the claimant by Austria within the meaning of the Treaty of Vienna. Such losses as may have been suffered by the claimant belong to that numerous class suffered as a consequence of the war or of post-war Treaty adjustments, for the payment of which the Treaties make no provision.

The claimant's counsel have cited cases decided by the Franco-German Mixed Arbitral Tribunal growing out of exceptional war measures taken by Germany. These cases are governed by the terms of the Treaty provisions applicable to damage resulting from exceptional war measures. It is not contended that claimant suffered as a result of any exceptional war measures taken by Austria and hence the decisions cited have no application to this case.

It is unnecessary to consider the effect upon the claim here asserted of the financial clauses of the Treaty of St. Germain and of the Treaty of Vienna dealing with secured debts of the former Austrian Empire and the apportionment between Poland and Romania by the Reparation Commission of the obligations of the former Austrian Empire to the Lemberg-Czernowitz-Jassy Railway Company.

The Commission decrees that under the Treaty of Vienna the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of Emil Frenkel, claimant herein.

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