

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN
CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDER-
WRITERS (UNITED STATES) *v.* GERMANY

*(Sabotage Cases, July 29, 1935, pp. 1173-1175; Certificate of Disagreement by the
National Commissioners, pp. 1159-1173.)*

Certificate of Disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree as to the action to be taken on the questions presented by the Motion filed by the American Agent on May 2, 1935, with reference to the procedure to be followed by the Commission at its next hearing on the sabotage cases:

Opinion of Mr. Anderson, the American Commissioner

This Motion calls upon the Commission to determine whether the next hearing shall be merely of a preliminary nature for the consideration of the

admissibility of the new evidence offered by the American Agent and its sufficiency to justify a reopening of the case, or, on the other hand, whether the Commission should at the same hearing consider the claims on the merits to determine whether the new evidence as admitted, taken together with the other evidence in the record, furnishes justification on grounds of justice and equity for the Commission to alter or confirm its previous decisions.

In the opinion of the American Commissioner the questions presented by this Motion simply require the interpretation and enforcement of the Commission's last decisions as rendered by the Umpire on December 15, 1933, and November 9, 1934.

In this Motion the American Agent calls attention to a letter addressed by the German Agent under date of April 16, 1935, to the Commission, in which he states that he has reserved "the right to submit additional evidence" if the Commission should decide to reopen these cases. It is this reservation which the American Agent desires to have specifically dealt with by the Commission in deciding the present Motion, because the American Agent contends that the effect of this reservation, if allowed, would be "to accomplish by indirection what the German Agent endeavored to accomplish directly by his Motion of June 13, 1934, which was denied by the Commission in the Opinion of the Umpire on November 9, 1934; namely, to further postpone the final action by the Commission in these cases by requiring the American Agent to argue the claims on an incomplete record in order that the German Agent may have the advantage of having the American Agent point out the particular evidence that it is necessary to meet."

It will be recalled that in the German Agent's Motion, which was overruled by the Umpire's decision of November 9th, he requested the Commission "to require the American Agent to either file a brief, a bill of particulars, or some other written statement, before the German Agent would be required to file any evidence in opposition to the pending petition for rehearing".

In denying that Motion the Umpire held that it would be "unfair to require the American Agent to make his argument in advance of presentation of proofs in opposition".

Exactly the same situation is again presented by the German Agent's present reservation of the right to submit additional evidence if the Commission should decide to reopen these cases.

It appears to the American Commissioner, from an examination of the previous proceedings and rulings of the Commission, that it has already definitely decided that at its next hearing it will expect these cases to be submitted for final decision, and in order to finally dispose of them the Commission must have before it all the evidence that either Government may desire to file, so that the Commission may pass not merely upon the preliminary question of the admissibility of such evidence, but also upon its probative value as to the merits of the claims. As the American Agent says, in the statement in support of his Motion, "It is obvious that consideration of the additional evidence submitted in support of the charges (of fraud, etc.) in the pending Motion for rehearing will require a review of the whole case. The new evidence can only be weighed and its effect gauged in connection with what has gone before." That being true, and the American Commissioner agrees with the views of the American Agent on this point, it would be a waste of time and a duplication and a delay of the work of the Commission to go over the same ground twice.

In brief, the position of the American Agent is that in accordance with the decisions of the Umpire of December 15, 1933, and November 9, 1934, the sabotage cases ought to be submitted to the Commission for final decision at one hearing. The Commission should then decide, first, whether the evidence

submitted by the United States sustains the allegations of the Petition, and, second, at the same hearing determine, from such evidence and any that Germany may offer, whether justice and right demand a confirmation or alteration of its previous decisions in these claims. This procedure would greatly expedite the final disposition of this litigation.

The question of the jurisdictional right to re-open the cases has already been passed upon affirmatively by the Umpire in his previous decisions, and, in order to have the two remaining questions, namely, fraud and revision, promptly disposed of by the Commission, all of the evidence on each side which either Government wishes to submit must be available to the Commission at its next hearing.

It is understood that the German Commissioner disagrees with the American Commissioner on the procedure above proposed. He apparently is of the opinion that there should be two hearings, (1) to pass upon the sufficiency of the evidence to sustain the allegations, and (2) if sustained, a further hearing to determine the character of the order to be entered upon the Petition, and that before the second hearing is held the German Agent should be permitted to file additional evidence. If this course were followed, the American Agent would also have the right to file further evidence, new briefs would be necessary, and the litigation conceivably would be prolonged for a considerable period.

The American Commissioner does not think that the German Commissioner's proposal conforms to the meaning of the decision of December 15, 1933, or that it is in accord with the expressed wish of both Governments to bring this litigation to as early a conclusion as is consistent with its proper determination.

There is one point which the two National Commissioners agree upon, and that is that when the German Agent has filed his evidence in opposition to the new evidence filed by the American Agent, the latter shall have an opportunity to file rebuttal evidence, and the German Agent shall then be at liberty within a reasonable time to file any evidence which he desires to present in opposition to the American Agent's rebuttal evidence, but that when in the course of the procedure to be adopted by the Commission as a consequence of this Motion, these proceedings are brought to the point of a final submission to the Commission for disposition on the merits, the German Agent will not then be at liberty to reserve the right to submit any additional evidence, but must then decide for himself what, if any, additional evidence he desires to submit on the question of the merits, and either submit it to the Commission or notify the Commission that no further evidence will be submitted.

The German Agent, in opposing this Motion, calls attention to a letter written by the American Agent on February 15, 1934, notifying the Commission that in filing his new evidence he "reserves the right to file further and additional evidence" in these cases upon their reopening under the decision of the Umpire of December 15, 1933.

The German Agent contends, therefore, that inasmuch as the reservation in his letter of April 8, 1935, is merely a duplication of the American Agent's letter of February 15, 1934, he is justified in making his reservation.

On this point it is to be noted that the American Agent's reservation was made before the Commission made its decision of November 9, 1934, which the American Agent considers was in effect a denial of the right of either Agent to make such a reservation, and, accordingly, the American Agent has abandoned his reservation and contends that the German Agent cannot maintain his reservation which was made after that decision was rendered.

In conclusion, if the American Agent has not correctly interpreted the decisions of the Umpire, the Commission nevertheless should at this time advise the Agents that it does not desire to take submission of the pending

Petition until both Governments have filed all the evidence they desire to have considered, and it is desirable that the Agents should now be advised that there is to be one hearing, at which all questions involved in the Petition are to be considered and determined in order that the Commission may enter a final order either confirming or modifying its previous decisions, thus finally disposing of the pending Petition. The American Commissioner considers further that the Commission should request the two Agents to agree on definite time limits within which the filing of their evidence and briefs must be completed and the cases finally submitted.

It is, of course, understood that the decision on the pending petition can only determine finally the question of Germany's liability in these claims, as the determination of the amount of damages, if any, has by agreement of all parties been postponed until the question of liability has been finally decided.

Washington, D.C., May 31, 1935.

Chandler P. ANDERSON
American Commissioner

Opinion of Dr. Huecking, the German Commissioner

I note from the American Commissioner's Opinion:

He does not uphold the American Agent's view, that the Sabotage Cases have already been reopened. He is aware of the fact that two different stages are before us and that this Commission is called upon to decide *first*: "Was the judgment in these cases obtained by fraud?", *second*: "Ought the judgment to be altered on its merits?". What he suggests is, that these two questions should not be pleaded separately, but at the same time; that the German Agent should be compelled to plead the merits, *before* there is any decision against him affirming fraud and reopening the cases.

The issue involves two practical consequences:

(a) It determines the subject matter of the Commission's next hearing

(b) At this time the American Agent wants the German Agent to define his attitude with regard to future evidence regarding the *merits*:

The fact that it is no longer contended that the case has already been reopened immediately carries with it the consequence that the whole question appears in an entirely different light. As long as it was said that the case was already reopened doubts could exist in which stage of the proceeding we actually were. A possibility existed to speak of the merits and to submit Motions dealing with the evidence regarding merits and similar points.

The very moment it is clearly seen and recognized on both sides that there are two separate stages in this cause (the preliminary stage of fraud and — perhaps — an ulterior stage dealing with the merits) the first impression must be that the American conclusions as now preferred are most unusual ones. I doubt that it will be possible to show among the thousands of cases dealing with reopening and retrial that are reported in the Law books or Commentaries one single instance in which such an extraordinary way of dealing with a case was adopted. To mix up two stages in the same proceeding although they have (as I will show later) a completely different subject matter, a different legal view from which they ought to be looked at and a different evidence, would mean so uncommon a practice, I may even say so unheard of a practice in international matters, that only the strongest reasons and the most exceptional considerations would justify it. That *logically* the preliminary procedure must come first and the main procedure must come afterwards — if at all — seems to be admitted; why should that logical and natural sequence be disregarded? The question imposes itself: Is this case really different from any other case?

Are the arguments adduced of such particular weight as to justify a conclusion that the German side should be compelled to acquiesce in a way of handling the matter never adopted before and going against the natural and logical sequence of things as well as against any precedent?

I utterly fail to see anything that distinguishes this case from any other case and that may justify such unwarranted request and I may now say at once that I vote for the adoption of the ordinary course followed by courts in cases of this kind.

This said, I will discuss the points which have been made in detail.

To support his views, the American Commissioner relies — without separating them on principle — on juridical reasons and on reasons of expediency. I will deal with both, but I want to make it quite clear from the outset, that they do not stand on the same footing. If a party pleads *res judicata* — and that is what the German Agent does — he cannot be overruled on reasons of expediency. The latter have no weight at all as long as the juridical plea has not been refuted by juridical reasons. Sub “ I ”, I propose to deal with the juridical aspect of the matter, sub “ II ” with the expediency.

I

Juridical aspect

(A) Although the American Commissioner cites with apparent approval the position of the American Agent that the question of reopening must come first and the examination of the merits second, he rejects the application of this principle to the pleadings. When he suggests *one* hearing he does not define it as one hearing having two consecutive parts, one part restricted to the subject matter of fraud, ensuing deliberation of the Court, then (if that deliberation has a result favorable to the Claimant) pleadings dealing with the merits. Under the circumstances “ one hearing ” would mean a hearing on the merits similar to that held before the judgment was rendered only extended by one point, the point of fraud which only for the Court would be a preliminary point in their deliberations.

Thus what is envisaged by the American Commissioner is a full retrial on the merits to be ordered *now*. And further it is suggested that this retrial should be ordered now without any examination of the evidence, allegedly supporting fraud.

The question, then, boils down to this: Is any Court entitled to order a retrial on the merits, without having examined evidence? and this admittedly with the consequence that (again without such examination) by now such ruling affects the rights of the party holding final judgment with respect to future evidence in a retrial on the merits?

As I said before: It would be impossible to show among the thousands of retrial cases which are reported one Court which upholds such a view; one writer who defends it.

But the necessary data in this respect are readily available. I intentionally refrain from quoting American cases or American writers. In order to illustrate the general point we are dealing with by a judgment of general significance I draw attention to the decision of the House of Lords *Jonesko versus Beard* (Law Reports, Appeal Cases, 1933, p. 300). The Court (The Lord Chancellor, Lord Buckmaster, Viscount Dunedin, Lord Warrington of Clyffe, Lord Blanesburgh, Lord Tomlin) quotes with assent Lord Justice James who had stated in *Flower versus Lloyd*:

You cannot go to your adversary and say “ You obtained the judgment by fraud and I will have a rehearing of the whole case ”, until that fraud is established.

Thus the House of Lords holds that you have no right to have fraud and merits established *at the same time* but that you must establish fraud *before*, and before you have a rehearing.

Should a unanimous decision of the House of Lords be deemed insufficient I may refer to the jurists:

In Danniels' Chancery Practice (8th Edition, Volume 2, Year 1914, Page 1333) we read

"the fraud used in obtaining the judgment is the principal point in issue and necessary to be established by proof before the propriety of the judgment can be investigated."

Again the "before" which like the "until" in the quotation from the House of Lords, though it be one word only, is a full answer to the Opinion of the American Commissioner.

And if further support of the juridical views quoted be desired, be it mentioned that in annotation (o) *loco citato* Danniels refers to ten cases pro with no case contra.

I may be permitted an additional remark.

In all juridical systems that know an order for retrial and at the same time allow appeals, an order of this kind may be separately appealed from (see for instance the three successive appeals from such order in *Brown versus Dean*, Law Reports, Appeal Cases, 1910, p. 373-376, brought before the Divisional Court, then before the Court of Appeals and finally before the House of Lords). The general principle underlying this practice is exactly the idea that no one holding a final judgment may be compelled to answer on the merits before the order for the retrial itself is final; (still less before it is even in existence!) the essence of the final judgment being, as it has been expressed "to close the mouth on the one side and the ear on the other".

(B) The American Commissioner tries to base his Opinion juridically on the decisions given by the present Umpire of this Commission under date of December 15, 1933, and November 9, 1934.

They do not serve him as a precedent in which may be found general principles of law which may be relied upon but he goes farther. He thinks that these two decisions directly and immediately contain the determination of the present issue so that they are in the present case the only source of law and in the American Commissioner's mind the whole question now to be discussed is merely a question of the interpretation of those two earlier decisions of the Umpire.

To deal with the latter point first: It stands to reason that the question now in issue (*viz.*: Shall the retrial on the merits take place simultaneously with the discussion of fraud) was not decided by the December and November decisions of the Umpire because when these decisions were rendered no disagreement of both Commissioners as to such simultaneousness had been certified to the Umpire (By the way: The American Commissioner fails to explain why if the issue was decided by the Umpire it was decided *twice* in two different decisions.). But I am quite agreeable that the two decisions of the Umpire be utilized as a guide to general principles applicable in this case. If I do so I fail to find in either decision anything that may support the American Commissioner's view but I find general principles which bear out my own standpoint.

In his Decision dated December 15, 1933 (the same decision in which the Umpire stresses that a decision in a reopening "involves the right to tender evidence") he says *expressis verbis*: "it would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing". What

else does this mean than the very matter now at issue, viz. that the preliminary question should not be tried *at the same time* as the main question but it should be dealt with (just as its name implies) preliminarily to that question?

Adverting to the decision dated November 9, 1934, I cannot find *one* syllable in it which deals with the merits. It deals with a Motion submitted by the German Agent and this Motion was (quite in conformity with the German Agent's general viewpoint) confined to fraud. It asked for a bill of particulars as to fraud and spoke of the evidence to be submitted on both sides as to fraud.

And fully in harmony with these facts the Umpire mentions "that the issue which will come before the Commission is made up by the allegations of the Petition and the categorical denials of the answer". Here we find it clearly delineated what the theme of the next hearing ought to be; and by inference we may state that it will *not* be the *merits* of the case. The same idea appears in the next part of the November decision: The German Agent is informed that he must examine the relevancy of the American evidence as to *fraud* (cf. the words: "the issue upon which the granting of a rehearing depends"). What about the merits then? Will it be seriously contended that the decision contains a similar direction as to German evidence regarding the merits? The answer, of course, must be No. But then this answer "No" disposes of the American Commissioner's contention, for if the decision — as he says — really orders that the hearing on fraud and the retrial on the merits should be held simultaneously then necessarily the decision of the Umpire would have given such directions.

(C) The American Agent admits that he held the same Opinion as I hold now and pleaded accordingly, when the Sabotage Cases were argued at Boston. No sufficient explanation is given why he changed his mind, for the present explanation "that he was overruled at Boston" is factually wrong. He could not have been overruled for the simple reason that the German Agent was not contradicting him at the time (Page 42, two first paragraphs). Further the printed record shows (Page 41, and cf. the remarks p. 132 beginning with "One thing") that the Commission through its Umpire made no ruling at all but merely expressed hopes and made courteous suggestions. Last but not least even if Boston had overruled the American Agent, Boston itself would not have been overruled by the present Umpire. I have already quoted from his December decision the passage in which he says "it would have been fairer to both the parties definitely to pass at the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing". (And be it noted additionally that some lines earlier he states that the Boston arrangement was an arrangement made "by mutual consent".)

Furthermore, I think the German Agent is entitled, as he does, strongly to emphasize the fact that even in the present proceedings the American Agent has made a reservation as to future evidence which is thoroughly incompatible with the simultaneous hearing on both fraud and merits. The facts cannot be denied that the American Agent made the very same reservation to which he objects when it was repeated by the German Agent. The American Commissioner says that the American Agent abandoned that reservation as superseded by the *November 1934* decision. Apart from the fact that the American Commissioner here admits (what he denies elsewhere) that the reservation would *not* be superseded by the *December 1933* decision (for the reservation is posterior to the December 1933 decision) the American Commissioner is mistaken about the facts: The last utterance of the American Agent which I have before me is his statement of May 20, 1935. Here he clearly persists in his reservation justifying it by reasons (which do not explain at all its incompatibility with the simultaneous hearing but) which show conclusively that he does

not abandon it. It goes without saying that it is a strong argument in favor of the German Agent's view when his adversary makes and upholds a reservation which is justifiable only when the German Agent's view is adopted, quite apart from the unusual fact that the American Agent opposes a reservation made by himself in his own favor when the identical reservation is made by the German Agent.

(D) I should not want to leave this point of the juridical aspect without stressing its particular importance with respect to the hearing which is before us. I feel it is my duty to insist on this because I find in the American Commissioner's Opinion certain considerations which I cannot leave uncontradicted. The American Commissioner says that it is obvious to him that the question of fraud requires a review of the whole case and that if the question of fraud should be separated from the merits it would be a waste of time and a duplication and it would mean going over the same ground twice.

There can be no question of going over the same ground.

First, the subject matter is totally different. The question "Was there fraud prevailing at the previous hearing?" is entirely different from the question: "How did the fire in Kingsland or Black Tom originate?"

Second, the Judge's general starting point is a fundamentally different one in both cases.

If the question of reopening has to be passed upon, the judge has to take his stand in the shoes of the former judge, who gave the final decision; his mind has to go back to the situation prevailing at the time the decision was rendered; his basis are the views held by the former judge and the former judge's appreciation of the evidence. The question put to the judge now sitting is: "Would the evidence as to fraud have influenced his predecessor?"

If the question of the merits has to be passed upon the views of the previous judge and the situation as it was at the time the judgment was rendered, are irrelevant. To the judge now sitting the *present* time and the *present* time only offers the basis, from which to answer the query: "What are *your* findings from the evidence now before *you*?"

Third, the evidence would be totally different.

If the decision of the Umpire of December 15, 1933 is loyally adhered to only a limited volume of evidence has to be considered as far as the question of fraud is concerned. I cannot admit for a moment that in order to discuss the subject matter of fraud it is necessary to plead the whole record.

II

Expediency

(A) Because I deny the American Agent's Motion on juridical grounds it is only for completeness' sake if I add some remarks about expediency (see above).

(B) When the American Commissioner contends that in order to avoid delay and other practical disadvantages expediency would recommend that the hearing as to fraud and the hearing as to merits should be held simultaneously I think he is misled by the fact that of two alternatives he sees and appreciates only one. He argues throughout as if it were a matter of course that the Commission will grant a rehearing on the merits. That is by no means a matter of course. It is quite possible that the Commission's decision goes the other way. In this case any hearing on the merits is *superfluous*.

The question, then, is:

What might we possibly win with respect to time and to effort of all concerned by adopting the American Commissioner's suggestion; and what might we possibly lose?

(1) We might possibly win the time that would lie between the hearing on fraud and the hearing on the merits. That we might spare a whole hearing, must be taken *cum grano salis*: It gives fallacious impression, if continually the words "one hearing" are stressed. Even if the American Commissioner's view were adopted there will be *two* hearings. Should the next hearing extend simultaneously to fraud and revision and should the Claimants obtain a reopening, still the amount of damages would be open.

(2) On the other hand, the list of what we might lose, is by far longer:

(a) We risk, what we otherwise would save, the time needed to collect evidence on the merits, the time needed to bring rebuttal evidence, the time needed to bring surrebuttal evidence.

(b) We risk, what we otherwise would save, the time to prepare briefs on such evidence; and the time to answer them and the time to answer such answer.

(c) We risk, what we otherwise would save, extension of the briefs (and the respective reply-briefs) concerning *fraud* to perhaps very voluminous briefs concerning *merits* covering the bulk of an enormous record instead of a reasonable part of it;

(d) We risk, what we otherwise would save, a very considerable extension of the preparation of both Judges and Agents, such preparation no longer being limited to a relatively restricted subject-matter but forcibly covering an extremely vast area.

(e) We risk, what we otherwise would save, days of discussion, afterwards turning out to be futile.

It is clear from all this, that what may be possibly gained is out of all proportion with what would be wasted in the way of time and exertions and it may be said, that granting the American Agent's Motion would much more probably mean delay, and very considerable delay, than denying it.

The American Commissioner concludes his argument by pointing to the general understanding, that the question of damages should not be pleaded at the hearing, only liability. Does not that understanding rest on the same ground as the one on which I place myself, and does it not testify as to the very practice of the Commission in these cases? Was not that understanding arrived at because everybody felt, that as long as there is a fair chance of a very extensive discussion and preparation becoming superfluous in consequence of a decision regarding a preliminary point, that preliminary point should not be treated together with the point dependent on it but previously and separately?

Conclusion

Rejecting the American Agent's Motion I suggest a ruling of this Commission:

That the next hearing of the Commission and its preparation should be limited to the question of fraud.

Additional remark

In the American Commissioner's Opinion I find certain observations regarding points about which he states we agree and about time limits to be agreed upon between the Agents. I do not think that it is necessary to embody these questions in the present Opinion and I shall define my attitude as to these

points not here but in a separate letter¹ which it is my intention to address to the American Commissioner.

Washington, D.C., June 7th, 1935.

Dr. Victor L. F. H. HUECKING
German Commissioner

¹ Letter referred to, dated June 8, 1935, reads:

“ My dear Mr. Anderson:

“ In your Opinion dated May 31st, 1935 you state on page 5, 6 [p. 1161, this print] (*Note by the Secretariat* — this volume, p. 213):

“ There is one point which the two National Commissioners agree upon, and that is that when the German Agent has filed his evidence in opposition to the new evidence filed by the American Agent, the latter shall have an opportunity to file rebuttal evidence, and the German Agent shall then be at liberty within a reasonable time to file any evidence which he desires to present in opposition to the American Agent's rebuttal evidence, but that when in the course of the procedure to be adopted by the Commission as a consequence of this Motion, these proceedings are brought to the point of a final submission to the Commission for disposition on the merits, the German Agent will not then be at liberty to reserve the right to submit any additional evidence, but must then decide for himself what, if any, additional evidence he desires to submit on the question of the merits, and either submit it to the Commission or notify the Commission that no further evidence will be submitted ’.

“ I think that indeed our views coincide regarding this matter, but as I am not absolutely certain whether I understand the passage aright, I state the point in my own terms:

“ (1) The American Agent is at liberty, to file rebuttal evidence, meeting the evidence which the German Agent has submitted on the 28th of February 1935 and on the 16th of April 1935.

“ (2) The German Agent is then at liberty to file surrebuttal evidence, meeting such rebuttal evidence as mentioned sub (1).

“ (3) Both Agents should try to agree on definite time limits within which to file the evidence mentioned sub (1) and (2). Same suggestion regarding briefs.

“ (4) Should the Umpire rule, that at the next hearing the question of fraud and the question of the merits should be dealt with simultaneously, the German Agent would be obliged to define after that decision his attitude as to further evidence regarding the merits.

“ (5) It seems that there is no unanimity about the question, regarding whether and to what extent further evidence on the merits may be submitted. Should no agreement be reached on such a question it must be decided; and it may be necessary to decide it before (5) is complied with.

“ (6) With the proviso mentioned sub (5) the German Agent in the contingency mentioned sub (4) cannot maintain his present reservations to evidence on the merits. Nor could he make such a reservation at the hearing on the merits itself.

“ It may be advisable to call this letter of mine not yet a confirmation of your views but merely a suggestion of mine; thus perhaps you will be good enough to consider its contents in this light and if you think you may fall in with it to send me a letter of confirmation.

“ Sincerely yours,

“ Dr. Victor L. F. H. HUECKING.

“ The American Commissioner concurs with the German Commissioner in the foregoing statement as to points of agreement between them.

“ Chandler P. ANDERSON
“ *American Commissioner* ”

For the reasons stated in the foregoing Opinions, the National Commissioners have disagreed on the questions at issue, and, accordingly, certify them to the Umpire for decision.

Done at Washington, D.C., this 7th day of June, 1935.

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

Decision of the Commission

The American Agent has filed a motion that an order be entered "to the effect that the Commission does not desire to take submission of these claims, until all evidence that either Government desires to have considered *in support of or in opposition to the pending petition for rehearing has been filed* in order that the Commission may, when it takes submission, enter an order finally disposing of these claims on their merits, and that the order further advise the Agents of the two Governments accordingly".

The German Agent opposes the making of such an order. The Commissioners have certified their disagreement as to the section to be taken.

The proceedings leading up to the filing on May 4, 1933, of a petition by the American Agent for a rehearing of these cases are sufficiently outlined in the decision of December 15, 1933. The present motion has to do solely with the procedure appropriate under that petition for rehearing. After the American Agent had petitioned for a rehearing, the German Agent challenged the power of the Commission to act upon it. This question of power had been raised in earlier stages of the case, but as shown by the decision of December 15, 1933, had been reserved. The contention of the German Agent required the Commission squarely to meet that question. This it did in its decision of December 15, 1933. The conclusion was that no power was vested in the Commission to reopen a case merely for after discovered evidence; but that, where, as in the present instance, the assertion is made that fraud has been perpetrated upon the Commission, power exists to examine the facts and to act in accordance with the findings consequent upon such examination. Nothing more was decided on December 15, 1933. At the time of that decision the German Agent had not answered the petition nor offered evidence. The American Agent had offered evidence intended to support the allegations of the petition. What was said at the close of the opinion was based upon the assumption that the claimants could effectively support the allegations of their petition. Thereafter the German Agent filed an answer denying those allegations.

By the petition and answer an issue was framed. The issue may be stated thus: "Was the Commission misled by fraud practiced upon it?" If that issue be decided in favor of the claimants, the Commission should reopen the case upon the merits and reexamine the conclusions reached in the light of the whole record, including the proofs offered to impeach evidence forming part of the record when its decision on the merits was rendered. Obviously the case is not reopened by the presentation of a petition praying for such action. Especially is this true where the allegations of the petition are categorically denied. This the American Agent concedes. The decision of November 4, 1934 [announced November 9, 1934], so recognizes. It is there said: "The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer."

The first step is the determination whether the claimant's assertions as to fraud, *et cetera*, are made out. To ascertain this the evidence in support of those assertions must be examined. Necessarily, such examination will include a reference to evidence in the record prior to the Commission's decision on the merits. Such reference will be necessary for comparison between the old evidence and the new, and to show the bearing and meaning of the proofs tendered upon the issue of fraud and collusion. On this preliminary matter, namely, whether the case shall be opened and a rehearing had upon the merits, it will not be necessary to argue the cases on the merits. If the claimants prevail upon that preliminary question, the former decisions will be laid aside and the merits reexamined in the light of all the evidence, including that tendered on the issue of fraud and collusion. If they fail, reconsideration of the Commission's decisions on the merits of the claims will be unnecessary and indeed improper. The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing.

It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con such a procedure. Nevertheless, I suppose that if the parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits.

It is earnestly urged that the Agents agree at once to limit the time for rebuttal by the United States of the proofs offered by Germany in opposition to the petition for rehearing, and confer with the Commission as to the fixing of a time for argument and for the filing of briefs on that issue.

I attach hereto the certificate of disagreement by the National Commissioners, together with their separate opinions and supplemental opinions attached thereto.

Done at Washington July 29th, 1935.

Owen J. ROBERTS
Umpire
