

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

BORDEN, INC.

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CU -3418

Decision No. CU

3529

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, in the amount of \$31,638.60, was presented by Smith-Douglass Division of The Borden Company, based upon the asserted loss of payment for merchandise shipped to Cuba.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for

losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Section 502(1)(B) of the Act defines the term "national of the United States" as a corporation or other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

The record shows that Smith-Douglass Company, Inc., in whose favor this claim arose, was organized under the laws of Virginia. On December 30, 1964, The Borden Company acquired all the assets of Smith-Douglass Company, Inc., which then became the Smith-Douglass Division of The Borden Company. Authorized officials have certified that at all pertinent times more than 50% of Smith-Douglass Company, Inc. and The Borden Company, organized under the laws of New Jersey, were owned by nationals of the United States, and that as of the Fall of 1959 more than 90% of the stockholders of Smith-Douglass Company, Inc. had addresses in the United States. The Commission holds that both Smith-Douglass Company, Inc., and The Borden Company, which succeeded to the claim in 1964, have been nationals of the United States within the meaning of Section 502(1)(B) of the Act at all pertinent times. The Borden Company is now known as BORDEN, INC.

The record shows that on February 26, 1959 Smith-Douglass Company, Inc. shipped 1,875 tons of fertilizer to a Cuban consignee known as Pereda Ferandez y Cia., of Havana, Cuba. Pursuant to the sale agreement, payment for the fertilizer was to be made in regular installments over a period of one year. It further appears from the record that early in 1960, the balance due from the Cuban consignee was \$31,638.60, and that the Cuban consignee paid an equivalent amount in pesos to a Cuban bank for transmittal to claimant. No transfer of such funds was ever made to claimant.

In the absence of evidence to the contrary and upon consideration of the terms of the sale agreement, the Commission finds that payment to the Cuban bank was made on February 26, 1960.

The Government of Cuba, on September 29, 1959, published its Law 568, concerning foreign exchange. Thereafter, the Cuban Government effectively precluded not only transfers of funds to creditors abroad, but also payment to creditors within Cuba, by numerous, unreasonable and costly demands upon the consignees, who were thus deterred from complying with the demands of the Cuban Government. The Commission holds that Cuban Law 568 and the Cuban Government's implementation thereof, with respect to the rights of the claimant herein, was not in reality a legitimate exercise of sovereign authority to regulate foreign exchange, but constituted an intervention by the Government of Cuba in the contractual rights of the claimant, which resulted in the taking of American-owned property within the meaning of Section 503(a) of the Act. (See Claim of The Schwarzenbach Huber Company, Claim No. CU-0019, 25 FCSC Semiann. Rep. 58 [July-Dec. 1966]; and Claim of Etna Pozzolana Corporation, Claim No. CU-0049, 1967 FCSC Ann. Rep. 46.)

The Commission finds that the property of Smith-Douglass Company, Inc. was lost as a result of intervention by the Government of Cuba. In the absence of evidence to the contrary, the Commission finds that the loss in the amount of \$31,638.60, occurred on February 27, 1960, one day after payment was made to the Cuban bank.

The Commission has decided that in certification of losses on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim No. CU-0644), and in the instant case it is so ordered.

CERTIFICATION OF LOSS

The Commission certifies that BORDEN, INC. succeeded to and suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Thirty-one Thousand Six Hundred Thirty-eight Dollars and Sixty Cents (\$31,638.60) with interest thereon at 6% per annum from February 27, 1960 to the date of settlement.

Dated at Washington, D. C.,
and entered as the Proposed
Decision of the Commission

FEB 26 1969

Leonard v. B. Sutton

Leonard v. B. Sutton, Chairman

Theodore Jaffe

Theodore Jaffe, Commissioner

Sidney Freidberg

Sidney Freidberg, Commissioner

The statute does not provide for the payment of claims against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended, 32 Fed. Reg. 412-13 (1967).)