

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3535

Based on the parties' written submissions

Concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)

DISPUTE:

Robert Murphy (Vaughan), twenty (20) demerits issued for wilful damage of Company property and the loss of wages and one (1) paid general holiday for unjustly being held out of service.

JOINT STATEMENT OF ISSUE:

The Union filed a grievance regarding this matter on July 14, 2005. The Company denied the Union's grievance on August 29, 2005. The grievor admits his scanner was damaged after he banged it on a table in an attempt to keep it from freezing up on the day in question.

The Company viewed this incident as a serious matter and held the grievor out of service pending an investigation as stipulated in the terms of article 6.5 of the collective agreement. The Company conducted its investigation and subsequently awarded the grievor twenty (20) demerits. They did not pay the grievor for the days he was held out of service. This time frame included one (1) general holiday. The Company deemed the grievor unavailable for work due to his status.

The Union grieved that the damage caused by the grievor was not wilful and the awarding of twenty (20) demerits was too severe under the circumstances and in violation of article 6.1 of the collective agreement. The Union further grieved that the grievor's actions should not be construed to fall within the scope and guidelines for holding an employee out of service as contemplated in article 6.5 of the collective agreement and he should be compensated for his lost time.

The Union has further argued that the grievor had qualified to be paid for the general holiday as per article 14.4 of the collective agreement and should have been paid on that basis.

The Company contends that they had just cause to issue the twenty (20) demerits. The Company views the cause of the damages as deliberate and contends that the incident was a serious infraction and they were justified in holding the grievor out of service and he should not be compensated for the lost time.

The Company contends that the grievor's status made him unavailable for work on the general holiday and he was not paid on that basis.

The parties have been unable to resolve the dispute to date.

FOR THE UNION:

(SGD.) A. KANE
REGIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
VICE-PRESIDENT, OPERATIONS

AWARD OF THE ARBITRATOR

On May 19, 2005, the grievor was called in to the terminal at approximately 4:00 p.m. and complained to dispatch that his portable scanner was not working. On the direction of his supervisor, Mr. Carter, the grievor was instructed to complete his duties and, on his return to the terminal, obtain a working scanner to scan the remaining packages.

On his return to the terminal, Mr. Murphy placed the scanner in the recharging cradle. His supervisor, Mr. Carter, then met with him and retrieved the scanner. The screen was cracked and there was also a smudge mark on the screen. Mr. Carter attempted to get the scanner to work without success and the grievor indicated that he had also tried without success. The grievor then advised Mr. Carter that he had dropped the scanner. Mr. Carter determined that the damage was more significant than damage

which would occur from having been dropped and that something more significant must have occurred.

The grievor was interviewed on May 31, 2005. He admitted that he told his supervisor initially that he had dropped his scanner when in fact he hit it on the table out of frustration. He also indicated that he did not intend to damage the scanner in any way. The grievor went on to say in his interview that the scanner was shutting off as it does continually and freezing up. That was the reason for his frustration.

The grievor was held out of service pursuant to article 6.5 when he reported for work the next morning. As a result of being held out of service, the Company did not pay the grievor for the three days he would normally have worked as well as for a general holiday. He was also assessed twenty demerits points which were subsequently reduced to ten demerits during the grievance procedure.

Article 6.5 reads as follows:

6.5 An employee may be held out of service for a period of not more than four (4) working days for infractions of a serious nature. This practice is only to be utilized in cases of alleged infractions of a serious nature where it is in the best interest of the public, the Company or fellow employees. This provision is not to be used as a form of discipline. In the event an employee is held out of service, the interview is to be held as soon as possible.

The Union maintains that the loss of four days' pay, including the earned benefit of a statutory holiday is a heavy penalty particularly where the collective agreement specifies: "This provision is not to be used as form of discipline".

The Company, in its submissions, points out Rule 10(C) of the Company's Instruction Manual:

10. The following Rules, if violated, could be considered cause for immediate dismissal:

...

(C) WILFUL DAMAGE, THEFT, WITHHOLDING COMPANY FUNDS, FAILURE TO SETTLE FUNDS AS INSTRUCTED OR FAILURE TO MAKE DAILY SETTLEMENTS OF FUNDS UPON COMPLETION OF THE DAY'S WORK. [sic]

The Company maintains the fact that rule 10(C) indicates that wilful damage is cause for dismissal underlines the seriousness of the offence from the Company perspective. The Company further maintains that the grievor deliberately damaged an expensive piece of equipment and tried to conceal his actions. Accordingly, it submits that the application of article 6.5 is consistent with the intent and practice of the Company. Further, the Company points out that article 14.4(b) clearly indicates that an employee must be available to work on the holiday in order to qualify for the holiday pay. The article identifies specific exceptions when unavailability on the holiday will not affect qualification for the holiday pay. Being held out of service under article 6.5 is not one of those identified circumstances. Similarly, an employee serving a disciplinary suspension would not qualify nor would an employee on a leave of absence.

The Arbitrator is in agreement with the Union that article 6.5 clearly indicates that being held out service is "not to be used as a form of discipline". However, that is not what occurred here. Article 6.5 does allow the Company, when serious concerns exist, to protect its interests and that of its customers, employees and the public by removing the individual from service.

What occurred here is that the grievor damaged a scanner out of a moment of frustration. His actions are certainly not to be condoned but this is not an infraction which falls within the spirit and intent of article 6.5. Those occasions contemplate situations such as an individual whose very presence on duty would threaten the interests of the public, the Company or his or her fellow employees.

Although the grievor did not come clean with the employer immediately, it does stand to his credit that he was unhesitant in his interview about damaging the scanner in a moment of frustration. His frustration with the equipment continually freezing up resulted in a sudden moment of recklessness. It did not, under the circumstances, and in the view of this arbitrator, amount to wilful property damage as alleged by the Company. The 10 demerits assessed by the Company stands as an appropriate warning to the grievor to control his anger and frustration when dealing with company equipment.

The grievance is allowed. The grievor is to be awarded four days' pay for being held out of service for the four days of service including holiday pay for the fourth statutory holiday.

January 16, 2006

(signed) J. M. MOREAU, Q.C.
ARBITRATOR