Pacific Elevators Ltd. v. Canadian Pacific Railway Co., [1974] S.C.R. 803

Supreme Court Reports

Supreme Court of Canada
Present: Martland, Hall, Spence, Pigeon and Laskin JJ.
1972: December 1 / 1973: August 27.

[1974] S.C.R. 803 | [1974] R.C.S. 803

Pacific Elevators Limited (Plaintiff), Appellant; and Canadian Pacific Railway Company (Defendant), Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Damages — Car derailment due to negligence — Unloading facilities damaged — Reduction in unloading capacity pending repairs — Loss of profit recoverable — Calculation of actual loss.

Two actions were brought by the plaintiff against the defendant for damages arising out of similar accidents which occurred at one of the plaintiff's grain elevators. In each case, as a result of an error made by a railway employee, a car was derailed and plaintiff's unloading facilities were damaged. The railway made good the physical damage and the claims were for loss of profit due to the reduction in the unloading capacity pending the completion of the necessary repairs.

The plaintiff's actions for the sums of $33,658 and $232,594 respectively were allowed in full at trial. On appeal, the judgment of the trial judge was reversed by the Court of Appeal and an appeal by the plaintiff was then brought to this Court.

Held: The appeal should be allowed, the judgment of the Court of Appeal set aside and the judgments at trial varied by directing that the first action be dismissed and that on the second action the plaintiff recover from the defendant the sum of $40,155.

The Court of Appeal erred in failing to give adequate consideration to the fact that there was conclusive evidence that the plaintiff had really suffered substantial loss, although its claim in tort was seriously overstated. Grain cars diverted were the basis on which the claim was to be assessed. The rule followed by railways in making diversions, namely the average of the preceding month, was the reasonable basis for estimating the number of cars lost.

A good case had not been made for a claim of business loss by reason of the first accident. As for the second accident, it was estimated that 573 cars were lost rather than 1,178 as claimed. The profit loss on the 573 cars not unloaded due to the second accident was calculated at $40,155.

APPEAL from a judgment of the Court of Appeal for British Columbia, reversing a judgment of Gregory J. Appeal allowed.

J.P. van der Hoop and L.M. Blond, for the plaintiff, appellant. C.C. Locke, Q.C., and Allan Graham, for the defendant, respondent.

Solicitors for the plaintiff, appellant: Harper, Grey, Easton & Co., Vancouver. Solicitors for the defendant, respondent: Ladner, Downs & Co., Vancouver.

The judgment of the Court was delivered by

PIGEON J.

This Appeal is from a judgment of the Court of Appeal of British Columbia reversing the judgment at trial allowing in full appellant's actions against the respondent railway company for the sums of $33,658 and $232,594 respectively. Appellant's claims are for loss of profit occasioned by similar accidents which occurred at its Elevator No. 1 on April 7 and September 17, 1966. In each case, as a result of an error made by a railway employee, a car was derailed and appellant's unloading facilities were damaged. The railway has made good the physical damage and the claims are for loss of profit allegedly due to the reduction in the unloading capacity pending the completion of the necessary repairs. It was brought in evidence that appellant held business interruption insurance and that these are subrogated actions for the benefit of the insurer. The claims, it was explained, were originally prepared for indemnity under a contract of insurance in undisclosed terms, and they are now submitted in identical form as being for damages in tort.

I find it unnecessary to summarize the oral reasons for judgment in the Courts below. It is clear to me that the Court of Appeal properly disagreed with the trial judge who had brushed aside every objection to the claim as prepared by appellant's chartered accountant. On the other hand I am, with respect, equally satisfied that the Court of Appeal erred in failing to give adequate consideration to the fact that there was conclusive evidence that the appellant had really suffered substantial loss, although its claim in tort was seriously overstated. It must be noted, however, that the Court was faced with a task of exceptional difficulty in the circumstances because the railway, to the very end, persisted in only making objections to the elaborate computations submitted by the appellant, never suggesting any alternative basis on any point. This is, of course, what a defendant is legally entitled to do but, when a claim rests on complex accounting and the basis adopted by the claimant is erroneous, the making of a satisfactory adjudication becomes really arduous. To this it must be added that the expert accountant called by the defence, although raising valid objections against a number of items, never did explain his points in a language that could be readily understood by persons without training or experience in accounting.

There is really no dispute as to the facts. They are all established by conclusive evidence, mostly documentary. Complete information was given respecting appellant's operations at the material time down to a record showing day by day, for a period of eighteen months, the number of each individual grain car diverted to or from it. In the unusual circumstances of this case, I find it necessary to analyse the evidence in the same way as a trial judge because I have to agree that the Court of Appeal has rightly reversed the findings of fact of the trial judge, but on the other hand, I am unable to agree with its own findings.

Grain cars diverted are really the basis on which the claim is to be assessed because, as counsel for the railway pointed out, appellant's revenues and profits for 1966 were up from the previous year. Its inventory was up too, as well as the quantities of grain received, stored and shipped. No ship was diverted from its dock. This does not mean that it suffered no loss

because if, without the disruption caused by the accidents, it would have been able to handle and store still more grain and consequently would have made higher profits, it is undoubtedly entitled to claim the loss suffered although in spite of that loss, its profit was higher than in the immediately Preceding year.

The basis on which the claim was submitted at the trial was a comparison between the average number of cars of grain unloaded daily at Elevator No. 1 with the actual number unloaded in the period when appellant's facilities were impaired as a result of the accidents, with some allowance for reductions applicable to other causes. The selection of the base period was obviously of prime importance. Counsel for the railway suggested that the proper period was a full year. This would mean an average close to 100 cars for a normal working day, (i.e. Saturday and Sunday excluded). On that basis, there would be no loss due to the first accident, the average number of cars unloaded in the period from the date of the accident to the completion of the repairs being just about that yearly average. That would not be a fair conclusion because both accidents occurred at a time when appellant's facilities were taxed to the maximum. The schedule of daily car unloadings shows that cars had been unloaded at Elevator 1 or 3 each of the four Saturdays preceding the April 7 accident although such Saturday work appears to have occurred again only four times in the balance of the year. The September 17 accident occurred just four days after an interruption of two weeks for the audit of the grain stock.

For his computation of the average cars unloaded in a normal working day, appellant's accountant took the ten days preceding the first accident. For the second accident, he took the three days immediately preceding plus the three days following the resumption of operations by the automatic car dumper. In both cases, this came to 130 cars a day. In my view, this was not a fair basis. The period was too short and it was not consistent. A lower average would have been obtained if days subsequent to the repairs, after the first accident, had been taken into account.

It is clear to me that the rule followed by railways, namely the average of the preceding month, is the reasonable basis for estimating the number of cars lost,in a manner which will be fair to both parties. It is a rule already established independently and of reasonably long standing. Everybody concerned was satisfied with it and accepted it as proper. The yearly average would not be fair because it would not be representative of a period in which maximum performance would normally be expected. The varying short term average selected by the claimant's accountant would not be fair either because it is based on unduly short periods, not selected in a consistent and objective manner.

At Vancouver, there is no penalty nor demurrage assessed on export grain, which is essentially what appellant was handling at Elevator No. 1. The practice is for the railways to divert cars from the consignee to another elevator, whenever there otherwise would be a "build up" of cars. The unwritten rule was stated as follows by the railway superintendent, who was retired at the time of the trial:

> ... If in the opinion of the superintendent of transportation elevator A has in excess of eight days' supply on wheels, and another elevator B is able to handle more cars than he has on track, then diversions are made.

A "supply on wheels" means loaded cars somewhere on the railway line. Usually only two days would elapse before a loaded car would reach the yard at Coquitlam where it would be ready to be moved to an elevator track shed for unloading.

The total of daily car unloadings for the month of March 1966 at Elevator No. 1 comes to 2,807 cars. Deducting 62 cars unloaded on two Saturdays makes it a total of 2,745 cars

unloaded in 23 normal working days, i.e. a fraction above 119 cars a day, say 120. This, I think, is the reasonable figure to use for the month of April rather than the aforementioned 130.

Substituting 120 cars a day for 130 as a reasonable estimate of the number of cars to be unloaded under normal conditions during the eleven days when appellant's facilities were affected by the April accident, would reduce by 110 the number of 198 calculated by appellant's accountant. In my view, a further deduction of 31 should be made because appellant failed to have any unloading done on the second Saturday after the accident. The first Saturday followed Good Friday, which was a statutory holiday, and there was a good reason for not attempting to have work done that day. But for the other Saturday, no good reason was given. When pressed on that point, appellant's comptroller finally said:

> ... I am not the elevator superintendent and I can't give you any definite answer as to why more overtime was not worked. Sorry.

I cannot accept, as the trial judge apparently did, that this was not proof enough because the defence had the onus of proving the failure to mitigate the loss. It is not necessary to consider whether this is rather not a case of a plaintiff failing to properly establish his loss. In my view, this case does not fall to be decided on the basis of onus of proof. All the facts are in evidence and the only questions are as to the proper deductions and conclusions to be drawn therefrom. Here, it is shown that appellant did have unloading work done on several Saturdays prior to the accident. It is a reasonable inference that such work was equally possible after the accident unless some good reason appears such as for the first Saturday.

Thus, the appellant's deficiency, in the eleven working days after the April accident, comes down to 57 cars. Was this number really lost? To answer this question one must consider that grain cars were not necessarily lost to an elevator operator because they could not be unloaded on a given day. As previously mentioned, the evidence is that only some six days after the arrival of the cars at Coquitlam was the consignee liable to be considered as having a "build up" necessitating diversion. An analysis of the diversions shows that in the period April 8 to April 22 (both days inclusive), 123 cars were diverted other elevators while 100 were diverted to Elevator No. 1, but in the six following days, only 20 cars were diverted to other elevators while 72 were diverted to Elevator No. 1. Thus, over the whole period, including the six following days, there was no net diversion to others.

> Concerning diversions, Davey C.J. said:
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> It now appears, and I think this point is made somewhat obliquely in the Respondent's factum, that the particular loss that the Respondent says it suffered was not in cars consigned to it and not delivered because of diversions to other elevators by the C.P.R., but in diversions from other companies which the Respondent would have received if its capacity to handle them had not been reduced by the damage.

In this Court, counsel for the appellant contended that a substantial number of cars had been lost to the appellant by stressing the fact that a tabulation of the diversions over a period of eighteen months, from January 1, 1966, to June 30, 1967, established a net diversion to appellant's Elevators No. 1 and 3 of 2,841 cars (4,591 less 1,750 diverted to other terminals). This is an average gain of between 7 and 8 cars per normal working day over that whole period, but there is a decisive reason for leaving that average out of consideration. It cannot properly be used when a short term average rather than such a long term average is used to establish the claim. As we have seen, appellant would have no claim on the basis of the yearly average of cars unloaded. It cannot therefore use a long term average for estimating diversions.

How completely different the picture turns out to be if one moves from a yearly average to a monthly average becomes readily apparent when the diversions for March 1966 are tabulated. The figures are:

Diverted to others..... 191 cars Diverted to Elevator No. 1..... 53 cars
Net diversion to others..... 138 cars

This is an average of 6 cars per normal working day lost by diversions and it is the obvious reason for the Saturday work. Thus, the record shows that the situation with respect to diversions was actually better after the April 7 accident than during the preceding month. This is not hard to understand because appellant's facilities had been promptly restored and practically, during the whole period, only one of the three receiving spouts accessible to the automatic car dumper was not operating. It operated pretty well on two receiving spouts and the shovelling pits were all available.

On the whole, I do not think a good case has been made for a claim of business loss by reason of the first accident. On a reasonable estimate of the unloading possibilities based on the average for the month of March, the deficit was only 57 cars. This does not really represent cars lost because, in the next five working days following the completion of the repairs, it was just about made up by 52 net diversions to Elevator No. 1 instead of substantial diversions to others in March.

The consequences of the second accident were much more severe. Appellant's unloading operations at Elevator No. 1 were completely interrupted for four full working days besides some four hours on the day of the accident and most of the day on which initial repairs were completed. After those repairs, four out of six unloading pits used with shovelling unloading equipment, remained inoperative. The repairs were fully completed only in July 1967 due to this being very old equipment dating from 1924 for which repair parts could not be promptly obtained. However, those inoperative pits restricted operations only when the automatic dumper went out of commission for one reason or another. The tables filed show that this happened infrequently.

For the first period, being the day of the accident, Saturday, September 17, and the following five working days, the claim is for a loss of 585 cars based on an estimated normal average of 130 cars a day. For the month of August, the average would be 115 cars a day, excluding Saturday, August 6, on which 27 cars were unloaded. However, the evidence is that operations in August were somewhat affected by the railway strike, the last day on which cars were unloaded being the 26th. For this reason, the March average of 120 cars a day would, I think, be better justified. Using this figure instead of 130 would reduce the claim by 60 cars making the loss 525 cars for that first period. Subject to a further deduction for cars unloaded at Elevator No. 3, this is, I think, a true loss because it is clear that there was already a "build up" necessitating diversions when appellant's facilities were damaged. Its unloading operations had been shut down for the government audit since the beginning of September and had been resumed only Wednesday, September 14. On Saturday, September 17, two shifts had been worked, the accident occurring during the second shift.

With respect to diversions, the list filed shows 398 cars diverted to Elevator No. 1 in August, only 32 diverted to others. This is an average of 18 net favourable diversions per day over that month of only 20 normal working days. But, in the week following the accident, I have counted 134 cars diverted to others and in the next following week, 131. On the basis of the August figures, 180 cars would have been expected to be diverted to appellant's Elevator No. 1 in those

two weeks, as against only 2 actually received and 265 diverted away. This means a loss of 443 cars which is not so very far from the 585 cars claimed adjusted to 525.

The difference is more than made up by the number of cars unloaded at Elevator No. 3 on the extra second shift that was worked September 19, 20, 21 and 22. On those four days, 325 cars were unloaded at that elevator as against an average of 44 per working day in August, which last average is better than the March average for that elevator. Thus, an additional 149 cars were unloaded in those four days at Elevator No. 3, a fact which, I think, was quite incorrectly disregarded in appellant's claim. Its accountant calculated the cars lost as if Elevator No. 1 had been a separate business operation when, in fact, it was just a unit in the overall undertaking and it was perfectly possible to unload cars at Elevator No. 3 when No. 1 was shut down and subsequently if need be, the grain could be moved for shipment through No. 1. The schedule of daily car unloadings shows that on one of the three Saturdays worked in March, unloadings were actually done at Elevator No. 3 rather than at No. 1. I find it decisive on that point that the claim is for lost carloads of grain. With respect to the 149 cars unloaded on the second shift at Elevator No. 3, the fact is that those cars were not lost.

> Appellant's comptroller said in his testimony:
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> ... We found that after four days, or four nights, that the production was so bad, the operation was so costly, and inefficient, so few extra cars were unloaded over two shifts, over one shift, we felt, in the interests of economy, also because of difficulty in getting the men that were more or less trained, or equipped to shovel, that it was advisable to disband the second shift, which we did, and that accounts for the first figure of 48 on the 23rd of September.

The figures in the exhibits reveal the precise situation. The additional 149 cars unloaded in four days average 37 for each second shift worked. This is only 7 cars less than the average for the first shift. The additional cost per car unloaded on the second shift due to the lower productivity was obviously so trifling that it is not surprising that no figures were submitted, although it is somewhat disappointing that counsel for the defence at the trial did not require them. A good indication of the amount involved is, however, available in the claim documents. A total of $2,475 is mentioned as wages saved due to employees laid off while the unloading facilities at Elevator No. 1 were inoperative and this must include two shifts. Then, the additional cost of unloading cars by shovelling rather than by the automatic dumper is estimated at $3 per car only.. For 149 cars this comes to less than $500. Even doubling this amount on account of low productivity, one gets only $1,000 or about 2/3 the wage cost of one shift. However, by counting as cars lost the 149 which were unloaded at Elevator No. 3, appellant is claiming more than $30,000 as damages when, obviously, its only just claim in respect of those cars is for the additional cost incurred by having them unloaded under less favourable conditions at Elevator No. 3. This claim cannot possibly be for more than a fraction of the wage cost and it will be considered later.

The fact is that the 149 cars unloaded on the second shift at Elevator No. 3 were not lost. A further deduction of 149 must accordingly be made from the number of 525 previously arrived at, thus bringing the number of cars lost in the first period after the accident down to 376. This is in reasonable agreement with the estimated number of diversions some of which were certainly due to the "build up" during the shut down for the grain audit, rather than to the accident that occurred three days only after the resumption of operations.

The claim for October and November 1966, January, February and March 1967 was submitted on a different basis. Appellant was then using the Elevator No. 1 shovelling pits only

when the mechanical dumper was not in operation for one cause or another. On such occasions, only one car could be handled at a time instead of three because there were only two shovelling pits available instead of six. The loss was therefore estimated by adding to the number of cars unloaded on those days by the mechanical dumper while operating, three times the number of cars shovelled while it was inoperative. Up to the average per day for what was taken as a representative period, the difference between the total thus obtained and the actual number of cars unloaded was claimed as a loss.

The first two days for which a claim was made on that basis are October 31 and November 1 for which a total loss of 56 cars was claimed. This was clearly an actual loss. The table of diversions shows that more than that number of cars were diverted to the Saskatchewan Wheat Pool at the beginning of November. I would only adjust the number to 54 by taking c 120 as the proper average to be met rather than 122.

The situation is somewhat different with respect to the loss claimed for January 16, 17, 24 and 25, 1967. There were just a couple of cars diverted to other elevators in the second half of January. However, the appellant certainly missed the substantial diversions from others which it had obtained in December. These totalled 138 with just a few the other way. In January, there were no favourable diversions to speak of and a slight net excess diversions to others. It therefore appears to me that there is a valid basis for the claim although I cannot agree that it was proper to select, as a basis for comparison, the other days of the month of January. The average of 131 obtained in that way was too high. Again taking 120 as the proper daily average, the claim for four days in January becomes 143 instead of 161. I would note that the record shows work done on Saturday, January 21, at the two elevators, No. 1 and No. 3. This shows that the appellant was conscious that the curtailment of the unloading operations meant that it was losing some business and was taking proper steps to minimize that loss.

This is just what I cannot find, with respect to the claim for 326 cars in the week February 20-24 There was no work done on Saturday, February 25, following the completion of the repairs to the mechanical dumper on the 24th. In the whole month, there were only 14 cars diverted to other elevators and it does not appear that appellant did miss a substantial number of favourable diversions. It is true that in the period February 1-18, 70 cars were diverted to Elevator No. 1 and 5 only in the week February 20-24, but there were only 7 cars diverted to it in the week of February 25-March 2. This shows there was no accumulation of cars available for diversions. A curtailment of the unloading activities is not of itself proof of a loss of business, but only of the possibility of such a loss. If there were no cars diverted to other elevators and no favourable diversions missed, there was no loss. I would therefore disallow the claim for February as well as that made for March 20 which is patently unjustified as it is for one day only at a time when the daily average was down to 101. Any cars not unloaded on that occasion could readily be taken care of the following day.

The last item of the claim remaining to be considered is in respect of October 28. On that day, screenings were unloaded, 111 cars were actually handled and it is contended that this low performance was due to the limitation in facilities. I find the evidence on that item totally unconvincing. On the two immediately preceding days for which no claim is made, only 114 cars were unloaded. I would not allow this item.

The addition of the losses allowed gives a total of 573 cars instead of 1 ,178 as claimed for the second accident. This is roughly one half or just about the amount claimed for the first period which, on a broad view of the matter, might well have been taken as an easy estimate. However, as these are pecuniary damages usually considered as susceptible of fairly accurate estimation, I considered it my duty to make a detailed analysis which has revealed, in spite of

the apparent precision of the figures submitted, the large degree of imprecision due to the countless assumptions on which such computations are in fact based.

Before calculating the amount of damages to be allowed, it is unfortunately necessary to recalculate the profit loss per bushel because the computations made by appellant's accountant have badly overstated appellant's average profit per bushel of grain handled. The method adopted has been to add up appellant's gross revenue in a given period and to divide the total by the number of bushels handled. The theory is that no consideration has to be given to the expenses because these do not increase when more grain is handled.

With respect to the storage charges for instance, it is pointed out quite correctly that the costs are all the same whether the bins are full or half full. This is true, however, only if there remains at all times unused capacity at least equal to the quantity of grain claimed to have been lost. In the present case, it would not have been completely true if the whole number of cars claimed as lost on account of both accidents had been allowed. The capacity of Elevator No. 1 is given as 7,111,500 bushels. The reports filed show the maximum stored as being on November 22, 1966, 5,841,763 bushels. This left an unused capacity of 1,269,737 bushels, but the claim to that date was for 850 cars of 1,910 bushels each, or 1,623,500 bushels. This would exceed the capacity by 353,763 bushels or 186 cars. Available capacity in other elevators could not have been considered on a claim disregarding the use of their unloading capacity. As it is, the claim allowed for 573 cars comes to 1,094,430 bushels which is substantially less than the available unused storage capacity in Elevator No. 1 at all material times.

For the cleaning and drying, it was certainly wrong to assume that appellant would have handled a million additional bushels without any expenditure. Appellant's accountant could see, with respect to berthage and wharfage charges that, although there would not be an additional ship docked if there were no grain carloads lost, it was nevertheless proper to allocate that revenue to every bushel of grain because every bushel shipped contributed to earning it, but he did not see that while every bushel cleaned did contribute to the earning of this revenue, it also did contribute to the necessary expenditure incurred for running the plant. The cleaning charges were not, like the berthage and wharfage, merely for the use of the property, but for work done. The only proper basis for a claim on that account would be for the cleaning and drying charges net of current expenditure. However, as there is no other basis available, I will leave these items, as submitted, subject to adjustment by a credit on the claim.

Interest and exchange should obviously be disallowed as the trial judge noted, although he thought, wrongly in my view, that it was not worth the trouble. These items are clearly unrelated to the loss and the same must be said of "Trading".

The miscellaneous item was also incorrectly claimed. The evidence is that it includes such things as rebates. From an accounting point of view, it is quite correct to include a rebate in the revenue because the refunded expenditure is on the other side of the ledger and is, therefore, deducted in the computation of the profit, but when a loss of profit is claimed without deduction of expenditures, this becomes quite wrong, it is nothing but an unjustified inflation of the profit.

This equally applies to the overtime loading. This is a charge made to ships to cover the increased expenditure due to overtime work in loading. There is no true profit in that, at least not on the record in this case, and it is unrelated to the loss.

The Pellet Plant revenue was also erroneously included in the claim for loss of profit. The evidence is clear that this is a separate operation which suffered no interference by reason of the accident. It was admitted in evidence that the appellant could and did obtain supplies from others when needed for the operation of that plant. Even if its own supplies were insufficient on

account of the accident, appellant was in the same situation as if merchandise readily obtainable elsewhere had not been delivered as contracted for, it did not suffer a loss thereby.

The screenings are another large item which was also improperly claimed. It was explained that this is foreign material that is removed from the grain. The proceeds are pooled and distributed to the shippers on a percentage basis on the amount of foreign material that has been in their cars. There was no profit lost to anyone on account of the screenings when cars were diverted. The appellant did not have to pay the shippers for the screenings from those cars and the shippers would have to look for payment to whatever elevator their grain was diverted. Appellant's obligation to shippers in respect of the cleanings was likened to its obligation to account for its net profit at the end of the year. In my view, this last-mentioned obligation was correctly considered as not being a true debit and as not preventing recovery for lost profit, but the obligation to pay for the screenings was not an allocation of profit, it was a true debit: the obligation was to pay a sale price, a debt that would not arise on diverted carloads. It would have constituted a loss of profit only if it had been shown that on the carloads diverted to other elevators, the shippers got nothing for the screenings. This does not appear and cannot be presumed. Appellant can claim as a loss the profit it did not make, not the price of merchandise it did not receive and did not have to pay for.

Finally, everyone seems to have overlooked that appellant's comptroller said:

> Q. Is the revenue to Pacific Elevators the same from a car that has been diverted to them, the same as the revenue from one of its own cars?
>
> A. No, it isn't.
>
> Q. Would you explain that?
>
> A. A car that is diverted to Pacific Elevators by the railway belonging to, for example, the Alberta Wheat Pool, the Pacific Elevators would pay the Alberta Wheat Pool if it was a car of wheat one and a half cents a bushel, or a car of coarse grains, one cent per bushel.
>
> Q. So this would be less than you would be receiving on one of your own cars?
>
> A. That is correct.

The net amount paid by appellant for diversions appears as a very substantial sum in its expenditures. As the cars diverted away or the lost favourable diversions were 85 per cent wheat, the claim must be reduced by 1.425 cents per bushel. Appellant has received this sum on the cars diverted to others and would have been obliged to pay it for the cars diverted to Elevator No. 1.

The following table gives the result of the required adjustments to the calculation of earnings per bushel submitted as ex. 19. As the number of cars lost in November is extremely small, I am making no separate computation and will be using the figure for October in the calculation of the actual loss.

ADJUSTMENT OF EARNINGS LOSS PER BUSHEL

3 months ended September	4 months ended October	7 months ended January	
$	$	$	Items Disallowed

Interest and
exchange..... 22,363 26,519 56,909
Miscellaneous..... 111,663 885 84,845
Overtime loading... 9,900 12,210 24,640
Pellet Plant..... 98,780 131,021 249,916
Screenings..... 551,934 739,690 1,426,656
Trading..... 14,316 139,338 154,214 ----------
Total..... 808,956 1,049,663 1,997,180
==========
No. of bushels
handled..... 15,113,641 21,409,938 40,281,254
==========
Claim per bushel... 10.570c 10.998c 11.181c
Disallowed..... 5.353 4.903 4.958 ----------
Loss per bushel.... 5.217c 6.095c 6.223c
Diversion charge... 1.425 1.425 1.425 ----------
Net loss per bushel 3.792c 4.670c 4.798c
==========

CALCULATION OF ACTUAL LOSS

Month	Cars lost	Bushels lost	Net loss per bushel	Actual loss
September....	376	718,160	3.792c	$27,233
October.....	54	103,140	4.670c	4,817
January.....	143	273,130	4.798c	13,105
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Total...	573			$45,155
	===			=======

This gives a total of $45,155 as the profit loss on 573 cars not unloaded due to the second accident instead of $244,869 claimed for 1,178 cars before considering the credits to be allowed. As I have excluded from the loss the cars unloaded on the second shift at Elevator No. 3, the credit of $2,475 for the saving of wages due to laid-off employees at Elevator No. 1 must be reduced by more than one-half in order to allow for the reduced efficiency. I will cut it down to $1,000 and will also completely eliminate the credit for the additional cost of unloading by shovelling, because I have dealt with the reduced efficiency as resulting in the re-scheduling of the unloadings.

As to the last item, the additional saving in expense, it must be partly retained in order to allow for the inclusion in the earnings loss of the full gross revenue from cleaning and drying charges. Having more or less cut in half the number of carloads lost, I will make this credit $4,000 instead

of $8,000. This is somewhat less than half the cleaning and drying revenue on 1,100,000 bushels. Thus, the total credit against the loss of earnings which I think proper to allow, comes to $5,000 bringing the amount for which appellant is, in my view, entitled to obtain judgment to $40,155.

It does not appear to me that any deduction on account of income tax should be made as contended by counsel for the railway. The evidence in this case was that appellant paid no income tax because all its profits went to some grain companies which were shipping under contractual arrangements so providing. Furthermore, nothing shows that the compensation for the business loss in question will be treated for income tax purposes otherwise than the lost income would have been.

Bearing in mind that the first action fails entirely and the second succeeds for only a sixth of the claim, that the first and the second appeal were both necessary but for partial success only, I feel justice will best be done by allowing no costs in any Court.

I would therefore allow the appeal, set aside the judgment of the Court of Appeal, and vary the judgments at trial by directing that the first action be dismissed and that on the second action the plaintiff recover from the defendant the sum of $40,155.

Appeal allowed.
