Harris #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Appointment

Under Title II of the Railway Labor Act, as amended, the parties entered into a collective bargaining agreement as amended February 8, 1988, which provides in Article 15 for the appointment of a System Board of Adjustment that has jurisdiction to hear and decide disputes "which may arise under the terms of this Agreement". The present Board was designated to hear and decide the issues involved in the instant case.

The arbitration hearing was held on January 14, 1993. The parties presented testimony, written evidence and arguments to support their respective positions. The System Board has met in executive session to discuss the case and it is ready for final decision.

Background

On March 12, 1992, the Employee was discharged from the Employer because on the previous day he had been "observed causing damage to a vehicle parked in the Employer parking lot by scratching the side of that vehicle with a sharp object as you walked by it". The Employee had been employed for four years by the carrier as a mechanic at the City 1 heavy maintenance facility.

Facts

Person 1, a supervisor in the frequent flyer customer service department, testified that on March 11, 1992, he left his office at about 2:15 p.m. for a late lunch with Person 2, another supervisor in the frequent flyer department. He stated that they left the building and were walking through the parking lot on their way to his car, which was parked at the northwest end of the lot, when he noticed a man (the Employee) walking behind some cars near the water tanks. He said that because he was aware of a memo from security regarding vandalism to parked cars[1]/ he had kept his eyes on the Employee. Person 1 said he noticed that the Employee turned between two cars, one of which belonged to an employee in his section, Person 3. The Employee took his hand out of his pocket and made a wave-like motion starting from the handle of the door going up and then down. As that happened he remarked to Person 2, who was not looking in that direction, "Did you see that guy scratch Person 3's car?" He then said to Person 2, "I can't believe what that guy did." The Employee then waved and said hello to them as they were looking in his direction. Person 1 said they continued to his car, got in, and then drove to Person 3's car. They got out and went over to the car and saw a large scratch on the driver's side door. He said that it looked like a fresh scratch. He then decided to drive to the guard shack to report the matter and as they did so, Lieutenant Person 4 of the security service was walking out of the building making hand signals

[1] The memo, dated February 4, 1992 from Corporate Security, stated:
In recent months there has been a problem with vandalism to cars parked in the OMF perking tot. The vandalism has taken the form of tires flattened and scratches to painted surfaces. The cost incurred by our fellow employees has been considerable.
Measures have been taken and continue to be taken in an effort to identify the person or persons responsible for these acts the most effective measure, however, that can be taken is the vigilance that each of us can exercise over our own and each other's vehicles.
Please be alert to any act of vandalism and immediately report it as indicated below. Hopefully, by working together, we will be able to soon identify the perpetrator(s) and put an end to this activity.

for them to stop. Lieutenant Person 4 asked whether they had seen what had happened and Person 1 said that he had. Person 1 said it was Person 3's car, that they were going to lunch and that they would make a statement when they returned.

Person 1 made such a statement when he returned. He also indicated that later that afternoon he returned to make a statement for the police. He said that at the time he first observed the Employee he was about 70 feet away and had an unobstructed view over the parked cars to where the Employee was walking. He said the Employee made a continuous motion when passing the door of the car and did not stop or rest his hand in one position. Person 1 indicated that because the Employee was walking on the grass at the edge of the parking lot, rather than on the roadway nearer to the building, he thought the Employee was acting suspiciously and observed him. Person 1 stated that at the time the Employee walked next to Person 3's car, Person 1 was two rows of cars away but in line with Person 3's car. He further indicated that when the Employee said "Hi" to them they were walking in opposite directions and had their backs to each other, but both had turned to look over their shoulders.

Person 2 testified that he and Person 1 left the building between 2:15 and 2:30 p.m. to go to Person 1's car. As they walked toward the car, Person 1 made the comment, "Did you see that guy scratch Person 3’s car?" Person 2 then looked in that direction and saw the Employee at the front of Person 3's car. They then took a few steps and made eye contact with Employee who waved and they responded. They walked to Person 1's car, drove back to look at Person 3's car which had a scratch, and' then proceeded to front of building where they spoke to Lieutenant Person 4, asking him whether he had seen what they had seen. They went to lunch and upon their return were asked about the incident.

Person 4, an employee of ITS Security who in March 1992 was a Lieutenant, testified that he was assigned to observe the Employee for several weeks and on March 11, 1992 was stationed to observe the parking lot from the third floor stairwell at the northeast corner of the building. He began his observation at about 2:00 p.m. and did not see anyone pass Person 3's car prior to the incident involved in this case.

Lt. Person 4 said it was a clear day and he observed the Employee drive into the parking lot and park his pickup truck in the row alongside of the water tanks. He stated that during the time of his observation of the Employee, the Employee always parked in this row. The Employee got out of the truck, turned away from the building and walked along the grass at the end of the parking lot toward the corner of the building. The Employee then walked between two cars, one of which was Person 3's car, and "made a motion beside the car like scratching the vehicle". He said he could see the side of the car, but he could not actually see the door handle or the metal side panel.

Lt. Person 4 said he left the building and stopped Person 1, who he knew, to ask whether he had seen the incident and then went over to Person 3's car and saw that it had been scratched. He said the scratch was fresh, without rust. He then reported the matter to Person 5, who went out to the car with him and examined it. He then filed a report on the incident.

Person 5, Manager of Heavy Maintenance in City 1, testified that on March 11, 1992, Lt. Person 4 reported "He scratched another car." Person 5 said, "Who?" Lt. Person 4 replied the Employee had. Person 5, with Lt. Person 4 and Person 6, Director of Heavy Maintenance in City 1, and Person 7, the second shift supervisor, went out and examined the car. Person 5 said he "rubbed his finger on the scratch and paint flakes pushed up in front of his finger and some fell to the ground". They then returned to the office and Person 5 asked that Person 8, the Local Chairman

of the IAM, be called. When Person 8 arrived, he and Person 5 went back to the car. Person 5 showed Person 8 the fresh scratch and then took pictures of it with his Polaroid camera. Person 5 indicated that he did not believe that the car had been moved after it had been scratched.

Person 9, a passenger service agent in the frequent flyer department, testified that it was his car which had been scratched. He said he first saw the scratch when a police officer showed it to him on March 11, 1992. He said he arrived at work at about 7:50 a.m. and did not move his car during the day. He said he had not given the keys to his car to anyone and that there had not been a scratch on the car when he came to work. He stated that the door had been repainted in late January, 1992, when the Nissan dealership had repaired the left front fender.

Person 3 testified that he had brought criminal charges against the Employee, but that the Employee had been found not guilty of any violation of law. He said the judge had said that while the witnesses had been creditable that it had to be proven beyond a shadow of a doubt that the Employee had committed the act, and so had to rule in favor of the Employee.

Person 6, Director of Heavy Maintenance, testified he saw the scratch on the car when he went out with Person 5 and he had investigated the incident. He spoke to the Employee and asked him, in the presence of his union representatives, what happened. The Employee said he parked his car and then entered the building and clocked in. He signed a statement to that effect at 3:56 p.m. After Person 6 discussed the situation with the Labor Relations Department, it was decided to terminate the Employee because of his violation of the Rules of Conduct. Person 6 stated that the Employee denied that he had scratched the car but he gave the Employee his termination notice nonetheless and asked him to leave the property.

The Employee testified that he has worked for the Employer for almost four years, having previously worked for 20 years for another airline and that he had worked in the aviation

industry since 1952. The Employee said he had pulled into a space "head first", got out of the truck and walked toward the grass area to zip up his coat, then walked toward the water tanks and turned between two parked cars. He walked by Person 3's car and touched the scratch which he saw on the car. In response to a question he said, "This is the thing I do. I've worked aircraft repair all my life. To determine the depth of it and what it would take to fix it and all that, I automatically touched it." Employee said he thought, "It was terrible; that it was a really good paint job ... and that it had been scratched." On cross examination, he said he only checked the depth and did not notice whether there were any paint flakes. He said he doesn't normally check scratches, but did this time because the scratch was so obvious.

The Employee said he then saw Person 1 and another man. Person 1 was glaring at him and he waved at Person 1 who waved back. He then continued into the building. The Employee said he thought it was about 2:30 p.m. when he went into the hangar. He said he then "went on downstairs, punched in and went to the break room and got into a card game." He said he punched in immediately after he went through the parking lot, about 2:35 p.m. He said that was the usual time he punched in; that he tried to get in about one-half hour before work time. When shown a record[2] that he had punched in on March 11, 1992 at exactly 3:00 p.m., Employee indicated that he did not have the same recollection. Employee said that being shown a record that he had not punched in at the time he normally did, did not make him recall anything differently. He said he was "trying to recall whether the clocks weren't working that day, because ordinarily I go straight to the clock and punch in when I come in." The Employee stated he did not believe that Person 1 could have seen him put his finger on the scratch.

[2] Employer records disclosed that during 1992, when Employee was stationed in Winston-Salem, he had clocked in between 2:30 and 2:40 p.m. each day except for March 11, 1992.

Person 10, a mechanic, testified that he and two other mechanics, Person 11 and Person 12, attempted to re-create the situation which occurred on March 11, 1992. He said that Person 12 took pictures from various locations. Person 10 stated that he could not see the doors of the cars across two lanes of parked cars, although he could see Person 11's head and shoulders even though he is 6'6" tall. He said it is between 460 and 500 feet between the building where the guard was standing and the scratched vehicle. He indicated that there have been instances of cars being broken into both before and after the incident involved in this case, and that he knew about such instances because he had been the Local Chairman of the Union prior to Person 8.

Person 11 testified that he was involved in the taking of the pictures. He said that he had worked with the Employee who was well-liked by his peers and was a competent mechanic. He stated that a lot of his fellow workers were upset when the Employee was charged with the vandalism.

Person 12 testified that he used a 35mm camera with a 50mm lens, without any filters, to take the pictures. He said the pictures were taken within two weeks of the incident and that he had not known what cars were actually parked in the various spaces at the time of the incident so he could not re-create the exact situation of the day of the incident. He said that the same evidence was presented at the criminal trial as at the earlier, third step grievance hearing held by the Employer. Person 12 said he was present during Employee's testimony at the third step hearing and that Employee had testified at the end of February that he had been paged at work.

Person 8, a mechanic and Local Chairman of Union, testified that he had gone out with Person 5 to examine the car. He said he saw paint chips only in the area of the scratches and saw some white dust in the area of the scratches. He said that some of the series of scratches were on the paint only and some of them were through the paint down to the primer. Person 8 said that at the third step hearing, the Employee had testified that' during February he had been paged to go to

the foreman's office and that the person who had paged him would have been Person 13. Person 8 testified that there were two incidents of car scratching, one before and one after the Employee's termination, but the incident after the Employee's termination was not reported to security or to management.

Person 14, a mechanic in the inspection department who also operates a separate maintenance and painting business for aircraft and cars, testified that he was present when the Employer asked the Employee to write his initial statement as to what had happened, and he had told the Employee to write exactly what happened and that the Employee did so.[3] No one asked to examine the Employee's hands or whether or not the Employee had a key in his pocket.

Person 14 stated that after examining the car, he attempted to duplicate the scratch the Employee was alleged to have made. He stated that, based upon his experience in his work, the scratches on the car were made going from the front of the car to the rear because all scratches start light and get heavier as more pressure is applied. He said that he noticed chips when he examined the vehicle a few days later. He stated that when he scratched his cars as an experiment, he noted that there were paint chips everywhere and they both fall to the ground and stick to the vehicle. He said that it was difficult to get the paint chips off his hands and it took some time to wash them off.

Person 13, a secretary in the maintenance department, testified that one of her job functions is to page individuals. She stated that she did not page the Employee during February, 1992 about an incident where a car was scratched.

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[3] Employee's statement, exactly as written, reads:
Locked truck, stepped up on curb, put on my cost. Came diag. across parking lot, came in building end clocked in.

Issue in Dispute

Was the action taken by the Employer in this case proper, based on all the facts and circumstances involved?

Applicable Posted Rules of Conduct

> Infractions of any of the rules listed below may lead to disciplinary action or discharge. Such discipline may include warnings (oral/written), suspensions without pay or, in cases of serious violations, dismissal without further warning may result where the facts warrant.
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> 8. Perform no acts of willful negligence or deliberate destruction to Employer property or property under control of the Employer.
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> 21. Threatening, intimidating or otherwise interfering with other employees at any time is prohibited. This includes off-duty periods.

Discussion

Most of the essential facts involved in this grievance are not in dispute. The car owned by Person 3 was scratched sometime on March 11, 1992. The Employee was observed by Person 1, Person 2, and Person 4, and admitted being next to Person 3's car shortly before the scratches were discovered. While passing the car, the Employee took his hand out of his pocket and placed it on the side of the car.

At this point the testimony differs. The Employee claims that all that he did was to place his finger on a scratch to determine its depth. Person 1 claims that he saw the Employee make a wave-like motion toward the front of the car.

If Employee's testimony is correct, another individual had appeared earlier and created the scratches. If Person 1 is correct, the scratches were created by a back-to-front motion on the side of the car.

Person 14 testified that it appeared that the scratches had been created by a front-to-back motion with pressure being increased as the object creating the scratches was drawn toward the rear of the car. He indicated that it is normal for damage to increase in severity as pressure is increased. Person 14's testimony was quite plausible. His testimony regarding the increasing pressure as an individual attempts to scratch a painted surface was convincing. However, his conclusion that the scratch at the door handle was at the end of the motion, rather than the beginning is less convincing. The only evidence of the depth of the scratches is from the photographs which were taken. These show that the deepest scratches were at the center of the series, with the initial scratch at each end being quite light. While it may be harder to begin scratching a car like Person 3's at the door handle, the evidence does not show it to be impossible.

The Board concludes that it was possible for the scratches to have been started at either end of the series.

The union offered a great deal of testimony and pictures to prove that Person 1 could not have observed the Employee making the motion which he described as having been made by the Employee. The Board actually examined the site and observed the location where Person 3's car had been parked, as well as the places from which the witnesses stated that they had observed the Employee. The only conclusion that can be drawn is that whether or not Person 1 could have seen the Employee over the vehicles parked in the two rows between where he was walking and where Person 3's car was parked would have depended upon the types of vehicles parked in those two rows. If the vehicles were pickup trucks, visibility would have been quite restricted. If the vehicles were small cars, visibility would have been quite good considering Person 1's height. No one took a picture of the general scene on March 11, 1992 and there is no way to

disprove the accuracy of Person 1's statement that he could clearly see the Employee at the time he was alongside of Person 3's car.

The carrier has attacked the Employee's explanation for the reason that he walked on the grass behind the cars, citing Lt. Person 4's testimony that the Employee had not walked that way during the previous two weeks when he had been under observation. The carrier may be correct; however, while following a habitual path may be normal, it may also be true that the Employee did not feel he could properly close his bulky parka while standing between the parked vehicles, and so went onto the grass behind the vehicles. It is impossible to know why the Employee chose the path that he did. Either he scratched Person 3's car or he was in the wrong place at the wrong time.

Because the Employee's testimony differs from that offered by the Employer in one essential fact, it must be examined in detail and its credibility weighed. The Employee stated that after seeing Person 1 and Person 2 and waving at them, he proceeded directly to clock in and then went to the break room where he participated in a card game. The carrier offered evidence to show that after having been seen alongside of Person 3's car, the Employee did not clock in as he testified. The report shows that the Employee clocked in on March 11, 1992 at exactly 3:00 p.m., his starting time. It also shows that the Employee's clock-in times for the first three months of 1992 contain no other instance of his reporting less than 25 minutes before his scheduled starting time. The Employee's response to this evidence was a statement that the clock must have been wrong. Neither the Employee nor the union offered any evidence to back up the assertion that the clock was not functioning properly on that particular day alone, and it cannot be credited.

The Board finds the Employee failed to tell the truth about what he did after leaving Person 3's car, and this throws into doubt his statement that he merely touched the car with one finger to

feel the depth of the scratches. Furthermore, as pointed out by the Employer, other testimony given by the Employee regarding his having been paged at work during February is called into question by the denial of Person 13 that she had paged him.

The union has attempted to undermine the credibility of Person 1's testimony that he saw the Employee make a wave-like motion from the front to the back of the car, however, since Person 1 was observing the Employee while walking and talking with Person 2, it is possible that he was in error as to the direction of the motion which he saw. Even if the union had shown, which it did not, that the scratch could only have been made by a front to back motion, any doubt as to the direction of the motion which scratched Person 3's car is not sufficient to destroy the general credibility of Person 1's testimony.

The Board concludes that it cannot believe the Employee's explanation of what happened. That being the case, the Board must consider whether there is sufficient evidence to conclude that Employee was guilty of scratching Person 3's car.

The union has pointed out that the Employee was found not guilty of the criminal charge of Malicious Injury to Property by a State court. It was noted that in that proceeding the Judge stated that no motive by the Employee for the scratching of Person 3's car had been shown. None has been shown in this proceeding. Nonetheless the burden of proof is different in the two proceedings. In a criminal case, the prosecution must prove beyond a reasonable doubt that the defendant committed the act of which he is accused. In an arbitration proceeding, even one involving the discharge of an employee, the standard of proof is less. Phrases like "preponderance of the evidence" are used to show that while a heavy burden is imposed, an employer is not required to continue the employment of an individual who the employer can reasonably believe violated the normal rules of conduct which are applicable to all employees.

The Board concludes that the carrier has met its burden of proof. Clear and convincing evidence placed the Employee next to Person 3's car. Such evidence also disclosed that immediately after the Employee was seen next to it, scratches were noticed on the car. The Employee offered no reasonable explanation of his action and failed, even after noting that Employer supervisors noticed his presence next to a car which had newly sustained scratch marks, to report the scratches to security. The Employee knew that there had been at least one other car scratched in the parking lot, yet he did not report the "terrible" scratch he saw to anyone. Accordingly, the Board finds that there was clear and convincing evidence to support the carrier decision, and so just cause to discharge the Employee.

Award

The grievance is denied.