



Billing for Unproductive Time Beyond Accountant's Control

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This class is dedicated by:

Josh Frankel: Lilui Neshmas Batsheva Blima a"h whom we miss dearly, and recognizing HaRav Moshe Yosef HaLevi Yeres for his incredible efforts in spreading Torah.

Jeremy and Hadassa Pertman

Malka and Allan Rutman

Vignette #1 – Jon, a computer programmer, spends all day working on his laptop. Just before the end of the day the computer crashes and the work done all day is lost. Can he still expect payment?

Vignette #2 – Jill experiences a power or connectivity outage while consulting and loses 15 productive minutes of her workday, does she need to make it up?

Vignette #3 – Sick of working remotely from his small apartment, Jack decides to work remotely from his vacation home. After flying to his cottage, he realizes he left his laptop at home and only has his smartphone to work with. Can he bill per hour at the same rate despite his lower productivity?

1. Re Peelle Co. Ltd. and United Steelworkers (1986) – 23 L.A.C. (3d) 1

The issue in dispute in this matter is whether employees sent home from work prior to the completion of their scheduled shift because of the travel difficulties caused by a severe blizzard are entitled to be paid for the full shift or for the minimum four-hour reporting allowance provided under art. 13 of the collective agreement. The company sent home all of its employees on the day in question...

- The practice of the company in the past has been to compensate employees for a full shift when they are sent home after noon for whatever reason. This has happened once or twice per year for a number of years. The union maintains that on some of these occasions the employees had been sent home before noon.
- Mr. McCandless, in conversation with Mr. Erney, decided to close the plant in order to ensure that the employees could return home and the employees punched out shortly before 9:30 a.m.
- The storm, although it disrupted travel outside the plant, had no effect on the work inside the plant. If the decision had not been made to close the plant there was sufficient work to occupy all 45 employees for the balance of their shift.
- Mr. McCandless spent an hour in the plant parking-lot after the plant had been closed assisting employees to leave the parking-lot.

2. Nova Scotia Power Incorporated's (Re), 2014 NSUARB 163 (CanLII), <<http://canlii.ca/t/gdt11>>

IN THE MATTER OF A REVIEW of NOVA SCOTIA POWER INCORPORATED'S state of preparedness and response to post-tropical storm Arthur

1] On July 10, 2014 Premier Stephen McNeil asked the Nova Scotia Utility and Review Board ("Board") to begin a review process investigating the state of preparedness and the response of Nova

Scotia Power Incorporated ("NSPI") to post-tropical storm Arthur ("Arthur"), which occurred on July 5, 2014. A similar request was also received from the PC Caucus on July 10, 2014.

[2] The Board agreed to undertake such a review and determined to approach the process in two phases: firstly, to investigate on a short timeline, matters which might be corrected in the near term, recognizing that the province of Nova Scotia had just entered hurricane season which lasts until November; and secondly, other items which may take more time to correct would be investigated on a longer timeline. In its letter dated July 16, 2014, the Board directed NSPI to provide a report with the following scope:

1. The cause of the power outages, what failed, an outline of the restoration efforts, and an explanation as to why it took the time it did to reestablish service;
2. Details with respect to the communication system failures that appear to have taken place during the course of the storm, particularly in light of the significant investigations and expenditures which were made on NSPI's system following a similar failure during Hurricane Juan and the storm of November 13 and 14, 2004. NSPI should outline any action it is taking, or proposes to take, to correct the problems;
3. An outline of NSPI's current practices with respect to vegetation management, including, specifically, in the affected areas, and whether those practices need to change as a consequence of the failures during post-tropical storm Arthur;
4. Any external benchmarks or metrics by which NSPI's performance may be judged.

What is considered beyond one's control?

To what extent should you prepare for the unknown?

אונס – circumstance beyond your control

פשיעה – Negligence – you should have been more careful but weren't

3. Mishnah Bava Metzia Chapter 6 Mishnah 9

זאב אֶחָד, אֵינוֹ אֹנֵס, שְׁנַי זְאֵבִים, אֹנֵס. רַבִּי יְהוּדָה אוֹמֵר, בְּשֵׁעַת מְשַׁלְחַת זְאֵבִים, אִף זְאֵב אֶחָד אֹנֵס. שְׁנַי כְּלָבִים, אֵינוֹ אֹנֵס. יָדוּעַ הַבְּבִלִי אוֹמֵר מִשּׁוּם רַבִּי מֵאִיר, מְרוּחַ אֶחָת, אֵינוֹ אֹנֵס, מִשְׁתֵּי רוּחוֹת, אֹנֵס. הַלִּסְטִים, הָרִי זֶה אֹנֵס. הָאָרִי וְהַדֵּב וְהַנְּמֵר וְהַבְּרָדָלֵס וְהַנְּחָשׁ, הָרִי זֶה אֹנֵס. אֵימְתִי, בְּזִמְן שֶׁבָּאוּ מֵאֵלֵיהֶן, אֶבֶל אִם הוֹלִיכֶן לְמִקּוֹם גְּדוּדֵי חַיָּה וְלִקְטִים, אֵינוֹ אֹנֵס:

If one wolf [attacked the flock that he was watching] it does not count as an unavoidable accident [for which no blame is placed on the guardian]. Two wolves do count as an unavoidable accident. Rabbi Judah says: "In a time where wolves are commonly attacking the settlements, even one wolf is considered to be an unavoidable accident." Two dogs do not count as an unavoidable accident. Yadua the Babylonian said in the name of Rabbi Meir says: "If [two dogs came] from one direction they do not count as an unavoidable accident, but if [they came] from two directions they count as an unavoidable accident. A bandit counts as an unavoidable accident. A lion or a bear or a leopard or a panther or a serpent counts as an unavoidable accident. When [is this so]? When they come of themselves. But if he took the flock to a place of wild animals or bandits they do not count as an unavoidable accident. (Sefaria Translation)

4. Mishnah Bava Metzia Chapter 6 Mishnah 10

מתה כדרכה, הרי זה אנס. סגפה ומתה, אינו אנס. עלתה לראשי צוקין ונפלה ומתה, הרי זה אנס. העלה לראשי צוקין ונפלה ומתה, אינו אנס. מתנה שומר חנם להיות פטור משובעה, והשואל להיות פטור מלשלם, נושא שָׁכַר והשוֹכֵר להיות פטורין משובעה ומלשלם:

If a beast died a natural death this counts as an unavoidable accident [for which a hirer or paid guardian is not liable]. But if he tortured it and it died it does not count as an unavoidable accident [and the hirer and paid guardian would be liable]. If it was led up to the top of a crag and it fell down and died, this does not count as an unavoidable accident. An unpaid guardian may make a stipulation that he will be exempt from taking an oath, and a borrower [may make a stipulation that he will be exempt] from making restitution, and a paid guardian and a hirer [may make a stipulation that they will be exempt] from taking an oath or from making restitution. (Soncino Talmud translation)

Different types of Guardians and their liability levels

5. Mishnah Bava Metzia Chapter 6 Mishnah 8

ארבעה שומרין הן. שומר חנם, והשואל, נושא שָׁכַר, והשוֹכֵר. שומר חנם נשבע על הכל, והשואל משלם את הכל, ונושא שָׁכַר והשוֹכֵר נשבעים על השבויה ועל השבויה ועל המתה, ומשלמין את האבדה ואת הגנבה:

Those that guard [gathered] produce may eat from it because that is the custom of the land and not because that is the law of the Torah. There are four kinds of guardians: an unpaid guardian, a borrower, a paid guardian and a hirer. An unpaid guardian may take an oath [that he had not been neglectful] in every case [of loss or damage and be free of liability]. A borrower must make restitution in every case. A paid guardian or a hirer may take an oath if the beast was injured, or taken captive or dead, but he must make restitution if it was lost or stolen. (Sefaria Translation)

6. Mishnah Bava Metzia Chapter 6 Mishnah 6

כָּל האַמְנִין, שומרי שָׁכַר הן. וכלן שאמרו, טל את שלחך והבא מעות, שומר חנם. שמר לי ואשמר לך, שומר שָׁכַר. שמר לי, ואמר לו הנח לפני, שומר חנם:

All craftsmen are accounted paid guardians. But all that have said, “Take what is yours and give me the money”, are accounted unpaid guardians. If one man said to another, “Guard that for me and I will guard this for you”, he is accounted a paid guardian. If one said, “Guard this for me”, and the other said “Put it down in front of me”, he is accounted an unpaid guardian. (Sefaria Translation)

7. Rambam, Maimonides (12th century, Egypt) Mishneh Torah, Hiring Chapter 1:1

ארבעה שומרים נאמרו בתורה ושלשה דינין יש להם. ואלו הן הארבעה שומרין. שומר חנם. והשואל. ונושא שָׁכַר. והשוֹכֵר:

Four guardians have been mentioned in the Torah, but only three rules govern their liability. The four guardians are: 1) the gratuitous guardian 2) the borrower, 3) the paid guardian, and 4) the hirer.

ואלו הן שלשה דינין שלהן.

[א] שומר חנם שנגנב הפקדון ממנו או אבד ואין צריך לומר אם נאנס הפקדון אנס גדול כגון שהיתה בהמה ומתה או נשבת הרי זה נשבע וישמר כדרך השומרין ופטור שְׁמָאָמֵר (שמות כב ו) "ונגב מבית האי" וגו' (שמות כב ז) "ונקרב בעל הבית אל האלהים".

The three rules that govern their liability are:

a) A gratuitous guardian from whom the deposited object was stolen or lost, and needless to say if it was overcome by a major accident, as in the case of an animal that dropped dead or was carried off,

may take an oath that he had guarded it properly and be free from liability, as it is written: "When a man gives money or goods to another for safekeeping, and they are stolen from the man's house ... the owner of the house shall depose before the judges ([Exodus 22:6-7](#)).

[ב] השואל משלם הכל בין שאבד דבר השואל או נגנב בין שארעו אנס גדול מזה כגון שמתה בהמה השואלה או נשברה או נשבת שקף פתוב בשואל ([שמות כב יג](#)) "ונשבר או מת בעליו אין עמו שלם ישלם".

b) A borrower must make restitution in every case, whether the object borrowed was lost or stolen or overcome by a major accident, as when a borrowed animal dropped dead or was injured or carried off. Concerning the borrower it is written: "When a man borrows [an animal] from another, and it was injured or died, its owner not being with it, he must make restitution" (13).

[ג] נושא שקר או השוכר שניהם דין אחד יש להן אם נגנב או אבד הדבר השוכר או שנטל שקר על שמירתו הרי אלו משלמים. ואם ארעו אנס גדול מזה כגון שהיתה בהמה ומתה או נשברה או נטרפה הרי אלו נשבעין ששאנסה ופטורין ששאמר ([שמות כב ט](#)) "ומת או נשבר או נשבה אין ראיה" ([שמות כב י](#)) "שבעת ה' וגו' וכתוב ([שמות כב יא](#)) "אם גנב יגנב מעמו ישלם לבעליו" וגו'. נמצאת אומר שומר חנם נשבע על הכל. והשואל משלם את הכל חוץ מן המתה בשעת מלאכה כמו שיתבאר. נושא שקר והשוכר משלמין את האבדה ואת הגנבה ונשבעין על האנסין הגדולים כגון שבורה ושבויה ומתה וטרפה. או שאבד הדבר בספינה שטבעה בים או נלקח בלסטים מזון וכל פיוצא באלו משאר אנסין הגדולים:

c) A paid guardian and a hirer are both subject to one rule. They are obligated to make restitution if either the hired object or the deposit for a fee was stolen or lost. But if something worse happened [through a superior force], as in the case of an animal that dropped dead or was injured, carried off, or torn by beasts, the paid guardian or the hirer may take an oath that the animal met with an accident and be released from liability, as it is written: "When a man gives to another a donkey, an ox, a sheep or any other animal to guard, and it dies or is injured, or is carried off, with no witness about, an oath before the Lord shall decide between the two of them" (9-10). It is written moreover: "But if it was stolen from him, he shall make restitution to its owner" (11).

Hence it follows that the gratuitous guardian clears himself by his oath in all cases; the borrower pays in all cases, except in the case of an animal that died from work, as will be explained ; the receiver of a fee and the hirer pay for what is lost or stolen, but they take an oath about the major accidents, namely about the injured or captured or dead or torn animal; or in a case where the object was lost in shipwreck or was taken by armed robbers; and so too, all similar major accidents. (Sefaria Translation)

הכל כמנהג המדינה – Accepted Practice

8. Mishnah Bava Metzia Chapter 7 Mishnah 1

השוכר את הפועלים ואמר להם להשכים ולהעריב, מקום שנהגו שלא להשכים ושלא להעריב, אינו רשאי לכופן. מקום שנהגו לזון, זיוון. לספק במתיקה, לספק. הכל כמנהג המדינה. מעשה ברבי יוחנן בן מתתיהו שאמר לבנו, צא שוכר לנו פועלים. הלה ופסק להם מזונות. וכשבא אצל אביו, אמר לו, בני, אפלו אם אתה עושה להם כסעדת שלמה בשעתו, לא יצאת ידי חובתך עמהן, שהן בני אברהם יצחק ויעקב. אלא עד שלא יתחילו במלאכה צא ואמר להם, על מנת שאין לכם עלי אלא פת וקטנית בלבד. רבן שמעון בן גמליאל אומר, לא היה צריך לומר, הכל כמנהג המדינה:

If one hired laborers and told them to work early or to work late, he has no right to compel them to do so where the custom is not to work early or not to work late. In a place where the custom is to give them their food he should give it to them, and where the custom is to provide them with sweet food, he must give it to them. Everything should follow local custom. It once happened that Rabbi Yochanan ben Mattia said to his son: "Go and hire laborers for us". He went and struck a deal to provide them with food. When he came to his father, his father said to him, "My son, even if you make them a banquet like Solomon's in his time you will not have fulfilled your obligation to them. For they are

sons of Abraham, Isaac and Jacob. But, rather, before they begin to work go and say to them, “On condition that I am not bound to give you more than bread and beans only.” Rabban Shimon ben Gamaliel says: “It was not necessary to speak thus, for everything should follow local use.” (Sefaria)

Due Diligence

9. Rabbi Yosef Karo (16th century, Israel) Shulchan Aruch Choshen Mishpat 334

השוכר את הפועל להשקות המנה הנהר, ופסק הנהר בהצני היום, אם אין דרכו להפסיק, או אפלו שדרכו לפסק והפועל יודע דרך הנהר, פסידא פועל ואין בעל הבית נותן לו פלום, אף על פי שגם בעל הבית יודע דרך הנהר. אכל אם אין הפועל יודע דרך הנהר, ובעל הבית יודע, נותן לו שכרו כפועל בטל.

If one hires a worker to irrigate a field from a specific river, and the river dried up halfway through the day and its practice is generally that it does not dry up, or even if its practice was to dry up but the worker knew of the practice, the worker will suffer the loss and the employer would not pay him anything, even if the employer also knew the river's practice. If the worker did not know the practice of the river, but the employer did, however, the employer must pay him like an idle worker. (Wikisource)

10. Rabbi Moshe Isserles (16th century, Poland) Rama Ibid.

{הגה: וכן בכל אנס שארע לפועל, בין ששניהם היו יודעין שדרכו האנס לבא או ששניהם אינן יודעין, הוי פסידא פועל. אכל אם בעל הבית יודע והפועל אינו יודע, הוי פסידא דבעל הבית (טור סי"ב). ואם הוי מכת מדינה, עין לעיל סימן שכ"א. מי ששכר בית לדור בו, ומת בתוך זמן השכירות, אין צריח לשלם לו רק מה שדור בו, דבעל הבית הוי כפועל והוי לה להתנות (מרדכי פרק האמנין). מיהו יש חולקין (בית יוסף בס"ס שי"ב בשם תשובת רשב"א אלה וכו' ובשם תוספות פרק חזקת ות"ה סימן שכ"ט, וכן משמע תשובת רשב"א שהביא הב"י סימן שלי"ה). לכן אם קבל השכר פלו, אין צריח להחזיר פלום, כן נראה לי. אם ברחו מחמת שנוי אור, הוי כשאר אנס, והוי פסידא פועל או המלמד (תשובת מהר"ל סימן מ"א ומתב"ם פדוואה סימן פ"ו).}

Note: The same applies to any unavoidable accident that occurred to the workers, regardless of whether both knew it was typical for the accident to occur or neither knew, and the worker would suffer the loss. If the employer knew and the worker did not, however, the employer would suffer the loss. If it was a communal plague, see above in Siman 321. If one rented a house to live in and died within the rental period, he would only have to pay for the amount he lived there because the owner is like a worker and he should have made the condition. There are those who disagree, however. Thus, if the owner already received the full rental payment, he would not have to return anything. This seems to me like the correct way to rule. If the employer fled because of a change in the air, it is like any other unavoidable accident and the worker or schoolteacher would suffer the loss.

שכרו להשקות שדהו ובא מטרי בלילה בענין שאינו צריח, אינו נותן לו פלום. וכן אם בא בהצני היום, אינו נותן לו מחצני היום ואילך פלום. אכל אם בא הנהר, נותן להם כל שכרו; מן השמים נסתעו.

If one hired a worker to irrigate his field and it rained at night in a way that the employer no longer needs the worker, he would not pay him anything. Similarly, if rained halfway through the day, he would not pay him anything from the halfway point and on. If a river came, however, he must pay for all their wages. They were assisted from the heavens.

{הגה: שכר פועלים לחפר שדהו ובא מטרי בלילה בענין שאינו יכולין לחפר, אם לא ראו הפועלים הקרקע, פסידא דבעל הבית הוא, דהוי לה להודיעם שלא יבואו. יש אומרים דאם בקר בעל הבית המלאכה מבצרב ונראה שצריכה פועלים, פטור בכל ענין (הפל בטור סי"א). ועין לעיל סימן שלי"ג סעיף א' ובי'. יש אומרים הא דאמרינן דאם ארע אנס הוי פסידא פועלים, הינו ששכרם למלאכה ידועה, אכל אם שכרו סתם, יכול לומר: תן לי מלאכה אחרת כזו (תרומת הדשן סימן שכ"ט).}

If one hired workers to dig his field and it rained at night in a way that they can no longer dig, and the workers did not see the land, the employer would suffer the loss because he should have told them not

to come. There are those who say that if the employer investigated the work at night and saw workers were needed, he would be exempt in all cases. See above 333:1-2. There are those who say that this that we said that if an unavoidable accident occurred then the workers would suffer the loss, is only where he hired them for a specific job. If he hired them without specification, however, the worker can say give me another job like this one.

(ד) מי ששכר מלמד לבנו, וחקלה התלמיד, אם אינו רגיל באותו חלי {הוא הדין אם מת הנער (מְרַדְכֵי רִישׁ פֶּרֶק הָאֲמִינוּ)}, נאפלו אם רגיל והמלמד מהעיר ומפיר בו, פסידא דמלמד. אכל אם רגיל בחלי ואין המלמד מפיר בו, כגון שאינו מן העיר, פסידא דבעל הבית, ונותן לו כל שכרו משלם. {הגה: דכל לומדי תורה יותר נוח להן ללמד מלילה בטל (טור ס"ו)...}

If one hires a teacher for his son, and the student became ill and it is not a typical illness for him- **the same would be true if the child died**- or even if it was typical but the teacher is from this city and is aware of the illness, the teacher would suffer the loss. If the student typically suffers from this illness and the teacher is unaware, however, such as where he is not from this city, the employer would suffer the loss and must pay his complete wages. **because all those who teach Torah prefer teaching over being idle...** (Translation from Wikisource)

11. Rambam Mishneh Torah Laws of Hiring 13:7

כְּרֵדָה שְׂמֹזְהָר בְּעַל הַבַּיִת שְׁלֵא יִגְזַל שְׂכָר עָנִי וְלֹא יַעֲפֹנֵנו כִּי הָעָנִי מְזֻהָר שְׁלֵא יִגְזַל מִלְאֲכָת בְּעַל הַבַּיִת וַיִּבְטַל מַעֲט בְּכֶאֱן וּמַעֲט בְּכֶאֱן וּמוֹצֵיא כָּל הַיּוֹם בְּמַרְמָה אֲלֵא חַיִּב לְדַקְדָּק עַל עֲצֻמוֹ בְּזִמְן שְׁהָרִי הַקְּפִידוֹ עַל בְּרַכָּה רְבִיעִית שֶׁל בְּרַכַּת הַמְּזוֹן שְׁלֵא יִכְרֹד אוֹתָהּ. וְכֵן חַיִּב לַעֲבֹד בְּכָל כַּחוֹ שְׁהָרִי יַעֲקֹב הַצַּדִּיק אָמַר כִּי בְּכָל כַּחַי עֲבַדְתִּי אֶת אַבְיָכֹן. לְפִיכָּה נָטַל שְׂכָר זֹאת אִף בְּעוֹלָם הַהָה שְׁנֵאמַר (בְּרֵאשִׁית ל מֵג) "וַיִּפְרֹץ הָאִישׁ מְאֹד מְאֹד": סְלִיקוּ לְהוֹ הַלְכוֹת שְׁכִירוֹת

Just as the employer is warned against robbing the wage of the poor workman, and against delaying it, so is the poor workman warned against robbing the employer by idling away his time on the job, a little here and a little there, thus wasting the entire day deceitfully. He must be scrupulous throughout the time of work. Also, he is required to work to the best of his ability, as the upright Jacob said: "I have served your father with all my strength" ([Genesis 31:6](#)). For this reason, he was rewarded even in this world, as it is written: "The man became exceedingly rich" (30:43). (Sefaria Translation)

12. Rabbi Yaakov Yeshaya Blau (1929-2013, Jerusalem) Pitchei Choshen 4 (Hiring) Chapter 7

י. מוזהר הפועל שלא יבטל מעט כאן ומעט כאן, אלא חייב לדקדק על עצמו בזמן, שהרי הקפידו חז"ל על ברכה רביעית של ברכת המזון שלא יכרך אותה, וכן חייב לעבוד בכל כחו, שהרי יעקב הצדיק אמר כי בכל כחי עבדתי את אביכן, לפיכך נטל שכרו בעולם הזה, שנאמר ויפרוץ האיש מאד מאד.

A worker is warned not to waste a little time here or a little time there, rather should be exacting on himself regarding time. Since our sages were so careful [of the owners time] they said not to say the fourth blessing of Grace After Meals, similarly you are required to work with all your strength, since Yaakov haTzadik said 'with all my strength I have worked for your father [Lavan]' therefore he was able to receive his reward in this world, as it says 'the man [Yaakov] increased [in wealth] very much.'

יא. אין הפועל רשאי לעשות מלאכתו בלילה ולהשכיר עצמו ביום, ולא ירעב ויסגף עצמו, מפני ביטול מלאכתו של בעל הבית, שהרי מחליש כחו ולא יוכל לעשות מלאכת בעל הבית בכח.

A worker isn't allowed to work at night and hire himself to another person during the day, nor can he starve and exhaust himself, since he is being negligent in his work towards his employer, since he is weaker and unable to properly do the work for his employer.

Can we credit a tax deduction for due diligence expenses (insurance, backups, etc)?

What about cutting edge technology, not yet standard?