CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4824

Heard in Calgary, Alberta, May 17, 2023

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The installation, collection of and reliance on information obtained by the use of cameras at the Schreiber GYO in violation of PIPEDA, the Privacy Act, the Collective Agreement and Human Rights Legislation.

THE JOINT STATEMENT OF ISSUE:

The Company installed cameras in the Schreiber GYO covering the booking in room, the lobby and both front and rear entrances. The Union was advised at the time that these cameras (and the information obtained from such) would not be monitored or utilized to observe employees. The Union was advised that the cameras had been installed to protect the integrity of the station as a result of a break-in where a non-employee entered the yard office and stole some employee belongings. On the basis of this assurance, the Union did not pursue its complaints in connection with the installation of the cameras at that time.

Union Position

In late October 2013, two employees were each assessed a thirty-day suspension for conduct unbecoming as evidenced by their alleged failures to ensure a prompt and accurate tie up from duty resulting in inaccurate and inappropriate ten-hour violations and subsequent ticket claims.

During the investigation, the Company relied upon video evidence taken at the Schreiber Station in order to impose the above noted unjust discipline on the crew. The Union objected to the Company's use of the video cameras and evidence in order to engage in surveillance of its members and impose the discipline in question. The Union submits that the use of the video

cameras and the evidence obtained from such is, intrusive, and a violation of the collective agreement, privacy rights and applicable statutes including PIPEDA. The Union objected to the video evidence and asked that it be excluded. The Employer rejected all of these claims.

It is Union's position that the installation of the video cameras, the collection of the evidence in this case and the reliance upon such is in violation of the collective agreement, privacy rights, PIPEDA and any other applicable statutory protections.

On December 31, 2013 the Union filed a joint step two grievance from Division 562 (Locomotive Engineers and CTY) in accordance with the applicable provisions of each of the Collective Agreements in question, respectfully. The Union relies upon the full arguments and attachments as set out in the aforementioned letter of grievances.

The Company rejected the Union's grievance on March 7, 2014. The Company maintained that it was well within its rights to use the video footage if it so desired on account that the allegations of the two employees in question constituted time theft.

On May 23, 2014 the Union progressed the grievance to Step 3 in accordance with the applicable provisions of each of the Collective Agreements. The Union maintained its position as set out in the aforesaid grievance. The Union also relies upon its arguments as set out in its letter of May 23, 2014.

The Union believes that the privacy of its members was and continues to be violated by the improper use of the cameras and video evidence. The Union requests that the Company cease and desist from using the cameras for the purpose of determining and in support to discipline its employees.

The Union requests that the cameras be removed (or at least be re-directed elsewhere so these intrusive surveillance techniques stop) and no camera regardless of location be used for surveillance, monitoring, or used in disciplining employees, and such other relief as the Arbitrator deems necessary in these circumstances.

Company Position

The Company's position is that the use of the video surveillance in the investigations in question was appropriate and within the scope of intended use as communicated to the Union upon its installation at the Schreiber General Yard Office.

Furthermore, the Company's position is well-supported by arbitral jurisprudence regarding video surveillance, particularly in open office environments where there is no reasonable expectation of privacy.

As provided in the Company's Step 2 grievance response, the Union was advised of the installation and purpose of the video surveillance at the Schreiber General Yard Office, namely for "theft or break and enters." This does not appear to be in dispute.

An investigation into the matter of alleged time theft was initiated after a Company officer (while diligently reviewing Company records) noticed unexpected wage claims. In support of the Company's position, the video surveillance was only viewed after the concern over time theft was raised by a Company officer. The Union was given an opportunity to view the surveillance prior to it being introduced as evidence in the investigations. Further, the use of this surveillance as evidence was well within the intended scope as communicated to the Union upon installation, namely "theft".

Arbitral jurisprudence supports the Company's position, in that "an employer is not required to overlook video evidence of employee misconduct merely because it is captured on a security video" (CROA 3877).

The Company disagrees that the use of video surveillance in this instance or in general violates an employee's rights under the Privacy Act, PIPEDA, the Collective Agreement or the Canadian Human Rights Act.

This video surveillance was in no way surreptitious or unduly intrusive, rather the Union was advised of its installation and purpose. In CROA 2772 the Arbitrator held that "the area surveyed is an open office and lunch space used by a number of employees and supervisors, none of whom could reasonably expect a substantial degree of privacy in that location."

The Union also seeks to reserve the right to allege a violation of, refer to and/or rely upon any other provisions of the Collective Agreement and/or any applicable statutes, legislation or policies. While both parties reserve the right to raise any issues that might arise out of the dispute, the Company notes that the grievance procedure is designed to ensure all issues and/or alleged violations are advanced prior to any hearing so as to allow both parties the opportunity to review the issues brought forward and address them if required. Claiming further issues may exist, but failing to bring them forward, is inconsistent with the grievance process and the basic rules of CROA which state in part:

> "No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement."

If the Union wishes to allege violations of any other statutes, legislation or policies, it must do so now so that the Company can respond.

With respect to the issues that have been raised, the Company disagrees that the use of the video surveillance infringed the rights of the Grievors in any way as alleged.

For the foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey -and- **E. Mogus**	**(SGD.) C. Clark**
General Chairperson CTY-E -and- General Chairperson LE-E	Manager Labour Relations

There appeared on behalf of the Company:

T. Gain	– Counsel, Calgary
L. McGinely	– Assistant Director, Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E Smiths' Falls
E. Mogus	– General Chairperson, LE-E, Toronto
P. Boucher	– President TCRC, Ottawa
R. Finnson	– Vice President TCRC, Ottawa
D. Fulton	– General Chairperson, CTY-W, Calgary
J. Hnatiuk	– Vice General Chairperson, CTY-W, Calgary
G. Lawrenson	– General Chairperson, LE-W, Calgary

AWARD OF THE ARBITRATOR

Context

1. This matter comes before CROA is somewhat unusual circumstances. In October, 2013, grievances were filed by Conductor Frank Commisso and Locomotive Engineer Vince Maggio, contesting imposed discipline, which used video surveillance taken from a security camera in the Schreiber GYO, which covered, amongst other areas, the booking in room.

2. On December 31, 2013, a policy grievance against the use of video surveillance was also filed.

3. In 2015, Arbitrator Albertyn held that the individual grievances should be upheld and the discipline removed. In addition, he ruled that the use of video surveillance was inadmissible in the circumstances. No judicial review was taken of CROA decisions 4362 and 4363.

4. Both parties agree that they are bound by the Albertyn decisions. They disagree, however, whether the decisions have been properly applied.

5. Some nine and one half years after the filing of the policy grievance, the matter is now before CROA.

Issues

6. The Union sets out the issues as follows:

The Union believes that the privacy of its members was and continues to be violated by the improper use of the cameras and video evidence. The Union requests that the Company cease and desist from using the cameras for the purpose of determining and in support to discipline its employees. The Union requests that the cameras be removed (or at least be re-directed elsewhere so these intrusive surveillance techniques stop) and no camera regardless of location be used for surveillance, monitoring, or used in disciplining employees, and such other relief as the Arbitrator deems necessary in these circumstances.

7. The Company sets out the issues as follows:

> Are there legitimate security reasons to retain the security cameras in place?;
> If yes, is viewing of security footage legitimate in some circumstances, where discipline may result?

8. In addition to questions about the existence and use of the cameras, there is also a procedural issue about whether I can or should make an Order concerning a policy grievance in these circumstances.

Analysis and Decision

Continued Existence and Positioning of Security Cameras

9. Security cameras were placed in the Schreiber Station Yard Office in 2011, due to security concerns and some thefts. They have been in place for the last twelve years. The cameras cover both entrances and exits, as well as company equipment including computers.

10. The jurisprudence supports the use of surveillance cameras for security reasons. See **CROA 2772**, where Arbitrator Picher noted:

> The Arbitrator knows of no principle which would prohibit the employer from installing a security camera to safeguard a sensitive area of its own premises.

11. Schreiber is an isolated operation and security is a valid concern. The Union did not object to the existence, as opposed to the use, of the cameras at the time. I can see no good reason to disturb the status quo with respect to the existence of the cameras and their current positioning.

Should an Order be Given Concerning a Policy Grievance in the Circumstances?

12. An Expedited Arbitration under CROA follows particular rules, designed to enhance timely decisions. The parties do their own investigation and present their facts and issues in a Joint Statement of Issues. The arbitrator is bound by this this evidence, subject to the possibility of limited additional witness testimony.

13. Here, the policy grievance could have been heard by Arbitrator Albertyn at the same time as the individual grievances. Alternatively, it could have been heard by another in the intervening ten years. Given the difficulties with CROA scheduling, this did not happen. The result, however, is that this policy grievance is quite old, with a factual basis which is also both old and limited.

14. The Union seeks to enter either contextual or new evidence in Tab 10 to suggest that the policy issue is not moot. The Company objects, noting that this evidence is not in the JSI, as is required, and that each situation is fact specific. Here, for the reasons that follow, I agree with the objection of the Company.

15. From a procedural perspective, the parties are bound by CROA Rules and use of the JSI and investigation as the basis for any arbitral decision. Rules 10 and 14 of the CROA Rules are explicit:

> 10) The signatories agree that for the Office to function as it is intended, good faith efforts must be made in reaching a joint statement of issue referred to in clause 7 hereof. Such statement shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to

> submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.
>
> 14) The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be …

16. Accordingly, the facts set out in Tab 10 of the Union documents, which are not found in the JSI or the investigation, or though one of the limited exceptions to this rule, may not form part of this decision. To do otherwise would take the other party by surprise and would defeat the purpose of an expedited arbitration.

17. From a substantive perspective, CROA and other jurisprudence is consistent that a balancing of security and privacy rights are required to determine whether security footage is admissible. To fully perform such a balancing operation, facts are critical. How deep are the security concerns? Are they theoretical or practical, with a single or multiple examples? Are the consequences of a security breach minor or life threatening? How invasive is the camera footage? What is the impact of such footage on the individuals affected? The test set out in PIPEDA 114, followed by the Federal Court (although the Court comes to a different decision based on a de novo application of the test), makes clear that a host of issues must be considered and weighed (see *Eastmond v. Canadian Pacific Railway (Eastmond) 2004 FC 852):*

> 10 The privacy Commissioner then embarked upon his analysis, i.e. the application of the facts to PIPEDA's legal structure. His focus was on subsection 5(3) of PIPEDA.
> 11 He paraphrased that section to mean that an organization may collect "... personal information only for purposes that a reasonable person would consider as appropriate in the circumstances". The Privacy Commissioner stated he was required to consider both the appropriateness of the organisation's purposes for collecting personal information as well as the circumstances surrounding the determination of those purposes.
> 12 He then recalled CP's stated purposes and said "[A]t first blush it would seem that these purposes are appropriate. But to ensure compliance with the intent of section 5(3), we also need to examine the circumstances. What motivated CP Rail to take such a measure? Do the circumstances merit a video surveillance solution?"
> 13 To determine whether CP's use of surveillance cameras was reasonable in this particular case, he found it useful to set up a four-part test as follows: - Is the measure demonstrably necessary to meet a specific need? - Is it likely to be effective in meeting that need? - Is the loss of privacy proportional to the benefit gained? - Is there a less privacy invasive way of achieving the same end?...
> 82 All parties agree that to determine the purpose question, in the case of camera surveillance, the four part test devised by the Privacy Commissioner is an appropriate analytical base.

18. While the particular facts matter, certain general principles do appear clear:

1) Employees at work have a right to privacy (see Monarch Fine Foods and Teamsters Local 647 (1978) LAC (2d) 419);
2) Employers have the right to protect company property through the use of security cameras;
3) Before security footage can be used to discipline employees, the test under PIPEDA 114 must be met;
4) If the company cannot meet the test, the footage may not be used for discipline;
5) Targeted footage may be used in limited circumstances (CROA 2772)

19. Here, we are left with the factual parameters set out in the JSI and investigation, which refers back to the circumstances surrounding the discipline of Conductor Commisso and Locomotive Engineer Maggio. Arbitrator Albertyn weighed the privacy concerns of the employees against the security concerns of the Company, and decided as follows:

> Decision on Videotape Admission
> 30. The parties wish to have a decision on this aspect of the case. Otherwise, given the conclusion I have reached on the merits of the grievance, I would have considered doing so unnecessary. 31. I recognize too that, having made close observation of the video tapes myself, it is artificial for me now to make a determination on the admissibility of the video tape evidence. Nonetheless, the parties require a determination, and I must do so on the established jurisprudence between them.
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> 32. The video cameras were introduced into the Schreiber station in January 2011. The Company's notice of introduction made clear the limited purpose for which the cameras were being installed: The cameras in Schreiber cover the booking in room, the lobby and both the front and rear entrances only, additionally we do not actively monitor these cameras to watch employees. The only time these cameras are reviewed are to investigate claims of theft or break and enter, which we recently had a CROA&DR 4362 – 13 – couple of months ago where a non-employee entered the Yard office and stole some employee belongings.
>
> 33. The Union argues that the manner in which video cameras were used is contrary to the Company's stated purposes and represents an unprecedented and unjustified incursion into the Union's members' privacy and dignity in the workplace. Employees have had no notice that the cameras in the booking-in room would be used to monitor performance; in fact, that purpose was disavowed by the Employer when the cameras were installed. Accordingly, the Union submits, Mr. Commisso and Mr. Maggio had an expectation of privacy while working in the booking-in room.

34. The Union refers to PIPEDA Case Summary #114, in which the Privacy Commissioner posed certain questions for determining if the use of video evidence was appropriate: Was the viewing demonstrably necessary to meet a specific need? Is the viewing likely to be effective in meeting that need? Is the employees' loss of privacy proportional to the benefit derived from viewing the video record? Is there a less privacy invasive method of achieving the same end?

35. The Company argues that the video surveillance was not surreptitious. The cameras are in fixed locations, clearly visible, and they capture the images directly in front of them. There is no sound recording. Although the purpose of the cameras is for security and not to measure employees' productivity, where misconduct is suspected, as here, the Company argues that management may legitimately view the images captured, and rely upon them. As was said in Eastmond v. Canadian Pacific Railway (2004) FC 852 at 181, the images were only viewed once an "incident requiring an investigation" CROA&DR 4362 – 14 – occurred. This was not part of a general monitoring of employee productivity in order to attempt to "catch" an employee engaging in conduct deserving of discipline. Relying on CROA 3877, the Employer submits that Ms. Bryson consulted a particular portion of the video recording only after she had taken steps through other means to determine whether there was misconduct: … it must be recognized that the incidental observation of events on a security camera system does not, of itself, make those events inadmissible at arbitration merely because it was observed on a video screen which was in fact being used for another purpose.

36. The Company disputes there was any intrusion in the employees' right to privacy in the workplace, but, if so, the intrusion was minimal and reasonable. The Company relies on Re McKesson Canada Corporation and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union 201 L.A.C. (4th) 60 (Hood) and on O.L.B.E.U. v. Ontario (Liquor Control Board) 2005 CanLII 55216 (ONGSB), in which it was held that, even where the video images were obtained for another purpose, an employee's reasonable expectation of privacy at work will yield if the employer has a reasonable suspicion justifying viewing the video recording.

37. Having regard to the questions posed in PIPEDA Case Summary #114, I find that the Company has not met the required tests. Viewing the tapes was not demonstrably necessary. The Company had sufficient information on which to rely from the details of the computer entries made by Mr. Commisso. Viewing the video tape achieved no greater insight. Consequently the intrusion into the crew's privacy was unnecessary and disproportionate to the small benefit of doing so. Further there were less

> invasive means of determining whether the crew were abusing the Company's trust, by the detailed CROA&DR 4362 – 15 – checking of the time of arrival and of what Mr. Commisso did on the computer. These determinations were made, and the video evidence was not a necessary adjunct to the information obtained without intruding on the employees' privacy.
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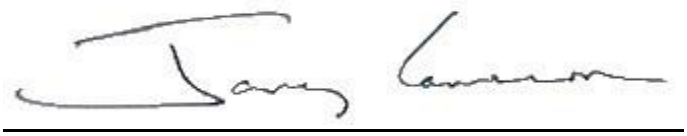
> 38. Most important, though, was the specific undertaking given to employees by the Company when the cameras were installed. They are intended only to monitor security. They are not meant to be used to measure employee productivity. In acting as Ms. Bryson did, the Company breached the undertaking it made when the video cameras were introduced. It undertook they would be used only "to investigate claims of theft or break and enter". That was the Union's understanding at the time. That was not the purpose for Ms. Bryson's viewing. In the circumstances, the Company was not entitled to view the video recording when Ms. Bryson did so, and it cannot rely upon them. Accordingly, as was said in CROA 2707 I find it was not reasonable for the Company to have regard to the video tape evidence.

20. The parties have agreed that they are jointly bound by the Albertyn decisions. The decisions reviewed the facts and appropriately balanced the competing interests of privacy and security. The reasoning found in Paragraph 37, which I endorse, is also responsive to the present policy grievance. The balancing operation called for by *PIPEDA 114* and *Eastmond*, must be made as against all relevant facts. The use of surveillance footage may be appropriate in some circumstances, and entirely inappropriate in others. Each case requires an application of the tests against relevant, and ideally timely, facts.

21. The reasoning found in Paragraph 38, with respect to the agreement between the parties concerning the use of the cameras being limited to "thefts and break-ins", is also endorsed. If the Company wishes to use the installed cameras for a different purpose, they should give the Union notice of their changed intentions. The Union would then have an opportunity to react in a timely manner.

22. To this extent, the grievance is allowed.



June 6, 2023

JAMES CAMERON

ARBITRATOR