CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3003

Heard in Calgary, Wednesday, 11 November 1998
and Thursday, 13 May 1999

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

Dismissal of Yard Foreman K.B. Goalen, Regina, Saskatchewan.

JOINT STATEMENT OF ISSUE:

On July 15, 1997, Yard Foreman Goalen was formally investigated in connection with:

> "Your reported personal injury of June 16, 1997 and your subsequent personal activities."

On July 24, 1997, Yard Foreman Goalen was dismissed from Company service for:

> "… consciously and deliberately misrepresenting yourself to the Company as being physically incapacitated and unable to perform your normal duties due to a work related right shoulder injury, and while you were claiming Workmen's Compensation Benefits, engaging in personal physical activities inconsistent with your reported condition, Moose Jaw, Saskatchewan."

The Council appealed Mr. Goalen's dismissal and has requested the reinstatement of Yard Foreman Goalen without loss of seniority and with full compensation for all time lost.

The Company has denied the Union's request.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) L. O. SCHILLACI	**(SGD.) K. E. WEBB**
GENERAL CHAIRPERSON	**FOR: DISTRICT GENERAL MANAGER, PRAIRIE DISTRICT**

There appeared on behalf of the Company:

R. M. Smith	– Labour Relations Officer, Calgary
M. E. Keiran	– Director, Labour Relations, Calgary
J. B. L. Dragani	– Labour Relations Officer, Calgary
G. D. Johnson	– Manager, Yard Operations, Moose Jaw
J. W. Greenway	– Operations Coordinator, Regina
Dr. K. Brett	– Regional Physician – Prairie District

And on behalf of the Council:

D. Ellickson	– Counsel
L. O. Schillaci	– General Chairperson, Calgary
B. McLafferty	– Vice-General Chairperson, Moose Jaw
M. G. Eldridge	– Vice-General Chairperson, CN West, Edmonton
W. McCotter	– Local Chairperson, Edmonton
B. Sparks	– Local Chairperson, Regina
K. Goalen	– Grievor

PRELIMINARY AWARD OF THE ARBITRATOR

This grievance concerns the discharge of Yard Foreman K.B. Goalen for the alleged abuse of Workers' Compensation benefits. The grievor maintains that he sustained a shoulder injury while at work on or about June 16, 1997. Shortly thereafter he remained off work and under the apparent separate care of several doctors. On July 5, 1997 the Company utilized the services of a private investigator, Mr. John Rombough, who videotaped the activities of Mr. Goalen outside his auto mechanics shop adjacent to his home in Bayard, Saskatchewan. On the strength of the videotape so obtained, the Company instituted a disciplinary investigation and came to the conclusion that the grievor was falsely claiming Workers' Compensation benefits, engaging in independent work activities incompatible with his alleged shoulder injury.

The sole issue in this preliminary award is the admissibility of the videotape evidence obtained by the Company. Counsel for the Council asserts that in the circumstances disclosed the Company did not have reasonable grounds to undertake covert surveillance of the grievor at his home. The position of the Company is that based on the information available to Company supervisors there were sufficient grounds to retain the services of the private investigator and engage in surveillance of Mr. Goalen, and that the videotape so obtained should be admitted into evidence.

Labour boards and boards of arbitration have long recognized that the surveillance of employees by their employer is an extraordinary measure which can only be resorted to with proper justification. Workplace surveillance may be appropriate to further the legitimate interests of an employer, for example to promote safety and security, or to deter theft and vandalism. Even in such circumstances, however, in accordance with Canadian arbitral jurisprudence, workplace surveillance must be judiciously used and manifestly justified: **Re Puretex Knitting Co. and Canadian Textile & Chemical Union** (1979), 23 L.A.C. (2d) 14 (Ellis); **Re U.A.W., Loc. 707, and Ford Motor Co. of Canada Ltd.** (1971), 23 L.A.C. 96 (Weatherill); **Re Liberty Smelting Works (1962) Ltd. and U.A.W., Loc. 1470** (1972), 3 S.A.G. 1035 (Dulude).

Boards of arbitration have also considered with great care the circumstances in which an employer may be justified in resorting to covert surveillance of the activities of employees away from the workplace, whether at their homes or elsewhere. This Office had occasion to fully consider the reported jurisprudence relating to the balancing of interests as between the legitimate business concerns of employers concerned about policing the abuse of false indemnity claims and the right to personal privacy and dignity of employees. In **Re Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees** (1996), 59 L.A.C. (4d) 112 (M.G. Picher) (**CROA 2707**) at p. 124 the following comments appear, concerning the approach to be taken by a board of arbitration with respect to the admissibility of surreptitiously obtained videotape evidence:

> In my view, in a case such as this, in considering the admissibility of videotape evidence acquired in the course of surreptitious surveillance, the appropriate test involves a two-part analysis.
>
> 1. Was it reasonable, in all of the circumstances, to undertake surveillance of the employee's off-duty activity?
>
> 2. Was the surveillance conducted in a reasonable way, which is not unduly intrusive and which corresponds fairly with acquiring information pertinent to the employer's legitimate interests?

As noted above, in the instant case the Council takes issue only with the first part of the two-fold test so described. It maintains that it was not reasonable, in the circumstances of this case, for the Company to resort to the services of a private investigator to observe and electronically record the activities of Mr. Goalen at his home during the period of his leave of absence, in respect of which he was claiming benefits from the Saskatchewan Workers' Compensation Board.

In support of its actions the Company called two witnesses. Mr. J.W. Greenway, Operations Coordinator of the Company in Regina, the grievor's home terminal, relates that on several occasions he heard rumours being expressed by members of running crews to the effect that Mr. Goalen was utilizing his workers' compensation leave to perform work in his own private business, an automobile service shop which he operated at his home. Mr. Greenway was specific that he had heard such comments several times from various yard crews, sometimes in a joking tone. He relates that the comments which he kept hearing caused him concern, and prompted him to verify his own concerns with another member of local management, Supervisor Teisdale. When Mr. Greenway explained to Mr. Teisdale the nature of the rumours that he had heard, Mr. Teisdale confirmed that he had separately heard the

same rumours that the grievor was operating an auto mechanics business from his home during his leave of absence. Mr. Greenway relates that on the strength of the information so gathered he became suspicious and contacted his own supervisor, Mr. Gordon Johnson, Manager of Yard Operations at Moose Jaw, who is also responsible for overseeing Regina.

Mr. Johnson confirms that he received a telephone call from Mr. Greenway. Based on the information provided to him by the Regina Operations Coordinator, to the effect that there were multiple rumours in the workplace at Regina that the grievor was operating an auto mechanics service business at his home during his workers' compensation leave, Mr. Johnson decided to retain an investigator to undertake surveillance of the grievor's activities.

Counsel for the Council argues that in the circumstances the Company had insufficient grounds to proceed with surreptitious surveillance of the grievor at his home. He submits that either Mr. Greenway or Mr. Johnson should have taken steps, to in his words, "substantiate the rumours" which had come to their attention in the workplace before resorting to surveillance. He also questioned both witnesses as to why they would not have confronted the grievor with the rumours they had heard. In this regard he stresses that there is no evidence of a prior history of absenteeism nor of abuse of sick leave or Workers' Compensation claims by Mr. Goalen, such as evidenced in the **CP Rail** case cited above. In support of his submissions Counsel refers the Arbitrator to a number of awards, including **Re Labatt Breweries (Toronto Brewery) and Brewery, General & Professional Workers Union, Local 304** (1994), 42 L.A.C. (4d) 152 (Brandt); **Re Alberta Wheat Pool and Grainworkers' Union, Local 333** (1995), 48 L.A.C. (4d) 332 (Williams); **Re Toronto Transit Commission and Amalgamated Transit Union, Local 113** (1997), 61 L.A.C. (4d) 218 (Saltman).

Counsel for the Company responds that there were ample grounds for the Company to take the action which it did. He stresses that Mr. Greenway heard reports from a number of employees which indicated that the grievor might be improperly engaged in another business during his Workers' Compensation leave of absence. He then took the additional step of verifying the circulation of the rumours with Supervisor Teisdale, and upon obtaining confirmation reported the matter to Mr. Johnson. Counsel also stresses that the grievor's residence is in a rural area some forty-five minutes travel from Regina, so that it was not practicable for the supervisors to make their own preliminary visual verification of the circumstances at the grievor's residence.

Upon a close examination of the evidence adduced, the Arbitrator is satisfied that in the circumstances disclosed it was not unreasonable for the Company to retain the services of an investigator to inquire into the activities of the grievor at his home. As is evident from the account of the two supervisors who testified at the hearing, this is not a situation in which the Company engaged in random or speculative surveillance of an employee's activities. Nor did Mr. Greenway and Mr. Johnson take action solely on the strength of a single report or one off-hand comment. As Mr. Greenway stressed, his concern mounted precisely because he repeatedly heard the same report respecting the grievor's purported activities at his home from a number of different yard employees. Moreover, he did take steps to substantiate the existence of those reports in the workplace, to the extent that he inquired further of Supervisor Teisdale as to whether he had heard the same accounts. It is only when he received confirmation from Mr. Teisdale that Operations Manager Greenway considered the matter sufficiently serious to report it to Mr. Johnson. Mr. Johnson, in turn, considered that he had enough information from his subordinate supervisors in Regina to take the steps which he did.

It is also significant, in my view, that the grievor's home is a considerable distance from Regina, requiring some forty-five minutes' drive. Without necessarily agreeing that it would be appropriate for supervisors to themselves to attempt to observe or police the activities of an employee at his or her residence for the purposes of substantiating reports of improper activity, it is clear that in the circumstances of this case that option was in any event relatively impracticable.

Needless to say, in a dispute such as this each case must be determined upon its own particular facts. Upon a review of the evidence adduced, I am satisfied that in the case at hand the information repeatedly provided to the Company's supervisors was sufficient to justify the actions which they took. Additionally, although it was not part of the decision making process engaged in by Mr. Johnson, there is further objective evidence which would also tend to support the actions of the employer. As stressed by Counsel for the Company, in a relatively short period of time the grievor had provided the Company with medical reports from three separate and apparently unrelated doctors, each indicating that Mr. Goalen would be absent for successively longer periods of time. In the Arbitrator's view the questionable pattern of medical consultation suggested by those reports would also have been an element

which would tend to justify management concerns as to the legitimacy of the grievor's claim of ongoing incapacity, particularly when coupled with the reports received by two separate supervisors in the employee's workplace.

For all of the foregoing reasons the Arbitrator rules that the videotape evidence is admissible. The matter shall be listed to be heard on its merits.

November 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR

On Thursday, 13 May 1999, there appeared on behalf of the Company:

R. M. Smith	– Labour Relations Officer, Calgary
G. D. Johnson	– Manager, Yard Operations, Moose Jaw
Dr. K. Brett	– Regional Physician – Prairie District

And on behalf of the Council:

D. Ellickson	– Counsel
L. O. Schillaci	– General Chairperson, Calgary
D. Finnson	– Vice-General Chairperson, Saskatoon
Dr. E.J.G. Sanderson	– Witness
K. Goalen	– Grievor

AWARD OF THE ARBITRATOR

The issue in this grievance is whether the grievor falsely claimed Workers' Compensation benefits as alleged by the Company, so as to justify his termination.

The grievor states that he suffered a injury to his lower neck, shoulder and mid-back while working as yard foreman in the Company's Regina yard on June 16, 1997 while in the process of lining a switch. He immediately reported the injury to his yardmaster, filled out an injury report form and left work early. The following two days were his scheduled days off. Mr. Goalen returned to work on June 19 and 20, 1997. He states that he again experienced pain in his right shoulder on the 20th, and once more left work early, seeking medical attention at the Pasqua General Hospital. He was then diagnosed with a soft tissue strain to the right shoulder. He was advised to stay off work for three to four days and prescribed anti-inflammatory medication.

According to Mr. Goalen the injury did not heal, and he sought further medical assistance from the Moose Jaw Medical Clinic on June 25, 1997. The physician there in attendance, Dr. Van Heerden, prescribed a further week off with continued anti-inflammatories. As his condition persisted, he relates that he again attended the Moose Jaw clinic on July 3, when he was seen by Dr. E.J.G. Sanderson, as Dr. Van Heerden was apparently on vacation. Dr. Sanderson diagnosed a trapezius strain and estimated that the grievor required a further two weeks off work, and prescribed further anti-inflammatory medication and physiotherapy, which Mr. Goalen pursued. On July 4 Mr. Goalen applied for Workers' Compensation benefits for his right shoulder injury. It also appears undisputed that the grievor indicated to the Company that he was willing to perform light duties, but was advised that none were available.

Mr. Goalen's supervisors at Regina developed suspicions that he might be malingering. They therefore obtained the services of a private investigator who proceeded to videotape the grievor on July 5, 1997 for a total period of some twenty-seven minutes over an expanse of six hours, at his home in Bayard, Saskatchewan. The videotape shows Mr. Goalen performing work on a number of vehicles in a yard adjacent to his home. Among the activities observed are the carrying and installing of a battery in a truck, the cranking of a winch, in part by his right hand, and other activities involving movements around vehicles and the use of light auto mechanic tools. Largely on the basis of the videotaped evidence, the Company convened a disciplinary investigation and discharged Mr. Goalen for fraudulently claiming Workers' Compensation benefits.

It is well established that an allegation of fraud resulting in discharge is a serious accusation, the proof of which requires a commensurately high standard of evidence. In the instant case the parties called competing expert medical testimony with respect to the conclusions to be drawn from the videotape evidence of the activities of Mr. Goalen at his home on July 5, 1997. During the course of argument the Company's representative suggested that a lay person could draw conclusions from the videotape itself. In some obvious cases that might be appropriate (see, e.g., **Re**

Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees (1996), 59 L.A.C. (4d) 112 (M.G. Picher) (**CROA 2707)**. However, the Arbitrator is not inclined to take that path of analysis, particularly where, as in the instant case, the videotape evidence is not overwhelming and two expert physicians have given their own evidence under oath.

Significantly, in my view, the Company's own witness, Dr. Brett, conceded during the course of cross-examination that he could not say to a certainty, based on the videotape, that the grievor could safely perform the tasks of a yard foreman, although he did indicate that in his view the grievor's injury was not as significant as Mr. Goalen maintained. The evidence of Dr. Sanderson is unequivocal. As the only physician of the two who examined the grievor, he states that he has no doubt that Mr. Goalen did suffer a trapezius strain in his right shoulder and lower neck, and felt pain in the mid-section of his back, at the relevant time. Having also viewed the videotape obtained by the Company, Dr. Sanderson stated that he did not see in that evidence any indication that the grievor could necessarily have performed the heavier tasks which might be encountered by the grievor in his duties as a yard foreman, particularly as would relate to throwing yard switches which might be particularly stiff or not well lubricated.

Upon a careful review of the evidence submitted the Arbitrator cannot conclude that the Company has satisfied the burden of proof in this case. As indicated, the evidence of its own medical expert is somewhat qualified. Bearing in mind that Dr. Brett did not himself examine the grievor, the Arbitrator is inclined to prefer the testimony of Dr. Sanderson, a physician long familiar with the Company and its employees by reason of having performed employee medicals for many years.

The grievance is therefore allowed. The Arbitrator directs that Yard Foreman Goalen be reinstated into his employment forthwith, with full compensation for all wages and benefits lost.

May 26, 1999

(signed) MICHEL G. PICHER
ARBITRATOR

SUMMARY – CROA 3003

Yard Foreman K.B. Goalen Regina – discharge – WCB benefit fraud – arbitrator discusses surreptitious surveillance – video tape evidence ruled admissible – medical testimony does not sustain position of company – reinstate with full compensation – GRIEVANCE ALLOWED

KEYWORDS – 3003

Discipline discharge WCB benefit fraud surreptitious surveillance video tape admissibility evidence compensation allowed

CPR – UTU – November 11 1998 – award dated May 26 1999